Malapportionment: A Murder Mystery

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Malapportionment—electoral districts with divergent ratios of people to representation—was ruled to be unconstitutional in a widely venerated series of cases before the Warren Court. Those cases held that a principle of political equality, 'one person, one vote', is required by the Constitution. But what is the content of that principle? Many Justices and commentators declare that it is vague, empty, circular, or meaningless. This creates a murder mystery. Malapportionment was killed; but by what, exactly? This Article seeks an answer by focusing on the Court's commitments about the scope and strictness of one person, one vote: it is a broad (rather than narrow) principle of rough (rather than exact) equality. As such, one person, one vote requires an equal number of people per district and an equal number of votes per voter; and it requires a roughly equal number of people per district. These commitments are attractive in isolation. But, this Article shows, they are objectionable in conjunction: they entail that one person, one vote is too permissive, as it only requires a roughly equal number of votes per voter. If your vote is roughly equal to mine when your district is fractionally more populous than mine, your vote is also roughly equal to mine when I can cast fractionally more votes than you.

Since this problem follows inexorably from the Court's commitments about the scope and strictness of one person, one vote, there are two possible solutions. First, one person, one vote could be broad a principle of exact equality; administrability may then justify underenforcing the principle in distributing voters to districts, but not in distributing votes to voters. Second, one person, one vote could include a narrow principle requiring rough equality in apportionment, as well as a distinct principle requiring exactly equal votes per voter. These solutions have important constitutional implications—including for resolving the population baseline at issue in malapportionment, which remains uncertain after Evenwel v. Abbott*. But neither provides an easy way out. Each makes one person, one vote either too restrictive or too permissive.*

This puzzle brings to light why the operative principle in a venerated series of cases is deeply unclear and unsettled. But it has a special significance beyond that. One person, one vote lies at the heart of America's constitutional democracy, which is already under considerable threat. On the one hand, if the content of the principle is too restrictive (or

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too uncertain), then objections to its constitutionality are considerably strengthened. On the other hand, if it is too permissive, then one person, one vote provides little constraint on Vice-President J.D. Vance's recent proposal to give extra votes to parents, as well as myriad similar policies and procedures that would erode voters' equality at the ballot box.

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INTRODUCTION

> *No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote*.[1]
>
> *'One person, one vote, give or take 10 percent,' somehow doesn't* sound *like a constitutional principle.*[2]

At the start of the Twentieth Century, malapportionment was alive and well in the US. It was the norm, not the exception, for electoral districts to have divergent ratios of people to representation. The scale of these disparities was simply staggering:

> In California, the six million residents of Los Angeles County had just one member in the state senate, the same as the 400 people living in Alpine County. In the Idaho Senate, the smallest district had 951 people, while the biggest had 93,400. In Nevada, the smallest state senate seat represented 568 people, while the one urban district had approximately 127,000 residents. […]
> One town of 38 residents in Vermont elected the same number of state representatives as Burlington, Vermont, a city of 33,000 people. In Georgia, assembly districts contained between 1,876 and 185,422 constituents.[3]

Then, in the civil rights era, malapportionment was eliminated in a landmark series of cases before the Warren Court. In *Baker v. Carr*,[4] the Court held that malapportionment was justiciable; in *Gray v. Sanders*,[5] *Wesberry v. Sanders*,[6] and *Reynolds v. Sims*,[7] the Court held that malapportionment violated one person, one vote (OPOV). As Justice Douglas wrote in *Gray*: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[8] Finding that OPOV as a conception of political equality was a constitutional requirement reshaped American democracy by triggering the "reapportionment revolution."[9]

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[1] Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) (Black, J., dissenting).
[2] JOHN HART ELY, DEMOCRACY AND DISTRUST, 239 n.61 (1980).
[3] ELLIOTT FULLMER, EVERYONE'S DEMOCRACY: CONFRONTING POLITICAL EQUALITY IN AMERICA, 68, 78 (2022).
[4] 369 U.S. 186 (1962).
[5] 372 U.S. 368 (1963).
[6] 376 U.S. 1 (1964).
[7] 377 U.S. 533 (1964).
[8] *Gray*, 372 U.S. at 381.
[9] See GORDON BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966).

This is the standard narrative: Malapportionment was rife, until it was killed by OPOV—a conception of political equality that is also a constitutional principle. As such, it is unsurprising that on this narrative the malapportionment cases are venerated,[10] and OPOV is seen as stable and secure.[11] The only trouble on the horizon, on this picture, is that the application of OPOV is somewhat indeterminate. It is an individual right,[12] and a right to procedural equality,[13] which requires equalizing the population of each electoral district. But what does "population" mean? In *Reynolds*, it was described as the "number of residents, or citizens, or voters" per district.[14] This formulation "carefully left open the question of what population was being referred to."[15] That question has since been addressed by circuit courts,[16] and by the Supreme Court most recently in *Evenwel v Abbott*.[17] But the question remains largely open,[18] at least for now.[19]

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[10] See especially Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 121(2020), ("In the Court's jurisprudence, the one-person, one-vote cases of the 1960s are probably the most famous examples of correct *Carolene* decisions"). See also Grant M. Hayden, *The False Promise Of One Person, One Vote*,102 MICH. L. REV., 213, 215 (2003) ("The one person, one vote principle was at the heart of the early reapportionment cases and has since become the sine qua non of democracy"). *See also* Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE, 207, 207 (E. Joshua Rosenkrantz & Bernard Schwartz, eds., 1997) ("the 'reapportionment revolution' launched by the Justice's opinion in *Baker v. Carr* (which Chief Justice Warren called "the most important case of my tenure on the Court") has been a smashing popular and judicial success.").

[11] See Jacob Eisler, *One Person, One Vote*, in OXFORD HANDBOOK OF AMERICAN ELECTION LAW 545,546 (Eugene Mazo ed., 2004) ("The one person, one vote rule has emerged as an island of doctrinal stability in the other [sic] fiercely contentious and periodically unstable terrain of election law.").

[12] *See*, *e.g.*, Guinier & Karlan, *supra* note 10, at 210 ("[T]he Court… identified the core equal protection concept governing reapportionment as "one *person*, one vote", using an "individual rights framework."). For a range of scholarly views about whether OPOV is best understood as concerning an individual and/or group right, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1737-1738 n.320 (2001) [hereinafter *The Right to an Undiluted Vote*].

[13] *See*, *e.g.*, Guinier & Karlan, *supra* note 10, at 210 ("the new [OPOV] doctrine was procedural; it focused on voting, rather than on the fairness of political outcomes.").

[14] Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[15] Burns v. Richardson, 384 U.S. 73, 91 (1966).

[16] Most famously, in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir., 1990).

[17] 136 S. Ct. 1120 (2016).

[18] *See*, *e.g.*, Paul H. Edelman, *Is Groton the next Evenwel?*, 117 MICH. L. REV. ONLINE 63, 64 (2018) (The Court in *Evenwel* held that Texas was "permitted to use total population as the basis for the districting", but "left open… whether the state would be *permitted* to use an alternative measure of population, such as registered voters or citizen voting age population", leading to "considerable speculation", all of which was "hypothetical", about how that question would be resolved).

[19] *See* Justin Levitt, *Citizenship and the Census*, 119 COL. L. REV. 1355, 1394 (2019): the first Trump administration's attempt to add "a citizenship question to the decennial census" may have been "a

But the standard narrative has long been contested. Dissenting Justices and critical commentators vehemently objected to the view that malapportionment is unconstitutional because it violates OPOV.[20] The "prevailing majority" of the current Court is highly sympathetic to those objections,[21] making OPOV seem far less secure.

The loudest objection concerns the constitutionality of OPOV: that it does not form part of the original meaning of any clause of the Constitution.[22] Justice Thomas recently echoed this claim.[23] If this objection succeeds, the Court's "draconian pronouncement"[24] amounts to the unlawful imposition of a democratic principle on American politics.[25]

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vehicle for a block-by-block dataset of citizen population, ostensibly suitable for a novel redistricting population base", and thereby testing the question that the Court left open in *Evenwel*.

[20] *See* ELY, *supra* note 2, at 118, 120. Of the significant "resistance… to active judicial review in the voting area", "most of the fire has been directed at the malapportionment cases." *Id.*

[21] See especially Stephanopoulos, *supra* note 10, at 128 ("Reading *Rucho*. . . any student of the Court's redistricting doctrine is likely to experience a powerful sense of déjà vu. It's as though the 1960s dissenters are speaking from the grave, only this time for a prevailing majority of the Court instead of a defeated minority.").

[22] The Court held that OPOV is required by U.S. CONST. art. I, § 2 (with respect to congressional districting) *and* U.S. CONST. amend. XIV, § 2 (with respect to state districting). See Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) ("the command of art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's") and Gray v. Sanders, 372 U.S. 368, 379 (1963) ("Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment"). Appealing to *original specific intentions*, Justice Harlan disputed these positions about Art. I, § 2 *and* amend. XIV, § 2. See especially *Wesberry* at 41 (Harlan, J., dissenting), Reynolds v. Sims, 377 U.S. 533, 595-608 (1964) (Harlan, J., dissenting), and Oregon v. Mitchell, 400 U.S. 112, 154-200 (1970) (Harlan, J., concurring in part and dissenting in part).

[23] See Evenwel v. Abbott, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring in the judgment) ("In my view, the majority has failed to provide a sound basis for the one-person, one-vote principle because no such basis exists.").

[24] Lucas v Forty-Fourth Gen. Assembly of Colo., 377 US 713, 746 (1964) (Stewart, J, dissenting).

[25] Whitcomb v. Chavis, 403 U.S. 124, 166 (1971) (Harlan, J. dissenting) (this "line of cases can best be understood, I think, as reflections of deep personal commitments by some members of the Court to the principles of … democracy", despite their "nonconstitutional sources").

The deepest objection, however, concerns the content of OPOV: 'one person, one vote' sounds simple, but it is "a mantra in need of meaning."[26] *Reynolds* is said to rely on an "essentially empty substantive rule."[27] Because the Court could not explain what "equality should mean in the context of apportionment", its "description of the one-person, one-vote injury became circular."[28] "The 'weight' of an individual vote, as protected by the one person, one vote rule, turns out to be a somewhat mysterious, ephemeral construct."[29] So by requiring that each vote has an equal weight, the Court ended up "enmeshed in the haze of slogans and numerology."[30]

Determining the content of OPOV is independent of determining its constitutionality. After all, OPOV is meant to be the "conception of political equality" in the constitution *and* in the Declaration of Independence and Lincoln's Gettysburg Address.[31] Determining the content of OPOV is also prior to determining its constitutionality. We need to know what the principle *is* to know whether it is constitutionalized.[32]

If the content of OPOV is unclear, this shakes the foundations of the standard narrative. We cannot understand the malapportionment cases as being decided by the Court's

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[26] This is the titular contention of Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N C. L. REV. 1269 (2002).

[27] Pamela S. Karlan, *Rights to Vote: Some Pessimism about Formalism*, 71 TEXAS LAW REVIEW 1705, 1705 (1993).

[28] Heather K Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1430 (2002) [hereinafter *Costs and Causes of Minimalism*].

[29] Joseph Fishkin, *Weightless Votes*, 121 YALE L. J. 1888, 1892 (2012).

[30] Whitcomb, 403 U.S. at 169 (Harlan, J. dissenting).

[31] That the Gettysburg Address is non-constitutional is uncontroversial. On the status of the Declaration of Independence, *see*, *e.g.*, Frederick Schauer, *Why the Declaration of Independence Is Not Law–And Why It Could Be*, 89 S. CAL. L. REV., 619 (2015) .

[32] Determining the constitutionality of OPOV also requires a theory of constitutional interpretation, and the identification of what clause (if any) of the constitution is at issue. Some argue that OPOV is the partial or sole product of U.S. CONST. art. IV § 4. *Cf.* ELY, *supra* note 2 at 122 ("to be intelligible, *Reynolds v. Sims*, its majority and dissenting opinions alike, must be approached as the joint product of the Equal Protection and Republican Form clauses") and AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 212 (2012) [hereinafter AMERICA'S UNWRITTEN CONSTITUTION]. ("The equal-protection clause as originally written and understood was categorically inapplicable to voting. *Baker* and *Reynolds* were really republican-government-clause cases masquerading in equal-protection clothing"). More recently, Bradley argues that OPOV is partly the product of U.S. CONST. amend. I. J. Colin Bradley, *The Petition Clause and the Constitutional Mandate of Total-Population Apportionment*, 75 Stan. L. Rev. 335, 338 (2023) ("the Petition Clause of the First Amendment requires states to use a total-population apportionment in drawing state legislative districts").

application of a (non)constitutional democratic *principle*. Instead, we are left with a murder mystery. Malapportionment was killed, surely; but by what, exactly?

This Article aims to bring to light a new puzzle about OPOV, as the operative principle in the malapportionment cases, by focusing on two questions about its content. One is about its scope; the other about its strictness. With each question, the Court's decisions provide considerable guidance: it is a *broad* principle, and a principle of *rough* equality. These commitments are attractive in isolation. But they are objectionable in conjunction.

First, what is the scope of OPOV? Many identify it with a narrow "equal-population principle."[33] But there is considerable evidence that the Court endorses a broad principle;[34] for example, in citing approvingly the first epigraphic quote above, the Court in *Reynolds* suggests that OPOV would "prohibit a law that would expressly give certain citizens a half-vote and others a full vote."[35] So, OPOV cannot narrowly require *an equal number of people per district*; it also requires *an equal number of votes per voter*. Considering the breadth of OPOV pushes us to identify its content at a higher level of generality—as a democratic principle, rather than a mechanical rule.[36] The importance of this is not restricted to constitutional theory. It matters for how OPOV would apply to a range of policies and proposals that erode voters' equality at the ballot box. One such example is Demeny voting — the practice of giving parents extra votes — which was recently defended by Vice-President JD Vance,[37] among others.[38] There are myriad similar possibilities. J.S. Mill famous proposed,[39] and some still defend,[40] a practice of

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[33] *See, e.g.*, Cox v. Larios, 542 U.S. 947, 949 (2004) (referring to OPOV as "the equal-population principle").
[34] *See infra* Part IA.
[35] Reynolds v. Sims, 377 U. S. 533, 563, n.40, (1964) citing Colegrove v. Green, 328 U.S. 549 (1946) (Black, J., dissenting).
[36] *Cf.* JACOB EISLER, THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY,141, 1552023(referring to OPOV as a "mechanically applied rule" and "a minimalist and mechanical rule").
[37] Zach Beauchamp, *Where J.D. Vance's weirdest idea actually came from,* VOX POLITICS (Jul. 30, 2024 6:30AM), https://www.vox.com/politics/363473/jd-vance-weird-voting-parents-demeny-postliberalism.
[38] See especially Joshua Kleinfeld & Stephen E. Sachs, *Give Parents the Vote*, 100 NOTRE DAME L. REV. (forthcoming 2025). *See also* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L REV. 1463, 1464-65 n4-6 (1997) (discussing support for Demeny voting abroad, from US political figures, and in academia.).
[39] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (London, Parker, Son & Bourn, 1861).
[40] *See, e.g.*, Thomas Mulligan, *Plural Voting for the Twenty-First Century*, 68 THE PHILOSOPHICAL QUARTERLY 286 (2018).

giving more educated citizens extra votes. Others propose that "adults should have more votes the younger they are,"[41] or that the least advantaged citizens should have extra votes.[42] Many states disenfranchise felons;[43] a law could instead give felons a half-vote. Citizens under the age of 18 are disenfranchised; then-Californian state senator John Vasconellos once proposed a bill that would give 14- and 15-year olds a quarter-vote and 16- and 17-year olds a half-vote.[44] Prior to the malapportionment cases, the Court held that laws that deny some citizens a vote because they fail a literacy test were constitutional;[45] a law could instead give citizens who pass a literacy test extra votes. In an age where America's democratic principles are being tested, if any such policy or practice were adopted, would it violate OPOV and hence be unconstitutional? The answer depends on whether OPOV is a broad principle that is violated not only by inequalities in the number of people per district, but in the number of votes per voter.

Second, what is the strictness of OPOV? Some describe OPOV as requiring "that each vote had to have exactly equal weight with every other."[46] But the Court is only committed to a principle of rough equality.[47] Hence the second epigraphic quote above: the operative principle is not 'one person, *exactly* one vote', but 'one person, one vote, *give or take 10 percent*.'[48] The Court takes OPOV to permit some degree of inequality in the number of people per district, making the principle more administrable, feasible, and compatible with a range of other justificatory considerations in apportionment.

