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The Chinese Stock Market's Not-so-Free Fall

Letter from the Editor

Dear Students of the Claremont Colleges,

Welcome to the fourth print edition of the Claremont Journal of Law and Public Policy. Volume Three, Number Two includes four of the articles our writers produced this semester. I encourage everyone to visit our website at www.5clpp.com to see the other articles we have published this semester. This was the first semester our journal has ever solicited submissions from outside Claremont. We received a total of seven submissions from across the country, including one from a lawyer who has been practicing for 30 years and another co-written by a law professor and a statistics professor at Northwestern. I could not be happier with the continued success and growth of our journal.

None of this would have been possible if it were not for the sustained efforts of our staff writers and senior editors. I strongly believe that staff writers compose the core of our operation. This edition is, as always, by and for the staff writers. I'd like to extend thanks to those staff writers who helped make this semester possible: Anna Shepard, Calla Cameron, Emily Zheng, Eric Millman, John Nikolaou, Kyleigh Mann, Ritika Rao, and Zachariah Oquenda. I am excited to announce that Calla and John will be joining the executive board next semester. For helping the staff writers unleash their genius, I'd also like to thank our tireless senior editors: April Xiaoyi Xu, Brandon Granaada, Jerry Yan, and Sofi Cullen.

Thanks is also due to our business team: Al Reeser, Christina Coffin, Michelle Goodwin, Nicky Blumm, and Bailey Yellen. Our business team is vital in keeping our organization fully staffed and fully present in the Claremont community. We hosted two events this semester, including one debate on salient political and social issues, which was so much fun that we plan on holding more next year.

I want to especially thank Byron Cohen, April Xiaoyi Xu, and Jessica Azerad, three people who never fail to offer uniquely helpful advice. I am overjoyed to announce that April will replace Al as our Chief Operations Officer next year. Our team must say a particularly sorrowful goodbye to a full half of our board, including the founder of the Journal, Byron Cohen, and most of the Journal's remaining founding members. To Byron, Al, Sofi, Christina, Michelle, and Bailey: you will be missed. I sincerely thank you for leaving us this wonderful organization. We will do our best to successfully continue your work.

I am extraordinarily proud of this organization, of our product, and of all the people who made this possible. I look forward to next year and I invite all 5C students to be a part of our future. If you feel you could be a valuable addition to our staff, please email info.5clpp@gmail.com.

With Regards,
Martin J. Sicilian
Editor-in-Chief

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The Man, The Myth, The Legend:
Thoughts After the Passing of Justice Antonin Scalia

By Calla Cameron, CMC '17

"A Constitution is not meant to facilitate change. It is meant to impede change, to make it difficult to change."

This quotation by Justice Antonin Scalia encapsulates his self-perceived role on the bench of the U.S. Supreme Court, and his actions as a Justice. President Obama has nominated the chief judge of the United States D.C. Court of Appeals Merrick Garland as his replacement. Though I disagreed with Scalia's decisions and much of his language, I have to reflect on Scalia's constant presence; this article will address Nino Scalia, the man, the myth, the legend.

Antonin Scalia was born to Italian-American parents, and grew up in Queens, New York. He attended Xavier High School, a military and Catholic school, where his conservative and religious beliefs flourished. From Xavier he went on to Georgetown University, where he graduated summa cum laude as the class of 1957 valedictorian with a bachelor's degree in history. From there, Scalia went on to study law at Harvard. After a few years practicing in Cleveland, Ohio, Scalia returned to academia to teach at the University of Virginia Law School; for all of his flaws, Scalia truly loved to teach. He went on in his academic career to teach at University of Chicago Law School, Stanford Law School, and Georgetown Law school before being asked by President Reagan to serve on the District of Columbia Court of Appeals in 1982. Throughout this career in academia, Scalia promoted, taught, and supported originalism, which is the philosophy that the Constitution should be interpreted in terms of what it meant to its original authors. At University of Chicago, he was one of the first faculty advisors of the Federalist Society, which promotes an originalist approach to government and to constitutional law.

> "Though liberals in both Congress and the public expressed concerns over Scalia's religiosity and conservatism, he was confirmed 98-0 in the Senate in 1986."

As a judge on the D.C. Court of Appeals, Scalia's opinions were usually marked by witty comments and digs at Supreme Court decisions he disagreed with; it was this habit that drew the attention of the Reagan Administration after the retirement of Chief Justice Warren Burger. Reagan liked him so much that he nominated him for the Supreme Court of the United States of America, where he would work tirelessly until his death. Though liberals in both Congress and the public expressed concern over Scalia's religiosity and conservatism, he was confirmed 98-0 in the Senate in 1986 (Senators Goldwater and Garn did not participate in the vote).

As a justice, Scalia wrote strong opinions, continuing his use of, shall we say, inventive language, like "jiggery-pokery" and "pure applesauce" to both disagree with and poke fun at those whose arguments he believed did not follow a classical interpretation of the Constitution. Scalia was controversial; twice, he was expected to recuse himself and refused, and he was outspoken in the media outside of the Court. Many believe that Scalia should have recused himself from judgement in *Bush v. Gore* because two of his sons worked in the law firm representing President Bush. Scalia did not, and the Court affirmed President Bush's position after the 2000 election scandal.

Another demonstration of Scalia's controversial actions on the bench is his behavior during the *Hamdan v. Rumsfeld* case. This case considered whether Guantanamo Bay detainees should be heard in federal court. Between oral arguments and the Court's decision, Scalia is quoted as saying that allowing detainees to be heard would "cause more Americans to be killed" in the "war with Radical Islam." After the story broke that Scalia was discussing a case still in the docket, he was asked to recuse himself. Again, he refused. Scalia frequently inflamed passions of onlookers with his unapologetically conservative and religious rhetoric.

> "[Justices Scalia and Ginsburg] were able to vehemently disagree in many aspects of politics and constitutional interpretation and still be best buddies. To me, this demonstrates their ability to put their disagreements aside and value each other for their brilliance."

Scalia was often offensive, but the mark he has made on the American political and legal system is hugely significant. His notable friendship with Justice Ruth Bader Ginsburg, who called him her "best buddy," should be an example for America as a whole; the two used their friendship to strengthen one another's arguments and minds by pointing out flaws in reasoning. Furthermore, they were able to vehemently disagree in many aspects of politics and constitutional interpretation and still be best buddies. To me, this demonstrates their ability to put their disagreements aside and value each other for their brilliance. This shows us that we can disagree with our friends' decisions or opinions, and still value them as friends. Further, we can use disagreement as an opportunity to educate each other, or to share our perspectives.

> "While many disagree with his decisions and many of his personal statements, myself definitely included, his influence on the Court over the last 30 years cannot be ignored. That influence is sure to last for decades, if not centuries, beyond the Justice's death."

