# THE CONTINUED RELEVANCE OF THE EQUAL ACCESS THEORY OF APPORTIONMENT

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*The one person one vote doctrine contains a core ambiguity: Do states need to equalize the voting strength of voters in each district? Or do they need to equalize the total number of people in each district? This difference matters when demographic trends lead to large numbers of noncitizens living in some districts but not others. When that happens, equalizing the total population across districts leads to large differences in the number of voters in each district, and differences in the voting power of voters across districts. In 1990 the Ninth Circuit held in* Garza v. County of Los Angeles *that the First and Fourteenth Amendments together require states to equalize the total population across districts, no matter the distribution of noncitizens and other ineligible voters. But that approach has not caught on, and recently the Supreme Court signaled that it thinks the* Garza *approach is inconsistent with the leading Supreme Court precedent of* Burns v. Richardson*, which allowed Hawaii to equalize the number of registered voters rather than the total population across districts. This Essay provides a reading of* Burns *according to which it holds that the goal of apportionment is to fairly distribute representatives across the to-be-represented population—the group of more or less permanent residents who belong to the political community—and that sometimes the total population reported in the Federal Census is an inaccurate measure of this. Thus,* Burns *should not stand as an obstacle to a modern acceptance of the* Garza *approach if the Court is forced to revisit these issues after the 2021 redistricting of state legislatures.*

## INTRODUCTION

In 2016 the US Supreme Court decided *Evenwel v. Abbott*, a case in

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which white voters asserted that Texas's apportionment policies violated the Equal Protection Clause of the Fourteenth Amendment.[1] Texas, like each of the other 49 states, draws the electoral map for its state legislature so as to come as near as possible to equalizing the total population of each state house and state senate district.[2] It does this because this is how every state has interpreted the command of "one person one vote" ever since it was ushered in by the Warren Court's "apportionment revolution," and the line of cases beginning with *Baker v. Carr*[3] and *Reynolds v. Sims*.[4]

But Texas has a lot of people who do not—because they cannot—vote. As the population of Texas has become less white, it has become younger,[5] yielding more people under the age at which the Constitution guarantees the franchise (eighteen).[6] The state also includes a large number of noncitizens,[7] whom Texas (alongside every other state and almost every locality) has chosen not to enfranchise.[8] The problem, according to the *Evenwel* plaintiffs, is that because there are the same number of people in each district, but the non-voting population is unevenly dispersed across the districts, they live in a district with *more voters* than other districts.[9] As a result, the votes they cast in their voter-dense district are less effective than the votes cast in less voter-dense districts. A voter in a district with a lot of noncitizens has, on this view, a more powerful vote than a voter in a district with a higher concentration of citizens.[10]

In an opinion written by the late Justice Ruth Bader Ginsburg, the Supreme Court unanimously rejected this challenge.[11] Texas's use of the total population as the apportionment base in satisfying the one person one vote command did not violate the equal protection rights of the white

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[1]  Evenwel v. Abbott, 136 S. Ct. 1120 (2016).

[2]  *Id.* at 1132 ("[A]ll 50 States and countless local jurisdictions" have used total-population apportionment "for decades, even centuries.").

[3]  369 U.S. 186 (1962).

[4]  377 U.S. 533 (1964).

[5]  Alexa Ura & Lindsay Carbonell, *Young Texans Make Up Most Diverse Generation*, TEX. TRIB. (June 23, 2016), https://www.texastribune.org/2016/06/23/texas-children-make-most-diverse-generation.

[6]  *See* U.S. Const. amend. XXVI.

[7]  In 2018 Texas had a total population of 28,701,845, including 3,071,353 noncitizens, or just over ten percent of the population. *See* MIGRATION POLICY INSTITUTE, TEXAS, https://www.migrationpolicy.org/data/state-profiles/state/demographics/TX.

[8]  *See* BALLOTOPEDIA, *Laws Permitting Noncitizens to Vote in the U.S.*, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States ("Ten municipalities across the country allowed noncitizens to vote in local elections as of March 2020."). However, this was not always the case. Many states and federal territories in the first half of the nineteenth century enfranchised non-citizens, partly to incentivize immigration. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 25 (2000).

[9]  Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).

