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Political Apportioning Is Not a Zero-Sum Game: The Constitutional Necessity of Apportioning Districts to Be Equal in Terms of Both Total Population and Citizen Voter-Age Population

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POLITICAL APPORTIONING IS NOT A ZERO-SUM GAME: THE CONSTITUTIONAL NECESSITY OF APPORTIONING DISTRICTS TO BE EQUAL IN TERMS OF BOTH TOTAL POPULATION AND CITIZEN VOTER-AGE POPULATION

Timothy Mark Mitrovich

Abstract: After each census, state legislatures must redraw voting districts for state and local elections. Each state legislature must perform this redistricting in a way that protects two important citizen rights. First, each citizen's vote must carry equal weight. Second, each citizen must have equal access to his or her representative. To this end, the U.S. Supreme Court has held that all state and local electoral apportionments must result in districts with equal populations. In *Reynolds v. Sims*, the Court held that the Fourteenth Amendment requires all state and local electoral apportionments to result in districts with equal populations. However, the Court has never defined *what* "population" state and local governments must equally distribute to comply with this requirement. This has resulted in a conflict among the federal circuit courts. Circuit courts that have addressed this issue have articulated three primary approaches to state political apportionment: first, according to "total population"; second, according to different types of "voter-population"; or third, according to the state's choice of total population or voter population. This Comment argues that the constitutional rights to both representational equality and electoral equality require that states apportion state and local electoral districts that are equal in terms of *both* total population and voter population. This Comment proposes that the U.S. Supreme Court adopt a "dual-standard" test in which both state and local electoral districts cannot deviate by more than ten percent in terms of either total population or citizen-voter age population.

Every ten years state legislatures redraw their electoral districts. This redistricting is done to protect two important rights—the right to have one's vote given equal weight and the right to have equal access to one's representative. These rights have been acknowledged by the U.S. Supreme Court.[1] Under the "one-person one-vote" principle established by the U.S. Supreme Court, state and local electoral districts must apportion the population equally to comply with the Fourteenth Amendment.[2] However, the Court has not yet defined what "population" state and local government must use to comply with the "one-person one-vote" principle. The federal circuit courts that have addressed the issue continue to disagree, each articulating a unique definition of what

1. *See* Avery v. Midland County, 390 U.S. 474, 478–79 (1968); Reynolds v. Sims, 377 U.S. 533, 560, 568 (1964); Gray v. Sanders, 372 U.S. 368, 379 (1963).

2. *See, e.g.*, *Avery*, 390 U.S. at 479; *Reynolds*, 377 U.S. at 560, 568; *Gray*, 372 U.S. at 379.

"population" to use to apportion state and local electoral districts.[3] While some circuits require districts to be equal in terms of their voter population,[4] other circuit courts of appeal insist that the relevant population to consider is the district's "total population."[5] Voter population bases generally attempt to exclude persons ineligible to vote.[6] In contrast, total population includes all persons living within a given area, including those persons who are ineligible to vote (i.e., aliens, children, and non-resident citizens).[7] The disagreement over which population basis to consider is really a disagreement over whether the goal of apportioning is to ensure "representational equality" or "electoral equality," because the population basis used to apportion is merely a means to one of the two respective end goals.[8] Theoretically, using a "voter-population" basis ensures that each vote will be weighted equally,[9] while using a total population basis to apportion districts is the way to theoretically ensure equal representation.[10] This Comment considers one form of voter population in particular: Citizen-Voter Age Population, which includes only those persons in a district who are eligible to register to vote.[11]

When states apportion their districts to be equal in terms of only total population or voter population, constitutionally questionable outcomes may result. Apportioning districts to be equal only in terms of total population could lead to vast disparities in the actual number of voters included in each district. Such a result would violate the "one-person one-vote" standard because actual votes in one district may carry more weight than votes in a neighboring district.[12] However, apportioning districts to be equal only in terms of voter population could also lead to large disparities in terms of total population in districts that contain large

3. *See* Chen v. City of Houston, 206 F.3d 502, 526–27 (5th Cir. 2000); Daly v. Hunt, 93 F.3d 1212, 1214 (4th Cir. 1996); Garza v. County of Los Angeles, 918 F.2d 763, 772 (9th Cir. 1990).

4. *See Garza*, 928 F.2d at 781 (Kozinski, J., dissenting).

5. *Id.* at 775.

6. *See id.*

7. *See id.*

8. *See id.* at 781.

9. *See* discussion *infra* Part II.A.2.

10. *See* discussion *infra* Part II.A.2.

11. *See* discussion *infra* Part II.A.2.

12. *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964); *see also Garza*, 918 F.2d at 779 (Kozinski, J., dissenting); *see generally* Scot Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521 (1994).

numbers of people ineligible to vote. Such a disparity could result in that district's population having such limited access to the political process that their Fourteenth Amendment rights also would be violated.[13]

The federal circuit courts are in conflict on this issue. In the Ninth Circuit, states must apportion according to total population in order to ensure representational equality.[14] In *Garza v. County of Los Angeles*, the Ninth Circuit held that the use of any standard other than total population to apportion electoral districts would violate peoples' right to equal representation under the Fourteenth Amendment.[15] The *Garza* court's primary concern was ensuring representational equality and equality in the level of people's access to their representatives.[16] The *Garza* dissent, however, focused on ensuring electoral equality by apportioning using voter population.[17] Most recently, the Fourth and Fifth Circuits have held that states have the discretion to choose which population base to consider for apportioning.[18] In *Daly v. Hunt*[19] and *Chen v. City of Houston*,[20] the Fourth and Fifth Circuits upheld the use of total population as an apportioning standard and held that the choice among population standards should be left to the states.[21]

The U.S. Supreme Court should address the conflict between the federal circuits to aid states who are currently attempting to apportion electoral districts based on the 2000 Census. Justice Thomas recognized this need in his dissent from the Court's denial of the petition for writ of certiorari for *Chen v. City of Houston*.[22] Justice Thomas emphasized the conflict between the circuits and, more importantly, states' need for guidance when choosing what population basis to use.[23]

This Comment proposes an apportioning standard for state and local electoral districts that meets the demands of the Fourteenth Amendment

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13. *See Garza*, 918 F.2d at 775.

14. *See id.* at 774–75.

15. *See id.* at 775.

16. *See id.*

17. *See id.* at 780.

18. *See* Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000).

19. 93 F.3d 1212 (4th Cir. 1996).

20. 206 F.3d 502 (5th Cir. 2000).

21. *Chen*, 206 F.3d at 523; *Daly*, 93 F.3d at 1227.

22. Chen v. City of Houston, 532 U.S. 1046, 1046 (2001) (mem.).

23. *See id.* at 2021.

regardless of the demographics of a given state. Part I discusses the history behind the "one-person one-vote" principle. Part II discusses the U.S. Supreme Court's inadequate definition of what "population" states must use to meet the "one-person one-vote" standard and the resulting conflict in the circuits over the appropriate method to use. Part III argues that States must apportion districts so that they do not deviate by more than ten percent in terms of either voter population or total population in order to comply with the Fourteenth Amendment.[24]

I. HISTORY OF "ONE-PERSON ONE-VOTE" PRINCIPLE

A. The Foundation of the "One-Person One-Vote" Principle

The issue of how to apportion districts consistent with the Constitution originally arose in the U.S. Supreme Court because of disparities in populations between electoral districts in many states.[25] These disparities generally arose out of legislators' desires to maintain traditional political subdivisions despite changing demographics, weaken the political influence of racial minorities, or give equal or greater political influence to rural interests.[26] In *Baker v. Carr*,[27] the Court set the stage for its later apportionment decisions by ruling that a challenge to a state's apportionment scheme did not constitute a political question.[28]

In *Gray v. Sanders*,[29] the Supreme Court laid the groundwork for its future holding in *Reynolds v. Sims*[30] by holding that the Constitution demands that each person's vote count equally and that districts be apportioned according to equal population.[31] The *Gray* Court examined the constitutionality of Georgia's system for counting votes in primary

24. *See* Brown v. Thompson, 462 U.S. 835, 842–43 (1983); Burns v. Richardson, 384 U.S. 73, 92–95 (1966); Reynolds v. Sims, 377 U.S. 533, 560, 568 (1964); Carl Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L.J. 1441, 1456 (1995).

