

Evenwel v. Abbott: Destroying Electoral Equality and Eroding “One Person, One Vote”

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In *Evenwel v. Abbott*, the Supreme Court answered a question that was still unanswered after decades of election-law jurisprudence: whether states violate the “one-person, one-vote” principle—which the Court had found in the Fourteenth Amendment’s Equal Protection Clause—when they draw legislative districts by equalizing total population.¹ The argument was that this method dilutes the weight of the votes of people who live in districts with many eligible voters, compared with other districts that have the same number of people but fewer voters (because of more noncitizens, children, and others who are ineligible to vote). Regrettably, the Court ruled that districting based on total population does *not* violate the one-person, one-vote standard—essentially deferring to states on this crucial issue of constitutional law. Thus, the Court deviated from its established electoral-equality principle that the votes of citizens cannot be weighted differently during the redistricting process. Instead, the Court adopted an “equal representation” theory that all “persons, whether or not they are eligible to vote, are entitled to equal representation in the legislature.”²

With this ruling, states will be able to continue diluting the votes of citizens by including large numbers of ineligible individuals such

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¹ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

² *Id.* at 1143.

as noncitizens—both legal and illegal immigrants—in redistricting, allowing them to manipulate and gerrymander legislative districts. The Court left unanswered whether states can use some measure other than total population—such as eligible voters—without violating the one-person, one-vote principle.

One-Person, One-Vote under the Equal Protection Clause

Following each decennial census, state legislatures (or so-called independent redistricting commissions in Arizona and California) reapportion voting districts for their state and federal legislative representatives. The guiding principle—one person, one vote—was created by the Supreme Court in a series of cases decided in the 1960s. After avoiding redistricting cases as a “political question” outside the purview of the judiciary for almost two centuries, the Court changed its mind in *Baker v. Carr* in 1962.³

In a case involving the redistricting of the Tennessee legislature, which had not occurred since the 1900 census, Justice William Brennan, writing for the Court, held that “allegations of a denial of equal protection present a justiciable constitutional cause of action” because the “right asserted is within the reach of judicial protection under the Fourteenth Amendment.”⁴ In his concurrence, Justice William Douglas said that the key “question is the extent to which a State may weight one person’s vote more heavily than it does another’s,”⁵ a principle that, as we shall see, the Court damaged considerably with the *Evenwel* decision.

Justice Felix Frankfurter, joined by Justice John Marshall Harlan, dissented, with Frankfurter writing that the Court was reversing “a uniform course of decision established by a dozen cases.” He criticized the majority for discarding “the equally uniform course of our political history . . . in asserting destructively novel judicial power” that violated “the role of this Court in our constitutional scheme” and for disregarding “inherent limits in the effective exercise of the Court’s ‘judicial Power.’” He warned that the Court’s intervention would “impair the Court’s position as the ultimate organ of ‘the

³ *Baker v. Carr*, 369 U.S. 186 (1962).

⁴ *Id.* at 237.

⁵ *Id.* at 242.

supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce."⁶

A year later, in *Gray v. Sanders*, the Court ruled that a state's reapportionment giving rural votes more weight than urban votes was unconstitutional, noting:

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?⁷

In 1964, in *Reynolds v. Sims*, a case involving Alabama's state legislature—which also had not been redistricted since the 1900 census—the Court held that the Equal Protection Clause demands substantially equal legislative representation for all citizens in a given state.⁸ This one-person, one-vote principle means "the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."⁹

The Court prohibited the apportionment of state legislatures based on geographic or political subdivisions. This is in sharp contrast to the U.S. Congress, whose senate chamber under the Constitution's Article I and Seventeenth Amendment is specifically based on geographic representation that the Court found unconstitutional for states in *Reynolds*.

The Court did not specify in *Reynolds* what population demographic must be used by states, such as total population, voting-age

⁶ *Id.* at 267.

⁷ *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

⁸ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

⁹ *Id.*

population, citizen voting-age population (“CVAP”), registered voters, or anything else, in drawing legislative districts. Echoing the warning expressed by Justice Douglas in *Baker* against diluting the *weight* of the vote of individuals, however, the Court noted that if a state provided “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.”¹⁰

This means that “effective participation by all *citizens* in state government requires . . . that each *citizen* have an equally effective voice in the election of members of his state legislature.”¹¹ The Constitution demands “no less.”¹² Thus, under the principle established in *Reynolds*, the Court held in 1970 that legislative 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.”¹³ This principle, which the Court articulated as applying to both *citizens* and *voters*, was not followed by the Court in *Evenwel*.

