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Defining Population for One Person, One Vote

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DEFINING POPULATION FOR ONE PERSON, ONE VOTE

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The one person, one vote doctrine requires that electoral districts within a state have equal populations. According to the U.S. Supreme Court, the doctrine has two stated goals: equal representation and equally weighted votes. Equal representation requires jurisdictions to have an equal number of persons residing within each district. However, in order to achieve the goal of equally weighted votes, each district must have an equal number of voters. The Court has refused to explicitly adopt a bright-line population measure, finding that the matter is best left to the states. However, whenever a state's redistricting plan does not employ a measure based on an equal number of persons, courts almost always strike down the plan as unconstitutional. This Article contends that courts should afford a reasonable range of deference to a state's chosen population measure because states should have the freedom to choose their own policies of representation. Under the "reasonable range of deference" standard, states should still follow the one person, one vote mandate that districts must have equal populations. However, this standard views the dual aims of the doctrine—equal representation and equally weighted votes—as political preferences for a state and not as exact constitutional requirements.

I. INTRODUCTION

Following the 2000 decennial census, the State of New York redrew its congressional districts so that each district had an equal number of persons.[1] New York's twenty-nine congressional districts had approximately 654,360 people per district.[2] This measure

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1. Kalson v. Paterson, 542 F.3d 281, 284–85 (2d Cir. 2008).

2. *Id.* at 285. Population deviations were plus or minus one person. *Id.* at 285 n.6.

included every man, woman, and child residing within the district. However, Michael Kalson, a registered voter of New York's Fifteenth Congressional District, pointed out that an equal number of persons did not translate into an equal number of voters.[3] Out of the 654,361 people residing within his district, only 497,192 were old enough to vote.[4] In contrast, New York's Sixteenth Congressional District had a voting-age population of only 428,285.[5] Therefore, Kalson argued that his vote was "worth less" than the votes of people residing in the Sixteenth District because his district included nearly 70,000 more people of voting age.[6]

In *Kalson v. Paterson*, Kalson brought suit against the governor of New York and New York election officials for violating the one person, one vote principle ("OPOV").[7] OPOV is the doctrine that courts use to determine whether a jurisdiction's redistricting scheme violates the U.S. Constitution.[8] Under OPOV, districts must have equal populations at the congressional, state, and local levels.[9] The objective of OPOV is to achieve political equality[10]—a theory that enables members of a constitutional democracy to participate equally in the political decision-making process.[11]

Political equality in the context of apportionment has two goals. First, political equality seeks to ensure equal representation in the election process.[12] Meeting this goal requires jurisdictions to have an equal number of persons residing within each district ("Equal Persons"). The Equal Persons measure ensures equal representation because it guarantees equal access to elected representatives.[13] Second, political equality requires each vote to be equally

3. *Id.* at 285.

4. *Id.*

5. *Id.* at 285 n.8.

6. *Id.* at 285.

7. *Id.*

8. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 7–8, 17–18 (1964).

9. *See* Avery v. Midland County, 390 U.S. 474, 475–76 (1968) (local legislative districts); *Wesberry*, 376 U.S. at 18 (congressional districts); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (state legislative districts); *see also infra* Part II.A.

10. *See Reynolds*, 377 U.S. at 566.

11. CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY, at xi (1989); *see also infra* Part II.A and accompanying text.

12. *Reynolds*, 377 U.S. at 576; *Wesberry*, 376 U.S. at 14.

13. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

weighted.[14] To meet this goal, each district within a jurisdiction must have an equal number of voters ("Equal Voters").[15] The Equal Voters measure prevents vote dilution because an equal number of eligible voters in each district theoretically translates to equally weighted votes.[16]

If no significant variation exists between the total number of people in a district and the number of eligible voters, then the Equal Persons and Equal Voters measures will achieve the same result—equal representation and equally weighted votes.[17] However, if there are substantial demographic deviations within a state, then the result will be different; the Equal Persons measure will produce unequally weighted votes, whereas the Equal Voters measure will produce districts with unequal numbers of residents.[18]

The U.S. Supreme Court has never adopted a particular measure of equality as a bright-line rule because the question has been "carefully left open" for the states to decide as a political matter.[19] However, when a state does not use the Equal Persons measure, courts almost always reject that state's redistricting schemes on the grounds that the schemes violate OPOV.[20] Therefore, despite the Court's hesitancy to recognize that a bright-line population measure exists, its jurisprudence demonstrates its implicit adoption of the Equal Persons measure. In *Kalson*, Judge Guido Calabresi of the Second Circuit Court of Appeals boldly stated the bright-line rule that the Supreme Court has refused to recognize—that apportionment within *all* states should be based on the Equal Persons measure.[21]

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14. *See Reynolds*, 377 U.S. at 576; *Wesberry*, 376 U.S. at 7–8.

15. Kalson v. Paterson, 542 F.3d 281, 283 (2d Cir. 2008).

16. Garza v. County of L.A., 918 F.2d 763, 782 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). There are three requirements for voting eligibility: an individual must be over eighteen, must be a citizen, and must register to vote. *See* THOM FILE, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION OF THE ELECTION IN 2006, CURRENT POPULATION REPORTS 3 (June 2008), *available at http://www.census.gov/prod/2008pubs/p20-557.pdf.* In 2006, there were roughly 220 million voting age citizens in the United States. *Id.* at 2. However, only 68 percent of these citizens registered to vote and 48 percent actually voted in the congressional election. *Id.*

17. *Garza*, 918 F.2d at 781.

18. *Id.*

19. Burns v. Richardson, 384 U.S. 73, 91–92 (1966).

20. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); *Kalson*, 542 F.3d at 283.

