ONE PERSON, ONE VOTE REVISITED: CHOOSING A POPULATION BASIS TO FORM POLITICAL DISTRICTS

SCOT A. READER*

I. INTRODUCTION

"One person, one vote" is an egalitarian principle firmly embedded in the American system of representation.[1] The Supreme Court has held that the Constitution requires state legislatures and courts to adhere to the one person, one vote principle in enacting all political districting plans through which voters elect congressional,[2] state legislative,[3] and local government[4] officials. The Court has held that Article I, section 2 of the Constitution requires one person, one vote in congressional districting,[5] and that the Equal Protection Clause requires one person, one vote in state and local districting.[6]

The Court intended to implement a form of electoral equality when it adopted the one person, one vote principle. The principle ensures electoral equality by equalizing the "weight" with which each vote influences the electoral process. In the landmark case *Reynolds v. Sims*, the Court reasoned:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply

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1. As Justice Douglas wrote for the Court: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963). However, neither the Framers nor those who proposed and ratified the Fourteenth Amendment intended the Constitution to require legislatures and courts to adhere to the one person, one vote principle when they form political districts. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 134-37.

2. Wesberry v. Sanders, 376 U.S. 1 (1964).

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

4. Avery v. Midland County, 390 U.S. 474 (1968).

5. *Wesberry*, 376 U.S. at 7-8. The Court held that Article I, § 2, which commands that representatives be elected "by the people of the several States," requires that states and courts adhere to the one person, one vote principle when they form congressional districts. *Id.*

6. *Reynolds*, 377 U.S. at 568 (state districting plans); *Avery*, 390 U.S. at 478-79 (local districting plans).

> not the same right to vote as that of those living in a favored part of the State.[7]

To achieve precisely the Court's intended end of electoral equality, elementary mathematics requires that all single-representative political districts that elect a representative to a given legislative body contain an equal number of voters.

Despite the seeming clarity of the *Reynolds* rationale, and later Supreme Court cases that recognize a broader right of voters to participate in elections on an equal basis with other voters,[8] political districting plans usually place an equal number of *people*, rather than *voters*, in all districts.[9] While it is mathematically possible that plans which place an equal number of people in all districts simultaneously provide equally-weighted voting, they do not necessarily do so. State laws limit the voting franchise to a particular class of individuals in the United States.[10] When enfranchised people and non-enfranchised people do not reside in uniform proportion in all geographical areas of a polity, the ratio of people to voters will vary among districts.[11] Typically, small variations from such a uniform proportion exist. Accordingly, plans that place an equal number of people in all districts typically provide substantially equally-weighted voting. On occasion, however, large variations from such a uniform proportion exist. Therefore, on occasion, plans that place an equal number of people in all districts do not provide substantially equally-weighted voting.

When political districting plans that place an equal number of people in all districts do not provide substantially equally-weighted voting, the decision of legislatures and courts to use a

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7. *Reynolds*, 377 U.S. at 563.

8. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982)(dictum); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34 n.74, 35 n.78 (1973)(dictum); Dunn v. Blumstein, 405 U.S. 330, 336 (1972). *See also*, Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-27 (1969).

9. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 U.C.L.A. L. REV. 1, 49 (1985)(noting that placing equal numbers of people in all districts has become "more or less the accepted norm"); *but cf.* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV., 77, 80-81 n.16 (1985)(providing examples of district population requirements that vary widely). Since the dicennial census provides total population statistics, placing an equal number of people in all districts is administratively efficient. Note, *Reapportionment*, 79 HARV. L. REV. 1228, 1254-55 (1966).

10. For example, all states have enacted laws excluding aliens from the franchise. Gerald Rosberg, *Aliens and Equal Protection, Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1100 (1977).

11. *See* Grofman, *supra* note 9, at 81 n.16; Lowenstein & Steinberg, *supra* note 9, at 50.

total population basis rather than a voter population basis[12] to form districts is clearly at odds with the *Reynolds* rationale. Even so, *Reynolds* failed to distinguish between plans that place an equal number of people, citizens, or voters in all districts,[13] and cases in the *Reynolds* progeny have never suggested that total population-based districting plans may be constitutionally infirm. Thus, an interesting question arises as to whether plans that place an equal number of people in all districts but do not provide substantially equally-weighted voting will pass constitutional muster.

The Supreme Court declined to address the issue when it denied *certiorari* in *Garza v. County of Los Angeles.*[14] In *Garza,* a split panel of the United States Court of Appeals for the Ninth Circuit held that the Equal Protection Clause does not prohibit political districting plans that place an equal number of people in all districts, even if such plans do not provide substantially equally-weighted voting. The *Garza* majority professed several reasons for so holding: (1) The Supreme Court spoke in permissive terms about the choice between voter-based or total population-based districting plans in *Burns v. Richardson,*[15] a case decided two years after *Reynolds;* (2) the Court recognized in *Reynolds v. Sims,* as did the Framers of the Constitution, that representative government includes people who are ineligible to vote; (3) the Court recognized in *Gaffney v. Cummings,*[16] a one person, one vote case in the *Reynolds* progeny, that total population-based plans always deviate from precisely equally-weighted voting; (4) plans that do not place an equal number of people in all districts unconstitutionally interfere with the First Amendment right, applicable to states through the Fourteenth Amendment, of individuals in districts with disproportionately large total populations to petition the government; and (5) districting plans that do not place an equal number of people in all districts unconstitutionally ignore the right of aliens and minors to equal protection with respect to

12. A discussion of which among the eligible, registered, or actual voter population bases serves as the best proxy for equally weighted voting is beyond the scope of this Article.

13. *See, e.g.,* 377 U.S. at 560-61 (advocating constitutional districting rules of equality among people and equality among voters in consecutive sentences); *id.* at 562 (advocating both in same paragraph); *id.* at 565 (referring to equal-population and equal-voter principles in same sentence); *id.* at 575 (same); *id.* at 577 (referring indiscriminately to residents, citizens, and voters in same sentence).

14. 918 F.2d 763 (9th Cir. 1990), *cert. denied* 498 U.S. 1028, 111 S. Ct. 681 (1991).

15. 384 U.S. 73 (1966).

16. 412 U.S. 735 (1973).

political participation, short of voting and holding sensitive public office.[17] Judge Kozinski dissented in *Garza* on the ground that the Equal Protection Clause, by virtue of the one person, one vote principle announced in *Reynolds*, prohibits political districting plans that place an equal number of people in all districts when such plans do not provide substantially equally-weighted voting.[18]

This Article explores the soundness of the *Garza* holding by revisiting the one person, one vote principle. The purpose of the Article is twofold. First, it reviews constitutional jurisprudence to determine whether the *Garza* court adhered to *stare decisis* when it abandoned equally-weighted voting in favor of a rule of equal numbers of representatives for equal numbers of people. Second, the Article explores the egalitarian implications of two possible decision rules: (1) The rule seemingly required by the *Reynolds* rationale, that districting plans must place a substantially equal number of *voters* in all districts; and (2) the rule seemingly required by *Garza*, that districting plans must place a substantially equal number of *people* in all districts.

II. Constitutional Jurisprudence and Population Bases

Part I noted that *Garza* professed five reasons for holding that using a total population-based districting plan that does not satisfy equally-weighted voting is constitutionally sound. The first three reasons led a panel of the Ninth Cicuit to deny the existence of a constitutional rule of equally-weighted voting. The last two reasons led the court to discover a new constitutional right that requires any existing rule of equally-weighted voting to yield in favor of a rule of equal numbers of representatives for equal numbers of people, when the two rules cannot be satisfied simultaneously. The majority termed its new implied fundamental right the right of all individuals to "free access to elected representatives,"[19] which is impermissibly burdened by any districting plan that allocates some people a greater "share" of representatives than others.

This Part reviews *Garza*'s constitutional analysis. Section A challenges the holding in *Garza* that a constitutional rule of equally-weighted voting does not exist. Section B challenges the holding

17. *Garza*, 918 F.2d at 773-76.
18. *Id.* at 779-88 (Kozinski, J., dissenting).
19. *Id.* at 775.

in *Garza* that a fundamental right of all individuals to free access to elected officials is anywhere to be found in the Constitution, at least when the right is interpreted, as in *Garza*, to require *equal* access. Because the *Garza* court mentioned the Petition Clause as a possible source of the equal access right, subsection B.1 searches for the right in First Amendment jurisprudence. Following the reasoning of the *Garza* majority, who found the equal access right primarily in the Equal Protection Clause, subsection B.2 searches for the right in equal protection jurisprudence. Finally, section C suggests a proper constitutional disposition of *Garza* and any future case involving districting plans that place an equal number of people in all districts but do not provide substantially equally-weighted voting.

A. *The Fundamental Right of Voters to Cast an Equally-Weighted Vote*

In the landmark case *Reynolds v. Sims*,[20] the Supreme Court held that the Equal Protection Clause requires legislatures and courts to adhere to equally-weighted voting when they form state legislative political districts. Subsequently, the Court extended the equally-weighted voting requirement to the formation of local government districts.[21] As Justice Harlan noted in his *Reynolds* dissent, "both the language and history of the controlling provisions of the Constitution [were] wholly ignored" by the majority.[22] As it often did, the Warren Court inferred a constitutional principle from its belief about a fair distribution of power.[23] Specifically, the Court began with the belief that "each citizen [should] have an equally effective voice in the election of members of his . . . legislature,"[24] and inferred that the principle that provides that distribution of power in the abstract is equally-weighted voting. Thus, the Court announced: "[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."[25]

20. 377 U.S. 533 (1964).
21. *See* Avery v. Midland County, 390 U.S. 474 (1968).
22. *Reynolds*, 377 U.S. at 591 (Harlan, J., dissenting).
23. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 594-95 (1982) (arguing that *Reynolds* masked a controversial substantive judgment about a fair distribution of power in the uncontroversial but empty language of equality).
24. *Reynolds*, 377 U.S. at 565.
25. *Id.* at 579.

Despite the seeming clarity of *Reynolds*, *Garza* articulated three reasons for the non-existence of a constitutional rule of equally-weighted voting. *Garza* first relied on the Supreme Court's permissive language in *Burns v. Richardson*.[26] In *Burns*, decided two years after *Reynolds*, the Supreme Court recognized that *Reynolds* spoke interchangeably of plans that place an equal number of people, citizens, or voters in all districts. *Burns* thus concluded that legislatures and courts may choose to include or exclude aliens, short-term residents, and felons in the population basis when they form political districts, since "[t]he decision to include or exclude any such group involves choices about the nature of representation with which *we have been shown no constitutionally founded reason to interfere.*"[27] In *Burns*, the Court indeed was not shown a constitutional reason to interfere. *Burns* upheld a districting plan that placed an equal number of registered voters in all districts, since the registered voter-based plan "produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[28] Clearly, any plan that uses a registered voter population basis provides substantially equally-weighted voting, and thus is not at odds with the *Reynolds* rationale.

