Stanford Law Review

Volume 75 February 2023

ARTICLE

The Petition Clause and the Constitutional Mandate of Total-Population Apportionment

J. Colin Bradley*

Abstract. The Constitution guarantees an equal right to representation for all residents of the nation—citizens and non-citizens, voters and non-voters alike. Yet ongoing political and legal controversies over the appropriate basis for state legislative apportionment and satisfying the "one person one vote" doctrine highlight the uncertainty about how the constitutional commitment to universal representation should be instantiated. Scholars and advocates argue that, at a minimum, the right to equal representation implies a constitutional mandate that state legislative districts be apportioned based on total population, rather than Citizen Voting Age Population or any other less inclusive measure. But leading arguments for that position, based on the Equal Protection Clause and the mechanism of "virtual representation," are seriously incomplete. This Article argues that the Petition Clause of the First Amendment should play a central role in these debates over the institutional design of representative democracy. Specifically, the Petition Clause and the practice of petitioning that it protects provide the link between universal representation and state legislative apportionment. The Petition Clause implies a right of

* Ph.D. Candidate, Princeton University Department of Philosophy; J.D., New York University School of Law, *magna cum laude*, 2021; M.A., Princeton University Department of Philosophy, 2018; A.B., University of Chicago, 2014. This Article was conceived and originally drafted under the auspices of the NYU Furman Academic Scholars Seminar and has benefitted enormously from the careful attention of Barry Friedman at every step. Rick Pildes and Sam Issacharoff have also guided and advised this project from its earlier days, and have contributed much through their advice and through their own scholarship. I would also like to thank Alexander Arnold, Chuck Beitz, Mala Chatterjee, Eleanor Gordon-Smith, Ethan Herenstein, Tyler John, Adam Kern, Joe Krakoff, Daryl Levinson, Burt Neuborne, Yurij Rudensky, and Phil Yaure for discussion and comments on earlier drafts. Support for this project was provided by the Legal Priorities Project and the German Academic Exchange Service (DAAD), and tangible support was provided by the Center for Global Constitutionalism at the Berlin Social Science Research Center, where I was hosted by Mattias Kumm. I am deeply grateful to all of these institutions. Thanks also to all participants of the 2020-21 Furman Academic Scholars Seminar for their virtual encouragement, questions, and helpful comments. And finally, many thanks to the editors of the *Stanford Law Review* for helpful and incisive editing.

equal access to one's representative, and this in turn requires that legislative districts contain equal numbers of people—voters and non-voters alike.

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Introduction

Post-census electoral redistricting defines the contours of America's representative democracy. Consequently, it is always accompanied by fierce political and legal fights. Post-2020 census redistricting has been no different, with state legislatures producing maps as advantageous as possible—or at least as advantageous as they can stomach[1]—for the majority party.[2] And right on cue, litigation to challenge such maps as illegal or unconstitutional gerrymanders has followed.[3] While this pattern has accompanied every round of redistricting since the Voting Rights Act of 1965 and the Warren Court's apportionment revolution (beginning with 1962's *Baker v. Carr*[4] and 1964's *Reynolds v. Sims*[5]), election lawyers have predicted for some time that a new era of redistricting battles is imminent. Redistricting fights will increasingly involve disputes over the appropriate apportionment base: whether districts should include the same number of people (total-population apportionment) or the same number of voters (eligible-voter apportionment).[6]

This Article argues that the Petition Clause of the First Amendment requires states to use a total-population apportionment base in drawing state legislative districts.[7] The democratic practice of petitioning provides the essential link between the Constitution's commitment to universal representation and the total-population apportionment requirement.[8]

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1. *See* Jim Newell, *Democrats Could Have Gerrymandered Away a GOP Seat. Why Didn't They?*, SLATE (Dec. 10, 2021, 12:31 PM), https://perma.cc/53DX-5ZKX ("When Maryland Democrats sat down to draw a new map, one that could have gone from a 7-1 Democratic advantage to an easy 8-0 shutout, they flinched.").
2. *FiveThirtyEight* maintains an overview of state congressional redistricting. *See What Redistricting Looks Like in Every State*, FIVETHIRTYEIGHT (updated July 19, 2022, 3:50 PM), https://perma.cc/55CL-WPS6.
3. *See* Nathaniel Rakich, *Ohio's Overturned Congressional Map Shows How Lawsuits Might Scramble Redistricting*, FIVETHIRTYEIGHT (Jan. 14, 2022, 1:21 PM), https://perma.cc/28US-4YYW (noting nine ongoing or completed lawsuits over congressional electoral maps in early 2022).
4. 369 U.S. 186, 209, 237 (1962) (holding that malapportionment is justiciable under the Equal Protection Clause of the Fourteenth Amendment).
5. 377 U.S. 533, 577 (1964) (holding that "both houses of a state legislature must be apportioned on a population basis").
6. *See* YURIJ RUDENSKY, ETHAN HERENSTEIN, PETER MILLER, GABRIELLA LIMÓN & ANNIE LO, BRENNAN CTR. FOR JUST., REPRESENTATION FOR SOME: THE DISCRIMINATORY NATURE OF LIMITING REPRESENTATION TO ADULT CITIZENS 4 (2021), https://perma.cc/NM4Z-4VHK.
7. U.S. CONST. amend. I.
8. *See infra* Part III.

The right to petition is a right to make claims before legislators, who in turn have an obligation to receive and consider those claims.[9] This right, now largely forgotten, was a staple of early Americans' understanding of democratic practice.[10] Access to elected officials between elections has long been a core feature of America's representative democracy, and the Petition Clause requires that such access be equally distributed.[11] By guaranteeing all residents an equal opportunity to access their legislators, to make a claim, and to be heard, the Petition Clause embodies an important principle of political equality. The right to petition is a core part of the dignity afforded to all residents of the nation, as well as a key tool in the struggle for recognition and representation.[12] Appreciating this aspect of American democracy requires understanding the methods for securing effective representation the Founders embedded in the Constitution.

This Article breaks new ground in two important ways. First, it provides a novel account of how constitutional actors have understood the role that apportionment plays in our scheme of representative democracy. Second, it presents the first sustained argument for the central role of the Petition Clause of the First Amendment, as opposed to the Equal Protection Clause of the Fourteenth Amendment, in addressing questions of apportionment and representation.

Despite the key role that the connection between apportionment and representation has played in constitutional debates since the Founding, the issue has received surprisingly little scholarly attention. Some scholars and advocates have sought to demonstrate that the Constitution—specifically, the Apportionment Clause of Article I, Section 2 and the Equal Protection Clause of the Fourteenth Amendment—contains a commitment to *universal representation*: that is, the principle that all more-or-less permanent residents ought to be represented in the legislature, no matter their alienage or immigration status,

9. *See infra* Part III.C.

10. *See infra* Part III.A.

11. *See infra* Part III.

12. This Article expands discussion of the right to petition into the realm of legislative representation. Other legal scholars have discussed the right to petition as a vital tool for judicial redress. *See, e.g.*, Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV 1741, 1777 (2017) ("By expanding the petitionary right to the judiciary, the Framers incorporated into the Petition Clause the traditional understanding that meritorious legal claims filed in court triggered an entitlement to redress."). Relatedly, philosophers have drawn attention to the connection between making claims and human dignity. *See, e.g.*, Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 252 (1970) ("[W]hat is called 'human dignity' may simply be the recognizable capacity to assert claims.").

and no matter their eligibility to vote.[13] This approach assumes that a commitment to universal representation requires the entire more-or-less permanent population to be included in the apportionment base.[14]

There is no doubt that the Constitution is committed to the principle of universal representation. This has been affirmed again and again throughout our Nation's history—at the Founding, in the debates over and ratification of the Reconstruction Amendments, and amidst the early twentieth-century immigration boom and nativist backlash.[15] Indeed, on President Biden's first day in the Oval Office, he issued an Executive Order reaffirming this point in the context of the national legislature: "We have long guaranteed all of the Nation's inhabitants representation in the House of Representatives. This tradition is foundational to our representative democracy . . . [and] respects the dignity and humanity of every person."[16]

But the connection between this principle of representation and the practice of apportionment is anything but obvious. No one could seriously argue that the mere fact of being counted in the apportionment base is *sufficient* to be represented.[17] But the opposition to eligible-voter apportionment is often voiced in the language of representation. For example, journalist and voting-rights advocate Ari Berman has claimed that, if the state of Texas opted for eligible-voter apportionment, it "would leave almost 2.7 million noncitizens and 7 million children *without political*

13. Ethan Herenstein & Yurij Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. REV. 1021, 1024-27 (2021).

14. *Id.* at 1028 ("Population-based apportionment forwards a theory of universal representation."). Universal representation could be achieved through other institutional arrangements than total-population apportionment, but given our system of apportioned single-member electoral districts, there is a strong *pro tanto* reason to prefer total-population apportionment since it furthers the constitutionally mandated goal of universal representation. *See id.* at 1028-29.

15. *Infra* Part I.A.

16. Exec. Order No. 13,986, 3 C.F.R. 414, 414 (2022).

17. The phenomenon of prison gerrymandering provides a ready refutation of this simple view. In several states, incarcerated people are counted as part of the population of the district in which they are incarcerated, rather than the one where they previously lived. For such people, being included in the apportionment base *hinders* their interest in political representation. *See, e.g.*, Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1312, 1314 (N.D. Fla. 2016) (finding that, because incarcerated people "lack a substantial representational nexus with the relevant legislative body," it would violate one person, one vote to include them in the apportionment base for that legislative body). *See generally Prison Gerrymandering Project: Impact on Democracy at the State Level*, PRISON POL'Y INITIATIVE, https://perma.cc/N8L8-K3J2 (archived Jan. 13, 2023) (providing an overview of the ongoing phenomenon of prison gerrymandering in several states).

representation."[18] This suggests that being counted in the apportionment base is at least necessary for representation. Yet if being counted as part of the apportionment base is *merely* necessary to be represented, this argument leaves unstated why that is so and what more is needed.[19]

The puzzle is intensified by the fact that these debates concern the representation of people who are *deprived of the right to vote*. America has always been a nation with a restricted franchise.[20] The right to vote—and the motivation and opportunity to exercise that right—has ebbed and flowed across time and across geography.[21] Today, the right to vote is nominally recognized as a fundamental right for all citizens over eighteen years old.[22] But several asterisks must be appended to that statement. First, it excludes the currently—and, in some states, the formerly—incarcerated.[23] Second, it ignores the many de facto and de jure limitations that already burden the right to vote, which Republican politicians across the country are currently fighting to strengthen.[24] While voting reform is at the top of the legislative agendas of both major political parties,[25] very few argue that the franchise should be

18. Ari Berman, *Trump's Stealth Plan to Preserve White Electoral Power*, MOTHER JONES (Jan./Feb. 2020) (emphasis added), https://perma.cc/YN6L-X492.

19. It is probable that representation is secured by a variety of strategies. This may include the right to vote (for some), structural protections, the design of the electoral system, and rights of political participation like petitioning, assembling, and speech. This Article emphasizes the role that petitioning plays in securing representation, in part because it has been neglected, but the Article does not mean to deny the importance of the other components of representation.

20. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (rev. ed. 2009) (documenting in detail the restrictions on voting in the American colonies and states, and their changes over time).

21. *See id.* at xx.

22. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (affirming that the right to vote is fundamental). The Supreme Court is, however, not exactly consistent on treating the right to vote as a fundamental right. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (failing to apply strict scrutiny to a restrictive voter ID law, thus calling into question the nature or existence of a fundamental right to vote); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008).

23. In Maine, Vermont, and the District of Columbia, people convicted of felonies never lose their right to vote. In all other states, those convicted of felonies lose the franchise while incarcerated; in eleven, that disenfranchisement continues after incarceration for some, at least until some additional remedial steps are taken. *See Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATORS (June 28, 2021), https://perma.cc/VQU8-23NX.

24. *See* Nathaniel Rakich & Elena Mejía, *Where Republicans Have Made It Harder to Vote (So Far)*, FIVETHIRTYEIGHT (May 11, 2021, 6:00 AM), https://perma.cc/2FJ7-X96E.

25. Though the parties have starkly different understandings of what voting reform requires. *Compare* For the People Act of 2021, H.R. 1, 117th Cong. (2021) (containing

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formally extended much beyond where it is today.[26] In particular, few advocate extending the franchise to most noncitizens or to those under eighteen years of age.[27] It has always been part of our constitutional system of representative democracy that some people are, to use President Biden's words, "guaranteed . . . representation," despite lacking the opportunity to exercise the franchise.[28] In other words, there has always been what this Article terms a "vote-representation gap."

The only plausible explanation for how inclusion in the apportionment base could be adequate to overcome the vote-representation gap is what this Article calls "geography-based virtual representation."[29] But this geography-based virtual representation approach falls far short, as this Article will demonstrate, as either a theory of representation or a theory of apportionment. Yet without it there is no apparent connection between universal representation and total-population apportionment at all.

This is far from a merely theoretical dispute. The battle over apportionment bases is an important new front in the "voting wars."[30] President Biden's Executive Order 13,986 explicitly required the Census Bureau to include in the reported population of each state, "all persons whose usual place of residence was in that State . . . regardless of their immigration status."[31] This explicit affirmation of what had routinely been standard practice was required to reverse former President Trump's order to *omit* noncitizens present without legal authorization from the reported census figures.[32]

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numerous provisions intended to make voting easier), *with* Rakich & Mejía, *supra* note 24 (showing how Republicans have made voting more difficult).

26. *But see* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 8-10 (2006) (arguing that voting rights for many newly arrived immigrants is practically feasible and normatively desirable).

27. However, this norm may be changing. New York City, for example, has recently extended voting rights in municipal elections to legal permanent residents, though this proposal is currently in litigation. *See* Grace Ashford, *Noncitizens' Right to Vote Becomes Law in New York City*, N.Y. TIMES (Jan. 9, 2022), https://perma.cc/S7HU-6U64; Rich Calder, *NYC Appealing Judge's Ruling That Prohibits Non-citizens from Voting*, N.Y. POST (updated July 23, 2022, 6:31 PM), https://perma.cc/72Y3-WHXE. In addition, Nancy Pelosi has stated that she supports lowering the voting age to sixteen. *See* John Bowden, *Pelosi Says She Backs Lowering Voting Age to 16*, HILL (Mar. 14, 2019, 3:19 PM ET), https://perma.cc/6TL2-6WMF.

28. Exec. Order No. 13,986, 3 C.F.R. 414, 414 (2022); *infra* Part I.A.1.

29. *Infra* Part II.B.

30. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012) (introducing the concept of "voting wars" to the literature).

31. Exec. Order No. 13,986, 3 C.F.R. 414, 415 (2022).

32. *See* Trump v. New York, 141 S. Ct. 530, 534 (2020); Exec. Order No. 13,880, 3 C.F.R. 338, 339-40 (2020) (requiring all federal agencies to report any data relevant to determining

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At stake in these battling executive orders is the post-census apportionment and redistricting of the U.S. House of Representatives. Leaving undocumented immigrants out of the census figures deliberately omits residents from the total populations of some areas, likely reducing the share of seats in the House that states with high populations of undocumented immigrants would otherwise garner.[33] Republicans believed this would be to their partisan advantage.[34] When Trump's order was challenged in court by a coalition of states and immigrant advocacy organizations, the Supreme Court somewhat surprisingly batted it away on jurisdictional grounds.[35] The Trump Administration's alternative efforts to acquire reliable data on the distribution of noncitizens foundered and were incomplete by the time Biden assumed office.[36] Biden's January 20 executive order appeared to settle this dispute for the 2020 census.[37]

Manipulation of the apportionment base—the figures that are used to draw electoral districts in conformity with the Court's "one person one vote" mandate[38]—will nevertheless be an important part of the ongoing voting wars over state legislatures. That possibility was almost guaranteed by the Court's 2016 decision in *Evenwel v. Abbott*, the first time the whole Court confronted issues around the selection of the apportionment base since the 1960s.[39] In

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the citizen voting age population by district). This was an alternative to the inclusion of a citizenship question on the census questionnaire, which was ultimately not included. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575-76 (2019). For discussion of the relationship between the citizenship question and the effort to depress census response rates among vulnerable populations, see Justin Levitt, Essay, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1389-90 (2019). Without this data, states and localities will likely have to rely on the American Community Survey and its Citizen Voting Age Population (CVAP) data to apportion on the basis of the eligible-voter population. However, this data may be vulnerable to challenge in litigation. *See* Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1404-06 (2017) (describing the data problems in the context of the *Evenwel* litigation).