21. Kalson v. Paterson, 542 F.3d 281, 289 n .16 (2d Cir. 2008).

Contrary to Judge Calabresi's opinion in *Kalson* and the Supreme Court's OPOV jurisprudence, this Article contends that any bright-line rule will fall short of political equality because states have different demographic variances. In states with low levels of variance, a bright-line application of the Equal Persons or the Equal Voters measure is not detrimental because the number of persons is substantially equivalent to the number of voters. On the other hand, in states with high demographic variance, choosing one measure means sacrificing the goal of the other. For example, using the Equal Persons measure may result in unequally weighted votes, while using the Equal Voters measure may result in unequally represented persons. Thus, in high-variance states, a bright-line rule deprives states of their ability to choose between competing theories of political equality. This deprivation violates the principles of federalism because states should ultimately decide their own policies of representation. Moreover, states are better suited to respond to their populations' unique representational needs. Accordingly, the courts should afford a reasonable range of deference to a state's chosen population measure. Under this "reasonable range of deference" standard, states should still follow OPOV's mandate requiring districts to have equal populations. However, this standard views the dual aims of OPOV—equal representation and equally weighted votes—as political preferences for a state and not as exact constitutional requirements.

Part II traces the development and application of population measures for OPOV. Part III elaborates on the Equal Persons and the Equal Voters measures, and considers the benefits and drawbacks of each approach. Part IV argues that the courts should defer more often to the states' respective population measures because the decision is a matter of policy. Part V concludes that a reasonable range of judicial deference is more likely to achieve political equality because a bright-line population measure would not be equally effective for all states.

II. HISTORY OF OPOV

Traditionally, courts were not involved in reapportionment decisions because of the political question doctrine.[22] Under this

22. *See* Baker v. Carr, 369 U.S. 186, 210 (1962).

doctrine, courts are not allowed to review matters that can only be resolved through the political process.[23] However, this judicial forbearance ended in 1962 with *Baker v. Carr*. In *Baker*, the plaintiffs challenged Tennessee's apportionment plan because the population deviations among districts diminished the voting power of some individuals.[24] The U.S. Supreme Court held that redistricting disputes were justiciable controversies because they implicated a "constitutional deprivation."[25] Therefore, despite the political nature of reapportionment, the Court held that judicial correction was warranted.[26]

To determine whether an apportionment scheme caused a constitutional deprivation, the Court developed the OPOV principle. According to OPOV, states must draw district boundaries to ensure that each district within a jurisdiction has an equal population.[27] The purpose of this principle is to achieve political equality through two stated goals: equally represented persons based on the Equal Persons measure, and equally weighted votes based on the Equal Voters measure. The Court clarified that a state is free to adopt its own population measure so long as it meets the constitutional requirements of OPOV.[28] Yet the history and current application of OPOV demonstrate the Court's tendency to overrule any measure other than the Equal Persons measure.

A. The Court Formulated OPOV to Achieve Political Equality

The Supreme Court created OPOV to preserve political equality in the redistricting process. Unfortunately, political equality in this context is an ambiguous concept. The Court has interpreted it to mean that individuals have a right to "fair and effective representation"[29] and a right to "full and effective participation"[30] in the political process. Through OPOV, the Court framed these rights

23. *Id.*

24. *Id.* at 188–90.

25. *Id.* at 229–30.

26. *Id.* at 237.

27. Reynolds v. Sims, 377 U.S. 533, 568 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

28. *See* Burns v. Richardson, 384 U.S. 73, 84–85 (1966); *Reynolds*, 377 U.S. at 586.

29. *Reynolds*, 377 U.S. at 565.

30. *Id.*

in terms of equal representation and equally weighted votes.[31] However, the Court's view of political equality is unclear because the Court has not stated who possesses these rights (i.e., whether they apply to citizens, voters, or all persons).[32] Further, the Court has not explained how a state should balance these rights when they conflict with each other.[33] Ultimately, political equality in the context of reapportionment should involve balancing the rights of equal representation and equally weighted votes in a manner that best suits a given state's representational interests and policies.[34]

The Supreme Court first articulated OPOV in two parallel cases decided in 1964. The first case, *Wesberry v. Sanders*,[35] addressed disproportionate populations in congressional districts. In *Wesberry*, Georgia citizens challenged the state's congressional districting plan because of extreme population variances among districts.[36] For example, Georgia's Fifth Congressional District contained 823,680 people, whereas the Ninth District had a total population of only 272,154.[37] Since only one congressperson represents each district, residents of the Fifth District claimed their votes did not have the same weight as the votes of other Georgians.[38] The Court agreed and invalidated the state's districting scheme.[39] The Court reasoned that to achieve political equality, Article I, Section 2 of the U.S. Constitution commands "as nearly as is practical one man's vote in a congressional election is to be worth as much as another's."[40]

In addition to equal voting strength, the Court added that proportionate representation was also a fundamental goal of OPOV.[41] Thus, on the congressional level, *Wesberry* established that political equality requires districts within a state to have equal

31. *Id.* at 576.
32. Kalson v. Paterson, 542 F.3d 281, 283–84 (2d Cir. 2008).
33. *Id.*
34. *See infra* Part IV.A.1.
35. 376 U.S. 1 (1964).
36. *Id.* at 2–3.
37. *Id.* at 2.
38. *Id.* at 2–3.
39. *Id.* at 4.
40. *Id.* at 7–8.
41. *See id.* at 18.

populations. Thus, the Court measured population according to the Equal Persons measure.[42]

The second foundational OPOV case was *Reynolds v. Sims*,[43] where the Court applied the OPOV principle to state legislative districts. In this case, Alabama residents challenged the apportionment plans of the state legislature, asserting that the uneven population counts among districts deprived residents of equal voting rights.[44] The Court struck down the legislative scheme as unconstitutional, using the Fourteenth Amendment's Equal Protection Clause as its doctrinal source.[45] The Court held that legislative districts must be apportioned on a population basis,[46] and that political equality included the "right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens."[47] Although the Court discussed political equality in terms of voters and citizens, it used the Equal Persons measure as the basis for the ruling in this case.[48]

Wesberry and *Reynolds* illustrate that the Court adopted OPOV to achieve political equality. The Court framed political equality through OPOV's dual aims of equally represented persons and equally weighted votes. However, the Court's view of political equality is ambiguous because it did not explicitly define the relevant population for OPOV.

B. Courts Defer to a State's Population Measure in Theory, but Apply the Equal Persons Measure as a Bright-Line Rule in Practice

Courts insist that they defer to states to determine the appropriate measure of equality, yet they consistently impose the

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42. *See id.* at 8.

