Session 402 | Navigating the Next Redistricting Cycle to Maximize AAPI Political Power

How district lines are drawn will determine both the political balance of power nationally and within states as well as the political salience of AAPI communities for the next decade. Historically, areas with significant AAPI populations have been split into different districts, reducing the voting power of these populations and thus reducing the accountability of elected representatives to our community. For example, in 1992, during the Los Angeles civil unrest, Asian American-owned businesses in Koreatown suffered a significant portion of the city’s estimated $1 billion damages. Koreatown was split into four City Council districts and five State Assembly districts, and with the divided AAPI population comprising only a small portion of each elected official’s district, the officials had little incentive to respond to requests for cleanup and recovery assistance.

Since district lines are normally redrawn only once every ten years, 2021 will be a watershed year – AAPI communities will likely remain among our nation’s fastest-growing populations, but whether they are able to maximize their political power will be largely predetermined by district lines drawn in 2021. Seasoned voting rights experts and litigators who have fought on the frontlines of redistricting battles will discuss how AAPIs can best succeed in redistricting, including delving into the evolving case law surrounding redistricting through Supreme Court decisions on racial and partisan gerrymandering and the Voting Rights Act. Come learn what NAPABA attorneys can do to help to ensure our communities are represented in the next redistricting cycle!

Moderator:
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Speakers:
Thomas A. Saenz, President and General Counsel, MALDEF (Mexican American Legal Defense and Educational Fund)
Andy Kang, Executive Director, Asian Americans Advancing Justice | Chicago
Kathay Feng, National Redistricting Director, Common Cause
Jerry G. Vattamala, Director, Democracy Program, Asian American Legal Defense and Education Fund (AALDEF)
1. Supreme Court decision in Evenwel v. Abbott
2. Amicus brief of the Texas Senate Hispanic Caucus and the Texas House of Representatives Mexican American Legislative Caucus in Evenwel v. Abbott
3. Supreme Court decision in Common Cause v. Rucho
4. Thomas Hoefeller 2015 study re: the use of citizen voting age population in redistricting
5. Asian Americans & Redistricting: The Emerging Voice article, Wayne State University Law School’s The Journal of Law in Society
6. AALDEF’s New York Redistricting Proposal to Federal Court
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EVENWEL ET AL. v. ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS


Under the one-person, one-vote principle, jurisdictions must design legislative districts with equal populations. See Wesberry v. Sanders, 376 U. S. 1, 7–8, Reynolds v. Sims, 377 U. S. 533, 568. In the context of state and local legislative districting, States may deviate somewhat from perfect population equality to accommodate traditional districting objectives. Where the maximum population deviation between the largest and smallest district is less than 10%, a state or local legislative map presumptively complies with the one-person, one-vote rule.

Texas, like all other States, uses total-population numbers from the decennial census when drawing legislative districts. After the 2010 census, Texas adopted a State Senate map that has a maximum total-population deviation of 8.04%, safely within the presumptively permissible 10% range. However, measured by a voter-population baseline—eligible voters or registered voters—the map’s maximum population deviation exceeds 40%. Appellants, who live in Texas Senate districts with particularly large eligible- and registered-voter populations, filed suit against the Texas Governor and Secretary of State. Basing apportionment on total population, appellants contended, dilutes their votes in relation to voters in other Senate districts, in violation of the one-person, one-vote principle of the Equal Protection Clause. Appellants sought an injunction barring use of the existing Senate map in favor of a map that would equalize the voter population in each district. A three-judge District Court dismissed the complaint for failure to state a claim on which relief could be granted.

Held: As constitutional history, precedent, and practice demonstrate, a
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State or locality may draw its legislative districts based on total population. Pp. 7–19.

(a) Constitutional history shows that, at the time of the founding, the Framers endorsed allocating House seats to States based on total population. Debating what would become the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Retaining the total-population rule, Congress rejected proposals to allocate House seats to States on the basis of voter population. See U. S. Const., Amdt. 14, §2. The Framers recognized that use of a total-population baseline served the principle of representative equality. Appellants’ voter-population rule is inconsistent with the “theory of the Constitution,” Cong. Globe, 39th Cong., 1st Sess., 2766–2767, this Court recognized in *Wesberry* as underlying not just the method of allocating House seats to States but also the method of apportioning legislative seats within States. Pp. 8–15.

(b) This Court’s past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. Appellants assert that language in this Court’s precedent supports their view that States should equalize the voter-eligible population of districts. But for every sentence appellants quote, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation. See, e.g., *Reynolds*, 377 U. S., at 560–561. Moreover, from *Reynolds* on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality. Pp. 15–18.

(c) Settled practice confirms what constitutional history and prior decisions strongly suggest. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have long followed. As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible to vote. Nonvoters have an important stake in many policy debates and in receiving constituent services. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation. Pp. 18–19.

(d) Because constitutional history, precedent, and practice reveal the infirmity of appellants’ claim, this Court need not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population. P. 19.

Affirmed.
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GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined except as to Part III–B.
Texas, like all other States, draws its legislative districts on the basis of total population. Plaintiffs-appellants are Texas voters; they challenge this uniform method of districting on the ground that it produces unequal districts when measured by voter-eligible population. Voter-eligible population, not total population, they urge, must be used to ensure that their votes will not be devalued in relation to citizens’ votes in other districts. We hold, based on constitutional history, this Court’s decisions, and longstanding practice, that a State may draw its legislative districts based on total population.

I

A

This Court long resisted any role in overseeing the process by which States draw legislative districts. “The remedy for unfairness in districting,” the Court once held, “is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.” Colegrove v. Green, 328 U. S. 549, 556 (1946). “Courts ought not to enter this political thicket,” as Justice Frankfurter put it.
Ibid.

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

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

Although the Court in Baker did not reach the merits of the equal protection claim, Baker’s justiciability ruling set the stage for what came to be known as the one-person, one-vote principle. Just two years after Baker, in Wesberry v. Sanders, 376 U. S. 1, 7–8 (1964), the Court invalidated Georgia’s malapportioned congressional map, under which the population of one congressional district was “two to three times” larger than the population of the others. Relying on Article I, §2, of the Constitution, the
Court required that congressional districts be drawn with equal populations. *Id.*, at 7, 18. Later that same Term, in *Reynolds v. Sims*, 377 U. S. 533, 568 (1964), the Court upheld an equal protection challenge to Alabama’s malapportioned state-legislative maps. “[T]he Equal Protection Clause,” the Court concluded, “requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” *Ibid.* *Wesberry* and *Reynolds* together instructed that jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment.1

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

1 In *Avery v. Midland County*, 390 U. S. 474, 485–486 (1968), the Court applied the one-person, one-vote rule to legislative apportionment at the local level.

2 Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. See *Chapman v. Meier*, 420 U. S. 1, 22 (1975). For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map’s maximum population deviation is
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presumptively impermissible. *Ibid.* See also *Mahan* v. *Howell*, 410 U. S. 315, 329 (1973) (approving a state-legislative map with maximum population deviation of 16% to accommodate the State’s interest in “maintaining the integrity of political subdivision lines,” but cautioning that this deviation “may well approach tolerable limits”).

In contrast to repeated disputes over the permissibility of deviating from perfect population equality, little controversy has centered on the population base jurisdictions must equalize. On rare occasions, jurisdictions have relied on the registered-voter or voter-eligible populations of districts. See *Burns* v. *Richardson*, 384 U. S. 73, 93–94 (1966) (holding Hawaii could use a registered-voter population base because of “Hawaii’s special population problems”—in particular, its substantial temporary military population). But, in the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. Today, all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way.3

6.8%.

Appellants challenge that consensus. After the 2010 census, Texas redrew its State Senate districts using a total-population baseline. At the time, Texas was subject to the preclearance requirements of §5 of the Voting Rights Act of 1965. 52 U. S. C. §10304 (requiring jurisdictions to receive approval from the U. S. Department of Justice or the U. S. District Court for the District of Columbia before implementing certain voting changes). Once it became clear that the new Senate map, S148, would not receive preclearance in advance of the 2012 elections, the U. S. District Court for the Western District of Texas drew an interim Senate map, S164, which also equalized the total population of each district. See Davis v. Perry, No. SA–11–CV–788 (Nov. 23, 2011). On direct appeal, this Court observed that the District Court had failed to “take guidance from the State’s recently enacted plan in drafting an interim plan,” and therefore vacated the District Court’s map. Perry v. Perez, 565 U. S. ___, ___, ___–___ (2012) (per curiam) (slip op., at 4, 8–10).

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

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

The case was referred to a three-judge District Court for hearing and decision. See 28 U. S. C. §2284(a); Shapiro v. McManus, 577 U. S. ___, ___–___ (2015) (slip op., at 5–7). That court dismissed the complaint for failure to state a claim on which relief could be granted. Appellants, the District Court explained, “rel[y] upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs’ chosen metric—voter population.” App. to Juris.

5Apart from objecting to the baseline, appellants do not challenge the Senate map’s 8.04% total-population deviation. Nor do they challenge the use of a total-population baseline in congressional districting.
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Statement 9a. Decisions of this Court, the District Court concluded, permit jurisdictions to use any neutral, nondiscriminatory population baseline, including total population, when drawing state and local legislative districts. Id., at 13a–14a.6 We noted probable jurisdiction, 575 U. S. ___ (2015), and now affirm.

II

The parties and the United States advance different positions in this case. As they did before the District Court, appellants insist that the Equal Protection Clause requires jurisdictions to draw state and local legislative districts with equal voter-eligible populations, thus protecting “voter equality,” i.e., “the right of eligible voters to an equal vote.” Brief for Appellants 14.7 To comply with their proposed rule, appellants suggest, jurisdictions should design districts based on citizen-voting-age-population (CVAP) data from the Census Bureau’s American Community Survey (ACS), an annual statistical sample of the U. S. population. Texas responds that jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including

6 As the District Court noted, the Ninth Circuit has likewise rejected appellants’ theory, i.e., that voter population must be roughly equalized. See Garza v. County of L. A., 918 F. 2d 763, 773–776 (CA9 1990). Also declining to mandate voter-eligible apportionment, the Fourth and Fifth Circuits have suggested that the choice of apportionment base may present a nonjusticiable political question. See Chen v. Houston, 206 F. 3d 502, 528 (CA5 2000) (“[T]his eminently political question has been left to the political process.”); Daly v. Hunt, 93 F. 3d 1212, 1227 (CA4 1996) (“This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.”).

7 In the District Court, appellants suggested that districting bodies could also comply with the one-person, one-vote rule by equalizing the registered-voter populations of districts, but appellants have not repeated that argument before this Court. See Tr. of Oral Arg. 22–23.
total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory. Although its use of total-population data from the census was permissible, Texas therefore argues, it could have used ACS CVAP data instead. Sharing Texas’ position that the Equal Protection Clause does not mandate use of voter-eligible population, the United States urges us not to address Texas’ separate assertion that the Constitution allows States to use alternative population baselines, including voter-eligible population. Equalizing total population, the United States maintains, vindicates the principle of representational equality by “ensur[ing] that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives.” Brief for United States as Amicus Curiae.

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

A

We begin with constitutional history. At the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States? The Framers’ solution, now known as the Great Compromise, was to provide each State the same number of seats in the Senate, and to allocate House seats based on States’ total populations. “Representatives and direct Taxes,” they wrote, “shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.” U. S. Const., Art. I, §2, cl. 3 (emphasis added). “It is a fundamental principle of the proposed constitu-
tion,” James Madison explained in the Federalist Papers, “that as the aggregate number of representatives allotted to the several states, is to be ... founded on the aggregate number of inhabitants; so, the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the state itself may designate.” The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001). In other words, the basis of representation in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives. As the United States observes, the “choice of constitutional language reflects the historical fact that when the Constitution was drafted and later amended, the right to vote was not closely correlated with citizenship.” Brief for United States as Amicus Curiae 18. Restrictions on the franchise left large groups of citizens, including women and many males who did not own land, unable to cast ballots, yet the Framers understood that these citizens were nonetheless entitled to representation in government.

JUSTICE ALITO observes that Hamilton stated this principle while opposing allocation of an equal number of Senate seats to each State. *Post*, at 7–8 (opinion concurring in judgment). That context, however, does not diminish Hamilton’s principled argument for allocating seats to protect the representational rights of “every individual of the community at large.” 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911). JUSTICE ALITO goes on to quote James Madison for the proposition that Hamilton was concerned, simply and only, with “the outcome of a contest over raw political power.” *Post*, at 8. Notably, in the statement JUSTICE ALITO quotes, Madison was not attributing that motive to Hamilton; instead, according to Madison, Hamilton was attributing that motive to the advocates of equal representation for States. Farrand, *supra*, at 466. One need not gainsay that Hamilton's
When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Concerned that Southern States would not willingly enfranchise freed slaves, and aware that “a slave’s freedom could swell his state’s population for purposes of representation in the House by one person, rather than only three-fifths,” the Framers of the Fourteenth Amendment considered at length the possibility of allocating House seats to States on the basis of voter population. J. Sneed, Footprints on the Rocks of the Mountain: An Account of the Enactment of the Fourteenth Amendment 28 (1997). See also id., at 35 (“[T]he apportionment issue consumed more time in the Fourteenth Amendment debates than did any other topic.”).

In December 1865, Thaddeus Stevens, a leader of the Radical Republicans, introduced a constitutional amendment that would have allocated House seats to States “according to their respective legal voters”; in addition, the proposed amendment mandated that “[a] true census of the legal voters shall be taken at the same time with the regular census.” Cong. Globe, 39th Cong., 1st Sess., 10 (1866). Supporters of apportionment based on voter population employed the same voter-equality reasoning that appellants now echo. See, e.g., id., at 380 (remarks of Rep. Orth) (“[T]he true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government. . . .”); id., at 404 (remarks of Rep. Lawrence) (use of total population “disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union”).

backdrop was the political controversies of his day. That reality, however, has not deterred this Court’s past reliance on his statements of principle. See, e.g., Printz v. United States, 521 U. S. 898, 910–924 (1997).
Voter-based apportionment proponents encountered fierce resistance from proponents of total-population apportionment. Much of the opposition was grounded in the principle of representational equality. “As an abstract proposition,” argued Representative James G. Blaine, a leading critic of allocating House seats based on voter population, “no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.” Id., at 141. See also id., at 358 (remarks of Rep. Conkling) (arguing that use of a voter-population basis “would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented”); id., at 434 (remarks of Rep. Ward) ( “[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no matter to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative.”).

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

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

Appellants ask us to find in the Fourteenth Amendment’s Equal Protection Clause a rule inconsistent with this “theory of the Constitution.” But, as the Court recognized in *Wesberry*, this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States. “The debates at the [Constitutional] Convention,” the Court explained, “make at least one fact abundantly clear: that when the delegates agreed that the House should represent ‘people,’ they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants.” 376 U. S., at 13. “While it may not be possible to draw congressional districts with mathematical precision,” the Court acknowledged, “that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.” *Id.*, at 18 (emphasis added). It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.

Cordonning off the constitutional history of congressional districting, appellants stress two points.10 First, they

10JUSTICE ALITO adds a third, claiming “the allocation of congressional representation sheds little light” on the meaning of the one-person, one-vote rule “because that allocation plainly violates one person, one vote.” *Post*, at 4. For this proposition, JUSTICE ALITO notes the consti-
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draw a distinction between allocating seats to States, and apportioning seats within States. The Framers selected total population for the former, appellants and their amici argue, because of federalism concerns inapposite to intra-state districting. These concerns included the perceived risk that a voter-population base might encourage States to expand the franchise unwisely, and the hope that a total-population base might counter States' incentive to undercount their populations, thereby reducing their share of direct taxes. Wesberry, however, rejected the distinction appellants now press. See supra, at 12. Even without the weight of Wesberry, we would find appellants' distinction unconvincing. One can accept that federalism—or, as JUSTICE ALITO emphasizes, partisan and regional political advantage, see post, at 6–13—figured in the Framers' selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.11

11 JUSTICE ALITO asserts that we have taken the statements of the Fourteenth Amendment's Framers "out of context." Post, at 9. See also post, at 12 ("[C]laims about representational equality were invoked, if at all, only in service of the real goal: preventing southern States from acquiring too much power in the national government."). Like Alexander Hamilton, see supra, at 9, n. 9, the Fourteenth Amendment's Framers doubtless made arguments rooted in practical political realities as well as in principle. That politics played a part, however, does not warrant rejecting principled argument. In any event, motivations aside, the Framers' ultimate choice of total population rather than voter population is surely relevant to whether, as appellants now argue, the Equal Protection Clause mandates use of voter population
Second, appellants and JUSTICE ALITO urge, see post, at 5–6, the Court has typically refused to analogize to features of the federal electoral system—here, the constitutional scheme governing congressional apportionment—when considering challenges to state and local election laws. True, in Reynolds, the Court rejected Alabama's argument that it had permissibly modeled its State Senate apportionment scheme—one Senator for each county—on the United States Senate. “[T]he federal analogy,” the Court explained, “[is] inapposite and irrelevant to state legislative districting schemes” because “[t]he system of representation in the two Houses of the Federal Congress” arose “from unique historical circumstances.” 377 U. S., at 573–574. Likewise, in Gray v. Sanders, 372 U. S. 368, 371–372, 378 (1963), Georgia unsuccessfully attempted to defend, by analogy to the electoral college, its scheme of assigning a certain number of “units” to the winner of each county in statewide elections.

Reynolds and Gray, however, involved features of the federal electoral system that contravene the principles of both voter and representational equality to favor interests that have no relevance outside the federal context. Senate seats were allocated to States on an equal basis to respect state sovereignty and increase the odds that the smaller States would ratify the Constitution. See Wesberry, 376 U. S., at 9–13 (describing the history of the Great Compromise). See also Reynolds, 377 U. S., at 575 (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. . . . The relationship of the States to the Federal Government could hardly be less analogous.”). “The [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to

rather than total population.
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preclude an informed choice by the citizenry at large.” Williams v. Rhodes, 393 U. S. 23, 43–44 (1968) (Harlan, J., concurring in result). See also Gray, 372 U. S., at 378 (“The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality.” (footnote omitted)). By contrast, as earlier developed, the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting. The Framers’ answer to the apportionment question in the congressional context therefore undermines appellants’ contention that districts must be based on voter population.

B

Consistent with constitutional history, this Court’s past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. Quoting language from those decisions that, in appellants’ view, supports the principle of equal voting power—and emphasizing the phrase “one-person, one-vote”—appellants contend that the Court had in mind, and constantly meant, that States should equalize the voter-eligible population of districts. See Reynolds, 377 U. S., at 568 (“[A]n individual’s right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.”); Gray, 372 U. S., at 379–380 (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”). See also Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U. S. 50, 56 (1970) (“[W]hen members of an elected body are chosen from separate districts, each
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district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.”). Appellants, however, extract far too much from selectively chosen language and the “one-person, one-vote” slogan.

For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality. In *Reynolds*, for instance, the Court described “the fundamental principle of representative government in this country” as “one of equal representation for equal numbers of people.” 377 U. S., at 560–561. See also *Davis v. Bandemer*, 478 U. S. 109, 123 (1986) (“[I]n formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation.”); *Reynolds*, 377 U. S., at 563 (rejecting state districting schemes that “give the same number of representatives to unequal numbers of constituents”). And the Court has suggested, repeatedly, that districting based on total population serves both the State’s interest in preventing vote dilution and its interest in ensuring equality of representation. See *Board of Estimate of City of New York v. Morris*, 489 U. S. 688, 693–694 (1989) (“If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts.”). See also *Kirkpatrick*, 394 U. S., at 531 (recognizing in a congressional-districting case that “[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives”).

12 Appellants also observe that standing in one-person, one-vote cases has rested on plaintiffs’ status as voters whose votes were diluted. But
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Moreover, from *Reynolds* on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality. See Brief for Appellees 29–31 (collecting cases brought under the Equal Protection Clause). See also *id.*, at 31, n. 9 (collecting congressional-districting cases). Appellants point to no instance in which the Court has determined the permissibility of deviation based on eligible- or registered-voter data. It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule. More likely, we think, the Court has always assumed the permissibility of drawing districts to equalize total population.

“In the 1960s,” appellants counter, “the distribution of the voting population generally did not deviate from the distribution of total population to the degree necessary to raise this issue.” Brief for Appellants 27. To support this assertion, appellants cite only a District Court decision, which found no significant deviation in the distribution of voter and total population in “densely populated areas of New York State.” *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (SDNY), aff’d, 382 U. S. 4 (1965) (*per curiam*). Had this Court assumed such equivalence on a national scale, it likely would have said as much. 13 Instead, in *Gaffney v. Cummings*, 412 U. S. 735, 746–747 (1973), the Court acknowledged that voters may be distributed un-

the Court has not considered the standing of nonvoters to challenge a map malapportioned on a total-population basis. This issue, moreover, is unlikely ever to arise given the ease of finding voters willing to serve as plaintiffs in malapportionment cases.

13In contrast to the insubstantial evidence marshaled by appellants, the United States cites several studies documenting the uneven distribution of immigrants throughout the country during the 1960’s. See Brief for United States as *Amicus Curiae* 16.
evenly within jurisdictions. “[I]f it is the weight of a person’s vote that matters,” the Court observed, then “total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because ‘census persons’ are not voters.” Id., at 746. Nonetheless, the Court in Gaffney recognized that the one-person, one-vote rule is designed to facilitate “[f]air and effective representation,” id., at 748, and evaluated compliance with the rule based on total population alone, id., at 750.

C

What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries. Appellants have shown no reason for the Court to disturb this longstanding use of total population. See Walz v. Tax Comm’n of City of New York, 397 U. S. 664, 678 (1970) (“unbroken practice” followed “openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside”). See also Burson v. Freeman, 504 U. S. 191, 203–206 (1992) (plurality opinion) (upholding a law limiting campaigning in areas around polling places in part because all 50 States maintain such laws, so there is a “widespread and time-tested consensus” that legislation of this order serves important state interests). As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. See supra, at 8–12. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education
system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation. See *McCormick v. United States*, 500 U. S. 257, 272 (1991) (“Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.”).¹⁴

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

* * *

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

*Affirmed.*

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

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

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

I write separately because this Court has never provided a sound basis for the one-person, one-vote principle. For 50 years, the Court has struggled to define what right that principle protects. Many of our precedents suggest that it protects the right of eligible voters to cast votes that receive equal weight. Despite that frequent explanation, our precedents often conclude that the Equal Protection Clause is satisfied when all individuals within a district—voters or not—have an equal share of representation. The majority today concedes that our cases have not produced a clear answer on this point. See ante, at 16.

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

I

In the 1960’s, this Court decided that the Equal Protection Clause requires States to draw legislative districts based on a “one-person, one-vote” rule.* But this Court’s decisions have never coalesced around a single theory about what States must equalize.

The Equal Protection Clause prohibits a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” Amdt. 14, §1. For nearly a century after its ratification, this Court interpreted the Clause as having no application to the politically charged issue of how States should apportion their populations in political districts. See, e.g., Colegrove v. Green, 328 U. S. 549, 556 (1946) (plurality opinion). Instead, the Court left the drawing of States’ political boundaries to the States, so long as a State did not deprive people of the right to vote for reasons prohibited by the Constitution. See id., at 552, 556; Gomillion v. Lightfoot, 364 U. S. 339, 341, 347–348 (1960) (finding justiciable a claim that a city boundary

*The Court’s opinions have used “one person, one vote” and “one man, one vote” interchangeably. Compare, e.g., Gray v. Sanders, 372 U. S. 368, 381 (1963) (“one person, one vote”), with Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U. S. 50, 51 (1970) (“one man, one vote” (internal quotation marks omitted)). Gray used “one person, one vote” after noting the expansion of political equality over our history—including adoption of the Nineteenth Amendment, which guaranteed women the right to vote. 372 U. S., at 381.
THOMAS, J., concurring in judgment

was redrawn from a square shape to “a strangely irregular twenty-eight-sided figure” to remove nearly all black voters from the city). This meant that a State’s refusal to allocate voters within districts based on population changes was a matter for States—not federal courts—to decide. And these cases were part of a larger jurisprudence holding that the question whether a state government had a “proper” republican form rested with Congress. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 149–150 (1912).

This Court changed course in Baker v. Carr, 369 U. S. 186 (1962), by locating in the Equal Protection Clause a right of citizens not to have a “‘debasement of their votes.’” Id., at 194, and n. 15, 200. Expanding on that decision, this Court later held that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” Reynolds v. Sims, 377 U. S. 533, 568 (1964). The Court created an analogous requirement for congressional redistricting rooted in Article I, §2’s requirement that “Representatives be chosen ‘by the People of the several States.’” Wesberry v. Sanders, 376 U. S. 1, 7–9 (1964). The rules established by these cases have come to be known as “one person, one vote.”

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

In a number of cases, this Court has said that States must protect the right of eligible voters to have their votes receive equal weight. On this view, there is only one way for States to comply with the one-person, one-vote princi-
ple: they must draw districts that contain a substantially equal number of eligible voters per district.

The Court’s seminal decision in Baker exemplifies this view. Decided in 1962, Baker involved the failure of the Tennessee Legislature to reapportion its districts for 60 years. 369 U. S., at 191. Since Tennessee’s last reapportionment, the State’s population had grown by about 1.5 million residents, from about 2 to more than 3.5 million. And the number of voters in each district had changed significantly over time, producing widely varying voting populations in each district. Id., at 192. Under these facts, the Court held that reapportionment claims were justiciable because the plaintiffs—who all claimed to be eligible voters—had alleged a “debasement of their votes.” Id., at 194, and n. 15, 204 (internal quotation marks omitted).

