Martinez, Ruben

From:	Martin Enriquezmarquez <
Sent:	Wednesday, November 03, 2021 4:18 AM
To:	cityclerk; PublicComment-AutoResponse; Jomsky, Mark
Subject:	Garza v County of Los Angeles 1990
Attachments:	Garza v. County of Los Angeles.pdf

We will either find a way or make one

Hannibal

3 November 2021

Here's Garza v County of Los Angeles 918 F. 2d 763 (9th Cir. 1990)

Seems that a quote attributed to this person: "the best thousand dollars I have spent" by City News is accurate.

In downtown Los Angeles I went through the physical court files. To my pleasant surprise in the fifth supervisorial district from the 1980s this resident of the Crown of the Valley was the most favored among an emerging majority.

I eagerly wrote down notes on yellow pads. I was elated. The data set generated became part of the records which demonstrated polarized voting. The reconfiguration lead many Pasadena people to elect the Honorable Gloria Molina. Brava!

Peace,

Martin

Any way, enjoy.

Nos. 90-55944, 90-55945 and 90-56024
United States Court of Appeals, Ninth Circuit

Garza v. County of Los Angeles

918 F.2d 763 (9th Cir. 1990)
Decided Nov 2, 1990

Nos. 90-55944, 90-55945 and 90-56024.

Argued and Submitted October 10, 1990.

Decided November 2, 1990. Certiorari Denied
764 January 7, 1991. *764

John E. McDermott, Los Angeles, Cal., for defendants-appellants Los Angeles County.

Thomas K. Bourke, Los Angeles, Cal., for appellant Flores.

Mark D. Rosenbaum, Richard P. Fajardo, Antonia Hernandez, Los Angeles, Cal., for plaintiffs-appellees Garza.

Irving Gornstein and Jessica Dunsay Silver, Steven H. Rosenbaum, Mark L. Gross and Miriam R. Eisenstein, Dept. of Justice, Washington, D.C., for plaintiff-appellee U.S.

Theodore Shaw, Los Angeles, Cal., for intervenor-appellee.

Appeal from the United States District Court for the Central District of California.

Before SCHROEDER, NELSON, and KOZINSKI, Circuit Judges.

765 *765

SCHROEDER, Circuit Judge:

INTRODUCTION

Hispanics in Los Angeles County, joined by the United States of America, filed this voting rights action in 1988 seeking a redrawing of the districts for the Los Angeles County Board of Supervisors. They alleged that the existing boundaries, which had been drawn after the 1980 census, were gerrymandered boundaries that diluted Hispanic voting strength. They sought redistricting in order to create a district with a Hispanic majority for the 1990 Board of Supervisors election in which two board members were to be elected.

The Voting Rights Act, 42 U.S.C. § 1973, forbids the imposition or application of any practice that would deny or abridge, on grounds of race or color, the right of any citizen to vote. In 1980, a plurality of the Supreme Court held that this provision prohibited only intentional
766 discrimination, and would not allow *766 minorities to challenge practices that, although not instituted with invidious intent, diluted minority votes in practice. *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). In response to this decision, Congress amended the Voting Rights Act in 1982 to add language indicating that the Act forbids not only intentional discrimination, but also any practice shown to have a disparate impact on minority voting strength. *See* 42 U.S.C. § 1973(b). Thus, after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.

To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.

See Bolden, 446 U.S. at 66-67, 100 S.Ct. at 1499. The plaintiffs in this case claimed that because the County had engaged in intentional discrimination in the drawing of district lines in 1981, the resulting boundaries violated both the Voting Rights Act and the Equal Protection Clause. They further claimed that, whether or not the vote dilution was intentional, the effect of the County's districting plan was the reduction of Hispanic electoral power in violation of the newly amended Voting Rights Act.

The district court held a three-month bench trial. At its conclusion the district court found that the County had engaged in intentional discrimination in the 1981 reapportionment, as it had in prior reapportionments, deliberately diluting the strength of the Hispanic vote. It also found that, regardless of intentional discrimination, the County's reapportionment plan violated the Voting Rights Act because it had the effect of diluting Hispanic voting strength. Finally, it found that, based on post-census data, it was possible to grant the remedy that the plaintiffs sought, which was a redistricting in which one of the five districts would have a Hispanic voting majority. It ordered the County to propose such a redistricting.

In its findings, the district court detailed the recent history of the Los Angeles County Board of Supervisors and the voting procedures by which it has been elected. At least since the beginning of this century, the Board has always consisted of five members, elected in even-numbered years to serve four-year terms. These elections are staggered so that two supervisors are elected one year, and three are elected two years later. Supervisors are elected in non-partisan elections, and a candidate must receive a majority of the votes cast in order to win. If no candidate receives such a majority, the two candidates who receive the highest number of votes must engage in a runoff contest.

The district court found persuasive the evidence showing that the Board had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971. The district court further found that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future. The findings of the district court on the question of intentional discrimination are set forth in the margin.[1] After

767 *767

[1] The relevant findings with regard to the 1959 Redistricting are as follows:

> 64. Prior to 1959, District 3 included Western Rosemead and did not include any portion of the San Fernando Valley, Beverly Hills, West Hollywood, West Los Angeles, or Eagle Rock.
>
> 65. The 1959 redistricting occurred less than six months after the November 1958 general election for the open position of District 3 Supervisor. Ernest Debs, a non-Hispanic, defeated Hispanic candidate Edward Roybal, by a margin of 52.2 percent to 47.8 percent.
>
> 66. Debs received 141,011 votes. Roybal received 128,974 votes. There were four recounts before Debs was finally determined to be the winner.
>
> 67. In 1959, Debs reported in a Supervisorial hearing that he and District 4 Supervisor Burton Chace agreed to shift Beverly Hills, West Hollywood, and West Los Angeles from District 4 to District 3.

68. The Board's action transferred between 50,000 to 100,000 voters from District 4 into District 3 and had the effect of substantially decreasing the proportion of Hispanic voters in District 3.

69. Dr. Kousser testified it was his opinion that Debs and Chace agreed to the transfer for two reasons. First, Chace was receptive to the agreement because it enabled him to eliminate Los Angeles City Councilwoman Rosaline Wyman as a possible opponent in his upcoming 1960 bid for reelection. Debs welcomed the change because the move west allowed him to make District 3 more easily winnable against Roybal or another candidate who might appeal to Hispanic voters in the next election.

The findings with regard to the 1965 Redistricting are as follows:

88. The Boundary Committee rejected a proposal to move Alhambra and San Gabriel, areas adjacent to growing Hispanic population, from District 1 to District 3. Instead, the committee recommended a complicated two stage change which moved Alhambra and San Gabriel from Supervisor Bonnelli's District 1 to Supervisor Dorn's District 5, moved a section of the San Fernando Valley from District 5 to Supervisor Debs' District 3, and moved Monterey Park and unincorporated South San Gabriel from District 1 to District 3.

89. Dr. Kousser testified that, in his opinion, the Board avoided transferring Alhambra and San Gabriel directly to District 3 because those areas were adjacent to areas of Hispanic population concentration and were becoming more Hispanic. The more complicated two-stage adjustments permitted the addition of heavily Anglo areas from the San Fernando Valley and offset the much more limited addition of Hispanic population gained by moving Monterey Park and the unincorporated area of South San Gabriel to District 3.

The court's findings with regard to the 1971 Redistricting are as follows:

109. In 1971, District 3 lost some areas with substantial Hispanic population on its eastern border. Western Rosemead was transferred from District 3 to District 1. A census tract in the City of San Gabriel was also transferred from District 3 to District 5.

110. George Marr, head of the Population Research Section of the Department of Regional Planning testified that he was surprised by the proposal to move a substantial portion of the San Fernando Valley from District 5 to District 3. Marr described the portion of the San Fernando Valley ultimately added to District 3 from District 5 as looking like "one of those Easter Island heads." Marr developed the general feeling that Debs' representative on the Boundary Committee had requested the additional area in the San Fernando Valley because the residents of the area were regarded as "our kind of people."

The court's findings on the Overall Intent of Past Redistrictings are as follows:

112. The Court finds that the Board has redrawn the supervisorial boundaries over the period 1959-1971, at least in part, to avoid enhancing Hispanic voting strength in District 3, the district that has historically had the highest proportion of Hispanics and to make it less likely that a viable, well financed Hispanic opponent would seek office in that district. This finding is based on both direct and circumstantial evidence, including the finding that, since the defeat of Edward Roybal in 1959, no well-financed Hispanic or Spanish-surname candidate has run for election in District 3.

113. While Hispanic population was added to District 3 during the 1959-1971 redistrictings, the Court finds that the proportion of Spanish-surname persons added to District 3 has been lower than the Hispanic population proportion in the County as a whole. No individual area added was greater than 15.1 percent Spanish-surname.

114. Dating from the adoption of the County's Charter in 1912 through the 1971 redistricting process, no Los Angeles County redistricting plan has created a supervisorial district in which Hispanic persons constituted a majority or a plurality of the total population.

The court's findings with regard to the 1981 Redistricting are as follows:

125. The individuals involved in the 1981 redistricting had demographic information available of population changes and trends in Los Angeles County from 1950 to 1980. It was readily apparent in 1980 that the Hispanic population was on the rise and growing rapidly and that the white non-Hispanic population was declining.

EDITORS' NOTE: THIS PAGE CONTAINED FOOTNOTES THAT WERE MOVED TO THE
768 LAST PAGE OF THIS CASE. *768 entering these findings and conclusions of law, the district court gave the County the opportunity to propose a new plan, as required by *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978).

Under the Los Angeles County Charter, any redistricting must be approved by four of the five members of the Board. In response to the court's order directing the County to propose a plan, three Board members submitted a proposal. The district court rejected that proposal with findings to support its conclusion that the proposal was less than a good faith effort to remedy the violations found in the existing districting. The court considered other proposals. On August 6 it accepted and imposed a plan which creates a district in which the majority of the voting age citizen population is Hispanic. The County then appealed and this court ordered the matter handled on an expedited basis.

There is a second appeal before us. It is from the
769 district court's denial of a motion *769 to intervene in the main case. During the course of the proceedings, there was a primary election under the existing districting plan. The incumbent supervisor, Edmund Edelman, received a majority of the votes in District 3, and thereby won that seat. In the District 1 contest, the incumbent did not seek reelection. No candidate received the required majority of the votes; therefore, the two front runners, Sarah Flores and Gregory O'Brien, were scheduled to compete in a runoff election on November 6, 1990.

During the remedial phase of these proceedings, one of those candidates, Sarah Flores, sought to intervene in this action in order to oppose any redistricting plan which would result in the need for a new primary election in which additional candidates could run for the seat she was seeking in District 1. The district court denied her petition to intervene and she appeals from that denial. We have jurisdiction of her appeal pursuant to 28 U.S.C. § 1291. *See California v. Block,* 690 F.2d 753, 776 (9th Cir. 1982) (denial of motion to intervene is an appealable order).

I. *The County Appeal — Liability*

Plaintiffs filed this action in order to require the imposition of new district lines for the 1990 election of supervisors. The record shows without serious dispute that at the time of the decennial redistricting in 1981, it was not possible to draw a district map, with roughly equal population in each district, that contained a district with a majority of Hispanic voters. The district court found, however, that the County in 1981, as part of a course of conduct that began decades earlier, intentionally fragmented the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors. The evidence in the record also shows that at the time that this action was filed it was possible to draw lines for five districts of roughly equal population size, as required by state law, with one single-member district having a majority of Hispanic voters.

The district court found the County liable for vote dilution on two separate theories. It found that the County had adopted and applied a redistricting plan that resulted in dilution of Hispanic voting power in violation of Section 2. It also found that the County, by establishing and maintaining the plan, had intentionally discriminated against Hispanics in violation of Section 2 and the Equal Protection clause of the fourteenth amendment.

In this appeal, the County's threshold argument is that districts drawn in 1981 are lawful, regardless of any intentional or unintentional dilution of minority voting strength, because at the time they were drawn there could be no single-member district with a majority of minority voters. The County asks us to extract from the Supreme Court's leading decision in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and subsequent cases in this and other circuits, the principle that there can be no successful challenge to a districting system unless the minority challenging that system can show that it could, at the time of districting, constitute a voter majority in a single-member district.

In response to this position, the appellees argue that no majority requirement should be imposed where, as here, there has been intentional dilution of minority voting strength. The County thus also challenges the sufficiency of the district court's findings with regard to intent.

We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. We affirm the district court on the basis of its holding that the County engaged in intentional discrimination at the time the challenged districts were drawn.

A. The Background and Effect of Gingles

In 1982, Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to provide minority groups a remedy for vote dilution without requiring a showing that the majority
770 engaged in *770 intentional discrimination. Congress set forth a non-exhaustive list of factors to guide courts in determining whether there had been a Section 2 violation. S.Rep. No. 417, 97th Cong., 2d Sess., pt. I at 28-29, U.S.Code Cong. Admin.News 1982, pp. 206-207. Congress indicated that in applying these factors, courts should engage in a "searching practical evaluation of the `past and present reality'" of the political system in question. *Id.* at 30, U.S.Code Cong. Admin.News 1982, p. 208. Creation of this "results" test for discrimination under Section 2 did not affect the remedies under Section 2 for intentional discrimination. *Id.* at 27.

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court discussed the meaning of the new amendment. While noting the factors the Senate had set out as indicators of impermissible vote dilution, it stated that a court must look to the totality of the circumstances in considering a vote dilution claim. It also established three preconditions for liability under the amendment to Section 2 for claims based only on discriminatory effects: (1) geographical compactness of the minority group; (2) minority political cohesion; and (3) majority block voting. 478 U.S. at 50-51, 106 S.Ct. at 2766-67.

The *Gingles* requirements were articulated in a much different context than this case presents. Although the *Gingles* Court was aware of the history of discrimination against blacks, which was the minority there in question, the Court did not consider any claim that the disputed districting plan had been enacted deliberately to dilute the black vote. *See* 478 U.S. at 80, 106 S.Ct. at 2760-61. The claim at issue was that the multi-member districts that were being used, regardless of the intent with which they were created, had the effect of diluting the black vote. 478 U.S. at 39-41, 106 S.Ct. at 2781-82. Thus, the court instituted the "possibility of majority" requirement in a case in which it was asked to invalidate a political entity's choice of a multi-member district system, and impose a system of single-member districts, and was not asked to find that the multi-member scheme had been set up with a discriminatory purpose in mind.[2] An emphasis on showing a statistically significant disparate impact is typical of claims based on discriminatory effect as opposed to discriminatory intent.

[2] *Gingles* has spawned confusion in the lower courts. The opinion explicitly reserved the question of whether the standards it set forth would apply to a claim in which minority plaintiffs alleged that an electoral practice impaired their ability to *influence* elections, as opposed to their ability to elect representatives. 478 U.S. at 46 n. 12, 106 S.Ct. at 2764 n. 12. Nevertheless, it has been applied to preclude such "ability to influence" claims, based upon plaintiffs' failure to demonstrate such an ability to elect representatives under the *Gingles* criteria. *See, e.g., McNeil v. Springfield Park*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989). *See generally* Abrams,

"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U.L.Rev. 449 (1988). On the other hand, some courts have dealt differently with the criteria articulated in *Gingles* when facing "ability to influence" claims. They have done so in opinions that "range from virtually ignoring the electoral standard or ignoring it entirely, to considering it a prerequisite to the application of the totality of the circumstances test [specified in the statute itself], to treating it as a, if not the, central element of the test." Abrams, 63 N.Y.U.L.Rev. at 465 (citing *United Latin Am. Citizens v. Midland Indep. School Dist.*, 812 F.2d 1494, 1496-98 (5th Cir. 1987), *Buckanaga v. Sisseton Indep. School. Dist.*, 804 F.2d 469, 471-72 (8th Cir. 1986); *Martin v. Allain*, 658 F. Supp. 1183, 1199-1204 (S.D.Miss. 1987)) (footnotes omitted). "[T]he language from *Gingles* that creates the `ability to elect' standard may prove to be *Gingles'* more enduring and problematic legacy." Abrams, 63 N.Y.U.L.Rev. at 468.

