

# Taking Virtual Representation Seriously

Joseph Fishkin

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# TAKING VIRTUAL REPRESENTATION SERIOUSLY

JOSEPH FISHKIN\*

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## INTRODUCTION

*“If I am not for myself, who will be for me? But if I am only for myself, what am I?”*<sup>1</sup>

Nobody likes virtual representation. Even the suggestion of it carries a taint of illegitimacy. There are good reasons for this. The history of democratic political development, both in this country and elsewhere, has been a history of the incremental, halting, painfully slow, sometimes reversed, always contested replacement of *virtual* representation, in which people do not get to vote for their representatives, with *actual* representation, in which they do. Over time, democracies have determined that various groups of people such as women, racial minorities, and the poor, are capable of choosing their representatives at the ballot box.

In the United States in particular, this is not just any history. It is the spine of our dominant democratic narrative. Our major moments of enfranchisement, many of them memorialized in Article V Amendments to the Constitution,<sup>2</sup> link together into a constitutional story, and the story has a moral: we are capable of choosing for ourselves, rather than relying on the wisdom and beneficence of others—for definitions of “we” that include not just well-heeled white men but also women, minorities, and the poor. To be sure, our actual constitutional history is considerably less Whiggish than this narrative. Just ask the women of Revolutionary-era New Jersey, who won the right to vote in 1776 and then lost it in 1807 for more than a hundred years, or the African American men of the former Confederacy, who won the right to vote during Reconstruction and then lost it for the first two-thirds of the twentieth century.<sup>3</sup> The tragedy of these reversals does not diminish the moral story, but rather tends to augment it. The right to vote—that is, the right to actual, direct representation—is a moral beacon by whose light we now retrospectively view much of our democratic history.

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1. Rabbi Hillel, *Pirkei Avot (Ethics of the Fathers)* 1:14.

2. See U.S. CONST. amends. XV, XIX, XXIV.

3. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 43-47 (rev. ed. 2009). This particular point—that the expansion of the right to vote has not been the linear, Whiggish story of progress that Americans often tell—is perhaps the central argument of Keyssar’s excellent book.

In this great story, virtual representation is cast as a villain. It played an especially explicit and conspicuous role as a villain in the fight over women's suffrage. "[T]he virtual representation argument," Reva Siegel explains, was "the core of the antisuffrage case."<sup>4</sup> For more than half a century, suffrage opponents pressed various related arguments to the effect that women were better off with virtual representation, with their husbands and fathers voting in ways that would take their interests into account.<sup>5</sup> There was a right side and a wrong side in that debate. When the right side eventually won,<sup>6</sup> our polity crossed a line that later democratic theorists would view as conceptually significant: for the first time ever, most of the representation in our system of representative government was actual rather than virtual.<sup>7</sup>

This long trajectory, and the legitimate sense of enlightened democratic accomplishment that accompanies it, leaves virtual representation today in a very awkward place, like an unwanted guest from less democratic times that has greatly overstayed its welcome. The reasons why we have virtual representation in the first place—its conceptual foundations and justifications, the normative universe in which it made sense—have largely been lost.

This is what led the plaintiffs in *Evenwel v. Abbott*, the 2016 Supreme Court case,<sup>8</sup> to see an opening for a very bold and modern claim, one that had the potential to completely remake our system of representation in a way not seen since *Baker v. Carr*.<sup>9</sup> Essentially their claim, about which I will say more below, was that virtual representation is over, and from now on we ought to draw our maps in a way that takes into account only *actual* representation.<sup>10</sup> The

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4. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 986 (2002).

5. See *infra* notes 77-78 and accompanying text.

6. See U.S. CONST. amend. XIX (ratified 1920).

7. Robert Dahl argues that this is the point at which a nation begins to be legitimately categorized as what he calls a polyarchy—essentially, what we might call a democracy—even if some citizens still remain disenfranchised. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 233-35 (1989). Before crossing this threshold, the United States disenfranchised *the majority* of its citizens, and therefore fell into a different, intermediate category which Dahl calls "male polyarchies." *Id.* at 235.

8. 136 S. Ct. 1120 (2016).

9. 369 U.S. 186 (1962).

10. The plaintiffs were not entirely consistent about this, but it is the most coherent way to understand their claim that representation should focus exclusively on the strength of votes

present and long-standing practice in the United States is to draw district lines so that each district contains the same number of people.<sup>11</sup> The *Evenwel* plaintiffs argued that instead, we should ignore the nonvoting people and draw districts with equal numbers of voters.<sup>12</sup> The plaintiffs' key move was to urge the Court to view

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and disregard questions of equal representation. *See infra* note 12 and accompanying text.

11. The widespreadness of this practice was, oddly, an issue disputed by the parties in *Evenwel*. *See Evenwel*, 136 S. Ct. at 1124-25. The Court concluded: "Today, all States use total-population numbers from the census when designing congressional and state-legislative districts." *Id.* at 1124. "[O]nly seven States adjust those census numbers in any meaningful way." *Id.* As far as I can discern, even that is a slight overstatement. There are actually only four states that adjusted the census population numbers at all in the most recent round of redistricting, and only two of them did so in a way that seems "meaningful" in terms of raw numbers. Hawaii and Kansas, two states with sizable military bases, "exclude certain non-permanent residents, including nonresident members of the military." *Id.* at 1124 n.3. That is a significant adjustment. Maine, Nebraska, New Hampshire, and Washington have statutes on the books saying they adjust as well, but it turns out these are not "operational as written." *See id.* at 1125 n.3 (quoting Brief for United States as Amici Curiae Supporting Appellees at 12 n.3, *Evenwel*, 136 S. Ct. 1120 (No. 14-940)) (regarding Maine and Nebraska); Brief of Amicus Curiae the Brennan Center for Justice at N.Y.U. School of Law in Support of Appellees and Affirmance at 24 n.10, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (noting *inter alia* that in New Hampshire in fact "the practice ... is to count everyone"). In Washington's case, the Secretary of State has interpreted the state law to require census block data without any adjustment. Telephone Interview with Nicholas Pharris, Ph.D., Elections Info. Specialist, Wash. Sec'y of State (July 7, 2017) (notes on file with author). Finally, the majority opinion in *Evenwel* reported that California, Delaware, Maryland, and New York make a very small adjustment of some relevance to the argument of this Article: they "exclude inmates who were domiciled out-of-state prior to incarceration." *Evenwel*, 136 S. Ct. at 1124 n.3. However, neither the California nor the Delaware law on this point has yet gone into effect. *See* CAL. ELEC. CODE § 21003(a)(1) (West 2017) (going into effect in 2020); DEL. CODE ANN. tit. 29, § 804A(c) (2017) (same). So, to summarize, total population without any adjustment at all is the basis for the current district lines in forty-six states—all except Hawaii, Kansas, Maryland, and New York, with the adjustment in the latter two states quite small. Stepping back from the details, on the whole this is a striking degree of convergence on a total-population base.

Outside the United States, the rule is less uniform. Total population is the most widespread method, but others also exist. An international think tank surveyed the electoral systems in eighty-seven countries and found that among the sixty countries that delimit electoral districts at all, a slim majority used total population; about a third used registered voters; six countries used total citizen population; one (Lesotho) used voting age population; and one (Belarus) used the number of voters who voted in the last election. LISA HANDLEY ET AL., INT'L FOUND. ELECTORAL SYS., DELIMITATION EQUITY PROJECT 17, 28 (2006), [https://www.ifes.org/sites/default/files/delimitations\\_manual\\_full\\_0.pdf](https://www.ifes.org/sites/default/files/delimitations_manual_full_0.pdf) [<https://perma.cc/23VF-E8RC>].

12. I am using shorthand here ("voters"). The plaintiffs could not entirely settle on whether they wished to count *eligible voters*, *citizen voting age population*, or some other related measure. *See* Transcript of Oral Argument at 5, 11-12, 17, 22-24, *Evenwel*, 136 S. Ct. 1120 (No. 14-940). They did not propose counting only registered voters or actual voters, although the logic of their position would in fact provide reasons for adopting those approaches, which

districting exclusively in terms of the voting power of voters seeking actual representation, and therefore to disregard—as irrelevant to the project of districting—the representation of those who cannot vote.

The plaintiffs in *Evenwel* surely knew their odds were long. A victory would have upended every districting map in every jurisdiction in the country. Courts are rightly loath to do that. Furthermore there was a serious problem of constitutional text looming behind the case.<sup>13</sup> But the plaintiffs also knew they had a shot. The reason they had a shot was that they were aiming at the soft underbelly of our present system: its extensive yet undertheorized reliance on virtual representation.<sup>14</sup> At oral argument, Justice Stephen Breyer brought this up. He was clearly uncomfortable with endorsing this fundamental aspect of our current system of representation—the fact that some of those represented cannot vote, and therefore rely on other people’s votes to choose the people who will represent them. Breyer said:

That sounds an awful lot [like] what they had in 1750 or something, where the British Parliament said, well, don’t worry, America, you’re represented by the people in England because after all, they represent everybody in the British Empire.... I mean, *that people are being represented through somebody else* is a little—possible, but tough.<sup>15</sup>

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raise problems of their own. *See id.* at 22-23. Part of their problem was that there is no census count of eligible voters; as a result, the plaintiffs were in the somewhat odd position of “urg[ing] the Court to mandate, as a constitutional rule, the use of currently available second-best alternatives that would not satisfy the rigid legal standard they proffered.” Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1398 (2017). In this sense the plaintiffs’ core proposal was “not only wrong, but ... impossible.” *Id.* at 1420.

13. *See infra* Part III.

14. Plaintiff-side amicus briefs in *Evenwel* pressed this line of attack a few different ways. *See, e.g.*, Brief of the Cato Institute and Reason Foundation as *Amici Curiae* Supporting Appellants at 14-16, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (arguing that total population-based apportionment is a continuation of theories that once supported the Three-Fifths Clause and coverture); Brief for Project 21 as *Amicus Curiae* in Support of Appellants at 14, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (arguing that the concept of virtual representation is “a bizarre suggestion in our political culture” and that “its bizarreness is a clue that the concept ... is unlikely to have been adopted”—in a way that somewhat mischaracterizes the view of virtual representation of the appellate panel in the case the brief is quoting (quoting *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998))).

15. Transcript of Oral Argument at 33-34, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (emphasis added).

In the end the *Evenwel* plaintiffs lost decisively. The Court held unanimously that total population is a perfectly fine basis for drawing district lines.<sup>16</sup> Justice Ruth Bader Ginsburg, writing for the Court, went one step further, elevating the use of total population (the current practice) to a sort of default baseline, and suggesting that departures from it require some justification.<sup>17</sup> However, Justice Ginsburg never tried to provide a defense of virtual representation, even though her opinion means that our Constitution—now more explicitly than before—favors an approach to districting that relies on it.

This Article offers a qualified defense of virtual representation. I do not claim that virtual representation is superior to actual representation. It is not. My main claims instead are: (1) that virtual representation is an inevitable feature of any democratic system, including ours; (2) that it has real value, even though it is second-best to actual representation; and (3) that rather than run away from virtual representation, we ought to take it seriously—and try to do it better.

Let us begin with the first and simplest point. Virtual representation is inevitable. It is an inescapable component not only of the current American system but of *every* democratic system, past, present, or future. In any society that has some children too young to vote—and here it does not matter whether the voting age is set at eighteen or at any other number greater than zero that one might choose—those children are necessarily represented only virtually in the halls of government. In any society with immigrants—which is to say, in nearly any conceivable society in a world with human migration—as long as immigrants are not immediately granted the right to vote on the day they arrive, there will be virtual representation of those immigrants for some period of time.<sup>18</sup> In the American

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16. *Evenwel*, 136 S. Ct. at 1123.

17. *See id.* at 1132 (“Appellants have shown no reason for the Court to disturb this long-standing use of total population.”); *see also id.* at 1128. Justice Samuel Alito, concurring, was unwilling to follow Justice Ginsburg down this road. *Id.* at 1144 (Alito, J., concurring in the judgment).

18. It was once common in the United States to allow some categories of noncitizen immigrants to vote, and some have argued for reviving and extending this practice. *See* RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* (2006). But few argue for enfranchising everyone in this country, regardless of immigration

system, there are also several groups of adult citizens who are represented only virtually. In every state, it is possible to lose one's right to vote by reason of mental incapacity.<sup>19</sup> In every state but two, people who are in prison lose their right to vote, while of course in many states, people who were convicted of crimes many years ago cannot vote.<sup>20</sup> All of these people are virtually represented.

