

# Free Speech & Election Law

## *EVENWEL V. ABBOTT: THE COURT SHANKS ITS PUNT ON “ONE PERSON, ONE VOTE”*

By Ilya Shapiro & Thomas A. Berry

### Note from the Editor:

This article criticizes the Supreme Court’s recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) on originalist grounds.

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- Garrett Epps, *One Person, One Vote?*, THE ATLANTIC (May 31, 2015), available at <http://www.theatlantic.com/politics/archive/2015/05/one-person-one-vote/394502/>.
- David H. Gans, *A Major Test of Equal Representation for All*, CONSTITUTIONAL ACCOUNTABILITY CENTER: TEXT & HISTORY BLOG (May 27, 2015), available at <http://theconstitution.org/text-history/3286/major-test-equal-representation-all>.
- Joseph Fishkin, *Of People, Trees, Acres, Dollars, and Voters*, BALKINIZATION (May 27, 2015), available at <http://balkin.blogspot.com/2015/05/of-people-trees-acres-dollars-and-voters.html>.
- David H. Gans, *Counting All Persons is the “Theory of the Constitution” When It Comes to Representation*, BALKINIZATION (April 5, 2016), available at <http://balkin.blogspot.com/2016/04/counting-all-persons-is-theory-of.html>.
- Rick Hasen, *Breaking/Analysis: Big Victory for Voting Rights as #SCOTUS Rejects Plaintiffs’ Claim in Evenwel One Person, One Vote Case*, ELECTION LAW BLOG (April 4, 2016), available at <http://electionlawblog.org/?p=81460>.
- Robert Thomas, *What Does Evenwel v. Abbott Mean For “One Person, One Vote”?*, CASETEXT (April 5, 2016), available at <https://casetext.com/posts/what-does-evenwel-v-abbott-mean-for-one-person-one-vote>.

### About the Author:

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## I. INTRODUCTION

In a democracy where some may vote and others may not—with various perfectly legitimate restrictions regarding age, citizenship, and domicile, let alone more controversial rules—what does it mean to achieve “equality” in the voting process? That is the profound question that the Supreme Court took up in *Evenwel v. Abbott*.<sup>1</sup> Alas, the Court did not resolve it.

In *Evenwel*, the Court decided that it is acceptable for a state to ignore the distinction between voters and nonvoters when drawing legislative district lines. According to the Court, a state may declare that equality is simply providing representatives to equal groups of *people*, without distinction as to how many of those people will actually *choose* the representative. A state may use this constituent-focused view of equality because “[b]y ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.”<sup>2</sup>

But ignoring the distinction between voters and nonvoters achieves a false picture of equality at the expense of producing far more serious inequalities. Rather than placing nonvoters and voters on anything approaching an equal political footing, it instead gives greater power to those voters who happen to live near more nonvoters, and less power to those who do not.

As we argued before the decision came down, the framers of the Fourteenth Amendment recognized that granting such extra voting power runs the risk of harming the very nonvoters to whom it ostensibly grants representation.<sup>3</sup> This recognition manifested itself in the enactment of the Fourteenth Amendment’s Penalty Clause. In both ignoring that clause and oversimplifying the debates over the Fourteenth Amendment, the Court’s opinion paints an incomplete picture of constitutional history.

## II. BACKGROUND

In the 1960s, four Supreme Court cases established a seemingly simple equal-protection principle: “one person, one vote.”<sup>4</sup> After first ruling that unconstitutional election schemes could be remedied by the judicial branch,<sup>5</sup> the Court went on to strike down the use of “electoral college” systems in elections for statewide offices,<sup>6</sup> congressional districts of unequal populations

1 136 S. Ct. 1120 (2016).

2 *Id.* at 1132.

3 See Brief of the Cato Institute & Reason Foundation as Amici Curiae Supporting Appellants, *Evenwel*, 136 S. Ct. 1120 (No. 14-940); Thomas A. Berry, *The New Federal Analogy: Evenwel v. Abbott and the History of Congressional Apportionment*, 10. N.Y.U. J. L. & LIBERTY 208 (2016).

4 This phrase first appeared in *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

5 *Baker v. Carr*, 369 U.S. 168, 207–08 (1962).

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

within a state,<sup>7</sup> and state legislative districts of unequal populations.<sup>8</sup> The last of these cases, *Reynolds v. Sims*, is where the Court pronounced that

the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.<sup>9</sup>

Although it appeared at first that these cases had settled the constitutional question of electoral equality once and for all, a new complication soon emerged. When eligible voters are distributed evenly throughout a state, drawing legislative districts with equal total populations results in an equal number of eligible voters per district.<sup>10</sup> But when the proportion of eligible voters varies by region, equalizing total populations will no longer equalize voter populations. And when the population of eligible voters is no longer equal across districts, the number of people actually choosing a representative will vary, thereby giving voters in different districts different voting strengths.<sup>11</sup>

This problem first arose in Hawaii, where thousands of military members living on local bases were counted in the census but not eligible to vote because they were citizens of another state. As a court noted at the time, "if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years."<sup>12</sup>

