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Evenwel v. Abbott: What Does One Person, One Vote Really Mean?

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Abstract: *The greatest hope of those committed to the one-person, one-vote status quo seems to be that in deciding* Evenwel v. Abbott*, the Supreme Court will simply leave it alone if they raise enough random objections. Infused in that view is a great deal of dismissiveness about the merits of the* Evenwel *litigation and a great deal of angst over its potential political effects. If the Court is true to its precedents, it will act to enforce Sue Evenwel's and Edward Pfenninger's right to cast votes of the same weight as those of their fellow Texans. If it does not do that, its decision will mark a real break in the law of OPOV and, as a practical matter, could even spell the beginning of the end of the doctrine. That is the choice the Court faces.*

Evenwel v. Abbott may prove to be the most consequential case of the coming Supreme Court term due to its possible electoral impact, but as a legal matter—which is what I'm here to discuss—there's not much room for controversy or consequence.

The meaning of the one-person, one-vote (OPOV) rule is one of the great open questions in election law. At least, that's what everyone says. But I would like to challenge both assumptions underlying that statement. As a matter of doctrine, there is no open question: The Court has answered it again and again. And this isn't really a question of election law, either; it is a civil rights issue—in particular, a voting rights issue.

From a voting rights perspective, this should be just about the easiest case of the 2015 term: The Court meant it when it said that each eligible voter is entitled to one vote—no more and certainly no less. Let me describe what the *Evenwel* plaintiffs are complaining about.

Key Points

- The issue in *Evenwel v. Abbott* is simple: How can a state, consistent with the principle of one person, one vote, gerrymander districts so that some persons have a full vote but others have only two-thirds of a vote?
- If one surveys OPOV cases from *Reynolds v. Sims* up to the present, their logic is remarkably consistent: The whole point is vote equality.
- The Equal Protection Clause imposes a limitation on discrimination by states in the administration of rights and privileges. In that way, the OPOV principle serves to enforce, on equal terms, the right to vote.
- The Court could still serve the purposes of originalism by properly aligning OPOV with the constitutionally guaranteed right to vote, with no greater intrusion on the states than today.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1269**

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Sue Evenwel is a resident of Titus County, Texas. Titus County consists of about 400 square miles of heavily forested terrain interspersed with farmland up in the Northeast corner of Texas, about as far as you can get from the Mexican border. The county itself has about 32,000 residents. By any measure, this is rural.

Ms. Evenwel's co-plaintiff is Edward Pfenninger, and he resides in Montgomery County, just north of Houston. If you're familiar with the area, it includes the Woodlands and Conroe—not exactly rural, but for purposes of electing members of the Texas Senate, it might as well be. The lower half of Montgomery County, adjacent to Houston, is part of Senate District 4, which winds its way over from the eastern border of the state in Jefferson County through Chambers County and part of Galveston.[1]

That is what Ms. Evenwel and Mr. Pfenninger have in common. They both reside in Senate districts lacking any major urban areas. Demographically, their districts contain very few resident noncitizens compared to other districts that have major cities or are further to the west and the south. Texas's 31 Senate districts were drawn based on the principle of roughly equal raw population, which is how basically every state does it. So all the districts have about the same number of residents, but they have different numbers of citizens and different numbers of eligible voters.

Very different, in fact. If you look at citizen voting-age population, Ms. Evenwel's district has about 574,000 potential voters. Mr. Pfenninger's has over 500,000. By contrast, Senate District 27, which includes Brownsville right on the Southern tip of the state up against the Mexican border, has only 372,000 potential voters. The math is straightforward: A Senate vote in Brownsville is worth about one-and-a-half times the votes cast by Ms. Evenwel and Mr. Pfenninger. Or, if you turn it around, Ms. Evenwel's and Mr. Pfenninger's votes are each worth about two-thirds as much as a vote cast in Brownsville.

That, in a nutshell, is their complaint: How on earth can a state, consistent with the principle of OPOV, gerrymander districts so that some persons have a full vote but others have only two-thirds of a vote?

Let me confess something: When I first confronted that question, my kneejerk response was, well, why not? Everyone knows that OPOV requires states to draw districts with equal population. That's been the underlying assumption in just about every case since the Court laid down the OPOV principle in *Reynolds v. Sims* in 1964.[2] In fact, *Reynolds* states that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[3] That would seem to answer the question. That would also make this a very short presentation.

