No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a not-for-profit, non-partisan think tank, and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and to prevent manipulation of electoral rules. The Brennan Center conducts empirical, qualitative, historic, and legal research on redistricting and electoral practices and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center takes an interest in this case because a ruling in favor of Appellants would undermine the rights of voters and residents of Texas, especially already underrepresented racial and ethnic minorities, and would violate the established principle of equal representation for equal numbers of people.

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[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for the Brennan Center affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

Apportionment based on total population not only is consistent with the Equal Protection Clause, but is deeply embedded in our Constitution, our Nation's history, and the longstanding actual practice of Government. *See NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2578 (2014). It gives life to the principles and values of equal representation that the Framers declared essential to representative democracy and that the Fourteenth Amendment commands to ensure a government of and for the people.

These values are deeply rooted in our constitutional heritage. The Framers believed that legislatures should be a portrait of the people "in miniature" and chose in Article I, Section 2 to apportion congressional seats among the states by "the whole number of free persons . . ." in each state. Congress built on Article I, Section 2 and made population the basis for apportionment of all but four of the territorial legislatures it created and for almost all of the conventions it called to draft constitutions for new states.

After the Civil War, the Reconstruction Congress—after extended debate over apportionment—embraced total population when it wrote the Fourteenth Amendment, mandating that "Representatives shall be apportioned among the several states according to their respective *numbers*, counting the *whole number of persons* in each State . . ." (emphasis added).

The history of apportionment in the states is equally clear. After the Revolution, states embraced the Framers' principle of "no taxation without representation" and, with limited exception, chose to base representation in their legislatures on equality of inhabitants rather than equality of voters—a trend that became almost universal after the Civil War. Only 17 of 123 state constitutions between 1776 and 1920 apportioned legislatures based on voters or votes cast, and today, some form of total population is the basis for apportionment of all state legislatures.

The rare uses of voter apportionment bases almost always reflected efforts to disadvantage unpopular or disfavored groups. Through manipulation of apportionment rules, politically dominant groups of the day were able to deny equal representation to parts of states where African Americans in the South, Irish-Americans in Massachusetts, Mormons and Chinese in the Nation's western territories, and immigrants in New York City lived. That troubling history teaches why for 200 years the overwhelming practice, and the now settled constitutional tradition, is apportionment based on population.

Appellants claim this case presents a constitutional question of first impression, but history shows that the issue—who should count for purposes of apportioning representation—is neither new nor in need of rethinking. Debates over apportionment occurred throughout the Nation's history. As in this case, those debates more often than not were driven by the country's rapidly

changing demographics. Whenever those debates took place, they almost always came back to the same place: representative democracy is best achieved by representation based on population.

This Court's reapportionment cases are part of, and embrace, that history and firmly establish that total population always satisfies the Equal Protection Clause. This Court also has expressed a deep skepticism about the appropriateness of voter-based apportionment in light of its vulnerability to manipulation.

This Court should affirm the district court judgment and declare total population the presumptive basis for apportionment.

ARGUMENT

The question of how to ensure fair representation for all people has long been central to American political life. Debates over apportionment by the Framers and by lawmakers since, at both the state and federal levels, have been vigorous and often contentious. Out of those debates, the clear consensus is that the goal of representative democracy is best served by apportionment based on "numbers" of "persons" rather than voters.

As this Court explained, the Constitution must be construed "in light of its text, purposes, and our whole experience as a Nation," and informed by "the actual practice of Government." *Noel Canning*, 134 S. Ct. at 2578 (looking to historical practices to help decide the meaning of the recess appointments clause) (internal quotation marks omitted). In this

analysis, the Court has said "*we put significant weight upon historical practice*." *Id.* at 2559; *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). These practices illuminate the Constitution's values and guide application of its principles, particularly on "doubtful question[s] . . . on which human reason may pause." *Noel Canning*, 134 S. Ct. at 2559 (quoting *McCulloch* v. *Maryland,* 17 U.S. 316, 401 (1819)); *see also Ariz. State Legis.* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673–5 (2015).

The text, history and purpose of the Constitution's provisions addressing apportionment and centuries of government practice all confirm that apportionment based on total population best satisfies the Constitution's vision of representative democracy and the guarantee of equal protection to all persons.

I. USE OF TOTAL POPULATION FOR APPORTIONMENT IS ROOTED DEEPLY IN THE NATION'S HISTORY AND ITS CONSTITUTIONAL VALUES AND PRACTICES

A. The Framers and the Drafters of the Fourteenth Amendment Chose Total Population as the Apportionment Base Most Consistent with Representative Democracy

Debates over representation were central to the drafting of the Constitution and the Fourteenth Amendment. Each time, those debates affirmed the importance of equal representation for equal numbers of people as a core constitutional value.

1. The Founding Era and the Constitutional Convention

The Framers' views on equal representation were influenced by maladies that afflicted the British system. Many parliamentary districts had grown large and unwieldy, while others scarcely had any people. Other places, like the American colonies and Ireland, had no representation at all. This mattered little under the British belief in "virtual representation." Equality of actual representation was of no concern because "the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogeneous order with a fundamental common interest." Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 174 (1969).

The founding generation rejected virtual representation, which for them meant "taxation without representation." When it came time to draft the Nation's new Constitution, ensuring effective actual representation was among the major topics debated—and resolved—by the Framers. Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* 16 (1965).

The debate focused on ensuring representation for all people, not just the select class of voters. For the Framers, voting was a separate topic—a privilege to be limited to those with sufficient independence to act in the best interest of the community. Eric Foner, *The Story of American Freedom* 18–20 (1998). Such political independence could come only with financial independence. *Id.* at 18–19. Thus, most states maintained some form of property requirements for voting, and even the most democratic and egalitarian of post-Revolution constitutions, like Pennsylvania's, contained taxpaying requirements that disenfranchised "mainly paupers and domestic servants." *Id.* at 16.