43. 377 U.S 533 (1964).

44. *Id.* at 540.

45. *Id.* at 568.

46. The Court demands absolute equality for congressional districts, but allows minor population deviations on the state and local level. Karcher v. Daggett, 462 U.S. 725, 732–33 (1983). According to Professor Richard L. Hasen, "[n]either constitutional text nor theory appears to explain the Court's divergent treatment." RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING FROM BAKER V. CARR TO BUSH V. GORE 24 (2003).

47. *Reynolds*, 377 U.S. at 576.

48. *See* Burns v. Richardson, 384 U.S. 73, 91 (1966). In *Burns*, Justice Brennan stated that "total population figures were in fact the basis of comparison in [*Reynolds*]." *Id.*

Equal Persons measure on every state.[49] Subsection 1 discusses courts' implicit endorsement of the Equal Persons measure. Subsection 2 analyzes the only case in which the U.S. Supreme Court upheld a state's use of the Equal Voters measure.

1. Courts Typically Reject State Population Measures That Do Not Follow the Equal Persons Measure

The foundational OPOV cases—*Wesberry* and *Reynolds*—measured population based on Equal Persons. However, the Court emphasized that states have the freedom to choose their own population measure, absent any constitutional violations.[50] In fact, the Court often discussed OPOV in terms of Equal Voters, "making no distinction between the acceptability of such a test and a test based on [Equal Persons]."[51] Nevertheless, subsequent OPOV jurisprudence shows that courts tend to strike down state apportionment plans that do not use the Equal Persons measure.

Courts cite the OPOV aim of equal representation to explain their rejection of the Equal Voters measure. For example, in *Kirkpatrick v. Preisler*,[52] the Court invalidated a Missouri congressional districting plan for violating OPOV.[53] The total population per district varied from about 420,000 to 445,000.[54] To justify the unequal number of persons per district, Missouri claimed its redistricting plan was based on the Equal Voters measure.[55] Missouri adopted this measure because of the strong military presence in the state and the large number of students attending universities.[56] Thus, the percentage of eligible voters would differ greatly from district to district if Missouri used the Equal Persons measure.[57] However, the Court struck down Missouri's scheme, reasoning that a deviation of approximately 25,000 people among congressional districts did not meet the "as nearly as is practicable"

49. *See, e.g.*, Kalson v. Paterson, 542 F.3d 281, 289 n.16 (2d Cir. 2008).
50. *Reynolds*, 377 U.S. at 586.
51. *Burns*, 384 U.S. at 91.
52. 394 U.S. 526 (1969).
53. *Id.* at 534–35.
54. *Id.* at 529 n.1.
55. *Id.* at 534.
56. *Id.*
57. *Id.*

standard for congressional districts.[58] Although *Wesberry* used this language to describe the OPOV goal of equally weighted votes, the *Kirkpatrick* court applied the "as nearly as is practicable" standard to the goal of equal representation.[59] The Court's focus on equal representation is an implicit rejection of the Equal Voters measure that Missouri chose, and it indicates the adoption of a bright-line Equal Persons measure.

Similarly, in *Garza v. County of Los Angeles*,[60] the Ninth Circuit overturned a local redistricting plan that was not based on the Equal Persons measure. The plaintiffs challenged Los Angeles County's apportionment system, which was based on its citizen voting-age population.[61] The County chose this Equal Voters measure because a large concentration of non-citizen Hispanics lived in one district.[62] Therefore, the County contended that "a redistricting plan based upon [the Equal Persons measure] . . . unconstitutionally weights the votes of citizens in that district more heavily."[63] However, the Ninth Circuit found that the County's population measure violated the Equal Protection Clause because "basing districts on voters rather than [persons] results in serious population inequalities across districts."[64] The court held that the Equal Persons measure was the more appropriate measure because "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'"[65]

Even though courts theoretically defer to a state's chosen population measure, *Kirkpatrick* and *Garza* show that courts generally apply the Equal Persons measure if the state fails to do so.[66] This threat of judicial intervention may explain why a majority

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

59. Kirkpatrick v. Preisler, 394 U.S. 526, 526–29 (1969).

60. 918 F.2d 763 (9th Cir. 1990).

61. *Id.* at 773.

62. *Id.*

63. *Id.*

64. *Id.* at 774.

65. *Id.* at 775 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).

66. *See also* Ellis v. Baltimore, 352 F.2d 123 (4th Cir. 1965); Brodhead v. Ezell, 348 F. Supp. 1244 (S.D. Ala. 1972).

of states choose to adopt the Equal Persons measure for their reapportionment plans.[67]

2. Exception: Deference to the States in *Burns v. Richardson*

Courts generally will not defer to a state if the state uses a population measure other than one based on Equal Persons. However, one notable exception exists. In *Burns v. Richardson*,[68] Hawaii adopted an apportionment plan based on Equal Voters.[69] Due to the significant presence of the U.S. military on the island of Oahu, the state asserted that the Equal Persons measure would "constitute a substantially distorted reflection of the distribution of state citizenry."[70] The Court upheld the use of the Equal Voters measure because "a State's freedom of choice to devise substitutes for an apportionment plan . . . should not be restricted beyond the clear commands of the Equal Protection Clause."[71] Despite this reasoning, no subsequent U.S. Supreme Court decision has upheld a state's application of the Equal Voters measure.

Burns is significant not only for its use of the Equal Voters measure, but also for the Court's deference to a state's choice of how to achieve political equality. Though the Court claims to defer to a state's chosen population measure *in theory*, *Burns* stands on its own as a court decision deferring to a state *in practice* on a population measure other than one based on Equal Persons. Therefore, while the current system suggests strong judicial preference toward the Equal Persons measure, *Burns* demonstrates that an alternate system giving states more deference to formulate their own population measures is possible.

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67. *See* Kalson v. Paterson, 542 F.3d 281 (2d Cir. 2008); *see also* Vieth v. Jubelirer, 541 U.S. 267 (2004); Karcher v. Daggett, 462 U.S. 725 (1983); Avery v. Midland County, 390 U.S. 474 (1968); Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000).