But that's not all that *Reynolds* says. Consider, for example, the very next sentence: "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."[4] And then there is the Court's statement of why the Equal Protection Clause requires OPOV:

> Full and 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.... Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race.[5]

In fact, if you survey the OPOV cases from *Reynolds* up to the present, their logic is remarkably consistent: The whole point is vote equality. Consider, for example, the Court's summation of the law in *Hadley v. Junior College District of Metropolitan Kansas City*, from 1970: "[W]hen members of an elected body are chosen from separate districts, each district must be established 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]

1. For a map of Texas State Senate districts, see Texas Legislative Counsel, Plan S172: State Senate Districts, 84th Legislature, 2015–2016, *available at* http://www.tlc.state.tx.us/redist/pdf/senate/map.pdf.
2. 377 U.S. 533 (1964).
3. *Id.* at 568 (emphasis added).
4. *Id.*
5. *Id.* at 565–66.
6. 397 U.S. 50, 56 (1970).

Or consider what the Court said in *Lockport v. Citizens for Community Action at Local Level, Inc.* in 1977: "[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and...the concept of equal protection therefore requires that their votes be given equal weight."[7] The Court said essentially the same thing in 1989's *Board of Estimate of New York v. Morris*[8] and in 2012 in *Tennant v. Jefferson County Commission*.[9]

I am not cherrypicking these statements. As Ninth Circuit judge Alex Kozinski has shown, the Court's OPOV jurisprudence is permeated with the concept of vote equality.[10] The language of vote equality appears again and again in case after case.

Raw Population vs. Voter Population

But that brings us to our first challenge: If the point of OPOV is vote equality, then why was the remedy in every single one of those cases to equalize raw population, not the number of eligible voters? That is a fair question. It is also an easy one to answer, with a bit of history in mind. The early 1960s marked the culmination of 40 years of restrictive immigration policy, with hard caps on visas and strict country-of-origin quotas. Not only were lawful non-citizen residents relatively few, but unlawful residents were also quite rare.

While there are no good estimates for the early 1960s, the federal government determined that there were about half a million undocumented immigrants in the United States by 1970—or about a third of a percent of the total population.[11] And even that was after a significant influx of undocumented immigrants in the mid to late 1960s.[12] Non-citizen populations were simply not a relevant factor in districting and equalizing vote weight for several decades after *Reynolds*, including the whole time that OPOV was taking shape.[13]

Needless to say, the facts have changed. Today, undocumented immigrants make up about 4 percent of the resident population of the United States.[14] They are not distributed uniformly but tend to cluster in certain states—California, Texas, Florida, Illinois, and New York—and also in urban areas, often in the same communities as citizens and lawful residents of similar backgrounds.[15]

We have reached a point, in states like Texas, where the distinction between raw population and lawful population really does make a difference in terms of vote weight. The result is that basing apportionment on raw population causes large deviations in vote weight between districts—the very disparity that OPOV was intended to eliminate.

If the Supreme Court meant what it said over the years, then *Evenwel* should be a straightforward case with an obvious result: The Court would simply clarify that when it directed states to ensure that districts contain roughly equivalent population, it meant the population of eligible voters. After all, it is hardly unusual that applying a settled principle of law to new factual circumstances may lead to a new or more precise remedy, even as the underlying principle being enforced remains the same. In fact, that kind of evolution is the story of voting rights enforcement in this country.

7. 430 U.S. 259, 265 (1977).
8. 489 U.S. 688, 693–94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts.").
9. 133 S. Ct. 3, 5 (2012) ("[A]s nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").
10. Garza v. County of Los Angeles, 918 F.2d 763, 780–82 (9th Cir. 1990) (Kozinski, J., dissenting). *See id.* at 782 ("It is very difficult...to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation.").
11. Jeffrey S. Passel & Karen A. Woodrow, *Change in the Undocumented Alien Population in the United States, 1979–1983*, XXI, 4 Int'l Migration Rev. 1304 (Feb. 1987), *available at* http://www.researchgate.net/publication/11136817_Change_in_the_Undocumented_Alien_Population_in_the_United_States_1979-1983.
12. *Id.*
13. *See generally Illegal Immigration, Population Estimates in the United States, 1969–2011*, ProCon.org, *available at* http://immigration.procon.org/view.resource.php?resourceID=000844#1969.
14. *Id.*
15. Jeffrey S. Passel & D'Vera Cohn, *Chapter 1: State Unauthorized Immigrant Populations*, Pew Research Ctr. (Nov. 18, 2014), *available at* http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/.

Equality of Votes vs. Equality of Representation

But what if we have the underlying principle all wrong? If the logic of OPOV is not vote equality, then it must be equality of representation, with the same number of constituents for every legislator. In this view, apportionment by raw population was not a historical happenstance, but the very objective. One might respond that there is a reason that the doctrine is called OPOV and not "one person, one equivalent slice of a legislator's attentions."

Even putting that aside, there's little to be said in favor of the equal-representation concept and much against. The strongest argument in favor, of course, is the Court's reliance on raw population in so many cases. But as we have seen, that reliance is at most ambiguous, whereas the Court's explanation of what it was doing—equalizing voting rights—is perfectly clear.