Representation, however, was not so restricted. The revolutionary cry of "no taxation without representation" was not about making sure the small numbers of voters were represented, but making sure the sentiment of communities—voters and nonvoters alike—was reflected in legislative bodies. This led to protracted debate over how to allocate congressional representation among states and, after that issue was resolved, over the proper size of congressional districts. James Madison called this question the most "worthy of attention" in the

entire Constitution. The Federalist No. 55 (James Madison).

John Adams had written that a representative assembly "should be in miniature, an exact portrait of the people at large. It should think, feel, reason and act like them." John Adams, *Thoughts on Government* Apr. 1776 Papers 4:86-93. James Wilson echoed Adams' sentiments at the Constitutional Convention: "The Legislature ought to be the most exact transcript of the whole Society." 1 *Records of the Federal Convention of 1787* 142 (Max Farrand ed., 1911) [hereinafter Farrand]. George Mason stressed: "Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel." *Id.* at 134.

Wilson explained that seats in the popularly elected house of the new Congress should be apportioned by numbers of people, not voters: "equal numbers of people ought to have an equal number of representatives." *Id.* at 179. Under Article I, Section 2, even indentured servants, who were not entrusted with the vote, would count. Slaves also would count, albeit only as fractions of persons because of the Three-Fifths Compromise.

But it was not enough to have apportionment based on numbers. The danger of Congress becoming unrepresentative due to the size of districts also worried the Framers. If districts had too many people, delegates worried that representatives would "not possess a proper knowledge of the local circumstances of their numerous constituents" and might lack sympathy "with the feelings of the mass

of the people." The Federalist No. 55 (James Madison).

These concerns prompted George Washington to propose that the population of districts be decreased from 40,000 persons to 30,000—the only occasion where, as chair, he addressed the convention on a substantive issue. Christopher St. John Yates, *A House of Our Own or A House that We've Outgrown? An Argument for Increasing the Size of the House of Representatives*¸ 25 Colum. J.L. & Soc. Probs. 157, 175–76 n.112 (1992). Madison attempted to address these concerns with a proposed amendment to increase the size of the House as population grew. David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution* 470 (1996).[2]

For Madison, representation for all people (rather than just voters) was paramount, as he repeatedly discussed in the Federalist Papers. Representation of all persons would guarantee that "the inhabitants" of the Nation would "find sufficient inducements of interest to become willing parties to the [federal government]." The Federalist No. 43 (James Madison).

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[2] These concerns would be echoed when Congress passed the Apportionment Act of 1842, which ended the unrepresentative practice in some states of at-large congressional elections. As Sen. William Graham of North Carolina explained, single-member districts would guarantee the "personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." Cong. Globe, 36th Cong., 2d Sess. app. 749 (1842).

Even Anti-Federalist writers agreed. In the *Federal Farmer*, Melancton Smith called for: "A full and equal representation . . . which possesses the same interests, feelings, opinions and views the people themselves would were they all assembled." 1 Herbert J. Storing et al., *The Complete Anti-Federalist* 17 (1981).

In the end, with "full and equal" representation as the common goal, the Framers all came to the same conclusion: "Numbers . . . 'are the only proper scale of representation.'" *Wesberry* v. *Sanders*, 376 U.S. 1, 15 (1964) (quoting The Federalist No. 54 (James Madison)).

2. The Fourteenth Amendment

Eight decades later, drafters of the Fourteenth Amendment resumed the apportionment debate in the new light of abolition. Faced with millions of Americans freed from slavery and the Confederate states returned to the Union, the drafters considered using voters, citizens and total population for apportionment. Again, the debate settled on total population. For President Lincoln, government was truly representative only if it accounted for—and was accountable to—all of its constituents. As this Court would explain a century later, that is what Lincoln meant when he recommitted the reborn Nation to a "government of the people, by the people, for the people." *Reynolds*, 377 U.S. at 567–68.

The concept that all people should count had deep roots for Lincoln. A decade earlier in the midst of the nativist "Know-Nothing" movement that roiled

American politics of the 1850s and destroyed the Whig Party, Lincoln warned:

> As a nation, we began by declaring that *'all men are created equal*.' We now practically read it, 'all men are created equal, *except negroes*.' When the Know-Nothings get control, it will read 'all men are created equal, except negroes, *and foreigners, and catholics*.'

2 *The Collected Works of Abraham Lincoln* 322–23 (Roy P. Basler ed., 1953).

As Sen. Henry Cabot Lodge later explained, representation for Lincoln was not about representing voters, but all the people:

> [R]epresentative government rests upon certain broad principles in regard to which Lincoln spoke clearly and decisively. The basic theory of representative government is that the representative body represents *all the people*, and that a majority of that body represents a majority of *all the people*.

The Democracy of Abraham Lincoln: Address before the students of Boston University School of Law 9 (Mar. 14, 1913) (emphasis added).

While representation for all was foremost in the minds of Lincoln and his contemporaries, the Reconstruction Congress was wary of the potential political imbalance the Civil War had created. Section 2 of the Fourteenth Amendment was shaped by a paradox of abolition: the recently rebellious

states would see their representation in the House increase as the population of former slaves began counting as 5/5 instead of 3/5 for apportionment purposes, even while those states denied the vote to African Americans.

To avoid that injustice, some in Congress proposed to change the apportionment base from total population to citizens or voters. *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (statement of Rep. Thaddeus Stevens) (suggesting apportionment "among the States . . . according to their respective legal voters"); *cf.* Cong. Globe, 42nd Cong., 2d Sess. 407 (1872) (explaining Stevens's belief that using voters would encourage states to enfranchise African Americans). Representatives of New England states, however, objected to the proposed "legal voters" formula because their region had large numbers of immigrants and higher percentages of women (due to the migration of men to the West). George D. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment,* 30 Fordham L. Rev. 93, 95 (1961). Others feared that departure from total population would lead to political mischief and manipulation: "an unseemly scramble in all the States during each decade to increase by every means the number of voters," including by extending suffrage to women and aliens. Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine).