33. Levitt, *supra* note 32, at 1388-89.

34. *See* Berman, *supra* note 18 (describing efforts of Republican politicians to undercount immigrant populations in order to pursue a partisan apportionment agenda).

35. *Trump*, 141 S. Ct. at 536-37.

36. *See* Thomas Wolf & Kelly Percival, *Trump Abandons Attempts to Rush Census and Use Citizenship Data Improperly*, BRENNAN CTR. FOR JUST. (Jan. 16, 2021), https://perma.cc/C37Z-PQRG.

37. Exec. Order No. 13,986, 3 C.F.R. 414, 414-15 (2022).

38. Reynolds v. Sims, 377 U.S. 533, 579 (1964) ("[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.").

39. Evenwel v. Abbott, 136 S. Ct. 1120 (2016). Previously, Justice Thomas discussed the issues in a dissent from the Court's denial of certiorari in *Chen v. City of Houston*, 532 U.S. 1046, 1047-48 (2001).

Evenwel, white plaintiffs in Texas sued the state over its total-population apportionment scheme for the state legislature, arguing that the uneven distribution of voters across districts—caused by an uneven geographic distribution of mostly Hispanic[40] noncitizens, who count toward the total population but cannot vote—led to the dilution of their votes.[41] Plaintiffs pointed out that the Texas State Senate map adopted in 2013 had a deviation of 8.04% of total population across districts, but a deviation of over 40% of eligible voters across districts.[42] In other words, the district most densely packed with voters had 40% more voters than the least densely packed district. Plaintiffs argued that, because some votes consequently carried much more weight than other votes, this is the very distortion of political equality that the Court sought to cure in *Reynolds v. Sims* and its progeny.[43]

The *Evenwel* Court unanimously declined the challengers' invitation to find a constitutional mandate for an eligible-voter apportionment base—that is, a base that would equalize the number of eligible voters in each district, rather than the total population.[44] Doing so would have been a momentous decision, upsetting the longstanding practice of all fifty states.[45] But the Court similarly declined an invitation from the Solicitor General to hold that the Constitution requires total-population apportionment, likely because such a holding was unnecessary to deal with the challenge at hand.[46]

Evenwel left open two possibilities: Either states are free to choose among apportionment bases to satisfy the one person one vote mandate, or states are required to use a total-population apportionment base.[47] Although the *Evenwel*

40. This Article uses the term "Hispanic" because this is the term typically used in voting rights litigation and in the demographic data usually employed therein.

41. *Evenwel*, 136 S. Ct. at 1125; *see also* Brief of the Texas Senate Hispanic Caucus and the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees at 8, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 5731666 ("[T]he majority of adult non-citizens in Texas are Latino and tend to live in Latino communities.").

42. *Evenwel*, 136 S. Ct. at 1125.

43. *Id. But see* Joseph Fishkin, Essay, *Weightless Votes*, 121 YALE L.J. 1888, 1893-99 (2012) (explaining the conceptual difficulties in the idea of votes carrying equal "weight"); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 191-98 (2000) (exploring the conceptual difficulties in applying the concept of equality to power and influence in democratic decision-making processes).

44. *Evenwel*, 136 S. Ct. at 1123.

45. *Id.* at 1132.

46. *See id.* at 1143-44 (Alito, J., concurring in the judgment) (emphasizing that this question remains open).

47. J. Colin Bradley, *The Continued Relevance of the Equal Access Theory of Apportionment*, 96 N.Y.U. L. REV. ONLINE 1, 3 (2021) ("[T]he [*Evenwel*] Court refrained from holding that equal protection *requires* the use of total population as the apportionment base. Nor did

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majority opinion, penned by Justice Ginsburg, hinted in dicta that it preferred a total-population approach,[48] that majority no longer sits on the Court. Justices Alito and Thomas each wrote separately, suggesting that, were the issue squarely presented, they would hold that the Constitution leaves the choice of apportionment base to the states and the political process.[49] With four new Justices on the Court, that approach could garner a majority.[50] Meanwhile, conservative activists continue to advocate for states to adopt eligible-voter or citizen voting age population ("CVAP") apportionment schemes.[51]

This Article demonstrates that the Petition Clause of the First Amendment provides the essential link between representation and the total-population apportionment requirement.[52] In 1990, a divided Ninth Circuit panel held in *Garza v. County of Los Angeles* that the Petition Clause mandates total-population apportionment.[53] But the *Garza* approach never caught on, partially because *Garza*'s approach to the Petition Clause was mired in

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it explicitly hold that states have a free choice between the two. That possibility remains open." (footnote omitted)).

48. *Evenwel*, 136 S. Ct. at 1132.

49. *Id.* at 1133 (Thomas, J., concurring in the judgment) ("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."); *id.* at 1143-45 (Alito, J., concurring).

50. The *Evenwel* Court was unanimous in its judgment that there is no constitutional mandate for eligible-voter apportionment. But Justices Thomas and Alito wrote concurring opinions to emphasize that the Court did not hold that there is a constitutional mandate for total-population apportionment. Since *Evenwel* was decided, Justices Kennedy, Ginsburg, and Breyer have all left the Court. Of the *Evenwel* majority who did not write separate opinions, only three Justices remain: Chief Justice Roberts and Justices Kagan and Sotomayor. Four new Justices have since joined the Court and have not weighed in on the apportionment issue: Justices Gorsuch, Kavanaugh, Barrett, and Jackson. Whether the Constitution requires total-population apportionment would be a question of first impression before the Court, and we know little about the views of the four new members of the Court.

51. *See, e.g.*, PROJECT ON FAIR REPRESENTATION, A BETTER APPROACH TO REDISTRICTING: APPORTIONING STATE LEGISLATIVE SEATS BASED ON CITIZEN VOTING AGE POPULATION (2021), https://perma.cc/799U-MD8A (advocating for states to adopt a CVAP apportionment base).

52. This argument takes for granted that there is a constitutional commitment to universal representation. The Fourteenth Amendment remains a strong textual source for this commitment, as Ethan Herenstein and Yurij Rudensky have argued at length. *See* Herenstein & Rudensky, *supra* note 13, at 1027. As Herenstein and Rudensky argue, despite Justice Alito's contentions in *Evenwel*, the Penalty Clause of Section 2 of the Fourteenth Amendment is best interpreted as promoting a commitment to universal representation and does not express a preference for voters. *Id.*

53. *See* Garza v. County of Los Angeles, 918 F.2d 763, 775-76 (9th Cir. 1990).

doctrinal confusion.[54] Drawing on recent legal and historical scholarship, this Article clears away that confusion and demonstrates the ongoing relevance of an independent Petition Clause, functioning as more than an adjunct to the Free Speech Clause.[55] In addition to the doctrine, this Article also shows how petitioning was one of the most important practices in American representative democracy until the Civil War.[56] It was, above all, the key tool for disenfranchised women, free and enslaved Black people, Native Americans, young people, and newly arrived immigrants to participate in politics and attain influence—overcoming the vote-representation gap.[57]

Advocates' focus on the Fourteenth rather than the First Amendment tracks a lacuna in the legal scholarship. Law and democracy scholars have tended to focus on those whom Bertrall Ross calls "political insiders," namely those who not only vote, but vote regularly for one of the two major political parties.[58] Despite legal realism's lasting legacy in the law of democracy scholarship,[59] and despite the heavy emphasis on institutional functionalism throughout the field,[60] discussions of the vote-representation gap have been rigidly formalist, often relying on implausible idealizations and assumptions.[61]

Scholars in related fields have, however, articulated a nascent political theory that helps make sense of the Constitution's realistic commitment to securing political representation through means other than the formal electoral process. For example, scholars studying the relationship between law and social movements have explored the myriad ways in which political power is distributed among "democratic-level" actors, how this distribution is related to the "power of government institutions at the level of constitutional

54. *See infra* text accompanying notes 332-60.

55. *See infra* Part III.

56. *See infra* Part III.A.

57. *See id. See generally* DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870 (2021) (describing the widespread use of petitions by disenfranchised groups from the Founding era through shortly after the Civil War).

58. Bertrall Ross, Essay, *Partisan Gerrymandering, The First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2190 (2018).

59. Representative examples of legal realism include Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); and Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

60. *Cf.* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 1-5 (discussing thinking more functionally and realistically); *see, e.g.*, Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 40 (2004) ("Constitutional lawyers are trained to think in terms of rights and equality . . . . But politics involves, at its core, material questions concerning the organization of power.").

61. *See infra* Part II.B.

structure," and how law facilitates this relationship.[62] These scholars have expanded their gaze beyond formal institutions to explore how social movements, "republican moments," and a developing "demosprudence" channel the direct power of members of the contestatory political community and shape the outcomes of political decisionmaking processes.[63]

A related group of scholars has begun reviving the ways in which the First Amendment specifically helps to encourage these nonelectoral forms of democratic participation. While the First Amendment's Speech and Press Clauses have long been recognized as central to the functioning of a legitimate electoral democracy,[64] legal scholars have until recently neglected the specific ways in which the Petition and Assembly Clauses facilitate nonelectoral forms of direct engagement with political decision-making.[65] This Article builds on

62. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 36-37 (2016); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1857 (2019) ("Increasingly, the study of constitutional law is becoming a holistic enterprise, as public law scholars have expanded their loci of inquiry from those traditional undemocratic aspects of public law to focus instead on how power ought to be distributed.").

63. The literature on law and social movements has grown capacious. For important recent developments, see Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 859-60 (2021); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 108-09 (2018); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 328-33 (2018); K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POL. 751, 751 (2017); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1302-04 (2016); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2743-44 (2014); and Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (book review). On the idea of "republican moments," see James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 310-13 (1990). On the idea of a contestatory citizenry, see Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 229, 232 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018); John Braithwaite, *Contestatory Citizenship; Deliberative Denizenship*, *in* COMMON MINDS: THEMES FROM THE PHILOSOPHY OF PHILIP PETTIT 161, 162 (Geoffrey Brennan, Robert Goodin, Frank Jackson & Michael Smith eds., 2007); and Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 164 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

64. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268-70 (1964); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16-17 (1948).

65. On the Petition Clause, see Michael Weingartner, Comment, *The Right to Petition as Access and Information*, 169 U. PA. L. REV. 1235, 1239 (2021) ("[T]he right to petition protected not only the speech contained within a petition but also an individual right to equal and meaningful participation in the lawmaking process."); and RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF

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these insights to explain the Petition Clause's theoretical, historical, and doctrinal importance to overcoming the vote-representation gap, and for grounding a constitutional mandate of total-population apportionment.

The Article proceeds as follows. Part I traces the connection between the principle of universal representation and the practice of total-population apportionment throughout early American history. Part I also traces the rise of the "one person one vote" doctrine and demonstrates how the ambiguous normative foundations of that doctrine resulted in current controversies. Part II explains and rejects the idea that a commitment to universal representation automatically leads to a requirement of total-population apportionment. Part III shows how the Petition Clause requires total-population apportionment. Distinguishing Free Speech Clause cases like *Buckley v. Valeo* and *Citizens United v. FEC*, it explains how this interpretation fits comfortably within the doctrine of the independent Petition Clause. Part III also explores the history of petitioning in the early republic and reveals that petitioning was a vital political technology for closing the vote-representation gap. Drawing on the theoretical framework developed by law and social movement scholars, Part III explains how the practices protected by the Petition Clause contribute to securing representation for the disenfranchised.

I. The Historical Foundations of Apportionment and One Person One Vote

The specific relationship between apportionment and political representation has puzzled American constitutional thinkers since the rejection of British rule. This Part traces constitutional thinking on the role of apportionment in securing political representation, from the Constitutional

GRIEVANCES, at ix (2012) ("At its core, the Petition Clause represents the framers' view that a democratic government must be both open and accessible, not only to its citizens, but to all persons residing within the polity."). For pre-constitutional historical background on petitioning, see Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1144-45 (2016) ("Notably, petitioning also served as the primary means of political engagement for the unenfranchised and for collective political activity, as petitioners formed associations and petitioned on behalf of the collectivity."). On the Assembly Clause, see Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1656, 1658 (2021) (showing how the Assembly Clause was originally understood to entail a right to local self-government, empowering local communities to resist the diktats of an unaccountable and distant governing elite); and Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) (demonstrating how the Assembly Clause, if taken on its own terms, protects "aspirations for collective public deliberation and action on issues of public importance" and provides "a mechanism to influence and check government").

Convention, through the Second Founding, and into the twentieth-century "apportionment revolution" under the Warren Court.

A. The Assumed Link Between Apportionment and Representation

The question of how to design a representative system was one of the most important facing the Framers in 1787.[66] James Madison declared to his colleagues that "[t]he great difficulty lies in the affair of Representation," and would write in *Federalist No. 55* that figuring out how to allocate congressional representation was one of the issues most "worthy of attention" in the entire Constitution.[67] The issue would return to prominence during debates over Section 2 of the Fourteenth Amendment, when the Reconstruction Congress had to decide how to formally incorporate millions of newly freed and still-vulnerable slaves into the political community, and again in the early twentieth century as Congress debated how to incorporate new immigrants from southern and eastern Europe.[68] On all three occasions, legislators assumed, but never analyzed, the importance of population-based apportionment to securing representation.

1. The Founding

The Apportionment Clause of Article I reflects the eventual consensus among the Framers that representation was to extend more widely than the right to vote, and that—aside from two important exceptions—all inhabitants of the country were entitled to representation:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[69]

By specifically excluding "Indians not taxed," and by specifying a compromise on the counting of slaves, the Framers clearly intended to include "all other Persons" among the pool of people entitled to representation.[70] This

66. ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 9-10, 19-20 (1965).

67. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321 (Max Farrand ed., 1911); THE FEDERALIST NO. 55, at 341 (James Madison) (Clinton Rossiter ed., 1961).

68. *See infra* Parts I.A.2-3.

69. U.S. CONST. art. 1, § 2, cl. 3.

70. Fed'n for Am. Immigr. Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980) (concluding that, "[b]y making express provision for Indians and slaves, the Framers demonstrated their awareness that" the provision's otherwise "all-inclusive" language does not permit the exclusion of any other residents).

in part reflected the view, expressed by John Adams, that a representative assembly "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them."[71]

The delegates to the Convention rejected proposals to apportion congressional representation on the basis of wealth or property, opting instead for total population on the grounds that "numbers were surely the natural & precise measure of Representation."[72] In Alexander Hamilton's words, apportioning on the basis of total population would ensure representation to "every individual of the community at large."[73] Madison later summarized the emerging consensus: "It is agreed on all sides that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation."[74] The Framers conceived of the "people" and the "community" as being more capacious and expansive than all voters or even all citizens.

The choice to explicitly include indentured servants ("those bound to Service for a Term of Years") reflects an additional consensus among the Framers that the right to representation would not be tethered to the right to vote. This marked an early appearance of the vote-representation gap.[75] Because the Constitution left the regulation of the franchise to the states, the Framers recognized that the right to vote would vary widely across the country.[76] This made tying apportionment to the right to vote a rather unstable metric. Yet beyond this, the Framers were clearly committed to the idea that, in some sense, all inhabitants of the country (excluding "Indians not taxed" and to some extent the slaves) should "be included in the census by which the federal Constitution apportions the representatives," despite the fact that the majority would be "deprived of [the] right" to vote.[77]

Beyond the question of whom to count in apportioning representation, the appropriate size of congressional districts represented the other central challenge to the Framers' design of apportionment. This debate implicated not merely the question of *who* was entitled to representation, but the equally important if not

71. JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 PAPERS OF JOHN ADAMS 87 (Robert J. Taylor ed., 1979).

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 67, at 605 (statement of James Wilson); *see also* Wesberry v. Sanders, 376 U.S. 1, 15 (1964) ("[N]umbers . . . are the only proper scale of representation." (quoting THE FEDERALIST NO. 54, at 368 (James Madison) (Jacob E. Cooke ed., 1961))).

73. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 67, at 473 (statement of Alexander Hamilton).

74. THE FEDERALIST NO. 54 (James Madison), *supra* note 67, at 337.

75. *See* U.S. CONST. art. I, § 2, cl. 3.

76. *Id.* art. I, § 4, cl. 1.

