



**THE NEW FEDERAL ANALOGY:
EVENWEL V. ABBOTT AND THE
HISTORY OF CONGRESSIONAL
APPORTIONMENT**

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INTRODUCTION

For purposes of congressional apportionment . . . Section 2 of the Fourteenth Amendment requires the use of total number of persons, not voters. It seems quite odd to require counting all people for purposes of dividing up representation among the states but not for drawing districts within each state.²

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² Richard L. Hasen, *Symposium: Ideology, Partisanship, and the New “One Person, One Vote” Case*, SCOTUSBLOG (July 31, 2015), <http://www.scotusblog.com/2015/07/symposium-ideology-partisanship-and-the-new-one-person-one-vote-case/>.

This reaction was typical of the commentary that followed the Supreme Court noting probable jurisdiction in the case of *Evenwel v. Abbott*,³ a lawsuit to prevent Texas from drawing its legislative districts with equal *total* populations as opposed to equal *voter* populations. How could the same amendment *forbid* at the state level (via the Equal Protection Clause) what it *requires* at the federal level?⁴ Without an adequate answer to that question, the plaintiff's case in *Evenwel* would be on thin theoretical ice.

Yet the question may also sound familiar. It was the same one asked fifty years ago, when the case of *Reynolds v. Sims*⁵ challenged Alabama's allocation of one state senator per county, regardless of population. How could the same Constitution that allocates two senators to every state, regardless of population, forbid a state from im-

³ *Evenwel v. Perry*, 2014 WL 5780507 (W.D. Tex. 2014), probable jurisdiction noted *sub. nom* *Evenwel v. Abbott*, 135 S. Ct. 2349 (2015).

⁴ After all, "[t]he [Fourteenth] Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee, which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States, which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate." *Reynolds v. Sims*, 377 U.S. 533, 594 (1964) (Harlan, J. dissenting). *But see* *Richardson v. Ramirez*, 418 U.S. 24, 74 (1974) (Marshall, J., dissenting) ("It is clear that s 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment."); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43 (1965) (noting that Sections 1 and 2, though introduced by the same drafting committee, were written by representatives of very different temperaments—John Bingham and Thaddeus Stevens, respectively—and that the two sections were combined into a single amendment relatively late in the legislative process).

⁵ *Reynolds v. Sims*, 377 U.S. 533 (1964).

plementing a similar system with its own counties? That was the argument the Supreme Court heard,⁶ and it is an argument the Court rejected.⁷

This Article will examine the history of federal apportionment, to determine its applicability to the state level. Ultimately, it will reach the conclusion that the new federal analogy, like the old one, should be rejected. Part I will lay out the Constitutional rules of apportionment and Supreme Court decisions that have brought us to this point. It will also trace the history of the federal analogy that has been so persuasive in the prior cases tackling the same problem as *Evenwel*, but that has not yet been thoroughly examined. Part II will examine the debates over the rule of apportionment at the Constitutional Convention, demonstrating that the rule of total population was created not as a theory of representation, but as a solution to the uniquely federal problem of each state being allowed to define suffrage for itself. Part III will examine the debates at the drafting of the Fourteenth Amendment, demonstrating that the rule of total population was retained to provide virtual representation for women. This Part will also shed light on the now nearly-forgotten second sentence of Section 2 of that amendment (the “Penalty Clause”), which is crucial evidence of the skepticism the drafters had for the concept of virtual representation. Part IV will apply the lessons of the historical record to arguments that have been supplied in favor of allowing Texas to use the total population rule. This Part will demonstrate that, though the census does not currently count eligible voters, it is in fact likely *already required to* by the Penalty Clause of Section 2 of the Fourteenth Amendment.

⁶ Brief for Appellant Reynolds at 35, *Reynolds v. Sims*, 377 U.S. 533 (1964) (Nos. 23, 27, 41).

⁷ *Reynolds*, 377 U.S. at 573.

Finally, Part V will suggest that a victory for the plaintiffs in *Evenwel* would not automatically spell the loss of representation for nonvoting aliens that opponents suggest. This is because, even if states lose the ability to provide “virtual representation” for nonvoting aliens (allowing their neighbors to vote with greater weight, in the hopes they will vote in their interests), states have always retained the ability to give aliens *actual representation*, in the form of suffrage.

I. THE FEDERAL RULE AND PRE-*EVENWEL* CASES

A. THE FEDERAL RULE OF CONGRESSIONAL APPORTIONMENT

The place to start in examining the Constitutional history of apportionment is the text itself. The Constitution has, since its inception, awarded representation in the U.S. House to the states on the basis of total population, not voter population. “Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.”⁸ Thus, ever since the first census of 1790, there have been disparities in the relative voting power of those voting for house members from state to state. Voters living in states with larger percentages of nonvoting residents were allocated more Representatives per voter than voters living in other states. To point out one obvious example of this unequal voting power, “[s]ince no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without

⁸ U.S. CONST. art. 1, § 2, cl. 3.

representation, Article I . . . ‘weighted’ the vote of voters in the slave States.”⁹

After the abolition of slavery, the infamous “Three-Fifths Compromise” was removed by the Fourteenth Amendment, but using total population rather than voter population remained as the primary basis for allocating state representation. “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 if the right to vote for any male 21-year-old non-criminal citizens is denied, total representation will be reduced in the same proportion].”¹⁰ Since the passage of that amendment, women have been given the vote, and we no longer live in an era where “[even] in the most liberal of [states, the right of voting] has always been confined to a small minority of people.”¹¹ Yet aliens, felons, minors, and others ineligible to vote do still reside in every state, and “some states have far more children or noncitizens in their populations, and some have far fewer of them,”¹² so that today the percentage of a state’s population who are eligible to vote ranges from 62.6% in California to 78.8% in Vermont.¹³ As a result, real disparities in voter strength for the U.S. House do exist from state to state. Even after eliminating the unrelated disparities caused by

⁹ *Wesberry v. Sanders*, 376 U.S. 1, 27 (1964) (Harlan, J., dissenting). Cf. Speech of Rufus King, *infra* note 96 (“[F]ive free persons in Virginia have as much power in the choice of representatives to Congress . . . as seven free persons in any of the states in which slavery does not exist.”).

¹⁰ U.S. CONST. amend. XIV, § 2.

¹¹ Cong. Globe, 39th Cong., 1st Sess. 2962 (1866) [hereinafter *Globe*] (statement of Sen. Poland).

¹² Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 *ARIZ. ST. L.J.* 1237, 1261 (2012).

¹³ Pew Hispanic, *Mapping the Latino Electorate by State*, <http://www.pewhispanic.org/interactives/mapping-the-latino-electorate-by-state/>.

rounding each state's Congressional delegation to a whole number,¹⁴ the voting strength of voters in Congressional elections ranges from one representative for every 451,887 eligible voters in California to one representative for every 568,321 eligible voters in Vermont.¹⁵

B. THE "ONE PERSON, ONE VOTE" CASES AND THE FIRST FEDERAL ANALOGY

In the 1960's, a series of four Supreme Court cases established that the Equal Protection Clause guarantees the principle of "one person, one vote." The result was a complete reshaping of both state legislative and Congressional districts, from wildly divergent populations to equalized populations (though the definition of "population," as will be seen, was still up for debate). First, in *Baker v. Carr*, the Court held that voters had standing to bring suit in federal court to challenge an apportionment plan that "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties."¹⁶ Next, in *Gray v. Sanders*, the Court struck down an "Electoral College" system used by Georgia in primary elections for statewide offices.¹⁷ The system weighted votes in rural counties more

¹⁴ For example, Montana's population of 1,005,000 receives only one representative, while Rhode Island's only-slightly-larger population of 1,050,000 receives two, which affects both the figures for representatives per person and representatives per voter. *Id.* (Indeed, without correcting for the effects of rounding, Montana is far and away the most underrepresented state by any measure, a disparity that has also provoked litigation. See *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442 (1992)).

¹⁵ Pew Hispanic, *supra* note 13. To eliminate the effects of rounding, the data has been "equalized" to reflect the number of voters each state would have, keeping the ratio of eligible voters to nonvoters in each state the same, if each state's total population were exactly 721,641 people per representative, the national average.

¹⁶ *Baker v. Carr*, 369 U.S. 168, 207-08 (1962).

¹⁷ *Gray v. Sanders*, 372 U.S. 368 (1963).

heavily than votes in urban counties, which the Court found unacceptable. "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 and . . . wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment."¹⁸ It is in this case that the phrase "one person, one vote," whose true meaning would go on to be so hotly debated, first appeared.¹⁹ Next, in *Wesberry v. Sanders*, the Court required the equalization of congressional districts within a state, holding that "the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."²⁰ Finally, in *Reynolds v. Sims*, the Court 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. 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 on other parts of the State."²¹ The Court mandated that in all future redistricting plans at the state level "the 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."²²

¹⁸ *Id.* at 379.

¹⁹ "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

²⁰ *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

²¹ *Reynolds*, 377 U.S. at 568.

²² *Id.* at 579.

It was in *Reynolds* that the federal analogy to the Senate was made most explicitly by defenders of the status quo. In its brief, Alabama argued that it should have been allowed to allocate one state senator to each county in the state, regardless of population, since this would simply have been to implement a “little federal system”²³ that would have been “framed after the Federal System of government - namely one senator in each county of the state.”²⁴

Reynolds is also where the Court most directly addressed – and rejected – this federal analogy. The Court held that “the federal analogy [is] inapposite and irrelevant to state legislative districting schemes.”²⁵ The Court noted that the states are “separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government,”²⁶ whereas “[p]olitical subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities, [but rather] have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”²⁷ Further, the Court reasoned that because “[t]he system of representation in the two Houses of the Federal Congress . . . [arose] from unique historical circumstances,”²⁸ “the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state

²³ Brief for Appellant Reynolds at 14, *Reynolds v. Sims*, 377 U.S. 533 (1964) (Nos. 23, 27, 41).

²⁴ *Id.* at 35.

²⁵ 377 U.S. at 573.

²⁶ *Id.* at 574.

²⁷ *Id.* at 575; cf. Gordon E. Baker, *One Vote, One Value*, 47 NAT'L MUN. REV. 16, 19 (1958) (“The term ‘federal plan’ is often employed and ‘federal’ is apparently a virtue-word accepted uncritically by much of the public. The suggestion that counties within a state should be regarded as states in the union has no basis whatsoever in theory, in law or in common sense. Counties are merely creatures of the states, which by their very nature are unitary and not federal in their composition.”).

²⁸ *Reynolds*, 377 U.S. at 574.

legislatures when the system of representation in the Federal Congress was adopted.”²⁹ In other words, if the explanation for a federal rule of representation applies only to a *federal* system, it does not lend support for the constitutional permissibility of using that same rule of representation in the *non-federal* systems that are state governments.

Justice Harlan dissented in all four cases, and repeatedly referenced the federal analogy to the Senate in his dissents.³⁰ Recent archival research also reveals that the federal analogy was invoked by several of the justices’ own law clerks, which did not dissuade the justices from rejecting it.³¹

²⁹ *Id.* at 573.

³⁰ See, e.g., *Baker*, 369 U.S. at 333 (Harlan, J., dissenting) (“It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that.”); *Wesberry*, 376 U.S. at 27 n.9 (Harlan, J. dissenting) (“The fact that the delegates were able to agree on a Senate composed entirely without regard to population . . . indicates that they recognized the possibility that alternative principles combined with political reality might dictate conclusions inconsistent with an abstract principle of absolute numerical equality.”); *Gray*, 372 U.S. at 385 (Harlan, J., dissenting) (“[T]he Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.” (quoting *MacDougall v. Green*, 335 U.S. 281, 283–84 (1948) (per curiam))).

³¹ See Derek T. Muller, *Perpetuating One Person, One Vote Errors*, Forthcoming, HARV. J. L. & PUB. POL’Y, draft at 7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697719&download=yes (accessed March 9, 2016) (quoting Bench Memorandum from Murray H. Bring to Earl Warren, *Baker v. Carr*, at 19 (from the Earl Warren Papers, Box 218, file 9, at the Library of Congress) “I have little doubt that the Calif. system, under which one house of the legislature is based upon geographical considerations while the other is based upon population, is constitutional. This is a reasonable classification because it attempts to strike a balance between the legitimate interests

C. THE RUN-UP TO EVENWEL AND THE NEW FEDERAL ANALOGY

Although it may have seemed at first that these four cases had settled the Constitutional rule of fair districting once and for all, a new issue soon cropped up. Assuming that the percentage of eligible voters is spread evenly throughout a given state, equalizing the populations in each district will also automatically equalize the number of eligible voters in each district.³² But where some areas have a much higher percentage of ineligible voters than others, equalizing total populations will no longer equalize voter populations. And when the population of eligible voters in districts is unequal, the number of people actually choosing a representative will vary from district to district, thereby creating unequal voting strengths³³—exactly what *Reynolds* had intended to end.³⁴

In Hawaii, this was not just a theoretical difficulty, but an actual one. As noted by a federal district court in 1965, “Hawaii has become

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

³² Cf. Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275, 276 (2012) (“[U]nder ordinary demographic conditions where noncitizen populations are relatively small and spread more or less proportionately throughout the electoral area, total population is a reliable proxy for voter population.”).

³³ “[A]ssume that there are two equally populated electoral districts within a state—district A and district B—each with fifty thousand people and each entitled to one representative because the allocation is based on total district population. District A, however, has twenty thousand eligible voters and thirty thousand ineligibles, while district B has forty thousand voters and ten thousand ineligibles. The franchise is then distributed between the voters of A and B unequally. Each of A's voters has twice the ability of B's voters to influence electoral outcomes.” Robert W. Bennett, *Should Parents be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 512 (2000).

³⁴ “[I]f 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.” *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear."³⁵ According to a contemporaneous article "[t]he military population in Hawaii, largely concentrated on one of the islands, has at times totaled almost 50 per cent of the state's population."³⁶ Because these military members on Hawaii bases were counted in the census but not, in general, eligible to vote in Hawaii (being for the most part citizens of the other 49 states), an apportionment that equalized total population across districts could have bizarre results. "For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature – for the following ten years."³⁷

To avoid this possibility, Hawaii drew its legislative districts to equalize registered voters – as a proxy for eligible voters – rather than to equalize total population. In *Burns v. Richardson*, the Supreme Court held this to be permissible under the Equal Protection Clause.³⁸ The Court noted that when it spoke of equalizing populations in *Reynolds*, its "discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a

³⁵ *Holt v. Richardson*, 238 F. Supp. 468, 474 (D. Haw. 1965).

³⁶ Case Comment, *The Application of Reynolds*, 79 HARV. L. REV. 1248, 1255 (1966).

³⁷ *Holt*, 238 F. Supp. at 474–75.

³⁸ *Burns v. Richardson*, 384 U.S. 73, 91 (1966); see also *WMCA, Inc. v. Lomenzo* 377 U.S. 633, 641 (1964) (noting, but not objecting to, the fact that "New York uses citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment").

test based on total population.”³⁹ The Court suggested that both were, at least as far as it could see at the time, permissible.⁴⁰

Since *Burns*, more states have begun to face issues similar to Hawaii’s, most commonly because of increases in immigration that have resulted in large populations of noncitizens.⁴¹ Unlike Hawaii, however, these states have almost unanimously chosen to use total population, rather than eligible voter population, in equalizing their districts.⁴² Several lawsuits have been brought, arguing that it is time to

³⁹ *Id.* (citing, *inter alia*, the *Reynolds* Court’s use of the phrase “an identical number of residents, or citizens, or voters.” *Reynolds*, 377 U.S. at 577).

⁴⁰ “The decision [of a state] to include or exclude [nonvoters in the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.” *Burns*, 384 U.S. at 92. Scholars and judges have noted – often critically – the failure of the Court to specify which population must be equalized. See generally Sanford Levinson, *One Person, One Vote: A Mantra in Need of a Meaning*, 80 N.C. L. REV. 1269 (2002); see also *Chen v. City of Houston*, 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting from denial of certiorari) (“We have never determined the relevant ‘population’ that States and localities must equally distribute among their districts. . . . [A]s long as we sustain the one-person, one-vote principle, we have an obligation to explain to the States and localities what it actually means.”); Bennett, *supra* note 33, at 507–08 (“[O]ne person, one vote’ . . . does not tell us who counts as part of the ‘population’ that must be divided equally among th[e] districts. Is only the voting population to be included in this apportionment base, or is one category or another of the population that is not eligible to vote still going to be included?”); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411, 1442 n.124 (2002).

