
FREE SPEECH & ELECTION LAW

ONE PERSON, ONE VOTE: ADVANCING ELECTORAL EQUALITY, NOT EQUALITY OF REPRESENTATION

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Note from the Editor:

This article previews *Evenwel v. Abbott*, which will be heard by the Supreme Court this fall, and advocates for a judicially enforceable right to equal electoral power. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- Derek Muller, *One Man, One Vote in Texas*, LIBRARY OF LAW & LIBERTY (May 29, 2015), available at <http://www.libertylawsite.org/2015/05/29/one-man-one-vote-in-texas/>.
 - *Evenwel v. Abbott*, SCOTUSBLOG, available at <http://www.scotusblog.com/case-files/cases/evenwel-v-abbott/>; Special Feature: One person, one vote and *Evenwel*, SCOTUSBLOG, available at <http://www.scotusblog.com/category/special-features/one-person-one-vote-and-evenwel/>.
 - Tierney Sneed, *5 Points On How 'One Person, One Vote' Is Suddenly In Jeopardy*, TALKING POINTS MEMO (May 27, 2015), available at <http://talkingpointsmemo.com/fivepoints/texas-supreme-court-districting>.
 - J. Douglas Smith, *When Not All Votes Were Equal*, THE ATLANTIC (July 26, 2015), available at <http://www.theatlantic.com/politics/archive/2015/07/one-person-one-vote-a-history/399476/>.
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In its October 2015 term, the Supreme Court of the United States will hear arguments in a case arising out of the Texas legislature's use of total population in drawing the state Senate's districts. This case, *Evenwel v. Abbott*, raises the issue of which population states can or should use when determining the legislative boundaries of representative districts. The question is whether the principle of "one person, one vote" requires that states use particular demographic information, such as total population versus voting-age population, or some other variant that includes or excludes individuals like noncitizens or felons who are ineligible to vote.

ONE PERSON, ONE VOTE

Following each decennial Census, state legislatures reapportion voting districts for their state and federal representatives. The guiding principle—"one person, one vote"—requires that all voters have approximately equal voting power. This principle comes from a line of cases decided by the Supreme Court in the 1960s. In *Baker v. Carr* (1962), the Court determined that it is within the judicial power for courts to review and alter state legislatures' attempts to reapportion voting districts.¹ The majority dismissed the argument that reapportionment is a

political question best left to the accountable political branches.

In *Gray v. Sanders* (1963), the Court ruled that a state's reapportionment giving rural votes more weight than urban votes was unconstitutional:

The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighed the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. . . . How then can one person be given twice or 10 times the voting power of another. . . because he lives in a rural area or because he lives in the smallest rural county?²

The following year, in *Reynolds v. Sims* (1964), the Court held that the Fourteenth Amendment's Equal Protection Clause demands substantially equal legislative representation for all citizens in a given state. This "one person, one vote" principle means that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis," and it prohibits the apportionment of state legislatures based on geographic or political subdivisions.³

The Court did not limit what population basis—such as total population or citizen voting-age population—states may use in drawing districts. However, warning against diluting the weight of some voters, the Court noted that "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted."⁴ This means that "[f]ull and effective participation by all citizens in state government

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requires...that each citizen have an equally effective voice in the election of members of his state legislature.”⁵ Thus, under the principle established in *Reynolds*, districts must be drawn “on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.”⁶

Prior to *Reynolds*, states like Alabama and Tennessee had refused to redistrict for more than half a century, despite a dramatic nationwide population shift from rural to urban areas. These state legislatures were dominated by rural legislators, who were not willing to reapportion and lose their power and control. Within two years of the *Reynolds* decision, however, legislative districts were redrawn in nearly every state, and urban areas gained a substantial number of legislative seats.

Today, lawmakers from urban areas dominate many state legislatures because of the huge influx of noncitizens, both legal and illegal, into predominantly urban settings. This greatly increases the population of non-voters who can be and are used to fill in urban legislative districts. The Supreme Court’s decision in *Evenwel v. Abbott* has the potential for a loss of clout by urban areas similar to the loss that rural districts experienced after *Reynolds*.