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

In applying the one-person, one-vote principle to state
legislative districts, the Court has also emphasized vote dilution, which also supports the notion that the one-person, one-vote principle ensures equality among eligible voters. It did so most notably in Reynolds. In that case, Alabama had failed to reappoint its state legislature for decades, resulting in population-variance ratios of up to about 41 to 1 in the State Senate and up to about 16 to 1 in the House. 377 U. S., at 545. In explaining why Alabama’s failure to reappoint violated the Equal Protection Clause, this Court stated that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.” Id., at 568.

This Court’s post-Reynolds decisions likewise define the one-person, one-vote principle in terms of eligible voters, and thus imply that States should be allocating districts with eligible voters in mind. The Court suggested as much in Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U. S. 50 (1970). That case involved Missouri’s system permitting separate school districts to establish a joint junior college district. Six trustees were to oversee the joint district, and they were apportioned on the basis of the relative numbers of school-aged children in each subsidiary district. Id., at 51. The Court held that this plan violated the Equal Protection Clause because “the trustees of this junior college district [must] be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.” Id., at 52. In so holding, the Court emphasized that Reynolds had “called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted.” Hadley, 397 U. S., at 52; see id., at 52–53.
In contrast to this oft-stated aspiration of giving equal treatment to eligible voters, the Court has also expressed a different understanding of the one-person, one-vote principle. In several cases, the Court has suggested that one-person, one-vote protects the interests of all individuals in a district, whether they are eligible voters or not. In *Reynolds*, for example, the Court said that “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people.” 377 U. S., at 560–561; see also ante, at 16 (collecting cases). Under this view, States cannot comply with the Equal Protection Clause by equalizing the number of eligible voters in each district. They must instead equalize the total population per district.

In line with this view, the Court has generally focused on total population, not the total number of voters, when determining a State’s compliance with the one-person, one-vote requirement. In *Gaffney v. Cummings*, 412 U. S. 735, 750–751 (1973), for example, the Court upheld state legislative districts that had a maximum deviation of 7.83% when measured on a total-population basis. In contrast, in *Chapman v. Meier*, 420 U. S. 1, 21–22, 26–27 (1975), the Court struck down a court-ordered reapportionment that had a total deviation of 20.14% based on total population. This plan, in the Court’s view, failed to “achieve the goal of population equality with little more than de minimis variation.” *Id.*, at 27.

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

II

This inconsistency (if not opacity) is not merely a consequence of the Court’s equivocal statements on one person, one vote. The problem is more fundamental. There is simply no way to make a principled choice between interpreting one person, one vote as protecting eligible voters or as protecting total inhabitants within a State. That is because, though those theories are noble, the Constitution does not make either of them the exclusive means of apportionment for state and local representatives. In guaranteeing to the States a “Republican Form of Government,” Art. IV, §4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation. The Constitution instead reserves these matters to the people. The majority’s attempt today to divine a single “‘theory of the Constitution’”—apportionment based on representation, ante, at 12 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766–2767 (1866))—rests on a flawed reading of history and wrongly picks one side of a debate that the Framers did not resolve in the Constitution.

A

The Constitution lacks a single, comprehensive theory of representation. The Framers understood the tension between majority rule and protecting fundamental rights from majorities. This understanding led to a “mixed” constitutional structure that did not embrace any single theory of representation but instead struck a compromise between those who sought an equitable system of repre-
sentation and those who were concerned that the majority would abuse plenary control over public policy. As Madison wrote, “A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” The Federalist No. 51, p. 349 (J. Cooke ed. 1961). This was the theory of the Constitution. The Framers therefore made difficult compromises on the apportionment of federal representation, and they did not prescribe any one theory of how States had to divide their legislatures.

1

Because, in the view of the Framers, ultimate political power derives from citizens who were “created equal,” The Declaration of Independence ¶2, beliefs in equality of representation—and by extension, majority rule— influenced the constitutional structure. In the years between the Revolution and the framing, the Framers experimented with different ways of securing the political system against improper influence. Of all the “electoral safeguards for the representational system,” the most critical was “equality of representation.” G. Wood, The Creation of the American Republic 1776–1787, p. 170 (1998) (Wood).

The Framers’ preference for apportionment by representation (and majority rule) was driven partially by the belief that all citizens were inherently equal. In a system where citizens were equal, a legislature should have “equal representation” so that “equal interests among the people should have equal interests in [the assembly].” Thoughts on Government, in 4 Works of John Adams 195 (C. Adams ed. 1851). The British Parliament fell short of this goal. In addition to having hereditary nobility, more than half of the members of the democratic House of Commons were elected from sparsely populated districts—so-called “rotten boroughs.” Wood 171; Baker, 369 U. S.,
The Framers’ preference for majority rule also was a reaction to the shortcomings of the Articles of Confederation. Under the Articles, each State could cast one vote regardless of population and Congress could act only with the assent of nine States. Articles of Confederation, Art. IX, cl. 6; id., Art. X; id., Art. XI. This system proved undesirable because a few small States had the ability to paralyze the National Legislature. See The Federalist No. 22, at 140–141 (Hamilton).

Consequently, when the topic of dividing representation came up at the Constitutional Convention, some Framers advocated proportional representation throughout the National Legislature. 1 Records of the Federal Convention of 1787, pp. 471–473 (M. Farrand ed. 1911). Alexander Hamilton voiced concerns about the unfairness of allowing a minority to rule over a majority. In explaining at the Convention why he opposed giving States an equal vote in the National Legislature, Hamilton asked rhetorically, “If . . . three states contain a majority of the inhabitants of America, ought they to be governed by a minority?” Id., at 473; see also The Federalist No. 22, at 141 (Hamilton) (objecting to supermajoritarian voting requirements because they allow an entrenched minority to “controul the opinion of a majority respecting the best mode of conducting [the public business]”). James Madison, too, opined that the general Government needed a direct mandate from the people. If federal “power [were] not immediately derived from the people, in proportion to their numbers,” according to Madison, the Federal Government would be as weak as Congress under the Articles of Confederation. 1 Records of the Federal Convention of 1787, at 472.

In many ways, the Constitution reflects this preference for majority rule. To pass Congress, ordinary legislation requires a simple majority of present members to vote in
favor. And some features of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants. *Ante*, at 8–12. Thus, “equal representation for equal numbers of people,” *ante*, at 12 (internal quotation marks and emphasis omitted), features prominently in how representatives are apportioned among the States. These features of the Constitution reflect the preference of some members of the founding generation for equality of representation. But, as explained below, this is not the single “theory of the Constitution.”

2

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

The Framers believed that a proper government promoted the common good. They conceived this good as objective and not inherently coextensive with majoritarian preferences. *See, e.g.*, The Federalist No. 1, at 4 (Hamilton) (defining the common good or “public good” as the “true interests” of the community); *id.*, No. 10, at 57 (Madison) (“the permanent and aggregate interests of the community”). For government to promote the common good, it had to do more than simply obey the will of the majority. *See, e.g.*, *ibid.* (discussing majoritarian factions). Government must also protect fundamental rights. *See* The Declaration of Independence ¶12; 1 W. Blackstone, Commentaries *124 (“[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which are vested in them by the immutable laws of nature”).
Of particular concern for the Framers was the majority of people violating the property rights of the minority. Madison observed that “the most common and durable source of factions, has been the various and unequal distribution of property.” The Federalist No. 10, at 59. A poignant example occurred in Massachusetts. In what became known as Shays’ Rebellion, armed debtors attempted to block legal actions by creditors to recover debts. Although that rebellion was ultimately put down, debtors sought relief from state legislatures “under the auspices of Constitutional forms.” Letter from James Madison to Thomas Jefferson (Apr. 23, 1787), in 11 The Papers of Thomas Jefferson 307 (J. Boyd ed. 1955); see Wood 412–413. With no structural political checks on democratic lawmaking, creditors found their rights jeopardized by state laws relieving debtors of their obligation to pay and authorizing forms of payment that devalued the contracts. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structures, 76 Cal. L. Rev. 267, 280–281 (1988); see also Fletcher v. Peck, 6 Cranch 87, 137–138 (1810) (Marshall, C. J.) (explaining that the Contract Clause came from the Framers’ desire to “shield themselves and their property from the effects of those sudden and strong passions to which men are exposed”).

Because of the Framers’ concerns about placing unchecked power in political majorities, the Constitution’s majoritarian provisions were only part of a complex republican structure. The Framers also placed several antidemocratic provisions in the Constitution. The original Constitution permitted only the direct election of representatives. Art. I, §2, cl. 1. Senators and the President were selected indirectly. See Art. I, §3, cl. 1; Art. II, §1, cls. 2–3. And the “Great Compromise” guaranteed large and small States voting equality in the Senate. By
malapportioning the Senate, the Framers prevented large States from outvoting small States to adopt policies that would advance the large States’ interests at the expense of the small States. See The Federalist No. 62, at 417 (Madison).

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

B

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

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

Republican governments promote the common good by placing power in the hands of the people, while curtailing the majority’s ability to invade the minority’s fundamental rights. The Framers recognized that there is no universal formula for accomplishing these goals. At the framing, many state legislatures were bicameral, often reflecting multiple theories of representation. Only “[s]ix of the original thirteen states based representation in both houses of their state legislatures on population.” Hayden, The False Promise of One Person, One Vote, 102 Mich. L. Rev. 213, 218 (2003). In most States, it was common to base representation, at least in part, on the State’s political subdivisions, even if those subdivisions varied heavily in
Reflecting this history, the Constitution continued to afford States significant leeway in structuring their “Republican” governments. At the framing, “republican” referred to “[p]lacing the government in the people,” and a “republick” was a “state in which the power is lodged in more than one.” S. Johnson, A Dictionary of the English Language (7th ed. 1785); see also The Federalist No. 39, at 251 (Madison) (“[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour”). By requiring the States to have republican governments, the Constitution prohibited them from having monarchies and aristocracies. See id., No. 43, at 291. Some would argue that the Constitution also prohibited States from adopting direct democracies. Compare Wood 222–226 (“For most constitution-makers in 1776, republicanism was not equated with democracy”) with A. Amar, America’s Constitution: A Biography 276–281 (2005) (arguing that the provision prohibited monarchies and aristocracies but not direct democracy); see also The Federalist No. 10, at 62 (Madison) (distinguishing a “democracy” and a “republic”); id., No. 14, at 83–84 (same).

Beyond that, however, the Constitution left matters open for the people of the States to decide. The Constitution says nothing about what type of republican government the States must follow. When the Framers wanted to deny powers to state governments, they did so explicitly. See, e.g., Art. I, §10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts”).

None of the Reconstruction Amendments changed the original understanding of republican government. Those
Amendments brought blacks within the existing American political community. The Fourteenth Amendment pressured States to adopt universal male suffrage by reducing a noncomplying State’s representation in Congress. Amdt. 14, §2. And the Fifteenth Amendment prohibited restricting the right of suffrage based on race. Amdt. 15, §1. That is as far as those Amendments went. As Justice Harlan explained in Reynolds, neither Amendment provides a theory of how much “weight” a vote must receive, nor do they require a State to apportion both Houses of their legislature solely on a population basis. See 377 U. S., at 595–608 (dissenting opinion). And JUSTICE ALITO quite convincingly demonstrates why the majority errs by reading a theory of equal representation into the apportionment provision in §2 of the Fourteenth Amendment. See post, at 8–13 (opinion concurring in judgment).

C

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

First, in embracing one person, one vote, the Court has arrogated to the Judiciary important value judgments that the Constitution reserves to the people. In Reynolds, for example, the Court proclaimed that “[l]egislators represent people, not trees or acres”; that “[l]egislators are elected by voters, not farms or cities or economic interests”; and that, accordingly, electoral districts must have roughly equal population. 377 U. S., at 562–563. As I have explained, the Constitution permits, but does not impose, this view. Beyond that, Reynolds’ assertions are driven by the belief that there is a single, correct answer to the question of how much voting strength an individual
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citizen should have. These assertions overlook that, to control factions that would legislate against the common good, individual voting strength must sometimes yield to countermajoritarian checks. And this principle has no less force within States than it has for the federal system. See The Federalist No. 10, at 63–65 (Madison) (recognizing that smaller republics, such as the individual States, are more prone to capture by special interests). Instead of large States versus small States, those interests may pit urban areas versus rural, manufacturing versus agriculture, or those with property versus those without. Cf. Reynolds, supra, at 622–623 (Harlan, J., dissenting). There is no single method of reconciling these competing interests. And it is not the role of this Court to calibrate democracy in the vain search for an optimum solution.

The Government argues that apportioning legislators by any metric other than total population “risks rendering residents of this country who are ineligible, unwilling, or unable to vote as invisible or irrelevant to our system of representative democracy.” Brief for United States as Amicus Curiae 27. But that argument rests on the faulty premise that “our system of representative democracy” requires specific groups to have representation in a specific manner. As I have explained, the Constitution does not impose that requirement. See Parts II–A, II–B, supra. And as the Court recently reminded us, States are free to serve as “laboratories” of democracy. Arizona State Legislature v. Arizona Independent Redistricting Comm’n, 576 U. S. __, ____ (2015) (slip op., at 28). That “laboratory” extends to experimenting about the nature of democracy itself.

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

So far as the Constitution is concerned, there is no single “correct” way to design a republican government. Any republic will have to reconcile giving power to the people with diminishing the influence of special interests. The wisdom of the Framers was that they recognized this dilemma and left it to the people to resolve. In trying to impose its own theory of democracy, the Court is hopelessly adrift amid political theory and interest-group politics with no guiding legal principles.

III

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

Although the majority does not choose among these theories, it necessarily denies that the Equal Protection Clause protects the right to cast an equally weighted ballot. To prevail, appellants do not have to deny the importance of equal representation. Because States can equalize both total population and total voting power within the districts, they have to show only that the right to cast an equally weighted vote is part of the one-person, one-vote right that we have recognized. But the majority declines to find such a right in the Equal Protection Clause. Ante, at 18–19. Rather, the majority acknowledges that “[f]or every sentence appellants quote from the Court’s opinions [establishing a right to an equal vote], one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality.” Ante, at 16. Because our precedents are not consistent with appellants’ position—that the only constitutionally available choice for States is to allocate districts to equalize eligible voters—the majority concludes that appellants’ challenge fails. Ante, at 15–19.

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

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

* * *

There is no single “correct” method of apportioning state legislatures. And the Constitution did not make this Court “a centralized politburo appointed for life to dictate to the provinces the ‘correct’ theories of democratic representation, [or] the ‘best’ electoral systems for securing truly ‘representative’ government.” *Holder v. Hall*, 512 U. S. 874, 913 (1994) (THOMAS, J., concurring in judgment). Because the majority continues that misguided search, I concur only in the judgment.
JUSTICE ALITO, with whom JUSTICE THOMAS joins except as to Part III–B, concurring in the judgment.

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

I

Both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule. The decennial census required by the Constitution tallies total population. Art. I, §2, cl. 3; Amdt. 14, §2. These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters. Since *Reynolds*, States have almost uniformly used total population in attempting to create legislative districts that are equal in size. And with one notable exception, *Burns v. Richardson*, 384 U. S. 73 (1966), this Court’s post-*Reynolds* cases have likewise looked to total population. Moreover, much
of the time, creating districts that are equal in total population also results in the creation of districts that are at least roughly equal in eligible voters. I therefore agree that States are permitted to use total population in redistricting plans.

II

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

Disagreeing with Texas, the Solicitor General dismisses Burns as an anomaly and argues that the use of total population is constitutionally required. The Solicitor General contends that the one-person, one-vote rule means that all persons, whether or not they are eligible to vote, are entitled to equal representation in the legislature. Accordingly, he argues, legislative districts must be equal in total population even if that results in districts that are grossly unequal in the number of eligible voters, a situation that is most likely to arise where aliens are disproportionately concentrated in some parts of a State.

This argument, like that advanced by appellants, implicates very difficult theoretical and empirical questions about the nature of representation. For centuries, political theorists have debated the proper role of representatives, and political scientists have studied the conduct of

1See, e.g., H. Pitkin, The Concept of Representation 4 (1967) ("[D]iscussions of representation are marked by long-standing, persistent controversies which seem to defy solution"); ibid. ("Another vexing and seemingly endless controversy concerns the proper relation between representative and constituents"); Political Representation i (I.
legislators and the interests that they actually advance. We have no need to wade into these waters in this case, and I would not do so. Whether a State is permitted to use some measure other than total population is an important and sensitive question that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts.

Shapiro, S. Stokes, E. Wood, & A. Kirshner eds. 2009) ("[R]elations between the democratic ideal and the everyday practice of political representation have never been well defined and remain the subject of vigorous debate among historians, political theorists, lawyers, and citizens"); id., at 12 ("[W]e need a better understanding of these complex relations in their multifarious parts before aspiring to develop any general theory of representation"); S. Dovi, Political Representation, The Stanford Encyclopedia of Philosophy (E. Zalta ed. Spring 2014) ("[O]ur common understanding of political representation is one that contains different, and conflicting, conceptions of how political representatives should represent and so holds representatives to standards that are mutually incompatible"), online at http://plato.stanford.edu/archives/spr2014/entries/political-representation (all Internet materials as last visited Mar. 31, 2016); ibid. ("[W]hat exactly representatives do has been a hotly contested issue").

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

A

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

First, the allocation of congressional representation sheds little light on the question presented by the Solicitor General’s argument because that allocation plainly violates one person, one vote. This is obviously true with respect to the Senate: Although all States have equal representation in the Senate, the most populous State (California) has 66 times as many people as the least populous (Wyoming). See United States Census 2010, Resident Population Data, http://www.census.gov/2010census/data/apportionment-pop-text.php. And even the allocation of House seats does not comport with one person, one vote. Every State is entitled to at least one seat in the House, even if the State’s population is lower than the average population of House districts nationwide. U. S. Const., Art. I, §2, cl. 3. Today, North Dakota, Ver-
mont, and Wyoming all fall into that category. See United States Census 2010, Apportionment Data, http://www.census.gov/2010census/data/apportionment-data-text.php. If one person, one vote applied to allocation of House seats among States, I very much doubt the Court would uphold a plan where one Representative represents fewer than 570,000 people in Wyoming but nearly a million people next door in Montana.4

Second, Reynolds v. Sims squarely rejected the argument that the Constitution’s allocation of congressional representation establishes the test for the constitutionality of a state legislative districting plan. Under one Alabama districting plan before the Court in that case, seats in the State Senate were allocated by county, much as seats in the United States Senate are allocated by State. (At that time, the upper houses in most state legislatures were similar in this respect.) The Reynolds Court noted that “[t]he system of representation in the two Houses of the Federal Congress” was “conceived out of compromise and concession indispensable to the establishment of our federal republic.” 377 U. S., at 574. Rejecting Alabama’s argument that this system supported the constitutionality of the State’s apportionment of senate seats, the Court concluded that “the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.” Id.,

4The Court brushes off the original Constitution’s allocation of congressional representation by narrowing in on the Fourteenth Amendment’s ratification debates. Ante, at 13, n. 10. But those debates were held in the shadow of that original allocation. And what Congress decided to do after those debates was to retain the original apportionment formula—minus the infamous three-fifths clause—and attach a penalty to the disenfranchisement of eligible voters. In short, the Fourteenth Amendment made no structural changes to apportionment that bear on the one-person, one-vote rule.

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

The original Constitution’s allocation of House seats involved what the *Reynolds* Court rather delicately termed “compromise and concession.” 377 U. S., at 574. Seats were apportioned among the States “according to their respective Numbers,” and these “Numbers” were “determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.” Art. I, §2, cl. 3. The phrase “all other Persons” was a euphemism for slaves. Delegates to the Constitutional Convention from the slave States insisted on this infamous clause as a condition of their support for the Constitution, and the clause gave the slave States more power in the House and in the electoral college than they would have enjoyed if only free persons had been counted. These slave-state delegates did not

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5See A. Amar, America’s Constitution: A Biography 87–98 (2005) (Amar); *id.*, at 94 (“The best justification for the three-fifths clause sounded in neither republican principle nor Revolutionary ideology, but raw politics”); see also *id.*, at 88–89 (explaining that the “protective coloring” camouflaging the slave States’ power grab “would have been wasted had the Constitution pegged apportionment to the number of voters, with a glaringly inconsistent add-on for nonvoting slaves”); cf. G. Van Cleve, A Slaveholders’ Union 126 (2010) (“[T]he slave states saw slave representation as a direct political protection for wealth consisting of slave property against possible Northern attacks on slavery, and told the Convention unequivocally that they needed such protection in order to obtain ratification of the Constitution”); *id.*, at 133–134 (“The compromise on representation awarded disproportionate shares of
demand slave representation based on some philosophical notion that “representatives serve all residents, not just those eligible or registered to vote.” Ante, at 18.6

B

The Court’s account of the original Constitution’s allocation also plucks out of context Alexander Hamilton’s statement on apportionment. The Court characterizes Hamilton’s words (more precisely, Robert Yates’s summary of his fellow New Yorker’s words) as endorsing apportionment by total population, and positions those words as if Hamilton were talking about apportionment in the House. Ante, at 9. Neither is entirely accurate. The “quote” comes from the controversy over Senate apportionment, where the debate turned on whether to apportion by population at all. See generally 1 Records of the Federal Convention of 1787, pp. 470–474 (M. Farrand ed. 1911). Hamilton argued in favor of allocating Senate seats by population:

“The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an artificial being, called states? There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government. If therefore three states contain a majority of the inhabitants of America, ought they to be governed by a minority? Would the inhabitants of the great states ever submit to this? If the smaller states main-

6See Amar 92 (“But masters did not as a rule claim to virtually represent the best interests of their slaves. Masters, after all, claimed the right to maim and sell slaves at will, and to doom their yet unborn posterity to perpetual bondage. If this could count as virtual representation, anything could”).
tain this principle, through a love of power, will not the larger, from the same motives, be equally tenacious to preserve their power?” *Id.*, at 473.

As is clear from the passage just quoted, Hamilton (according to Yates) thought the fight over apportionment was about naked *power*, not some lofty ideal about the nature of representation. That interpretation is confirmed by James Madison's summary of the same statement by Hamilton: “The truth is it [meaning the debate over apportionment] is a contest for power, not for liberty. . . . The State of Delaware having 40,000 souls will lose power, if she has ¼ only of the votes allowed to Pa. having 400,000.” *Id.*, at 466. Far from “[e]ndorsing apportionment based on total population,” *ante*, at 9, Hamilton was merely acknowledging the obvious: that apportionment in the new National Government would be the outcome of a contest over raw political power, not abstract political theory.

C

After the Civil War, when the Fourteenth Amendment was being drafted, the question of the apportionment formula arose again. Thaddeus Stevens, a leader of the so-called radical Republicans, unsuccessfully proposed that apportionment be based on eligible voters, rather than total population. The opinion of the Court suggests that the rejection of Stevens' proposal signified the adoption of the theory that representatives are properly understood to represent all of the residents of their districts, whether or not they are eligible to vote. *Ante*, at 10–12. As was the case in 1787, however, it was power politics, not democratic theory, that carried the day.

In making his proposal, Stevens candidly explained that the proposal's primary aim was to perpetuate the dominance of the Republican Party and the Northern States. Cong. Globe, 39th Cong., 1st Sess., 74 (1865); Van Alstyne,
ALITO, J., concurring in judgment

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

Stevens’ proposal met with opposition in the Joint Committee on Reconstruction, including from, as the majority notes, James Blaine. Ante, at 11. Yet, as it does with Hamilton’s, the majority plucks Blaine’s words out of context:

“[W]e have had several propositions to amend the Federal Constitution with respect to the basis of representation in Congress. These propositions . . . give to the States in future a representation proportioned to their voters instead of their inhabitants.

“The effect contemplated and intended by this change is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States. . . .

“The direct object thus aimed at, as it respects the rebellious States, has been so generally approved that little thought seems to have been given to the incidental evils which the proposed constitutional
amendment would inflict on a large portion of the loyal States—evils, in my judgment, so serious and alarming as to lead me to oppose the amendment in any form in which it has yet been presented. As an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.

“If voters instead of population shall be made the basis of representation certain results will follow, not fully appreciated perhaps by some who are now urgent for the change.” Cong. Globe, 39th Cong., 1st Sess., 141 (1865).

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

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

As should be obvious from these lengthy passages, Blaine recognized that the “generally approved” “result aimed at” was to deprive southern States of political power; far from quibbling with that aim, he sought to *achieve it* while limiting the collateral damage to the loyal northern States. See Van Alstyne 47.

Roscoe Conkling, whom the majority also quotes, *ante*, at 11, seemed to be as concerned with voter-based apportionment’s “narrow[ing] the basis of taxation, and in some States seriously,” as he was with abstract notions of representational equality. Cong. Globe, 39th Cong., 1st Sess., 358; *id.*, at 359 (“representation should go with taxation”); *ibid.* (apportionment by citizenship “would narrow the basis of taxation and cause considerable inequalities in this respect, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year”). And Hamilton Ward, also quoted by the majority, *ante*, at 11, was primarily disturbed by “[t]he fact that one South Carolinian, whose hands are red with the blood of fallen patriots, and whose skirts are reeking with the odors of Columbia and Andersonville, will have a voice as potential in these Halls as two and a half Vermont soldiers who have come back from the grandest battle-fields in history maimed and scarred in the contest with South Carolina traitors in their efforts to destroy this Government”—and only secondarily worried about the prospect of “taxation without representation.” Cong. Globe, 39th Cong., 1st Sess., 434.
ALITO, J., concurring in judgment

Even Jacob Howard, he of the “theory of the Constitution” language, ante, at 12, bemoaned the fact that basing representation on total population would allow southern States “to obtain an advantage which they did not possess before the rebellion and emancipation.” Cong. Globe, 39th Cong., 1st Sess., 2766. “I object to this. I think they cannot very consistently call upon us to grant them an additional number of Representatives simply because in consequence of their own misconduct they have lost the property [meaning slaves, whom slaveholders considered to be property] which they once possessed, and which served as a basis in great part of their representation.” Ibid. The list could go on. The bottom line is that in the leadup to the Fourteenth Amendment, claims about representational equality were invoked, if at all, only in service of the real goal: preventing southern States from acquiring too much power in the National Government.