Moreover, Scalia was paramount in raising the level of constitutional discourse within oral arguments. He questioned everyone thoroughly and antagonistically during oral arguments, pointing out flaws and making obscure originalist arguments, forcing the advocates to think more critically and to understand every case Scalia judged to be at all relevant to the one in question. His relentless challenges to those he both agreed with and opposed have inarguably influenced the Court, alongside his modern pioneering of originalism. Scalia believed in and enforced the Constitution as an embalmed document. He asserted that the Constitution was not a "tool for change" but existed to make change more difficult. While many disagree with his decisions and many of his personal statements, myself definitely included, his influence on the Court over the last 30 years cannot be ignored. That influence is sure to last for decades, if not centuries, beyond the Justice's death.

Antonin Scalia passed away in his sleep on February 13th, 2016. He is survived by his wife, Maureen, his nine children, Eugene, Paul, Ann, Christopher, Margaret, Matthew, Catherine, John, and Mary, as well as by his 28 grandchildren.

The Chinese Stock Market's Not-so-Free Fall:
Its Impact on China, the United States, and the World

By Emily Zheng, PO '19

The People's Republic of China was the world's fastest-growing major economy until 2015, and is currently one of the world's largest economies. Therefore, shockwaves resonated throughout global markets in the first week of 2016 when the trading of shares and index futures in China was abruptly halted after the CSI 300 stock index—a stock market index designed to replicate the performance of 300 stocks traded in the Shanghai and Shenzhen stock exchanges—fell 5%.[1] When markets re-opened, the stock index's losses reached 7% within seconds, triggering the circuit breakers to completely close the market for the day after only a total of 30 minutes.[2]

As of January 7, 2016, the CSI 300 has fallen 12%.[3] China's central bank has responded to this drop by announcing it would pump $10.6 billion into the financial system, following an earlier injection of $20 billion. These initiatives are designed to help stocks and stabilize mainland markets, but also signal Chinese leaders' concern about the economy.[4] At the end of 2015, Chinese markets rallied after a summer crash caused trillions of dollars in losses. The government spent at least $236 billion to stop the slide, cutting interest rates while regulators suspended new share listings and threatened to jail short sellers.[5] These actions do have its consequences, and markets are now anticipating that brokers would unload huge amounts of stock once the ban on selling by major shareholders expire.[6]

Further reports strengthened fears of slower growth in China's economy. One revealed that China's services sector grew at the weakest pace in 17 months in December, while another showed that activity had slowed in the country's key factory sector.[7] Concerns about China have also severely damaged oil prices, which has further unsettled global economies and stocks. As of January 2016, oil is now trading below $33 a barrel.

With concerned investors and governments closely watching China's economy as it attempts to balance its economic policy with market fluctuations, this stock market free fall has had ramifications around the globe. In order to analyze the effects of the event and the implementation of circuit breakers, we will first examine the purpose of circuit breakers and what they entail. Then, we will review other economic policies in China that contribute to the state of its overall economy. Finally, we will explore the effects of these policies on the United States and the world, and why China should lessen government intervention.

Circuit Breakers

Circuit breakers shut down and close the trading day if the market is down by a specific percent.[8] A new economic policy that was removed after January 8th by the China Securities Regulatory Commission, circuit breakers were used to halt trading in China for 15 minutes if the benchmark index CSI 300 fell 5% in a day, and for the rest of the trading day if the decline were 7% or higher.[9] Circuit breakers are intended to help "prevent panic selling" from collapsing prices too quickly and "restore stability among buyers and sellers in a market."[10] Overall, their primary function is to prevent a free fall of the market and to restore a balance between buyers and sellers during the halt period. Ironically, however, many analysts have pointed to the circuit breakers as being one of the main causes for China's stock market collapse during the first week of trading in 2016.

1 Riley, Charles and Barbieri, Rich, "China stock trading abruptly halted after 7% plunge," *CNN Money*, 1/7/16.

2 Ibid.

3 Riley, Charles and Barbieri, Rich, "China stock trading abruptly halted after 7% plunge," *CNN Money*, 1/7/16.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

9 Hayes, Adam, "Why China is Suspending Market Circuit Breakers," *Investopedia*.

10 Ibid.

Circuit breakers originated in the United States following the stock market crash of October 19th, 1987, commonly referred to as "Black Monday," when the Dow Jones lost half a trillion dollars in value (nearly 22% of its total value) in a single day.[11] First implemented in 1989, circuit breakers are still used today by the New York Stock Exchange (NYSE) if the Dow Jones falls by 10%.[12] The duration of the halt depends on the size of the decline. The S&P 500 and many other exchange traded funds (ETFs) make use of circuit breakers as well.[13] In the United States, circuit breakers have been used a number of times since their implementation. For instance, they were vital in preventing a market free fall after the Dotcom bubble burst in the 1990s.[14]

Despite their merits, circuit breakers are often controversial. Chinese regulators decided to suspend their use in order to "'smooth' trading operations" and "create stability in equity markets."[15] However, the purpose of implementing circuit breakers in the first place was to maintain continuity and stability in the markets, which raises some concerns. Some argue that a 7% drop is too small to justify a full day stop, especially because some hedge fund managers and portfolio managers exacerbated the event since they were forced to liquidate positions in order to withdraw cash prior to the halt.[16] In addition, many funds and investors have agreements that dictate "mandatory liquidation levels if their holdings drop below a specified level." As a result, circuit breakers can actually drive prices even lower since all the fund managers must sell at the same time.

On the other hand, without circuit breakers, a panic-driven free fall could occur without any hindrance. Even so, some free-market advocates argue that "trading halts are artificial barriers to market efficiency" and that "if a market falls 20% or more in a single day, it is because it should be lower by such an amount."[17] Furthermore, they argue that even if circuit breakers are intended to initially limit losses, they may actually encourage investors to sell more after the cool-down period.[18] Thus, Chinese regulators are divided as to what their options are, because all are prone to criticism.

The main problem with implementing circuit breakers in China is that China's stock market already uses daily price limits. For instance, individual stock prices cannot fall by more than 10% per day.[19] Furthermore, marginal investors that have the power to affect market prices seem to be "uninformed, speculative, individual investors" according to Kenneth Kim of *Forbes*. Therefore, using circuit breakers is "not only repetitive to [China's] price limit system," continues Kim, "but it also only served to incite panic rather than to reduce it," especially because China was not transparent to begin with, so investors would—and did—panic once they heard that Chinese regulators were installing circuit breakers in fear of a market crash.[20]

However, there are some justifications for China's implementation of circuit breakers. After the country's stock plunge in June that rattled global markets, Chinese authorities have been trying for months to "restore confidence in the country's stocks" after a "panicked, multibillion-dollar government intervention."[21] Chinese authorities could not have anticipated China's market free-fall in early January, despite knowing the consequences of circuit breakers. Mike Brunker of *NBC News* believes that the spark that "lit the selloff was the Caixin/Markit index of Chinese manufacturing," a composite index designed to provide an overall view of the manufacturing sector and acts as a leading indicator for China's economy. "The closely watched gauge fell to 48.2 points in December from 48.6 the previous month, marking contraction for the 10th straight month." This is especially dire because a value below 50.0 indicates that the manufacturing economy is declining, while a value above 50.0 indicates that the manufacturing economy is expanding.[22] An official manufacturing index also showed a persistent contraction in factory activity

11 Ibid.

12 Ibid.

13 Ibid.

14 "Dotcom Bubble," *Investopedia*.