68. 384 U.S. 73 (1966).

69. *Id.* at 77. Specifically, the plan was based on registered voters. *See infra* Part III.B.1.

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

71. *Id.* at 85.

III. MEASURING POLITICAL EQUALITY: EQUAL PERSONS VS. EQUAL VOTERS

The twin goals of political equality are equal representation and equally weighted votes. The only time that both of these goals are met is when there is insignificant variance in the proportion of voters to persons among districts. Using New York as an example, if the state's congressional districts, which contained approximately 654,360 persons per district, also *all* had around 400,000 eligible voters per district, then the Equal Persons measure and the Equal Voters measure would be virtually indistinguishable. Either standard would result in equally weighted votes and equally represented persons.

However, in high-variance states, the Equal Persons measure dilutes voter strength, while the Equal Voters measure results in representational inequality. Thus, demographic deviations make the attainment of both goals impossible, forcing states to choose between the Equal Persons measure and the Equal Voters measure. This section evaluates the advantages and disadvantages of each measure of equality.

A. Equal Persons

Judge Calabresi is the primary proponent of the Equal Persons measure of political equality—the measure implicitly adopted by the U.S. Supreme Court. He interprets political equality to mean that "every member of Congress should be charged with representing the same number of persons."[72] Judge Calabresi and other proponents of the Equal Persons measure understand political equality to include representational rights, such as the right to petition the legislature, the right to an equal share of government services, and the right to equal access to elected officials.[73] A broad recognition of representational rights for people who cannot vote has many advantages, but the main drawback is the electoral imbalance that it creates.

72. Kalson v. Paterson, 542 F.3d 281, 284 n.5 (2d Cir. 2008).

73. *See* Carl E. Goldfarb, Note, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L.J. 1441, 1452 (1995).

1. The Equal Persons Measure Benefits Representational Rights

The Equal Persons measure of political equality recognizes that representational rights include more than the right to vote. Every person, regardless of his or her eligibility to vote, has certain rights by virtue of living in a certain area.[74] These rights include equal access to elected officials and government services, participation in the political process, and recognition as a member of the community.[75]

One benefit of using Equal Persons is that it provides an equal distribution of government attention. Non-voting groups are entitled to this attention because they pay the same taxes as voting groups.[76] The Equal Persons measure guarantees that all residents similarly situated have equal access to elected officials and receive an even distribution of government services.[77] This is based on the assumption that elected officials can obtain services in proportion to their district's share of the state's total population.[78] Such services include medical care, libraries, police service, fire protection, and waste disposal.[79]

Another benefit of the Equal Persons measure is its recognition that non-voting groups still have political participation rights. Despite their inability to vote, non-voting groups are still represented by their elected official and have several ways to hold him or her accountable. For example, non-citizens can influence the political process by joining political groups and attending political rallies. Although non-citizens cannot vote, they may express their views to their elected representative through the petition process.[80] In addition, children do not possess the right to vote, but their parents arguably represent them by proxy.[81] The Equal Persons measure recognizes and promotes the political participation of these non-voting community members.

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74. *See* Garza v. County of L.A., 918 F.2d 763, 775 (9th Cir. 1990).

75. *See id.*

76. *See* Goldfarb, *supra* note 73, at 1454.

77. *Id.* at 1451; *see also Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part).

78. *Garza*, 918 F.2d at 781.

79. *See* Goldfarb, *supra* note 73, at 1454.

80. *See Garza*, 918 F.2d at 775 (majority opinion).

81. *See* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1502 (1998).

Finally, using Equal Persons has a significant normative benefit. It recognizes that non-voting groups are still members of the community. Many non-voting groups, including non-citizens, make valuable contributions to their communities and arguably deserve a form of political recognition.[82] The Equal Persons measure provides that recognition by including them in the state's apportionment base.

The Equal Persons measure interprets OPOV as standing for more than just equal voting power. Pursuant to the Equal Persons measure, political equality can only be achieved if all members of a community have the same representational rights. By preserving these rights, the measure shows that every individual is politically relevant.

2. The Equal Persons Measure Creates an Electoral Imbalance

The greatest disadvantage of the Equal Persons measure is its tendency to create unequal voting strength among districts in states with substantial demographic variances. This result seems contrary to *Wesberry*, which held that one vote—not one person—should be worth as much as another vote in a different district.[83]

One major source of demographic variance is the non-citizen population, which is growing rapidly in the United States.[84] According to the 2000 Census, approximately nineteen million non-citizens live in the United States.[85] For states with low non-citizen populations, such as Montana, Michigan, South Dakota, and Vermont, the Equal Persons measure is unlikely to produce a significant disparity between the number of people and the number of voters among districts.[86] On the other hand, in states like New York, California, and Florida, which have substantial demographic variance, using Equal Persons often results in a significant difference in the number of voters among districts.[87]

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82. *See Garza*, 918 F.2d at 775–76.

83. Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

84. *See* STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., THE IMPACT OF NON-CITIZENS ON CONGRESSIONAL APPORTIONMENT, Dec. 6th, 2005, *available at* http://www.cis.org/articles/2005/sactestimony120605.html.

85. *Id.*

86. *See* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1283 (2002).

87. *Id.*

For example, a court-ordered redistricting plan in Los Angeles County utilized the Equal Persons measure.[88] Under this measure, each district had approximately 1,780,000 persons.[89] Among these districts, the number of voting-age citizens ranged from around 700,000 in District 1 to 1,000,000 in District 5.[90] Thus, a person's vote in District 5 was worth 7/10 of a person's vote in District 1. Arguably, this vote dilution violates the clear command of *Reynolds*, which held that a citizen is entitled "to have his vote weighted equally with those of all other citizens."[91]

The Equal Persons measure looks beyond OPOV's literal meaning because, under that measure, one person does not necessarily constitute one vote. Though using Equal Persons serves OPOV's goal of equal representation, this measure creates an electoral imbalance in states with high demographic variance.