To avoid this problem, Hawaii drew legislative districts to equalize registered voters—as a proxy for eligible voters—rather than to equalize total population. This plan was challenged in the courts, but in *Burns v. Richardson* the Supreme Court held it to

be permissible.<sup>13</sup> The Court noted that when it spoke of equalizing populations in *Reynolds v. Sims*, its "discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."<sup>14</sup> The Court suggested that both were, at least as far as it could see then, permissible.<sup>15</sup>

Since *Burns*, other states have faced issues similar to Hawaii's, most often because of increases in immigration that have resulted in large noncitizen populations.<sup>16</sup> Unlike Hawaii, however, these states have almost always chosen to use total population—rather than any measure of voting population—in equalizing districts.<sup>17</sup> Over the years, several vote-dilution lawsuits were brought by voters in districts with large numbers of other voters, arguing that it is time to close the option "carefully left open" in *Reynolds* and *Burns* and require states to apportion on the basis of equal numbers of voters.<sup>18</sup> Before *Evenwel*—which came up on direct appeal from a special three-judge district court—the Supreme Court had declined to review these challenges after they were rejected by the lower courts. Only in *Evenwel*, 40 years after such unequal voter populations were first challenged, did the issue finally reach the Supreme Court.

### III. GINSBURG'S MAJORITY OPINION

#### A. *The Framers and Federalist 54*

*Evenwel's* majority opinion was authored by Justice Ginsburg, writing for six of the eight justices on the Court after Justice Scalia's passing. Ginsburg inauspiciously introduces her analysis with an all-too-quick assumption that, "[a]t the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States?"<sup>19</sup> In fact, determining whether apportionment at the federal level (*interstate* apportionment) is

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

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

9 *Id.*

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

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

12 *Holt v. Richardson*, 238 F. Supp. 468, 474–75 (D. Haw. 1965), *vacated sub nom. Burns v. Richardson*, 384 U.S. 73 (1966).

13 *Burns*, 384 U.S. at 91.

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

15 "The decision [of a state] to include or exclude [nonvoters in the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92.

16 See Krabill & Fielding, *supra* note 10, at 276 ("With the dramatic influx of concentrated illegal immigration in the late 1980s and 1990s, however, an increasing number of cities and counties began to face the unusual demographic circumstance where the ordinary correlation between total population and voter population began to break down.").

17 See *id.* ("For many years, with the notable exception of *Burns v. Richardson*, the issue of which apportionment base to use in redistricting remained non-controversial. It was nearly always total population.").

18 See, e.g., *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *Calderon v. City of Los Angeles*, 481 P.2d 489 (Cal. 1971). See also *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011) (unpublished) (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on citizens-of-voting-age (CVAP) as opposed to total population).

19 *Evenwel*, 136 S. Ct. at 1127.

actually analogous to apportionment at the state level (*intrastate* apportionment) is—or should have been—the crux of the entire case. As we have in the past, we will call this supposed analogy the “federal analogy.”<sup>20</sup>

Ginsburg begins to lay out the federal analogy by reminding us that the Constitution apportions federal representatives “among the several States which may be included within this Union, according to their respective Numbers.”<sup>21</sup> In other words, interstate apportionment is indeed based on a total-population rule; voters and nonvoters alike increase the number of representatives allocated to a state. But why was this rule chosen, and are the reasons for it equally applicable at the intrastate level?

The most extensive contemporary discussion of why this rule was chosen appears in Federalist 54. Ginsburg quotes James Madison’s assertion that “it is a fundamental principle of the proposed constitution” that representatives be allocated based on the states’ “aggregate number of inhabitants,” and at the same time that “the state itself may designate” who is eligible to vote for those representatives.<sup>22</sup>

From this quotation, Ginsburg concludes that the choice at the Constitutional Convention to use total population affirmed that “the Framers understood that [nonvoting] citizens were nonetheless entitled to representation in government.”<sup>23</sup> Yet in the next sentence of Federalist 54, which Ginsburg does not quote, Madison goes on to explain that this “fundamental principle” was chosen not to provide “representation” to nonvoters, but because “the qualifications on which the right of suffrage depend” are different in every state.<sup>24</sup>

What is the connection between suffrage laws and interstate apportionment? To answer this question, we must keep in mind that states, then as now, controlled voter-eligibility rules (as Madison reminds us by saying “the state itself may designate” who will choose its representatives). Suffrage laws differed from colony to colony before the Revolution,<sup>25</sup> and these differences remained after the colonies became independent states.<sup>26</sup> When Gouverneur Morris proposed to the Constitutional Convention that suffrage in the House be based on a uniform national standard, rather than up to the states, Oliver Ellsworth quickly responded

that “[t]he States are the best Judges of the circumstances and temper of their own people,”<sup>27</sup> and the proposal was ultimately voted down.<sup>28</sup> Instead, the Framers simply made federal House suffrage identical to suffrage in state house elections, over which each state already had full control.<sup>29</sup>

The Framers knew, then, that each state would be left to make its own choices regarding every aspect of the franchise. These included minimum-property qualifications, when immigrants could vote, and even whether to enfranchise women, as New Jersey did until 1807.<sup>30</sup> The Framers likewise knew that the choices states made could have a huge effect on their own number of eligible voters. Thus, assigning states political power based on their voter populations would have incentivized them to enfranchise as many residents as possible, distorting the intended federalist system in which each state would be free to choose suffrage rules based solely on the “temper of their own people,” without federal interference one way or the other.