⁴¹ See Krabill & Fielding, *supra* note 32, at 276 (“With the dramatic influx of concentrated illegal immigration in the late 1980s and 1990s, however, an increasing number of cities and counties began to face the unusual demographic circumstance where the ordinary correlation between total population and voter population began to break down.”); Bennett, *supra* note 33, at 511–12.

⁴² See Krabill & Fielding, *supra* note 32, at 276 (“For many years, with the notable exception of *Burns v. Richardson*, the issue of which apportionment base to use in redistricting remained non-controversial. It was nearly always total population.”); see also Bennett, *supra* note 33, at 515 (“[T]he usual practice in intrastate apportionment is to use total population.”); Levinson, *supra* note 40, at 1281 (“[T]he United States currently seems to operate under a system in which any given representative should have (roughly) the same number of constituents as any other representative.”).

close the option “carefully left open” in *Reynolds* and *Burns*, and require states to use apportionment on the basis of voters, where the alternative would be greatly unequal voting strength.

All such lawsuits, so far, have failed. It is in these post-*Burns* cases that the new federal analogy has developed. The first court to explicitly use the federal analogy in upholding a state apportionment by total population was the California Supreme Court in the 1971 case *Calderon v. City of Los Angeles*.⁴³ The Court noted the federal rule of apportioning House seats among the states by total population, and argued that this rule provided strong evidence that such a rule would be permissible *within* a state. “[I]t seems clear that total population—not voters—was the apportionment criterion envisioned by the framers of the Constitution. . . . When after the Civil War, the congressional apportionment formula was amended slightly to reflect the ex-slaves’ new status as citizens, nearly identical language was used.”⁴⁴

As more courts upheld the use of total population apportionment within a state, the federal analogy continued to be often cited. The Ninth Circuit held that a total population rule “derives from the constitutional requirement that members of the House of Representatives are elected ‘by the people’ from districts ‘founded on the aggregate number of inhabitants of each state,’”⁴⁵ since “[t]he 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 later times, aliens.”⁴⁶ The Fifth Circuit similarly declared that “the drafters of the Fourteenth Amendment . . . do appear to have debated this question,

⁴³ 481 P.2d 489 (Cal. 1971).

⁴⁴ *Id.* at 493 n.6.

⁴⁵ *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (citing THE FEDERALIST 54 (James Madison)).

⁴⁶ *Id.*

and rejected a proposal rooted in . . . the principle of electoral equality.”⁴⁷

Advocates have not been shy to invoke this new federal analogy in briefs defending the constitutionality of population-based apportionment.⁴⁸ Scholars have also noted the appeal of this federal analogy in defending the population-based rule at the state level.⁴⁹ In the wake of the Supreme Court announcing that it would confront the question head-on for the first time by agreeing to hear *Evenwel*, commentators have frequently cited the federal analogy in arguing that

⁴⁷ *Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000).

⁴⁸ See, e.g., Brief For The United States In Opposition to Certiorari, County of Los Angeles v. Garza (Nos. 90-849 and A-422) December, 1990, <http://www.justice.gov/sites/default/files/osg/briefs/1990/01/01/sg900576.txt> (“[P]etitioners’ position would create an indefensible tension between the rules governing congressional apportionment and those governing state legislative apportionment. . . . [U]nder Article I, Section 2, total population is the only appropriate apportionment base for congressional apportionment. In petitioners’ view, what is constitutionally required for apportionments for the House of Representatives is constitutionally forbidden in apportionments for state and local legislative bodies. Petitioners have pointed to nothing that would sanction such a curious result.”); Motion of Appellees to Dismiss or Affirm, *Evenwel v. Abbott*, (No. 14-940), April 2015, at 20 (“This Court’s forbearance to ‘settle’ this debate in *Burns* respects the historical context. The drafters of the Fourteenth Amendment debated the representational and electoral theories of political equality, but the Fourteenth Amendment does not endorse either theory as a constitutional mandate.”).

⁴⁹ See, e.g., Aida Cristina Cabeza, *Total Population: A Constitutional Basis for Apportionment Reaffirmed in Garza v. Los Angeles County*, 13 CHICANO-LATINO L. REV. 74, 86 (1993) (“[T]he debates at the Constitutional Convention and those over the Fourteenth Amendment came to the same conclusion: total population was to be the reapportionment base. . . . Latino non-citizens are thus[] explicitly protected by the Constitution and the Fourteenth Amendment and must be included in the apportionment base.”). Other scholars have been more willing to leave open the constitutional question of whether this analogy is determinative. “It may be, of course, that Section 2, properly interpreted, places constraints on Congress that the Equal Protection Clause does not place on the states themselves.” Levinson, *supra* note 40, at 1283.

the Court should rule in Texas's favor.⁵⁰ Justice Kagan herself cited the analogy in *Evenwel's* oral arguments,⁵¹ as did the solicitor general

⁵⁰ See, e.g., Richard Pildes, *Symposium: Misguided Hysteria over Evenwel v. Abbott*, SCOTUSBLOG, July 30, 2015, <http://www.scotusblog.com/2015/07/symposium-misguided-hysteria-over-evenwel-v-abbott/#more-230545> (“[T]he Constitution’s text itself recognizes the validity of basing political representation on persons, rather than only voters. . . . [In 1787] apportionment among the states of members to Congress was based on the number of ‘persons’ . . . Congress [in 1866] specifically rejected proposals to base apportionment on eligible voters instead. The legitimacy of basing political representation on population, not voters alone, is embodied in these provisions. These provisions might not require states to equalize population across districts, but they strongly suggest using ‘persons’ as the relevant baseline is constitutionally permissible.”); Garret Epps, *One Person, One Vote?*, THE ATLANTIC (May 31, 2015), <http://www.theatlantic.com/politics/archive/2015/05/one-person-one-vote/394502/> (“The text and history of the Constitution itself don’t offer much support for the idea that voters, not population, should be counted as the basis of representation. . . . [T]he framers provided that seats [in] the U.S. House of Representatives would be awarded to states ‘according to their respective numbers.’ . . . [Now] apportionment is to be based on ‘the whole number of persons in each State, excluding Indians not taxed.’ Population, not voting rights, again. . . . Taken together, these provisions suggest that the basic constitutional rule of apportionment is, as the *Reynolds v. Sims* Court said, raw population.”); Hasen, *supra* note 2; Joseph Fishkin, *Of People, Trees, Acres, Dollars, and Voters*, BALKINIZATION BLOG (May 27, 2015), <http://balkin.blogspot.com/2015/05/of-people-trees-acres-dollars-and-voters.html> (“Apportionment, of course, is not districting. And so it might be that while Congress must divide the nation into Congressional districts based on total population, states are permitted (required?) to use some other basis like CVAP. But the relationship between apportionment and districting is pretty tight. Not to put too fine a point on it, but Texas got four new representatives in the U.S. House in the most recent redistricting cycle, all four of which can be attributed to Latino population growth.”); David H. Gans, *A Major Test of Equal Representation for All*, CONSTITUTIONAL ACCOUNTABILITY CENTER: TEXT & HISTORY BLOG (May 27, 2015), <http://theconstitution.org/text-history/3286/major-test-equal-representation-all> (“Importantly, the Framers of the Fourteenth Amendment specifically considered and rejected proposals to use the number of voters as opposed to the total number of people as the basis for representation. . . . The argument that voters, not persons, are the true basis of a representative democracy is one that has been consistently rejected throughout our Constitution’s history.”); Alan B. Morrison, *The Latest Gerrymander: Voters Instead of People*, HUFFINGTON POST (July 15, 2015), http://www.huffingtonpost.com/alan-b-morrison/the-latest-gerrymander-vo_b_7800942.html (“Because the House districts must use population as their base line (not voters or anything else), the Equal Protection doctrine applicable

of Texas.⁵² It is clear that the federal analogy will play a major role in the case, one of the most important voting rights cases in fifty years. The question few have asked, however, is *why* the Constitution uses a total population rule, and whether the reasons that led to that rule are applicable at the state level in the present day. That is the question this Article will undertake to answer, starting with an examination of the debates at the Constitutional Convention in the next Part.

II. THE DEBATES AT THE CONSTITUTIONAL CONVENTION

A. ALLOCATING HOUSE MEMBERS BY ELIGIBLE VOTERS: THE PROBLEM OF PERVERSE INCENTIVES

The federal rule of apportioning House seats creates a division of power between state governments and the federal government in determining the representation of each state. As James Madison identified in *The Federalist Papers*, “[i]t is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of

to state districting decisions must also use population if equality is to be assured in practice as well as in theory.”).

⁵¹ “The framers of the Fourteenth Amendment explicitly considered this issue, and, you know, made a decision. . . . This is just a clear, explicit choice that was made about what it meant to have equal representation with respect to [House apportionment]. And how you go from that being mandated [at the federal level] to it being prohibited in the State context is something that I still can't quite work myself around.” Evenwel v. Abbott, Transcript of Oral Argument at 18-19, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-940_c07e.pdf. This quote is discussed in more detail *infra*, Part III. B.

⁵² “[T]he framers of the Equal Protection Clause accepted total population as a permissible apportionment base in Section 2 of the Fourteenth Amendment.” *Id.* at 27.

choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.”⁵³

Why was it so important to have this dichotomy, a single federal rule (total population) to determine every state’s representation, coupled with individual state rules for determining the franchise? Suppose what would have happened if U.S. House seats had instead been allocated on the basis of total eligible voters per state, but states had still been allowed to determine the eligibility of their residents to vote. The Framers never directly considered such a possibility (at least as recorded in Madison’s notes of the convention), but they *did* directly consider an analogous problem, that of having a direct popular vote for president while allowing each state to determine its own rules for suffrage. “There was one difficulty however of a serious nature attending an immediate choice [i.e. popular vote] by the people [for president]. The right of suffrage was much more diffusive [i.e. widespread] in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.”⁵⁴ In other words, simply by virtue of having a more liberal voting rule, northern states would have contributed more votes to the national popular vote for president, and thus had greater weight in the election than southern states of similar size with more restrictive voting rules. The obvious result of such a system would be that “a state’s incentive to extend

⁵³ THE FEDERALIST No. 54 (James Madison); cf. Muller, *supra* note 12, at 1249 (“[T]he Constitutional Convention [reached] a fairly simple assessment of the balance of political power by counting population. . . . But the decision as to who among that population would vote was left to other governing bodies—an element of invisible federalism.”) (citations omitted).

⁵⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 57 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

suffrage would no longer affect just that state.”⁵⁵ The natural concern is that states would “have incentives to change their own eligible voting population as a reaction to what another state has done,”⁵⁶ and soon find themselves in a race to the bottom, extending the franchise to younger and younger children, the mentally ill, and others who ought not wield it, all to gain an advantage on other states in choosing the president. Such a system would clearly have been unacceptable.

Though the debates of the Convention do not show that a rule to apportion representatives by voters was discussed, the possibility is raised, implicitly, by Madison in Federalist 54. Characterizing a hypothetical northerner’s objection to counting nonvoters like slaves in the apportionment for southern states, Madison points out that slaves “neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation?”⁵⁷ Madison answers his own question by explicating the “fundamental principle” of the Constitution quoted at the start of this Subpart. Madison does not say explicitly *why* this is a fundamental principle of the Constitution, but the immediately following observation suggests that it is for the same reason that he and the other Framers rejected a popular vote for president. “The qualifications on which the right of suffrage depend are not, perhaps, the same in any two States. In some of the States the difference is very material.”⁵⁸ This is the reason why a popular vote for president would have favored states with liberal suffrage laws, and likewise, had representatives been allocated to states by eligible voters, a state would have been able to increase its representation in

⁵⁵ Muller, *supra* note 12, at 1268 (discussing the effects of a National Popular Vote Interstate Compact for presidential elections).

⁵⁶ *Id.*

⁵⁷ THE FEDERALIST 54 (James Madison).

⁵⁸ *Id.*

Congress simply by changing its laws to allow more people to vote. The Electoral College system which the Framers settled on solved the problem for presidential elections in exactly the same way that allocating representatives by total population solved it in the House. Madison suggests this parallel most directly when he concludes his train of argument in *Federalist* 54 by stating that “[the] principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants.”⁵⁹ States instead would have a predetermined influence (number of electors, or number of representatives) and then could define for themselves who within the state would wield that influence.⁶⁰ It is clear, then, that a system of allocating representatives to the states by eligible voters would not have worked in a federalist system of differing rules of suffrage, just as the Framers recognized a system of popular election of the president would not have worked.

B. THE CONSTITUTIONAL CHOICE: FEDERALISM OVER VOTER EQUALITY

The Framers could have taken a different path than the one they chose, establishing a uniform criterion of voter eligibility for congressional elections nationwide and allocating representatives to states by eligible voters. (Just as they could have established popular election of the presidency by establishing a uniform rule of suffrage.) This path would have had the benefit of establishing equal voter strength in congressional elections across the states. But it also would have come with a greater cost, because “a federal standard would prevent the states from serving as the institutions that are most inclined to extend suffrage to new voters, as is historically the case, and would stifle the opportunity for new enfranchisement.”⁶¹

⁵⁹ *Id.*

⁶⁰ *Cf.* *Globe* app. at 117 (“[I]n the lower House [representation] was purposely placed where the States could not alter it if they would. It was based, not on voters, but on the masses of people.”) (statement of Sen. Henderson).

⁶¹ Muller, *supra* note 12, at 1265.

These possibilities were recognized when the Convention debated the rule of suffrage for the House. When one delegate proposed that suffrage in the House be based on a uniform standard of freeholders, rather than up to the states, Oliver Ellsworth quickly responded that “[t]he right of suffrage was a tender point, and strongly guarded by most of the <State> Constitutions. The people will not readily subscribe to the Nat[ional] Constitution, if it should subject them to be disenfranchised. The States are the best Judges of the circumstances and temper of their own people.”⁶² Imposing a nationwide standard of suffrage would have necessarily resulted in at least some change in the suffrage laws of nearly every state. Rules of suffrage had varied from colony to colony in the pre-Revolutionary period,⁶³ and large differences in approaches to suffrage remained after the revolution, now often more permanently enshrined in the constitutions of the newly independent states.⁶⁴ The proposal for a uniform national standard of suffrage at the convention was ultimately voted down.⁶⁵ Accounts by the delegates afterwards of the deliberations suggest that this was viewed primarily as a vote to allow states to grant *greater* suffrage than the proposed national rule limited to freeholders.⁶⁶ This is supported by the fact that the standard of federal

⁶² 2 FARRAND at 201.

⁶³ “[A]side from property qualifications, there were no firm principles governing colonial voting rights, and suffrage laws accordingly were quite varied.” ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5 (revised ed. 2009).

⁶⁴ “[D]eclaring independence from Britain compelled the residents of each colony to form a new government, and the process of forming new governments inescapably brought the issue of suffrage to the fore. . . . [H]ow broad should suffrage be in a republic? The answers . . . varied from one state to the next.” KEYSSAR, *supra* note 63, at 13.

⁶⁵ 2 FARRAND at 206.