The puzzle emerges when we consider these commitments in conjunction. A broad principle of rough equality requires a roughly equal number of people per district as well as a roughly equal number of votes per voter. If your district has two or five or 10 times as many people as mine, the Court tells us,[49] this is equivalent to giving me two or

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[41] MARTIN WOLF, THE CRISIS OF DEMOCRATIC CAPITALISM, 336 (2023).
[42] Andreas Bengtson, *One Person, One Vote and the Importance of Baseline*, INQUIRY 1 (2022)
[43] For discussion and references, *see*, *e.g.*, Manoj Mate, *Felony Disenfranchisement and Voting Rights Restoration In The States*, 22 NEV. L. J. 967 (2022).
[44] *See* Daniel B. Wood, *Should 14-Year-Olds Vote? OK, How about a Quarter of a Vote?*, CHRISTIAN SCIENCE MONITOR, Mar. 2004, https://www.csmonitor.com/2004/0312/p01s03-uspo.html (last visited Feb 1, 2025).
[45] Lassiter v. Northampton Cnty. Bd. Elections, 360 U.S. 45 (1959).
[46] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 32, at 212.
[47] *See infra* Part IB.
[48] *See supra* note 2.
[49] See *infra* Part IIA.

five or 10 times as many votes as you; so, OPOV would prohibit a law that gives some a half-vote and others a full vote. But if your district has fractionally more people as mine, this is equivalent to giving me fractionally more votes as you. If OPOV permits your district having 1,100 people while mine has 1,000, it must also permit you having one vote while I have 1.1 votes—either practice makes our votes roughly equal.

This problem follows inexorably from the Court's commitments about the strictness and scope of OPOV. As such, there are only two possible solutions: we can take the operative principle in the malapportionment cases to be a *broad* principle of *strict* equality; or we can take it to be a *narrow* principle of *rough* equality. Neither path is untenable. The first raises the question of why OPOV requires exact equality, yet the Court only enforces a rough equality standard for apportionment; but this could be answered by taking OPOV to be a justifiably underenforced constitutional principle.[50] The second raises the question of why the Court considers putative violations of OPOV that do not involve inequalities in the number of people per district; but this could be answered, following the Court in *Evenwell*, by positing that OPOV encompasses distinct subprinciples of "equality of representation" and "voter equality."[51] Each path also promises to solve the puzzle. On the first, considerations of administrability justify underenforcing OPOV when officials divide people into districts, but not when they distribute votes to voters. On the second, equality of representation requires roughly equal people per district, while voter equality requires exactly equal votes per voter. These solutions have significant implications for how we understand the operative principle in the malapportionment cases, and for the correct resolution of future cases—including contested issues such as the population baseline to be used in apportionment and uncontested issues such as the constitutionality of practices like Demeny voting. But neither solution fully resolves the puzzle. Instead, each leaves us with an account of OPOV that makes the principle either far too restrictive or far too permissive.

The significance of this implication is hard to overstate. We should care whenever the content of the operative principle in an important series of cases is unclear and

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[50] As such, this answer can draw support from, among others, Lawrence Gene Sager, *Fair Measure: the Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-19 (1978).

[51] Evenwel v. Abbott, 136 S. Ct. 1120, 1131 (2016) ("For every sentence the appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality.").

unsettled. But OPOV is a cornerstone of America's constitutional democracy. If the content of the principle is too restrictive, or too uncertain, then long-standing objections to its constitutionality are considerably strengthened; it becomes much easier, in other words, for "the anti-Carolene Court"[52] to justify striking it down. If it is too permissive, then OPOV does not need to be struck down for new federal or state policies and practices, such as Demeny voting, to erode voters' equality at the ballot box. As such, our murder mystery has far more urgency than one might expect from a cold case.

The Article proceeds as follows. In Part I, I explain the Court's commitments about OPOV's scope and strictness, and how they lend support for a view about its content that answers common criticisms that OPOV is empty, meaningless, circular, and vague. In Part II, I explain how these commitments about the scope and strictness of OPOV lead inexorably to what I call *the parity problem*. A broad principle of rough equality permits some inequality in the number of people per district, and a proportionate degree of inequality in the number of votes per voter—so OPOV is too permissive. Then, in Part III, I consider the response that OPOV is a broad principle of exact equality, but is justifiably underenforced due to considerations of administrability. I show why this response faces a dilemma: *either* OPOV permits some inequalities in the number of votes per voter when similar considerations of administrability are present *or* it prescribes radical, yet similarly administrable, solutions to malapportionment. Finally, in Part IV, I consider the response that OPOV bifurcates into distinct principles of equal representation and voter equality. I show why this response again makes OPOV either too restrictive or too permissive, or both; most importantly, the principle of voter equality is either never operative (and hence any decision on policies that generate inequalities in the number of votes per voter is unconstrained by *stare decisis*) or requires exactly equal numbers of voters per district—contradicting the Court's unanimous verdict in *Evenwel*.[53] The murder mystery, then, admits of no easy solution.

I—A BROAD PRINCIPLE OF ROUGH EQUALITY

In *Wesberry*,[54] the appellants were voters in Georgia's Fifth Congressional District. According to the 1960 census, its population was 823,680, while the Ninth District's

[52] *See generally* Stephanopoulos, *supra* note 10.
[53] *Evenwel*, 136 S. Ct. at 1132.
[54] Wesberry v. Sanders, 376 U.S. 1 (1964).

population was 272,154.[55] In *Reynolds*,[56] the appellants were voters in Jefferson County, Alabama; "Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people."[57] The Court held that these unequal numbers of people per district in federal and state legislative elections violate OPOV. But 'one person, one vote' is just the name of the operative principle in these cases. What is the content of that principle?

A principle, like a judicial decision, can be broad or narrow in its scope. How, then, should we understand the scope of OPOV? It could be a narrow principle concerned only with inequalities in the number of people per district in federal and state legislative elections, as well as in primary elections for statewide offices,[58] general purpose municipal elections,[59] and indeed "whenever a state or local government decides to select persons by popular election to perform government functions."[60] But the Court is clearly committed to taking OPOV to be a broad principle that can be violated by a much wider range of electoral practices—including those involving unequal numbers of votes per voter, rather than unequal numbers of people per district.

A principle of equality can also vary in its strictness. So how should we understand the strictness of OPOV? Suppose it requires *exact* equality; then, if Lowndes County has one senator per 15,417 people, Wilcox County must also have one senator per 15,417 people. If it requires *rough* equality, OPOV tolerates some degree of inequality. But how much? We need to quantify the rough equality standard for this to be settled by the application of a principle that confines and guides judicial discretion, rather than by mere intuition.

A—The Scope of OPOV

Some identify OPOV with a narrow "equal-population principle."[61] Stanford Levinson and others identify the operative principle of OPOV in the malapportionment cases as a

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[55] *Id*. at 2.
[56] Reynolds v. Sims, 377 U.S. 533 (1964).
[57] *Id*. at 546.
[58] Gray v. Sanders, 372 U.S. 368 (1963).
[59] Avery v. Midland Cnty., 390 U.S. 474 (1968); Bd. of Estimate of NYC v. Morris, 489 U.S. 688 (1989).
[60] Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970).
[61] *See, e.g.*, Cox v. Larios, 542 U.S. 947, 949 (2004) (referring to OPOV as "the equal-population principle").

narrow principle requiring "equal constituents per voting representative."[62] Jacob Eisler's recent overview of the Court's OPOV jurisprudence writes that the OPOV "principle says that legislative districts must have equal numbers of constituents."[63]

The scope of OPOV matters for both constitutional theory and practice. If OPOV is a narrow rule requiring equipopulous districts, it cannot also be a bona fide democratic principle. This mechanical rule is hardly the sole conception of political equality running through the Declaration of Independence and Lincoln's Gettysburg Address.[64] Nor would this mechanical rule be violated by any practice of giving extra votes to some citizens (those who are parents, young adults, disadvantaged, or well educated). Heather Gerken, after identifying OPOV with a narrow principle, claims that "if each district contains an equal number of voters, no individual voter therein can assert a one-person, one-vote claim."[65] This seems a far cry from the Court's own understanding of its OPOV jurisprudence. The Court, after all, wrote in *Reynolds* that what OPOV proscribes is "[w]eighting the votes of citizens differently, *by any method or means*."[66] If each district has an equal number of voters but some voters have extra votes, then it seems that some voters can assert a one-person, one-vote claim after all.[67]

This illustrates one of the two central reasons why OPOV cannot be identified a narrow equal-population principle: any such principle is *under-inclusive*. Most pertinently for our purposes, it is under-inclusive in its application to practices such as Demeny voting.

There is significant evidence that from the start of the reapportionment revolution, the Court understood OPOV to be broad principle proscribing inequalities in the number of

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[62] Levinson, *supra* note 26 at 1270. Similar views about the operative principle of OPOV have been defended by, e.g., Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 454-55 (1999).

[63] Eisler, *supra* note 11, at 554.

[64] This plays a considerable role in prominent challenges to the standard narrative. *See*, *e.g.*, Levinson, *supra* note 26 at 1295 ("equal constituents per voting representative" is "very far away from the 'naïve' meaning of one person, one vote.").

[65] *The Right to an Undiluted Vote*, *supra* note 12, at 1738.

[66] Reynolds v. Sims, 377 U. S. 533, 563 (1964) (emphasis added).

[67] Gerken's quoted claim above—"if each district contains an equal number of voters, no individual voter therein can assert a one-person, one-vote claim"—may implicitly assume that each individual voter and each representative can cast one vote. *The Right to an Undiluted Vote*, *supra* note 12, at 1738. If so, however, a narrow equal-population principle cannot be equivalent to the content of OPOV in its full generality.

people per district and in the number of votes per voter. Consider the most pivotal passage on the OPOV principle from the majority decision in *Wesberry*:

> We hold that, construed in its historical context, the command of Art. I, § 2 that Representatives be chosen "by the People of the several States" means that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. It would be extraordinary to suggest that, in such statewide elections, the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People".[68]

In this passage, the Court describes two practices that can violate OPOV. The first involves inequalities in the number of votes per voter: giving some Georgians "two or three times" the number of votes as other Georgians in the same statewide election. The second involves "districts containing widely varied numbers of inhabitants." The Court describes these practices as involving "the same vote-diluting discrimination." As such, OPOV must be a broad principle proscribing vote-dilution that can be effectuated by inequalities in the number of people per district *or* in the number of votes per voter.

Consider also the most pivotal passage on the OPOV principle from *Reynolds*:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the

[68] Wesberry v. Sanders, 376 U.S. 1, 7-8, (1964) (citations omitted).

> votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.[69]

This is a long passage. What matters most is that "any method or means" of "weighting the votes of citizens differently" can violate OPOV, including inequalities in the number of votes per voter and in the number of people per district. But it is also worth noting the Court's strong commitment about comparisons between these means of diluting votes. Giving some voters "two, five, or 10" votes while others "could vote only once" has an "effect" on vote dilution that is "identical" to districts with similarly "unequal numbers of constituents." In other words, if we are in the same district but you can cast two (or five or 10) times the number of votes as me, this is equivalent to you and I being in different districts, each electing one representative, where my district has two (or five or 10) times more people as yours. This is only intelligible if OPOV is a broad principle.

There is further evidence that the Court understands OPOV to be violated by inequalities in the number of votes per voter. The Court has declared that because of the

[69] Reynolds, 377 U. S. at 562-63 (citations omitted).

OPOV principle from *Reynolds,* "the Constitution does not permit weighted voting",[70] referring to the practice of giving some voters more votes than others. This is especially clear in the two cases where the Court considered forms of weighted voting: *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[71] and *Ball v. James*.[72]

Salyer involved elections of directors of a water storage district where landowners were given votes weighted "according to the assessed valuation of land."[73] *Ball* involved elections of directors of a water reclamation project where landowners were given votes weighted according to amount of land owned: "one-acre, one vote."[74] Both practices generated significantly unequal numbers of votes per voter. For example, in *Salyer*, landowners whose land had "an assessed valuation of under $100 were given one vote each", while the largest landowner whose land had "an assessed valuation of $3,782,220 was entitled to cast 37,825 votes in the election."[75] In both *Salyer* and *Ball*, the Court held that these weighted voting practices were constitutional.[76] This was because the majority of the Court in each case held that the elections in question were for a sufficiently "special limited purpose" to generate an "exception to the rule laid down in *Reynolds*."[77] (This is known as "the Salyer-Ball exception" to "the one-person-one-vote requirement."[78]) Crucially, the majority and dissenting justices all agreed that *if* these elections were subject to OPOV rule laid down in *Reynolds*, they violated that rule;[79] this requires the rule in question to proscribe inequalities in the number of votes per voter.

Lower courts have also considered cases involving unequal votes per voter. Consider *Stewart v. Parish School Board*,[80] which held that "gearing the weight of each elector's

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[70] Phoenix v. Kolodziejski, 399 U. S. 204, 209 (1970).
[71] 410 U.S. 719 (1973).
[72] 451 U.S. 355 (1981).
[73] *Salyer,* 410 U.S. at 733.
[74] Ball, 451 U.S. at 375 (White, J., joined by Brennan, Marshall, and Blackmun JJ., dissenting).
[75] 410 U.S. at 734.
[76] *Salyer*, 410 U.S. 719; *Ball*, 451 U.S. 355.
[77] *Salyer* at 728. *See also Ball* at 370 (the elections are of a "narrow, special sort which justifies a departure from the popular election requirement of the Reynolds case").
[78] *See* Kessler v. Grand Central Dist. Mgt. Assoc., 158 F.3d 92, 99 (2d Cir. 1998) (discussing whether exception applies to business improvement district).
[79] *See Salyer*, 410 U.S. at 719; *id.* at 738-741 (dissenting); *Ball*, 451 U.S. at 355; *id.* at 375 (dissenting).
[80] Stewart v. Parish Sch. Bd. St. Charles Parish, 310 F. Supp. 1172 (E.D. La. 1970), *judgment aff'd*, 400 U.S. 884 (1970).

vote to the amount of his assessed property the laws debase the vote of small landowners", constituting a "violation of the one man, one vote canon."[81] *Stewart* did not reach the Supreme Court on the merits, but it once cited approvingly its central finding about the unconstitutionality of "a percentage reduction" of individuals' votes.[82]

If this evidence is not dispositive, there are further reasons why a narrow equal-population principle should be considered under-inclusive. The Court has held that OPOV is violated by disenfranchisement;[83] dissenting Justices have also claimed that OPOV is violated by partisan gerrymandering.[84] Individuals' complaints about these practices are not complaints about unequal numbers of constituents per representative. The same also can be said about two other cases in the Court's OPOV jurisprudence.

The first is the *per curiam* judgment in *Bush v. Gore*.[85] The Court agreed that unequal vote-counting procedures in Presidential elections can violate OPOV.[86] Lower courts have also held that unequal vote-counting procedures can violate OPOV.[87]

The second is *Gordon v. Lance*.[88] This case concerned whether a supermajority voting procedure violated OPOV.[89] The Court ruled that it did not: the "one man, one vote principle was not apposite",[90] because the procedure treated the electoral options

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[81] *Id.* at 1173, 1180.
[82] *Id.*, *cited with approval* in Gordon v. Lance, 403 U.S. 1, n.1 (1971) ("While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective.").
[83] *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) and *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).
[84] See especially Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) (OPOV prohibits "the devaluation of one citizen's vote as compared to others", and the "constitutional injury" in partisan gerrymandering "is much the same, except that the dilution is based on party affiliation.").
[85] 531 U. S. 98 (2000).
[86] The Court held disparities in Florida's vote-counting procedures can constitute the "dilution of the weight of a citizen's vote", in violation of the core principle of the Court's "one-person, one-vote jurisprudence", the "principles" of which the Court notes it had previously "relied on" in elections that concerned "the Presidential selection process in *Moore*." *Id.* at 107; Moore v. Ogilvie, 394 U. S. 814 (1969).
[87] *See*, *e.g.*, Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006).
[88] 403 U.S. 1 (1971).
[89] *Id.*
[90] Alvin N. Jaffe, *The Constitutionality of Supermajority Voting Requirements:* Gordon v. Lance, 1971 U. ILL. L.F., 703, 704 (1971) (summarizing the opinion of the Court).

unequally, but did not treat voters unequally.[91] This is a subtle, and defensible, point.[92] It is also an important point; *Gordon* put to rest an "essentially majoritarian rationale for one person, one vote."[93] But what is somehow overlooked is that the procedure in question was not used to elect representatives. It was used to approve bonds. Other cases of at least putative violations of OPOV also involve direct democracy.[94] If OPOV requires only equal constituents per representative, then any putative violation of OPOV in direct democratic elections should have been dismissed on that basis.

So, OPOV cannot be identified a narrow equal-population principle because any such principle is under-inclusive. But any such principle is also *over-inclusive*. It cannot explain why two remedies for malapportionment that leave unequal numbers of people per electoral district intact have nonetheless been held to comply with OPOV.