EVENWEL V. ABBOTT

Sue Evenwel and Edward Pfenninger challenged the state Senate districts drawn by the Texas legislature in 2013. The legislature used total population in determining whether the population of each Senate district met the requirements of the Equal Protection Clause’s “one person, one vote” principle. Evenwel and Pfenninger, registered voters in Senate Districts 1 and 5, respectively, filed suit because both the number of citizens of voting age and the number of registered voters in their districts deviate substantially—between 31 and 49 percent—from the “ideal” population of a Texas Senate district.⁷

The plaintiffs argue that this disparity significantly dilutes their votes in comparison to those of voters who live in districts with large numbers of non-voters, particularly districts with large numbers of noncitizens who are ineligible to vote and may not be in the country legally. According to this logic, their votes were worth roughly half those of voters in other districts. In other words, they claimed that their districts were allotted the same number of representatives as other districts that contained the same number of people but only half the number of eligible voters. Although Texas used total population data, data on the citizen voting-age population compiled by the U.S. Census Bureau that would have remedied this disparity was available to the state.

Evenwel and Pfenninger lost their constitutional challenge before a three-judge panel, which determined that the legislature’s choice of total population for reapportionment was judicially unreviewable. The panel concluded that the plaintiffs sought judicial “interference with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals.”⁸ The plaintiffs appealed directly to the Supreme Court, arguing that a “statewide districting plan that distributes voters or potential votes in a grossly uneven way... is patently unconstitutional under *Reynolds* and its progeny.”⁹

The Supreme Court has left unresolved the issue of what population is appropriate for redistricting: whether it is total population, voting-age population, citizen voting-age population, citizen-eligible voting-age population, or some variant thereof. In *Gaffney v. Cummings* (1973), the Court noted that total population “may not actually reflect the body of voters whose votes must be counted and weighed for the purposes of reapportionment, because ‘census persons’ are not voters,” and in *Burns v. Richardson* (1973), the Court said it was up to states to choose what population to use “unless a choice is one the Constitution forbids.”¹⁰

In *Burns*, the Court upheld Hawaii’s choice of registered voters as the reapportionment basis because many people counted in the Census, such as members of the military stationed there, were not actually Hawaii voters. The Court concluded that using total population was not mandated when it would result in “a substantially distorted reflection of the distribution of state citizenry.”¹¹ The Court did warn about using registered voters or “actual voter basis,” because that population is “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.”¹²

However, in a point directly applicable to the issue being raised by *Evenwel* and Pfenninger, the Court also said that states are not “required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime.”¹³ Additionally, while absolute parity of population is not required, the Court has established that a state legislative redistricting plan with a population deviation that exceeds 10 percent creates a prima facie case of discrimination.¹⁴

In 2001, the Court declined to review *Chen v. City of Houston*, another Texas case that raised this same issue. Justice Clarence Thomas dissented from the Court’s refusal to hear that case, saying that the Court had “left a critical variable in the [‘one person, one vote’] requirement undefined. We have never determined the relevant ‘population’ that States and localities must equally distribute among their districts.”¹⁵ According to Thomas, this failure means that the “one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population.”¹⁶

The plaintiffs in *Evenwel* agree and point out in their Jurisdictional Statement that, absent such a determination, the legislature could have drawn a Senate districting plan with 31 districts of equal population without violating the “one person, one vote” principle “even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State.”¹⁷ As they argue, “That cannot be correct.”¹⁸

In 1990, the U.S. Court of Appeals for the Ninth Circuit ruled in a similar case, *Garza v. County of Los Angeles*, that total population was the correct population to use regardless of voters because “the people, including those who are ineligible to vote, form the basis for representative government.”¹⁹ However, a dissenting judge, Alex Kozinski, pointed out that the theory “at the core of one person one vote is the principle of electoral equality, not that of equality of representation.”²⁰

Kozinski wrote that “the name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court’s primary con-

cern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten...or one-half.”²¹ Kozinski further added that a “districting plan that gives different voting power to voters in different parts of the county...even though raw population figures are roughly equal...certainly seems in conflict with what the Supreme Court has said repeatedly” with regard to equal protection and “one person, one vote.”²² Equal protection “protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned.”²³

One issue that has been raised in the *Evenwel* case is the accuracy and availability of population data on noncitizens who are ineligible to vote. Some claim that there is no database of citizenship that “exists at the level of granularity necessary to draw legislative districts that comply with one person, one vote.”²⁴

However, according to a brief filed with the Supreme Court by a number of demographers, including Dr. Peter Morrison of the RAND Corporation’s Population Research Center, citizen voting-age population (CVAP) data are readily available through the American Community Survey conducted by the U.S. Census Bureau.²⁵ The Census Bureau designed this survey to “collect detailed demographic information on an ongoing basis.”²⁶ The data are compiled on “running 1-, 3-, and 5-year summaries” that include citizenship information, and the federal government relies on this survey to distribute “more than \$450 billion in federal programs.”²⁷

