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***Evenwel v. Abbott: Redistricting and the Meaning of Political Representation*  
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**Evenwel v. Abbott: Redistricting and the Meaning of Political Representation**

**Executive Summary**

On April 4 of this year, the Supreme Court rendered its decision in *Evenwel v. Abbott*,<sup>1</sup> holding that states are constitutionally permitted to draw legislative districts based on total population. The opinion comes after a quarter century of effort by petitioners seeking a Supreme Court ruling that would require governmental bodies to draw legislative districts based on the population of eligible voters rather than total population.

While the Court refused to mandate an eligible-voter apportionment base, it left open the question of whether states may choose to draw districts based on equalizing the number of eligible voters in each district, rather than the number of persons. Thus, an unanswered question remains: are states, in general, permitted to draw electoral districts to equalize the population of eligible voters in each district? Or is the use of this metric limited to special circumstances, as in *Burns v. Richardson*,<sup>2</sup> where the Supreme Court found that the State of Hawaii had acted constitutionally in using eligible voter population to draw electoral districts, in order to account for the fact that many people living in Hawaii—such as seasonal visitors and members of the military—were not eligible to vote in state elections?

The Court's decision in *Evenwel* has important implications for American politics and how we understand political representation. The decision to base districts on total population or eligible voter population has partisan implications, as district maps based on total population are often more favorable to Democrats, while district maps based only on the population of eligible voters

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are generally thought to be more favorable to Republicans. On a philosophical level, *Evenwel* addresses questions about whether non-voting classes—such as children and non-naturalized immigrants—should receive representation. *Evenwel* indicates that they may, but does not determine whether they must.

The philosophical question that lies at the heart of constitutional debate over whether to base electoral districts on total population or eligible voter population is the question of what type of equality the Constitution requires—representational or electoral equality—and whether the Constitution mandates either type of equality to be protected in state voting district plans. This debate has deep roots in American constitutional history. The framers of section 2 of the Fourteenth Amendment thoroughly debated whether to use total population or citizen-voting-age-population as the standard for apportioning U.S. House districts. They settled on total population, deciding that “population is the true basis of representation,” and that the non-voting classes, then including women as well as children and non-citizens, “may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”<sup>3</sup> While the *Evenwel* appellants argued that one person-one vote cases such as *Reynolds v. Sims*<sup>4</sup> should be interpreted as mandating voter-based apportionment, the *Evenwel* opinion rejects that interpretation. Although the Supreme Court in *Reynolds* and subsequent cases spoke of equally weighted votes, it also referred to districts needing to contain equal population. It is unlikely the Court even considered the possibilities that those two formulations would produce different results. In any event, it seems that the *Reynolds* Court would not have tied apportionment to any sort of metric that depended on registered voters. *Reynolds* arose in the State of Alabama. The Court was well aware of the widespread voter disenfranchisement of African-Americans in the South. *Reynolds* was, after all, decided in the same year that the Civil Rights Act of 1964 passed and a year before the enactment of the Voting

Rights Act of 1965. It is inconceivable that the Court would have mandated a voter apportionment system that would have effectively left disenfranchised African-Americans out of Southern states' electoral apportionment formulas.

While the *Evenwel* Court rendered no decision on this issue of whether a jurisdiction might choose to use an apportionment base consisting of some eligible voter metric, there are practical issues that may make it difficult to do so. Electoral apportionment based on the number of registered voters raises issues about whether voter lists are accurate, and involves a database that is subject to political manipulation.<sup>5</sup> The more likely eligible voter metric for drawing districts would be citizen-voting-age-population (CVAP). Government data on citizen-voting-age-population, however, is limited and can be statistically unreliable at the small geographic levels used in drawing voting districts, as citizenship data is not drawn from the decennial census, but instead from the U.S. Census Bureau's American Community Survey (ACS), which produces population statistics that have been described as "ballpark figures at best, and misleading and confusing estimates at worst."<sup>6</sup> Due to the unreliability of these statistics, state and local governments are likely to face significant, if not insurmountable, challenges in attempting to draw electoral districts based on CVAP rather than total population.