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status, on the day they arrive here, which is what it would take to eliminate this form of virtual representation.

19. The boundaries of this category are highly contested. Reformers have made a powerful case in recent decades that we have been disenfranchising far too many citizens on this ground, and these efforts have achieved some legal reforms. *See Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1180 (2008) (“[D]evelopments in the law of elections and of disability rights suggest that states may be reversing course on the arbitrary disenfranchisement of mentally incapacitated persons. Several states have reformed their disenfranchisement provisions, although these reforms are inconsistent and often not sufficiently comprehensive.”). Disaggregating the legal disability to vote from other legal disabilities, such as the power to manage one’s own financial affairs, is a helpful reform. *See, e.g.*, BAZELON CTR. FOR MENTAL HEALTH LAW ET AL., A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 12 (2016), <http://www.bazon.org/wp-content/uploads/2017/01/voting-rights-guide-2016.pdf> [<https://perma.cc/FM4S-GAXG>] (“Ten states have laws that bar voting by individuals who are ‘under guardianship.’... Typically, however, [guardianship] determinations involve competencies other than voting .... For example, many individuals are placed under guardianship because they were unable to care for themselves during a psychiatric crisis. Yet they may have a good understanding of how elections work and of the issues at stake in federal, state, and local elections.”).

However, there is arguably some core of people who are truly not able, by reason of their disability, to form an intention to vote and express that intention in some way. For an unambiguous example, consider someone who is in a coma. In my view, because that small group of people literally cannot, as a positive matter, vote, it is reasonable for the state not to allow members of this group to have a ballot. But there is much uncertainty about the boundaries of the group. Given the balance of harms involved, the state ought to err on the side of enfranchising persons who have any possibility of being able, with reasonable assistance, to form and express an intention to vote. For our purposes here, my claim is simply as follows: even if a state adopts the near-maximalist position just outlined on the question of disability and voting, some core group of citizens will remain who are virtually represented.

20. *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 16 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf> [<https://perma.cc/5VR6-FGVP>]; *see id.* at 1 (“Approximately 2.5 percent of the total U.S. voting age population—1 of every 40 adults—is disenfranchised due to a current or previous felony conviction.... In six states—Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia—more than 7 percent of the adult population is disenfranchised.”); *Felon Voting Rights*, NAT’L CONF. ST. LEGISLATURES (Sept. 29, 2016), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/69XZ-L3DC>] (“In Maine and Vermont, felons never lose their right to vote, even while they are incarcerated.”).



It is possible to deny this. It is possible to claim that really *none* of these groups is virtually represented. On this view, the job of an elected representative is exclusively to represent the people who vote, or perhaps, those eligible to vote. If we take this view seriously, it would follow that children—the largest group of people who cannot vote—are not actually the constituents of any representative. If we accept this, it follows that when a seventeen-year-old contacts the representative of his local area for constituent services, such as help navigating a government bureaucracy, or perhaps a nomination to a military service academy, the representative should, in theory, politely decline, to the same extent that she would decline a request from a person whose home address fell outside her district.<sup>21</sup> It would also follow on this view that, when making policy decisions, a representative ought not view the interests of children in her district as having any more independent weight in her decision calculus than the interests of people on the other side of the country.<sup>22</sup> Only *voters*, on this view, count as the constituents whose interests an elected official has a special obligation to serve.

This is an implausible view. One indication of its implausibility is that nobody ever seems to argue for it. Even the plaintiffs in *Evenwel* repeatedly claimed that should they win their case, children *would* still be constituents of whoever was the representative for the place they lived—that is, the children would be virtually represented—even though they would not count for district line-drawing

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21. Some might object here that the seventeen-year-old will soon be a constituent, or has parents who are. Put this aside. Even if we stipulate that the seventeen-year-old is an emancipated minor, whose parents live in some other district, and who plans to move out of this district, never to return, before turning eighteen and becoming eligible to vote, our normal practice today would still be to count him as a constituent.

22. There are a number of assumptions packed into this statement but none is very controversial. I am assuming the following model: A representative has some general moral obligation to pursue policies that are morally good overall; perhaps also a patriotic obligation to pursue policies good for the people of her country; and finally a specific democratic obligation to pursue policies that benefit her particular constituents. These obligations sometimes conflict; and *pace* Edmund Burke, *see infra* notes 56-57 and accompanying text, the obligation to help one's constituents can sometimes trump the others. The bottom line, on this model, is that the interests of a constituent ought to have considerably greater weight in a representative's decision calculus than the interests of other people.

Now perhaps in-district children should matter to a representative because they matter to their parents, who are voting constituents. As I will discuss below, this is precisely the way that children can arguably get reasonably good virtual representation. *See infra* notes 33-36 and accompanying text.

purposes.<sup>23</sup> Similarly, a century earlier, opponents of women's suffrage did not claim that women were not constituents or were not citizens. Instead they argued the opposite: that women *were* citizens and constituents, and were already well represented by their elected officials, who were actively looking out for their best interests.<sup>24</sup>

Nobody argues for the hardcore no-virtual-representation position because it does not comport with widely shared conceptions of the boundaries of the polity. Although immigrants are a more contested and complex case, nearly everyone agrees that women, children, prisoners, people who are in comas, and any other citizens who are not able to vote for whatever reason, fall within the boundaries of the polity rather than outside. Even if they cannot vote, they count.

Thus, the question is not whether we should have virtual representation. We do and we will. The question is *how* we do it. Once again, to avoid misunderstanding: Actual representation, where possible, is best. Our dominant democratic narrative has much to recommend it. Suffrage should extend broadly; we should disenfranchise fewer people than we do now. Even so, there will always be virtual representation. Such representation has value. As long as we are going to do this thing, we ought to do it as well as we can.

If we took virtual representation more seriously, we would take seriously a set of questions that have long been buried in our democratic discourse. What makes for *good* virtual representation? How can a democratic system structure itself in ways that yield virtual representation that is relatively better rather than worse? If I cannot vote for myself, who should vote for me? Or more practically: If I cannot vote, with whom should I be grouped, in order to ensure reasonably good virtual representation?

The remainder of the Article proceeds in three Parts. The first Part begins by exploring how and why virtual representation got cast in its role as villain in our democratic discourse, a story that begins before the American Revolution. My purpose here is to retell the story in a way that helps us begin to develop distinctions among different kinds of virtual representation and arguments for why

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23. At oral argument, Evenwel's lawyer noted that "children are represented at the polls. They're represented at the polls by their parents." Transcript of Oral Argument at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

24. See *infra* notes 77-78 and accompanying text.

some species of virtual representation might be better or worse than others.

The second Part examines the particular form of geography-based virtual representation that plays such a large role in the American democratic system. It then turns to an especially concrete application of these ideas: the problem of so-called prison gerrymandering, which is the question of where and how incarcerated people who cannot vote ought to count for purposes of representation. Courts have recently struggled with this problem.<sup>25</sup> They have struggled in part because they have failed to take seriously the idea that even though prisoners may have only virtual representation, they may nonetheless have a right to *better* virtual representation than what they often receive under current law.

The third, concluding Part explores the role that virtual representation plays in the U.S. Constitution. This Part suggests that although virtual representation is a seriously neglected topic in modern constitutional thought, some aspects of virtual representation may, in fact, be constitutionally protected. To see how that could possibly be the case, let us begin with a closer look at what went wrong with what must surely have been one of the most abysmal systems of virtual representation ever devised.

### I. BAD VIRTUAL REPRESENTATION—AND ALTERNATIVES TO IT

Exactly as Justice Breyer suggested at oral argument in *Evenwel*, the American hostility to virtual representation stretches all the way back to the Revolution. Indeed, one way to understand what that Revolution was about is that the American colonists aimed to get out from under an exceptionally inadequate form of virtual representation—so inadequate that (they plausibly argued) it was a mere fiction, amounting to no representation at all.

Before the Revolution, the theory of the Parliament of Great Britain was as follows. British voters—meaning, at that time, men in England, Wales, and Scotland who owned substantial property—elected representatives to the House of Commons. Representation was not evenly apportioned across even this population,<sup>26</sup> but the

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25. See *infra* Part II.B.

26. See CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES: THE

Members of Parliament were supposed to be enlightened people who would look beyond the parochial interests of the specific area that had elected them. Indeed, despite Britain's small size, Members of Parliament were charged with an extraordinary responsibility: to safeguard the interests of all the subjects across the British Empire.<sup>27</sup> This is part of what it means to have an empire: reciprocal obligations of allegiance and protection extend throughout the imperium, but other important rights and powers—such as, in this case, the right to vote—do not.<sup>28</sup> Instead, actual representation went exclusively to (some of) the people of Britain, and the representatives chosen in that way were charged with a duty to provide *virtual representation*—a careful consideration and protection of the interests—of everybody else.

From early on, the American colonists were not impressed with this arrangement. From their perspective, the implicit guarantee of virtual representation was essentially fake. Parliament defended the interests of Britain, not its colonies.<sup>29</sup> As the colonists gained

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DEVELOPMENT AND OPERATION OF THE PARLIAMENTARY FRANCHISE 1832-1885, at 45-46 (Archon Books 1970) (1915). Prior to the Reform Act of 1832, Britain made almost no effort to equally apportion Parliament. Each county or borough generally returned two legislators, and “rotten boroughs” with almost no constituents were common. *Id.* at 46-49; see also Baker v. Carr, 369 U.S. 186, 302 (1962) (Frankfurter, J., dissenting). In fact, malapportionment was so extreme that in 1831, the far south of England, which had roughly as many people as the far north, had 3.5 times as many MPs. See Baker, 369 U.S. at 302-03. Moreover, many of these MPs were effectively named by the borough proprietors, such that by some estimates, 180 men could appoint 355 members of Parliament. SEYMOUR, *supra*, at 50-51.

27. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 175 (1998) (“The significance of such a conception for the role of the representative, as Blackstone and Thomas Whateley summarized it, was clear: every member of the House of Commons, ‘though chosen by one particular district, when elected and returned serves for the whole realm,’ and was ‘not bound ... to consult with, or take the advice, of his constituents.’ The general interests of the whole people, however much they may hurt a member’s particular constituency, ‘ought to be the great Objects of his Attention, and the only Rules for his Conduct; and to sacrifice these to a partial Advantage in favour of the Place where he was chosen, would be a Departure from his Duty.’” (quoting THOMAS WHATELEY, THE REGULATIONS LATELY MADE CONCERNING THE COLONIES AND THE TAXES IMPOSED UPON THEM, CONSIDERED 109 (London, 1765))).

28. By this same definition, certain U.S. possessions come clearly into focus as imperial possessions. If this seems problematic to modern Americans, it should. See *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding that people born in American Samoa, a U.S. territory, are not U.S. citizens by birth). See generally *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616 (2017).

29. See, e.g., DENIS JUDD, EMPIRE: THE BRITISH IMPERIAL EXPERIENCE, FROM 1765 TO THE PRESENT 24 (1996) (describing the escalating breakdown of cooperation between British and

financial clout and became increasingly frustrated with their inability to command Parliament's attention, colonists in New York secretly hired an MP—named Edmund Burke—as their paid agent, to make sure their interests in Parliament would *actually* be represented.<sup>30</sup> Even so, by the time of the Declaration of Independence, the catalog of frustrations and “usurpations,” unjust laws and special taxes, troops quartered in people's homes, and all the rest of it, reflects pretty clearly a British government decision-making process that was excruciatingly unresponsive to the colonists' interests and pleas.<sup>31</sup> As measured by its policy outputs, it would seem that the quality of virtual representation afforded to the American colonists in the British Parliament was abysmal.