The first of these practices is multi-member districting. To illustrate, suppose my district has 1000 people and yours has 2000. Instead of reapportioning our districts to be equipopulous, another remedy for this malapportionment would be for my district to elect one representative while yours elects two. Multi-member districting is less common, and perhaps not preferable,[95] but it is a constitutional remedy for malapportionment, as the Court ruled in *Fortson v. Dorsey*,[96] and in *Whitcomb v. Chavez*.[97] In *Fortson*, Justice Brennan wrote for the majority that unequally populous districts generated "no mathematical disparity" between their residents' votes: "Fulton County,

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[91] *Gordon* 403 U.S. at 4-5.

[92] For example, in social choice theory, supermajority requirements are similarly understood to violate *neutrality* (a condition for treating electoral options identically) but not *anonymity* (a condition for treating each voter identically). See especially Kenneth O May, *A set of independent necessary and sufficient conditions for simple majority decision*, 20 ECONOMETRICA 680 (1952).

[93] Guinier & Karlan *supra* note 10, at 213. For an example of where the Court expressed support for such a rationale, see Reynolds v. Sims, 377 U. S. 533, 565 (1964). Majoritarianism is an uncompelling rationale for OPOV; as I have argued elsewhere, any district-based legislative system—even with equipopulous districts—can generate "election inversions" where the minority of a state's voters elect the majority of its legislators. See Daniel Wodak, *Which Majority Should Rule?*, PHIL. & PUB. AFF. 52 no. 2 (2023): 177-220.

[94] *See, e.g.,* Stewart v. Parish Sch. l Bd. St. Charles Parish, 310 F. Supp. 1172 (E.D. La. 1970) (holding that a Louisiana law that restricted bond elections to property owners violated the fourteenth amendment).

[95] Connor v. Johnson, 402 U.S. 690, 692 (1971) ("single-member districts are preferable to large multi-member districts as a general matter.").

[96] 379 U.S. 433 (1965).

[97] 403 U.S. 124 (1971).

the State's largest constituency, has a population nearly seven times larger than that of a single-district constituency, and, for that reason, elects seven senators."[98]

The second of these practices is "using weighted voting to comply with the one-person, one-vote requirement."[99] Here 'weighted voting' refers to giving each representative a number of votes in proportion to the number of people that they represent.[100] For example, if my district has 1000 people and yours has 2000, your representative would cast twice as many votes as mine: "In each district, the mathematic ratio of people to legislative votes is 1000 to 1", such that while our districts are not equipopulous, our "votes are numerically equal."[101] In this way, introducing inequalities *between representatives* is used to "cancel out the inequalities" *between voters* that are "caused by substantially unequal districts."[102] Following the initial malapportionment cases, weighted voting was adopted in several state legislatures;[103] it is still used in many local counties;[104] and many advocate that its use should be expanded to comply with OPOV without the pitfalls of decennial redistricting.[105] It attracts significant criticism.[106] But

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[98] 379 U.S. 433, 437 (1965).

[99] *See* Ashira Pelman Ostrow, *One Person, One Weighted Vote*, 68 FLA. L. REV., 68, 1839, 1851 (2016) [hereinafter *One Person, One Weighted Vote*], and Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J., 1033, 1034 (2018) [hereinafter *The Next Reapportionment Revolution*].

[100] *See* Jurij Toplak, *Equal Voting Weight of All: Finally "One Person, One Vote" From Hawaii to Maine?*, 81 TEMPLE L. REV. 123, 146 n.175 ("Systems with voters or representatives having unequal voting weight are usually referred to as weighted-voting systems. This term, however, often produces confusion because it is used to describe two different types of voting schemes. First, it may refer to the representation scheme in which voters have equal weight and representatives' voting weight is proportional to the number of people they represent. … Second, it may refer to the elections in special districts in which voters have an unequal number of votes, depending on their property or other characteristics.").

[101] *The Next Reapportionment Revolution*, *supra* note 99, at 1040.

[102] John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317, 321 (1965).

[103] *See id.* at 317.

[104] *The Next Reapportionment Revolution*, *supra* note 99, at 1037.

[105] See Toplak, *supra* note 100, at 126 ("In the proposed model, the total number of representatives in the [US] House [of Representatives] would remain the same, but each member of the House, instead of having one vote, would have the number of votes in the House that corresponds to the number of voters that member represents"). *See also One Person, One Weighted Vote supra* note 99; and *The Next Reapportionment Revolution*, *supra* note 99.

[106] See Richard David Emery, *Weighted Voting*, 6 TOURO L. REV. 159, 160-61 (1989); Keith R. Wesoloski *Remedy Gone Awry: Weighing in on Weighted Voting*, 44 WM. & MARY L. REV. 1883 (2003). See also the discussion of monotonicity *infra* notes 230-35.

federal courts have held that weighted voting complies with OPOV,[107] and even ordered weighted voting as a remedy for malapportionment.[108] By dismissing appeals for want of a federal question, the Supreme Court has "effectively determined that weighted voting at the local level does not violate the federal constitution."[109]

If OPOV is a narrow equal-population principle, multimember districting and weighted voting should be obviously unconstitutional. But in *Reynolds*, the violation of OPOV arose because "Jefferson County, with over 600,000 people, *was given only one senator*, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people."[110] The violation of a constitutional right arose not simply because of unequal *numbers of people*, but because of unequal *ratios of people to representation*. That injury can be corrected with or without redistricting: by equalizing the number of people per district, or by increasing the representation of more populous districts.

B—The Strictness of OPOV

Political equality is often understood in terms of *exact equality*. Informally, the equal treatment of you and me is often glossed as requiring that your treatment is "identical to" mine.[111] The same is true in formal work in social choice theory. Political equality is standardly formalized as the "anonymity" condition, which (in a mathematically precise way) requires that "each individual be treated the same as far as his influence on the [electoral] outcome is concerned."[112] Anonymity is sometimes said to "correspond[] to the one man-one vote principle."[113] But it requires exact, not rough, equality.

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[107] See Franklin v. Krause, 415 U.S. 904 (1974) and Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 244 (N.D.N.Y. 1995), *aff'd*, 80 F.3d 42, 49 (2d Cir. 1996).

[108] *One Person, One Weighted Vote*, *supra* note 99, at 1853 ("the federal courts have twice *ordered* counties to adopt weighted-voting schemes to remedy malapportioned districts.").

[109] *Id.* at 1852.

[110] Reynolds v. Sims, 377 U.S. 533, 546 (1964) (emphasis added).

[111] See especially Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 540 (1982), who also uses similar locutions (e.g. "the same as").

[112] May, *supra* note 92, introduces this condition, and notes that a more "usual label [for it] is *equality*." *Id.* at 681.

[113] Peter C. Fishburn, *Social Choice Functions*, 16 SIAM REV. 63, 66 (1974). Though see Daniel Wodak, *One Person, One Vote*, in 11 OXFORD STUD. POL. PHIL. (Steven Wall ed., forthcoming) [hereinafter Wodak, *One Person, One Vote*] arguing that if the content of OPOV is the anonymity condition, then complaints about OPOV must be symmetric. That is, voters in Jefferson County and in Lowndes County would each have

By contrast, many endorse principles of rough political equality. Robert Dahl and Charles Edward Lindblom wrote that political equality requires that "the vote of each member has about the same weight."[114] John Rawls wrote that it requires that each citizen has an "approximately equal" opportunity to "influence the outcome of political decisions."[115] Principles of rough political equality are less demanding. If the weight of my vote is a smidgen more than the weight of yours, then the weight of our votes is not identical, but it may still be about the same or approximately equal.

For state and local apportionments, it seems unquestionable that OPOV is a principle of rough equality.[116] "Where the maximum population deviation between the largest and smallest district is less than 10%... a state or local legislative map presumptively complies with the one-person, one-vote rule."[117] Such maps constitute "minor deviations from mathematical equality" which are "insufficient to make out a prima facie case" for a violation of OPOV and do not "require justification by the State,"[118] but they may still be unconstitutional if they are based on an "impermissible intent."[119] Where the maximum deviation is greater than 10%, a state or local legislative map violates OPOV unless there is a sufficient justification from a rational state policy.[120]

For congressional apportionments, OPOV is more demanding. *Wesberry* held that "as nearly as is practicable, one person's vote in a congressional election is to be worth as much as another's."[121] There is no "fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly

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the same complaint, as neither was not treated the same as each other far as their influence on the electoral outcome is concerned. So, anonymity cannot be the operative principle in *Reynolds*.

[114] ROBERT A. DAHL AND CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 277-78 (1953).

[115] JOHN RAWLS, POLITICAL LIBERALISM 327 (1993).

[116] *See especially* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[117] Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

[118] Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

[119] Cox v. Larios, 542 U.S. 947, 949-950 (2004) (The Court's OPOV jurisprudence does not "a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever", as evidence of "impermissible intent" can still render a map unconstitutional).

[120] *Cf.* Mahan v. Howell, 410 U.S. 315, 329 (1973) (a Virginia apportionment scheme with a 16.4% maximum deviation "may well approach tolerable limits") and Brown v. Thomson, 462 U.S. 835, 838 (1983) (a Wyoming apportionment scheme with a 90% maximum deviation did not exceed tolerable limits).

[121] Wesberry v. Sanders, 376 U.S. 1, 7-8, 18.

as practicable" standard";[122] rather, OPOV "permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown."[123] This can sound like the Court embraces OPOV as a principle of strict equality,[124] and it is sometimes described that way.[125] But the Court is better understood as adopting a more demanding principle of rough equality for OPOV for congressional (rather than state or local) apportionments.

This is evident when we consider the two reasons for the Court's rough equality standard. The first is that exact equality would often make compliance with OPOV impossible. A state's fixed number of federal (or state, or local) legislative districts is rarely a factor of its population. Hence, in *Reynolds*, the Court recognized that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."[126] "Precise mathematical equality", the Court similarly noted in *Karcher*, "may be impossible to achieve."[127]

The second reason is that non-compliance with exact equality is sometimes justified. When a state's population is divisible by its number of federal (or state, or local) legislative districts without remainder, compliance with exact equality is feasible. But non-compliance may still be permissible due to a wide range of considerations:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.[128]

Hence, the Court takes OPOV to permit not only "population variances" that are "unavoidable", but variances "for which justification is shown."[129] For both of these reasons, the Court holds that exact or "absolute equality" is not required by OPOV.

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[122] Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).
[123] *Id.* at 531.
[124] See e.g. Karcher v. Daggett, 462 U.S. 725, 732 (1983) ("As between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2.").
[125] Guinier & Karlan, *supra* note 10, at 215 (describing the Court as endorsing as an "absolute approach to one person, one vote").
[126] Reynolds v. Sims, 377 U.S. 533, 577 (1964).
[127] 462 U.S. at 730.
[128] *Id.* at 740. *See also* White v. Weiser, 412 U.S. 783, 790 (1973).
[129] Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

The strictness of OPOV matters. It rules out some candidates for the content of OPOV. There is coherent way to understand the anonymity condition give or take 10%. Moreover, dissenting justices complain that requiring that votes must be "approximately equal" in weight is "vague and meaningless."[130] What is the weight of a vote? How is this quantified? The Court provides little guidance. Its decisions are sometimes praised for using "precise arithmetic standards."[131] But we should not confuse the use of numbers with precise arithmetic; numerology uses numbers too. Justice Harlan criticized the Court for becoming "enmeshed in the haze of slogans and numerology" due to its "inability to measure what it purports to be equalizing."[132] Commentators similarly note that the Court never "defined or quantified" the relevant notion of rough equality, preferring to "approach the matter intuitively, using their common sense."[133] This is foolhardy, since relying on intuition does little to confine or guide the exercise of judicial discretion, supporting a core objection of the dissenting judges in the malapportionment cases,[134] to which the current Court is sympathetic.[135] To answer this criticism, the Court needs to be able to measure what it purports to be equalizing, so that a rough equality principle can guide and confine discretion.

C—Equal Shares

We have now considered the Court's commitments about the scope and strictness of OPOV at some length. This is for two reasons. First, considering these commitments in isolation helps to undercut existing skepticism about the content of the operative principle in the malapportionment cases: that it is empty, circular, meaningless.[136]

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[130] Reynolds v. Sims, 377 U.S. 533, 587-88 (1964) (Clark, J., concurring). *See also, e.g.,* Justice Harlan's dissent in Wesberry v Sanders, 376 U. S. 1, 21 n.2, n.4 (1963): "The Court's 'as nearly as is practicable' formula sweeps a host of questions under the rug."

[131] Guinier & Karlan, *supra* note 10, at 217.

[132] Whitcomb v. Chavis, 403 U.S. 124, 169 (1971) (Harlan, J. dissenting).

[133] DAN S. FELSENTHAL & MOSHÉ MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES 86 (1998). For an earlier and similar assessment, see Banzhaf, *supra* note 102, at 321 ("Throughout the opinions in the reapportionment cases, the Court uses such language as 'equal voting weight,' 'diluting the vote,' the 'effect' of a vote being unequal, the 'worth' of a vote, and similar words without clearly explaining how these effects are to be measured and evaluated.").

[134] *See, e.g.,* Baker v Carr, 369 U. S. 269 (Frankfurter J, joined by Harlan J. in dissent).

[135] Rucho v. Common Cause, 139 S. Ct. 2484,2505 (2019) (justiciable claims "typically involve constitutional… provisions... confining and guiding the exercise of judicial discretion.").

[136] See *supra* notes 62-67.

Second, as we shall soon see, considering these commitments in conjunction generates a new problem for identifying the content of OPOV.[137] Since this problem follows inexorably from the two commitments, understanding why each is attractive in isolation makes the new problem with identifying the content of OPOV harder to solve.

Before we turn to the new problem, then, let's consider how reflecting on the scope and strictness of OPOV helps to undercut existing skepticism about its content. The best way to appreciate this is to consider how each commitment coheres with a plausible candidate for the content of OPOV: the equal shares principle.

"By definition, one person, one vote achieves equal shares", Lani Guinier and Pamela Karlan recently wrote, continuing: "Indeed, that is its animating vision."[138] By 'equal shares', they mean the principle of political equality that was first named and discussed explicitly by Jonathan Still,[139] who took it to be the operative principle in *Reynolds*.[140] Others also take it to be the operative principle in the malapportionment cases.[141]

But if equal shares provides the content of OPOV, what is the content of equal shares? Karlan and Guiner say "*Equal shares* means that each elected official represents the same number of voters; put slightly differently, each voter enjoys an equal 'piece' of a representative."[142] But this is too narrow; indeed, it is equivalent to the narrow principle

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[137] See *infra* Part II.

[138] Guinier & Karlan, *supra* note 10, at 218.

[139] Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 379 (1981).

[140] Still claims equal shares is "the one criterion which the Court added" in *Reynolds*. *Id.* at 389-91. To be clear, Still also notes that while *Reynolds* "used the same effusive rhetoric as in *Gray*" and "cited *Gray* for the principle of political equality", equal shares cannot be the operative principle in *Gray*. *Id.* at 390. Others also note the discrepancy between the Court's reasoning about political equality in *Gray* and across the other malapportionment cases. See, e.g., FELSENTHAL AND MACHOVER, *supra* note 133, 86-90.

[141] See Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts,* 1995 U. CHI. LEGAL F. 205, 211-12 (1995), who cites Still for Equal Shares, and describes the "one one-person, one-vote principle of redistricting" as requiring "'equal shares' in the distribution of votes." Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395, 399 (1981), also citing Still, says equal shares is "equivalent" to "one voter, one vote." See also John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L. J., 163, 176 n.3 (1984) ("The [right to an] equally powerful vote can also be defined both as an individual and as a group right. As an individual right, it means that each voter will have the same share in a representative."). Low-Beer then cites Still's account of equal shares.

[142] *See* Guinier & Karlan, *supra* note 10, at 217, citing (but not quoting) Still.

requiring equal constituents per voting representative. That cannot be the principle Still had in mind: "In the usual sort of general election at large for a single official (or referendum question), … [e]ach person's 'share in the official' or 'share in the decision' is … simply one divided by the total number of voters."[143] Referenda involve no representatives. But the equal shares principle can be satisfied or violated in referenda.

Unfortunately, Still never defined or quantified equal shares, preferring to instead illustrate the principle in application: "Equal shares is difficult to define in general, but easy to define in practice."[144] However, the following simple proposal fits with all of Still's applications of this broad principle: your share in the decision is defined by and quantified as what you are voting on (x), multiplied by the number of votes you hold (y), divided by the total number of votes (z)—as a formula, it is $x(y/z)$.