In *Garza*, however, the total population-based districting plan approved by the district court[29] contained a total maximum deviation[30] from equally-weighted voting of 40%. Thus, the plan clearly did not satisfy the equally-weighted voting requirement that *Reynolds* found in the Equal Protection Clause.[31] The *Garza*

26. 384 U.S. 73 (1966).

27. *Id.* at 92 (emphasis added).

28. The Court held that the total population basis and the citizen population basis are permissible. *Id.* at 92-93. The Court held that registered and actual voter population bases are usually impermissible because they base representation upon the extent of political activity in a district. *Id.* The Court did not discuss the permissibility of the *eligible* voter population basis. Although the Court has never decided the issue, the Court assumed *arguendo* in Kirkpatrick v. Preisler, 394 U.S. 526, 534 (1969), that the eligible voter population basis is permissible in congressional districting.

29. *See* Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D.Cal. 1990).

30. "Total maximum deviation" is the absolute value of the sum (as a percentage) of the deviations from average district size of the largest district and the smallest district. Grofman, *supra* note 9, at 82 n.19.

31. If, as the *Reynolds* rationale suggests, equally-weighted voting is the baseline from which deviations are to be measured, then the 40% total maximum deviation in the district court's plan almost certainly would not pass constitutional muster. In Mahan v. Howell, 410 U.S. 315 (1973), the Supreme Court held that a 16.4% total maximum deviation accompanied by compelling state interests "may well approach tolerable limits." *Id.* at 329. Tolerable limits for deviations from equally-weighted voting may in fact be less 16.4%, since *Mahan* measured the 16.4% deviation from a total population baseline rather than an equally-weighted voting baseline, and *Gaffney v. Cummings* instructs that

court was squarely presented with a constitutional reason to interfere with the district court's plan.

As a second proffered reason for the non-existence of a constitutional rule of equally-weighted voting, *Garza* pointed out that both *Reynolds* and the Framers of the Constitution recognized that all people, including those who are ineligible to vote, form the basis for representative government. *Reynolds*' alleged recognition came in the form of its reliance on *Wesberry v. Sanders*,[32] which *Garza* cited as announcing a rule of equal numbers of congressional representatives for equal numbers of people.[33] The Framers' supposed recognition was Madison's statement in *Federalist No. 54*, calling for the allocation of congressional representatives to states "founded on the aggregate number of inhabitants" in each state.[34]

However, *Garza*'s reliance on *Reynolds* and the Framers' intent as evidence of the non-existence of a constitutional rule of equally-weighted voting is misplaced. In fact, *Reynolds*' mention of *Wesberry* provides some evidence that *Reynolds approved* of a constitutional rule of equally-weighted voting. After all, *Wesberry* expressly announced a rule of equally-weighted voting in congressional elections,[35] despite the Court's reliance on Article I, section 2, which requires the election of the House of Representatives "by the People" of the several states as the constitutional basis for its decision. *Wesberry* did not announce a rule of equal numbers of congressional representatives for equal numbers of people.

Garza's reliance on the Framers' intent also misses the mark. *Garza* noted that Madison called for the allocation of congressional representatives to states "founded on the aggregate number of inhabitants" in each state.[36] But the quotation recited by *Garza* disingenuously parsed Madison's statement. In full, Madison wrote:

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deviations from a total population baseline are justified, in part, because the total population basis only approximates equally weighted voting. *Garza*, 918 F.2d at 786 (Kozinski, J., dissenting) (citing *Gaffney*, 412 U.S. 735, 745-46 (1973)).

32. 376 U.S. 1 (1964).

33. *Garza*, 918 F.2d at 774.

34. *Id.* (quoting THE FEDERALIST No. 54, at 338 (James Madison) (Clinton Rossiter ed., 1961)).

35. *Wesberry*, 376 U.S. at 7-9.

36. 918 F.2d at 774 (quoting THE FEDERALIST No. 54, at 369 (James Madison) (Clinton Rossiter ed., 1961)).

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, *so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.*[37]

As the full quotation demonstrates, the Framers arrived at their method for the allocation of congressional representatives among the states out of concerns about federalism, not equal protection of individuals. Indeed, Article I, section 2 requires that voters elect the House of Representatives after congressmen are allocated to states in proportion to their percentage of the total U.S. population.[38] However, the Framers selected this allocation method because they viewed taxation and representation as interdependent. Since total population served as the best available proxy for state wealth, states received congressional representation in proportion to their total population.[39] The Framers envisioned the Constitution as requiring a method for allocating representatives *among* the states, but left to the states' discretion the method for allocating representatives *within* the states.[40] Thus, despite the majority's contention in *Garza,* neither the Supreme Court in *Reynolds* nor the Framers recognized that the general population forms the basis of representative government.

The third of *Garza*'s reasons for denying the existence of a constitutional rule of equally-weighted voting was the Supreme Court's recognition in *Gaffney v. Cummings*[41] that using total population-based districting plans will always lead to some deviation from equally-weighted voting. But *Gaffney* upheld a total population-based plan because "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted."[42] Thus, *Gaffney* did not abandon equally-weighted voting as a rule. Rather, the Court recognized that total population-based plans are constitutionally permissible *if* they serve as a close proxy for

37. THE FEDERALIST No. 54, at 338 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

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

39. Note, *A Territorial Approach to Representation for Illegal Aliens,* 80 MICH. L. REV. 1342, 1350-52 (1982) [hereinafter *A Territorial Approach*].

40. *Id.* at 1360 n.92.

41. 412 U.S. at 735.

42. *Id.* at 745-46.

equally-weighted voting.[43] In *Garza*, the district court's total population-based plan did not serve as a close proxy for equally-weighted voting, and was thus constitutionally infirm.

The "one person, one vote" cases do not supply the only evidence of a constitutional rule of equally-weighted voting. The Supreme Court has recognized a more general equal protection principle, of which the equally-weighted voting rule announced in *Reynolds* is but one facet. The more general rule makes clear that each "citizen has a constitutionally protected right to participate in elections *on an equal basis* with other citizens in the jurisdiction."[44] The more general rule can be traced to Chief Justice Warren's opinion in *Kramer v. Union Free School District No. 15.* There, the Court held:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Such laws] must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections.[45]

The Court made clear in *Kramer* that this fundamental right is held by citizens who are otherwise qualified to vote by residence and age.[46] Unquestionably, then, it is a right held exclusively by voters. Accordingly, even if *Burns, Wesberry,* or *Gaffney* had provided some justification for *Garza* to stray from equally-weighted voting, the Supreme Court's continuing acknowledgment[47] of the right of all voters to participate in elections on an equal basis would render *Garza*'s reliance on these cases largely unpersuasive.

In short, despite *Garza*'s holding to the contrary, voters' constitutional right to cast an equally-weighted vote is alive and well. To reach the conclusion that using total population-based dis-

43. *Garza,* 918 F.2d at 783 (Kozinski, J., dissenting).

44. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (emphasis added).

45. 395 U.S. 621, 626-27 (1969).

46. *Id.* at 627.

47. For instance, Justice Powell wrote for the Court: "The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (dictum). In the same opinion, he wrote of "the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters." *Id.* at 35 n.78 (dictum). More recently, Justice Brennan wrote for the Court: "[W]e have . . . recognized the fundamentality of participation in state 'elections on an equal basis with other citizens in the jurisdictions.'" Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) (quoting *Dunn,* 405 U.S. at 336) (dictum).

tricting plans that do not satisfy equally-weighted voting is constitutionally sound, it was necessary for the *Garza* court to discover a new constitutional right that demands that equally-weighted voting yield to a rule of equal numbers of representatives for equal numbers of people.

B. *A Fundamental Right of People to Equal Access?*

1. *A Public Forum Analysis*

Garza held that the First Amendment right of certain individuals to free access to elected officials was at issue, and would be impermissibly burdened by a voter-based districting plan. Specifically, individuals who resided in the body politic, and who wished to engage in political speech, claimed a right of access to air their political views. These speakers wanted to convey their message to the representative from their political district. The individuals claimed that using a voter-based plan would impermissibly burden their right to access if they lived in a district with a disproportionately large number of people. The Ninth Circuit, relying in part on the Petition Clause of the First Amendment, agreed that individuals in districts with disproportionately large numbers of people have a right of access to elected officials, which would be impermissibly burdened by a voter-based plan. This subsection seeks to determine the strength of this "right of access" claim under general First Amendment principles.

First Amendment rights are fundamental rights that warrant special protection from governmental interference. They are afforded special protection against intrusion by the federal government through direct application of the amendment,[48] and are afforded special protection from intrusion by state and local government through application of the Due Process Clause of the Fourteenth Amendment, in which First Amendment rights are incorporated.[49] First Amendment rights are alternatively protected from government interference through application of the Equal Protection Clause, which prohibits government, absent a compelling interest, from creating classifications that allocate the ability to exercise fundamental rights.[50] All individuals, including

48. U.S. CONST. amend. I.

49. Gitlow v. New York, 268 U.S. 652 (1925).

50. Carey v. Brown, 447 U.S. 455, 461-63 (1980); Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Acts of Congress are subject to equal protec-

illegal aliens, are "persons" entitled to protection under the Equal Protection Clause.[51]

Garza announced that individuals' First Amendment right of access to elected officials under the Petition Clause was at issue without any further First Amendment analysis.[52] The dearth of Petition Clause precedents cannot absolve the court from its failure to perform a full-blown First Amendment analysis, since the Supreme Court has held that rights implicating the Petition Clause are afforded no greater or lesser protection than rights deriving from the Speech and Press Clauses.[53] Therefore, the propriety of *Garza*'s reliance on the Petition Clause must be assessed in light of Speech and Press Clause precedents.

A review of Speech and Press Clause precedents reveals that right of access cases usually arise when individuals claim a right to access a particular forum to air their views. Individuals demand access to the forum to reach a desired audience. Two questions must be answered to determine the scope of their right. The first question involves individuals' *threshold* right to access the forum. This question is, when do individuals have an absolute entitlement to access the forum, however limited it may be? Phrased differently, this question asks under what conditions the government must assure individuals at least *some* access to the forum. The term "assured minimum access" is commonly associated with the legal rule that assures an individual some access. The first question cannot be the subject of the individuals' right of access claim in *Garza*, since the individuals would have been assured minimum access to elected officials under a voter-based districting plan. Specifically, the individuals would have *a* representative under a voter-based plan.

The second question involves individuals' *relative* right to access the particular forum. This question is, when do individuals have the same non-interference right to access the forum that

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tion analysis through the Due Process Clause of the Fifth Amendment under the doctrine of reverse incorporation. Bolling v. Sharpe, 347 U.S. 497 (1954).

51. *Plyler*, 457 U.S. at 210.

52. The Court cited only Eastern Railroad President's Conference v. Noerr, 365 U.S. 127, *reh'g denied* 365 U.S. 875 (1961), in which the Supreme Court held that the First Amendment right to petition the government immunizes from antitrust liability parties that bring lawsuits against competitors when the alleged antitrust violation is the bringing of the suit.

