The Stanford Daily

# In with a bang, out with a whisper: Evenwel v. Abbott as a win for everyone

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April 12, 2016

When the Supreme Court granted certiorari in *Evenwel v. Abbott* in May of last year, commentators considered it a "major test" of voting rights, and many feared the Court would deal a serious blow to the voting system employed across the country. The case was spearheaded by Edward Blum, the conservative "mastermind" who spearheaded litigation efforts in the 2013 voting rights challenge in *Shelby County v. Holder* and the challenge to affirmative action in *Fisher v. University of Texas at Austin* (which the Court heard arguments on for a second time this fall). This time, Blum was interested in upending the prevailing understanding of "one person, one vote."

That concept draws its support mostly from the Court's 1964 decision in *Reynolds v. Sims*, in which the Court held that a state must draw its legislative districts to have roughly equal populations so that every person's vote has approximately the same impact on the overall election. However, the Court in that case did not specify *what* needed to be equal: the number of eligible voters in each district or the total populations of each district.

The plaintiffs in *Evenwel* argued that only eligible voters measure the "one person, one vote" principle, so the State of Texas had violated the Constitution by drawing its maps according to total population. By excluding children, noncitizens, disenfranchised felons and (possibly) persons not registered to vote from the calculation, many suggested that the effect of a plaintiff victory would have been to give relatively more voting power to districts comprised of older, whiter populations and to deprive minority groups of political influence.

Regardless of political affiliation, most seemed to agree that the case had the potential to create significant changes in the way political elections are conducted nationwide. Yet, on Monday, the Supreme Court issued a unanimous opinion that largely leaves the current voting system in place and virtually assures future challenges to determine the outer boundary of the result.

Beginning with history, Justice Ginsburg's opinion for six Justices points out that the Founders based the number of seats in the House of Representatives on the total population of each state, not its population of eligible voters. Indeed, during the debates surrounding the enactment of the Fourteenth Amendment, legislators proposed – and ultimately rejected – reapportioning

representation based on the number of "legal voters." The majority opinion also emphasizes the largely uniform practice in all 50 states of using total population as a basis for legislative districts for "decades, even centuries," and points out the significant interest nonvoting populations have in the outcome of elections.

Yet, despite this strong defense of total population as the correct metric, the majority opinion notes the limited scope of its holding: "We need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population." In other words, while Texas *may* draw legislative districts based on total population, the Court does not decide whether Texas*must* use total population as the relevant metric. As a result, Texas (or any other state) could change its system tomorrow to base districts on voter-eligible population with the effect of disempowering certain voting blocs.

At first blush, this appears to neuter an opinion that had the potential to cement the voting power of marginalized groups and boldly proclaim that all people have an equal right to representation, even if they are not themselves eligible to vote. However, the*Evenwel* opinion arguably represents the Court at its best – taking a measured step that above all protects the Court's legitimacy while giving both sides of the political spectrum a short-term victory.

Firstly, the opinion leaves open the option for conservative groups to make their eligible-voter argument in political forums, rather than judicial ones. Indeed, within hours of the *Evenwel* opinion, the Cato Institute had encouraged state legislatures to adopt the eligible-voter metric, "forcing the Supreme Court's hand in some future case." For this reason, at least one commentator called the decision "a significant victory" for the plaintiffs, arguing that this will prompt calls for use of eligible voters through political channels. Once those systems emerge democratically and prove effective in practice, the Court will have a harder time striking them down.

On the other hand, in the words of law professor Richard Hasen, "It is hard to stress enough what a victory [the *Evenwel* opinion] is for liberal supporters of voting rights." Most obviously, the decision allows states to continue drawing districts based on total population. And as a practical matter, most (if not all) states will continue to do just that for two reasons: First,ly this is the system already used by states, and redistricting would be a massive undertaking. Secondly, as Justice Alito noted in his opinion concurring in the judgment (joined in part by Justice Thomas), the national census provides accurate data on total population for states to use, while data on eligible voters is more "subject to manipulation and dispute." Thus, even if a state does change its districts, the new districts may be challenged for failing to accurately apportion the population of potential voters due to poor information gathering. Moreover, by the time a challenge to such a state system makes its way back to the Supreme Court, the alignment of Justices may look quite different. Eventually, a ninth Justice will join the Court, and if that Justice sides with the liberal half of the bench (for example, a liberal judge appointed by a Democratic president, or even a judge appointed by a Republican president who shares the majority's view of

constitutional history), there may be a five-Justice majority to rule that *only* total population can be used to allocate judicial districts.

But the most immediate significance of the *Evenwel* opinion is the clear compromise made to create a majority opinion. Had the liberal Justices taken a stronger position – namely, requiring that states use total population and not citizens eligible to vote when drawing districts – Justices Kennedy and Roberts almost certainly would have refused to join. Justice Kennedy in particular strongly favors the rights of states to make decisions unencumbered by federal control, and a decision dictating state districting decisions would have been a tough sell. The likely effect of such a strong position would have been for the current eight-Justice Court to once again find itself in a 4-4 deadlock, this time about whether states have a choice between population metrics. A decision in which no majority opinion pointed the way forward for states would arguably give about as much guidance as leaving the question for another day, which the Court ultimately did. However, it would have perpetuated the notion that the Court is hopelessly deadlocked on controversial cases and further highlighted the political quagmire currently besetting the nomination process. By instead scaling back the language of the opinion, the Court was able to provide a united front at a time when litigants across the country fear their cases may never result in a definite decision.