

What Exactly Does “One Person, One Vote” Mean, Anyway?

The Supreme Court justices turn a simple question into something more complicated.

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It is a complete accident of history that the Supreme Court hears a case about whether noncitizens are to be counted when states draw legislative districts on the day after Donald Trump suggested that it's a good idea to prohibit all Muslims from entering the United States for a while. But the fact that the former idea gets as strong a reception at the high court as it does this morning really isn't an accident, even as it's rather surprising. The argument that looked like nothing more than a fanciful thought experiment born of a conservative think tank could well prevail this term.

In the plainest sense, *Evenwel v. Abbott* simply asks the court to determine whether states—in this case Texas—should apportion legislative districts by counting the total population (as determined through the census) or the number of eligible voters. The plaintiffs, Sue Evenwel and Edward Pfenninger, contend that basing apportionment on persons rather than voters violates the line of 50-year-old cases, including *Reynolds v. Sims*, that established the principle of “one person, one vote” the court has located in the Constitution's Equal Protection Clause.

It's a political idea pushed by Edward Blum, who directs the Project on Fair Representation, which spearheaded the challenge to the Voting Rights Act to the court in 2013, and is also behind the affirmative action case being argued Wednesday. If the court sides with Evenwel and accepts the view that only voters or even registered voters are to be counted when drawing district lines, children, legal residents, and people who have committed felonies or the mentally ill—all of whom are certainly affected when legislators legislate—are not to be counted for apportionment purposes. In the words of the Obama administration, which sides with Texas in this case against the two plaintiffs, whole swaths of the population become “invisible or irrelevant to our system of representative democracy.”

In a series of opinions that Justice Earl Warren touted as the most important achievement in his career, most notably in *Baker v. Carr* and *Reynolds v. Sims*, the court determined that legislative

districts had to be roughly equal in population. This was a dramatic fix to the malapportionment that had led to shocking disparities in voting power and equal representation until the 1960s. But white voters in this case claim that, for instance, in Sue Evenwel's rural district, 584,000 citizens are eligible to vote whereas in a neighboring urban district, only 372,000 citizens are eligible. This dilutes her vote based on where she lives, in violation of the "one person, one vote" rule. A three-judge panel rejected the argument—and as election law requires in such cases—it came straight to the high court.

As a practical matter, if the plaintiffs win this appeal, power will shift markedly from urban voters to rural voters and to white and Republican districts over minority and Democratic ones. In their brief asking the court to take the case, the Cato Institute was quite clear: If we apportion seats based on population, "a relatively small constituency of eligible Hispanic voters ... have their votes 'over-weighted' and 'over-valuated,' effectively diluting the votes of eligible voters" and giving Hispanic voters "disproportionate power."

As an even more practical matter, nobody really has any idea how voters are to be counted, given that the census—the best measure we have for who lives where—doesn't track whether you're a voter. An amicus brief submitted by a group of former directors of the census points out that "there is no actual count of the number of voting age citizens." (Although there are political models to guess at this.)

Evenwel is ably represented this morning by William Consovoy, and it's clear that—with the exception of an oddly silent Antonin Scalia—the justices will likely break along the usual partisan lines.

He opens with the claim that the case "presents a fundamental question ... whether the 'one person, one vote' rule affords eligible voters any reasonable protection." Justice Sonia Sotomayor stops him almost immediately. "What you're forgetting," she says, "is the dual interest. There is a voting interest, but there is also a representation interest ... the legislature is protecting not just voters; it's protecting its citizens—or noncitizens. The people who live there."

Justice Elena Kagan points out that the Constitution requires using total population as the metric to apportion House seats. She asks why it would be the case that the "Constitution requires something with respect to one apportionment that it prohibits with respect to another." Ruth Bader Ginsburg asks whether, in Consovoy's view, it was wrong for the states to include women for the purposes of drawing districts, given, as she notes, that at least until they won the franchise, "they were not eligible voters." And Justice Stephen Breyer amplifies Kagan's point by noting that "if you look to other parts of the Constitution, what we actually want is the kind of democracy where people, whether they choose to vote or whether they don't choose to vote, are going to receive a proportionate representation in Congress."

Sotomayor presses Consovoy on whether as a practical matter it makes any difference that there is no meaningful way to count eligible voters. He believes states should at least be allowed to try.

Breyer asks what's wrong with Texas deciding that children should count for apportionment purposes. Consovoy replies that children are represented at the polls by their parents. Sotomayor, so often the reality-based justice, shoots out, "How about children who are citizens when their parents are not, which is fairly common in many areas?" Consovoy: "When they become eligible voters, they will move into this base." We will talk about children far more than immigrants today.

Texas Solicitor General Scott Keller has 20 minutes to defend the states' interest in counting people as opposed to voters. He quickly runs afoul of Chief Justice John Roberts, who makes his views on the subject fairly plain when he tells Keller, "It's called the 'one person, one vote' rule. That seems to be designed to protect voters." And Anthony Kennedy, who likes to try to split the difference, makes an effort this morning to do just that: "Why isn't Texas required at that point to recognize that these interests that are legitimate under the Constitution ... so that you should at least give some consideration to this disparity that you have among voters?" He goes on to propose a hybrid system using both measures to count: "Why can't you have both? You have population equality and voter quality, both?"

And Justice Samuel Alito, so often the surreality-based justice, warns Ian Gershengorn, representing the U.S. solicitor general's office that the census numbers sweep in "aliens" and "prisoners" and also "undocumented aliens." He goes on to characterize Gershengorn's argument as "voters are irrelevant."

889 CommentsJoin InIt's not clear that there are five votes to accept the Evenwel argument, but it's clear that the conservative justices are bothered by what Kennedy sees as a massive disparity in some areas. Whether there is a will to upend a constitutional idea that has been undisturbed for 50 years and a methodology that is used in every state on the guarantee that the states can work out the details later is another matter. But there just might be.

Writing in 1964 the court famously noted that "legislators represent people, not trees or acres." The question the court must now decide is how to choose which people we want to represent. That proves far more complicated than counting trees.