53. The protections offered by the Speech, Press, and Petition Clauses are identical, as "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." McDonald v. Smith, 472 U.S. 479, 485 (1985).

other individuals have? In other words, this question asks under what conditions the government must afford individuals equal treatment with respect to access to the forum, even if the equal treatment means that all individuals have *no* access to the forum. The term "equal access" is associated with the legal rule that assures individuals equal treatment with respect to access. The second question *is* the point of contention in *Garza*, since a voter-based districting plan would not have guaranteed equal access to all individuals, when equal access is defined in terms of equal numbers of representatives for equal numbers of people.[54] Thus, if couched in the public forum terminology that now dominates the First Amendment debate, the First Amendment issue in *Garza* is the scope of the right of equal access to the forum of petitioning representatives,[55] unquestionably an important public forum.

Speech and Press Clause precedents also reveal that the strength of individuals' right of equal access to a public forum is a function of the objective of the government regulation that would deny them equal treatment. Specifically, when individuals assert a right of equal access to a public forum, government regulations that target expression in the forum and discriminate based on point of view, subject matter, or speaker identity—so-called "content-based" regulations—must be justified by a compelling interest.[56] Government regulations that target expression in the forum but do not so discriminate—so-called "content-neutral" regulations—must be justified by an important interest.[57] Government regulations that do not target expression in the forum at all—so-called "laws of general application"—need only be

54. For a general discussion of "equal access" and "assured minimum access," see GERALD GUNTHER, CONSTITUTIONAL LAW 1249-53 (12th ed. 1991).

55. A forum may encompass means of communication as well as physical environments. Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 800-02 (1985). Accordingly, the forum analysis introduced here suits the facts of *Garza*, where speakers asserted a right to access a means of communication—petitioning representatives. One previous commentator similarly recognized that the forum analysis suits *voting* as a means of communication, and suggested that all of the Supreme Court's voting distribution cases are best explained as First Amendment cases. *See* Emily M. Calhoun, *The First Amendment and Voting Distribution Controversies*, 52 TENN. L. REV. 549 (1985).

56. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (subject matter discrimination); *Mosley*, 408 U.S. 92 (subject matter discrimination); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (point of view discrimination). For a fairly recent application of the rule, see American Booksellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986) (point of view discrimination).

57. Frisby v. Schultz, 487 U.S. 474 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (dictum).

rationally related to a legitimate interest.[58] Among the rationales that support making the strength of the right to equal access dependent upon the objective of the regulation are that the First Amendment is concerned with: (1) guarding against governmental control of political preferences by exorcising specific messages from public debate;[59] (2) ferreting out improper legislative motivations;[60] and (3) preventing paternalistic legislation that questions the ability of individuals who are exposed to information to make wise decisions.[61]

Under these general First Amendment principles, the individuals in *Garza* had no equal access claim of constitutional significance. The interest that countervailed their asserted right to equal access was not in the form of a government regulation, but rather a constitutional mandate. This countervailing interest was the fundamental right of voters to cast an equally-weighted vote, recognized by the Supreme Court in *Reynolds*.[62] Equally-weighted voting does not discriminate based on point of view, subject matter, or speaker identity. In fact, equally-weighted voting does not target expression in the forum of petitioning representatives. As Professor John Hart Ely explained, expression is targeted when "the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed."[63] There is no necessary causal connection between the constitutional interest in preventing the evil of vote dilution and the suppression of the message that the individuals claiming equal access in *Garza* wished to convey.[64] The constitutional interest requiring the use of a voter-based districting plans results from a simple correlation of equal access and the evil of vote dilution when the ratio of people to voters varies among districts. Because

58. Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991); Barnes v. Glen Theatre, 111 S. Ct. 2456, 2463-68 (1991) (Scalia, J., concurring); Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 886 n.3, *reh'g denied* 496 U.S. 913 (1990) (dictum); Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

59. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-200, 225-26 (1983).

60. *Id.* at 227-33.

61. *Id.* at 212-13.

62. *See supra* section II.A.

63. JOHN HART ELY, DEMOCRACY AND DISTRUST 111 (1980).

64. As Justice Souter noted in *Barnes*, where the expression impacted by the state regulation was nude dancing: "Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a [causal] relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression." *Barnes*, 111 S. Ct. at 2471 (1991) (Souter, J., concurring).

the effect of equally-weighted voting on the message of the individuals claiming equal access in *Garza* was entirely incidental, equally-weighted voting was akin to a law of general application, against which the First Amendment generally affords the most minimal protection.[65]

There are two exceptions to the rule that laws of general application are subjected to the rational basis test, neither of which is applicable here. First, if an individual selects a forum that symbolizes the message she wishes to convey, and the law of general application necessarily precludes her use of the forum, the law must be justified by an important state interest.[66] While the individuals in *Garza* could have claimed that the forum of petitioning representatives was essential to the preservation of their message, and thus symbolic, equally-weighted voting did not necessarily preclude their use of the forum. This is demonstrated by the fact that when voters and non-voters reside in uniform proportion in all districts, equally-weighted voting is achieved without any impairment of equal access. In any event, the remedy for a successful "symbolic forum" challenge may well be limited to *some* access to the precluded forum, or assured minimum access.[67] The individuals in *Garza* would have been assured minimum access to elected officials under a voter-based districting plan.

65. From this analysis it does not follow that First Amendment claims will *always* fail when another constitutional right is at issue. Consider Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), in which the Court balanced the public's First Amendment right to access to pre-trial hearings in a criminal case against a defendant's Sixth Amendment right to trial by an impartial jury. The trial court issued an order denying the public access to the pre-trial proceedings. Although the Supreme Court ultimately denied access, the Court assumed *arguendo* that the public had a significant First Amendment claim to be carefully balanced against the defendant's countervailing Sixth Amendment right. Recognition of a strong First Amendment claim on the facts of *Gannett* would be proper because the trial court's action in furtherance of the defendant's Sixth Amendment right targeted expression in the forum. The trial court sought to guarantee the defendant's Sixth Amendment right by averting the particular dangers of public dissemination of information about the pre-trial proceedings. The Supreme Court noted that the reason for the trial court's order was that "[p]ublicity concerning the proceedings at a pretrial hearing . . . could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial." *Id.* at 378. When another constitutional right is furthered by targeting expression in the forum, as in *Gannett*, First Amendment claims require careful balancing.

66. *Barnes*, 111 S. Ct. at 2456 (plurality); *id.* at 2468-71 (Souter J., concurring); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (regulation preventing homeless from sleeping in a public park during a political demonstration justified by an important state interest); United States v. O'Brien, 391 U.S. 367 (1968) (regulation proscribing mutilation of draft cards justified by an important state interest).

67. *See Barnes*, 111 S. Ct. at 2458 (petitioner's symbolic forum claim sought to have regulation declared unconstitutional only as applied to him); *O'Brien*, 391 U.S. at 376 (same).

The second exception demands that laws of general application that inevitably single out for special burdens those engaged in expressive activity be subjected to an unspecified level of scrutiny more rigorous than the rational basis test.[68] Equally-weighted voting disproportionately impacts the access to elected officials of *all* people who reside in districts with disproportionately large total populations when voters and non-voters do not reside in uniform proportion in all geographical areas. Thus, equally-weighted voting does not impose a disproportionate burden upon people who wish to engage in expressive activity. Rather, it imposes a disproportionate burden upon all people in disproportionately large districts, whether or not they wish to communicate with their representatives or otherwise express political views.[69]

Still, even though under existing First Amendment principles the individuals in *Garza* had no equal access claim of constitutional significance, the Supreme Court has on occasion taken a more speech-protective stance than existing principles mandate, without articulating reasons for its departure. For instance, in *Hustler Magazine v. Falwell*,[70] the Court focused not on whether the law targeted expression, but rather on the nature and extent of the expression affected. The Court declined to treat the common law tort of intentional infliction of emotional distress under the deferential standard of review that generally applies to laws of general application, where liability under the tort arose from speech in the area of public debate about a public figure. Following *Hustler Magazine*, *Garza* might have honored the general First Amendment principle in the breach, and concluded that since the individuals claimed equal access in order to register their political opinion in public debate, the First Amendment afforded them strong protection. Although the bulk of precedent would

68. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07 (1986) (dictum); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). Surely, *Minneapolis Star* did not apply the compelling state interest test. If generally applicable laws that single out those engaged in expressive activity were subjected to strict scrutiny, laws proscribing copyright infringement would be unconstitutional. *See Cohen*, 111 S. Ct. at 2518.

69. For instance, equally-weighted voting may burden those in disproportionately large districts who do not communicate with their representatives since their representatives do not hold the abstract voting power in legislative roll call votes that is necessary to secure government benefits for their district in proportion to their district's percentage of the total population of the polity. *See infra* section III.B.

70. 485 U.S. 46 (1988).

still weigh against the equal access claim, such an approach would have at least legitimized the court's result.

2. *A Suspect Classification Analysis*

As discussed in subsection B.1, *Garza* relied in part on the Petition Clause of the First Amendment in reaching its conclusion that individuals in political districts with disproportionately large numbers of people have a right of access to elected officials, which would be impermissibly burdened by a voter-based districting plan. The court's primary reliance was placed, however, on Supreme Court precedents that recognize aliens as a "discrete and insular minority" entitled to special judicial protection from discriminatory laws under the Equal Protection Clause of the Fourteenth Amendment,[71] and a precedent that recognizes that minors have a right to political expression.[72] This subsection seeks to determine the strength of the individuals' right to access claim by applying general equal protection principles.

The Equal Protection Clause contains two prohibitions. First, it prohibits government from making classifications in regulations that allocate the ability to exercise the fundamental rights enumerated in or emanating from the Bill of Rights, absent a compelling interest.[73] The analysis in the previous subsection focused on the conclusion drawn in *Garza*, that a voter-based districting plan would violate this prohibition. Second, the Equal Protection Clause prohibits government from enforcing regulations, absent a compelling interest, that discriminate against particular groups in any of three ways: intentionally,[74] through regulatory classifications that single out such groups ("suspect" classifications),[75] or through regulatory classifications that serve as a close proxy for such groups.[76] The clause affords particular groups special protection against such inequitable treatment by state and local governments through direct application of the amendment,[77] and

71. *Garza*, 918 F.2d 763, 775 (9th Cir. 1990)(citing Bernal v. Fainter, 467 U.S. 216 (1984) and Nyquist v. Mauclet, 432 U.S. 1 (1977)).

72. *Id.* (citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511-13 (1969)).

73. Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

74. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

75. Korematsu v. U.S., 323 U.S. 214 (1944).

76. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969)(striking under compelling interest test a voter amendment to city charter calling for automatic voter referendum procedure if city council enacted fair housing law, since impact of amendment would be to disadvantage solely a discrete and insular minority).

77. U.S. CONST. amend. XIV.

affords them special protection against such treatment by the federal government through application of the Due Process Clause of the Fifth Amendment, under the doctrine of reverse incorporation.[78] The second prohibition, using suspect classifications, is the subject of the inquiry in this subsection.