15 Hayes, Adam, "Why China is Suspending Market Circuit Breakers," *Investopedia*.

16 Ibid.

17 Ibid.

18 Riley, Charles and Barbieri, Rich, "China stock trading abruptly halted after 7% plunge," *CNN Money*, 1/7/16.

19 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

20 Ibid.

21 Brunker, Mike, "China Worries Send U.S. Stocks Tumbling; Dow Down 1.58 Percent," *NBC News*, 1/4/16.

22 "China Caixin Manufacturing PMI," *Investing.com*, 2/1/16.

despite Beijing's stimulus measures.[23] Yet, considering the other problems in China's economy, circuit breakers should not have been implemented in the first place.

Problems in the Chinese Economy and Related Economic Policies

In any economy, policies should not be viewed in a vacuum. Thus, when examining the implementation of circuit breakers that crashed China's stock market in early 2016, we must also evaluate how circuit breakers have affected other aspects of China's economy.

Shadow banking constitutes one problem with China's banks. It refers to financial intermediaries, or "middle men," who are involved in the creation of credit in the global financial system. However, these members are not subject to regulatory oversight, so the shadow banking system can often refer to unregulated activities by regulated institutions.[24] Hedge funds are one example. The United States suffered from this issue as well in 2008, when shadow banking partly resulted in the crumbling of American financial institutions and systems.[25] Though it presents a significant problem to China's economy, the government follows shadow banking closely, so it will most likely have little impact on the Chinese economy.

The lack of growth in Chinese domestic consumption also hinders Chinese economic growth. The government has realized that it cannot rely on solely exports to maintain the country's income and wealth. *The Japan Times* reported that sales by China's major exporters, which employ tens of millions of people, shrank by 8.3% in July 2015 from a year earlier.[26] Because of this, they are attempting to shift the economy's reliance on a more self-sustaining domestic consumption to boost their GDP, instead of relying on net exports. Unfortunately, even among the rising middle class, consumption has failed to expand in recent years.[27] This has prevented the economy from growing as rapidly as it did in the past. A widely held view holds that the share of consumption in total expenditure has been declining because of rising saving rates of Chinese households as "uncertainty over provision of pensions, and healthcare and education costs have increased since the mid-1990s."[28] However, Jahangir Aziz and Li Cui of the International Monetary Fund find that the rise in saving rate has actually been a minor factor. A larger impact has been "the role of the declining share of household income in national income, which has occurred across-the-board in wages, investment income, and government transfers," as well as "financial sector weaknesses" that have restricted "firms' access to bank financing for working capital [and] have played quantitatively a major role in keeping wage and investment income shares low and on a declining trend."[29]

Other related economic policies include new limits on the amount of stock that major corporate shareholders can sell. This follows a recent government intervention that attempted to prop up shares.[30] Despite attempts to control the economy, authorities are being forced to allow the markets to have more freedom after policy makers spent about $5 trillion to support shares during the summer of 2015, including "ordering stock purchases by state funds, suspending initial public offerings and allowing trading halts that froze hundreds of mainland-listed shares."[31]

Effects of China's Economy on the United States

After China's stock market free fall, United States stocks slumped as well. The first week of trading in 2016 saw the worst four-day start to a year ever for both the Dow and S&P 500.[32] New data on Chinese factory activity "sent a wave of financial concern across the Pacific… on the first day of stock trading in the new year," further exacerbating the situation and sending major United States market indices—statistical measures of change in an economy or securities market—on a sharp down-

23 Brunker, Mike, "China Worries Send U.S. Stocks Tumbling; Dow Down 1.58 Percent," *NBC News*, 1/4/16.

24 "Shadow Banking System," *Investopedia*.

25 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

26 McDonald, Joe, "China struggles to control shift to lower growth based on domestic consumption," *The Japan Times,* 8/26/15.

27 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

28 Aziz, Jahangir and Cui, Li, "Explaining China's Low Consumption: The Neglected Role of Household Income," *International Monetary Fund*, 7/07.

29 Ibid.

30 "China Suspends Stock Circuit Breaker Days After Introduction," *Bloomberg News*, 1/6/16.

31 Ibid.

32 Valetkevitch, Caroline, "Dow, S&P off to worst four-day Jan start ever as China fears grow," *Reuters*, 1/7/16.

turn, with the Dow Jones industrial average closing at 276 points down, or nearly 1.6% of its total value.[33] Since the end of 2015 to early January, the Dow Jones has lost 5.2%, the S&P 500 is down 4.9% since December 31, and the NASDAQ is down 6.4%.[34]

"People see the weakness in China and in the overall equity market and think there's going to be an impact on corporations here in the United States," said Robert Pavlik, chief market strategist at Boston Private Wealth in New York.[35] Many investing professionals surveyed by *CNNMoney* listed China as the biggest risk to U.S. stocks.[36] However, contrary to popular belief, U.S.-China trade actually represents a very small portion of the U.S.'s GDP.[37] China currently wants to weaken its currency, known as the RMB or Yuan, because weakening its currency is a proven effective way to boost exports.[38] In January 2016, China set the Yuan's value at its lowest level since March 2011.[39] *Bloomberg* reports that China's central bank is currently "considering new measures to prevent high volatility in the exchange rate and will continue to intervene in the currency market," including the restricting of arbitrage—the simultaneous purchase and sale of the same securities, commodities, or foreign exchange in different markets to profit from unequal prices—between onshore and offshore rates.[40] A weaker currency can help Chinese exporters and support growth, but it can also push money out of the country and hurt asset values.[41] If the American economy was so dependent on the Chinese economy, a weaker Yuan would be welcome news to the United States, because it would help the Chinese economy and consequently the American economy. However, that depreciation has had little to no effect on the American economy. The current effects of China's stock market crash on the United States stock market are the results of an overreaction.

Furthermore, when the Yuan falls in value, goods imported into the United States from China become cheaper, which has large consequences on the United States' economy. American businesses will have lower export sales in China, because their goods will be relatively more expensive. Because many American companies do a substantial portion of their business abroad, a weaker Yuan lowers the value of any income generated in China and could lead to lower earnings for American companies.[42] Despite the negative impacts of a weaker Yuan on the United States, a weak Chinese currency can still produce benefits on the US, because a healthy Chinese economy is necessary to maintain a healthy global economy. Thus, the benefits of a weak Yuan on the United States' economy are currently indirect.