This explanation for the total-population rule, rather than Ginsburg’s, accords with Madison’s full argument in Federalist 54. As he goes on to explain succinctly (in a passage which Ginsburg again does not quote), “the [total-population] principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants” regarding suffrage.<sup>31</sup> Madison himself thus confirms that the principle was chosen because it neither incentivized nor disincentivized any particular state’s suffrage policy.

Yet further evidence that this was the main reason for the selection of the total-population rule comes from the similar reasoning behind the Convention’s choice of an electoral college to elect the president, rather than a direct popular vote. As Madison explains in his Notes on the Convention:

There was one difficulty however of a serious nature attending an immediate choice [i.e. popular vote] by the people [for president]. The right of suffrage was much more diffusive [i.e. widespread] in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.<sup>32</sup>

Madison again recognized that a national popular vote would have encouraged states to enfranchise as many people as possible, so as to contribute more votes to the national total. The Electoral College, in which states are allocated a number of electors based

20 See Brief of the Cato Institute & Reason Foundation, *supra* note 3, at 2; Berry, *supra* note 3, at 220; Ilya Shapiro, *Why Texas Is Wrong in the ‘One Person, One Vote’ Case*, WASH. POST, Oct. 15, 2015, available at [www.washingtonpost.com/news/in-theory/wp/2015/10/20/why-texas-is-wrong-in-the-one-person-one-vote-case](http://www.washingtonpost.com/news/in-theory/wp/2015/10/20/why-texas-is-wrong-in-the-one-person-one-vote-case).

21 *Evenwel*, 136 S. Ct. at 1127 (quoting U.S. CONST. art. I, §2, cl. 3).

22 *Id.*, quoting FEDERALIST No. 54 (James Madison).

23 *Id.* at 1127 n.8.

24 FEDERALIST No. 54 (James Madison).

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

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

27 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

28 *Id.* at 206.

29 “[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, §2, cl. 1.

30 See generally Judith Apter Klinghoffer & Lois Elkis, “*The Petticoat Electors*”: *Women’s Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159 (1992).

31 FEDERALIST No. 54 (James Madison).

32 2 FARRAND at 57.

on their total populations rather than their voter populations, again obviated this problem.

If this is the true reason the total-population rule was chosen for interstate apportionment, it presents a serious problem for the federal analogy. Unlike the states in our federal system, municipalities and counties within a state do *not* control their own suffrage laws. Eligibility to vote in elections for the state legislature is a matter of state law, not local law. If state senators were apportioned on the basis of eligible voters, one county could not lower its voting age to 16 in a bid to gain an extra state senator. The reason for choosing the rule at the interstate level simply does not exist at the intrastate level, and the federal analogy breaks down.

Ginsburg is aware of this argument; it was submitted to the Court in our own amicus brief.<sup>33</sup> Though Ginsburg does not mention that brief by name, she acknowledges and accurately summarizes its argument: “[Appellants and their amici] draw a distinction between allocating seats *to* States, and apportioning seats *within* States. The Framers selected total population for the former, [they] argue, because of federalism concerns inapposite to intrastate districting. These concerns included the perceived risk that a voter-population base might encourage States to expand the franchise unwisely, and the hope that a total-population base might counter States’ incentive to undercount their populations, thereby reducing their share of direct taxes.”<sup>34</sup>

Justice Ginsburg’s response to this argument comes in two parts, which we consider in turn.

#### B. *The Federal Analogy in Wesberry, Reynolds, and Gray*

The first part of Ginsburg’s response is a defense, based on Court precedent, of the legitimacy of federal analogies to answer apportionment questions (at least when those analogies are made to the House). The heart of her claim is that “*Wesberry v. Sanders* . . . rejected the distinction appellants now press” between intrastate and interstate apportionment, and thus provides precedent for collapsing that distinction in *Evenwel*.<sup>35</sup>

In *Wesberry*, the Court declared that all *federal* congressional districts must be of equal populations within a state. Of the four original “one person, one vote” cases, *Wesberry* is unusual for being the only one not to rely on the Equal Protection Clause. Instead, the *Wesberry* Court rested its holding on the Apportionment Clause of Article I (the same clause with which Ginsburg began her opinion), which allocates representatives to the states “according to their respective numbers.”<sup>36</sup> Ginsburg quotes this part of *Wesberry* at length:

“The debates at the [Constitutional] Convention,” the Court explained, “make at least one fact abundantly clear: that when the delegates agreed that the House should represent ‘people,’ they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants.” “While it may not be

possible to draw congressional districts with mathematical precision,” the Court acknowledged, “that is no excuse for ignoring our Constitution’s plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives.”<sup>37</sup>

The *Wesberry* Court thus decided that because members of Congress are awarded *to* the states on the basis of population, congressional districts must be drawn *within* the states on the basis of population. For Ginsburg, this is sufficient precedent for accepting an analogy between interstate and intrastate apportionment. Yet it is not so straightforward, because in the very same term *Wesberry* was decided, the Court was also presented with a federal analogy in *Reynolds*. And in *Reynolds*, the Court’s attitude toward such analogies could not appear more different.