Another argument that's been made in favor of equal representation is that it furthers citizens' First Amendment right to petition their representatives. This strikes me as a makeweight point, given that it is well settled that citizens have no right for their petitions to government to be heard or acted upon. Vote dilution is a well-established constitutional injury; petition-dilution does not exist.

Let me concede something here: I have tried to be fair and do justice to the arguments in favor of the equal-representation principle, but it's not an easy thing to do. Perhaps someone else could make these arguments with more enthusiasm. But there really isn't anything more to be said in terms of their substance—and if you don't believe that, I encourage you to look up the Ninth Circuit's underwhelming opinion in *Garza v. County of Los Angeles*.[16] Its acceptance of the equal-representation principle is an exemplar of ipse dixit reasoning. So let's just assume that the positive case for equal representation can be made so that we can consider the case against it.

The first negative is that the Supreme Court has already rejected equal representation as the heart of OPOV. *Burns v. Richardson* was a 1966 case challenging a Hawaiian apportionment plan based on registered voters rather than raw population.[17] The state's raw population numbers included large numbers of military personnel and seasonal tourists. The Court held that Hawaii was not required to use raw population as its apportionment base when it would produce, in the Court's words, "a substantially distorted reflection of the distribution of state citizenry."[18]

One central argument by the challengers that the Court rejected was that Hawaii's plan abandoned equality of representation: Some districts contained twice as many residents as others.[19] *Burns* expressly left open the question of exactly what population figure a state is required to use in creating electoral districts but did not depart from the equal vote-weight logic of previous cases—in fact, it recognized that using raw population would lead to "grossly absurd and disastrous results."[20] What it did do, however, was definitively reject any notion that OPOV is based on equal representation.

OPOV vs. Vote Dilution

The second objection to equal representation is even more fundamental: That principle has nothing to do with the right that's actually at issue. The Equal Protection Clause imposes a limitation on discrimination by the states in the administration of rights and privileges. In that way, the OPOV principle serves to enforce, on equal terms, the right to vote.

But how do we know that? Well, for one thing, the Court said so in *Reynolds,* explaining that the Constitution "protects the right of all qualified citizens to vote, in state as well as in federal elections," and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[21] For another, that kind of vote dilution is the injury that has supported Article III standing in every single OPOV case.[22] No one has

16. 918 F.2d 763 (9th Cir. 1990).
17. 384 U.S. 73 (1966).
18. *Id.* at 95.
19. *Id.* at 90–91, 94 n.24.
20. *Id.* at 94.
21. 377 U.S. at 554.
22. *See* Baker v. Carr, 369 U.S. 186, 208 (1962).

ever suggested that non-voters have standing to bring an OPOV challenge, as they would if equal representation were the rule.

We should also not forget that OPOV was a central plank of the civil rights revolution of the 1950s and '60s that opened our political processes to participation by those who had previously been marginalized—particularly African Americans in the South. The Fifteenth Amendment nominally guaranteed African Americans the right to participate on an equal basis in electoral politics, but as a practical matter, they faced substantial barriers, from poll taxes to literacy tests and grandfather clauses.[23]

Vote dilution was among the subtlest of barriers, but it was also pervasive and devastatingly effective. There is, after all, a reason why in 1964 Alabama's legislature clung to its 1901 apportionment map that was all but obsolete after 60 years of urban growth. The Supreme Court in *Reynolds* may have been polite about this aspect of the case, but the district court was not. It described Alabama's apportionment plan as a "[s]ystematic and intentional dilution of Negro voting power by racial gerrymandering."[24] The whole point, it recognized, was "turning Negro majorities into minorities" in the state legislature.[25]

That was the kind of evil that OPOV was directed to address. The Court was very clear about this: The precedents it cites in support of the OPOV principle are ones striking down race-based gerrymanders and whites-only primaries.[26] OPOV was simply the next step in dismantling barriers to African Americans exercising their voting rights.

So *Reynolds* is a civil rights case, and the right at stake is the right to vote, which had so often been violated through apportionment schemes designed to nullify African-American voting power. Part of the right to vote, the Court explained, is the right to have a voice in the election of those who make the laws under which we all live—that is the connection to representation.[27] But none of this has anything to do with ensuring that every legislator represents the same number of constituents. That notion is as bizarre as it is arbitrary and ahistorical.

So if those are the two alternatives—equal voting rights versus some made-up entitlement to equal representation—then *Evenwel* is an easy case. But that conclusion may be too pat. There are more sophisticated arguments that could lead the Court to a different result.

