# Preview Analysis of *Evenwel v. Abbott*, courtesy of SCOTUS Blog, December 6, 2015

**Argument preview: How to measure "one person, one vote"**
Lyle Denniston Independent Contractor Reporter
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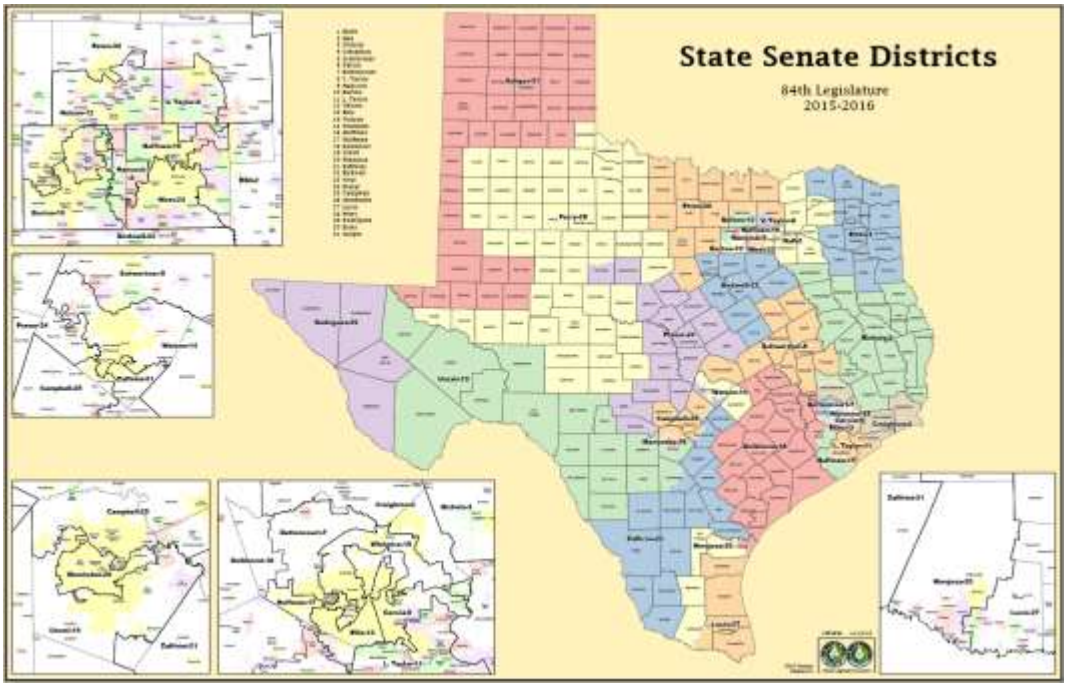
**Analysis**

A half-century after the Supreme Court declared the democratic ideal that the voters within a state should be equal to each other, it has indicated that it is finally ready to say how that should be measured. "One person, one vote" was a very simple constitutional slogan. But what does it mean, in the real world of sorting out election opportunity?

Next Tuesday, December 8, the Court will take up the case of *Evenwel v. Abbott*, a Texas case in which two voters have complained that, because they were placed in two state senate districts with many other voters, their votes count for less than those in other districts with fewer voters eligible to go to the polls. Their plea raises the profound question, as important in practice as it is in theory: what, in a democracy, does representation mean?




The Supreme Court famously said, in 1964, that "legislators represent people, not trees or acres." That was its basic explanation for getting away from the traditional pattern of mapping election districts by geographic area, rather than by the people who are to be represented. But the lingering question is: who are "the people" who are represented?

They could be the voters who actually go to the polls to exercise that right. They could be the people eligible to vote, many of whom stay away from the polls. They could be only the U.S. citizens. They could be all the people, even those who do not have the right to vote — because they are children, non-citizens, or prison inmates, for example.

Actually, when the Supreme Court in the 1964 decision in *Reynolds v. Sims* first mandated equality, it used the idea of population and voters interchangeably. "The overriding objective," it said, "must be substantial equality

among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."

It is possible, some mathematicians argue, that a legislature, drawing up districts for election purposes, can achieve both absolute equality of population among the districts and absolute equality among the voters in those districts. That can be done, they say, because census data is now very precise and computer technology is exceedingly sophisticated.