In fact it was nearly the worst imaginable kind of virtual representation. The reasons are fairly obvious. Compared to the colonies, Britain was located on the other side of an ocean, weeks away by ship. It was differently situated, economically and politically, in nearly every relevant respect. There were commonalities to be sure—a shared language and culture, many extended family ties—but on the crucial economic and political issues of the day from the colonists' point of view, the differences and the physical distance loomed larger. As Alexander Hamilton pithily asks—in the musical—“Why should a tiny island across the sea regulate the price of tea?”<sup>32</sup>

Not all virtual representation is like this. For instance, we sometimes run virtual representation through families, with children being represented by their parents and other family members. Then it becomes somewhat less implausible. There are two reasons for

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colonial elites that preceded the Revolution, as “potential concessions by the British government” to the colonists' various demands “were represented as an unacceptable capitulation by powerful interest groups” within British politics). As the Declaration of Independence would eventually recount, from the colonists' point of view, the colonists had appealed to the British leadership “by the ties of our common kindred,” but the British “have been deaf to the voice of justice and of consanguinity.” THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776). Ancestral familial ties, it seems, did not do the trick.

30. See Calvin Stebbins, *Edmund Burke: His Services as Agent of the Province of New York*, 9 PROC. AM. ANTIQUARIAN SOC'Y 89, 92-93 (1893), <http://www.americanantiquarian.org/proceedings/44769403.pdf> [<https://perma.cc/VJG4-G8E5>]. They paid him £500 per year—a substantial salary—plus expenses. *Id.*

31. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

32. LIN-MANUEL MIRANDA, *Farmer Refuted*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015).

this. First, it is reasonable to expect parents to vote in ways that partly reflect the interests of their children, because their interests are deeply intertwined with those of their children.<sup>33</sup> The old virtual representation-based arguments against women's suffrage were wrong for many reasons that today seem obvious—they violated women's basic rights, enforced a sex role hierarchy, and treated women as children.<sup>34</sup> But for actual children, as opposed to adults who are wrongly being treated as children, it is likely that the votes of family members will make for some reasonable degree of virtual representation. For many people—although not everybody—the single best available answer to the question, “if I cannot vote myself, who will vote for me?” is a family member. The strength of this point is part of why opponents of women's suffrage found it such a useful argument.

There is also a second and arguably simpler reason. Households (perhaps by definition, certainly as a general rule) live together in the same location. People in the same location have some interests in common. This does some work all by itself. The effect can be overstated, but a great many policy choices have what we might call a geographic tilt: they tend to affect people who live in the same location in roughly the same way.<sup>35</sup> Think of a type of policy proposal

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33. Surprisingly little has been written about the virtual representation of children and its role in the American system. Some scholars have argued for giving parents extra votes to exercise on behalf of their children. See Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 536-37 (2000); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1502-06 (1998). This would replace our present system of virtual representation of children with a different and more direct system of virtual representation of children, but both rely on the intertwining of interests involved in the parent-child relationship as a way of enabling the virtual representation of children's interests. Andrew Rehfeld argues that the focus on interest-representation is misplaced: instead we ought to view the participatory role of children in democratic institutions as a form of civic education. Andrew Rehfeld, *The Child as Democratic Citizen*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 151-52 (2011). He advocates, inter alia, for giving increasing fractional votes to children aged twelve and up. *Id.* at 158-59. I am unaware of any proposal for the representation of children that would not rely on some form of virtual representation. For a sufficiently young child, this is the only possible form of representation.

34. Cf. Siegel, *supra* note 4, at 979-83, 990-91 (discussing the contestation over these same arguments in the course of the long public debate over women's suffrage).

35. We could state this “geographic tilt” more formally as a kind of correlation property. To what extent does the *location* where a person lives correlate with the *effect* a given policy has on the person, for good or ill? A geographic tilt score of 0 would mean there was no discernible correlation between effect and location, while a geographic tilt score of 1 would



that would be equally comprehensible in 1776 or today: Should we tax everybody in a certain jurisdiction in order to build some sort of public facility, which is useful to most households, in a particular location? Whether such a proposal is a good idea or not, it is at least the sort of question where everyone living in the same household will *to some extent* be similarly affected. Members of any given household might ask such questions as: Would we use this proposed facility? Do we live near enough to its location to benefit from it? A policy proposal like this will have a substantial geographic tilt. If proposals of this sort dominate politics—a big if—then if some members of each household can vote while others cannot, the others who cannot should receive some reasonable degree of virtual representation. At least, what they would get is a lot better than what the American colonists got.<sup>36</sup>

Consider, in contrast, the lament of Daniel Dulany, the Mayor of Annapolis, in 1765. He complained that in England, the electors “are inseparably connected in their interests with the non-electors,” but on the other hand, “not a single actual elector in England might be immediately affected by a taxation in America.”<sup>37</sup> This was a big problem. If you think about it, taxing nonvoters and using the funds to relieve the economic burdens on voters is a very nearly axiomatic strategy for electoral success—and also a near-certain recipe for distributive unfairness.

There are three ways around this problem. First, you can enfranchise the nonvoters. But that may not be possible or workable, and it may not be a complete solution in any case.<sup>38</sup> Second, you can change the structures of representation so that the voters and the nonvoters are *more* “inseparably connected in their interests,” as Dulany put it—for instance, because they live in the same house-

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mean the policy has *exactly* the same effect on any two people who live at the same spot. Few policies are at 0, and probably none are at 1, but some types of policies are likely to have considerable geographic tilt.

36. Although they are far beyond the scope of this Article, there are a range of areas of the law in which courts must ask whether some people can adequately represent others who did not choose them. For instance, the plaintiffs in a class action must represent the absent class members, who did not vote the named plaintiffs into this role. Legal standards in such contexts often proceed on parallel tracks: Is there a sufficient degree of convergence, rather than conflict, between the interests of the representatives and the interests of those they are supposed to represent? See FED. R. CIV. P. 23(a)(3)-(4).

37. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 83 (1980).

38. Enfranchisement is not necessarily a recipe for significant political power.

holds, rather than living an ocean apart. For the white women and other nonvoting citizens of the new American republic, the Revolution effectuated this second strategy, trading in a deeply defective system of virtual representation for a more effective one.

Third, you can change the way government policies and laws themselves are structured, so that they apply equally to the voters and the nonvoters alike—thus making it impossible for the voters (or more broadly, those with more political power) to cause the enactment of special burdens that fall exclusively or too-disproportionately on the nonvoters (or those with less political power). Courts can help with this by policing laws, on various doctrinal grounds, to ensure that they fall evenhandedly on all rather than placing special burdens on some. These second and third methods have something in common: unlike the first method, which relies on enfranchising the nonvoters, both the second and the third methods work by improving the quality of virtual representation the nonvoters enjoy.

Those who have recently studied or taught constitutional law may remember a version of the third method playing a role in the classic case of *McCulloch v. Maryland*.<sup>39</sup> That case famously held that Maryland could not tax the Bank of the United States. But that was not quite it. Chief Justice John Marshall held that “a tax paid by the real property of the bank, *in common with the other real property within the State*” would be fine, but a special tax on the Bank of the United States would not.<sup>40</sup> Taxing the Bank, in other words, is only permissible to the extent that the voters of Maryland themselves, the people who vote for the legislators who write the tax laws, bear the same burden.<sup>41</sup> This observation about *McCulloch*, and the quote from Daniel Dulany above, are not original to me. Both are building blocks of an important argument in John Hart Ely’s book *Democracy and Distrust*: that part of how we protect those who lack political power is by structuring legal benefits and burdens in such a way that they are generally applicable *both* to those with political power and to those without it.<sup>42</sup> That way, those without the power will enjoy better virtual representation.

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39. 17 U.S. (4 Wheat.) 316 (1819).

40. *Id.* at 436-37 (emphasis added).

41. See ELY, *supra* note 37, at 85-86.

42. See *id.*



This is a powerful method of protecting nonvoters (and, more generally, of protecting politically powerless minorities). It is a method that resonates with a variety of arguments and legal doctrines, especially some that were prominent in United States law in the early nineteenth century, that require laws of broad, general, and equal applicability.<sup>43</sup> Ely argues that this sort of move is the way to make virtual representation work: the key is “tying the interests of those without political power to the interests of those with it.”<sup>44</sup> This line of argument has recently been revived by Bertrall Ross, who contends that judicially enforced requirements that laws be generally applicable can function as “a promising tool for protecting the politically marginalized.”<sup>45</sup>

At a high level of generality, this is clearly the right answer. The key to good virtual representation is the linkage, or identity, of *politically relevant interests* between the people who are actually represented and the people who are only virtually represented. Both the second and the third of our strategies aim for this linkage or identity of interests. But the idea remains abstract. Bringing it down to earth involves some challenging questions: What, exactly, is a politically relevant interest? How would we tell if the crucial links exist? The reason these questions are challenging is because they require at least the outlines of a theory of politics. At a minimum they require some account of what types of political questions are the important ones, the ones that define a person’s political interests. Once you know that, you need a further account of which variables best predict whether two people—such as a given voter and a given nonvoter—will find that their views or interests fall on the same side or different sides of those important questions.

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43. See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 673-77 (2014).

44. ELY, *supra* note 37, at 83.

45. Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 234 (2012). Similarly, the Constitution itself guards in various ways against states treating nonresidents worse or differently than their own (voting) residents. See ELY, *supra* note 37, at 82-85; Ross, *supra*, at 236.

### A. Which Interests Matter?

In this Article I will make no attempt to offer an overall, systematic account of which questions matter most in politics. Obviously, this varies. But here are three possible accounts, keyed to important dimensions of American politics. Each is stylized; none is a complete description of reality. But it is useful to lay them out because they differ in their implications for who ought to be virtually represented by whom.

#### 1. All Politics Is Partisan

According to this account of politics, highly resonant in our current polarized era, partisan disagreement, which is chiefly ideological in nature, dominates politics. On this view, we have much in common with co-partisans when it comes to the questions that matter most; we have much less in common with those on the other side.

This account of politics is consonant with a particular vision of virtual representation: one dominated by party, in which I am best virtually represented by someone who shares my partisan orientation. This has practical implications. Suppose a certain district is a safe district for Republicans. A voter who is a Democrat lives there, always votes against the incumbent, and always ends up on the losing side. This voter is represented by her representative. But she may well feel *virtually* represented *not* by her local representative but instead by a representative from somewhere else who shares her party affiliation.<sup>46</sup>

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46. There is plenty of anecdotal evidence that some people today do in fact view their representation in this way. My city of Austin, Texas, presents an interesting test. It is a heavily Democratic city, but most of it is represented in Congress by Republicans, each of whose districts includes only a small slice of Austin. See *Election 2016: Texas Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/results/texas?mcubz=3> [<https://perma.cc/5VBR-ZQJA>]. However, some Austin residents apparently *believe* that they are represented by Rep. Lloyd Doggett, a longtime Democrat who now represents only a small part of the city (and some of San Antonio). Although this is entirely anecdotal, a former student working in Rep. Doggett's district office reports a constant stream of constituent service calls from Austinites whose addresses fall outside Doggett's district and who are surprised to be redirected to their actual representative.

Some representatives themselves encourage such views of representation, underscoring the way partisanship can sometimes trump geography. When many Republican United States

Something like this idea may be at work in a number of the standards that judges, advocates, and scholars have proposed in partisan gerrymandering cases.<sup>47</sup> It is also certainly part of what is going on when many small donors express their support for and affiliation with legislative candidates who do not directly represent them by sending campaign money to distant races halfway across the country. Research suggests that such donations correlate overwhelmingly with the donor's political party, suggesting that a lot of (small) donors are motivated by ideology and partisanship, rather than any other cross-cutting variable.<sup>48</sup> It is not a stretch to imagine that some of these small donors, especially those who are on the opposite political side from their own local representative, might have a subjective sense of being virtually represented by the distant representatives they are paying money to help elect.

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representatives declined to hold town hall meetings during the 2017 Easter recess, amid controversy over proposals to repeal Obamacare, some Democratic representatives traveled across district lines to hold their own town halls for people who were actually their colleagues' constituents. See Amber Phillips, *To Hold a Town Hall or Not? It's a Lose-Lose Situation for Many Republicans Right Now*, WASH. POST (May 13, 2017), <http://www.washingtonpost.com/news/the-fix/wp/2017/05/13/to-hold-a-town-hall-or-not-its-a-lose-lose-situation-for-many-republicans-right-now> [<https://perma.cc/FXR7-CU8M>]. Meanwhile, social scientists have found that when Americans express their views to politicians, they are considerably more likely to reach out to an elected official with whom they share a party affiliation. See David E. Broockman & Timothy J. Ryan, *Preaching to the Choir: Americans Prefer Communicating to Copartisan Elected Officials*, 60 AM. J. POL. SCI. 1093, 1093-94 (2016) (using experimental designs that included studying constituent communication in states with two senators of different parties).