77. THE FEDERALIST NO. 54 (James Madison), *supra* note 67, at 338.

more vexing question of *how* that representation was to be delivered. The key basis for Adams's belief that the legislature be a miniature of society was that representatives should have a close enough connection with the people whom they represent that they can "think as they think, & feel as they feel."[78] In other words, a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government" is best forged by proximity between the people and their representative.[79]

2. The second Founding

Questions of apportionment, representation, and the relationship between the two were raised again in stark fashion as the Reconstruction Congress worked to rebuild American democracy with a more expansive conception of political equality and membership.[80] Among the most difficult of the many issues addressed by the 39th Congress was how to avoid a perverse increase in the political power of the southern states as a result of the de facto nullification of the Three-Fifths Clause.[81] After the Thirteenth Amendment was ratified, each newly freed slave would be counted for apportionment as five-fifths of a free person, thus increasing the share of congressional representation apportioned to the former slave states.[82] Republicans in Congress were understandably uneager to "reward traitors with a liberal premium for treason."[83]

Yet Congress was divided over how to both ensure the effective representation of the newly freed slaves and prevent the southern states from using any resulting increase in political power to gum up the works of Reconstruction and retrench the white supremacist slaveocracy. Radical Republican Thaddeus Stevens proposed using an eligible-voter apportionment base.[84] If apportionment was based on eligible voters, states would be incentivized to expand the franchise.[85] Adding more voters to a state's rolls would increase its proportional share of seats in the House of Representatives.

78. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 67, at 134 (statement of George Mason).

79. JAMES WILSON & THOMAS M'KEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30-31 (1792).

80. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (recounting the work of successive Congresses during the Civil War and Reconstruction as providing a "second founding" of the nation with a newly defined citizenry).

81. *Id.* at 61.

82. *Id.*; *see* U.S. CONST. amend. XIII.

83. CONG. GLOBE, 39th Cong., 1st Sess. 404 (1866) (statement of Rep. William Lawrence).

84. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (statement of Rep. Thaddeus Stevens).

85. *See* FONER, *supra* note 80, at 59.

Southern states would then face the dilemma of withholding the franchise to the freed slaves, thereby forgoing any increase in political power, or enfranchising the freed slaves, thereby increasing the overall power of the state but splitting that power between the old political elite and the newly empowered Black citizens.[86]

Opposing Stevens's plan for eligible-voter apportionment, James Blaine argued that, as at the Founding, population was "the true basis of representation."[87] The alternative strategy for empowering the freedmen without rewarding the southern states was the two-part proposal eventually adopted as Section 2 of the Fourteenth Amendment: apportioning representation on the basis of total population while penalizing states that discriminatorily withheld the franchise.[88] Blaine and his allies had two principal justifications for this approach. The first was a continuation of the Founding-era assumption that a constitutional commitment to universal representation necessitated a total-population approach to apportionment. Senator George Edmunds argued that total-population apportionment was necessary to preserve "the original principle that all society in some form is to be represented in a republican Government."[89] Blaine urged that total population was required because "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."[90] To enjoy representation, "women, children, and other non-voting classes" must be included in the apportionment base.[91]

The second reason offered by advocates of the total-population approach was a concern that Stevens's approach of incentivizing states to increase the franchise would go too far. Blaine feared that an eligible-voter apportionment base would spark "an unseemly scramble in all the States during each decade to increase by every means the number of voters."[92] This "rash and reckless effort to procure an enlarged representation" was something that Blaine believed must be avoided at all costs.[93] On the other hand, total-population apportionment, combined with the penalty of Section 2, would allow states to continue making their own uncoerced decisions about whether to enfranchise

86. *Id.* (explaining Stevens's belief that using voters would encourage states to enfranchise Black people).

87. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine).

88. U.S. CONST. amend. XIV, § 2.

89. CONG. GLOBE, 39th Cong., 1st Sess. 2944 (1866) (statement of Sen. George Edmunds).

90. CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine).

91. *Id.*

92. *Id.*

93. *See id.*

women, noncitizens, children, and convicted felons, thereby protecting the patriarchal, nativist 1866 status quo.

After Stevens's eligible-voter proposal was defeated, the 39th Congress turned to the question of whether the "total population" would be understood to include only citizens or all inhabitants. An earlier draft of the Fourteenth Amendment apportioned representation on the basis of the "whole number of citizens" in each state.[94] In proposing an amendment that would alter the language of Section 2 to apportion on the basis of "persons" rather than "citizens," Representative Roscoe Conkling of New York (a state with a large immigrant population) maintained that "'[p]ersons,' and not 'citizens,' have always constituted the basis" of America's representative system.[95] He was backed by Representative John Bingham of Ohio, the principal drafter of the Fourteenth Amendment, who insisted that the "whole immigrant population should be numbered with the people and counted as part of them," because "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation."[96]

These disputes raised anew the distinction between *who* was to be represented and *how* that representation was to be effected. Framers of the Reconstruction Amendments largely agreed that all inhabitants should receive representation, but controversy remained over how to achieve that goal.

3. Early twentieth-century debates

In the 1920s, after a prolonged period of high immigration and a subsequent increase in nativist hostility (also fueled by the First World War), Congress considered a series of bills and constitutional amendments that sought to exclude noncitizens from congressional apportionment.[97] Arguing that the Fourteenth Amendment was adopted when the number of immigrants "had not become sufficiently noticeable to be recognized as a danger or an evil," Representative William Vaile of Colorado urged a change to apportionment policy to exclude noncitizens.[98] While Vaile's proposal garnered little traction, seven years later Representative Homer Hoch of Kansas introduced a

94. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865-1867, at 50-51 (1914).

95. CONG. GLOBE, 39th Cong., 1st Sess. 359 (1866) (statement of Rep. Roscoe Conkling).

96. CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866) (statement of Rep. John Bingham).

97. *See, e.g.*, CHARLES W. EAGLES, DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S, at 69-73 (1990).

98. 61 CONG. REC. 6339 (1921) (statement of Rep. William Vaile). He was proposing a change to the Apportionment Act of 1872, not the Fourteenth Amendment itself.

constitutional amendment that similarly sought to exclude noncitizens from congressional apportionment.[99] The next year, Senator Frederic Sackett of Kentucky introduced an amendment to the Reapportionment and Census Act of 1929 similar to Hoch's proposal in the Senate.[100] He argued that the "question of citizenship was not pertinent" at the time of the Founding, but "to-day it is doubly pertinent . . . ."[101]

The arguments raised against these proposals should sound familiar. Representative Fiorello LaGuardia (again of New York) responded to Hoch's complaint that the total-population approach granted a disproportionate share of power to immigrant-heavy states like New York by reminding him that America has "a representative government, and the very purpose of making an apportionment according to population was to have everyone represented in the Federal Congress."[102] Yet LaGuardia did not merely recite the dogma that everyone is entitled to representation and that total-population apportionment was therefore required. Instead, he stressed that noncitizens paid taxes, had been drafted in World War I, and were subject to the same laws as everyone else, and were thus entitled to representation.[103] Echoing James Madison, Senator Sam Bratton of New Mexico argued that "although a foreigner could not vote . . . so long as he was compelled to pay tribute to the Government through taxation, he was entitled to be represented."[104]

A striking feature of LaGuardia and Bratton's argument for including noncitizens in the apportionment base is how much it had in common with recurring arguments throughout American history for extending the franchise. As Alexander Keyssar has chronicled, military service in particular has been a powerful driver of sometimes-successful calls to expand voting rights after the Revolutionary War, the War of 1812, the Civil War, World War I, and World War II.[105] Similarly, in the late 1860s and early 1870s, suffragists relied on their status as taxpayers to argue that the continued disenfranchisement of women directly contradicted the revolutionary motto of "no taxation without

99. EAGLES, *supra* note 97, at 70-71.

100. 71 CONG. REC. 1907 (1929) (statement of Sen. Frederic Sackett).

101. *Id.*

102. 70 CONG. REC. 699 (1928) (statement of Rep. Fiorello LaGuardia).

103. *Id.* at 703; *see also* 71 CONG. REC. 1912 (1929) (statement of Sen. Sam Bratton).

104. 71 CONG. REC. 1912 (1929) (statement of Sen. Sam Bratton).

105. *See* KEYSSAR, *supra* note 20, at 24, 27, 31. The general phenomenon of democratic gains in the wake of war is well-documented by Paul Starr. *See* Paul Starr, *Dodging a Bullet: Democracy's Gains in Modern War*, *in* IN WAR'S WAKE: INTERNATIONAL CONFLICT AND THE FATE OF LIBERAL DEMOCRACY 50, 52-53, 55, 62 (Elizabeth Kier & Ronald R. Krebs eds., 2010).

representation."[106] They repeatedly organized tax strikes, putting pressure on local governments in an effort to win the right to vote.[107]

But neither LaGuardia nor Bratton argued that these reasons counted in favor of enfranchising noncitizens, let alone women or the young. Instead, they aligned themselves with the solid American tradition of believing that the representation owed to noncitizens and other nonvoters could be satisfied through inclusion in the apportionment base. The difference could not be starker between these elected representatives and Abby Hadassah Smith and Julia Evelina Smith, sisters who refused to pay taxes on their Connecticut farm until the town of Glastonbury would permit them to vote.[108] The fact that the Smith sisters were included in the apportionment base could not have been further from those women's minds.

B. The Evolution of "One Person One Vote"

Courts are notably absent from the debates over apportionment canvassed in the previous section. Indeed, it was not until the 1960s that an untenable situation of malapportionment in both congressional and state legislative districts finally tempted the U.S. Supreme Court to enter the "political thicket."[109]

The above debates centered on the apportionment of congressional seats to the states. This was separate from both the allocation of congressional seats within each state and from the apportionment and allocation of state legislative seats. Many of the Framers believed that geographically defined districts could help guard against the threat of majority tyranny and ensure that representatives were sufficiently familiar with their constituents to actually represent their interests.[110] Madison defended adopting districts as opposed to statewide, at-large elections, at least in large states, arguing that "it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district."[111] The Constitution itself left this question to the states, while reserving congressional power to intervene.[112] In 1842, Congress finally legislated to require single-member, equipopulous, geographically based legislative districts for

106. KEYSSAR, *supra* note 20, at 147.

107. *Id.*

108. *Id.*; *see also* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 81, 87-90, 103 (1998).

109. Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

110. *See, e.g.*, THE FEDERALIST NO. 56 (James Madison), *supra* note 67, at 347-48.

111. *Id.* at 347.

112. U.S. CONST. art. I, § 4, cl. 1.

congressional elections.[113] The standardization of single-member districts eventually led to distortions in district lines, which then drew the courts into policing the political process to an unprecedented degree, beginning in the 1960s with *Baker v. Carr*.[114] And it set the backdrop for today's ongoing apportionment controversies.

1. The equipopulation principle

In *Baker v. Carr*, a divided Court held, for the first time, that malapportionment claims were justiciable under the Equal Protection Clause of the Fourteenth Amendment.[115] Voters in Tennessee alleged that the state legislative districts in force in 1961 were based on census figures from 1901, the state legislature having failed to pass a new apportionment statute since then.[116] In the intervening sixty years, however, Tennessee had undergone important population changes, including widespread internal migration among Black people from rural areas to the cities.[117] Without reapportionment to match these changes in population, rural voters had an outsize share of control of the Tennessee General Assembly.[118] A 6-2 majority of the Court agreed that this somehow violated the Equal Protection Clause and its guarantee of political equality.[119] Yet when it came to a deeper explanation of why, or what the appropriate judicial remedy may be, the Justices splintered, and failed to provide a clear principle.[120]

113. For analysis of the political incentives behind this decision, see ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 129-31 (1987).

114. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 157-60 (5th ed. 2016) (explaining how the adoption of single-member districts precipitated the finding that disputes over the structure of the political process were justiciable).

115. 369 U.S. 186, 209-10 (1962). Several scholars have questioned the Court's decision to use the Equal Protection Clause rather than the Guaranty Clause. *See, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106-07 (2000); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1717-18 (1999).

116. *Baker*, 369 U.S. at 192-95.

117. *See* Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES 297, 298 (Michael C. Dorf ed., 2004); Louis M. Kyriakoudes, *Southern Black Rural-Urban Migration in the Era of the Great Migration: Nashville and Middle Tennessee, 1890-1930*, 72 AGRIC. HIST. 341, 346-37 (1998).

118. *Baker*, 369 U.S. at 254-56.

119. *Id.* at 228, 237.

120. Six Justices signed Justice Brennan's opinion finding that the claim was justiciable. Three wrote separately to explain their views. Frankfurter and Harlan each wrote dissents.

It was not until *Reynolds v. Sims*[121] two years later that a majority of the Court settled on an acceptable remedial principle under the Equal Protection Clause. The Alabama State Legislature was malapportioned as a result of uneven population growth in different parts of the state since 1903, when the legislature was last reapportioned.[122] Recognizing the same sort of political inequality from *Baker*, the *Reynolds* Court held that "both houses of a state legislature must be apportioned on a population basis."[123] The Court clarified that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[124]

The Court's rationale, though intuitively appealing, seems to rest on different grounds at different points in the opinion. At times, the majority referred to distortions to voting strength caused by malapportionment. For example, the Court asserted that a state that "provide[s] that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State" would violate Equal Protection.[125] Yet the equipopulation principle on its face refers simply to *population*.[126] And the Court also asserted that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."[127] Famously, "[l]egislators represent *people*, not trees or acres."[128] These conflicting statements leave it unclear whether the normative foundation for one person one vote rests in avoiding the dilution of voting strength or in ensuring equal representation for equal numbers of people. The likely reason why the Court left this point ambiguous was that it simply did not occur to the Justices that there might be a large deviation between the voting population and the total population, or that such a deviation would be unevenly distributed across districts.[129]

121. 377 U.S. 533 (1964).

122. *Id.* at 539-40.

123. *Id.* at 577.

124. *Id.* While *Wesberry v. Sanders* had already found that congressional apportionment must be based on population, its holding relied on the text of Art. I, § 2 of the Constitution. 376 U.S. 1, 13-14, 17 (1964). The Court in *Reynolds*, by contrast, claimed to find the state legislature equipopulation requirement—what would come to be known as the "one person one vote" rule—in the Equal Protection Clause itself. 377 U.S. at 577.

125. *Reynolds*, 377 U.S. at 561-62.

126. *Id.* at 568.

127. *Id.* at 567.

128. *Id.* at 562 (emphasis added). But again, the next sentence muddies the waters: "Legislators are elected by voters, not farms or cities or economic interests." *Id.*

129. In several major opinions, the Court does seem to have assumed that the total population and voting population will not come apart. For example, in *Reynolds*, the

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2. An early test: *Burns v. Richardson*

It was not long before the ambiguous foundation of one person one vote was put to the test. In *Burns v. Richardson*, the Court upheld Hawaii's use of a registered-voter apportionment base for its state legislature.[130] Because Hawaii had a large military and a transient population, it distributed seats in the State House of Representatives based on the number of registered Hawaii voters in each geographic district.[131] The apportionment scheme was challenged on the basis of the holding in *Reynolds*, which the plaintiffs argued compelled the use of a total-population apportionment base.[132] But the Court was quick to disclaim this understanding of *Reynolds*, instead affirming "that the Equal Protection Clause does not require the States to use total population figures . . . as the standard" by which to measure the "population equivalency" demanded by *Reynolds*.[133] The *Burns* Court emphasized the ambiguities in *Reynolds*'s language, now touting it as intentional: "[O]ur discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population . . . ."[134]

The Court was perhaps quick to run from the language of *Reynolds* because it recognized that "Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis" for apportionment.[135] The district court had found that Hawaii had a large population of military personnel stationed in the state, who were mostly not registered to vote and, although possibly eligible, did not seek to register in meaningful numbers.[136] Indeed, many of

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Court argued that "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579. The *Reynolds* Court also spoke of "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of [representatives]." *Id.* at 576. In *Board of Estimate v. Morris*, the Court suggested that the one person one vote principle "assure[s] that legislators will be elected by, and represent citizens in, districts of substantially equal size." 489 U.S. 688, 699 (1989).

130. 384 U.S. 73, 96-97 (1966) (upholding Hawaii's use of a registered-voter apportionment base).

131. *Id.* at 76-77, 94.

132. *Id.* at 75.

133. *Id.* at 91.

134. *Id.*

135. *Id.* at 94. The *Burns* Court uses "state citizen" to refer to something like bona fide resident of the state. It is not referring to U.S. citizenship. *See* Bradley, *supra* note 47, at 12.