25. *See* Wesberry v. Sanders, 376 U.S. 1, 3 (1964); Gray v. Sanders 372 U.S. 368, 370 (1963); Baker v. Carr, 369 U.S. 186, 230 (1962).

26. *See Wesberry*, 376 U.S. at 3; *Gray*, 372 U.S. at 370; *Baker*, 369 U.S. at 230; *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 532 (1969); Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).

27. 369 U.S. 186 (1962).

28. *Baker*, 369 U.S. at 188.

29. 372 U.S. 368 (1963).

30. 377 U.S. 533 (1964).

31. *Gray*, 372 U.S. at 379.

elections for the lower house of their state legislature.[32] The Georgia system gave greater weight to the votes of rural voters than urban voters.[33] As a result, rural voters were able to elect more state representatives than they should have been allowed given their percentage of the state population.[34] The Court found that the system was unconstitutional because urban votes did not carry the same weight as rural votes.[35]

The next year, in *Wesberry v. Sanders,*[36] the Supreme Court held that in order to properly apportion federal electoral districts, each congressional district must contain equal populations in order to balance the weight of each person's vote and ensure equal representation.[37] The Court declared that "[t]he command of Art. I, & 2 . . . [is] that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[38] The Court also recognized that the original intent of the delegates to the Constitutional Convention was to create equal representation for equal numbers of people.[39] One delegate that the Court specifically referred to was James Wilson, a member of the Constitutional Convention and later a U.S. Supreme Court Justice, who stressed the importance of both voting equality and representational equality.[40] Wilson believed that "[a]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state."[41] The *Wesberry* Court also found persuasive Wilson's statement that "equal numbers of people ought to have an equal [number] of representatives."[42] Therefore, by the mid-1960s the Court had articulated a constitutional standard of equality.

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32. 372 U.S. 368, 370 (1963).
33. *Id.* at 370.
34. *Id.* at 370–71.
35. *Id.* at 379.
36. 376 U.S. 1 (1964).
37. *Id.* at 14.
38. *Id.* at 7–8.
39. *Id.* at 10–11, 18.
40. *Id.* at 10–11, 17.
41. *Id.* at 17.
42. *Id.* at 10–11.

B. *The "One-Person One-Vote" Standard Applies to State and Local Elections*

The U.S. Supreme Court, in *Reynolds v. Sims*[43] and *Avery v. Midland County,*[44] extended the previously established requirements of representational and electoral equality to state and local elections. The *Reynolds'* Court held that *Gray's* requirement that electoral districts for primaries contain equal population numbers also applied to general state electoral districts.[45] The *Avery* Court then extended the *Reynolds* requirement to local elections.[46]

1. *Applying "One-Person One-Vote" to State Elections*

The "one-person one-vote" standard applies to apportionments for state electoral districts.[47] In *Reynolds*, the U.S. Supreme Court invalidated Alabama's plans to apportion the state's legislative districts because the state used sixty-year old census data that resulted in districts of significantly unequal populations.[48] The Court held that the Fourteenth Amendment's requirement that states treat each voter equally by giving each citizen's vote the same weight, as articulated in *Gray* and *Wesberry,*[49] also applied to states and that to hold otherwise would unconstitutionally result in a preferred class of voters.[50] Consequently, the Court held that in order to determine the validity of a districting scheme it must look at whether there is substantial equality of population among the districts established by a state legislature.[51]

Although *Wesberry* dealt with federal congressional districts, the *Reynolds* Court found *Wesberry* persuasive and extended *Wesberry's* requirements to state electoral districts.[52] The *Reynolds'* Court held that the Equal Protection Clause requires apportionments to be based on equal population in order to protect "[t]he right of a citizen to equal

43. 377 U.S. 533 (1964).

44. 390 U.S. 474 (1968).

45. *Reynolds*, 377 U.S. at 560.

46. *Avery*, 390 U.S. at 479.

47. *See id.*; *Reynolds*, 377 U.S. at 560, 568; *see also* Gray v. Sanders, 372 U.S. 368, 379 (1963).

48. *See Reynolds*, 377 U.S. at 543–45.

49. *Id.* at 560.

50. *Id.* at 568.

51. *Id.* at 559.

52. *Id.* at 560.

representation *and* to have his vote weighted equally."[53] In *Reynolds*, like *Wesberry* before it, the Court tied its demand for "equal population" in each district to its determination that the Constitution demands that each vote be counted equally and that each person have equal representation.[54]

The *Reynolds'* Court also emphasized the connection between the right to vote and citizenship and suggested that few rationales, if any, could qualify that right.[55] The Court determined that a citizen's right to vote can be impaired by diluting votes through unequal apportioning just as severely as by prohibiting the right to vote altogether.[56] Furthermore, to the degree a citizen's right to vote is impaired "he is that much less a citizen."[57] Any suggested system that weighs citizens' votes unequally between districts is insufficient unless it falls within one of the few permissible purposes of legislative apportionment recognized by the Court.[58] The Court has thus extended the dual requirements of equal representation and equally weighted votes to statewide electoral apportionment.

2. *Applying "One-Person One-Vote" to Local Elections*

In *Avery v. Midland County*, the U.S. Supreme Court extended the principle of "one-person one-vote" to local and municipal elections.[59] The *Avery* Court heard a challenge to an apportionment plan for electing county commissioners which resulted in considerable deviations between the total populations of different districts.[60] The Court noted that governments, whether national, state, or local, must grant each citizen equal protection under the law, and that this principle of equality applies to any election for public officials.[61]

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53. *Id.* at 576 (emphasis added); *see also id.* at 568.

54. *See id.* at 568, 579.

55. *See id.* at 567.

56. *See id.* at 555.

57. *See id.* at 567.

58. *See id.* at 566. One legitimate purpose the U.S. Supreme Court has recognized for state and local apportionments is to maintain historic political subdivisions. *See* Brown v. Thompson, 462 U.S. 835, 842–43 (1983). However, apportionment plans in general cannot deviate by more than ten percent. *See Brown*, 462 U.S. at 842–43; Mahan v. Howell, 410 U.S. 315, 326–28 (1973); *infra* Part I.C.

59. *See* Avery v. Midland County, 390 U.S. 474, 479 (1968).

60. *See id.* at 476.

61. *See id.* at 481 n.6.

In *Hadley v. Junior College District*,[62] the U.S. Supreme Court further clarified the "one-person one-vote" principle by holding that it applies to any popular election for a position that performs a governmental function.[63] The deviations in the election districts for school district trustees in *Hadley* violated the Fourteenth Amendment, even though the positions did not wield broad power.[64] Similarly, in *Board of Estimate v. Morris*,[65] the Court held that even local elections for positions that do not wield any legislative powers are subject to the "one-person one-vote" principle, as long as the officials are selected by popular vote.[66] In *Morris*, the elected positions at issue were positions on the board of estimate for New York City representing the five boroughs.[67] The Court reasoned that "the right to choose a representative is every man's portion of sovereign power"[68] and thus electoral systems should make each citizen's portion equal.[69] After *Hadley* and *Morris*, the Court's "one-person one-vote" standard has been applied to most state and local election apportionment schemes.

C. *The Requisite Level of Population Equality Demanded under "One-Person One-Vote"*

After *Wesberry*, *Reynolds*, and *Avery*, the U.S. Supreme Court established that the Constitution requires federal, state, and local electoral apportionments to result in districts that contain equal populations.[70] However, the Court had not yet articulated how "equal" the apportionments must be other than to say that the Constitution did not require "mathematical exactness."[71] As a result, several subsequent cases dealt directly with the question of how large of a population deviation between electoral districts is permissible under the "one-person one-vote" principle. The Court has held that de minimis deviations are not permitted for congressional districts, but state and local electoral districts

62. 397 U.S. 50 (1970).

63. *See id.* at 56.