So how would it be possible, then, if population is made equal among districts, to have the power to vote come out unequally? Lawyers for the two Texas voters whose appeal the Court will hear next week have provided examples. Their case arose when the state legislature was drawing new districting maps for electing the thirty-one members of the state senate following the 2010 census.

Here is their hypothetical example: "The legislature could have adopted a senate map containing thirty-one districts of equal total population without violating the one-person, one-vote principle — even if thirty of the districts each contained one voter and the thirty-first district contained all other voters in the state."

That was the hypothetical. The real arrangement they were complaining about began when the legislature chose total population as its starting point, then simply divided it by thirty-one, giving an "ideal" population measure for each district. Then, taking into account local arrangements such as county lines and existing district maps, the legislature moved the district lines around to get within the ten percent shy of absolute mathematical equality that the Supreme Court has said is permissible.

In Texas, this meant there was only an 8.4% difference between the population of the largest senate district and that of the smallest one. That was enough, a federal court concluded when the maps were challenged, to achieve the "one person, one vote" objective.

But the two voters wanted the legislature to start and finish with some measure of voters, not total population. The legislature, under this scenario, would have to take into account the numbers of actual or potential voters put in each district (using voting age, voter registration or participation, or citizenship as a measure), and try to even them out. But, using total population, the resulting maps crowded a lot of non-voters into some districts, while leaving others with fewer voters.

Because each district would elect only one state senator, the power of each voter's ballot would be greater in those districts with fewer actual or potential voters, than those who wound up in districts with larger numbers of voters. For those in the latter group, their votes were said to be diluted — each ballot had less electoral clout when cast.

The two voters making the challenge in this case were Sue Evenwel and Edward Pfenninger. Evenwel lived in what wound up as District 1. Using any one of seven measures of voters, Evenwel's vote would count as only about forty percent as effective as in an "ideal" district (total population divided by thirty-one). Pfenninger landed in District 4, and using the same voter measures, his vote was calculated as between thirty and forty percent as effective as in an "ideal" district.

That, their lawsuit contended, violated the "one person, one vote" principle because they were not treated equally with some of their neighbors in Texas. "A statewide districting plan that distributes voters or potential voters in a grossly uneven way," they argued, "is patently unconstitutional under *Reynolds v. Sims* and its progeny."

A three-judge federal district court rejected their challenge, saying that the Supreme Court had left it to the legislatures to decide which metric to use in drawing new districting maps. The one constitutional measure, they said, was that the metric chosen not discriminate against selected groups of voters.

Taking the case on to the Supreme Court, the two Texas voters posed a single question: did the principle of "one person, one vote" give them a court-enforceable right "ensuring that the districting process does not deny voters an equal vote"? It is voter equality, they insisted, that the Constitution mandates.

Their petition cited a now-famous dissenting opinion by Ninth Circuit Judge Alex Kozinski in 1991, declaring that the celebrated phrase proclaimed by the Supreme Court "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, ten, or one-half."

The Court agreed on May 26 that it had jurisdiction to hear the case from a three-judge trial court, and granted review.

**Briefs on the merits**

The two voters' brief on the merits, aside from repeatedly pressing the argument that it is the equality of voting power that counts constitutionally, is based on two basic premises: first, that the Supreme Court should create a maximum deviation number when the calculation is based on the number of voters in each district, like the maximum deviation of ten percent it allows when population is the basic metric; and, second, a seemingly more radical proposition, that the Supreme Court should simply not base its judgment on the meaning of "one person, one vote" on a theory of equal representation.

When deciding this case, the brief contended, the Justices need not work out all of the details of how to implement a principle explicitly based on the equality of voting power. At the end of the day, it said, the Court should establish "some outer limit to the magnitude of the deviation" from voter equality that will pass constitutional muster. If the Court does not do that, it added "the right of all citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

On the second, theoretical point, the voters' brief argued that the First Amendment's guarantee that the people have a right to approach their elected government officials to express their grievances does not "include a right to equal access." The Petition Clause, it said, does gives the constituents — including non-voters — a right not to be blocked from contacting their representatives, but it is strongly implied that those who vote should have preferred access to attempt to influence the laws that are made.

Non-voters, the brief noted, would not have a right to sue under the "one person, one vote" principle to try to block a redistricting plan that divided up eligible voters among the state's election districts.