In contrast, the district court in this case found that the County had adopted its current reapportionment plan at least in part with the intent to fragment the Hispanic population. *See* Findings at 44 No. 81. The court noted that continued fragmentation of the Hispanic population had been at least one goal of each redistricting since 1959. Thus, the plaintiffs' claim is not, as in *Gingles*, merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it is one in which the plaintiffs have made out a claim of intentional dilution of their voting
771 strength. *771

The County cites a number of cases in support of its argument that *Gingles* requires these plaintiffs to demonstrate that they could have constituted a majority in a single-member district as of 1981. None dealt with evidence of intentional discrimination. *See, e.g., Romero v. City of Pomona*, 883 F.2d 1418, 1422 (9th Cir. 1989); *McNeil v. Springfield Park*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384 (S.D.Cal. 1989).

To impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting Section 2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

B. The Findings of Intent

We therefore turn to the appellants' challenge to the district court's rulings with respect to the intent of the supervisors in 1981. The County contends that the district court did not make sufficient findings on intentional discrimination. Focusing on language in Finding 177, quoted *supra* in note 1, the County claims that the district court found only that the supervisors in 1981 intended to perpetuate their own incumbencies. This is a mistaken reading of what the district court found. Although the court noted that "the Supervisors appear to have acted primarily on the political instinct of self-preservation," the court also found that they chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation. Finding No. 181. The supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Accordingly, the findings of the district court are adequate to support its conclusion of intentional discrimination, and the detailed factual findings are more than amply supported by evidence in the record.

Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result. Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made to assure that the district court can impose a meaningful remedy.

That intent must result, according to the Voting Rights Act, in the

> political processes leading to nomination or election ... [not being] equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). This language is echoed in the intentional discrimination case of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). There, in addition to intent, the Supreme Court required proof that "the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766, 93 S.Ct. at 2339. *See also Whitcomb v. Chavis,* 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971).

Applying that standard to this case of intentional discrimination, we agree with the district court that the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice. We conclude, therefore, that this intentional discrimination violated both the Voting Rights Act and the Equal Protection Clause. *772

C. Laches

The County claims that, because four rounds of elections have occurred since the 1981 reapportionment plan was instituted, and because a regular reapportionment is scheduled to occur in 1991, the plaintiffs' claim for redistricting relief is barred on the ground of laches. It argues that substantial hardship will result from a redistricting now, when another regularly scheduled one is set to occur so closely on its heels. Furthermore, the County contends that the plaintiffs had no excuse for their delay in bringing suit. Therefore, it concludes, the suit should have been dismissed.

Although plaintiffs could have filed an action as early as 1981 in order to enhance their ability to influence the result in a district in which they were then still a minority, their failure to do so does not constitute laches. The record here shows that the injury they suffered at that time has been getting progressively worse, because each election has deprived Hispanics of more and more of the power accumulated through increased population. Because of the ongoing nature of the violation, plaintiffs' present claim ought not be barred by laches.

II. *The County Appeal — Remedy* A. Redistricting Between Decennial Redistrictings

The County contends that the district court erred in requiring it to redistrict now, at a point between regularly scheduled decennial reapportionments. Citing *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, *reh'g denied,* 379 U.S. 870, 85 S.Ct. 12, 13 L.Ed.2d 76 (1964), the County claims that decennial redistricting based upon census data is a "rule," and that case "was intended to avoid" the confusion that might be associated with more frequent reapportionments.

The County misreads *Reynolds.* The Court in *Reynolds* instituted a requirement of periodic reapportionment based upon current population data. It stated that decennial reapportionment "would clearly meet the minimal requirements," and less frequent reapportionment would

"assuredly be constitutionally suspect." 377 U.S. at 583-84, 84 S.Ct. at 1393. The Court further noted, however, that while more frequent apportionment was not constitutionally required, it would be "constitutionally permissible," and even "practicably desirable." *Id.* Thus, *Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall.

B. Use of Post-1980 Population Data

The County further claims that the district court erred in considering any data other than data from the 1980 census. Since the 1980 census data does not suggest the possibility of creating a Hispanic majority district, the County claims that the plaintiffs must lose in their 1988 claim to redistrict to provide for such a district. This claim, too, misinterprets the case law on which it purports to rest.

Since *Reynolds* would permit redistricting between censuses, it appears to assume that post-census data may be used as a basis for such redistricting. Furthermore, in a subsequent opinion the Court noted with approval the possibility of using predictive data in addition to census data in designing decennial reapportionment plans. The court stated that "[s]ituations may arise where substantial population shifts over such a period [the ten years between redistricting] can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." *Kirkpatrick v. Preisler,* 394 U.S. 526, 535, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519, *reh'g denied,* 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969). *See also Burns v. Richardson,* 384 U.S. 73, 91, 86 S.Ct. 1286, 1296, 16 L.Ed.2d 376 (1966) ("the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured."). The Court has never hinted that

*773 plaintiffs claiming present Voting Rights Act violations should be required to wait until the next census before they can receive any remedy.

The Fifth Circuit has held that non-census data may be considered in reapportionments between censuses if the relevant information cannot be obtained through census data. *Westwego Citizens for Better Government v. Westwego,* 906 F.2d 1042, 1045-46 (5th Cir. 1990). Such a practice makes sense not only where, as in *Westwego* itself, census data on the population in question was unavailable because of the limited nature of the compilations and manipulations performed by the census; it is also logical where, as here, the census data is almost a decade old and therefore no longer accurate.[3]

> [3] In *McNeil v. Springfield Park District,* 851 F.2d 937, 946 (7th Cir. 1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989), the Seventh Circuit found that in order to prove an effects violation from post-census data, the data used must be of a clear and convincing nature, and that "estimates based on past trends are generally not sufficient to override 'hard' decennial census data." We see no reason to impose this high standard in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy.

The County contests the validity of the population statistics that the court employed. The district court's findings, however, present an extensive review of the data itself and of the methodology that produced it, coupled with an inquiry into its validity. The County has not offered any reason why the district court should have rejected this data, other than the fact that it does not come from the census. Since it was permissible for the district court to rely on non-census data, we find that the district court did not err in its assessment of the size and geographic distribution of the Hispanic population in Los Angeles.

The district court's findings concerning vote dilution may be set aside only if they are clearly erroneous. *Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781. The findings at issue here were amply supported by the evidence that was before the district court.

C. Apportionment Based on Population Rather than Voting Age Citizen Data

The County contends that because the district court's reapportionment plan employs statistics based upon the total population of the County, rather than the voting population, it is erroneous as a matter of law. The County points out that many Hispanics in the County are noncitizens, and suggests that therefore a redistricting plan based upon population alone, in which Hispanics are concentrated in one district, unconstitutionally weights the votes of citizens in that district more heavily than those of citizens in other districts.

The district court adopted a plan with nearly equal numbers of persons in each district.[4] The districts deviated in population by sixty-eight hundredths of one percent. (Findings and Order Regarding Remedial Redistricting Plan and Election Schedule, 4). The variance is larger when the number of voting age citizens in each district is considered.[5]

[4] District Total Pop. White Black Hispanic Other

[5] District Total White Black Hispanic Other

The County is correct in pointing out that *Burns v.* 774 *Richardson,* 384 U.S. 73, 91-92, *774 86 S.Ct. 1286, 1296-97, 16 L.Ed.2d 376 (1966), seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. It does not, however, *require* states to do so. In fact, the *Richardson* Court expressly stated that "[t]he decision to include or exclude [aliens or other nonvoters from the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92, 86 S.Ct. at 1296-97. *Richardson* does not overrule the portion of *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), that held that apportionment for state legislature must be made upon the basis of population.

In *Reynolds,* 377 U.S. at 560-61, 84 S.Ct. at 1381, the Supreme Court applied to the apportionment of state legislative seats the standard enunciated in *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), that "the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." This standard derives from the constitutional requirement that members of the House of Representatives are elected "by the people," *Reynolds,* 377 U.S. at 560, 84 S.Ct. at 1381, from districts "founded on the aggregate number of inhabitants of each state" (James Madison, The Federalist, No. 54 at 369 (J. Cooke ed. 1961); U.S. Const. art. I, § 2. The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote — women, children, bound servants, convicts, the insane, and, at a later time, aliens. *Fair v. Klutznick,* 486 F. Supp. 564, 576 (D.D.C. 1980). Nevertheless, they declared that government should represent *all* the people. In applying this principle, the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment.

Furthermore, California state law requires districting to be accomplished on the basis of total population. California Elections Code § 35000. No part of the holding in *Richardson,* or in any other case cited by the appellants, suggests that the requirements imposed by such state laws may be unconstitutional. In fact, in *Gaffney v. Cummings,* 412 U.S. 735, 747, 93 S.Ct. 2321, 2328, 37

L.Ed.2d 298 (1973), the Court approved a redistricting based on total population, but with some deviations based upon consideration of political factors. In approving that plan, the Court expressly noted that districting based upon total population would lead to some disparities in the size of the eligible voting population among districts. These differences arise from the number of people ineligible to vote because of age, alienage, or non-residence, and because many people choose not to register or vote. *Id.* at 746-47, 93 S.Ct. at 2328. The Court made no intimation that such disparities would render those apportionment schemes constitutionally infirm.

Even the limited latitude *Gaffney* affords state and local governments to depart from strict total population equality is unavailable here. The Supreme Court has held that unless a court ordering a redistricting plan can show that population variances are required by "significant state policies", that court must devise a plan that provides for districts of equal population. *Chapman v. Meier,* 420 U.S. 1, 24, 95 S.Ct. 751, 764, 42 L.Ed.2d 766 (1975). Since California law requires equality of total population across districts, there are no locally relevant contrary policies.

There is an even more important consideration. Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative. Those adversely affected are those who live in the districts with a greater percentage of non-voting populations, including aliens and children. Because there are more young people in the predominantly Hispanic District 1 (34.5% of the L.A. County Hispanic population
775 (Findings of *775 Fact and Conclusions of Law re: County's Remedial Plan, 5-6)), citizens of voting age, minors and others residing in the district will suffer diminishing access to government in a voter-based apportionment scheme.

The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure "equal representation for equal numbers of people." *Kirkpatrick,* 394 U.S. at 531, 89 S.Ct. at 1229. Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137, 81 S.Ct. 523, 539, 5 L.Ed.2d 464, *reh'g denied,* 365 U.S. 875, 81 S.Ct. 899, 5 L.Ed.2d 864 (1961). Since "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives", this right to petition is an important corollary to the right to be represented. *Id.* Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles County. California Welfare and Institutions Code §§ 14007.5, 17000. As such, they have a right to petition their government for services and to influence how their tax dollars are spent.

In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative. For over a century, the Supreme Court has recognized that aliens are "persons" within the meaning of the fourteenth amendment to the Constitution, entitled to equal protection. *See Yick Wo v. Hopkins,* 118 U.S. 356, 368, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). This equal protection right serves to allow political participation short of voting or holding a sensitive public office. *See Bernal v. Fainter,* 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984) (law that would have denied alien the right to become a notary public and thereby assist in litigation for the benefit of migrant workers struck down under strict scrutiny equal protection

analysis); *Nyquist v. Mauclet,* 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977) (state's interest in educating its electorate does not justify excluding aliens from state scholarship program, since aliens may participate in their communities in ways short of voting). Minors, too, have the right to political expression. *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 511-13, 89 S.Ct. 733, 739-40, 21 L.Ed.2d 731 (1969). To refuse to count people in constructing a districting plan ignores these rights in addition to burdening the political rights of voting age citizens in affected districts.

The principles were well expressed by the California Supreme Court in its opinion in *Calderon v. City of Los Angeles,* 4 Cal.3d 251, 258-59, 93 Cal.Rptr. 361, 365-66, 481 P.2d 489 (1971), in holding that the United States Constitution requires apportionment by total population, not by voting population.

> Although we are, of course, constrained by the supremacy clause (U.S. Const., art VI, cl.2) to follow decisions of the Supreme Court on matters of constitutional interpretation, we emphasize that we do so here not only from constitutional compulsion but also as a matter of conviction. Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.
>
> Thus, a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area. Furthermore, much of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance
>
> 776 *776 and to listen to concerned citizens. (footnote omitted).

Judge Kozinski's dissent would require districting on the basis of voting capability. Adoption of Judge Kozinski's position would constitute a denial of equal protection to these Hispanic plaintiffs and rejection of a valued heritage.

D. Rejection of the Supervisors' Proposal

After it found that the County's districting plan was statutorily and constitutionally invalid, the district court gave the County 20 days to develop and propose a remedial plan of its own. The County submitted a plan, but the district court rejected it because, although it did create a district that had a Hispanic majority, it unnecessarily fragmented other Hispanic populations in the County. The district court found that such fragmentation posed an impediment to Hispanic political cohesiveness. Furthermore, the district court objected to the placement of the Hispanic majority district in a section controlled by a powerful incumbent, rather than in the one section that had a naturally occurring open seat, an open seat that was "in the heart of the Hispanic core." For these reasons, the district court found that the County's plan did not represent a good faith effort to remedy the violation.

The County objects to the district court's rejection of its proposal. It argues that the district court may not substitute "even what it considers to be an objectively superior plan for an otherwise constitutionally and legally valid plan," citing *Wright v. City of Houston,* 806 F.2d 634 (5th Cir. 1986); *Seastrunk v. Burns,* 772 F.2d 143, 151 (5th Cir. 1985).

However, there appear to be at least two fundamental reasons why the district court was not required to defer to the plan put forward by the supervisors in this case. First, as two of the supervisors themselves point out in their separate brief on the issue, the plan that the Board submitted to the district court could not, under the County's charter, have been considered a *Board* Redistricting plan, because only three members voted in favor of it, not the four required for such matters. Los Angeles County Charter, Art. II, Sec. 7 (1985). Thus, the proposal was not an act of legislation; rather, it was a suggestion by some members of the Board, entitled to consideration along with the other suggestions that had been received. Second, the district court found that it did not constitute a good faith attempt to remedy the violation because, *inter alia,* it used unnatural configurations in order to place an Anglo incumbent in the new Hispanic communities in other districts in the same manner in which the Board had deliberately diluted Hispanic influence in the past.

E. The County's Claim of Reverse Discrimination

The County argues that, by deliberately creating a district with a Hispanic majority, the district court engaged in discrimination in favor of a minority group of the type forbidden by *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). It claims to have had a valid defense based upon the district court's "creation of an equal protection violation in order to establish a Section 2 claim." The district court erred, it contends, in refusing to address this constitutional defense.

The County makes no suggestion, however, that the redistricting plan somehow dilutes the voting strength of the Anglo community. The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court or by a political entity in the first instance, does not violate the constitution. *United Jewish Organizations v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). For that reason, the district court properly refused to consider the appellants' constitutional defense.

III. *The Flores Appeal*

Sarah Flores appeals from the district court's denial of her petition to intervene. Her petition
777 was based upon her *777 interest in the outcome of the suit as a candidate in the election that stood to be invalidated. Under the plan adopted by the district court, she would be eligible to run for election in the new Hispanic district. Under the status quo, she was scheduled to participate in a runoff election against one other candidate. The district court dismissed her petition to intervene because it was untimely and because, in any event, the interests that she claimed to advocate either were already represented in the case or had not been proven to exist.

A party is entitled to intervene as of right under Fed.R.Civ.Pro. 24(a)(2) if that party moves to do so in a timely fashion and asserts an interest in the subject of the litigation, shows that the asserted interest stands to be impeded or impaired if the litigation goes forth without intervention, and demonstrates that the interest is not adequately represented by the parties to the litigation. *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527 (9th Cir. 1983). In determining whether a motion to intervene is timely, a court must

consider whether intervention will cause delay that will prejudice the existing parties. *United States v. Oregon,* 745 F.2d 550, 552 (9th Cir. 1984).