Prior to *Reynolds*, states like Alabama and Tennessee had refused to redistrict state legislative districts for more than half a century, despite a dramatic, nationwide population shift from rural to urban areas. Those state legislatures were dominated by rural legislators who were not willing to lose their power and control. As the Court said in *Evenwel*, those “rural legislators who benefited from malapportionment had scant incentive to adopt new maps that might put them out of office.”¹⁴ But within two years of the *Reynolds* decision, legislative districts were redrawn in nearly every state, and urban areas gained a substantial number of seats.

Today, lawmakers from urban areas dominate many state legislatures partly because of the huge influx of noncitizens—both legal and illegal immigrants—into predominantly urban settings.

¹⁰ *Id.* at 562.

¹¹ *Id.* at 565 (emphasis added).

¹² *Id.*

¹³ *Hadley v. Junior College Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970) (emphasis added).

¹⁴ *Evenwel*, 136 S. Ct. at 1123.

This greatly increases the population of nonvoters who can be used to fill in urban legislative districts. Thus, the Court in *Evenwel* was faced with issues very similar to what it faced 50 years ago—although in an unexpected way, because it took decades for voting-population metrics to diverge from voting population. A decision in favor of the challengers in *Evenwel* could have resulted in a loss of clout by urban areas similar to, though perhaps smaller than that experienced by rural districts after *Reynolds* (at least in Texas; the reverse might have been the case in places like Utah). Regardless, that will not happen because of the Court’s decision.

***Evenwel* and the Challenge to Define “One Person, One Vote”**

Two registered voters, Sue Evenwel and Edward Pfenninger, challenged the state senate districts adopted by the Texas legislature in 2013, based on an interim plan drawn by a federal district court. The court and the legislature used total population from the 2010 census in drawing the districts. Evenwel and Pfenninger sued because both the number of citizens of voting age and the number of registered voters in their state senate districts deviated substantially from the “ideal” population of such a district. While the deviation of the districts based on total population was 8.04 percent, when “measured by a voter-population baseline—eligible voters or registered voters—the map’s maximum population deviation exceeds 40%.”¹⁵ In fact, according to the challengers, the deviation ranged from 46 percent to 55 percent, depending on which metric was used, from citizen voting age population to total voter registration.¹⁶

They argued that using total population produced “unequal districts when measured by voter-eligible population.”¹⁷ Thus, their votes were significantly diluted—by nearly half their value—in comparison to the votes of those who lived in districts with large numbers of nonvoters, particularly districts with large numbers of noncitizens who are ineligible to vote. (They may not even be in the country legally; Texas has the second-largest population of illegal

¹⁵ *Id.* at 1125.

¹⁶ Brief for Appellants at 8, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

¹⁷ *Evenwel*, 136 S. Ct. at 1123.

aliens—after California—in the United States, 1.8 million in 2012 compared with 16 million citizens—a significant percentage.¹⁸)

In other words, the plaintiffs 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, CVAP data compiled by the Census Bureau that would have remedied this disparity was available.

Is Citizen-Population Data Even Available?

Justice Samuel Alito claims in his concurrence that total population “statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters”¹⁹—it could be that his vote was dependent on that belief—but that is simply not the case. According to an amicus brief filed by demographers, including several formerly with the Rand Corporation and the Census Bureau, the government has extensive citizenship-population data that professional demographers can use to “readily establish district boundaries that divide citizen voting-age population on a ‘substantially equal’ basis.”²⁰ The reliability of the data “is demonstrated by its widespread use and acceptance” by the “Justice Department, States and local government” as well as “[t]his Court, U.S. Courts of Appeals, and district courts” in ensuring “compliance with the Voting Rights Act.”²¹

An amicus brief by the American Civil Rights Union, which included not only former U.S. Attorney General Edwin Meese III, but other former Justice Department officials and lawyers (including this author), listed numerous Voting Rights Act lawsuits in which

¹⁸ Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, Office of Immig. Statistics, U.S. Dep’t of Homeland Security (Mar. 2013); *Voting and Registration in the Election of November 2012*, U.S. Census Bureau, Report No. P20-568, Table 4a, Reported Voting and Registration, for States.