136. Holt v. Richardson, 238 F. Supp. 468, 475 (D. Haw. 1965).

them were stationed permanently aboard ships.[137] Similarly, the trial court found that the federal census figures likely included a large number of tourists, who of course would not vote in Hawaii.[138]

This framing suggests that the *Burns* Court understood apportionment as a way of parceling out representative districts among the population to whom representation is owed.[139] This would include the permanent nonvoting population of Hawaii, but not the transient military personnel or tourists.[140] Hawaii's "special population problems" meant that the total-population figures reported in the Census would not prove a reasonable metric for capturing the more-or-less permanent population of Hawaii to whom representation is owed.[141] Because of this, the Court permitted, under Hawaii's peculiar circumstances, the use of an alternative metric: the registered-voter population.[142] The Court was clear in limiting its holding to the facts of the case, however, disclaiming the suggestion that "the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."[143]

The *Burns* Court recognized that the selection of an apportionment base "involves choices about the nature of representation with which [the Court has] been shown no constitutionally founded reason to interfere."[144] The question remained open, however, just what sorts of decisions about the "nature of representation" were constitutionally left to the political processes of the states. In particular, it was unclear whether the Court developed an understanding of who belongs to the population owed representation. One way to understand *Burns* is that the Court believed the permanent residents of Hawaii were entitled to representation, and Hawaii had latitude to decide what apportionment scheme would be best, under local circumstances, to secure representation to that defined population. An alternative reading of *Burns* finds that the states have latitude to define the contours of the political community entitled to representation. Yet this reading clashes with the consensus canvassed above that "'[p]ersons,'" not any other metric, "have always constituted the basis" of America's representative system."[145] This clash has found its way back to the courts.

137. *Id.* at 474.

138. *Id.* at 475.

139. *See* Bradley, *supra* note 47, at 9-10.

140. *Burns*, 384 U.S. at 94-95.

141. *Id.*

142. *Id.*

143. *Id.* at 96.

144. *Id.* at 92.

145. CONG. GLOBE, 39th Cong., 1st Sess. 359 (1866) (statement of Rep. Roscoe Conkling).

3. The modern challenge: *Garza* and *Evenwel*

A new generation of apportionment challenges rooted in "special population problems" began with a 1990 challenge to a court-drawn districting plan for Los Angeles County commissioners.[146] The plan was ordered after the county's own scheme had been struck down as intentionally discriminatory against Hispanics, in violation of both the Voting Rights Act and the Equal Protection Clause.[147] The County itself challenged the court-drawn plan, objecting that its use of total-population numbers for apportionment was inappropriate in light of the high concentration of (largely Hispanic) noncitizens, and nonvoters more generally, in some of the commission districts.[148] A divided Ninth Circuit panel upheld the plan, finding that total-population apportionment was required both by California law and by the U.S. Constitution.[149] As discussed at length in Part III below, the court based its reasoning on the idea that all bona fide residents are entitled to equal representation, and that a corollary of equal representation is the right of equal access to one's representative.[150] In other words, *Garza* rejected the idea that states or localities can decide a particular group of bona fide residents are not entitled to the same representation as voters or citizens.

But the *Garza* approach did not catch on. Two other courts that confronted similar challenges to apportionment plans, drawn in response to similar demographic patterns, explicitly rejected *Garza*'s holding that the Constitution requires total-population apportionment. Just several years after *Garza*, the Fourth Circuit in *Daly v. Hunt* held that, because apportionment is an "inherently political and legislative process," courts should not enforce any particular approach.[151] The Fifth Circuit reached a similar conclusion a few years later in *Chen v. City of Houston*, referring to apportionment as an "eminently political question [that] has been left to the political process."[152] This produced a circuit split between the Ninth Circuit's view (that the Constitution mandates total-population apportionment) and the view of the two other circuits to examine the question (that either the Constitution permits states to choose, or it is a nonjusticiable political question).

The most recent challenge to a total-population apportionment scheme—and the only to reach the Supreme Court since *Burns*—was brought against this

146. Garza v. County of Los Angeles, 918 F.2d 763, 765-69 (9th Cir. 1990).

147. *Id.* at 766.

148. *Id.* at 773.

149. *Id.* at 773-74.

150. *Id.* at 775.

151. 93 F.3d 1212, 1227 (4th Cir. 1996).

152. 206 F.3d 502, 528 (5th Cir. 2000).

background. The Supreme Court in *Evenwel v. Abbott*[153] rejected a challenge brought by white voters in Texas, who argued that the state's total-population apportionment scheme unconstitutionally diluted their votes. The white plaintiffs alleged that they lived in a district with an unusually high number of voters. Because noncitizens were unevenly distributed across districts, the plaintiffs argued, the plaintiffs' votes were less meaningful than votes cast by voters in districts with more noncitizens and fewer voters.[154] In 2013, Texas Senate districts had a deviation of over 40% between eligible voters and registered voters, in contrast to a roughly 8% deviation in total population.[155]

The *Evenwel* plaintiffs sought to tempt the Court into adopting an interpretation of one person one vote that *required* the use of an eligible-voter apportionment base.[156] The Court unanimously declined to do so.[157] The fact that all fifty states used a total-population apportionment base for their legislatures rendered the plaintiff's request to recognize a contrary constitutional mandate rather incredible.[158] While the Court acknowledged precedential language suggesting one person one vote aims to equalize voting strength, it also noted that there is plenty of precedential language suggesting that equal total population is intrinsically valuable.[159]

Most importantly, the Court's interpretation of the decisions made at the Founding and during Reconstruction led it to suggest that total-population apportionment is likely a better way to enact the constitutional commitment to equal representation for all residents.[160] The Court explained that "[n]onvoters have an important stake in many policy debates" and that total-population apportionment is the best way to "promote[] equitable and effective representation" for everyone entitled to it.[161] Yet the Court declined the Solicitor General's invitation to hold that the Constitution requires total-population apportionment, finding this broader argument unnecessary to resolve the case.[162]

Justices Thomas and Alito each wrote separately to express their views that, even if the question were properly presented, it would be inappropriate to

153. 136 S. Ct. 1120 (2016).

154. *Id.* at 1125.

155. *Id.*

156. *Id.* at 1123.

157. *Id.* at 1126-27.

158. *Id.* at 1123, 1132.

159. *Id.* at 1130-31.

160. *Id.* at 1127-30.

161. *Id.* at 1132.

162. *Id.* at 1132-33.

find a constitutional mandate for total-population apportionment.[163] Justice Thomas argued that the one person one vote rule rests on shaky normative and textual foundations, while Justice Alito argued that the Constitution does not contain a theory of representation adequate to require any particular approach to apportionment.[164] Justice Alito relied in part on a strikingly implausible interpretation of the significance of the Fourteenth Amendment's Penalty Clause.[165] But Justice Alito also made a broader point worth heeding: The concept of "representation" is multifaceted.[166] To argue that the Constitution contains any particular conception of representation, and that such a conception of representation mandates any particular institutional arrangements, we must cast a more critical eye on the question than was done in the debates canvassed in this Part.

II. Closing the Gap: Geography-Based Virtual Representation

The Court's *Evenwel* opinion affirmed the principle that "representatives serve all residents, not just those eligible or registered to vote."[167] But this leaves open the question of *how* representation for nonvoters is supposed to be secured. One of the lasting lessons of Madison and the political theory of the U.S. Constitution is that mere "parchment barriers" are not effective guarantees of meaningful political representation.[168] This Part examines what role apportionment could play in securing meaningful representation. Part II.A canvasses the strategies employed in the Constitution to protect the rights and interests of constituents: votes and structure. Part II.B then analyzes apportionment as a rights-protecting structure. It develops and then refutes the most plausible extant account for how total-population apportionment operates as a structure to protect nonvoting constituents: geography-based virtual representation.

163. *Id.* at 1133 (Thomas, J., concurring in the judgment); *id.* at 1143-44 (Alito, J., concurring in the judgment).

164. *Id.* at 1133 (Thomas, J., concurring in the judgment); *id.* at 1144, 1149 (Alito, J., concurring in the judgment).

165. *See* Herenstein & Rudensky, *supra* note 13, at 1048 (arguing that Justice Alito seems to rely on an interpretation that "produces a feckless, even backward, Penalty Clause—one that harms the very groups it is designed to benefit").

166. *Evenwel*, 136 S. Ct. at 1143 n.1 (Alito, J., concurring in the judgment) (noting that lawyers, political theorists, historians, and citizens use the concept of "representation" in many different and competing ways).

167. *Id.* at 1132 (majority opinion).

168. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 67, at 308-09.

A. Structural Safeguards of Representation

After the War of Independence and the Articles of Confederation, a primary challenge was ensuring that the powerful new federal government would be representative, and to explain what being "representative" would mean.[169] The starting point for this debate was the pre-Revolutionary British claim that the colonies enjoyed *virtual representation* in Parliament, despite the fact that they lacked *actual* representation in Parliament.[170] The English politician Thomas Whately commented, after the uproarious colonial response to the Stamp Act of 1765, that the Americans' situation was not unlike that of most people living in Britain: "[N]one of them chuse their Representatives; and yet are they not represented in Parliament?"[171] The answer was taken to be obvious: They are all "virtually represented in Parliament."[172] By "virtual representation," Whately and others meant that the Members of Parliament took account of the interests of the colonists, even if they were not forced to do so by an electoral process.[173] This contrasts with *actual* representation, which requires, at a minimum, the opportunity to vote for one's representatives.[174]

The Stamp Act Congress, purporting to speak on behalf of the colonists, rejected this characterization.[175] But when the smoke settled after the war, the Framers needed a specific account of *why* virtual representation was inadequate. Madison explained the conventional wisdom succinctly: Virtual representation was inadequate "[b]ecause G. Britain had a separate interest real

169. *See* THE FEDERALIST NO. 55 (James Madison), *supra* note 67, at 341-42.

170. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 67, at 135-36 (recounting Madison's argument that there were insufficient mechanisms tying the British Parliament to the interests of the American colonies).

171. THOMAS WHATELY, THE REGULATIONS LATELY MADE CONCERNING THE COLONIES, AND THE TAXES IMPOSED UPON THEM, CONSIDERED 109 (London, J. Wilkie 1765); *see also* GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 28-29 (2002) (discussing the Stamp Act and the colonists' reaction).

172. WHATELY, *supra* note 171, at 190. Whately continues, "[F]or every Member of Parliament sits in the House, not as Representatives of his own Constituents, but as one of that august Assembly by which all the Commons of *Great Britain* are represented." *Id.*

173. *See* Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1685 (2018) (quoting Transcript of Oral Argument at 33-34, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940)).

174. *Id.* at 1682.

175. RESOLUTIONS OF THE STAMP ACT CONGRESS (1765), *reprinted in* HISTORICAL SOURCE BOOK 63, 64 (Hutton Webster ed., 1920) ("[T]he people of these colonies are not, and from their local circumstances cannot be, represented in the House of Commons in Great Britain.").

or supposed."[176] The literal distance between the colonies and Britain produced two formidable obstacles to forging a genuinely representative relation between the two.[177] First, Britain had, in many respects, separate economic and political interests. And second, the colonists lacked meaningful opportunities to influence and engage with Members of Parliament.[178]

Because of the divergence of interests between the colonies and Members of Parliament, even an honest intention to look after the interests of the colonists was suspect. This point reflects one of the central insights of Madison and the other Framers on rights like the right to representation. A right, without some mechanism for ensuring an alignment of interest between the right-holder and the agent charged with providing or protecting that right, is a mere "parchment barrier."[179]

For that reason, "the original design of the Constitution relied primarily on structural arrangements to protect rights."[180] The goal was to "creat[e] a structure of government that would empower vulnerable groups to protect their interests through the political process."[181] The most obvious way to empower groups in the political process is to give them rights of participation.[182] But the Founders were not prepared for the sort of mass democracy that the full implementation of this strategy would entail.[183]

176. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 67, at 135 (quoting James Madison).

177. Fishkin, *supra* note 173, at 1692.

178. *Id.*

179. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 67, at 308-09, 313.

180. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) (citing Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357 (2007)). This idea that bare rights (or rights that are not "resourced" and backed up by active power) are deficient and ultimately incompatible with an ideal of respect and democratic self-government has been developed extensively by Philip Pettit. *See generally* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012) (arguing that individual freedom and effective rights against government requires channels for people to exercise control over government decision-making); Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 577-78, 589 (1996) (describing the concept of "antipower" as the ability for citizens to secure freedom by imposing controls on those who might control them).

181. Levinson, *supra* note 180, at 1293.

182. *Id.* at 1304-05 ("Give us the ballot, and we will no longer have to worry the federal government about our basic rights.") (quoting Martin Luther King, Jr., "Give Us the Ballot," Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), *in* 4 THE PAPERS OF MARTIN LUTHER KING, JR. 208, 210 (Clayborne Carson, Susan Carson, Adrienne Clay, Virginia Shadron & Kieran Taylor eds., 2000)).

183. *See, e.g.*, THE FEDERALIST NO. 55, (James Madison), *supra* note 67, at 342 ("Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.").

Instead, the ability to protect one's rights by direct participation in the political process ("voting," for short) was supplemented by—and, for many members of the political community, completely replaced by—structural protections that incentivized those in power to act in rights-protecting ways and took opportunities for abuse off the table.[184] Two of the most celebrated of these structural provisions were the horizontal separation of powers between the several branches, in which "[a]mbition . . . counteract[s] ambition,"[185] and the political safeguard of federalism, which divides power between the states and the federal government.[186]

Most relevant for present purposes is the third structural protection of rights: the creation of the House of Representatives, with the assumption that House districts would be relatively small.[187] One of Madison's most celebrated contributions to constitutional thought is his argument in *Federalist No. 10* that "a large and modestly heterogenous society could actually produce a more stable republic than could a small city or state."[188] Nevertheless, Madison recognized that, for the new federal government to be *genuinely* representative, the representatives should never be too far from the people. As he argued, "[b]y enlarging too much the number of electors [per representative], you render the representative too little acquainted with all their local circumstances and lesser interests."[189] One of the final changes made to the proposed Constitution during the Philadelphia convention was to make an "erasure" in the parchment to the provision assigning one representative to every *forty* thousand people, hastily replacing "forty" with "thirty."[190] Despite this change, the perception that the proposed House was too small was a recurring objection during the ratification debates.[191] As a result, the very first of Madison's proposed amendments passed by the First Congress contained a complicated formula for adjusting and increasing the number of representatives in the House.[192]

184. Philip Pettit has referred to these strategies—typical of the republican tradition in which Madison and the other Framers were steeped—as "sanctions" and "screens." PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 212-14 (1997).

185. THE FEDERALIST NO. 51 (James Madison), *supra* note 67, at 321-22.

186. *See* THE FEDERALIST NO. 45 (James Madison), *supra* note 67, at 288-89, 291.

187. THE FEDERALIST NO. 10 (James Madison), *supra* note 67, at 82 (articulating Madison's argument for keeping districts relatively small by having a larger legislative body).

188. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 9 (1998).

189. THE FEDERALIST NO. 10 (James Madison), *supra* note 67, at 83.

190. AMAR, *supra* note 188, at 13.

191. *Id.* at 14 (explaining that concerns that the House was too small led to calls to establish a "secure minimum size" for the House).

192. *See id.* at 14-16; Akhil Reed Amar, Lecture, *The First Amendment's Firstness*, 47 U.C. DAVIS L. REV. 1015, 1019 (2014).

Although this proposed first amendment was narrowly defeated, it reflects the consensus among the Framers that *proximity* to constituents was one of the necessary elements of a genuinely representative body.[193]

B. Geography-Based Virtual Representation

Nobody at the time of the Founding would deny that actual votes in actual elections were the best way to protect the people's interests and rights: Elections would, as Madison put it in *Federalist No. 52*, establish "a due connection between [the people's] representatives and themselves."[194] On the other hand, while regulating elections was left to the states rather than the federal government,[195] everyone agreed that the appropriate electors, though much more expansive than any other place in history, would not include all inhabitants.[196]

The availability of the franchise varied widely in the early republic.[197] By 1820, Alabama, Illinois, Indiana, Kentucky, Maine, Maryland, Missouri, and Vermont had neither property nor taxpaying requirements for the franchise,[198] though of these only Vermont lacked racial exclusions.[199] By

193. AMAR, *supra* note 188, at 14-16. Among the amendments that were accepted as the original Bill of Rights, many of them look like they may amount to simple parchment barriers: the right to bear arms, the right to not be unreasonably searched or cruelly punished, and so on. However, Jamal Greene and Akhil Amar, among others, have argued convincingly in recent years that these provisions are best understood as structural protections for local institutions and processes—not for individual rights-bearers per se. *See, e.g.*, Akhil Reed Amar, Leary Lecture, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 892-93. As Greene puts it, "the rights to be protected were themselves grounded in political participation and self-governance via local community institutions." JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 30 (2021). Among these local institutions were juries, militias, and local assemblies or legislatures. *See also* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1814-16 (1999) (defending a structural interpretation of rights provisions).