[10]  *Id.*

[11]  *Id.*

voters.[12] However, the Court refrained from holding that equal protection *requires* the use of total population as the apportionment base. Nor did it explicitly hold that states have a free choice between the two.[13] That possibility remains open.

As the 2020 Census nears completion and state legislatures begin to gear up for the next round of districting to draw the lines for the ensuing decade, some states are preparing to exploit this legal opening.[14] Specifically, Republican-controlled states—including Texas—have begun preparation to change the apportionment base used in the next round of map drawing.[15] They want to equalize, not the total population, but the number of eligible voters in each district. The effect of this would be that in areas where there are fewer eligible voters—which means not only areas where there are fewer citizens, but most areas with large non-white populations—the districts will have greater total populations. To borrow a term from gerrymandering, non-whites will be "packed" into districts.[16]

Part of the reason state legislatures are interested in making this change

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[12]    *Id.* at 1126.

[13]    *See id.* at 1143 (Alito, J., concurring in judgment) (emphasizing that this question remains open).

[14]    *See* Ari Berman, *Trump's Stealth Plan to Preserve White Electoral Power*, MOTHER JONES (Jan./Feb. 2020), https://www.motherjones.com/politics/2020/01/citizenship-trump-census-voting-rights-texas. ("For the past decade, Republicans have sought to exclude noncitizens from the redistricting process. Now Trump was going even further, suggesting that anyone who is not eligible to vote, including children, did not have to be counted toward apportioning representation at the state and local level.") The Census results, typically delivered by March of the year following its completion, will be delayed until late 2021. *See* Zach Montellaro & Ally Mutnick, *Census Data Snafu Upends 2022 Elections*, POLITICO (Mar. 1, 2021, 4:30 AM), https://www.politico.com/news/2021/03/01/census-data-elections-471882 ("The Census Bureau announced in mid-February [2021] that redistricting data . . . would be released by Sept. 30 this year, well past the usual delivery date of March 31.").

[15]    Berman, *supra* note 14.

[16]    It is worth mentioning another battle over the Census and apportionment recently fought during the Trump presidency, which is adjacent to the discussed in this Article. *Evenwel* was about apportionment of state legislatures. The reason that state legislatures, and not the U.S. Congress, have been targeted is that the Constitution seems quite clear that total-population apportionment is required for the U.S. House of Representatives. Section 2 of the Fourteenth Amendment specifies that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend XIV § 2. Nevertheless, in July 2020, President Trump issued a memorandum to Secretary of Commerce Wilbur Ross, instructing him to include in his report of the 2020 Census information enabling the President to exclude noncitizens who are not lawfully present in the country from the base population number for apportioning seats in the U.S. House of Representatives. Trump v. New York, 592 U.S. ___, at *2 (2020) (slip op). Several states challenged this action, but the Supreme Court ultimately dismissed the challenge as unripe, citing the uncertainty over how effectively the Census Bureau would be able to actually exclude that population from the final count. *Id.* at *4. Even if the Court had reached the merits in that case, it would not bear directly on the issue of state legislative apportionment. This is because neither the Fourteenth Amendment nor any other part of the Constitution contains as explicit a provision governing state legislative apportionment.

to apportionment practices now, is that they might finally have the data. When *Evenwel* was litigated, the plaintiffs encountered the problem that they lacked reliable data of the citizen voting age population.[17] Without a reliable count provided by the official Census, they proposed relying on Citizen Voting Age Population (CVAP) data from the American Community Survey (ACS).[18] However, this data is clearly inappropriate for electoral districting because it "do[es] not provide current, accurate data at the levels of geography (census block level of precinct) where most redistricting is conducted."[19] Moreover, while the Census is constitutionally mandated, the House of Representatives could eliminate the ACS at any point, rendering it an unreliable source.[20] There is good reason to believe that overcoming this obstacle was at least part of President Trump's motivation for including a citizenship question on the 2020 Census.[21] While that question was not ultimately included,[22] President Trump issued an Executive Order requiring executive agencies to deliver to the Secretary of Commerce, who oversees the Census, all information they have that may be relevant to determining the alienage status of residents.[23] This may be just as effective as a Census question in acquiring the necessary data.