After much debate, Congress eventually settled on the compromise that now appears in §2 of the Fourteenth Amendment. Under that provision, House seats are apportioned based on total population, but if a State wrongfully denies the right to vote to a certain percentage of its population, its representation is supposed to be reduced proportionally. Enforcement of this remedy, however, is

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7Section 2 provides:

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

dependent on action by Congress, and—regrettably—the remedy was never used during the long period when voting rights were widely abridged. Amar 399.

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

* * *

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

Needless to say, the reference in this provision to “male inhabitants . . . being twenty-one years of age” has been superseded by the Nineteenth and Twenty-sixth Amendments. But notably the reduction in representation is pegged to the proportion of (then) eligible voters denied suffrage. Section 2’s representation-reduction provision makes no appearance in the Court’s structural analysis.
In The
Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF THE TEXAS SENATE HISPANIC CAUCUS AND THE TEXAS HOUSE OF REPRESENTATIVES MEXICAN AMERICAN LEGISLATIVE CAUCUS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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September 25, 2015
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INTEREST OF AMICI CURIAE¹

Established in 1987, the Senate Hispanic Caucus is comprised of all Hispanic Texas State Senators and those Senators who represent districts with large minority populations. The goals of the Senate Hispanic Caucus include promoting legislative initiatives that better the Texas Hispanic community, particularly in the areas of economic development, health, education, civic engagement and civil rights. The members of the Senate Hispanic Caucus advance its mission through introducing, educating Senators about, and voting in support of legislation that benefits the Latino community in Texas, as well as voting against legislation that harms the Latino community. Members of the Senate Hispanic Caucus live in demographically diverse districts that will suffer severe negative effects from adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.

The Mexican American Caucus (MALC) was founded in 1973 in the Texas House of Representatives for

¹ Pursuant to Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.
the purpose of strengthening the numbers of Latino House members and better representing a united Latino constituency across the state. MALC is the oldest and largest Latino legislative caucus in the United States. MALC has a membership of 39 House members from all parts of the state, and MALC members vote as a bloc on consequential matters for Latino constituents, including voting rights. Members of MALC live in demographically diverse districts that will suffer severe negative effects from the adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.

SUMMARY OF ARGUMENT

The apportionment metrics advanced by Plaintiffs would strip state legislative seats out of Houston, Dallas and South and West Texas and create grossly oversized districts of up to one million people. In addition, Plaintiffs’ apportionment metrics would have disastrous effects on the Latino community because the metrics are tied to demographic characteristics, such as youth and lower rates of voter registration, that are most closely associated with Latinos.

Subtracting predominantly Latino population from apportionment in Texas will shift seats towards more heavily Anglo and older population in Central and East Texas. This radical change in apportionment
and representation will harm the voters who live in communities with significant Latino populations, whether or not those voters are themselves Latino. Packed into super-sized legislative districts, voters and their non-voting children and neighbors will be forced to compete with a vast number of other constituents for state resources and responsive legislation. Elected representatives without the resources or capacity to tend to the needs of hundreds of thousands more constituents will strain to the breaking point. For the Latino community in particular, which has struggled to gain the opportunity to elect their candidates of choice, apportionment based on citizen-voting-age population (CVAP) or registered-voter population would eliminate opportunity districts and subtract decades of progress from the Texas redistricting maps.

ARGUMENT

I. The Apportionment Metrics Sought by Plaintiffs Shift Legislative Seats Away From Texas’s two Largest Cities and South and West Texas

The great diversity of Texas is mirrored in its largest cities. People of all races and backgrounds mix together in the state’s economic and cultural hubs. Houston, the largest city in Texas, is home to 25 Fortune 500 corporations, including some of the
nation’s largest energy companies. The Dallas metropolitan area is the fourth-largest employment center in the nation with more than three million jobs. Texas is also diverse in its South and West Texas regions, which include agricultural areas as well as cities. South and West Texas are home to the largest inland ports along the U.S.-Mexico border – crossing billions of dollars in goods annually. Subtracting millions of children and others not yet eligible or registered to vote from the apportionment base skews legislative districts away from the source of much of the state’s economic success.

A. Texas Is One of the Most Demographically Diverse States in the Nation

From 2010 to 2014, Texas’s population grew 7%, compared to 3% overall for the United States. Texas’s population is younger than the national average;

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more than one-quarter of Texans are under age 18.\textsuperscript{6} Texas is 44\% Anglo, 39\% Latino, 12.50\% African American, and 4.50\% Asian American.\textsuperscript{7}

The composition of the Texas electorate is also changing. Latinos have slowly increased their registration rates over time and in November 2014 constituted 23\% of Texas registered voters.\textsuperscript{8} Today, 47\% of native-born Texas children are Latino; these young people will become eligible to vote as they turn 18.\textsuperscript{9}

Texas’s population, however, is unevenly distributed. In Plaintiffs’ Senate Districts 1 and 4, the residents are, on average, slightly older and less

\begin{enumerate}
\item[\textsuperscript{6}] \textit{Id.}
\item[\textsuperscript{7}] \textit{Id.} The term “Anglo” refers to persons who identify to the U.S. Census Bureau as White and not Hispanic.
\item[\textsuperscript{9}] See U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003&prodType=table (limit geography to Texas); U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status (Hispanic or Latino), 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table (limit geography to Texas).\
\end{enumerate}
racially diverse than state averages.Senate Districts 1 and 4 are 67% and 63% Anglo, respectively, although Texas on the whole is 44% Anglo. Less than one in ten registered voters in Senate Districts 1 and 4 is Latino. The voter turnouts in Senate Districts 1 and 4 are also slightly higher at 37% than the statewide average of 34%.

1. **Children in Texas**

Texas children constitute the largest number of persons ineligible to vote in the state – 7,040,918. Compared to older age brackets, Texas children are also disproportionately Latino.

Race and ethnicity play a strong role in the distribution of children across Texas. In Texas, the average Anglo family contains 0.8 children and 2.14

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15 See id.
The average Latino family contains 1.49 children and 2.38 adults.\textsuperscript{16} Texas House and Senate districts containing the greatest percentages of families living with children tend to be in areas with high Latino populations. For example, according to the 2010 Census, the state Senate districts with the highest percentages of families living with children were in Houston and along the Texas-Mexico border.\textsuperscript{17} Eight of the ten state House districts with the highest percentage of families living with children were also in Houston and along the Texas-Mexico border.\textsuperscript{18}

The child population varies so widely across Texas Senate and House districts that simply using voting-age population as an apportionment metric renders the current plans malapportioned on that metric.\textsuperscript{19} In fact, the main source of Plaintiffs' claimed

\textsuperscript{16} U.S. Census Bureau, Table Viewer: Average Family Size by Age (White Alone, Not Hispanic or Latino Householder), 2010 Census (2010), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37I&prodType=table (limit geography to Texas).

\textsuperscript{17} U.S. Census Bureau, Table Viewer: Average Family Size by Age (Hispanic or Latino Householder), 2010 Census (2010), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37H&prodType=table (limit geography to Texas).

\textsuperscript{18} See U.S. Census Bureau, 2010 Census Summary File 1 (2011) (calculated from Tables P17, P18, P34, P37, and P38).

\textsuperscript{19} Id.

\textsuperscript{20} See, e.g., Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (ideal voting-age population: 589,669; District 27 voting-age (Continued on following page)
“imbalance” in voter eligibility across the state is due to the presence of children, and specifically the relatively large number of children who are Latino.

2. Adult Non-citizens in Texas

Adult non-citizens in Texas constitute a much smaller population than children. According to the U.S. Census Bureau, 2,685,393 adult non-citizens live in Texas.\(^\text{21}\) Although adult non-citizens constitute less than 8% of the Texas population, the majority of adult non-citizens in Texas are Latino and tend to live in Latino communities.\(^\text{22}\) Thus, excluding adult non-citizens from apportionment exacerbates the effect on Latino communities of excluding children.


Adult non-citizens include individuals with a mix of immigration statuses, including legal permanent residents, visa-holders, and the undocumented. Many adult non-citizens, although not currently able to vote, are eligible to naturalize; each year, more than 50,000 Texans become naturalized U.S. citizens.  

3. Eligible Individuals Who Are Not Yet Registered to Vote

In Texas, approximately 2.1 million U.S. citizens of voting age are not registered to vote. Although eligible, these individuals have either never registered or fallen off the rolls after changing address and not updating their voter-registration information.

Here too, race and ethnicity drive regional differences. Latino voter registration lags Anglo voter registration by 17 percentage points. Factors contributing to lower rates of voter registration among

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Latino citizens include younger average age and lower educational attainment than Anglos.\textsuperscript{26}

4. Registered Voters Who Do Not Vote

In 2014, over 9 million registered voters in Texas did not vote.\textsuperscript{27} In 2012, a presidential election year, over 5 million registered voters did not go to the polls.\textsuperscript{28}

Low voter turnout is a problem throughout Texas. In Ms. Evenwel's Senate District 1, voter turnout in the 2014 General Election was only 37% of the district's registered voters and only 31% of the district's citizen-voting-age population.\textsuperscript{29} Similarly, in Mr. Pfenninger's Senate District 4, voter turnout in the 2014 General Election was only 37% of the

\textsuperscript{26} U.S. Census Bureau, Table 5: Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2014 (2014), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.


district’s registered voters and only 34% of the district’s citizen-voting-age population.\footnote{30}

**B. The Metrics Advanced by Plaintiffs Shift Districts Across the State and Create Grossly Overpopulated Districts**

As explained in Section II below, apportionment based on either CVAP or registered-voter population does not equalize the weight of votes. However, apportionment on those metrics does result in excessive total population deviations and fewer seats in Houston, Dallas and South and West Texas.

**1. The Texas Senate Map and Plaintiffs’ Metrics**

The Texas Senate contains 31 single-member districts. See Tex. Const. art. III, §§ 2, 25. In the current Senate redistricting plan, the ideal total population used for apportioning districts is 811,147.\footnote{31} The overall plan deviation from the total population ideal is 8.04%.\footnote{32}


\footnote{32} Id.
In a Senate redistricting plan apportioned on the basis of CVAP, districts in Houston, Dallas and South and West Texas would have to take on substantial new territory and population in order to reach the ideal.\textsuperscript{33}

South and West Texas would lose a Senate district, reducing the number of seats in that region from five to four.\textsuperscript{34} The remaining districts would be forced to increase their total populations by an average of over 100,000.\textsuperscript{35}

In Houston, Senate District 6, currently represented by Senator Sylvia Garcia, would swell to over one million constituents in order to reach the CVAP ideal.\textsuperscript{36} Senate District 6 would also no longer be a Latino opportunity district. The Latino CVAP would drop below 50% and the Latino registered voters


\textsuperscript{34} See Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6.


\textsuperscript{36} Id.
would drop from 55% to 45% as the district expanded to take in new areas that are not majority Latino.\textsuperscript{37}

Also in Houston, Senate District 13, currently represented by Senator Rodney Ellis, would have to grow to over 900,000 in total population in order to meet the CVAP ideal.\textsuperscript{38} As a result, the district’s African American voting-age population would drop to 39%.\textsuperscript{39}

In Dallas, Senate District 23, represented by Senator Royce West, would have to grow to over 900,000 in total population.\textsuperscript{40}

By contrast, Senate District 24 in Central Texas drops more than 100,000 below the ideal total population to 707,313.\textsuperscript{41} Senate District 25, also in Central Texas, and Senate District 3, in East Texas, contract to less than 730,000.\textsuperscript{42}


\textsuperscript{39} See id.

\textsuperscript{40} See id.

\textsuperscript{41} See id.

\textsuperscript{42} See id.
Overall, the total population deviation of the plan would be 36.36%.43 The number of Latino majority districts in the Senate plan would drop from seven to five.44 Most of the remaining Latino and African American districts would dramatically increase in total population.45

Similar to the CVAP apportionment map, a map apportioned based on registered voters would reduce the number of Latino majority districts in the Senate plan from seven to five46 and most of the remaining Latino and African American districts would dramatically increase in total population.47 Overall, the total population deviation of the plan would be 58.04%.48
2. The Texas House Map And Plaintiffs’ Metrics

The Texas Constitution’s “County Line Rule” requires the Legislature to apportion state House districts to whole counties “according to the number of population in each, as nearly as may be.” Tex. Const. art. III, § 26. The County Line Rule “generally limits the redistricting body to the creation of districts that consist of whole counties or groups of whole counties.” Following this Court’s decision in White v. Regester, 412 U.S. 755 (1973), Texas adopted the single member district system of electing state representatives.

In the current Texas House of Representatives districting plan, the district ideal total population is 167,637. This ideal is used by the Legislature to apportion districts to counties and to draw districts.

In a House plan apportioned on the basis of CVAP or registered voters, Cameron and Hidalgo Counties in the Lower Rio Grande Valley would lose a combined two seats because of their low CVAPs and registered-voter populations. El Paso County would


lose one seat.\textsuperscript{52} This loss of seats reduces those counties to the political representation held in 1980.\textsuperscript{53}

Harris County (Houston) would lose two state representative seats and Dallas County would lose one state representative seat.\textsuperscript{54}

The negative effects of changing apportionment in the Texas House are not limited to apportionment of seats to counties. Within counties, a House plan apportioned on the basis of CVAP or registered voters would force some districts to expand, and others to contract, in order to meet the new apportionment metric. For example, in Harris County, the House district with the lowest CVAP (HD 137-Gene Wu) is 40% below the CVAP ideal.\textsuperscript{55} The House District with

\begin{itemize}
\item \textsuperscript{52} See supra note 51.
\end{itemize}
the highest CVAP (HD 134-Sarah Davis) is 20% above the CVAP ideal.\textsuperscript{56} House District 137 would be forced to take on thousands of new residents, while House District 134 would shed residents to meet a CVAP ideal.

Similarly, in Dallas County, the district with the lowest CVAP (HD 103-Rafael Anchia) is 33% below the ideal and the district with the highest CVAP (HD 108-Morgan Meyer) is 13% above the ideal.\textsuperscript{57} As in Houston, districts below the CVAP ideal in Dallas would become grossly malapportioned as thousands of individuals are packed into their boundaries, while other districts contract and become much smaller in total population.

C. The Loss of Legislative Seats, and the Creation of Super-sized Districts, will Injure Constituents and Elected Representatives

The apportionment metrics advanced by Plaintiffs reduce the number of representatives from Houston, Dallas and South and West Texas and make it harder for the remaining representatives in those delegations to pass legislation serving regional interests. In addition, the accompanying growth of “underpopulated” districts to take in dramatically higher total population puts impossible burdens on the

\textsuperscript{56} See id.
\textsuperscript{57} See id.
legislators representing these districts and forces constituents to compete with each other for scarce legislator time and resources.

In super-sized districts, Senators and Representatives will be hard-pressed to represent all of their voters as well as disproportionately high numbers of non-voters. For example, in order to meet a CVAP ideal, Senate District 29 (El Paso) would have to expand to take in Del Rio, a city of over 35,000 residents, located 423 miles from El Paso. The Senator who represents SD 29, Jose Rodriguez, would have to reallocate his already small office budget to cover the new geography and would face having to close an existing district office to open a new office in or near Del Rio. Senator Rodriguez would have to stretch his small staff to respond to requests for assistance from over 90,000 new constituents.

In addition to the drain on member and staff resources, legislative districts that grow to take in disproportionately high populations also take in more geographic areas with competing interests. Although all legislative districts contain a variety of interests, adding more people and more geography to some

districts will overburden them compared to other districts that will stay the same size or even become smaller. The competing needs for economic development, improvements in roads and highways, public safety, healthcare, and education will become even greater in districts that take in new counties and cities in order to meet a CVAP or registered-voter population ideal.

II. Plaintiffs’ Claim to an “Equally Weighted Vote” Is Illusory and Cannot Form the Basis of an Equal Protection Claim

The practical goal of Plaintiffs’ standard is to shift legislative seats, and public policy, from one part of the state to another based on votes cast in elections. 59

Plaintiffs claim that their equally-populated districts are unconstitutional because the districts do not guarantee equality in the weight of their votes. Plaintiffs invoke a “right to an equally weighted vote” and “the right of voters to an equally weighted vote.” 60

As the Court has explained, its requirement of equal population in districts does not and is not intended to equalize the weight of a vote:

60 Pls.’ Opp’n to Mot. to Dismiss, ECF. No. 20 at 7, 9 (emphasis original).
[I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person’s vote under a later adopted reapportionment plan. . . . [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, 746-48 (1973) (internal citations omitted)

That same year, the Court ruled that a 9.90% variation in equal population in Texas legislative redistricting did not give rise to a one-person-one-vote violation:

> For the reasons set out in _Gaffney v. Cummings_, _supra_, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut.

_White_, 412 U.S. at 764. Of note, this Court found no malapportionment in the Texas House plan despite the Court’s recognition that Mexican Americans lived in heavily concentrated communities in some areas of the state and that “Mexican-American voting
registration remain[s] very poor in the county.” Id. at 768. If the Equal Protection Clause required equalization of the weight of a vote, the fact that few Mexican Americans were voting in 1973 would have rendered the state’s redistricting plan malapportioned. This Court made no such finding.

A. As a Practical Matter, the “Weight” of Votes Cannot Be Equalized

Even if a state tried to equalize the weight of votes by apportioning population based on votes cast, the endeavor would be fruitless. Voter turnout is a moving target; it varies with every election. As voter turnout rises and falls, a state would have to redraw its political boundaries after every election – creating confusion for voters and elected officials. Also, because past elections cannot predict turnout in future elections, the goal of an equally-weighted vote would remain forever out of reach as the state looked backward to past elections to draw its political lines.  


62 See Burns v. Richardson, 384 U.S. 73, 92 (1966) (noting that registered or actual voter numbers vary depending on who  

(Continued on following page)
There is even fluctuation in voter turnout for districts in the same redistricting plan, as officials elected in staggered terms (like the Texas Senate) face very different electorates. For example, during the last decade, Ms. Evenwel voted for her Senator in non-presidential years. In 2010, her Senate District 1 elected its Senator with only 140,273 votes.\textsuperscript{63} Because so few voters in Ms. Evenwel’s Senate district cast a ballot in that race, Ms. Evenwel’s vote was weighted among the most powerful across Senate districts in that election.\textsuperscript{64} Comparing the vote of Ms. Evenwel to the electorate for Senate seats in the 2008 election demonstrates that, for those elections, any injury flowing from an unequally weighted vote belonged to most 2008 Senate voters, and not Ms. Evenwel.\textsuperscript{65}


\textsuperscript{64} See id.

B. Apportionment Based on Voter Eligibility Metrics Such as CVAP or Registered Voters Creates Bizarre Results and Does Not Equalize the Weight of Votes

Comparing votes cast in an election (i.e., the substance giving “weight” to the vote) to either CVAP or registered voters is an apples-to-oranges comparison. The chasm between the approximations (CVAP and registered voters) and the standard (votes cast) is too wide to bridge. Moreover, apportionment based on CVAP or registered voters creates arbitrary results.

1. The Texas Senate Plan and CVAP

CVAP would not cure Plaintiffs’ claimed injury of unequally weighed votes and, in some cases, would exacerbate the injury.

If Senate districts were apportioned based on CVAP, Ms. Evenwel and Mr. Pfenninger would remain disadvantaged based on the weight of their votes cast as compared to voters in other districts with lower voter turnout and higher CVAP. For example, Senate Districts 3, 5, 22, 24, 28, and 30 all contain greater CVAP than Mr. Pfenninger’s District 4, but District 4 casts more ballots than Districts 3, 5, 22, 24, 28, and 30.66 Under the current plan, Mr. Pfenninger would remain disadvantaged compared to voters in other districts with lower voter turnout and higher CVAP.

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Pfenninger’s vote cast carries less weight in determining Senate elections than votes cast in Districts 3, 5, 22, 24, 28, and 30 because District 4 voters cast more votes than these other districts. However, if Senate districts were reapportioned to equalize CVAP, Districts 3, 5, 22, 24, 28, and 30 would drop more CVAP than would District 4 because each of these districts has a higher CVAP than District 4.\textsuperscript{67} Assuming voters are equally distributed across CVAP, following reapportionment, District 4 would cast \textit{even more} votes when compared to Districts 3, 5, 22, 24, 28, and 30 than before reapportionment. Therefore, CVAP-based apportionment would exacerbate Mr. Pfenninger’s claimed injury of an unequally-weighted vote with respect to these districts.\textsuperscript{68}

Just as problematic, under Plaintiffs’ proposed standard, CVAP-equalized apportionment would diminish the weights of votes cast in Dallas and Houston. Voters in current Senate Districts 23 (Dallas) and 15 (Houston) cast more ballots but have lower CVAPs as compared to Districts 19, 20, 21, and 26.\textsuperscript{69} Voters in Senate District 7 (Houston) present the

\begin{footnotesize}
\textsuperscript{67} All of these districts are above the CVAP ideal of 522,508. \textit{See} Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

\textsuperscript{68} Similarly, the weight of Ms. Evenwel’s vote would be diminished as compared to votes cast in Districts 3, 5, and 30.

\end{footnotesize}
most extreme example. Their votes would be diminished as compared to votes cast in Districts 2, 11, 14, 19, 22, 24, 26, 28, 30, and 31.\footnote{See Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15; Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.}

On the other hand, the highest CVAP Senate district in the state, Senate District 3, is considered “over populated” for CVAP-equalized apportionment, despite casting fewer votes in the 2012 General Elections than Districts 1, 4, 5, 10, 14, 17, 18, and 25.\footnote{Compare Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 with Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.}

The metric of voter registration for apportionment also creates winners and losers that do not track the weight of the vote. For example, in the 2014 General Election, Senate District 15 (Houston) cast more votes than Senate Districts 19, 20, 21, 26, and 29 but has fewer registered voters.\footnote{See Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.} The unexpected winner in apportionment based on voter registration is Senate District 30 (Wichita Falls). Because of its higher voter registration, Senate District 30 is “more populated” when compared to the following Districts, all of which cast more votes than Senate District 30
in the 2014 General Election: 1, 4, 5, 7, 8, 10, 11, 12, 16, 17, 18, 22, and 24.\textsuperscript{73}

The disparity in the weight of votes across districts created by using CVAP or registered voters for apportionment gives rise to the exact type of imbalance that Plaintiffs claim violates the Equal Protection Clause. The arbitrary results that flow from using CVAP or voter registration render these metrics inappropriate for apportionment.

C. Equalization of Both Total Population and Voters Cannot Be Achieved

Plaintiffs’ standard requires the impossible – districts that simultaneously equalize total population and voters. Such a redistricting plan is a chimera; it cannot be formed.

1. Plaintiffs’ Complaint Asserts Dual Constitutional Mandates

According to Plaintiffs’ complaint, “[t]he one-person, one-vote principle requires Texas to safeguard the right of electors like [Plaintiffs] to an equally weighted vote in addition to equal representation based on total population.”\textsuperscript{74} Under the asserted dual mandates, “Texas should not be permitted to base

\textsuperscript{73} See id.

\textsuperscript{74} Compl., J.S. App. 31a (emphasis added).
apportionment on voter population alone.” Plaintiffs distinguished their dual-mandate standard from the single-mandate standard asserted in Chen v. City of Houston, 206 F.3d 502, 522 (5th Cir. 2002), that CVAP alone must be equalized. The district court accordingly, considered and rejected only Plaintiffs’ asserted dual-mandate standard.

2. Plaintiffs Tiptoe Away from Dual Mandates But Continue to Assert that Both Total Population and Voters Can Be Equalized

Plaintiffs now subtly shift from a dual-mandate standard toward a single-mandate standard in this Court. They assert: “[T]he ‘population’ States must equalize for one-person, one-vote purposes is the population of eligible voters.”


76 See id. (“Chen decided a legal issue different from the one presented here. In Chen . . . the Fifth Circuit was confronted with an argument that the Fourteenth Amendment required Houston ‘to use CVAP rather than total population’ in designing city council districts.”) (quoting Chen, 206 F.3d at 523); see also Compl., J.S. App. 32a (“Chen did not consider whether electoral power could be ignored when it is possible to safeguard both interests.”).

77 See Mem. Op., J.S. 5a (“[Plaintiffs] conclude that PLANS 172 [sic] violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts to equalize both total population and voter population.”) (emphasis original).

78 Pls.’ Br. 15.
districts of equalized total population to be merely a state “interest,” not a mandate.\textsuperscript{79}

This Court should consider only Plaintiffs’ dual-mandate standard because Plaintiffs did not assert a single-mandate standard in their complaint, and the district court did not consider a single-mandate standard. See Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430 (2012) (“Ordinarily, we do not decide in the first instance issues not decided below.”) (internal quotations omitted).

Plaintiffs, nevertheless, continue to assert that both total population and voters can be equalized in a Texas Senate districting plan.\textsuperscript{80} Plaintiffs have never supported their assertion with anything other than implausible, conclusory statements.\textsuperscript{81}

\textsuperscript{79} See id. at 48.

