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Who's the 'We?' Who's 'the People?'

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Editor's Note: Today the country celebrates Constitution Day. The following is part of a series The News Journal and Widener University Delaware Law School have put together with commentary that looks at the Constitution's most popular words, "We The People."

This year marks the 10th anniversary of the Constitution Day series.

The invocation of "We the People" in the Preamble to the Constitution has always been both stirring and vexing. Who are the "we" included among "the people"?

This fall the Supreme Court will hear *Evenwel v. Abbott*, arising from a legislative redistricting plan adopted by Texas for its state Senate. Texas made each of its Senate districts roughly the same size as measured by total population.

That plan was challenged as unconstitutional, however, because when measured by the number of "eligible voters" in each district, the districts were vastly disproportionate.

The disparity in voting power caused by the Texas

plan allegedly violates a voting equality principle derived from the Equal Protection Clause of the 14th Amendment, in which the Court held that "both houses of a bicameral state legislature must be apportioned on a population basis." The principle is commonly known by the shorthand "one person one vote."

"One person one vote" is by no means a self-evident moral or legal principle. It is not, for example, the principle that guided the constitutional design of the United States Congress. Under the "Great Compromise" adopted by the Framers of the Constitution, the United States Senate is comprised of two senators from each state, and the House of Representatives is comprised of representatives proportioned among the states according to population. This means that voters in small states such as Delaware have more "voting power" for the Senate than voters in large states such as New York.

States, however, are governed by a different set of rules. In *Reynolds*, the Court held that states could not adopt the federal model in designing their state legislatures, but were instead compelled by the 14th Amendment to make the representation in each state chamber proportionate to population. But "what" population? That issue has never been clarified.

As with many large constitutional conflicts, resolu-

tion implicates an amalgam of disputes over the import of words, the lessons of history, deep questions of national identity and the meaning of representative democracy.

The text of the Constitution as originally written required that districts voting for the United States House of Representatives be apportioned "according to their respective numbers." The textural purity of that phrase, however, was adulterated by the infamous three-fifths compromise, under which slaves were counted as three-fifths of a person, by the exclusion of "Indians not taxed," and by the fact that women, while counted in the population, were not allowed to vote.

As to *Evenwel*, there is some immediate intuitive appeal to the position that only eligible voters should be counted. Voters, after all, pick legislatures, and if all votes should count equally, there is a certain logical purity to the argument that only eligible voters should count. Perhaps Texas should be able to decide for itself whether to grant a measure of representative "voice" to all persons within its borders. If you were a Justice, what version of "We the People" would you endorse?

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