More to the point, surely one reason Republicans are pursuing an eligible-voter apportionment base for state legislative districting is that they believe it will secure them partisan advantage for the ensuing decade.[24] However Republicans need not justify their desire to use an eligible-voter apportionment base purely in partisan terms. They can argue that the use of an eligible-voter apportionment base better captures the *principle* behind the Court's one person one vote jurisprudence, and the interpretation of equal protection it embodies. But this way trouble lies.

The Supreme Court's one person one vote jurisprudence has displayed a studied ambiguity between two competing values buried within that phrase. In some cases, the Court has emphasized the value of "voter equality." This is perhaps most evident in *Reynolds* itself, where the Court stressed the

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    17    *See* Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395 (2017).

    18    *Id.* at 1398.

    19    *Id.*

    20    U.S. Const. art. I, § 2; *id.* amend. XIV, § 2.

    21    *See* Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1390 (2019).

    22    Department of Commerce v. New York, 139 S. Ct. 2551 (2019)

    23    Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

    24    In 2020 Democrats were as close to re-taking a majority in the Texas House as they had been since 2002. Berman, *supra* note 14. However, if Texas Republicans are able to exclude children and non-citizens from the apportionment base during the 2021 round of districting, they will be able to flip at least eight currently Democratic seats safely into the Republican column. ANDREW A. BEVERIDGE, SOC. REPORTER, THE THREAT TO REPRESENTATION FOR CHILDREN AND NON-CITIZENS: AN ANALYSIS OF THE POTENTIAL IMPACT OF *EVENWEL V. ABBOTT* ON REDISTRICTING (2016), https://static.socialexplorer.com/evenwel/Evenwell_Impact_Report.pdf.

inequities in the strength of votes caused by the fact that urban districts were far more populous than rural districts.[25] Yet in other cases, the Court has emphasized the value of "representational equality," suggesting the intrinsic value of ensuring that representatives all have the same number of constituents—voting or non-voting.[26] The ambiguity is likely the result of the fact that the Court never had to confront the difference. As Judge Kozinski pointed out in the most influential judicial opinion touching on this issue, "[i]n most cases, of course, the distinction between the two formulations makes no substantive difference."[27] Yet when demographic patterns lead to geographic concentrations of disfranchised populations, as they do now, "the selection of apportionment base does make a material difference."[28]

The trouble is that the caselaw gives little guidance on which of these two formulations ought to prevail when they come into conflict. As Justice Ginsburg noted in her *Evenwel* opinion, "for every sentence [advocates of voter equality] quote, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation."[29] This fact, combined with the fact that all fifty states currently use a total-population apportionment base, was sufficient for the *Evenwel* Court to find that equal protection does not *require* the use of an eligible-voter apportionment base for the states.[30] But the challenge that will be posed after the 2021 districting will be much thornier. If states like Texas apportion using eligible-voter data, the ensuing challenge will force the Court to decide whether or not the Equal Protection Clause *permits* the choice of apportionment base, or whether it *requires* the use of total population.

Only one court has ever concluded that the Constitution requires total-

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[25]    Reynolds v. Sims, 377 U.S. 533, 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."); *see also* Bd. of Estimate v. Morris, 489 U.S. 688, 701 (1989) ("In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'"); Lockport v. Citizens for Cmty. Action, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and [] the concept of equal protection therefore requires that their votes be given equal weight."); Wesberry v. Sanders, 376 U.S. 1, 8 (1964) ("To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government.").

[26]    *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 321 (1973) ("[T]he basic constitutional principle [is] equality of population among the districts."); Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969) ("[E]qual representation for equal numbers of people [is] the fundamental goal for the House of Representatives.") (alteration in original) (internal quotation omitted).

[27]    Garza v. Cty. of Los Angeles, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., dissenting).

[28]    *Id.*

[29]    Evenwel v. Abbott, 136 S. Ct. 1120, 1122 (2016).

[30]    *Id.* at 1132 ("What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries.").

population apportionment for state legislatures. In *Garza v. County of Los Angeles*, the Ninth Circuit held that the First and Fourteenth Amendments together provide a right to equal access to one's representative, and therefore districts with roughly equal total populations are mandatory.[31] Yet the Supreme Court's *Evenwel* opinion indicated that the Court agrees with the two other circuit courts that have addressed the question—the Fourth and Fifth Circuit Courts of Appeals—both of which explicitly rejected *Garza*'s approach.[32]

This short essay argues that the reasons offered for rejecting the *Garza* approach are unsound and rely on a mistaken reading of the leading Supreme Court precedent *Burns v. Richardson*.[33] Therefore, the Court should be open to seriously considering the *Garza* approach as one of several arguments that can and should be made in favor of the position that the Constitution requires total-population apportionment. This essay does not argue that *Garza* is definitively correct, but it does clear some of the mess out of the way.