*Reynolds* involved a challenge to an Alabama plan that allocated one state senator to each county without regard to county populations. Alabama argued that its system was constitutional because of its similarity to the *federal* Senate, which allocates two senators to each state without regard to state populations.<sup>38</sup> The state contended that it had simply implemented a “little federal system”<sup>39</sup> that was “framed after the Federal System of government—namely one senator in each county of the state.”<sup>40</sup> But the *Reynolds* Court rejected this analogy in strident terms, writing that “the federal analogy [is] inapposite and irrelevant to state legislative districting schemes,”<sup>41</sup> because “[t]he system of representation in the two Houses of the Federal Congress . . . [arose] from unique historical circumstances,”<sup>42</sup> and “the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.”<sup>43</sup>

Similarly in *Gray v. Sanders*, decided only a year before *Wesberry*, the Court rejected Georgia’s analogy to the federal Electoral College in its attempt to justify a state electoral college that over-weighted votes from less populous counties. “The inclusion of the electoral college in the Constitution, as the result of specific historical concerns . . .” the Court wrote, “implied nothing about the use of an analogous system by a State in a statewide election.”<sup>44</sup>

Why did the same Court that so forthrightly rejected a federal analogy in *Reynolds* and *Gray* seem to accept one in *Wesberry*? Is there a way these federal analogies can be distinguished and, if so, which is closer to the one used in *Evenwel*? Ginsburg has one answer, which is that, unlike *Wesberry*, “*Reynolds* and *Gray* . . . involved features of the federal electoral system that contravene

33 See Brief of the Cato Institute & Reason Foundation, *supra* note 3, at 7–15.

34 *Evenwel*, 136 S. Ct. at 1129.

35 *Id.*

36 See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

37 *Evenwel*, 135 S. Ct. at 1129, quoting *Wesberry*, 376 U.S. at 13, 18 (alterations and emphasis in original) (citations omitted).

38 See U.S. CONST. art. I, §3, cl. 1.

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

40 *Id.* at 35.

41 *Reynolds*, 377 U.S. at 573.

42 *Id.* at 574.

43 *Id.* at 573.

44 *Gray*, 372 U.S. at 378.

the principles of both voter and representational equality to favor interests that have no relevance outside the federal context.<sup>45</sup> For Ginsburg, it is inappropriate to use a federal analogy to the Senate or Electoral College, but appropriate to use one to the House, because “the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting.”<sup>46</sup>

But this reasoning too quickly conflates the questions at issue in *Wesberry* and *Evenwel*, which in fact were quite different. In *Wesberry*, the Court was presented with a conflict between apportionment based on *people* and apportionment based on *geography*. Georgia had drawn its congressional districts in 1931 so that each would be coextensive with pre-existing county boundaries. As populations shifted and grew, Georgia kept its congressional boundaries the same, since the boundaries of its counties remained the same. By 1960, the population of the Fifth District—which was coextensive with Fulton, DeKalb, and Rockdale counties (Atlanta and environs)—had grown to more than twice that of the average Georgia district.<sup>47</sup>

The *Wesberry* Court quite reasonably held that drawing congressional districts based only on political boundaries was inconsistent with the Constitutional Convention’s plan, because “those [at the Convention] who wanted both houses to represent the people had yielded on the Senate, [but] they had not yielded on the House of Representatives.”<sup>48</sup> In other words, the *Wesberry* Court was correct in saying that the House (as opposed to the Senate) was designed to give political power to people rather than political units. This particular aspect of apportionment, at least, was indeed chosen for reasons that apply at both the interstate and intrastate level.

But once it is settled that congressional districts ought to be drawn on the basis of people rather than counties, it is an entirely separate question whether they ought to be based on *total* population or *voter* population. It would be anachronistic to suggest that the *Wesberry* Court even considered this distinction; all evidence instead indicates that it was not brought to the Court’s attention until two years later in *Burns*.<sup>49</sup> And so after *Wesberry*, it remained an open question whether, as Ginsburg claims, the federal total-population rule “rest[ed] in part on the same representational concerns” that exist at the state level.

<sup>45</sup> *Evenwel*, 136 S. Ct. at 1130.

<sup>46</sup> *Id.*

<sup>47</sup> See *Wesberry*, 376 U.S. at 2.

<sup>48</sup> *Id.* at 13.

<sup>49</sup> The language Justice Ginsburg quotes from *Wesberry* could be read to endorse a total-population view as opposed to a voter-population view. See *Evenwel*, 136 S. Ct. at 1129 (emphasizing *Wesberry*’s reference to “our Constitution’s plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives.” (emphasis added by Ginsburg)). But just as in the other pre-*Burns* cases, the *Wesberry* Court spoke interchangeably of equal numbers of people and equal voting weight, without acknowledging the potential conflict between the two. See, e.g., *Wesberry*, 376 U.S. at 7–8 (“We hold that . . . as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

In sum, there can be no universal answer to the question of whether federal analogies are apposite. Each analogy must be examined on its own terms, to see if the same concerns relevant to the particular question at hand exist at the state and federal level. Since the analogy in *Evenwel* had never previously been presented to the Court, precedent alone cannot justify it. It is the second part of Ginsburg’s argument, then, on which this particular analogy must stand or fall.