Let's illustrate each component of the formula, starting with x. In the usual sort of elections described by Still—an at-large for a single official or referendum question—x has the same value for each voter (i.e., 1). Likewise, in district-based legislative elections, x will typically have the same value for each voter, as typically each district elects one representative who can cast one vote in the legislature. But in other contexts, x takes different values for different voters. The Electoral College provides a helpful illustration of this. Suppose you vote in New Mexico and I vote in Wisconsin. Since New Mexico is worth five electoral college votes and Wisconsin is worth 10, what you are voting on is half the value of what I am voting on: x is 5 for you and 10 for me. Similarly, if my legislative district elects one representative who can cast one vote, but yours elects two representatives who can each cast one vote, x is one for me and two for you; and likewise, if each of our districts elects one representative, but mine can cast one vote in the legislature and yours can cast two, x is one for me and two for you.

What about y and z? These concern, in Still's words, "the number of votes [a] person has divided by the total number of votes held."[145] (It is worth emphasizing that these numbers are not affected by individual abstention or disparities in turnout rates.[146])

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[143] Still, *supra* note 139 at 379.

[144] *Id.*

[145] *Id.*

[146] If you and I have the same number of votes but I vote and you abstain, y is the same for each of us. Likewise, if there is an equal number of eligible voters in our districts but turnout is higher in my district

Where each voter can cast only one vote, *y* is the same for all voters. But if a law gives me a full vote and you a half-vote, *y* takes a value of 1 for me and .5 for you. In *Salyer*, the values for *y* ranged from 1 to 37,825, depending on the voter.[147] What about *z*? When each voter casts one vote, *z* will be equivalent to the number of voters. But suppose in my district there are 1000 voters, each of whom holds one vote, while in your district there are also 1000 voters, each of whom holds two votes. This should not introduce any inequality in between our shares: 1/1000 is equivalent to 2/2000. By contrast, familiar cases of malapportionment involve inequalities due to differences in the value of *z*.

Equal shares is, at least, a plausible candidate for the broad principle of rough equality that is operative in the malapportionment cases. This is for three main reasons. First, identifying the content of OPOV with equal shares identifies it as a recognizable, and relatively uncontroversial,[148] principle of political equality. This does not tell us whether that principle is constitutionalized, but it at least makes it intelligible that violations of OPOV violate an individual right to procedural equality—a right to an equal share.

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than yours, *z* is the same for each of us. This is Still's view, and it coheres with the orthodox theory that political equality is concerned with equality of power and opportunity to influence outcomes, regardless of whether those powers or opportunities are exercised. For references to and critical discussion of that orthodox theory, see generally Daniel Wodak, *What Is the Point of Political Equality?*, 133 PHIL. REV. 367 (2024) [hereinafter *What Is the Point of Political Equality?*]. I emphasize these points because they are not always appreciated by commentators. *Cf.* Fishkin, *supra* note 29. Fishkin's central claim is that "no coherent account can be reconstructed of a nontrivial, non-tautological *individual* interest in the 'weight' of a vote that one person, one vote protects." *Id.* at 1892. One would think Fishkin should show that Still's equal shares principle does not provide a coherent account of this. Fishkin does, at one point, consider "an 'equal shares' conception of political equality", attributed to Still. *Id.* at 1896-1897, n.30. Fishkin then makes two objections about it. First, "the one person, one vote rule" does not capture "the number of people who actually turn out to vote in a given election"; second, the "share" of "a vote for the winner will be considerably smaller in a landslide than in a squeaker." Neither of these are features of 'equal shares', as understood by Still: one's share of the decision is not affected by turnout or margins of victory.

[147] 410 U.S. 719, 734 (1973).

[148] Bernard Grofman, *Fair and equal representation*, 91 ETHICS 477 (1981) ("[V]irtually everyone will now [...] agree with the reasonableness of […] equal shares."). Though see Wodak, *One Person One Vote*, *supra* note 113 (noting that equal shares should be controversial as it sometimes requires that significant numbers of voters can only cast "dummy votes"—i.e., votes which cannot change the electoral outcome).

Second, identifying the content of OPOV with equal shares makes the 'weight' of a vote not only definable without circularity,[149] but quantifiable with precision. The mathematics is not difficult: $x(y/z)$ is "sixth-grade arithmetic".[150] But this is a virtue.[151] As such, there should be no fear that a rough equality principle does not confine or guide the exercise of judicial discretion. Courts can determine whether your vote is roughly equal to mine without relying on common sense, intuition, or numerology.

Finally, consider how equal shares fits with the Court's commitments about the application of OPOV to a broad range of practices. Most pertinently, equal shares explains why OPOV can be violated by inequalities in the number of voters per district (in cases like *Wesberry* and *Reynolds*) and in the number of votes per voter (in cases like *Salyer* and *Ball*). But it also explains the Court's comparisons between these inequalities. Giving some Georgians "two or three times" the number of votes as other Georgians in the same statewide election involves "the same vote-diluting discrimination" as having "districts containing widely varied numbers of inhabitants."[152] Giving some voters "two, five, or 10" votes "while voters living elsewhere could vote only once" has an "identical" effect on vote dilution as state legislative districting schemes involving similarly "unequal numbers of constituents."[153] Why would that be? Suppose you and I are in different electoral districts where each voter has one vote, each district elects one representative, and each representative has one vote; but my district has 1000 voters and yours has 2000. My share of the decision is 1(1/1000), while yours is 1(1/2000). My share of the decision is twice yours. This is a simple example of malapportionment. Now compare it to a case where you and I are in the same electoral district, but I can cast two votes while you can cast one. My share of the decision is, again, twice yours: $x(2/y)$ to $x(1/y)$. The effect on vote dilution in each case is, indeed, *identical*. In general,

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[149] *See*, e.g., Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting): "One cannot speak of 'debasement' or 'dilution' of the value of a voter until there is first defined a standard of reference as to what a vote should be worth."

[150] Avery v. Midland County, 390 U.S. 474, 510 (1968) (Stewart J., dissenting).

[151] *Cf.* the discussion of the mathematics of the Penrose-Banzhaf index, *infra* Part IV.A. As Justice Harlan noted, the "elementary arithmetic on which the Court relies" differs from "the elementary probability theory on which Professor Banzhaf relies" because "calculations in the latter field cannot be done on one's fingers." Whitcomb v. Chavis, 403 U.S. 124, n.2 (1971).

[152] Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (citations omitted).

[153] Reynolds v. Sims, 377 U.S. 533, 562-63 (1964) (citations omitted).

equal shares explains why holding all else fixed, OPOV is a broad principle that requires equal numbers of voters per district and equal numbers of votes per voter.

Equal shares is also, as I noted above, violated in direct and indirect democracies. (It is not generally violated by partisan gerrymandering, and it is not immediately clear how to apply the principle to the disparities in vote-counting procedures in *Bush v Gore*.[154])

More impressively, the equal shares principle explains the Court's verdicts about remedies for malapportionment that do not involve redistricting. Consider again the simple example of malapportionment where my share of the decision is 1(1/1000) while yours is 1(1/2000). This could be cured via multimember districting: your district elects two representatives while mine elects one, while each representative casts one vote. Or it could be cured via weighting representatives' votes: your district's representative casts two votes while my district's representative casts one. Either way, x becomes one for me and two for you. So, our shares become equivalent: 1(1/1000) and 2(1/2000).

All of this should be welcome news to the standard narrative about the malapportionment cases. OPOV is not a mantra in search of a meaning, the 'weight' of an individual vote is not an empty or ephemeral construct, and the Court need not be enmeshed in a haze of slogans and numerology. Malapportionment was killed; and a principle of political equality, equal shares, is the prime suspect.

II—THE PARITY PROBLEM

Then the real trouble starts. Once we dispel the haze of slogans and numerology, we can see clearly the intolerable, but inexorable, implications of a commitment to a broad principle of rough equality. 'One person, one vote give or take 10%' is too permissive.

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[154] Partisan gerrymandering *without malapportionment* does not involve any inequality in x, y, or z. The central concern in *Bush v. Gore*—that voters may have an "unequal chance that their votes will be counted"—may generate an inequality in y. *Bush v. Gore* 121 S.Ct. 525, 552 (Breyer, J., dissenting). The intuitive idea seems to be that if my vote has a 100% chance of being counted and yours has a 95% chance—due to different voting technologies or standards for manual recounts—that is equivalent to me casting one vote and you casting .95 votes. For you to have a lesser chance that your vote is counted is thus equivalent to you having less of a vote. But while intuitive, that idea requires a defense. It is not in general true that probabilities of injuries are equivalent to magnitudes of injuries; a 50% chance of being given a lethal dose of poison is not equivalent to being given 50% of lethal dose of poison.

A—Parity

We now have a precise account of the weight of your vote in terms of your share of the decision: what you are voting on (x), multiplied by the number of votes you hold (y), divided by the total number of votes (z)—$x(y/z)$. We can use this to calculate your share of the decision, and mine. Your share is *exactly* equal to mine when these sums are mathematically equivalent. Your share is *roughly* equal to mine when these sums are within a mathematical range: e.g., when your share is equal to mine give or take 10%.

All we need to see the storm on the horizon is a formal feature of this account of the content of OPOV which I will call *parity*. By parity, I mean the following: if my share of the election is identical to yours, the effect of multiplying *any* variable in the formula $x(y/z)$ by n is to generate an n-fold difference between our shares. This can be easily illustrated. Suppose that our shares are exactly the same except that: there are double the number of votes in your district; or, I hold twice as many votes as you; or, my representative can cast twice as many votes as you. In any case, my share becomes double yours. In the first scenario, my share is $x(y/z)$ and yours is $x(y/2z)$; in the second, your share is $x(y/z)$ and mine is $x(2y/z)$; in the third, your share is $x(y/z)$ and mine is $2x(y/z)$. It is easily demonstrable mathematically that these sums are equivalent. So, identical changes to the number of votes per district, the number of votes per voter, or the number of votes per representative all produce identical effects on vote dilution.

Parity is entailed by equal shares. Many commentators also make comparisons between such inequalities that seem to presuppose parity.[155] As does the Court. In the long, pivotal passage from *Reynolds* quoted above, the Court said it is "easily demonstrable mathematically" that giving some voters two (or five, or 10) votes while others have one has an "identical" effect on "vote dilution" as putting some voters in district with two (or five, or 10) times as many voters: "Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor".[156] This is, indeed,

[155] *See*, *e.g.*, JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY 175-92 (2019). Wilson objects to the fact that in the US Senate each state elects two senators, regardless of its population, writing that in "intuitive terms of voting power," the population disparity between California and Wyoming is "equivalent" to giving some citizens "about seventy-four votes compared to one," which is "a plural voting scheme of a magnitude far beyond that imagined by John Stuart Mill." *Id.*

[156] Reynolds v. Sims, 377 U.S. 533, 562-63, (1964) (citations omitted).

demonstrable mathematically: 1(1/1000) is a fifth of both 1(5/1000) and 1(1/5000). The Court makes similar comparisons elsewhere. Consider *Board of Estimate v Morris*:[157]

> [A] citizen is… shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or, to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.[158]

If your district elects one representative while my equipopulous district elects two, your share is half of mine: $x(y/z)$ to $2x(y/z)$. If your district elects one representative while my district, which is half the size, elects one, your share is again half mine: $x(y/2z)$ to $x(y/z)$. Doubling the number of your district's representatives is identical to halving the number of voters in my district, with respect to violations of equal shares.

Such comparisons appear to endorse parity. But the Court also relies upon parity in its decisions about multimember districts. Recall the decision in *Forston*: unequally populous districts generated "no mathematical disparity" between their residents' votes when they were proportion to unequal numbers of representatives: "Fulton County, the State's largest constituency, has a population nearly seven times larger than that of a single-district constituency, and, for that reason, elects seven senators."[159] Why does the latter inequality cancel out the former? This is easy to explain: $7x(y/7z)$ equals $x(y/z)$. A seven-fold increase in the total number of voters (and hence votes) in your district generates a seven-fold decrease in your share of the decision; a seven-fold increase in the total number of your district's representatives' votes generates a seven-fold increase in your share of the decision. One inequality balances out the other, because of parity. The same holds if we weighted the votes of Fulton County's sole representative in proportion to its voter population. So, parity is also assumed in the many federal court decisions finding that weighting representatives' votes complies with OPOV.[160]

Let's put the pieces together. If your share in a state legislative election is roughly equal to mine even though your district is fractionally more populous, this can be permitted by OPOV. But by parity, OPOV must also permit laws that give me fractionally more votes than you, or that give my representative fractionally more votes than yours!

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[157] 489 U.S. 688 (1989).
[158] *Id.* at 698.
[159] 379 U.S. 433, 437 (1965).
[160] See *supra* Part IA at note 107.

B—Fractional Votes for Voters

Let's first consider inequalities in the number of votes per voter. Such inequalities could arise due to changes to vote-counting technology,[161] but for now we can consider a state policy that gives extra votes to some voters: to parents, the more educated, the less advantaged, or whoever. On one well-developed proposal for Demeny voting, for example, "a single parent with one child could receive a ballot indicating that it counts for two", a couple with one child could each receive 1.5 votes, and so on.[162]

For the sake of the argument, suppose a law that gives some voters (such as parents) a full extra vote in state legislative elections is unconstitutional because it violates OPOV. If a single parent has a full extra vote, their share in election is $x(2y/z)$ in comparison to a non-parent's share of $x(y/z)$. These shares are not sufficiently equal. Now modify the law so that it only gives some voters a fractional extra vote: perhaps a single parent can cast 1.05 votes while a non-parent can cast one. Now their shares are $x(1.05y/z)$ and $x(y/z)$, respectively. These shares are sufficiently equal. Via parity, the case is equivalent to a five percent maximum variation in the number of voters per district. It constitutes a minor deviation from mathematical equality, and hence is insufficient to make out a prima facie case for a violation of OPOV; it is presumptively permitted by OPOV and does not require justification by the State.[163] The same applies if the law also gives some citizens fractionally fewer votes than others. In a statewide election, the average number of votes per voter could be one, while some voters get as few as .96 votes and others get as many as 1.04 votes. The maximum deviation between any two citizens' shares would be less than 10%. So, as a broad principle of rough equality, OPOV proscribes a law that gives some voters a full extra vote, but presumptively permits similar laws that give some voters a fractional extra vote and others fractionally less of a vote.

Of course, a law that is presumptively permitted by OPOV could be unconstitutional. If the law relied on an inherently suspect basis for classification (for example, a law that

[161] See *infra* Part IIIC.
[162] Kleinfeld & Sachs, *supra* note 38, at 8.
[163] Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

gave white voters extra votes),[164] or treated voters differently based on an impermissible intention,[165] then it would and should be struck down. But this barrier is not insuperable. A law could give fractionally more votes to some voters using many bases for classification, only a few of which would be inherently suspect; and it could do so for many reasons, only a few of which would constitute impermissible intentions.

Giving extra votes to parents is a good example. It was proposed by demographer Paul Demeny in an article on pronatalist policies: its justification was in part to "let custodial parents exercise the children's voting rights until they come of age" and in part to "induce shifts in values and social rewards favoring responsible parenthood."[166] It is constitutional for states to treat parents differently than non-parents in many ways to reward and incentivize parenting, and to compensate for costs of parenting.[167] This last point offers another possible justification for giving parents extra votes. Compared to non-parents, parents plausibly have less time and fewer resources to influence politics in myriad ways—by canvassing, protesting, petitioning, or donating. Giving parents fractionally more formal influence on elections could be justified by the aim of compensating for their marginal disadvantage in informal dimensions of political influence. As such, it is hard to avoid the conclusion that giving some voters fractionally more votes can be permitted by OPOV as a broad principle of rough equality.

I do not claim that the Court *would* accept a law that gave some voters fractionally more or fewer votes than others. To the contrary, the Court has already expressed support for the view that OPOV proscribes "a percentage reduction" of some voters' votes;[168] the "right to vote includes" includes "the right to have the vote counted at full value without dilution or discount."[169] Nor do I claim that the Court *should* accept such a law. To the contrary, I claim they shouldn't. My point is simply that such a law is compatible with OPOV as the operative principle in the malapportionment cases. By considering

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[164] An inherently suspect basis of classification will be subject to exacting scrutiny regardless of whether it violates OPOV. See, e.g., McLaughlin v. Florida, 379 U. S. 184, 192 (1964); Takahashi v. Fish & Game Comm'n, 334 U. S. 410, 420 (1948); Oyama v. California, 332 U. S. 633, 640 332 U. S. 640 (1948).
[165] Cox v. Larios, 542 U.S. 947, 950 (2004).
[166] Paul Demeny, *Pronatalist policies in low-fertility countries: Patterns, performance, and prospects*, 12 POPULATION & DEV. T REV., 1335 (1986).
[167] See Kleinfeld & Sachs, *supra* note 38 at 35-44, for discussion.
[168] Gordon v. Lance, 403 U.S. 1, n.1 (1971).
[169] Reynolds v. Sims, 577 U.S. 533, 555 n.29 (1964).

how that principle is broad in its scope and rough in its strictness, we are led inexorably to the conclusion that OPOV proscribes laws that give some voters a full extra vote while permitting similar laws that give some voters a fractional extra vote.