## I
### THE *GARZA* EQUAL ACCESS THEORY

The Ninth Circuit's *Garza* opinion concerned an appeal from Los Angeles County pertaining to a court-drawn districting plan for county commissioners, which was ordered after the county's own plan had been struck down as intentionally discriminating against Hispanics,[34] in violation of both the Voting Rights Act and the Equal Protection Clause.[35] Among other things, the county objected to the court's use of total-population figures in drawing districts of roughly equal population, despite the fact that noncitizens were heavily concentrated in some of the districts.[36] The *Garza* majority rejected this argument and held that not only was the use of total-population figures *permitted*, it was in fact *required* by both California law and the U.S. Constitution.[37]

*Garza*'s central argument was that the right to petition is a necessary

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[31]   *Garza*, 918 F.2d at 774–76.

[32]   Chen v. Houston, 206 F.3d 502, 528 (5th Cir. 2000) ("[T]his eminently political question has been left to the political process."); Daly v. Hunt, 94 F.3d 1212, 1227 (4th Cir. 1996) ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.").

[33]   384 U.S. 73 (1966). *See Chen*, 206 F.3d at 526 ("We read *Burns* as compelling rejection of the *Garza* majority view that the Equal Protection Clause mandates inclusion of aliens in the population base of electoral districts against which the equality requirements of *Reynolds* are applied.").

[34]   This essay adopts the term "Hispanics" because this is the term used throughout the *Garza* litigation, and in most voting rights litigation involving Latinx voters.

[35]   Garza v. Cty. of Los Angeles, 918 F.2d 763, 765–69 (9th Cir. 1990).

[36]   *Id.*

[37]   *Id.* at 774–76.

corollary to the right to representation, and an eligible-voter apportionment scheme would unduly burden the right to petition of voters, noncitizens, and young people under eighteen living in districts with a high proportion of nonvoters.[38] The court argued that "[s]ince 'the whole concept of representation depends upon the ability of people to make their wishes known to their representatives,' this right to petition is an important corollary to the right to be represented."[39] The effect of eligible-voter apportionment would be to "interfere[] with individuals' free access to elected representatives," by overpopulating some districts, and overburdening the representatives of those districts.[40]

This argument relies on the uncontentious premise that although noncitizens and children cannot vote, they enjoy political rights, and are entitled to representation. This follows from the fact that both groups are considered "persons" under the Equal Protection Clause of the Fourteenth Amendment.[41] As the *Garza* court put it, taxpaying noncitizens "have a right to petition their government for services and to influence how their tax dollars are spent."[42] It is a longstanding facet of our constitutional system that although the franchise is restricted, all residents are entitled to representation and access to government.[43] The inequities that flow from unequally populated districts must be avoided, so that "those who cannot or do not cast a ballot may still have some voice in government."[44] Since children and noncitizens enjoy equal protection under the Fourteenth Amendment and are afforded First Amendment protections, apportionment must take them into account in satisfying the one person one vote command.[45]

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[38]  *Id.*

[39]  *Id.* at 775 (quoting E. R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961)).

[40]  *Id.*

[41]  *See, e.g.*, Bernal v. Fainter, 467 U.S. 216 (1984) (holding that a Texas statute limiting notaries public to citizens only violated the Equal Protection Clause of the Fourteenth Amendment); Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (holding that noncitizens residing in the country without legal authorization are "persons" "in any ordinary sense of the term").

[42]  *Garza*, 918 F.2d at 775.

[43]  For example, in arguing against a proposed Constitutional amendment to exclude noncitizens from congressional apportionment, Representative Fiorello LaGuardia of New York argued that in a "representative government, . . . the very purpose of making an apportionment according to population [is] to have everyone represented." 70 CONG. REC. 699 (1928).

[44]  *Garza*, 918 F.2d at 775 (quoting Calderon v. City of Los Angeles, 4 Cal.3d 251, 258–59 (1971)).