### C. The Fourteenth Amendment Debates: Three Types of Nonvoters

“Even without the weight of *Wesberry*,” Ginsburg transitions, “we would find appellants’ distinction unconvincing.”<sup>50</sup> This, she asserts, is because “[o]ne can accept that federalism—or, as Justice Alito emphasizes, partisan and regional political advantage[]—figured in the Framers’ selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.”<sup>51</sup>

This argument could be called the Hodgepodge View of the permissibility of federal analogies: if a federal rule was chosen for a hodgepodge of reasons, a similar state rule is permissible so long as it shares just one of those justifications. Or put another way, the most important qualifier in Ginsburg’s claim about the total-population rule is that it rested “in part” on concerns relevant to the states. For her, this is enough.

We do not need to consider whether the Hodgepodge View is legitimate as an argument to support federal analogies generally. In *Evenwel*, the flaw is that Ginsburg oversimplifies the number of dimensions in the choice of the federal rule. As she frames it, both the original Framers and the framers of the Fourteenth Amendment faced a single binary choice—to count everyone or to count only voters. And so any justifications that were made for counting *any* nonvoter, Ginsburg assumes, must have been a justification for counting all nonvoters.

But as the debates surrounding the Fourteenth Amendment show, all nonvoters were not regarded as identical. In fact, nonvoters were divided into three distinct categories: women and children, aliens, and disenfranchised adult-male citizens. The Fourteenth Amendment’s framers ultimately enacted a rule that counted the first two groups in interstate apportionment but not the third. The hard work of translating this political theory to present-day circumstances requires understanding the theory behind each of these three categories.

#### 1. Women and Children

Justice Ginsburg collects four quotations from the Fourteenth Amendment debates that support the legitimacy of counting some nonvoters. Across these four quotations, wives and children are the only specific examples of counted nonvoters used.<sup>52</sup> This is not a coincidence. Because of the close familial

<sup>50</sup> *Evenwel*, 136 S. Ct. at 1129.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *id.* at 1128 (quoting Rep. Roscoe Conkling’s argument “that [the] use of a voter-population basis ‘would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and

relationship between wives and children and one particular voter (the husband/father), those who enacted the Fourteenth Amendment were much more comfortable espousing a theory of “virtual representation” for these nonvoters than for others.

Sen. William Fessenden, for example, emphasized the influence which nonvoting wives have on their voting husbands, remarking that “I could hardly stand here easily if I did not suppose I was representing the ladies of my State. I know, or I fancy I know, that I have received considerable support from some of them, not exactly in the way of voting, but in influencing voters.”<sup>53</sup> Sen. Luke Poland similarly limited his argument to the context of family members. “The right of suffrage . . . is given to [a particular class] as fair and proper exponents of the will and interests of the whole community, and to be exercised for the benefit and in the interest of the whole. The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own.”<sup>54</sup>

The framers of the Fourteenth Amendment knew that any nonvoters counted in apportionment would increase the number of representatives assigned to a state and chosen by its voters. But when this could be framed as a husband “voting for” his wife and children, such an increase in voter weight was viewed as more legitimate.

## 2. Aliens

The Fourteenth Amendment retained not only women and children in each state’s apportionment total, but also nonvoting aliens. Conspicuously missing from the debates over counting aliens, however, are the same virtual representation arguments that were repeatedly made regarding women and children.<sup>55</sup> To understand why aliens were counted, it is important to understand how the 1860s were different from today in relevant ways.

During the 19th Century, states would often grant voting rights to aliens before they obtained federal citizenship, with at least 22 states or territories having some form of alien suffrage during the era.<sup>56</sup> Different states took different approaches in making their own rules of enfranchisement—some imposed a five-year waiting period, some imposed a state-run test akin to the federal citizenship test, and some merely accepted a “declaration of intent” to become a citizen.<sup>57</sup> It was not idle speculation, then, to worry that a federal policy allocating representation based on the number of voters in a state would be particularly likely to

influence a state’s policy toward alien suffrage, and this is indeed where such concern was frequently directed.

“There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters,” Rep. James G. Blaine worried, “and all conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. Foreigners would be invited to vote on a mere preliminary ‘declaration of intention.’”<sup>58</sup>

Rep. Roscoe Conkling similarly predicted that “[i]f voters alone should be made the foundation of representation . . . [o]ne State might let women and minors vote. Another might—some of them do—give the ballot to those otherwise qualified who have been resident for only ten days. Another might extend suffrage to aliens. This would lead to a strife of unbridled suffrage.”<sup>59</sup>

Moreover, the usual lapse of time from arrival in the country to suffrage was much shorter in 1866 than it is today. In justifying the established rule that nonvoting aliens would be counted for state apportionment, Conkling remarked that the question of “how [aliens] should be treated during the interval between their arrival and their naturalization, during their political nonage . . . was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment.”<sup>60</sup> It was universally understood that five years was the longest most aliens would wait for the vote.<sup>61</sup>

This certain and regular progress toward becoming a voter was put forward by Senator John Henderson as the justification for counting aliens *in contrast* to the virtual representation rationales for counting women. “The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother.”<sup>62</sup> Since enumerations were taken every 10 years, it was assumed that most aliens would become voters before the next census. Rep. William Kelley asked rhetorically “whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to

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who are, and always have been, represented”).