\textsuperscript{80} See id. at 46 (“[H]ad the Texas Legislature used the population of eligible voters as its starting point . . . , it still could have largely reconciled total and voter population.”).

\textsuperscript{81} See, e.g., Pls.’ Mot. for Summ. J., ECF No. 12-1 (Declaration of Peter A. Morrison, Ph.D.: “I was not asked to, and did not attempt to, devise a plan that would optimally balance [CVAP and total population] deviations. . . . I was able to create a 31-district plan . . . that eliminated the gross deviations in CVAP without significantly exceeding the 8.04\% total population deviation from ideal in Plan S172.”).
3. Both Total Population and Voters Cannot Be Equalized Across Texas Senate Districts

Texas’s concentrations of children, non-citizens, non-registered voters, and non-voting-but-registered voters prevent the drawing of Texas Senate districts equalizing both total population and voters within overall plan deviations of 10%.\(^2\)

The current Texas Senate plan has a deviation of 8.04% based on total population. Therefore, the plan is balanced for total population within an acceptable range. See Brown v. Thomson, 462 U.S. 835, 842 (1983).\(^3\) To achieve Plaintiffs’ dual-mandate standard, current Senate districts would have to gain or lose significant numbers of children, citizens, registered voters, and actual voters, without significantly

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\(^2\) If the standard of “equalized” total population and voters is not equalization within 10% deviations, but is rather a “best-fit” or “lowest-possible-combined deviation,” then the standard is not a dual-mandate standard, as asserted. The Court has never required a State to minimize the combined deviations of two population measures; instead, it has allowed deviations greater than 10% for “nonpopulation criteria.” See Brown v. Thomson, 462 U.S. 835, 842-43 (1983); see also Karcher v. Daggett, 462 U.S. 725, 740 (1983) (“Any number of consistently applied legislative policies might justify some variance [in population equality], including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.”).

altering total population numbers. Regional variations in the populations of children, citizens, registered voters, and actual voters make this task impossible.\(^{84}\)

Current Districts 27 (Brownsville) and 29 (El Paso) illustrate why a dual-mandate plan cannot be devised. Each district is underpopulated by voting-age population,\(^ {85}\) CVAP,\(^ {86}\) registered voters,\(^ {87}\) and actual voters.\(^ {88}\) Districts 27 and 29, however, cannot add significant numbers of voting-age residents, citizen-voting-age residents, registered voters or actual voters

\(^{84}\) The task is impossible to the extent that districts must be contiguous. \textit{Cf.} Compl., J.S. App. 24a ("It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population.").

\(^{85}\) The voting-age population of District 27 is 524,120, a deviation of -11.12% from ideal; the voting-age population of District 29 is 571,426, a deviation of -3.09% from ideal. \textit{See} Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

\(^{86}\) The CVAP of District 27 is 399,530, a deviation of -23.54% from ideal; the CVAP of District 29 is 469,130, a deviation of -10.26% from ideal. \textit{See} Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

\(^{87}\) The registered-voter population of District 27 is 354,303, a deviation of -21.81% from ideal; the registered-voter population of District 29 is 415,152, a deviation of -8.39% from ideal. \textit{See} id.

\(^{88}\) The actual-voter population of District 27 is 84,566, a deviation of -44.55% from ideal; the actual-voter population of District 29 is 83,529, a deviation of -45.23% from ideal. \textit{See} Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.
because (1) they are at or near ideal total population, and (2) they are surrounded by other districts lacking the same population groups. Thus, if Districts 27 and 29 added significant numbers of voting-age residents, citizen-voting-age residents, registered voters, or actual voters by taking those individuals from surrounding districts, Districts 27 and 29 would greatly exceed acceptable total population deviations, and the new Districts 27 and 29 would drain surrounding districts of population, which would further exacerbate those districts’ negative deviations from ideal voting-age population, citizen-voting-age population, registered-voter population, and actual-voter population.

To achieve the dual mandates, Districts 27 and 29 would have to swap populations with districts on the opposite end of the deviation spectrum. Those districts, however, are not contiguous to Districts 27 and 29.

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89 The total population of District 27 is 786,946, a deviation of -2.98% from ideal; the total population of District 29 is 816,681, a deviation of 0.68% from ideal. See id.


91 Districts 27 and 29 would add geography that included not just the desired populations, but also all other population groups, including children, non-citizens, non-registered voters, and non-voters.

Amici curiae have drafted alternative maps equalizing CVAP population and registered voters across Texas Senate districts, within 4% total deviation. In each alternative map, South Texas loses a seat (District 19) because all current South Texas districts (Districts 19, 20, 21, 27, and 29) must add populations of citizen-voting-age residents and registered voters to bring those deviations within acceptable limits. Achieving equalization under these measures, however, massively increases the plans’ total population deviations from ideal. Total population deviation goes from a baseline of 8.04% in the current Texas Senate plan, to 36.36% in the CVAP-equalized plan and to 58.04% in the registered-voter-equalized plan. Under the CVAP-equalized plan, Districts 27 and 29 jump in population and acquire total population deviations of 18.80% and 12.04%, respectively. Likewise, District 6 in Houston and


District 23 in Dallas add CVAP and registered voters to correct large negative deviations in these measures under the current plan. Consequently, the total population deviations for District 6 and District 23 jump to 23.56% and 12.29%, respectively, under the CVAP-equalized plan.

4. Both Total Population and Voters Cannot Be Equalized Across Texas House Districts

Plaintiffs do not assert that the Texas House can be districted to achieve their asserted dual-mandate standard. However, the principle of equal protection does not stop with one legislative chamber. See Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964) (“It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also

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evaluating the actual scheme of representation employed with respect to the other house.”); see also Lucas v. Colo. Gen. Assembly, 377 U.S. 713, 735 n.27 (1964) (“[In Tawes] we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters were raised by the parties and decided by the court below.”). Accordingly, the Court must consider Plaintiffs’ dual-mandate standard as applied to the Texas House.

The Texas House cannot be districted in a plan that equalizes both total population and voters for the same reasons that prevent the drawing of an equalized-total-population-and-voter-eligible plan in the Texas Senate. In fact, the reasons are more pronounced with the Texas House.

The Texas House is comprised of 150 districts, each wholly contained within a single county where possible. This County Line Rule prevents statewide equalization of both total population and voters because it limits how districts may be altered. For example, El Paso County contains districts 75, 76, 77, 78, and 79.98 Each of these five districts is equalized for total population, but all have negative CVAP

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deviations under the current plan.\textsuperscript{99} If the County Line Rule is followed, in El Paso County there is no way to reallocate the population to equalize CVAP across all districts because the county’s population contains too few citizen-voting-age residents to bring all five districts near the statewide ideal.\textsuperscript{100}

If the County Line Rule is abandoned, regional differences in populations of children, citizens, registered voters, and actual voters would prevent the drawing of districts equalizing total population and eligible voters for the same reasons that apply to the Texas Senate. Current House districts in South Texas, Dallas, and Houston, which are equalized for total population, are completely, or nearly completely, surrounded by districts similarly lacking in CVAP.\textsuperscript{101} One or more of these South Texas, Dallas, and Houston districts could achieve ideal CVAP, but, consequently, swell in total population and further deprive neighboring districts of CVAP.


\textsuperscript{100} It may be possible to equalize CVAP if El Paso County loses a seat; however the remaining four districts would greatly exceed the ideal total population.

5. Plaintiffs’ Dual-Mandate Standard Should Be Rejected Because the Court Does Not Impose Impossible Standards

The law does not create traps. See Ala. Leg. Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015) (“The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under [Voting Rights Act] § 5 should the legislature place a few too few.”). Plaintiffs’ dual-mandate standard creates an impossible goal in Texas by establishing competing constitutional limits. The Court should reject Plaintiffs’ standard because, as implemented in Texas, the standard is impossible to satisfy.

III. The Current Effort to Reduce Latino Representation Through Apportionment Follows a Long History of Voting Discrimination in Texas

The radical changes in apportionment sought by Plaintiffs, if adopted by Texas, would raise an inference of unconstitutional racial discrimination against Latino voters.

102 Cf. Pls.’ Mot. for Summ. J., ECF No. 12 at 9-10 (“Texas should not be permitted to base apportionment on voter population alone; it must fairly balance all relevant factors within constitutional limits.”).
In *LULAC v. Perry*, 548 U.S. 399, 439 (2006), this Court noted “the long history of discrimination against Latinos and Blacks in Texas” (internal quotations omitted). The Court explained:

‘Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and the restrictive voter registration time periods are an unfortunate part of this State’s minority voting rights history. The history of official discrimination in the Texas election process – stretching back to Reconstruction – led to the inclusion of the state as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.’

*Id.* at 439-40 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)).

Two years before the Court struck down state poll taxes in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Texans voted to retain the poll tax despite public recognition that it operated to
exclude Latinos and African Americans from voting.\textsuperscript{103} The same year as Harper, the Texas Legislature met in a special session and enacted Senate Bill 1, which required voters to re-register annually.\textsuperscript{104} The annual re-registration requirement was not rescinded by the Texas Legislature until 1971.\textsuperscript{105}

In 1973, this Court declared that Texas’s use of multi-member election districts in San Antonio and Dallas diluted minority voting strength in violation of the Fourteenth Amendment. \textit{White}, 412 U.S. 755. The Court took particular note of the historical factors leading to very low political participation rates by Mexican Americans in Bexar County in South Texas:

The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the [district] court thought, with respect to the political life of Bexar County. ‘(A) cultural incompatibility . . . conjoined with the poll tax and the most restrictive


\textsuperscript{105} Id.
voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.’ [Graves v. Barnes, 343 F. Supp. 704, 731 (W.D. Tex. 1972).] The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county.

White, 412 U.S. at 768-69.

Texas legislators continued to draw district boundaries that diluted the Latino vote after White. In every decade since the 1970’s, one or more Texas statewide redistricting plans was blocked by the U.S. Department of Justice or the federal courts for illegally diluting Latino votes.  

Most recently, in 2006, the Court struck down the Texas congressional redistricting plan because it diluted Latino voting strength in violation of section 2 of the Voting Rights Act. See LULAC, 548 U.S. at 440.

The battles for political opportunity fought by Latinos in Texas have resulted in seven Senate districts in which Latinos have the opportunity to elect their candidate of choice. Changing the apportionment metric for the Texas Senate would reduce the number of opportunity districts by at least two, sending the map back to the 1980’s. The Texas House map would suffer a similar fate. Worse, many Latino voters would find themselves not only with fewer opportunity districts overall, but also living in districts that contain far more constituents than districts that elect Anglo representatives.

Because the apportionment metrics advanced by Plaintiffs are tailored to characteristics of the Latino community (such as youth and low voter-registration rates), and the metrics themselves do not equalize the weight of votes, their use gives rise to an inference of intentional vote dilution in violation of the Fourteenth Amendment.

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IV. The Effect of Shifting Political Representation to More Homogenous Communities Will Be Fewer Policy Proposals and Less Enacted Legislation Addressing the Needs of Diverse Communities in Urban Areas and in South and West Texas

Plaintiffs’ proposed apportionment standard would shift representation from urban areas to rural areas and from South and West Texas to Central and East Texas.

A. Past Legislative Accomplishments May Never Have Been Achieved

Against these headwinds, communities in urban areas and in South and West Texas may never have achieved the legislative accomplishments of recent sessions.

Before 2013, the Lower Rio Grande Valley did not have a medical school to serve the region’s 1.2 million inhabitants. The region suffers from the highest incidence of diabetes in the state, and a third of its residents live below the poverty line. In the 2013

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109 See Tex. Dep’t of State Health Serv., The Health Status of Texas at 39, Map 20 (2014), https://www.dshs.state.tx.us/chs/HealthStatusTexas2014.pdf; U.S. Census Bureau, 2013 Small Area Income (Continued on following page)
Texas Legislative Session, Senators from South and West Texas worked together to co-author and pass a bill establishing a medical school in the Rio Grande Valley. They lobbied their colleagues in the Senate, secured funding and gathered the necessary votes to win passage of the bill. If representation had been stripped from South and West Texas, the delegation would have been smaller and less influential, and this generational accomplishment might never have been achieved.

B. Harmful Legislation May Be Imposed if Large, Diverse Communities are Underrepresented

Diverse communities strengthen a representative democracy by providing balance to majority factions. See The Federalist No. 10 (James Madison) (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”). Plaintiffs’ proposed standard would shift political power away from growing and diverse communities in urban areas and South and West Texas towards more established and more homogenous communities in Central and East Texas.


Texas. Weakening the presence of large, diverse communities at the state Capitol can lead to passage of laws detrimental to those communities.

Of immediate concern, legislation narrowly defeated by coalitions of Senators representing districts in urban areas and West and South Texas may pass in future sessions if Senate seats shift to Central and East Texas. Among such narrowly defeated measures in 2015 was Senate Bill 185, which would have banned cities from taking local needs into account when designing policies on police questioning of immigrants.\(^{111}\) Passage of the measure would have severely constrained local control and chilled police-community relations – particularly in high-minority-population communities. Senators from Dallas, Houston and South and West Texas joined with a small number of additional colleagues in a bipartisan effort to defeat the bill.\(^{112}\) The group of 13 Senators denied the bill’s supporters a three-fifths majority needed to bring the bill for debate on the Senate floor, a necessary precursor to passage.\(^{113}\) A switch of just

\(^{111}\) See Tex. S.B. 185, 84th Leg., R.S. (2015).

\(^{112}\) See Julian Aguilar, With Clock Running, Immigration Bills Cling to Senate Calendar, Tex. Tribune, May 19, 2015, available at http://www.texastribune.org/2015/05/19/-state-repeal-sanctuary-cities-back-calendar-there/.

\(^{113}\) See id.; see also Tex. S. Rules 5.13, 16.07, S. Res. 39, 84th Leg., R.S, 2015 S.J. of Tex. 50, 50-53.
one Senator from opposition to support would have enabled the bill to move forward.

CONCLUSION

For the foregoing reasons and those stated in the brief by Texas, the judgment below should be affirmed.

Respectfully submitted,

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September 25, 2015
SUPREME COURT OF THE UNITED STATES

RUCHO ET AL. v. COMMON CAUSE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 18–422. Argued March 26, 2019—Decided June 27, 2019*

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State’s districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State’s plan discriminated against Republicans. The plaintiffs alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 6–34.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court “must find that the question is presented in a ‘case’ or ‘controversy’ that is . . . ‘of a Judiciary Nature.’” DaimlerChrysler Corp. v. Cuno, 547 U. S. 332, 342. While it is “the province and duty of the judicial department to say what the law is,” Marbury v. Madison, 1 Cranch 137, 177, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable “political question,” Baker v. Carr, 369 U. S. 186, 217. Among the political question cases this Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” Ibid. This Court’s partisan gerrymandering cases have left unresolved the question whether such claims are claims of legal right, resolvable according to legal principles.

*Together with No. 18–726, Lamone et al. v. Benisek et al., on appeal from the United States District Court for the District of Maryland.
Syllabus

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, §4, cl. 1, assigning to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas—one-person, one-vote and racial gerrymandering—this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in Baker v. Carr, for example, could be decided under basic equal protection principles. 369 U. S., at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See Gomillion v. Lightfoot, 364 U. S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because “a jurisdiction may engage in constitutional political gerrymandering.” Hunt v. Cromartie, 526 U. S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is “determining when political gerrymandering has gone too far.” Vieth v. Jubelirer, 541 U. S. 267, 296 (plurality opinion). Despite considerable efforts in Gaffney v. Cummings, 412 U. S. 735, 753; Davis v. Bandemer, 478 U. S. 109, 116–117; Vieth, 541 U. S., at 272–273; and League of United Latin American Citizens v. Perry, 548 U. S. 399, 414 (LULAC), this Court’s prior cases have left “unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering.” Gill, 585 U. S., at ___. Two “threshold questions” remained: standing, which was addressed in Gill, and “whether [such] claims are justiciable.” Ibid. Pp. 6–14.
(b) Any standard for resolving partisan gerrymandering claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” Vieth, 541 U. S., at 306–308 (Kennedy, J., concurring in judgment). The question is one of degree: How to “provid[e] a standard for deciding how much partisan dominance is too much.” LULAC, 548 U. S., at 420 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its “appropriate” share of “safe” seats. Or perhaps it should be measured by adherence to “traditional” districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: “How much is too much?”

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court’s one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 15–21.

(c) None of the proposed “tests” for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 22–30.

(1) The Common Cause District Court concluded that all but one of the districts in North Carolina’s 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Demo-
crats. It applied a three-part test, examining intent, effects, and causation. The District Court’s “predominant intent” prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is “inherently suspect,” Miller v. Johnson, 515 U. S. 900, 915, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The Common Cause District Court also required the plaintiffs to show that vote dilution is “likely to persist” to such a degree that the elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court’s third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a “legitimate redistricting objective”—just restates the question asked at the “predominant intent” prong. Pp. 22–25.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. Pp. 25–27.

(3) Using a State’s own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 27–29.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, §2, and the Elections Clause, Art. I, §4, cl. 1. But the Vieth plurality concluded—without objection from any other Justice—that neither §2 nor §4 “provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.” 541 U. S., at 305. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, §4, which “guarantee[s] to every State in [the] Union a Republican Form of Government.” This Court has several times concluded that the Guarantee Clause does not pro-
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(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause. That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 30–34.


ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.
CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State’s districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State’s plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2, of the Constitution. The District Courts in both cases ruled in favor
of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are “justiciable”—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. Rucho v. Common Cause, No. 18–422. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F. Supp. 3d 777, 807–808 (MDNC 2018). As one of the two Republicans chairing the redistricting committee stated, “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” Id., at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did “not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” Id., at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not “fair, reasonable, [or] balanced” because, as recently as 2012, “Democratic con-
gressional candidates had received more votes on a statewide basis than Republican candidates.” *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of “the People” to elect their preferred candidates for Congress, in violation of the requirement in Article I, §2, of the Constitution that Members of the House of Representatives be chosen “by the People of the several States.” Finally, they alleged that the Plan violated the Elections Clause by exceeding the State’s delegated authority to prescribe the “Times,
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Places and Manner of holding Elections” for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. Common Cause v. Rucho, 279 F. Supp. 3d 587 (MDNC 2018). The defendants appealed directly to this Court under 28 U. S. C. §1253.

While that appeal was pending, we decided Gill v. Whitford, 585 U. S. ___ (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly “cracked” or “packed” district. Id., at ___ (slip op., at 17). A “cracked” district is one in which a party’s supporters are divided among multiple districts, so that they fall short of a majority in each; a “packed” district is one in which a party’s supporters are highly concentrated, so they win that district by a large margin, “wasting” many votes that would improve their chances in others. Id., at ___–___ (slip op., at 3–4).

After deciding Gill, we remanded the present case for further consideration by the District Court. 585 U. S. ___ (2018). On remand, the District Court again struck down the 2016 Plan. 318 F. Supp. 3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that “the General Assembly’s predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates,” and to “entrench Republican candidates” through widespread cracking and packing of Democratic voters. Id., at 883–884. The court rejected the defendants’ arguments that the distribution of Republican and Democratic voters throughout North Carolina and the
interest in protecting incumbents neutrally explained the 2016 Plan’s discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*, at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, §2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U. S. ___ (2019).

B

The second case before us is *Lamone v. Benisek*, No. 18–726. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State’s eight congressional districts. The Governor at the time, Democrat Martin O’Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a “serial gerrymanderer,” to advise the committee. 348 F. Supp. 3d 493, 502 (Md. 2018). The Governor later testified that his aim was to “use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping” one district. *Ibid.* “[A] decision was made to go for the Sixth,” *ibid.*, which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000
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voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. Id., at 499–501. The map was adopted by a party-line vote. Id., at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, §2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F. Supp. 3d 493. It concluded that the plaintiffs’ claims were justiciable, and that the Plan violated the First Amendment by diminishing their “ability to elect their candidate of choice” because of their party affiliation and voting history, and by burdening their associational rights. Id., at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District “were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy.” Id., at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. Id., at 525. The defendants appealed directly to this Court under 28 U. S. C. §1253. We postponed jurisdiction. 586 U. S. ___ (2019).

II

A

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” We have understood that limitation to mean that federal courts can address only questions “historically viewed as capable of
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resolution through the judicial process.” *Flast v. Cohen*, 392 U. S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. “But before we do so, we must find that the question is presented in a ‘case’ or ‘controversy’ that is, in James Madison’s words, ‘of a Judiciary Nature.’” *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. *Baker v. Carr*, 369 U. S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” Ibid.

Last Term in *Gill v. Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases “leave unresolved whether such claims may be brought.” 585 U. S., at ___ (slip op., at 13). This Court’s authority to act, as we said in *Gill*, is “grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right.” Ibid. The question here is whether there is an “appropriate role for the Federal Judiciary” in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere. *Id.*, at ___ (slip op., at 8).
Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See Vieth, 541 U. S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia’s districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) (“Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house”).

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker “gerrymander” was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See Vieth, 541 U. S., at 274 (plurality opinion); E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). “By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength.” Id., at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, §4, cl. 1. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elec-
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tions” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

“[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.” 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress’s power under the Elections Clause would allow Congress to make itself “omnipotent,” setting the “time” of elections as never or the “place” in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment.

M. Klarman, The Framers’ Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-
member districts for the first time, specified that those districts be “composed of contiguous territory,” Act of June 25, 1842, ch. 47, 5 Stat. 491, in “an attempt to forbid the practice of the gerrymander,” Griffith, supra, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, §3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, §2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U. S. C. §2c.) See Vieth, 541 U. S., at 276 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, e.g., 52 U. S. C. §10101 et seq.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See Baker, 369 U. S., at 217. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts. See Wesberry v. Sanders, 376 U. S. 1 (1964); Shaw v. Reno, 509 U. S. 630 (1993) (Shaw I).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, “it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could
have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former.” The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See Wood v. Broom, 287 U. S. 1 (1932); Colegrove v. Green, 328 U. S. 549 (1946).

In the leading case of Baker v. Carr, voters in Tennessee complained that the State’s districting plan for state representatives “debase[d]” their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court’s precedents, including Colegrove. Baker v. Carr, 179 F. Supp. 824, 825, 826 (MD Tenn. 1959). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is “a lack of judicially discoverable and manageable standards for resolving it.” 369 U. S., at 217. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. Id., at 226. In Wesberry v. Sanders,
the Court extended its ruling to malapportionment of congressional districts, holding that Article I, §2, required that “one man’s vote in a congressional election is to be worth as much as another’s.” 376 U. S., at 8.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in Gomillion v. Lightfoot, concluding that a challenge to an “uncouth twenty-eight sided” municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U. S. 339, 340 (1960). In Wright v. Rockefeller, 376 U. S. 52 (1964), the Court extended the reasoning of Gomillion to congressional districting. See Shaw I, 509 U. S., at 645.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” Hunt v. Cromartie, 526 U. S. 541, 551 (1999) (citing Bush v. Vera, 517 U. S. 952, 968 (1996); Shaw v. Hunt, 517 U. S. 899, 905 (1996) (Shaw II); Miller v. Johnson, 515 U. S. 900, 916 (1995); Shaw I, 509 U. S., at 646). See also Gaffney v. Cummings, 412 U. S. 735, 753 (1973) (recognizing that “[p]olitics and political considerations are inseparable from districting and apportionment”).

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerry-

We first considered a partisan gerrymandering claim in Gaffney v. Cummings in 1973. There we rejected an equal protection challenge to Connecticut’s redistricting plan, which “aimed at a rough scheme of proportional representation of the two major political parties” by “wiggl[ing] and joggl[ing] boundary lines” to create the appropriate number of safe seats for each party. 412 U. S., at 738, 752, n. 18 (internal quotation marks omitted). In upholding the State’s plan, we reasoned that districting “inevitably has and is intended to have substantial political consequences.” Id., at 753.

Thirteen years later, in Davis v. Bandemer, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause. 478 U. S. 109, 116–117 (1986) (plurality opinion). A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of “intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” Id., at 127. Two Justices would have focused on “whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends.” Id., at 165 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply “does not supply judicially manageable standards for resolving purely political gerrymandering claims.” Id., at 147 (O’Connor, J., concurring in judgment). At the end of the day, there was “no ‘Court’ for a standard that properly should be applied in determining whether a challenged redistricting
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plan is an unconstitutional partisan political gerrymander.” *Id.*, at 185, n. 25 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania’s legislature “ignored all traditional redistricting criteria, including the preservation of local government boundaries,” in order to benefit Republican congressional candidates. 541 U. S., at 272–273 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs’ claims were nonjusticiable because there was no “judicially discernible and manageable standard” for deciding them. *Id.*, at 306. Justice Kennedy, concurring in the judgment, noted “the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention.” *Id.*, at 306–307. He nonetheless left open the possibility that “in another case a standard might emerge.” *Id.*, at 312. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs’ partisan gerrymandering claims. See 548 U. S., at 414 (noting that the “disagreement over what substantive standard to apply” that was evident in *Bandemer* “persists”).