⁶⁶ “[I]t was objected that if the qualifications of the Electors were the same as in the State Governments, it would involve in the Federal System all the Disorders of a Democracy; and it was therefore contended, that none but Freeholders, permanently interested in the Government ought to have a right of Suffrage — the Venerable Franklin

suffrage was made that of each state's standard of suffrage for the *more numerous* branch of its legislature.⁶⁷ It was well known at the time that New York and North Carolina had much lower property standards for their lower, more numerous state houses than for their state senates.⁶⁸

Had we taken the path of a uniform national standard of suffrage, Wyoming could not have extended the franchise to women as a territory in 1869 and upon statehood in 1890, paving the way to national acceptance.⁶⁹ The federalist system of congressional elections that the Framers chose "permitted states to act as the first movers in the expansion of enfranchisement,"⁷⁰ and the benefits of this ability were keenly felt when "the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter."⁷¹

History has shown that the Framers were right to allow concerns of federalism – which allowed states to experiment with the franchise without undue incentives to go too far – to trump concerns of equality of voter strength.⁷²

opposed to this the natural rights of Man – their rights to an immediate voice in the general Assemblage of the whole Nation, or to a right of Suffrage & Representation and he instanced from general History and particular events the indifference of those, to the prosperity and Welfare of the State who were deprived of it." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 146–47 (Max Farrand ed., 1911) [hereinafter 3 FARRAND] (James McHenry before the Maryland House of Delegates, November 1787).

⁶⁷ U.S. CONST. art. 1, § 2, cl. 1.

⁶⁸ KEYSSAR, *supra* note 63, at 14.

⁶⁹ Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1260 (2000).

⁷⁰ *Id.* at 1254.

⁷¹ G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 PENN. ST. L. REV. 1133, 1147 (2011).

⁷² See Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521, 528 (1994) (citing THE

C. NO SIMILAR FEDERALIST CONCERNS EXIST AT THE INTRA-STATE
LEVEL

Because cities and counties do not have the same autonomy as the separate states, such concerns about federalism are inapplicable at the state level. In Texas, as in all fifty states, the qualification for voting in state legislative elections is determined by state law, not local law.⁷³ Just as popular votes for governor and other statewide offices can occur within states without the problems that arise from varying voter eligibility, so can legislative districts based on voter population be created within states without the problems that arise from varying voter eligibility. The Supreme Court has, in fact, already recognized that the reasons that gave rise to the necessity of an Electoral College at the federal level do not exist at the state level, rejecting Georgia's federal analogy to the Electoral College in striking down statewide primary systems based on county votes rather than popular vote.⁷⁴

D. THE FEDERAL RULE WAS CONCERNED WITH THE REPRESENTATION
OF STATES BY TOTAL WEALTH AND INFLUENCE, AND WAS
INTIMATELY TIED TO STATE TAXATION

1. *Apportionment by Population was Intended as a Proxy for State Wealth*

The members of the Convention, in apportioning power in the House of Representatives, showed much more concern with apportioning it fairly to represent the relative powers of the states than

FEDERALIST 54 (James Madison)) (“[T]he Framers arrived at their method for the allocation of congressional representatives among the states out of concerns about federalism, not equal protection of individuals.”).

⁷³ See Tex. El. Code Ann. § 11.002.

⁷⁴ Gray v. Sanders, 372 U.S. 368 (1963).

with the purpose of achieving individual electoral equality.⁷⁵ The number of people was often cited as a useful shorthand for the wealth of a state, given the assumption that the productivity of every worker was roughly equal.⁷⁶ As early as May 30, a proposal was put forward in the Convention, which would reappear often in similar forms, “[t]hat the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.”⁷⁷ Population and wealth frequently appear together in phrases describing proposed apportionments of power in the House,

⁷⁵ One delegate, Edmund Randolph, noted in a letter after the convention that under the previous Articles of Confederation, “[t]he representation of the states bears no proportion to their *importance*. This is an unreasonable subjection of the will of the majority to that of the minority.” I J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486 (rev. ed. 1861) [hereinafter I ELLIOT], Edmund Randolph, *Letter to the Speaker of the Virginia House of Delegates*, Oct. 1787 (emphasis added); see also II J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 439 (rev. ed. 1861) [hereinafter II ELLIOT] (“[I]n this second branch of the legislature, each state, without regard to its *importance*, is entitled to an equal vote.”) (debate in Pennsylvania Convention on adoption of the Constitution, statement of William Wilson) (emphasis added).

⁷⁶ “As we have found it necessary to give very extensive powers to the federal government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people, and that both wealth and numbers should be considered in the representation. We were at a loss, for some time, for a rule to ascertain the proportionate wealth of the states. At last we thought that the productive labor of the inhabitants was the best rule for ascertaining their wealth. In conformity to this rule, joined to a spirit of concession, we determined that representatives should be apportioned among the several states, by adding to the whole number of free persons three fifths of the slaves. We thus obtained a representation for our property; and I confess I did not expect that we had conceded too much to the Eastern States, when they allowed us a representation for a species of property which they have not among them.” 3 FARRAND at 253 (C. C. Pinckney: Speech in South Carolina House of Representatives).

⁷⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (Max Farrand ed., 1911) [hereinafter 1 FARRAND].

by delegates at the time of the convention and after.⁷⁸ Where the equal weight of votes across state lines was described as a purpose of the House rule, it was often placed in a subordinate position.⁷⁹ It is telling that Madison in Federalist 54 justifies the counting of slaves in apportionment partially based on the theory that they are both persons and property.⁸⁰ Madison characterizes the southern argument for counting slaves in apportionment, that since “[i]n the federal Constitution . . . [t]he rights of property are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands.”⁸¹ Madison ultimately declares of this reasoning that “although it may appear to be a little strained in some points, yet, on the whole, I must confess that it fully reconciles me to the scale of representation which the convention have established.”⁸²

⁷⁸ See, e.g., 1 FARRAND at 522 (“Many of the members, impressed with the utility of a general government, connected with it the indispensable [sic] necessity of a representation from the states according to their numbers and wealth.”); *id.* at 27 ([T]he Rights of Suffrage shall be ascertained by the Quantum of Property or Number of Souls—This the Basis upon which the larger States can assent to any Reform.”); II ELLIOT at 237 (“The best writers on government have held that representation should be compounded of persons and property. This rule has been adopted, as far as it could be, in the constitution of New York.”) (statement of Alexander Hamilton, Debates of the New York Convention on Adoption of the Constitution, June 1788).

⁷⁹ “Those who advocated this inequality [of representatives per state] . . . said, no State ought to wish to have influence in government, except in proportion to what it contributes to it; that, if it contributes but little, it ought to have but a small vote; that taxation and representation ought always to go together; that if one State had sixteen times as many inhabitants as another, or was sixteen times as wealthy, it ought to have sixteen times as many votes; that an inhabitant of Pennsylvania ought to have as much weight and consequence as an inhabitant of Jersey or Delaware.” 3 FARRAND at 181 (Luther Martin, Genuine Information: delivered to the Maryland legislature November 29, 1787).

⁸⁰ “The true state of the case is, that [slaves] partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.” THE FEDERALIST 54 (James Madison).

⁸¹ *Id.*

⁸² *Id.*

Ultimately, the choice to use population rather than wealth as the measure of apportionment in the House may have had more to do with practicability than any theory of democratic equality. After James Madison proposed that Representatives be allocated to the states based *only* on the contributions each state makes in taxes, “Mr. King observed that the quotas of contribution which would alone remain as the measure of representation, would not answer; because waving every other view of the matter, the revenue might hereafter be so collected by the general Gov[ernment] that the sums respectively drawn from the States would <not> appear; and would besides be continually varying. <Mr. Madison admitted the propriety of the observation, and that some better rule ought to be found. Col. Hamilton moved to alter the resolution so as to read ‘that the rights of suffrage in the national Legislature ought to be proportioned to the number of free inhabitants.[’”⁸³ Many argued, perhaps to achieve compromise, that total population was indeed the best proxy for wealth, and that therefore a rule based on the former still implicitly reflected a rule based on the latter. Mr. Wilson “observed that in districts as large as the States, the number of people was the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same.”⁸⁴

All this makes clear that the rule of apportionment created at the Constitutional Convention was less concerned with representing *individuals* fairly and more concerned with representing the states fairly. It was, after all, the half of the great compromise intended to be suitable to the larger states, and over and over again the representatives of these states argued that they deserved greater representation not

⁸³ 1 FARRAND at 35–36.

⁸⁴ *Id.* at 179–80; *cf. id.* at 593 (“Dr Johnson, thought that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth.”).

because the alternative would be to underweight the votes of individuals within their states, but rather because it would underweight the importance of *the states themselves* to the union. This further reduces the sway of any theory of individual representation adduced from the original federal rule.⁸⁵

Just as the *Reynolds* Court suggested that little could be learned from the example of the U.S. Senate, given that it was the result of a compromise in a unique historical situation, so can the same be said of the House. Three indisputably powerful states, Virginia, Massachusetts, and Pennsylvania, were necessary to ratify any constitution with a hope of strength and legitimacy. The debates show that delegates from these states insisted that one House be proportional to overall might and contribution to the federal government, for which total population was held to be a suitable proxy. The differing standards of suffrage across the states thus suggests a further reason why allocation based on total voters may not have been considered. If it were assumed that the same proportion of each state's population were voters, then a standard based on voters would have also been a proxy for total population, and would have achieved the same distribution. But to the extent that, either through differing suffrage laws or differing demographics, the states had different percentages of eligible voters, this standard would have diverged from the allocation of total population, and thus also from a proxy for total wealth.

⁸⁵ “[I]nterstate apportionment might be viewed as an integral, but not necessarily ‘principled,’ part of the bargain necessary to secure agreement at the Constitutional Convention. . . . In this view, the provision for apportionment of the House among the states would not be taken to be especially relevant to the intrastate questions raised by *Wesberry* and *Reynolds*.” Bennett, *supra* note 33, at 515.

2. *Apportionment by Population Checked the Incentive to Underreport Population for Tax Purposes*

Why did the Constitution establish a rule that both representatives and direct taxes would be apportioned by the same standard, total population? In the Federalist Papers, James Madison provides an explanation for the important function that was meant to be served by this linking of the two:

As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.⁸⁶

The tensions suggested by Madison in state incentives may have indeed appeared before even the first census. At the Constitutional Convention, it was briefly proposed that, prior to the first census, states pay direct taxes in proportion to the number of representatives allotted to them by the Constitution.⁸⁷ With the expectation in the

⁸⁶ THE FEDERALIST No. 54 (James Madison). Cf. 3 FARRAND at 255 ("It is a principle of this Constitution, that representation and taxation should go hand in hand.") (Rufus King in the Massachusetts Convention).

⁸⁷ "Mr. Gerry moved . . . 'That from the first meeting of the Legislature [of the U.S] till a census shall be taken all monies to be raised [for supplying the public Treasury] by direct taxation, shall be assessed on the inhabitants of the [several] states, according

Convention that this or a similar rule might be enacted, one participant “had observed he said in the Committee a backwardness in some of the members from the large States, to take their full proportion of Representatives. He did not then see the motive. He now suspects it was to avoid their due share of taxation.”⁸⁸

The Supreme Court has also recognized the importance of Madison’s idea of opposing interests. “The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives . . . [was founded partially on the principle that] the opposite interests of the states, balancing each other, would produce impartiality in enumeration.”⁸⁹

3. Linking Representation and Taxation Increased Support for the Three-Fifths Compromise

Records from the Constitutional Convention show that the linking of congressional apportionment to taxation was inspired, in part, as a way to further cement the Three-Fifths Compromise as acceptable to both northern and southern states. “In his notes on the Constitutional Convention, James Madison described Gouverneur Morris’s proposal of ‘proportioning direct taxation to representation,’ . . . as having the ‘object [of] lessen[ing] the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the S. <Sothern> [sic] States on account of the Negroes.’”⁹⁰ Northerners who resented that slaves counted for any amount in southern representation could take solace that such a rule also meant the south

to the [number of their] Representatives [respectively] in the 1st. branch.” 1 FARRAND at 600–01.

⁸⁸ *Id.* at 601.

⁸⁹ *Pollock v. Farmer’s Loan & Trust Co.*, 157 U.S. 429, 564 (1895) (citing THE FEDERALIST No. 54 (James Madison)).

⁹⁰ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clause)*, 21 CONST. COMMENT. 355, 375 (2004) (citing 2 FARRAND at 106).

would pay more in direct taxes. Madison records that “Mr. Wilson observed that less umbrage would perhaps be taken [by northerners against] an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation: and as representation was to be according to taxation, the end would be equally attained.”⁹¹ Likewise, southerners who were eager to increase the value to five-fifths would be less eager, knowing that doing so would also increase their direct taxes. “The controversy was therefore settled by imposing direct taxation upon the States in the same proportion in which they might be represented upon their slave population.”⁹²

As it turned out, the mechanism largely did not work as the Framers intended.⁹³ Federal direct taxes were “occasional and rare,”

⁹¹ 1 FARRAND at 595.

⁹² *Globe*, *supra* note 60, at 3033 (statement of Sen. Henderson); *cf.* THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865–1867 54–55 (Benj. B. Kendrick ed., 1914) [hereinafter JOURNAL] at 202–03 (“The free states could not maintain that [the slave] was a person to be taxed. The slave states could not maintain that he was a person to be represented without some special provision. Both taxation and representation, however, were desirable from the respective standpoints of the two sections. Therefore they made the ‘three-fifths compromise,’ which was purely an arbitrary agreement.”). Apparently this “arbitrary” fraction in fact had its origin in taxation, since “[t]he idea was evidently derived from the tax law of April 18, 1783, in which each slave was counted as three fifths of a freeman in the apportionment of taxes.” Albert F. Simpson, *The Political Significance of Slave Representation, 1787-1821*, 7 J. OF SOUTHERN HIST. 315, 316 (1941).

⁹³ “As time went on, it became clear that the ‘direct taxes’ provision of the Constitution was a dead letter, and that the balancing of the burdens of taxation with the privilege of representation envisioned by the Three Fifths Compromise would not be implemented in tax policy.” Margo Anderson, *The Missouri Debates, Slavery and Statistics of Race: Demography in Service of Politics*, 2003 ANNALES DE DÉMOGRAPHIE 23, 26 (2003). One northern delegate who opposed the Three-Fifths Compromise can lay claim to prescience in this regard. “Let it not be said that direct taxation is to be proportioned to representation. It is idle to suppose that the Gen[eral] Gov[ernment] can stretch its hand directly into the pockets of the people scattered over so vast a Country.

imposed only three times in the first forty years of the Constitution.⁹⁴ In fact, “[t]he last apportioned direct tax was the Act of Aug. 5, 1861, ch. 45, (12 Stat.) 292.”⁹⁵ It was recognized by a former member of the Convention as early as 1819 that, although linking direct taxes to apportionment had been the key to northern support of the Three-Fifths Compromise, it was already apparent that the southern states had gotten the better of that compromise.⁹⁶ Mention of direct taxes is entirely omitted from the final draft of the Fourteenth Amendment.⁹⁷ It was because of the rarity of direct taxes that the drafters were willing to enact a rule that partially delinked taxation from representation.⁹⁸

They can only do it through the medium of exports imports and excises.” 2 FARRAND at 223.

⁹⁴ I J. Story, Commentaries on the § 642 (5th ed. 1891).

⁹⁵ Jensen, *supra* note 89, at 357 n.7.

⁹⁶ “[W]hile 35,000 free persons are requisite to elect one representative in a state where slavery is prohibited, 25,559 free persons in Virginia may and do elect a representative — so that five free persons in Virginia have as much power in the choice of representatives to Congress, and in the appointment of presidential electors, as seven free persons in any of the states in which slavery does not exist. This inequality in the appointment of representatives was not misunderstood at the adoption of the constitution; but as no one anticipated the fact that the whole of the revenue of the United States would be derived from indirect taxes (which cannot be supposed to spread themselves over the several states according to the rule for the apportionment of direct taxes), but it was believed that a part of the contribution to the common treasury would be apportioned among the states by the rule for the apportionment of representatives — the states in which slavery is prohibited, ultimately, though with reluctance, acquiesced in the disproportionate number of representatives and electors that was secured to the slave-holding states.” 3 FARRAND at 429–30 (Rufus King in the Senate of the United States, March 1819).

⁹⁷ See JOURNAL at 58 (“Mr Stevens moved to amend [the proposal] by striking out the words ‘and direct taxes.’ The motion was agreed to by [a 12-2 vote.]”).