Where a would-be intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention under Fed.R.Civ.Pro. 24(b)(2). Courts will allow such intervention where the intervenor raises a claim that has questions of law or fact in common with the main case, shows independent grounds for jurisdiction, and moves to intervene in a timely fashion. *Venegas v. Skaggs,* 867 F.2d 527, 529 (9th Cir. 1989), *aff'd,* ___ U.S. ___, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). The decision to grant or deny this type of intervention is discretionary, subject to considerations of equity and judicial economy. *Id.* at 530-31. Sarah Flores sought both intervention as of right and, in the alternative, permissive intervention in the proceedings below. The district court denied intervention on either ground.

This ruling was correct. Flores knew that this lawsuit was pending at the time when she decided to run in the election, and knew that part of the relief sought was a redistricting plan that could affect the outcome of that election. She did not petition to intervene until four months after she declared her candidacy, which was almost two years after the proceedings had been instituted. While Flores points out that the entry of a trial into a "new stage" may be the appropriate point for intervention, such is only the case where the new phase develops as a result of a change in the law or the factual circumstances. *See United States v. Oregon,* 745 F.2d 550 (9th Cir. 1984). Here, the new phase came about in the general progression of the case to a close. It was a foreseeable part of a chain of events. Therefore, Flores' delay cannot be excused on this ground. Introduction of a new party at that late stage could have resulted in irreversible prejudicial delay in a case where time was of the essence.

IV. *The Election*

A motions panel of this court entered an order which had the effect of staying the County's election procedures pending our decision. Because the time schedule originally contemplated by the district court's order can no longer be followed, we REMAND for the district court to impose a new schedule pursuant to which the primary, and if necessary, a general election can be conducted. Because it is imperative that such election procedures go forward as soon as practicable, the opinion of this panel shall constitute the mandate.

The judgment of the district court on liability and its decision as to remedy are AFFIRMED. The scheduling provisions of the district court's order of August 6, 1989 are VACATED and the matter is REMANDED for the purpose of determining the schedule for elections under the district court's redistricting plan. We issue the mandate now because 42 U.S.C. § 1971(g) requires that voting
778 rights cases "be in every way expedited." *778

AFFIRMED IN PART; VACATED IN PART AND REMANDED. THE MANDATE SHALL ISSUE FORTHWITH.

. . . . .

127. From a political perspective, since Hispanic population growth was most significant in Districts 1 and 3, if the 1971 boundaries were changed in any measurable way to eliminate the existing fragmentation, the incumbency of either Supervisor Schabarum or Supervisor Edelman would be most affected by a potential Hispanic candidate.

. . . . .

136. An analysis of the 1978 Supervisor election in District 3 was conducted after the Boundary Committee recommended a plan with an Hispanic population majority in District 3. The actual results of the analysis were never produced. Mr. Seymour did not rule out the possibility that he requested such an analysis and Supervisor Edelman testified that he "most probably" discussed the results of the 1978 election analysis with Mr. Seymour.

137. Peter Bonardi, a programmer with the Urban Research Section of the Data Processing Department in 1981 and a participant in the data analysis requested by Supervisor Edelman, stated that he was directed not to talk about the analysis of voting patterns and that an "atmosphere of 'keep it quiet'" pervaded.

138. Supervisors Hahn and Edelman sought to maintain the existing lines. To this end, the Democratic minority agreed to a transfer of population from District 3 to District 2. Supervisor Edelman acknowledged that he and Supervisor Hahn had worked out a transfer of population from the heavily Hispanic Pico-Union area on the southern border of District 3 to the northern end of District 2.

139. Supervisor Edelman knew that if the 1971 boundary lines were kept intact, the Hispanic community was going to remain essentially the same in terms of its division among the districts.

140. The Board departed from its past redistricting practice in 1981 and approved a contract with The Rose Institute for State and Local Government, a private entity, to perform specialized services and produce redistricting data at a cost of $30,000.

. . . . .

157. [Boundary Committee Members] Smith and Hoffenblum opposed the CFR [Chicanos for Fair Representation] plan because the plan proposed increasing the Hispanic proportion in District 1 from 36 to 42 percent. Both Boundary Committee members perceived the CFR effort as intended to jeopardize the status of Supervisor Schabarum as well as that of the conservative majority.

158. Hoffenblum testified that one of the objectives of the Republican majority was to create an Hispanic seat without altering the ideological makeup of the Board. According to Hoffenblum, it was "self-evident" that if an Hispanic district was created in Supervisor Schabarum's district it would impact on the Republican majority.

159. The proponents of the Smith and Hoffenblum plans sought to gain areas of Republican strength such as La Mirada, Arcadia, Bradbury in Districts 4 and 5, while losing increasing Hispanic areas such as Alhambra or the predominantly black Compton and other liberal areas of Santa Monica and Venice.

. . . . .

162. Supervisor Edelman would not rule out the possibility that ethnic considerations played at least some part in the rejection by the Board majority of the CFR Plan. Moreover, the fact that CFR proposed a plan in which District 1 had a 42 percent Hispanic population was a possible basis for the rejection of the plan by the majority. Supervisor Schabarum would not accept a 45 or 50 percent Hispanic proportion in his district in 1981.

. . . . .

165. On September 24, 1981, prior to the Board's adoption of the challenged plan, Board members met, two at a time in a series of private meetings in the anteroom adjacent to the board room, where they tried to reach agreement on a plan.

. . . . .

175. The plan adopted in 1981 retained the boundary between the First and the Third Supervisorial Districts, the districts that contain the largest proportions of Hispanics. In doing so, the 1981 Plan continued to split the Hispanic Core almost in half.

176. The Board appeared to ignore the three proposed plans which provided for a bare Hispanic population majority.

177. The Court finds that the Board of Supervisors, in adopting the 1981 redistricting plan, acted primarily with the objective of protecting and preserving the incumbencies of the five Supervisors or their political allies.

178. The Court finds that in 1981 the five members of the Board of Supervisors were aware that the plan which they eventually adopted would continue to fragment the Hispanic population and further impair the ability of Hispanics to gain representation on the Board.

179. The continued fragmentation of the Hispanic vote was a reasonably foreseeable consequence of the adoption of the 1981 Plan.

180. The Court finds that during the 1981 redistricting process, the Supervisors knew that the protection of their five Anglo incumbencies was inextricably linked to the continued fragmentation of the Hispanic Core.

181. The Supervisors appear to have acted primarily on the political instinct of self-preservation. The Court finds, however, that the Supervisors also intended what they knew to be the likely result of their actions and a prerequisite to self-preservation — the continued fragmentation of the Hispanic Core and the dilution of Hispanic voting strength.

1 1,779,835 12.4 2.1 71.2 14.3 2 1,775,665 15.0 38.6 35.3 11.1 3 1,768,124 60.9 3.9 25.5 9.7 4 1,776,240 53.9 4.3 26.6 15.2 5 1,780,224 57.1 5.9 24.3 12.6 Total 8,880,109 39.8 11.0 36.6 12.6

1 707,651 25.4 3.5 59.4 11.6 2 922,180 23.8 50.8 17.1 8.3 3 1,098,663 77.0 4.3 13.9 4.7 4 1,081,089 67.5 4.4 19.7 8.4 5 1,088,388 69.8 6.2 18.1 5.9 Total 4,897,971 55.8 13.4 23.3 7.5

[71] KOZINSKI, Circuit Judge, concurring and dissenting in part:

I. Liability

A determination by a federal court that elected officials have intentionally discriminated against some of their constituents is a matter of no little moment. While I join the liability portion of Judge Schroeder's opinion without reservation, I write briefly to explain, for the benefit of those not conversant with the esoterica of federal discrimination law, what today's ruling means — and what it does not.

First the good news. Nothing in the majority opinion, or in the district court's findings which we review and approve today, suggests that the County supervisors who adopted the 1981 reapportionment — all of whom are still in office — harbored any ethnic or racial animus toward the Los Angeles Hispanic community. In other words, there is no indication that what the district court found to be intentional discrimination was based on any dislike, mistrust, hatred or bigotry against Hispanics or any other minority group. Indeed, the district court seems to have found to the contrary. *See Garza v. County of Los Angeles,* Nos. 88-5143 88-5435, at 7 (C.D.Cal. June 4, 1990) ("The Court believes that had the Board found it possible to protect their incumbencies while increasing Hispanic voting strength, they would have acted to satisfy both objectives.").[1]

[1] The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Which brings us to what this case *does* stand for. When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern — a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.

But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here — the systematic splitting of the ethnic community into different districts — is the obvious, time-honored and most effective way of averting a potential challenge. Incumbency carries with it many other subtle and not-so-subtle advantages, *see* Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency,* 49 Ohio St. L.J. 773, 774-81 (1988), and incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act. Today's case barely opens the door to our understanding of the potential relationship between the preservation

of incumbency and invidious discrimination, but it
779 surely *779 gives weight to the Seventh Circuit's observation that "many devices employed to preserve incumbencies are necessarily racially discriminatory." *Ketchum v. Byrne,* 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied,* 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

The Supreme Court in *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), left open whether and under what circumstances political gerrymandering may amount to a violation of the Voting Rights Act. *Id.* at 118 n. 8, 106 S.Ct. at 2803 n. 8. The record before us strongly suggests that political gerrymandering tends to strengthen the grip of incumbents at the expense of emerging minority communities. Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference — indeed a presumption — that this was a result of intentional discrimination, even absent the type of smoking gun evidence uncovered by these plaintiffs. State and local officials nationwide might well take this lesson to heart as they go about the task of decennial redistricting.

II. The Remedy

While I enthusiastically join the majority as to liability, I have two points of disagreement as to the remedy. The first is really just a quibble: I agree with the majority that the County's proposed plan was not entitled to any deference. The Los Angeles County Charter requires at least four supervisors to pass a reapportionment plan. Los Angeles County Charter Art. 2, § 7. Since two of the five supervisors opposed the plan proposed by the County, *see* maj. op. at 776, it is obvious that the "proposal was not an act of legislation; rather, it was a suggestion by some members of the Board," *id.,* not entitled to the special deference afforded apportionment plans that are the legislative act of the apportioning body.

The majority's alternative reason for upholding the district court's rejection of the plan, contained in the last sentence of part II.D of the opinion, is therefore dicta, and dicta about which I harbor some doubt. It is not at all clear to me that, had the Board of Supervisors adopted the apportionment plan proposed by the County, the reasons relied on by the district court for rejecting the plan would be sufficient. Certainly the issue is far more difficult than the majority's casual reference acknowledges. I would prefer to see a more detailed discussion of the issue before adopting the majority's conclusion as the law of the circuit, but a more extensive discussion is inappropriate, as it's all dicta anyhow. The more prudent course would be to reserve the issue for a day when it is squarely presented to us.

My second disagreement is more substantive; I cannot agree with the majority's conclusion, contained in part II.C of the opinion, that the district court's reapportionment plan complies with the one person one vote principle announced by the Supreme Court in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). While the majority may ultimately be vindicated, its conclusion is hard to square with what the Supreme Court has said on this issue up to now.

A. Before plumbing the doctrinal waters in this murky area of constitutional law, it is worth stating exactly what the County is complaining about. In drawing the remedial plan in this case, the district court adhered closely to state law which calls for supervisorial districts that are equal in population. In doing so, the court wound up with two districts where the numbers of voting age citizens are markedly lower than those in the three other districts.[2] The disparity is particularly
780 *780 great between Districts 1 and 3. District 1 has 707,651 eligible voters while District 3 has 1,098,663, a difference of 391,012, about 55% of the eligible voters in District 1. Since it takes a majority in each district to elect a supervisor, this means that the supervisor from District 1 can be elected on the basis of 353,826 votes (less than the

difference between the two districts), while the supervisor from District 3 requires at least 549,332 votes. Put another way, a vote cast in District 1 counts for almost twice as much as a vote cast in District 3.

[2] The district court's remedy finding No. 5 sets forth the relevant figures for the districting plan it adopted:District Total White Black Hispanic Other

B. Does a districting plan that gives different voting power to voters in different parts of the county impair the one person one vote principle even though raw population figures are roughly equal? It certainly seems to conflict with what the Supreme Court has *said* repeatedly. For example, in *Reynolds,* the Court stated: "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." 377 U.S. at 563, 84 S.Ct. at 1382. The Court also stated: "With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live," *id.* at 565, 84 S.Ct. at 1383; and "Simply stated, 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," *id.* at 568, 84 S.Ct. at 1385;[3] and "the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives," *id.* at 567, 84 S.Ct. at 1384.

[3] This language is also quoted in *Gaffney v. Cummings,* 412 U.S. 735, 744, 93 S.Ct. 2321, 2327, 37 L.Ed.2d 298 (1973).

Almost identical language appears in numerous cases both before *Reynolds, see, e.g., Wesberry v. Sanders,* 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964) ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'"); *Gray v. Sanders,* 372 U.S. 368, 379, 83 S.Ct. 801, 808, 9 L.Ed.2d 821 (1963) ("Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."[4]); and after, *see, e.g., Hadley v. Junior College Dist.,* 397 U.S. 50, 56, 90 S.Ct. 791, 795, 25 L.Ed.2d 45 (1970) ("[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); *Chapman v. Meier,* 420 U.S. 1, 24, 95 S.Ct. 751, 764, 42 L.Ed.2d 766 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action,* 430 U.S. 259, 265, 97 S.Ct. 1047, 1052, 51 L.Ed.2d 313 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight.").

[4] This language is also quoted in *Moore v. Ogilvie,* 394 U.S. 814, 817, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969), and *Reynolds,* 377 U.S. at 557-58, 84 S.Ct. at 1379.

The Court adhered to the same formulation as recently as two Terms ago: "In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately 781 equal in *781 weight to that of any other citizen.'" *Board of Estimate v. Morris,* 489 U.S. 688, 109 S.Ct. 1433, 1441, 103 L.Ed.2d 717 (1989) (quoting *Reynolds,* 377 U.S. at 579, 84 S.Ct. at 1390).

Despite these seemingly clear and repeated pronouncements by the Supreme Court, the majority's position is not without support, as the Court has also said things suggesting that equality of population is the guiding principle. *See, e.g., Reynolds,* 377 U.S. at 568, 84 S.Ct. at 1385 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."); *Mahan v. Howell,* 410 U.S. 315, 321, 93 S.Ct. 979, 983, 35 L.Ed.2d 320 (1973) ("[T]he basic constitutional principle [is] equality of population among the districts."); *Kirkpatrick v. Preisler,* 394 U.S. 526, 530, 89 S.Ct. 1225, 1228, 22 L.Ed.2d 519 (1969) ("`[E]qual representation for equal numbers of people [is] the fundamental goal for the House of Representatives.'" (quoting *Wesberry,* 376 U.S. at 18, 84 S.Ct. at 535)).

In most cases, of course, the distinction between the two formulations makes no substantive difference: Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa. Here, however, we *do* have a demographic abnormality, and the selection of an apportionment base does make a material difference: Apportionment by population can result in unequally weighted votes, while assuring equality in voting power might well call for districts of unequal population.

How does one choose between these two apparently conflicting principles? It seems to me that reliance on verbal formulations is not enough; we must try to distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment. Coming up with the correct theory is made no easier by the fact that the Court has been less than consistent in its choice of language and that, as Justice Harlan pointed out in his *Reynolds* dissent, "both the language and history of the controlling provisions of the Constitution [have been] wholly ignored" by the Court, 377 U.S. at 591, 84 S.Ct. at 1397 (Harlan, J., dissenting), making it impossible to rely on the Constitution for any meaningful guidance. Still we must try.

C. While apportionment by population and apportionment by number of eligible electors normally yield precisely the same result, they are based on radically different premises and serve materially different purposes. Apportionment by raw population embodies the principle of equal representation; it assures that all persons living within a district — whether eligible to vote or not — have roughly equal representation in the governing body.[5] A principle of equal representation serves important purposes: It assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy. Also, assuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, it assures that constituents are not afforded unequal government services depending on the size of the population in their districts.