64. *See id.* at 51–52.

65. 489 U.S. 688 (1989).

66. *See id.* at 693.

67. *See id.* at 691.

68. *Id.* at 693 (quoting Daniel Webster in Luther v. Borden, 48 U.S. 1, 30 (1849)).

69. *See id.*

70. *See supra* Part I.A., Part I.B.

71. *See supra* Part I.B; Reynolds v. Sims, 377 U.S. 533, 577 (1964).

have more latitude.[72] The Court has allowed large deviations under very specific factual scenarios, but has held that state and local electoral districts should generally not deviate by more than ten percent in terms of population.[73]

In *Kirkpatrick v. Preisler*,[74] the Court held that there was no deviation small enough to be considered de minimis when it comes to congressional districts.[75] In *Kirkpatrick*, the Court dealt with the issue of exactly how large a deviation in population was allowable under the "one-person one-vote" principle.[76] The plaintiff claimed that the six percent population deviations between Missouri's federal congressional districts violated the constitutional requirement of "one-person one-vote."[77] Although the Court did not rule out the possibility that a state could justify its deviations, it held that attempting to justify deviations in congressional districts based on a desire to maintain traditional political subdivisions is inadequate.[78]

In subsequent cases, the Court modified its holding by giving wider latitude to state and local apportionments both in terms of the size and reason for the deviations.[79] In *Gaffney v. Cummings*,[80] the Court held that the strict equality standard for congressional districting did not apply to state elections.[81] A deviation of roughly eight percent in Connecticut's legislative districts did not violate the Equal Protection Clause.[82] The Court based its decision on *Mahan v. Howell*,[83] which permitted deviations of over sixteen percent in state electoral districts when the state's rationale was to keep historic districts intact.[84] The *Gaffney*

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72. *See* Brown v. Thompson, 462 U.S. 835, 842–43 (1983); Gaffney v. Cummings, 412 U.S. 735, 741–42 (1973); Mahan v. Howell, 410 U.S. 315, 327 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

73. *See Brown*, 462 U.S. at 842–43.

74. 394 U.S. 526 (1969).

75. *See Kirkpatrick*, 394 U.S. at 530.

76. *See id.*

77. *See id.* at 528–29.

78. *Id.* at 533–34.

79. *See* Brown v. Thompson, 462 U.S. 835, 842–43 (1983); Gaffney v. Cummings, 412 U.S. 735, 741–42 (1973); Mahan v. Howell, 410 U.S. 315, 327 (1973).

80. 412 U.S. 735 (1973).

81. *See Gaffney*, 412 U.S. at 741–42 (citing *Mahan*, 410 U.S. at 322).

82. *See id.* at 737, 739–41.

83. *Mahan*, 410 U.S. at 328.

84. *See Gaffney*, 412 U.S. at 742 (citing *Mahan*, 410 U.S. at 325).

decision significantly helped to define the limits of permissible population deviation for state electoral districts.[85]

The Supreme Court further clarified the permissible population deviation in *Brown v. Thompson*.[86] In *Brown*, the Court established that there was not a prima facie violation of the Equal Protection clause unless the deviation between electoral districts was greater than ten percent.[87] *Brown* involved a challenge to a legislative district in Wyoming with a deviation of eighty-nine percent in size from the other districts in the state.[88] The Court stated that deviations of less than ten percent in the population of state legislative districts are insufficient to establish prima facie discrimination under the Fourteenth Amendment.[89] The Court recognized that the deviation challenged in *Brown* exceeded ten percent and therefore required that the state offer a justification.[90] Wyoming justified its creation of the smaller district, and the resulting large deviation in population between that district and others, on the state's desire to maintain historic political subdivisions along county lines.[91]

The *Brown* Court upheld the constitutionality of the district, holding that a state's desire to maintain political subdivisions may justify departures from population equality so long as that desire is "free from any taint of arbitrariness or discrimination" and "there is no evidence of 'a built-in bias tending to favor particular political interests or geographic areas.'"[92] The Court noted that deviations may get so large as to be unjustifiable.[93] However, the *Brown* Court did not address that issue in the instant case, because allowing the challenged district did not significantly add to the substantial deviations that already existed in Wyoming's apportioning scheme.[94] After *Kirkpatrick*, *Gaffney*, and *Brown*, the Court's demand for districts of equal population can now be

85. *See id.* at 740–41, 749.

86. 462 U.S. 835 (1983).

87. *Id.* at 842–43.

88. *See id.* at 838–39.

89. *See id.* at 843.

90. *See id.*

91. *See id.* at 841.

92. *Id.* at 843–44 (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964); Abate v. Mundt, 403 U.S. 182, 187 (1971)).

93. *See id.* at 845.

94. *See id.* at 847 (even without the challenged district "the average deviation per representative would be 13% and the maximum deviation would be 66%").

read to mean that state and local electoral districts must not deviate by more than ten percent unless the state can justify the deviation.

D. *The U.S. Supreme Court Assesses the Validity of a Chosen Population Basis in* Burns v. Richardson

The U.S. Supreme Court established in *Reynolds* and subsequent cases[95] that the Constitution requires states to create districts of equal population. However, it did not decide what particular population basis a state should use to achieve that end until *Burns v. Richardson*.[96] The *Burns* Court heard a challenge to Hawaii's use of registered voters as the population basis for apportioning state legislative districts.[97] The plaintiffs asserted that the Fourteenth Amendment required states to use total population as the basis for apportioning electoral districts.[98] The Court rejected this argument and ruled that Hawaii's use of a registered voter population basis did not violate the Fourteenth Amendment.[99]

One reason for the *Burns* Court's decision to permit Hawaii's use of registered voters as an apportioning basis was its finding that the Fourteenth Amendment does not specifically require states to use total population.[100] First, the Court found no prior cases mandating the use of total population to apportion electoral districts.[101] Second, the use of a total population basis in some cases may result in a distorted distribution of legislative power.[102]

Although the *Burns* Court permitted Hawaii's use of registered voters as the population base, it did so with multiple qualifications. One qualification was that using a "registered voter basis" is acceptable as long as it results in a distribution similar to that which would have been reached had the state used another acceptable population basis.[103] A mere showing that the distribution of legislators did not match the total population did not disqualify Hawaii's plan because it still approximated

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95. *See infra* Part I.B.2.

96. 384 U.S. 73 (1966).

97. *See id.* at 73–75.

98. *See id.* at 90.

99. *See id.* at 91–92.

100. *See id*; *see also* Gaffney v. Cummings, 412 U.S. 735, 746 n.12 (1973).

101. *See Burns*, 384 U.S. at 92.

102. *See id.* at 94.

103. *See id.* at 93.

another permissible population basis.[104] Another qualification was the Court's concern that using registered voters as the apportioning basis could make the system susceptible to efforts to perpetuate the under-representation of certain groups in society by creating hardships for certain groups in registering to vote.[105]

The *Burns* Court did not rule out states using a total population basis. Instead, it suggested that there were multiple population bases which could meet the Fourteenth Amendment's standards.[106] The Court did not give any guidance to states regarding how to determine when to use a given apportionment standard, other than to say that state citizenship may be one of multiple acceptable standards.[107]

In *Burns*, the Supreme Court held that courts should generally leave to the states the decision concerning which apportionment base to use, and consequently, which groups should be excluded from the apportionment basis.[108] The *Burns* Court reasoned that the Constitution does not allow courts to interfere with permissible state decisions,[109] "[u]nless [the] choice is one the Constitution forbids."[110] Thus, the Court qualified its deference to the states by requiring that the state's initial choice be constitutionally acceptable.[111]

II. THE U.S. SUPREME COURT HAS NOT DEFINED WHAT POPULATION BASIS STATES MUST USE TO COMPLY WITH THE CONSTITUTIONAL PRINCIPLE OF "ONE-PERSON ONE-VOTE"

While the U.S. Supreme Court has held that the Constitution requires populations to be apportioned equally among electoral districts, and has even defined that "equal" generally means a deviation in population of no greater than ten-percent between state and local electoral districts, it has failed to specifically define what "population" states must use to

104. *See id.* at 94–95 (the Court did not specify which population basis it was referring to).