¹⁹ *Evenwel*, 136 S. Ct. at 1143.

²⁰ Brief of Demographers Peter A. Morrison, Thomas M. 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*, 136 S. Ct. 1120 (2016).

²¹ *Id.* at 4.

the department used citizen voting age population to determine compliance with the law and to remedy violations. According to the brief, the “logic of the one-person, one-vote principle” is the “reason why redistricting and other suits brought by the Justice Department under Section 2 of the Voting Rights Act have been based on Citizen Voting Age Population (CVAP), or otherwise focused on the rights of citizens who can vote, or on ‘voters.’”²²

Before issuing its decision in *Evenwel* the Supreme Court had left unresolved the issue of what population is appropriate for states to use in redistricting. In the 1973 case of *Gaffney v. Cummings*, 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.”²³ In *Burns v. Richardson*, the Court said it was up to states to choose what population to use “unless a choice is one the Constitution forbids.”²⁴

The Court in *Burns* upheld Hawaii’s choice of registered voters as the reapportionment basis because many people counted in the census were not actually Hawaiian voters, but members of the large military contingent stationed there. The military population was so large that the lower court noted that if “Hawaii’s reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years.”²⁵

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.”²⁶ The Court did warn about using registered voters or “actual voter basis,” because that population

²² Brief of American Civil Rights Union as Amicus Curiae in Support of Appellants at 14–15, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). The author is one of the amici on this brief.

²³ *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

²⁴ *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

²⁵ *Holt v. Richardson*, 238 F. Supp. 468, 474–75 (D. Haw. 1965), vacated by *Burns*, 384 U.S. 73.

²⁶ *Burns*, 384 U.S. at 94.

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.”²⁷

In a point directly applicable to the issue raised by *Evenwel* and *Pfenninger*, the *Burns* Court also said states are not “required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime.”²⁸ Additionally, while the Court has established that congressional districts must have as equal populations as possible,²⁹ absolute parity of population is not required in state legislative districts. The Court has ruled that a state legislative-redistricting plan that has a population deviation that exceeds 10 percent creates a *prima facie* case of discrimination³⁰—a principle that the Court reaffirmed in *Evenwel*.³¹

Justice Ginsburg’s Majority Opinion

All of the challengers’ principled arguments against using total population in the redistricting process were to no avail. In an opinion written by Justice Ruth Bader Ginsburg, joined by Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, with concurring opinions by Justices Clarence Thomas and Samuel Alito, the Court ruled “based on constitutional history, this Court’s decisions, and longstanding practice, that a State may draw its legislative districts based on total population.”³²

The Court claims in its opinion that while there have been repeated disputes “over the permissibility of deviating from perfect population equality, little controversy has centered on the population base jurisdictions must equalize.”³³ However, in a 1990 case, *Garza v. County of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit held that total population was the correct population to use

²⁷ *Id.* at 92.

²⁸ *Id.*

²⁹ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

³⁰ *Brown v. Thomson*, 462 U.S. 835 (1983).

³¹ *Evenwel*, 136 S. Ct. at 1124 (noting that maximum deviations above 10 percent are presumptively impermissible).

³² *Id.* at 1123.

³³ *Id.* at 1124.

regardless of voters because “the people, including those who are ineligible to vote, form the basis for representative government.”³⁴ Judge Alex Kozinski dissented, pointing out that the theory “at the core of one person one vote is the principle of electoral equality, not that of equality of representation.”³⁵

Kozinski also 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 concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten . . . or one-half.”³⁶ Kozinski also noted 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.”³⁷ 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.”³⁸

The Supreme Court avoided this very issue in 2001 when it refused to review another Texas case, *Chen v. City of Houston*, in which the plaintiffs claimed that the city drew districts “without regard to the citizen voting age population,” thus diluting “the value of votes in districts with larger total populations and citizen voting age populations.” Justice Thomas dissented, saying that the Court had “left a critical variable in the [one-person, one-vote] requirement undefined.” The Court never “determined the relevant ‘population’ that States and localities must equally distribute among their districts.”³⁹

The Supreme Court in *Evenwel* disagrees with Kozinski’s analysis—which echoed the claims raised by the challengers in this case—saying it rejected the “appellants’ attempt to locate a voter-equality mandate in the Equal Protection Clause” and that it was

³⁴ *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (1990).