States and "The Nature of Representation"

Perhaps the strongest argument for the State of Texas is that the choice of a population base in redistricting is one properly left to the states, as the Fourth and Fifth Circuits have held.[28] There is some support for this view in *Burns*, which said that U.S. courts would not interfere in "choices about the nature of representation."[29]

Then again, *Burns* asked whether Hawaii's voter-based plan was permissible, not whether it was required. Perhaps the best rejoinder was offered by Justice Clarence Thomas, who correctly observed that OPOV "may...be of little consequence if [the Court] decides that each jurisdiction can choose its own measure of population."[30] In other words, if OPOV is to have any bite in terms of ensuring vote equality and limiting vote dilution, states must be held to some minimum standard.

That view is consistent with *Burns*'s focus on avoiding *gross* disparities in vote weight. For some states with few non-citizens, raw population numbers may suffice; for others, more proportionate measurements may be required. So long as states achieve the minimum of roughly equal vote weight, they can decide which precise measure to use, which could be registered voters, citizen voting-age population, and so on.

23. *See generally* Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (2013).
24. Sims v. Baggett, 247 F.Supp. 96, 109 (M.D. Ala. 1965).
25. *Id.*
26. *See* 377 U.S. at 555 (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960); Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953)).
27. *See id.* at 560 (quoting Wesberry v. Sanders, 376 U.S. 1, 14 (1964)).
28. Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996); Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000).
29. 384 U.S. at 92.
30. Chen v. City of Houston, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari).

There is also an argument along similar lines involving federalism and original meaning. A justice who views the OPOV principle as an invention of the Warren Court may be reluctant to intrude further on matters that would otherwise be left to state discretion. This is basically trolling: None of the people making this argument are actually originalists.[31] And it completely ignores the possibility of second-best solutions; even a committed originalist who doubts the provenance of OPOV knows that it isn't going anywhere and that *Evenwel* does not ask the Court to overrule it.

In these circumstances, the Court could still serve the purposes of originalism by properly aligning OPOV with the constitutionally guaranteed right to vote, with no greater intrusion on the states than today. After all, vote dilution claims under the Voting Rights Act typically use measures of voting population as a baseline.[32]

Finally, there is a clever argument—too clever, I think—that there is no voter-based analogue to the raw population data produced by the decennial Census, so that raw population is the only game in town.[33] This is a red herring. The Census Bureau's American Community Survey produces citizen voting-age population figures that states already use in redistricting and to comply with the Voting Rights Act.[34] While these figures may not be as precise or exhaustive as the Census's raw population count, they are good enough to make districts "substantially equal."[35] And that's all that OPOV has ever required.

Conclusion

If these arguments against a decision that enforces equal voting rights seem scattershot, that's because they are. The greatest hope of those committed to the status quo seems to be that the Court will simply leave it be if they raise enough random objections. Infused in that view is a great deal of dismissiveness about the merits of the *Evenwel* litigation and a great deal of angst over its potential political effects.

For example, the blogger Linda Greenhouse described the case as "a cynical effort to maximize the voting power of Anglo Republicans in Texas."[36] Factually, this is blinkered: Republicans already dominate Texas politics at every level. As for the law, Greenhouse has absolutely nothing to say about the merits of the case, and that's not unusual among those critical of *Evenwel*. I leave it to you to decide which side here is the cynical one.

Let me conclude by saying that, if the Court is true to its precedents, it will act to enforce Sue Evenwel's and Edward Pfenninger's right to cast votes of the same weight as those of their fellow Texans. If it does not do that, its decision will mark a real break in the law of OPOV and may even spell the beginning of the end of the doctrine as a practical matter. That is the choice the Court faces.

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31. *See, e.g.*, Richard Hasen, *Symposium: Ideology, Partisanship, and the New "One Person, One Vote" Case*, SCOTUSblog (July 31, 2015), http://www.scotusblog.com/2015/07/symposium-ideology-partisanship-and-the-new-one-person-one-vote-case/.

32. *E.g.*, Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997); Romero v. City of Pomona, 883 F.2d 1418, 1425 (9th Cir. 1989); Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998); Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368, 372 (5th Cir. 1999); Reyes v. City of Farmers Branch, Tex., 586 F.3d 1019, 1023 5th Cir. 2009); Thompson v. Glades Cnty. Bd. of Cnty. Comm'rs, 493 F.3d 1253, 1263 n.19 (11th Cir. 2007).

33. *See* 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/.

34. *See supra* note 32.

35. Reynolds, 377 U.S. at 568. *See also* Karcher v. Daggett, 462 U.S. 725 (1983).

36. Linda Greenhouse, *The Supreme Court Down the Stretch*, N.Y. Times, June 11, 2015, *available at* http://www.nytimes.com/2015/06/11/opinion/the-supreme-court-down-the-stretch.html.