194. THE FEDERALIST NO. 52 (James Madison), *supra* note 67, at 329; *see also* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 14 (2014) ("[E]lections had to occur with an appropriate frequency, by the appropriate electors, and within a framework that produced the correct number of representatives to maintain a suitable relationship between representatives and their constituents.").

195. U.S. CONST. art. I, § 4, cl. 1.

196. *See* KEYSSAR, *supra* note 20, at 306-07 tbl.A.1 (chronicling the restrictions on the franchise at the time of ratification).

197. *See generally id.* (tracing the rise and fall of suffrage rights throughout early American history).

198. *Id.* at 308-12 tbl.A.2.

199. Maine excluded "Indians not taxed," but otherwise similarly lacked racial exclusions. *Id.* at 315-19 tbl.A.4.

1855, only three states still had property requirements,[200] but most states restricted voting to white men.[201] Thus, while the overall constitutional design reflected a rejection of the British claim of virtual representation in favor of a scheme of actual representation secured by a combination of rights, votes, and structure, it was still assumed that *nonvoters*—the majority of the population—would be virtually represented within the new government.

As early as 1765, the prominent Maryland lawyer Daniel Dulany summarized this view:

> The Security of the Non-Electors against Oppression, is, that their Oppression will fall also upon the Electors and the Representatives. The one can't be injured, and the other indemnified. . . . The Electors, who are inseparably connected in their Interests with the Non-Electors, may be justly deemed to be the Representatives of the Non-Electors, at the same Time they exercise their personal Privilege in their Right of Election, and the Members chosen, therefore, the Representatives of both. This is the only rational Explanation of the Expression, *virtual Representation*.[202]

At first blush, it looks outright hypocritical to argue that British virtual representation was inadequate, but that Americans can adequately virtually represent other Americans. However, the adequacy of virtual representation is a matter of degree. The debates over the size of the House of Representatives suggest as much: The rights of nonvoters may be better protected by striking a balance between a House small enough to manage factions and to "refine and enlarge" popular sentiment, and a House large enough to allow representatives to be "acquainted with all the[] local circumstances and lesser interests" of their constituents.[203] A representative who campaigns in and is elected by the voters in a relatively small district in western Massachusetts is likely going to be more knowledgeable of and responsive to the interests of both the voters and nonvoters there than is a Member of Parliament in London.

Nevertheless, the prima facie tension between virtual representation and a commitment to democracy is powerful, and virtual representation has had a much-maligned career in American political thought as a result.[204] The

200. *Id.* at 336 tbl.A.3.

201. *Id.* at 315-19 tbl.A.4.

202. DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES, FOR THE PURPOSE OF RAISING A REVENUE, BY ACT OF PARLIAMENT 7-8 (Annapolis, Jonas Green 2d ed. 1765).

203. THE FEDERALIST NO. 10 (James Madison), *supra* note 67, at 82-83.

204. *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1291 (2002) ("All of this might have made a modicum of sense in a world we no longer inhabit, which included elaborate theories of the male's duty to protect vulnerable females or the ubiquity of public officials sufficiently virtuous as to be wholly

footnote continued on next page

Founders were, we should agree today, much too restrictive in their understanding of who should exercise the franchise. The story of American democracy is often told as a history of *overcoming* virtual representation by opening the franchise to an ever-wider electorate.[205] Jacksonian democracy brought in poor white men,[206] the Civil War and Reconstruction briefly brought in Black men,[207] the Nineteenth Amendment brought in women,[208] the Voting Rights Act brought Black voters *back* in,[209] and the Twenty-Sixth Amendment brought in eighteen- to twenty-year-olds.[210]

Some scholars have nevertheless argued that virtual representation cannot be completely eradicated and therefore must be better understood.[211] The remainder of this Part explores the best possible defense of the idea that virtual representation provides the necessary structure to protect the rights of nonvoters. As we will see, that claim is tenuous at best. More importantly, even if virtual representation does offer some protection to nonvoters, it does so via a mechanism that is indifferent to the underlying apportionment base. It thus provides no argument in favor of total-population apportionment.

1. The defense of virtual representation

Joseph Fishkin acknowledges that "actual representation" is superior to virtual representation, but argues that the expansion of the franchise has a natural limiting point.[212] There will always be at least *some* young people and at least *some* newly arrived immigrants who are unable to exercise the franchise and who, if they are going to be represented at all, can only be

unmotivated by such crass interests as paying sufficient attention to the interests of actual voters as would allow the officials to be returned to office in the next election.").

205. *See* KEYSSAR, *supra* note 20, at xxi-ii (documenting the recurring temptations to adopt a Whiggish view of American democracy according to which it progresses steadily toward increased participation and inclusiveness).

206. *See generally* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN (2005) (giving an account of increased democratic participation during the era of Jacksonian democracy).

207. U.S. CONST. amend. XV; *see* Foner, *supra* note 80, at xix, 126.

208. U.S. CONST. amend. XIX; *see* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 981-97 (2002) (describing the view that the Nineteenth Amendment was a rejection of virtual representation for women).

209. *See generally* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (chronicling the social and political history leading up to the passage of the Voting Rights Act and the restoration of the franchise to Black Americans).

210. U.S. CONST. amend. XXVI.

211. *See, e.g.*, Fishkin, *supra* note 173, at 1686.

212. *Id.* at 1686-87.

virtually represented.[213] Fishkin argues that "virtual representation is an inevitable feature of any democratic system, including ours . . . [and] it has real value."[214] But he points out that not all forms of virtual representation are created equal. For example, "[a]s measured by its policy outputs, it would seem that the quality of virtual representation afforded to the American colonists in the British Parliament was abysmal."[215] This is because the colonists were "differently situated, economically and politically, in nearly every relevant respect" from their putative virtual representatives across a massive physical and communicative distance.[216] Contrast the virtual representation that children enjoy.[217] Fishkin argues that "it is reasonable to expect parents to vote in ways that partly reflect the interests of their children, because their interests are deeply intertwined with those of their children."[218] We might quibble with

213. *Id.* Political philosophers and ethicists working in the field of "intergenerational justice" also tend to hold that future generations are entitled to representation in our current political arrangements, and that this representation can only be virtual. *See, e.g.*, Dennis F. Thompson, *Representing Future Generations: Political Presentism and Democratic Trusteeship*, 13 CRITICAL REV. INT'L SOC. & POL. PHIL. 17, 26-27, 30 (2010) (discussing the possibility of providing virtual representation for future generations through a trusteeship). *See generally* Lukas Meyer, *Intergenerational Justice*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., updated May 4, 2021), https://perma.cc/7MQ5-4YCL (providing an overview of the philosophical discussion of intergenerational justice).

214. Fishkin, *supra* note 173, at 1686.

215. *Id.* at 1692.

216. *Id.*

217. It is unclear in Fishkin's argument whether children are virtually represented *by their parents*, or if they are virtually represented by elected representatives, *by virtue of the fact that their parents vote* (assuming they are eligible to and do vote, and ignoring the fact that not all children have living parents). This ambiguity regarding who actually stands in the relationship of "virtual representation" runs throughout Fishkin's account. It also differs from Lani Guinier's characterization of virtual representation. *See* Lani Guinier, Commentary, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 427-29 (1989) (explaining that actual representation involves direct election by constituents; whereas virtual representation consists of representation by someone elected by another constituency with common interests and sympathies). What this indicates is that the legal scholarship has run together several phenomena under the catch-all label "virtual representation." It is useful to distinguish Guinier's concept of virtual representation from the concept philosophers sometimes call "informal representation," where an informal, unelected representative takes it upon herself to speak and act on behalf of a constituency. This raises a distinct set of questions for political morality. *See* Wendy Salkin, *The Conscription of Informal Political Representatives*, 29 J. POL. PHIL. 429, 449 (2021) (discussing the moral issues raised by informal representation).

218. Fishkin, *supra* note 173, at 1693.

the particular example, but the general point seems valid.[219] The important question is what makes a particular instance of virtual representation adequate.

The lesson from Madison and the American Founding is that a bare duty imposed on the representative is not sufficient to guarantee adequate virtual representation. Madison's insight is that adequate representation of any kind—virtual or actual—turns not on whether the representative understands herself to be providing adequate representation, but rather on the structural alignment of interest between the representative and those represented.[220] But what accounts for the structural incentives of a representative to protect the interests of her constituents?

In the case of voting constituents, the answer is obvious. The representative has an interest in reelection, and she pursues that interest by seeking to assemble at least a minimal successful coalition of voters. Political scientists converge on the view that the behavior of elected officials can be well-explained in terms of seeking reelection.[221] The representative is incentivized to further the interests of those voters whom she thinks can be assembled or mobilized into a minimal successful coalition.[222] The *voting relation* therefore promotes the requisite coincidence of interests.

In the case of nonvoters, this obviously cannot be the story. Since the structural alignment between the interests of the virtually represented and the interests of the representative cannot be provided by voting, it has to come from somewhere else. "The key," Fishkin explains, quoting John Hart Ely, "is 'tying the interests of those without political power to the interests of those with it.'"[223]

Fishkin's invocation of Ely is meant to trade on Ely's celebrated reading of *M'Culloch v. Maryland*. That staple of constitutional law classes held, in an opinion by Chief Justice John Marshall, that Maryland could only tax the

219. *See, e.g.*, Gabriel M. Ahlfeldt, Wolfgang Maennig & Malte Steenbeck, *Direct Democracy and Intergenerational Conflicts in Aging Societies*, 60 J. REG'L STUD. 129, 152-53 (2020) (providing some empirical evidence for the claim that older voters have a shorter-term perspective than younger voters). The empirical evidence is ambiguous, however. For discussion, see Tyler M. John, *Empowering Future People by Empowering the Young?* 7-10 (Legal Priorities Project Working Paper Series, Paper No. 5-2021, 2021), https://perma.cc/UQU2-FGTE.

220. *See supra* Part II.A.

221. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004) (describing representatives as "single-minded seekers of reelection"); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 31, 60-66 (3d ed. 1989) (arguing that constituency appears to have a substantial effect on representatives' behavior).

222. JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 61 (3d ed. 1989).

223. Fishkin, *supra* note 173, at 1696 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 83 (1980)).

Bank of the United States if the tax were levied on "the real property of the bank, in common with the other real property within the State."[224] The Bank exercised no direct political influence on the Maryland legislature, and was for that reason particularly vulnerable to being taxed out of existence by that body—hence, "the power to tax involves the power to destroy."[225] Protecting the Bank did not require giving it direct influence over the legislature, but rather ensuring that laws would be enforced generally, so that any burden imposed on the Bank would be similarly imposed on those who *do* exercise direct political power in Maryland—namely, the voters and the legislators themselves.[226] The lesson that Ely and Marshall teach, according to Fishkin, is that "[t]he key to good virtual representation is the linkage, or identity, of *politically relevant interests* between the people who are actually represented and the people who are only virtually represented."[227]

But how should one determine what politically relevant interests to tie together? In American democracy, there are three mechanisms, other than the vote, that can plausibly "tie" the relevant interests of those without political power to the interests of those with it: party, race, and geography.[228] Each of these enjoys some sort of official recognition in the law of democracy. The two major political parties are nationally organized, provide a reasonable degree of discipline over candidates and platforms, and enjoy a wide range of statutory privileges ensuring they retain that control and their ballot access.[229] Likewise, race is recognized as a politically relevant interest primarily by the Voting Rights Act's efforts to ensure that, when a racially polarized voting bloc exists, it is not illegitimately prevented from electing its preferred candidate.[230]

The political relevance of geography, however, exercises perhaps the most far-reaching influence on American democracy through the use of single-member, first-past-the-post districts for most legislative offices.[231] In 1842, Congress mandated the use of single-member districts for congressional elections, thereby "protect[ing] geographic representation from being entirely

224. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

225. *Id.* at 431.

226. *Cf.* DULANY, *supra* note 202, at 7 (explaining and defending how virtual representation can work in some contexts).

227. Fishkin, *supra* note 173, at 1696.

228. *Id.* at 1709.

229. *See* ISSACHAROFF ET AL., *supra* note 114, at 259-357 (elaborating on the law regulating political parties).

230. *See* Thornburg v. Gingles, 478 U.S. 30, 56 (1986); *see also* Fishkin, *supra* note 43, at 1900.

231. For extended discussion of the normative significance of this structural feature, as compared to party-list or proportional parliamentary systems, see Charles R. Beitz, *How Is Partisan Gerrymandering Unfair?*, 46 PHIL. & PUB. AFFS. 323 (2018).

supplanted by partisanship."[232] The worry at the time was that, if states continued to elect congresspeople using statewide multimember districts, then a state-level partisan majority could elect an entire congressional delegation.[233] That could lead to a 51% Republican statewide advantage in, for example, Massachusetts, resulting in the election of exclusively Republican representatives, all from Boston. Single-member districts ensure, first, that no one geographic region will dominate the others, and second, that parties will still have to compete district by district, making it less likely that one party could capture the entire congressional delegation.

The product of the decision to adopt single-member districts is a "distinctive American geography-obsessed approach to representation."[234] But despite the many flaws of single-member districts,[235] Fishkin argues that the approach "amounts to an unintentionally elegant solution to the problem of how to achieve tolerably good virtual representation."[236]

The basic idea is that geographic location tends to reliably track a host of politically relevant characteristics, especially economic interests. Thus people living in Harlan County, Kentucky are likely to have an interest in protecting coal (or labor), while people in King County, Washington are likely to have an interest in protecting the technology industry.[237] In addition, people tend to *self-segregate* geographically along other axes that are politically important, such as partisan identity, race, religion, and so on.[238] Perhaps most importantly, people tend to live with or near their families, with whom they likely share many politically relevant interests.[239]

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232. Fishkin, *supra* note 173, at 1705.

233. *Id.*

234. *Id.* at 1718.

235. For example, Charles Beitz argues that in the American single-member district system, "for the average voter, the political agenda formed in the legislature is less likely than in [proportional representation systems] to identify issues and establish priorities among them in the way that most closely matches the voter's reflective preferences." Beitz, *supra* note 231, at 344.

236. Fishkin, *supra* note 173, at 1718.

237. The example of Harlan and King Counties is stylized and not meant to reflect an empirical claim about the interests of voters in those regions. This is far too simplified, of course. Even in a geographic region dominated by a particular industry, the interests of the working class and the professional, managerial, and capitalist classes are likely to deviate sharply over issues of employment regulation, housing and development policy, taxation, transportation, and so on.

238. Fishkin, *supra* note 173, at 1718.

239. A gaping exception to Fishkin's idea that geography does a reasonably good job of predicting interests is the current practice, still prevalent in most states, of counting incarcerated people as constituents of the district in which they are incarcerated,

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There are several dimensions along which one could raise serious doubts about the ability of geography-based virtual representation to deliver reasonably good representation of the interests of nonvoters. Fishkin seems to be rather blasé, for example, about the likelihood that parents will consistently vote in the interests of their children—he assumes this will often be the case.[240] We might doubt this. There is some empirical evidence to suggest that older voters, even those with children, take a shorter-term perspective than younger voters do.[241] This is especially salient in the context of the climate crisis.[242] In addition, studies of "Demeny voting" (where parents are given additional votes as proxies for their children) also suggest that parents do not always use their supplemental votes to promote the interests of their children.[243]

Perhaps more importantly, we should be cautious about any causal reliance on self-segregation as a mechanism of clustering interests. The main reason for skepticism is the history of *enforced* segregation.[244] The ongoing legacy of redlining and other de jure and de facto segregation policies of federal, state, and local governments renders it somewhat implausible to suggest that current patterns of residential segregation reflect self-segregation along lines of relevant electoral preferences.[245] Indeed, while many scholars

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rather than where they lived previously, or where their families live: so-called "prison-based gerrymandering." *See* Bradley, *supra* note 47, at 10 & n.62.