47. Any standard that looks to the statewide balance of partisan power is implicitly relying on an idea of virtual representation. Those who are in districts dominated by the other party can at least be sure, under such standards, that there are *other* districts electing representatives of their party. Indeed the very idea of comparing the statewide map, in partisan terms, to the partisan views of the voters—lots of whom may live in the “wrong” district in partisan terms—suggests a robust if generally unacknowledged role for virtual representation. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 365 (2004) (Breyer, J., dissenting) (arguing for a measure of whether an overall statewide map amounts to an “unjustified entrenching” of one party over the other); *Whitford v. Gill*, 218 F. Supp. 3d 837, 843, 854, 910 (W.D. Wis. 2016) (three-judge court) (adopting a combination of standards in which the overall statewide “efficiency gap” in wasted votes between the two parties plays an important role), *argued*, No. 16-1161 (U.S. Oct. 3, 2017). *But see Vieth*, 541 U.S. at 339 (Stevens, J., dissenting) (arguing for an examination of specific districts rather than the overall map).

48. Data suggests that over 97 percent of individual donors in the 2016 election cycle donated to only one political party. Less than 1 percent of donors gave at least a third of their contributions to both major parties. *Donor Demographics*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/donordemographics.php> [<https://perma.cc/MBW3-8KGV>].

## 2. *All Politics Is Racial*

According to this account of politics, the underlying core dynamic of politics is not partisanship, but rather membership in a highly politically salient group. In this country, the strongest contender for such a group-based dynamic, by far, is race. (A more abstract name for this model would be: “all politics is group-based.” But in the United States, it is obvious which group would be the relevant group, so I will just use “all politics is racial.”) For a relatively clear example, consider the years of litigation under the Voting Rights Act in what was once the one-party South.<sup>49</sup> At that time, there was no partisan division, but within the Democratic party there were a number of important cleavages, of which the most important was race.

A key prerequisite for bringing a claim under section 2 of the Voting Rights Act today is to prove that voting is sufficiently “racially polarized.”<sup>50</sup> That is another way of saying that racial group membership must be a *sufficiently powerful predictor* of most people’s political choices that it functions as a central axis of politics. To the degree that this is the case, a different model of virtual representation emerges. At the extreme where *all* politics is racial, good virtual representation for a nonvoter will consist essentially of making sure that representatives are elected who are the *choice of members of her racial group*. This does not necessarily need to happen in her particular district, but it needs to happen someplace.

This model of representation would predict, uncontroversially, that the dramatic expansion of black representation in Congress that followed the 1982 Amendments to the Voting Rights Act would have the effect of helping millions of black people feel better

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49. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980) (plurality opinion); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966), *abrogated by Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

50. See S. REP. NO. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (setting out the Senate Factors for determining whether a challenged electoral device violates section 2, the second of which is the extent of “racially polarized” voting). The Supreme Court later crystallized these Senate Factors into a three-factor threshold test for racial vote dilution in which two of the three factors essentially turn on racially polarized voting. *Gingles*, 478 U.S. at 50-51 (creating a test in which the minority group must be “politically cohesive” and must show “that the white majority votes sufficiently as a bloc ... usually to defeat the minority’s preferred candidate”).

represented in Congress *whether or not* they lived in the new majority-minority districts. There is evidence of this; indeed it is a commonplace in the political science literature of race and representation to observe that members of minority groups sometimes feel that they are better represented not by the white representative of their own district, but instead by a minority representative elected in a different district.<sup>51</sup>

This concept of virtual representation plays a subtle but unmistakable role in current voting rights law. When a voter claims racial vote dilution, she cannot plausibly claim that she is personally entitled, in her own district, to a representative who is the choice of her own racial group. For one thing, it would not be logically possible for all voters to have such an entitlement; the claims would be mutually incompatible. If her group has a number of *other* districts in which *other* members of the group can elect their candidates of choice—and especially if that number of districts is roughly proportional to the minority group's numbers in the total population—then that weighs heavily under current law against recognizing her claim seeking yet another district in which her group can be in the majority.<sup>52</sup> The implicit idea is that such a voter is not being turned away empty-handed. She may have no shot at winning actual representation in her own district of the kind that matters most

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51. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 37 (1994) (describing how African American voters in majority-white southern districts often viewed Harlem Congressman Adam Clayton Powell, Jr. as their representative in Congress); CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 217-18 (1993); James B. Johnson & Philip E. Secret, *Focus and Style Representational Roles of Congressional Black and Hispanic Caucus Members*, 26 J. BLACK STUD. 245, 258 (1996) (quoting members of the Congressional Black Caucus on their feelings of obligation to black constituencies beyond their districts—as one put it: “People throughout ... [my state] wherever they live, if they are African American or other minorities, consider me to be their representative.” (alteration and omission in original)); see also Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POLITICS 628, 642 (1999).

52. See *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (“We hold that no violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population. While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended, 42 U.S.C. § 1973)).

according to this model of politics—a representative who is the choice of her racial group. But lots of people are stuck in the minority in their own district. The key is that she is virtually represented by those who are elected elsewhere, where her group *can* elect its candidates of choice. This way of looking at virtual representation makes sense only if, and to the extent that, race really is a central axis of politics. That is why a plaintiff must prove that voting is racially polarized to get a claim like this off the ground.

### 3. *All Politics Is Local*<sup>53</sup>

According to this final account of the core dynamic of politics, the questions that matter most are tied to geography. Think of some of the oldest and most familiar divides in American politics. New York City versus upstate. The South Carolina Piedmont versus the low country. Or, on a different and much larger scale, the North versus the South. On this view, geographic communities share certain important interests related to such factors as the industries that are central to their economic life, a shared need for particular forms of development and infrastructure, a shared cultural background, or a shared vulnerability to particular threats. This account paints a picture of different cities, regions, and states as relatively internally homogenous in their politically salient interests, and relatively

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53. The phrase “all politics is local” is a famous twentieth-century aphorism most associated with Tip O’Neill, the Democratic Speaker of the House from 1977-1987. See TIP O’NEILL & GARY HYMEL, *ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME* (1994). It may be notable that the phrase is associated with a person who became famous in this particular period (although he likely said it earlier). The 1980s were a period of relatively low partisan polarization within Congress—especially compared to what has happened since—because an ongoing party realignment was underway but incomplete, leaving many conservative Southern Democrats and liberal Northern Republicans in this period. See, e.g., Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RES. CTR. (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/> [<https://perma.cc/Y4XN-PM7Y>]. In this less polarized environment, O’Neill himself cut a number of important bipartisan deals with Republican President Ronald Reagan. Present-day nostalgia for this period in politics, from some quarters, may have a lot to do with the fact that American politics itself has changed. See, e.g., Charlie Stenholm, *How Tip O’Neill and Ronald Reagan Would Make This Congress Work*, HILL (Mar. 12, 2015, 6:00 AM), <http://thehill.com/blogs/pundits/blog-lawmaker-news/235409-how-ronald-reagan-and-tip-oneill-would-make-this-congress> [<https://perma.cc/7K78-WD65>]. Under today’s political conditions, “all politics is partisan” seems the more plausible aphorism.



different from one another.<sup>54</sup> This account, too, implies a form of virtual representation: we get good virtual representation when our neighbors get actual representation, because we share our most politically salient interests with our neighbors.

Of these three accounts of politics, American political leaders in the colonial period and the early republic unambiguously chose the third. They did not plan for—and famously opposed—what turned out to be the inevitable emergence of political parties. They did not enfranchise enough nonwhite people to imagine the possibility of a politics of race. Although there were some significant group-based divisions in early American politics, these divisions were not where the action seemed to be. The nation was vaster geographically (by travel time<sup>55</sup>) than it is today; the geographic differences loomed large. They became the de facto basis of the American system of virtual representation.

### *B. The American Approach*

The American revolutionaries who rallied behind the idea of “no taxation without representation” thought they were rejecting virtual representation. In fact they were substituting one system of virtual representation for another. It was a good trade. The ideas about

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54. A number of scholars have argued in the context of redistricting that our law either does, or should, take account of the continuing centrality of geography to politics—that is, they have argued that this area of law either does or should operate on the basis of something like the “all politics is local” model just sketched. “Objectively, people who live nearby tend to have common interests,” Nick Stephanopoulos argues. “[S]patial closeness correlates with, and helps generate, [those] interests.” Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1391 (2012); *see also id.* at 1391 n.38 (collecting citations of others making versions of this point). While Stephanopoulos applauds, and argues for strengthening, the ways U.S. redistricting law tries to protect geographically defined political communities, Jim Gardner argues more pessimistically that our long commitment to this geographic conception of politics has bequeathed to us a set of doctrinal principles that are unable to address modern districting problems such as partisan gerrymandering. James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 889–90 (2006).

55. For an illustration of how much closer to one another different parts of America became, in terms of travel time, over the course of the first century and a half of American history, see Michael Graham Richard, *How Fast Could You Travel Across the U.S. in the 1800s?*, MOTHER NATURE NETWORK (Dec. 26, 2012, 11:48 AM), <https://www.mnn.com/green-tech/transportation/stories/how-fast-could-you-travel-across-the-us-in-the-1800s> [https://perma.cc/87KL-69T9].

representation that emerged during the Revolution were an important development in the history of democratic thought. They broke sharply with the ideas of the colonists' old friend—and sometime secret agent—Edmund Burke, who had imagined elected leaders as trustees.<sup>56</sup> Trustees can virtually represent everyone's interests, and that is their job. As Burke explained: "Parliament is not a *congress* of ambassadors from different and hostile interests ... [but] a *deliberative* assembly of *one* nation, with *one* interest, that of the whole."<sup>57</sup> In that case, it does not matter much how the districts are drawn.

In the early United States, a new model of representation began to emerge in opposition to this view. Articulated in somewhat different terms by both Federalists and Antifederalists, the new model imagined that different groups of people in different geographic areas deserved their *own* representatives who they actually chose themselves, and who would indeed fight for specific local interests.<sup>58</sup> This emerging model of republican democracy imagined a stronger connection between representative and constituent than the trustee model. In a world without parties, that connection ran primarily

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56. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 122 (J. Parsons 1793).

57. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 THE FOUNDERS' CONSTITUTION 391, 392 (Philip B. Kurland & Ralph Lerner eds., 1987). He continues: "You choose a member, indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of *parliament*." *Id.*

58. For Federalist, pro-Constitution versions of this argument, see, for example, THE FEDERALIST No. 56, at 64-65 (Alexander Hamilton) (Williams & Whiting 1810) (acknowledging that "[i]t is a sound and important principle, that the representative ought to be acquainted with the interests and circumstances of his constituents" and addressing the charge that the House of Representatives "will be too small to possess a due knowledge of the interests of its constituents"); John Adams, *Thoughts on Government*, in 1 THE FOUNDERS' CONSTITUTION, *supra* note 57, at 107, 108 ("The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them."); see also WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 233 (Rita & Robert Kimber trans., UNC Press 1980) (1973). The Antifederalist version of this argument held, among other things, that the new Constitution had too few representatives to actually represent all the diverse interests of Americans. See, e.g., Letter from the Federal Farmer to the Republican, No. 2 (Oct. 9, 1787), reprinted in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (Walter Hartwell Bennett ed., 1978) ("[T]o allow professional men, merchants, traders, farmers, mechanics, [etc.] to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous"—far more numerous than the proposed Congress. "The representation cannot be equal ... if the extreme parts of the society cannot be represented as fully as the central.").



through geography.<sup>59</sup> To be sure, this model did not emerge fully formed at the moment of the Revolution. Madison, for his part, was skeptical that representing small and specific local interests was either normatively desirable, or positively what the House of Representatives would likely do.<sup>60</sup> The new model may have seemed too much like an open embrace of factionalism to those Framers who still had in mind something of the Burkean model of trustee-like statesmanship.<sup>61</sup> That older model had—and has, today—a number of attractive features. It is indispensable in any society to have politicians willing to consider the interests of the whole nation and not focus exclusively on the interests of their own constituents.