⁹⁸ See, e.g., GLOBE at 3033 (“If I believed it probable that direct taxation would be resorted to in the future legislation of the country, nothing could induce me to support this proposition [for Section 2 of the Fourteenth Amendment].”) (statement of Sen. Henderson). It was not, in fact, the removal of the words “and direct taxes” that caused this partial delinking. See *id.* at 703 (“[I]f the words ‘and direct taxes’ were stricken out of the resolution, the result is precisely the same, because the direct taxes are by the Constitution levied and apportioned upon precisely the same principle. Therefore it

Eventually, in 1913, the Constitution was amended to largely abandon this system of opposing state interests in enumeration altogether, allowing income taxes to be collected “without apportionment among the several States, and without regard to any census or enumeration.”⁹⁹ Nonetheless, as sordid as the Three-Fifths Compromise now strikes us, it served the crucial purpose at the time of assuring the unanimous adoption of the proposed Constitution.¹⁰⁰ The fact that the original purpose of a constitutional design is no longer relevant should not obscure an understanding of what the original design *was*, and a large part of this original design based on total population was motivated by fair taxation and incentives for fair census-taking, *not* by a particular theory of representational equality.

4. *No Such Concerns are Operative Today at the State Level*

There were several factors that produced the rule that ultimately arose from the Constitutional Convention, that representation in

was entirely unnecessary to have the words in.”) (statement of Sen. Fessenden). Rather, the partial delinking came from the fact that direct taxes were not reduced in proportion to disenfranchised male 21-year-old citizens, as apportionment was (as will be explained in Part III, *infra*). Thus, in any state where all male 21-year-old citizens were franchised, direct taxes and Congressional representation would still be linked, but to the extent a state disenfranchised male 21-year-old citizens, direct taxes would be proportionally higher than congressional representation. *See* Globe at 766 (“[Unless we agree to let every black man vote who possesses the qualification of age the whole number of the race is to be deducted in the basis of representation: but when we come to the question what proportion of taxes we are to pay, the whole number, instead of three fifths, is to be counted, so that the operation of the amendment is to diminish representation and increase taxation.”) (statement of Sen. Johnson).

⁹⁹ U.S. CONST. amend. XVI.

¹⁰⁰ *See, e.g.*, 3 FARRAND at 30 (“The concession was, at the time, believed to be a great one, and has proved to have been the greatest which was made to secure the adoption of the constitution.”); II ELLIOT at 237 (“[T]hat clause which allows a representation for three fifths of the negroes . . . was one result of the spirit of accommodation which governed the Convention; and without this indulgence no union could possibly have been formed.”) (statement of Alexander Hamilton, Debates of the New York Convention on Adoption of the Constitution, June 1788).

Congress and direct taxes would be mutually linked to total population. But none of these issue, concerns, or compromises have any relation to the workings of the Texas government of 2016. Neither Texas nor any other state imposes direct taxes on its various subdivisions by total population. It was already recognized in 1866 that no state had borrowed the federal constitution's model in this regard, and that "[i]t has been adopted in no State, in no county, in no town, in no municipal corporation, of apportioning taxation according to population."¹⁰¹ Nor has Texas suggested that chronic underreporting of population figures in its subdivisions might be a serious problem, one that would require the reward of representation based on total population to counteract. Once again, the history and purpose of the federal rule finds no connection to the situation of Texas or any of the states today.

The debates at the Convention show that democratic equality as we consider it today was not at the forefront of any decision-making related to the federal rule. But *Evenwel* will not ultimately be decided on the basis of any clause of the Constitution written in 1787; it will turn instead on the proper meaning of the Equal Protection Clause, written in 1866. The pre-existing federal rule set the backdrop for the debates that would accompany the drafting of the Fourteenth Amendment, when the opportunity came to revise that rule. It is to those debates I will now turn.

¹⁰¹ Globe at 378 (statement of Rep. Sloan).

III. THE DEBATES AT THE PASSAGE OF THE FOURTEENTH AMENDMENT¹⁰²

A. THE FOURTEENTH AMENDMENT REJECTED A THEORY OF VIRTUAL REPRESENTATION FOR DISENFRANCHISED FORMER SLAVES

“Virtual representation” is the democratic theory that where one person votes with the interests of both himself (gendered pronoun unfortunately intentional) and other particular nonvoters in mind, the weight of his vote should somehow be increased to reflect the full number of those he is virtually representing.¹⁰³ “The founding generation used concepts of virtual representation to . . . enabl[e] one entity to speak for—to virtually represent—another, larger one. . . . [T]he electorate—the polity—could, at least at regularly called elections and by petition, speak for the larger society (which included children, incompetents, women, slaves, etc.).”¹⁰⁴ Since the nation’s founding, the concept of virtual representation for disenfranchised persons has been in an uneasy tension with the principles that led to the Revolution.¹⁰⁵ The legitimacy of virtual representation is, none-

¹⁰² For a thorough account of the Congressional debates of 1866, see generally George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WESTERN POL. Q. 829 (1970).

¹⁰³ See Bennett, *supra* note 33, at 523 (“Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people, and the people in whose name they act, though the trustees are not actually chosen by them.” (quoting *Letter From Edmund Burke to Sir Hercules Langrache*, in BURKE’S POLITICS: SELECTED WRITINGS AND SPEECHES ON REFORM, REVOLUTION AND WAR 494 (Ross J.S. Hoffman & Paul Levack eds., 1949))).

¹⁰⁴ Akhil Reed Amar, *Philadelphia Revisited: Amending The Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1075 n.117 (1988).

¹⁰⁵ “To say that men could be fairly represented by those whom they had played no part in choosing rang just as false as the royal claim that the colonists were adequately, if virtually, represented by 15 British members of Parliament.” KEYSSAR, *supra* note 63,

theless, a necessary prerequisite to the legitimacy of justifying population-based districts on democratic grounds, since “the conclusion that [representing all interests equally] requires total population-based districting plans assumes that the non-voters in a district are ‘virtually’ represented by the voters in their district.”¹⁰⁶ Justice Harlan has gamely attempted to attribute a theory of virtual representation to the Framers’ choice to (partially) include nonvoting slaves in the enumeration that determined their state’s representation. “[I]t might have been thought that Representatives elected by free men of a State would speak also for the slaves. But . . . Representatives from the slave States could have been thought to speak only for the slaves of their own States, indicating . . . that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group.”¹⁰⁷ Derek Muller similarly suggests that “the Electoral College was founded upon a kind of republican vision of virtual representation in which a number of residents (including women, children, aliens, non-property owners, *and, in part, slaves*) would be included in a state’s population tally for the allocation of electoral votes (and for that state’s representation in the House of Representatives).”¹⁰⁸

It is more likely that the (at least northern) Framers never truly believed the interests of slaves to be aligned with their masters, and only supported assigning slaves any weight in a state’s enumeration

at 12; *see also* Bennett, *supra* note 33, at 523 (“Given the American experience, the possibility of virtual representation, which had initially been advanced in aid of the republican project, may well have helped expose its frailty.”)

¹⁰⁶ Reader, *supra* note 72, at 557–58; *cf.* Bennett, *supra* note 33, at 533 (“[I]nclusion of a group of ineligible voters in the [apportionment] base results in votes effectively being cast on account of that group.”). For decisions upholding the total population basis on explicitly virtual-representation-based grounds, see notes 119 and 120, *infra* and accompanying text.

¹⁰⁷ *Wesberry*, 376 U.S. at 27 (Harlan, J., dissenting).

¹⁰⁸ Muller, *supra* note 12, at 1243 (emphasis added).

out of expediency.¹⁰⁹ However, regardless of the beliefs that led to it, the *effect* of the Three-Fifths Compromise was indisputably one of virtual representation, since “[t]he power thus agreed upon could not be exercised by the fractional persons themselves, but as somebody else owned them, it was so arranged that that same somebody else should own the political power also.”¹¹⁰

After the Civil War, when those slaves had been freed from any formal paternalistic relationship to their former owners, and had political interests that were diametrically opposed to those former owners, the notion of their being “virtually represented” by white voters

¹⁰⁹ See Levinson, *supra* note 40, at 1289–90 (“It was the anti-slavery North that had originally suggested that slaves be treated as non-persons when computing representation, and, concomitantly, it was they who insisted that slaves count for no more than three-fifths of a person. One could easily argue that slaves would have been better off with the North’s rule, however much it formally denied their membership in the polity. And, of course, slaves would have been even worse off had they been counted as whole persons!”); Reader, *supra* note 72, at 563 (“[I]t cannot seriously be argued that the interests of slaves would have been better served by being formally recognized as whole persons, the constitutional rule desired by the South, than by being excluded altogether, the constitutional rule desired by the North.”); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 265 n.38 (2004) (“Fractionalization of African-Americans in this particular clause of the Constitution helped them and the anti-slave interests; a two-fifths or lesser compromise would have been better because it would have further reduced the power of slave interests in Congress.”); Sanford Levinson, “Who Counts?” “Sez Who?”, 58 ST. LOUIS U. L.J. 937, 939 (“Anti-slavery forces properly argued that slaves should not count at all, whereas one can be certain that slave owners would have been delighted to have them count as the equivalent of five ordinary people. The reason is obvious: No one suggested that slaves would be able to vote. Nor, almost as significantly, could anyone seriously have suggested that slaves would be ‘virtually represented.’”).

¹¹⁰ Globe at 356 (statement of Rep. Conkling). This arrangement provoked consternation and criticism by northern politicians as undemocratic for much of the period prior to the Civil War. See, e.g., *Annals of Congress*, 16th Cong., 1st sess. (1820) at 1133–34 (“[A]ccording to the mode prescribed by the Constitution, the owner of one hundred slaves has as much influence in the representation as sixty-one freemen.”) (statement of Rep. Hemphill) (quoted in Anderson, *supra* note 93, at 27); see generally Simpson, *supra* note 92.

went from dubious to patently absurd.¹¹¹ Yet, without a change to the Constitutional rule at the time, “the disenfranchised but freed slaves would count not as three-fifths in the apportionment of House seats but as five-fifths.”¹¹² Members of Congress from free states that had little to no black populations, realizing the inequality in voting strength that would result from this, asked “in fairness, why should two Marylanders count equal to three Iowaians [sic]?”¹¹³ Representative Ignatius Donnelly analogized the outsized voting strength of

¹¹¹ See *id.* (“No figment of slavery remains with which to spell out a right in somebody else to wield for them a power which they may not wield themselves. This was one of the appurtenances of property in man, and has been extinguished by constitutional amendment, if it was not destroyed before.”); see also *id.* at 2986 (“There is no reason why the white citizens of South Carolina should vote the political power of a class of people whom they say are entirely unfit to vote for themselves.”) (statement of Sen. Sherman).

¹¹² Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 819–20 (2009); see also *Globe* app. at 115 (“[W]hile the war made freemen of the slaves against the will of the southern whites, it has also the effect of increasing the political power of the seceded States, both in the lower branch of Congress and in the colleges for the election of President.”) (statement of Sen. Henderson). Representative Roscoe Conkling estimated that the congressional delegation of the fifteen former slave states combined would have increased from 85 to 94 if freed slaves were fully counted in apportionment. *Globe* at 357; cf. *id.* at 74 (statement of Rep. Stevens); *id.* at 2766 (statement of Sen. Howard); *Oregon v. Mitchell*, 400 U.S. 112, 157 (1970) (Harlan, J., concurring in part and dissenting in part); Chin, *supra* note 109, at 265.

¹¹³ *Globe* at 767 (statement of Sen. Kirkwood); cf. *id.* at 434 (“The fact that one South Carolinian . . . will have a voice as potential in these Halls as two and a half Vermont soldiers . . . cries aloud for remedy; and it depends upon Congress to inaugurate this remedy.”) (statement of Rep. Ward); *id.* at 1255 (“By the Constitution as it is, one rebel in South Carolina or Mississippi is equal in power in the House of Representatives and the Electoral College to two loyal men in New England, the great central States, or the States of the West. Such inequality is unjust and wholly indefensible.”) (statement of Sen. Wilson); *id.* at 357 (“Shall one hundred and twenty-seven thousand white people in New York cast but one vote in this House, and have but one voice here, while the same number of white people in Mississippi have three votes and three voices . . . merely because [they] live[] where blacks outnumber whites two to one?”) (statement of Rep. Conkling); *id.* at 2535 (“This presents the anomaly of allowing five million

white men living in states with large black populations to the “rotten borough system” of the English Parliament, where some infamously small districts were vastly overrepresented.¹¹⁴

In response, some Democratic allies of the southern states, citing virtual representation principles, continued to make “the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to provide representation for the black population would be taxation without representation.”¹¹⁵ One such claim was the speech of Representative Philip Johnson, who declared that reducing a state’s representation by its number of disenfranchised African Americans would be to “limit the class of persons who shall be represented [in Congress] to the white male adults” and “take away from the entire negro population, now all free alike, all representation whatever.”¹¹⁶ In the very same address, Representative Johnson made appeals to a theory of virtual representation that would not sound wholly out of place coming from supporters of equality of populations (as opposed to voter equality) among legislative districts today:

A faithful member of Congress represents the whole population of his district, male and female, black and white . . . If he relies wholly upon the voters of his district for the expressed wish of his whole

white rebels to represent four million loyal blacks, and makes two white persons—rebels at that—in South Carolina equal to five white loyalists in Ohio, Pennsylvania, or New York.”) (statement of Rep. Eckley); *id.* at 2986 (“[T]o give to the white people of [the southern] States the right to vote for the negro population and represent them is to give them an undue advantage, one which we could not justify even if they had not been in rebellion.”) (statement of Sen. Sherman).

¹¹⁴ *Id.* at 377. Cf. Simpson, *supra* note 92, at 324.

¹¹⁵ Scarberry, *supra* note 112, at 842.

¹¹⁶ Globe app. at 55; cf. Globe at 3029 (“[Under the proposed amendment,] the poor black man, unless he is permitted to vote, is not to be represented, and is to have no interest in the Government.”) (statement of Sen. Johnson).

constituency he may err, but not unless the voters are unfaithful representatives of the population behind them. And this is not likely to happen, because men's wishes, when intelligibly made, are found to be with their interests. The vote of the husband is supposed to represent the interests of his wife, and so the father those of his children, and these aggregated make up the public weal, commonwealth, or *res publica*.¹¹⁷

Representative Andrew Rogers, a Democrat of New Jersey, spoke in similarly glowing terms of the principle of full representation for all persons, disenfranchised or not:

What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the councils of the nation.¹¹⁸

Representative Rogers similarly declared that any reduction in southern representation would "violate the great principle of democracy, that all the population in a country ought to be represented, although not allowed to exercise the elective franchise."¹¹⁹

It is striking how similar the language used in recent cases upholding total population equality has been to the language used 150 years ago by opponents of removing disenfranchised African Americans from apportionment. One court declared that "representatives have an inherent obligation to champion the interests of their constituents. . . . These representatives should represent roughly the same

¹¹⁷ *Globe* app. at 55; *cf.* *Globe* at 767 (statement of Sen. Johnson). Of course, knowing they were made in the context of freed blacks in the Reconstruction South, these sentiments now rightfully appear either hopelessly naive or disingenuous.

¹¹⁸ *Id.* at 353.

¹¹⁹ *Id.* at 354.

number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative.”¹²⁰ Another court similarly argued that “[a]dherence 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.”¹²¹

The enactors of the Fourteenth Amendment, however, rejected arguments of representational equality as being in the best interest of freed slaves. Those who passed the amendment recognized that at the time “the negro of the South . . . has his vote cast for him . . . by his white and hardly more loyal neighbor,”¹²² and that “if men have no voice in the national Government, other men should not sit in this Hall pretending to represent them.”¹²³ As Senator John Sherman remarked bluntly, “[i]f there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them.”¹²⁴

Of course, it cannot be disputed that factionalism played a role in the drafting of the Fourteenth Amendment, with nearly all members of congress from free states supporting it and members from former slave states opposing it. The first draft of the Penalty Clause, as proposed by the committee to the full House and Senate, read “whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall

¹²⁰ *Daly v. Hunt*, 93 F.3d 1212, 1226 (4th Cir. 1996).