³⁵ *Id.* at 782 (Kozinski, J., concurring and dissenting in part).

³⁶ *Id.*

³⁷ *Id.* at 780.

³⁸ *Id.* at 782.

³⁹ *Chen v. City of Houston*, 121 S. Ct 2020, 2021 (Thomas, J., dissenting from denial of certiorari).

“plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.”⁴⁰

The Court goes through the constitutional history of the apportionment of congressional seats allocated to the states, which it calls a “question analogous to the one at issue here.”⁴¹ But it is questionable whether federal apportionment is “analogous” to internal state apportionment, and Ginsburg’s opinion is somewhat selective in its recitation of that history.

For example, Justice Ginsburg’s opinion cites James Madison in Federalist No. 54 as saying that “It is a fundamental principle of the proposed constitution that as the aggregate number of representatives allowed to the several states, is to be . . . founded on the aggregate number of inhabitants; so, the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the state itself may designate.” Therefore, the Court concludes that Madison and the Framers believed that “the basis of *representation* in the House was to include all residents” and that even nonvoters were entitled to representation.⁴²

But Ginsburg’s majority opinion leaves out the further explanation given by Madison in the same essay. He writes that the reason for this rule on the federal level is that “[t]he qualifications on which the right of suffrage depend are not . . . the same in any two states” and in some states those differences are “very material.”⁴³ In other words, Madison did not believe that nonvoters were entitled to representation as the Court claims; federal apportionment was being based on total population simply because the qualifications for voting varied so greatly.

In fact, the Framers specifically gave the states the sole power over the qualifications of voting, and that has not changed. It seems obvious that they did not want federal apportionment to depend on the differing suffrage rules of the state while leaving control over suffrage to state governments. Thus, contrary to the Court’s claims, the issue in *Evenwel* over intrastate apportionment is *not* “analogous” to

⁴⁰ *Evenwel*, 136 S. Ct. at 1126–27.

⁴¹ *Id.* at 1127.

⁴² *Id.* (emphasis added).

⁴³ Federalist No. 54 (James Madison) (Clinton Rossiter, ed., 1961).

the Constitution's rules for federal, interstate apportionment—and there is a lack of evidence that the Framers believed in the Court's newly created theory of nonvoter and noncitizen representation.

The Court also cites Alexander Hamilton as supposedly endorsing apportionment based on total population. But as Justice Alito points out in his concurrence, the Court's account “plucks out of context Alexander Hamilton's statement on apportionment . . . and positions those words as if Hamilton were talking about apportionment in the House.”⁴⁴ Instead, Hamilton's “quote” related to the debate over how the Senate would be apportioned, with Hamilton arguing that Senate seats should be apportioned by population. Alito cites the Records of the Federal Convention where Hamilton made it clear that he did not think that the larger states with larger populations should be governed by a minority.

As Alito says, Hamilton “thought the fight over apportionment was about *naked* power, not some lofty ideal about the nature of representation.” And this “interpretation is confirmed by James Madison's summary of the same statement by Hamilton: ‘the truth is it [meaning the debate over apportionment] is a contest for power, not for liberty.’” Hamilton was “merely acknowledging the obvious: that apportionment in the new National Government would be the outcome of a contest over raw political power, not abstract political theory.”⁴⁵

The Passage of the Fourteenth Amendment

The Court in Ginsburg's opinion also cites the congressional debate over the passage of the Fourteenth Amendment and the fact that one version introduced by “Radical Republicans” would have allocated House seats to states according to the numbers of their respective legal voters. Supporters of that version “based on voter population employed the same voter-equality reasoning that appellants now echo.”⁴⁶ According to the Court, this “voter-based apportionment” encountered “fierce opposition” that was “grounded in the principle of representational equality.”

⁴⁴ Evenwel, 136 S. Ct. at 1145–46 (Alito, J., concurring).

⁴⁵ *Id.* at 1146.

⁴⁶ *Id.* at 1128.

As a result, the Court says that Section 2 of the Fourteenth Amendment “retained total population as the congressional apportionment base” because the Court claims that, based on an argument made by Rep. James G. Blaine, “population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”⁴⁷ Thus, the Court concludes that the appellants were asking the Court to “find in the Fourteenth Amendment’s Equal Protection Clause a rule inconsistent with this ‘theory of the Constitution.’”⁴⁸

Of course, the Court does not mention that it “found” the one-person, one-vote principle in the same Equal Protection Clause, in a creative interpretation of the law that is certainly not obvious or inherent in the plain text of the amendment. And the Court’s precedent in applying that court-created principle was concerned with ensuring that *voters* are given *equal weight* when they cast a ballot.