But over time, the new model came to dominate our politics. It led to the idea of drawing geographic districts, with equal numbers of people in each. Such districts do important work: they have the effect of making sure different places, which have different interests, are equally well represented by population.<sup>62</sup> In our system, this took time. Drawing districts was not a major part of the way early American governance worked.<sup>63</sup> Within state legislatures, representation usually went to towns or counties, which meant that geography drove representation but representatives represented different numbers of people.<sup>64</sup> In congressional elections, districting was more popular early on in large states, which makes sense: this was where within-state geographic differences were the most pronounced and interests the most divergent.<sup>65</sup> In large states, different regions made strong enough demands for electing their own representatives that they generally got their way.<sup>66</sup> However, in smaller states, most early congressional elections were at-large.<sup>67</sup>

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59. Cf. SEYMOUR, *supra* note 26, at 46.

60. See ANDREW REHFELD, THE CONCEPT OF CONSTITUENCY 98-99 (2005) (“Madison believed the large district would help neutralize local interests rather than replicate them within Congress.... Facing multiple local interests [because of the large-sized congressional districts], the elected representative would then not be beholden to any particular one.”).

61. See BURKE, *supra* note 56, at 122.

62. ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 36-37 (1987).

63. See *id.* at 37.

64. *Id.* at 36. However, in the late eighteenth century, many large states did work to tie population to representation. *Id.* at 36-37.

65. *Id.* at 111.

66. See, e.g., *id.* at 113.

67. *Id.* at 108.

The State of Connecticut, for instance, would elect all of its representatives statewide, for numbered seats.<sup>68</sup> This meant that different geographic regions of Connecticut would not necessarily get any representation at all.

As American politics became more partisan in the early nineteenth century, this statewide method tended to give smaller states a partisan advantage: a state-level partisan majority could elect an entire congressional delegation, leaving the other party with nothing. As partisanship deepened, this effect loomed larger, leading to worries that larger states might soon choose to switch to at-large methods as well, giving up districting in order to gain this partisan advantage. In response to this worry about a potential cascade of states switching to at-large, nongeographic representation, Congress passed a statute in 1842 mandating that all states elect members of Congress by district.<sup>69</sup>

This was a significant and underappreciated moment of stepping back from the brink. At a liminal point in the long transition from a politics dominated by geography (that is, “all politics is local”) to a politics almost completely dominated by the rapidly consolidating party system (that is, “all politics is partisan”), Congress acted in a way that protected geographic representation from being entirely supplanted by partisanship. Our elected leaders in this way preserved geographic representation as a distinctive building block of the American democratic model. In doing so, they set in motion the conflicting incentives and constraints that eventually led to today’s fights about partisan gerrymandering.

This move preserved a particular form of virtual representation. Even if you do not or cannot vote, *someone chosen by your neighbors* will be elected, and that person will virtually represent you. Is this a good form of virtual representation? The answer depends a great

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68. *Id.* at 105.

69. *Id.* at 129-31. Congress was undoubtedly aware of how such a cascade would affect both the parties and individual Members. See ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43-55 (2013) (arguing that Zagarrri’s account underplays a central motivation for the 1842 Act: the Whig majority’s ultimately unsuccessful attempt to avoid losing control of the House in the impending 1842 election). Ironically, even though partisan considerations likely played a substantial role in explaining why Congress passed this statute, the law’s effect was to place geographic districting on a much firmer and more permanent footing, thereby preventing geography from being completely replaced by partisanship.

deal on what you have in common, or do not have in common, with your neighbors. The closer the “all politics is local” model comes to describing politics, the more straightforward the argument for this form of virtual representation becomes. And yet it was exactly when partisanship was emerging as a rival or successor to geography as the central axis of politics that our leaders made this move to preserve the older form of geography-based virtual representation.

Americans in the eighteenth and nineteenth centuries did not understand what they were doing in these terms. Ideologically, they opposed virtual representation. As we have seen, this opposition was an important part of the ideology of the Revolution. In reality, both before and after the Revolution, *most* of the representation in the United States was, in fact, virtual. Women were represented only virtually everywhere but New Jersey.<sup>70</sup> Property requirements varied, but in a number of states they were high enough that a large proportion of adult white men had to make do with virtual rather than actual representation as well.<sup>71</sup> Meanwhile, slaves were not even virtually represented—their presence gave bonus representation to the masters who owned them, but nobody purported to virtually represent the slaves.<sup>72</sup> Yet even as virtual representation

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70. See KEYSSAR, *supra* note 3, at 43-44 (“Both [New Jersey’s] constitution of 1776 and an election law passed in 1790 granted the right to vote to all ‘inhabitants’ who otherwise were qualified: this was interpreted locally to mean that property-owning women could vote. New Jersey’s policy was exceptional.”); see also *id.* at 5 (noting that in the colonial era, propertied widows “in at least a few Massachusetts towns and New York counties ... did legally vote”).

71. See, e.g., *id.* at 7 (“[A]s the revolution approached, ... the proportion of adult white males who were eligible to vote was probably less than 60 percent.”); *id.* at 21 (“By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.”). States varied a bit. See David Alexander Bateman, *Democratic Exclusion: The Right to Vote in the United States, United Kingdom, and France* 76 tbl.3.2 (2013) (unpublished Ph.D. dissertation, University of Pennsylvania) (estimating pre-Revolution enfranchisement in the thirteen colonies and finding that only 51.9 percent of adult white men could vote in Maryland and only 54.8 percent could vote in New York; in other colonies it was over 60 percent). See generally KEYSSAR, *supra* note 3, at tbls.A.1, A.2 & A.3 (listing suffrage requirements, property requirements, and a chronology of property requirements).

72. As Akhil Amar explained: “[I]n 1787, voters could with a straight face claim to virtually represent the interests of the larger free population—their minor children; their mothers, daughters, wives, and sisters; their unpropertied adult sons and brothers; and so on. But masters did not as a rule claim to virtually represent the best interests of their slaves.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 92 (2005). “Masters, after all, claimed the right to maim and sell slaves at will, and to doom their yet unborn posterity to perpetual bondage. If this could count as virtual representation, anything could.” *Id.* Sandy Levinson argues, similarly, that no one would “seriously have suggested that slaves would be

dominated our system of representative government, the ideology of the Revolution frowned on it, linking it famously with the great Revolutionary slogan, “no taxation without representation.”<sup>73</sup>

It was only the passage of the Nineteenth Amendment that really cracked open the core of virtual representation in the American system.<sup>74</sup> Up until that point, because most representation was virtual, the political sphere was rich with arguments that some kinds of virtual representation were superior to others.<sup>75</sup> Such arguments created a kind of implicit hierarchy of forms of virtual representation. In this hierarchy, the representation of the colonists in the British Parliament was firmly at the bottom. The representation of women and children by their husbands and fathers was closer to the top. Thus, opponents of women’s suffrage consistently argued that yes, the virtual representation of the colonists by distant British electors was bad, but on the other hand, the virtual

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‘virtually represented.’... [Slaves] might ‘count’ as part of the ‘apportionment census,’ but no one imagined that they would, in fact, ‘count’ as part of the community whose opinions or interests would ever be taken into account.” Sanford Levinson, “*Who Counts?*” “*Sez Who?*,” 58 ST. LOUIS U. L.J. 937, 939-40 (2014) (footnote omitted). “What it meant to be a *chattel* slave was precisely that one was another’s property, entitled to no more solicitude, save that determined by naked self-interest, than other live chattels such as cattle or horses.” *Id.* at 939. Some commentators have apparently assumed that the slaves must have been “virtually represented” since they counted (albeit at a three-fifths ratio) for apportionment purposes. See Thomas A. Berry, *The New Federal Analogy: Evenwel v. Abbott and the History of Congressional Apportionment*, 10 N.Y.U. J.L. & LIBERTY 208, 240-41 (2016) (collecting citations). This is not the right way to understand the relationship between slavery and democratic government, for the reasons Amar and Levinson explain.

73. See, e.g., WOOD, *supra* note 27, at 177 (“The Americans’ objection to parliamentary taxation was ‘not because we have no vote in electing members of Parliament, but because we are not, and from our local situation never can be, *represented* there.’ The Americans were in fact coming to argue that in their clarifying conception of the British empire the mother country and the colonists did not possess an overriding harmony of interest that made Englishmen on both sides of the Atlantic one common people.”); see also ADAMS, *supra* note 58, at 231 (“The conflict between the assemblies and Parliament over the Stamp Act resulted in the articulation of two mutually exclusive theories of representation.”); ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 16 (1965) (“In the United States the idea of representative government was not only accepted but demanded, the memory of ‘no taxation without representation’ still ringing in the ears of those who developed the earliest legislative patterns. To a surprising degree even the colonial legislatures had reflected this interest in representation in proportion to population.”).

74. For a discussion of this trajectory and the role of women’s suffrage in it, see Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1338-45 (2011).

75. See, e.g., *id.* at 1342-45; Siegel, *supra* note 4, at 981-82.

representation of women by their husbands and fathers was good.<sup>76</sup> Not only, they said, because it promoted the right kind of authority within the family and maintained separate spheres, but also because the men were effective and good guardians of the women's political interests.<sup>77</sup>

Those were losing arguments. Nineteenth Amendment advocates argued that women deserved actual, not virtual, representation, and eventually they won.<sup>78</sup> That was the most decisive moment in the long shift from the old way of thinking, which assumed a mixed system of virtual and actual representation, toward the current way of thinking, in which actual representation is the universally accepted normative baseline, and virtual representation has come to seem hollow and tainted.

However, our system never eliminated virtual representation. No functioning democratic system ever has. As it has evolved, the particular American method of structuring democratic politics places a special premium on geographic rather than partisan forms of virtual representation. That is, our system has embedded in it, at a very deep level, an assumption that people who live geographically close to one another have some important political interests in common. We do not elect our representatives through, for instance, party lists, a method that ensures a more precise and nuanced degree of representation for the different political parties—which means better virtual representation if parties are what matter<sup>79</sup>—but

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76. See generally Siegel, *supra* note 4, at 981-87 (offering a comprehensive account of these arguments and their role). For example, Representative John Broomall, Republican of Pennsylvania, argued in 1868 that in a republican government, "it is necessary that every citizen may either exercise the right of suffrage himself, or have it exercised for his benefit by some one who by reason of domestic or social relations with him can be fairly said to represent his interests." CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (emphasis added). Unlike the ex-slaves, he argued, women could be fairly placed into this latter virtual representation category because of "[t]he primary and natural division of human society ... into families." *Id.*

77. For instance, Senator John Henderson, Republican of Missouri, argued that women do not vote because the ballot "is not needed for her security. Her interests are best protected by father, husband, and brother." CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866). The view that virtual representation is *superior* to actual representation for women requires more than an argument that virtual representation will protect women's interests. The key additional step is the ideology of separate spheres. See, e.g., HORACE BUSHNELL, WOMEN'S SUFFRAGE; THE REFORM AGAINST NATURE 68 (Zenger Publ'g Co. 1978) (1869); Siegel, *supra* note 4, at 981-87.

78. Siegel, *supra* note 4, at 1034-35.

79. And, further, if the nonvoters' party preferences are similar to those of the voters. (As I will discuss below, party is not *all* that matters, even in a time of intense partisanship.)

promises nothing about the geography of representation.<sup>80</sup> Some democracies, like Germany, offer a hybrid of these models, on a view that both party and geography matter and deserve independent consideration.<sup>81</sup> Our system does not.

And yet, for reasons the Framers could not possibly have anticipated, it turns out that our geographic method of representing the people does a reasonably good job of producing virtual representation, not just in terms of geography but *also* in terms of partisanship and race, as I will discuss in the next Part. Along each of these axes, it does significant work to ensure that the voters and the nonvoters are “inseparably connected in their interests.” That is what gives our current system of virtual representation its power—a power that remains largely hidden, because today we barely acknowledge the role virtual representation plays in our democratic order.

## II. GOOD VIRTUAL REPRESENTATION?

The winning arguments in *Evenwel* did not directly invoke virtual representation or suggest that part of what was at stake in the case was the quality of virtual representation. There was no need for such arguments. There are plenty of simpler arguments for why it makes sense to have equal representation for equal numbers of people—arguments about the allocation of government resources to the population or direct constituent services—that do not seem to invoke the *quality* of virtual representation at all.