105. *See id.* at 92–93.

106. *See id.* at 92–95.

107. *See id.* at 95.

108. *See id.* at 92.

109. *See id.*

110. *Id.*

111. *See id.*

comply with the Constitution.[112] Justice Thomas dissented from the Court's denial of a petition for a writ of certiorari in *Chen v. City of Houston*,[113] in order to voice his concern that the Court should hear the case and finally answer this question.[114] Justice Thomas stated that the Court had left "a critical variable" in the requirement of "one-person one-vote" undefined by never clarifying what "population" state and local governments must use to redistrict.[115] Justice Thomas added that the Court had an "obligation" to resolve the issue,[116] citing the circuit split on the issue[117] and the upcoming redistricting based on the 2000 Census data.[118]

Lower federal circuit courts have articulated three different types of population bases that state and local governments must use to apportion their electoral districts in order to comply with *Reynolds* and the Fourteenth Amendment's requirement that electoral districts contain equal populations. The first approach, advocated by the Ninth Circuit, is to use a "total population basis."[119] Advocates of this position argue that the true goal of *Reynolds* and the Fourteenth Amendment was to guarantee equal representation for all persons, and because using total population to apportion is the best means to equalize representation, it alone must be used.[120] The second approach, advocated by a dissenting judge in the Ninth Circuit, states that electoral apportionments must use some form of "voter population" basis.[121] This position stresses that the true goal of *Reynolds* and the Fourteenth Amendment was to equalize the *weight* of each person's vote, and therefore state and local governments must apportion according to voter population to guarantee that each district has approximately the same number of voters.[122] The third and

112. While the Court addressed the specific challenge to the population basis a state used to apportion, it failed to articulate which specific populations were constitutionally permissible or which standard State governments and lower courts should use to make such a determination. *See id.* at 90–98.

113. *See* Chen v. City of Houston, 532 U.S. 1046, 1046 (2001) (mem.).

114. *See id.* at 2021.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

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

120. *See id.* at 775, 781.

121. *See id.* at 779, 781–82 (Kozinski, J., dissenting).

122. *See id.*

final approach, adopted by the Fourth and Fifth Circuits, states that *either* standard meets the requirements of "one-person one-vote," and that the choice should be left to the individual states.[123]

A. Equalizing Total Population to Ensure Equal Representation

Apportioning districts so that each district is equal in terms of total population ensures the principle of equal representation will be achieved.[124] The term "total population" includes "all persons" living within a district, regardless of their eligibility to vote.[125] Creating districts which include equal numbers of people theoretically means that each elected official will represent the same number of constituents in his or her district and that constituents will have equal access to their representative.[126] On multiple occasions, the U.S. Supreme Court has articulated that protecting peoples' ability to have equal access to their representatives is an important judicial concern.[127]

1. The Ninth Circuit Emphasizes Equalizing Districts in Terms of Total Population to Ensure Equal Representation

The Ninth Circuit, in *Garza v. County of Los Angeles*,[128] became the first circuit court to render a decision dealing directly with the constitutionality of a selected apportionment basis. The Ninth Circuit held that the Fourteenth Amendment required the use of a "total population basis."[129] In *Garza*, a district court imposed a districting plan on Los Angeles county that required apportionment using a "total population basis."[130] The district court's plan attempted to draw a majority Hispanic district and was a response to an earlier suit brought by Hispanic voters in the county who claimed that the County Board of

123. *See* Daly v. Hunt, 93 F.3d 1212, 1227–28 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000).

124. *See Garza*, 918 F.2d at 781 (Kozinski, J., dissenting).

125. *See id.*

126. *See id.*

127. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969); E. R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

128. 918 F.2d 763 (1990).

129. *Id.* at 775.

130. *See id.* at 772.

Elections had intentionally discriminated against them in redistricting.[131] The County appealed, claiming that there was no basis for a suit because at the time the district was drawn no district with a majority of minority voters could have been drawn.[132]

The Ninth Circuit upheld the district court's plan based on a belief that apportioning districts using a "voter population basis" would deny persons ineligible to vote of their right to equal representation.[133] The *Garza* court, citing U.S. Supreme Court precedent, stated that aliens are "persons" within the Fourteenth Amendment and as such have a right to equal protection which extends to political participation (short of voting or holding office).[134] The Ninth Circuit also cited to the Court's statement in *Kirkpatrick* that one goal of redistricting is to ensure equal representation.[135] The Ninth Circuit additionally cited the statement in *Reynolds* that "the fundamental principle of representative government is one of equal representation for equal numbers of people."[136] The *Garza* court reasoned that if districts were apportioned based on "voter population", it would be possible for a district with a large "total population" to emerge that had considerably more people in it because a large percentage was comprised of aliens and/or minors.[137] This, the Ninth Circuit noted, would result in the district's representative having less time to provide assistance and to listen to his or her constituents' concerns, thus depriving those constituents of their right to equal protection by diluting their access to representation.[138]

2. *Historic Case Law Support for the Necessity of Ensuring Equal Representation*

The principle of ensuring equal representation has significant support in U.S. Supreme Court precedent, primarily in the Court's decision in *Reynolds*. The rationale behind apportioning districts to have equal total populations is that it guarantees that each state or local representative

131. *See id.* at 767–69.

132. *See id.* at 769.

133. *See id.* at 775.

134. *See id.*; *see also* Goldfarb, *supra* note 24, at 1445.

135. *See Garza*, 918 F.2d at 775 (citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).

136. *See id.* at 774 (citing Reynolds v. Sims, 377 U.S. 533, 560–61 (1964)).

137. *See id.* at 774–75.

138. *See id.* at 775.

will provide representation for an equal number of constituents.[139] The *Reynolds* Court stated that "the *fundamental principle* of representative government in this country is one of *equal representation for equal numbers of people*."[140] The Court also held that ensuring equal representation is one goal of redistricting and a requirement under the Equal Protection Clause.[141] A key component of equal representation is the ability to freely access one's representative in order to articulate one's positions.[142]

Furthermore, the Supreme Court has upheld plans using total population on multiple occasions,[143] and several circuit courts have followed suit.[144] In *Burns* the Court stated that "the Equal Protection Clause does not *require* the States to use total population" and that total population is not the *only* acceptable standard, but that the total population method is one of many acceptable methods under the Fourteenth Amendment.[145] Every circuit court that has addressed this issue has upheld the use of a total population basis.[146] The Ninth Circuit in *Garza* went so far as to hold that total population was the *only* acceptable standard under the Fourteenth Amendment.[147] The Fourth Circuit in *Daly* agreed that "total population 'is constitutionally unassailable beyond question,'" but did not hold that it was the *only* acceptable basis.[148] The Fifth Circuit in *Chen* agreed with the *Daly* court, and held that total population does not violate the equal protection clause

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139. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969); *Reynolds*, 377 U.S. at 576; *see also* Daly v. Hunt, 93 F.3d 1212, 1226–27 (4th Cir. 1996).

140. *Reynolds*, 377 U.S. at 560–61 (emphasis added).

141. *See id.* at 565–66, 568. The *Reynolds* Court used the term "citizens," not "persons." *Id.* It could be argued that the right to equal representation does not extend to aliens. *See generally* Scot Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521 (1994). While this Comment does not focus on the extent of aliens' Fourteenth Amendment rights, other U.S. Supreme Court case law suggests that, short of holding office or voting, aliens are protected by the Fourteenth Amendment. *See Garza*, 918 F.2d at 775.

142. *Garza*, 918 F.2d at 775 (citing E. R.R. President's Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 137 (1961)).

143. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 747 (1973); Kirkpatrick v. Preisler, 394 U.S. 226, 531 (1969).

144. *See* Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000); *Daly*, 93 F.3d at 1225; *Garza*, 918 F.2d at 774.

145. Burns v. Richardson, 384 U.S. 73, 91–92 (1966) (emphasis added).

146. *Chen*, 206 F.3d at 523; *Daly*, 93 F.3d at 1225; *Garza*, 918 F.2d at 775.