The reliability of the American Community Survey and its CVAP data, according to these demographers, “is demonstrated by its widespread use and acceptance,” including by the U.S. Justice Department, states, and local governments to “ensure compliance with the Voting Rights Act.”²⁸ In fact, the Supreme Court, federal courts of appeals, and district courts routinely use the American Community Survey’s CVAP data. The demographers assert that the Census Bureau’s “CVAP data is reliable enough to allow states, like Texas, to draw, analyze, and adjust voting district boundary lines of substantially equal numbers of eligible voters.”²⁹

THE POSSIBLE EFFECT OF A DECISION

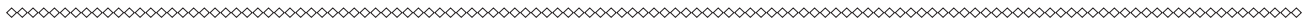
If the Supreme Court rules in favor of the plaintiffs in *Evenwel*, its decision could have a huge effect on state legislative districts as they currently stand. Democrat-controlled legislative seats tend to have larger numbers of noncitizens than do Republican-controlled seats. For example, in the heavily Democratic areas of Queens and Kings County, New York, only 78 percent of the residents are citizens, whereas in the more Republican Nassau County, 91 percent of the residents are citizens.³⁰ If the Court finds that Texas violated the “one person, one vote” guarantee, legislative districts likely would be redrawn in parts of the country with large noncitizen populations, with a noticeable shift toward Republicans. Yet it is not the potential political effects that make this case important; rather, it is the principle of “one person, one vote.”

While states have a great deal of leeway under our federalist system, the Supreme Court determined 50 years ago that equal protection applies to the election process—particularly when determining the districts in which voters exercise their

basic right to choose their representatives. As Judge Kozinski said, that principle protects the value of the vote of individual voters. When the value of the votes of Sue Evenwel and Edward Pfenninger is half the value of their neighbors’ votes, it seems clear that this principle has been violated.

Endnotes

- 1 369 U.S. 186 (1962).
- 2 *Gray v. Sanders*, 372 U.S. 368, 379 (1963).
- 3 *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The Court recognized the “dangers of entering into political thickets and mathematical quagmires” but ultimately found that “a denial of constitutionally protected rights demands judicial protection.” *Id.* at 566.
- 4 *Id.* at 562.
- 5 *Id.* at 565.
- 6 *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50, 56 (1970).
- 7 Jurisdictional Statement of Appellants at 11, *Evenwel v. Abbott* (Feb. 2, 2015) (No. 14-940).
- 8 *Evenwel v. Perry*, 2014 WL 5780507 at *4 (W.D. Texas 2014) (internal citation omitted).
- 9 Jurisdictional Statement at 12.
- 10 *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973); *Burns v. Richardson*, 384 U.S. 73, 92 (1966).
- 11 *Burns*, 384 U.S. at 94.
- 12 *Id.* at 92.
- 13 *Id.*
- 14 *Brown v. Thomson*, 462 U.S. 835 (1983)(2001).
- 15 *Chen v. City of Houston*, 532 U.S. 1046 (Thomas, J., dissenting from denial of certiorari).
- 16 *Id.*
- 17 Jurisdictional Statement at 3.
- 18 *Id.*
- 19 *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (1990).
- 20 *Id.* at 782 (Kozinski, J., concurring and dissenting in part).
- 21 *Id.*
- 22 *Id.* at 780.
- 23 *Id.* at 782.
- 24 Nathaniel Persily, Symposium: *Evenwel v. Abbott* and the Constitution’s big data problem, SCOTUSBLOG (Aug. 3, 2015), <http://www.scotusblog.com/2015/08/symposium-evenwel-v-abbott-and-the-constitutions-big-data-problem/>.
- 25 Brief of Demographers Peter A. Morrison, Thomas B. Bryan, William A.V. Clark, Jacob S. Siegel, David A. Swanson, and the Pacific Research Institute as Amici Curiae in Support of Appellants at 3, *Evenwel v. Abbott* (Aug. 2015) (14-940).



26 *Id.*

27 *Id.* at 4.

28 *Id.*

29 *Id.*

30 Sean Trende, *The Most Important Redistricting Case in 50 Years*, REALCLEAR-POLITICS (June 3, 2015), http://www.realclearpolitics.com/articles/2015/06/03/the_most_important_redistricting_case_in_50_years_126831.html.