No one denies that individuals such as children who are not eligible to vote are entitled to have their interests represented by members of Congress. But that does not mean that their interests should allow states, through the redistricting process, to devalue the weight of particular eligible citizens’ votes. Members of Congress provide constituent services to all of the residents of their districts, whether they are eligible to vote or not. And children are represented by their parents (who are eligible to vote) in all legal matters, such as policy debates over “a strong public-education system” that the Court cites as one of the reasons for its “representational equality” theory.⁴⁹

In his concurring opinion, Justice Alito once again takes issue with the majority’s interpretation of history, saying that the Court suggests that the rejection of the Radical Republican proposal to base apportionment on voting population “signified the adoption of the theory that representatives are properly understood to represent all of the residents of their districts, whether or not they are eligible

⁴⁷ *Id.* (citations omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1132 (“[T]otal-population apportionment promotes equitable and effective representation.”).

to vote.” According to Alito, however, “it was power politics, not democratic theory, that carried the day.”⁵⁰

The Fourteenth Amendment’s sponsors “candidly explained that the proposal’s primary aim was to perpetuate the dominance of the Republican Party and the Northern States.” And, Alito contends, the majority “plucks Blaine’s words out of context,” not revealing that his true intent was to avoid any “disruption to *loyal States’* representation in Congress” that would be caused by “varying suffrage requirements” in the states that had remained loyal during the Civil War.⁵¹ Blaine wanted total population to be used “to deprive southern States of political power . . . while limiting the collateral damage to the loyal northern States.” This type of “power” politics does not seem like a very credible basis for the Court’s decision in this case.

Alito also points out the majority’s misreliance on other legislators who were deeply involved in the passage of the Fourteenth Amendment to support the majority’s view on “representational equality.” For example, he points out that “Roscoe Conkling, whom the majority also quotes . . . seemed to be as concerned with voter-based apportionment’s ‘narrow[ing] the basis of taxation’ . . . as he was with abstract notions of representational equality.”⁵²

Hamilton Ward, cited by the majority, was primarily disturbed according to Alito by the idea that “one South Carolinian, whose hands are red with the blood of fallen patriots, and whose skirts are reeking with the odors of Columbia and Andersonville, will have a voice as potential in these Halls as two and a half Vermont Soldiers who have come back from the grandest battle-fields in history maimed and scarred in the contest with South Carolina traitors in their efforts to destroy this Government.”⁵³

As to the “theory of the Constitution” language cited by the Court, Alito notes that language came from Jacob Howard, the senator from Michigan and former attorney general of that state. Howard “bemoaned the fact that basing representation on total population would allow southern States ‘to obtain an advantage which they

⁵⁰ *Id.* at 1146 (Alito, J., concurring).

⁵¹ *Id.* at 1147 (citations omitted) (emphasis added).

⁵² *Id.* at 1148 (citations omitted).

⁵³ *Id.* Legislators with such a turn of phrase and such poetic stamina are sadly absent from the halls of Congress today.

did not possess before the rebellion and emancipation.”⁵⁴ According to Alito, the “bottom line is that in the leadup to the Fourteenth Amendment, claims about representation equality were invoked, if at all, only in service of the *real* goal: preventing southern States from acquiring too much power in the National Government.”⁵⁵

The Federal System vs. Intrastate Apportionment

The Court rejected the arguments made by the appellants, and voiced by Justice Alito, that there is a “distinction between allocating seats *to* States, and apportioning seats *within* States.” The appellants claimed that the Framers selected total population for apportionment because of federalism concerns that are “inapposite to intrastate districting.” Those concerns included a “risk that a voter-population base might encourage States to expand the franchise unwisely, and the hope that a total-population base might counter States’ incentive to undercount their populations, thereby reducing their share of direct taxes.”⁵⁶

Justice Ginsburg and those who joined her opinion found this argument “unconvincing.”⁵⁷ But she failed to distinguish the differences between the federal system and state governments. While the federal government controls apportionment, states control the qualifications of being an eligible voter. Within states, state governments still control the eligibility of voters—and counties, cities, and towns cannot vary those eligibility requirements without the permission of the state government. So the fears over the franchise and direct taxes that were of concern to the Framers simply do not exist with intrastate apportionment.