147. *See Garza*, 918 F.2d at 775.

148. *Daly*, 93 F.3d at 1225 (quoting Ellis v. Mayor & City Council of Balt., 352 F.2d 123, 130 (4th Cir. 1965).

and was an acceptable choice of population basis for states.[149] Therefore, the U.S. Supreme Court has confirmed that the Constitution requires equal representation and that state plans using total population to achieve that end are permissible.

B. Equalizing "Voter Population" to Ensure Electoral Equality

A second method of apportioning districts gives each district an equal number of voters. This "voter population" method furthers the principle of electoral equality.[150] "Electoral equality" means that each person's vote is given equal weight, and is achieved by apportioning districts to have roughly equal numbers of voters.[151] The purpose of apportioning districts to include equal numbers of voters is to comply with the Fourteenth Amendment's requirement that each person's vote carry equal weight.[152] There are many different types of voter population bases that states might use to apportion electoral districts, and thus the persons included in determining population numbers varies according to which type is used.

One type of apportioning standard used to equalize the weight of votes between districts is the "voting-age population" standard.[153] This standard includes anyone over the age of eighteen living in the district.[154] However, as the Fourth Circuit in *Daly* noted, using voting-age population is not an accurate indicator of actual voting strength because, similar to total population, it includes persons who are not eligible to register to vote.[155]

A second type of apportioning standard courts have approved uses only registered voters as the apportioning basis.[156] Although using a registered voter basis more accurately determines the number of people likely to vote in the next election, the U.S. Supreme Court has expressed concerns about this method. The Court upheld Hawaii's use of a registered voters basis in *Burns*, cautioning that it did so hesitantly

149. *See Chen*, 206 F.3d at 523.

150. *See Garza*, 918 F.2d at 781 (Kozinski, J., dissenting).

151. *See id.* at 781.

152. *See* Reynolds v. Sims, 377 U.S. 533, 576 (1964).

153. *See* Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996).

154. *See id.*

155. *See id.*

156. *See* Burns v. Richardson, 384 U.S. 73, 82 (1966).

because of the method's susceptibility to abuse by those in power "to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process."[157] A registered voter basis could be manipulated by targeting more resources to increasing voter registration among one voter demographic (i.e., Democrats or Caucasians) than another voter demographic (i.e., Republicans or African Americans).

A third voter-based apportioning standard is the citizen-voter age population standard (CVAP).[158] As the name indicates, apportioning using this standard results in districts that contain equal numbers of citizens of voting age.[159] Unlike a registered voter standard, a CVAP is not based on a mechanism like registering voters that can be manipulated by states. Instead, CVAP reflects the size of a population living in a given area, similar to the total population standard.[160] CVAP is also a more accurate representation of the number of actual voters in an area than the voting-age population standard because unlike a voting-age population basis, it only measures those persons eligible to register to vote.[161] In sum, of the three voter population standards, CVAP offers the most accurate estimate of potential voters while having the fewest possible concerns.[162]

1. Using a Voter Population Standard to Ensure Electoral Equality

Judge Kozinski, dissenting in *Garza*, argued that the *Reynolds* line of cases, in conjunction with the Fourteenth Amendment, requires electoral districts to consist of equal voter populations.[163] Judge Kozinski argued that both the Fourteenth Amendment and *Reynolds* require voters to have an equal influence in the electoral process, thus requiring each vote to be weighed equally.[164] Judge Kozinski noted that in most cases whether a

157. *See id.* at 92.

158. *See* Chen v. City of Houston, 206 F.3d 502, 524 (5th Cir. 2000).

159. *See* Garza v. County of Los Angeles, 918 F.2d 763, 780 (9th Cir. 1990) (Kozinski, J., dissenting).

160. *See Burns*, 384 U.S. at 92–93.

161. An apportioning standard concerned with equalizing the voting strength among districts should probably also exclude felons from the count to get an even more accurate reflection of those eligible to vote in a given area, especially in areas with large prison populations. *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974) (holding that § 2 of the Fourteenth Amendment permits states to disenfranchise felons without violating the Constitution's Equal Protection Clause).

162. *See supra* notes 150–161 and accompanying text.

163. *See Garza*, 918 F.2d at 780 (Kozinski, J., dissenting).

164. *See id.* at 779.

state apportions districts using "total population" or "citizen voting age population" does not make a sizable difference.[165] However, Judge Kozinski highlighted the possibility that using a "total population basis" can cause great disparities in the number of eligible voters between districts, and consequently create disparities between the districts in the weight accorded to citizens' votes.[166]

Judge Kozinski suggested that in prior U.S. Supreme Court "apportioning" cases, the Court only used the term "total population" because it did not foresee the possibility that the total population standard may result in vastly disproportionate distributions of citizen voters between districts.[167] Judge Kozinski's opinion relied in part on language from *Reynolds* and from *Connor v. Finch*,[168] which according to Judge Kozinski both suggest that the reason the Court sought to equalize population was to equalize voting power.[169] According to Judge Kozinski, in both *Reynolds* and *Connor* the Court reasoned that districts must consist of equal populations *so that* each person's vote would carry equal weight, thus seeming to indicate that the Court's primary concern was electoral equality.[170] Judge Kozinski argued that if the goal was to ensure electoral equality, and voter population is the only way to ensure that goal,[171] then using a voter population basis was necessary to comply with the Fourteenth Amendment and *Reynolds'* principle of "one-person one-vote."[172]

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165. *See id.* at 781.

166. *See id.*

167. *See id.* at 783, 784.

168. 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that* each person's vote may be given equal weight in the election of representatives.") (emphasis added); *see also Garza*, 918 F.2d at 783–84.

169. *See supra* notes 167–168 and accompanying text.

170. *See supra* notes 166–167 and accompanying text.

171. *See* Gaffney v. Cummings, 412 U.S. 735, 746–47 (1973) (stating that the total population approach is not an accurate way to ensure that a reapportionment results in districts that give equal weight to each person's vote).

172. *See Garza*, 918 F.2d. at 784.

2. *U.S. Supreme Court Jurisprudence and the Historical Understanding of Representative Government States that the Constitution Requires Electoral Equality*

U.S. Supreme Court jurisprudence demonstrates that one goal of the principle of "one-person one-vote" is to achieve electoral equality by equalizing the voting strength of citizens among each district. The *Reynolds'* Court placed heavy emphasis on the importance of states using apportionment methods that ensure each citizen's vote will be counted equally in elections.[173] In fact, the *Reynolds'* Court held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted,"[174] and that to the extent a person's vote is diluted "he is that much less a citizen."[175] In addition, the *Reynolds'* Court declared that few, if any, rationales would be permitted for upholding a system that does not weigh each citizen's vote equally.[176] The Court again emphasized the importance of electoral equality in *Hadley*, stating that the Equal Protection clause requires states to weigh each person's vote equally.[177] In *Gray* the Court saw no constitutional way that a state may apportion districts so as to evade the requirement of equalizing the weight of citizens' votes among districts.[178] The Court in *Wesberry* proclaimed that "*[n]o right* is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[179] Thus, the Court has established that a state's foremost priority in apportioning is to do so in a fashion that ensures each citizen has equally voting power.

The U.S. Supreme Court has also considered historical evidence of the framers' original intent that suggests the Constitution requires electoral equality among districts. In *Wesberry*, the Court stated that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every

173. *See* Reynolds v. Sims, 377 U.S. 533, 576 (1964).

174. *See id.* at 568.

175. *See id.* at 567.

176. *See id.* at 566.