[5] It is established, of course, that an elected official represents all persons residing within his district, whether or not they are eligible to vote and whether or not they voted for the official in the preceding election. *See Davis v. Bandemer,* 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (1986) (plurality).

Apportionment by proportion of eligible voters serves the principle of electoral equality. This principle recognizes that electors — persons eligible to vote — are the ones who hold the ultimate political power in our democracy. This is an important power reserved only to certain members of society; states are not required to bestow it upon aliens, transients, short-term residents, persons convicted of crime, or those

782 considered too young. *See* J. Nowak, R. *782 Rotunda J.N. Young, Constitutional Law § 14.31, at 722-23 (3d ed. 1986).

The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location. Under this paradigm, the fourteenth amendment protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned.

It is very difficult, in my view, to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation. To begin with, the name by which the Court has consistently identified this constitutional right — one person one vote — is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote — not two, five or ten, *Reynolds,* 377 U.S. at 562, 84 S.Ct. at 1381; or one-half.

But we need not rely on inferences from what is essentially an aphorism, for the Court has told us exactly and repeatedly what interest this principle serves. In its most recent pronouncement in the area, the Court stated: " *The personal right to vote is a value in itself, and a citizen is,* without more and without mathematically calculating his power to determine the outcome of an election, *shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two;* or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative." *Morris,* 109 S.Ct. at 1440 (emphasis added).

References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity. Thus, in *Hadley v. Junior College District,* the Court stated: "[T]he Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district." 397 U.S. at 52, 90 S.Ct. at 792. The Court further explained: "[A] qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted," *id.* (footnote omitted); and "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's," *id.* at 54, 90 S.Ct. at 794 (footnote omitted); and "once a State has decided to use the process of popular election and `once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded,'" *id.* at 59, 90 S.Ct. at 797 (quoting *Gray v. Sanders,* 372 U.S. at 381, 83 S.Ct. at 809).

Reynolds itself brims over with concern about the rights of citizens to cast equally weighted votes: " [T]he judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." 377 U.S. at 561, 84 S.Ct. at 1381. Again: "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Id.* at 565, 84 S.Ct. at 1383.[6] And yet again: "And the right of suffrage can be denied by a debasement or

783 *783 dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555, 84 S.Ct. at 1378. *Reynolds* went so far as to suggest that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567, 84 S.Ct. at 1384.

[6] This language is also quoted in *Whitcomb v. Chavis,* 403 U.S. 124, 141, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971).

While the Court has repeatedly expressed its concern with equalizing the voting power of citizens as an ultimate constitutional imperative — akin to protecting freedom of speech or freedom of religion — its various statements in support of the principle of equal representation have been far more conditional. Indeed, a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality. Thus, the Court stated in *Reynolds:* "[T]he overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579, 84 S.Ct. at 1390 (emphasis added). This language has been quoted in numerous subsequent cases. *See Gaffney,* 412 U.S. at 744, 93 S.Ct. at 2327; *Mahan v. Howell,* 410 U.S. 315, 322, 93 S.Ct. 979, 984, 35 L.Ed.2d 320 (1973); *Burns,* 384 U.S. at 91 n. 20, 86 S.Ct. at 1296 n. 20. In *Connor v. Finch,* 431 U.S. 407, 416, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977), the Court stated the proposition as follows: "The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that* each person's vote may be given equal weight in the election of representatives." (emphasis added).[7]

[7] The Court has continued to justify the requirement of equality of populations as a means of assuring that "each citizen's portion [is] equal." *Morris,* 109 S.Ct. at 1438; *see also Lockport v. Citizens for Community Action,* 430 U.S. 259, 264, 97 S.Ct. 1047, 1051, 51 L.Ed.2d 313 (1977) ("[I]t has been established that the Equal Protection Clause cannot tolerate the disparity in individual voting strength that results when elected officials represent districts of unequal population. . . .").

Particularly indicative of the subservience of the representational principle to the principle of electoral equality is *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), on which the majority mistakenly relies. *Gaffney* deals with the question of how much variation in population is permissible in effectuating the one person one vote principle of *Reynolds.* The Supreme Court held that absolute mathematical precision is not necessary. Total population, the Court held that absolute mathematical precision is not necessary. Total population, the Court pointed out, is only a proxy for equalizing the voting strength of eligible voters. But, the Court noted, it is not a perfect proxy; voters might not be distributed homogeneously throughout the population, for example. Therefore, "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Gaffney,* 412 U.S. at 745-46, 93 S.Ct. at 2327-28. The Court continued:

> What is more, it must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless *not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan.* The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differential in population growth rates are striking and well-known phenomena. So, too, *if it is the weight of a person's vote that matters,* total population — even if stable and accurately taken — may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.

Id. at 746, 93 S.Ct. at 2328 (emphasis added, footnotes omitted).

Finally, there is the teaching of *Burns v. Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), which the majority dismisses far too lightly. Because it is the only Supreme Court case applying the one person one vote principle in a situation *784 where there were large numbers of residents not eligible to vote — it being the only case where there was a divergence between the representational principle and the principle of electoral equality — the case deserves a more careful examination. While *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so. As noted earlier, in a situation such as ours — as that in *Burns* — one or the other of the principles must give way. If the ultimate objective were to serve the representational principle, that is to equalize populations, *Burns* would be inexplicable, as it approved deviations from strict population equality that were wildly in excess of what a strict application of that principle would permit.[8]

[8] In *Burns,* the ninth and tenth districts contained 28% of Oahu's total population, yet were entitled to only 6 representatives. The fifteenth and sixteenth districts, on the other hand, contained only 21% of the population, but were entitled to 10 representatives. *Burns,* 384 U.S. at 90-91 n. 18, 86 S.Ct. at 1295 n. 18. Thus, in districts 9 and 10, there was one representative for every 4.67% of Oahu's total population, whereas in districts 15 and 16, there was one representative for every 2.1% of the population. This deviation of well over 100% — 122%, in fact — far exceeds the population deviations held permissible by the Supreme Court in the line of cases discussed below. *See* pp. 785-786 *infra.*

Burns can only be explained as an application of the principle of electoral equality; the Court approved the departure from strict population figures because raw population did not provide an accurate measure of whether the voting strength of each citizen was equal. Thus, while *Burns* spoke in permissive terms, its logic is far more categorical.

The only other way to explain the result in *Burns* is to assume that there is no principle at all at play here, that one person one vote is really nothing more than a judicial squinting of the eye, a rough-and-ready determination whether the apportionment scheme complies with some standard of proportionality the reviewing court happens to find acceptable. I am reluctant to ascribe such fluidity to a constitutional principle that the Supreme Court has told us embodies "fundamental ideas of democratic government," *Wesberry,* 376 U.S. at 8, 84 S.Ct. at 530.[9]

[9] One's resolve in this regard is put to the test by *Brown v. Thomson,* 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983). *See id.*

at 850, 103 S.Ct. at 2700 (Brennan, J., dissenting); note 11 *infra*.

When considered against the Supreme Court's repeated pronouncements that the right being protected by the one person one vote principle is personal and limited to citizens, the various arguments raised by the majority do not carry the day. Thus, the Court's passing reference in *Kirkpatrick v. Preisler,* 394 U.S. 526, 531, 89 S.Ct. 1225, 1229, 22 L.Ed.2d 519 (1969), to "prevent[ing] debasement of voting power and diminution of access to elected representatives" suggests only that the Court did not consider the possibility that the twin goals might diverge in some cases. As *Kirkpatrick* contains no discussion of the issue, it provides no clue as to which principle has primacy where there is a conflict between the two.

Similarly unpersuasive is the majority's citation of cases that hold that aliens and the young enjoy many constitutional rights on the same basis as citizens. Maj. op. at 775. One right aliens and children do not enjoy is the right to vote. Insofar as the Court views its one person one vote jurisprudence as protecting the right to vote enjoyed only by citizens, *see* pp. 780-781 *supra,* it's entirely beside the point what other rights noncitizens may enjoy. If, as I suggest, one person one vote protects a right uniquely held by citizens, it would be a dilution of that right to allow
785 noncitizens to share therein.[10] *785

[10] My colleagues also rely on the fact that apportionment for the House of Representatives is based on whole population figures. But for reasons explained by the Supreme Court in *Reynolds,* 377 U.S. at 571-77, 84 S.Ct. at 1386-89, arguments based on the "federal analogy" are "inapposite and irrelevant to state legislative redistricting schemes," *id.* at 573, 84 S.Ct. at 1387, and therefore are not particularly persuasive in the context of state and local apportionment cases. Congressional apportionments are governed by section 2 of the fourteenth amendment, which makes total population the apportionment base; it says nothing about state apportionments. If this provision were meant to govern state legislative apportionments, the principle of one person one vote, based on a separate part of the fourteenth amendment, would be superfluous.

Finally, I understand my colleagues to be suggesting that, as a matter of policy, the principle of equal representation is far wiser than the principle of electoral equality. Were I free to disregard the explicit and repeated statements of the Supreme Court, I might well find this argument persuasive. But I am not free to ignore what I regard as binding direction from the Supreme Court, so my own policy views on this matter make no difference.

All that having been said, I must acknowledge that my colleagues may ultimately have the better of the argument. We are each attempting to divine from language used by the Supreme Court in the past what the Court would say about an issue it has not explicitly addressed. While much of the language and some of the rationale of the Supreme Court's decisions clearly support my view, other language, as well as tradition, supports my colleagues. Were the Supreme Court to take up the issue, I would not be surprised to see it limit or abandon the principle of electoral equality in favor of a principle of representational equality. But the implications of that decision must be considered by those who have the power to make such choices, not by us. My colleagues may well be looking into the future, but controlling guidance comes from the past.

D. Having concluded that it is the principle of electoral equality that lies at the heart of one person one vote, we must address whether the district court's plan nevertheless falls within acceptable limits. While the Supreme Court has not been completely consistent in its methodology, usually it creates hypothetical ideal districts (i.e.,

districts that contain precisely the same number of people) and then determines, in percentage terms, the degree of deviation between each of the actual districts and the ideal one. The maximum deviation is calculated by adding the percentage points that the largest district is above the ideal, to the percentage points the smallest is below. *See, e.g., Brown v. Thomson,* 462 U.S. at 839, 103 S.Ct. at 2694, *Mahan,* 410 U.S. at 319, 93 S.Ct. at 982. While the Court has always used raw population figures, not electors, there seems to be no reason to apply a different methodology when comparing numbers of electors.

Here, a hypothetical ideal district would contain 979,594 electors. *See* note 2 *supra.* Compared to this ideal district, the districts under the plan adopted below deviate as set forth in the following table:District # Electors Raw Deviation % Deviation

1 707,651 — 271,943 — 28% 2 922,180 — 57,414 — 6% 3 1,098,663 + 119,069 + 12% 4 1,081,089 + 101,495 + 10% 5 1,088,388 + 108,794 + 11% [108] As this table demonstrates, the districts in the court-ordered plan contain a very significant deviations from the ideal district. As expected, the greatest spread is between Districts 1 and 3, and it amounts to 40%. Equally significant are the individual deviations. Only one district, number 2, has a number of electors close to the norm, i.e., a deviation within single digits. Three of the districts have deviations between 10% and 20% and one district has a deviation nearly three times that amount — 28%.

If I am right that it is qualified electors, not raw population figures, that count, these deviations fall far outside the acceptable range. The Supreme Court's cases in this area have defined three ranges of deviation that bear on the constitutionality of the plan. A maximum deviation of less than 10% 786 is considered de minimis and will *786 be acceptable without further inquiry. *White v. Regester,* 412 U.S. 755, 763, 93 S.Ct. 2332, 2338, 37 L.Ed.2d 314 (1973). Deviations somewhat above 10% may be acceptable if justified by compelling and legitimate interests. *See, e.g., Abate v. Mundt,* 403 U.S. 182, 184-85, 91 S.Ct. 1904, 1905-06, 29 L.Ed.2d 399 (1971). And, the Court has stated quite clearly that deviations above this buffer range will not be acceptable at all, even if justified by the most compelling and legitimate interests. The Court has not precisely identified the upper range for this buffer category, but does not appear to have approved any plans having a maximum deviation over 20%.[11]

[11] The only contrary authority seems to be *Brown v. Thomson,* as to which it is not clear at all what the relevant deviation was. The only deviation mentioned by the majority and concurring opinions is 89%, which was the degree of deviation of one particularly small county. But the majority and concurrence go to great lengths to assure us that that is *not* the relevant figure; the two concurring Justices expressed "the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny. . . ." 462 U.S. at 850, 103 S.Ct. at 2700 (O'Connor, J., joined by Stevens, J., concurring). Because of the peculiar procedural posture of the case, it is hard to tell just what the court viewed as the relevant deviation; it might have been 23%, *see id.* at 860 n. 6, 103 S.Ct. at 2705 n. 6 (Brennan, J., dissenting), although, for the reasons explained by the dissent, this figure, like the theory of the majority, seems to make little sense.

It should be noted that, in discussing the range of possible deviations, the Court in all of these cases was comparing total population figures. *Gaffney,* however, tells us that deviation in total population figures is permissible, to some extent at least, because raw population is only an approximation of the number of electors. 412 U.S. at 746, 93 S.Ct. at 2328. It may well be that where, as here,

the comparison is between the number of electors, the permissible range of deviation is much narrower.

Even if we apply to this case the ranges established by the Court in cases involving raw population figures, it is clear that the district court's plan falls far outside the permissible range. As far as I am aware, no plan has ever been approved with a maximum deviation of as much as 40%. If I read the Court's cases correctly, a deviation that large could not be justified even by the most compelling reasons. Nor, do I believe, has the district court even advanced reasons that would permit it to go beyond the 10% de minimis range. Such reasons may exist, but they are not articulated in the record. Four out of the five districts therefore fall outside the acceptable range for purposes of one person one vote.

E. Having concluded that the district court's plan runs afoul of the one person one vote principle, we arrive at the single most difficult issue in this case: To what extent, if any, this principle may have to give way when it collides with a remedial plan designed to cure the effects of discrimination.

There is, as far as I am aware, little or no guidance on this issue. All prior cases alleging violations of one person one vote involved a conflict between that constitutional principle and various interests advanced under state law. *See, e.g.*, pp. 785-786 *supra*. Under such circumstances, even if the state is found to have a rational and compelling interest in deviating from substantial district equality, this interest may not justify more than a small range of deviations; beyond that, the state's interest gives way to the constitutional imperative.

The balance may well be different where, as here, the competing interest is itself grounded in the fourteenth amendment or its derivative, the Voting Rights Act. What seems absolutely clear to me, however, is that the district court cannot simply ignore one person one vote in seeking to create a remedy. The Supreme Court has cautioned that district courts have "considerably narrower" discretion than state legislatures to depart from the ideal of one person one vote, and that "the burden of articulating special reasons for following [policies that would result in a departure are] correspondingly higher." *Connor v. Finch*, 431 U.S. 407, 419-20, 97 S.Ct. 1828, 1836, 52 L.Ed.2d 465 (1977). Moreover, "it is the reapportioning court's responsibility to articulate precisely why a
787 *787 plan of single-member districts with minimal population variance cannot be adopted." *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975).

At the very least, it seems to me, the district court must make a determined effort to eliminate or minimize the electoral disparities within the districts, consistent with achieving the remedial purposes of the plan. In so doing, I should think the district court would have latitude of up to 20% maximum deviation from the ideal district, providing, of course, that it supplies an adequate explanation of why its purposes cannot be achieved within a narrower range.