Implications for the World

"When you have a market that begins a year with weakness, people are sort of suspect anyway," continues Pavlik. "The economy isn't moving all that well, the outlook is modest at best, and they don't want to wait for the long term. China creates more uncertainty."[43] As China's market valuations were rapidly dropping, many of the world's markets followed suit.[44] For instance, European indices fell between 2 and 4% as China's main index shed 6.9% of its value.[45]

The Yuan's depreciation has had its effects on the rest of the world's economies as well. "The Yuan's depreciation has exceeded investors' expectations," said Wang Zheng, Shanghai-based chief investment officer at Jingxi Investment Management Co. "Investors are getting spooked by the declines, which will spur capital outflows."[46] One such outflow was to Hong Kong. When the Yuan weakened by 0.6%, the Hong Kong Dollar strengthened by

33 Brunker, Mike, "China Worries Send U.S. Stocks Tumbling; Dow Down 1.58 Percent," *NBC News*, 1/4/16.

34 Valetkevitch, Caroline, "Dow, S&P off to worst four-day Jan start ever as China fears grow," *Reuters*, 1/7/16.

35 Ibid.

36 Riley, Charles and Barbieri, Rich, "China stock trading abruptly halted after 7% plunge," *CNN Money*, 1/7/16.

37 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

38 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

39 Valetkevitch, Caroline, "Dow, S&P off to worst four-day Jan start ever as China fears grow," *Reuters*, 1/7/16.

40 "China Suspends Stock Circuit Breaker Days After Introduction," *Bloomberg News*, 1/6/16.

41 Riley, Charles and Barbieri, Rich, "China stock trading abruptly halted after 7% plunge," *CNN Money*, 1/7/16.

42 Hjelmgaard, Kim, "Yuan and you: How China's devalued currency affect U.S. consumers," *USA Today*, 8/12/15.

43 Valetkevitch, Caroline, "Dow, S&P off to worst four-day Jan start ever as China fears grow," *Reuters*, 1/7/16.

44 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes*, 1/18/16.

45 Brunker, Mike, "China Worries Send U.S. Stocks Tumbling; Dow Down 1.58 Percent," *NBC News*, 1/4/16.

46 "China Halts Stock Trading After 7% Rout Triggers Circuit Breaker," *Bloomberg Business*, 1/6/16.

0.4%.[47] Chinese stocks in Hong Kong fell to "the lowest level in four years as mainland shares plunged," and mainland companies are now 39% more expensive than their Hong Kong peers.[48] "The gap [between China and Hong Kong] will probably widen," said Paul Chan, Hong Kong-based chief investment officer for Asia excluding Japan at Invesco Ltd., which oversees $791 billion globally. "Earnings-per-share in Hong Kong dollar terms are lower, and I pay Hong Kong dollars for those shares."[49]

However, some economists believe that the fear surrounding China's potential economic downfall is unjustified. "The Chinese economy will grow. It is not a matter of if, but when, China will become the world's largest economy," affirms Kim of *Forbes.* China is still in its beginning stages in its transition to a market-based economy, so the economy's current ability to adjust quickly to new problems demonstrates its resilience and should be viewed as a merit, not a downfall. "My estimate is that during the next 20 years, China will contribute at least a half billion additional people to the global middle class, which is both the engine and benefit of economic growth," continues Kim.[50] It is important to recognize the lack of transparency in China's accounting and corporate governance, so the world should take cues from Chinese market fluctuations with a grain of salt, because its rises and falls in reality means very little, especially because the marginal investors who can affect stock prices in China are "uninformed, speculative, [and] individual investors."[51]

The Future State of the Chinese Economy

In an attempt to stabilize the stock market, the government sharply limited stock sales in early January, allowing major shareholders to unload only 1% of their holdings in any three-month period after disclosing their plans 15 days in advance.[52] This has raised sharp criticism from some economic analysts, who argue that the Chinese government's intervention in these markets is actually hurting the economy. Mainland stocks are still expensive when compared to corporate profits, and the government's efforts to support the market are only delaying the inevitable sharp decline in equity prices in the near future.[53] In addition, many believe that this is a "manipulated, distorted market," according to the director of a China-based consulting firm. "It's a market that's not open ... there are all sorts of restrictions on selling, and foreign institutions will be very alarmed by this."[54]

As of now, the direction China should take in terms of the economy is to lessen government intervention. Though intended to alleviate significant issues, intervention often only delays the problem it is intended to address instead of solving it. Thus, when the problem reemerges after a few months of government intervention, not only would the government have to address them again, but the government will also have accumulated large sums of debt from its earlier attempts to prop up the economy. Government officials should closely consider currently enforced economic policies in the country before implementing new policies such as circuit breakers, because their intended effects may be reversed when enforced simultaneously with conflicting policies. This was the case with the circuit breakers and the daily price limits for China's stock market. However, China should not get rid of government intervention entirely, because that may end up destabilizing the economy.

The market would also benefit from having more participants. By opening the market further and allowing more investors to contribute towards it, fluctuations would have fewer drawbacks. Because China's economy is still growing and developing, its full impact on the world has yet to be seen. Currently, it seems like the United States has not been significantly affected. However, because the world's economy is so interconnected, it is important to notice the effects of policies in certain markets. After all, circuit breakers were first introduced in the United States, with very different results. Whether China can continue its economic growth is up for debate, but for now, investors, governments, and citizens alike should pay close attention to the world's second-largest economy and its economic policies.

47 Ibid.

48 "China Halts Stock Trading After 7% Rout Triggers Circuit Breaker," *Bloomberg Business,* 1/6/16.

49 Ibid.

50 Kim, Kenneth, "What's Going On With China's Stock Markets and Economy?," *Forbes,* 1/18/16.

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid.

Single Member Plurality (SMP) Congressional Districts:
The Pros, Cons, and Alternatives

By Zachariah Oquenda, CMC '16

While the framers of the U.S. Constitution did not create or mandate the single member plurality (SMP) system, in which voters cast a vote for one candidate only, it has remained central to the design of the U.S. electoral system for over 170 years. As David M. Farrell writes in his *Electoral Systems: A Comparative Introduction*, "[u]ltimately the main factor determining the influence an electoral system can bring to bear on a polity is the way in which it has been designed, whether in terms of the degree of electoral proportionality it produces, the type of party system it engenders, the degree of choice it offers to the voter, or other such factors."[1] Pursuant to its design, the SMP system has created a self-perpetuating electoral disproportionality, a rigid duopolistic party system, and a false choice at the ballot, in which voters often must pick the better of *two* evils. If Congress could repeal its federal mandate over the electoral system, then states may be able to experiment again in electoral design, assessing the U.S.'s ability to adopt mixed electoral systems that might increase representative equality, revive competitive pluralism, and give voters more choices on the ballot.

The Apportionment Act of 1842 first wrote into law the U.S.'s current SMP system.[2] Before 1842, while some states had adopted SMPs, no such system was required. The Constitution required that representatives "be apportioned among the several States…according to their respective Numbers."[3] The particular manner in which States should apportion their districts and in which they should elect their representatives is not mandated by the Constitution. The year 1842 was first time Congress specified what electoral system States were to use: districts must be "composed of contiguous territory equal in number to the number of representatives to which said state may be entitled, no one district electing more than one representative."[4]

The SMP system has its advantages and disadvantages. First, the system itself and its results are both easy to understand.[5] Out of a list of candidates on the ballot, each voter gets just one vote to pick his or her top choice. The candidate with the most votes wins. While this system is simple, the downside is that the result is proportionally unrepresentative. For example, consider a hypothetical congressional district, District X. Assume in District X that the constituency makeup is as follows: 40% of voters are Federalists, 30% are Antifederalists, and 30% are Whigs. Also assume for simplicity that these voters always vote for members of their party. It is Election Day in District X, and each party has nominated one candidate to the ballot. Under the U.S.'s SMP scheme, the Federalist candidate would win with 40%, a plurality, and because it is a single member district, the Federalist candidate represents 100% of District X's population. This could mean that 60% of the population does not have a candidate in office that represents their views. While this example is oversimplified, the principle is clear: one can easily imagine even a majority of the population going underrepresented.