As we summed up last Term in *Gill*, our “considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering.” 585 U. S., at ___ (slip op., at 13). Two “threshold questions” remained: standing, which we addressed in *Gill*, and “whether [such] claims are justiciable.” *Ibid.*
In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy’s counsel in Vieth: Any standard for resolving such claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” 541 U. S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, “[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.” Bandemer, 478 U. S., at 145 (opinion of O’Connor, J.). See Gaffney, 412 U. S., at 749 (observing that districting implicates “fundamental ‘choices about the nature of representation’” (quoting Burns v. Richardson, 384 U. S. 73, 92 (1966))). An expansive standard requiring “the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process,” Vieth, 541 U. S., at 306 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to “provid[e] a standard for deciding how much partisan dominance is too much.” LULAC, 548 U. S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” Vieth, 541 U. S., at 307 (opinion of Kennedy, J.). If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, Bandemer, 478 U. S., at 145 (opinion of O’Connor, J.), they must be armed with a standard that can reliably differen-
tiate unconstitutional from “constitutional political gerrymandering.” *Cromartie*, 526 U. S., at 551.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.” *Bandemer*, 478 U. S., at 159 (opinion of O’Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O’Connor put it, such claims are based on “a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes.” *Ibid.* “Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Id.*, at 130 (plurality opinion). See *Mobile v. Bolden*, 446 U. S. 55, 75–76 (1980) (plurality opinion) (“The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.”).

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or “general ticket” elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy
43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: “their party garnered 43 percent of the statewide vote, yet did not receive a single seat.” Id., at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. Id., at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in Vieth:

“‘Fairness’ does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.” 541 U. S., at 291.

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and
cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, “[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” Bandemer, 478 U. S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. See id., at 130–131 (“To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit.”); Gaffney, 412 U. S., at 735–738. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as Amici Curiae; Brief for Professor Wesley Pegden et al. as Amici Curiae in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity “cannot promise political neutrality
when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.” Vieth, 541 U. S., at 308–309 (opinion concurring in judgment). See id., at 298 (plurality opinion) (“[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines”).

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts. Zivotofsky v. Clinton, 566 U. S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court “reverse gerrymander” other parts of a State to counteract “natural” gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal
number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are “unguided and ill suited to the development of judicial standards,” Vieth, 541 U. S., at 296 (plurality opinion), and “results from one gerrymandering case to the next would likely be disparate and inconsistent,” id., at 308 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influen-
tial in proportion to its number of supporters. As we stated unanimously in *Gill*, “this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” 585 U. S., at ___ (slip op., at 21). See also *Bandemer*, 478 U. S., at 150 (opinion of O’Connor, J.) (“[T]he Court has not accepted the argument that an ‘asserted entitlement to group representation’ . . . can be traced to the one person, one vote principle.” (quoting *Bolden*, 446 U. S., at 77)).*

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.” *Shaw I*, 509 U. S., at 650 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

*The dissent’s observation that the Framers viewed political parties “with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic” *post*, at 9, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.
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IV

Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The Common Cause District Court concluded that all but one of the districts in North Carolina’s 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F. Supp. 3d, at 923. In reaching that result the court first required the plaintiffs to prove “that a legislative mapdrawer’s predominant purpose in drawing the lines of a particular district was to ‘subordinate adherents of one political party and entrench a rival party in power.’” Id., at 865 (quoting Arizona State Legislature v. Arizona Independent Redistricting Comm’n, 576 U. S. ___, ___ (2015) (slip op., at 1)). The District Court next required a showing “that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.” 318 F. Supp. 3d, at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are “attributable to a legitimate state interest or other neutral explanation.” Id., at 868.

The District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a “predominant
intent” inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because “race-based decisionmaking is inherently suspect.” Miller, 515 U. S., at 915. See Bush, 517 U. S., at 959 (principal opinion). But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent “predominates.”

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution “is likely to persist” to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F. Supp. 3d, at 867. But “[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites ‘findings’ on matters as to which neither judges nor anyone else can have any confidence.” Bandemer, 478 U. S., at 160 (opinion of O’Connor, J.). See LULAC, 548 U. S., at 420 (opinion of Kennedy, J.) (“[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.”). And the test adopted by the Common Cause court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that “the persistence of a
party’s advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions.” Brief for Appellees League of Women Voters of North Carolina et al. in No. 18–422, p. 55. See also 318 F. Supp. 3d, at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in Bandemer rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in Vieth. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates’ campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different
points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court’s third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a “legitimate redistricting objective”—adds to the inquiry. 318 F. Supp. 3d, at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See Common Cause, 318 F. Supp. 3d, at 929; Benisek, 348 F. Supp. 3d, at 522. Both District Courts concluded that the districting plans at issue violated the plaintiffs’ First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced “difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance.” 318 F. Supp. 3d, at 932. Similarly, the District Court in Maryland examined testimony that “revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion,” and concluded that Republicans in the Sixth District “were burdened in fundraising, attracting volunteers, campaigning, and generating inter-
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To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs’ argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, “[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.” *Gaffney*, 412 U. S., at 752. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a “de minimis” “chilling effect or adverse impact” on any First Amendment activity. 318 F. Supp. 3d, at 930. The court went on to rule that there would be an adverse effect “even if the speech of [the plaintiffs] was not in fact chilled”; it was enough that the districting plan “makes it
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easier for supporters of Republican candidates to translate their votes into seats,” thereby “enhanc[ing] the[ir] relative voice.” Id., at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. The Common Cause court embraced that conclusion, observing that “a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an ‘acceptable’ level of partisan gerrymandering from ‘excessive’ partisan gerrymandering” because “the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering.” Id., at 851. The decisions below prove the prediction of the Vieth plurality that “a First Amendment claim, if it were sustained, would render unlawful all consideration of political affiliation in districting,” 541 U. S., at 294, contrary to our established precedent.

C

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. Post, at 18–19, 25 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It
is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent’s proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” Vieth, 541 U. S., at 296–297 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see post, at 22, but it seems a useful way to make the point.) The dissent’s answer says it all: “This much is too much.” Post, at 25–26. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See post, at 27. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine “substantial anticompetitive effect[s]” in antitrust law. Post, at 27 (citing Ohio v. American Express Co., 585 U. S. ___ (2018)). That language, however, grew out of the Sherman Act, understood from the beginning to have its “origin in the common law” and to be “familiar in the law of this country prior to and at the time of the adoption of the [A]ct.” Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 51 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experi-
Sys ence gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, §4, cl. 1.

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, §2. We are unconvinced by that novel approach. Article I, §2, provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” Art. I, §4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly’s Elections Clause authority because, among other reasons, “the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts.” 318 F. Supp. 3d, at 937. The court further held that partisan gerrymandering infringes the right of “the People” to select their representatives. Id., at 938–940. Before the District Court’s decision, no court had reached a similar conclusion. In fact, the plurality in Vieth concluded—without objection from any other Justice—that neither §2 nor §4 of Article I “provides a judicially enforceable limit on the political considerations that the States and Congress may take into
account when districting.”  541 U. S., at 305.

The District Court nevertheless asserted that partisan gerrymanders violate “the core principle of [our] republican government” preserved in Art. I, §2, “namely, that the voters should choose their representatives, not the other way around.”  318 F. Supp. 3d, at 940 (quoting Arizona State Legislature, 576 U. S., at ___ (slip op., at 35); internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, §4, which “guarantee[s] to every State in [the] Union a Republican Form of Government.” This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, e.g., Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” Arizona State Legislature, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by standard, by rule,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. Vieth, 541 U. S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in Gill: “this Court
can address the problem of partisan gerrymandering because it must.” 585 U. S., at ___ (slip op., at 12). That is not the test of our authority under the Constitution; that document instead “confines the federal courts to a properly judicial role.” Town of Chester v. Laroe Estates, Inc., 581 U. S. ___, ___(2017) (slip op., at 4).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See post, at 32–33.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. League of Women Voters of Florida v. Detzner, 172 So. 3d 363 (2015). The dissent wonders why we can’t do the same. See post, at 31. The answer is that there is no “Fair Districts Amendment” to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan “shall
be drawn with the intent to favor or disfavor a political party” provides little guidance on the question. See post, at 31, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, §3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, §20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); Mo. Const., Art. III, §3 (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”); Iowa Code §42.4(5) (2016) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.”); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall “be created so as to unduly favor any person or political party”).

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections
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Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts “with the major purpose of diluting the voting strength of any person, or group, including any political party,” except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., §2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative’s residence. H. R. 2642, 109th Cong., 1st Sess., §4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of
the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say “this is not law.”

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.
KAGAN, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 18–422, 18–726

ROBERT A. RUCHO, ET AL., APPELLANTS 18–422  
COMMON CAUSE, ET AL.; AND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL., APPELLANTS 18–726  
O. JOHN BENISEK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[June 27, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted parti-
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sanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority’s own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case’s facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals’ rights. All that will help in considering whether courts confronting partisan
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gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State’s 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris v. McCrory*, 159 F. Supp. 3d 600 (MDNC 2016), aff’d sub nom. *Cooper v. Harris*, 581 U. S. ___ (2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly’s redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State’s congressional delegation come what might. Using sophisticated technological tools and
premise-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats’ voting strength and ensure the election of 10 Republican Congressmen. See Common Cause v. Rucho, 318 F. Supp. 3d 777, 805–806 (MDNC 2018).

- Lewis then presented for the redistricting committee’s (retroactive) approval a list of the criteria Hofeller had employed—including one labeled “Partisan Advantage.” That criterion, endorsed by a party-line vote, stated that the committee would make all “reasonable efforts to construct districts” to “maintain the current [10–3] partisan makeup” of the State’s congressional delegation. Id., at 807.

- Lewis explained the Partisan Advantage criterion to legislators as follows: We are “draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it[’s] possible to draw a map with 11 Republicans and 2 Democrats.” Id., at 808 (internal quotation marks omitted).

- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See id., at 809.

- Lewis announced: “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” Ibid. (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Repub-
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Republican congressional candidates won 10 of North Carolina’s 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland’s 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State’s Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O’Malley, who oversaw the process, decided (in his own later words) “to create a map that was more favorable for Democrats over the next ten years.” Because flipping the First District was geographically next-to-impossible, “a decision was made to go for the Sixth.” Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (Md. 2018) (quoting O’Malley; emphasis deleted).

- O’Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described “serial gerrymanderer,” to hire and direct a mapmaker. Id., at 502. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See id., at 502–503.

- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic
seats, and to protect all Democratic incumbents. See id., at 503.

- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and another 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See id., at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly’s Democratic caucuses about the new map’s aims. Miller told his colleagues that the map would give “Democrats a real opportunity to pick up a seventh seat in the delegation” and that “[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity.” Id., at 506 (internal quotation marks omitted).

- The General Assembly adopted the plan on a party-line vote. See id., at 506.

Maryland’s Democrats proved no less successful than North Carolina’s Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8
House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

“Governments,” the Declaration of Independence states, “deriv[e] their just Powers from the Consent of the Governed.” The Constitution begins: “We the People of the United States.” The Gettysburg Address (almost) ends: “[G]overnment of the people, by the people, for the people.” If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The “power,” James Madison wrote, “is in the people over the Government, and not in the Government over the people.” 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: “[R]epublican liberty” demands “not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people.” 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to “recollect[ ] [that] dependence” every day. Id., No. 57, at 155. To retain an “intimate sympathy with the people,” they must be “compelled to anticipate the moment” when their “exercise of [power] is to be reviewed.” Id., Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.
And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to “rigging elections.” Vieth v. Jubelirer, 541 U. S. 267, 317 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The “core principle of republican government,” this Court has recognized, is “that the voters should choose their representatives, not the other way around.” Arizona State Legislature v. Arizona Independent Redistricting Comm’n, 576 U. S. __, ___ (2015) (slip op., at 35) (internal quotation marks omitted). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, “in the Government over the people.” 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” Ante, at 30 (quoting Arizona State Legislature, 576 U. S., at ___ (slip op., at 1)). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See ante, at 31–33; infra, at 29–31. The other is that political gerrymanders have always been with us. See ante, at 8, 24. To its credit, the majority does not frame that point as an originalist constitutional argument.
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After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See ante, at 10. The majority’s idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as Amici Curiae 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See id., at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today’s mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting tradi—

1 And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and “symptom[s] of disease in the body politic.” G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).
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tional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather’s—let alone the Framers’—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I’ve already recounted the results from North Carolina and Maryland, and you’ll hear even more about those. See supra, at 4–6; infra, at 19–20. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State’s original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See League of Women Voters v. Pennsylvania, ___ Pa. ___, ___, 178 A. 3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1074 (SD Ohio 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See infra, at 15, 31.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn’t hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.
Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren’t bad enough). It violates individuals’ constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party. See generally Gill v. Whitford, 585 U. S. ___, ___–___ (2018) (slip op., at 14–16). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. See id., at ___ (KAGAN, J., concurring) (slip op., at 4). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment’s Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. Reynolds v. Sims, 377 U. S. 533, 566 (1964). And that opportunity “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” Id., at 555. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus “dilut[e] the weight of votes because of place of residence.” Id., at 566. The constitutional injury in a
partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens’ votes, and thereby deprive them of their capacity to “full[y] and effective[ly] participat[e] in the political process[].” *Id.*, at 565. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map “so as most to burden [the votes of] Party X’s” supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U. S., at 312. For (in the language of the one-person-one-vote decisions) it would infringe those voters’ rights to “equal [electoral] participation.” *Reynolds*, 377 U. S., at 566; see *Gray v. Sanders*, 372 U. S. 368, 379–380 (1963) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications”).

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views.” *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is “unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.” *California Democratic Party v. Jones*, 530 U. S. 567, 574 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U. S., at ___ (KAGAN, J., concurring) (slip op., at 9) (“Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their
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policy objectives”). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of “democracy embodied in the First Amendment.” Elrod v. Burns, 427 U. S. 347, 357 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, e.g., Vieth, 541 U. S., at 293 (plurality opinion) (“[A]n excessive injection of politics [in districting] is unlawful” (emphasis deleted)); id., at 316 (opinion of Kennedy, J.) (“[P]artisan gerrymandering that disfavors one party is [im]permissible”); id., at 362 (BREYER, J., dissenting) (Gerrymandering causing political “entrenchment” is a “violation of the Constitution’s Equal Protection Clause”); Davis v. Bandemer, 478 U. S. 109, 132 (1986) (plurality opinion) (“[U]nconstitutional discrimination” occurs “when the electoral system is arranged in a manner that will consistently degrade [a voter’s] influence on the political process”); id., at 165 (Powell, J., concurring) (“Unconstitutional gerrymandering” occurs when “the boundaries of the voting districts have been distorted deliberately to deprive voters of “an equal opportunity to participate in the State’s legislative processes”). Once again, the majority never disagrees; it appears to accept the “principle that each person must have an equal say in the election of representatives.” Ante, at 20. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic
governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See ante, at 15–19. According to the majority, “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.” Ante, at 16. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims “inevitably” would require courts to decide what is “fair” in the context of districting. Ante, at 17. They would have “to make their own political judgment about how much representation particular political parties deserve” and “to rearrange the challenged districts to achieve that end.” Ibid. (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’” Ante, at 19. No “discernible and manageable” standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. Ante, at 20; see ante, at 15–16.

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not
be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done has been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also Ohio A. Philip Randolph Inst., 373 F. Supp. 3d 978; League of Women Voters of Michigan v. Benson, 373 F. Supp. 3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts’ analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority’s more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts’ reasoning, as I’ll show, proves the opposite.
Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into “a number of ‘tests.’” *Ante*, at 22; see *ante*, at 22–30. But in doing so, it fails to convey the decisions’ most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra*, at 11, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials’ “predominant purpose” in drawing a district’s lines was to “entrench [their party] in power” by diluting the votes of citizens favoring its rival. *Rucho*, 318 F. Supp. 3d, at 864 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1)). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. *Lamone*, 348 F. Supp. 3d, at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho*, 318 F. Supp. 3d, at 867. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test’s application. First, did the North Carolina and Maryland districters have the predominant

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² Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante*, at 25, I therefore pass quickly over this part of the test.
purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra*, at 4–6: North Carolina’s redistricting committee used “Partisan Advantage” as an official criterion for drawing district lines. And from the first to the last, that committee’s chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that “electing Republicans is better than electing Democrats.” For their part, Maryland’s Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority’s response to the District Courts’ purpose analysis is discomfiting. The majority does not contest the lower courts’ findings; how could it? Instead, the majority says that state officials’ intent to entrench their party in power is perfectly “permissible,” even when it is the predominant factor in drawing district lines. *Ante*, at 23. But that is wrong. True enough, that the intent to inject “political considerations” into districting may not raise any constitutional concerns. In *Gaffney v. Cummings*, 412 U. S. 735 (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth*, 541 U. S., at 286 (plurality opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes
too far. Consider again Justice Kennedy’s hypothetical of mapmakers who set out to maximally burden (i.e., make count for as little as possible) the votes going to a rival party. See supra, at 12. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See supra, at 13.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See ante, at 23–24. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See Vieth, 541 U. S., at 312–313 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan’s effects mostly by relying on what might be called the “extreme outlier approach.” (Here’s a spoiler: the State’s plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State’s physical and political geography and meet its declared districting criteria, except for partisan gain. For each of those maps, the method then uses
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actual precinct-level votes from past elections to determine a partisan outcome (i.e., the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.\(^3\) We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State’s actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as Amicus Curiae 7–22.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State’s map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State’s actual map, and 77% would have elected three or four more. See Rucho, 318 F. Supp. 3d, at 875–876, 894; App.

\(^3\)As I’ll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State’s own plan. See ante, at 16–19; supra, at 14; infra, at 22–25. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?
276. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (e.g., compactness and contiguity of districts). Over 99% of that expert’s 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See Rucho, 318 F. Supp. 3d, at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs’ votes.4

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You’ve heard some of the numbers before. See supra, at 6. The 2010 census required only a minimal change in the Sixth District’s population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district’s partisan composition translated into four consecutive Democratic victories, including in a wave election year for

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4 The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan’s “partisan asymmetry.” See Rucho, 318 F. Supp. 3d, at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See Rucho, 318 F. Supp. 3d, at 886–887, 892–893.
Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans’ votes. See *Lamone*, 348 F. Supp. 3d, at 519–520.

The majority claims all these findings are mere “prognostications” about the future, in which no one “can have any confidence.” *Ante*, at 23 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders’ effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O’Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante*, at 24–25; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America’s future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.
The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” Ante, at 19; see supra, at 14. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See ante, at 16–19. And even once courts have chosen, the majority continues, they will have to decide “[h]ow much is too much?”—that is, how much deviation from the chosen “touchstone” to allow? Ante, at 19–20. In answering that question, the majority surmises, they will likely go far too far. See ante, at 15. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. See ante, at 19–20.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge’s philosophizing but of the State’s own
characteristics and judgments. The effects evidence in these cases accepted as a given the State’s physical geography (e.g., where does the Chesapeake run?) and political geography (e.g., where do the Democrats live on top of each other?). So the courts did not, in the majority’s words, try to “counteract ‘natural’ gerrymandering caused, for example, by the urban concentration of one party.” Ante, at 19. Still more, the courts’ analyses used the State’s own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians’ effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I’ve mentioned formed the core of the plaintiffs’ case that the North Carolina plan was an “extreme[] outlier.” Rucho, 318 F. Supp. 3d, at 852 (internal quotation marks omitted); see supra, at 18–20. Those maps took the State’s political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See Rucho, 318 F. Supp. 3d, at 896–897. On top of that, the maps took the State’s legal landscape as a given. They incorporated the State’s districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See supra, at 19–20. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as Amici Curiae 19–20. The point is that the assemblage of maps, reflecting the characteristics and
judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. Not as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina’s fancy evidence, but analyzed the gerrymander’s effects in much the same way—not as against an ideal goal, but as against an ex ante baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland’s partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State’s natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial
ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override its own political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority’s sole response misses the point. According to the majority, “it does not make sense to use” a State’s own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria “will vary from State to State and year to year.” Ante, at 27. But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State’s districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. Ante, at 28. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (e.g., must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority’s analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See ante, at 16–17. But those two demands are different, and only the former is at issue here.

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much.
any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The only one that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. See Lamone, 348 F. Supp. 3d, at 519. Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” Ante, at 27. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see ante, at 28, it could have used the lower courts’ general standard—focusing on “predominant” purpose and “substantial” effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See ante, at 19–20 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, e.g., Miller v. Johnson, 515 U. S. 900, 916 (1995); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 533 (1993); Washington v. Davis, 426 U. S. 229, 239 (1976). Those inquiries would be no harder here than in other contexts.
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Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map “substantially” dilutes the votes of a rival party’s supporters from the everything-but-partisanship baseline described above. (Most of the majority’s difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, “the law is full of instances” where a judge’s decision rests on “estimating rightly . . . some matter of degree”—including the “substantial[ity]” of risk or harm. *Johnson v. United States*, 576 U. S. ___, ___ (2015) (slip op., at 12) (internal quotation marks omitted); see, e.g., *Ohio v. American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 9) (determining “substantial anticompetitive effect[s]” when applying the Sherman Act); *United States v. Davis*, ante, at 7–10 (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a “substantial” risk of harm). The majority is wrong to think that these laws typically (let alone uniformly) further “confine[] and guide[]” judicial decisionmaking. *Ante*, at 28. They do not, either in themselves or through “statutory context.” *Ibid*. To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority’s suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra*, at 13.
Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See Rucho, 318 F. Supp. 3d, at 808 (quoting Lewis’s statements to that effect). They therefore felt free to openly proclaim their intent to entrench their party in office. See supra, at 4–6. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders, they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan’s vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs’ claims and the decisions below. Everything in today’s opinion assumes that these cases grew out of a “desire for proportional representation” or, more generally phrased, a “fair share of political power.” Ante, at 16, 21. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is

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5 A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, e.g., Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court’s prohibition of racial gerrymanders affected districting).
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not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice’s removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals’ supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people’s power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that “our oath and our office require no less.” Reynolds, 377 U. S., at 566. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” Gill, 585 U. S., at __ (KAGAN, J., concurring) (slip op., at 14). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. “Dozens of [those] bills have been introduced,” the majority says. Ante, at 33. One was “introduced in 2005 and has been reintroduced in every Congress since.” Ibid.
And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. *See ante*, at 32. Some Members of the majority, of course, once thought such initiatives unconstitutional. *See Arizona State Legislature*, 576 U. S., at ___ (ROBERTS, C. J., dissenting) (slip op., at 1). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. *See ante*, at 32. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. *See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019).* I’d put better odds on that bill’s passage than on all the congressional proposals the majority cites.

The majority’s most perplexing “solution” is to look to state courts. *Ante*, at 30. “[O]ur conclusion,” the majority states, does not “condemn complaints about districting to echo into a void”: Just a few years back, “the Supreme Court of Florida struck down that State’s congressional districting plan as a violation” of the State Constitution.
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Ante, at 31; see League of Women Voters of Florida v. Detzner, 172 So. 3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See League of Women Voters, ___ Pa., at ___, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?6

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 1 Cranch 137, 177 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They

6Contrary to the majority’s suggestion, state courts do not typically have more specific “standards and guidance” to apply than federal courts have. Ante, at 31. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that “elections shall be free and equal” and no one shall “interfere to prevent the free exercise of the right of suffrage.” League of Women Voters, ___ Pa., at ___—___, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, §5). And even the Florida “Free Districts Amendment,” which the majority touts, says nothing more than that no districting plan “shall be drawn with the intent to favor or disfavor a political party.” Fla. Const., Art. III, §20(a). If the majority wants the kind of guidance that will keep courts from intervening too far in the political sphere, see ante, at 15, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida’s, so the majority’s state-court solution does not go far.
evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see ante, at 34, this was law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the amicus briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call “a cascade of negative results.” Brief as Amicus Curiae 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See id., at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has “sounded the death-knell of bipartisanship,” creating a legislative environment that is “toxic” and “tribal.” Brief as Amicus Curiae in Gill v. Whitford, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See supra, at 7–8. In our government, “all political power flows from the people.” Arizona State Legislature, 576 U. S., at ___ (slip op., at 35). And that means, as Alexander Hamilton once said, “that the people should choose whom they please to govern them.” 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10
Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.
THE USE OF CITIZEN VOTING AGE POPULATION IN REDISTRICTING

This study comments on the practicality of the use of citizen voting age population (CVAP) as a basis for achieving population equality for legislative redistricting. What this means in practice is that the total CVAP for a state would be divided by the number of legislative districts to be redistricted in order to compute an ideal district population for each single-member district. Each district’s variance from this ideal district population would be used to calculate both the least and most populous district and also to compute the total percentage deviation (or “high to low”) for a redistricting plan as a whole. Compliance with the federal “one person, one vote” standard would thus be determined on the basis of CVAP as opposed to total population (TPOP), as is presently the case. The use of CVAP is not a new concept, but as of this date, federal courts have not held that it is permissible to use CVAP as a standard for legislative redistricting.

In Hawaii, courts have ruled that registered voters may be used as a population base for legislative redistricting. This practice was adopted to remove non-resident military personnel from the redistricting population base, and to avoid the creation of legislative districts with extremely high percentages of non-registered adults. The courts, however, have also mandated that the TPOPs in the districts must be closely related to the district deviations based on registered voters. Appendix 1 discusses these court rulings in more detail. This practice is still tied to total population.

In addition, the removal of prison inmates housed from other states has been allowed in 3 states in the 2010 redistricting cycle (Delaware, Maryland and New York). This practice, often referred to as “prisoner adjustment” also moves the counts for domestic inmates in state prisons to the location where they lived before being incarcerated (prisoners not from out-of-state). Democrat allies are now lobbying the Census Bureau to include this practice in the 2010 Decennial. Prisoner adjustment is generally believed to be favorable to the Democrats,

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1 This study does not constitute professional legal advice and is not intended to be substituted in place of advice from qualified legal counsel.
but may, in some states, be less favorable to minorities. This, of course depends on the
locations of the prisons. This practice, however, is still tied to total population.