### ***Evenwel v. Abbot: The Total Population Metric Affirmed***

In *Evenwel*, the Supreme Court unanimously held<sup>7</sup> that states could draw electoral districts to equalize total population, laying to rest the appellants' claim that the Constitution required state legislatures to equalize the number of eligible voters in each district.<sup>8</sup> The Court left undecided the question of whether states may, absent special circumstances, use voter eligible population as the relevant metric for drawing electoral districts.<sup>9</sup>

Texas' thirty-one state senate districts were roughly balanced in terms of total population. The appellants' claim rose from their contention that, because they lived in state senate districts with high numbers of eligible voters, the weight of their votes was diminished in comparison to voters who lived in districts with lower numbers of eligible voters, so that voters in those districts had more individual political influence than the appellants did.<sup>10</sup> The appellants claimed that voters in the districts with the lowest number of eligible voters had votes weighing approximately 1.5 times more than theirs, as the appellants' Senate districts were "among the most overpopulated with eligible voters" in the state Senate district plan.<sup>11</sup> The appellants sought to require the map to be replaced with another that would equalize voter eligible population, rather than total population, in each district.<sup>12</sup> The appellants recommended designing the districts based on CVAP data from the American Community Survey.

The *Evenwel* appellants claimed that the Equal Protection Clause requires state legislative districts to be drawn based on the population of eligible voters, not total population, so as to ensure "the right of eligible voters to an equal vote."<sup>13</sup> According to the appellants, this is the only constitutionally permissible way to protect the constitutional principle of "one person, one vote" articulated in *Reynolds v. Sims*.<sup>14</sup>

In response, the State argued that the basis for a malapportionment claim is "the Equal Protection Clause's general guarantee against invidious discrimination," which the State interpreted to mean "invidious vote dilution."<sup>15</sup> To establish that the State of Texas had committed invidious vote dilution in legislative reapportionment, it maintained that the appellants had to "prove that the State reapportioned districts in an irrational manner or for the purpose of diluting voting strength."<sup>16</sup> This the appellants could not do, the State claimed, because while the Court may infer purposeful vote dilution when a State does not equalize *any* population base across

electoral districts, the Court does not infer vote dilution when a State substantially equalizes a nondiscriminatory measure of population—whether that measure is total population, citizen population, or eligible voter population.<sup>17</sup> The State asserted that, because it had sufficiently equalized total population across electoral districts, it had clearly not engaged in invidious vote dilution and was thus not in violation of the Equal Protection Clause.<sup>18</sup> According to the appellees, the Equal Protection Clause “does not compel a State to choose a particular population base when reapportioning,” thus supporting their claim that the State was permitted to choose between the use of total population, eligible voter population, or another nondiscriminatory population measure in drawing electoral districts.<sup>19</sup> The State of Texas, whose elected officials are predominantly Republican, then argued it had the option to use an eligible-voter apportionment base but was not required to do so. By contrast, the United States, which appeared as an amicus, agreed with the State that it was permitted to use total population as the apportionment metric and urged the Court not to address Texas’ claim that it had the option to use an alternative population baseline including a voter-eligible population.<sup>20</sup> Additionally, the appellees argued that districts based on CVAP were, for all practical purposes, unworkable because the federal decennial census does not collect data on citizenship or any other measure of the eligible voter population.<sup>21</sup>

The Supreme Court affirmed the district court’s decision.<sup>22</sup> The Court’s opinion, grounded in constitutional history, precedent, and longstanding practice, found that electoral districts based on total population were: chosen as the basis for drawing U.S. House districts by the framers of section 2 of the Fourteenth Amendment; supported by prior Court decisions, such as *Reynolds*<sup>23</sup> (holding that “as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis”); and used by all states in drawing legislative districts.<sup>24</sup> The Court refused to find, in the Equal

Protection Clause, a rule that would be inconsistent with the theory of the Constitution that political representation should be based on population.<sup>25</sup> As the Court reasoned, “it cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.”<sup>26</sup> Notably, the Court, following the position urged by the Solicitor General of the United States, declined to address the issue of whether the State had the option of using an alternative apportion base such as CVAP.