The second argument made by the appellants (and Justice Alito) is that the Court has “typically refused to analogize to features of the federal electoral system . . . when considering challenges to state and local election laws.” That was why in *Reynolds*, the Court rejected Alabama’s argument that, based on the U.S. Senate’s geographical representation scheme, it should be allowed to have one state senator

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.* at 1148.

⁵⁶ *Id.* at 1129 (majority op.).

⁵⁷ *Id.*

represent each county in that state. Similarly, in *Gray*, Georgia “unsuccessfully attempted to defend, by analogy to the electoral college, its scheme of assigning a certain number of ‘units’ to the winner of each county in statewide elections.”⁵⁸

The majority distinguishes these prior cases because they supposedly “involved features of the federal electoral system that contravene the principles of both voter and representational equality to favor interests that have no relevance outside the federal context.”⁵⁹ These “features” include respecting “state sovereignty” (as if respecting the sovereignty of county governments should be of no concern to state governments) and permitting “the most knowledgeable members of the community to choose the executive of a nation” (as if permitting voters to have an equal voice instead of a diluted voice when total population is used is also not a desirable feature).

Even though he concurs in the judgment, Justice Alito points out the fallacy in the majority’s reliance on the “Constitution’s formula for allocating seats in the House of Representatives among the States” on the basis of total population: that “allocation plainly violates one person, one vote.”⁶⁰ Since every state is entitled to at least one seat in the House of Representatives under Article I, Section 2, it seem obvious that even states whose population is lower than the average population of House districts nationwide—such as North Dakota, Vermont, and Wyoming—are still entitled to House seats. As Alito sarcastically states, “If one person, one vote applied to allocation of House seats among States, I very much doubt the Court would uphold a plan where one Representative represents fewer than 570,000 people in Wyoming but nearly a million people next door in Montana.”⁶¹

The Settled Practices of the States

The Court also rejected the challengers’ claim because of “settled practice” by the states. Supposedly, adopting “voter-eligible apportionment” would “upset the well-functioning approach to districting

⁵⁸ *Id.* at 1130.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1144 (Alito, J., concurring).

⁶¹ *Id.*

that all 50 States and countless local jurisdictions have followed for decades.”⁶² Again, the Court neglects to mention that the practices of states like Georgia, Alabama, and Tennessee that it tossed out as unconstitutional in its one-person, one-vote cases of the early 1960s were “settled practices” that had been followed for many decades. That concern didn’t stop the Court from acting then, but it was used as an excuse by the Court not to act in *Evenwel*.

Justice Thomas concurred in the judgment because he said that the Court’s precedents “do not require a State to equalize the total number of voters in each district.” However, he emphasized that the Court “has never provided a sound basis for the one-person, one-vote principle” and has struggled for 50 years “to define what right that principle protects.” In fact, many of the Court’s precedents do “suggest that it protects the right of eligible voters to cast votes that receive equal weight.” Yet despite that precedent, the Court’s decisions have also concluded that the Equal Protection Clause “is satisfied when all individuals within a district—voters or not—have an equal share of representation.” There is no “clear answer” in the Court’s prior cases.⁶³

This “inconsistency (if not opacity) is not merely a consequence of the Court’s equivocal statements on one person, one vote,” according to Thomas. The problem is more fundamental:

There is simply no way to make a principled choice between interpreting one person, one vote as protecting eligible voters or as protecting total inhabitants within a State. That is because, though those theories are noble, the Constitution does not make either of them the exclusive means of apportionment for state and local representatives. In guaranteeing to the States a ‘Republican Form of Government,’ Art. IV, § 4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation.⁶⁴

Despite his questioning of the majority’s recitation of constitutional history, Justice Alito, in his concurrence that Justice Thomas

⁶² *Id.* at 1132 (majority op.).

⁶³ All quotations in this paragraph are taken from *id.* at 1133 (Thomas, J., concurring).

⁶⁴ *Id.* at 1136.

joined in part, agreed that “both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule.” He also believes that the Census statistics on total population “are more reliable.”⁶⁵ Additionally, most redistricting using total population “results in the creation of districts that are at least roughly equal in eligible voters.”