Many argued that total population should be retained for the same reasons the Framers selected it in Article I, Section 2. Blaine, for example, called population "the true basis of representation" and

argued that "women, children, and other nonvoting classes may have as vital an interest in the legislation of the country as those who actually deposit a ballot." *Id.*

A subsequent draft of the Fourteenth Amendment apportioned representation instead on the "whole number of citizens." Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 50–51 (1914). But Rep. Roscoe Conkling of New York proposed substituting "persons" for "citizens." *Id.* at 52. He explained:

> 'Persons,' and not 'citizens,' have always constituted the basis . . . . I believe it a wise and salutary provision, a solid block needed in the foundation of our structure.

Cong. Globe, 39th Cong., 1st Sess. 359 (1866). Conkling also expressed concern about the negative effect that a "citizen" apportionment base would have on states with large "alien" populations, noting the "considerable inequalities in this respect, because the number of aliens in some States is very large and growing larger." *Id.* Conkling's amended language was adopted. Kendrick, *supra*, at 52.

In addressing another version of the amendment, Sen. Jacob Howard of Michigan argued that since "an unequal distribution of voters" would lead to an "inequality" of representation, the "theory of the Constitution" required that the number of all persons remain the basis of apportionment:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States. It was desirable to avoid this inequality in fixing the basis. The committee adopted numbers as the most just and satisfactory basis and this is the principle upon which the Constitution itself was originally framed, that *the basis of representation should depend on numbers; and such, I think, after all, is the safest and most secure principle upon which Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.*

Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (emphasis added). Sen. George Edmunds agreed total population was necessary to preserve "the *original principle* that all society in some form is to be represented in a republican Government." *Id.* at 2944 (emphasis added).

The final version of the Fourteenth Amendment, approved by the Senate in June 1866, required apportionment based on total population. *Id.* at 2991. To satisfy concerns that some provision was needed to induce former rebel states to enfranchise African Americans, the second sentence of Section 2 provided that a state's representation

would be reduced in the same proportion as male inhabitants aged 21 were denied the vote. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 252–53 (1988).

B. Congress Repeatedly Rejected the Exclusion of Non-Citizens or Other Nonvoters from the Apportionment Base

Soon after passage of the Fourteenth Amendment, Congress passed the Apportionment Act of 1872, which built on the Fourteenth Amendment's apportionment of representation among the states by requiring that each congressional district within a state contain "as nearly as practicable an equal number of inhabitants." § 2, 17 Stat. 28.

Passage of the law was uncontroversial. The sole objection was made by Rep. William R. Stoughton, who argued unsuccessfully that fast-growing states like his should have the flexibility to underpopulate districts to take into account expected future growth. Cong. Globe, 42nd Cong., 2d Sess. 141 (1871).

Later, mass immigration from southern and eastern Europe would cause Congress to revisit the question of who should "count" in apportionment. Although immigration had always been a facet of American life, a large influx of immigrants arrived in America at the end of the nineteenth century, with the number growing from five million arrivals between 1881 and 1890 to nearly nine million between 1901 and 1910. McKay, *supra*, at 26. This

immigration boom, combined with the fact that immigrants increasingly settled in cities rather than on the frontier, rekindled debate about allocation of legislative power. *Id.*

In 1921, Rep. William Vaile of Colorado proposed to change apportionment laws to prevent a decrease in the number of seats of "more distinctly American population." 61 Cong. Rec. 6339 (1921); *see also* Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s* 50 (1990). Vaile argued that the Fourteenth Amendment had been drafted at a time when the number of immigrants "had not become sufficiently noticeable to be recognized as a danger or an evil." *Id.* He claimed that immigrants congregated in ethnic enclaves which allowed "alien elements [to] control the election of their Congressman even if they do not vote." *Id.*

Vaile's proposal did not succeed, but it set the stage for another debate when representatives from Great Plains and southern states with declining populations twice introduced legislation to remove aliens from the apportionment base. Eagles, *supra*, at 70–71, 77–78.

In 1928, Rep. Homer Hoch of Kansas proposed a constitutional amendment to exclude aliens from Congressional apportionment. He argued that counting aliens meant that states like his lost representation to immigrant-heavy New York. *Id.* at 70. Rep. Fiorello LaGuardia of New York responded that Hoch's proposal was contrary to the American idea of representation: "This is a representative

government, and the very purpose of making an apportionment according to population was to have everyone represented in the Federal Congress." 70 Cong. Rec. 699 (1928).

LaGuardia explained that non-citizens were equally affected by laws passed by Congress, paid taxes, and had been drafted during the First World War. *Id.* at 703. Echoing concerns in 1866 that apportioning on a basis other than population was open to manipulation, LaGuardia warned it was dangerous to allow politicians to decide who was worthy of representation:

> [T]he exclusion of aliens is only the first step in getting away from a popular and constitutional government of free men . . . . Perhaps this is only the entering wedge—first to exclude aliens from the count. And then the next step will be to exclude those who do not own property; and then the next step will be to exclude all those who do not own real property, until the government will be controlled entirely by a small privileged class, as it was in England at the time of the American Revolution.

Id. at 704. Other representatives protested that Hoch's amendment would amount to "taxation without representation." *Id.* at 705.

In 1929, the Senate, likewise, debated a proposed amendment to apportionment legislation offered by Sen. Fredric Sackett of Kentucky that would exclude aliens from the apportionment base.