Is this conclusion worrisome? Some may doubt this: the marginal difference between having .96 votes or 1 vote, or between having 1 vote and 1.04 votes, may seem trivial. But that marginal difference is meaningful. One way to see this is to consider the effect of adding exactly two votes with fractionally different values to a single election. Take the 2017 election of Virginia's 94th District in the House of Delegates, which famously tied: Shelly Simmonds (D) received 11,608 votes, and so did David Yancey (R).[170] (A coin toss determined the winner.[171]) Suppose we added only your and my votes to this election while leaving all other votes the same. You cast your .96 votes (or your 1 vote) for one candidate; I cast my one vote (or my 1.04 votes) for the other. My candidate wins. The marginal difference between our votes means my vote outvotes yours.

Another way to see why marginal differences in the number of votes per voter are meaningful is to consider their effect in the aggregate. In any close election, a candidate who received the support of the plurality of *voters* may not win the plurality of *votes*.[172] Their opponent, after all, may win a larger share of the votes that have fractionally more weight. This could easily be the result of any law that gives fractionally more votes to a group (parents, the more educated, the young…), who have some partisan lean.[173] As such, we could invert electoral outcomes by giving some voters fractionally more votes.

C—Fractional Votes for Representatives

Let's now consider inequalities in the number of votes per representative. A law that introduces such an inequality could be rationally explicable. Ely notes that it is often

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[170] Emily Tillett, *Virginia Election Results 2017: Republican David Yancey wins Virginia House Seat*, CBS NEWS (Jan. 4 2018), https://www.cbsnews.com/news/virginia-election-results-lottery-drawing-house-of-delegates-david-yancy-winner-virginia-house-seat/

[171] *Id.*

[172] Here I assume we are considering legislative elections which use plurality rule or first-past-the-post, which is the norm in US legislative elections—with some exceptions. *See* Daniel Wodak, *The Expressive Case Against Plurality Rule*, 27 J. POL. PHIL. 363 (2019).

[173] There is not only evidence that parents are more conservative than non-parents, but evidence that parenthood increases conservatism. Nicholas Kerry et al., *Experimental and Cross-Cultural Evidence That Parenthood and Parental Care Motives Increase Social Conservatism*, 289 PROC. R. SOC. B. 20220978 (2022).

considered a rational state policy to treat agricultural areas differently in order to foster a strong agricultural economy; an "entirely rational way of pursuing [that] goal is to give rural areas more legislative representatives per unit of population."[174] Rural areas can get more legislative representation per unit of population via malapportionment. But a state could also pursue that goal by giving each representative from an (equipopulous) rural district an extra vote in the state legislature. There is no general constitutional requirement for equally weighted votes for representatives.[175] But such a law would plausibly still be unconstitutional because it violates OPOV: that is, it gives these representatives' *voters* unequally weighted votes. Some voters' shares in election will be $x(y/z)$ while others are $2x(y/z)$. Their shares are not sufficiently equal.

As before, we can now modify the law so that it gives some districts' representatives fractionally more votes. In the state legislature, the average number of votes per representative may be one, with some representatives holding as few as .96 votes while others hold as many as 1.04. The maximum deviation would again be less than ten percent. As before, parity has the implication that this law is equivalent to an apportionment scheme where the maximum deviation is less than ten percent. It is a minor deviation from mathematical equality, and presumptively permitted by OPOV.

The problem, once again, stems from parity. Specifically, it stems from a commitment to parity between unequal numbers of voters per district and unequal numbers of votes per district representative. It is worth emphasizing that the Court not only endorses that commitment but relies on it in its decisions on multimember districts, and federal courts rely on it too in their decisions about weighting representatives' votes.[176] So again, reflecting on the scope and strictness of OPOV leads us inexorably to the conclusion that it permits giving some voters' representatives fractionally more votes.

Again, I do not claim that the Court would, or should, decide that a law that gave my representative fractionally more votes than yours in the state legislature is constitutional. To the contrary, I am confident that the Court would and should strike down such a law. The problem lies with explaining that verdict in terms of OPOV *as a*

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[174] ELY, *supra* note 2, at 121.
[175] "Equality of representatives," Jurji Toplak notes, is not "a constitutional principle", with the obvious exception of equal state suffrage in the Senate under art. I § 3. Toplak, *supra* note 100, at 149.
[176] See *supra* notes 158-160.

broad principle of rough equality. If as principle of rough equality OPOV permits minor deviations from mathematical equality, and as a broad principle we apply this same standard to inequalities in the number of votes per district representative, then OPOV must also proscribe laws that give some representatives a full extra vote but permit similar laws that give some representatives a fractional extra vote. Once more, as a broad principle of rough equality, OPOV turns out to be too permissive.

III—UNDERENFORCING EXACT EQUALITY

Since the problem with parity follows inexorably from the Court's commitments about the strictness and scope of OPOV, there are only two ways out, and each will face a significant initial challenge. In Part IV, I will consider understanding OPOV as a narrow principle of rough equality, despite the evidence that it considers a broad range of putative violations of OPOV that do not involve inequalities in the number of people per district (from Part IA, *supra*). In this Part, I will consider understanding OPOV as a broad principle of exact equality, despite the evidence that it only enforces a rough equality standard across the malapportionment cases (from Part IB, *supra*).

A—Principles & Decision-Rules

The nature of the question invites a readily available answer. The question is: Why do the Court's decisions permit degrees of inequality in the number of voters per district that are constitutionally impermissible as a matter of principle? The question presupposes that these decisions are an example of what Larry Sager described as a "disparity in the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives."[177] Put otherwise, OPOV is an example of an *underenforced constitutional principle*.[178] There are, as Sager argued, many decisions where the Court, "because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries."[179] There are also familiar "reasons which explain and to some degree justify federal judicial restraint" in enforcing constitutional principles.[180] Many of those reasons concern the

[177] Sager, *supra* note 50, at 1218-1219.
[178] *See generally id.*
[179] *Id.* at 1213.
[180] *Id.* at 1217.

propriety of unelected federal judges displacing the judgment of elected officials, especially state and local officials.[181] This provides a model for reading the malapportionment cases as involving the justifiable underenforcement of OPOV.

But what, exactly, is the model? Familiar reasons for judicial restraint often justify not enforcing constitutional principles by making certain questions non-justiciable. That was the basis for Justice Frankfurter's dissenting opinion in *Baker v Carr*.[182] For the Court to hold that congressional malapportionment is unconstitutional would

> cut very deep into the very being of Congress. Courts ought not to enter this political thicket. … The Constitution has many commands that are not enforceable by courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action.[183]

This does not deny that OPOV is among the Constitution's commands; it contends that OPOV is one of the Constitution's commands *that are not enforceable by courts*.

That's not the model we need here. We need to explain how familiar reasons for judicial restraint justify *underenforcing* rather than *not enforcing* a principle; that is, why the Court justifiably applies a standard that is less onerous than the principle itself. One way to explain this is to appeal to a plurality of modalities of constitutional argument,[184] and hence endorse pluralism about constitutional interpretation.[185] This is not the path I will take, in part because it risks alienating originalists, who express the strongest skepticism about OPOV;[186] originalists are typically understood to be monists.[187]

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[181] *See, e.g.,* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed. 1986) at 16-23.

[182] 369 U.S. 186, 297-324 (1962) (Frankfurter J., dissenting); *see also* Sager, *supra* note 50, at 1226 n46 (comparing Justice Harlan's and Justice Frankfurter's dissenting judgments in *Baker v. Carr*.).

[183] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[184] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION IN THE UNITED STATES (1991).

[185] *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018).

[186] Evenwel v. Abbott, 136 S. Ct. 1120, 1136 (2016) (Thomas J., concurring in the judgment).

[187] *See* Berman, *Our Principled Constitution*, *supra* note 185 at 1342: "the originalists were monists (or nearly so)." See also William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019). *But cf.* Lawrence Solum, *We Are All Originalists Now, in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 60 (Robert W. Bennett ed., 2011) ("[O]riginalists can and should agree that constitutional construction (as currently practiced) involves a plurality of methods—purposes, structure, precedent, and all the rest.").

Instead, the path I will take posits a (monist-friendly) distinction between constitutional principles and a distinct "substructure" of "rules."[188] In particular, it distinguishes between constitutional *principles* and constitutional *decision-rules*, or "between judicial determinations of the meaning of a constitutional provision and announcements of the rule courts should apply when called upon to decide whether the judicially interpreted meaning is complied with."[189] On this picture, OPOV is a broad constitutional *principle* that requires exact equality. Yet OPOV is (under-)enforced by a constitutional *decision rule* that takes rough equality in the number of people per district be sufficient for determining when apportionment schemas comply with this principle.

Why take this path? There is no simple "litmus-paper test" for determining whether it is correct to read the court's rough equality standard as applying a decision-rule.[190] But this reading of the role of the rough equality standard is attractive, for three reasons.

First, consider what this reading allows us to preserve. OPOV is still a broad principle; it is violated by unequal numbers of voters per district, of votes per voter, or of votes per district representative; and parity exists between these inequalities. The content of that principle is that each voter should have an equal share in the outcome, which makes OPOV definable without circularity, and quantifiable without vagueness.

Second, consider what this reading allows us to explain. We can explain why laws that give some voters fractionally more votes than others in the same district, or that give some representatives factionally more votes than others from equipopulous districts, would be unconstitutional. They would violate OPOV as a broad principle of exact equality. Simultaneously, we can explain why when the Court is confronted with laws involving similar inequalities in the number of voters per district, it should decide that such laws do not violate OPOV. This explanation does not turn on the content of OPOV: the principle entails parity between inequalities in the number of voters per district, votes per voter, and votes per representative. Instead, it turns on the Court's reasons for adopting a less onerous decision-rule for determining what complies with OPOV.

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[188] Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).
[189] Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 54 (2004).
[190] *Id.* at 74 ("*There is no algorithm or litmus-paper test for correctly sorting existing constitutional doctrine into* [constitutional principle] *and decision-rule components*.").

Third, this reading at least arguably better fits with the Court's reasons for adopting a rough equality standard. Constitutional decision-rules serve a different function from constitutional principles: a judicial pronouncement of a decision-rule concerns the correct *implementation*, rather than correct *interpretation*, of the Constitution.[191] And the rough equality standard is preferred because it is a "workable constitutional requirement."[192] Particularly telling in this context is the Court's explanation for why it employs a less onerous standard for state and local apportionment: "more flexibility" is "constitutionally permissible with respect to state legislative apportionment than in congressional districting," because the "significantly larger number of seats in state legislative bodies" make it "feasible to use political subdivision lines to a greater extent in establishing state legislative districts."[193] These considerations *could* be read as bearing on the correct interpretation of a constitutional principle; but flexibility and feasibility are more naturally read as concerning the principle's implementation. Furthermore, while it was never offered explicitly, a promising rationale for the rough equality standard is that it ameliorates the concerns that underpinned Frankfurter's warning, acknowledged directly in *Reynolds*,[194] about the risks of entering the political thicket. Using a rough equality standard cuts less deeply into the very being of Congress, and shows greater deference to the good faith efforts of elected officials.

Of course, one could resist this reading. But consider the alternative hypothesis. Suppose the Court's reasons for the rough equality standard concern the interpretation of the principle. This is, on reflection, rather odd. As Ely notes in the second epigraphic quote above, "'One person, one vote, give or take 10 percent,' somehow doesn't *sound* like a constitutional principle."[195] Nor does it sound like the principle of equality that runs through nonconstitutional sources such as the Declaration of Independence and Lincoln's Gettysburg Address. So, why interpret Article I and the Fourteenth Amendment as containing a principle of *rough* equality? Or, more aptly, why interpret

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[191] *Id.* at 55, 59.
[192] Reynolds v. Sims, 377 U.S. 533, 577 (1964).
[193] *Id.* at 578.
[194] "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id.* at 566.
[195] ELY, *supra* note 2, at 239 n.61.

them as containing *subtly distinct* principles of rough equality? (The strictness of a principle is, after all, part of its content.) Here it is worth emphasizing a striking omission. The Court holds that OPOV, as a constitutional principle, applies to congressional apportionments due to Article I and to state apportionments due to the Fourteenth Amendment. The Court also holds that more flexibility is constitutionally permissible with respect to state legislative apportionment than congressional apportionment. But the Court never appeals to a difference between Article I and the Fourteenth Amendment, or how they relate to OPOV, to explain this stance. That omission is hard to explain if we posit that the rough equality standards were developed as a matter of constitutional interpretation. It fits comfortably, however, with reading the rough equality standards as decision-rules for constitutional *implementation*.

We have, then, at least a reasonable case for reading OPOV as a broad principle of exact equality, while explaining the role of the Court's rough equality standards in the malapportionment cases by positing that they are decision-rules. The decision-rules underenforce the principle, but are justified by considerations related to constitutional implementation. This provides what seems to be a tidy solution to the parity problem.

The solution also has significant implications for how we understand the operative principle in the malapportionment cases, and for the correct resolution of future cases. As I noted, a virtue of this solution is that it preserves equal shares as our account of the content of OPOV, the operative principle in the malapportionment cases. But it does complicate our understanding of the principle's operation in those cases. Its role in the decisions is mediated by a decision-rule; it is, then, only the distal cause of malapportionment's demise. So, what is the proximate cause of malapportionment's demise? What is the content of the decision-rule that killed malapportionment? This is a new iteration of the murder mystery, but the mystery does not run very deep. This Article previously noted that the Court and commentators alike often identify OPOV with a narrow, mechanical rule.[196] We can now offer a partial vindication of that view: it correctly identifies the content of the decision-rule that is operative in these cases, while mistaking the content of the decision-rule for content of the operative principle itself.

[196] *See* discussion *supra* notes 62-67.

What about the resolution of future cases? Here things are somewhat less clear, but at least for the question left open in *Evenwel*, this solution can provide a promising answer. Astute readers have almost certainly noticed that the equal shares view requires equal numbers of votes, and hence voters, per district. This is at odds with the Court's OPOV jurisprudence. In *Reynolds*, the Court "carefully left open the question of what population was being referred to."[197] Why would it do that if equal shares is the operative principle? In defending equal shares, Still did not seem to think this was a deep problem, noting that "the Court implicitly assumed throughout [the early malapportionment cases] that the ratio of voters to population was the same in all districts, so that population could be used as a measure of the number of voters."[198] But that invites the further question: Why should the Court make that assumption, which was not supported by good evidence?[199] We have a ready answer if we posit the Court developed a rough equality standard as a decision-rule, due to concerns about constitutional implementation. Allowing the use of total population, which was measured in the decennial Census, makes OPOV easier to implement; leaving open the population baseline also gave greater flexibility to state officials. Of course, these virtues of a decision-rule come at the cost of underenforcing the underlying constitutional principle, but as in other constitutional contexts, that cost may well be worth paying. Construing the rough equality standards as a decision rule at least makes sense of the otherwise perplexing gap between what OPOV requires and the Court's remedy.[200]

What about any future cases that inequalities in the number of votes per voter? This is where things get murkier. Since OPOV is a broad principle of exact equality, we know that any inequality in the number of votes per voter is unconstitutional. What we don't yet know is whether the Court should underenforce OPOV in such contexts, for similar reasons to those which justify a decision-rule that underenforces OPOV elsewhere.

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[197] *See* Burns v. Richardson, 384 U.S. 73, 91 (1966).

[198] Still, *supra* note 139 at 389 n.39.

[199] *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1132 n 13 (2016) (noting "several studies documenting the uneven distribution of immigrants throughout the country during the 1960s.").

[200] *Cf.* the majority in *Evenwel* at 1131.: "It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule. Most likely, we think, the Court has always assumed the permissibility of drawing districts to equalize total population."

B—Weighing Votes

On the solution offered here, the Court underenforces OPOV when faced with apportionments that generate inequalities in the number of people per district. Should it also underenforce OPOV when faced with practices or procedures that generate inequalities in the number of votes per voter? If not, why not? Why treat inequalities in the number of votes per voter differently than inequalities in the number of people per district? The answer may seem obvious for several reasons. First, it is often impossible for a legislative map to have exactly the same number of people per district. The number of people cannot always be divided by the number of districts without remainder; so, some districts will need to have at least one extra person. Second, a wide range of considerations justify deviations from exact equality, including compactness, contiguity, and preserving the boundaries of political subdivisions.[201] By contrast, it is clearly possible to give each voter exactly one vote; and few considerations seem to count against this easily administrable practice. So, it may seem, we have a simple answer to why the Court should not underenforce OPOV if it were faced with, in Justice Black's words, "a law that would expressly give certain citizens a half-vote and others a full vote",[202] or a law that gives some citizens a fractional vote and others a full vote.