Justices Thomas and Alito concurred in the judgment that Texas’ use of total population was constitutional. Justice Thomas, however, agreed with the State’s position and would have held that the Court should have also recognized that “a State has wide latitude in selecting its population base for apportionment...[and] can use total population, eligible voters, or any other nondiscriminatory voter base.”<sup>27</sup> Justice Alito argued that the Court wrongly assessed the use of total population in section 2 of the Fourteenth Amendment as merely reflecting the ideal of representational equality, when in reality, “the apportionment of seats in the House of Representatives was based in substantial part on the distribution of political power among the States [at the time of Reconstruction] and not merely on some theory regarding the proper nature of representation.”<sup>28</sup>

Before *Evenwel* was decided, it was predicted that the decision might be a significant one. Linda Greenhouse, a columnist and former Supreme Court correspondent for the *New York Times*, wrote in June 2015 that *Evenwel* “loom[ed] so far as the dominant case of the court’s next term.”<sup>29</sup> That prediction would undoubtedly have been correct if the Court had ruled for, rather than against, Ms. Evenwel, since the result would have been to disallow the apportionment standard that all 50 states have used for decades if not centuries.<sup>30</sup> What, then is the actual significance of *Evenwel*—

both in terms of electoral politics and the philosophical implications for political representation in American government?

### **The Meaning of *Evenwel***

*Evenwel* has important implications for partisan politics, as electoral district maps based on CVAP are thought to be more favorable to Republican candidates, while district maps based on total population are considered more favorable to Democratic candidates. The total population metric also gives greater representation to areas with large numbers of children and non-naturalized immigrants. This is particularly important for areas with large Hispanic or Asian populations, as adult Hispanics and Asians living in the U.S. tend to have a lower citizenship rate than Anglos and Blacks, and thus would have reduced representation in districts based on CVAP.

The areas with high concentrations of non-citizens and children tend to be more urban in nature. Thus, a shift to a CVAP or similar apportionment base would move legislator influence away from urban areas to rural areas. For example, Harris County, Texas, which contains the City of Houston, and has a population greater than 25 of the 50 states, filed an amicus brief in the case as did other large cities and counties. Undoubtedly, these large urban areas were concerned that some of the representation in the state legislature would be lost to more rural areas.

Deciding whether to base voting districts on total population or CVAP also has important philosophical implications for representative democracy, as these metrics influence which groups receive political representation. Total population includes non-voting categories of the population, such as children and immigrants. Using CVAP operates to exclude these groups, giving them no representation while eligible voters receive full representation. Using total population reflects the idea that elected officials represent all their constituents, not just those who can vote, while using CVAP as the apportionment base results in elected officials effectively representing only voters.



Basing districts on CVAP could also increase the burden of constituent casework on individual elected officials. Districts based on CVAP would tend to contain more people than districts based on total population, as non-voters would not be counted. Nevertheless, elected officials and their staff would continue to bear the burden of conducting constituent casework and addressing local problems for children, non-naturalized immigrants, and other non-voting persons in their districts.

### **I. Political Impact**

The strong partisan divide over *Evenwel* indicates that the decision to draw districts based on total population or CVAP has an important political impact. The lead appellant, Sue Evenwel, was chairwoman of the local Republican Party in Titus County, Texas, and a member of the state Republican executive committee.<sup>31</sup> Conservative groups, including the Cato Institute, the Mountain States Legal Foundation, Judicial Watch, and the Eagle Forum Education & Legal Defense Fund, submitted briefs supporting the appellants. Liberal groups that were not natural allies of Texas' Republican leadership—including the Democratic National Committee, the American Civil Liberties Union, and a group of Democratic Texas state senators—wrote amicus curiae briefs in support of the State. Of course, Governor Greg Abbott, the defendant in the case, is a Republican as is Texas Attorney General Ken Paxton, who defended the case. The State took an intermediate position, asking the Court to uphold the total population apportionment base while also asking it to rule that it had the option to use a voter-eligible metric favored by the appellants. The United States, which appeared as an amicus, suggested that the Court need not address anything other than the legality of the total population metric, and the Court followed the United States' advice.