Second, SMP can produce a stable political system. When a party's role is strictly to get representatives of the party's interests elected to public office, political parties are inclined to concentrate power and resources so they can have more influence on the electoral process. Add to the mix that SMP provides a simple way to win a seat with

1 David M. Farrell, *Electoral Systems: A Comparative Introduction* (New York: PALGRAVE, 2001), 18.

2 Tory Mast, Fairvote.org, "History of Single Member Districts for Congress: Seeking Fair Representation Before PR," http://archive.fairvote.org/reports/monopoly/mast.html.

3 Ibid., quoting Article 1, Section 2 of the U.S. Constitution.

4 Ibid., quoting the Apportionment Act of 1842.

5 Farrell, *Electoral Systems*, 20.

only a plurality of votes. The result is a system in which political parties will tend to expand their parties' platforms to incorporate the major issues facing the voters. When political parties are strong enough, they have the power either to ignore minority parties and their issues or (if the issue is sufficiently important to enough voters) to simply absorb the minority's issue. This party dominance creates stability in that having fewer major parties tends to foster more predictable majoritarian legislatures.[6]

Nevertheless, the SMP system in the U.S. has tended to have the opposite effect. A duopolistic party system has so effectively marginalized minority parties that they have virtually no place at the political bargaining table, leading the countervailing powers of the two major parties into gridlock. One way to dismantle a duopoly is simply to enable other parties to compete.

While some democratic countries also rely on varieties of the plurality system, many others have adopted proportional representation (PR) schemes, or some mixture. PR systems also have advantages and disadvantages, of course. A PR system's goal is ensuring that any given party's share of the districts vote is roughly equal to the share of seats that party holds in the legislature.[7] The main differences between SMPs and PRs are (1) in the latter, voters typically must vote for their preferred party rather than their preferred individual candidate and (2) PRs by definition require more representatives per district than an SMP. For example, reimagine District X to be a PR system. Because PR systems are multi-member district (MMD) systems, let us assume for simplicity that District X will elect 10 candidates. Let the party breakdown in District X be the same as before: 40% Federalists, 30% Antifederalists, and 30% Whigs. On Election Day, each party produces a list of potential candidates that could earn a seat in the legislature, and after the voters vote with their party allegiance, 40% of the seats (4) go to the Federalist Party, 30% (3) go to the Antifederalist Party, and 30% (3) go to the Whig Party. Thus, unlike the SMP system in which 60% of the voters went unrepresented, under a PR system each voter is represented according to their share of the districts voting population.

One major obstacle to introducing a list PR system in the U.S. is that the U.S. is becoming increasingly "candidate-centered" rather than party-centered. Paul S. Herrnson argues that the U.S. SMP system established under the Apportionment Act of 1842 has driven the old "political machines" out of fashion and granted individual candidates "the ultimate responsibility for election outcomes."[8] If Herrnson's analysis is correct, then most U.S. voters today have been conditioned to relate to and connect with candidates, not parties. As Farrell points out, it is misguided to suggest that "one electoral system is 'best' or 'ideal' for all circumstances…and a judgment on which electoral system is best for a given country should be made in light of that country's history, social composition, and other political structures."[9] What is best for the U.S.?

A single transferable vote (STV) system, which is similar to what Pomona College's ASPC elections use, is likely a step in the right direction. In a STV system, voters rank their preferences for individual candidates by indicating their first choice, second choice, etc.—maximizing voters' influence. The STV system captures the best of both worlds between a SMP system and a PR system. It minimizes the representative distortions through use of a PR-like scheme and also remains candidate-centered. According to Farrell, STV "is a system which is both proportional *and* which facilitates constituency politicians."[10] In the case of our District X, parties would become secondary to the candidate-constituent relationship under a STV system. Voters select their top preferences; the candidate with the least first-rank votes is eliminated; and those votes from voters whose first-choice candidate was eliminated are "transferred" to those voters' second choices. The process repeats until the desired number of candidates emerges. This system is more complex that an SMP, but the complexity is offset by the increased proportionality and voter choice. As for stability, evidence that suggests "proportionality produces instability is tenuous."[11]Further research could analyze whether our political institutions could manage MMDs. While major parties are unlikely to cede power voluntarily, a STV system is conceivable in the United States.

6 Ibid.

7 Andrew Reynolds and Ben Reilly, *The International IDEA Handbook of Electoral System Design*, (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 1997), 19.

8 Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington* (Los Angeles: CQ Press of SAGE Publications, Inc., 2016), 7.

9 Farrell, *Electoral Systems*, 207.

10 Ibid., 121.

11 Ibid., 207.

Evenwel v. Abbott:

The Future of "One Person, One Vote" and the Role of the Courts

By Jerry Yan, PO '18 & Zachariah Oquenda, CMC '16

FOREWORD

It seems obvious that every citizen in the United States is entitled to an equally-weighted vote, regardless of age, race, sex, or socioeconomic status. But, as far as the courts are concerned, the concept of an equally-weighted vote did not emerge until relatively recently. In the early 1960s, the Supreme Court held in *Baker* v. *Carr* (1962) and *Reynolds* v. *Sims* (1964) that the Equal Protection Clause of the Fourteenth Amendment requires States to draw their legislative districts in a way that achieves "substantial equality of population," boldly declaring that "[t]he conception of political equality from the Declaration of Independence, to Lincoln›s Gettysburg Address … can mean only one thing – one person, one vote." The Court, however, was not particularly clear about what "substantial equality of population" meant. In the years that have followed since *Reynolds*, judges and politicians have, generally speaking, interpreted *Reynolds* to mandate the States to equalize districts' total population – that is, States must draw their legislative districts so as to ensure that each district has the same number of persons regardless of citizenship status, age, race, sex, and so on.

But is that what "One Person, One Vote" really means? In December 2015, the Supreme Court heard arguments in *Evenwel* v. *Abbott*. The plaintiffs in that case sued Texas, arguing that equalizing total population is not enough to satisfy the "One Person, One Vote" standard. Instead, they maintain that States must equalize both the total number of people in the district *as well as the number of voters in the district*. They argue that failure to do so deprives some, especially those who live in districts with large populations of people who cannot vote (*e.g.*, undocumented immigrants, children, convicted felons), of an equally weighted vote. In April 2016, the Court unanimously sided with Texas, and held that the Constitution does not require States to redistrict on the basis of voter population.

As part of the process of appealing a case to the Supreme Court, parties submit briefs arguing their case. This article is a mock brief for *Evenwel v. Abbott*. In this brief, we argue that States should not be required to equalize voter population and that the choice of what population to use when drawing legislative districts should be left to the States.

QUESTION PRESENTED

Does substantial equality of total population among a State's legislative districts satisfy the "One Person, One Vote" standard required by the Equal Protection Clause?