53 Cong. Globe, 39th Cong., 1st Sess. 705 (1866) [hereinafter *Globe*].

54 *Id.* at 2962.

55 One scholar lists 12 separate discussions of the issue of aliens in apportionment; in *none* of these instances is it suggested that aliens’ political concerns were represented by the voters who lived in their states. See George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WESTERN POL. Q. 829, 851 n.146 (1970).

56 See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993).

57 See *id.* at 1399–1417.

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58 *Globe* at 141.

59 *Id.* at 357.

60 *Id.* at 356 (emphasis added).

61 See *id.* at 2987 (“Nearly all the men who come to this country are naturalized in five years. The exceptions are very rare.”) (statement of Sen. Sherman); *id.* at 2535 (“The foreigner who comes to our shores . . . is put upon five years’ probation before we admit him to citizenship.”) (statement of Rep. Eckley); THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865–1867 299 (Benj. B. Kendrick ed., 1914) [hereinafter *JOURNAL*] (“We seclude minors from political rights, not because they are unworthy, but because, for the time, they are incapable. So of foreigners; we grant them the privileges of citizenship only after five years’ probation.”) (Robert Dale Owen to Thaddeus Stevens, quoted from Robert Dale Owen, *Political Results from the Varioloid*, ATLANTIC MONTHLY, June, 1875).

62 *Globe* at 3035.

acquire that right; and whether inasmuch as both may acquire it in the current decade, they should not be included in the basis of representation[?]<sup>63</sup> Kelley explicitly contrasted the position of the nonvoting alien with that of the “freeman [a permanently disenfranchised former slave] who can *never* vote [and who] should not be counted among voters *and possible voters* in fixing the basis of suffrage.”<sup>64</sup>

Finally, concerns of political pragmatism were also at their most explicit in the realm of counting aliens. Rep. Thaddeus Stevens admitted that “there are from fifteen to twenty Representatives in the northern States founded upon those who are not citizens of the United States. . . . I do not think it would be wise to put into the Constitution or send to the people a proposition to amend the Constitution which would take such Representatives from those States, and which therefore they will never adopt.”<sup>65</sup> Rep. Conkling also admitted, bluntly, that “many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these states are to pass upon the amendment. It must be made acceptable to them.”<sup>66</sup>

Distinguishing women and children from aliens reveals the weakness of the Hodgepodge View. Though a theory of virtual representation was indeed one of the arguments made to justify counting the former, this does not automatically mean that it was also used to justify counting the latter. Indeed, such arguments would have been highly implausible. Why should we assume that the voters in a state will take particular care that they vote along with the interests of the disenfranchised noncitizens in their state, even though they may have no personal relationship to those nonvoters? Can the hope that they will do so justify increasing the weight of their votes? There is no evidence that any of the Fourteenth Amendment’s framers believed so. Were it not for the concerns of incentivizing suffrage and political pragmatism—the two concerns that do *not* find analogy at the state level—and the certainty that all aliens would be enfranchised before the next census—which no longer holds true—aliens would likely have been removed from apportionment. The strongest evidence for this inference is the rule created for the third category of nonvoter, which *did* remove them from the apportionment total.

### C. Disenfranchised Adult-Male Citizens

Although Justice Ginsburg states flatly that the Fourteenth Amendment “retained total population as the congressional apportionment base,”<sup>67</sup> this is only half-true. While the amendment retained total population as the baseline for calculating apportionment, it also introduced the first exception to the total-population rule, the Penalty Clause (which Ginsburg never mentions).<sup>68</sup> This

clause, which effectively removed disenfranchised adult-male citizens from a state’s apportionment total—by far the largest such group of whom were newly freed slaves—expressed a rejection of the view that voters will always vote with the interests of their disenfranchised neighbors at heart.

The Penalty Clause was heartily opposed by some Democratic allies of the southern states, who made “the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to provide representation for the black population would be taxation without representation.”<sup>69</sup> Rep. Phillip Johnson declared that the clause would “limit the class of persons who shall be represented [in Congress] to the white male adults” and “take away from the entire negro population, now all free alike, all representation whatever.”<sup>70</sup> Johnson continued on to make an appeal to a theory of virtual representation similar in tone to the ones Ginsburg herself makes:

A faithful member of Congress represents the whole population of his district, male and female, black and white . . . If he relies wholly upon the voters of his district for the expressed wish of his whole constituency he may err, but not unless the voters are unfaithful representatives of the population behind them. And this is not likely to happen, because men’s wishes, when intelligibly made, are found to be with their interests. The vote of the husband is supposed to represent the interests of his wife, and so the father those of his children, and these aggregated make up the public weal, commonwealth, or *res publica*.<sup>71</sup>

Rep. Andrew Rogers similarly conflated counting disenfranchised persons with granting them representation: “What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the councils of the nation?”<sup>72</sup> Rogers declared that reducing southern representation would “violate the great principle of democracy, that all the population in a country ought to be represented, although not allowed to exercise the elective franchise.”<sup>73</sup>

The true attitude of those who passed the Fourteenth Amendment toward the concept of virtual representation for independent adults is revealed in their responses to these argu-

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of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” U.S. CONST. amend. XIV, § 2.