The use of total population versus CVAP also determines which categories of the population receive political representation. Drawing electoral districts based on CVAP would likely reduce the political representation of areas with large numbers of children and non-naturalized citizens. This would have a serious political impact on areas with large Hispanic populations.<sup>32</sup> Adult Hispanics living in the U.S. tend to have a lower U.S. citizenship rate (67.3 percent, according to 2013 American Community Survey estimates) than Anglos and Blacks (who have adult citizenship rates of 98.3 percent and 95.1 percent, respectively).<sup>33</sup> The Hispanic population is also younger—Hispanics, who constitute 17 percent of the total population, made up only 15.3 percent of the 2013 national voting age population.<sup>34</sup> Thus, due to the combination of lower citizenship rates and relative youth, Hispanics constituted only 10.98 percent of the citizen-voting-age-population in 2013, although they accounted for 17 percent of the total U.S. population. In contrast, Anglos made up 70.26 percent and Blacks constituted 12.6 percent of the citizen-voting-age-population.<sup>35</sup> As a result of these demographic factors, districts based on total population would generally accord greater representation to Hispanics than districts based on CVAP. Recognizing this, numerous Hispanic organizations provided amicus curiae briefs supporting the appellees, including the Texas Senate Hispanic Caucus, the Texas House of Representatives Mexican American Legislative Caucus, and the Hispanic National Bar Association. The National Association for the Advancement of Colored People and the South Asian Bar Association of North America also supported the appellees.

## **II. Philosophical Implications**

The decision to use total population or CVAP as the relevant population metric is not only a matter of political significance—it also has important philosophical implications regarding which groups should be represented in our democratic system of government. Electoral districts based on

CVAP would give 100 percent representation to voter-eligible groups, meaning adult U.S. citizens, while giving no representation to children and non-naturalized immigrants. Thus, in districts based on CVAP, communities with older populations and higher percentages of U.S. citizens would have more political power than communities with large numbers of children and non-naturalized immigrants. This raises the question, who should receive full representation in American democracy? For example, should a retirement community or nursing home where all the residents are adults receive representation based on their total number of residents while an area with young couples each having an average of two children be counted at only half their number (*i.e.*, by excluding the non-voting-age children)?

The framers of the Fourteenth Amendment specifically discussed this issues and chose total population as the standard for apportioning districts for the U.S. House of Representatives.<sup>36</sup> As Representative Roscoe Conkling argued to his colleagues, “population is the true basis of representation,” and the non-voting classes “may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”<sup>37</sup> This same philosophy on representation appeared in *Evenwel*, in which the Court said that “nonvoters have an important stake in many policy debates,” suggesting that “children, their parents, even their grandparents...have a stake in a strong public education system” and “in receiving constituent services, such as help navigating public-benefits bureaucracies.”<sup>38</sup>

The contrasting philosophical view, of course, is that using total population may create an unfair situation where, as the appellants asserted in *Evenwel*, voters in districts with many eligible voters have votes that are worth considerably less than those in districts with fewer eligible voters.<sup>39</sup> In this view, equalizing districts by eligible voter population ensures that all votes are weighted equally, giving each voter equal influence over elections.

## **The Historic Basis for the Standard of Representation**

The constitutional debate over the use of total population versus eligible voter population is not one that first emerged in the 21<sup>st</sup> century. In 1866, the framers of section 2 of the Fourteenth Amendment thoroughly analyzed and debated the constitutional implications of which metric to use to apportion U.S. House districts. The issue was a contentious one, because the former slaves—who had been freed by the Thirteenth Amendment but not yet enfranchised by the Fifteenth Amendment whose consideration and ratification lay three and four years in the future—would now be counted as whole persons rather than three-fifths of a person. As a result, under the total population standard, states that had been loyal to the Union would see their congressional power diminished, while the political power of the vanquished Southern states would be increased. The Republicans who controlled the Congress considered this acceptable only if the newly freed slaves were enfranchised, as they anticipated that the freedmen would vote for Lincoln’s party, allowing them to make electoral inroads in the South.<sup>40</sup>

The use of total population versus citizen-voting-age-population also had important implications for the political power of different regions of the U.S. The Western states, with fewer women and children, would have benefited politically from electoral districts based on CVAP, while the New England states would have diminished representation under such a standard.<sup>41</sup> For instance, California and Vermont had roughly equal populations, and thus would have had roughly equal congressional representation under the total population standard. However, using an eligible voter measure, California would have been entitled to eight seats compared to equally populated Vermont’s three, because post-Gold-Rush California had relatively few women and children.