INTRODUCTION

The Texas Constitution requires the Texas Legislature to reapportion its senate districts after each federal decennial census.[1] In compliance with that mandate, the Texas Legislature used data from the 2010 census to create Plan S148 in 2011. Then-Governor of Texas Rick Perry signed Plan S148 into law in June 2011. A three-judge panel in the United States District Court for the Western District of Texas found that Plan S148 violated the federal Voting Rights Act ("VRA") and issued an interim plan, Plan S172, for the 2012 election, which the Texas Legislature then permanently adopted.

Plaintiffs Sue Evenwel and Edward Pfenninger filed suit in the United States District Court for the Western District of Texas in 2014, alleging that Plan S172 violates the "One Person, One Vote" principle of the Equal Protection Clause. Conceding that Plan S172 achieves substantial equality of total population, the plaintiffs maintain that Plan S172 violates the Equal Protection Clause because it fails to achieve substantial

1 Tex. Const. art. III, § 28.

equality of *both* total population *and* voter population. Plaintiffs suggest a variety of metrics with which to measure voter population, including citizen voting age population (CVAP), total voter registration, and non-suspense voter registration. Plaintiffs' suit calls for requiring Texas to account for both voter population and total population in all future apportionment schemes, and stopping Texas from holding any elections using Plan S172.

The defendant, Texas Governor Greg Abbott, moved to dismiss the plaintiffs' complaint for failing to state a claim the court could act on. The lower court ruled that plaintiffs must demonstrate that Plan S172 either (1) fails to achieve substantial equality of population between districts when using a permissible population base or (2) was created in a manner that is otherwise invidiously discriminatory against a protected group.[2] The court noted that the plaintiffs conceded that Plan S172 achieves substantial equality of population among districts using total population as a metric.[3] Accordingly, the court directed its attention to the question of whether Plan S172 is invidiously discriminatory against a protected group. The court found that the plaintiffs failed to allege facts that, if proven, demonstrate that Plan S172 is invidiously discriminatory against a protected group.[4] The three-judge panel found that neither the Fifth Circuit nor this Court has ever endorsed the plaintiffs' theory that any apportionment scheme that fails to achieve substantial equality in voter population and total population is unconstitutional.[5] Citing this Court's decision in *Burns* v. *Richardson* (1966), the district court went on to hold that "a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group."[6]

Finally, the district court held that the plaintiffs' theory "is contrary to the reasoning in *Burns* and has never gained acceptance in the law." The district court concluded that the plaintiffs' complaint failed to state a claim upon which relief can be granted and granted Defendants' motion to dismiss the case. The plaintiffs then appealed.

2 *Evenwel* v. *Perry* (2014).
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*, quoting *Burns* v. *Richardson*, 384 U.S. 73, 91 (1966).

ARGUMENT

I. THIS COURT HAS NEVER HELD THAT STATES MUST EMPLOY A SPECIFIC POPULATION METRIC WHEN APPORTIONING STATE LEGISLATIVE DISTRICTS.

A. *Reynolds v. Sims* Left The Decision Of Which Population Metric To Employ Open To The States.

The "One Person, One Vote" principle articulated in *Reynolds* v. *Sims* (1964) requires States to apportion their legislative districts in a manner that achieves the "overriding objective" of "substantial equality of population among the various districts."[7] The *Reynolds* Court relied on total population as a metric for equality, finding that Alabama's apportionment scheme violated the Equal Protection Clause because, among other reasons, the substantial variations in total population between districts were constitutionally impermissible.[8]

Although the *Reynolds* Court used total population as its means of measuring equality, it did not at any point hold that States *must* employ total population, or any other single metric, as a metric for population equality. Instead, the *Reynolds* Court noted that "the matter of apportioning representation in a state legislature is a complex and many-faceted one" and declined "to restrict the power of the States to impose differing views as to political philosophy on their citizens."[9] Furthermore, *Reynolds* held that some flexibility may be accorded to States when drawing their own legislative districts, because "[w]hat is marginally permissible in one State may be unsatisfactory in another."[10] The *Reynolds* Court cautioned that a certain degree of deference would only be given "so long as the resulting apportionment was one based substantially on population."[11] Nevertheless,

7 *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964).
8 *Id.*, at 568-569.
9 *Id.*, at 566.
10 *Id.*, at 578.
11 *Ibid.*

the *Reynolds* Court did not elaborate upon what metric of population should be employed in an apportionment scheme.

As such, the "One Person, One Vote" principle in *Reynolds* is a constitutional floor for State redistricting plans. *Reynolds* placed the bar for satisfying the constitutional requirements of the Equal Protection Clause at substantial equality of population. The means of meeting that bar, including choosing which population metric to employ when drawing legislative districts, were left to the States.

B. Later Decisions Do Not Require States To Employ A Specific Population Metric.

The *Reynolds* Court, realizing that the specifics of redistricting should be left to the individual States, declined to establish any specific tests, instead deciding to resolve future disputes on a case-by-case basis.[12] We now turn to those cases, beginning with *Burns* v. *Richardson*.

In *Burns*, this Court was confronted with Hawaii's apportionment scheme that relied on the number of registered voters when drawing State legislative districts. The *Burns* Court held that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."[13] The *Burns* Court, elaborating on *Reynolds*, found that *Reynolds* "carefully left open the question what population was being referred to."[14] *Burns* also left that question open. *Burns* does not at any point hold that any one apportionment base must be used, nor does it hold that that a specific apportionment base cannot be used. *Burns* merely specifies that "[u]nless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar."[15]

This principle was seen later in *Hadley* v. *Junior College District of Metropolitan Kansas City* (1969). In *Hadley*, this Court held that the apportionment scheme used by a Kansas City school district to apportion board members was unconstitutional. In conducting its analysis in *Hadley*, the Court relied on disparities between "school enumeration," or the "number of persons between the ages of six and 20 years who reside in each district."[16] The apportionment scheme was ultimately held unconstitutional because of how trustees were apportioned, not because of the population metric chosen by Kansas. *Hadley* suggests that school enumeration is a valid apportionment base for school districts, but does not require that all States use it to apportion their school districts.

Hadley and *Burns* both attest to this Court's historical deference to States on the metric chosen by States when devising apportionment schemes. Unless the State's choice of apportionment base offends the Constitution, this Court should not interfere. Similarly, it is not this Court's responsibility to require States to employ a specific population metric when drawing legislative districts, whether it be CVAP, total voter registration, or even total population.

II. PLAN S172 IS CONSTITUTIONAL BECAUSE IT ACHIEVES SUBSTANTIAL EQUALITY OF TOTAL POPULATION AND IS NOT OTHERWISE INVIDIOUSLY DISCRIMINATORY.