This answer, however tempting, is far too quick. Considerations of administrability do not exclusively arise when the Court is called upon to make decisions about the number of people per district. They can easily arise, and can have similar force, when the Court is called upon to make decisions about the number of votes per voter. So, the considerations that justify using a decision-rule that underenforces OPOV in one context can also justify using a decision-rule that underenforces OPOV in the other.

To see the problem, it helps to move away from laws that *expressly* give some citizens fewer votes than others, and consider instead procedures that *functionally* do so. Demeny voting is an example of the former. It could be justified by a range of considerations that may seem to constitute legitimate state purposes: to parents vote as proxies on behalf of otherwise disenfranchised children, to incentivize childbirth, or,

[201] Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).
[202] *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) (Black, J., in dissent).

perhaps, to compensate parents for their loss of informal modes of political influence.[203] Perhaps such purposes could justify deviations from exact equality. But since such laws expressly give some citizens fewer votes than others, there is always a threat that they expressively harm some citizens. Such expressive harms are an important, albeit limited, thread in the Court's OPOV jurisprudence.[204] (In many cases, such as *Evenwel* and *Bush v. Gore*,[205] the Court takes seriously complaints that OPOV is violated when no one is expressly treated differently or subject to any obvious expressive harm.) Moreover, with any such law, compliance with exact equality remains administrable.

Laws that functionally give some citizens fewer votes than others are a different story. Arguably, cases involving voting technologies that *make some voters' ballots slightly less likely to be counted* already functionally give some citizens fewer votes.[206] But voting technologies could also *make it likely that some voters' ballots count for slightly less*.[207] That difference is subtle, and easiest to appreciate by considering a hypothetical example.

Here's the hypothetical. Arizona's state legislature adopts a procedure whereby in all Arizonan elections, ballots were counted by weight. (Such procedures have been used elsewhere.[208]) A vote's political *weight* (the number of votes a citizen can cast) would then correspond to its physical *weight* (the gravitational force that the ballot exerts on the scale); to avoid confusion, I'll refer to the latter as a vote's *mass*. Arizona then makes a good faith effort to ensure that each ballot has an identical mass. But exact inequality is practically impossible. Ballots will not be perfectly consistent, especially when printed with unbelievable speed,[209] and when local counties are given flexibility in ballot design. Besides, even if one ballot had the same mass as any other when it was printed, it may not have the same mass when it is weighed (remember the hanging

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[203] See *supra* Part IIB.
[204] *See*, *e.g.*, *Costs and Causes of Minimalism*, *supra* note 28, at 1425–1426 (on the role of expressive harms in justifying the Court's OPOV jurisprudence), and at 1439 ("if the expressive harm theory were the Court's mediating principle, we would end up with a less rigid rule than the one announced in *Karcher*").
[205] *Evenwel* at 1120; 531 U.S. 98 (2000).
[206] See especially Bush v. Gore, 531 U.S. at 98. *See also* Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006).
[207] See *supra* notes 140-46 on why this distinction may make a difference on an equal shares view.
[208] Switzerland has used such a method. METTLER TOLEDO, *Ballots Placed on the Scales*, https://www.mt.com/us/en/home/library/know-how/industrial-scales/weighing_votes.html.
[209] In 2020 Runbeck Election Services in Phoenix printed mail-in ballots at a rate of approximately 20,000 per hour. *See* Malia Wollan, *Printing the Franchise*, NYT MAGAZINE, (Oct. 28, 2020), https://www.nytimes.com/interactive/2020/10/26/magazine/printing-mail-in-ballots.html.

chads from *Bush v. Gore*).[210] Still, Arizona ensures that the maximum disparity in the mass of ballots is very small. This is hypothetical, so you can suppose it is .9 to 1.1, or .99 to 1.01, or .999 to 1.001, or .9999 to 1.0001. The point is to illustrate how a vote-counting procedure can functionally give some citizens fractionally fewer votes.

This raises two questions. Did Arizona's use of this vote-counting procedure violate OPOV? And should the Court rule that the vote-counting procedure violated OPOV?

If OPOV is a broad principle of exact equality, the first answer is obvious. The procedure violates OPOV no matter how small we make the maximum disparity between the mass, and hence weight, of voters' votes. It is *one person, one vote*, not *one person, one vote, give or take a bit*. If you cast .999 votes while I cast one vote, my vote outweighs yours. If 1000 citizens casting ballots with a mass of 1.001, their votes have the same effect on the outcome, given this procedure, as 1001 citizens casting ballots with a mass of 1. If OPOV requires exact equality, it is easy to explain why it is violated by any such functional inequality in the number of votes per voter.

The answer to the second question, however, is far from obvious. It turns on whether there is sufficient reason for the Court to underenforce OPOV in this context. As we saw, a broad range of considerations related to administrability are deemed sufficient to justify underenforcing OPOV with respect to malapportionment. If the Court were faced with the question of whether to rule that Arizona's vote-counting procedure violated OPOV, sufficiently similar reasons favor using a rough equality standard as a decision-rule, and hence deciding that Arizona's good faith effort complies with OPOV.

This contention is supported by three main observations. First, familiar reasons favoring judicial restraint should make the Court, as unelected federal judges, reluctant to interfere with elected state officials' decisions about the vote-counting procedures used in their state elections. (Should the Court enter the political thicket by prescribing how states count votes?) Such restraint is especially warranted since the Constitution explicitly grants state legislatures considerable discretion over electoral processes.[211] So,

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[210] 531 U.S. at 119-20.

[211] As per U.S. CONST. Art. I, § 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."

underenforcing OPOV with respect to vote-counting procedures gives elected officials more flexibility over their own electoral procedures.

Second, the initial decision to count votes by weight can be justified by a wide range of legitimate considerations. Arizona's state legislature may have reasonably judged that it is best to weigh votes using a precision scale in order to: continue using paper ballots (due to the fear that electronic voting systems can be hacked), avoid manual ballot counting (which is slow, error-prone, and difficult to staff when electoral officials receive death threats from partisan conspiracy theorists), and avoid mechanical ballot tabulators (which malfunctioned in 2022, leading to more conspiracy theories).[212] They could also have reasonably judged that the weight of ballots as measured by precision scales should be the final determination of the total vote in Arizona (avoiding inefficient recounts, and any inequality in manual or mechanical vote-counting procedures).[213]

Third, once Arizona adopts the procedure, it becomes infeasible, indeed virtually impossible, to ensure each voter must have an exactly equal number of votes. The most that can reasonably be expected from officials is that they make a good faith effort to ensure each voter has as close to an exactly equal number of votes as possible.

More could be said about the details of the example, but they are hypothetical, so it is best to focus on the bigger picture point being illustrated. The parity problem arises once the Court's rough equality standard is applied to inequalities in the number of people per district *and* to inequalities in the number of votes per voter. The solution under consideration insists that OPOV is a broad principle of exact equality, and that the rough equality standard is a decision-rule that underenforces the principle in relation to the number of people per district, due to considerations of administrability. But this does not fully resolve the problem. Parity can arise again with respect to those considerations of administrability. Once it does, the Court is similarly justified in using

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[212] *See* Vera Bergengruen & Eric Cortellessa, *Problems with Some Arizona Voting Machines are Stoking Right-Wing Conspiracy Theories*, TIME (Nov. 8, 2022 6:46PM), https://time.com/6230714/arizona-voting-machines-conspiracy-theories/

[213] On inequalities in manual recounts, see the majority in Bush v. Gore, 531 U.S. at 98. An implication of scales being the final determination of vote totals would be that if your ballot weighs more or less than mine on the scale, that would not be a correctable error in vote-tabulation.

a rough equality standard as a decision-rule to underenforce OPOV in relation to the number of votes per voter. So once again, OPOV becomes too permissive.

C—Interstate Malapportionment

You may resist the argument that there is sufficient justification for underenforcing a broad principle of exact equality in relation to laws that functionally give some citizens fewer votes than others. But it is best to view that argument as one horn of a dilemma. On the other horn of the dilemma, taking OPOV to be a broad principle of exact equality requires radical, albeit administrable, remedies for malapportionment.

There are obvious deficiencies in the reapportionment revolution as a remedy for malapportionment. For example, decennial reapportionment at best generates equal numbers of people per district for one election out of every five biennial congressional elections.[214] The most glaring and interesting deficiency, however, arises due to *interstate* malapportionment. Consider the 2020 redistricting process. The population of the average—and hence, "ideal"—congressional district was 761,169. Few states' total populations are divisible by 761,169 without remainder. But compare that number to the populations of the eight least populous states: Wyoming (577,719), Vermont (643,503), Alaska (736,081), North Dakota (779,702), South Dakota (887,770), Delaware (990,837), Montana (1,085,407), and Rhode Island (1,098,163).[215] In 2020, the first six of these states received one representative; Montana and Rhode-Island received two. Delaware's at-large district thus had almost twice the population of MO-1 or MO-2. The same problem recurs every cycle. In 2010, Rhode Island was the least populous state to receive two representatives;[216] a similarly large maximum deviation (65.67%) was present between each of its congressional districts and Montana's at-large district.[217]

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[214] *See*, *e.g.*, Levinson, *supra* note 26, at 1280 ("Although it is true that the Constitution mandates a census only every decade, it would be altogether feasible if courts… required states to conduct their own population counts every two years (and to redraw district lines accordingly)."). Many may respond by denying that it is consistent with the Constitution to mandate biennial reapportionment.

[215] U.S. CENSUS BUREAU, *Apportionment of the U.S. House of Representatives Based on the 2020 Census* (Apr. 26, 2021), https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf

[216] U.S. CENSUS BUREAU, *Historical Apportionment Data (1910-2010)* (Apr. 26, 2021), https://www.census.gov/data/tables/time-series/dec/apportionment-data-text.html

[217] Jeffrey W. Ladewig, *One Person One Vote 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1131 (2011).

Compare these deviations to the conclusion of the majority opinion in *Wesberry*:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[218]

The Court did not conclude that equal representation for equal numbers of people *within each state delegation* is the fundamental goal of the House of Representatives. (Nor, for that matter, did it say that equal representation for equal numbers of people *for one election out of every five* is the fundamental goal of the House of Representatives.) The Constitution's plain objective, then, is violated by interstate malapportionment.

That, at least, was the view taken by Montana in *Department of Commerce v. Montana*.[219] In the 1990 redistricting cycle, the average congressional district had a population of 572,466, but Montana's at-large district had a population of 803,655; Montana, and the District Court, took the view that this violated OPOV.[220] But on appeal, the Supreme Court reversed the District Court's judgment. Strikingly, the Court did not hold that interstate malapportionment is consistent with the Constitution's plain objective for the House of Representatives, as it was described in *Wesberry*. To the contrary, it said:

> [T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50. Accordingly, although "common sense" supports a test requiring "a good faith effort to achieve precise mathematical equality" within each State… the constraints imposed by Article I, 2, itself make that goal illusory for the Nation as a whole.[221]

The Court's verdict turns on a particular consideration of administrability: that it is virtually impossible to distribute a fixed number of indivisible Representatives among

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[218] 376 U. S. 1, 18 (1964).

[219] 503 U.S. 442 (1992).

[220] *Id.*at 445-446.

[221] *Id.* at 464 (citations omitted). It is noteworthy that this decision permits deviations from a principle of exact equality, but is very hard to explain by positing that the Court is following a decision-rule according to which rough equality in the number of people per district is sufficient for satisfying OPOV. For one, the degree of inequality is too great. For another, the Court expressly denies that the goal of "precise mathematical equality" is met, and instead describes that goal as "illusory"!

50 States of varying populations without encountering what the Court calls the "the fractional remainder problem."[222] The fractional remainder problem is nothing new. It became apparent as soon as Congress first redistributed seats in the House after the 1790 Census: "It was evident that each state must be given either too many or too few representatives, and never the exact number required by the Constitution."[223]

But here's the rub. There's an alternative remedy to the fractional remainder problem. We cannot distribute a fixed number of indivisible Representatives among 50 States of varying populations without a fractional remainder because we cannot give districts fractionally more representatives. But we can give a district's representative fractionally more votes. Representatives are not divisible. Their votes are. This is the simple insight behind plans that weight representatives' votes in proportion to district populations. "Weighted-voting plans grant each district a percentage of the total number of votes that corresponds precisely with its percentage of the total population. As a result, there is zero percent deviation from population equality."[224] Federal courts have ordered local governments to adopt weighted voting plans, so this solution is administrable. Should the Court likewise order Congress to adopt a weighted voting plan?[225]

It is hard to see why they should not if take the Court in *Wesberry* at their word that "our Constitution's plain objective" is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives",[226] and interpret equal to mean *exactly* equal. If exact equality is virtually impossible without weighted voting, but weighted voting generates "zero percent deviation from population equality",[227] then the Court faces a simple choice. It can declare the Constitution's fundamental goal for the House of Representatives to be "illusory"; or it can impose weighted voting.

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[222] *Id.*at 443.
[223] Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1021 (1929).
[224] *The Next Reapportionment Revolution*, *supra* note 99, at 1038. *See also* Toplak, *supra* note 100 at 145 ("In Congress, each state would have the number of votes exactly equal to the number of its residents", if each congressperson's vote were weighted in proportion to their district's population).
[225] Such a plan is consistent with the constraints imposed by Article I; the Constitutional does not require an equal number of votes per Representative regardless of the population of their district.
[226] Wesberry v. Sanders, 376 U. S. 1, 18 (1964).
[227] *The Next Reapportionment Revolution, supra* note 99, at 1038. *See also* Toplak, *supra* note 100 at 145.

To be clear, I doubt the Court would or should impose weighted voting on Congress. If OPOV requires the imposition of weighted voting, then it turns out to be too restrictive. This is in part for the obvious reason that weighted voting is far too radical of a political intervention even for the Warren Court, the "high-water mark of progressive constitutional law."[228] For the current "anti-Carolene" Court,[229] the conclusion that OPOV requires such a radical political intervention would only strengthen objections to the constitutionality of this democratic principle.

Worse yet, if OPOV requires the imposition of weighted voting as a remedy, that may even call into question the status of OPOV as a democratic principle. This is because there is a good reason to doubt that weighting representatives' votes in proportion to their populations is a democratic practice. The practice is, in technical parlance, *non-monotonic*. Monotonicity is the requirement that "winning alternatives remain winners when their support increases *ceteris paribus*": that is, adding votes for the electoral winner while leaving all other votes unchanged does not cause the winner to lose the election.[230] Monotonicity has been described as the "essence of democracy."[231] Being non-monotonic, conversely, is "the worst possible sin an electoral system can commit,"[232] and "the most serious pathology that may afflict voting procedures."[233]

Why are these weighted voting systems non-monotonic? This is easy to illustrate with an example. Suppose weighted voting is adopted in Virginia's House of Delegates. In 2023, Katrina Callsen (D) won 19,852 of the 20,480 votes cast in VA HD54.[234] So suppose 19,000 Republican voters had been added to HD54—via immigration or internal migration. The effect would be that Callsen would have still won, and would hold roughly twice as many votes in the House of Delegates (since Callsen would represent roughly twice as many people). Once we see this, we can see the path for violating monotonicity. If delegates' votes are weighted in proportion to their district's

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[228] CASS SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 37 (2023).
[229] *See generally* Stephanopoulos, *supra* note 10.
[230] DAN S. FELSENTHAL & HANNU NURMI, MONOTONICITY FAILURES AFFLICTING PROCEDURES FOR ELECTING A SINGLE CANDIDATE 4 (2017).
[231] Robert E. Goodin & Christian List, *Special Majorities Rationalized*, 36 BRIT. J. POLIT. SCI. 213, 218 (2006).
[232] WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 106 1982.
[233] Felsenthal & Nurmi, *supra* note 230 at 4.
[234] VA. DEPT. ELECTIONS, *2023 House of Delegates Special Election: District 54* (2023), https://historical.elections.virginia.gov/elections/view/160966/.

populations, a party's delegates must represent the majority of Virginians in order to win control of the House of Delegates. So, if Republicans win control of the House of Delegates, then *adding votes for Republicans to the Democratic delegates' districts* while leaving all other votes unchanged can make the Republicans lose control of the House. Adding votes for the winning party to the losing party's districts, while leaving all else unchanged, can make the loser become the party that represents the most people.[235]

Much more can be said about *Department of Commerce v. Montana*, about the causes of interstate malapportionment,[236] and about the virtues and vices of weighted voting. But let's once more return to the bigger picture. We are considering the view that OPOV—the constitutional principle that is operative in the malapportionment cases—is a broad principle of exact equality. Given its strictness, what justifies the Court in underenforcing OPOV when interstate congressional malapportionment generates vast inequalities in the number of people per district? The answer must take the form of pointing to a range of legitimate considerations for using the simple procedure of giving each Representative one indivisible vote, then noting that once that procedure is adopted it becomes impossible to achieve anything close to exact equality in the number of people per district. Suppose that answer is adequate. Now recall the vote-counting procedure considered in Part IIIB. We can point to a range of legitimate considerations for using a simple procedure for counting votes: weighing them on a precision scale. Once that procedure is adopted it becomes impossible to achieve exact equality in the number of votes per voter, though it may be possible to get close. It is hard to see how considerations of administrability justify underenforcing OPOV in one context but not the other. The two examples should stand or fall together.