Ultimately, the principle of representational equality prevailed in the framing of section 2 of the Fourteenth Amendment as the issue of whether a population or eligible-voter metric should

be adopted was presented for a vote in the Joint Committee on Reconstruction, in the House, and in the Senate. The population metric overwhelmingly prevailed in each forum.<sup>42</sup> As noted earlier, and as U.S. Representative Roscoe Conkling argued to his colleagues, Section 2 reflected the view that “population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”<sup>43</sup> Similarly, the guarantees of the Equal Protection Clause were extended to “all persons,” not merely to citizens or eligible voters. In deciding *Evenwel*, the Supreme Court reasoned that surely the framers of the Fourteenth Amendment could not have intended to deny to the states a method of voting district apportionment that Congress had selected as the basis for apportioning its own legislative districts.<sup>44</sup> Representational equality also apparently prevailed in later decisions on reapportionment, notably in *Reynolds v. Sims*. *Reynolds* is the seminal case applying the “one person, one vote” principle to state legislative districts, and addressed the question of whether the Equal Protection Clause permits disparately sized legislative districts. In *Reynolds*, the Court found that “the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”<sup>45</sup> The *Evenwel* appellants argued that *Reynolds* supported the constitutionally mandated use of an eligible voter metric, as *Reynolds* said that “an individual’s right to vote 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.”<sup>46</sup>

However, it is unlikely that the Court intended for *Reynolds* to require districts to be drawn with equal numbers of voters. *Reynolds* could be interpreted as recognizing that states *may* apportion districts based on “an identical number of residents, or citizens, or voters.”<sup>47</sup> As the Court would have been well aware in 1964, however, mandating the use of registered voters would have had the effect of largely ignoring the representation rights of the African-American

population, the members of which were widely disenfranchised by voter registration policies across the deep South. The Supreme Court would have also been aware of that disenfranchisement policy not only from the headlines of the day but also from a case it decided only two years earlier, in which the Court affirmed the authority of federal judges to order Alabama officials to register African-Americans whose applications to vote had been denied.<sup>48</sup> It is inconceivable that the Court would have mandated a voter-based apportionment system that would have effectively left disenfranchised African-Americans out of states' apportionment formulas.

### **The Unresolved Possibility of “Eligible Voter Population”—Will States Use It As An Apportionment Measure?**

*Evenwel* did not resolve whether states *may* draw districts to equalize eligible voter population rather than total population, though the State of Texas sought the Court's determination that eligible voter population was a constitutional basis for drawing electoral districts.<sup>49</sup> As this remains an open question, are states likely to use eligible voter population as the basis for drawing electoral districts?

For now, this appears unlikely, as there are significant challenges associated with determining what a state's actual citizen-voter-age-population is. The federal decennial census does not collect data on citizenship or voter eligibility. The data on citizenship that does exist is drawn from the U.S. Census Bureau's American Community Survey (ACS), a far less statistically reliable source than the decennial federal census.

Prior to the adoption of the ACS, the Census Bureau distributed a form known as “the long form census” to about one in six American households annually, a practice that began in the mid-twentieth century.<sup>50</sup> The long form census questionnaire contained all the questions on the short form, and also multiple socioeconomic questions, some of which could be used to ascertain citizenship. There was not at that time, and is not now, any census question that explicitly asks

whether the respondent is a U.S. citizen. The long form data produced highly reliable data for several reasons: (1) the sample of responses, from one-sixth of U.S. households, was enormous; (2) the data reflected the status of the population on the same day as the decennial census, so the data from the two sources could be compared; and (3) the definitions and questions in the long form census were consistent with those of the short form, so the data could be aggregated.