¹²¹ *Calderon v. City of Los Angeles*, 481 P.2d 489, 493 (Cal. 1971); cf. Fishkin, *supra* note 50, at 1910 (“[C]ourts should take care before holding that only eligible voters count as The People. There is value in having a government that represents all of the people living in its jurisdiction and subject to its laws, a value we ought not to trade away lightly.”).

¹²² *Globe* at 2498 (statement of Rep. Broomall).

¹²³ *Id.* at 377 (statement of Rep. Donnelly).

¹²⁴ *Id.* at 2986.

be excluded from the basis of representation.”¹²⁵ In other words, if a state did not allow African Americans to vote, and African Americans represented 40% of the adult male citizen population of the state, the congressional allocation would be based on the total population of the state *decreased* by 40%. This version would have removed representation based on southern disenfranchised males, but not northern disenfranchised males; even though many northern states also disenfranchised African Americans, the black populations in northern states would likely not have been large enough to result in the loss of a single seat.¹²⁶ Northern states that denied large numbers of male 21-year-old citizens the right to vote did so for reasons other than race, such as the reading and educational requirements of Massachusetts and Connecticut.¹²⁷

Yet this earlier version of the Penalty Clause was ultimately replaced by one that “adopt[ed] a general principle applicable to all the states alike.”¹²⁸ The final version rejected virtual representation for

¹²⁵ See JOURNAL at 53; Globe at 351.

¹²⁶ See Globe at 359 (“The amendment is common to all States and equal for all; its operation will of course be practically only in the South. No northern State will lose by it, whether the southern States extend suffrage to blacks or not. Even New York, in her great population, has so few blacks that she could exclude them all from enumeration and it would make no difference in her representation.”) (statement of Rep. Conkling); *id.* at 764 (“[Northern States] may be willing to adopt [the amendment] because it will operate upon and will diminish the power of the States in which the [black] race is to be found. . . . The experiment is quite a safe one for them. They will not be affected by it injuriously. They will lose no Representative.”) (statement of Sen. Johnson); JOURNAL at 201 (“[The measure] was intended to deprive the South of as many representatives as possible without decreasing the number to which any northern state was then entitled.”).

¹²⁷ See Globe at 2767 (statement of Sen. Clark, *infra* note 186); *id.* at 2769 (“I believe the constitution of [Massachusetts] restricts the right of suffrage to persons who can read the Constitution of the United States and write their names.”) (statement of Sen. Ward); see generally George H. Haynes, *Educational Qualifications for the Suffrage in the United States*, 13 POL. SCI. Q. 495 (1898).

¹²⁸ Globe at 2767 (statement of Sen. Howard). Howard stresses the point, continuing: “[T]his Amendment does not apply exclusively to the insurgent States, nor to the

adult males not just in the South but universally, declaring “that where a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded . . . applying not to color or to race at all, but simply to the fact of the individual exclusion.”¹²⁹ Attempts by northern Republicans to create an exception for states that denied the vote based on intelligence or property were rejected.¹³⁰ The enactors thus determined that rejecting the legitimacy of virtual representation for any male citizen was important enough to create an exception—to date the only one—to the federal rule of total population:

But when the right to vote at any election for . . . Representatives in Congress . . . 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.¹³¹

slaveholding States, but to all States without distinction. . . . It holds out the same penalty to Massachusetts as to South Carolina, the same to Michigan as to Texas.” *Id.*

¹²⁹ *Id.* For the first appearance of this apportionment method as a proposal, see JOURNAL at 102.

¹³⁰ See Globe at 2768 (“No class of persons as to the right of any of whom to suffrage discrimination shall be made, by any State, shall be included in the basis of representation, unless such discrimination be in virtue of impartial qualifications founded on intelligence or property, or because of alienage, or for participation in rebellion or other crime.”) (proposal of Sen. Ward).

¹³¹ U.S. CONST. amend. XIV, § 2 (known as the “Penalty Clause”).

This final version of Section 2—the section which Representative Thaddeus Stevens “consider[ed] the most important in the article”¹³²—is the one that was approved by Congress and ratified by the states. Thus, the only time that the nation confronted a situation where nonvoters would obviously not be virtually represented, and did not have any guarantee of becoming voters in a defined and reasonable time,¹³³ it eliminated those nonvoters from the apportionment calculus.

B. THE FOURTEENTH AMENDMENT RETAINED THE POPULATION RULE
DUE TO EASTERN OPPOSITION, AND TO ENSURE WOMEN WOULD BE
VIRTUALLY REPRESENTED

Why, with the theory of virtual representation so clearly repudiated in the case of freed slaves, did the Fourteenth Amendment not move fully to a voter-based system of apportionment? Such proposals were, indeed, made and debated. “[W]e have had several propositions to amend the Federal Constitution . . . all embrac[ing] substantially the one idea of making suffrage instead of population the basis of apportioning Representatives; or in other words, to give to the States in future a representation proportioned to their voters instead of their inhabitants.”¹³⁴ In support of retaining the population-based rule, Senator Luke Poland defended the theory of virtual

¹³² Globe at 2459; *see also id.* at 2510 (“The [second section], as to representation, I deem the most important amendment, and is in fact the corner-stone of the stability of our Government.”) (statement of Rep. Miller).

¹³³ Aliens were also not viewed as virtually represented at the time, but were assumed to become voters in short order, like male minors. *See infra* section III. C.2.

¹³⁴ Globe at 141 (statement of Rep. Blaine). *See, e.g.,* proposal of Rep. Stevens, *id.* at 10 (“Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters . . . A true census of the legal voters shall be taken at the same time with the regular census.”) and JOURNAL at 41; *see also* proposals of Rep. Schenck, Globe at 9; Rep. Broomall, *id.* at 10, Rep. Sloan, *id.* at 378, Rep. Orth, *id.* at 380–81, Sen. Clark, *id.* at 1284, and Sen. Doolittle, *id.* at 2942. Such

representation, but *only* in the context of family members, not aliens. “The right of suffrage . . . is given to [a particular class] as fair and proper exponents of the will and interests of the whole community, and to be exercised for the benefit and in the interest of the whole. The theory is that fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own.”¹³⁵

Similarly, Senator William Fessenden, chairman of the amendment’s drafting committee,¹³⁶ defended virtual representation for wives and children (again omitting aliens), suggesting that virtual representation was legitimate because wives plausibly had tangible effects on the votes of husbands—in a way that it would be hard to imagine nonvoters outside the family structure of having—and thus were fairly counted in representation:

What objection is there to basing representation upon voters? . . . [W]hen a state has representation, the representatives, whoever they may be, do not consider themselves as representing males over twenty-one years of age alone, but as representing all, those under age as well as those over age, females as well as males. . . . I could hardly stand here easily if I did not suppose I was representing the ladies of my State. I know, or I fancy I know, that I have received considerable

proposals were taken seriously and their rejection was often narrow; an early vote in the drafting committee on the resolution “That, in the opinion of this Committee, representatives should be apportioned among the several States according to their respective numbers of legal voters” was defeated by a 6–8 vote with one absence (though the absent member, Rep. Rogers, would certainly have voted no). JOURNAL at 45.

¹³⁵ *Id.* at 2962.

¹³⁶ JOURNAL at 39.

support from some of them, *not exactly in the way of voting, but in influencing voters.*¹³⁷

With the virtual representation of women in mind, Senator Poland voiced objection to a voter-based system of representation because “new States to a great extent are settled by emigration from the older States, and it has been and will ever continue [to be] the case that a much larger proportion of this emigration are males. The consequence is that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters.”¹³⁸ According to Representative James G. Blaine, who likewise opposed changing the rule, this disparity was indeed substantial, with “[t]he ratio of voters to population . . . varying in the [nineteen free states] from a minimum of nineteen per cent. to a maximum of fifty-eight per cent.”¹³⁹ Representative Blaine, one of the few who suggested that a voter apportionment rule would be copied by the states and would be harmful, made his arguments entirely under the assumption of a society in which women have no vote:

If we distribute representation on the basis of voters, the States will take it up by logical sequence, and within their own territory distribute their Representatives on the basis of voters, and a city or district of country which might have a surplus or a deficiency of *males over twenty-one years of age* would either aggrandize itself or lose its proper weight and power as the figures might go up or down.¹⁴⁰

¹³⁷ *Id.* at 705 (emphasis added).

¹³⁸ *Id.* at 2962. *See also id.* at 411 (“[T]here is a greater proportion of women and children in the old States. These should be and are represented. They are represented, in the true sense of the word, by their fathers and brothers.”) (statement of Rep. Cook).

¹³⁹ *Id.* at 141.

¹⁴⁰ *Id.* at 377 (emphasis added).

Granting women direct rather than virtual representation, via the vote, was not viewed as politically feasible at the time.¹⁴¹ A later post-mortem of the failure of the voter apportionment rule identified the unequal percentages of women across the states, and the opposition of eastern states to either losing relative power in the House or enfranchising their female population, as the main objection to its passage.¹⁴² Eastern opposition to voter-based apportionment made its defeat inevitable, regardless of the principled views of democratic equality held by the members of the drafting committee.¹⁴³ To the ex-

¹⁴¹ Globe app. at 116 (“[While voter-based apportionment] might coerce the South to admit negro suffrage, it might drive the North and the East to woman suffrage, for which they were not prepared.”) (statement of Sen. Henderson).

¹⁴² *Id.* at 115-16 (“At an early period of the session the prevailing sentiment . . . was in favor of a simple constitutional provision by which representation should be based on voters qualified as electors under the respective State constitutions and laws . . . Just at this moment . . . [Rep. Blaine] betook himself to the census, and found the proposition would not do. It suddenly became unjust. Why unjust? Because, if adopted, the eastern and Atlantic states would lose power comparatively with the West. The active and enterprising, but poor young men of those States are in the habit of emigrating West. The women are left, but the men seek their fortunes in larger fields of adventure. . . . [I]t might drive the North and the East to woman suffrage, for which they were not prepared. The very moment Mr. Blaine made some figures on this subject and laid them before the House of Representatives, that proposition was dead forever.”) (statement of Sen. Henderson).

¹⁴³ A portion of Senator Jacob Howard’s speech introducing the amendment framed the total population rule in more principled terms, and this portion was quoted by Justice Kagan in *Eventuel’s* oral arguments:

The framers of the Fourteenth Amendment explicitly considered this issue, and, you know, made a decision. So Senator Howard, who introduces the Amendment on behalf of the joint committee that drafts it, talks about these deliberations. And he says the committee adopted numbers as the most just and satisfactory basis, and that’s the principle upon which the Constitution itself was originally framed, referring back to the original drafting. And then he says numbers, not voters; numbers, not property; this is the theory of the Constitution. . . . This is just a clear, explicit choice that was made about what it meant to have equal representation with respect to [House

tent that principle did play a role, it was thus primarily for the protection of virtual representation for disenfranchised women (really, disenfranchised wives) that the population basis for apportionment was retained in 1866, *not* for the virtual representation of aliens.¹⁴⁴

C. ALIENS WERE RETAINED IN APPORTIONMENT FOR SEVERAL REASONS UNRELATED TO VIRTUAL REPRESENTATION

1. *The Same Federalist Concerns of 1787 Were Still Present in 1866*

The drafters of the Fourteenth Amendment did have an opportunity to decline to give states representation for nonvoting aliens.¹⁴⁵

apportionment]. And how you go from that being mandated to it being prohibited in the State context is something that I still can't quite work myself around.

Transcript, *supra* note 51, at 18–19. However, the full quotation, including the two previous sentences which Justice Kagan omitted, actually confirms the account that it was the prospect of the “old states” losing power to the “new states” that defeated the voter-based rule:

Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States, *the old States having proportionally fewer than the new States*. It was desirable to avoid this inequality in fixing the basis. The committee adopted [total] 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.

Globe at 2767 (emphasis added). In context, Senator Howard's explanation appears to be an attempt to put a principled gloss on what was ultimately a decision of political necessity.

¹⁴⁴ Some proposals were made to provide women with direct representation rather than virtual representation, via women's suffrage, but none was politically popular enough to be a serious alternative. *See, e.g.* Globe at 180 (reading a letter from Elizabeth Cady Stanton and proposing an amendment to incentivize equal suffrage for gender as well as race) (statement of Rep. Brooks).

¹⁴⁵ The drafting committee considered one such proposal to count nonvoting citizens but *not* aliens in apportionment. *See* JOURNAL at 50 (“Representatives and direct

After all, simply removing the phrase “and citizens of the United States” from the clause that was eventually passed (and changing the later references to “male citizens” to instead read “male inhabitants”) would have accomplished exactly this, reducing each state’s representation in Congress by the percentage of its male adult population who are nonvoting aliens. Does the continued inclusion of nonvoting aliens in the allocation of representatives lend support to a notion that the drafters of the Fourteenth Amendment *did* think that aliens were virtually represented? In fact, George Smith provides a representative list of twelve instances where the issue of aliens in apportionment was discussed in Congressional debate over Section 2, by supporters and opponents of the amendment alike, and in *none* of these instances is it suggested that aliens’ interests were virtually represented by the voters who lived near them, nor that aliens interests were served by maintaining “representational equality” of the states.¹⁴⁶

First and foremost, Congressional debate shows that nonvoting aliens were kept in a state’s apportionment total for precisely the reasons discussed in Part II. A., *supra*. To do otherwise would have been to give states an incentive to grant the vote to as many of its resident aliens as possible. This rationale was explicitly put forward as a reason for opposing a move to suffrage-based representation multiple times:

There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters, and all conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in

taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State.”). The language was soon amended to replace “citizens of the United States in each State” with “persons in each State, excluding Indians not taxed” by an 11–3 vote. *Id.* at 52.

¹⁴⁶ Smith, *supra* note 102, at 851 n.146.

the national councils. *Foreigners would be invited to vote on a mere preliminary 'declaration of intention.'*¹⁴⁷

Among the fifteen members of the drafting committee, a subcommittee of five members—Senators Fessenden and Howard and Representatives Stevens, Bingham, and Conkling¹⁴⁸—was tasked with examining “the various propositions submitted by members of [the] Committee in relation to apportionment of representatives in Congress, with instructions to prepare and report to [the] Committee a proposition upon that subject.”¹⁴⁹ The statements of these members of Congress are thus particularly relevant to discerning the motives behind the federal rule, and they too focused on the problems of perverse incentives. Representative Roscoe Conkling suggested that “[i]f voters alone should be made the foundation of representation . . . [o]ne State might let women and minors vote. Another might—some of them do—give the ballot to those otherwise qualified who have been resident for only ten days. *Another might extend suffrage to aliens.* This would lead to a strife of unbridled suffrage.”¹⁵⁰ Senator Fessenden likewise worried that “[a] State being possessed of political power, naturally desiring more, might look around to see how it could make itself equal with another State, and thus might extend its franchise; and the other might see that it is likely to be overbalanced, and extend its franchise in the same way, and perhaps the result

¹⁴⁷ Globe at 141 (statement of Rep. Blaine) (emphasis added); *see also* Globe app. at 116 (“The real objection to [voter-based apportionment] in my mind consists in cheapening the franchise to obtain political power.”) (statement of Sen. Henderson); JOURNAL at 211 (summarizing an editorial in *The Nation* magazine, February 1, 1866: “The amendment as reported has two advantages over the proposition to make legal voters the basis of representation. (1) It does not punish, as the other would have done, the older states for sending large drafts of their young men to the West. (2) It does not tempt the states into competing for voters, thus cheapening the suffrage.”).

¹⁴⁸ JOURNAL at 46–47.

¹⁴⁹ *Id.* at 46.