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[235] I present this argument in Daniel Wodak, *The Perversity of Weighted Voting*, 86 J. POL, 815 (2024).

[236] In particular, it is striking that a major cause of interstate malapportionment is that the number of representatives to be allocated to the states was fixed at 435 in 1911 (see 2 U.S.C. § 2a (2006), codifying the Reapportionment Acts of 1911, 1929, and 1941). For a thorough explanation of the effect of these acts of Congress on interstate malapportionment, see Jeffrey W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 PERSPECTIVES POL. 89 (2008) at 92-98. For more evidence of their dramatic consequences, see Nicholas R. Miller, *The House Size Effect and the Referendum Paradox in U.S. Presidential Elections*, 35 ELECTORAL STUDIES 265, 265-66 (2014): the winner of the Electoral College would have been different in the Presidential elections of 1960, 1976, and 2000 but for the size of the House being fixed at 435 in 1911.

The bottom line is simple. The first solution to the parity problem is to posit that OPOV is a broad principle of exact equality that is justifiably underenforced. But this does not solve the problem. It just leads to a dilemma. On this view, OPOV must either be too restrictive (requiring the use of weighted voting in Congress) or it must be too permissive (allowing procedures that give some voters fractionally more votes).

IV—ONE PERSON, ONE VOTE, TWO PRINCIPLES

If we cannot solve the parity problem by taking OPOV to be a broad principle of exact equality, there is one final way out: taking OPOV to be a narrow principle of rough equality. That is, we can understand the content of OPOV to be a principle that requires roughly equal numbers of people per district, but is silent about or inapplicable to other inequalities (including in the number of votes per voter, or per representative).

Prima facie, it is not obvious that this solution offers a promising path forward. First, it faces stronger headwinds. As we saw in Part IA, there is significant evidence that the Court seriously considers a broad range of at least putative violations of OPOV that do not involve inequalities in the number of people per district. How can this be squared with the proposition that the Court takes the content of OPOV to be a narrow principle?

Second, and relatedly, it is less obvious how this can solve the parity problem. Suppose the Court were faced with the question of whether a practice such as Demeny voting is unconstitutional. If OPOV is silent about or inapplicable to inequalities in the number of votes per voter, then OPOV permits any such practice. A narrow principle cannot be a bulwark against a broad variety of means to erode voters' equality at the ballot box.

A—Bifurcating OPOV

Nonetheless, there may be a path forward. Consider an analogy. The rule of law is often stated as a single, broad principle: no one is above the law. But it is typically understood to decompose into distinct, narrow principles. On Joseph Raz's influential account, a vague law would violate the rule of law because it violates the principle that laws must be clear, while a retroactive law would violate the rule of law because it violates the

distinct principle that laws must be prospectively applied, and so on.[237] Notice that these narrow principles plausibly differ in strictness. The rule of law might tolerate some degree of vagueness, which "is inescapable,"[238] but no degree of retroactivity. By analogy, while OPOV is stated as a single, broad principle, we could interpret its content as decomposing into distinct, narrower principles, which differ in strictness.

If it is tenable, this path forward does seem attractive. For one thing, it promises to explain why the Court seriously considers a range of putative violations of OPOV that do not violate the principle requiring equal numbers of people per district. That narrow principle is a component of OPOV, but does not exhaust its content. For another, it opens the door for a simple solution to the parity problem. If OPOV includes a principle requiring *roughly* equal people per district and a distinct principle requiring *exactly* equal votes per voter, then OPOV is neither too restrictive nor too permissive.

There is some evidence that the Court understands OPOV to be comprised of two distinct principles, though it is subject to interpretation. In *Evenwel*, the appellants quoted extensively from previous malapportionment decisions that suggest that OPOV is a "principle of equal voting power."[239] In response, the Court did not deny that OPOV contains some such principle, which they labeled "voter equality." Instead, the Court wrote: "For every sentence the appellants quote from the Court opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality."[240] One interpretation of this is that OPOV is ambiguous. It includes *either* a principle of equality of representation *or* a principle of voter equality.[241] The other interpretation is that OPOV includes *both* principles.

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[237] Joseph Raz, *The Rule of Law and Its Virtues*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979). (Raz's full account of the rule of law encompasses more than these two principles.) Others similarly view the rule of law as decomposing into narrow specific principles. See Jeremy Waldron, *The Rule of Law* §5.1, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Fall 2023 ed. 2023), https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/ (last visited Jan 18, 2025) ("Theorists of the Rule of Law are fond of producing laundry lists of the principles it comprises.").

[238] Raz, *supra* note 237 at 222.

[239] Evenwel v. Abbott, 136 S. Ct. 1120, 1130 (2016).

[240] *Id.* at 1131.

[241] This was the position taken by Judge Kozinski of the Ninth Circuit in Garza v County of Los Angeles 918 F.2d 763, 780-83 (9th Cir. 1990) (Kozinski J., concurring in part and dissenting in part). (observing that the Court across the malapportionment cases appeals extensively to "two apparently conflicting principles"—"the principle of electoral equality" and "the principle of equal representation"—and that

Let's adopt this as our working hypothesis and see how far it can take us: OPOV bifurcates into distinct principles of equality of representation and voter equality. There are many important questions to ask about this hypothesis, but the one that looms largest is simple: If this hypothesis is true, what killed malapportionment? Did equal representation alone do the deed? Or was voter equality the second shooter on the grassy knoll? Which of these principles, in other words, is operative in the malapportionment cases and in the Court's broader OPOV jurisprudence? To investigate, let's consider the content of each of these putative subprinciples of OPOV.

B—Equal Representation

What is the content of the principle of equal representation? Some may say, as before, that it simply requires equal constituents per voting representative.[242] This is too narrow to be the whole of OPOV, as we saw in Part IA; but it may not be too narrow to be a constituent part of OPOV. However, if we identify the principle of equal representation with a mechanical rule of this form, we face the serious concerns that it is hard to understand equal representation as a subprinciple of political equality, or to explain without circularity the important right that is protected by equal representation.

Thankfully, the Court in *Evenwel* suggests that the content of equality of representation is not equivalent to any mechanical rule. The Court distinguishes between "the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation,"[243] and suggests that voter equality is violated by "vote dilution" (or "the debasement of voting power") while equality of representation is violated by the "diminution of access to elected representatives."[244] We can thus take the content of the principle of equal representation to be something like: that each constituent must have an equal opportunity to access their elected representative.

"choose between them" requires one to "distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment.").

[242] *See supra* notes 62-67.

[243] *Evenwel*, 136 S. Ct. at 1131.

[244] *Id.* citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

Construed as such, equality of representation is plausibly a subprinciple of political equality. The orthodox view is that political equality requires equality of opportunity to influence political outcomes.[245] Some, such as Cass Sunstein, identify OPOV in these terms.[246] It is standard to distinguish between formal and informal modes of influence over political outcomes; voting is the paradigmatic instance of the former, and lobbying a paradigmatic instance of the latter.[247] Issuing requests and suggestions is a way of lobbying your elected representative. So, if we understand OPOV to require equality of opportunity to influence political outcomes, we can also understand OPOV to bifurcate into distinct principles, one of which concerns equality of opportunity over *formal* modes of influence (voter equality), while the other concerns equality of opportunity over *informal* modes of influence (equality of representation). In other words, we can explain why voter equality and equality of representation are two constituent parts of a whole, where that whole is a *bona fide* principle of political equality. This fits neatly with the standard, celebratory narrative about the malapportionment cases.

Moreover, we can also explain without circularity why this subprinciple of political equality is violated in the malapportionment cases. Inequalities in the number of constituents per representative violate a constitutional right because they result some constituents having diminished access to their representative. This access, as the Court noted, can concern making "requests and suggestions" or "receiving constituent services, such as navigating public-benefits bureaucracies."[248] If some districts are more populous, some representatives will be subject to more requests, suggestions, and demands for constituent services; but each representative only has finite time. So, ensuring that each district has an equal number of people ensures "that each

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[245] *See*, *e.g.*, RAWLS, *supra* note 115. See generally *What Is the Point of Political Equality?*, *supra* note 146.
[246] Cass Sunstein, refers to "the one-person, one-vote rule" as "the idea that every citizen should have the same power over political outcomes." Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2410 (1994). See also ELY, *supra* note 2, at 123 (identifying OPOV as a general principle requiring "at least rough equality in terms of one's influence on governmental choices."). *See also*, *e.g.*, CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 144 (1989)(describing a system that "adheres to 'one person, one vote', as one that is "is 'quantitatively' fair", in the sense that "the distribution of procedural opportunities provides everyone with the capacity" to influence political outcomes, and hence gives them "equal power" over political outcomes.).
[247] See especially Niko Kolodny, THE PECKING ORDER: SOCIAL HIERARCHY AS A PHILOSOPHICAL PROBLEM 254-366, 383-393 (2023) on equality of opportunity for formally influencing political outcomes, and equality of opportunity for informally influencing political outcomes.
[248] Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).

representative is subject to requests and suggestions from the same number of constituents,"[249] and hence ensures equality of opportunity to access representatives.

This explanation allows us to cast equality of representation as *an* (if not *the*) operative principle in the malapportionment cases. At the same time, it makes clear that equality of representation is not an operative principle in the rest of the Court's OPOV jurisprudence. That follows from its status as a narrow principle. As constituents in a district, you and I have equal of access to our representative even if you cannot vote, as the Court noted.[250] For the same reason, you and I have equal access to our representative if you hold one vote and I hold 37,825 votes. Nor is equality of representation the operative principle when individuals make complaints about OPOV in elections to approve policies or issue bonds, rather than appoint representatives.

If OPOV includes the principle of equality of representation, this also has significant implications for what population baseline is at issue in malapportionment. Does OPOV require equalizing the number of: (a) voters; (b) people; (c) voters *or* people; or, (d) voters *and* people?[251] In *Evenwel*, this was not fully resolved. The Court unanimously rejected (a).[252] But it also unanimously declined to affirm the Solicitor-General's view, which was (b).[253] The concurring judgments from Justices Alito and Thomas accepted (c).[254] Justice Ginsburg's majority opinion was ambiguous; it briefly suggested that it

[249] *Id.*

[250] *Id*. "Nonvoters have an important stake … in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."

[251] A district's 'voters' can be defined as its eligible voters, registered voters, or its citizens of voting age; a district's 'people' be defined in terms of its total residential population as measured by the Census.

[252] *Evenwel* at 1123; 1133 (Thomas J., concurring).

[253] *Id.* at 1126-27 (majority opinion); 1133 (Thomas J., concurring); 1144 (Alito J., concurring).

[254] *Id.* at 1133 (Thomas J., concurring); 1144 (Alito J., concurring).

rejected (d),[255] but did not clearly affirm (b) or (c).[256] However, as the Court made clear, equality of representation requires equalizing the number of people per district. So, if the constitution requires equality of representation, the only options would be (b) or (d).

Prima facie, it is puzzling why the Court would be open to (c). To treat OPOV as compatible with this disjunction seems akin to holding, absurdly, that the rule of law decomposes into distinct principles so it requires that laws must be *either* clear *or* prospectively applied, providing latitude to lawmakers as to which rule-of-law principle they choose to satisfy at any given time. But there are at least two ways to explain the majority decision. First, we could regard it as an example of a "minimally theorized agreement",[257] with all the benefits,[258] and costs,[259] that this entails. The appellants argued that the correct resolution was (a). A minimally theorized agreement required the Court to reject (a), but not to affirm one of (b)–(d). Second, the majority may leave (c) on the table simply due to the strictness of the principle of equality of representation. *Ex hypothesi*, it requires that each constituent has a roughly equal opportunity to access their representative. The Court previously indicated a willingness to treat the number of people per district as an *inexact proxy* for the number of voters per district—assuming, in effect, that each district has a roughly equal number of voters per capita.[260] Via that assumption, equalizing the number of voters per district could also serve as an inexact proxy to roughly equalize the number of people per district.

So far, our working hypothesis seems to be bearing fruit. But it faces three serious hurdles. First, it requires equality of representation to be a constitutional principle. Yet the Court was pressed on this issue in *Evenwel*, and offered a concessive response:

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[255] The final footnote of the Ginsburg opinion noted the appellants' suggestion that "Texas could have roughly equalized the total population and eligible-voter population," and responded that "this Court has never required jurisdictions to use multiple population baselines", further noting that the appellants "never presented a map that manages to equalize both measures." *Id.* at 1132-33 n.15. But this cannot be a dispositive reason to reject (d). The Court has never required (a), (b), (c), *or* (d). The Court has never required that jurisdictions use any of these particular, disjunctive, or conjunctive population baselines simply because it has left unresolved the issue of which population baseline(s) is (or are) required.

[256] *See*, *e.g.*, Bradley, *supra* note 32, at 344-45. See also *supra* note 18.

[257] *See The Costs and Causes of Minimalism, supra* note 28, at 1433.

[258] In defense of minimally theorized agreements, see CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

[259] *See The Costs and Causes of Minimalism, supra* note 28.

[260] See especially Gaffney v. Cummings, 412 U.S. 735, 745-48 (1973).

> Appellants point out that constituents have no constitutional right to equal access to their elected representative. But a State certainly has an interest in taking reasonable, nondiscriminatory steps to facilitate access for all of its residents.[261]

The Court's response casts equality of representation not as a constitutional principle, but as a legitimate state interest in apportionment—alongside, say, contiguity. Others have argued that this response was a mistake.[262] While the constitutionality of OPOV is important, it is also not my main focus, so I mention this issue only to set it aside.

Second, equality of representation may be too permissive. It requires equalizing constituents' access to their representative, which is violated when some representatives receive far more suggestions, requests, and demands than others. But representatives could receive *unequal numbers of requests, suggestions, and demands* even though they receive *requests, suggestions, and demands from equal numbers of constituents*. Once we consider how districts differ, demographically and geographically, it is obvious that our representatives may not receive the same number of requests, suggestions, and demands *per capita*. Some districts will be relatively socially underprivileged, subject to more frequent and severe natural disasters, have large prisons,[263] or have any other features that mean that per capita its representative faces less pressure to provide constituent services, such as navigating public-benefits bureaucracies. If a district is sparsely populated, its residents will also have a less effective pipeline to contacting their representative in comparison to residents of a densely populated urban district.[264]

It may seem that this problem can be resolved by again appealing to the strictness of equality of representation. The number of people per district could serve as an inexact proxy for the number of requests and suggestions issued to district representatives.[265]

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[261] *Evenwel*, 136 S. Ct. at 1132 n.14.

[262] See Bradley, *supra* note 32 at 391-92 (explaining the appellants' position then arguing that Justice Ginsburg "uncritically assumed" that position, which "is a mistake.").

[263] Levinson, *supra* note 26, at 1288-89, notes that incarcerated persons "are, for purposes of computing the relevant districts, non-persons" as their presence or absence in a district does not make a difference to "equalizing the practical burdens" on elected officials in apportionments.

[264] ELY, *supra* note 2, at 124 ("Urban working people" have "historically have had an effective pipeline to the governor" than rural "farmers."). An urban district, for similar reasons, provides a more effective pipeline for its constituents to issue requests and suggestions to their elected legislator.

[265] Bradley, *supra* note 32 at 396 ("The simplest way to recognize the right to petition on an equal basis is to ensure that each legislature can receive petitions from the same number of people.").

But this misconstrues the problem. It explains why equality of representation *permits* equalizing the number of people per district; it does not explain why equality of representation *require* the use of this specific inexact proxy. An apportionment scheme with substantially unequal numbers of people per district may utilize a different inexact proxy and still equalize the demands on districts' representatives. It would then similarly serve to equalize constituents' opportunity to access representatives. Hence, equality of representation permits significantly unequal numbers of people per district.