177. Hadley v. Junior College Dist., 397 U.S. 50, 54 (1970).

178. Gray v. Sanders, 372 U.S 368, 381 (1963).

179. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (emphasis added).

other."[180] The *Reynolds'* Court found James Wilson's statements persuasive, and agreed that all elections must consist of an equal number of citizens choosing an equal number of representatives.[181] Echoing the *Reynolds* Court's emphasis on the connection between voting and citizenship, the Court in *Board of Estimate v. Morris*, citing Daniel Webster, stated that the right to vote is each citizen's piece of sovereign power and primary means of political participation; therefore, each state must ensure that its electoral system gives equal weight to each citizen's vote.[182] The Fifth Circuit agreed in *Chen*, and noted that while the Equal Protection Clause allowed for the use of total population it also included a mechanism for punishing "egregious departures from the principle of *electoral equality*."[183] Courts have therefore held that electoral equality may be just as important a principle as representational equality, and have recognized three main types of "voter population" methods. Of those three types, CVAP provides the most accurate reflection of the number of potential voters with the fewest concerns.[184]

C. *The Choice of Which Apportioning Standard to Use is a Decision for the States*

Two circuit courts since *Garza* have addressed the issue of whether states must apportion districts using "total population" to achieve representational equality or use some form of "voter population" to achieve electoral equality.[185] The Fourth and Fifth Circuits both upheld the use of total population and held that the decision of what apportioning standard to use is a decision best left to the states.[186] Both courts relied on the U.S. Supreme Court's statement in *Burns* that the

180. *See id.* at 10. As the Court noted in *Reynolds*, these statements were not made in reference to state elections, but rather to Article I, § 2 of the Constitution and the elections for the House of Representatives. *See Reynolds*, 377 U.S. at 560. However, the Court relied on these statements in *Reynolds*, saying that while *Gray* is not dispositive neither is it "wholly inapposite" because *Gray* "established the basic principle of equality among voters within a State." *Reynolds*, 377 U.S. at 560–61.

181. *See Reynolds*, 377 U.S. at 564 n.41. ("All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state.").

182. Board of Estimate v. Morris, 489 U.S. 688, 693, 698 (1989).

183. *See* Chen v. City of Houston, 206 F.3d 502, 526–27 (5th Cir. 2000) (emphasis added).

184. *See id.* at 524.

185. *See id.*; Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996).

186. *See Chen*, 206 F.3d at 523; *Daly*, 93 F.3d at 1227.

decision of which apportioning scheme to use, and consequently which groups to include or exclude in the count, "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless [the] choice is one the Constitution forbids."[187] Thus, the Fourth and Fifth Circuits do not require any one particular method of apportionment, but rather leave the choice to the states as long as the chosen method is constitutionally permissible.[188]

1. *The Fourth Circuit's Reading of the "One-Person One-Vote" Standard in* Daly v. Hunt

Daly v. Hunt involved a constitutional challenge brought by voters in North Carolina to a districting plan for county commissioners and school board officials that used a "total population basis" instead of a voting-age population basis, on grounds that it violated the "one-person one-vote" principle.[189] In *Daly*, the Fourth Circuit reasoned that where using one standard cannot achieve both electoral equality and representational equality, it should defer to the state's choice of how to apportion electoral districts, and in doing so made a conscious decision to reject both the majority and dissent's approaches in *Garza*.[190] The Fourth Circuit rejected the challenge to North Carolina's apportionment scheme, and permitted the state to continue to use the total population method to apportion their electoral districts even if it did not result in an equal distribution of voters.[191] One reason the court upheld the "total population basis" was that in the past the U.S. Supreme Court had upheld plans which used a total population basis to apportion.[192] The court also stated that equal representation and electoral equality, which are achieved through the use of total population and citizen voter-age population respectively, are equally important constitutional concerns.[193]

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187. *See Chen*, 206 F.3d at 526–27; *Daly*, 93 F.3d at 1225 (both citing Burns v. Richardson, 384 U.S. 73, 92 (1966)).

188. *See Chen*, 206 F.3d at 523; *Daly*, 93 F.3d at 1227.

189. *See Daly*, 93 F.3d at 1214.

190. *See id.* at 1227.

191. *See id.* at 1227–28.

192. *See id.* at 1222.

193. *See id.* at 1223, 1226–27.

A related rationale of the *Daly* court was that federal circuit courts should defer to the states because the choice of which population basis to use involves issues that are inherently political and legislative in nature.[194] The Fourth Circuit noted the Court's warning in *Gaffney* that "federal courts should not 'become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.'"[195] The *Daly* court reasoned that using a "voter-age population" basis would not achieve the goal of "one-person one-vote" any better than a "total population" basis.[196] Similar to using a total population basis, apportioning using a voting-age population basis would include many people ineligible to vote (such as aliens, non-resident students, military personnel or other transient persons, and convicted felons).[197] Thus, according to the Fourth Circuit, using a voter-age population basis would not result in a significantly better apportioning of actual voters among the districts and would not achieve true electoral equality.[198] In addition, the court cited its distrust in the accuracy of census data for its conclusion that the choice between population bases makes little difference because all apportionments are based on somewhat inaccurate, outdated information.[199] Therefore, while not going to the point of saying that issues concerning apportionment are non-justiciable questions, the Fourth Circuit concluded that generally courts should stay out of such issues.

2. *The Fifth Circuit's Reading of the "One-Person One-Vote" Standard*

In *Chen v. City of Houston*, the Fifth Circuit held that the use of a total population basis was an acceptable apportioning method, but refused to find that it was the only acceptable apportionment method and instead concluded that states can choose which apportioning scheme to use.[200] The specific challenge in *Chen* concerned the electoral districts for the city council, which used a "total population" basis.[201] Although the Fifth

194. *See id.*

195. *Id.* (quoting Gaffney v. Cummings, 412 U.S. 735, 750 (1973)).

196. *See id.* at 1227.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See* Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000).

201. *See id.* at 505.

Circuit upheld the use of total population as the apportioning method, it flatly rejected the majority's opinion in *Garza* that districting plans must include aliens in their apportionments.[202] The court based its rejection on the U.S. Supreme Court's opinion in *Burns* which states directly that states are not required to include aliens nor are they required to use total population.[203]

However, the Fifth Circuit did not choose to follow Judge Kozinski's rationale in the *Garza* dissent either, which argued that only a voter population basis fulfilled the requirement of "one-person one-vote." The court did note that in its opinion "the numerical weight of references is on the side of electoral equality."[204] The court also noted that section 2 of the Fourteenth Amendment seemed to include a mechanism for punishing "egregious departures from the principle of *electoral* equality," which would lend weight to Judge Kozinski's position that the Fourteenth Amendment's concern is with electoral equality.[205] One reason the Fifth Circuit did not find Judge Kozinski's dissent persuasive was that U.S. Supreme Court case law is unclear on the appropriate standard and often uses the term "population" to refer to either total population or voter population.[206] Another reason was the fact that the Court's language seems to argue for representational equality in some places and then for electoral equality in others.[207] Furthermore, the Fifth Circuit reasoned that the drafters of the Fourteenth Amendment appeared to have considered both standards, but that there was no clear evidence of a decision in favor of one standard or the other.[208]

After examining support for both types of population bases, the Fifth Circuit in *Chen* decided to follow the Fourth Circuit and held that the choice of which apportioning base to use should be left to the states.[209] Having found no compelling evidence that established either total population or voter population as the clear constitutional standard, the court turned to the Supreme Court's decision in *Burns* for guidance and adopted *Burns'* proposition that the choice of which measurement to use

202. *See id.* at 526.

203. *See id.*; Burns v. Richardson, 384 U.S. 73, 91 (1966).

204. *See Chen*, 206 F.3d at 525.

205. *See id.* at 527.

206. *See id.* at 525–26.

207. *See id.*

208. *See id.* at 526–27.

209. *See id.*

is a decision with which the courts have no constitutional authority to interfere unless it is clearly unconstitutional.[210]

In sum, the U.S. Supreme Court has thus left open the question of which population basis states must use. In the absence of guidance from the high court, the circuit courts have come to conflicting conclusions. In the Ninth Circuit, states must apportion using a total population standard. The *Garza* dissent argued that the Constitution requires that states apportion using a voter-population basis. In contrast, the Fourth and Fifth Circuits defer to a state's choice.[211] What has emerged is a recognition of the dual goals of representational and electoral equality, and an acknowledgement of the methods used to achieve each goal.