¹⁵⁰ Globe at 357 (emphasis added).

might be an unseemly race between States to increase their political power by increasing the number of their voters.”¹⁵¹

Once again, establishing a uniform nationwide standard of the franchise would have been necessary to solve this problem,¹⁵² as one proponent of moving to suffrage-based representation fully admitted when he proposed an amendment “making the qualification universal . . . that qualified male electors, citizens of the United States of the age of twenty-one years and upward, shall be the basis of representation.”¹⁵³ But once again, for reasons of federalism, “there was considerable opposition within both the [Joint Committee on Reconstruction] itself and Congress as a whole to any measure that would strip the states of their power to control suffrage and elections. . . . [T]he Committee rejected two proposals that would have given Congress express control over ‘elective’ rights and ‘the elective franchise.’”¹⁵⁴ One Senator declared that he was “not now ready to take away from the States the long-enjoyed right of prescribing the qualifications of electors in their own limits. Congress is not now prepared to take and exercise properly this power. Local reasons may exist, and do often exist, for excluding certain persons from the ballot. The people of each State can better judge of these reasons than Congress or the people in other States.”¹⁵⁵ In supporting the Fourteenth

¹⁵¹ *Id.* at 705.

¹⁵² *See id.* at 2883 (“Suffrage has never in the history of the world been made the basis of representation, at least by any Government which does not itself prescribe the qualifications of electors.”) (emphasis added) (statement of Rep. Latham).

¹⁵³ *Id.* at 378 (statement of Rep. Sloan); *cf. id.* at 380–81 (“Representatives shall be apportioned among the several States which may be included within this Union according to the number of male citizens over twenty-one years of age having the qualifications requisite for electors of the most numerous branch of the State Legislature.”) (proposed amendment of Rep. Orth).

¹⁵⁴ Mark R. Killenbeck & Steve Sheppard, Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation, 45 ALA. L. REV. 1121, 1178 (1994) (citing JOURNAL at 54–55).

¹⁵⁵ Globe app. at 120 (statement of Sen. Henderson).

Amendment as it was eventually passed, Representative John Bingham, the committee member who drafted and proposed the language of Section 1,¹⁵⁶ felt the need to reassure that “this amendment takes from no State any right that ever pertained to it. . . . The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.”¹⁵⁷ And likewise in the Senate, Senator Jacob Howard stressed that “[t]he second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.”¹⁵⁸

2. Aliens, Like Male Minors, Were Assumed Likely to Become Voters in a Short and Regular Time Period

Nonvoting aliens were not treated as a serious democratic problem by the drafters of the Fourteenth Amendment because it was assumed that all would, after a fairly short and uniform period of time, become citizens and therefore voters. In justifying the established rule that nonvoting aliens would be counted for state apportionment, Representative Conkling remarked that the question of “how [aliens] should be treated during the interval between their arrival and their naturalization, during their political nonage . . . was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against

¹⁵⁶ See JOURNAL at 87, 106.

¹⁵⁷ Globe at 2542.

¹⁵⁸ *Id.* at 2766; see also Chin, *supra* note 109, at 274–75. Section 2 was, indeed, criticized by those who felt that guaranteeing black suffrage did justify “meddling” with states’ rights. See Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 535 (1989) (“The Fourteenth Amendment was condemned by Wendell Phillips and other strong supporters of the Blacks as ‘a fatal and total surrender’ because it not only failed to enfranchise blacks, but implicitly recognized the right of states to restrict the ballot to whites.”). Not until the political will was mustered to pass the Fifteenth Amendment would the rejection of virtual representation for blacks fully trump federalist concerns.

them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment."¹⁵⁹ In fact, at the time of the Fourteenth Amendment's debate many states actually allowed aliens to vote even *before* they had attained citizenship. "Up to 1875 over half the states allowed aliens to vote if they met certain other requirements, like residence."¹⁶⁰ Though the federal government is given the sole power to grant citizenship through the Naturalization Clause,¹⁶¹ it was established early on that citizenship need not be a prerequisite to suffrage.¹⁶² This progress toward becoming a voter was put forward as the justification for counting aliens *in contrast to* the virtual representation justifications for counting women. "The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother."¹⁶³

More specifically, since enumerations were taken only every ten years, it was assumed that many of those aliens counted would not just become voters eventually, but in fact before the next census and apportionment. Representative William Kelley asked with rhetorical understatement "whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to acquire that

¹⁵⁹ *Id.* at 356 (emphasis added).

¹⁶⁰ PETER ODEGARD, *THE AMERICAN REPUBLIC* 76 (1964). *Cf.* *Globe* at 1285 ("In several . . . of the northwestern States the right of suffrage is given to persons who are not citizens.") (statement of Sen. Johnson); *id.* at 2943 ("In Wisconsin a man can vote who has been on this continent only six months.") (statement of Sen. Grimes).

¹⁶¹ U.S. CONST. art. 1, § 8, cl. 4.

¹⁶² *See, e.g.* IV J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 440 (rev. ed. 1861) [hereinafter IV ELLIOT], *Alien and Sedition Laws*, ("The states, notwithstanding [the federal] power of naturalization, could impart to aliens the rights of suffrage[.]") (statement of Sen. Tazewell, June 1798).

¹⁶³ *Id.* at 3035 (statement of Sen. Henderson).

right; and whether . . . both may acquire it in the current decade.”¹⁶⁴ Representative Kelley explicitly contrasted the position of the non-voting alien with that of the “freeman who can *never* vote [and who] should not be counted among voters *and possible voters* in fixing the basis of suffrage.”¹⁶⁵ Both opponents and supporters of treating aliens differently from freed slaves agreed that five years was at the longest end of potential waits for the vote.¹⁶⁶ Indeed, the phrase “and citizens of the United States” was inserted in the final draft of the amendment relatively late, replacing the former language “its male citizens” under the fear that the former language might be construed to refer to *state* citizenship, something considered less predictable and more open to abuse than federal citizenship and its near-guarantee within five years.¹⁶⁷ Thus, the drafters of the Fourteenth Amendment did not have in mind aliens who might inhabit a state of residency without progress toward citizenship lasting for decades, a picture that, unfortunately, has evolved to become a common reality in 2016.¹⁶⁸ Had someone hypothetically proposed altering the language

¹⁶⁴ Globe at 354.

¹⁶⁵ Globe at 354 (emphasis added).

¹⁶⁶ See *id.* at 2939 (“[I]n some of the Northern states the foreigner is denied a vote for five years.”) (statement of Sen. Hendricks); *id.* at 2987 (“Nearly all the men who come to this country are naturalized in five years. The exceptions are very rare.”) (statement of Sen. Sherman); *id.* at 2535 (“The foreigner who comes to our shores . . . is put upon five years’ probation before we admit him to citizenship.”) (statement of Rep. Eckley); JOURNAL at 299 (“We seclude minors from political rights, not because they are unworthy, but because, for the time, they are incapable. So of foreigners; we grant them the privileges of citizenship only after five years’ probation.”) (Robert Dale Owen to Thaddeus Stevens, quoted from Robert Dale Owen, *Political Results from the Varioloid*, ATLANTIC MONTHLY, June, 1875).

¹⁶⁷ Globe at 2897.

¹⁶⁸ Today, the wait for lawful permanent resident status, a necessary prerequisite to an application for citizenship, can be as long as 24 years, the entirety of which could be spent in the U.S. legally, on temporary worker visas, as a disenfranchised resident. Claire Bergeron, *Going to the Back of the Line*, Migration Policy Institute Brief, March 2013, <http://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-BackofLine.pdf>.

of the Penalty Clause to read “is denied to any male citizen *or non-citizen who has resided in the United States for greater than ten years*,” nothing in the debates suggest such language would have been opposed on any principle that its debaters had cited. Its absence is explained by the fact that, at the time, such persons simply did not exist.

3. Political Pragmatism Limited the Changes that Could be Made by the Fourteenth Amendment

Representative Conkling also admitted, bluntly, that “many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these states are to pass upon the amendment. *It must be made acceptable to them.* For these reasons the committee has adhered to the Constitution as it is, proposing to add to it only so much as is necessary to meet the point aimed at.”¹⁶⁹ Similar pragmatism reigned in the Senate, where Senator Fessenden likewise explained that “my honorable friends from the Pacific coast, where there is a large number of foreigners, *would hardly be willing to have them cut off*, [so that] they have no benefit of political power in the legislation of the country arising from the number of those foreigners who make a portion of their population. . . . [Y]ou meet with troubles of this kind everywhere the moment you depart from the principle of basing representation upon population.”¹⁷⁰

¹⁶⁹ Globe at 359 (emphasis added). *See also id.* at 537 (“[T]here are from fifteen to twenty Representatives in the northern States founded upon those who are not citizens of the United States. . . . I do not think it would be wise to . . . send to the people a proposition to amend the Constitution which would take such Representatives from those States, and which therefore they will never adopt.”) (statement of Rep. Stevens).

¹⁷⁰ *Id.* at 705 (emphasis added). *Cf. id.* at 1256 (“[Voter-based apportionment] throws out of the basis at least two and a half millions of unnaturalized foreign-born men and women, and by this [the loyal states] lose at least fifteen Representatives in the other House . . . It may be best to make this sacrifice . . . you may be able to go before the people and prove that it is right; you may go to the great State of New York and get her to agree to a constitutional amendment basing representation on the number of

Thus, the fact that aliens are still retained in the apportionment totals for House members may have a great deal more to do with politics (specifically, the politics of 1866) than with principle, further weakening the strength of any analogy to the federal rule.¹⁷¹

In summary, a detailed examination of the history of the passage of the Fourteenth Amendment shows that it outright rejected one claim of virtual representation (that of former slaves) and included aliens for concerns entirely apart from virtual representation, concerns that have no analogy at the state level. Instead, the closest analogy to many aliens today, independent adults who are prevented from voting indefinitely, may well be the freed slaves of 1866, whom the drafters of the Fourteenth Amendment removed from Congressional apportionment.

IV. APPLYING THE CONSTITUTIONAL HISTORY TO *EVENWEL* AND BEYOND

The preceding historical examination has, I believe, shown that neither the Framers nor those who enacted the Fourteenth

voters by which she will be unable to count half a million of unnaturalized foreigners for whom she now has four Representatives in Congress; but I apprehend that it will lead to discussion, to division, to opposition, if it ever passes.”) (statement of Sen. Wilson). *But cf.* *Globe app.* at 131 (“So it is said that in the State of New York where there is a large preponderance of foreigners, the State of New York will lose [under voter-based apportionment], because foreigners not being voters will not be counted. Suppose it is, would not that be right? . . . The States ought not to look upon this question as it affects their own particular interests for the time.”) (statement of Sen. Sherman).

¹⁷¹ See George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 *FORDHAM L. REV.* 93, 123 (1961) (“The limitation of the effect of disfranchisement to citizens was not inserted in section 2 by accident. . . . [I]t was chosen at the insistence of New England States who demanded the right to disfranchise their alien population with impunity.”); *cf.* Kennedy, *supra* note 158, at 535 (“[T]he Reconstruction Amendments were as much the product of morally ambiguous bargaining as the document they altered.”).

Amendment believed in the principle that independent and permanently disenfranchised adults could be adequately virtually represented by other voters. Nonetheless, other arguments besides general principles of virtual representation have been put forward in opposition to a ruling for the plaintiffs in *Evenwel*, based either on practical concerns or claims that the specific circumstances in *Evenwel* present a better case for virtual representation than the cases confronted by past generations. I will examine those arguments here.

A. THE CENSUS AND COUNTING CITIZENS

An objection that has been made to voter-based apportionment both before and after the Supreme Court agreed to hear *Evenwel* is that any Supreme Court mandate to take eligible voters into account will require using information that the census does not currently collect.¹⁷² What does the history of the Fourteenth Amendment tell us about plausible burdens it may place on the census?

¹⁷² See, e.g., Nathaniel Persily, *Symposium: Evenwel v. Abbott and the Constitution's big data problem*, SCOTUSBLOG (Aug. 3, 2015), <http://www.scotusblog.com/2015/08/symposium-evenwel-v-abbott-and-the-constitutions-big-data-problem/#more-230547> (“[T]he Census form we now receive every ten years . . . does not ask anything about citizenship, voter registration, or anything comparable. . . . Unless the Justices are prepared to mandate a new kind of ‘citizen census’ . . . they should leave it to the states to draw their districts using the most accurate data available.”); Richard L. Hasen, *Only Voters Count?*, SLATE (May 26, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/evenwel_v_abbott_supreme_court_case_state_districts_count_voters_or_total.html (“[I]t is not even clear we have good measures of citizen population, meaning there could be great errors in how newly ordered redistricting following *Evenwel* would be conducted.”); Bennett, *supra* note 33, at 528 (“If some more limited base [than total population] were thought ideally appropriate for intrastate apportionment purposes, further imprecision could often be expected from an effort to quantify that base.”); *Note: Reapportionment*, *supra* note 36, at 1254–55 (“Most legislatures use total number of inhabitants, the figure computed in the federal census, as their population base for apportioning districts. . . . it seems clear that the administrative convenience in using this figure would outweigh almost all objections that might be raised by the fact that the

In the debates of 1866, supporters of moving to a fully voter-based apportionment realized that such a rule would require collecting census data on voters, and in some cases included such a mandate explicitly in their proposed amendments. One proposal specified that “[a] true census of the legal voters shall be taken at the same time with the regular census.”¹⁷³ In rejecting these proposals, then, the drafters rejected such an explicit constitutional requirement for the census. Does this mean that any interpretation of the Equal Protection Clause that necessitated an accurate census of voters, as a voter-based apportionment for state legislative districts inevitably would, must be against the intent of those who created the Fourteenth Amendment?

The answer is not so simple. For though all *explicit* requirements on the census to take note of whether a resident is eligible to vote were rejected, the rule that was enacted carries an *implicit* requirement that the census, in addition to calculating the total population of every state, must calculate two other figures: the total number of male 21-year-old citizens in each state, and the total number of male 21-year-old citizens in each state denied the right to vote for reasons other than conviction of crime or rebellion. This is because these two figures must be known in order to distribute representatives to the states as the rule requires, and thus are necessary for the Fourteenth Amendment to actually be implemented.

That a rule of apportionment can impose an implicit requirement on the census is not just theoretical, it was in fact actually carried out

figure would include small distortions based on the number of aliens, minors, and convicted felons in individual districts.”).

¹⁷³ Globe at 10 and JOURNAL at 41 (proposal of Rep. Stevens); see also Globe at 407 (“The Congress . . . shall provide by law for the actual enumeration of [legal] voters; and such actual enumeration shall be separately made in a general census . . . within every subsequent term of ten years.”) (proposal of Rep. Schenck).

in the first eight national censuses. The original text of Article I, Section 2 nowhere explicitly requires the census to take note of whether a person is a slave or free.¹⁷⁴ Yet the original rule of apportionment, which counted the two differently, could only have been faithfully followed if the census did note whether every person counted was slave or free. And the census did indeed make separate counts of slave and free persons,¹⁷⁵ as demonstrated by the numerous references to the totals for each from the 1860 census that were made in the debates of 1866.¹⁷⁶

Likewise, it would be impossible to carry out the express command of the current rule of apportionment, Section 2 of the Fourteenth Amendment, without an accurate count of both franchised and disenfranchised male adult citizens. Indeed, some critics of the final version of the amendment expressed concern that it would require the census to take note of the voting laws and eligible voters in

¹⁷⁴ U.S. CONST. art. 1, § 2, cl. 3. (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

¹⁷⁵ See Globe at 2769 (“The census always discriminates between the black and the white population, and it makes several other discriminations.”) (statement of Sen. Ward); C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. OF SOC. 563, 565 (2003) (“In 1790, the first Secretary of State, Thomas Jefferson, carried out the first census of the United States. As dictated by the Constitution, the enumeration excluded Indians exempt from taxes and counted the number of slaves in fractions of three fifths . . . In the first five censuses of this nation, marshals were responsible for recording the political and legal status of the population, whether free or enslaved, and if American Indian, whether a taxpayer or not.”); Anderson, *supra* note 93, at 25 (“The Constitution also required the identification of the slave and the free population for the formula to apportion seats in the House among the states.”).

¹⁷⁶ See, e.g., Globe at 357 (statement and table of Rep. Conkling); *id.* at 2767 (statement of Sen. Howard).

each state, using language quite similar to critics of moving to a voter-based apportionment today.¹⁷⁷ Representative Stevens, the primary author of Section 2, directly acknowledged that “if this amendment prevails you must legislate to carry out many parts of it. You must legislate for the purpose of ascertaining the basis of representation.”¹⁷⁸ The passage of the amendment after this acknowledgment and despite the practical objections raised thus represented a determination that the goal of the amendment was worth the logistical difficulties.