Sackett argued that "[t]he question of citizenship was not pertinent at th[e] time [of the Founding], but to-day it is doubly pertinent" because of the wave of immigration from southern and eastern Europe in recent decades. 71 Cong. Rec. 1907 (1929). Expressing doubts about the loyalty of immigrants, his amendment would "reserve the American Government for those who have faith in the Nation." *Id.*

Sen. Carraway of Arkansas said it was "unthinkable" that aliens could not serve in Congress but yet could vote indirectly for those offices because of apportionment. *Id.* at 1967. Sen. Capper of Kansas "pointed out that the aliens in five northeastern states would have strength in the electoral college equal to his entire state." Eagles, *supra*, at 77. In a preview of contemporary politics, Sen. James Heflin of Alabama claimed that most immigrants were in the country illegally and called them "crooks, criminals, kidnappers, bandits, terrorists, racketeers, and 'refuse of foreign countries.'" *Id.*

Sackett's proposal was rejected. Much of the counterargument rested on taxation without representation. Sen. Sam Bratton of New Mexico, when pressed by proponents of the change to explain why non-citizens should be included in apportionment, responded:

> [The Constitution was based] upon the theory that aliens were subject to taxation in this country and consequently were entitled to

> representation as a corresponding right accompanying that obligation. A foreigner has always been subject to taxation . . . . [H]e must pay every ordinary species of property tax the same as a citizen of this country. *I dare say that it was felt by the framers of the fourteenth amendment that, although a foreigner could not vote . . . so long as he was compelled to pay tribute to the Government through taxation, he was entitled to be represented.*

71 Cong. Rec. 1912 (1929) (emphasis added). Sen. David Walsh of Massachusetts worried that, if the amendment succeeded, efforts might be made to bar other groups, such as citizens who did not exercise their right to vote. Eagles, *supra*, at 77–78.[3]

Repeatedly throughout our history, Congress reaffirmed that apportionment based on total population is essential to representative democracy. Relying on these debates, one court found that it is "generally accepted that [to exclude aliens from the apportionment base] would require a constitutional amendment." *Fed'n for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576–77 (D.D.C. 1980).

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[3] The provision requiring allocation according to equal numbers of inhabitants would remain a part of federal apportionment acts until 1929, when it was removed as part of a compromise to allow gerrymandering. *See Wood* v. *Brom*, 287 U.S. 1, 7–8 (1932). *Wesberry* v. *Sanders*, *supra*, restored the total population requirement as constitutionally mandated.

C. Congress Required Total Population-Based Apportionment in Acts Regulating Territories and the Admission of New States

The wide practice of population-based apportionment—and the general rejection of voter-based apportionment—also is reflected in the way Congress governed territories and admitted new states.

In 1787, the last Congress under the Articles of Confederation passed the Northwest Ordinance governing territories west of the Ohio River acquired under the Treaty of Paris. McKay, *supra*, at 21. The Ordinance provided for apportionment of a territorial assembly based on the number of "free male inhabitants." Northwest Ordinance of 1787, *in The Northwest Ordinance 1787: A Bicentennial Handbook* 31–77 (Robert M. Taylor, Jr. ed., 1987). The same apportionment formula was followed by Congress in the organic acts for Kentucky (1790), the Mississippi Territory (1798), Indiana (1800), Michigan (1805), and Illinois (1809).[4] The territorial legislatures for Missouri (1812) and Arkansas (1819) similarly apportioned not on the basis of voters, but all "free white male inhabitants" regardless of age, citizenship, or eligibility to vote. 4 Thorpe, *supra*, at 2140; 1 Thorpe, *supra*, at 262.

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[4] 1-7 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now Or Heretofore Forming the United States of America* (1909); McKay, *supra,* at 275–458.

Then, beginning with the Wisconsin Organic Act in 1836, Congress broadened the apportionment formula to include all inhabitants. 7 Thorpe, *supra,* at 4067. Congress used total population to apportion territorial legislatures, with minor differences in the treatment of Indians, in 12 of the 16 organic acts passed from 1838 onward.[5]

Most state constitutional conventions Congress created also used total population. Of the 19 constitutional conventions between 1802 and 1910, 16 apportioned representation on the basis of population.[6]

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[5] The organic acts for territories of Iowa (1838), Oregon (1848), Minnesota (1849), New Mexico (1850), Utah (1850), Colorado (1861), Nevada (1861), the Dakotas (1861), Arizona (1863), Wyoming (1868), the District of Columbia (1871), and Oklahoma (1890) all apportioned territorial legislatures based on total population. *Id.* The four exceptions were the organic acts for Washington (1853), Kansas-Nebraska (1854), Idaho (1863), and Montana (1864), which used "qualified voters" for apportionment. *Id.* Records from the Committee on Territories for this period are incomplete, leaving the reasons for variances uncertain. *See The American Territorial System* 95 (John Porter Bloom ed., 1969). However, anti-Mormon bias may have been a factor in the Western territories. *See supra,* II.A.

[6] Constitutional conventions for Ohio (1802), Nevada (1864), Nebraska (1864), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), and Oklahoma (1906) were apportioned explicitly on a total population basis. McKay, *supra*, at 275–458. Conventions for Louisiana (1811), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Missouri (1820), Minnesota (1857), and Utah (1894) either relied on apportionment of territorial legislatures or specified representation for each county. *Id.* Only constitutional conventions for Colorado (1875) and Arizona/New Mexico (1910) were based on votes cast in the last election. *Id.*

D. Most State Constitutions Required Apportionment on the Basis of Total Population Prior to the 1960s Reapportionment Cases, and Nearly All States Have Adopted Some Form of Total Population Apportionment Since

At the state level, population-based apportionment also has been favored, and voter-based apportionment disfavored.

At the time of independence, apportionment was generally based on counties or towns (following the English model), but, even in those states, apportionment often loosely correlated with population because of provisions giving greater representation to larger towns. McKay, *supra*, 16–17. After the Revolution, many new state constitutions embraced some form of population-based apportionment more directly, starting with the Pennsylvania constitution of 1776, which explicitly adopted total population. *Id.*

As new states joined the Union, the overwhelming number apportioned based on population, at least in one house. One scholar calculates that in original constitutions, "32 upper houses and 26 lower houses were apportioned essentially on the basis of population," even after application of provisions such as those guaranteeing minimum representations to counties. Robert G.

In the case of Arizona/New Mexico, poor census data appears to have been behind the use of votes rather than persons. H.R. Rep. No. 2079, at 5 (1909).

Dixon, *Democratic Representation: Reapportionment in Law and Politics* 76 (1968). In the original constitutions of 21 states, both houses were apportioned effectively according to population. *Id.*

What is clear is the near complete rejection of voter-based apportionment. Of the 123 state constitutions adopted between 1776 and 1920 (excepting Confederate state constitutions), only 15 used qualified electors, and only two used votes cast, for apportionment.[7] Four other states at various points excluded aliens from their apportionment bases.[8] Even these states, however, counted citizen children and other nonvoters such as women. *Id.* By contrast, 185 chambers under 92 constitutions during this period were apportioned on some form of population.[9] *Id.*; *see* Appendix*, infra*.