B. Equal Voters

Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals, the primary proponent of the Equal Voters measure, was the first legal scholar to point out that the Equal Persons and the Equal Voters measures were competing theories.[92] According to Judge Kozinski, the Equal Voters measure means that every vote should have the same theoretical weight.[93] The Equal Voters measure guarantees that, regardless of a district's total population, there are an equal number of voters in each district within a state.[94] By equalizing the number of voters, the Equal Voters measure prevents the dilution of a person's vote in comparison to voters in another district within the same state.[95]

Unlike the Equal Persons measure, the Equal Voters measure remains highly speculative and is rarely upheld as valid in OPOV jurisprudence.[96] There are several variations of the Equal Voters

88. Garza v. County of L.A., 918 F.2d 763, 773 (9th Cir. 1990).
89. *Id.* at 773 n.4.
90. *Id.* at 773 n.5.
91. Reynolds v. Sims, 377 U.S. 533, 576 (1964).
92. *Garza*, 918 F.2d at 781–82 (Kozinski, J., concurring in part and dissenting in part).
93. *Id.* at 781.
94. *Id.* at 782.
95. *Id.*
96. *Id.* at 783–84.

measure, such as registered voters population, voting-age population, and citizen voting-age population. A review of these concepts demonstrates that the Equal Voters measure improves electoral balance, but often diminishes representational rights.

1. The Registered-Voters Measure Is a Pure Form of the Equal Voters Measure but Risks Harm to Representational Rights

The registered-voters measure exemplifies the Equal Voters measure because it creates districts based on the number of people who are eligible to vote. The registered-voters measure is arguably the most literal representation of OPOV because it attempts to equalize the number of eligible voters, thereby creating a mathematical system where one person amounts to one vote.[97]

In addition, the registered-voters measure focuses on protecting the right to representation of the individual voter.[98] Professor Sanford Levinson agrees that there is enough case law to substantiate this "individualist" interpretation.[99] In *Hadley v. Junior College District*,[100] the Court held that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted."[101] Under this conception, OPOV is founded on the personal nature of the right to vote.[102]

A measure based on registered voters is the only Equal Voters measure that the U.S. Supreme Court has ever upheld. In *Burns*, the Court ruled in favor of Hawaii's use of registered voters as a basis for apportionment.[103] Oahu's share of Hawaii's total population was 79 percent, whereas its share of persons registered to vote was 73 percent.[104] The disparities among Oahu's districts were even more noticeable because of the uneven distribution of military residents,

97. Obviously, there is no way to know whether all registered voters will actually vote until the day of the election. Thus, it is practically impossible to create a system where one person actually amounts to one vote without any mathematical deviation.

98. *Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

99. *See* Levinson, *supra* note 86, at 1286.

100. 397 U.S. 50 (1970).

101. *Id.* at 52.

102. *See Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

103. Burns v. Richardson, 384 U.S. 73, 90–93 (1966).

104. *Id.* at 90.

most of whom were not registered voters.[105] According to Judge Kozinski, *Burns* did not use Equal Persons because "raw population did not provide an accurate measure of whether the voting strength of each citizen was equal."[106] Thus, the registered-voters measure was an effective basis for political equality because it offset significant differences in voting power among districts.

However, the use of the registered-voters measure presents several problems. First, this measure makes voting the sole basis for political equality.[107] Therefore, the system is vulnerable to "improper influences" whereby political powers can manipulate the voting population and diminish the representation of groups entitled to participate in the electoral process.[108] Second, the measure may be practically unworkable. The number of registered voters may vary per election, depending on the controversy of issues and the popularity of candidates.[109] Finally, an equal number of registered voters in each district does not necessarily translate into an equal number of votes.[110] In 2006, roughly 71 percent of all registered voters actually voted in congressional elections.[111] As such, the number of *actual* voters was probably not as evenly distributed as the number of registered voters. Thus, while the registered-voters measure improves electoral balance, it does not guarantee exact equality in voting power among districts.

2. The Voting-Age Measure Does Not Embody the Equal Voters Measure Because It Has the Same Drawbacks as the Equal Persons Measure

A second variation of the Equal Voters measure uses the voting-age population. In *Kalson*, the plaintiff argued that the voting-age measure was the appropriate proxy for OPOV.[112] The plaintiff lived

105. *Id.* "[T]he ninth and tenth districts contained 28% of Oahu's population but only 17% of its registered voters; the fifteenth and sixteenth districts, with only 21% of island population contained 29% of island registered voters." *Id.* at 91 n.18.

106. *Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part).

107. *See Burns*, 384 U.S. at 92.

108. *Id.* Bribery is one possible improper influence. *See* Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1040–41, 1061, 1064 (2005).

109. *Burns*, 384 U.S. at 93.

110. *See* FILE, *supra* note 16, at 2.

111. *Id.*

112. Kalson v. Paterson, 542 F.3d 281, 285 (2d Cir. 2008).

in a congressional district with a total population of 654,361 residents, of which 497,192 were of voting age (eighteen years or older).[113] He maintained that his vote had less weight in comparison to a district with fewer voting-age residents, resulting in unconstitutional vote dilution.[114] Judge Calabresi's opinion, however, did not accept the validity of the Equal Voters measure.[115] Even if that measure did apply, Judge Calabresi reasoned that the voting-age population measure did not serve as a valid proxy for equal voting power.[116] Even though the use of the voting-age population eliminates minors from the relevant population, non-citizens, felons, and other ineligible voters are still included in that measure.[117] While this standard would preserve representational rights for some non-voting groups, the voting-age population measure unacceptably discriminates against minors. Although minors, unlike non-citizens, do not pay taxes, the Court has stated that they still have a right to petition their elected representative.[118]

3. The Citizen Voting-Age Population Measure Is an Effective Version of the Equal Voters Measure but Still Diminishes Representational Rights

A third variation of the Equal Voters measures uses the citizen voting-age population ("CVAP").[119] Like voting-age population, CVAP eliminates minors from the apportionment base. Further, CVAP does not include aliens, transients, and other non-citizens in its population tally. CVAP basically limits the relevant population to eligible voters, though not necessarily the ones who have registered. Thus, CVAP, unlike the registered-voters measure, is not susceptible to the risk of improper political influences.[120] Courts also cite CVAP as a potentially valid measure when "large numbers of those ineligible to vote are disproportionately concentrated in certain

113. *Id.*

114. *Id.*

115. *Id.* at 289–90.