The Census Bureau discontinued use of the long form after the 2000 federal decennial census due to concerns about cost, privacy, and the need for more current data in the years between censuses. It was replaced with the American Community Survey (ACS), which mails approximately 250,000 questionnaires a month across the United States, or about 15 million over a five-year period.<sup>51</sup> The five-year ACS sample is only about two-thirds the size of the long form sample taken on the decennial census day. While 15 million questionnaires might be mailed, the National Research Council estimates that the five-year sample is only based on about 10 to 11 million responses to those questionnaires.<sup>52</sup>

Furthermore, while the annual sample sizes may produce a statistically significant result for relatively large populations, the accuracy diminishes as the population size decreases, making ACS a poor choice for drawing CVAP-based electoral districts in areas with smaller populations. The ACS publishes annual results only for jurisdictions of 65,000 or more people. In order to collect and aggregate enough information to produce meaningful estimates, the Census Bureau must collect ACS data on smaller jurisdictions over a five-year period. As the data from each new year becomes available, the Census Bureau adds it to the sample for the immediately preceding years, and deletes the data for the least recent year. Thus, each five-year file is built on approximately 80 percent of the responses that were used in the immediately preceding five-year file. Those multiyear reports generally provide the most used data in the voting rights context,

since the data is reported at the block group level and can be aggregated to geographic election units such as existing and proposed single member districts.<sup>53</sup> However, as previously discussed, that data still has two significant defects: (1) relatively small sample size, compared to the general population and (2) the data comes from multiple years, rather than one single point in time, so it cannot be compared to the much larger sample of responses from the decennial federal census. The relatively small sample size is highly problematic, because the larger the sample, the greater confidence one will have that the estimate is accurate. Conversely, the smaller the sample, the less confidence one can have in the resulting estimates.<sup>54</sup>

Reliable data on small geographical areas is essential for drawing accurate CVAP-based districts—but the ACS does not provide such accurate citizenship data for small areas. This is problematic because U.S. citizenship rates vary significantly from city to city. Citizenship rate differences become even more pronounced as one looks to small geographic areas within cities. Non-citizens of a certain racial or ethnic group may cluster in certain areas, so that those areas have particularly low citizenship rates, while in other parts of the city, virtually all members of the same racial or ethnic group may be citizens. This is relevant for the Hispanic population, as non-citizen Hispanics are likely to settle in areas with the heaviest Hispanic concentrations, which then also become the areas where the putative Hispanic districts are likely to be drawn. Because citizenship data for small areas can be unreliable, those responsible for drawing electoral districts might, in drawing a majority-minority district, assume that the citizenship rate for Hispanics is approximately the same across the city. Assuming a citywide citizenship rate, rather than deriving a rate that is specific to that geographic area, will overstate the Hispanic citizen-voting-age population in some districts, while understating it in others. Similar difficulties would be faced in



constructing electoral districts for areas with large Asian populations, and areas with large non-naturalized immigrant populations in general.

Thus, because CVAP data is far less statistically reliable than the total population data collected in the federal decennial census, states will face many more practical difficulties and potentially more voting rights challenges if they decide to redraw districts based on CVAP rather than total population. Due to these concerns, it is likely that most states and other governmental entities responsible for drawing electoral districts will choose to continue basing their districts on total population.

### **Conclusion**

The Supreme Court's decision in *Evenwel* establishes that electoral districts may be based on total population—but does not settle the related question of whether states are constitutionally permitted to instead draw districts based on CVAP. American history, Supreme Court precedent, and the states' widespread, longstanding reapportionment practices support the Court's assessment that voting districts may be based on total population. The equalization of total population across districts was chosen by the framers of section 2 of the Fourteenth Amendment to apportion U.S. House districts. Total population has been the population measure of choice among state legislatures tasked with reapportioning electoral districts. By contrast, the use of CVAP in redistricting is not strongly supported by tradition or popular practice. While the Court may decide in a future opinion that states may also use CVAP as a valid population measure for reapportioning voting districts, such a ruling is not a foregone conclusion.