69 Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 842 (2009).

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

71 Globe app. at 55.

72 Globe at 353.

73 *Id.* at 354.

63 *Id.* at 354.

64 *Id.* (emphasis added).

65 *Id.* at 537.

66 *Id.* at 359.

67 *Evenwel*, 136 S. Ct. at 1128.

68 “But when the right to vote at any election for . . . Representatives in Congress . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

ments. Rep. Ignatius Donnelly remarked that “if men have no voice in the national Government, other men should not sit in this Hall pretending to represent them.”<sup>74</sup> Sen. John Sherman similarly declared that “[i]f there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them.”<sup>75</sup>

Had the Penalty Clause been written to apply only to the South, its precedential value as a principle would be less strong, and it could be written off as only another instance of Civil War Era factionalism. But these arguments were not limited to the case of disenfranchised former slaves—even though it presented a particularly stark repudiation of virtual representation principles when, as Rep. Broomall put it, “the negro of the South . . . has his vote cast for him . . . by his white and hardly more loyal neighbor.”<sup>76</sup>

The first draft of the Penalty Clause, which only eliminated adult males from apportionment “whenever the elective franchise shall be denied or abridged in any State on account of race or color,”<sup>77</sup> was indeed written to apply specifically to the South. Yet this earlier version of the clause was ultimately replaced by one that “adopt[ed] a general principle applicable to all the states alike.”<sup>78</sup> The final version universally rejected virtual representation for adult-male citizens, mandating “that where a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded . . . appl[ying] not to color or to race at all, but simply to the fact of the individual exclusion.”<sup>79</sup> Northern states that denied large numbers of male adults the right to vote did so for reasons other than race, such as the reading and educational requirements of Massachusetts and Connecticut.<sup>80</sup> Nonetheless, an amendment put forward by northern Republicans to create an exception for intelligence or property tests was rejected.<sup>81</sup>

Disenfranchised former slaves were unlikely to become voters by the next census; incentivizing their enfranchisement was actually desired; and removing them from apportionment was politically feasible. With all of these pieces in place, the framers of the Fourteenth Amendment—the same people who enacted the Equal Protection Clause—removed them from apportionment.

74 *Id.* at 377.

75 *Id.* at 2986.

76 *Id.* at 2498.

77 *Id.* at 351.

78 *Id.* at 2767 (statement of Sen. Howard). Howard stresses the point, continuing: “[T]his Amendment does not apply exclusively to the insurgent States, nor to the slaveholding States, but to all States without distinction. . . . It holds out the same penalty to Massachusetts as to South Carolina, the same to Michigan as to Texas.” *Id.*

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

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

81 *See* Globe at 2768.

This is the strongest evidence that these framers’ concerns for representational equality and virtual representation were limited to the family and extended no further.

Examining these three classes of nonvoters shows that Justice Ginsburg simplified things far too much in declaring that “the Framers of the Constitution and the Fourteenth Amendment comprehended [that] representatives serve all residents, not just those eligible or registered to vote.”<sup>82</sup> On the one hand, the framers of the Fourteenth Amendment lived in a country in which half of the population relied on its close familial ties with the other half for political protection. On the other hand, they also witnessed the disenfranchised freed slave “ha[ving] his vote cast for him . . . by his white and hardly more loyal neighbor.”<sup>83</sup> The difference between these two types of nonvoters, which was clear 150 years ago, has evidently now become obscured in our election law jurisprudence. But the resulting hodgepodge is of the Court’s own making.

#### IV. THE QUESTION OF PRESENT-DAY ALIENS

With that fuller picture of the historical debates in mind, Justice Ginsburg should have applied its principles to the nonvoters most at issue in *Evenwel*. As noted above, the disparities in eligible voters now seen across Texas districts are largely a result of varying populations of nonvoting aliens, and so in effect the question at the heart of *Evenwel* was whether *this* group of nonvoters should be counted for state apportionment. Which of the three classes of 1860s nonvoters presents the closest analogy to the nonvoting aliens of today?

As we have already suggested, none of the justifications for counting nonvoting aliens at the federal level in 1866 exist at the state level in 2016. Retaining aliens in apportionment is not politically necessary to achieve some other overriding goal (like passage of the Fourteenth Amendment). Unlike at the federal level, state sub-jurisdictions do not control their own suffrage rules, and so an intrastate system that only counted voting aliens could not incentivize a city or county to enfranchise its aliens. And unlike in the 1860s, for good or ill, a significant number of aliens will remain nonvoters through the next census.

The closest analogy is instead between the aliens of today and the disenfranchised former slaves of the 1860s. Without any overriding reason to count them, we are left only with the hope that a district’s voters will vote with the interests of their nonvoting neighbors. But the framers of the Fourteenth Amendment rejected that dubious justification for independent adult nonvoters in 1866, and it is no less dubious a claim today.