116. *Id.*

117. *Id.* at 289.

118. Garza v. County of L.A., 918 F.2d 763, 774–75 (9th Cir. 1990).

119. Chen v. City of Houston, 206 F.3d 502, 522–23 (5th Cir. 2000).

120. *See* Timothy Mark Mitrovich, Comment, *Political Apportioning is not a Zero-Sum Game: The Constitutional Necessity of Apportioning Districts to be Equal in Terms of Both Total Population and Citizen Voter-Age Population*, 77 WASH. L. REV. 1261, 1278 (2002).

areas."[121] However, CVAP is not as accurate as the registered voters measure in terms of voter turnout.[122] Only 48 percent of the CVAP voted in the 2006 congressional election, whereas 71 percent of registered voters cast ballots in the election.[123] Also, like other forms of the Equal Voters measures, CVAP deprives children and non-citizens of representational rights. Therefore, while CVAP bears a strong resemblance to registered voters, CVAP is less likely to produce equally weighted votes. Furthermore, CVAP possesses the same primary drawback as registered voters—the diminution of representational rights.

4. The Equal Voters Measure Favors Voting Rights, Whereas the Equal Persons Measure Supports Representational Rights

The Equal Voters measure protects individual voting rights by creating equally weighted votes, which prevents vote dilution. A state is likely to adopt the Equal Voters measure if there are concentrated populations of ineligible voters within the state.[124] A state may also use Equal Voters to remedy a history of vote dilution.[125]

In contrast to the Equal Voters measure, the Equal Persons measure focuses on membership and community by protecting representational rights. These rights include equal access to government officials and services, political participation, and symbolic representation.[126] One factor that may lead a state to adopt the Equal Persons measure is a desire to preserve the political voice of non-voting groups. A state may also favor an apportionment plan based on the Equal Persons measure if the state wants to maintain an even distribution of government resources for its constituents.[127]

The Equal Persons and the Equal Voters measures have strengths and weaknesses that states should closely consider when

121. *Chen*, 206 F.3d at 524.

122. *See* FILE, *supra* note 16, at 3.

123. *Id.* at 1–2.

124. Garza v. County of L.A., 918 F.2d 763, 781–82 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

125. *See* Darren Rosenblum, *Deconstructing the Image Repertoire of Women of Color: Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1131–32 (2006).

126. *Garza*, 918 F.2d at 775 (majority opinion).

127. *See* Goldfarb, *supra* note 73, at 1444.

deciding between these measures. The Equal Persons and the Equal Voters measures both serve essential aspects of political equality. Therefore, the success of either measure should rely on how a state chooses to define political equality.

IV. COURTS SHOULD GRANT A REASONABLE RANGE OF DEFERENCE TO A STATE'S CHOSEN POPULATION MEASURE

Courts defer to a state's measure of population in theory, but not in practice. In *Kalson*, Judge Calabresi's contention that apportionment within all states should be based on Equal Persons makes explicit what courts already do implicitly. However, the application of a bright-line rule is improper because it deprives states of their autonomy over the reapportionment process. Judge Calabresi and the U.S. Supreme Court have legitimate concerns about using measures other than the Equal Persons measure. However, courts should give states a reasonable range of deference because the issues of apportionment are ultimately policy decisions. Therefore, federalism mandates that courts should defer more often to states, who are the actors best suited to make these sorts of decisions.

A. The Principles of Federalism Support Increased Judicial Deference to a State's Apportionment Plan

Federalism involves the allocation of power between the state and federal governments.[128] Under a federalist system, the federal government cannot interfere with state sovereignty "within the realm of authority left open to [the states] under the Constitution."[129] This authority includes "traditional government functions" such as police powers, economic restrictions, and public services.[130] The Framers of the U.S. Constitution feared that a strong federal government would undermine the states' capacity to function as political entities and weaken their political identity.[131] Under the Constitution's division of authority, the Framers viewed states as "distinct and

128. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

129. *Id.* at 546 (majority opinion).

130. Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976).

131. *Garcia*, 469 U.S. at 568–70 (Powell, J., dissenting).

independent [forms] of . . . supremacy."[132] Therefore, the Framers integrated the concept of federalism into the Constitution to preserve states' rights.[133]

Under the principles of federalism, federal courts have a constitutional obligation to respect the legitimate interests of the states.[134] One legitimate concern is a state's representational interests,[135] which is part of the fabric of a state's political structure and identity.[136] A state promotes its representational interests through the process of reapportionment.[137] Subsection 1 analyzes *Georgia v. Ashcroft*[138] to explain why states, rather than courts, should have the power to make apportionment decisions, including the choice between population measures. Subsection 2 discusses *Upham v. Seamon*[139] to elaborate on how courts should determine the amount of deference they give to the states with respect to these decisions.

1. States Should Have the Ultimate Authority to Choose Population Measures for Reapportionment

Defining population equality is a decision that involves weighing the tradeoffs of competing theories of representation. Since these tradeoffs often involve matters of policy, the states, rather than the courts, should have the right to ultimately decide which population measure should be applied.

In the context of reapportionment, the Court has recognized a state's right to choose between competing theories of representation. For instance, in *Georgia v. Ashcroft*, the Court adjudicated a dispute involving Georgia's 2001 redistricting plan.[140] Georgia sought approval of its plan under section 5 of the Voting Rights Act of 1965

132. *Id.* at 570 (quoting THE FEDERALIST NO. 39 (James Madison)).

133. *Id.* at 560.

134. *Id.* at 581 (O'Connor, J., dissenting).

135. Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 812 (1998).

136. *Id.*

137. *Id.*

138. 539 U.S. 461 (2003).

139. 456 U.S. 37 (1982).

140. 539 U.S. at 461.