Garza held that using a voter-based districting plan would be constitutionally impermissible, relying on Supreme Court precedents that treat alienage as a suspect classification,[79] and a precedent that recognizes the right of minors to political expression.[80] The use of voter-based districting plans, which precisely equally-weighted voting requires, is tantamount to making classifications based on alienage and status as a minor. Voter-based plans do not by their terms single out aliens and minors. Such plans do facially discriminate against "non-voters," however, and aliens and minors inescapably fall into the class of non-voters. An analogous case would involve a hypothetical law that imposes a burden upon people with "dark skin." That the law might envelop some Anglos with deeply tanned skin would not make "dark skin" a race-neutral classification. Since almost all members of certain racial groups would inescapably fall into the burdened class, the classification "dark skin" would be suspect, provided (as is the case) that racial groups are entitled to special protection.[81]

Thus, the real point of contention in *Garza* was whether the court acted properly in treating aliens and minors as particular groups deserving of special judicial protection. Although the Supreme Court continues to struggle in its efforts to pinpoint the indicia that entitle a group to special protection, the Court has often noted the importance of the discreteness and insularity of a minority group.[82] Hence, the court in *Garza* had to determine

78. Bolling v. Sharpe, 347 U.S. 497 (1954).

79. *See supra* note 70.

80. *See supra* note 71.

81. *Garza* could have alternatively found that voter-based plans intentionally discriminate against aliens and children. In such case, the court would have had to discuss the intent and the discriminatory effects of a voter-based plan. *See Davis*, 426 U.S. at 239. Intent to discriminate against aliens and children could be easily shown. Discriminatory effects could also be shown, since voter-based districting plans provide individuals who reside in districts where non-voters reside in disproportionately large numbers relatively less access to representatives than they provide individuals who reside in districts with fewer non-voters. Thus, although voters who reside in districts with disproportionately large numbers of non-voters suffer access dilution under voter-based plans, aliens and children are disproportionately affected.

82. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 495-96 (1989); Graham v. Richardson, 403 U.S. 365, 372 (1971); U.S. v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

whether aliens and minors are discrete and insular minority groups deserving of special protection; or, if discreteness and insularity are not characteristics that trigger special protection, whether aliens and minors are entitled to special protection because they possess other indicia that equal protection precedents have identified as relevant to the special protection inquiry.

The early Burger Court announced in *Graham v. Richardson*[83] that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[84] The rationale behind this constitutional stance is clear. The Equal Protection Clause protects those groups who are incapable of protecting themselves through the democratic process. Aliens are not permitted to participate in that process. This renders them even more vulnerable than racial minorities, who at least have formal participation rights. Accordingly, since aliens are the paradigm case of a discrete and insular minority, they are entitled to special protection under the Equal Protection Clause.

However, the Supreme Court has since retreated from the idea that discreteness and insularity are indicia that trigger heightened judicial scrutiny. At times, the Court has suggested that the immutability of a group characteristic figures in the special protection calculus.[85] Further, the Court more recently has focused the special-protection inquiry on the magnitude of the risk that a regulatory classification will establish or reinforce societal perceptions that members of a group are inferior. Thus, in *City of Richmond v. J.A. Croson Co.*,[86] the plurality emphasized that prohibited classifications include those that abridge the right of members of a group "to be treated with equal dignity and respect."[87] Accordingly, classifications are suspect if they "promote notions of . . . inferiority and lead to a politics of . . . hostility."[88]

In step with the ever-shifting focus of the Court's special protection inquiry, equal protection rights for aliens have eroded

83. 403 U.S. 365 (1971).

84. *Id.* at 372 (citing *Carolene Products*, 304 U.S. at 152-53 n.4).

85. *See* Parham v. Hughes, 441 U.S. 347, 350 (1979) (plurality); Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (plurality). *But see* ELY, *supra* note 63, at 110-16 (advocating special protection for aliens because they are a discrete and insular minority).

86. 488 U.S. 469 (1989).

87. *Id.* at 493.

88. *Id.*

since *Graham.* Alienage is a mutable characteristic.[89] Moreover, the Court likely views the risk that alienage classifications will promote a societal perception of aliens as inferior to be acceptably low. The Court reasoned in *Croson* that racial regulatory classifications are suspect because they run an unacceptably high risk of establishing or reinforcing societal perceptions of the inferiority of the racial group that the regulation burdens (or benefits). This is because the Court almost never considers race a legitimate criterion for discrimination. The Court views alienage, unlike race, as a legitimate criterion for discrimination in a sizeable number of cases involving political participation and discretionary public decision-making. As such, the Court probably views alienage classifications as posing a far smaller risk of stigmatic harm.

Because the Court considers alienage a legitimate criterion for discrimination in the limited areas of political participation and discretionary public decisionmaking, it is unsurprising that the Court's gradual retreat from *Graham* has come in the form of a broad exception to a general rule of special protection for aliens. The political function exception was fashioned by the Burger Court to preserve laws that deny the voting franchise to aliens.[90] At its inception, the exception recognized that government has the power "to exclude aliens from participation in its democratic political institutions."[91] It has since been read to encompass all claims by aliens to any "position . . . whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."[92] Therefore, even though aliens are a discrete and insular minority, governmental exclusion of aliens from certain political functions, when "political" is defined broadly, is not suspect.

Under these general equal protection principles, a case can still be made that the aliens in *Garza* had a right to access claim

89. *See* Tom Gerety, *Children In the Labyrinth: The Complexities of* Plyler v. Doe, 44 U. PITT. L. REV. 379, 394 (1983) (criticizing treatment of aliens as a suspect class, citing absence of an immutable characteristic).

90. *See generally* Elwin Griffith, *The Alien Meets Some Constitutional Hurdles in Employment, Education and Aid Programs,* 17 SAN DIEGO L. REV. 201 (1980); Elizabeth Hull, *Resident Aliens and the Equal Protection Clause: The Burger Court's Retreat from* Graham v. Richardson, 47 BROOK. L. REV. 1 (1980). The Supreme Court of Colorado rejected an equal protection challenge to a state law denying aliens the franchise on the basis of this exception. *See* Skafte v. Rorex, 553 P.2d 830, 832 (Col. 1976), *appeal dismissed,* 430 U.S. 961 (1977).

91. Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

92. Foley v. Connelie, 435 U.S. 291, 296 (1978).

of constitutional significance. The right to access asserted by the aliens in *Garza* was a right to participate in democratic political institutions. *Garza* alternatively characterized the claim as involving a "right to petition their government for services and to influence how their tax dollars are spent," and a "right to . . . political participation short of voting."[93] Unquestionably, both of these characterizations of the asserted right to access established the aliens' claim as *political.* The characterizations arguably did not establish, however, that the aliens sought access to a political *function.* Although the political function exception was originally concerned with the historical power of governments to define their political communities,[94] later renditions of the exception suggest that it is concerned with aliens' exercise of discretion over citizens in the public sector. Whereas police officers certainly exercise discretion over citizens,[95] and voters can be viewed as exercising discretion over citizens,[96] non-voting petitioners of the government do not.

On the other hand, a stronger case can be made that the aliens in *Garza* had no right to access claim of constitutional significance. The original rationale for the political function exception subsumed *all* equal protection claims by aliens to participate in the political community. The focus on discretionary public decisionmaking in later cases probably represents a broadening of the exception rather than a shifting of its foundation. Moreover, commentators have noted, and the Supreme Court has on occasion agreed, that federal preemption rather than the Equal Protection Clause demands equal treatment of aliens.[97] Various constitutional provisions vest in Congress the power to regulate

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

94. *Sugarman,* 413 U.S. at 648.

95. *See Foley,* 435 U.S. 291 (upholding a state law barring employment of aliens as state troopers).

96. Whether voters are thought to exercise discretion over citizens depends upon how representation is viewed. *See* discussion *infra* section III.B.

97. *See* Toll v. Mareno, 458 U.S. 1 (1982) (relying solely on the Supremacy Clause in striking a statute denying preferential tuition and fees treatment to non-immigrant aliens); Foley v. Connelie, 435 U.S. at 295 (noting that *Graham* and its progeny banned exclusions that "struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence."); Note, *State Burdens on Resident Aliens: A New Preemption Analysis,* 89 YALE L.J. 940 (1980); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?,* 31 STAN. L. REV. 1069 (1979).

the entrance and residence of aliens.[98] Thus, state laws that single out aliens violate the Supremacy Clause, because "regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."[99] If federal preemption is really the driving force behind *Graham* and its progeny, then any congressional interest in providing aliens equal access to elected officials would be trumped by each voter's constitutional right to an equally-weighted vote. This follows from the most basic constitutional postulate: Congress holds no preemptive power over the operation of the Constitution as interpreted by the Supreme Court.[100] In any event, even if the aliens' claim fell within the equal protection ballpark, only lawfully admitted aliens would be entitled to special protection.[101]

While the aliens in *Garza* may have had a colorable right to access claim, the minors in *Garza* had no right to access claim of constitutional significance under equal protection principles. The Ninth Circuit sorely missed the mark by citing *Tinker v. Des Moines Independent Community School District*,[102] a case that recognized that minors have a First Amendment right to political expression,[103] as authority in its equal protection argument for minors' right to access. To the extent that *Tinker* was relevant, it was relevant only in the context of the First Amendment analysis performed in subsection B.1 of this Article. What the court needed in order to vindicate the minors' right-to-access claim under equal protection principles was a precedent that recognizes minors as a group for whom heightened judicial solicitude is appropriate. Equal protection principles suggest the contrary.

The Supreme Court has held that classifications based upon age are not suspect.[104] Although the Court made its determination in the context of a classification that discriminated against individuals *above* a certain age, the Court's rationale, articulated

98. Note, *State Burdens*, *supra* note 97, at 944-45 (mentioning "federal authority over foreign affairs, the power to make a uniform rule of naturalization, and the power to regulate commerce with foreign nations").

99. *Toll*, 458 U.S. at 12-13 (quoting De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976)).

100. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

101. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (dictum) (rejecting the claim that illegal aliens are a "suspect class" entitled to special protection).

102. 393 U.S. 503 (1969).

103. *See id.*

104. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976).

in *City of Cleburne v. Cleburne Living Center, Inc.*,[105] is equally applicable to a classification that discriminates against individuals *below* a certain age.

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize [sic] legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.[106]

Simply put, status as a minor is often a relevant characteristic; it is often a legitimate criterion for discrimination. Government and society may often legitimately treat minors as inferior in certain matters, such as voting and petitioning representatives, that implicate individual autonomy.

Accordingly, *Garza*'s holding, that a voter-based districting plan that does not provide substantially equal numbers of representatives for equal numbers of people would impermissibly burden individuals' right to access, can be squared even less with existing equal protection principles than with existing First Amendment principles. The illegal aliens and minors in *Garza* clearly had no right to access claim of constitutional significance under general equal protection principles. The lawfully admitted aliens arguably had a significant claim, but the stronger equal protection arguments weighed against it. Thus, *Garza*'s holding under the guise of the Equal Protection Clause cannot be squared with existing equal protection principles.