[45]  The most in-depth scholarly treatment of *Garza* argues that the court misuses some First Amendment precedent in its argument, but nevertheless concludes that "[i]t is possible that all individuals have a First Amendment right to equal access to elected officials." Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J. L. & PUB. POL'Y 521, 548 (1994).

## II

### *Burns* Is Not Inconsistent with *Garza*

In its most direct confrontation with the question of the appropriate apportionment base for satisfying the one person one vote command, the Supreme Court authorized Hawaii's decision to use an eligible-voter base for its state legislative districting. In *Burns v. Richardson*, the Court cited Hawaii's "special population problems" as justifying its deviation from the otherwise standard practice of total-population apportionment.[46] For some, this is a decisive refutation of the *Garza* position that Constitution *requires* total-population apportionment. The reasoning is simple *modus tollens*: If the Constitution requires total-population apportionment, then *Burns* was wrongly decided. But *Burns* was not wrongly decided, so the *Garza* majority was wrong to conclude that the Constitution requires total-population apportionment.

### *A.*    Chen v. City of Houston

In *Chen v. City of Houston*, the Fifth Circuit agreed that the *Garza* majority erred in deciding that *Burns* allows a reading of the Constitution according to which it requires total-population apportionment.[47] The plaintiffs in *Chen* brought both a *Shaw* challenge and a "one person one vote" challenge against Houston's creation of several majority-minority districts for its single-member municipal districting plan.[48] The Fifth Circuit affirmed the district court's judgment rejecting the *Shaw* claim, finding inadequate evidence that race predominated during the districting process.[49] It then turned to an extended discussion of the one person one vote claim, going far beyond what the district court had considered.[50]

The heart of the plaintiff's claim in *Chen* was that because Houston has a large population of noncitizens (owing mainly to its large Hispanic population), the total-population figures and eligible-voter figures depart significantly.[51] The result was maldistribution of eligible voters across the districts and—so the plaintiffs argued—the dilution of votes for voters living in districts with a larger number of eligible voters.[52] They argued that in such circumstances, Equal Protection requires the use of eligible-voter apportionment.[53]

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[46]    Burns v. Richardson, 384 U.S. 73, 94 (1966).
[47]    Chen v. City of Houston, 206 F.3d 502, 526 (5th Cir. 2000).
[48]    *Id.* at 504.
[49]    *Id.*
[50]    *Id.* at 522.
[51]    *Id.*
[52]    *Id.*
[53]    *Id.*

The Fifth Circuit rejected the argument, holding instead that "the choice of population figures is a choice left to the political process."[54] In the Fifth Circuit's view, the choice of apportionment base "involve[s] questions about the nature of representative democracy," and "there is nothing inherent in the concept of representative democracy," nor in constitutional law, "that requires the embrace" of either eligible-voter or total-population apportionment.[55] In reaching this conclusion, the Fifth Circuit explicitly disagreed with the *Garza* majority's holding that Equal Protection requires total-population apportionment. Although the effect of the *Chen* holding would be to uphold a total-population apportionment plan, the court understood this to be the outcome of upholding the free choice of the political process, as opposed to a constitutional mandate.

### B.    Burns v. Richardson *and the To-Be-Represented Population*

This rejection of *Garza* was based primarily on a reading of *Burns v. Richardson*. The Fifth Circuit "read *Burns* as compelling rejection of the *Garza* majority view that the Equal Protection Clause mandates inclusion of aliens in the population base of electoral districts against which the equality requirements of *Reynolds* are applied."[56]

But the *Chen* court was wrong to read *Burns* as rejecting the view that, generally speaking, Equal Protection does in fact require total-population apportionment. Like the city of Houston, Hawaii too had "special population problems,"[57] resulting in "sizable differences in results produced by [the distribution of eligible voters] in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures."[58] The issue in Hawaii was its unusually large military presence, and an unusually large presence of tourists and other transient populations, whom the district court concluded might be counted in the federal Census.[59] The complication these groups raised was not that they were ineligible to vote *per se*. Rather the complication was that they did not even purport to *be represented* in Hawaii. Nor did the elected officials in Hawaii purport to represent them.