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[7] Florida (1868-85), Kentucky (1799-1890), Louisiana (1812-52, 1864-68), Massachusetts (1857-1967), Mississippi (1869-90), New York (1777-1821), Tennessee (1834-1966), and Texas (1845-1965). Douglas Keith and Eric Petry, *Apportionment of State Legislatures, 1776-1920*, available at http://www.brennancenter.org/analysis/apportionment-state-legislatures-1776-1920. Idaho apportioned its first legislature in 1889 on the basis of votes cast in the last delegate election, and from 1918-1966, Arizona used votes cast in the last gubernatorial election before the provision was found to be unconstitutionally discriminatory. *Id.*; *see also Klahr* v. *Goddard*, 250 F. Supp. 537, 541–42 (D. Ariz. 1966).

[8] New York from 1821-1969 and North Carolina from 1868-1968 both excluded aliens. Maine (1820) and Nebraska (1920), in theory, still do but, in practice, no longer do. Keith and Petry, *supra*; McKay, *supra*, at 336, 366, 381, 391.

[9] A handful of other states during this period apportioned legislative chambers based on taxes paid or fixed geographic units. Keith and Petry.

To be sure, even where states adopted population for apportionment, they often did so imperfectly because of efforts to shoehorn representation of people into the framework of counties and territorial units. This would play a key role in the malapportionment crisis of the twentieth century. Early on, populations were often fairly evenly distributed across each state, and there was little hesitation about expanding the size of legislatures as population grew, meaning that population variances were relatively minimal. McKay, *supra*, at 25–26. But as Americans increasingly moved to cities and towns, and rural counties depopulated, disparities became wider. *Id.* at 26. By the 1960s, this, combined with the refusal of many legislatures to redistrict at all, meant that apportionment in most states bore little relation to actual population. *Id.* at 28.

Since *Reynolds*, however, all states use total population for apportionment, with narrow adjustments in only eight states for various non-residents.[10] None apportion on the basis of voters or citizens. *Id.*

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[10] California, Delaware, Maryland, and New York exclude from apportionment prisoners whose domicile before incarceration was outside the state. *See* App. To Appellee's Brief. These exclusions make total-population counts more accurate—the states count incarcerated persons where they resided before incarceration, rather than where prisons are located. Counting them in prison districts would artificially inflate the population and representation of the prison districts, where the incarcerated persons share no community of interest. *See, e.g.*, *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887, 895–97 (D. Md. 2011), *aff'd* 133 S. Ct. 29 (2012). Washington excludes non-

II. APPORTIONMENT BASES OTHER THAN TOTAL POPULATION HAVE BEEN WIDELY MANIPULATED FOR DISCRIMINATORY PURPOSES

In the infrequent instances in which Congress or states deviated from apportionment based on total population, history shows that politics of exclusion or outright discrimination was at work.

A. Idaho

In the Mountain West, rampant anti-Mormon sentiment in the nineteenth century fueled passage of laws designed to weaken the political power of a fast-growing community that many saw as anti-American. In the 1880s, Congress and Idaho's territorial legislature passed laws disenfranchising Mormons. Joseph H. Groberg, *The Mormon Disfranchisements of 1882 to 1892,* 16 BYU Stud. 399, 400–01 (1976).

Efforts to limit the power of Mormons in Idaho dominated debates in 1889 over the form of the proposed state constitution. The constitutional convention prohibited Mormons from voting and denied representation to heavily Mormon southern Idaho by apportioning the new state's legislature according to the "number of votes cast" rather than total population. When asked why the number of

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resident military personnel, and Kansas and Hawaii exclude non-resident military personnel and out-of-state students. *See* App. To Appellee's Brief. The constitutions of Maine and Nebraska, in theory, exclude aliens and New Hampshire's constitution allows the legislature to exclude non-residents, but the practice in all three is to count everyone. Keith and Petry.

votes rather than population was being used, the chairman of the drafting committee explained that non-voting Mormons should not be allowed a "large" amount of representation:

> Because it was thought it would not be proper to give the Mormon counties which cannot vote so large an amount of representation as it would give them if the representation was given in accordance with population.

1 *Proceedings and Debates of the Constitutional Convention of Idaho, 1889* 487 (I.W. Hard ed., 1912).

B. New York

In New York, hostility toward immigrants drove the decision in 1821 to exclude aliens, along with "paupers and persons of colour [*sic*] not taxed" from the state's apportionment base. The champions of the change argued that immigrants (largely in New York City) were "unsound" and that counting them would be "injurious if not dangerous to the independence of the country." *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York* 410 (Nathaniel H. Carter et al. eds., 1821).

In opposition, Delegate Abraham Van Vechten argued that the proposed rule improperly equated representation with voting:

> [T]he idea appears to have been entertained by some gentlemen present,

> that none are represented in our legislature, but those who have a right to a voice in the election of its members. This is a mistake—all classes are represented. There may be a vast amount of property owned by persons not possessing the right of suffrage; and is this to have no weight, or receive no consideration? All classes of the community have a right to representation—and having proceeded thus far in admitting a large portion of voters in the country, we are bound in duty to render an equivalent to the inhabitants of the city of New-York.

Id. at 409.

The proposed apportionment rule passed, and New York excluded aliens until the 1960s. The underrepresentation of New York City in the legislature had precisely the disparate impact the Framers feared: while nearly half the population of New York lived in New York City in 1961-62, only 38 percent of state funds distributed to local governments went to New York City. McKay, *supra*, at 56.

C. Massachusetts

The wave of Irish Catholic immigration to Massachusetts led to efforts to underrepresent immigrant-heavy areas.