After all, anybody might need constituent services. Everyone benefits from the expenditure of government resources in their area. These arguments use a very thin and parsimonious conception of what matters, politically, to an individual. If we took virtual representation more seriously, we might be more inclined to ask whether our system does an adequate job of representing nonvoters’ views

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80. In party list systems, seats are allocated to parties and not individual candidates. ANDREW REYNOLDS ET AL., *ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK* 60 (2005). This can work either in large multimember districts, as in Brazil, where each state chooses eight to seventy legislators on a party list basis, *see id.* at 86, or with a single, nationwide list, as in Israel, *see id.* at 82. The Israeli approach completely eliminates any attempt to represent geographic interests, unless such interests form an independent political party.

81. *Id.* at 100.

and interests—their political identities, described in some thicker way than a virtual pin dropped on a street address.

But this is tricky. Examining people’s political interests, views, and identities—and determining their most significant aspects—tends to put a sharp point on the trouble with virtual representation in modern democratic theory. The trouble is that virtual representation seems to be in serious tension with a fundamental idea that we might frame in terms of antipaternalism or self-determination. Robert Dahl once framed it this way: “[N]o person is, in general, more likely than yourself to be a better judge of your own good or interest or to act to bring it about.”<sup>82</sup>

This principle is not specific to the domain of voting and democracy. Any student of political theory will recognize it as a species of a more general strain of antipaternalistic thought that plays some role in every form of liberalism that can trace its lineage to the work of John Stuart Mill.<sup>83</sup> But of course, paternalism is sometimes necessary. As the name suggests, the paradigm case is when we are protecting the interests of children. Virtual representation is similarly sometimes necessary—even in the most enlightened modern democracy that enfranchises everyone who ought to be enfranchised. And again the paradigm case—and the largest case in numerical terms—is children.<sup>84</sup> Children, too, have interests that deserve democratic recognition, even though they cannot vote.

#### *A. Piggybacking on Geography*

The beauty of one person, one vote is the thinness of its conception of politics. It treats all of us, fundamentally, as people and nothing more. Of course we layer many more types of protection on top of one person, one vote—protections for the political power of racial groups, and perhaps protections for the political power of partisan groups as well.<sup>85</sup> But we begin with a layer that is very thin,

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82. DAHL, *supra* note 7, at 99. This is an argument for actual, over virtual, representation.

83. See generally JOHN STUART MILL, ON LIBERTY (Project Gutenberg 2011) (1859) [<https://perma.cc/6AW6-4XBP>].

84. Cf. Bennett, *supra* note 33, at 503 (noting that about a quarter of all American citizens are ineligible to vote because they are children).

85. Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1908-10 (2012). Regarding partisanship, see *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).



one that takes no account of even such basic questions as whether a person is on the winning or the losing side in elections. Win or lose, we all count as equals to the doctrine of one person, one vote, just by being people rather than trees.

Is it possible for a system with such a thin conception of politics to do the thicker work of ensuring not just virtual representation, but *good* virtual representation? Can a virtual pin dropped on a street address—which is all any of us ever amounts to, as far as the computers that do the work of one-person, one-vote calculations are concerned—actually give nonvoters the kind of virtual representation they deserve? Surprisingly, the answer is a qualified yes. Because of common patterns of residential segregation, the dead-simple geographic pin-drop approach tends to be fairly effective at clumping nonvoters with voters who are “inseparably connected in their interests” along lines of geography, partisanship, race, and some other axes besides.

Consider, for instance, the district that the plaintiffs in *Evenwel* singled out as the worst, Texas State Senate District 27.<sup>86</sup> The plaintiffs singled it out because a lot of its people cannot vote, in contrast to a district like District 4, where some of the *Evenwel* plaintiffs lived, where a much higher proportion of the population can vote. The difference arises because District 27, down at the southern tip of Texas and along the Gulf Coast, including Brownsville and part of McAllen, has a lot of children (33 percent) *and* a lot of noncitizens (18 percent). This compares to about 26 percent children and 8 percent noncitizens in District 4, which is in the outer Houston suburbs.<sup>87</sup> But of course those are not the only differences between these two places. The nonvoters in District 27 actually have a lot of important things in common with the voters, including race and political party. For example, in District 27, 89 percent of the population is Hispanic. The nonvoters are even more overwhelmingly Hispanic than the voters, but the difference is not

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86. Brief for Appellants at 10-12, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

87. *Compare Overview of State Senate District 27, Texas*, STAT. ATLAS, <https://statisticalatlas.com/state-upper-legislative-district/Texas/District-27/Overview> [<https://perma.cc/9NUN-ZRX3>], with *Overview of State Senate District 4, Texas*, STAT. ATLAS, <https://statisticalatlas.com/state-upper-legislative-district/Texas/District-4/Overview> [<https://perma.cc/2KHP-9C97>]. This atlas, which includes data from both the U.S. census and the American Communities Survey, is the source for all of the numerical comparisons of the two districts in this paragraph.



that large. Beyond party and race, harking back to the ideas of geographic representation from the American Founding Era, the voters and the nonvoters in these districts have a certain amount in common because of the dominant industries, occupations, and economic circumstances of the places where they live. District 27 has more than three times the state average percentage of farmers; District 4 has less than half the average. District 4 has lots of scientists and engineers; District 27 comparatively few. Although both of these districts run along the Gulf Coast, over the years they have been struck by *different* hurricanes in different decades, with different consequences.

Thus, if you took a few thousand nonvoters out of District 27 and told them that they would henceforth be represented by the elected officials of District 4, there would be a reduction in the quality of their virtual representation. This decline would occur along a variety of dimensions; we need not decide exactly which dimension matters most. This scenario might seem far-fetched. But in fact it is exactly what states do when they remove some voters from one district, take away their voting rights, and incarcerate them elsewhere, in an entirely different district. Thus, perhaps the starkest contemporary application of the concept of virtual representation is the current wave of legislation and litigation about where and how to count prisoners.

### *B. Prison Gerrymandering and Baker v. Carr*

Since 2010, there has been a flurry of state laws altering the way prisoners are counted within states for districting purposes, taking advantage of data that the Census Bureau began providing in 2010 that allows states to break out prisoners as a separate category.<sup>88</sup> Several blue states—Maryland, New York, California, and Delaware—now require counting inmates not at the location of the

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88. See Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU (Mar. 1, 2010), <https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html> [<https://perma.cc/Z26E-VFAE>] (“This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale.”).

prison, but instead, at their last known residence.<sup>89</sup> Other groups of states take various approaches including counting them at the location of the prison, or not counting them at all.<sup>90</sup> Meanwhile, there has been recent constitutional litigation about this in several states.<sup>91</sup> And nobody seems to have a good idea of what to do with prisoners whose last known residence is outside the state. It would take federal legislation, undoubtedly subject to constitutional challenge, to count out-of-state prisoners in their home states.

The real question in these prison controversies is this: If prisoners are going to be virtually represented, what method will provide for the best virtual representation? That question has both a partisan edge and a racial edge, which are much of the reason for all the legislation and litigation. Legislatures and courts may be deciding whether prisoners from urban areas who are disproportionately racial minorities—and therefore, disproportionately Democrats—should count toward the population totals in what are often rural areas that are more conservative, Republican, and white. In states like New York, at least, this is the heart of the dispute.<sup>92</sup>

As so often happens in election law, when these cases go to court, judges generally do not really reach the reasons why the litigants are in court. Judges tend to focus on the nexus (or lack of nexus) between prisoners and local government services, as though that is

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89. CAL. ELEC. CODE § 21003(b) (West 2017); DEL. CODE ANN. tit. 29, § 804A(b) (2017); MD. CODE ANN., ELEC. LAW § 8-701(a)(2) (West 2017); MD. CODE ANN., STATE GOV'T § 2-2A-01 (West 2017); MD. CODE ANN., LOCAL GOV'T § 1-1307 (West 2017); N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2017).

90. Many states, and hundreds of localities, count prisoners at the location of their prison. The Prison Policy Initiative's Prison Gerrymandering Project conducts the most comprehensive accounting of these states and localities. See *Impact on Democracy at the State Level*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/problem/state.html> [https://perma.cc/BG6Y-SKS5]; *The Impact on Local Democracy*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/problem/local.html> [https://perma.cc/Z7GU-GSU2]. For two examples of state statutes that require prisoners to not be counted at all for districting purposes, see COLO. REV. STAT. § 30-10-306(1) (2017); MICH. COMP. LAWS § 46.404(g) (2017).

91. See, e.g., *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016); *Calvin v. Jefferson Cty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016); *Little v. N.Y. St. Task Force on Demographic Research & Reapportionment*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).

92. See *Little*, slip op. at 8-10. Not all states, however, match the classic New York fact pattern, particularly when it comes to partisanship. See, e.g., Maggie Clark, *Could a Recount of Prisoners Affect Elections?*, PEW CHARITABLE TRS.: STATELINE (Oct. 12, 2012), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/10/12/could-a-recount-of-prisoners-affect-elections> [https://perma.cc/DM8S-85YV] (suggesting that the overall partisan impact, across the country, may be limited).

all there is to being a constituent.<sup>93</sup> The courts never discuss partisanship and they avoid discussing race except to the extent that the Voting Rights Act clearly requires them to discuss it.<sup>94</sup> Courts generally seem to lack the tools to say anything about the divergence of *political* interests between, say, voters in a community where a major prison is the biggest business and source of jobs, and prisoners whose top political priority might be to reduce mass incarceration.<sup>95</sup>

In a jurisdiction whose population consists of nonvoting prisoners and voting guards, the interests of the voters and the nonvoters, far from being “inseparably connected,” are fundamentally and profoundly at odds. They are a clear exception to the general rule that geography tends to yield common interests. Although physically proximate, they are at least as deeply at odds as the American colonists and their distant British MPs. They may have found an even worse form of virtual representation than the one that led to the American aversion to virtual representation itself.

In fact there is an even better and sharper example, closer to home. Under Jim Crow, certain districts in the rural South had large black supermajorities—all disenfranchised—and a voting population that consisted of a white minority hell-bent on preserving white rule.<sup>96</sup> These districts were a problem. They tended to elect the most retrograde of white Democrats, the most strongly opposed to integration and civil rights. Malapportionment gave them outsized power. Before *Baker v. Carr*, rural areas, where

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93. See, e.g., *Calvin*, 172 F. Supp. 3d at 1315-16 (focusing on the lack of representational nexus between prisoners and local officials); *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 152 (D.R.I. 2016) (discussing the lack of “representational nexus” that prisoners had with the city council and school committee), *rev'd*, 837 F.3d 135, 145 n.5 (1st Cir. 2016) (“To our knowledge, the Supreme Court has never adopted a ‘representational nexus’ analysis.”).

94. See, e.g., *Calvin*, 172 F. Supp. 3d at 1325-26 (not mentioning race at all in a decision holding unconstitutional the practice of counting inmates at the location of their prisons in Florida).

95. The concern that legislators representing prisons might favor high levels of incarceration is not merely theoretical. See, e.g., Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 364 (2011) (“[T]he two state senators in New York who led the opposition to efforts to reform New York’s harsh Rockefeller drug sentencing laws represented districts that were home to more than 17% of the state’s prisoners.”).

96. See J. DOUGLAS SMITH, ON DEMOCRACY’S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT “ONE PERSON, ONE VOTE” TO THE UNITED STATES 4-5 (2014).

population growth had lagged, were overrepresented because of the failure to redistrict, while urban areas where populations had skyrocketed were severely underrepresented. In the South, the population-lagging rural areas included many Black Belt districts in which the black people could not vote and the white minority intended to keep it that way. Thus, as J. Douglas Smith explains in his recent book about the one-person, one-vote cases, “[M]alapportionment served as a cornerstone of white supremacy, ensuring the overrepresentation of the most ardent segregationists and thus further delaying the realization of civil and voting rights for African Americans.”<sup>97</sup> The great political scientist of the South, V.O. Key, saw this dynamic at work in 1950: “By the overrepresentation of rural counties in state legislatures, the whites of the black belts gain an extremely disproportionate strength in state law making,” giving additional power “to those areas in general the most conservative and in particular the most irreconcilable on the Negro issue.”<sup>98</sup>

This political reality, obscure today, was obvious at the time. It is why Chief Justice Earl Warren maintained that the one-person, one-vote cases were the most important cases of any type decided during his tenure—a striking claim for a Chief Justice whose tenure included, among other cases, *Brown v. Board of Education*. “If *Baker v. Carr* had been in existence fifty years ago, we would have saved ourselves acute racial troubles. Many of our problems would have been solved a long time ago ... through the political process rather than through the courts.”<sup>99</sup>

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97. *Id.* at 5. For a terrific student note on the racial dimensions of *Baker v. Carr*, see generally Robert M. Crea, Note, *Racial Discrimination and Baker v. Carr*, 30 J. LEGISLATION 289 (2004). Pam Karlan also explores this same point, from a different direction, in an excellent Article in this volume. See Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921 (2018).