240. Fishkin, *supra* note 173, at 1693.

241. *See generally* Ahlfeldt et al., *supra* note 219 (providing some empirical evidence for the claim that older voters have a shorter-term perspective than younger voters).

242. *Cf.* Cary Funk, *Key Findings: How Americans' Attitudes About Climate Change Differ by Generation, Party and Other Factors*, PEW RSCH. CTR. (May 26, 2021), https://perma.cc/3FU7-B8HX (providing evidence that views on climate change differ intergenerationally).

243. Reiko Aoki & Rhema Vaithianathan, *Intergenerational Voter Preference Survey - Preliminary Results* (Hitotsubashi Univ. Ctr. for Intergenerational Stud., Discussion Paper No. 539, 2012), https://perma.cc/7N47-KQUS; Yoshio Kamijo, Teruyuki Tamura & Yoichi Hizen, *Effect of Proxy Voting for Children Under the Voting Age on Parental Altruism Towards Future Generations*, 122 FUTURES 102569, at 7 (2020), https://perma.cc/4EYD-69SY.

244. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at vii (2017) ("[U]ntil the last quarter of the twentieth century, racially explicit policies of federal, state, and local governments defined where whites and African Americans should live."); *see also* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 655 (2020) (describing the relationship between policing and residential segregation).

245. *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844-45 (1994) (arguing that "racial segregation persists in the absence of explicit, legally enforceable racial restrictions"); *see also* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 5-6 (2010) (arguing that residential segregation is an ongoing source of racial injustice). For a more cautious view suggesting that segregated Black neighborhoods often do reflect deliberate preferences

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look to localism as a way of empowering disenfranchised groups, they are generally careful to note that local communities are not homogenous. Sabeel Rahman and Jocelyn Simonson, for example, in exploring mechanisms for "community control" over important institutions, recognize that "localities have historically been central to the construction of systemic racial and economic inequality," and that there are "dangers in relying on localism as a panacea."[246] The manifest heterogeneity of local interests is a thorn in the side of these important critical calls for localism.[247]

However, for the sake of the argument in this Article, we can put these worries about geography-based virtual representation to one side. Even if virtual representation does a reasonably good job of protecting the interests of nonvoters, the question remains whether its ability to do so depends in any way on underlying apportionment policy.

2. Virtual representation and apportionment

With this explanation and partial defense of a geography-based approach to virtual representation in view, the question is now whether the choice of apportionment base can upset the virtual representation of nonvoters. Recall the persistent refrain during disputes over apportionment that total-population apportionment is required to ensure that the right to representation is actually delivered to all who are entitled to it.[248] Because the right to representation far outstrips the right to vote, creating the vote-representation gap, that gap must be filled.[249] Fishkin's suggestion is that the gap is filled by geography-based virtual representation. This presses the question: Why would total-population apportionment be necessary to secure geography-based virtual representation?

Consider *M'Culloch v. Maryland* once again. By reinforcing the requirement that all real property in the state must be taxed equally, Chief Justice Marshall tethered the interests of the Bank of the United States to the interests of other real property owners across Maryland.[250] For that structural alignment of interests to work, it is irrelevant *how many* real

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of Black communities, see TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 49-79 (2016).

246. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 686-87 (2020).

247. *See generally* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019) (giving an overview of contemporary debates over localism).

248. *See supra* Part I.A.

249. *See supra* Introduction.

250. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37.

property owners there are in Maryland. The same basic principle applies to apportionment. If a nonvoting employee in the technology industry in King County, Washington is effectively virtually represented because her interests reliably align with the interests of her voting neighbors, then it is not clear why it should matter whether or not she was included in the apportionment base for that district. The alignment between her interests and those of her voting neighbors is impervious to apportionment. Those interests will continue to be aligned, whether the state of Washington opts for citizen-population apportionment, eligible-voter apportionment, total-population apportionment, or any other workable apportionment base. What matters is that her geographic region and the interests that are characteristic of the residents of that region receive representation.

Critics will object that leaving the nonvoting technology worker out of the apportionment base for the Washington State Legislature will deprive her of representation in the following sense: Suppose all residents of King County can be said to have substantively similar interests, such that any nonvoters living in the county will be adequately virtually represented by whomever the county voters elect. If the nonvoters are removed from the apportionment base, the apportionment base for King County will be a lower number than it otherwise would have been. When the entire state is apportioning representatives across the various districts, then, King County will likely receive fewer legislative seats. As a result, the proportion of seats in the state legislature occupied by people elected by King County voters will be lower than it otherwise would have been. Therefore, the objection runs, the nonvoters (and the voters, for that matter) of King County will receive less representation than they otherwise would have on a total-population apportionment scheme.

Call this the "King County objection." There are three responses to the King County objection.

a. Democratic representation

First, the giveaway word in the objection is "less"—the residents of King County will receive *less* representation. This presupposes that the operative sense of "representation" at issue here is understood in terms of legislative outcomes: The residents will receive less representation in the sense that their diminished presence in the state legislature will give them a diminished opportunity to secure their preferred legislative outcomes. This conception of representation raises several issues.

A legislative-outcome conception of representation is a contentious interpretation of the value of democratic representation, as a matter both of democratic theory and of American constitutional history. To begin with

democratic theory, many scholars would agree "that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions (or, more briefly, with *equal power over outcomes*)."[251] Yet few would peg the value of democratic representation *purely* to influence over outcomes. Instead, democratic theorists argue that the value of democracy is realized in its ability to promote the *best* outcomes (as opposed to one's own preference),[252] non-domination,[253] or non-subordination,[254] or its power to instantiate egalitarian relationships.[255] On these views, apportionment schemes could perhaps be evaluated for their tendency to publicly announce the status of all members of the community as equals.[256] But the relation between such egalitarian goals and the ability to secure legislative outcomes is at best unexplained.

Yet for our purposes, the larger obstacle facing this conception of representation is its poor fit with our constitutional tradition. The value of maximizing the chance of legislative success does not map easily onto the arguments canvassed in Part I. Nobody at the Founding or during the Reconstruction debates argued in terms of legislative success, let alone an appropriate proportion of legislative success to which anyone is entitled. Instead, their arguments were couched in the theory that achieving representation was a matter of forging the appropriate "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government."[257]

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251. CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 4 (1989); *see also* Levinson, *supra* note 62, at 120.

252. *See, e.g.*, DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 70-71 (2008) (arguing that democracy can be justified by how effectively it promotes justice); Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 280-81 (2001) (arguing that democratic procedures are effective at getting correct results on questions pertaining to justice).

253. *See, e.g.*, PETTIT, *supra* note 180, at 7-8 (arguing that democracy helps promote the value of non-domination).

254. *See, e.g.*, Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 316-17 (2014) (arguing that democracy helps promote the value of non-subordination).

255. *See, e.g.*, Daniel Viehoff, *Democratic Authority and Political Equality*, 42 PHIL. & PUB. AFFS. 337, 352 (2014) (arguing that democracy is justified in virtue of promoting egalitarian relationships among the population); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 313 (1999) (same).

256. *See* THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS 122 (2008).

257. *See* WILSON & M'KEAN, *supra* note 79, at 30-31. Joseph Fishkin has argued that, in addition to these "structural" values, we would be remiss in overlooking the role that individual rights rooted in dignity play in the law of democracy. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1333-34 (2011). Yet Fishkin

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b. A priori and ex ante perspectives on institutions

The second issue raised by the King County objection is reflected in the distinction made by political scientists between a priori and ex ante perspectives on the design of democratic institutions. A perspective is a priori if it only considers information about the size and procedural rules of a decision-making body—for example, that there are 10,000 people casting equally weighted votes for one candidate in a first-past-the-post single-member district.[258] By contrast, a perspective is ex ante if it also lets in information about the expected voting behavior or political preferences of members of the community, and can assign probabilities to outcomes as a result.[259]

The debates over apportionment and representation plainly adopt an ex ante perspective.[260] Yet the simple arithmetic embedded in the objection that the residents of King County will receive less representation relies solely on an a priori perspective, which undermines its main point. What the objection should really say is that, given a switch from total-population to eligible-voter apportionment, it is *possible* that King County's diminished presence in the state legislature will give its residents a diminished opportunity to secure their preferred legislative outcomes. Whether that possibility comes to pass depends

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is discussing the individual right to vote. When we are talking about the relationship between apportionment and representation, we are talking about structural values. *Cf.* Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1678 (2001) (emphasizing the fact that the concept of representation applies to groups and is a structural value).

258. *See* Beitz, *supra* note 251, at 337-38 (citing ANNICK LARUELLE & FEDERICO VALENCIANO, VOTING AND COLLECTIVE DECISION-MAKING: BARGAINING AND POWER 67-69, 123-27 (2008)). *See generally* DAN S. FELSENTHAL & MOSHÉ MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES (1998) (clarifying the concept of an a priori perspective in political science); PETER MORRISS, POWER: A PHILOSOPHICAL ANALYSIS 154-98 (2d ed. 2002) (same).

259. *See* Beitz, *supra* note 251, at 338.

260. In fact, they may need an even more robust perspective, allowing in more information than is available on an ex ante perspective. For example, Beitz has argued that other institutional design features—most importantly the adoption of single-member districts—exert an outsized influence on legislative agenda-setting, and that "[t]he effects of the determination of the legislative agenda on the chances of individual voters of getting the *legislative* outcomes they want most likely swamp those of differences in *ex ante* voting power." *See* Beitz, *supra* note 251, at 343 (citing GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 1-13 (2005)).

on other facts: how polarized voting is along partisan dimensions, for example, and how such a shift would alter the partisan balance in the state legislature.[261]

Lani Guinier has made a related point in her criticism of the "black electoral success theory" that dominated the second generation of litigation under Section 2 of the Voting Rights Act.[262] Guinier argues forcefully that both the statutory language of the VRA and the "linchpin of pre-1982 constitutional dilution challenges" focused on "unresponsiveness," but since the concept of legislative unresponsiveness posed such thorny evidentiary challenges for courts, it was dropped and replaced instead with a simpler goal of electing minority-preferred candidates.[263] Guinier's critique of this legal and political strategy is multifaceted, but relevant here is her argument that the election of a group's or individual's preferred candidate in a single-member district to a legislative assembly does not bear a straightforward relationship to the legislative enactment of policies that would be preferred by those groups or individuals.[264] Once again, the problem follows from adopting a legislative-success conception of representation, as both the King County objection and Lani Guinier do. There is no straightforward relationship between the number of elected officials chosen by the electors of King County and the attainment of the legislative outcomes that are, *ex hypothesi*, preferred uniformly by all residents of King County.

c. The wrong in shifting apportionment base

Nevertheless, we can again assume for the sake of argument that there is a predictable relationship between a shift in apportionment base and a reduction in representation for the residents of regions like King County with a high proportion of nonvoters, where representation is understood in terms of

261. *See* Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIF. L. REV. 1019, 1021-22 (2021) (analyzing a few states from an ex ante perspective and predicting mixed partisan results).

262. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1094-95 (1991) [hereinafter Guinier, *Tokenism*]; *see also* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1415 (1991) ("The second-generation remedial agenda is premised on the notion that black representatives, elected from majority-black subdistricts and electorally accountable only to black voters, will represent those voters' concerns from their newly established legislative seats.") [hereinafter Guinier, *No Two Seats*].

263. Guinier, *Tokenism*, *supra* note 262, at 1095-96.

264. Guinier, *No Two Seats*, *supra* note 262, at 1448 ("[S]econd-generation litigation is premised on the assumption that, by increasing the number of black representatives, single-member district voting will ensure that blacks have effective representation. . . . [T]his assumption is in error: effective representation is not just the process of reelection; it is the policy-centered process of governing responsibly.").

securing legislative outcomes. There is a still a fundamental problem with this argument for total-population apportionment: Even supposing we can predict that some residents—voters and nonvoters alike—will lose representation in the above sense, we are without an argument that such a loss of representation would be *wrong*.

The crux of the argument linking a commitment to universal representation to a requirement of total-population apportionment is the idea that some people will lose some of the representation they currently enjoy if their state changes to an eligible-voter apportionment scheme. However, in the context of the present constitutional and normative controversy, it is illegitimate to privilege the status quo of total-population apportionment in this way. The eligible-voter apportionment advocate argues that the level of representation currently enjoyed under the total-population apportionment scheme is unwarranted because it is premised on a misunderstanding of the constitutional commitment to political equality. Therefore, simply pointing out that the status quo would be altered—that the amount of representation people currently enjoy under a total-population scheme would be different under an eligible-voter scheme—is not a good argument. It is an example of status quo bias: an unjustified normative preference for the way things currently are.[265] To see this, observe that if states had traditionally opted for an eligible-voter apportionment scheme, it would be a bad constitutional argument for total-population apportionment to point out that such an apportionment base would *increase* the amount of representation for some members of the polity.[266]

A related problem with this approach is that it is very difficult, if not impossible or senseless, to specify the quantity of legislative success to which any particular individual or group is entitled.[267] The rejection of such a

265. For an introduction to status quo bias, see generally Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, *in* CHOICES, VALUES, AND FRAMES 159 (Daniel Kahneman & Amos Tversky eds., 2000).

266. This is an example of the "reversal test" for exposing status quo bias. *See* Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 ETHICS 656, 664-65 (2006).

267. One possibility is that each individual or group merits equal legislative success. *Cf.* CHRISTIANO, *supra* note 256, at 84-85 (responding to a hypothetical query of how much welfare democratic citizens are entitled to by arguing that the answer should be *equal* welfare). The leading institutional proposal for implementing this idea is some form of proportional representation. *See, e.g.*, Guinier, *Tokenism*, *supra* note 262, at 1136-44. Though it deserves more detailed treatment, I set this proposal aside here because of the legal difficulties facing proportional representation in the United States. In *City of Mobile v. Bolden*, a plurality of the Supreme Court rejected the idea that "[t]he Equal Protection Clause of the Fourteenth Amendment . . . require[s] proportional representation as an imperative of political organization." 446 U.S. 55, 75-76 (1980)
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substantive standard lies behind the Court's *Carolene Products* jurisprudence and the political process theory that has grown up around it.[268] Yet critics could urge that political process theory itself provides an argument linking universal representation to total-population apportionment. While we may be unable to specify the proportion of legislative success to which any individual or group is entitled, we can make sure that the process of securing legislative successes is working properly. The King County objection claims that it would be unfair, and hence distort the proper functioning of the legislative process, to exclude a group of people who are entitled to representation from the apportionment base used in electing representatives. However, this objection simply begs the question. We should only think that the exclusion of a group from the apportionment base introduces a *distortion* into the political process if we have reason to believe that this exclusion will lead to a diminished opportunity of securing desired legislative outcomes. But it would be circular to cite this ideal of legislative success as a reason why the system needs to be set up in a particular way—i.e., with total-population apportionment—in order to function properly.

We cannot point to legislative success as a factor in deciding whether the political process is functioning properly: The point of turning to a study of the political process is to avoid having to make these contentious, substantive judgments about what would count as an adequate quantity of legislative success.[269] But that is not to say that the political process approach offers no insight into this problem. The insight can be salvaged by noting that we could look to *other* potential defects in the political process that could be introduced by a switch from total-population to eligible-voter apportionment. Yet to pursue this line of thought, we need to have more of the political process in

(plurality opinion). While the 1982 amendments to the VRA repudiated the core holding of *Bolden*, the legislative debates show that the Senate conditioned its acceptance of the new bill on a rejection of the idea that it committed to proportionate representation. This is the legacy of the so-called Mathias-Hatch colloquy and the Dole Compromise. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1414-20 (1983) (chronicling the debate over the reenactment of the Voting Rights Act). Guinier maintains, partly on normative grounds, that the VRA should be interpreted to contain a mandate for proportional representation. *See* Guinier, *Tokenism*, *supra* note 262, at 1136-44. I do not take a side in this debate, since the present Article is concerned with constitutional arguments.

268. For the classic statement on political process theory, see generally ELY, *supra* note 225. *See also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748 (1991) (arguing that it is appropriate to "rehabilitate political process theory").

269. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 783 (2022).

view. We need to turn to the role that the First Amendment's protections of participatory democracy play in the political process, and how apportionment may distort these. That is the subject of Part III.