III. STATES SHOULD HAVE THE DISCRETION TO CHOOSE AN APPORTIONING STANDARD THAT RESULTS IN APPORTIONMENTS THAT DO NOT DEVIATE BY MORE THAN TEN PERCENT IN TERMS OF EITHER TOTAL POPULATION OR CVAP

Given the dual goals of representational equality and electoral equality, how can states fashion an apportionment plan that meets *both* important constitutional requirements? This Comment proposes that in order to ensure both representational equality and electoral equality, states must apportion districts so that they do not deviate by more than ten percent in terms of either total population or CVAP.[212] U.S. Supreme Court precedent indicates that the *Reynolds'* "one person one vote" principle was concerned with achieving both representational equality and electoral equality.[213] Total population and CVAP apportioning standards are the means to achieving both representational equality and electoral equality, respectively. Allowing states to favor either representational equality or electoral equality when deciding which population basis to use to apportion their state and local electoral districts is not a complete, nor constitutional, solution.[214] As the following hypothetical scenarios demonstrate, apportioning districts according to only one standard can lead to unconstitutional deviations in terms of the

210. *Id.*

211. *See id.*; Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996).

212. *See infra* Part III.C.

213. *See infra* Part III.B.

214. *See infra* Part III.A.

other standard.[215] Therefore, states should not be permitted to apportion so as to achieve only one form of political equality, but must ensure that their citizens have both electoral *and* representational equality. While U.S. Supreme Court case law indicates that states have discretion when apportioning districts, that discretion must be limited to apportioning districts with deviations of less than ten percent in terms of total population and CVAP.

A. U.S. Supreme Court Jurisprudence Indicates that People Have a Right to Both Representational and Electoral Equality

Although the U.S. Supreme Court often appears to argue for both representational equality and electoral equality when dealing with the principle of "one-person one-vote," this language does not indicate inconsistency, but reflects an understanding that electoral districts must be apportioned to achieve both outcomes.[216] Lower courts have noted that the Court's language often seems to contradict itself, or appears to argue at different times for both representational equality and electoral equality.[217] Most often the circuit courts have rationalized this apparent inconsistency by holding that either standard must be an acceptable means for apportioning districts.[218] However, a more accurate interpretation is that while both standards deal with the issue of "political equality" they are two distinct forms of political equality which need to be fulfilled.[219] The Court has juxtaposed these rights within a single sentence on more than one occasion. In *Reynolds'* the Court stated that every citizen has a "right . . . to equal representation *and* to have his vote weighted equally with those of all other citizens."[220] Later, in *Kirkpatrick*, the Court noted that the principle of equal representation for

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215. *See infra* Part III.A.

216. *See* SAMUAL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 172 (2d ed. 2001).

217. *See* Chen v. City of Houston, 206 F.3d 502, 526 (5th Cir. 2000); Daly v. Hunt, 93 F.3d 1212, 1222–24 (4th Cir. 1996); Garza v. County of Los Angeles, 918 F.2d 763, 774–76, 781 (9th Cir. 1990).

218. *See Daly*, 93 F.3d at 1226–27; *Chen*, 206 F.3d at 526.

219. The *Reynolds'* Court alluded to the existence of "political rights" in a footnote that cited Justice Douglas' dissent in *MacDougall v. Green*, which stated that the theme of the Constitution is that citizens should have an equal ability to exercise their "political rights." *See* Reynolds v. Sims, 377 U.S. 533, 564 n.41 (1964) (citing MacDougall v. Green, 335 U.S. 281, 290 (1948) (Douglas, J., dissenting)).

220. *Reynolds*, 377 U.S. at 576 (emphasis added).

equal numbers of people was "designed to prevent the debasement of voting power *and* diminution of access to elected representatives."[221] Such statements are evidence of the Court's intention that these two standards not be seen as mutually exclusive, but as working together to achieve the same end of political equality between citizens.

B. Exclusive Reliance on Either a Total Population Apportionment Standard or a Voter-Based Apportionment Standard Can Result in a Denial of Constitutional Rights

Allowing states to apportion their electoral districts based exclusively on either a total population or citizen-voter population basis may create results that are constitutional as to one goal (i.e., representational equality), but not the other (i.e., electoral equality). The U.S. Supreme Court recognized in *Gaffney* that, given the right set of circumstances, the two standards can result in completely different outcomes.[222] As the following hypothetical scenarios demonstrate, when a state chooses to apportion district populations only in terms of total population, districts with vastly different numbers of voters may result. As a consequence, voters in districts containing a larger percentage of voters would have their votes unconstitutionally diluted, thus denying them electoral equality.[223] Conversely, when a state chooses to apportion districts only in terms of voters, and in the process creates districts with vastly different total population sizes, people living in districts with excessively large populations would have their right to representation unconstitutionally diluted as well.[224]

1. Apportionment by Total Population Alone Can Result in a Denial of Electoral Equality

The use of total population in some contexts will result in outcomes that violate the Equal Protection Clause. The first hypothetical scenario consists of a state with some areas of extraordinarily large numbers of residents ineligible to vote such as aliens or children, which decides to apportion districts using a total population standard so that each electoral

221. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (emphasis added).

222. *See Gaffney*, 412 U.S. at 746–47.

223. *See infra* Part III.B.1.

224. *See infra* Part III.B.2.

district is equal only in terms of people. The state determines that each electoral district will consist of 200,000 people, and creates ten such districts. However, upon comparison two of the districts have substantially different demographics. District A is comprised of 200,000 people, but only 50,000 citizens who are of voting age. District B also contains 200,000 people, but has 150,000 citizens who are of voting age. Although these districts are equal in terms of total population, and thus theoretically afford the constituents in each district equal representation, the weight of citizen's vote in District A will be roughly three times greater than the weight of citizen's vote in District B. The unequal weight given to votes in these two districts would violate the U.S. Supreme Court's requirement of giving equal weight to each citizen's vote.[225]

The Supreme Court has articulated on multiple occasions that states must ensure electoral equality by apportioning districts so that each citizen's vote is given equal weight. Beginning with *Wesberry* and *Reynolds*, the Court stated that the weight of a person's vote must be equal in each district.[226] However, as the Court later noted in *Gaffney*, total population alone cannot guarantee the equal weight of each person's vote.[227] The *Reynolds* Court stated numerous times that apportionment plans that give unequal voting strength to different groups run contrary to the Constitution's requirements for representative government.[228] The Court noted that each citizen has an inalienable right to participate in the political process, and that most citizens exercise this right through voting.[229] Therefore, to ensure effective participation, each citizen must be given an "equally effective voice" in elections.[230] The Court in *Avery* reiterated that state and local governments must ensure that those qualified to vote are given equal weight in the election process.[231] States have an affirmative duty to "insure [sic] that each person's vote counts as much, insofar as it is practicable, as any other person's."[232] The hypothetical apportionment plan discussed above violates the Court's

225. *See supra* Part II.B.2.

226. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Reynolds v. Sims, 377 U.S. 533, 560, 568 (1964).

227. *See Gaffney*, 412 U.S. at 746–47.

228. *See Reynolds*, 377 U.S. at 559, 564–65, 576, 579.

229. *See id.* at 565, 576.

230. *See id.*

231. *See* Avery v. Midland County Tex., 390 U.S. 474, 480 (1968).

232. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 54 (1970).

mandate of electoral equality by creating districts consisting of unequal numbers of voters. This type of apportionment does not result in electoral equality because vastly different numbers of voters elect the same number of representatives.

2. *Apportionment by Voter Population Alone Can Result in a Denial of Representational Equality*

A state relying solely on a citizen-voting age population basis to apportion districts could create districts that would deviate so much in terms of total population that they would violate the Equal Protection Clause. This second hypothetical scenario involves a state that also contains areas with large pockets of residents ineligable to vote. To achieve electoral equality the state decides that it will apportion the population to create ten districts each containing 100,000 citizens of voting age. However, two districts in the state are substantially different in terms of total population. District A has 600,000 people within its boundaries while District B only has 200,000 people within its boundaries. All persons within a district are considered constituents and may make demands on their representative's time.[233] Therefore, the representative for District A will have three times as many constituents as the representative for District B, and thus the people of District A will receive less representation.