98. V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 666, 670 (2d prtg. 1950). At least some of the Justices were aware of the problem by 1950 as well. Justice William O. Douglas, dissenting in an earlier case that upheld Georgia’s county-based primary system, wrote that such arrangements have “been called the ‘last loophole’ around our decisions holding that there must be no discrimination because of race in primary as well as in general elections.” *South v. Peters*, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting); see Crea, *supra* note 97, at 296-97.

99. PAUL MOKE, EARL WARREN AND THE STRUGGLE FOR JUSTICE 171 (2015) (quoting an article by Arthur Goldberg that contains this quote from Warren). In 1961, six months before the decision in *Baker*, the Kennedy Administration’s Commission on Civil Rights published

The undemocratic system that the Supreme Court was stuck with the task of dismantling in the 1960s was a complex amalgam of mal-apportionment and Jim Crow disenfranchisement. Chief Justice Warren was being highly optimistic if he thought that fixing malapportionment, by itself, would have yielded a sufficient opening for the less retrograde elements of the white South to undo Jim Crow disenfranchisement through the normal political process. That seems unlikely, although there is no way to know for sure. What we do know is that in those rural Southern rotten boroughs, the ones whose power the Court began to dismantle in *Baker v. Carr*, the virtual representation that the disenfranchised black citizens received was abysmal—indeed, it was perverse. It was not the black citizens' interests that were being represented, but rather, the interests of their oppressors in maintaining their oppression. In this way, the pre-*Baker* mode of southern black virtual representation resembled the nonrepresentation of the slaves under the three-fifths compromise more than it resembled the virtual representation of, say, children through their parents today. The interests of the voters and the nonvoters in the Jim Crow Black Belt were indeed “inseparable,” but not in a good way. They were inseparable by virtue of being fundamentally opposed.<sup>100</sup>

Any time the government makes policy that disenfranchises some citizens, there is a risk that in addition to losing their actual representation, whoever is disenfranchised might also see a collapse in the quality of their virtual representation. This need not always occur, but it seems to occur fairly often. The key question, as always, is the relationship between the interests of the disenfranchised group and those of the people who are still able to vote. In the Jim

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a report on voting that contained a significant discussion of the racial dimension of mal-apportionment. See U.S. COMM'N ON CIVIL RIGHTS, VOTING 113-32 (1961); see also Crea, *supra* note 97, at 294.

100. Thomas Berry, in a short article that forms a major part of the Cato Institute's *Evenwel* brief, makes much of the fact that a century earlier, the Framers of the Fourteenth Amendment were skeptical that white Southerners after the Civil War would fairly represent the interests of their disenfranchised, recently freed slaves—a concern that unfortunately turned out to be extremely well-grounded and on the mark. See Berry, *supra* note 72, at 246-49. But while Berry aims to leverage this skepticism into a claim that the Framers of the Reconstruction Amendments were hostile to *all* virtual representation, there is no good evidence for this broader claim. See *id.* at 261-62. Given the divergent treatment of women and Freedmen in the Amendment, it would seem that instead Congress was picking and choosing among forms of virtual representation with some care.

Crow context, the perverse virtual-representation result depended on a number of factors. Black disenfranchisement was so complete and sweeping that there was no way for the black community to leverage some political power or form a coalition with white voters.<sup>101</sup> And yet the threat of a potential black majority was real enough to keep the enfranchised whites on edge about any relaxation of Jim Crow's strictures. Thus the interests of the two groups, like those of masters and slaves, far from being aligned or "inseparable" in the Daniel Dulany sense, were profoundly and implacably at odds.

The disenfranchisement of prisoners today is a much more limited case. Only a small percentage of any community is losing their right to vote. But there is one important continuity, from the point of view of virtual representation. In the prison context, the connection between the voters and the nonvoters has again been severed—in a different way, through the combination of (1) the practice of moving the prisoners to distant prisons far from their communities, and (2) the practice of counting the prisoners at the location of the prison rather than at their last address. This combination is what yields a form of virtual representation that has considerable potential to be perverse, in the sense described above.

Good virtual representation is a relative term. It would be asking far too much to insist that every nonvoter should be grouped with voters who closely match their political interests and preferences along all important dimensions. Clearly, this is impossible—and even if it were possible, the project of enforcing such a strong requirement would involve the government too much in deciding the question of exactly which political interests are or ought to be the salient ones.

This last problem is serious. A court can adjudicate the question of whether, for instance, voting is racially polarized.<sup>102</sup> But it is not realistic, and arguably not conceptually possible, for any observer

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101. This is part of the point of Sam Issacharoff and Rick Pildes's classic article, Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

102. Or so current law assumes. For a contrarian view, see Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 590-91 (2016) (arguing that even this determination is somewhat messier, and more bound up with contestable normative assumptions about what matters in politics, than we generally assume to be the case).



to determine the precise relative contributions of race, party, geography, and/or other axes of political disagreement. Indeed, the question of their relative importance is itself a question hotly contested in politics. In a pluralistic society, there will be multiple, competing answers to this question that will shift over time. To choose some of these answers over others—to codify today's answers as the ground rules for future politics—would freeze the system of virtual representation in a way that the government lacks a sufficient justification for doing.

And yet, for all that, there really is a stark and obvious difference between the kind of virtual representation that parents generally provide to their nonvoting children, and the kind involved in the prison and Jim Crow fact patterns. The chasm between these examples is readily apparent when we think in terms of *any* of the major axes of politics discussed earlier in this Article (race, party, geography) and others as well.

This is why the distinctive American geography-obsessed approach to representation—no party lists, no proportional representation, just single-member geographic districts—for all its flaws, amounts to an unintentionally elegant solution to the problem of how to achieve tolerably good virtual representation. Absent mass disenfranchisement of the kind that derailed representation under Jim Crow, and as long as people are counted in the community where they actually live or have lived—as opposed to, for instance, a prison where society may have relocated them—the geography-based approach trades on patterns of residential concentration or segregation along different axes to ensure tolerably good virtual representation along a variety of axes at once. We do not have to choose which axes matter most. And indeed it may not make sense to treat these axes as wholly separate axes in the first place; intersectional effects are common. Geography-based districting largely accounts for that too.

To be sure, this virtual representation is only as good, at best, as the actual representation the voters receive. So here many familiar problems reappear. Various kinds of vote dilution and gerrymandering can cause entire communities—voters and nonvoters alike—to lose any real chance they might have to elect a candidate of their choice. When divisions are sharp across partisan lines or racial lines, many people who are on the losing end of such map-drawing



strategies may not see much in the way of substantive representation, whether or not they vote.

This set of problems is very important, and it is the great downside of geographic districting. But it is also very familiar, so it is not the subject of this Article. What is less familiar to us today is the problem to which geographic districts, drawn according to population, amount to an elegant solution. That problem is as follows: How can we ensure that the nonvoters have representation that approaches what the voters have? Geographic districting by total population is one surprisingly effective way to do this. It is not perfect, even as an answer to this particular problem, but it does a tolerably good job of ensuring that nonvoters will be about as likely as the voters to see their views and interests, along many of the most important axes of politics, reflected in representative government. This may seem like a low bar, given that both the voters and the nonvoters may together be subject to familiar and serious problems such as vote dilution and gerrymandering that are only imperfectly constrained by law. Yet clearing this bar is no mean feat. It is hard to find a system that leaves the nonvoters closer to the position of the voters than the geography-obsessed approach to representation that Americans have pursued for much of our history.

### *C. The Limits of Proportional Representation*

There is a long modern tradition of opposition to geography-based districting, especially single-member districting, from several directions: advocates of greater political pluralism, opponents of the two-party duopoly, and advocates for minority representation, among others. The most powerful line of critique is probably the one that Lani Guinier has famously advanced: single-member districts are much worse than other methods (mostly methods involving some form of proportional representation (PR)) for representing minority groups.<sup>103</sup> Protecting any kind of minority group, racial or otherwise, in a single-member district system means drawing districts in which

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103. See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

the minority is a local majority. This can create or exacerbate various problems and dysfunctions.<sup>104</sup> Why not just allow voters to group *themselves* and decide *for themselves* who they want to join together with to form enough of a majority to elect a representative? This is the promise of PR.<sup>105</sup>

It is a powerful line of critique, one that in some enlightened circles has become the conventional wisdom: that various alternative voting systems are simply better than single-member districts for this reason. There is much truth to this line of critique. But it also has a serious flaw, one that the argument of this Article helps bring into focus: PR does not necessarily provide for good virtual representation. Indeed, it can lead to a kind of erasure of the nonvoters and their representational interests—and the further down the road toward “pure” PR one proceeds, the more complete the potential erasure.

The American single-member district system was designed for a political world in which most representation was virtual, and geography seemed to capture the most important dimensions of politics. Today we live in a completely different political world where the most important political axes are probably partisanship and race. And yet, either way, if people have politically important things in common with their neighbors, that means that even if they do not vote, and even if they *cannot* vote, they may still get tolerably good virtual representation through the votes of their neighbors. The facts of *Evenwel* illustrate this quite well. In districts with a lot of

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104. Attempting to protect minority voters through single-member districts inherently requires some degree of careful line-drawing so that a minority can be a local majority. Such race-conscious line-drawing, beginning in the 1990s, provoked a forceful if not entirely coherent backlash from the Supreme Court in the name of colorblindness. See *Shaw v. Reno*, 509 U.S. 630, 642, 647, 657 (1993). It leads to complex trade-offs between overall minority political power and the solidity of majority-minority districts. See *Georgia v. Ashcroft*, 539 U.S. 461, 485-90 (2003). All of this could be avoided by adopting any one of a range of non-single-member-district approaches.

105. Indeed, John Stuart Mill enthusiastically endorsed a very rudimentary, party-less proto-PR proposal (eliminating geographic districting in favor of a nationwide ballot to select individual candidates) partly on these grounds. “Every member of the House would be the representative of an unanimous constituency,” he argued, noting as well that “[i]t would be the minorities chiefly,” who would benefit from the power to band together across geographic boundaries to elect a candidate. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 142-43 (1861). The flip side of Mill’s point, however, is that a “unanimous” voting constituency is one that consists exclusively of voters, rather than the voters and non-voters who comprise a geographic constituency.

children and a lot of immigrants, there are a lot of nonvoters. But depending on what those nonvoters have in common with the voters, they may be able to get surprisingly good virtual representation.<sup>106</sup> Single-member districts have many problems, but they make this possible.

Some alternative voting systems would not require us to trade away this advantage entirely. For example, a multimember district (MMD) system with a relatively small number of members per district could retain some of the virtual representation properties of a single-member district. But, the larger the districts, and the more heterogeneous the population within each district along relevant axes, the more likely it becomes that the nonvoters will lose their virtual representation. For a concrete illustration, imagine merging some of the districts the plaintiffs in *Evenwel* picked out with others into one long MMD the length of the Texas Gulf Coast. If you did this, it would seem unlikely that either the voters or the nonvoters of Brownsville (the South Texas district with more children and noncitizens) will have as much representation as they do now, because comparatively fewer of the people of that area are voters.<sup>107</sup>

In effect, combining more and more districts together into successively larger MMDs gradually reallocates representation away from total population, and toward *actual voters*. The further down this path one goes, toward the endpoint of simple, statewide PR with no district lines at all, the less virtual representation the nonvoters will obtain. This will also, predictably, mean less representation for any group—such as Hispanics—who have a lower-than-average ratio of voters to population. This is just math. If group *A* contains one hundred people and only thirty voters, while group *B* contains one hundred people and sixty voters, combining the two groups into one district will mean that two thirds of the district's voters come from group *B*. In case of disagreement, group *A*, with the lower voter-to-population ratio, will be outvoted. On the other hand, if each group had a district it dominated, the two groups would see equal representation.

The same issue arises regardless of why the voter-to-population ratios vary: different levels of eligibility (because of citizenship, age,

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106. See *supra* notes 86-87 and accompanying text.