While what Justice Thomas said about population may be true in many parts of the country, that is certainly not true in states with large noncitizen populations, as shown by the huge (and undisputed) differential in the Texas state legislative districts that were challenged in this case. Indeed, the reason this has become an issue is because of the huge influx of illegal aliens into the United States in recent decades, and the breakdown in the legal-immigration and naturalization processes compared with the time of the Fourteenth Amendment debates.

In the early 1960s when the Court first established its one-person, one-vote principle, there were not large numbers of aliens entering or present in the country that would distort the redistricting process when total population was used. An estimated half-million illegal aliens were here in 1969. The Department of Homeland Security estimates that the number was 2–4 million in 1980. By 2012 it was over 11 million.⁶⁷ And immigrant numbers have continued to surge in recent years.⁶⁸ In 2015, the nation’s immigrant population—both legal and illegal—hit a record high of 41.1 million (or 13.3 percent of the population), “the largest share in 105 years.”⁶⁹

⁶⁵ *Id.* at 1143 (Alito, J., concurring).

⁶⁶ Illegal Immigration, Population Estimates in the United States, 1969-2014, ProCon.org (Mar. 18, 2016), <http://immigration.procon.org/view.resource.php?resourceID=000844>.

⁶⁷ Bryan Baker and Nancy Rytina, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012, Office of Immigration Statistics, U.S. Department of Homeland Security (March 2013).

⁶⁸ Steven A. Camarota, New Data: Immigration Surged in 2014 and 2015, Center for Immigration Studies (June 2016), <http://cis.org/New-Data-Immigration-Surged-in-2014-and-2015>.

⁶⁹ Karen Zeigler and Steven A. Camarota, Immigrant Population Hits Record 41.1 Million in Second Quarter of 2015, Center for Immigration Studies (Aug. 2015), <http://cis.org/Immigrant-Population-Hits-Record-Second-Quarter-2015>.

Moreover, the Court's extension of representation to millions of noncitizens—including people who are illegally in this country—is a refutation of the importance of—the very concept of—citizenship and the rule of law. If the Court were really concerned with making sure that ineligible individuals such as children, felons, or the mentally incompetent have representation in Congress, at the very least it should have required states to remove noncitizens from the population used for redistricting. Apportionment within states should be limited to the citizen population that is part of the social, cultural, and governmental compact that makes up the American experiment.

Alito's most important point in his concurrence was that the Court was not deciding another issue that Texas urged the Court to settle. While Texas successfully argued that it should be allowed to use total population in redistricting, it also wanted the Court to rule that the state was "not barred from using eligible-voter statistics" if it decided to do so of its own volition. The U.S. solicitor general, who had generally supported Texas before the Court, opposed this argument and claimed that "the use of total population is constitutionally required."⁷⁰

Alito said this argument raised "very difficult and theoretical and empirical questions about the nature of representation" and the Court had "no need to wade into these waters in this case."⁷¹ This is an "important and sensitive question" that the Court can consider when it gets another case in which a jurisdiction "uses something other than total population as the basis for equalizing the size of districts."⁷² The justices simply were not prepared to go as far as the federal government wanted.

Conclusion

If the Supreme Court had ruled in favor of the plaintiffs in *Evenwel*, it could have had a significant effect on state legislative districts as they currently stand. Democratically controlled legislative seats tend to have larger numbers of noncitizens than do Republican seats.⁷³

⁷⁰ *Evenwel*, 136 S. Ct. at 1143 (Alito, J., concurring).

⁷¹ *Id.*

⁷² *Id.* at 1144.

⁷³ Sean Trende, *The Most Important Redistricting Case in 50 Years*, RealClearPolitics (June 3, 2015), http://www.realclearpolitics.com/articles/2015/06/03/the_most_important_redistricting_case_in_50_years_126831.html.

While *Evenwel* was about state legislative seats and congressional seats may pose a slightly different question, what would happen in Congress is an easily understood parallel to the changes that would ensue in state houses. Of the 50 congressional districts “with the lowest share of adult citizens, 82 percent are represented by Democrats, while Republicans represent 38 of the 50 districts with the highest share of adult citizens.” Stated another way, if the Court had found that using total population—when it unevenly distributes the voting-age eligible population—violates the one-person, one-vote guarantee, legislative districts likely would have been redrawn in parts of the country with large noncitizen populations, with a noticeable shift toward Republicans and away from urban districts.⁷⁴

As an example, one analysis predicted that a decision in favor of the challengers would have likely moved “two [state] senate seats out of reliably Democratic New York City and into upstate New York.” Similarly, “adopting CVAP would likely move a congressional district out of the city and into the swing areas upstate.”⁷⁵ Congressional redistricting using citizenship population “would probably move five or 10 House seats toward the Republicans, with proportional gains likely in the state legislatures.”