*Burns* raises the importance of what we might call the "to-be-represented population." When it is said that "representatives serve all residents, not just those eligible or registered to vote,"[60] the emphasis should

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54    *Id.* at 523.
55    *Id.* at 525.
56    *Id.* at 526.
57    Burns v. Richardson, 384 U.S. 73, 94 (1966).
58    *Id.* at 90.
59    *Id.* at 90–91.
60    Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).

be understood to be on *residents*—on those who have, at least for some time, decided to make their home in the district. This obviously does not include everyone who just happens to be in the district at a given time. Foreign diplomats or vacationers, for example, are not to-be-represented by the representatives of a district which they are passing through.[61] More controversially, incarcerated individuals are typically not understood as part of the to-be-represented population of the district in which they are incarcerated. This fact grounds an important argument that incarcerated individuals should not be counted for apportionment purposes in the district in which their prison is located, as opposed to the districts in which they had previously resided.[62]

The *Burns* Court made an argument about the connection between the to-be-represented population, and the appropriate choice of apportionment base.[63] The Court emphasized that the goal of apportionment is to apportion representatives among those whom they are expected to represent.[64] In Hawaii's case, the use of total-population statistics from the federal Census ran the risk of missing the point of apportionment: securing equal effective *representation* for everyone who was entitled to it. This is because the total population figures would have included a wide swath of people who neither expected nor received representation from Hawaiian officials.[65]

The question of who belongs to the to-be-represented population is notoriously difficult, as the example of the incarcerated population makes clear. The analogous problem of determining bona-fide residency for determining voter eligibility is starkly illustrated by the facts of *Casarez v. Val Verde County*.[66] Murry M. Kachel, who had previously been active in the Ku Klux Klan, narrowly won an election for county commissioner of Val Verde County, Texas, a majority-Hispanic border county west of San Antonio. Kachel's narrow victory owed almost exclusively to absentee ballots cast by voters claiming residency at nearby Laughlin Air Force Base. The district court upheld the ballots against a challenge from the Texas Rural

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61  *See, e.g.* Carrington v. Rash, 380 U.S. 89, 95–96 (1965) (states do not need to represent "transients" who do not establish bona fide residency). But they do enjoy equal protection of the laws. Even before the Fourteenth Amendment's Equal Protection Clause, this basic structural feature of the rule of law was a vital part of the American system. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436–37 (1819).

62  This phenomenon is usually called "prison-based gerrymandering." *See, e.g.*, *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org; *see also* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1312 (N.D. Fla. 2016) (finding that because incarcerated people "lack a substantial representational nexus with the relevant legislative body" it would violate one person one vote to include them in the apportionment base for that legislative body).

63  *Burns,* 384 U.S. at 94.

64  *Id.*

65  *Id.*

66  957 F. Supp. 847 (W.D. Tex. 1997).

Legal Aid society, finding that the plaintiffs presented inadequate evidence that the voters had inadequate ties to the community and hence were not to-be-represented.[67]

In *Burns*, the Court expressed the view that Hawaii's political decisionmakers acted within permissible bounds when they concluded that the state's transient and military populations did not belong in the to-be-represented population.[68] Therefore, it was acceptable to remove these individuals from the population figures used for apportionment.[69]

The insight of the *Burns* Court was that *no* particular measure—citizen population, total population, registered-voter population—will perfectly capture the to-be-represented population. Given Hawaii's "special population problems," there were specific reasons to disfavor the use of total population, and under those special circumstances the Court authorized the use of an eligible-voter apportionment base.[70]

### C. The Limits of Defining the To-Be-Represented Population

It is vital to keep in mind, however, that the Court made clear that it did not *generally* approve of the use of the registered-voter population for apportionment.[71] The reason is that the registered-voter population can be illicitly manipulated due to states' control over the voter-registration process.[72] The possibility for this manipulation is especially troubling given the opportunities it creates for locking in majorities and removing "disfavored minorities" from serious political competition.[73] This makes clear that the Court did not approve leaving the entire decision of population choice with the political process.

There are two clear limits. First, "one person one vote" applies to the to-be-represented population. Within this first limit, states may have a choice as to which of the several available, imperfect population counts might be the best proxy for getting at the to-be-represented population. In *Burns* the Court agreed with Hawaii that in its special circumstances, the eligible-voter population was a better approximation of the to-be-represented population

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[67]  *Casarez v. Val Verde County*, 967 F. Supp. 917 (W.D. Tex. 1997).