An effort to adopt a "legal voters" apportionment base in 1853 failed, largely based on

the force of arguments rooted in the principles of the Framers. One opponent had vocally declared that the very purpose of the American Revolution was to make sure that representation and taxation "go together":

> By adopting such a basis as this, we shall violate what I have supposed has always been considered as the leading principle at the very foundation of our government, that representation and taxation should go together. What do [the] gentlemen propose? That none but legal voters shall be reckoned as the basis of representation? Will they say that the remainder of the population shall be omitted in making up the taxes? It strikes me, that this would be a violation of the very principle which laid at the foundation of our Revolution.

Official Report of the Debates and Proceedings in the State Convention: assembled May 4, 1853, to revise and amend the constitution of the commonwealth of Massachusetts 194 (Harvey Fowler ed., 1853). Another argued that populated areas needed representation even if many of the inhabitants were immigrants:

> The very reason why so large a number of inhabitants concentrate in these large cities is because the great interests of business are concentrated there, and those interests require

> legislation in proportion to their novelty, magnitude, and importance.

Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, 366 (1930).

But after the Know-Nothings captured the governor's office and legislature in 1854, they "proposed and passed legislation aimed at restricting the strength of the growing Irish community in Boston . . . [including] a legislative redistricting that would reduce the number of seats in predominantly immigrant Boston." Steven Taylor, *Progressive Nativism: The Know-Nothing Party in Massachusetts*, 28 Hist. J. Mass. 167, 167–68 (2000). In 1857, the Know-Nothings succeeded in amending the state constitution to switch the apportionment base from "inhabitants" to "legal voters." 3 *Debates in the Massachusetts Constitutional Convention, 1917-1918* 161 (1920). As with New York, this new apportionment formula would last until the 1960s. *Supra* at 23, n.7.

D. The Southern States

Five of the eight states that at one point apportioned using voters were in the South.[11] These were often instances designed to disempower and deny representation to African Americans and other minorities.

Kentucky's first constitution (1792) made no distinction between whites and free blacks. By the

[11] *See* footnote 7.

end of the decade, however, whites increasingly found the presence of a large number of free blacks in the state "at best unsettling and at worst dangerous." John V. H. Dippel, *Race to the Frontier: "White Flight" and Westward Expansion* 144 (2005). When the Kentucky General Assembly adopted a new constitution in 1799, it limited the franchise to white males and apportioned the state legislature on the basis of "qualified voters." *Id.* The changes had their desired effect: large numbers of free blacks left Kentucky for the Ohio Territory. *Id.*

In Texas, likewise, jockeying over political power at the time of statehood between the slave-heavy east and the western frontier (which had higher numbers of voters) led to a compromise that apportioned seats in the state house on the basis of population and seats in the senate on the basis of "qualified electors." John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech. L. Rev. 1089, 1148–50 (1995). Supporters of "qualified electors" gained traction, in part, when they framed their arguments in terms of a "racist appeal" about "the effects of emigration of Mexicans, Indians, and others" to certain parts of the state. *Id.* at 1148. The Texas senate would continue to be apportioned on the basis of qualified electors until 1965 when courts struck down elector based apportionment as unconstitutional and a violation of the Voting Rights Act. *See Kilgarlin* v. *Martin*, 252 F. Supp. 404, 411 (S.D. Tex. 1966); *Terrazas* v. *Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (finding in court-approved settlement that apportionment under the Texas Constitution based

on "qualified electors rather than population dilutes the voting strength of racial and ethnic minorities").

E. California

In California, animus toward the Chinese drove the state to enact measures to exclude the Chinese from apportionment.

The state's initial constitution in 1850 had counted only white inhabitants in apportionment. Cal. Const. of 1850, art. IV, § 29. When the state adopted a new constitution in 1879, it followed the lead of the federal constitution in embracing apportionment by population, but with a key proviso: "no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming a part of the population of any district." Cal. Const. of 1879, art. IV, § 6 (repealed 1980). The proviso was aimed at the Chinese, who, under then current naturalization laws, could not become naturalized citizens. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 312 (1997).

This came at a time of rising anti-Chinese sentiment that culminated three years later when Congress passed the Chinese Exclusion Act of 1882. Chinese Exclusion Act, Pub. L. No. 47-71, 22 Stat. 58 (1882) (repealed 1943); *see also* Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 Cal. L. Rev. 61, 61–63 (1947). It granted the legislature the authority to enact "all necessary regulations for the protection of the State . . . from the burdens and evils arising from the

presence of aliens." Cal. Const. of 1879, art. XIX, §§ 1–4 (repealed 1952).

F. Hawaii

In Hawaii, the decision by Congress to use citizens for apportionment of the territorial legislature took place in a period of active fear about the potential political power of Asian immigrant communities. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 585 n.199 (1996).

The Hawaii Organic Act provided an initial apportionment for the territory's legislature, but required that all future reapportionment be based on the number of citizens, rather than total population. *An Act to provide a government for the Territory of Hawaii*, ch. 339, § 55, 31 Stat. 141 (1900).

At the same time, the Organic Act restricted access to citizenship for the Asian populations. While the House Committee on Territories described Portuguese and Native Hawaiian residents who would have access to citizenship as "peaceable" and "industrious," the Organic Act denied citizenship to almost all of the territory's Chinese and Japanese residents by limiting citizenship to those born or naturalized as citizens under the Republic of Hawaii. The Republic had not naturalized any foreigners since before the most recent wave of immigration. H.R. Rep. No. 56-305, at 7–9 (1900).

III. TOTAL POPULATION SHOULD BE THE PRESUMPTIVE APPORTIONMENT BASE

History teaches that total population is not only a permissible constitutional value but one that should be preferred over apportionment bases like voters or citizens, and any variation from total population should be prohibited except in rare and extraordinary circumstances.

As Congress and the states have recognized in the years since 1868, total population best fulfills the Fourteenth Amendment's promise that all "persons," not just citizens or voters, are guaranteed the equal protection of the laws. It assures that legislative officials are familiar with and can represent the interests of all inhabitants of their districts and that our governments are, in fact, of the people, by the people, and *for the people*.