Further, there are many districts not only with significant numbers of noncitizens, but where nonvoters are a majority. For example, in California’s 34th congressional district (downtown Los Angeles) only 41 percent of the residents are adult citizens. In other words, a majority of the residents are individuals ineligible to vote.⁷⁶ This is an even more uneven and unfair distribution of voters and nonvoters than the Court noted in the *Burns* case out of Hawaii.

But the Court refused to apply the interpretation of the one-person, one-vote principle urged by the challengers. It did so despite its numerous precedents in which it starkly explained that this principle is supposed to prevent voters from having different weights assigned to their votes. And it did so despite the fact that it was uncontested

⁷⁴ Though not exclusively; in low-noncitizen states with large disparities in child-bearing between urban and suburban or rural areas, (more progressive) cities would have gained. For example, Salt Lake City has both more Democratic voters and fewer children than surrounding counties.

⁷⁵ *Trende*, *supra* note 73.

⁷⁶ *Id.*

that in countless cases filed by the Justice Department to enforce the Voting Rights Act and protect the votes of Americans from being abridged or diluted, the key factor used by DOJ and the courts in determining whether dilution was occurring was citizen voting age population, not total population.

This decision was not an application of some lofty theory of representation—no matter what the Court claimed. It was the same type of power politics that both Madison and Hamilton discussed when they were debating federal apportionment and representation in the U.S. Senate and House of Representatives.

While states have a great deal of leeway under our federalist system, the Supreme Court determined a half-century 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, not some kind of general right to “equality of representation.”

As the editor of this volume has correctly pointed out, by sanctioning the ability of states to ignore “the distinction between voters and nonvoters,” the Court “achieves a false picture of equality at the expense of producing far more serious consequences.” Instead of “placing nonvoters and voters on anything approaching an equal political footing, it instead gives greater power to those voters who happen to live near more nonvoters, and less power to those who do not.”⁷⁷ This directly contradicts the holdings of prior cases such as *Gray* that prohibited states from diluting the votes of individuals based on their residence within a particular “geographical unit” to use the exact terminology of the *Gray* decision.⁷⁸

As the challengers said in their brief, these arguments do not ‘disparage representational equality as an appropriate legislative concern.’ But it is “voter equality” that must be the number one concern: “it must be given ‘controlling consideration’ under the one-person, one-vote rule.” What a state should not be able to do “as Texas did

⁷⁷ Ilya Shapiro and Thomas A. Berry, *Evenwel v. Abbott: The Court Shanks Its Punt on ‘One Person, One Vote,’* 17 Fed. Soc’y Rev. 12, 12 (June 2016), <http://www.fed-soc.org/publications/detail/evenwel-v-abbott-the-court-shanks-its-punt-on-one-person-one-vote>.

⁷⁸ *Gray*, 372 U.S. at 379–80.

here, is elevate that policy interest above the fundamental constitutional protection the one-person, one-vote rule affords to eligible voters.”⁷⁹

The result of Texas’s using total population in redistricting its state senate was that the value (or weight) of the votes of Sue Evenwel and Edward Pfenninger was only about half that of voters in other senate districts that were packed with large numbers of individuals ineligible to vote. To quote the Court’s own language from *Reynolds*, which it essentially ignored here, “it could hardly be contended that the right to vote of those [such as Evenwel and Pfenninger] residing in the disfavored areas had not been effectively diluted.”⁸⁰ Unfortunately, the Supreme Court has now vindicated and approved such vote dilution.

The only bright spot in this opinion is the fact that the Court did not bar states from, on their own, deciding to use CVAP instead of total population to redistrict. The question of whether that violates the one-person, one-vote principle was reserved for another day. Hopefully, that day will come soon if states do the principled thing: to use population data in their redistricting that does not dilute the votes of U.S. citizens.

⁷⁹ Brief of Appellants at 41, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

⁸⁰ *Reynolds*, 377 U.S. at 562.