As it turned out, however, this congressional will was never successfully translated to executive action. Section 2 was never enforced

¹⁷⁷ “Under the [proposed final version of Section 2], it seems to me, you must have a census commission all the time in operation in order to keep pace with the variations that will take place from time to time.” *Id.* at 2769 (statement of Sen. Ward); *see also id.* at 3038–39 (“The census-taker will find it necessary . . . to note down in his tables the various persons within the State who are capacitated to vote . . . Without this exact information to be furnished from the State, it will be readily perceived that it will be impossible to fix and settle the ratio of representation which the State shall be entitled to. It appears to me that it introduces a rule which is so uncertain, so difficult of practical application, as not only greatly to increase the expenses of ascertaining the basis of representation by Congress in procuring the necessary information, but in many cases the returns must be so inaccurate and unreliable as to be next to worthless.”) (statement of Sen. Howard); *cf.* Chin, *supra* note 109, at 298 (“If Section 2 operates alongside the Fifteenth Amendment as a means of coercing universal suffrage and must be imposed upon a finding of discrimination and withdrawn when the discrimination is remedied, then in many periods of American history, daily reapportionments of Congress would have been required, as on Day 1 when Birmingham, for example, is found to have unconstitutional voting requirements, and then again when they are fixed on Day 7.”). The Supreme Court has in fact already suggested it would be open to mandating more frequent apportionments. *Burns v. Richardson*, 384 U.S. 73, 96 (1966) (“It may well be that reapportionment more frequently than every 10 years, perhaps every four or eight years, would better avoid the hazards of [the registered voters basis].”).

¹⁷⁸ *Globe* at 2544.

as written,¹⁷⁹ and today remains largely ignored¹⁸⁰ or treated as a historical curiosity,¹⁸¹ with only occasional scholarly attempts at its revival.¹⁸² Some have argued that the Fifteenth Amendment implicitly repealed the apportionment rule of Section 2 of the Fourteenth

¹⁷⁹ “There never has been a successful implementation of the full provisions of section 2 of the fourteenth amendment. No state has ever suffered a reduction in congressional representation through its disfranchisement of adult male citizens.” Zuckerman, *supra* note 171, at 124; *see also* Chin, *supra* note 109, at 260 (“[N]o other provision of the Constitution of 1787 or any of its amendments has been so comprehensively unenforced.”); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L. REV. 108, 108 (1960) (“The second section of the Fourteenth Amendment is one of the few provisions of the Constitution which no one has seriously attempted to enforce through judicial action.”); Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 L. TRANSITION 128, 128–29 (1963) (“[O]n February 2, 1872, Congress enacted a statute which restated the second sentence of section 2. Nothing further has ever been done to enforce or implement this constitutional provision.”).

¹⁸⁰ *See* Chin, *supra* note 109, at 289 n.150 (“[S]ome Supreme Court opinions quote what appears to be the entirety of ‘Section 2’ without indicating that it has a second sentence.”). Scholars have also generally ignored the implications of the Penalty Clause of Section 2 of the Fourteenth Amendment for the requirements put on the census, assuming that the first sentence represents the full extent of the Constitutional requirements. *See, e.g.*, Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 773 (2011) (“Consistent with the constitutional command to conduct an ‘actual Enumeration,’ ‘counting the whole number of persons in each State,’ the census counts citizens and noncitizens alike.”) (emphasis in original) (citing Art. 1 § 2 and the first, *but not the second*, sentence of amend. XIV, § 2); *id.* at 776 (“A constitutional rule requiring equal numbers of citizens would necessitate a different kind of census than the one currently conducted (or for that matter, the one the text of the Constitution requires).”).

¹⁸¹ *See, e.g.*, Chin, *supra* note 109, at 273; Killenbeck & Sheppard, *supra* note 154, at 1177.

¹⁸² *See, e.g.*, Katherine Shaw, *Invoking the Penalty: How Florida’s Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What To Do About It*, 100 NW. U. L. REV. 1439 (2006) (arguing that Section 2 should be invoked to reduce Florida’s apportionment for its population of felons disenfranchised for life); Killenbeck & Sheppard, *supra* note 154 (arguing that Section 2 should be invoked to reduce apportionment to states with Congressional term limits).

Amendment.¹⁸³ If, in fact, it was not implicitly repealed, then the census remains in violation of the Fourteenth Amendment to this day, since more than half of the states have some form of disenfranchisement for those ruled mentally incompetent,¹⁸⁴ a restriction that should require a reduction in apportionment both under the plain text of the amendment¹⁸⁵ and by the explicit acknowledgment of a member of the drafting committee,¹⁸⁶ yet no official count is made of

¹⁸³ Chin, *supra* note 109, at 259; Emmet O'Neal, The Power of Congress to Reduce Representation in the House of Representatives and in the Electoral College, 131 N. AM. REV. 530 (1905).

¹⁸⁴ See Kay Schrivener, Lisa Ochs, & Todd Shields, *Democratic Dilemmas: Notes on the ADA & Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000). Many states, in fact, have blanket disenfranchisement for all people ruled mentally incompetent to vote enshrined in their state constitutions. See, e.g., N.J. CONST. art. 2, § 1, ¶ 6 ("No person shall have the right of suffrage who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting."). For an argument that such disenfranchisement should not fall under Section 2, see Zuckerman, *supra* note 171, at 108.

¹⁸⁵ See Chin, *supra* note 109, at 289 n.154.

¹⁸⁶ "Mr. CLARK: "I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State. Mr. HOWARD: Certainly it does, no matter what may be the occasion of the restriction. . . . No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the state loses representation in proportion." Globe at 2767; cf. Cong. Globe, 42d Cong., 2d Sess. 83 (1871) (statement of Rep. Garfield); Killenbeck and Sheppard, *supra* note 154, at 1213 ("Any argument that Section 2 must be limited to matters involving the voting rights of African-Americans must, of course, give way in the face of the [Supreme] Court's abandonment of similar limitations on Section 1."); Bonfield, *supra* note 179, at 114 ("[T]he legislative history clearly demonstrates that the consensus of those who enacted both section 2 and present section 6 of 2 U.S.C. (1958) was that they are not so limited [to only racial distinctions] It was clear to them that if the provision were to be drawn so narrowly, it could easily be circumvented."). *Contra* Chin, *supra* note 109, at 268–69 ("The race-neutral language of Section 2 raised the possibility that it applied to all grounds of disenfranchisement, imposing its penalty if individuals were disenfranchised for any reason, except those explicitly authorized. However, the Constitution's traditional discretion about race suggests that this conclusion is not compelled. . . . Historians and judges

the number of such disenfranchised citizens in each state who are 21-year-old males (nor, obviously, is any adjustment made to the allocation of Representatives based on the number of such persons in each state). But whether Section 2 was implicitly repealed by the Fifteenth Amendment or has just fallen into constitutional desuetude, the important question for interpreting the Equal Protection Clause and the federal analogy is the requirement the amendment put on the census *when it was written*.¹⁸⁷ And here, the actions of Congress soon after they enacted Section 2 show that they knew exactly what it required.

In 1871, just five years after Congress approved the Fourteenth Amendment, the House passed by voice vote a resolution that with data collected from the just-completed census “the Secretary of the Interior be . . . directed to furnish to the House of Representatives the following information; namely . . . the number of male inhabitants of each state, twenty-one years of age and over; [and] the number of male inhabitants in each state, being twenty-one years of age, and citizens of the United States, whose right to vote in such state in any election . . . is denied, or in any way abridged, except for participation in rebellion or other crime.”¹⁸⁸ The House that passed this resolution still contained seventeen of the 120 members who voted in favor of the Fourteenth Amendment.¹⁸⁹ One of those seventeen, Representa-

agree that the Fourteenth Amendment made no mention of race for political reasons, and Section 2 makes perfect linguistic sense if the term ‘African-American’ is read into it.”).

¹⁸⁷ See Chin, *supra* note 109, at 287 n.136 (“That a statute has been repealed does not mean that it is irrelevant to the meaning of surviving statutes.”).

¹⁸⁸ Cong. Globe, 42d Cong., 2d Sess. 42 (1871); See also Zuckerman, *supra* note 171, at 111.

¹⁸⁹ For the House roll call vote on final passage of the resolution submitting the Fourteenth Amendment to the states, see Globe at 3149. For a roll call listing the members of the House from the day before the resolution sent to the secretary, see Cong. Globe, 42d Cong., 2d Sess. 31 (1871).

tive James Garfield, chaired a subcommittee with the express purpose of investigating state disenfranchisement, acknowledging the task as both difficult and constitutionally necessary, stating that “[t]he census is our only constitutional means of determining the political representative population. The Fourteenth Amendment has made that work a difficult one.”¹⁹⁰ Nonetheless, Representative Garfield did not consider this to be an avoidable difficulty, and undertook to create a preliminary table of nine categories of disenfranchisement in the various states as the first step in apportionment.¹⁹¹

Prior to the House resolution, the director of the census had also, on his own initiative, added two questions to the census form. “The first was intended to obtain the number of male citizens of the United States, in each State, of twenty-one years and upward; the second, to obtain the number of such citizens whose right to vote is denied or abridged on other grounds than rebellion or other crime.”¹⁹² As one scholar has noted, “It is significant that the director of the 1870 census, a person most likely to be aware of the intent of the Congress which had debated and voted for the adoption of section 2, conceived it to be his duty to obtain the facts required by that section.”¹⁹³ It is because collection of this data had already been attempted that the secretary was able to respond to the resolution with the requested count only four days later.¹⁹⁴ However, the resulting numbers of disenfranchised were implausibly small,¹⁹⁵ and the Secretary admitted that his agencies “are not deemed adequate to the determination of

¹⁹⁰ See Zuckerman, *supra* note 171, at 108 (quoting Cong. Globe 41st., Cong., 2d Sess. 52 (1869)).

¹⁹¹ *Id.*; see also Cong. Globe, 42d Cong., 2d Sess. 35 (1871).

¹⁹² Report of the Superintendent of the Ninth Census, 1 NINTH CENSUS OF THE UNITED STATES XXVIII (1870) (quoted in Margolis, *supra* note 179, at 156); see also Zuckerman, *supra* note 171, at 110.

¹⁹³ Margolis, *supra* note 179, at 156.

¹⁹⁴ See Zuckerman, *supra* note 171, at 111-12.

¹⁹⁵ *Id.* at 136.

the numerous questions of difficulty and nicety which are involved” in making such a count.¹⁹⁶ Explanations for the continued failure of the census to follow the text of Section 2 have generally focused on the difficulty involved, without denying that the enactors intended for this difficult process to be carried out nonetheless.¹⁹⁷

Ultimately, it was a lack of executive branch will, as well as later abstentions by the judicial branch to get involved on the basis of the “political question” doctrine,¹⁹⁸ that led to the failure of Section 2 to be enforced, not a Congressional determination that they had not understood the implications of the rule they enacted. Thus, there is little doubt that when the Fourteenth Amendment was passed, its enactors intended that the census take note of whether every male 21-

¹⁹⁶ *Id.* at 111 (quoting Cong. Globe, 42d Cong., 2d Sess. 66 (1871)).

¹⁹⁷ *See, e.g., id.* at 135 (“[T]he framers of the fourteenth amendment did not make the task of implementing the provisions of [Section 2] an easy one to perform. The arduous task of placing the long and difficult language of the section into a workable statutory plan has baffled congressional minds for nine decades.”); Haynes, *supra* note 127, at 508 (“Massachusetts, as well as Mississippi, each year excludes from the suffrage ‘male inhabitants of such state, being twenty-one years of age and citizens of the United States’ [via literacy requirements]. Why, then, has not the [Fourteenth Amendment] penalty been inflicted? . . . [T]he obvious futility of attempting to apply the penalty provided by the constitution . . . explains inaction in the face of these restrictions. Granted that some census, state or national, may tell with the requisite accuracy the number of male citizens twenty-one years of age and over, what basis is there for estimating the number of those whom the educational test excludes from the suffrage? . . . [T]he vast majority of those actually excluded foresee that result and never face the ordeal.”).

¹⁹⁸ *See, e.g.,* United States v. Sharrow, 309 F.2d 77 (2d Cir. 1962) (declining to require the census bureau to collect data on disenfranchised citizens, per the requirements of Section 2); Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945) (declining to enforce the Section 2 penalty on Virginia for its denial of the vote via a poll tax); Dennis v. United States, 171 F.2d 986 (D.C. Cir. 1948) (declining to enforce the penalty on Mississippi for various voter abridgments) Lampkin v. Connor, 239 F. Supp. 757 (D.D.C. 1965) (declining to enjoin the Secretary of Commerce to enforce Section 2); *see generally* Margolis, *supra* note 179.

year-old citizen is eligible to vote, and if not, for what reason.¹⁹⁹ The notion that the Equal Protection Clause of Section 1 of the Fourteenth Amendment might require the census to take note of who is an eligible voter in each state becomes much less radical when we realize that Section 2 of the same amendment plainly does so as well.²⁰⁰

B. VIRTUAL REPRESENTATION BY RACE

It could be argued that the concerns expressed by the enactors of the Fourteenth Amendment bear little weight today, because they dealt with a case where, uniquely in our nation's history, the interests of voters and nonvoters living in close proximity were diametrically opposed: disenfranchised black former slaves living alongside white voting former slaveholders. Today, in contrast, the districts that often display the highest percentage of nonvoters are racially homogenous districts where nonvoting Hispanics live among voting Hispanics.²⁰¹ Courts and commentators have often viewed *Evenwel* and other post-*Burns* cases through the lens of an attack on the political power of these Hispanic districts, assuming the political goals of voters and

¹⁹⁹ It is necessary for the census to distinguish whether the disenfranchisement has occurred as punishment for a crime or rebellion, or for some other reason. The latter would necessitate removal from apportionment, the former would not. See text of amendment, *supra* Part III. A.

²⁰⁰ "[I]f 'apportionment practice would seem to indicate that at least the first sentence of Section 2 has been considered mandatory,' we wonder why the second is not also, unless 'shall' somehow changes meaning in the transition from apportionment to reduction in representation. . . . 'shall' is the language of command, 'mandatory and not precatory.'" Killenbeck & Sheppard, *supra* note 154, at 1190 & n.362 (quoting *Sharrow v. Brown*, 447 F.2d 94, 98 n.9 (2d Cir. 1971); *Banner Indus. v. Cent. States Pension Fund*, 875 F.2d 1285, 1288 n.2 (7th Cir. 1989)).

²⁰¹ See Michael Li, *A Stealth Attack on Voting Rights is Brewing*, TRIBTALK (Aug. 6, 2015), <http://www.tribtalk.org/2015/08/06/a-stealth-attack-on-voting-rights-is-brewing/> ("[U]p to half of adult Latinos in urban areas like Dallas and Houston are non-citizens, meaning that many Latino-majority state Senate districts have significantly fewer actual voters than non-Latino districts.") (citing data from Texas Legislative Council).

nonvoters in these racially homogeneous districts to be largely aligned.²⁰² As the Seventh Circuit has noted, “if it is assumed that citizen and noncitizen Latinos have a strong community of interest, then giving citizen Latinos extra voting power based on the number of noncitizen Latinos gives the latter a kind of representation in the political process.”²⁰³ Does this justify using total population rather than voter population in particular districts with high racial homogeneity?

The first problem with this argument is that it would go against the spirit of skepticism toward racial stereotyping that the Supreme Court has frequently demonstrated. The Court has always conditioned an assumption that voters of one race virtually represent other voters of the same race upon an empirical finding that racial bloc voting is, in fact, already taking place.²⁰⁴ The test articulated by the Supreme Court for determining that a racial group is being electorally

²⁰² See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990) (“In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district.”); *Calderon v. City of Los Angeles*, 481 P.2d 489, 493, 495 (Cal. 1971) (“Racial or ethnic minorities often have distinct political interests, not shared by the general public, for which they seek political redress through their elected representatives. . . . Where, for any reason, a nonpopulation-based scheme tends sharply to reduce the representation of such groups, it must be regarded as constitutionally suspect.”); *Cabeza*, *supra* note 49, at 95 (“When the Latino population grew too large to ignore and a challenge to the power structure arose, the County tried to change the rules—by advocating for apportionment based on voting population.”); *Li*, *supra* note 201 (“Latinos are currently able to elect their community’s candidate of choice in just seven of 31 (22.5 percent) of the districts in the Texas Senate. . . . [I]t’s easier to argue that Latino communities in Texas today have too little representation, not too much.”)