107. See *supra* notes 86-87 and accompanying text.

incarceration, or any other reason), different levels of registration or turnout among those eligible, or any combination of these factors. None of this matters if all we care about is the representation of the voters. But if we care about the representation of the people—including the quality of virtual representation that the nonvoters receive—then it matters a great deal. From that perspective, keeping districts small and single-member has the potential to sweep away these potential distortions, as long as the group axes most relevant to politics are also highly correlated with geography.

Advocates of alternative election systems have not yet adequately grappled with what it would mean to give all this up.<sup>108</sup> It may well be that alternative election systems would *still* be superior to our present single-member-district-based system for other reasons.<sup>109</sup> In an era of intense polarization and dysfunction, this is certainly possible. But advocates of such changes need to consider the effects of their proposals on the representation of people who do not or cannot vote.

### III. VIRTUAL REPRESENTATION IN THE CONSTITUTION

So far, this Article has proceeded primarily as a genealogy of the American system of virtual representation and a reconstruction of how and why it works. Part of my goal has been to show that, although we do not view virtual representation this way, in fact it has

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108. Most advocates of alternative electoral systems do not discuss this problem, although it has occasionally been noted by others. See, e.g., Michael E. Lewyn, *When Is Cumulative Voting Preferable to Single-Member Districting?*, 25 N.M. L. REV. 197, 213 (1995); Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 778-79 (2001). Lani Guinier, in her argument for multi-member systems, sees the problem squarely and offers three responses. First, she argues, multimember systems will still require subdistricting; second, alternative voting schemes encourage political participation by nonvoters; and third, the “consensus politics” created by alternative voting mechanisms are better for everyone, including nonvoters. See GUINIER, *supra* note 51, at 154-55.

109. There are various potential reasons. Some have to do with the representation of geographically diffuse minorities, who generally do not benefit from geography-based districting. Others have to do with the kind of politics that different voting systems might produce. Richard Briffault argues, for instance, that “there might be a positive value in reducing the role of territoriality in congressional elections if we thought Congress ought to devote less time to place-specific pork-barrel projects and meddling in local affairs and more effort to setting policy on matters of national significance.” Richard Briffault, *Race and Representation After Miller v Johnson*, 1995 U. CHI. LEGAL F. 23, 42.

long been a central feature of our democratic order. I have tried to show, as well, that the American system of geographic districting, despite its many problems, does have the unusual property of ensuring tolerably good virtual representation—in terms of any variable that people share with their neighbors. We may be able to do better, but this is a surprisingly good start.

All this may seem a little theoretical. Good virtual representation may be nice; it may be normatively desirable for various reasons; but does our Constitution actually impose any requirements on it? Should we read statutes that implement constitutional commands—in particular, the Voting Rights Act—in ways that take virtual representation into account? At the end of the day, should a person who is not allowed to vote be able to make any sort of claim, either statutory or constitutional, about the inadequacy of the virtual representation she receives?

There is a good case that the answer to these questions is yes. The chief reason is that our constitutional order was built in a world where most of the representation was, in fact, virtual.<sup>110</sup> As a result, a system of virtual representation is built deeply into the text and structure of the Constitution itself.

Any textual comparison between the U.S. Constitution and its many younger counterparts around the democratic world reveals a sharp disjunction in the area of voting and elections. Almost every other constitution guarantees, by express constitutional text, the right to vote.<sup>111</sup> Ours does not. American courts have instead had to interpolate the right to vote, along with other fundamental rights, from more open-textured constitutional provisions such as the Equal Protection Clause.<sup>112</sup> What we *do* have in the text is two major structural election provisions, one general and one specific. The general provision holds that the United States will guarantee states “a Republican Form of Government.”<sup>113</sup> The specific one concerns the

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110. See *supra* Part I.B.

111. See *Comparative Constitutions Project*, CONSTITUTE, [https://www.constituteproject.org/search?lang=en&key=voteun&status=in\\_force](https://www.constituteproject.org/search?lang=en&key=voteun&status=in_force) [<https://perma.cc/A25C-W75X>] (citing 132 national constitutions that contain some textual guarantee of a right to vote).

112. See Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 458-65 (2007). The text, of course, includes many enfranchising amendments that prohibit *particular* forms of discrimination in voting. See U.S. CONST. amends. XV, XIX, XXIV, XXVI.

113. See U.S. CONST. art. IV, § 4.

system of representation for the Republic as a whole. It says: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State.”<sup>114</sup> The key phrase here is “whole number of persons”—not citizens, not voting age population, not eligible voters, but persons, will be the basis for apportioning representatives. This is a constitutional framework that unambiguously relies on virtual representation. From the earliest days of the Republic, representation in the House was allocated in a way that explicitly takes into account the virtual representation of women, children, and all other “free Persons” (later amended to “persons”) who may or may not have been allowed to vote.<sup>115</sup>

This is the constitutional provision that loomed large in the background of the *Evenwel* case. It weighs heavily in favor of the resolution the majority chose: total population as the default base for apportionment at all levels of government, unless there is some good justification for departing from that baseline.<sup>116</sup> Proponents of counting only the eligible voters—who were on the losing side in *Evenwel*—disagree, arguing that the apportionment framework in the Constitution applies, by its terms, only to apportioning the seats in the House of Representatives. And that is true enough.

And yet—apportioning the seats in the House is more than a dry exercise in structural democratic engineering. It is a model of representation in a Republic. Indeed it is the *only* model the Constitution provides of what representation in a Republican form of Government might look like. This model aims to ensure the representation—virtual or actual—of all the people, whether eligible to vote or

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114. *Id.* amend. XIV, § 2. This provision is exactly the same as the one in the original Constitution except that slavery and the Three-Fifths Clause have been removed. The basic method of apportionment—counting “the whole Number of free Persons,” now “the whole number of persons”—is unchanged. *See id.* art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”), *amended by id.* amend. XIV.

115. In parallel to this textual command, the Constitution states that members of the House will be “chosen ... by the People”—even though only some of “the People,” those who meet each state’s “Qualifications” for state legislative elections, will actually be allowed to vote. The rest of “the People” are virtually represented, by constitutional design. U.S. CONST. art. I, § 2, cl. 1.

116. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

not. The apportionment clauses of Article I and the Fourteenth Amendment offer a constitutional model of representation that treats those who are virtually represented as *just as important* to the constitutional scheme as those who actually have the right to vote.

Sandy Levinson has suggested that we ought to distinguish between the “constitution of conversation,” the open-textured clauses that yield most constitutional interpretation and argument (such as freedom of speech and equal protection), and the “constitution of settlement,” which determines hardwired features of the constitutional structure.<sup>117</sup> The apportionment clauses are both. They obviously settle the question of how we apportion House seats to states. In that sense they are part of the constitution of settlement, of more interest to a political scientist than to a constitutional litigant. But that is not all they do. The apportionment clauses also set out a distinctive conception of representation, one that treats voters and nonvoters equally, making both actual and virtual representation constitutionally essential. This conception of representation is powerful and generative; it is not easily confined.

Some have suggested that the rules for congressional districting *within* a state—who ought to count when drawing the lines for House districts—need not be the same as the rules for apportioning seats to states.<sup>118</sup> According to this argument, a state could take the House seats it was awarded on the basis of total population, and divide them up (on an intrastate basis) according to a different population base, such as eligible voters. With all due respect to anyone who is making this argument in good faith, it is absurd. In practical terms, it would mean that a state like Texas could gain several House seats entirely, say, because of Hispanic population growth in one part of the state, but could then award *all* of those new House seats to areas hundreds of miles away, perhaps in other,

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117. Sanford Levinson, *Reflections on What Constitutes ‘a Constitution’: The Importance of ‘Constitutions of Settlement’ and the Potential Irrelevance of Herculean Lawyering*, in PHILosophical Foundations of Constitutional Law 83-85 (David Dyzenhaus & Malcolm Thorburn eds., 2016); see also SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNMENT* 5-13 (2012).

118. See Brief for Appellants, *supra* note 86, at 42 (“The Constitution’s formula for apportioning Congressional seats *across* States has no bearing on the requirements for creating districts *within* each State.”); Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL’Y 521, 528 (1994).



whiter parts of the state with fewer children and noncitizens. That sort of distortionary windfall would have the effect of disconnecting representation in the House from its underlying constitutional basis. If representatives represent *people*, according to the Constitution, then they must do so for purposes of both apportionment and districting. The two simply do not logically come apart.<sup>119</sup>

However, the apportionment clauses do not nearly so straightforwardly settle the question of whether a state's own legislature must follow the model of republican government, including virtual representation, that the Federal Constitution defines.<sup>120</sup> That was the question *Evenwel* formally left open.<sup>121</sup> But there is a strong case to be made that states too are bound. The early convergence of one-person, one-vote jurisprudence on a common standard, across the state-legislative and congressional contexts, even though *Reynolds v. Sims* and *Wesberry v. Sanders* were applying entirely separate bits of constitutional text,<sup>122</sup> strongly suggests that there is a structural

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119. Cf. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (locating in these apportionment clauses "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

120. There is a confusing argument here regarding the so-called "federal analogy." In applying one person, one vote to state legislative redistricting, the Supreme Court long ago rejected the "federal analogy": it said that unlike states of the Union, counties and other subdivisions within states have no independent political power within our system. See *Reynolds v. Sims*, 377 U.S. 533, 572-73 (1964) ("We ... find the federal analogy inapposite and irrelevant to state legislative districting schemes."); see also *Gray v. Sanders*, 372 U.S. 368, 376-78 (1963). This is black letter law; subdivisions of states do not have the same role within states that states do within the Union. See *Reynolds*, 377 U.S. at 575 ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."). The *Evenwel* plaintiffs tried to leverage this point to make an entirely different argument we might call the "federal analogy" analogy. See Brief for Appellants, *supra* note 86, at 42-44. Their claim was that because the Court rightly rejected the "federal analogy" just described (treating counties like little states), we should also reject *districting by total population* (the method used in the Federal Constitution) in the context of within-state districting. See *id.* That is essentially a non sequitur. The rejected federal analogy was about creating a *federal system within a state*, in which counties or other subunits of a state would function like states in the federal system. See *Gray*, 372 U.S. at 376-78. Rejecting it says nothing either way about which other, *non-federalism-related* features of the U.S. Constitution—such as districting by total population—must be mirrored in state constitutional structures.

121. See *Evenwel*, 136 S. Ct. at 1132-33.

122. See *Reynolds*, 377 U.S. at 568 (arriving at the one-person, one-vote standard for congressional malapportionment claims under Article I, Section 2's requirement that

constitutional principle at work here that we do not usually identify, one that holds that all of the people (and not merely the voters) have an equal constitutional interest in representation.

Perhaps this principle has been obscured by our century-and-a-half-long trajectory of replacing virtual representation with actual representation. But despite this arc of constitutional change, in one way our Constitution has never wavered: virtual representation has always been a central component of our system of representation. Indeed, the virtual representation of nonvoting persons has always counted just as much as the actual representation of voters in the one model of representation that the Constitution spells out. This suggests that we ought to take virtual representation more seriously—not only for normative reasons but also for reasons of constitutional fidelity.

#### CONCLUSION

In the end, virtual representation is second-best representation. But it deserves far more attention than we have lately given it. If we took virtual representation more seriously, we might uncover a usefully unfamiliar way of thinking about representative government: one in which we cannot always rely on the simple mechanism of the franchise to empower all the people, but must also come up with additional means of ensuring that the government faithfully represents all the people, however exactly we define the boundaries of “all.” This way of thinking about representative government is not new. It is quite old; and its tangled history as a component of arguments *against* expanding the franchise is part of how, over time, it became so discredited that we gave up on it.

That was a mistake. The grand march of enfranchisement that is our dominant democratic narrative will continue, but there are some people it will never reach. Many of us—most obviously young children—are both legally and practically disabled from various forms of democratic participation including voting. It does not say much for a society’s democratic evolution if that evolution results in

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Representatives be chosen “by the People”); *Wesberry*, 376 U.S. at 17-18 (arriving at the same standard for state legislative malapportionment claims under the Equal Protection Clause of the Fourteenth Amendment).

an erasure of the political interests of those who are the most politically vulnerable and dependent. We can do better. The first step is to acknowledge the importance, and the challenge, of using democratic structures to safeguard the interests of people who—often for very good reason—cannot vote.