Third, equality of representation may also be too restrictive. Suppose you and I can each write letters to our district representative, but I can also cut a fat check for their reelection campaign. It seems doubtful that we have equal access to our representative, or equal opportunity to informally influence political outcomes. This principle is often recognized to make radical demands on the social conditions of democracies.[266] If it is a component of OPOV, then OPOV may once again be too demanding. The problem here, to be clear, is not that equality of representation is too demanding to be a plausible principle of political equality; it is instead that its full implications may be too radical for any Court, let alone the current Court, to consider it to be constitutionalized.

The principle of equality of representation, then, is arguably non-constitutional, too permissive, and too demanding. But voter equality is where the real trouble starts.

C—Voter Equality

The Court in *Evenwel* provides some guidance about the content of the distinct principle of voter equality. It suggests that voter equality is violated by either "vote dilution" or "the debasement of voting power."[267] Vote dilution and the debasement of voting power are not obviously equivalent injuries (more on this below). But both suggestions fit with the earlier proposal that OPOV requires equality of opportunity to influence political outcomes, where voter equality—as a subprinciple—requires equality of opportunity over formal modes of influencing political outcomes.

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[266] *See*, *e.g.*, Kolodny, *supra* note 247 at 383 (arguing that equal opportunity of formal influence over political outcomes "demands deflatingly little of formal procedures", whereas equal opportunity of informal influence over political outcomes "demands a great deal, perhaps impossibly much.").
[267] Evenwel v. Abbott, 136 S. Ct. 1120, 1131 (2016).

We can make more progress on what the content of the subprinciple of voter equality must be, if we are to solve the parity problem, by considering its strictness and scope. With respect to its strictness, it must be a principle of exact equality. If both voter equality and equality of representation both turn out to require rough equality, then bifurcating OPOV into two distinct subprinciples provides no path to explaining why OPOV requires roughly equal people per district and exactly equal votes per voter.

What about the scope of voter equality? It must be at least somewhat broad. That is, it must explain why OPOV can be violated in direct and indirect democratic elections, by unequal numbers of votes per voter or per representative, and so on. Suppose that all districts are equipopulous, but I hold one vote while you hold .95 votes, or my district elects a representative who holds one vote but yours elects a representative who holds .95 votes. By giving some voters or some representatives fractionally fewer votes than others, we give some individuals fractionally less opportunity over formal modes of influencing political outcomes, such as changing what bills become legislation.

The most important question is whether the principle of voter equality can also be violated by unequal numbers of voters per district. There are many reasons to think that it can. This is suggested by the Court in *Evenwel*: representational equality can be violated by unequal numbers of *constituents* per district, while voter equality can be violated by unequal numbers of *voters* per district.[268] The Court elsewhere suggests that the weight of your vote is less than the weight of mine if there are more voters in your district than mine—even if the total number of people in our districts is the same because there are more children or non-citizens in my district than yours.[269]

Notably, the best accounts of the content of voter equality will also have this implication—as they should if they are accounts of equality of opportunity over formal modes of influencing political outcomes. We could identify the content of voter equality with the equal shares principle, and hence understand the dilution of your vote in terms of the reduction in your share of the electoral outcome.[270] Alternatively, we could identify the content of voter equality with a principle of equal voting power, where

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[268] *Id.*

[269] The Court has noted this. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 746 (1973).

[270] *See supra* Part IC.

your voting power is the probability that your vote changes the outcome.[271] (Notably, while many defend the view that OPOV or voter equality means equal voting power,[272] this view was rejected by the Court—not once,[273] but twice.[274]) If each voter casts one vote and each district elects one representative who casts one vote, but your district has many more voters than mine, it follows that your vote has less weight than mine. Your share of the outcome is less than mine. Your voting power is less than mine. More generally, you have less opportunity to formally influence political decisions than me.

Our earlier discussion of what I called *parity* also strongly suggests that voter equality can be violated by unequal numbers of voters per district, votes per voter, and votes per representative.[275] Making your district have nine times as many voters as mine and giving me nine times more votes than you have an identical effect on diluting your vote relative to mine.[276] There is "no mathematical disparity" between our votes if your district has seven times as many voters as mine, but your district also elects seven times more representatives than mine.[277] The Court's discussions of, and reliance on, similar

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[271] John F. Banzhaf III influentially defended the view that OPOV means equality of voting power. Your vote can have less voting power than mine when, compared to my vote, (i) if you vote, your vote is less likely to change the electoral outcome in your district (e.g. which candidate is elected to the legislature), or (ii) if you vote and your changes the electoral outcome in your district, it is less likely to change the overall electoral outcome (e.g. which party controls the legislature and passes legislation). *See* Banzhaf, *supra* note 102. *See also* John F, Banzhaf III, *One man, 3.312 votes: a mathematical analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968).

[272] In THE MEASUREMENT OF VOTING POWER, Felsenthal and Machover wrote that when the Court embraced OPOV, it "intended to equalize the 'worth' of citizens' votes. If this is to mean anything at all, it must be equalizing their voting power." FELSENTHAL & MACHOVER, *supra* note 133 at 86. (1998: 86). The appellants in *Evenwel* cast their complaint in terms of equality of voting power. *Evenwel*, 136 S. Ct. at 1130.

[273] Whitcomb v. Chavis, 403 U. S. 145, 146 (1971): the "theoretical" methodology of voting power indices fails to "take into account any political or other factors which might affect the actual voting power of the residents." This was, as Justice Harlan noted in dissent in that case, a spurious argument. *Id.* at 168 (Harlan J., dissenting) ("Precisely the same criticism applies, with even greater force, to the "one man, one vote" opinions of this Court. The only relevant difference between the elementary arithmetic on which the Court relies and the elementary probability theory on which Professor Banzhaf relies is that calculations in the latter field cannot be done on one's fingers"). Justice Harlan went on to make a more persuasive objection to the Banzhaf index, showing that "minor variations in assumptions can lead to major variations in results." *Id.* at 169. For a proof vindicating Justice Harlan's argument, see Bernard Grofman, *Fair apportionment and the Banzhaf index,* 88 THE AMERICAN MATHEMATICAL MONTHLY 1 (1981).

[274] Bd. of Estimate of NYC v. Morris, 489 U.S. 688, 689 (1989).

[275] See *supra*, Part IIA.

[276] *Reynolds* 377 U. S. 562-63.

[277] 379 U.S. 433 (1965) at 437.

claims about parity between a range of inequalities is an important feature of its OPOV jurisprudence. Parity is easily explained by the principle of equal shares.[278] (We cannot explain parity by appealing to the principle of equal voting power, but that principle still enables us to make meaningful comparisons between these inequalities: making your district have *nine* times as many voters as mine has an identical effect on diluting your vote relative to mine as giving me *three* times as many votes as you.[279]) If OPOV contains no subprinciple that requires equal numbers of votes per voter, votes per district representative, and voters per district, it is unclear what makes any comparisons between such inequalities meaningful, or what makes it constitutionally permissible to introduce inequalities in representation as a cure for malapportionment.

So, there is good reason to think that voter equality must require exact equality, and can be violated by unequal numbers of votes per voter, votes per representative, voters per district. But once more, we cannot simply consider the strictness and scope of voter equality in isolation. We must consider these commitments in conjunction. If voter equality is broad principle of exact equality, then *voter equality requires exactly equal numbers of voters per district*. This makes voter equality, as a component of OPOV, highly restrictive—it is incompatible with any degree of inequality in apportionment! It also makes voter equality, as a component of OPOV, determinate with respect to the population baseline that must be used in apportionment. Of the four possible outcomes—equalizing the number of: (a) voters; (b) people; (c) voters *or* people; or, (d) voters *and* people—voter equality rules out (b) and (c), leaving (a) or (d). (Notice also that since voter equality requires exactly equal numbers of voters per district, it is incompatible with equalizing the number of people per district as an inexact proxy.) These implications are inconsistent with the Court's decision in *Evenwel*, or indeed any

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[278] See *supra*, Part IIA.

[279] This result can be derived from two generalizations about voting power, both of which were identified by Lionel S. Penrose. (Banzhaf's voting power index is a reinvention of Penrose's voting power index.) The first is *Penrose's square root law*: if n voters can each cast one vote, the voting power of any voter is $1/\sqrt{n}$. The second is *Penrose's limit theorem*: in a sufficiently large election, the relative voting power of two voters tends asymptotically to the relative difference in the number of votes that each can cast. If in a large election you can cast one vote when I can cast nine, my voting power tends to be *nine* times yours (via Penrose's limit theorem). But if there are n voters in my district and $9n$ voters in your district, my voting power is only *three* times yours (via Penrose's square root law, my voting power is $1/\sqrt{n}$ and yours is $1/\sqrt{9n}$, so the difference in our voting power is equivalent to three, which is the square roof of nine). See Lionel S. Penrose, *The elementary statistics of majority voting*, 109 J. ROYAL STAT. SOC'Y, 53 (1946), *See also* Felsenthal & Machover, *supra* note 133, ch. 3.

of the Court's decisions and reasoning throughout the malapportionment cases. They make OPOV far too restrictive to be acceptable to the Court.

As such, if we are to solve the parity problem, voter equality must be somewhat narrow in its scope. It must be a principle of exact equality that is violated by a range of inequalities (in the number of votes per voter, or the number of votes per representative), but *not* by any inequalities in the number of voters per district.

However, if voter equality must be somewhat narrow in its scope, we face two significant problems. The first is that we no longer have a non-circular account of its content. How can we identify voter equality with a principle of political equality while also holding that malapportionment in cases like *Reynolds* and *Wesberry* was consistent with that principle? How, indeed, can we identify voter equality and representational equality as subprinciples of OPOV if malapportionment can never violate voter equality? If there is exact equality in the number of votes per voter and in the number of votes per representative, but my district of three voters elects one representative while your district of three million does the same, your vote does not have the same weight as mine. There is no plausible candidate for the content of voter equality with the requisite scope to make this solution to the parity problem tenable. So, if we bifurcate OPOV to solve the parity problem, we make the content of a component of OPOV a mystery.

The second problem is independent, and inescapable. If voter equality is violated by inequalities in the number of voters per district, then it is also an operative principle in the malapportionment cases. Malapportionment was killed by both parts of OPOV. By contrast, if voter equality is not violated by inequalities in the number of voters per district, then it was never an operative principle in the malapportionment cases.

Assume for the moment that we understand precedent and *stare decisis* in terms of the *ratio decidendi* of past decisions.[280] Any support for a principle of voter equality in the malapportionment cases would be mere *dicta*. So, voter equality would not constrain any future court—it is not the principle that determined the result of any past case, so it

[280] See Frederick Schauer & Barbara A Spellman, *Precedent and Similarity*, *in* PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 240 (Timothy Endicott, Hafsteinn Dan Kristjánsson, & Sebastian Lewis eds., 1 ed. 2023), (noting the *ratio decidendi* view is the "traditional answer to the question of what makes some earlier decision a controlling precedent" and collecting citations).

is not binding in any future case. This problem does not depend on the assuming that precedent and *stare decisis* are understood in terms of a decision's *ratio decidendi*; similar problems arise on other accounts horizontal and vertical precedential constraint.[281]

To see the force of the problem, it may help to return to the earlier analogy to the rule of law. Imagine that a significant line of cases before the Court constituted its 'rule of law' jurisprudence; but in each case where the Court held that a law was unconstitutional because it violated the rule of law, the law in question was vague. Now imagine that the Court was confronted with a precise, retroactive law. Once we hold that the rule of law is best understood as decomposing into a plurality of distinct, narrow principles, how should the Court decide this case? The Court could, and perhaps should, decide that the law in question is also unconstitutional because it violates the rule of law. But it would not be *bound* do to so by the weight of its rule of law jurisprudence. The operative principle across its past cases is the narrow principle requiring laws to be clear; no past case was ever decided on the distinct principle that laws must be prospectively applied.

The same lesson applies to the Court's OPOV jurisprudence. Suppose the Court were faced with a case where some voters received more votes than others. For example, perhaps a law gave parents extra votes as a pronatalist policy aimed at rewarding and incentivizing childbirth; the details of the relevant law do not matter much. Suppose that the Court ruled that such a law does not violate OPOV and is constitutionally permitted. Such a decision would, like *Dobbs v. Jackson Women's Health Organization*,[282] likely be criticized not only for embracing a dim view of democracy,[283] but for flagrantly

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[281] This can be substantiated by considering two leading rivals to the *ratio decidendi* view, each of which is discussed by Schauer & Spellman, *id.* One rival locates "the constraining or precedential force" of an earlier case in "the conjunction of the material facts of the earlier case, as identified by the judge in the earlier case, with the outcome that the earlier case had reached based on those material facts." *Id.* at 244, *citing* Arthur L Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930). Across its OPOV jurisprudence, when the Court has found that OPOV is violated, the material facts never involved unequal numbers of votes per voter. Another rival locates the precedential force of an earlier case in "the language of the earlier decision", where it is "understood as equivalent to a rule set forth in canonical language and subject to interpretation as such." Schauer & Spellman, *supra* note 280 at 245, *citing* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989), and Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551 (2020). Across its OPOV jurisprudence, the Court's canonical language does not unambiguously set forth the principle of voter equality; and it certainly does not set forth voter equality as a principle of exact equality.

[282] 597 U.S. 215 (2022).

[283] See Melissa Murray& Kate Shaw, *Dobbs and democracy*, 137 HARV. L. REV., 728 (2023).

flouting *stare decisis*.[284] But would such criticism be apt? If OPOV bifurcates into narrow principles of representational equality and voter equality, then the Court's OPOV jurisprudence does not make the latter principle constrain the Court.[285] And only the latter principle would be violated by inequalities in the number of votes per voter. Thus, the issue of whether the Constitution permits a wide range of laws such that give unequal votes to voters—such as Demeny voting—must be open and uncontested. So, we are once more left with the implication that the operative principle of OPOV that runs across the malapportionment cases turns out to be far too permissive.

CONCLUSION

In many respects, it is surprising that there should be so great a mystery about OPOV. As Lana Guinier and Pamela Karlan wrote, if you happen to meet "the average person on the street" and ask "her what political equality means", then "she is likely to reply 'one person, one vote.'"[286] Hence the celebratory tenor of the standard narrative that malapportionment was rife until the civil rights era, when it was killed by OPOV.

That narrative has long faced resistance, because the Court never made the content of OPOV particularly clear: "For 50 years, the Court has struggled to define what right that principle [OPOV] protects."[287] Determining the content of the principle is prior to determining its constitutionality; we cannot know if this principle of political equality is also a constitutional principle without knowing what principle is at issue. Nor, for that matter, can we explain how the Court's OPOV jurisprudence guides and constrains the exercise of judicial discretion without explaining what right is protected. If it is the right to an equally weighted vote, this must be defined and quantified, so that we can see through the haze of slogans and numerology to determine what violates the principle.

This Article sought to cut through that haze by analyzing the Court's commitments about the scope and strictness of OPOV. While these commitments are defensible in isolation, they are deeply objectionable in conjunction. The Court endorses OPOV as a

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[284] *See*, *inter alia*, Nina Varsava, *Precedent, reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2022), and Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV 684 (2023).

[285] Recall that the Court did not find that OPOV was violated in either case where it considered unequal numbers of votes per voter, hence the Salyer-Ball exception to OPOV. See *supra* notes 72-79.

[286] Guinier & Karlan, *supra* note 10, at 207.

[287] Evenwel v, Abbott, 136 S. Ct. 1120, 1136 (2016) (Thomas J., concurring).

broad principle of rough equality. As a broad principle, OPOV requires equal numbers of people per district and votes per voter. It would prohibit a map that makes some districts half as populous as others, just as it would prohibit a law that gives some citizens a full vote and others a half-vote. As a principle of rough equality, OPOV permits some inequalities in the number of people per district; if my district is five percent less populous than yours, our votes are still roughly equal. But as a broad principle of rough equality, it would also permit a law that gives some citizens a full vote and others .95 votes. This is the inexorable implication of taking OPOV to be a broad principle of rough equality: it is too permissive. It allows procedures that give some voters fractionally more votes, eroding our equality at the ballot box.

What makes this problem so vexing is that it follows inexorably from the Court's commitments about the scope and strictness of OPOV. This only leaves two ways out. We can take the operative principle in the malapportionment cases to be a broad principle of exact equality, or we can take it to be a narrow principle of rough equality. But neither path leads to a neat resolution of the problem. Either way, the content of OPOV ends up being either too restrictive or too permissive—or both at once.[288]

We are left, then, with a murder mystery that is not simply unsolved, but apparently unsolvable. That implication is, to put it mildly, unsettling. OPOV is supposed to be a cornerstone of America's constitutional democracy. If it is too restrictive or too permissive—or too unsettled—then when it is inevitably stress-tested, it will prove too precarious or too feeble to provide a guardrail against democratic backsliding.

[288] I provided an independent argument for this conclusion—which does not turn on the strictness of the principle—in Wodak, *One Person, One Vote*, *supra* note 113.