III. The Petition Clause and Total-Population Apportionment

The Constitution provides a mechanism for allowing all residents of a geographically defined district—including nonvoters—to actively influence their representatives: petitioning.[270] Combined with the Constitution's commitment to universal representation, the Petition Clause should be interpreted to mandate total-population apportionment. All bona fide residents of the nation have an equal right to be represented.[271] But as we have seen, that right is not effectively realized by mere fiat.[272] Some structure or mechanism must be available to secure representation. For many, that mechanism is the elective franchise. For nonvoters, however, as Part II demonstrated, mere virtual representation does not suffice.[273] Instead, this Part shows how the Petition Clause guarantees a right for all residents to directly make claims on their representative. Because the Constitution guarantees an *equal* right to representation,[274] the ability to influence representatives must be at least formally equal. The only way to achieve this is to guarantee that all representatives have the same number of constituents who can petition them. In other words, the Constitution mandates total-population apportionment.

The Petition Clause confers a right to equal access to one's representative in order to make claims on that representative.[275] That is why it requires total-population apportionment. Of course, an equal right to petition does not guarantee substantive representation in terms of the outcomes of political decision-making. Nor does an equal right to vote guarantee that one's preferred candidates or policies will prevail. But petitioning, as a nonelectoral way of attempting to secure representation, is fundamentally different from casting a vote or exercising one's right of free speech in order to influence political debate and electoral outcomes. Petitioning is a right to demand recognition

270. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

271. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016) ("As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.").

272. *See supra* Part II.A.

273. *See supra* Part II.B. Or, to the extent that virtual representation is effective, its effectiveness does not depend on the underlying apportionment base. *Id.*

274. *Supra* note 271.

275. *See infra* Part III.B.

from one's representative.[276] Unlike virtual representation, petitioning is not primarily about electoral outcomes; it thus makes sense to provide it equally.

This contrast between petitioning's emphasis on claims and recognition and the electoral emphasis on decision-making outcomes has an important doctrinal consequence. The Petition Clause has a different theoretical, historical, and doctrinal foundation from the Free Speech Clause.[277] This means that unhelpful precedents rooted in the Free Speech Clause—most notably *Buckley v. Valeo*'s rejection of political equality as a legitimate reason for limiting electoral speech—do not pose obstacles to a right, rooted in the Petition Clause, to equal access to one's representative.[278]

Part III.A provides historical and theoretical context for the role petitioning plays in securing representation. Part III.B elaborates on the claim that the Petition Clause requires total-population apportionment because it secures representation by linking residents to representatives. It also explains briefly how this proposal has been overlooked. Finally, Part III.C explains why *Buckley*'s rejection of political equality is irrelevant to the Petition Clause's guarantee of equal access to representatives.

A. The Historical Practice of Petitioning

Arguably no unrepealed part of the Constitution has undergone a more dramatic fall from grace than the Petition Clause, along with the practice of petitioning that it was originally understood—and long functioned—to protect. The right to petition was central to King John's capitulation in the Magna Carta and was historically seen as "the cornerstone of the Anglo-American constitutional system."[279] It was included in the first modern bill of rights in 1689 and is included in the charters of most European Union (EU) member states, as well as the EU Charter of Fundamental Rights.[280] Petitioning played a central role in developing colonial and state legislatures in America.[281] As historian Daniel Carpenter explains, "Petitions dominated the life and work of early Anglo-American legislatures."[282]

276. *See* McKinley, *supra* note 65, at 1145-46.

277. *See infra* Part III.B.

278. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

279. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1153 (1986).

280. Ulrich K. Preuß, *Associative Rights (The Rights to the Freedoms of Petition, Assembly, and Association), in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 949, 949-50 (Michel Rosenfeld & András Sajó eds., 2012).

281. *See* CARPENTER, *supra* note 57, at 63.

282. *Id.*

Petitioning was consequently long-cherished as a fundamental civil liberty.[283] William Lloyd Garrison's abolitionist newspaper *The Liberator* wrote in 1837 that "the right of petition is one of the most sacred ever enjoyed by man. When that is lost, there is little left in civil government which is valuable."[284] It was only when petitioning exploded in popularity as a tool of abolitionists in the 1830s (aiming to draw Southern legislators into open debate on slavery) that it began its terminal decline and eventual disappearance as a distinctly acknowledged right in American constitutional law.[285]

As Daniel Carpenter's recent definitive history of American petitioning demonstrates, petitioning was originally understood to be an enormously popular, powerful, empowering, and inclusive political technology,[286] a status it retained into the nineteenth century.[287] Petitioning was a nonelectoral mechanism relied on to build, organize, and institutionalize contestatory power.[288] Petitioning, enjoyed on an equal basis, thus emerges as a tailor-made mechanism to bridge the vote-representation gap in a society committed to universal representation.

Petitioning has long been an important political tool for the historically disempowered and marginalized—the "political outsiders."[289] On February 21, 1838, Angelina Grimké took the floor of the Massachusetts General Court, becoming the first woman recognized to speak before a U.S. legislature.[290] She was invited to read and present her petition, with over 20,000 signatures from

283. *See* Smith, *supra* note 279, at 1170-75 (describing the widespread use of petitioning in the American colonies).

284. CARPENTER, *supra* note 57, at 314 (quoting LIBERATOR, June 23, 1837, at 2).

285. *See* Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 158 (1986).

286. *See* CARPENTER, *supra* note 57, at 24-27.

287. *See id.*

288. *See supra* note 63.

289. The term "political outsiders" is from Ross, *supra* note 58, at 2191. Focusing on strategies for political participation among "political outsiders" is an important theme in recent scholarship on law and social movements. *See, e.g.*, Akbar et al., *supra* note 63, at 859-60 (articulating their concept of "movement law," and emphasizing that it aims to "unearth[] alternative arcs of history, often ignored in legal discourse, of people collectively generating ideas and struggling to build and practice alternative possibilities[] from the bottom up . . . ."); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 843-845 (2021) (looking for ways that "institutional and policymaking processes [can] be structured to facilitate collective resistance" and other forms of "contestatory democracy"); Rahman & Simonson, *supra* note 246, at 690 (seeking "to better enable countervailing interests and community groups to assert their views, to hold governments and other actors to account, and to claim a share of governing power").

290. CARPENTER, *supra* note 57, at 56, 324.

Black and white residents, calling on the legislature to endorse abolition in the District of Columbia.[291] By the 1830s, petitioning was well-established as a vital tool for democratization and, in particular, for the inclusion in high politics of otherwise disenfranchised persons and interests.

Almost forty years earlier, Black Freemen in Philadelphia presented the U.S. Congress with "The Petition of the People of Colour, Freemen within the City and Suburbs of Philadelphia," in which they called on Congress to effectively enforce the Slave Trade Act of 1794.[292] At the time, it was uncertain whether slaves could petition Congress (they had more success in state legislatures, especially in the North), so the Philadelphia petitioners argued that they were "authorized to address and petition [Congress] [o]n their behalf" since the slaves are "objects of representations in your public Councils, in common with ourselves and every other class of Citizens within the Jurisdiction of the United States . . . ."[293]

As Carpenter shows, "Petitions flowed abundantly from people of color in the post-Revolution world."[294] This included Native Americans, who relied on petitions in diplomatic negotiations with the federal government, including successful efforts in the 1830s and 1840s by the Seneca in New York and the Ojibwe in Michigan to preserve reservation land and treaty rights.[295] Petitioning even became the form of political engagement most available to young people, as "girls and boys aged eight to twelve began to circulate and sign petitions in the 1820s and 1830s."[296]

Petitioning is important in part because it is nonelectoral. This insight echoes another important strand in the recent scholarly analysis of social movements.[297] Two deficiencies sharply limited the capacity of elections to

291. *Id.*

292. *Id.* at 170-71.

293. *Id.* at 168-71.

294. *Id.* at 67.

295. *See id.* at 416-29.

296. *Id.* at 46.

297. *See, e.g.*, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 578 (2021) ("[E]fforts to protect the right to vote at the individual level are essential. But participation through voting is only one small way in which citizens participate in politics and governance. Likewise, making it easier for a diverse range of participants to lobby, or to engage in the regulatory process more broadly, are worthy goals. But without greater organization, poor and working-class Americans are unlikely to engage their legislators or the administrative state effectively."); Guinier & Torres, *supra* note 63, at 2751 (encouraging "greater attention to the lawmaking (not just election-defining) effects of movements"); Pope, *supra* note 63, at 311 (distinguishing between "representative politics-as-normal" and other forms of politics, including "direct popular power").

forge a representative chain of communication between the people and government officials. The first is implicit in the above discussion of petitioning among the disenfranchised: Elections were primarily limited to white men.[298] The second deficiency is intrinsic to elections: They are episodic.[299] By contrast, petitions offered an expressive and timely mechanism to communicate with government, providing a more effective route to discerning "public opinion."[300] They also offered politicians powerful tools with which shape the legislative agenda between elections. This is strikingly illustrated by Massachusetts Senator Charles Sumner's decision, in February 1864, to ask two Black men to deliver to his office a petition with nearly 100,000 signatures calling on Congress to abolish slavery by constitutional amendment, thereby giving vital momentum to the political effort that would result in the Thirteenth Amendment.[301]

The other crucial difference between petitions and elections is that petitions allow signatures—voices—to be aggregated and joined together in a single statement of political will.[302] This feature helps explain the indispensable role that petitioning has played in political organizing and building democratic organizations.[303] Gathering petition signatures continues to serve as a vital way to develop a network in many political campaigns, and is often the first "ask" that organizers make of people whom they are recruiting as members of an organization or as supporters of a particular cause.[304]

298. *Supra* Part II.

299. *See* CARPENTER, *supra* note 57, at 44 ("The quotidian character of the petition stands in sharp contrast with the episodic nature of elections.").

300. *See id.* at 457-58; *id.* at 479 ("When legal changes favored those who could not vote . . . the resulting changes remain difficult to explain by reference to electoral or partisan politics, at least without including petitioning as central within those politics."); *cf.* PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST 30 (Arthur Goldhammer trans., 2008) ("Calls for surveillance of government by public opinion became common in [the French Revolutionary] period because the term and its associated images were useful for resolving the great problem of popular sovereignty.").

301. CARPENTER, *supra* note 57, at 462.

302. For a discussion of the importance of political organizing to the health of a democracy, see generally J. Colin Bradley, *Solidarity, Legitimacy, and the* Janus *Double Bind*, 131 YALE L.J.F. 823 (2022).

303. Law and social movement scholars also emphasize the centrality of building democratic institutions. *See, e.g.*, Andrias & Sachs, *supra* note 299, at 551; Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 211 (2019) (emphasizing the "mobilizing capacity of the justice system" in a recent reconceptualization of criminal justice policy); NeJaime, *supra* note 63, at 877 ("Social movement scholars analyze . . . the ways in which movements mobilize constituents and persuade others to support their objectives.").

304. *See, e.g.*, *Organizing Toolkit*, CHANGE.ORG, https://perma.cc/8Z6Y-HU5R.

Throughout the eighteenth and nineteenth centuries, "the entrepreneurs and radicals who founded new organizations . . . knew intimately the powerful feedback between petitioning and organization building."[305] Carpenter documents the use of petitions as an organizing tool for benevolent societies, trade unions, temperance societies, antislavery societies, farmers' organizations, tenants' organizations, and Indigenous lobbies.[306]

Petitioning was also vital in the development of electoral politics itself. Petitioning campaigns ushered in the widespread expansion of the franchise after the War of 1812 and initiated and influenced state constitutional conventions throughout the nineteenth century.[307] Henry Clay and other Whig opponents of Andrew Jackson's massive Democratic Party also used petitions as a way of signaling the democratic legitimacy of their opposition to Jackson, thereby ushering in competitive party politics in its modern form.[308]

Perhaps the most surprising feature of early American petitioning—and the most foreign to contemporary observers—is that petitioners rightfully expected a formal hearing and an answer.[309] Early Congresses would devote several scarce days to the ceremonial reading of petitions on the assembly floor.[310] Occasionally, legislatures, executives, and courts would seek to exclude or refuse a petition on the grounds that its subject matter exceeded the jurisdiction of the body to which it was presented.[311] The most dramatic instance of this was the insistence of John C. Calhoun and other antebellum southern congressmen that abolitionist petitions to Congress were not entitled to a hearing because, in their view, Congress had no jurisdiction to weigh in on slavery in the existing states.[312] This was the basis of the so-called "Gag Rule" that, ironically, led to an explosion in the number of petitions drafted and signed, but which could not get a hearing in Congress.[313] But this procedural maneuvering only makes sense against the background presumption that petitions were entitled to a hearing and a response. Petitions were thus the institutionalized form of contestation par excellence in early American democracy.

Early American political culture, both before and after the Revolution and the ratification of the Constitution, centered petitioning as a mechanism for

305. CARPENTER, *supra* note 57, at 45.

306. *See id.* at 44-45.

307. *See id.* at 244-45.

308. *See id.* at 274.

309. *See id.* at 59; Higginson, *supra* note 285, at 142-43; McKinley, *supra* note 65, at 1145-46.

310. CARPENTER, *supra* note 57, at 63.

311. *See* Higginson, *supra* note 285, at 159-61.

312. *See id.* at 160-61.

313. *See id.* at 143-44, 158; CARPENTER, *supra* note 57, at 300.

bringing millions of otherwise excluded residents into politics and into direct contact with all levels of government. It was the most widely used and, in some sense, the most important link in the chain of communication between the people and elected officials. As a result, petitioning was the primary mechanism by which the otherwise disenfranchised pursued representation in the halls of power. It was how early Americans understood representation to be *actual* instead of merely virtual. Petitioning, and its constitutional enshrinement in the Petition Clause of the First Amendment, provides the link between the right to representation and the apportionment of legislators, particularly in the case of the disenfranchised. It performs a distinctive function in the Constitution's narrative of "democracy in action."[314]

B. Petitioning and the Equal Right to Access Representatives

Petitioning helps secure representation by giving residents a right to make claims on their legislators. It forms an essential link in the "chain of communication" essential to the Founding vision of representative democracy.[315] For many Americans of the Founding generation, rejecting British virtual representation and adopting a new American form of actual representation entailed a *right to instruct* elected representatives. Leading up to the Revolution, several colonial governments began giving instructions to representatives to ensure the decisions they made were genuinely representative.[316] Under the Articles of Confederation, state delegates to the Confederation Congress could be bound by instructions issued by the state legislature, and were subject to recall and loss of salary if they deviated from their instructions.[317]

But the mechanism was controversial, and this controversy erupted during debate in the First Congress over what would eventually become the First Amendment.[318] Some believed instructions were the only way to be definitively rid of the evils of virtual representation. For example, Elbridge Gerry of Massachusetts argued that, without the right to instruct, the people

314. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 20 (2015).

315. *See supra* Part II.A.

316. *See* McKinley, *supra* note 65, at 1147-48 (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 189 (1969)); Christopher Terranova, Note, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. REV. 1331, 1331 (2009).

317. McKinley, *supra* note 65, at 1147 (citing John P. Kaminski, *From Impotence to Omnipotence: The Debate over Structuring Congress Under the New Federal Constitution of 1787*, *in* THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 1, 25-26 (Kenneth R. Bowling & Donald R. Kennon eds., 2002)).

318. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1093-95 (Bernard Schwartz ed., 1971).

would be giving up their sovereignty to a wholly independent body.[319] But others, including ultimately a majority, found instructions to be too restrictive in even a mildly pluralistic and heterogenous society.[320] Binding a delegate with instructions prevented them from accommodating any dissenting voices outvoted in the body issuing the instruction, and also prevented the representative body from being "an independent and deliberative body" of the sort that Madison had envisioned: One capable of skimming the cream off the top of society, and enlarging and refining the sentiments of the people.[321]

Congress voted down a motion to include a right to instruction among the enumerated liberties of the First Amendment.[322] But Madison was sensitive to the idea that the independence of representatives "was potentially in tension with the 'chain of communication' necessary to connect representatives to their constituents."[323] The solution proposed to address this possible disconnect—which threatened to make a mockery of the idea that the Americans had really disavowed virtual representation—was the First Amendment. Madison argued that, with the First Amendment:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will."[324]

Madison understood these First Amendment freedoms to effectively substitute for a distinct right of instruction.[325] Among them, petitioning is the most relevant to apportionment since it bears directly on the relationship between constituents and representatives. By ensuring that all residents—including noncitizens, those too young to vote, and those disenfranchised by incarceration—can access their representative to make claims on her, petitioning serves two interrelated functions. First, it requires representatives to consider the views of all their constituents, not just those whose votes or voices are likely to make a difference for reelection. Indeed, the fact that the right to petition extends beyond the right to vote was crucial to its victory over the right to instruction in the drafting of the First Amendment.