("VRA").[141] Section 5 requires that a state's plan preserve the ability of minority voters to elect a candidate of their choice.[142] The Court explained that there are two ways for a state to accomplish this: by creating "majority-minority" districts, or by increasing "influence" districts.[143] In majority-minority districts, a minority group constitutes the majority of the district's population.[144] In "influence" districts, a minority group's population does not constitute the majority but is large enough "to exert a significant—if not decisive—force in the election process."[145]

Georgia's new plan reduced the African-American population in three majority-minority districts[146] but increased the number of influence districts.[147] The Court upheld Georgia's choice to increase influence districts because section 5 "does not dictate that a State must pick one of these methods of redistricting over another."[148] Further, section 5 "gives States the flexibility to choose one theory of effective representation over the other."[149] Therefore, the Court deferred to the State's chosen mode of representation and held that the plan did not violate section 5 of the VRA.[150]

The Court's deference in the context of the VRA is analogous to OPOV because both principles involve competing theories of representation involving reapportionment. To satisfy the VRA, a state can preserve minority-voting power by either creating majority-minority districts or increasing influence districts. To satisfy OPOV, a state can equalize district populations by using either the Equal

141. *Id.* at 465. Section 5 of the Voting Rights Act of 1965 requires that before a covered jurisdiction's new voting "standard, practice, or procedure" goes into effect, it must be precleared by either the Attorney General of the United States or a federal court to ensure that the change "[does not] have the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006). Georgia is a covered jurisdiction that requires preclearance. Miller v. Johnson, 515 U.S. 900, 905 (1995).

142. *Ashcroft*, 539 U.S. at 480.

143. *Id.*

144. *Id.* at 470.

145. *Id.* African-Americans constitute roughly 30–50 percent of the population in influence districts. *Id.* at 471.

146. *Id.* at 472–73. The African American population dropped in the following three majority-minority districts: District 2 (60.58 percent to 50.31 percent), District 12 (55.43 percent to 50.66 percent), and District 26 (62.45 percent to 50.80 percent). *Id.*

147. *Id.* at 471.

148. *Id.* at 480.

149. *Id.* at 482.

150. *Id.* at 487.

Persons or the Equal Voters measures. In *Georgia*, Justice O'Connor explained that "the State's choice [for redistricting] ultimately may rest on a political choice of whether substantive or descriptive representation is preferable." [151]

Pursuant to the VRA, a state may decide that its constituents are better off having fewer majority-minority districts and more influence districts in order to increase a minority group's overall representation. [152] Similarly, under OPOV, a state should be able to decide whether the Equal Persons measure or the Equal Voters measure is preferable. For instance, if a high-variance state uses Equal Persons, a number of individuals will suffer vote dilution. However, a greater number of people might benefit from the preservation of their representational rights. Thus, a state should be able to decide whether favoring one right over another will be more beneficial for its constituents.

The political choice of preferred representation also involves a number of factors specific to a state. In the context of the VRA, a state can gauge a minority group's political rights by "the comparative position of legislative leadership, influence, and power for representatives of . . . majority-minority districts." [153] OPOV parallels the VRA because there are several factors a state must consider to gauge political equality. Such factors include the political visibility of non-voting groups in a community, the current distribution of government services, and the relative voting strength of eligible voters in different districts. [154] Since these factors vary from state to state, a bright-line population measure would not account for states' differing needs. Therefore, as the similarities between the VRA and OPOV illustrate, the choice between population measures is a political decision best left to the states.

2. Courts Should Only Review a State's Reapportionment Plan if There Is a Clear Constitutional or Statutory Violation

The U.S. Supreme Court has ruled that courts must defer to a state's apportionment plan unless there is a constitutional or statutory

151. *Id.* at 483

152. *Id.*

153. *Id.*

154. *See supra* Part III.B.4.

violation with respect to that plan.[155] Yet, whenever states apply the Equal Voters measure, courts almost always reject the apportionment plan and implement the Equal Persons measure.[156] The courts' justification is that the Equal Voters measure violates the constitutional aim of equal representation.[157] Strangely, courts have yet to reject the Equal Persons measure as a violation of the constitutional aim of equally weighted votes.[158] Based on the courts' reasoning, the Equal Persons and the Equal Voters measures should *always* violate the Constitution in high-variance states because in these states, *neither* measure is capable of achieving OPOV's dual constitutional aims. As a result, judicial review of a state's respective apportionment plan appears arbitrary and infringes on states' political rights.

To make judicial review less arbitrary, courts should defer to a state's apportionment plans absent a *clear* constitutional violation. For example, in *Upham v. Seamon*, the Texas legislature submitted its congressional reapportionment plan for approval to the U.S. Attorney General, as required by the VRA.[159] The Attorney General objected to two of the state's congressional districts because the legislature did not meet its burden of demonstrating that the plan was "nondiscriminatory in purpose and effect."[160] The district court devised its own plan for the two districts to remedy the violation.[161] Texas Republican party officials challenged the district court's plan because it did not respect the State's political policy.[162] Here, the State's policy for the two districts was to create a "safe seat" in response to interests expressed by minority voters.[163] Since this policy did not violate the Constitution or the VRA, the Supreme

155. Upham v. Seamon, 456 U.S. 37, 40–41 (1982).

156. *See supra* Part II.B.1.

157. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969); Garza v. County of L.A., 918 F.2d 763, 775 (9th Cir. 1990).

158. Reynolds v. Sims, 377 U.S. 533, 560 n.7 (1964).

159. *Upham*, 456 U.S. at 38.

160. *Id.*

161. *Id.*

162. *Id.* at 40.

163. *Id.* at 39–40.

Court held that the district court must adhere to the policy with respect to the two districts.[164]

Upham established that courts must not interfere with a state's apportionment plan unless there is a statutory or constitutional violation.[165] According to Professor Daniel Hays Lowenstein, "[a] Court seriously committed to principles of federalism would apply *Upham* with rigor and persistence."[166] The courts' prior history of rejecting the use of Equal Voters technically abides by the *Upham* rule because it violates OPOV's aim of equal representation. However, courts should view the dual aims of OPOV more as alternative political preferences and less as exact constitutional requirements. Currently, OPOV consists of two constitutional aims—equal representation and equally weighted votes—that are sometimes unable to coexist.[167] This mutual exclusivity creates an impossible standard that undermines states' autonomy over the reapportionment process.