C. *Disposing of* Garza *Properly*

Voters have a right to an equally-weighted vote under the Equal Protection Clause.[107] It is possible that all individuals have a First Amendment right to equal access to elected officials.[108] Assuming *arguendo* that the First Amendment right to equal access exists, how is a court to choose between these competing constitutional interests? In other words, how is the *Garza* question properly resolved under existing constitutional principles?

105. 473 U.S. 432 (1985).
106. *Id.* at 441-42.
107. *See* discussion *supra* section A.
108. *See* discussion *supra* subsection B.1.

The answer is that the right of voters to cast an equally-weighted vote must not yield. As discussed in subsection B.1, the rationales underlying the First Amendment right to equal access are: (1) guarding against governmental exorcism of a particular message from public debate; (2) ferreting out improper legislative motivations; and (3) preventing paternalistic legislation that questions the ability of informed individuals to make wise decisions.[109] Because equally-weighted voting does not target expression in the forum of petitioning representatives, these rationales are inapposite. If one adopts the Supreme Court's approach in *Hustler Magazine v. Falwell*[110] and focuses on the nature and extent of the expression affected rather than whether expression is targeted, then the fear of government exorcism of a specific message from public debate may come into play, because equally-weighted voting disproportionately affects the access of non-voters to representatives.[111] However, in this regard, the equal access claim is dubious at best. First, it is not clear that aliens or minors bring a unique message to public debate. Infants arguably bring *no* message to public debate. Second, even if aliens or minors do bring a unique message to public debate, the message is not exorcised. At worst, it is attenuated, since aliens and minors do have some access to representatives under voter-based plans.

Moreover, even if this fear were a strong concern, equally-weighted voting must not yield. Unlike access, voting is a zero-sum game. If the weight of one vote increases, the weight of another vote necessarily decreases. In contrast, if one individual's access to a representative increases, another individual's access to a representative need not decrease. Access is a function of the number and scope of the lines of communication between individuals and representatives. An individual's "share" of a representative is but one variable of the access calculus. For instance, equal access can be achieved by increasing the staffs of representatives from disproportionately populous districts. Additional staff may condense and transmit to representatives incoming ideas that would otherwise not reach them. Thus, increasing staff size can increase the number and scope of the lines of communication without abrogating voters' rights to cast equally-weighted

109. *See supra* notes 59-61 and accompanying text.

110. 485 U.S. 46 (1988).

111. *See* discussion *supra* note 81.

votes. Hence, even if individuals' First Amendment rights to equal access were strong, a court must preserve voters' rights to equally-weighted votes.

Under existing constitutional principles, then, the Equal Protection Clause, by virtue of the one person, one vote principle announced in *Reynolds*, prohibits political districting plans that place an equal number of people in all districts when such plans do not provide substantially equally-weighted voting. The contrary holding in *Garza* is not sound under existing constitutional jurisprudence.

All this is not to say that the Supreme Court would be ill-advised both to decline to acknowledge *Garza*'s equal access right and to abandon *Reynolds* and its progeny. No provision in the Constitution was intended by its ratifiers to embody the one person, one vote principle.[112] In fact, as the next Part discusses, the Framers did not view representation as being closely related to district population. Moreover, the choice of population basis implicates far more than the constitutional values of voting power and access to representatives in the abstract. Perhaps the time has come for the Court to emerge from the thicket of representation and permit state legislatures to tailor their own political districts after considering all relevant normative and descriptive theories of representation.

III. Egalitarian Implications of the Choice of Population Basis

The previous section of this Article analyzes how the *Garza* question is properly resolved under existing constitutional principles. But at least as interesting as the question of which population basis the Constitution *requires* legislatures and courts to use when they form political districts is the question of which population basis *should* be used. These are two quite different questions, especially since the choice of population basis involves values other than the abstract constitutional values of voting power and access to representatives. Perhaps the fact that the Supreme Court has twice declined to address the constitutional question can be explained by its unwillingness to address the complex nor-

112. *See* Kelly, *supra* note 1, at 134-37.

mative and descriptive considerations that the constitutional question in *Garza* raises.[113]

It is important to assess these considerations because at stake in *Garza* is the very form of the republican governments guaranteed by the Constitution.[114] Further, the *Garza* question will likely arise again. Racial minorities generally have a younger median age than the population as a whole and, accordingly, fewer of them are eligible to vote.[115] Aliens are not eligible to vote in any state.[116] Since racial minorities and aliens do not reside in uniform proportion in all geographical areas, legislatures and courts are likely to be confronted with situations where total population-based districting plans will not provide substantially equally-weighted voting.

In this Part, this Article evaluates the merits of using voter-based districting plans and total population-based districting plans in terms of how these plans comport with procedural equality. For the purposes of this inquiry, "procedural equality" exists when all people entitled to representation have an equal opportunity, in the abstract, to have their preferences or interests taken into account by the representatives from their political district when the representatives cast roll call votes in the legislature.[117] This definition is deliberately ambiguous. It leaves open the questions of whether "preferences" or "interests" must be equalized to achieve equality, and of which individuals are "entitled to representation." In so doing, the definition recognizes that although egalitarianism, which demands that like cases be treated alike, is a valuable postulate upon which to base a representative system, it is not self-evident that all people within such a system are situated so as to have a valid claim to equal treat-

113. Commentators have touched on some of the complex normative and descriptive considerations associated with the choice of population basis but have drawn few conclusions. *See, e.g.*, ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 501-03 (1968) (considering approaches tried in various states during the 1960s).

114. *See* U.S. CONST. art. IV, § 4.

115. James M. Schermerhorn & Michael A. Stoto, *Measuring a Redistricting Plan's Deviation from Population Equality and Its Effect on Minorities: New Mexico's Experiment with a "Votes Cast" Formula*, 17 U.C. DAVIS L. REV. 591, 596 (1984); *cf.* Lowenstein & Steinberg, *supra* note 9, at 50.

116. Rosberg, *supra* note 10, at 1100.

117. This definition of equality is purely procedural, as it is wholly independent of the nature of roll call vote outcomes or their desirability. *See* CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 75 (1989).

ment.[118] For instance, all people may have *interests* that a system should take into account, but not all people may have *preferences* that a system should take into account. Multiple egalitarian representative regimes may therefore exist at the same time. One regime may value the interests of all people equally; another may value equally the preferences of those people whose preferences the system considers relevant.

Do voter-based districting plans or total population-based districting plans best provide procedural equality? In an autonomy-based view, plans that provide procedural equality are located at the equilibrium point reached in a bargaining game by autonomous individuals who bargain behind a "veil of ignorance" toward the consummation of a social contract. Voter-based plans best provide procedural equality under this view. In an interest-based view, procedural equality is arrived at by envisioning representatives as intermediaries between voters and their preferences, who satisfy interests rather than preferences. Total population-based plans best provide procedural equality under this view. In a third view, plans that provide procedural equality acknowledge that representative democracies should afford apparent if not actual equal status to the interests of all people, in order to establish and maintain appropriate societal attitudes. Total population-based plans may also best provide procedural equality under this view. These three views are explained below.

A. *Equilibrium in the Social Bargaining Game*

The autonomy-based view envisions voter-based districting plans as the outcome of a bargaining game undertaken by autonomous individuals who seek to maximize their preference satisfaction in a dispute resolution system. Autonomous individuals seek to consummate a social contract in order to resolve disputes peacefully. Bargaining behind a Rawlsian veil of ignorance,[119] each individual tries to minimize the frequency with which she expects to be on the losing side in dispute resolutions. Thus, in the face of ignorance about their future preferences and the

118. *See* Westen, *supra* note 23, at 550 n.41 (describing multiple egalitarian regimes in the voting context).

119. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

preferences of others, all agree to a system of simple majority rule, or equally-weighted voting.[120]

The fundamental criticism of the autonomy-based view is commonly known as the "boundary problem." Essentially, this criticism correctly notes that one cannot reach a proper decision rule—even if one can determine what the parties bargaining toward the consummation of the social contract would agree to—unless one can first identify the class of people who have the right to bargain in the first place.[121] The voting franchise is currently reserved for adult citizens. Thus, if equally-weighted voting is to be considered a decision rule of any significance in the American system of representation, it must first be established that the classification "adult citizens" is a reasonable proxy for the group of autonomous individuals who should be deemed parties to the social contract.

The two most populous groups denied the franchise are aliens and minors.[122] One plausible reason for excluding minors is incompetence, and two plausible reasons for excluding aliens are incompetence and non-membership in the political community.[123] Neither of these reasons for exclusion is entirely satisfactory.

Professor Bickel has brilliantly articulated the problem with the exclusion of aliens due to non-membership in the political community:

> A relationship between government and the governed that turns on citizenship can always be dissolved or denied. Citizenship is a legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson, which is the point of the *Dred Scott* case. Emphasis on citizenship as the tie

120. *See* BEITZ, *supra* note 117, at 88 (arguing that this observation is an instance of a more general proposition about the choice of decision rules); *see also* Douglas W. Rae, *Decision-Rules and Individual Values in Constitutional Choice*, 63 AM. POL. SCI. REV. 40, 41 (1969).

121. For a general discussion of the boundary problem, see Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, *in* LIBERAL DEMOCRACY: NOMOS XXV 13 (J. Roland Pennock & John W. Chapman eds., 1983).

122. States have also routinely denied the franchise to less populous groups, such as convicted felons. *See* Richardson v. Ramirez, 418 U.S. 24, 53-54 (1974).

123. Although these reasons do not exhaust the list of plausible reasons for excluding aliens, they seem to be the most plausible. For a lengthy discussion of other reasons, such as loyalty, the prevention of voter fraud and bloc voting, see Rosberg, *supra* note 10, at 1115-17, 1125-35.

> that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next to and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive, and stable institutions and of a balance between order and liberty. It is by such thinking, as in Rousseau's *The Social Contract,* that the claims of liberty may be readily translated into the postulates of oppression.[124]

Still, while no rational reason may exist for the exclusion of lawfully admitted aliens on the ground of non-membership, important reasons for the exclusion of illegal aliens on this ground may exist. Granting the franchise to illegal aliens would ratify their unlawful conduct[125] and encourage future illegal immigration.[126] Moreover, illegal aliens are often migrant workers who reside in a district only temporarily. As transients, they are likely to hold different views of short-run benefits and long-run costs to the community than those who reside there indefinitely.[127] Thus, exclusion of illegal aliens from the franchise does not depend on the concept of citizenship; rather, it invokes the more concrete concepts of residence and conduct.

A blanket exclusion of aliens and minors from the franchise on the ground of incompetence is not completely satisfactory either. The federal and state governments recognize most adult aliens and many minors as autonomous beings who are capable of making some deliberative choices about their preferences. For instance, states subject aliens and minors to their jurisdiction for purposes of imposing certain obligations, such as the duties to pay taxes and obey the criminal law.[128] To subject these groups to obligations of the social contract without allowing them to reap corresponding benefits would constitute a paradigm case of injustice.[129]

But a blanket exclusion of aliens and minors from the franchise on the ground of incompetence may not be entirely

124. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53 (1975).

125. Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection,* 44 U. PITT. L. REV. 351, 374 (1983).

126. *Id.* at 376 (arguing that this reason is compelling in the limiting case since unlimited immigration to the United States would constitute a grave threat to its continued existence in its current form).

127. Rosberg, *supra* note 10, at 1113.

128. *A Territorial Approach, supra* note 39, at 1347.

129. *Id.*

irrational. Aliens and minors in the United States may already receive benefits that more than correspond with their obligations under the social contract, even if they are denied specific benefits such as the right to vote. For instance, a study of 2.3 million immigrants in Los Angeles County for fiscal year 1991-92 revealed that they accounted for $946.7 million in county spending while paying $139.1 million in county taxes and fees.[130] The 700,000 illegal aliens in the study accounted for $308.4 million in county spending while paying $36.2 in county taxes and fees.[131]

Perhaps a substantive claim about the net government benefits received by aliens and minors is no answer to a charge of procedural inequality. But there is more to the claim that the preferences of aliens and minors should not be given the same status in a representative system as the preferences of adult citizens. The federal and state governments do not subject infants to any obligations of the social contract. Certainly, no one would suggest that infants should be recognized as autonomous beings capable of making deliberative choices about their preferences. Further, federal and state governments do not subject any minors to all of the obligations of the social contract.[132] Adolescent minors are capable of making some deliberative choices, and perhaps they should receive a partially weighted vote.[133] Still, their preferences should arguably be relegated to some lesser status than the preferences of adults on the ground that they are less autonomous. One could mount a similar, albeit less persuasive argument that the preferences of adult aliens should be relegated to a lesser status than adult citizens on the ground that aliens are not as well-equipped as citizens to make deliberative choices within the American representative system.[134] Thus, while there may not be a compelling or even an important reason to deny adult aliens

130. Hector Tobar, *Immigrants' Cost to County is Debated*, L.A. TIMES, Nov. 10, 1992, at B1, B4. The 2.3 million immigrants included 630,000 recently legalized immigrants, 720,000 immigrants who received amnesty under the Immigration Reform and Control Act, 700,000 illegal immigrants, and 250,000 children born in the U.S. of illegal immigrant parents. *Id.* Thus, all of the people in the study were non-voters. The study also found that these people paid a total of $4.3 billion in taxes to federal, state, and county government. *Id.*

131. *Id.* at B4. The study also found that illegal aliens paid an additional $777 million in taxes to federal and state government. *Id.*

132. Rosberg, *supra* note 10, at 1115.

133. *See id.* (noting that the exclusion of children from the franchise is controversial).

134. *See id.* at 1117-25 (making and then challenging argument for denying aliens the franchise on the ground of incompetence).

the franchise on the basis of incompetence, such a denial may not be without a rational basis.

Another criticism of the autonomy-based view is that it portrays all of the bargaining parties as if their only interest is finding a peaceful means for resolving disputes that maximizes their abstract voting power. The view thus excludes other interests that parties might bring to bear in the negotiations, such as a concern for conditions of responsible deliberation and satisfaction of urgent needs.[135]

Similarly, one might criticize the autonomy-based view for neglecting the fact that a particular party might agree to equally-weighted voting only if her preference in any dispute is not precluded from being the majority's preference. Thus, all parties might agree to a system of equally-weighted voting by itself only if each party operates under the assumptions of pluralist theory. Pluralist theory assumes that equally-weighted votes will translate into abstractly equal influence in electoral outcomes, since "each person is an atom, able best to judge for himself and unpredictable in either his tastes or his alignments with others."[136] However, cohesive voting may preclude certain electoral outcomes.[137] For example,

> [o]ne can imagine an electorate perfectly informed, perfectly expert, and perfectly concerned for society's welfare, in which nonetheless holders of 51 percent of the votes always consulted internally and then cast their votes as a bloc. The result, in an absolute-majority voting system, would be . . . that the holders of the other 49 percent would be unrepresented by the results of the voting: none of them could ever be decisive for any outcome.[138]

One response to these criticisms is to deny that they pose a problem in reality. An uninhibited struggle among factions may promote social welfare better than any alternative system.[139] Political ordering may be likened to market ordering, where the responsiveness of representatives to the variety and intensity of

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135. BEITZ, *supra* note 117, at 91.

136. Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395, 402 (1981).

137. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33 (1985) (noting that factional domination by one group or an alliance of groups effectively deprives other groups of the opportunity to assert their views).

138. Rogowski, *supra* note 136, at 403.

139. Sunstein, *supra* note 137, at 33 (noting this response without advocating it).

preferences promotes aggregate social welfare through an "invisible hand" akin to that found in other markets.[140]

Even if one admits that these criticisms pose a problem, however, proponents of the autonomy-based view are not without a response. The Constitution recognizes certain areas of individual autonomy into which majorities may not trespass.[141] Moreover, the Constitution affords special protection to some discrete and insular minority groups that are unable to protect themselves in the majoritarian process.[142]

Furthermore, an attempt to attack the problem of some bloc voting directly has, ironically, met with legislative success. Section 2 of the Voting Rights Act provides a statutory remedy for the effects of racial-bloc voting without any deviation from equally-weighted voting.[143] The Supreme Court has read the amended section 2 to require legislatures and courts to form "safe" political districts for racial minorities when majority and minority groups engage in racially cohesive and polarized voting, provided that legislatures and courts can feasibly do so under existing geographic conditions.[144] Lower courts have eroded the geographic limitations on the section 2 remedy by requiring that any minority district formed under its auspices be only "functionally" rather than geographically compact, such that any district capable of providing effective representation is sufficiently compact.[145]

Thus, although it is underinclusive (and overinclusive), equally-weighted voting under existing voting criteria may serve as a rough approximation of procedural equality when procedural equality is defined as the equilibrium point of the social bargaining game. The underinclusiveness is a definitional problem that can be cured by expanding the franchise to include those people who should be deemed parties to the social contract. However, equally-weighted voting in its current form provides rough procedural equality by entitling all adult citizens to an equal opportunity, in the abstract, to have their preferences taken into account by the representatives from their political district when the representatives cast roll call votes. One can, there-

140. *Id.* at 34.
141. *See id.* at 33.
142. *See id.* at 34.
143. Voting Rights Act of 1965, § 2, *as amended*, 42 U.S.C.A. § 1973 (1988).
144. Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986).
145. *See, e.g.*, Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988).

fore, make a case on the ground of procedural equality that legislatures and courts should use voter-based districting plans, when equally-weighted voting and equal numbers of representatives for equal numbers of people cannot be satisfied simultaneously.

B. *Representatives as Intermediaries*

An alternative, interest-based view of procedural equality envisions representatives as intermediaries between voters and their preferences, who satisfy interests rather than preferences. This view is quite different from that espoused in *Garza*. *Garza*'s main reason for supporting a rule of equal numbers of representatives for equal numbers of people, and thus for supporting total-population-based districting plans, was that all individuals are autonomous beings capable of making deliberative choices about their preferences.[146] The *Garza* view is vulnerable because its logic only entitles individuals access to *a* representative, not an equal share of representatives. In any event, the *Garza* view is susceptible to a *reductio ad absurdum*, since it calls for treating infants as autonomous centers of deliberation.[147] The interest-based view, in contrast, must rest on the postulate that all people, whether autonomous or not, have interests. Representatives cast equally-weighted roll call votes in the legislature, so each holds abstract voting power to satisfy the interests of an equal number of people with the other representatives. Thus, to the extent that representatives cast roll call votes to satisfy interests common to all people within their districts, it is desirable to place an equal number of people in all districts to guarantee a form of government that assigns roughly equal weight to all interests.

The fundamental difference between the autonomy-based view and the interest-based view lies in the depiction of representation. The autonomy-based view holds that voter-based districting plans provide procedural equality because they provide equally-weighted voting, which approximates the dispute resolution sys-

146. For example, the court noted: "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Garza*, 918 F.2d at 775 (quoting Eastern R.R. Presidents Comm'n v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, *reh'g denied*, 365 U.S. 875 (1961)). Furthermore, with respect to the autonomy of minors, the court noted: "Thus, a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area." *Garza*, 918 F.2d at 775 (quoting Calderon v. City of L.A., 481 P.2d 489, 493 (Cal. 1971)).

147. *See* discussion *supra* sections II.B and C.

tem that lies at the equilibrium point of a social bargaining game entered into by autonomous individuals. Thus, the autonomy-based view presupposes that the role of representatives is to cast roll call votes in the legislature just as the autonomous individuals from their district would cast them. Therefore, inherent in the autonomy-based view is a normative theory of representation that envisions representatives as the agents or delegates of voters.

The role of agent-representatives is to mirror, so much as possible, the preferences of their constituents.[148] Accordingly, representatives should cast roll call votes that reflect the will of an effective majority of their constituents.[149] The agency theory rests on the notion that constituents send their representatives to the legislature to do something for them that they could choose to do for themselves.[150] Accordingly, representatives do not truly "represent" if they do the opposite of what their constituents would do.[151] Thus, the agency theory likens representatives to mechanical devices through whom constituents act.[152] Since the parties to the social contract are those individuals who might choose to go to the legislature themselves, "constituent" becomes synonymous with "voter." The role of representatives becomes simply to ensure that the preferences of the parties to the social contract, the voters, are honored. By making all representatives agents of an equal number of voters, voter-based districting plans ensure that the preferences of all voters count equally, in the abstract, when representatives cast roll call votes. In this way, voter-based plans provide procedural equality.

In contrast, the interest-based view is premised on the fact that in a representative democracy, disputes are resolved by representatives, not voters. The interest-based view rejects the notion that the role of representatives is to mirror the preferences of

148. *See* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 146-47 (1967) (describing this view as that of the "mandate theorist"). In this Article, "constituents" includes and is limited to those individuals whose preferences or interests representatives respond to when they cast roll call votes.

149. J. Roland Pennock, *Political Representation: An Overview, in* REPRESENTATION: NOMOS X 3, 12 (J. Roland Pennock & John W. Chapman eds., 1968). An interesting question arises as to whether "effective majority" includes weighing the intensity of opinions as well as counting them. *Id.*

150. Professor Sunstein attributes this view of representation to the antifederalists at the time the Constitution was debated. *See* Sunstein, *supra* note 137, at 35-38. For the antifederalists, "representation was a necessary evil brought about by the impracticability of direct self-governance by the people." *Id.* at 37.

151. Hanna F. Pitkin, *Commentary: The Paradox of Representation, in* REPRESENTATION: NOMOS X 38, *supra* note 149, at 41.

152. PITKIN, *supra* note 151, at 146-47.

their voters. Indeed, it is not at all clear that the proper role of American representatives is to satisfy voter preferences. The Constitution guarantees a republican form of government,[153] and the Framers amply explained why representatives are introduced as intermediaries between the voters and their preferences. Madison argued that the function of representative democracy is

> to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.[154]

Madison's reference to "temporary or partial considerations" exemplifies the Framers' concern that voters may act as self-interested individuals[155] whose preferences may often be incongruous with the "public interest."[156]

Thus, the Framers identified an alternative normative theory of representation that envisions representatives as trustees or guardians.[157] This theory holds that representatives should exercise discretion and cast roll call votes in pursuit of their constituents' best interests. Proponents of the trustee theory claim that

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153. U.S. CONST. art. IV, § 4.

154. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

155. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 485-87 (1988) (noting that the Framers assumed they were establishing a system of government that would guide the affairs of highly self-interested economic actors).

156. Defining the "public interest" is itself a matter of great controversy. Pluralists believe that the public interest can amount to nothing more than the aggregation of private preferences. Sunstein, *supra* note 137, at 32-33. Hence, pluralists view any attempt to define an independent public interest as "incoherent, potentially totalitarian, or both." *Id.* at 32. Others believe, in common with the Framers, that while there may be no universally acceptable definition of the public interest, some government ends are more legitimate than others. *See id.* at 45, 84-85. As Professor Sunstein notes:

> The requirement of [representative] deliberation does not exclude compromises among those with different conceptions of appropriate government ends. But it does demand that representatives engage in some form of discussion about those ends, rather than responding mechanically to political power or to existing private preferences.

Id. at 84-85 (citation omitted).

157. Professor Sunstein makes the case that the Framers envisioned representatives in the trustee role. *See id.* at 41-48. Sunstein refers to this theory of representation as "deliberative democracy." *Id.* at 45. Deliberative democracy is closely aligned with the views of Edmund Burke. *Id.* at 41-42. Sunstein's views on this point are not universally held. *See, e.g.*, Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL'Y 49, 50 (1993).

the legislative situation provides opportunities to discuss, deliberate, and obtain information which render the exercise of discretion by representatives desirable.[158] In addition, the polity would not exist without some obligation on the part of each person to support the welfare of the whole society, and representatives cannot overlook this obligation, even when their constituents do.[159]

To the extent that the proper role of representatives is as trustees, the importance of the autonomy-based view diminishes. Trustees satisfy interests rather than preferences, and voters do not have a monopoly on interests. As one commentator has noted, if the proper role of representatives is as trustees, then

> the purpose of the elective system would appear to be simply to select the requisite number of wise and able men to act together to make judgments for the people of the state. There is no evidence to show that the ability to select such men depends closely on population or that a basic constitutional right is involved.[160]

In other words, casting representatives in the trustee role obviates voter-based districting plans as a means to achieve procedural equality.

Still, while depicting representatives as trustees renders voter-based districting plans unnecessary, it does not, without more, recommend total population-based plans. The trustee-representative, as Madison envisioned, regards all people in the polity, not just those in his home district, as members of his constituency. One pillar of the trustee theory is that the polity would not exist without some obligation on the part of each individual to support the welfare of the whole society. A second pillar is that the legislative situation provides those opportunities already mentioned—to discuss, deliberate, and obtain information—that render representatives' exercise of discretion desirable. Presumably, such deliberation is desirable because it leads to legislation based on enlightened judgments; and truly enlightened judgments would result in government action in the public interest, regardless of the population of districts. Thus, as with deviating

158. Pennock, *supra* note 149, at 15.

159. *Id.* at 22. For instance, an issue may arise regarding which a representative should arguably vote her conscience notwithstanding what a perfectly informed effective majority of her constituents would do. The issue of racial segregation in the American South serves as a prime example. *Id.* at 20.

160. John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309, 1325 (1966) (citation omitted).

voter populations, deviating total populations should not be a matter of concern if representatives act as trustees.

Thus, to justify total population-based districting plans, the interest-based view must adopt a more cynical view of representation than the Framers did. The Framers rejected the agency role for representatives because voters may advance their own interests at the expense of the wider public.[161] The interest-based view must reject the Madisonian trustee role for representatives on the ground that representatives, too, may advance their own interests at public expense.[162] For example, representatives may act as agents for self-interested voters not because they ought to, but rather to preserve their legislative careers. Voting in periodic elections may advance a principal-agent relationship between voters and representatives in two ways. First, periodic elections may induce a representative to be responsive to voter preferences out of a desire for reelection.[163] Second, periodic elections may serve as a means by which voters, who may not have a preexisting will on every topic, have their preferences satisfied by electing a representative who so shares their policy views "that in following his own convictions he does his constituents' will."[164]

In its least cynical form, the interest-based view may envision total population-based districting plans as merely providing a safety valve when some self-interested representatives shirk their duties as trustees for the polity in favor of their voters' self-interested preferences. Unquestionably, enlightened judgments made in the public interest will often be contrary to the preferences of self-interested voters. Should some self-interested representatives place voters' self-interested preferences above the public interest, total population-based plans would enable other representatives, who hold abstractly equal voting power in roll call votes, to continue to assign weight to the interests of people in their districts in proportion to their percentage of the polity.

161. Madison recognized that voters could not be trusted to control legislative affairs directly because civic virtue and public education "would be unable to overcome the natural self-interest of men and women, even in their capacity as political actors. Self-interest, in Madison's view, would inevitably result from differences in natural talents and property ownership." Sunstein, *supra* note 137, at 40.

162. To their credit, the Framers did not place complete faith in the benevolence of representatives, as is evidenced by the separation of constitutional powers and the constitutional embodiment of a requirement of some form of electoral accountability. *See id.* at 46-47.

163. Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 50 (1963).

164. *Id.*

Thus, total population-based plans would allow representatives to become, when necessary, trustees for the people of their districts and to ensure a just satisfaction of interests within their districts. Voter-based plans, in contrast, would not allow representatives from more populous districts to assign weight to the interests of people in their districts in proportion to their respective percentages of the polity.

However, this version of the interest-based view is deficient. Total population-based districting plans do not provide a means to bring the behavior of self-interested representatives into conformity with the public interest. Accordingly, rather than serving as a threat of "mutually assured destruction" that induces shirking representatives to return to trusteeship for the polity, the temporary safety valve is more properly viewed as a permanent fixture. What is naively viewed as a temporary check on self-interested representatives in reality degenerates into an endless cycle of vote-trading in which all representatives aim solely to satisfy the interests of the people in their own districts, resulting in government spending that is excessive from the point of view of the public interest.[165]

The interest-based view is consequently more plausible if cast in a more cynical form, resigning itself to a representative system in which purely self-interested representatives respond to purely self-interested voters. In this more cynical view, total population-based districting plans provide rough procedural equality since self-interested representatives, who cast equally-weighted roll call votes, hold abstract voting power to satisfy an equal number of interests. Because it brings them electoral success (or because their policy views are indistinguishable from those held by their constituents), representatives when they cast roll call votes satisfy the interests of the self-interested voters within their own districts. Thus, since all districts contain interests that carry equal weight in roll call votes, it is desirable to place an equal number of people in all districts in order to guarantee a form of government that assigns roughly equal weight to all interests across the polity.

Of course, the conclusion that the cynical form of the interest-based view requires total population-based districting plans as-

165. Macey, *supra* note 155, at 492-93 n.64. This conclusion assumes a definition under which roll call votes in the "public interest" are equated with those that maximize a social welfare function.

sumes that the non-voters in a district are "virtually" represented by the voters in their district. In other words, non-voters will realize the fruits of representative responsiveness to voters in any particular district only if their interests are more highly correlated with the interests of voters in their own district than with the interests of voters in other districts. There are several reasons to expect that this proposition is generally true. First, districts are often occupied by people similar to one another in their economic means. Since the impact of legislation on people with similar economic means is usually similar, their interests tend to converge. Second, people who reside in the same geographic region have interests that tend to correlate. For example, most people, regardless of their economic means, support "pork barrel" legislation that brings government funds into their district. Third, state legislatures engage in partisan gerrymandering that purposely stacks districts with people whose interests are similar in important respects. Fourth, amended § 2 of the Voting Rights Act calls for racial gerrymandering that does the same.[166] Fifth, the interests of non-voting minors are often inseparable from the interests of their voting parents.

Unlike the Framers' view and the less cynical form of the interest-based view, the more cynical form of the interest-based view has little to recommend it normatively. The more cynical form does not aspire to the lofty goal of a government that acts in the public interest, and it depends heavily on the validity of a particular description of representation in which: (1) voters are self-interested; (2) representatives cast roll call votes to satisfy voters; and (3) the interests of non-voters correlate better with the interests of voters in their own district than with the interests of voters in other districts.[167] Public choice scholars have performed empirical studies that provide evidence that this description of representation in the United States is somewhat accurate but not perfect.[168] Public choice studies have thus far failed to explain all

166. Voting Rights Act of 1965, § 2, *as amended*, 42 U.S.C.A. § 1973 (1988); *see also* Clark v. Roemer, 777 F. Supp. 445 (M.D. La. 1990) (gerrymandering judicial election districts in accordance with these provisions of the Voting Rights Act).

167. Public choice scholars have encountered success modeling representatives and voters as self-interested actors, although these scholars recognize the normative limitations of their work. *See, e.g.*, Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Noble" Lie*, 74 VA. L. REV. 179 (1988).

168. For a thorough accounting and analysis of public choice studies prior to 1987, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890-906 (1987). Professors Farber and Frickey conclude that pre-1987 public choice stud-

roll call votes of representatives in terms of representatives' self-interest.[169] More important to the issue at hand, the public choice studies show that when representatives do cast roll call votes out of self-interest, their votes often do not correspond with the interests of voters in their district. One public choice scholar opines that pressure from special interest groups rather than pressure from self-interested voters may explain many roll call votes cast by self-interested representatives, since responsiveness to interest groups may bring representatives far more political success in the form of interest group support than it costs them in voter support.[170] Furthermore, public choice studies demonstrate that when representatives do cast roll call votes to satisfy voters in their districts, their votes tend to advance the interests of those voters likely to support them in the next election far more than the interests of other voters and of non-voters.[171] Thus, although the more cynical form of the interest-based view has some empirical support, total population-based districting plans can only serve as a rough proxy for procedural equality.

Moreover, the argument that total population-based districting plans must be used to guarantee that the interests to be satisfied are assigned equal weight perhaps proves too much. While all

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ies identify self-interested tendencies within the political system but do not explain all of politics. *Id.* at 900.

169. *See, e.g.*, Michael L. Davis & Philip K. Porter, *A Test for Pure or Apparent Ideology in Congressional Voting*, 60 PUB. CHOICE 101 (1989) (claiming that roll call votes of representatives cannot be explained entirely in terms of self-interest); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103, 127 (1990).

170. Macey, *supra* note 155, at 490. Macey notes that voters face a massive free-rider problem that provides a disincentive to seek information about representatives. *Id.* at 489. Accordingly, representatives recognize widespread voter apathy due to rational ignorance and secure legislation which benefits interest groups adept at overcoming the free-rider problem. *Id.* at 490. However, other public choice scholars note that representatives gain far more political advantage by attracting the support of interest groups in their own districts than they could gain from those outside their own districts, since service to local interest groups simultaneously attracts both votes and organized resources. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 136-37 (1988); *see also* Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89 (1986) (providing some empirical support for this view). In addition, one public choice study provides some evidence that even when voters are rationally ignorant, representatives may still cast roll call votes to advance voter interests in order to maintain their reputations as ideologues committed to particular roll call voting patterns. William R. Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 J.L. & ECON. 119, 139-40 (1989).