As of today, the use of CVAP is limited to an evaluation of minority voting strength in
districts protected by the mandates of the Federal Voting Rights Act (sometimes, also, to
evaluate compliance with state and local civil rights provisions), and is most commonly used
to determine the ability of Latino voters to have equal opportunities to elect their preferred
candidates of choice in newly enacted districts.

The use of CVAP in redistricting has always been difficult. In decennial censuses prior to
2010, a citizenship question was included in the long form questionnaire which was
distributed to approximately one in seven households. This information, however, was not
available until after most states had already completed their line-drawing process.

For several reasons, the Bureau of the Census decided to discontinue the use of the long form
questionnaire for the 2010 Decennial Census and to depend exclusively on the short form
Questionnaire, which did not include a question on citizenship. The two primary reasons
given for this change were cost savings and an increase in the initial percentage of
questionnaires returned by mail.

As a replacement to the long form questionnaire, the Census Bureau instituted the American
Community Survey. To quote the Census Bureau: “The American Community Survey (ACS)
is an ongoing survey that provides vital information on a yearly basis about our nation and its
people. Information from the survey generates data that help determine how more than $400
billion in federal and state funds are distributed each year.” Each year, about 3.5+ million
households receive very detailed questionnaires of which about 2.2 million are successfully
returned. This represents a 62% return rate.

In the version of the ACS data used for redistricting in this cycle, the questionnaires from 5
years were compiled together into a report released in late 2010. This included the samples
collected in 2005 through 2009. The number of questionnaires included in the 2005 through
2009 sample was about 9.5 million. By comparison, about 16.2 million households would have received a Long-Form Questionnaire had its use been continued in the 2010 Decennial Census. This means that the accuracy of the ACS sample is significantly lower than the long form sample would have been. In addition, the use of a 5-year rolling sample was much less reflective of the actual characteristics of the population at the time of the actual 2010 Decennial Enumeration, which would have been a one-time snapshot taken in mid-2010 (April to August). Even if a majority of the justices on the U. S. Supreme Court are sympathetic to the use of CVAP, it is not probable, in my judgment, that they will accept a rolling 5-year survey in lieu of an actual full enumeration for use in redistricting or reapportionment.

Another issue with use of the ACS in redistricting is that the accuracy for small units of geography is extremely poor. This is particularly true for Census Tracts and Census Block Groups. In some cases the confidence interval for a Block Group exceeds the actual range of the data, creating negative numbers for the low point of the confidence interval.

Another problem with the ACS data is that the units of geography by which the ACS is compiled is different from the geographic units used in redistricting. Almost all states are using Census Voting Districts (VTDs) are preferred as the basic geographic building blocks for creating new districts. VTD boundaries generally follow precinct boundaries. ACS data are simply not available for VTDs, and any estimates of CVAP populations for VTDs would be even more inaccurate than the ACS estimates for Census Tracts and Block Groups.

For those states in which CVAP estimates for legislative districts have been compiled, determinations have been required to compute the percentage of each Census Block Group’s population which is in each legislative or congressional district. The CVAP statistics have been summed for all the block groups which have either 50% or 75% of their population in an individual district and these estimates have been imputed to the total adult populations of the districts. The Texas Legislative Counsel’s report (Appendix 3), contains the confidence intervals for the estimated of Texas House district are generally from 2 to 3 percent.
In many states, such as Texas, experienced redistricting experts have relied much more on the use of ethnic surname matches against the registered voter file to determine Latino voting strength, rather than estimates of the percentage of adult citizens who are Latino. Of course, since the population base for compliance with the one person, one vote rule has been TPOP, ethnic surname and CVAP estimates have only been used as indices of probable district election performance for Latino candidates.

Another issue to consider is whether or not CVAP, or just total citizen population (CPOP), would be the proper base, should the U. S. Supreme Court determine that citizenship should replace TPOP, which is presently in use. So far, courts have not even accepted the use of total voting age population (TVAP or VAP) as a redistricting standard, so it would be a high leap from TPOP to CVAP as the new standard.

All this leads to a possible conclusion that without a congressional mandate for the United States Census Bureau to add a citizenship question to the 2020 Decennial Census form, or such a mandate from the Supreme Court, the relief sought in the *Evenwel* case is functionally unworkable.

The other important topic to address are the political ramifications of using CVAP as the redistricting population standard for one person, one vote compliance. Would the gain of GOP voting strength be worth the alienation of Latino voters who will perceive a switch to CVAP as an attempt to diminish their voting strength? That, however, is not the subject of this study.

By mutual agreement, a study of the effect of using CVAP instead of TPOP as the redistricting population basis for drafting a plan for the Texas State House of Representatives has been commissioned. Demographic information on the current 150 State House districts has been obtained from the website of the Texas Legislative Council. Since State House districts are roughly equal in population they are appropriate for such an examination.
A spreadsheet containing information on each of the 150 State House districts in Texas has been compiled. There is one row for each district and each row contains 15 columns of geographic, demographic and political information for each individual district. This spreadsheet has been sorted in 6 different orders which make up Tables 2 through 7. The column header by which the table is sorted is shaded purple. An explanation of each of the 15 columns can be found in Appendix 2.

Table 2 is sorted by district number (Column A).

Table 7 is sorted by the population deviation measured in terms of TPOP (Column M).

Table 3 is sorted by the population deviation measured in terms of CVAP (Column O).

The population deviations for the current districts, as measured in terms of TPOP, ranges from 4.83% above to -5.02% below the idea district population (Table 7, Column M). The ideal population is the sum of the base population (either TPOP or CVAP) divided by the total number of districts. The range of deviation from the most to least populated district is 9.85% (total deviation), which is below the 9.99% range acceptable under the provisions of the United States Supreme Court’s “one person, one vote” rule. The deviations of the 2003 House district could have been lower. They are as high as they are because Texas’ Constitution has special provisions for the redistricting of it State House of Representatives which mandate keeping districts within whole counties or groups of whole counties. These provisions, however, may, to some extent, fall by the wayside as a result of the current federal court lawsuit challenging Texas’ adherence to the Voting Rights Act in its latest redistricting (2003).

When CVAP is used as the population base, the population deviations for the current State House districts increase in range from a high of 20.47% to a low of -40.38% with a total deviation of 60.85% (Table 3, Column O). This deviation is clearly unacceptable under the “one person, one vote” rule. If the Supreme Court were to impose CVAP as the proper
population base, and mandate its application to the districts for 2016, a radical redrawing of the State House districts would be required.

**POLITICAL AND DEMOGRAPHIC EFFECTS OF USING CVAP**

There are several general rules related to redistricting in general which should be discussed at this point:

1. First, the party which controls the actual line-drawing process, in most instances, possesses a huge advantage which outweighs almost all other factors influencing the redistricting process. This would be equally true if the population base were to be shifted from TPOP to CVAP.

2. Second, redistricting has often been described as a “game of margins”. Many times a shift of two or three precincts into or out of a district can significantly alter the political characteristic of that district. As an example, if a district is solidly Democratic and the Republicans are drawing the plan, the Republican will almost always add additional heavily Democratic precincts to that district to improve their advantage in surrounding districts. On the other hand, if Democrats are doing the line drawing, they will often submerge heavily Republican precincts into a strong Democratic district to improve their chances of electing Democrats in the surrounding districts.

These factors would also apply for Texas if CVAP were to become the new population base. In the case of Texas redistricting, the ability of the party in power to overcome a switch to CVAP would be somewhat limited in State House redistricting because of the mandate to keep counties intact – particularly if the Democrats regained control.

Table 4, which sorts the existing House districts by percent Hispanic CVAP, demonstrates that considerable population would have to be added to a majority of the Latino districts to bring their populations up to acceptable levels of deviation (Table 4, Column H). There are
presently 35 districts with HCVAP percentages over 40. As a whole, those 35 districts only contain sufficient HCVAP populations to comprise 30.1 districts (See the green shading on Table 4). As would be expected, the remaining 115 districts have sufficient combined HCVAP populations to comprise 119.6 districts.

Table 6 sorts the districts by the political party of the incumbent State House members (See Table 6, Column C). The 97 GOP districts have sufficient CVAP populations to actually form 103.2 districts, while the 53 Democrat districts only have sufficient CVAP population to comprise 46.8 districts. Use of CVAP would clearly be a disadvantage for the Democrats.

Since all of the Republican and Democrat districts are not located in two distinct areas, it is helpful to examine the effects of switching from TPOP to CVAP as the population base by regions. Texas has been divided into 13 regions comprised of whole State House Districts. Those regions are shown on Maps 1 and 2. The regions are:

1. Dallas-Ft Worth and suburbs (3 regions)
2. Houston and its suburbs (2 regions)
3. Austin and its suburbs (1 region)
4. San Antonio and its suburbs (1 region)
5. El Paso County (1 region)
6. The Rio Grande Valley and South Texas (1 region)
7. The area southeast of Houston (1 region)
8. The northeast area of Texas (1 region)
9. The central area of the State, roughly between DFW, Austin and Houston (1 region)
10. The areas of West-Central and Western Texas (1 region).

These regions certainly are not in any way official, but are sufficient for this redistricting analysis.

The data for these 13 regions may be found on Table 5 (which is sorted first by Column B and then by Column A) and demonstrates some interesting characteristics. This table compares
the number of projected CVAP-based districts which would be contained in these 13 regions to the number of actual Texas State House districts presently located within them (the 2003 House Plan). The combined CVAP district deviations within each region have been summed to determine the number of districts each region would be entitled to using CVAP as the population base. These data are summarizes on Table 8, and correspond to the green-shaded areas on Table 5 (found in Column O at the bottom of the section for each region).

The use of CVAP as the population based would cause a loss of relative population (and, thus districts) in the Greater Dallas/Ft. Worth Area (-.7 districts overall), with the greatest loss in Dallas County (1.7 districts). Harris County and its suburbs would lose relative population (1.7 districts overall), with a loss of 1.9 districts being slightly offset by the gain in the surrounding suburban counties. The greatest loss would be in South Texas, El Paso and the Rio Grande Valley which would lose 2.6 districts overall. All other regions of the State would enjoy relative gains in population, with the greatest gains being in Central as well as West Texas’ rural and semi-rural counties.

Even within the individual regions (Using Table 5), an inspection of the CVAP deviation percentages of Republican versus Democratic districts shows that the Democratic CVAP deviations are generally negative and the GOP deviations are generally positive. The means that Democratic districts could geographically expand to absorb additional high Democrat precincts from adjacent Republican districts, strengthening the adjoining GOP districts.

**CONCLUSIONS**

- A shift from a redistricting population based determined using total population to adult population is radical departure from the federal “one person, one vote” rule presently used in the United States.

- Without a question on citizenship being included on the 2020 Decennial Census questionnaire, the use of citizen voting age population is functionally unworkable.
• The Obama Administration and congressional Democrats would probably be extremely hostile to the addition of a citizenship question on the 2020 Decennial Census questionnaire.

• The chances of a U. S. Supreme Court’s mandate to add a citizenship question to the 2020 Decennial Census are not high.

• A switch to the use of citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites.

• A proposal to use CVAP can be expected to provoke a high degree of resistance from Democrats and the major minority groups in the nation.
THE JOURNAL OF LAW IN SOCIETY

Volume 13           Fall 2011           Number 1

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# The Journal of Law in Society

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I. INTRODUCTION

Every ten years, battles erupt in states across the nation after reapportionment where the instrument of warfare is redistricting. The decennial census provides population data for the country every ten years. The Census Bureau then reapportions the 435 seats in the U.S. House of Representatives by dividing them among the fifty states based on each state’s population. Redistricting occurs after reapportionment and involves redrawing district lines and boundaries for elected officials at all levels of government (i.e., federal, state, and local). While it is easy to view redistricting as a battle between good and evil – or party versus party, the focus of redistricting should be on the people in the states and ensuring proper representation for them. Redistricting is critical because how and where districts are drawn will often determine whether a community can elect representatives of its choice to sit in seats of power.

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1. The author is the Director of Census & Voting Programs at the Asian American Justice Center (AAJC), a member of the Asian American Center for Advancing Justice. Founded in 1991, the Asian American Justice Center works to advance the human and civil rights of Asian Americans, and build and promote a fair and equitable society for all. The author would like to acknowledge the assistance of Meredith Higashi and Jeanette Lee (staff attorneys at AAJC) in finalizing this article, as well as Stephanie Gray Chang and Sally Kim (from APIAVote – Michigan) for their hard work in Michigan during the redistricting process. Mrs. Minnis holds a Juris Doctorate, cum laude, from American University Washington College of Law and a Bachelor’s Degree in Economics from the University of Chicago.
(i.e., on the local school board, city council, state legislature and Congress), as well as whether or not elected officials are going to be responsive to its needs and concerns. What can be overlooked in the redistricting process are the rights and voices of communities of color. Decade after decade, communities of color have had to fight for their own communities’ interests to ensure that they are not harmed by redistricting battles. Using a variety of tools, including the Voting Rights Act and other legal standards, communities of color have been able to carve out districts for themselves that afford them opportunities to elect candidates of their choice.

African Americans and Latinos have frequently faced discrimination during redistricting. For example, after the 2000 census Louisiana adopted a discriminatory plan for its state House of Representatives that harmed African American voters. Despite 2000 data indicating that African Americans increased both numerically and by percentage in Louisiana, the state legislature completely eliminated a majority-minority district in the New Orleans area where African Americans did not lose any population in their proposed redistricting plan. Louisiana admitted that this elimination was a conscious effort to limit African American voting strength in the New Orleans area and to increase electoral opportunities for white voters. Similarly, when Texas redrew its congressional district boundaries in 2003, it dismantled a Latino-majority district along the U.S.-Mexico border. Texas moved more than 100,000 Latinos out of (and reduced from fifty-seven to forty-five percent the Latino citizen voting-age population in) the 23rd Congressional District in order to protect the re-election chances of the incumbent, who was not the preferred candidate of Latinos. In finding that the state legislature wrongfully dismantled the district, the U.S. Supreme Court emphasized that it was only when Latinos had organized into a cohesive group and gained in population enough to defeat the incumbent that the state


3. The state legislature also reduced the percentage of African American voters in several other districts where they had a reasonable opportunity to elect their candidate of choice in the same plan. Id.

4. Louisiana eventually withdrew the discriminatory redistricting plan and created a new redistricting plan that did not dilute African American voting strength only after fifteen months of litigation where evidence emerged that the 2001 plan violated the State’s own redistricting principles. Interesting to note, every initial state legislative redistricting plan for the Louisiana House of Representatives through the post-2000 census plan has drawn an objection since the Voting Rights Act was passed in 1965. Id.

5. Id. at 3.
divided them to prevent them from electing the candidate of their choice.\(^6\)

In the face of these discriminatory efforts, African Americans and Latinos have been able to use tools such as the Voting Rights Act to protect their communities’ interests during redistricting. For example, African Americans were protected by Section 5 of the Voting Rights Act from a redistricting plan that significantly reduced the African American voting-age population of a Delhi, Louisiana ward in 2003. In objecting to the plan under Section 5, the Department of Justice (DOJ) found that officials adopted the plan despite the existence of more favorable alternative maps that had been presented during the redistricting process. DOJ further found evidence of discriminatory intent in recognizing there had been consistent growth of the African American population over the preceding three decades and that the plan was adopted over concerns raised by the town’s own hired demographer.\(^7\) Furthermore, when Texas dismantled the Latino-majority 23rd Congressional District along the U.S.-Mexico border, the Latino community was able to protect their district through a legal challenge under the Voting Rights Act, winning a ruling in 2006 from the U.S. Supreme Court that Texas had discriminated against Latinos in violation of Section 2 of the federal Voting Rights Act.\(^8\)

Asian Americans have also found their voices silenced and their communities harmed during redistricting decade after decade. Historically, Asian Americans have found their communities split into different districts, thus reducing their voting power. For example, in Chicago, the 2001 redistricting divided Chicago’s Chinatown – a compact community whose members have common ground in terms of history, ethnicity, language, and social concerns – from two Illinois Senate districts into three Senate districts, and from three Illinois House districts into four House districts. Similarly, after the 1991 redistricting in Los Angeles, Koreatown, which covers just over one mile square, was split into four City Council districts and five State Assembly districts. This fracturing was patently problematic after the 1992 riots in Los Angeles, where an estimated $1 billion in damages occurred, concentrated mainly on businesses operated by Koreans and other Asian immigrants in Koreatown. However, because Asian Americans did not make up a significant portion of any elected official’s constituency, officials were left with little incentive to respond to the community.

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7. IMPACT OF REDISTRICTING, supra, note 2 at 12.
8. Id. at 3.
Thus, when Koreatown residents approached their local officials for assistance with the cleanup and recovery effort, no one was willing to take responsibility for the neighborhood and they were unable to receive assistance. In order to address these attempts to fracture its communities, Asian Americans have had to be more creative during the redistricting process to try to ensure that their communities are not harmed, in part due to the diverse demographic makeup of the community. While still being able to utilize the tools of the Voting Rights Act, Asian Americans have also had to employ different arguments, such as using a “communities of interest” strategy, to ensure their communities remain intact within a district.

This article will focus on how Asian Americans can increasingly become players in redistricting battles moving forward. The article will begin by providing an overview of a number of legal standards that must be met during redistricting. It will follow by discussing the applicability of these standards to the Asian American population as well as other tools that can be used by Asian American communities looking to engage in redistricting. Finally, the article will provide a case study on Asian Americans participating in the Michigan redistricting process to illustrate how a smaller community can have an impact on the redistricting process.

II. OVERVIEW OF REDISTRICTING PRINCIPLES AND TOOLS FOR COMMUNITIES OF COLOR

When creating districts, a number of concepts and factors must be taken into consideration. A basic principle that must be satisfied in redistricting is that of “one person, one vote.” Established in the 1960s by the U.S. Supreme Court through a series of cases, “one person, one vote” requires that legislative and congressional districts be of equal population. That is, the entire population of the redistricted-jurisdiction must be equally divided so that each district in the redistricting plan houses the same number of people. There are two different standards that apply to “equal population” – a strict equal protection standard for congressional districts (i.e. virtually no deviation) and a more lenient


10. Wesberry, 376 U.S. at 7-8.
one for state legislative districts (i.e. need to only show “substantial equality of population”).

A. Section 2 of the Voting Rights Act

Once it is determined how many people must go into each district, line drawers need to ensure that the requirements of the Voting Rights Act are satisfied. One tool that communities of color can use to protect their interest during redistricting is Section 2 of the Voting Rights Act, which can be used to advocate for, or litigate to obtain, a more fairly drawn plan that better reflects the voting strength of minority voters. Applicable nationwide, Section 2 protects minority voters from practices and procedures that deprive them of an effective vote because of their race, color, or membership in a particular language minority group.

Within the context of redistricting, Section 2 prohibits the enactment of redistricting plans that have a discriminatory effect, or were adopted with a discriminatory purpose. Section 2 protects minority communities of all sizes from redistricting plans drawn or infected with a discriminatory purpose. Additionally, Section 2 prohibits minority vote dilution— that is, practices that have the effect of depriving minority voters of an equal opportunity to elect a candidate of choice are not allowed. Vote dilution most commonly occurs either when those in charge of redistricting crowd minority communities into a small number of districts (packing) or stretch them across a large number of districts (cracking, fracturing, or splitting). For example, vote dilution via packing can occur when two districts are created each with eighty-five percent African American population rather than drawing three African American majority districts with their population evenly spread out over three districts. On the other hand, vote dilution via cracking can occur if two districts are created where each has forty percent Latino population rather than creating one majority-Latino district where Latinos could have a better opportunity to elect a candidate of their choice.

Section 2 can require states to create new majority-minority districts to avoid diluting minority voting strength during redistricting. For example, states that experienced significant minority population growth

11. Reynolds, 377 U.S. at 533. It is generally recognized that there is a 10% deviation allowed between state legislative districts (i.e. there can be up to a 10% deviation between population sizes of state legislative districts). See Brown v. Thomson, 462 U.S. 835, 842-43 (1983). However, this ten percent deviation is not guaranteed to be safe and can be challenged for violating “one person, one vote.” See Cox v. Larios, 542 U.S. 947 (2004).

since the last census may need to create new majority-minority districts to ensure that they are complying with Section 2. Plans that dilute minority voting strength either by failing to create feasible majority-minority districts or preserve existing majority-minority districts may be legally challenged quickly following adoption. In order to determine whether a redistricting map dilutes minority voting strength, one must look to the legal principles set forth in *Thornburg v. Gingles*. A minority group must prove the following three prongs as set forth by the Supreme Court in *Gingles* to establish a violation of Section 2 of the Voting Rights Act:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive [that is, it usually votes for the same candidates] . . . [and T]hird, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . – to defeat the minority’s preferred candidate.

Under the first prong, the minority group must make up more than fifty percent of the voting age population of a district in order to state a Section 2 vote dilution claim. That is, Section 2 does not require the drawing of districts in which racial minorities would make up less than fifty percent of the voting age population of a district. However, the Court made clear that those responsible for redistricting retain discretion to create districts to provide a geographically concentrated minority population an opportunity to elect candidates of choice even where their population falls fall short of fifty percent.

The second and third prongs of the *Gingles* test, regarding minority political cohesiveness and white bloc voting, look at racially polarized voting. For purposes of Section 2, “‘racial polarization’ exists where there is ‘a consistent relationship between [the] race of the voter and the way in which the voter votes,’ . . . or to put it differently, where ‘black

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14. Id. at 50-51.
15. Id. (internal citations omitted).
17. Id. at 44 (“. . . in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.”).
voters and white voters vote differently.  

Experts will conduct complex statistical analyses looking at trends across multiple elections at different levels of government to determine whether there is racially polarized voting. Specifically, political scientists can analyze a variety of election information, including election returns and voter registration rolls, to determine voting patterns among white and minority voters, the results of which can be used to determine whether minority voters tend to support the same candidates and whether white voters tend to vote against those candidates. Without racially polarized voting, there can be no minority vote dilution claim.

The analysis continues once these three preconditions are established. A minority group must then show it had less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of its choice under “the totality of the circumstances.” A totality of the circumstances analysis will generally look to a number of the following factors:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

18. Gingles, 478 U.S. at 53 n.21 (internal citations omitted).
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.\textsuperscript{19}

Additionally, in some cases, other factors have had probative value as part of plaintiffs’ evidence to establish a violation, including:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[, and] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.\textsuperscript{20}

Only after answering each prong and “totality of the circumstances” test in the affirmative must a majority-minority district be created and/or protected.

B. \textit{Section 5 of the Voting Rights Act}

Section 5 of the Voting Rights Act prohibits the enforcement or administration by covered jurisdictions of “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” without first receiving approval, or “preclearance,” from DOJ or the U.S. District Court for the District of Columbia (the federal court in Washington, D.C.).\textsuperscript{21} Voting changes with a discriminatory purpose or with a retrogressive effect will not be precleared and thus Section 5 will prohibit the submitting jurisdiction from adopting the voting change. A change is retrogressive if it puts minorities in a worse position than if the change did not occur. For example, a redistricting plan might be deemed retrogressive if it contains only two majority-minority districts where it previously contained three or if the line drawers reduce the minority

\textsuperscript{19} Id. at 36-37 (discussing the Senate Judiciary Committee majority report accompanying the bill that amended Section 2 and providing these factors as circumstances that might be probative of a Section 2 violation).

\textsuperscript{20} Id.

\textsuperscript{21} 42 U.S.C. \textsection 1973c. The following States are covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Only certain counties or towns in the following states are covered under Section 5: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. It must be noted, however, that even if only a part of a jurisdiction is covered by Section 5, congressional and state legislative redistricting plans for the entire state must be submitted for review. A detailed listing of counties and towns covered is available at \textit{Section 5 Covered Jurisdictions}, U.S. JUSTICE DEPT., http://www.justice.gov/crt/about/vot/sec_5/covered.php.
population percentage of a district to a level that will make it more difficult or impossible for them to continue to elect candidates of their choice.

Once the redistricting process has concluded and the plans have been finalized, a covered jurisdiction must submit the plan to the DOJ or the District Court of the District of Columbia for review, along with any rules or procedures related to redistricting that may have changed since the last redistricting cycle. To begin the administrative process, a Section 5 covered jurisdiction will submit the voting change to the DOJ. The DOJ then has sixty days to review the change and determine if the change was adopted with a discriminatory intent or will have a discriminatory effect. During the review period, interested individuals and community groups can provide information to the DOJ, such as submitting a Comment Letter that provides the writer’s perspective regarding the facts and process leading up to the creation and adoption of the proposed redistricting plan or other voting change as well as on any impact on their community. Once the DOJ has finished reviewing the change, they can either approve or “preclear” the change (finding that the change is not discriminatory) or disapprove or “object” to the change (finding that the jurisdiction has failed to show that the change is not discriminatory). While a decision by the DOJ to preclear a redistricting plan (or other voting change) is final and cannot be challenged in court, the precleared redistricting plan (or other voting change) can still be challenged on other legal grounds. For example, a redistricting plan precleared under Section 5 could still be challenged under Section 2 of the Voting Rights Act if the plan dilutes minority voting strength.\footnote{22. \textit{Id}.}

In covered jurisdictions, communities of color can use Section 5 to help protect their interest during redistricting by showing that the redistricting plan is retrogressive (i.e. makes them worse off than the previous map), or was drawn with a discriminatory purpose through the comment process. For example, Webster County, Georgia officials adopted a new redistricting plan for the county board of education that would have significantly reduced the African American population in three of the board’s five single-member districts. The DOJ denied preclearance and blocked the redistricting plan, observing “. . . that there were serious doubts as to whether minorities would continue to have an equal opportunity to elect candidates of choice in either district.”\footnote{23. \textit{IMPACT OF REDISTRICTING, supra} note 2, at 12.} As evidence of discriminatory purpose underlying the plan, the DOJ also pointed to the fact that the decision to adopt a new redistricting plan
occurred only after the school district elected a majority black school board for the first time in 1996. The DOJ concluded that the redistricting plans were created to intentionally decrease the opportunity for African American voters to participate in the political process and thus blocked the plan.  