The best way to reconcile the dual aims of OPOV with the principles of federalism is for states to decide which aim best achieves political equality for their constituencies. The clear constitutional command of OPOV is that districts within a state must have equal populations. However, the measure of such equality is a matter of political policy and preference. Therefore, courts should give states more discretion so that each state is free to determine which measure is more appropriate for its unique needs.

B. A Reasonable Range of Deference to a State's Chosen Population Measure Will Better Achieve Political Equality

The "reasonable range of deference" standard retains OPOV's requirement that districts within a state must have equal populations. However, the standard interprets the dual aims of OPOV—equal representation and equally weighted votes—as political preferences

164. *Id.* at 43; *see also* White v. Weiser, 412 U.S. 783, 797 (1973) ("The only limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject." (citing Upham v. Seamon, 456 U.S. 37, 42 (1982))).

165. *Upham*, 456 U.S. at 40.

166. Lowenstein, *supra* note 135, at 816–17 n.162.

167. *See* TERRY B. O'ROURKE, REAPPORTIONMENT: LAWS, POLITICS, COMPUTERS 25 (1972).

for a state and not as exact constitutional requirements. Thus, the standard limits judicial review of a state's chosen population measure and implements a more decentralized approach to OPOV. Subsection 1 details how the Court should apply the "reasonable range of deference" standard. Subsection 2 considers the drawbacks of the decentralized framework.

1. Application of the Decentralized Framework

When the Court adopts a highly contested political equality rule such as OPOV, it should leave room for the states to experiment with that rule.[168] According to Professor Richard L. Hasen, a noted election law expert, a strategy of judicial minimalism will enable the Court to gain more "valuable information before the Court *itself* settles upon the ultimate contours of a political equality rule."[169] By adopting a "reasonable range of deference" standard, the Court allows states to experiment with different ranges of deference. This experimentation will help the Court figure out exactly how much deference is reasonable.

The decentralized framework does not suggest that courts give complete deference to states' chosen population measures. In *Lucas v. Forty-Fourth General Assembly*,[170] Justice Stewart proposed a system where states would have the freedom to adopt their own measure of political equality.[171] However, his standard suggested that states did not have to base their measures on population.[172] Rather, he argued that the Court should uphold a state's apportionment plan so long as the plan was rationally related to the state's needs and did not systematically frustrate "the will of a majority of the electorate of the State."[173]

The "reasonable range of deference" standard is not as lenient as Justice Stewart's proposal. According to Professor Hasen, Justice Stewart's standard would have caused "[l]ong and protracted litigation over virtually every state's apportionment."[174] Unlike

168. *See* HASEN, *supra* note 46, at 48.

169. *Id.* at 49.

170. 377 U.S. 713 (1964).

171. *Id.* at 751.

172. *Id.*

173. *Id.* at 753–54.

174. *See* HASEN, *supra* note 46, at 58.

Stewart's plan, a "reasonable range of deference" standard would keep OPOV's judicial manageability because districts would still have equal populations. However, the standard would also curtail the Court's vigilant application of the Equal Persons measure. Subsequently, states will have more flexibility to articulate population measures tailored to their representational needs and political policies.

OPOV provides states with the foundation for political equality. By giving states a reasonable range of deference to choose their preferred population measure, the Court enables states to construct a system more suitable to their constituents. This minimalist strategy will likely provide the Court with enough information to place limits on the amount of deference given to the states.

2. Potential Drawbacks of the Decentralized Approach

Like any new proposal, negative consequences may arise from using a decentralized framework for measuring population. First, giving states more flexibility to measure their respective populations may encourage partisan or racial gerrymandering. The more leeway and opportunity that incumbents have to redraw district lines, the more likely they are to draw them in favor of themselves and their personal interest groups.[175] Next, divergent definitions of "population" may create inconsistencies at the congressional level. Not all 435 members of the House of Representatives would be elected based on the same definition of "population." This may increase litigation under Article I, Section 2 of the U.S. Constitution, which mandates that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States"[176] and "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."[177] Finally, the absence of a bright-line population measure may provide the states with even less guidance about how to apply OPOV.[178]

175. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 546 (2004).

176. U.S. CONST., art. I, § 2, cl. 1.

177. *Id.* § 2, cl. 3.

178. *See* Levinson, *supra* note 86, at 1274.

These criticisms have merit but ultimately fail to counter the utility of a decentralized framework. First, while a relaxed definitional approach may give redistricting authorities more latitude to apportion districts, a "principle of population equality does not prevent any State from taking steps to inhibit gerrymandering."[179] Such safeguards include the VRA, which prevents racial gerrymandering.[180] Next, while Article I, Section 2 dictates that representatives shall be elected "by the People of the several States," the text of the Constitution does not specify whether each state has to use the same population measure.[181] Finally, the idea that OPOV requires districts to have equal populations describes a *principle* rather than a *mathematical formula* of measuring a district's relevant population.[182] OPOV provides sufficient guidance to the states because it requires districts to have equal populations. If OPOV were to also control how states measure their relevant population, the principle would provide less guidance and further invade the sovereignty of the states.

V. CONCLUSION

The U.S. Supreme Court adopted OPOV to achieve political equality. Under OPOV, political equality means that districts within a state must have equal populations. However, the Court purposefully did not define the relevant population because it claimed that this was a matter best left to the states. Nevertheless, OPOV jurisprudence demonstrates that the Court heavily favors apportionment plans based on Equal Persons. According to Judge Calabresi, this is why the Court should finally recognize the Equal Persons measure as a bright-line rule.

If the Court continues to explicitly impose the Equal Persons measure on all states, or continues to do so implicitly, then it will continue to not only violate the fundamental principles of federalism, but also weaken the political identity of the states. If, instead, the Court grants to the states a reasonable range of deference to choose

179. Karcher v. Daggett, 462 U.S. 725, 734 n.6 (1983).

180. *See* Shaw v. Hunt, 517 U.S. 899 (1996).

181. U.S. CONST., art. I, § 2, cl. 1.

182. *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("Mathematical exactness or precision is hardly a workable constitutional requirement.").

their preferred population measure, then the Court will clarify the current ambiguity in OPOV.