171. *See* Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 193 (1984); Lilliard E. Richardson & Michael C. Munger, *Shirking, Representation, and Congressional Behavior: Voting on the 1983 Amendments to the Social Security Act*, 67 PUB. CHOICE 11, 16, 27, 30 (1990).

people who reside in the United States certainly have interests to be satisfied, not all interests should be satisfied by governments in the United States. Although incompetence-based objections to a person's inclusion in the population basis have no place in an interest-based view, objections to a person's inclusion based on non-membership in the political community may apply with the same force they had under the autonomy-based view. Specifically, just as granting the voting franchise to illegal aliens would ratify their unlawful conduct and encourage future illegal immigration,[172] including illegal aliens in the population basis when allocating representatives may have the same effects.

That having been said, exclusion of illegal aliens from the population basis may lead to serious inequities. Various mandates emanating from the polity *require* districts to provide particular government benefits to illegal aliens.[173] Since the polity demands that districts assign some weight to the interests of illegal aliens, the polity arguably must count illegal aliens when assigning representatives so that the interests of lawful residents in districts with disproportionately large numbers of illegal aliens continue to be assigned weight in proportion to their respective percentages of the polity. An especially compelling case that illegal aliens should be counted when allocating congressional representatives, in particular, can be made on the ground that lawful residents of congressional districts with disproportionately large illegal alien populations should not be disadvantaged by the failure of the entire polity, as represented by the United States government, to enforce its immigration laws adequately.

Therefore, total population-based districting plans may guarantee rough procedural equality under the more cynical form of the interest-based view by entitling all people to an equal opportunity, in the abstract, to have their interests taken into account by representatives from their political districts when the representatives cast roll call votes. As was true of the autonomy-based view, one can make a case on the ground of procedural equality that legislatures and courts should use total population-based plans when the goals of equally-weighted voting and equal numbers of representatives for equal numbers of people cannot be simultaneously satisfied.

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172. *See supra* notes 125-26 and accompanying text.

173. Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990) (citing CAL. WELFARE & INST. CODE §§ 14007.5, 17000).

C. *Formal Recognition of Equal Interests*

A third view of procedural equality would require total population-based districting plans because they formally recognize the equality of interests of all people. This third view rests on the notion that representative democracies should not establish or reinforce the perception that the interests of some people deserve less respect than others by virtue of their membership in one rather than another social or ascriptive group.[174] By allocating the same number of representatives to all people, total population-based plans may provide the only system of allocating representatives in a manner that does not establish or reinforce a perception that the interests of some people deserve less respect than the interests of others.

Like the first two views, however, the third view is problematic. It rests on a slippery-slope argument. The argument claims that districting by a basis other than total population would cause an undesirable shift in societal attitudes with respect to persons not counted when allocating representatives. Like any slippery-slope argument, this is persuasive only if there is a slope, the slope is slippery, and what is at the bottom of the slope is undesirable.

What is at the bottom of the slope may well be undesirable, at least with respect to minors and legally resident aliens.[175] According to Hegel, the most fundamental desire of man is to be recognized as the equal of other men.[176] Any other human relationship is that of master and slave, and as such is inherently unstable. The slave is unsatisfied because he is something less than human; he has succumbed to his animalistic desire for biological necessities instead of battling for emancipation from his master at the risk of violent death. The master is unsatisfied because he is recognized only by the slave, who is something less than human. Ultimately, the slave recovers his humanity through work, in which he recognizes his capability to transform nature through free and creative labor. The slave eventually conceives of

174. *See* BEITZ, *supra* note 117, at 109-10.

175. The interests of *illegal* aliens perhaps should not be recognized by a society as equivalent to the interests of lawful residents. Including illegal aliens in the population basis when allocating representatives may ratify their unlawful conduct and encourage future illegal immigration. *See* discussion *supra* section III.B.

176. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 146-47 (1992) (deriving this account from GEORG W.F. HEGEL, THE PHENOMENOLOGY OF MIND 28-40 (J.B. Baillie ed., 2d ed. 1931) (1807) by way of ALEXANDRE KOJÈVE, INTRODUCTION TO THE READING OF HEGEL 3-30, 41ff. (Allan Bloom ed., 1969)).

the idea of freedom and rebels against his master.[177] Accordingly, universal and reciprocal recognition, whereby every person recognizes the equal dignity and humanity of every other person, may be an essential component of a stable society.[178]

However, the other two propositions of the slippery-slope argument may not hold. First, there may not be a slope. Districting plans that do not provide equal numbers of representatives for equal numbers of people will reinforce perceptions that the interests of some people deserve less respect than others only if people generally think that representatives cater to the common interests of the people in their district. While Americans may perceive representation in this way,[179] they do not necessarily do so. For instance, Americans may perceive representatives as trustees for the entire polity, who strive to advance the public interest. Or Americans may perceive representatives as agents who follow the instructions of altruistic voters in their districts. If either of the latter perceptions reflects the dominant American attitude, then total population-based districting plans are unnecessary to safeguard against the risk of a belief that the interests of some people deserve less respect than the interests of others.[180]

Second, the slope may not be slippery. In fact, in the case of aliens, total population-based districting plans may *increase* the slipperiness of any slope that does exist. Despite benevolent intentions, total population-based plans may reinforce the perception that the interests of aliens deserve less respect than the interests of citizens. Whether or not there is normative support for its attitude, a society may perceive aliens, who are neither counted when assigning representatives nor extended the voting franchise under voter-based plans, as non-members of the political community. When aliens are counted when assigning representatives but denied the franchise, as they are under total population-based plans, society's perception of aliens as non-

177. *Id.* at 192-95.

178. *See id.* at 199-202.

179. *See* discussion *supra* section III.B.

180. Numerous studies have been performed categorizing the attitudes of representatives about their role. Generally, these studies reveal that representatives view themselves as trustees slightly more often than they view themselves as agents. *See* DAVID M. OLSON, THE LEGISLATIVE PROCESS: A COMPARATIVE APPROACH 125-31 (1980). Many representatives view themselves in a hybrid role. *Id.* at 126-27. Most representatives who consider themselves agents view themselves as agents solely for the people in their district. *Id.* at 128. Most of those who consider themselves trustees view themselves as trustees for the polity. *Id.*

members of the political community may be less pronounced. As the non-membership distinction blurs, society may perceive some other distinction as the controlling reason for denying aliens the franchise. The most easily imagined reason for denying aliens the franchise, other than non-membership, is incompetence. In the United States, a perception of aliens as less competent than citizens may be far more harmful to their interests than a perception of them as non-members of the political community, especially since competence, unlike non-membership in the polity, is a legitimate criterion for discrimination in the private sector.

Moreover, one need look no farther than an American history textbook to see limits to the importance of formal recognition of equality, where such recognition takes the form of being counted by a representative democracy when it allocates representatives. By constitutional mandate, each slave in the antebellum South was counted as three-fifths of a human being for the purpose of allocating congressional representation.[181] One tragic consequence of the Three-Fifths Compromise was the loss of dignity associated with being counted as three-fifths of a person. However, the greater tragedy of the Compromise was that a slave was counted as three-fifths of a person for the purpose of assigning representatives, but was denied even three-fifths of a vote. The South wanted to count slaves as whole persons—wanted, that is, a "formal recognition" of slaves as whole persons; the North wanted to exclude slaves from the count altogether.[182] Yet it cannot seriously be argued that the interests of slaves would have been better served by being formally recognized as whole persons, the constitutional rule desired by the South, than by being excluded altogether, the constitutional rule desired by the North.

The Three-Fifths Compromise serves as a reminder that the duty of fair institutions to maintain the appearance of egalitarianism must be carefully balanced against their duty to be truly egalitarian. It does not mean that formal recognition of the interests of all people as equal is entirely unimportant. Despite the foregoing criticisms, total population-based districting plans may provide procedural equality, when procedural equality is defined

181. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2.

182. Northern delegates to the Constitutional Convention opposed counting slaves because they feared that granting the South increased representation would encourage the institution of slavery. *A Territorial Approach, supra* note 39, at 1351.

as the formal recognition of the interests of all people as equal. On balance, this view may not eclipse the autonomy-based view or the interest-based view of procedural equality in importance, but it deserves serious consideration.

IV. Conclusion

Constitutionally, the one person, one vote principle announced by the Supreme Court in *Reynolds* is alive and well, and demands that legislatures and courts use voter-based districting plans when total population-based plans would not provide substantially equally-weighted voting. *Garza*'s holding to the contrary is not on firm constitutional footing. However, since the Framers did not believe that representatives ought to act as agents for their voting constituents, they did not think representation was closely related to district population. The Supreme Court would perhaps be well-advised to abandon *Reynolds* and its progeny and allow state legislatures to tailor their own political districts. The abandonment of the *Reynolds* line would be consistent with the Framers' intentions and would allow state legislatures to choose a population basis after considering all relevant normative and descriptive theories of representation.

Voter-based districting plans derive support from a normative theory of representation that views representatives as agents of altruistic voters, whereas total population-based plans have little to recommend them normatively. In constrast, total population-based districting plans have a fairly strong foundation in a descriptive theory of representation, whereas voter-based plans have little to recommend them descriptively. One can fairly conclude from public choice studies that total population-based plans serve to guarantee a reasonably equitable satisfaction of interests in a representative system dominated by self-interested voters and representatives. Moreover, one can make a more speculative slippery slope argument that total population-based plans provide the only means to allocate representatives in a manner that does not establish or reinforce the perception that the interests of some people deserve less respect than the interests of others.

Because they have some descriptive backing, total population-based districting plans probably are the most justifiable. If one believes that representatives ought to act as trustees, then the population of districts is not a matter of great import. If one be-

lieves that representatives ought to act as agents, the advantages of establishing a representative system that comports with observed human behavior probably outweigh the advantages of modeling a system on an idealistic but inaccurate view. Accordingly, absent institutional improvements, the use of total population-based plans seems appropriate regardless of one's normative beliefs about representation.

The ultimate goal, however, must be to bring the descriptive in line with the normative. Advocates of the agency theory could make a case for voter-based districting plans if they could increase the altruism of voters and the responsiveness of representatives to voter preferences. Advocates of the trustee theory of representation need not make a case for any particular districting plan, but they have an equally important chore: They must increase the altruism and decrease the responsiveness of representatives in order to fulfill, at last, Madison's dream of a public voice consonant with the public good.[183]

183. *See supra* note 154 and accompanying text. Numerous means have been proposed to achieve Madison's goal. *See, e.g.*, GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992) (advocating term limits); Macey, *supra* note 155, at 512, 514 (advocating the abolition of administrative agencies and a requirement that statutes be approved by a committee of the whole before being sent to select committees); Sunstein, *supra* note 137, at 85 (advocating more rigorous judicial scrutiny of legislation).