A. Plan S172 Achieves Substantial Equality Of Total Population.

Reynolds held that the Equal Protection Clause requires that a State's apportionment scheme be "based substantially on population" and achieve "substantial equality of population among the various districts."[17] Therefore, according to *Reynolds*, this Court must consider whether Plan S172 meets several criteria: (1) whether Plan S172 is based substantially on some metric of population and (2) whether Plan S172 achieves substantial equality of that population metric among the districts. Additionally, according to *Burns*, this Court must also consider (3) whether the particular metric employed by Texas is constitutional.[18]

12 *Ibid.*
13 *Burns*, *supra*, at 91.
14 *Ibid.*
15 *Id.*, at 92.
16 *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 51 (1970).
17 *Reynolds*, *supra*, at 578-579.
18 *Burns*, *supra*, at 92.

Plan S172 clearly meets all three criteria. First, plaintiffs have conceded that Plan S172 is based on total population. Second, plaintiffs have also conceded that Plan S172's total deviation from ideal, measured using total population, is 8.04%. As 8.04% is less than 10%, any population deviations in Plan S172 are *de minimis* and thus insufficient to establish a prima facie case of a violation of the Equal Protection Clause.[19] Therefore, Plan S172 satisfies the first two criteria. The question then becomes whether the total population alone is a constitutional metric of population.

The third criterion is a key point of dispute in today's suit. By alleging that both total population *and* voter population must be equalized, the plaintiffs implicitly allege that total population by itself is an unconstitutional population metric. To evaluate the plaintiffs' claim, this Court must turn to *Burns*. Under *Burns*, the plaintiffs must show that using total population as the sole apportionment base offends the Constitution.[20] Nevertheless, this Court has consistently held that total population by itself is a constitutionally permissible apportionment base.[21] Thus, this Court's past decisions compel it to find that total population alone is a constitutional apportionment base.

As such, Plan S172 meets all three criteria for achieving substantial equality of population set forth in *Reynolds* and *Burns*. Plan S172 is therefore not an unconstitutional dilution of citizens' votes.

B. Plan S172 Is Not Otherwise Invidiously Discriminatory

Plaintiffs' theory in this case alleges that Plan S172 is unconstitutional because Texas did not use a dual apportionment base of total population and voter population. One possible construction of the plaintiffs' claim is that Plan S172 is invidiously discriminatory because Texas failed to give voters sufficient weight over non-voters in its redistricting scheme. However, Plan S172 gives equal weight to voters and non-voters because it treats voters and non-voters equally and makes no effort to distinguish between the two. Thus, the plaintiffs are essentially arguing that the Texas should give preferential treatment to voters, not that Texas should treat voters and non-voters equally. The Equal Protection Clause demands that States provide equal treatment to different groups. It does not demand preferential treatment to one group or another. Moreover, Texas has not unconstitutionally included nor excluded a protected group, because this Court has never held that voters or non-voters in general qualify as a protected class. The relative weight Texas gives to voters relative to non-voters has no bearing on this case.

An alternative construction of the plaintiffs' theory is that Plan S172 is invidiously discriminatory because Texas must exclude non-voters from one of the two population metrics. This theory fails on three counts. First, claiming that failing to *exclude* a group amounts to invidious discrimination is, at best, illogical and oxymoronic. Second, this Court has consistently held that only *one* population metric is necessary when drawing state legislative districts.[22] Plaintiffs' theory requiring that *two* population metrics be employed in apportionment schemes is entirely without precedent in this Court's jurisprudence. Third, even if this Court were to hold that two apportionment bases are required, this Court has never held that States are required to include or exclude certain groups of persons in any one apportionment scheme. The *Burns* Court acknowledged this, noting that no decision, including *Reynolds*, required States "to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" in their apportionment base.[23] Similarly, neither *Reynolds* nor its progeny have required States to *exclude* such groups. The *Burns* Court further held that the choice of which groups to include and which to exclude is one "about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[24] To require States to equalize both to-

19 *Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973).
20 *Burns*, *supra*, at 92.
21 *See Reynolds*, *supra*, at 568-569, *Burns*, *supra*, at 95, *Gaffney*, *supra*, at 737.
22 *See Reynolds*, *supra*, at 577 ("both houses of a state legislature must be apportioned on *a* population basis" (emphasis added)) and *Burns*, *supra*, at 80 ("using registered voters as *a* basis" (emphasis added)).
23 *Ibid.*
24 *Ibid.*

tal population *and* voter population would be to break from decades of this Court's jurisprudence.

III. EQUALIZING TOTAL POPULATION AND VOTER POPULATION IS NOT A PRACTICAL CONSTITUTIONAL REQUIREMENT.

A. CVAP Is Not Sufficiently Precise Or Accurate To Satisfy The "One Person, One Vote" Standard.

Not only has census data been traditionally used in apportionment, but census data is also the most reliable and precise method of measuring population. CVAP and similar metrics are inherently flawed. No other datasets, including those derived from the American Community Survey ("ACS"), "have the granularity, timeliness, detail, or accuracy comparable to the census enumeration."[25] The United States census data set is superior to other sets because it is the only set of data that is based on "actual enumeration," meaning it counts people head-by-head.[26] Unlike other datasets, including those derived from ACS data, census data accounts for children, noncitizens, prisoners and disenfranchised felons, and those ineligible [to register to vote or to vote] because of mental disability."[27] The precision of the dataset is important because failing to precisely account for actual enumeration may lead to both under- and over-inclusion in apportionment.

At best, ACS measurements for CVAP are ballpark figures and are insufficient for establishing a constitutional standard. ACS is a survey and not an enumeration as defined by the Constitution. Surveys are samplings of the population and are accompanied by significant margins of error. While a 95% confidence is the normal standard for determining "statistical significance," according to the U.S. Census Bureau itself, the "ACS releases data and error margins at the 90 percent confidence interval."[28] This evidence should not be construed to mean that CVAP and ACS are useless metrics for other purposes; however, it is clear that these measures are inferior to census data.

Plaintiffs and supporters of CVAP argue that CVAP is a viable constitutional standard because CVAP and other ACS datasets happen to "serve[] as the basis for distributing more than $450 billion in federal programs" and "to ensure compliance with the Voting Rights Act."[29] While we acknowledge that CVAP can be a useful metric to aid in redistricting and apportionment matters, plaintiffs fail to prove that the Equal Protection Clause requires States to employ CVAP or any other ACS datasets. Establishing that CVAP is a useful metric in administering federal programs or in complying with the VRA is not relevant to the constitutional question in this case.

We recognize that total population is not without its own flaws. As this Court has already noted, "total population, even if absolutely accurate as to each district when counted, is not a talismanic measure of the weight of a person's vote."[30] The main reason for this is that the U.S. census "is more of an event than a process. It measures population at only a single instant in time."[31] Naturally, a decennial census will have its own distortions to population distribution, as people often relocate between different jurisdictions. Nevertheless, this Court has never ruled that this shortcoming of total population as a metric disqualified total population from alone being sufficient to establish "One Person, One Vote" standard. On the contrary, this Court has approved total population as a State legislative apportionment scheme so long as the State maintains the 10% *de minimis* rule created to allow for flexibility when complying with the standards already in place: compactness, contiguity, geographical boundaries, race, gender, ethnicity, etc.[32] This Court's rulings have consistently affirmed that total population is a workable constitutional standard.

B. Forcing States To Equalize Total Population and CVAP May Have Unintended Consequences Of Diluting Minority Voting Strength.