319. *Id.* at 1099 (quoting Rep. Elbridge Gerry).

320. McKinley, *supra* note 65, at 1147-49.

321. 2 THE BILL OF RIGHTS, *supra* note 318, at 1093 (quoting Rep. George Clymer).

322. *Id.* at 1103-05.

323. POST, *supra* note 194, at 13.

324. 1 THOMAS HART BENTON, ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 141 (New York, D. Appleton & Co. 1857); *see also* POST, *supra* note 194, at 13.

325. *See* POST, *supra* note 194, at 13 (explaining that Madison concluded that "[w]ith such freedoms . . . there was no need for a distinct right of instruction").

Petitioning—alongside other structural protections of the Constitution—was explicitly envisioned as a core tool in overcoming the vote-representation gap for those who are entitled to representation, but who cannot vote.

Second, petitioning confers a dignitary value on the petitioner by allowing her to make a claim on her representative, and to do so on an equal basis with any other constituent. Unlike the mere fact of being included in the apportionment base, one's equal right to petition confers a sense of dignity.[326] A resident knows she is a member of the political community, not because she is counted numerically, but because she is entitled to make claims on her representative, and her representative is obligated to receive them. This ability to petition one's representative does not mean that a resident will persuade her representative to enact her preferred policy goals. But democratic inclusion is not simply about getting one's preferred policy outcomes. It is often thought that democratic inclusion is fundamentally about being treated with "equal concern" as a full member of the political community, equal to all others.[327] The best way to demonstrate equal concern would, of course, be extending the right to vote to all members of the community. This would give each person an equal opportunity to influence the outcomes of elections, and thus at least indirectly to influence the outcomes of political decision-making processes.[328] Yet if we take for granted the current political consensus that we will remain short of universal enfranchisement for at least the near-term future,[329] an equal right to access one's representative—that is, a requirement of total-population apportionment—is the next best option.

Under a scheme of total-population apportionment, each representative answers to the same number of constituents. It is true that representatives under such a scheme will answer to different numbers of *voters*.[330] But representatives answer to more than voters—they answer to all constituents.[331]

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326. *See* Feinberg, *supra* note 12, at 252 (arguing that the recognized capacity to make a claim may be the core of human dignity).

327. *See, e.g.*, T.M. SCANLON, WHY DOES INEQUALITY MATTER? 9 (2018) (articulating the democratic value of "equal concern").

328. *See* Niko Kolodny, *Rule Over None I: What Justifies Democracy?*, 42 PHIL. & PUB. AFFS. 195, 197-98 (2014).

329. *But see supra* note 27 and accompanying text (discussing the possibility that this consensus is evolving).

330. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1125 (2016).

331. *Id.* at 1132 ("As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.").

What distinguishes the Petition Clause approach to apportionment from the virtual representation approach is the understanding of what it means for a representative to "answer to" her constituents. On the virtual representation approach, a representative does not *really* answer to her nonvoting constituents at all. She answers to her voting constituents and then, hopefully, doing so correlates with pursuing the policy preferences of voting and nonvoting constituents alike.[332] On the Petition Clause approach, by contrast, a constituent may demand an answer by presenting a petition to her representative. There are no guarantees about what happens next—whether the petition translates into legislative action or the provision of constituent services. But the right to petition only indirectly concerns what happens after the petition is delivered and considered. The point is that by guaranteeing the availability of this nexus of claim and answer, the Petition Clause provides a way for all members of the political community to meaningfully pursue their own representation.

The availability of this form of representation—the right to petition one's representative, to make a claim and receive consideration—is something that can be provided equally to all members of the community. The Petition Clause therefore guarantees a right of *equal* access to one's representative. This is what the Ninth Circuit held in 1990 in *Garza v. County of Los Angeles*.[333] *Garza*'s central constitutional argument was that the right to petition is a necessary corollary to the right to representation, and an eligible-voter apportionment scheme would unduly burden the right to petition of all residents—voters, noncitizens, and young people under eighteen—living in districts with a high proportion of nonvoters.[334] The court argued that, "[s]ince 'the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives,' this right to petition is an important corollary to the right to be represented."[335] The effect of eligible-voter apportionment would be to "interfere[] with individuals' free access to elected representatives" by overpopulating some districts and thus overburdening the representatives of those districts.[336] The inequities that flow from unequally populated districts must be avoided so that "those who cannot or do not cast a ballot may still have some voice in government."[337]

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332. *See supra* Part II.B.

333. Garza v. County of Los Angeles, 918 F.2d 763, 774-76 (9th Cir. 1990).

334. *Id.* at 775.

335. *Id.* (quoting E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961)).

336. *Id.*

337. *Id.* (quoting Calderon v. City of Los Angeles, 481 P.2d 489, 493 (1971)).

The claim that the Petition Clause confers an *equal* right to access one's representative has been challenged. The petitioners in *Evenwel*, while making their case that the Constitution requires eligible-voter apportionment, sought to cast aside the *Garza* approach, arguing that "[t]he Petition Clause does not include a right to 'equal access.'"[338] Troublingly, Justice Ginsburg's opinion for the *Evenwel* Court indicated that it accepted this general idea, saying in a footnote that the petitioners "*point out* that constituents have no constitutional right to equal access to their elected representatives."[339]

This challenge to the right to equal access is based on a mistake. The contention that the Petition Clause lacks an equality requirement rests on the conflation of the Petition Clause with the Free Speech Clause. The *Evenwel* petitioners cited *Buckley v. Valeo* repeatedly.[340] Quoting *Buckley*, they argued that, "just as there is no interest under the Free Speech Clause 'in equalizing the relative ability of individuals and groups to influence the outcome of elections,' there is no protectable interest under the Petition Clause in equalizing the access of constituents to their elected representatives."[341]

Buckley held that certain restrictions on independent campaign expenditures violated the Free Speech Clause.[342] More broadly, it has come to stand for a rejection in American constitutional law of a certain ideal of political equality.[343] The campaign financing laws at issue in *Buckley* were defended on the grounds that equal political participation required limiting the influence that some members of the polity could achieve by independently—i.e., not in coordination with candidates' campaigns—spending large sums of money on advertising and other forms of mass-media communications.[344] The Court emphatically rejected this argument, holding that political equality may not be furthered by limiting the right to engage in political speech.[345]

If *Buckley*'s holding and rationale extend to the right to petition, it threatens to undercut the claimed right to equal access to representatives. This

338. Brief for Appellants at 40, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 4624625, at *40.

339. *Evenwel*, 136 S. Ct. 1120, 1132 n.14 (2016) (emphasis added).

340. *E.g.*, Brief for Appellants at 40, *Evenwel*, 136 S. Ct. 1120, 2015 WL 4624625, at *40.

341. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam)) (citation omitted).

342. *Buckley*, 424 U.S. at 143.

343. *See, e.g.*, J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982) (criticizing *Buckley* for misreading the First Amendment).

344. *See Buckley*, 424 U.S. at 39-59.

345. *Id.* at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

is what the *Evenwel* petitioners suggested, and what Justice Ginsburg seemed to uncritically assume.[346] But this is a mistake. *Buckley*'s rationale is firmly rooted in the principles underpinning the Free Speech Clause and the Court's political speech jurisprudence. The Petition Clause has a separate rationale, separate doctrinal development, and separate historical grounding. It is simply wrong to conflate the two.

The reasoning in *Garza*, unfortunately, invited this conflation. Faced with the Supreme Court's erasure of a self-standing Petition Clause, the Ninth Circuit reached for what it viewed as the next best thing: public forum analysis under the Court's Free Speech jurisprudence.[347] The problem with treating access to representatives as a public forum under the First Amendment, however, is that it imports a formalistic concept of equality from that area of law. Under prevailing public forum analysis, a "generally applicable law[]" which does not target expression in the relevant forum at all, let alone discriminate between various viewpoints in that forum, is only subject to rational basis review.[348] An apportionment plan, on this understanding, would be subject to rational basis review. That standard would give a reviewing court little choice but to defer to a state's non-invidious choice between total-population, eligible-voter, or any other apportionment base.

The court in *Garza* was tempted into this mistake by the Supreme Court's erasure of a self-standing Petition Clause.[349] But as Maggie Blackhawk has demonstrated, the Court simply erred in its erasure of an independent Petition Clause.[350] Before assimilating the Petition Clause to the Speech Clause, the Court recognized a petition right that protected lobbying,[351] potentially anticompetitive public relations campaigns,[352] access to courts and soliciting

346. *Evenwel*, 136 S. Ct. at 1132 n.14.

347. *See* Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521, 532-33 (1994).

348. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); *see also id.*

349. *See* McDonald v. Smith, 472 U.S. 479, 485 (1985) ("The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.") (citations omitted); Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.").

350. McKinley, *supra* note 65, at 1176-77.

351. *See* United States v. Harriss, 347 U.S. 612, 617, 627 (1954).

352. *See* E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

civil rights plaintiffs,[353] and habeas petitioning by "jailhouse lawyers."[354] But after the conflation, the independent history and normative significance of the Petition Clause was lost to the Court. Thus in 1984, in *Minnesota State Board for Community Colleges v. Knight*, the Court upheld a state labor law requiring the community college to "meet and confer" over employment contract terms only with an appointed faculty union representative.[355] The appellees argued that the Petition Clause guaranteed individual employees the right to "meet and confer" over employment and administrative matters with the school officials.[356] Understanding the claim to be rooted in an unlimited right to petition, the Court could only fathom this as an asserted "right to participate directly in government."[357] Somewhat scandalized, the Court asserted baldly that "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."[358]

Such an unlimited right of direct participation would indeed be unprecedented.[359] But that is not what the Petition Clause was ever intended, understood, or practiced to mean.[360] And as the next section shows, the First Amendment—the Petition Clause in particular—*does* require policymakers to listen and to respond, and to do so on an equal basis.[361]

C. Petitioning and Equality: Why *Buckley* Doesn't Matter

The Supreme Court re-awakened the possibility of an independent Petition Clause jurisprudence in its 2011 opinion in *Borough of Duryea v. Guarnieri*.[362] There, both the majority opinion by Justice Kennedy and Justice

353. NAACP v. Button, 371 U.S. 415, 444 (1963) (striking down a Virginia law prohibiting the solicitation of civil rights plaintiffs). *But see* Ross, *supra* note 58, at 2198 (characterizing *Button* as a case implicating the right to association).

354. Johnson v. Avery, 393 U.S. 483, 489-90 (1969) (striking down a Tennessee law banning the practice of "jailhouse lawyers" helping prisoners to file habeas petitions).

355. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 291-92 (1984).

356. *See id.* at 280-85.

357. *Id.* at 284.

358. *Id.* at 285.

359. And arguably undesirable. *See generally* GIANPAOLO BAIOCCHI & ERNESTO GANUZA, POPULAR DEMOCRACY: THE PARADOX OF PARTICIPATION (2017) (outlining ways in which increasing opportunities for direct democratic participation may facilitate elite capture of democratic institutions).

360. *See generally* McKinley, *supra* note 65 (tracing the development and erasure of Petition Clause jurisprudence).

361. *Infra* Part III.C.

362. 564 U.S. 379, 382-83 (2011).

Scalia's concurring opinion pointed the way toward distinguishing the Free Speech and Petition Clauses in virtue of the different values underlying each.[363] Justice Kennedy explicitly linked the Free Speech Clause with electoral deliberation and contrasted the petition right, which, he wrote, "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives."[364] Justice Kennedy recognized that petitioning is centrally about engaging with and influencing government officials *between* elections.[365] By contrast, the Free Speech Clause has long been closely identified with *electoral speech*.[366] The difference is consequential and bears directly on the need to distinguish *Buckley*'s rejection of political equality from the *Garza* strategy of rooting total-population apportionment in a right to equal access to representatives.

As we have seen, a self-standing Petition Clause should not be interpreted as applying in the first instance to electoral speech; rather, insofar as it applies to speech, it applies to speech between constituents and their representative.[367] Consequently, none of the objections recognized by *Buckley* to a law regulating political speech are applicable to a principle regulating access to elected officials.

Buckley held that it is both *impermissible* and *unnecessary* to limit anyone's right to engage in political speech for the sake of "equalizing the relative ability of individuals and groups to influence the outcome of elections."[368] It is impermissible because the Free Speech Clause "has its fullest and most urgent application to speech uttered during a campaign for political office."[369] Political speech enjoys special protections in order to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[370] Limiting political speech is also unnecessary, according to *Buckley*, because there is no scarcity in opportunities to engage in

363. *Id.* at 387-88 (majority opinion); *id.* at 404-05 (Scalia, J., concurring in the judgment in part and dissenting in part).

364. *Id.* at 388 (majority opinion).

365. *See id.*

366. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (Black, J., concurring); *see* MEIKLEJOHN, *supra* note 64, at 24-25 (defending a principle of free speech rooted in the value of democratic elections).

367. *Supra* Parts III.A-.B.

368. Buckley v. Valeo, 424 U.S. 1, 48 (1976).

369. Citizens United v. FEC, 558 U.S. 310, 339-40 (2010) (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)) (internal quotation marks omitted).

370. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

political speech: One person's speech does not take away another person's opportunity to speak.[371]

Neither of these objections bears on the Petition Clause's guarantee of a right of equal access to one's representative. First, access to representatives *is* a scarce resource.[372] Indeed, recognizing this fact is part of what led the Court to back away from the right to petition beginning in the 1970s.[373] Scarcity necessitates some principle regulating that access. The obvious principle is equality; the alternative would be merit, but this would violate deeply held principles of political equality. But unlike electoral speech, equality of access can be guaranteed without *limiting* anyone else's right. Equal speaking time can only be achieved by cutting off someone's speech, but equal access can be achieved without limiting anyone's ability to present petitions. The right of equal access to representatives is easy to provide: It is in principle secured by a total-population apportionment scheme that ensures each representative has the same number of constituents as any other in that state. Every resident of the state therefore has the same formal opportunity to present their claims to their representative. The *Buckley* idea that it is unfair to limit one person's right to speak in order to provide equal opportunity to speak therefore simply does not arise for petitioning.

Petitioning is not just about informing legislators or influencing public debate. It is about making a claim, and therefore presupposes that the official to which the petition is addressed will listen. This contrasts sharply with the electoral speech considered in *Buckley*: The right to speak does not include a right to be listened to.[374] This is part of the reason why it is impermissible to restrict the speech of one person in order to promote equal opportunity to speak. It only makes sense to insist on an equal opportunity to speak if we think everyone is entitled to the same audience—but that is not what free speech means.

The right to petition, by contrast, necessarily includes the right to be heard. It follows that the right to petition must be recognized on an equal basis, for that is the only way to give everyone the same right to have their petitions

371. *See Buckley*, 424 U.S. at 48-49.

372. McKinley, *supra* note 65, at 1173.

373. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511-13 (1972) (carving out an exception to Petition Clause protection for "sham" petitions that try to take advantage of the scarcity of government resources to consider petitions); McKinley, *supra* note 65, at 1172-73.

374. Freedom of speech does include the freedom to "hear." *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). But the fact that there is a right to speak and a right to hear, does not imply that there is a right *to be heard* in any particular case.

received. The simplest way to recognize the right to petition on an equal basis is to ensure that every legislator can receive petitions from the same number of people, i.e., to require total-population apportionment.

Conclusion

As has been clear since the Founding, the Constitution contains a commitment to universal representation. The Constitution also mandates total-population apportionment. This Article has tried to illuminate the connection between the two. While many have thought the connection between universal representation and total-population apportionment runs through virtual representation, that approach falls short. Instead, the connection is to be found in the Petition Clause of the First Amendment. That provision, and the practices it was originally understood to protect, has long enabled those who are excluded from the formal electoral process to influence lawmaking and to bridge the vote-representation gap. It requires that all members of the polity have an equal opportunity to advance claims before their representative. This can be achieved—without running afoul of the Constitution's free speech protections—by a practice of total-population apportionment. Total-population apportionment ensures that everyone—not only voters—has an equal right to make claims on those who claim to represent them.