#### V. AFTER *EVENWEL*

Since the Court declined to require that states apportion on the basis of eligible voters—or at the very least remove aliens from apportionment—the next question is how state legislatures will react. The issues seen in Texas, where nearly 50% of the populations of some districts are ineligible to vote, will not go away. And even if apportioning is always a contentious issue potentially affecting political balances of power, there are some

82 *Evenwel*, 136 S. Ct. at 1128.

83 Globe at 2498 (statement of Rep. Broomall).

consensus principles that people on both sides of the aisle can agree on, and that might lead to actual reform.<sup>84</sup>

Ideally, everyone in a political community should either be a voter or on the path—however long and arduous that path may be—to enfranchisement; this was the expectation of those who passed the Fourteenth Amendment.<sup>85</sup> A state could reach a political compromise, perhaps, by removing nonvoting aliens from apportionment but enfranchising noncitizen residents who are fully qualified to vote: for example, those who have been in the country for 10 years and can pass the equivalent of a citizenship test, but who have been denied U.S. citizenship due to nationality-based waiting lists or other administrative delays. We do not endorse any particular compromise here, but we encourage states to move away from the precarious mechanism of *virtual* representation and toward *actual* representation.

The next burning question is, if states do attempt such compromises, could the Court go even further and declare that states *must* apportion on a total-population basis? The six justices in the majority declined to give any explicit indication on how they might rule if such a question were presented. Any prediction will depend on how seriously we should take the test upon which Ginsburg appears to rely: that a state apportionment scheme is constitutionally valid so long as it is based on concerns that “figured prominently in the decision”<sup>86</sup> to create the federal rule of apportionment and upon which therefore “the constitutional scheme for congressional apportionment rests in part.”<sup>87</sup> Because there is just as ample a quantity of statements from the framers of the Fourteenth Amendment criticizing virtual representation in the context of expressing support for the Penalty Clause as there are statements supporting virtual representation in the context of wives and children, a state scheme built around a similar skepticism would have just as much claim to a tradition that “figured prominently” in the creation of the Fourteenth Amendment and upon which our federal system “rests in part.” The question is whether the majority will be just as generous in acknowledging that part.

Among the two concurring justices, Justice Alito also does not tip his hand. “Whether a State is permitted to use some measure other than total population is an important and sensitive question,” he writes, “that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts.”<sup>88</sup>

84 It should be noted that, in the 1860s, aliens were retained in apportionment largely to help *Republican* members of Congress hold on to their seats in northeastern states like New York. In other words, things change and no one can predict how a rule will affect politics in the long run. Even today, counting nonvoting prison inmates in suburban districts where their prisons are located likely benefits Republicans more than Democrats.

85 At least in regards to the male half of the population, and we have no doubt that if the leaders of 1866 were transported to the present, they would easily translate that principle to the full population.

86 *Evenwel*, 136 S. Ct. at 1129.

87 *Id.* at 1130.

88 *Id.* at 1143–44 (Alito, J., concurring in the judgment).

Alito, unlike the majority, rejects the use of the federal analogy, primarily on the ground that much of the debate over the passage of the Fourteenth Amendment took place against the backdrop of a fight for relative political gain, both between the parties and between regions of the country.<sup>89</sup> Alito’s support of the judgment comes from more pragmatic concerns, such as the lack of thorough census data on eligible voters.<sup>90</sup> Thus if a state were to collect more thorough data as part of a move to voter-based apportionment, Alito’s fears could well be allayed.

Finally, the one justice whose position on the constitutionality of voter-based apportionment can be predicted with certainty is Justice Thomas. “The Constitution does not prescribe any one basis for apportionment within States,” he declares. “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.”<sup>91</sup> Thomas, agreeing with Alito, finds in the Fourteenth Amendment debates only partisanship.<sup>92</sup> Since it is in the Equal Protection Clause that the one-person, one-vote principle is grounded, it is not surprising that this leads him to deny its force altogether. It is possible that Thomas’s only real difference with Alito is greater forthrightness about where such a complete rejection of the Fourteenth Amendment as a guidepost for redistricting must lead.

## VI. CONCLUSION

The late Justice Scalia once asked rhetorically, with more than a little self-deprecation, “Do you have any doubt that this [Supreme Court] system does not present the ideal environment for entirely accurate historical inquiry? No, speaking for myself at least, does it employ the ideal personnel.”<sup>93</sup> *Evenwel* will go down in history as one of the cases where Scalia voted in conference but did not live to see an opinion issued, meaning that his vote—and any opinion he may have started to write—is lost to history. Justice Scalia’s death could not have changed the outcome of a case that was ultimately 8-0 on the judgment, but there is a chance that it deprived us of some deeper insight or more thorough research on the history that we have presented. Perhaps, even if only in a concurrence or dissent, it would have provided greater clarity to courts going forward, as we all wonder about the fate of voter-based apportionment after *Evenwel*. As it is, reading the opinions in *Evenwel* left us with a feeling we have had quite often since February: something’s missing.

89 *Id.* at 1144–49. While we do not deny that factionalism played a large role in these debates, as we have argued above we nonetheless believe there is a principle to be found in the rule that resulted, especially in the Penalty Clause.

90 *Id.* at 1142.

91 *Id.* at 1133 (Thomas, J., concurring in the judgment).

92 *See id.* at 1140.

93 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