What if the district court determines that it cannot construct an adequate remedial plan without going beyond the 20% maximum deviation range? Under one view of the matter, one person one vote would not provide an absolute constraint on the court's remedial powers, as the competing interest here is not state law — which necessarily takes a back seat to a constitutional imperative — but an interest of equivalent dignity, itself growing out of the same constitutional roots as one person one vote. Under this paradigm, the district court would be allowed, under certain circumstances, to go beyond the 20% buffer allowed by the earlier cases. The district court would have to make very specific findings on how it has sought to achieve substantial equality among the districts and why it has been unable to do so without sacrificing the remedial purpose of the plan. If supported by the record (i.e., if no one comes forward with a plan that can do what the district court says can't be done), I should think that a much greater deviation

from the ideal plan would be permissible, quite possibly as much as the 40% maximum deviation here.

There is, however, another paradigm: A plausible case could be made that the district court gets no greater latitude when it acts pursuant to the Voting Rights Act because its remedial powers are absolutely constrained by the principle of one person one vote. The argument in support of this position grows not out of some hierarchy of values, but out of the nature of the remedial process. A reapportionment plan designed to remedy unlawful discrimination can have one purpose and one purpose only: To put the victims of discrimination in the position they would have enjoyed had there been no discrimination. Here, for example, the object would be to create the type of district that would have existed had the supervisors not continually split the Hispanic core.

Even if we make the most favorable assumptions about what might have been, we cannot conclude that the supervisors would have come up with a district that violated the constitutional constraint of one person one vote. Since we know that, in the normal course of events and in the absence of discrimination, no such district could have been created, no legitimate remedial purpose would be served by creating such a district now. Under this view of the matter, there would be no tension between the court's remedial power and the principle of one person one vote, and therefore no justification for going beyond the 20% buffer. Even departures beyond the 10% de minimis buffer could, under this paradigm, be justified only upon a showing that compelling circumstances in the county would, in the absence of discrimination, have resulted in districts of greater than de minimis disparity.[12]

[12] The Court has been somewhat vague as to what interests justify departure beyond the 10% de minimis buffer, but the only one clearly identified has been a long-standing and genuine desire to maintain the integrity of political subdivisions. *Reynolds*, 377 U.S. at 578-81, 84 S.Ct. at 1390-91; *Abate*, 403 U.S. at 183, 187, 91 S.Ct. at 1905, 1908.

It is unnecessary to explore this conundrum, however, as it seems absolutely clear that we must remand to the district court on this issue. To begin with the district court constructed the remedial plan under the mistaken impression that it was constrained by the state law requirement that supervisorial districts be equal in population. It is clear, however, that where state law runs up against a constitutional constraint such as one person one vote, state law must yield. It is most
788 emphatically *788 *not* the case, as the majority suggests, that a district court, in drafting a remedial plan, is constrained by state apportionment law where that law would violate the Constitution.

Remand is also appropriate because the district court was apparently not aware that it was, required to try — if at all possible — to construct a remedial plan that avoided the conflict between the two interests. Since the district court did not try, we do not know whether it is possible to reconcile both interests. A remand is necessary in order to find out. Only if it turns out that an effective remedial plan that also satisfies one person one vote cannot be constructed would I venture an opinion on the difficult question whether, to what extent and under what circumstances the principle of one person one vote must yield when the district court exercises its equitable powers to remedy the effects of past discrimination.

III. Expedited Issuance of the Mandate

Reluctantly, I must also part company with my colleagues in their decision to issue the mandate forthwith. As it is clear from this action that this panel will not grant a stay, we place an unnecessary burden upon the parties, the district judge, our own colleagues and the Justices above us.

I well understand the reason for haste; delaying an election any longer than absolutely necessary should not be done lightly. Consistent with that imperative, we have issued a significant opinion in an important and difficult case about three weeks after submission. No one can justly accuse us of sitting on our thumbs. Were the opinion unanimous, or were I convinced that our differences are relatively trivial, I would go along with expedition the mandate.

But we do not all agree. Moreover, our disagreement goes to the heart of the district court's remedial plan. Should there be further review, any steps taken by the district court and the parties in implementing the majority opinion would be wasted. The more prudent course, is seems to me, would be to let the parties consider their options in a sober, unhurried fashion, as contemplated by the Federal Rules of Appellate Procedure.

My able colleagues have advanced very compelling arguments as to why the one person one vote rule should be construed as embodying the principle of equal representation. I have suggested that much of the Court's language and rationale supports the opposite view, that it is the principle of electoral equality that lies at the heart of one person one vote. We are not in a position to resolve this issue, which grows out of a lack of meaningful guidance in a long series of Supreme Court opinions. Yet this issue will have immediate and growing significance as large populations of aliens are taking up residence in several of our largest states.[13] The Supreme Court may deem it prudent to take up the issue before large-scale redistricting gets underway in 1991.

13 *See, e.g.*, Suro, *Behind the Census Numbers*, N Y Times, Sept. 16, 1990, § 4, at 4 col. 1.

Given these considerations, I would preserve the opportunity to have the matter considered in a deliberative fashion, unhurried by the pendency of an election. For better or worse, the election was stayed, which allowed us to consider the case without the sword of Damocles hanging over our heads. I would offer the same opportunity for unhurried deliberation to our colleagues and to any of the Justices who might wish to consider the matter.

IV. Conclusion

This is a fascinating case. It poses many new questions which required the district court to sail into uncharted waters. For the most part, the district court — and the majority — got it right. But close is not close enough when important constitutional rights are at stake. I would order a limited remand for the district court to apply the teachings of *Reynolds v. Sims* and its progeny.

1 707,651 25.4 3.5 59.4 11.6 2 922,180 23.8 50.8 17.1 8.3 3 1,098,663 77.0 4.3 13.9 4.7 4 1,081,089 67.5 4.4 19.7 8.4 5 1,088,388 69.8 6.2 18.1 5.9 TOTAL 4,897,971 55.8 13.4 23.3 7.5 Findings and Order Regarding Remedial Redistricting Plan and Election Schedule 4 (filed Aug. 6, 1990).

789 *789

Martinez, Ruben

From: Martin Enriquezmarquez <
Sent: Wednesday, November 03, 2021 2:52 PM
To: cityclerk; PublicComment-AutoResponse; Jomsky, Mark
Subject: Evenwell v Abbott 2016 + Total Population standard
Attachments: Evenwel v. Abbott.pdf

In three words I can sum up everything I've learned about life: it goes on.
Robert Frost

3 November 2021

Dear All:

Here's Evenwell v Abbott 136 S Ct. 1120 (2016).

This case brought about the question who counts; answer, each and every one of us. You are a person who is domiciled within the jurisdiction of the United States of America, you count. God bless America.

Total Population standard is a valid standard used extensively throughout the nation:

"Total Population apportionment promotes equitable and effective representation"

Ruth Bader Ginsburg

In California the state supreme court in 1971 Calderon already established the one person, one vote rule for California. With better reasoning about the difference in registration and Total Population; see Hawaii.

The amicus brief filed by local jurisdictions is important to state California's position to the U S Supreme Court: Total Population.

I urge caution by the city council not to rubber stamp the incumbent- protection plan which is to their liking.

Small changes to approximate equal Total Population with a ten percent deviation will not pass mustard because no Section 2 exist.

Case law from Chicago will be instructive.

Begorrah,

Martin

No. 14-940
SUPREME COURT OF THE UNITED STATES

Evenwel v. Abbott

136 S. Ct. 1120 (2016) · 577 U.S. 937 · 194 L. Ed. 2d 291
Decided Apr 4, 2016

No. 14–940.

04-04-2016

Sue EVENWEL et al., Appellants v. Greg ABBOTT, Governor of Texas, et al.

William S. Consovoy, Arlingotn, VA, for Appellants. Scott A. Keller, Solicitor General, for Appellees. Ian H. Gershengorn for the United States, as amicus curiae, by special leave of the Court, supporting the Appellees. Ken Paxton, Attorney General of Texas, Charles E. Roy, First Assistant, Attorney General, Office of the Attorney General, P.O., Austin, TX, Scott A. Keller, Solicitor General, Matthew H. Frederick, Deputy Solicitor General, Lisa Bennett, Assistant Solicitor General, for Appellees. Meredith B. Parenti, Parenti Law PLLC, Houston, TX, William S. Consovoy, Thomas R. McCarthy, J. Michael Connolly, Consovoy McCarthy Park PLLC, Arlington, VA, for Appellants.

Justice GINSBURG delivered the opinion of the Court.

William S. Consovoy, Arlingotn, VA, for Appellants.

Scott A. Keller, Solicitor General, for Appellees.

Ian H. Gershengorn for the United States, as amicus curiae, by special leave of the Court, supporting the Appellees.

Ken Paxton, Attorney General of Texas, Charles E. Roy, First Assistant, Attorney General, Office of the Attorney General, P.O., Austin, TX, Scott A. Keller, Solicitor General, Matthew H. Frederick, Deputy Solicitor General, Lisa Bennett, Assistant Solicitor General, for Appellees.

Meredith B. Parenti, Parenti Law PLLC, Houston, TX, William S. Consovoy, Thomas R. McCarthy, J. Michael Connolly, Consovoy McCarthy Park PLLC, Arlington, VA, for Appellants.

1123*1123 Justice GINSBURG delivered the opinion of the Court.

Texas, like all other States, draws its legislative districts on the basis of total population. Plaintiffs-appellants are Texas voters; they challenge this uniform method of districting on the ground that it produces unequal districts when measured by voter-eligible population. Voter-eligible population, not total population, they urge, must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts. 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.

I

A

This Court long resisted any role in overseeing the process by which States draw legislative districts. "The remedy for unfairness in districting," the Court once held, "is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Colegrove v. Green,*

328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). "Courts ought not to enter this political thicket," as Justice Frankfurter put it. *Ibid.*

Judicial abstention left pervasive malapportionment unchecked. In the opening half of the 20th century, there was a massive population shift away from rural areas and toward suburban and urban communities. Nevertheless, many States ran elections into the early 1960's based on maps drawn to equalize each district's population as it was composed around 1900. Other States used maps allocating a certain number of legislators to each county regardless of its population. These schemes left many rural districts significantly underpopulated in comparison with urban and suburban districts. But rural legislators who benefited from malapportionment had scant incentive to adopt new maps that might put them out of office.

The Court confronted this ingrained structural inequality in *Baker v. Carr,* 369 U.S. 186, 191–192, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). That case presented an equal protection challenge to a Tennessee state-legislative map that had not been redrawn since 1901. See also *id.,* at 192, 82 S.Ct. 691 (observing that, in the meantime, there had been "substantial growth and redistribution" of the State's population). Rather than steering clear of the political thicket yet again, the Court held for the first time that malapportionment claims are justiciable. *Id.,* at 237, 82 S.Ct. 691 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.").

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,* 376 U.S. 1, 7–8, 84 S.Ct. 526, 11 L.Ed.2d 481 (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. *Id.,* at 7, 18, 84 S.Ct. 526. Later that same Term, in *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Court upheld an equal protection challenge to Alabama's malapportioned state-legislative maps. "[T]he Equal Protection Clause," the Court concluded, 1124 "requires that the seats *1124 in both houses of a bicameral state legislature must be apportioned on a population basis." *Ibid* . *Wesberry* 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.[1]

[1] In *Avery v. Midland County,* 390 U.S. 474, 485–486, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), the Court applied the one-person, one-vote rule to legislative apportionment at the local level.

Over the ensuing decades, the Court has several times elaborated on the scope of the one-person, one-vote rule. States must draw congressional districts with populations as close to perfect equality as possible. See *Kirkpatrick v. Preisler,* 394 U.S. 526, 530–531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969). But, when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. See *Brown v. Thomson,* 462 U.S. 835, 842–843, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983). Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. *Ibid.* [2] Maximum deviations above 10%

are presumptively impermissible. *Ibid.* See also *Mahan v. Howell,* 410 U.S. 315, 329, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973) (approving a state-legislative map with maximum population deviation of 16% to accommodate the State's interest in "maintaining the integrity of political subdivision lines," but cautioning that this deviation "may well approach tolerable limits").

[2] Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. See *Chapman v. Meier,* 420 U.S. 1, 22, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%.

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. On rare occasions, jurisdictions have relied on the registered-voter or voter-eligible populations of districts. See *Burns v. Richardson,* 384 U.S. 73, 93–94, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966) (holding Hawaii could use a registered-voter population base because of "Hawaii's special population problems"—in particular, its substantial temporary military population). But, in the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. 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.[3] *1125 B

*1125

[3] The Constitutions and statutes of ten States —California, Delaware, Hawaii, Kansas, Maine, Maryland, Nebraska, New Hampshire, New York, and Washington— authorize the removal of certain groups from the total-population apportionment base. See App. to Brief for Appellees 1a–46a (listing relevant state constitutional and statutory provisions). Hawaii, Kansas, and Washington exclude certain non-permanent residents, including nonresident members of the military. Haw. Const., Art. IV, § 4; Kan. Const., Art. 10, § 1 (a); Wash. Const., Art. II, § 43 (5). See also N.H. Const., pt. 2, Art. 9–a (authorizing the state legislature to make "suitable adjustments to the general census ... on account of non-residents temporarily residing in this state"). California, Delaware, Maryland, and New York exclude inmates who were domiciled out-of-state prior to incarceration. Cal. Elec.Code Ann. § 21003(5) (2016 West Cum. Supp.); Del.Code Ann., Tit. 29, § 804A (Supp.2014); Md. State Govt.Code Ann. § 2–2A–01 (2014); N.Y. Legis. Law Ann. § 83–m(b) (2015 West Cum. Supp.). The Constitutions of Maine and Nebraska authorize the exclusion of noncitizen immigrants, Me. Const., Art. IV, pt. 1, § 2; Neb. Const., Art. III, § 5, but neither provision is "operational as written," Brief for United States as *Amicus Curiae* 12, n. 3.

Appellants challenge that consensus. After the 2010 census, Texas redrew its State Senate districts using a total-population baseline. At the time, Texas was subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965. 52 U.S.C. § 10304 (requiring jurisdictions to receive approval from the U.S. Department of Justice or the U.S. District Court for the District of Columbia before implementing certain voting changes). Once it became clear that the new Senate map, S148, would not receive preclearance in advance of the 2012 elections, the U.S. District Court for the Western District of Texas drew an interim Senate map, S164, which also equalized the total population of each district. See *Davis v. Perry,* No. SA–11–CV–788, 2011 WL 6207134 (Nov. 23, 2011).[4] On direct appeal, this Court observed that the District Court had failed to "take guidance from the State's recently enacted plan in

drafting an interim plan," and therefore vacated the District Court's map. *Perry v. Perez*, 565 U.S. ——, ——, ——– ——, 132 S.Ct. 934, 940–942, 943–944, 181 L.Ed.2d 900 (2012) (*per curiam*).

[4] Various plaintiffs had challenged Texas' State House, State Senate, and congressional maps under, *inter alia*, § 2 of the Voting Rights Act of 1965. They sought and received an injunction barring Texas' use of the new maps until those maps received § 5 preclearance. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 561, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) ("[A]n individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny.").

The District Court, on remand, again used census data to draw districts so that each included roughly the same size total population. Texas used this new interim map, S172, in the 2012 elections, and, in 2013, the Texas Legislature adopted S172 as the permanent Senate map. See App. to Brief for Texas Senate Hispanic Caucus et al. as *Amici Curiae* 5 (reproducing the current Senate map). The permanent map's maximum total-population deviation is 8.04%, safely within the presumptively permissible 10% range. But measured by a voter-population baseline—eligible voters or registered voters—the map's maximum population deviation exceeds 40%.

Appellants Sue Evenwel and Edward Pfenninger live in Texas Senate districts (one and four, respectively) with particularly large eligible- and registered-voter populations. Contending that basing apportionment on total population dilutes their votes in relation to voters in other Senate districts, in violation of the one-person, one-vote principle of the Equal Protection Clause,[5] appellants filed suit in the U.S. District Court for the Western District of Texas. They named as defendants the Governor and Secretary of State of Texas, and sought a permanent injunction barring use of the existing Senate map in favor of a map that would equalize the voter population in each district.

