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The War to Empower Rural White Voters Is Bigger Than Trump

His attempt to include a citizenship question on the census is part of a broader legal crusade that predates his presidency—and will outlive it.

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One month before Donald Trump launched his presidential bid, the Supreme Court agreed to consider a bid by conservative legal activists to rejigger the boundaries of American electoral politics in their favor. The plaintiffs in the case, *Evenwel* v. *Abbott*, argued that Texas should not use total population numbers in determining how to redistrict the state, and instead count only citizens of voting age.

But the significance of the case extended well beyond Texas. If the justices held that states had to redraw its maps based on eligible and registered voters alone, large urban areas would see their electoral power diluted in favor of rural regions that trend whiter and more conservative. That shift, in turn, would strengthen the Republican Party in red, purple, and blue states alike.

When the Supreme Court ruled against the plaintiffs in April 2016, it appeared that *Evenwel* might be the high-water mark of conservative legal activism. Hillary Clinton, after all, was certain to trounce Trump in the upcoming election and nominate a successor to the late Justice Antonin Scalia, tilting the court in liberals' favor for the first time since the 1960s. *Evenwel* seemed destined to be a footnote in legal history.

But now, more than halfway through Trump's first term, the historic significance of the case is clear: It was an early skirmish in the coming legal war over redistricting and the 2020 census, one that is culminating today with the president's pigheaded determination to put a citizenship question on the next national survey. Revisiting *Evenwel* also helps to further lift the veil on Trump's motives, showing that the goal all along was never to make American democracy fairer and more representative, but to magnify the political power of white conservatives.

The Trump administration announced in March 2018 that it would add a citizenship question on the 2020 census. Secretary of Commerce Wilbur Ross claimed the question would help the Justice Department enforce the Voting Rights Act, though critics suspected the real goal was to suppress immigrant and non-citizen participation in the census, shifting the landscape of American political power away from diverse urban communities toward whiter, more conservative rural residents.

The plan was dealt a severe blow last month when the Supreme Court blocked the question, though left an opening for the Census Bureau to craft a new justification for it. Chief Justice John

Roberts, writing for himself and the court's four liberals, essentially concluded that the Justice Department had lied to them about the rationale.

In theory, this should be a major scandal, but it's rather prosaic for this administration. The census saga has all the hallmarks of a quintessentially Trumpian story, in which bad-faith pretexts are crafted—and the Justice Department's integrity is mortgaged—to justify and defend a policy that's animated by hostility toward non-white Americans. Despite his defeat at the high court, Trump has forged ahead by ordering the Justice Department to concoct a new theory for putting the citizenship question on the census. Over the weekend, the department abruptly replaced the lawyers on the case; some legal experts speculated that this was because those lawyers refused to make further false representations to the courts.

But this fight long predates Trump. In a way, it begins not with *Evenwel* but 1963's *Gray* v. *Sanders*, in which the Supreme Court overturned Georgia's convoluted statewide primary system, ruling that it diluted urban voters' political power in violation of the Fourteenth Amendment's Equal Protection Clause. *Gray* marked the first time that the justices articulated the one person, one vote rule. The following year, the Supreme Court held in *Reynolds* v. *Sims* that the rule also applies to state legislative districts, forcing state lawmakers to redraw maps that had long favored rural interests. "Legislators," wrote Chief Justice Earl Warren, "represent people, not trees or acres." Using total population is now the norm when states redraw their legislative maps. (The Fourteenth Amendment also explicitly requires its use for congressional redistricting.)

The Supreme Court, however, never explicitly said what population base can be used for state-level redistricting. Texas voters Sue Evenwel and Edward Pfenninger sought to answer that question. In 2014, they filed a lawsuit challenging the state's redistricting plan for the Texas Senate after the 2010 census. The proposed plan used total population to draw new district boundaries, creating some districts with more registered and eligible voters than others. The two plaintiffs, who lived in rural districts, argued the proposed map diluted their effective political power in violation of the one person, one vote rule. They instead urged the court to require the use of citizen voting-age population (CVAP) data when drawing equal districts.