U.S. Supreme Court jurisprudence has recognized people's rights to representation and free access to their representatives.[234] As the Court stated in *Reynolds*, "[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens."[235] A key component of representation is access to one's representative because "representation depends upon the ability of the people to make their wishes known to their representatives" and, "interference with an individual's free access to elected representatives impermissibly burdens their right to petition the government."[236] As the previous hypothetical scenario demonstrates, when a given district contains large numbers of non-voters that were not considered in the apportionment, the demands upon their representative's time may be so great as to violate all

233. *See* Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1991).

234. *See Garza*, 918 F.2d at 775.

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

236. *Garza*, 918 F.2d at 775.

residents' rights to representation and free access to his or her representative.[237] All people living in such a district would receive less attention from their elected official, and would not have the same ability to influence the system as a district with fewer constituents.[238] Furthermore, as lower courts have pointed out, if an elected official's ability to secure government benefits and services for their constituents is in proportion to the constituents' share of governmental power, then people living in districts with larger populations would likely receive less than their share of benefits and services because their district would contain more people but only have one representative lobbying for them.[239]

C. *The Only Way to Protect Both Constitutional Rights Is to Apportion Districts According to Both Total Population and CVAP*

As the hypothetical scenarios above demonstrate, using only one test may result in unconstitutional outcomes. Therefore, the U.S. Supreme Court should adopt a dual-standard test which would allow states the discretion to choose any apportioning standard, so long as it creates districts with deviations of less than ten percent in terms of both total population and CVAP.[240] States should have to apportion according to the "dual-standard test for three reasons. First, it ensures that peoples' rights to representational and electoral equality are protected.[241] Second, it avoids the risk of unconstitutional outcomes when only one standard is used.[242] Third, it is consistent with U.S. Supreme Court case law that has indirectly used similar reasoning to address the issue of how states must apportion electoral districts.[243]

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237. *See supra* note 233.

238. *See Daly*, 93 F.3d at 1226; *Garza*, 918 F.2d at 775–76, 781.

239. *See Daly*, 93 F.3d at 1226; *Garza*, 918 F.2d at 775–76, 781.

240. The U.S. Supreme Court has also placed other restriction on state electoral apportionments, i.e., prohibiting political or racial gerrymandering. *See generally* Karcher v. Daggett, 467 U.S. 1222 (1984); Shaw v. Reno, 509 U.S. 630 (1993).

241. *See supra* notes 216–221 and accompanying text.

242. *See supra* Part III.B.

243. *See infra* Part III.C.1.

1. *The Dual-Standard Test is Based in Part on the U.S. Supreme Court's Decision in* Burns v. Richardson

The dual-standard test has implicit support from the Court's decision in *Burns v. Richardson*. The dual-standard test achieves the necessary specificity by explicitly requiring states to apportion districts to not deviate by more than ten percent in terms of either *total population* or *CVAP*, thereby ensuring that the apportioning scheme in question protects people's right to representational and electoral equality. In *Burns*, the court permitted the State of Hawaii to apportion state electoral districts using registered voters as its basis,[244] because it resulted in a distribution similar to that which would have been achieved using a different apportioning basis.[245] However, the court recognized that in certain situations using one particular apportioning standard can result in a "distorted" population distribution—a possibility demonstrated in the hypotheticals above.[246] The implicit principle in *Burns* is that in order to guarantee the constitutionality of an apportionment scheme, the scheme should result in apportionments that could result from multiple standards. This reduces the possible inadequacy in some cases when only one standard is used, and ensures that the multiple principles and rights those standards are designed to ensure are protected as well. The dual-standard test essentially adopts this principle from *Burns*, but requires that states evaluate their apportionment scheme's results against the results that would be obtained from using both a total population basis and CVAP basis.

The U.S. Supreme Court should adopt the dual-standard test not because *Burns* is incorrect, but because it is too vague. Although the *Burns* Court suggested that courts can evaluate an apportioning scheme by comparing its results to those that would be produced by other "permissible standards," the Court failed to specify which apportioning standards (i.e., what types of populations) courts and states must use to evaluate an apportioning scheme's constitutionality.[247] Justice Thomas focused on this problem in his dissent from the denial for the petition for writ of certiorari in *Chen*, arguing that a broad constitutional mandate to apportion districts so as to have equal populations is not enough, courts

244. *See* Burns v. Richardson, 384 U.S. 73, 93 (1966).

245. *See id.* at 92–93.

246. *See id.* at 94–95.

247. *See id.* at 92–94.

and states must know what specific population(s) to consider.[248] The dual-standard test achieves this specificity by explicitly requiring states to apportion districts to not deviate by more than ten percent in terms of either *total population* or *CVAP*, thereby ensuring that the apportioning scheme in question protects people's right to representational and electoral equality.

2. *A States' Discretion in Apportioning Districts is Not Unlimited*

States have discretion to choose any apportioning standard so long as it results in districts that do not deviate by more than ten percent in terms of either total population or CVAP. The Fourth and Fifth Circuits held that states were free to decide for themselves what standard they would use to apportion their districts.[249] The circuit courts based their decisions on the U.S. Supreme Court's statement in *Burns* that courts should not interfere with a state's choice of what apportioning standard to use.[250] However, the Supreme Court also held in *Burns* that such deference was permissible only to the extent that the state's choice was not unconstitutional.[251] An apportionment scheme that does not ensure *both* representational equality and electoral equality is unconstitutional as would be a state's choice to use such a scheme.[252] Therefore, states should have discretion to select any type of apportioning scheme, so long as that scheme results in districts that are equal in terms of both total population and CVAP. The fact that the Court even evaluated Hawaii's apportionment method to determine if it was constitutional demonstrates that states' discretion to choose between methods of apportionment is not unlimited.[253] Furthermore, other Supreme Court decisions in the voting rights arena suggest a trend that states' discretion in apportioning districts is not unlimited due to the potential for political abuse and/or manipulation.[254]

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248. Chen v. City of Houston, 532 U.S. 1046, 1046 (2001) (mem).

249. *See supra* note 186 and accompanying text.

250. *See supra* note 187 and accompanying text.

251. *See Burns*, 384 U.S. at 92–94.

252. *See supra* Part III.B.

253. *See Burns*, 384 U.S. at 90–98.

254. *See* Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 348–49 (1999) (Scalia, J., concurring); *Burns*, 384 U.S. at 93. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

3. *To Achieve "Equality" The Size of the Deviation of State and Local Electoral Districts Should Not Exceed Ten-Percent in Terms of Both Total Population and Voter Population*

When using the dual-standard test to apportion electoral districts equally in terms of both total population and citizen-voter age population, states must ensure that the districts do not deviate by more than ten percent. Although the U.S. Supreme Court has acknowledged that districts' population need not be identical,[255] and has stated that courts should be somewhat flexible[256] the Court has also held that an apportioning plan cannot be constitutional if it results in districts which deviate by more than ten percent in population.[257] In order to give states the discretion and latitude they need to apportion according to the ten percent standard, states may relegate the normal apportioning concerns of shape, compactness, and traditional political subdivisions to the status of secondary concerns.[258]

IV. CONCLUSION

States should be given discretion in determining what standard they wish to use as their basis for apportioning districts. However, the need for a clear standard, the possibility of such discretion resulting in partisan abuse, and the inadequacy of any one standard to fulfill both of the constitutional requirements of representational and electoral equality, demand that the U.S. Supreme Court take action. While the Court's previous standard may have been acceptable in the past, modern demographic realities in many states require a more precise standard. Furthermore, given the right set of facts, no one apportioning standard by itself can guarantee that both of the constitutional requirements of representational and electoral equality are met. Therefore, states should be required to apportion districts using the dual-standard test which would require them to apportion electoral districts so that they do not deviate by more than ten-percent in terms of either total population or citizen-voter age population.

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255. *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

256. *See id.* at 577; Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

257. Brown v. Thompson, 462 U.S. 835, 842–43 (1983).

258. Gaffney v. Cummings, 412 U.S. 735, 742–45 (1973).