[5] Apart from objecting to the baseline, appellants do not challenge the Senate map's 8.04% total-population deviation. Nor do they challenge the use of a total-population baseline in congressional districting.

The case was referred to a three-judge District Court for hearing and decision. See 28 U.S.C. § 2284(a) ; *Shapiro v. McManus*,

1126*1126

577 U.S. ——, ——– ——, 136 S.Ct. 450, 454–456, 193 L.Ed.2d 279 (2015). That court dismissed the complaint for failure to state a claim on which relief could be granted. Appellants, the District Court explained, "rel[y] upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." App. to Juris. Statement 9a. Decisions of this Court, the District Court concluded, permit jurisdictions to use any neutral, nondiscriminatory population baseline, including total population, when drawing state and local legislative districts. *Id.*, at 13a–14a.[6]

[6] As the District Court noted, the Ninth Circuit has likewise rejected appellants' theory, *i.e.*, that voter population must be roughly equalized. See *Garza v. County of L. A.*, 918 F.2d 763, 773–776 (C.A.9 1990). Also declining to mandate voter-eligible apportionment, the Fourth and Fifth Circuits have suggested that the choice of apportionment base may present a nonjusticiable political question. See *Chen v. Houston*, 206 F.3d 502, 528 (C.A.5 2000) ("[T]his eminently political question has been left to the political process."); *Daly v. Hunt*, 93 F.3d 1212, 1227 (C.A.4 1996) ("This is quintessentially a decision

that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.").

We noted probable jurisdiction, 575 U.S. ——, 136 S.Ct. 381, 193 L.Ed.2d 288 (2015), and now affirm.

II

The parties and the United States advance different positions in this case. As they did before the District Court, appellants insist that the Equal Protection Clause requires jurisdictions to draw state and local legislative districts with equal voter-eligible populations, thus protecting "voter equality," *i.e.,* "the right of eligible voters to an equal vote." Brief for Appellants 14.[7] To comply with their proposed rule, appellants suggest, jurisdictions should design districts based on citizen-voting-age-population (CVAP) data from the Census Bureau's American Community Survey (ACS), an annual statistical sample of the U.S. population. Texas responds that jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory. Although its use of total-population data from the census was permissible, Texas therefore argues, it could have used ACS CVAP data instead. Sharing Texas' position that the Equal Protection Clause does not mandate use of voter-eligible population, the United States urges us not to address Texas' separate assertion that the Constitution allows States to use alternative population baselines, including voter-eligible population. Equalizing total population, the United States maintains, vindicates the principle of representational equality by "ensur[ing] that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives." Brief for United States as *Amicus Curiae* 5.

7 In the District Court, appellants suggested that districting bodies could also comply with the one-person, one-vote rule by equalizing the registered-voter populations of districts, but appellants have not repeated that argument before this Court. See Tr. of Oral Arg. 22–23.

In agreement with Texas and the United States, we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and practice demonstrate, it is 1127 plainly permissible for jurisdictions to *1127 measure equalization by the total population of state and local legislative districts.

A

We begin with constitutional history. 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 (emphasis added). "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." The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001). 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.[8] Endorsing apportionment

based on total population, Alexander Hamilton declared: "There can be no truer principle than this —that every individual of the community at large has an equal right to the protection of government." 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911).[9]

[8] As the United States observes, the "choice of constitutional language reflects the historical fact that when the Constitution was drafted and later amended, the right to vote was not closely correlated with citizenship." Brief for United States as *Amicus Curiae* 18. Restrictions on the franchise left large groups of citizens, including women and many males who did not own land, unable to cast ballots, yet the Framers understood that these citizens were nonetheless entitled to representation in government.

[9] Justice ALITO observes that Hamilton stated this principle while opposing allocation of an equal number of Senate seats to each State. *Post,* at 1136 – 1137 (opinion concurring in judgment). That context, however, does not diminish Hamilton's principled argument for allocating seats to protect the representational rights of "every individual of the community at large." 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911). Justice ALITO goes on to quote James Madison for the proposition that Hamilton was concerned, simply and only, with "the outcome of a contest over raw political power." *Post,* at 1146. Notably, in the statement Justice ALITO quotes, Madison was not attributing that motive to Hamilton; instead, according to Madison, Hamilton was attributing that motive to the advocates of equal representation for States. Farrand, *supra,* at 466. One need not gainsay that Hamilton's backdrop was the political controversies of his day. That reality, however, has not deterred this Court's past reliance on his statements of principle. See, *e.g., Printz v. United States,* 521 U.S. 898, 910–924, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Concerned that Southern States would not willingly enfranchise freed slaves, and aware that "a slave's freedom could swell his state's population for purposes of representation in the House by one person, rather than only three-fifths," the Framers of the Fourteenth Amendment considered at length the possibility of allocating House seats to States on
1128 the basis of voter population. J. *1128 Sneed, Footprints on the Rocks of the Mountain: An Account of the Enactment of the Fourteenth Amendment 28 (1997). See also *id.,* at 35 ("[T]he apportionment issue consumed more time in the Fourteenth Amendment debates than did any other topic.").

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." Cong. Globe, 39th Cong., 1st Sess., 10 (1866). Supporters of apportionment based on voter population employed the same voter-equality reasoning that appellants now echo. See, *e.g., id.,* at 380 (remarks of Rep. Orth) ("[T]he true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government...."); *id.,* at 404 (remarks of Rep. Lawrence) (use of total population "disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union").

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." *Id.*, at 141. See also *id.*, at 358 (remarks of Rep. Conkling) (arguing that use of a voter-population basis "would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented"); *id.*, at 434 (remarks of Rep. Ward) ("[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no matter to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative.").

The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base. See U.S. Const., Amdt. 14, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."). Introducing the final version of the Amendment on the Senate floor, Senator Jacob Howard explained:

> "[The] basis of representation is numbers ...; that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime.... The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2766–2767 (1866).

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
*1129 theory underlies *1129 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." 376 U.S., at 13, 84 S.Ct. 526. "While it may not be possible to draw congressional districts with mathematical precision," the Court acknowledged, "that is no excuse for ignoring our Constitution's plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives." *Id.*, at 18, 84 S.Ct. 526 (emphasis added). 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.

Cordoning off the constitutional history of congressional districting, appellants stress two points.[10] First, they draw a distinction between allocating seats *to* States, and apportioning seats *within* States. The Framers selected total population for the former, appellants and their *amici* argue, because of federalism concerns inapposite to intrastate districting. These concerns included the perceived risk that a voter-population base might encourage States to expand the franchise unwisely, and the hope that a total-population base might counter States' incentive to undercount their populations, thereby reducing their share of direct taxes. *Wesberry,* however, rejected the distinction appellants now press. See *supra,* at 1128 – 1129. Even without the weight of *Wesberry,* we would find appellants' distinction unconvincing. One can accept that federalism—or, as Justice ALITO emphasizes, partisan and regional political advantage, see *post,* at 1145 – 1149—figured in the Framers' selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.[11]

[10] Justice ALITO adds a third, claiming "the allocation of congressional representation sheds little light" on the meaning of the one-person, one-vote rule "because that allocation plainly violates one person, one vote." *Post,* at 1144. For this proposition, Justice ALITO notes the constitutional guarantee of two Senate seats and at least one House seat to each State, regardless of its population. But these guarantees bear no kinship to the separate question that dominated the Fourteenth Amendment's ratification debates: After each State has received its guaranteed House seat, on what basis should additional seats be allocated?

[11] Justice ALITO asserts that we have taken the statements of the Fourteenth Amendment's Framers "out of context." *Post,* at 1148. See also *post,* at 1148 ("[C]laims 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."). Like Alexander Hamilton, see*supra,* at 1127, n. 9, the Fourteenth Amendment's Framers doubtless made arguments rooted in practical political realities as well as in principle. That politics played a part, however, does not warrant rejecting principled argument. In any event, motivations aside, the Framers' ultimate choice of total population rather than voter population is surely relevant to whether, as appellants now argue, the Equal Protection Clause *mandates* use of voter population rather than total population.

Second, appellants and Justice ALITO urge, see *post,* at 1144 – 1145, the Court has typically refused to analogize to features of the federal
1130 electoral system— *1130 here, the constitutional scheme governing congressional apportionment—when considering challenges to state and local election laws. True, in *Reynolds,* the Court rejected Alabama's argument that it had permissibly modeled its State Senate apportionment scheme—one Senator for each county—on the United States Senate. "[T]he federal analogy," the Court explained, "[is] inapposite and irrelevant to state legislative districting schemes" because "[t]he system of representation in the two Houses of the Federal Congress" arose "from unique historical circumstances." 377 U.S., at 573–574, 84 S.Ct. 1362. Likewise, in *Gray v. Sanders,* 372 U.S. 368, 371–372, 378, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), Georgia unsuccessfully attempted to defend, by analogy to the electoral college, its scheme of assigning a certain number of "units" to the winner of each county in statewide elections.

Reynolds and *Gray,* however, 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. See *Wesberry,* 376 U.S., at 9–13, 84 S.Ct. 526 (describing the history of the Great Compromise). See also *Reynolds,* 377 U.S., at 575, 84 S.Ct. 1362 ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.... The relationship of the States to the Federal Government could hardly be less analogous."). "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." *Williams v. Rhodes,* 393 U.S. 23, 43–44, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (Harlan, J., concurring in result). See also *Gray,* 372 U.S., at 378, 83 S.Ct. 801 ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality." (footnote omitted)). 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.

B

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. Quoting language from those decisions that, in appellants' view, supports the principle of equal voting power—and emphasizing the phrase "one-person, one-vote"—appellants contend that the Court had in mind, and constantly meant, that States should equalize the voter-eligible population of districts. See *Reynolds,* 377 U.S., at 568, 84 S.Ct. 1362 ("[A]n 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 on other parts of the State."); *Gray,* 372 U.S., at 379–380, 83 S.Ct. 801 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic
1131 qualifications."). See also *1131 *Hadley v. Junior College Dist. of Metropolitan Kansas City,* 397 U.S. 50, 56, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970) ("[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."). Appellants, however, extract far too much from selectively chosen language and the "one-person, one-vote" slogan.

For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality. 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." 377 U.S., at 560–561, 84 S.Ct. 1362. See also *Davis v. Bandemer,* 478 U.S. 109, 123, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) ("[I]n formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation."); *Reynolds,* 377 U.S., at 563, 84 S.Ct. 1362 (rejecting state districting schemes that "give the same number of representatives to unequal numbers of constituents"). And the Court has suggested, repeatedly, that districting based on

total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation. See *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693–694, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."). See also *Kirkpatrick*, 394 U.S., at 531, 89 S.Ct. 1225 (recognizing in a congressional-districting case that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives").[12]

[12] Appellants also observe that standing in one-person, one-vote cases has rested on plaintiffs' status as voters whose votes were diluted. But the Court has not considered the standing of nonvoters to challenge a map malapportioned on a total-population basis. This issue, moreover, is unlikely ever to arise given the ease of finding voters willing to serve as plaintiffs in malapportionment cases.

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. See Brief for Appellees 29–31 (collecting cases brought under the Equal Protection Clause). See also *id.*, at 31, n. 9 (collecting congressional-districting cases). Appellants point to no instance in which the Court has determined the permissibility of deviation based on eligible- or registered-voter data. It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule. More likely, we think, the Court has always assumed the permissibility of drawing districts to equalize total population.

"In the 1960s," appellants counter, "the distribution of the voting population generally did not deviate from the distribution of total population to the degree necessary to raise this issue." Brief for Appellants 27. To support this assertion, appellants cite only a District Court decision, which found no significant deviation in the distribution of voter and total population in "densely populated areas of New York State."
1132*1132 *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916, 925 (S.D.N.Y.), aff'd, 382 U.S. 4, 86 S.Ct. 24, 15 L.Ed.2d 2 (1965) (*per curiam*). Had this Court assumed such equivalence on a national scale, it likely would have said as much.[13] Instead, in *Gaffney v. Cummings*, 412 U.S. 735, 746–747, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), the Court acknowledged that voters may be distributed unevenly within jurisdictions. "[I]f it is the weight of a person's vote that matters," the Court observed, then "total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters." *Id.*, at 746, 93 S.Ct. 2321. Nonetheless, the Court in *Gaffney* recognized that the one-person, one-vote rule is designed to facilitate "[f]air and effective representation," *id.*, at 748, 93 S.Ct. 2321, and evaluated compliance with the rule based on total population alone, *id.*, at 750, 93 S.Ct. 2321.

[13] In contrast to the insubstantial evidence marshaled by appellants, the United States cites several studies documenting the uneven distribution of immigrants throughout the country during the 1960's. See Brief for United States as *Amicus Curiae* 16.

C

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. Appellants have shown no reason for the Court to disturb this longstanding use of total population. See *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("unbroken practice" followed "openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside"). See also *Burson v. Freeman,* 504 U.S. 191, 203–206, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion) (upholding a law limiting campaigning in areas around polling places in part because all 50 States maintain such laws, so there is a "widespread and time-tested consensus" that legislation of this order serves important state interests). As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. See *supra,* at 1126 – 1129. 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. See *McCormick v. United States,* 500 U.S. 257, 272, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.").[14]

[14] Appellants point out that constituents have no constitutional right to equal access to their elected representatives. But a State certainly has an interest in taking reasonable, nondiscriminatory steps to facilitate access for all its residents.

In sum, the rule appellants urge has no mooring in the Equal Protection Clause. The Texas Senate map, we therefore conclude, complies with the requirements of the one-person, one-vote 1133 principle.[15] Because *1133 history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.

[15] Insofar as appellants suggest that Texas could have roughly equalized both total population and eligible-voter population, this Court has never required jurisdictions to use multiple population baselines. In any event, appellants have never presented a map that manages to equalize both measures, perhaps because such a map does not exist, or because such a map would necessarily ignore other traditional redistricting principles, including maintaining communities of interest and respecting municipal boundaries.

* * *

For the reasons stated, the judgment of the United States District Court for the Western District of Texas is

Affirmed.

Justice THOMAS, concurring in the judgment.

This case concerns whether Texas violated the Equal Protection Clause—as interpreted by the Court's one-person, one-vote cases—by creating legislative districts that contain approximately equal total population but vary widely in the number of eligible voters in each district. I agree with the majority that our precedents do not require a State to equalize the total number of voters in each district. States may opt to equalize

total population. I therefore concur in the majority's judgment that appellants' challenge fails.

I write separately because this Court has never provided a sound basis for the one-person, one-vote principle. For 50 years, the Court has struggled to define what right that principle protects. Many of our precedents suggest that it protects the right of eligible voters to cast votes that receive equal weight. Despite that frequent explanation, our precedents often conclude that the Equal Protection Clause is satisfied when all individuals within a district—voters or not—have an equal share of representation. The majority today concedes that our cases have not produced a clear answer on this point. See *ante,* at 1131.

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.

I

In the 1960's, this Court decided that the Equal Protection Clause requires States to draw legislative districts based on a "one-person, one-vote" rule.* But this Court's decisions have never coalesced around a single theory about what States
1134 must equalize.*1134 The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. For nearly a century after its ratification, this Court interpreted the Clause as having no application to the politically charged issue of how States should apportion their populations in political districts. See, *e.g., Colegrove v. Green,* 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) (plurality opinion). Instead, the Court left the drawing of States' political boundaries to the States, so long as a State did not deprive people of the right to vote for reasons prohibited by the Constitution. See *id.,* at 552, 556, 66 S.Ct. 1198 ; *Gomillion v. Lightfoot,* 364 U.S. 339, 341, 347–348, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (finding justiciable a claim that a city boundary was redrawn from a square shape to "a strangely irregular twenty-eight-sided figure" to remove nearly all black voters from the city). This meant that a State's refusal to allocate voters within districts based on population changes was a matter for States—not federal courts—to decide. And these cases were part of a larger jurisprudence holding that the question whether a state government had a "proper" republican form rested with Congress. *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118, 149–150, 32 S.Ct. 224, 56 L.Ed. 377 (1912).