[68]  *Burns,* 384 U.S. at 94.

[69]  *Id.*

[70]  *Id.* at 94.

[71]  *Id.* at 96 ("We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.").

[72]  *Id.* at 92–93 ("Use of a registered voter or actual voter basis . . . is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'").

[73]  An example of what Professors Samuel Issacharoff and Richard Pildes have famously called "lockups." *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

than the total population was.[74]

This points to the second limit: States do not have free reign in choosing who counts as among the to-be-represented population. The Court made this clear when it expressed skepticism toward the use of registered-voter population in any other context, because it would give the state far too much leeway in deciding who will be considered as part of the to-be-represented population.[75] There is a fact of the matter about who belongs to that population; whether some individual or group belongs to the to-be-represented population depends on facts about residency, permanency, and community ties. It would therefore be inappropriate to rely on a proxy measure that could be so easily manipulated, because doing so would give the state the opportunity to decide to arbitrarily narrow the subset of people present in the state who belong to the to-be-represented population.

The appropriate measure seems to be *residents*, as the *Evenwel* Court put it.[76] The *Burns* Court interpreted this to mean that "[s]tates are [not] required to include aliens, transients, [or] short-term, or temporary residents" in the apportionment base.[77] These populations, in the Court's view, were permissibly excluded from the to-be-represented population.[78] The *Burns* Court's mention of "aliens" on that list bears quick explanation. Read in context, the Court clearly intended to use "aliens" to refer to out-of-state residents: a citizen of California is an "alien" in Hawaii, in this sense. There is little disagreement that noncitizens are among the class of "persons" protected by the Fourteenth Amendment, nor is there disagreement about the fact that the Equal Protection Clause includes some sort of guarantee of political representation.[79]

The takeaway from *Burns* is therefore not a rejection of the *Garza* majority rule. *Burns* stands for the twofold proposition that (i) the goal of apportionment is to fairly apportion representatives across the to-be-represented population; and (ii) it is not always the case that the total population from the federal Census is the most accurate proxy for getting at the to-be-represented population. A contemporary reception of *Burns* should add a third observation: *states are not free to decide that noncitizens do not belong to the to-be-represented population*. Therefore, any apportionment measure that is designed to leave noncitizens out of the apportionment base

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74    Burns v. Richardson, 384 U.S. 73, 94 (1966).

75    *Id.* at 90–93.

76    Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016) ("[R]epresentatives serve all *residents*, not just those eligible or registered to vote.") (emphasis added).

77    Burns v. Richardson, 384 U.S. 73, 92 (1966).

78    *Id.* at 94.

79    *See* Franklin v. Massachusetts, 505 U.S. 788, 804–05 (1992) (holding that the Fourteenth Amendment's reference to persons "in each state" includes all "usual resident[s]"); Plyler v. Doe, 457 U.S. 202, 210 (1982) (explaining that "an alien is surely a 'person' in any ordinary sense of that term," "[w]hatever his status under the immigration laws.").

is illegitimate, since noncitizen residents are part of the to-be-represented population.

## CONCLUSION

The Supreme Court will inevitably be asked to decide whether the Constitution permits states to choose between eligible-voter and total-population apportionment bases, or whether it requires the latter. The *Garza* court's view that the Constitution protects equal access to representatives and therefore requires total-population apportionment is a powerful starting point for this debate. While that argument may encounter other difficulties,[80] the objection that it runs afoul of the Court's precedent in *Burns v. Richardson* does not withstand scrutiny and should be cast aside.

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[80]  For example, it could be argued that the Supreme Court's campaign finance decisions, which reject the notion that citizens have an equal right to influence candidates, *see, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48–49 (rejecting the idea of "equalizing the relative ability of individuals and groups to influence the outcomes of elections" as "wholly foreign to the First Amendment") (per curiam), may be in tension with *Garza*'s proposition that residents have an equal right to influence representatives. I argue elsewhere, however, that this analogy to campaign finance jurisprudence is inapposite in the context of apportionment debates. *See* J. Colin Bradley, Putting Apportionment In Its Place: Representation, Contestation, and the First Amendment (Mar. 7, 2021) (unpublished manuscript) (on file with author).