The Framers chose a form of total population to apportion Congress because they maintained that representation for all the people was the only way to fulfill the Constitution's mandate that the "House of Representatives shall be composed of Members chosen . . . by the People . . . ." *Wesberry*, 376 U.S. at 13. For them, it was synonymous with the principle of "equal representation for equal numbers of people" that they considered the fundamental principle for apportioning House members among states. *Wesberry* found that the Framers would have intended that same standard for apportioning congressional districts *within* states. *Id.* at 8–9, 13–

14. In *Reynolds*, the Court extended those principles to state legislatures. *Reynolds*, *supra*.

Voter-population apportionment, by excluding children and other nonvoters, ironically would recreate the very situation this Court's reapportionment jurisprudence of the 1960s was intended to remedy: less populous areas would have greater representation than more populous areas, thereby giving voters in more populous areas less political representation, and less access to state and local resources, than voters in less populous areas. This would hurt all people, voters and nonvoters alike, living in those more populous areas. Voters and nonvoters need schools for their children, police and fire protection for their neighborhoods, and the transportation, health and other services provided by state and local governments. The need for these services is proportional to population, and history shows that populous but underrepresented areas were often underserved and underfunded.[12] This was precisely the situation that *Reynolds* held violated the Equal Protection Clause. 377 U.S. at 533. Voter-based apportionment also would reopen the door to the manipulation that the Court in *Burns* v. *Richardson*, 384 U.S. 73 (1966) cautioned against.

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[12] *See generally* Stephen Ansolabehere, et al., *The End of Inequality: One Person, One Vote and the Reshaping of American Politics* (2008) (finding that transfers of public funds to a district increase proportionally with the district's representation, and that malapportionment leads to underfunding of more populous districts); *see also* Stephen Ansolabehere, et al., *Equal Votes, Equal Money*: *Court Ordered Redistricting and Public Expenditures*, 96 Am. Pol. Sci. Rev. 767, 767 (2002) (same).

A. Apportionment Based on Total Population Fully Satisfies Equal Protection

Appellants invoke the principle of "one person, one vote" to claim that reapportionment on the basis of total population violates the Equal Protection Clause where it results in differences in voter populations among districts. This reflects a misunderstanding of both the "one person, one vote" case law and this Court's separate reapportionment jurisprudence.

"One person, one vote" originated in *Gray* v. *Sanders*, 372 U.S. 368 (1963), a case in which voters in statewide elections, choosing among the same candidates for statewide office, were assigned differently weighted votes (because winning required carrying the majority of counties, not the majority of votes). The Court held that the Equal Protection Clause required that each voter in such statewide elections was entitled to a vote equal to the vote of every other voter in the same election. *Id.* at 380–81. In other words, within a given electoral unit—be it a state as a whole in a statewide contest or a legislative district in a race for legislator—no voter's vote can count more than another's.

This Court stressed, however, that it neither addressed nor decided the very different question of legislative apportionment first posed by *Baker* v. *Carr*, 369 U.S. 186 (1962)—*i.e.*, "the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts

from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." *Gray*, 372 U.S. at 376; *see also id.* at 381–82 (Stewart, J. concurring). The Court would not address reapportionment of representation within state legislatures until *Reynolds* v. *Sims*, *supra*, when it relied not on *Gray*, but on the Constitution's apportionment principles for congressional representation laid out in *Wesberry* v. *Sanders*, *supra*.

Decided a year after *Gray*, *Wesberry* required apportionment of congressional districts within states on the same basis as Article I, Section 2, as amended by the Fourteenth Amendment, requires for apportionment of House members among the states—on a total-population basis to reflect the Framers' principle of "equal representation for equal numbers of people." 376 U.S. at 18.

Relying on *Wesberry*, *Reynolds* held that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560–61. While *Reynolds* described *Gray* as establishing the principle of voter equality, it explained that *Gray* was not determinative. *Id.* Instead, *Reynolds* established that, for reapportionment, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. *Reynolds* emphasized: "[W]e mean that the Equal Protection Clause requires that States make an honest and good faith effort to construct districts, in both houses of its

legislature, as nearly of equal population as is practicable." *Id.* at 577.[13] In this context, Equal Protection is satisfied for voters because every voter can vote for a representative representing an equal number of people. *Id.* at 575–77. Nonvoters and voters are protected by enjoying equal representation.

There is no question that *Reynolds* understood that apportionment based on total population fully satisfies and ensures Equal Protection. Its holding that Alabama's redistricting plan violated the Equal Protection Clause was based solely on disparities in total population, and the Court repeatedly referred to "population" as the basis for reapportionment. *Id.* at 568–69, 576, 583. That principle has been accepted in this Court's subsequent reapportionment decisions. *See, e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530–31 (1969).

B. *Burns* v. *Richardson* Does Not Support Voter-Based Apportionment

Burns v. *Richardson*, *supra*, does not change the constitutional status given to population as the basis for apportionment. If anything *Burns*' awareness of the history of manipulation with voter-

[13] *Reynolds* goes on to say: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." The decision in *Reynolds,* however, was based entirely on disparities in Alabama's districts using total population. The reference to "citizens or voters" is dicta that was not based on any consideration of the problems that use of such population bases would entail and how they might conflict with the constitutional principles discussed above.

based apportionment argues for high caution whenever such systems are used.

In *Burns*, this Court acknowledged that the holding in *Reynolds* was based on total population. 384 U.S. at 91. Nevertheless, relying on dicta, *Burns* maintained that *Reynolds* left open the question of whether other population bases might suffice. *Id.* at 91 & n.20. On the facts before it, the *Burns* Court upheld Hawaii's interim use of a voter registration base for the soon impending 1966 election. *Id.* at 91–92. *Burns* is not, however, an uncategorical endorsement for voter registration or any other form of voter-based apportionment.

In allowing the Hawaii voter-registration base, *Burns* criticized such voter bases as problematic, recognizing, as the history above shows, that such alternative apportionment bases can be used as a means of manipulation or for political advantage:

> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment."

Id. at 92–93 (quoting *Buckley* v. *Hoff*, 243 F. Supp. 873, 876 (D. Vt. 1965)).