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

This Court changed course in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), by locating in the Equal Protection Clause a right of citizens not to have a " 'debasement of their votes.' " *Id.,* at 194, and n. 15, 200, 82 S.Ct. 691. Expanding on that decision, this Court later held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The Court created an analogous requirement for congressional redistricting rooted in Article I, § 2's requirement that "Representatives be chosen 'by the People of the several States.' " *Wesberry v.*

Sanders, 376 U.S. 1, 7–9, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The rules established by these cases have come to be known as "one person, one vote."

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. On this view, there is only one way for States to comply with the one-person, one-vote principle: they must draw districts that contain a substantially equal number of eligible voters per district.

The Court's seminal decision in *Baker* exemplifies this view. Decided in 1962, *Baker* involved the failure of the Tennessee Legislature to reapportion its districts for 60 years. 369 U.S., at 191, 82 S.Ct. 691. 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. *Id.*, at 192, 82 S.Ct. 691. 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
1135 their votes." *1135 *Id.*, at 194, and n. 15, 204, 82 S.Ct. 691 (internal quotation marks omitted).

The Court similarly emphasized equal treatment of eligible voters in *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). That case involved a challenge to Georgia's "county unit" system of voting. *Id.*, at 370, 83 S.Ct. 801. This system, used by the State's Democratic Party to nominate candidates in its primary, gave each county two votes for every representative that the county had in the lower House of its General Assembly. Voting was then done by county, with the winner in each county taking all of that county's votes. The Democratic Party nominee was the candidate who had won the most county-unit votes, not the person who had won the most individual votes. *Id.*, at 370–371, 83 S.Ct. 801. The effect of this system was to give heavier weight to rural ballots than to urban ones. The Court held that the system violated the one-person, one-vote principle. *Id.*, at 379–381, and n. 12, 83 S.Ct. 801. In so holding, the Court emphasized that the right at issue belongs to "all qualified voters" and is the right to have one's vote "counted once" and protected against dilution. *Id.*, at 380, 83 S.Ct. 801.

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. 377 U.S., at 545, 84 S.Ct. 1362. 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." *Id.*, at 568, 84 S.Ct. 1362.

This Court's post-*Reynolds* decisions likewise define the one-person, one-vote principle in terms of eligible voters, and thus imply that States should be allocating districts with eligible voters in mind. The Court suggested as much in *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). That case involved Missouri's system permitting separate school districts to establish a

joint junior college district. Six trustees were to oversee the joint district, and they were apportioned on the basis of the relative numbers of school-aged children in each subsidiary district. *Id.*, at 51, 90 S.Ct. 791. The Court held that this plan violated the Equal Protection Clause because "the trustees of this junior college district [must] be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district." *Id.*, at 52, 90 S.Ct. 791. In so holding, the Court emphasized that *Reynolds* had "called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *Hadley*, 397 U.S., at 52, 90 S.Ct. 791 ; see *id.*, at 52–53, 90 S.Ct. 791.

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
1136 *Reynolds*, for example, the Court *1136 said that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S., at 560–561, 84 S.Ct. 1362 ; see also *ante*, at 1131 (collecting cases). Under this view, States cannot comply with the Equal Protection Clause by equalizing the number of eligible voters in each district. They must instead equalize the total population per district.

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. In *Gaffney v. Cummings*, 412 U.S. 735, 750–751, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), for example, the Court upheld state legislative districts that had a maximum deviation of 7.83% when measured on a total-population basis. In contrast, in *Chapman v. Meier*, 420 U.S. 1, 21–22, 26–27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975), the Court struck down a court-ordered reapportionment that had a total deviation of 20.14% based on total population. This plan, in the Court's view, failed to "achieve the goal of population equality with little more than *de minimis* variation." *Id.*, at 27, 95 S.Ct. 751.

This lack of clarity in our redistricting cases has left States with little guidance about how their political institutions must be structured. Although this Court has required that state legislative districts "be apportioned on a population basis," *Reynolds, supra*, at 568, 84 S.Ct. 1362, it has yet to tell the States whether they are limited in choosing "the relevant population that [they] must equally distribute." *Chen v. Houston*, 532 U.S. 1046, 1047, 121 S.Ct. 2020, 149 L.Ed.2d 1017 (2001) (THOMAS, J., dissenting from denial of certiorari) (internal quotation marks omitted). Because the Court has not provided a firm account of what States must do when districting, States are left to guess how much flexibility (if any) they have to use different methods of apportionment.

II

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 majority's attempt today to divine a single " 'theory of the Constitution' "—

apportionment based on representation, *ante,* at 1128 – 1129 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766–2767 (1866))—rests on a flawed reading of history and wrongly picks one side of a debate that the Framers did not resolve in the Constitution.

A

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
1137 representation and *1137 those who were concerned that the majority would abuse plenary control over public policy. As Madison wrote, "A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). *This* was the theory of the Constitution. The Framers therefore made difficult compromises on the apportionment of federal representation, and they did not prescribe any one theory of how States had to divide their legislatures.

1

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. In the years between the Revolution and the framing, the Framers experimented with different ways of securing the political system against improper influence. Of all the "electoral safeguards for the representational system," the most critical was "equality of representation." G. Wood, The Creation of the American Republic 1776–1787, p. 170 (1998) (Wood).

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]." Thoughts on Government, in 4 Works of John Adams 195 (C. Adams ed. 1851). The British Parliament fell short of this goal. In addition to having hereditary nobility, more than half of the members of the democratic House of Commons were elected from sparsely populated districts—so-called "rotten boroughs." Wood 171; *Baker,* 369 U.S., at 302–303, 82 S.Ct. 691 (Frankfurter, J., dissenting).

The Framers' preference for majority rule also was a reaction to the shortcomings of the Articles of Confederation. Under the Articles, each State could cast one vote regardless of population and Congress could act only with the assent of nine States. Articles of Confederation, Art. IX, cl. 6; *id* ., Art. X; *id* ., Art. XI. This system proved undesirable because a few small States had the ability to paralyze the National Legislature. See The Federalist No. 22, at 140–141 (Hamilton).

Consequently, when the topic of dividing representation came up at the Constitutional Convention, some Framers advocated proportional representation throughout the National Legislature. 1 Records of the Federal Convention of 1787, pp. 471–473 (M. Farrand ed. 1911). Alexander Hamilton voiced concerns about the unfairness of allowing a minority to rule over a majority. In explaining at the Convention why he opposed giving States an equal vote in the National Legislature, Hamilton asked rhetorically, "If ... three states contain a majority of the inhabitants of America, ought they to be governed by a minority?" *Id.,* at 473; see also The Federalist No. 22, at 141 (Hamilton) (objecting to supermajoritarian voting requirements because they allow an entrenched minority to "controul the opinion of a majority respecting the best mode of

conducting [the public business]"). James Madison, too, opined that the general Government needed a direct mandate from the people. If federal "power [were] not immediately derived from the people, in proportion to their numbers," according to Madison, the Federal Government would be as weak as Congress under the Articles of Confederation. 1 Records of the Federal
1138 Convention of 1787, at 472.*1138 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. *Ante,* at 1126 – 1129. Thus, "equal representation for equal numbers of people," *ante,* at 1129 (internal quotation marks and emphasis omitted), 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."

2

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. See, *e.g.,* The Federalist No. 1, at 4 (Hamilton) (defining the common good or "public good" as the "true interests" of the community); *id* ., No. 10, at 57 (Madison) ("the permanent and aggregate interests of the community"). For government to promote the common good, it had to do more than simply obey the will of the majority. See, *e.g., ibid.* (discussing majoritarian factions). Government must also protect fundamental rights. See The Declaration of Independence ¶ 2; 1 W. Blackstone, Commentaries *124 ("[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which are vested in them by the immutable laws of nature").

Of particular concern for the Framers was the majority of people violating the property rights of the minority. Madison observed that "the most common and durable source of factions, has been the various and unequal distribution of property." The Federalist No. 10, at 59. A poignant example occurred in Massachusetts. In what became known as Shays' Rebellion, armed debtors attempted to block legal actions by creditors to recover debts. Although that rebellion was ultimately put down, debtors sought relief from state legislatures "under the auspices of Constitutional forms." Letter from James Madison to Thomas Jefferson (Apr. 23, 1787), in 11 The Papers of Thomas Jefferson 307 (J. Boyd ed. 1955); see Wood 412–413. With no structural political checks on democratic lawmaking, creditors found their rights jeopardized by state laws relieving debtors of their obligation to pay and authorizing forms of payment that devalued the contracts. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structures, 76 Cal. L. Rev. 267, 280–281 (1988) ; see also *Fletcher v. Peck,* 6 Cranch 87, 137–138, 3 L.Ed. 162 (1810) (Marshall, C.J.) (explaining that the Contract Clause came from the Framers' desire to "shield themselves and their property from the effects of those sudden and strong passions to which men are exposed").

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
1139 Constitution *1139 permitted only the direct election of representatives. Art. I, § 2, cl. 1. Senators and the President were selected indirectly. See Art. I, § 3, cl. 1; Art. II, § 1, cls. 2–3. 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. See The Federalist No. 62, at 417 (Madison).

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.

B

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.

Instead, the Constitution broadly required that the States maintain a "Republican Form of Government." Art. IV, § 4. But the Framers otherwise left it to States to make tradeoffs and reconcile the competing goals.

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." Hayden, The False Promise of One Person, One Vote, 102 Mich. L. Rev. 213, 218 (2003). 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. Wood 171; *Baker,* 369 U.S., at 307–308, 82 S.Ct. 691 (Frankfurter, J., dissenting).

Reflecting this history, the Constitution continued to afford States significant leeway in structuring their "Republican" governments. At the framing, "republican" referred to "[p]lacing the government in the people," and a "republick" was a "state in which the power is lodged in more than one." S. Johnson, A Dictionary of the English Language (7th ed. 1785); see also The Federalist No. 39, at 251 (Madison) ("[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour"). By requiring the States to have republican governments, the Constitution prohibited them from having monarchies and aristocracies. See *id.,* No. 43, at 291. Some would argue that the Constitution also prohibited States from adopting direct democracies. Compare Wood 222–226 ("For most constitution-makers in 1776, republicanism was not equated with democracy") with A. Amar, America's Constitution: A Biography 276–281 (2005) (arguing that the provision prohibited monarchies and aristocracies but not direct democracy); see also The Federalist No. 10, at 62 (Madison) (distinguishing a "democracy" and a "republic"); *id.,* No. 14, at 83–
1140 84 (same).*1140 Beyond that, however, the Constitution left matters open for the people of the States to decide. The Constitution says nothing about what type of republican government the States must follow. When the Framers wanted to deny powers to state governments, they did so explicitly. See, *e.g.,* Art. I, § 10, cl. 1 ("No State

shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts").

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. Amdt. 14, § 2. And the Fifteenth Amendment prohibited restricting the right of suffrage based on race. Amdt. 15, § 1. That is as far as those Amendments went. 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. See 377 U.S., at 595–608, 84 S.Ct. 1362 (dissenting opinion). And Justice ALITO quite convincingly demonstrates why the majority errs by reading a theory of equal representation into the apportionment provision in § 2 of the Fourteenth Amendment. See *post,* at 1146 – 1149 (opinion concurring in judgment).

C

The Court's attempt to impose its political theory upon the States has produced a morass of problems. These problems are antithetical to the values that the Framers embraced in the Constitution. These problems confirm that the Court has been wrong to entangle itself with the political process.

First, in embracing one person, one vote, the Court has arrogated to the Judiciary important value judgments that the Constitution reserves to the people. In *Reynolds,* for example, the Court proclaimed that "[l]egislators represent people, not trees or acres"; that "[l]egislators are elected by voters, not farms or cities or economic interests"; and that, accordingly, electoral districts must have roughly equal population. 377 U.S., at 562–563, 84 S.Ct. 1362. As I have explained, the Constitution permits, but does not impose, this view. Beyond that, *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. See The Federalist No. 10, at 63–65 (Madison) (recognizing that smaller republics, such as the individual States, are more prone to capture by special interests). 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. Cf. *Reynolds, supra,* at 622–623, 84 S.Ct. 1362 (Harlan, J., dissenting). 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.

The Government argues that apportioning legislators by any metric other than total population "risks rendering residents of this country who are ineligible, unwilling, or unable to vote as invisible or irrelevant to our system of representative democracy." *1141 Brief for United States as *Amicus Curiae* 27. But that argument rests on the faulty premise that "our system of representative democracy" requires specific groups to have representation in a specific manner. As I have explained, the Constitution does not impose that requirement. See Parts II–A, II–B, *supra* . And as the Court recently reminded us, States are free to serve as " 'laboratories' " of democracy. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. ——, ——, 135 S.Ct. 2652, 2673, 192 L.Ed.2d 704 (2015). That "laboratory" extends to experimenting about the nature of democracy itself.

Second, the Court's efforts to monitor the political process have failed to provide any consistent guidance for the States. Even if it were justifiable for this Court to enforce some principle of majority rule, it has been unable to do so in a principled manner. Our precedents do not address the myriad other ways that minorities (or fleeting majorities) entrench themselves in the political system. States can place policy choices in their constitutions or have supermajoritarian voting rules in a legislative assembly. See, *e.g.,* N.Y. Const., Art. V, § 7 (constitutionalizing public employee pensions); Ill. Const., Art. VII, § 6(g) (requiring a three-fifths vote of the General Assembly to preempt certain local ordinances). In theory, of course, it does not seem to make a difference if a state legislature is unresponsive to the majority of residents because the state assembly requires a 60% vote to pass a bill or because 40% of the population elects 51% of the representatives.

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.

III

This case illustrates the confusion that our cases have wrought. The parties and the Government offer three positions on what this Court's one-person, one-vote cases require States to equalize. Under appellants' view, the Fourteenth Amendment protects the right to an equal vote. Brief for Appellants 26. Appellees, in contrast, argue that the Fourteenth Amendment protects against invidious discrimination; in their view, no such discrimination occurs when States have a rational basis for the population base that they select, even if that base leaves eligible voters malapportioned. Brief for Appellees 16–17. And, the Solicitor General suggests that reapportionment by total population is the only permissible standard because *Reynolds* recognized a right of "equal representation for equal numbers of people." Brief for United States as *Amicus Curiae* 17.

Although the majority does not choose among these theories, it necessarily denies that the Equal Protection Clause protects the right to cast an equally weighted ballot. To prevail, appellants do not have to deny the importance of equal representation. Because States can equalize both total population and total voting power within the districts, they have to show only that the right to cast an equally weighted vote is part of the one-person, one-vote right that we have recognized. But the majority declines to find such a right in the Equal Protection Clause. *Ante,* at 1132 – 1133. Rather, the majority acknowledges that "[f]or
1142 every sentence appellants *1142 quote from the Court's opinions [establishing a right to an equal vote], one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality." *Ante,* at 1131. Because our precedents are not consistent with appellants' position—that the only constitutionally available choice for States is to allocate districts to equalize eligible voters—the majority concludes that appellants' challenge fails. *Ante,* at 1130 – 1133.

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. See Part II–B, *supra* . It can use total population, eligible voters, or any other nondiscriminatory voter base. *Ibid.* 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. *Ibid* .

Our precedents do not compel a contrary conclusion. Appellants are correct that this Court's precedents have primarily based its one-person, one-vote jurisprudence on the theory that eligible voters have a right against vote dilution. *E.g., Hadley,* 397 U.S., at 52–53, 90 S.Ct. 791 ; *Reynolds,* 377 U.S., at 568, 84 S.Ct. 1362. But this Court's jurisprudence has vacillated too much for me to conclude that the Court's precedents preclude States from allocating districts based on total population instead. See *Burns,* 384 U.S., at 92, 86 S.Ct. 1286 (recognizing that States may choose other nondiscriminatory population bases). Under these circumstances, the choice is best left for the people of the States to decide for themselves how they should apportion their legislature.