If this Court were to side with the plaintiffs, it would necessarily "enter[] into political thickets and mathe-

25 Brief of Nathaniel Persily, *et al.*, as *Amici Curiae*, at 4.
26 *Id.*, at 3.
27 *Id.*, at 4-5.
28 *Id.*, at 18.
29 Brief of Demographers Peter A. Morrison, *et al.*, as *Amici Curiae*, at 4.
30 *Gaffney, supra*, at 746.
31 *Ibid.*
32 *Id.*, at 775.

matical quagmires," a position which this Court has already explicitly rejected.[33] Moreover, forcing States to equalize total population *and* voter population could create practical problems that may dilute minority voting strength and violate § 2 of the VRA.

CVAP may lead to minority vote dilution. As "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large,"[34] this Court must consider how forcing states to equalize total population and CVAP would disproportionately break up "racial voting blocs" for minority voters.[35] This Court would mostly likely see the effects of the foregoing theory of minority vote dilution under two separate conditions: (1) in districts with heavy immigration populations and (2) in districts with high compactness of majority-minority populations. Furthermore, border States such as Arizona, Texas, New Mexico, and California are likely to have districts in which both conditions are simultaneously satisfied, further exacerbating the risk of minority vote dilution.

Forcing border States to equalize total population *and* voter population could result in minority vote dilution in cases where there are large populations of children, undocumented persons, and other noncitizens. Some States, in an effort to equalize voter population, may be unable to satisfy other constitutional and statutory requirements like compactness and contiguity. Adding on further requirements such as equalizing voter population *and* equalizing total population could require States to engage in a deleterious trade-off between theoretical and practical equality: at some point, adding requirements that may sound appealing in theory will prove to be meaningless. For example, this Court has clearly determined that the VRA prevents States from diluting minority voting strength by breaking apart "politically cohesive and geographically compact" minority populations.[36] Nevertheless, the plaintiffs demand that a State should not only have to preserve minority voting strength, but also ensure equality of total population, equality of voter population, geographical compactness, and geographical contiguity. Additionally, State constitutions may require consideration of other factors including, but not limited to, county lines, geographical features, and municipal boundaries. With all of these factors, something must give way, and minority voting strength may well be diminished to a certain degree.

Despite the plaintiffs' best intentions, the potential discriminatory effects of their proposed apportionment scheme renders voter population an impermissible constitutional standard. Inviting States to dilute minority voting strength would be to take a step back 50 years in representational- and voting-equality progress established by this Court.

IV. EVEN IF EQUALIZING TOTAL POPULATION AND VOTER POPULATION WERE PRACTICAL, THIS COURT SHOULD NOT REQUIRE STATES TO DO SO.

The district court was correct in asserting that the plaintiffs' argument can be reduced to a complaint that Texas does "not apportion[] districts pursuant to plaintiffs' proffered scheme."[37] Plaintiffs' argument fails to take into account that this Court has always deferred to the state legislatures to frame their apportionment scheme given their unique populations, unless the scheme "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[38] In *Burns*, this Court permitted registered voters as a metric because (1) it closely approximated total population and (2) Hawaii chose the apportionment scheme to alleviate the "sizeable" differences in the population distribution.[39] This Court was careful not to create a new constitutional mandate as it recognized that this Court had no role in doing so. Hawaii's apportionment scheme cannot reasonably be expected to work in every district of Hawaii, let alone every district across the United States. The *Burns* Court declined to adopt a blanket law, and

33 *Reynolds, supra*, at 566.

34 *Thornburg* v. *Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment).

35 *Id.*

36 *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 425 (2006) (quoting *Gingles*, *supra*, at 50).

37 *Evenwel* v. *Perry* (2014).

38 *Burns*, *supra*, 89.

39 *Id.*, at 90.

chose instead to defer to the judgment of the States as to how to apportion their districts.

It is worth noting that Texas has not chosen CVAP as its preferred apportionment base. Nevertheless, even if Texas did employ CVAP or any other metric, *Burns* still does not hold that CVAP is necessary for an apportionment scheme to be constitutional. The plaintiffs argue that *Reynolds* requires the use of CVAP or some other similar metric, but, as discussed previously, *Reynolds* carefully left the question of which metric to use open to the States. *Burns* permits Hawaii to use registered voters as the metric in its apportionment schemes, but did not go so far as to *require* it. Similarly, this Court cannot impose CVAP as a required metric for Texas when a metric of "substantial equality of population" that satisfies this Court's 10 percent-deviation test already exists.[40] Plaintiffs have confused sufficiency with necessity in this case. CVAP may be sufficient as a standard, but it is certainly not necessary.

This Court has repeatedly refused to "become bogged down in a vast, intractable apportionment slough."[41] Accepting the plaintiffs' conflation of sufficiency and necessity will drag this Court down a road with no end in sight. This Court has already rejected this path in *Gaffney* v. *Cummings* (1973), when the Court said that "[i]nvolvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population equality standard... The point is, that such involvements should never begin."[42]As long as the apportionment scheme selected by the State is constitutionally sufficient, and plaintiffs are unable to show "a prima facie case of invidious discrimination," then this Court has no constitutional basis to interfere.[43] In this case, the plaintiffs are unable to present a prima facie case of invidious discrimination. Thus, this Court should defer to Texas's right to use the reliable total population metric.

40 *Gaffney*, *supra*, at 744 (quoting *Reynolds*, *supra*, at 579).
41 *Gaffney*, *supra*, at 750.
42 *Id.*, at 750-751.
43 *Id.*, at 751

CONCLUSION

Although this Court has often used total population as its metric of equality, it has "never determined that relevant 'population' that states and localities must equally distribute among districts," instead defining the general boundaries of constitutional permissibility.[44] Moreover, this Court has held that an apportionment scheme is constitutionally valid if it substantially equalizes population among the districts and is not invidiously discriminatory. Plaintiffs have conceded that Plan S172 achieves substantial equality of total population, a metric of equality consistently allowed by this Court. The plaintiffs rely on an entirely novel theory rejected by the Fourth, Fifth, and Ninth Circuits. This Court has never endorsed the plaintiffs' theory and should not do so today.

Total population based on decennial census data is a reliable metric that is permitted under the Equal Protection Clause. On the other hand, CVAP and other ACS datasets are insufficiently precise for redistricting purposes. Additionally, requiring States to equalize total population *and* voter population could dilute minority voting strength in an attempt to satisfy other requirements. But, even after setting aside practical concerns, this Court must not mandate that all States equalize voter population by using CVAP or some other similar metric when drawing legislative districts. Doing so would drag this Court down into "a vast, intractable apportionment slough"[45] and thrust this Court into "political thickets and mathematical quagmires."[46] This Court has carefully avoided those situations and should continue to do so.

The judgment of the United States District Court for the Western District of Texas should be affirmed.

44 *Chen* v. *City of Houston*, 532 U.S. 1046, 1047-1048 (2001) (Thomas, J., dissenting from denial of cert.).
45 *Gaffney*, *supra*, at 750.
46 *Reynolds*, *supra*, at 566.

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