While legislatures must have some leeway to take a variety of public policy interests into account in drawing up new election maps, the voters asserted, they must make a good-faith effort to draw districts with approximately equal numbers of eligible voters. The deviations in the Texas senate maps are nowhere near what should be constitutionally acceptable, the voters argue.

Texas's merits brief relies on two theories of its own: first, that the "one person, one vote" principle is actually based upon the notion that what is unconstitutional is an intentional effort to cause vote dilution — that is, to draw maps that consciously treat some voters as less deserving of strength at the polls; and, second, that the state is left free to choose any reliable method of dividing up the state's election districts that will result in substantial equality.

The first theory is traced directly to the Equal Protection Clause, and thus relies upon the common understanding that discrimination is the evil against which the Constitution militates. If a state makes a good-faith effort — as the state insists that its legislature did — to find some dependable equality measure, that is all that the equal protection guarantee mandates.

Lying behind the second theory is the idea that a legislature's choice of what metrics to use in redistricting is based upon the nature of representation that the lawmakers are seeking to foster, the brief indicated. It quoted from a ruling by the Court in 1966 promising not to interfere with "choices about the nature of representation." That leaves the state legislatures free, it contended, to use whatever metric they deem best suited to achieving the representation model they seek.

Further, the state's brief argues that the approach the two voters advance simply would not be workable, and would bog the courts and the legislatures down in a series of battles over whether a districting map did or did not intentionally attempt to dilute a given voter segment's strength at the polls.

The two voters have the support of ten *amicus* briefs, filed in the main by conservative or libertarian legal and political advocacy organizations, many of which complain that the modern legacy of *Reynolds v. Sims* is that political voting power has shifted sharply to the nation's urban centers, with large populations of people, many of whom are not citizens and thus are not eligible to take part in the electoral process. The arguments in these briefs are dominantly oriented toward the electoral rights of citizens, and Texas's large non-citizen population provides an ideal basis for those arguments.

Those briefs match the intense debate that has been unfolding for years over state attempts to require additional proof of U.S. citizenship to qualify to vote. Redistricting based on total population, those briefs generally contend, has the predictable effect of diluting the votes of those who can and do vote as citizens.

The twenty-one briefs supporting Texas are just as ideologically centered, but on the other side: liberal and progressive legal and political advocacy groups, urban centers, major urbanized states, and the Democratic National Committee.

A theme running through much of these filings on Texas's side of the case is that there simply is no metric available on how to apportion a state's election districts according to eligible voters.

But a more prominent theme in these briefs is a defense of a theory of universal representation as the standard of equality. Elections, these briefs contend, are simply the mode by which public leaders are chosen, to be accountable to all whom they represent. Those who wrote the Constitution, one of these briefs typically comments, "decreed that the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution."

The Obama administration has entered the case, nominally on the side of Texas but it advocates significantly more constitutional caution for the Justices to follow. On a practical level, it argues that a total population metric had worked well, and that it is the only one for which precise data is available.

When the federal brief moves into the constitutional realm, though, it strikes more of a middle position. It urges the Court not to rule on a claim it attributes to Texas, that the Equal Protection Clause does not require states to equalize total population on its districting maps.

First, the government lawyers argue that Texas itself uses the total population basis for redistricting, and the question whether that is constitutionally mandated should await a case in which a state has chosen some other metric and seeks to justify that as an alternative approach.

But, more broadly, the federal government suggests that Texas's position on what is permissible under the Equal Protection Clause in the method of redistricting conflicts with the Supreme Court's recognition that officials are responsible to their entire constituency, not just to those who vote.

It asserted: "Allowing states the unfettered discretion that Texas seeks to choose the relevant population base for purposes of the Equal Protection Clause multiplies the opportunities for gerrymandering and other

gamesmanship that entrenches incumbents and limits participatory democracy." States already have sufficient latitude in this area, the brief said, and they must use that discretion against the background of federal civil rights and voting rights laws that may limit its scope.

The case is set for argument at 11 a.m. next Tuesday. William S. Consovoy, an attorney with Consovoy, McCarthy and Park PLLC in Arlington, Va., will represent the voters, with thirty minutes of time. Texas's Solicitor General, Scott A. Keller, will argue for the state, with twenty minutes. Deputy U.S. Solicitor General Ian H. Gershengorn will represent the federal government, with ten minutes.

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Posted in *Evenwel v. Abbott*, Analysis, Featured, Merits Cases

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