* * *

There is no single "correct" method of apportioning state legislatures. And the Constitution did not make this Court "a centralized politburo appointed for life to dictate to the provinces the 'correct' theories of democratic representation, [or] the 'best' electoral systems for securing truly 'representative' government." *Holder v. Hall,* 512 U.S. 874, 913, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). Because the majority continues that misguided search, I concur only in the judgment.

Justice ALITO, with whom Justice THOMAS joins except as to Part III–B, concurring in the judgment.

The question that the Court must decide in this case is whether Texas violated the "one-person, one-vote" principle established in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), by adopting a legislative redistricting plan that provides for districts that are roughly equal in total population. Appellants contend that Texas was required to create districts that are equal in the number of eligible voters, but I agree with the Court that Texas' use of total population did not violate the one-person, one-vote rule.

I

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,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), this
1143 Court's post-*Reynolds* cases have likewise *1143
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.

II

Although this conclusion is sufficient to decide the case before us, Texas asks us to go further and to hold that States, while generally free to use total population statistics, are not barred from using eligible voter statistics. Texas points to *Burns,* in which this Court held that Hawaii did not violate the one-person, one-vote principle by adopting a plan that sought to equalize the number of registered voters in each district.

Disagreeing with Texas, the Solicitor General dismisses *Burns* as an anomaly and argues that the use of total population is constitutionally required. The Solicitor General contends that the one-person, one-vote rule means that all persons, whether or not they are eligible to vote, are entitled to equal representation in the legislature. Accordingly, he argues, legislative districts must

be equal in total population even if that results in districts that are grossly unequal in the number of eligible voters, a situation that is most likely to arise where aliens are disproportionately concentrated in some parts of a State.

This argument, like that advanced by appellants, implicates very difficult theoretical and empirical questions about the nature of representation. For centuries, political theorists have debated the proper role of representatives,[1] and political scientists have studied the conduct of legislators and the interests that they actually advance.[2] We have no need to wade into these waters in this case, and I would not do so. Whether a State is
1144 permitted to *1144 use some measure other than total population is an important and sensitive question that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts.

[1] See, *e.g.*, H. Pitkin, The Concept of Representation 4 (1967) ("[D]iscussions of representation are marked by long-standing, persistent controversies which seem to defy solution"); *ibid.* ("Another vexing and seemingly endless controversy concerns the proper relation between representative and constituents"); Political Representation i (I. Shapiro, S. Stokes, E. Wood, & A. Kirshner eds. 2009) ("[R]elations between the democratic ideal and the everyday practice of political representation have never been well defined and remain the subject of vigorous debate among historians, political theorists, lawyers, and citizens"); *id.*, at 12 ("[W]e need a better understanding of these complex relations in their multifarious parts before aspiring to develop any general theory of representation"); S. Dovi, Political Representation, The Stanford Encyclopedia of Philosophy (E. Zalta ed. Spring 2014) ("[O]ur common understanding of political representation is one that contains different, and conflicting, conceptions of how political representatives should represent and so holds representatives to standards that are mutually incompatible"), online at http://plato.stanford.edu/archives/spr2014/entries/political-representation (all Internet materials as last visited Mar. 31, 2016); *ibid.* ("[W]hat exactly representatives *do* has been a hotly contested issue").

[2] See, *e.g.*, Andeweg, Roles in Legislatures, in The Oxford Handbook of Legislative Studies 268 (S. Martin, T. Saalfeld, & K. Strom eds. 2014) (explaining that the social sciences have not "succeeded in distilling [an] unambiguous concept[ion]" of the "role" of a legislator); Introduction, *id.*, at 11 ("Like political science in general, scholars of legislatures approach the topic from different and, at least partially, competing theoretical perspectives"); Diermeier, Formal Models of Legislatures, *id.*, at 50 ("While the formal study of legislative politics has come a long way, much remains to be done"); Best & Vogel, The Sociology of Legislators and Legislatures, *id.*, at 75–76 ("Stable representative democracies are ... institutional frameworks and informal arrangements which achieve an equilibrium between the competing demands [of constituents and political opponents]. How this situation affects the daily interactions of legislators is largely unknown").

III

A

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.[3] This is obviously true with respect to the Senate: Although all States have equal representation in the Senate, the most populous State (California) has 66 times as many people as the least populous (Wyoming). See United States Census 2010, Resident Population Data, http://www.census.gov/2010census/data/apportionment-pop-text.php. 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. U.S. Const., Art. I, § 2, cl. 3. Today, North Dakota, Vermont, and Wyoming all fall into that category. See United States Census 2010, Apportionment Data, http://www.census.gov/2010census/data/apportionment-data-text.php. If one person, one vote applied to allocation of House seats among States, I very much doubt the Court would uphold a plan where one Representative represents fewer than 570,000 people in Wyoming but nearly a million people next door in Montana.[4]

[3] As Justice THOMAS notes, *ante*, at 1137 – 1138 (opinion concurring in judgment), the plan for the House of Representatives was based in large part on the view that there should be "equality of representation," but that does not answer the question whether it is eligible voters (as appellants urge), all citizens, or all residents who should be equally represented. The Constitution allocates House seats based on total inhabitants, but as I explain, the dominant, if not exclusive, reason for that choice was the allocation of political power among the States.

[4] The Court brushes off the original Constitution's allocation of congressional representation by narrowing in on the Fourteenth Amendment's ratification debates. *Ante*, at 1129, n. 10. But those debates were held in the shadow of that original allocation. And what Congress decided to do after those debates was to retain the original apportionment formula —minus the infamous three-fifths clause— and attach a penalty to the disenfranchisement of eligible voters. In short, the Fourteenth Amendment made no structural changes to apportionment that bear on the one-person, one-vote rule.

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. Under one Alabama districting plan before the Court in that case, seats in the State Senate were allocated by county, much as seats in the United States Senate are allocated by
1145 State. (At that time, the upper houses *1145 in most state legislatures were similar in this respect.) The *Reynolds* Court noted that "[t]he system of representation in the two Houses of the Federal Congress" was "conceived out of compromise and concession indispensable to the establishment of our federal republic." 377 U.S., at 574, 84 S.Ct. 1362. 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." *Id.*, at 573, 84 S.Ct. 1362 ; see also *Gray v. Sanders*, 372 U.S. 368, 378, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963).

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." 377 U.S., at 574, 84 S.Ct. 1362. 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.[5] These slave-state delegates did not demand slave representation based on some philosophical notion that "representatives serve all residents, not just those eligible or registered to vote." *Ante,* at 1132.[6]

[5] See A. Amar, America's Constitution: A Biography 87–98 (2005) (Amar); *id.*, at 94 ("The best justification for the three-fifths clause sounded in neither republican principle nor Revolutionary ideology, but raw politics"); see also *id.*, at 88–89 (explaining that the "protective coloring" camouflaging the slave States' power grab "would have been wasted had the Constitution pegged apportionment to the number of voters, with a glaringly inconsistent add-on for nonvoting slaves"); cf. G. Van Cleve, A Slaveholders' Union 126 (2010) ("[T]he slave states saw slave representation as a direct political protection for wealth consisting of slave property against possible Northern attacks on slavery, and told the Convention unequivocally that they needed such protection in order to obtain ratification of the Constitution"); *id.*, at 133–134 ("The compromise on representation awarded disproportionate shares of representative influence to certain vested political-economy interests, one of which was the slave labor economies").

[6] See Amar 92 ("But masters did not as a rule claim to virtually represent the best interests of their slaves. Masters, after all, claimed the right to maim and sell slaves at will, and to doom their yet unborn posterity to perpetual bondage. If this could count as virtual representation, anything could").

B

The Court's account of the original Constitution's allocation also plucks out of context Alexander Hamilton's statement on apportionment. The Court characterizes Hamilton's words (more precisely, Robert Yates's summary of his fellow New 1146 Yorker's *1146 words) as endorsing apportionment by *total* population, and positions those words as if Hamilton were talking about apportionment in the House. *Ante,* at 1127. Neither is entirely accurate. The "quote" comes from the controversy over Senate apportionment, where the debate turned on whether to apportion by population *at all* . See generally 1 Records of the Federal Convention of 1787, pp. 470–474 (M. Farrand ed. 1911). Hamilton argued in favor of allocating Senate seats by population:

> "The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an *artificial* being, called states? There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government. If therefore three states contain a majority of the inhabitants of America, ought they to be governed by a minority? Would the inhabitants of the great states ever submit to this? If the smaller states maintain this principle, through a love of power, will not the larger, from the same motives, be equally tenacious to preserve their power?" *Id.*, at 473.

As is clear from the passage just quoted, Hamilton (according to Yates) thought the fight over apportionment was about naked *power*, not some lofty ideal about the nature of representation. That interpretation is confirmed by James Madison's summary of the same statement by Hamilton: "The truth is it [meaning the debate over apportionment] is a contest for power, not for liberty.... The State of Delaware having 40,000 souls will *lose power*, if she has $^{1}/_{10}$ only of the votes allowed to Pa. having 400,000." *Id.*, at 466. Far from "[e]ndorsing apportionment based on total population," *ante*, at 1127, Hamilton was merely acknowledging the obvious: that apportionment in the new National Government would be the outcome of a contest over raw political power, not abstract political theory.

C

After the Civil War, when the Fourteenth Amendment was being drafted, the question of the apportionment formula arose again. Thaddeus Stevens, a leader of the so-called radical Republicans, unsuccessfully proposed that apportionment be based on eligible voters, rather than total population. The opinion of the Court suggests that the rejection of Stevens' proposal signified the adoption of the theory that representatives are properly understood to represent all of the residents of their districts, whether or not they are eligible to vote. *Ante*, at 1127 – 1129. As was the case in 1787, however, it was power politics, not democratic theory, that carried the day.

In making his proposal, Stevens candidly explained that the proposal's primary aim was to perpetuate the dominance of the Republican Party and the Northern States. Cong. Globe, 39th Cong., 1st Sess., 74 (1865); Van Alstyne, The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty–Ninth Congress, 1965 S. Ct. Rev. 33, 45–47 (Van Alstyne). As Stevens spelled out, if House seats were based on total population, the power of the former slave States would be magnified. Prior to the Civil War, a slave had counted for only three-fifths of a person for purposes of the apportionment of House seats. As a result of the Emancipation Proclamation and the Thirteenth Amendment, the former slaves would now be fully counted even if they were not permitted to vote. By Stevens' calculation, this would give the South 13 additional votes in both the House and the 1147 electoral college. Cong. Globe, 39th *1147 Cong., 1st Sess., 74 (1865); Van Alstyne 46.

Stevens' proposal met with opposition in the Joint Committee on Reconstruction, including from, as the majority notes, James Blaine. *Ante*, at 1128. Yet, as it does with Hamilton's, the majority plucks Blaine's words out of context:

> "[W]e have had several propositions to amend the Federal Constitution with respect to the basis of representation in Congress. These propositions ... give to the States in future a representation proportioned to their voters instead of their inhabitants.
>
> "The effect contemplated and intended by this change is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States....
>
> "The direct object thus aimed at, as it respects the rebellious States, has been so generally approved that little thought seems to have been given to the incidental evils which the proposed constitutional amendment would inflict on a large portion of the loyal States—evils, in my judgment, so serious and alarming as to lead me to oppose the amendment in any form in which it has yet been presented. As an abstract proposition 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....
>
> "If voters instead of population shall be made the basis of representation certain results will follow, not fully appreciated perhaps by some who are now urgent for the change." Cong. Globe, 39th Cong., 1st Sess., 141 (1865).

The "not fully appreciated" and "incidental evi[l]" was, in Blaine's view, the disruption to *loyal* States' representation in Congress. Blaine described how the varying suffrage requirements in loyal States could lead to, for instance, California's being entitled to eight seats in the House and Vermont's being entitled only to three, despite their having similar populations. *Ibid.* ; see also 2 B. Ackerman, We the People: Transformations 164, 455, n. 5 (1998); Van Alstyne 47, 70. This mattered to Blaine because *both States were loyal* and so neither deserved to suffer a loss of relative political power. Blaine therefore proposed to apportion representatives by the "whole number of persons except those to whom civil or political rights or privileges are denied or abridged by the constitution or laws of any State on account of race or color." Cong. Globe, 39th Cong., 1st Sess., 142.

> "This is a very simple and very direct way, it seems to me, of reaching the result aimed at without embarrassment to any other question or interest. It leaves population as heretofore the basis of representation, does not disturb in any manner the harmonious relations of the loyal States, and it conclusively deprives the southern States of all representation in Congress on account of the colored population so long as those States may choose to abridge or deny to that population the political rights and privileges accorded to others." *Ibid.*

As should be obvious from these lengthy passages, Blaine recognized that the "generally approved" "result aimed at" was to deprive southern States of political power; far from quibbling with that aim, he sought to *achieve it* while limiting the collateral damage to the loyal
1148 northern States. See Van Alstyne 47.*1148 Roscoe Conkling, whom the majority also quotes, *ante,* at 1128, seemed to be as concerned with voter-based apportionment's "narrow[ing] the basis of taxation, and in some States seriously," as he was with abstract notions of representational equality. Cong. Globe, 39th Cong., 1st Sess., 358; *id.,* at 359 ("representation should go with taxation"); *ibid.*

(apportionment by citizenship "would narrow the basis of taxation and cause considerable inequalities in this respect, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year"). And Hamilton Ward, also quoted by the majority, *ante,* at 1128, was primarily disturbed by "[t]he fact that one South Carolinian, whose hands are red with the blood of fallen patriots, and whose skirts are reeking with the odors of Columbia and Andersonville, will have a voice as potential in these Halls as two and a half Vermont soldiers who have come back from the grandest battle-fields in history maimed and scarred in the contest with South Carolina traitors in their efforts to destroy this Government"—and only secondarily worried about the prospect of "taxation without representation." Cong. Globe, 39th Cong., 1st Sess., 434.

Even Jacob Howard, he of the "theory of the Constitution" language, *ante,* at 1128 – 1129, bemoaned the fact that basing representation on total population would allow southern States "to obtain an advantage which they did not possess before the rebellion and emancipation." Cong. Globe, 39th Cong., 1st Sess., 2766. "I object to this. I think they cannot very consistently call upon us to grant them an additional number of Representatives simply because in consequence of their own misconduct they have lost the property [meaning slaves, whom slaveholders considered to be property] which they once possessed, and which served as a basis in great part of their representation." *Ibid.* The list could go on. The bottom line is that in 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.

After much debate, Congress eventually settled on the compromise that now appears in § 2 of the Fourteenth Amendment. Under that provision, House seats are apportioned based on total population, but if a State wrongfully denies the right to vote to a certain percentage of its population, its representation is supposed to be reduced proportionally.[7] Enforcement of this remedy, however, is dependent on action by 1149 Congress, and—regrettably—the *1149 remedy was never used during the long period when voting rights were widely abridged. Amar 399.

[7] Section 2 provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Needless to say, the reference in this provision to "male inhabitants ... being twenty-one years of age" has been superseded by the Nineteenth and Twenty-sixth Amendments. But notably the reduction in representation is pegged to the proportion of (then) *eligible voters* denied suffrage. Section 2's representation-reduction provision makes no appearance

in the Court's structural analysis.

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.

* The Court's opinions have used "one person, one vote" and "one man, one vote" interchangeably. Compare, *e.g., Gray v. Sanders,* 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) ("one person, one vote"), with *Hadley v. Junior College Dist. of Metropolitan Kansas City,* 397 U.S. 50, 51, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970) ("one man, one vote" (internal quotation marks omitted)). *Gray* used "one person, one vote" after noting the expansion of political equality over our history—including adoption of the Nineteenth Amendment, which guaranteed women the right to vote. 372 U.S., at 381, 83 S.Ct. 801.