"From the beginning, the fundamental purpose of the one-person, one-vote principle has been to ensure that the states apportion districts in a way that protects the right of eligible voters to an equal vote," they wrote in their brief for the Supreme Court. "It necessarily follows that requiring the States to apportion approximately the same number of eligible voters to each district is the only way to enforce that constitutional right.

The plaintiffs were represented by the Project on Fair Representation, a nonprofit group led by conservative activist Edward Blum, whose organizations use litigation to challenge laws and policies designed to remedy racial discrimination. He masterminded the campaign to gut the Voting Rights Act of 1965, culminating in the Supreme Court's 2013 ruling in *Shelby County* v. *Holder*. His organization also represented Abigail Fisher in her failed lawsuit over the University of Texas's race-conscious admissions program, which imperiled affirmative-action programs across the country. Though she won the first round at the high court in 2013, the justices ultimately upheld the program in 2016.

Texas disagreed with the plaintiffs' assertion that states *must* use CVAP data as the population base when drawing equal legislative districts. But the state argued that it *could* use total

population, citizen population, or eligible-voter population as the base when reapportioning its legislature. The Supreme Court had never ruled one way or the other on that question, so Texas took aim at a Ninth Circuit Court of Appeals ruling in 1990 that held states must use total population when reapportioning legislative seats. "Non-voters cannot experience vote dilution because they cannot cast a vote that could possibly be diluted," the state argued in its brief for the justices.

A host of conservative legal organizations, including Judicial Watch, the Eagle Forum, and even the libertarian-leaning Cato Institute, urged the justices to reject total population in one way or another. The Heritage Foundation's Hans von Spakovsky, who later served on Trump's ill-fated voter-fraud commission, wrote favorably about a potential victory for the plaintiffs, noting that "legislative districts would probably get redrawn in parts of the country with large non-citizen populations, with a noticeable shift towards Republicans." The Justice Department and multiple civil-rights groups urged the court to reject both the plaintiffs' arguments and Texas' push to choose alternatives to total population.

At oral arguments in December 2015, the case appeared divided along the usual lines, with Scalia staying silent and Justice Anthony Kennedy seeking a middle ground. Scalia's death the following February upended the Supreme Court's docket that year, forcing it to reach 4-4 deadlocks in some cases and seek consensus around narrow rulings in others. That may be why the justices ruled unanimously against the plaintiffs, concluding that states could use total population when drawing legislative districts.

"In agreement with Texas and the United States, we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause," Justice Ruth Bader Ginsburg explained. "As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts." Texas' question on alternatives went unanswered. Because the court had resolved the underlying dispute, Ginsburg wrote, the justices "need not and do not resolve whether, as Texas now argues, states may draw districts to equalize voter-eligible population rather than total population."

Though all eight justices agreed with the outcome, Justice Clarence Thomas wrote a concurring opinion suggesting that he would let states use alternatives to total population. "As far as the original understanding of the Constitution is concerned, a state has wide latitude in selecting its population base for apportionment," Thomas wrote. "It can use total population, eligible voters, or any other nondiscriminatory voter base. And states with a bicameral legislature can have some mixture of these theories, such as one population base for its lower house and another for its upper chamber." Justice Samuel Alito also wrote separately to criticize the majority for suggesting that the Constitution points toward using total population alone at the state level.

These remarks could embolden conservatives on the state level. Even if the census' integrity is preserved, some Republican-led states may be tempted to try abandoning total population when they reapportion their state legislatures. The Supreme Court already approved partisan gerrymandering last month by ruling that federal courts can't intervene to remedy it. And with five reliably conservative justices on the bench, some states may see no downside in trying to use existing CVAP data to dilute urban influence in state legislatures, especially when at least one justice has already signaled he would be open to it.

Trump may be an enthusiastic champion of the citizenship question, but he did not create or develop the idea behind it. Nor is he the lead architect of conservatives' wider campaign today to tilt American democracy in their favor, whether through voter suppression, partisan gerrymandering, or poll taxes. *Evenwel* shows that these efforts were well underway when Trump entered the White House, but the biggest lesson from the case may be that these efforts will persist long after he leaves it.