III. REDISTRICTING AND ASIAN AMERICANS

Asian Americans are a diverse population that includes both affluent, multi-generation English speakers and low-income refugees, many of whom are among the poorest in our nation. While approximately sixty percent of Asian Americans are foreign-born, increasing numbers of Asian Americans are native-born and approximately fifty-seven percent of Asian American immigrants have naturalized. The diversity of the Asian American population is also reflected in education data, income and poverty data, employment, housing, health, and other issues. These demographics result in a complex relationship between Asian Americans and redistricting.

As the fastest growing group during the last decade, with a forty-six percent growth rate, Asian Americans are poised to have an increasing voice during redistricting. In fact, during the 2011 redistricting process in California, the state’s first Asian American majority-minority district was drawn in the west San Gabriel Valley, where Asian Americans make up roughly percent of the citizen voting-age population in Assembly...
District 49. New York’s Assembly District 22 in Flushing, Queens (represented by Grace Meng), is majority-Asian with Asian Americans comprising 68.7% of the total population and 69.2% of the voting-age population. This is not surprising as these states have the top two highest population numbers of Asian Americans according to the 2010 census. These two states represent 7.1 million Asian Americans and more than forty percent of the total Asian American population in America.

Even as Asian American populations are growing in virtually every state, their numbers may still be too small to take advantage of the VRA as discussed in Section II. Nevada, Arizona and North Carolina had three of the fastest growing Asian American populations, with growth rates of 116%, ninety-five percent and eighty-five percent respectively. At the same time, the population numbers for those three states are: 242,916 for Nevada, 230,907 for Arizona, and 136,212 for North Carolina. While nineteen states are home to more than 225,000 Asian Americans each, Asian Americans generally make up only two to nine percent of their respective state’s total population. Combine these population numbers with the fact that the Asian American community is exceedingly diverse– comprised of a multitude of ethnicities speaking dozens of languages and dialects– and it becomes apparent that utilizing traditional methods of gaining power through redistricting becomes more and more difficult. Thus, Asian Americans must often approach redistricting from slightly different angles than other communities of color.

34. N.Y. STATE LEG. TASK FORCE ON DEMOGRAPHIC RESEARCH & REAPPORTIONMENT, 2010 CENSUS DATA BY DISTRICT: ASSEMBLY A-6 (2010), http://www.latfor.state.ny.us/data/2010files/asm-prof.pdf (This is an increase from the 2000 data, where Asian Americans were 52.94% of the total population and 53.29% of the voting age population); N.Y. STATE LEG. TASK FORCE ON DEMOGRAPHIC RESEARCH & REAPPORTIONMENT, 2000 CENSUS DATA BY DISTRICT: ASSEMBLY 6 (2000), http://www.latfor.state.ny.us/data/2000files/2000asm-prof.pdf.
35. COMMUNITY OF CONTRASTS, supra note 25, at 8.
36. Id. at 60 (The Asian American population in California is 5,556,592 and 1,579,494 in New York.).
37. See id. at app. B.
38. Id. at 8.
39. Id. at 60.
40. Id. at 8, 60 (This of course does not include outliers Hawaii and California, where Asian Americans make up fifty-seven percent and fifteen percent of the state’s total population respectively).
A. Minority Coalition Districts

One approach that Asian Americans can look to moving forward is utilizing minority coalition arguments to advocate for certain districts. A minority coalition is a district where two (or more) minority groups come together to create a politically cohesive voting bloc to elect a representative of choice, and, where their combined numbers constitute a majority in their district. For example, a minority coalition district may consist of thirty percent Latinos and twenty-five percent Asian Americans.

Where the minority groups form a coalition that meets the *Thornburg v. Gingles* requirements, under the totality of the circumstances, the state’s scheme has the effect of diminishing or abridging the voting strength of the protected class, a minority-coalition district will be required under Section 2 in most jurisdictions. That is, one must show:

1. that the combined minority population [that constitutes the coalition] . . . is sufficiently large and compact to constitute a majority in a single member district [i.e., is more than a numerical majority of the district] . . . ;
2. that the coalition is politically cohesive in that its members usually vote together . . . ; and that the non-minority population tends to vote as a bloc against the interests of the minority coalition . . . .

While the Supreme Court has not addressed the issue of minority coalition districts being required under Section 2 explicitly, other courts looking at this issue have allowed minority coalition districts to satisfy the first precondition under *Gingles*. Additionally, the Supreme Court noted in its *Bartlett v. Strickland* decision that its decision applied only to


42. See e.g. Campos v. Baytown, 840 F.2d 1240, 1244 (1988) (the Fifth Circuit permitted African-Americans and Hispanics to be combined for the purposes of complying with the first *Gingles* precondition, so long as the groups could show that they were politically cohesive); Concerned Citizens v. Hardee Cnty. Bd., 906 F.2d 524, 526-27 (1990) (where the Eleventh Circuit stated: “Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner.”); and Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 276 (2d Cir.), vacated and remanded on other grounds, 512 U.S. 1283 (1994) (where the Second Circuit combined African-Americans and Hispanics for purposes of satisfying first *Gingles* requirement).
crossover districts (one in which minorities do not form a numerical majority but still reliably control the outcome of the election with some white voters “crossing over” to vote with the minority group) and not minority coalition districts.\(^43\) Thus, the Voting Rights Act can require the creation of minority coalition districts that meet the Gingles requirements.

Asian Americans, along with other communities of color, have started to look to minority coalition districts as an avenue for empowering their community during redistricting as our nation becomes more diverse. For example, in Prince Williams County, Virginia, one of the nation’s most diverse counties with a growth rate of 172% of the Asian American population and 204% of Latinos, local organizers contend there is voter cohesion among Latinos, Asian Americans, and African Americans, and that if their numbers were fairly represented in the district maps, they would constitute minority coalition districts.\(^44\) The district map approved by the County’s all-white Board of County Supervisors creates a district, called Coles, that “extends an arm northward to snake around the city of Manassas and encompass neighborhoods on the city’s northern perimeter.”\(^45\) Rather than splitting Coles and two other districts as the current map does, a new district could be formed around this neighborhood that would have a voting-age population of fifty-seven percent Asian American, Latino, and African American.\(^46\) In Texas, Asian Americans argued against the removal of House District 149, which had the largest concentration of Asian Americans in Harris County along with large percentages of Latino and African American populations.\(^47\) A coalition of groups representing all three communities of colors sent a letter to the Chair of the Texas House Redistricting Committee urging the committee to reinstate the minority coalition district.\(^48\) Another example of minority coalition districts advocating is in New Jersey, where a coalition of minority groups

43. Referring to coalition district claims in which two minority groups form a coalition to elect the candidate of the coalition’s choice, Justice Kennedy states that “[w]e do not address that type of coalition district here.” Bartlett, 556 U.S. at 25.
45. Id.
46. Id.
released their version of a legislative map that would not only maintain the number of existing majority-minority districts, but also double the number of minority coalition districts from seven to fourteen. Arguments in favor minority coalition districts will continue to increase in future redistricting efforts as our communities continue to become more diverse.

B. Communities of Interest

Asian American communities can also argue for “communities of interest.” Under Shaw v. Reno, Asian Americans and other communities of color cannot argue for districts that are drawn with race as the predominant or controlling factor. Race, however, remains a permissible consideration in drawing districts so long as it does not subordinate “traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions, or communities defined by actual shared interests, to racial considerations.” Utilizing the idea of communities defined by actual shared interests and needs (also known as “communities of interest”), communities can argue that they should be kept intact within a district during the redistricting process. Particularly for Asian American communities that are not large enough in population size to constitute majority-minority districts by themselves and/or where minority-coalition districts cannot be created, a community of interest argument allows advocacy for districts that will protect against the fracturing of their interest groups and provide them with responsive elected officials.

In order to identify communities of interest, one should look to a variety of data sources including, but not limited to, census data, other governmental data, demographic studies, surveys, or political information to determine what social and economic characteristics community members share. Beyond looking at numbers, it is important to speak with community activists, civic leaders, and review local reports and studies to make sure that there is a deeper understanding of the


50. Shaw, 509 U.S. at 630. It is important to note, however, that race must be considered during the redistricting process to ensure that any map considered complies with the Voting Rights Act.


52. Bush v. Vera, 517 U.S. 952, 966-967 (1996). It can also be used to defeat a claim of racial gerrymandering so long as the communities were actually considered when the districts were drawn and not as an afterthought.
community including specific needs and concerns of the residents. The communities’ local government may also be a good source of information, such as information on school enrollment and attrition rates, socio-economic disparities, crime rates, and other issues of interest. The data can then be visualized through maps showing how the socioeconomic data impacts a geographic area, including the particular similarities among community members. For example, a map showing households that predominantly speak a language other than English, foreign-born residents, poverty-level residents, and high school graduation rates can be used to identify a “community of interest” within a particular geographic area. Communities of interest can be multi-racial communities that include Latino, Asian American, and African American populations and should be focused on commonalities between community members with respect to characteristics, needs and concerns. Some examples of relevant social and economic characteristics and/or needs and concerns are:

- Cultural and language characteristics
- Educational backgrounds
- Employment and economic patterns (such as the type of employment and the economic base of the community)
- Health and environmental conditions
- Housing patterns and living conditions (urban, suburban, and rural)
- Policy issues raised with local representatives (e.g., concerns about crime, education, etc.)

A community of interest argument was made in *Diaz v. Silver* on behalf of the Chinese community in a *Shaw v. Reno* challenge lodged against New York’s 12th Congressional District. The Court found that there was an Asian American community of interest residing in Manhattan’s Chinatown and Brooklyn’s Sunset Park because they shared common socio-economic characteristics (i.e. speaking a common


54. Diaz v. Silver, 978 F. Supp. 96, 101-102 (1997). Additionally, while courts have played a role in identifying communities of interest, there is not one accepted standard. Anyone making community of interest arguments should determine whether the courts in his or her state have identified or rejected state-specific standards for articulating communities of interest.
Chinese dialect, reading Chinese-language newspapers, having similar employment, having limited English proficiency, and going to the same private and municipal health and social service agencies). During the 2011 redistricting cycle in California, Asian Americans successfully argued for keeping communities of interest together in the resulting maps approved by the Citizens Redistricting Commission for California Assembly, Senate, Board of Equalization, and Congressional districts. The Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR – a statewide coalition of Asian American and Pacific Islander organizations and individuals working in ten regions), worked diligently to incorporate community feedback and input related to keeping together specific communities of interest and neighborhoods and conveyed this information to the commission via testimony at the public hearings. On behalf of CAPAFR, the Asian Pacific American Legal Center, the coalition’s anchor, developed assembly and senate mapping proposals that incorporated the communities’ priorities around their communities of interest. These testimonies and maps influenced the final district configurations in all ten regions in which it worked, including the creation of California’s first Asian American majority-minority state or federal district and the unifying of many Asian American and Pacific Islander communities that were fragmented in the 2001 district maps.

IV. MICHIGAN CASE STUDY

California’s Asian American community was able to make gains and protect communities of interest in part due to its size (a population of more than 5.5 million, representing fifteen percent of the state’s population) and its previous redistricting experience (this was the second redistricting cycle for CAPAFR – the coalition was able to build upon previous successes and learn from previous mistakes and challenges). However, the tactics used in California are relevant for small communities across the country even where the Asian American population may not be as large. In fact, APIAVote-Michigan (APIAVote-MI), which made its first foray into redistricting during the 2011 cycle on behalf of Asian Americans, was able to utilize some of the same tactics and arguments to help promote the Asian American voice during redistricting.

55. Id. at 124 (1997).
57. Information for this section of the article is from a grantee report from APIAVote-MI to the Asian American Justice Center as part of their funding to conduct redistricting work in Michigan. The report is on file with the author and is not a public document.
According to the 2010 Census, Asian Americans were the fastest-growing population group in Michigan. The largest Asian American populations in Michigan were found in Oakland County, followed by Wayne County, Washtenaw County, and Macomb County. The fastest-growing Asian American populations were found in Macomb County, Ingham County, Oakland County, Ottawa County, and Washtenaw County. In order to achieve their goal of keeping growing and sizeable Asian American communities with shared interests together in the newly-drawn districts, it needed to credibly assert that the community was an emerging political force; a small but well organized group that wants to be part of the process of policy making. To that end, APIAVote-MI focused on ensuring Asian Americans were prominent in the public dialogue around redistricting through hosting public education events, working with mainstream and ethnic press, communicating with policymakers and allies, and consistently attending policymakers’ meetings (along with other community events) related to redistricting. In addition to media work, APIAVote-MI utilized Census 2010 data and created educational materials about the Asian American communities in Michigan. They also engaged the community. Outreach efforts included: holding a community movie night on redistricting, meeting with potential allies from the University of Michigan to the League of Women Voters, and hosting a Community Roundtable on Redistricting to gain input from stakeholders in the Asian American community.

APIAVote-MI’s efforts were focused on the tri-county area of Wayne County, Oakland County and Macomb County. The Asian American population in Michigan failed to reach the threshold of greater than fifty percent in a single jurisdiction; therefore, APIAVote-MI had to focus on building the communities of interest argument that Asian Americans in these counties shared interests and wanted geographic cohesion during the redistricting process. APIAVote-MI testified that the growing Asian American communities in Wayne County were communities of interest that should be kept geographically together as practicable, including those in Canton, Northville Township,

59. Id.
60. Id.
61. Written Testimony for the Wayne County Reapportionment Commission by Sally Kim, APIAVote-MI (June 10, 2011) (on file with the author). APIAVote-MI also advocated that the redistricting process be transparent and accessible to the public.
Hamtramck, and East Detroit. These communities shared racial, ethnic and cultural similarities and needs, policy concerns, voting patterns, languages spoken and language access needs, and included geographically relevant centers and facilities to serve them (i.e. places of worship, schools, and community service centers). Other characteristics that APIAVote-MI offered to bolster its argument included political cohesiveness and sharing strong language assistance needs.

APIAVote-MI ensured that the communities of interest districts were presented to the line drawers. First, they sent letters to those in charge at the county and state level to introduce the organization and request that Asian American communities be kept together during the redistricting process. Next, using census data, they created county Asian American population comparison maps showing the Asian American population shifts and growths between 2000 and 2010. Finally, APIAVote-MI ensured that the Asian American population was a strong presence at the

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62. Id. at 2. (East Detroit has a small Hmong population that has strong geographic and demographic ties like Hamtramck, and should be kept together).

63. Id. at 1-2. Examples pointed to include: the annual Bengali festival on Conant Avenue in Hamtramck during the summer; houses of worship serving the Asian American community, including a Hindu temple in Canton on Cherry Hill Road, a Muslim Community of Western Suburbs – a mosque in Canton – and Gurdwara Sahib – a Sikh gurdwara also in Canton, the Hidden Falls – a Sikh gurdwara in Plymouth; and a trifecta of community centers in metro Detroit run by the Association of Chinese Americans, which hosts a youth cultural summer Campaign for Justice held in Plymouth and has a satellite cultural center and program in Canton.

64. Id. at 2. In 2006, the majority of Asian Americans in Southeast Michigan polled were Democrats. In 2008, nine out of 10 Asian and Arab voters voted Democratic for President Obama, and eighty-one percent voted for Democratic Congressional candidates. Asian American voters were concerned with three top issues during the presidential race: Economy/Jobs, Foreign Policy/War in Iraq, and Health Care. In 2008, eighty-two percent of Asian and Arab American voters voted for the Democratic candidate for Congress, while seventeen percent voted for the Republican incumbent in the 11th Congressional District. That same year, ninety-eight percent of Asian and Arab American voters voted for the Democratic incumbent while two percent voted for the Republican challenger in the 13th Congressional District. Eighty-four percent of Asian and Arab American voters voted for the Democratic incumbent while twelve percent voted for the Republican challenger in the 15th Congressional District.

65. Id. at 3. Sixty-eight percent of Asian Americans in Wayne County are foreign born. 79.9% of Asian Americans in the county speak a language other than English at home. A 2008 exit poll found that sixteen percent of respondents in Michigan were limited English proficient (LEP). Specifically, forty-five percent of native Bengali speakers in Detroit were LEP, with twenty-seven percent preferring to vote with language assistance. In Hamtramck, forty percent of native Arabic speakers were LEP, with twenty-nine percent preferring to vote with language assistance. Of Wayne County Asian American residents who have limited or no English skills, and therefore may have special needs, fifty-three percent Bangladeshi, forty-five percent of Hmong, twenty-six percent of Vietnamese and other Asian ethnic populations fell in this category.
public redistricting meetings. They testified at various legislative and county reapportionment commission hearings about Asian American populations as communities of interest and the need for transparency in the redistricting process. They also submitted proposed redistricting maps to the House and Senate Redistricting Committees and reapportionment commissions in Oakland and Wayne Counties. Additionally, APIAVote-MI mobilized a handful of stakeholders to attend county meetings or testify before commissioners, particularly in Wayne, Oakland and Washtenaw Counties.

APIAVote-MI also worked with the Michigan Redistricting Collaborative to contact other organizations and communities to see who else would be working on redistricting or proposing local-level maps. Although it turned out that APIAVote-MI was the only organization preparing to propose new maps at the county level, they reached out and attended redistricting-related events and trainings with other groups, including the League of Women Voters, Data Driven Detroit, the Michigan Redistricting Collaborative, the NAACP, and the Michigan Legislative Black Caucus. It was important to APIAVote-MI that they made clear that they were not interested in creating maps that could potentially negatively impact other communities of interest or minority communities. These conversations led to helpful feedback and a desire to work together in the future.

APIAVote-MI’s work on redistricting had a substantial impact in their communities, on the public discourse on redistricting, and in shaping final county maps. They showed that they wanted to work broadly with other communities of color to protect each other’s voting rights and widened their ally base. In addition, they made significant, effective contributions during the county redistricting process. For example, they educated Oakland County Commissioners about the county’s rapidly growing Asian American community, thereby changing

some commissioners’ perspective on the importance of Asian American voters. In addition, some of APIAVote-MI’s redistricting suggestions were incorporated in the final maps, including keeping Asian American communities of interests together in Novi and Troy. APIAVote-MI’s frequent presence and testimony around communities of interest at Wayne County meetings ensured communities of interest shaped committee discussions. Ultimately, commissioners considered communities of interest in the County’s mapmaking. The highest-growth Asian American areas, including Canton and Hamtramck, were protected and commissioners themselves pointed out where the Asian American communities were protected. Furthermore, by testifying on the need for transparency and accessibility to the public, the county became more transparent in its processes as meetings progressed. Through active participation and utilizing the communities of interest argument on behalf of Asian American communities in Michigan, APIAVote-MI managed to successfully raise awareness about the Asian American community. Specifically, the community’s needs and concerns, the importance and effect of redistricting on the Asian American community, the need for the community to be civically engaged to protect its democracy, and the need for elected officials to be responsive to their Asian American constituents.

V. CONCLUSION

Asian Americans are the fastest-growing group in the country and are poised to be a major political force in the future. However, pure population increase will not be enough to drive the Asian American voice if Asian American communities continue to be fractured and split during the redistricting process. Too long have Asian Americans found themselves silenced and ignored because their communities have been split into different districts. The time has come for Asian Americans to become actively engaged in their redistricting processes, utilizing a myriad of tools. Not only should Asian Americans continue to look to the traditional tools of the Voting Rights Act, such as drawing Section 2 majority-minority coalitions, to create districts that benefit their communities, they should also look to other more creative strategies such as arguing to keep communities of interests together and creating minority-coalition districts with other communities of color during the redistricting process. As seen in the efforts of Asian Americans in Michigan during the 2011 redistricting cycle, more and more Asian Americans will continue to engage in the redistricting process and gain wins, both through the creation of favorable districts and through the elevation of the community’s needs and issues.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.,

Plaintiffs,

DONNA KAY DRAYTON, EDWIN ELLIS,
AIDA FORREST, GENE A. JOHNSON, JOY WOOLLEY,
SHEILA WRIGHT, LINDA LEE, SHING CHOR CHUNG,
JUNG HO HONG, JULIA YANG, JAUN RAMOS,
NICK CHAVARRIA, GRACIELA HEYMANN,
SANDRA MARTINEZ, EDWIN ROLDA and
NANOLIN TIRADO

Intervenor-Plaintiffs,

v.

ANDREW M. CUOMO, as Governor of the
State of New York, et al.,

Defendants.

LEE INTERVENORS’ SUBMISSION TO MAGISTRATE JUDGE ROANN MANN
WITH RESPECT TO CONGRESSIONAL REDISTRICTING PURSUANT
TO ORDER DATED FEB. 28, 2012

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C. Kawezya Burris
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Plaintiff-Intervenors are four Asian American registered voters in New York State who reside in neighborhoods with large Asian American populations in the boroughs of Queens and Brooklyn, in the City of New York. The current congressional district configuration dilutes Asian American voting strength. Plaintiff-Intervenors seek congressional redistricting that does not violate the “one person, one vote” principle under Article I, Section 2 of the Constitution of the United States and the federal Voting Rights Act of 1965. They desire to have their vote weighted equally with those of all other citizens of the City and State of New York.

The proposed Plaintiff-Intervenors also seek to ensure that this redistricting process results in congressional districts that keep the Asian American communities of common interest in which they reside whole and together, to ensure that their voting power is not diluted.

Co-Counsel for the Plaintiff-Intervenors, the Asian American Legal Defense and Education Fund (AALDEF) is a 38-year old nonpartisan, New York-based organization that protects and promotes the civil rights of Asian Americans through litigation, legal advocacy and community education. AALDEF has a long history in defending the voting rights and political representation of Asian Americans.

Plaintiff Intervenors seek to keep Asian American communities of interest together as new boundaries for congressional district are drawn. Keeping communities together will ensure that Asian Americans will have a full and fair opportunity to elect candidates of their choice, in accordance with the Voting Rights Act of 1965. 42 U.S.C. § 1973(b).

Standard of Review

In the Court’s Order referring the task of preparing a congressional redistricting plan to Your Honor, it directed, inter alia, that “Districts shall . . . preserve communities of interest” and
“shall comply with 42 U.S.C. §1973(b) and with all other applicable provisions of the Voting Rights Act.” (Dkt. 133 at 3). This language comports with the U.S. Supreme Court’s directive that under Section 2 of the Voting Rights Act, voting districts should encompass minority “communities of interest.” *League of Latin American Citizens v. Perry*, 548 U.S. 399, 433 (2006). Indeed, courts have long recognized that “[t]he equal protection clause of the fourteenth amendment guarantees the opportunity for equal participation by all voters, and redistricting plans that do not achieve fair and effective representation for all citizens impair the basic and fundamental rights secured by this amendment.” *Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, 796 F.Supp. 681, 687 (E.D.N.Y.1992) (“PRLDEF”) (citing *Reynolds v.. Sims*, 377 U.S. 533, 566 (1964)).

**Background**

We urge this Court to take account of Asian American communities of interest in Queens, Brooklyn and Manhattan to ensure that certain heavily Asian American neighborhoods, many of which have grown substantially over the last decade, are kept together within newly-drawn districts. As described below, we have attached the following: Asian American Neighborhood Maps (Attachment A); the Asian American Communities of Interest Survey (Attachment B); Proposed Congressional District 5 (Attachment C); Proposed Congressional District 12 (Attachment D); and a file of the racial breakdown of each proposed district (Attachment E). In addition, Plaintiff-Intervenors have filed a copy of the Unity Map.

**I. Asian American Neighborhood Maps (Attachment A)**

To assist in this process, we have attached copies of two documents. The first, *Asian American Neighborhood Maps*, was submitted to the Legislative Task Force On Demographic Research and Reapportionment (LATFOR) at the public hearing in Queens on September 7,
2011 by AALDEF staff attorney Jerry Vattamala. It includes detailed maps of 15 Asian American neighborhoods in New York City, as defined by community groups and residents who live and work in those geographic areas. They include:

Queens:
- Flushing
- Bayside
- Elmhurst
- Jackson Heights
- Woodside
- Floral Park-Queens Village-Bellerose-Glen Oaks
- Richmond Hill-South Ozone Park
- Ozone Park
- Briarwood
- Jamaica Hills

Brooklyn:
- Sunset Park
- Bensonhurst
- Sheepshead Bay
- Kensington

Manhattan:
- Chinatown-Lower East Side

For each of these maps, we indicated the total population of these community-defined neighborhoods and their racial/ethnic breakdown.

II. Asian American Communities of Interest Survey (Attachment B)

At the Manhattan public hearing on September 21, 2011, Margaret Fung, executive director of AALDEF, submitted to LATFOR the Asian American Communities of Interest Survey.¹ AALDEF met with community groups and residents throughout New York City,²

¹ AALDEF prepared a similar communities of interest study after the 2000 Census. AALDEF Community Survey Project, “Asian Neighborhoods in New York City: Locating Boundaries and Common Interests”, Professor Tarry Hum, Ph.D., Department of Urban Studies, Queens College/City University of New York, 2002. See aaldef.org/docs/Asian-Neighborhoods-in-NYC%282002%29.pdf.
² AALDEF met with the following community groups to determine neighborhood boundaries and communities of interest: Adhikaar; Alliance of South Asian American Labor (ASAAL); Chhaya CDC; Chinese American Voters’
especially in neighborhoods experiencing the fastest Asian American population growth. They were asked to draw their neighborhood's street boundaries on a map and describe the most common concerns and issues in their neighborhoods. Among the top concerns cited by the groups we surveyed were the need for Asian language assistance, immigrants’ rights, social services, health care, education, affordable housing, and workers’ rights. Finally, we asked the groups to identify the surrounding neighborhoods that were most similar to and most different from their neighborhood.

