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'1-Person-1-Vote' Decision Relies On Misreading of Federalist Papers

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In *Evenwel v. Abbott*, the "one-person, one-vote" case decided on April 4, the U.S. Supreme Court unanimously held that a state may apportion its legislative districts on the basis of total population, even if this leads to a wide disparity in the number of eligible voters. Unfortunately, six justices reached this conclusion in part by relying on a misreading of the Federalist Papers and a misunderstanding of the different interests at play in federal and state apportionment rules.

Justice Ruth Bader Ginsburg begins her majority opinion — which Justices Clarence Thomas and Samuel Alito joined only in result — by quoting a passage from Federalist 54, in which James Madison discusses the federal rule of apportioning representatives to the states. Madison explains 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.

The majority takes this use of total population to mean that "the Framers understood that [nonvoting] citizens were nonetheless entitled to representation in government." Yet in practice, counting disenfranchised persons for the purposes of apportionment, which Ginsburg calls granting them "representation," simply means adding to the number of representatives chosen by the enfranchised people in their states, and thus increasing the voting power of the already enfranchised.

Did the Framers really believe that, for example, wealthy landholders would always vote with the interests of their disenfranchised landless neighbors at heart? The colonists had, after all, forthrightly rejected the British argument that they were "virtually represented" by members of Parliament for whom they had no vote, and this repudiation of "virtual representation" was one of the contributing factors of the revolution itself.

Thus, even if there were no further evidence as to the intent behind Madison's "fundamental principle," the majority's claim would be dubious. But in fact, we don't have to speculate, because the majority's quotation leaves out the very next sentence, in which Madison himself

explains that this "fundamental principle" was chosen not to provide virtual representation, but because "the qualifications on which the right of suffrage depend" are different in every state.

Because states, then as now, controlled their own rules of voter eligibility, giving 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 what it considers to be the best for its population.

As Madison goes on to explain succinctly, "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. In other words, the principle was chosen because it neither incentivized nor disincentivized any particular state's choice in the matter, a consideration that has no analogy at the intrastate level at issue in *Evenwel*.

Where does the decision leave us, then, going forward? Surely people on both sides can agree that when barely 50 percent of a legislative district is eligible to vote — as is the case in several of the districts in Texas — the democratic system is not in an ideal state. The Framers of the 14th Amendment lived in a country where nearly all immigrants became voting citizens within five years of arrival.

Today, the wait for citizenship can last decades. Because of this fundamental change, a total-population apportionment rule can now grant vastly unequal voting power, effectively transferring the political power from large numbers of nonvoting adult residents to their voting neighbors, who may or may not share their political interests.

Because the court declined to solve this problem itself, it is now up to the political branches to do so. Any shift that may affect the balance of political power will be controversial, but states can always experiment with creative forms of compromise. For example, states are free to grant the franchise to some noncitizens; a simultaneous move to voter-based apportionment alongside a grant of the franchise to legal noncitizen residents who have been in the country for 10 years could be an attractive solution to both political parties.

This is not to endorse any one solution. The best result will depend on the particular situation and partisan makeup of the different states. Going forward, the most important thing is that courts not interfere with this process and declare that states may only draw their districts on the basis of total population.

The Supreme Court erred in reading the "virtual representation" theory as playing a part in our democratic constitutional tradition, but it would err far more grievously to read it as playing the only part.

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