²⁰³ *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); cf. *Bennett*, *supra* note 33, at 533 (“If the eligible and ineligible populations are both largely immigrant, with a common language and similar patterns for their countries of origin, that might plausibly supply a degree of the desired attachment, so that the voting population of the districts could represent ‘virtually’ the interests of the ineligible population.”).

²⁰⁴ See, e.g., *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 n.24 (1977) (“[T]he white voter who . . . is in a district more likely to return a

underrepresented requires showing “the existence of a correlation between the race of voters and the selection of certain candidates.”²⁰⁵ As the Court has emphasized, “minority-group political cohesion never can be assumed, but specifically must be proved in each case” when applying this test.²⁰⁶ But, of course, an examination of voting patterns can never show the existence of a correlation between the political preferences of voters and *nonvoters* of the same race. Allowing Texas to assume that its ineligible voters will share the political preferences of eligible voters of the same race would, then, be the first time the Court has endorsed a belief that homogenous racial-bloc political preferences are inevitable and need no empirical verification, a departure from prior precedent. In fact, an assumption that Hispanic citizens and Hispanic noncitizens will always have the same political opinions would likely “reinforce[] the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls,”²⁰⁷ perceptions which the Court “ha[s] rejected . . . as impermissible racial stereotypes.”²⁰⁸

More fundamentally, the rule put in place by the Supreme Court in *Evenwel* will be the rule for all contexts, not just the particular districts at issue in Texas. The present racial homogeneity of these proposed state senate districts is largely the result of current interpreta-

nonwhite representative will be represented, *to the extent that voting continues to follow racial lines*, by legislators elected from majority white districts.”) (White, J., plurality opinion) (emphasis added).

²⁰⁵ *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986).

²⁰⁶ *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (citing *Grove v. Emison*, 507 U.S. 25, 40-41 (1993)).

²⁰⁷ *Shaw*, 509 U.S. at 647.

²⁰⁸ *Id.*

tions of the Voting Rights Act that require gerrymandering some majority-minority districts where they can be created,²⁰⁹ but it will not necessarily be the case that such rules will always be in place. In fact, where districts show *too much* racial homogeneity, they may also be vulnerable to challenge under the VRA.²¹⁰ Since *Evenwel* will determine an electoral principal that will apply far beyond the particular situation in Texas, racial homogeneity, even if it did lead to a greater likelihood of virtual representation, cannot be assumed to be inevitable. The only guarantee, so long as the U.S. continues to use geographically contiguous districts, is that the voters and nonvoters in a district will live near each other. If the case is to be made that voters in legislative elections will, in all circumstances, be decent proxies for the political will of nonvoters, it will require an argument for virtual representation based on geographic proximity.

C. VIRTUAL REPRESENTATION BY GEOGRAPHY

Some have argued that, by living in the same geographic areas, the interests of voters and nonvoters are likely to be aligned, regardless of racial or other demographic similarities.²¹¹ Yet these arguments were also made – and rejected – in the debates of 1866 by opponents of removing disenfranchised former slaves from apportionment. One Democratic Senator who opposed the amendment declared that “[i]t matters not by whom the Virginia Representative may be elected, if when here his votes shall be cast in favor of the

²⁰⁹ 42 U.S.C. § 1973; *Thornburg v. Gingles*, 478 U.S. 30 (1986).

²¹⁰ See *Bennett*, *supra* note 33, at 534 (“[I]f too much of a particular racial minority is ‘packed’ into a given district, the courts will lend a sympathetic ear to a Voting Rights Act challenge on the ground that such packing dilutes the political force of that minority in the polity as a whole.”).

²¹¹ See, e.g., *Reader*, *supra* note 72, at 558 (“[P]eople who reside in the same geographic region have interests that tend to correlate. For example, most people, regardless of their economic means, support ‘pork barrel’ legislation that brings government funds into their district.”).

negro's interest. If he represents the whites he cannot fail to represent the negroes, for their pursuits are regulated by soil and climate and productions. Their pursuits are necessarily similar and their interests cannot be divided."²¹² The reality, of course, was that sharing a home, and even a pursuit, did not lead to shared political interests.

Further, unlike at the interstate level, the intrastate level allows for the possibility of intentionally gaming the system by means of gerrymandering. Thus, there is the possibility, unlike at the state level, of nonvoters being intentionally clustered in the same districts as voters aligned with those drawing the districts. Indeed, there is some evidence that this has already happened in the case of choosing prison locations and drawing the district boundaries around those prisons.²¹³ Is it out of the question to imagine creative gerrymandering in the future in which large populations of nonvoting aliens are put in the same district as citizens of opposite political views, to enhance the voting power of those citizens?

²¹² Globe app. at 118 (statement of Sen. Henderson).

²¹³ See Levinson, *supra* note 40, at 1288–89 (citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 189–90* (2002) (“The strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation.”); Robert Whiteside, *Map: Sprawling for Prisoners*, *HARPER'S MAGAZINE*, Feb. 2002, at 88 (“Since 1982, [Florence, Arizona] has repeatedly expanded its borders to include prisons being built beyond them, inflating its census count . . . Today, three fourths of Florence's 21,000 residents are incarcerated . . . [Prisoner's] numbers influence the drawing of congressional and state districts. And the resulting power shifts can be dramatic, given that most prisoners are minorities from urban, Democratic areas and reside in typically white, rural, Republican enclaves hundreds, even thousands, of miles from home.”)); Eric Lotke and Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 *PACE L. REV.* 587 (2004); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 *WM. MITCHELL L. REV.* 1241 (2012); Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, *PRISON POLICY INITIATIVE* (Apr. 22, 2002), <http://www.prisonpolicy.org/importing/importing.shtml>.

Additionally, though some have suggested that the nature of defined geographic districts will lead representatives to naturally feel they represent the interests of all their constituents,²¹⁴ the mechanisms of actual political accountability, which is by voting, have led to a system in which expecting representatives to give the desires of disenfranchised constituents the same weight as franchised constituents is likely unrealistic.²¹⁵

As Sanford Levinson has said, “we might legitimately compare the ‘illegal alien’ and ‘disenfranchised felons’ bonuses, in their practical political effects, to the three-fifths bonus, at least in some states and legislative districts.”²¹⁶ The dark history Levinson references is indeed useful in reminding us that letting others “own the political power”²¹⁷ of those who live near them is a dangerous game, one that can, and has, lead to disastrous results.²¹⁸

V. ALIEN SUFFRAGE: THE TRUE STATES’ RIGHTS OPTION

Many have argued that deciding for the plaintiffs in *Evenwel* would be to take away an option from the states, no longer allowing

²¹⁴ See *supra* note 120 and accompanying text.

²¹⁵ “[I]t is fair to suggest that the dominant theory of representation in this country, often articulated by public officials themselves, is that their job is to respond to, perhaps even to mirror, the preferences of voting constituents. . . . If Yale Professor David Mayhew is correct that most members of Congress are motivated above all by the desire to be re-elected, then it is exceedingly difficult to explain why those we call ‘representatives’ would ever take into account the interests of non-voters, especially if, in contrast to teenagers, there is no likelihood that they might become voters in the relatively near future.” Levinson, *supra* note 109, at 949–50.

²¹⁶ Levinson, *supra* note 109, at 951.

²¹⁷ Statement of Rep. Conkling, *supra* note 110.

²¹⁸ “You once trusted the duty of exercising both the civil and political rights of the blacks to the whites and it came near destroying every spark of republicanism they ever possessed. . . . It is now a fixed fact that it is not safe to add to the political and social power of the white man the political and social power of the black man.” Globe at 2799 (statement of Sen. Stewart).

them to include aliens in their representation.²¹⁹ But this is not true, because it misses a choice states have always had. This is the choice to give the franchise to residents of the state who have not been granted citizenship by the federal government.²²⁰

In the wake of the rising proportion of aliens that has led to the controversy in *Evenwel*, some localities have already made this choice. “In 1992, Takoma Park, Maryland extended the right to vote in local elections to legal resident aliens after discovering that some of its ‘wards had far more eligible voters than others because some contained a large alien population.’”²²¹

If a state legislature were to agree with the Garza court that “Non-citizens . . . have a right to . . . influence how their tax dollars are spent,”²²² this influence could be given to them via suffrage. Since the nation’s founding, the expansion of the franchise has been a consistent theme of Constitutional Amendment, which might be viewed as the gradual alignment of our democratic practice with the skepticism of virtual representation that birthed this country. Amendments guaranteeing the vote to women,²²³ those without the property necessary to pay poll taxes,²²⁴ and 18-20 year olds²²⁵ each represented a

²¹⁹ See, e.g., Hasen, *supra* note 172 (“If successful, [*Evenwel*] will undermine federalism by limiting states’ rights to design their own political systems.”).

²²⁰ See, e.g., Leon Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Levinson, *supra* note 40, at 1273 (noting a recent trend of granting alien suffrage in municipal elections).

²²¹ Bennett, *supra* note 33, at 512 n.45 (quoting Raskin, *supra* note 220, at 1463); see also Bennett, *supra* note 33, at 530 n.110 (“In a limited number of local jurisdictions, [legal aliens] are accorded the vote still, including, for instance, in elections for local school ‘councils’ in Chicago.”).

²²² *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990).

²²³ U.S. CONST. amend. XIX.

²²⁴ U.S. CONST. amend. XXIV.

²²⁵ U.S. CONST. amend. XXVI.

rejection of the notion that these persons could be adequately virtually represented by others.

The history of suffrage in the United States thus represents a clear path away from virtual representation and toward direct representation, via the granting of the ballot.²²⁶ Usually the end of the former has been simultaneous with the granting of the latter, as with suffrage for women and 18-year-olds. On one occasion in our history, there has been a gap of two years between the end of virtual representation and the beginning of actual representation (in theory, if not in practice).²²⁷ This is the gap between the Fourteenth and Fifteenth Amendments. The rejection of virtual representation for the newly freed slaves is traditionally identified with the Fifteenth Amendment. In fact, it dates to the Fourteenth Amendment, where the elimination of those newly freed slaves from the calculation of the voting strength of their white neighbors was explicitly justified through a rejection of arguments that they were virtually represented. It is clear that the end of virtual representation for freed slaves was seen by the drafters of the Fourteenth Amendment as a natural first step toward what they thought was not yet politically possible at the time, mandating suffrage for those freed slaves. The same people who pro-

²²⁶ Cf. Fishkin, *supra* note 50, at 1910 ("It is, in a way, a reflection of a long-term democratic triumph that we have reached the moment when litigants can come forward and argue seriously that The People consist only of the eligible voters. As the franchise has grown, virtual representation has narrowed in ways that the Framers of our Constitution could scarcely have imagined.").

²²⁷ The Fifteenth Amendment, like the Penalty Clause of the Fourteenth Amendment, went notoriously unenforced for most of its first hundred years. See Chin, *supra* note 109, at 283 ("Sadly, the Fifteenth Amendment's prohibition on racial discrimination was not honored; many states defied the Constitution and discriminated anyway.").

posed the end of virtual representation often also proposed mandating actual representation.²²⁸ It was only political concerns, and a desire to have the Amendment passed, that led to actual representation being left for another day.²²⁹

²²⁸ See, e.g., JOURNAL at 44 (“[N]o state shall make any distinction in the exercise of the elective franchise on account of race or color.”) (proposal of Rep. Boutwell); Globe app. at 115 (“No State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race.”) (proposal of Sen. Henderson).

²²⁹ See Globe at 536 (“How many [States] would allow Congress to come within their jurisdiction to fix the qualification of their voters? . . . I venture to say you could not get five in this Union. And that is an answer, in the opinion of the committee, to all that has been said on this subject.”) (statement of Rep. Stevens); *id.* at 703–04 (“Why not propose a simple amendment . . . doing away at once with all distinctions on account of race or color in all the States of this Union so far as regards civil and political rights, privileges, and immunities? . . . I would like that much better . . . but, after all, the committee did not recommend a provision of that description. . . . [T]he argument that addressed itself to the committee was, what can we accomplish? What can pass? If we report a provision of this kind is there the slightest probability that it will be adopted by the States and become a part of the Constitution of the United States? It is perfectly evident that there could be no hope of that description.”) (statement of Sen. Fessenden); *id.* at 358 (“The northern States, most of them, do not permit negroes to vote. Some of them have repeatedly and lately pronounced against it. Therefore, even if it were defensible as a principle for the General Government to absorb by amendment the power to control the action of the States in such a manner, would it not be futile to ask three quarters of the States to do for themselves and all others, by ratifying such an amendment, the very thing which most of them have already refused to do in their own cases?”) (statement of Rep. Conkling); *id.* at 765 (“The States will not adopt it. They will stand upon the Constitution their fathers gave them. . . . [T]hey would claim even to the point of revolution that they should have a right to regulate suffrage within their own limits.”) (statement of Sen. Johnson); *id.* at 2766 (“[I]f my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least. . . . [B]ut the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises[?] . . . The committee were of the opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race.”) (statement of Sen. Howard); Globe app. at 131–32 (“If we propose to exclude those eleven States from the Union until we can compel three fourths of the States to vote for negro suffrage, then these eleven States will be a Hungary, a Poland, an Ireland, to be ruled over by the military rod for years to come. . . .

The *Chen* court recognized the purpose of the Penalty Clause of Section 2. “While the final version of section 2 provided generally for the use of total population figures for purposes of allocating the federal House of Representatives among the states, it also included a mechanism to insure that egregious departures from the principle of *electoral* equality – the disenfranchisement of adult male “citizens” – would be penalized.”²³⁰ In fact, though, the debates show that it was not the denial of the vote to citizens *per se* that constituted the egregiousness. It was the fact that, at the time, disenfranchised male citizens were the only independent people who *were* denied the vote indefinitely.²³¹

Evenwel presents the opportunity to confront another uncomfortable question of virtual representation, one that has come into existence since the creation of a new phenomenon, alien residents, living in the United States perpetually with no certain time-frame for attaining citizenship, and therefore no certain time-frame for attaining the franchise. While the “five-year wait” familiar to the framers of the Fourteenth Amendment lives on, this five-year period does not begin until an alien has been granted *permanent* residence, a wait that can last for decades.²³²

A victory for the plaintiffs in *Evenwel* would end the ability of others to claim the right to virtually represent nonvoting aliens, just as the Fourteenth Amendment did for nonvoting African Americans. But, just like the Fourteenth Amendment, it would not be the whole solution to the problem. A victory in *Evenwel* would rather set the

[W]ithout going into its merits, I say it is simply proposing that which we cannot adopt.”) (statement of Sen. Sherman); *see also* JOURNAL at 206–07; *id.* at 302; Chin, *supra* note 109, at 267 n.47.

²³⁰ *Chen*, 206 F.3d at 527.

²³¹ *See, e.g.*, Statement of Rep. Kelley, *supra* note 165.

²³² 8 U.S.C. § 1427(a)(1) (1994).

stage for states to consider the natural next step, just as the Fourteenth Amendment naturally led to the logic of the Fifteenth Amendment.

Debating the merits of a state's choice to grant alien suffrage is beyond the scope of this Article. What is important is simply that it is a state's choice, and it would remain so after a win for the plaintiffs in *Evenwel*. Those who make the plausible case that aliens deserve some regard in the political process are not limited to defending the perilous mechanism of virtual representation in the courts. They can rather make their case directly, in the legislative process of the individual states. A victory for the plaintiffs in *Evenwel* would finally present the question to the states front and center: If the political power of aliens shouldn't be "owned"²³³ by their neighbors, is it time to let them own it themselves?

²³³ See statement of Rep. Conkling, *supra* note 110.