"ONE PERSON ONE VOTE" STILL MEANS ONE PERSON, ONE VOTE

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"One person one vote" has been a catch phrase since the days of *Baker v. Carr*, but a recent case before the Court called into question what that phrase really means in the context of apportionment for state and local redistricting. Since the apportionment revolution in the 1960's, the phrase generally has been used to refer to the doctrine pursuant to which states and localities are required to roughly equalize the population in their voting districts. But in *Evenwel v. Abbott*, a group of Texas voters asked the Court for the first time to decide what the baseline should be for equalizing population within the state. Can districts be apportioned based total population, or must they be apportioned using only eligible voters as the baseline?

The Texas voters maintained that "one person one vote" is a doctrine focused on voters, and that using total population as the baseline results in significant vote dilution when a state (like Texas) has districts with large populations of children and non-citizens. The plaintiffs therefore took the radical position that the use of total population for intrastate apportionment—which has been the standard in every state for decades—violated the Constitution. The state of Texas countered that the use of total population was permissible. It was supported by *amicus* the United States of America, who maintained that "one person one vote" is a doctrine focused on representation and therefore fully consistent with the use of total population for apportionment. Indeed, the United States went so far as to suggest that the use of total population as the baseline for apportionment might be constitutionally required.

The Court, relying on constitutional history, precedent, and practice, unanimously rejected the challenge from the Texas voters and held that total population is a constitutionally permissible means of apportioning representation. In an opinion authored by Justice Ginsburg, the Court held that: "In agreement with Texas and the United States, we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. 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." Slip Op. at 8. The Court expressly left for another day the more difficult question of whether the use of eligible voters as the baseline is constitutionally permissible. Concurring in the judgment, Justices Alito and Thomas separately seemed to suggest that they might be amenable to upholding the use of eligible voters as the baseline.

The question now is whether Texas, or any other state looking to shift the balance of power away from districts with large populations of children and non-citizens (i.e. districts that tend to be Democratic) toward districts with older and whiter populations (i.e. districts that tend to be Republican) will take Justice Alito up on the invitation to present the Court with the question it left undecided here, by redistricting its legislative districts using eligible voters as the baseline for apportionment. An *amicus* brief we filed in *Evenwel* on behalf of former directors of the Census Bureau suggests that states will have enormous legal and practical difficulties if they decide to do so.

Many Americans do not realize that there actually is no count of voting age citizens. The only data that exist as to the number of citizens of voting age are estimates based on sampling done as part of the American Community Survey (ACS) conducted by the Census Bureau. While sampling can certainly be valid for many reasons, the sampling conducted as part of the ACS does not lend itself well to the type of precision that is demanded by the one person one vote doctrine. Among other problems, the relatively small sample sizes means that several years' worth of data must be aggregated before estimates can be made at small geographic units. This means that districts drawn based on those estimates will be immediately based upon stale data. Moreover, even the aggregated data does not allow estimates at the Census block level—the unit of geography most commonly used in making redistricting decisions. And as with any estimate, ACS estimates can carry significant margins of error due to the small sample sizes.

Thus, should a state decide to redistrict using ACS data to apportion districts based on eligible voters (i.e. citizens of voting age), litigation will undoubtedly ensue. The only accurate data that currently exist are total population counts conducted by the Census Bureau. Whether or not total population is the constitutionally required criteria for equalization is a question for another day. But for now, it is clear that total population is the only viable method for a state to redistrict without fear of future "one person one vote" litigation.