For each of these fifteen neighborhoods, our survey describes how Asian American communities are currently divided between two or more Assembly districts, Senate districts, and Congressional districts. The survey summarizes the socioeconomic, language, and cultural characteristics of these Asian American neighborhoods and describes the services and common issues shared by local residents. Our survey identified areas in Queens, Manhattan, and Brooklyn where Asian Americans share common interests. We urge Your Honor to keep the identified communities of interest whole as district boundaries are redrawn.

III. Unity Map

On December 21, 2011 AALDEF, along with Latino Justice/PRLDEF, Center for Law and Social Justice at Medgar Evers College (CLSJ) and National Institute for Latino Policy (NILP) submitted a congressional plan for New York City to LATFOR, called the Unity Map. The Unity Map was submitted to LATFOR with the expectation that the suggested districts would be considered by LATFOR in the redistricting process. The Unity Map is now being
submitted to this Court for consideration in its redistricting process, focusing on proposed Congressional Districts 12 and 5.

Our community survey project, nonpartisan exit polls of Asian American voters, review of census data, personal knowledge of the Asian American community in New York City, and work with community-based organizations and community leaders are the basis from which we developed proposed Congressional Districts 5 and 12.

IV. History of Asian American Voter Disenfranchisement in New York

Asian Americans have been historically disenfranchised in the redrawing of district boundaries and in their right to vote. *Cf.* S. Rep. No. 94-295, 94th Cong., 1st Sess. 28-30 & n. 21 (1975) (noting that “[d]iscrimination against Asian Americans is a well known and sordid part of our history.”); 42 U.S.C. §§ 1973b(f), 1973l(c)(3) (extending the Voting Rights Act to cover “language minorities,” including “persons who are . . . Asian American.”). AALDEF has a long history in defending the voting rights and political representation of Asian Americans.

In the past, redistricting plans have diluted Asian American voting strength by fragmenting communities into multiple districts. See U.S. Comm. on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, 159-161 (1992). Past and current congressional district boundaries in Queens have divided Asian American communities.

Between 1997 and 2002, Flushing was divided among congressional districts (“CD”) 5, 7, and 18. CD 5 included Bayside and the eastern portion of Flushing. CD 7 included part of Elmhurst and the western portion of Flushing. CD 18 came down from Westchester and included a strait in Flushing between CDs 5 and 7. The areas with the greatest Asian concentrations in Elmhurst were, likewise, divided among CDs 7, 9, and 18. While the western part of Elmhurst was in DC 7, the eastern part was in CD 9. A smaller area of Asians in the far
eastern part of Elmhurst was in CD 18. The Asian American vote in Flushing/Bayside and Elmhurst are each diluted among three congressional districts.

Even after the redistricting of 2002, these communities remain divided among different congressional districts. Flushing/Bayside is currently divided between CD9 and CD5, and Elmhurst is divided among CDs 5, 7, 9 and 12.

In light of this history, every effort should be made to not divide the Asian American communities and avoid the mistakes of the past in this current round of congressional redistricting.

**Discussion**

Asian Americans are the fastest growing racial minority group in New York City. The Asian American population in New York City has increased 32% over the past decade and now constitutes almost 13% of the city’s population, numbering 1,028,119. Seven out of ten Asian New Yorkers reside in three boroughs: Queens, Brooklyn and Manhattan.

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<td>- Queens</td>
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* Only includes those who checked “Asian” and no other race.

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3 U.S. Census Bureau, 2010 and 2000 Census.
4 The “Not Hispanic Asian alone” number should be taken as the minimum number of Asian Americans. In the 2000 and 2010 censuses, respondents were allowed to mark more than one race, resulting in the category “alone or in combination,” which includes people who reported a single race alone (e.g., Asian) and people who reported that race in combination with one or more of the other race groups (i.e., White, Black or African American, American Indian and Alaska Native, Native Hawaiian and Other Pacific Islander, and Some Other Race). In addition, race and ethnicity are considered separate and distinct identities, with a separate question on Hispanic or Latino origin. This means that all respondents are also categorized as “Hispanic or Latino” and “Not Hispanic or Latino.” A more accurate and inclusive estimate of Asian Americans would be to aggregate both the Hispanic and Not Hispanic Asian...
Asian American populations have increased faster than the overall growth rate of the boroughs in which they reside. In Queens, the Asian American population has grown over 300 times faster than the overall rate of the borough, over 25 times faster than Brooklyn's growth, and over 7 times faster than Manhattan's growth. New York has the largest Asian American population of any municipality in the nation. Yet, no Asian American has ever been elected in New York to the U.S. Congress.

In the neighborhood areas reviewed in our survey, AALDEF found that Asian Americans shared many tangible interests and concerns. Furthermore, residents also had consensus on the areas' boundaries. These communities of interest should not be divided when political districts are redrawn. Additionally, community members identified other areas and neighborhoods that were either similar to or different from their own neighborhoods. These findings should inform redistricting decisions about which areas to include within congressional districts, since such districts typically encompass multiple neighborhoods.

I. Proposed Congressional District 5

A. Flushing/Bayside, Queens, Constitutes a Single "Community of Interest"

Flushing is the Chinatown of Queens and is the cultural, economic and social hub of the Asian American community in Queens. Elmhurst also shares many common interests with Flushing. Asian immigrants first settle in either Elmhurst or Flushing and have many shared concerns, such as the need for Asian language assistance, immigrants’ rights, social services, health care, education, affordable housing, and workers’ rights.

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alone or in combination populations. Accordingly, the total Asian American population citywide is actually 1,134,919, or 13.9% of the total New York City population.
As Asian Americans in Elmhurst and Flushing become more established, they migrate eastward towards Bayside, Little Neck, Douglaston and Great Neck, moving along Northern Boulevard. See Attachment B ("Community Survey") at 4-6. The Asian American community has settled along this road and maintains a local link to Flushing, the cultural heart of the community. Using this local road, Asian Americans return to Flushing for religious purposes, shopping, ethnic restaurants and culture. Moreover, many residents work in Flushing but live in Bayside. \textit{Id.} Despite sharing many common cultural characteristics, however, Flushing and Bayside are currently divided between CD9 and CD5.


\textbf{B. Queens Village/Bellerose/Floral Park/Glen Oaks, Queens, Constitutes a Single “Community of Interest”}

This community-defined area is currently divided between CD5 and CD6. Most of the Asian Americans in this community are South Asian and are homeowners. They are opposed to down-zoning and want to be able to rebuild and renovate their homes to a larger size. Many of the women work in health care, mainly as nurses. Residents moved to these neighborhoods in part because of the proximity to local hospitals, including Long Island Jewish Hospital, North Shore University Hospital, Winthrop Hospital, and Parker Jewish Nursing Home. Community Survey at 9.
Residents rely on public transportation, including the F train subway line and Express Bus service, many of which run along Union Turnpike. *Id.* The neighborhoods of Bellerose, Floral Park, Queens Village, and Glen Oaks share many common interests and should be considered as one community that should not be divided.

**C. Briarwood/Jamaica Hills, Queens, Constitutes a Single “Community of Interest”**

This community-defined area is currently divided between CD9 and CD6. Briarwood/Jamaica Hills is home to a large Bangladeshi population. Most residents are owners of either single family or multi-family homes. Most of the population are immigrants who rely on public transportation, primarily the F train subway lines, along the Briarwood, Sutphin Boulevard, Van Wyck Expressway and Parsons Boulevard subway stops. Many residents do their shopping along Hillside Avenue at ethnic stores. Many of the residents are in favor of the rezoning of Hillside Avenue from six story buildings to fifteen story buildings. See Community Survey at 11.

**D. Because of Shared Interests Among Residents in the Queens Communities of Flushing/Bayside, Queens Village/Bellerose/Floral Park/Glen Oaks and Briarwood/Jamaica Hills, All of These Neighborhoods Should Be Kept in the Same Congressional District**

Residents of Flushing/Bayside, Queens Village/Bellerose/Floral Park/Glen Oaks and Briarwood/Jamaica Hills share many similar concerns and socio-demographic and political characteristics. Residents have similar needs, including: language access; difficulty applying for and receiving benefits or government assistance that they are entitled to; priority on education for their children; naturalization and immigration issues; shared opposition to down-zoning legislation; and, at some legislative levels, shared elected officials. See Community Survey at 9.
Indeed, proposed LATFOR Senate District 11 groups most of these neighborhoods together into one district, as does proposed LATFOR Assembly District 24, to a lesser extent.

Residents of Flushing/Bayside, Queens Village/Bellerose/Floral Park/Glen Oaks and Briarwood/Jamaica Hills share a number of demographic and political characteristics and perceived their neighborhoods as similar. Each neighborhood should be kept whole, and all should be kept together in the same congressional district. Therefore, Plaintiff-Intervenors respectfully urge Your Honor to adopt Plaintiff-Intervenors’ proposed 5th Congressional District.

**II. Proposed Congressional District 12**

A. Chinatown/Lower East Side, Manhattan, Constitutes a Single “Community of Interest”

The community-defined area of Chinatown/Lower East Side is currently divided between CD12 (with Sunset Park), CD14 and CD8. Chinatown/Lower East Side is one of the last affordable immigrant neighborhoods in Manhattan. 34 % of Asians in Chinatown/Lower East Side live below the poverty level, and 74% are foreign born. The percentage of Asians in Chinatown/Lower East Side is 40%, and 73% of the Chinese-speaking population in this neighborhood is limited English proficient. Chinatown/Lower East Side is comprised of a significant Latino and Chinese population – which includes Cantonese, Mandarin, and Fujianese speakers. Many of the newer Chinese Fujianese immigrants live along East Broadway and farther east, stretching out much farther than what some consider the historic core of Chinatown, centered at Canal and Mott Streets. See Community Survey at 14-16.

Chinatown/Lower East Side is one of the few Asian neighborhoods in which a significant amount of public housing exists, which is reflected in the higher percentage of applications to and general knowledge about public housing among Chinatown/Lower East Side residents as
compared to people surveyed in the other neighborhoods. Because of this affordable housing stock in addition to the rent regulated units, Chinatown/Lower East Side has remained a largely working class community. See Community Survey at 15. Both neighborhoods have a shared immigrant history, which is reflected in the stores and resources that support the neighborhoods’ economy. Residents, small businesses, and property owners in both neighborhoods have similar concerns about the development that is encroaching in the area. Id. at 15-16.

**B. Sunset Park, Brooklyn, Constitutes an Asian American “Community of Interest”**

The community-defined area of Sunset Park, Brooklyn, is currently divided between CD12 and CD8. 30% of Asians in Sunset Park live below the poverty level, and 75% are foreign born. The neighborhood’s Chinese population is 39,952, and 81% of the Chinese-speaking population in this neighborhood is limited English proficient. A significant Chinese population of both Cantonese and Mandarin speakers live in Sunset Park, often considered Brooklyn’s Chinatown. See Community Survey at 12. Sunset Park’s Eighth Avenue serves as a main commercial corridor for Chinese Americans in the neighborhood and many surrounding areas in Brooklyn, including Bensonhurst. Many Chinese Americans live in Sunset Park, but continue to work in Manhattan’s Chinatown after being priced out of its rental market. Ironically, city rezoning plans have also pushed more development into Sunset Park, making this neighborhood increasingly less affordable in recent years. Chinese and Latino residents are concerned about finding housing that is affordable for their families.

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5 2010 Census, Summary File 1.
C. Because of Shared Interests Among Residents in Chinatown and Sunset Park, Both Neighborhoods Should Be Kept in the Same Congressional District.

In *Diaz v. Silver*, 978 F.Supp. 96 (E.D.N.Y. 1997), aff'd, 522 U.S. 801 (1997), which involved New York’s 1992 round of congressional districting, the Court noted extensive ties between the Sunset Park area in Brooklyn and the Chinatown neighborhood of Manhattan, two communities joined within the current 12th Congressional District. See *id.* at 101-102, 124. The Court took note of evidence that residents of both communities are tied together by “the same cultural background, economic conditions, service organizations, and media market” and “the Asian–American community votes similarly, originates from the same area and speaks the same dialect.” *Id.* (citation omitted). The Court placed particular emphasis on the fact that “the record indicates that the Asian-Americans in the 12th CD are mostly of Chinese background,” and, in light of this showing, “assume[d] that all Asian–Americans in the 12th CD have a community of interest” for summary judgment purposes. *Id.* at 124.

With respect to the 2002 round of congressional districting, the Special Master appointed by the Court, Frederick Lacey, sought to preserve “the cores of current districts and the communities of interest that have formed around them” in drawing congressional boundaries. See *Rodriguez v. Pataki*, No. 1:02-cv-00618-RMB-FM, Dkt. 37 ("Report and Plan") at 14 (May 13, 2002), available at http://www.senate.mn/departments/scr/redist/redsum2000/New_York_Congress/planandreport.pdf. In light of the *Diaz* decision and the expert materials submitted in that case, see Report and Plan at 14, produced a map containing a District 12 that “maintains substantially the same demographic make-up as the current District 12 under the 2000 Census.” *Id.* at 16. The expert affidavit in *Rodriguez*, submitted by Prof. Bernard Grofman, Prof. Nathaniel Persily and
Marshall Turner and noted by the Special Master in his Report and Plan, see *Rodriguez*, Dkt. 38, 2002 WL 32933930 ("Grofman Affidavit"), also referred to "the existence of strong communal ties between the Asian populations in Chinatown and Sunset Park..." See Grofman Affidavit at ¶ 49.

In approving the Special Master's Plan, the Court noted that "[t]he Lacey Plan safeguards the voting strength of minority populations protected under the Voting Rights Act," noting specifically that it preserved District 12, "in which protected minorities combined currently constitute a majority of the voting age population... and elect minority candidates." *Rodriguez*, 2002 WL 1058054 at *2 (S.D.N.Y. May 24, 2002). The Court also found that the Lacey plan "respects the redistricting principles of compactness, contiguity, pre-existing political subdivisions, and preservation of communities of interest." *Id.* at *5.

Residents of both Chinatown and Sunset Park continue to not only share community resources and are interdependent, but they also share many similar concerns and socio-demographic and political characteristics. Residents of one neighborhood also continue to identify the other neighborhood as being similar to their own.

In the Community Survey, community groups of both neighborhoods identified concerns in employment, housing, immigrant issues, neighborhood quality, public safety, and transportation as key issues of concern. The majority of residents of Sunset Park said Chinatown was similar to their own neighborhood. Likewise, residents of Chinatown identified Sunset Park as similar. Residents of both neighborhoods said their neighborhoods were a mix of Asians and Latinos. According to Census 2010, the Asians in both neighborhoods are mostly Chinese. Because of the special relationship between Chinatown and Sunset Park and the demographic

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and political similarities between residents of the two neighborhoods, Chinatown and Sunset Park should continue to be kept together in the same congressional district.

The newly drawn 12th Congressional District submitted by the authors of the Unity Map preserves the core areas of the current district, maintains the Latino and Asian populations, and includes all of Chinatown, Manhattan and Sunset Park, Brooklyn. The district will give the Asian American residents a fair opportunity to elect candidates of their choice. Therefore, Plaintiff-Intervenors respectfully urge Your Honor to adopt our proposed 12th Congressional District.

**Conclusion**

For the aforementioned reasons, Your Honor should draw congressional districts that keep Asian American communities together, thereby ensuring the meaningful representation of this historically disenfranchised and underrepresented community.

Dated: February 29, 2012

Respectfully,

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Illinois Redistricting Collaborative
Redistricting Reform Principles

Representative democracy works best when the public actively engages with policy discussions and elections. Even a cursory look at Illinois’ current process shows a system that favors incumbents and is dominated by partisan, rather than public objectives. Redistricting reform will offer diverse voices and independent thinkers an opportunity to serve. Breaking partisan gridlock and restoring functional state government is essential for Illinois’ future and is an especially urgent call to action as we near the 2020 Census.

Redistricting plans must be drawn in a manner that allows Illinois residents, including communities of color, to elect candidates of their choice who represent and are held accountable to, the interests of that community. Fundamentally improving Illinois’ redistricting process will strengthen our communities, foster a more robust democracy and restore public confidence in government.

Any meaningful redistricting plan must provide transparency and allow true public participation. However, we recognize that principles of voter choice, geographic cohesiveness and competitiveness can at times come into conflict with one another.

Signed,

CHANGE Illinois
Asian Americans Advancing Justice – Chicago
Better Government Association
Chicago Chapter of the Centrist Project
Chicago Lawyers’ Committee for Civil Rights Under the Law
Citizen Advocacy Center

Common Cause Illinois
Illinois Campaign for Political Reform
Illinois Chamber of Commerce
League of Women Voters Illinois
NAACP Chicago – South Side Branch
Small Business Advocacy Council
Union League Club

The eight criteria below are presented in priority order to help guide considerations in Illinois’ mapmaking:

1. COMPLY WITH THE U.S. CONSTITUTION
The process must be in accordance with the requirements of the U.S. Constitution. All persons -- regardless of age, citizenship, immigration status, ability or eligibility to vote -- should be accurately counted through the Census. In accordance with the U.S. Constitution, districts should be populated equally, as nearly as is practicable.

2. COMPLY WITH FEDERAL AND STATE VOTING RIGHTS ACT
The process must emphasize representation and be fully compliant with both the federal Voting Rights Act (VRA) and all state voting rights laws, including the Illinois Voting Rights Act. The letter and the spirit of the VRA should be reflected in redistricting to protect
Illinois Redistricting Collaborative
Redistricting Reform Principles

the rights of voters of color. To advance these foundational goals, redistricting decision-makers should exercise their latitude under the law to create majority-minority, coalition, and influence districts.

3. COM普ICE AND UPHOOLD A NON-PARTISANSHIP PROCESS
The process should be independent of partisan political considerations. Mapmaking must include provisions and resources ensuring independence from political parties and legislative leaders. The process must include diverse decision-makers who reflect a broad range of viewpoints and who prioritize people and communities. Mapping consultants and software contracts, paid for with public resources, should be awarded on merit rather than partisan affiliation.

4. MAXIMIZE VOTER CHOICE, ELECTORAL CANDIDACY AND COMPETITIVENESS
The process should result in maximizing voter choice, encouraging electoral candidacy and enhancing electoral competitiveness.

5. RECOGNIZE AND PRESERVE COMMUNITIES OF INTEREST
The process should give consideration to true communities of interest. To the extent possible, but secondary to the protection of voting rights, populations with common social, ethnic or economic interests and/or shared political and geographic boundaries should have unified representation.

6. ACCURATELY INCLUDE PERMANENT RESIDENCE OF ALL ILLINOISANS
The process must accurately represent the permanent residence of all Illinoisans. All persons residing away from their permanent residence, such as students, incarcerated individuals, and missionaries, should be counted at their home address regardless of Census counting rules. The Census should be encouraged to expand its exceptions to the usual residence rule to include incarcerated individuals, as well as students, missionaries, and overseas Americans.

7. COM普ICE AND UPHOOLD A TRANSPARENT AND ACCOUNTABLE PROCESS
The process must be transparent and accountable. Meetings of decision-makers, and their legal, political and mapping consultants, must be open and accessible to the public to the greatest extent possible. The criteria used to draw maps must be objective, clear and justifiable and districts must be drawn to offer voter choice. Communications related to the redistricting process should be subject to the Open Meetings Act and the Freedom of Information Act. Clear conflict-of-interest rules must be adopted and applied.

8. PROVIDE FOR OPEN, FULL, AND MEANINGFUL PUBLIC PARTICIPATION
The process must allow for meaningful public participation and have the confidence of the public. Opportunities for public education and engagement must be provided, including opportunities to offer comment and amend draft maps. Redistricting bodies must provide data, tools and ways for the public to have direct input into and impact on the specific plans under consideration.
Redistricting Principles
For a More Perfect Union

Throughout our history, Americans have aspired to “form a more perfect union.” We as a people have sought to achieve a fair, representational democracy where the citizens fairly select their representatives; where our elected officials are responsive to the needs and concerns of their constituents; and where the vestiges of historic and ongoing racial discrimination are removed.

Yet even now, current redistricting practices too often pose new and daunting threats to our democracy’s vibrancy, inclusiveness, transparency and accountability of its elected officials. Instead, in many cases, the process is used as a means for those with disproportionate political power to maintain that clout. Closed-door processes exacerbate the disconnect between the self-interested and the ideal of representative democracy. The public is cut out of the process and disillusioned as entrenched forces draw lines to maintain the status quo. The resulting district lines can ignore changes in U.S. demographics, which results in disenfranchisement of communities of color and others. Citizens lose a true sense of ownership of our democracy.

Improved redistricting practices can enhance and expand civic participation, help restore public confidence and participation in elections and governance, and build a modern democracy that serves as a beacon of inclusion and representation.

The undersigned organizations, which are committed to defending our democracy, agree on the following baseline principles to inform redistricting in this decade and future decades, as well as to present a framework upon which to build possible reforms in coming years as we as a nation move toward that more perfect union.

1. Consistent with the requirements of the Constitution, all persons who reside in a state or local jurisdiction -- regardless of age, citizenship, immigration status, ability or eligibility to vote -- should be counted for purposes of reapportionment and redistricting. Districts should be populated equally, as defined by law, counting all residents as constituents to be represented by elected officials.

2. The Census Bureau should continue to improve its outreach and data collection to ensure as full and accurate a count of all communities as possible, including a full and accurate count of the population by race, ethnicity, and national origin. Redistricting decision-makers should use legally- permitted population deviation among districts in state and local redistricting to serve legitimate redistricting considerations, including underpopulation of districts to ensure adequate representation of undercounted communities.

3. Incarcerated or detained persons should be considered residents of their immediate pre-incarceration location or their family residence for purposes of reapportionment and redistricting. The Census Bureau should collect and release the data necessary to implement this principle in all jurisdictions.

4. Compliance with the letter and spirit of the federal Voting Rights Act and its prohibition of vote dilution and of retrogression must remain a primary consideration in redistricting. While the elimination of racial discrimination in voting is a critical goal, that goal and the protection of civil rights are undermined by decision-makers who deny, without sufficient evidentiary proof, the continued existence of factors, including racially polarized voting, that support the creation of
remedial districts under the Voting Rights Act. In light of long-established historical pattern, the prudent course, absent compelling evidence of changed circumstances, is for decision-makers to preserve extant remedial districts under the Voting Rights Act and to create new opportunity districts consistent with growth in relevant populations. Moreover, the requirements of the Voting Rights Act should be viewed as a floor, and not a ceiling, with respect to the voting rights of voters of color in redistricting. To advance these foundational goals, redistricting decision-makers should always make it a priority to exercise their considerable latitude within the law to create coalition and/or influence districts for voters of color where the creation of Voting Rights Act-compliant opportunity districts, in which voters of color comprise the majority of the voting-age population in a district, is not possible.

5. Consideration of communities of interest is essential to successful redistricting. Maintaining communities of interest intact in redistricting maps should be second only to compliance with the United States Constitution and the federal Voting Rights Act as a consideration in redistricting.

6. Transparency in redistricting is essential to a successful process. Meetings of decision-makers, among themselves or with legal and mapping consultants, must be open and accessible to the public in all but the most limited of circumstances.

7. Full access requires the development and implementation of measures to facilitate public attendance and meaningful participation. This includes outreach, informational materials, and interpretation services provided in languages other than English where the constituency involved warrants the provision of such services. This also includes means to permit the participation of constituents in remote locations. All efforts must recognize that certain communities face greater barriers to full participation, and outreach, education, and weighting of input should reflect this recognition. Full access to the redistricting process must also include maximized opportunity for input and participation. This requires facilitating participation through the availability of data and equipment well in advance of the consideration of specific proposals. This also requires timely disclosure of proposed maps being voted upon to allow ample opportunity for public input before adoption. Finally, meaningful participation requires that the decision-making body demonstrate its due consideration of the public input provided.

8. Public confidence in redistricting requires the decision-makers to reflect a broad range of viewpoints and be representative and appreciative of the full diversity of the population. Public confidence is furthered when relevant financial and other information about decision-makers and their paid retained consultants is disclosed. Fairness requires the development of clear conflict-of-interest criteria for disqualification of decision-makers and consultants.

9. Public trust in redistricting requires disclosure of information about any relationships between decision-makers and significant non-decision-making participants. Transparency requires the avoidance of rules that provide an incentive for outside participants to conceal their relationship to incumbents or candidates for the offices being redistricted. Rules that require participants in the redistricting process to disclose information must be applied evenly.

10. Accountability in redistricting requires public access to information about any non-public discussions of redistricting between redistricting decision-makers. This requires advance abrogation of any statutory or common-law legislative privilege that would protect such discussions of redistricting by decision-makers from disclosure during or after conclusion of the process.
Endorsing organizations include:

Advancement Project
American Civil Liberties Union (ACLU)
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice – AAJC
Brennan Center for Justice
Campaign Legal Center
CHANGE Illinois
Common Cause
Demos
Lawyers’ Committee for Civil Rights Under Law
Lawyers’ Committee for Civil Rights of the San Francisco Bay Area
LatinoJustice PRLDEF
Mexican American Legal Defense and Educational Fund (MALDEF)
NAACP LDF
NALEO Educational Fund
Prison Policy Initiative
Sierra Club
Southern Coalition for Social Justice