The Hawaii legislature defended its decision to use registered voters based on the unique geographic distribution of districts among Hawaii's islands, and the unusual concentration of military personnel and tourists that would exaggerate the population of the island of Oahu for apportionment purposes. After taking these "special population circumstances" into account—and finding that the difference between registered voters and total population was due largely to the military personnel—the Court found that apportionment on the basis of registered voters was permissible, *but only* because it produced results that were substantially the same as those of both a total population and a citizen base. *Id.* at 93–94. The Court was explicit about the limited reach of its decision, and cautioned against taking it out of its unique context:

> We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere. . . . We hold that, with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards.

Id. at 96–97.

Burns should not be construed as license for wholesale departures from the constitutional principles of total population, particularly in light of

its well-founded concerns about manipulation.[14] To be sure, *Burns* suggested that the exclusion of non-citizens and disenfranchised persons convicted of a crime might be constitutional. *Id.* at 91–92. Unlike the exclusion of military transients or persons who are in fact domiciliaries of other jurisdictions, however, excluding children, non-citizens, and disenfranchised persons, or other residents is contrary to our founding principles, such as "no taxation without representation," and their corollary that those subject to the burdens and benefits of the laws are entitled to equal and effective representation. It also is contrary to our Nation's history and practice as detailed above. In many states, the apportionment impact would be dramatic, leading to underrepresentation of more populous districts and misallocation of resources from those districts to less populous districts.

The Framers, the drafters of the Fourteenth Amendment, and Congress and virtually all state legislatures for more than 200 years selected population as the appropriate apportionment base. Based on that history, and on this Court's reapportionment jurisprudence, it is clear that total population ensures the equality of representation essential to the democratic structure of our national and state governments and should be the presumptive apportionment base.

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[14] *See supra*, II for examples.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to affirm the District Court's judgment dismissing Appellants' claims and require use of total population as the presumptive apportionment base.

Respectfully submitted,

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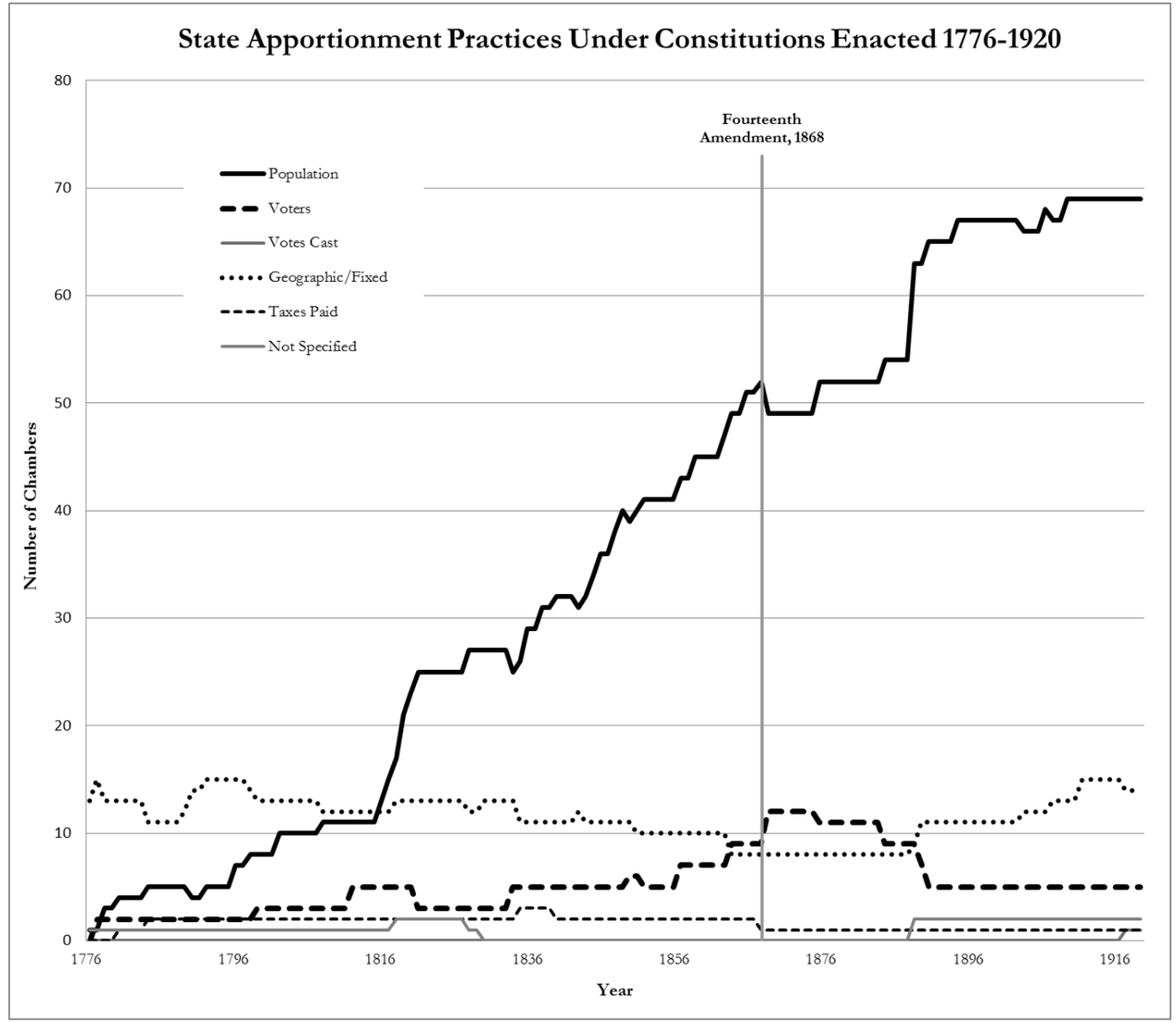
APPENDIX



*Note: This chart reflects state constitutions enacted between 1776 and 1920. Population includes all instances where the apportionment base is broader than eligible voters of the time. *See* Keith and Petry, *supra* note 7, at 22.