For now, the Court has chosen to let this aspect of redistricting law remain ambiguous, apparently leaving the states to decide for themselves whether to base districts on total population or CVAP. However, most states are unlikely to reapportion electoral districts based on CVAP,

because the federal data on CVAP is much less reliable than the population data in the decennial census.

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<sup>1</sup> 136 S.Ct. 1120, 1131 (2016).

<sup>2</sup> 384 U.S. 73 (1966).

<sup>3</sup> *Evenwel*, 136 S.Ct. at 1128.

<sup>4</sup> 377 U.S. 533 (1964).

<sup>5</sup> *Burns v. Richardson*, 384 U.S. 73 (1966).

<sup>6</sup> N. Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L.R. 755, 776 (2011).

<sup>7</sup> J. Ruth Bader Ginsburg wrote for the majority. J. Clarence Thomas and J. Samuel Alito concurred in the judgment.

<sup>8</sup> *Evenwel*, 136 S.Ct. at 1132.

<sup>9</sup> *Id.* at 1133.

<sup>10</sup> *Id.* at 1125.

<sup>11</sup> Brief for the Appellant at 10, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) (No. 14-940).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1126; Brief for the Appellants, *Evenwel*, 136 S.Ct. (No. 14-940) at 14.

<sup>14</sup> 377 U.S. 533 (1964).

<sup>15</sup> Brief for the Appellees, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) (No. 14-940) at 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 18.

<sup>20</sup> *Evenwel*, 136 S.Ct. at 1126.

<sup>21</sup> Brief for the Appellees, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) (No. 14-940) at 9.

<sup>22</sup> *Evenwel*, 136 S.Ct. at 1133.

<sup>23</sup> 377 U.S. at 568.

<sup>24</sup> *Evenwel*, 136 S.Ct. at 1123.

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<sup>25</sup> *Id.* at 1128.

<sup>26</sup> *Id.* at 1129.

<sup>27</sup> *Id.* at 1142 (Thomas, J., concurring in judgment).

<sup>28</sup> *Id.* at 1149 (Alito, J., concurring in judgment).

<sup>29</sup> Linda Greenhouse, Op-Ed., *The Supreme Court Down the Stretch*, N.Y. TIMES, June 15, 2015, [http://www.nytimes.com/2015/06/11/opinion/the-supreme-court-down-the-stretch.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&\\_r=0](http://www.nytimes.com/2015/06/11/opinion/the-supreme-court-down-the-stretch.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0).

<sup>30</sup> *Evenwel*, 136 S.Ct. at 1142.

<sup>31</sup> David Montgomery and Michael Wines, *District Fight May Persist in Texas After Supreme Court Ruling*, N.Y. Times, April 4, 2016, <http://www.nytimes.com/2016/04/05/us/district-fight-may-persist-in-texas-after-supreme-court-ruling.html>.

<sup>32</sup> Basing electoral districts on CVAP would also have a serious political impact on areas with significant Asian populations. The Asian population makes up 5.07 percent of the total U.S. population, but because its citizenship rate is 69 percent, Asians make up only 3.93 percent of the citizen-voting-age-population. U.S. Census Bureau, American FactFinder, Table B05003. This paper focuses primarily on how CVAP would impact the Hispanic population, as Hispanics constitute the second-largest racial/ethnic group in the U.S. *Id.*

<sup>33</sup> U.S. Census Bureau, American FactFinder, Table B05003.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Evenwel*, 136 S.Ct. at 1128.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1132.

<sup>39</sup> Brief for the Appellants, *Evenwel*, 136 S.Ct. (No. 14-940) at 10.

<sup>40</sup> JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997) at *xiii-xiv*, 28. Judge Sneed's book appears to be privately published. The Library of Congress Catalog Card Number is 97-090651. *Also see*, HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 99 (The Johns Hopkins Press, 1908).

<sup>41</sup> *Congressional Globe*, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 141 (Jan. 8, 1866).

<sup>42</sup> BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39<sup>TH</sup> CONGRESS, 1866-1867, New York (1914), at 45-46; *Globe*, at 538 (Jan. 31, 1866); *Globe*, at 2986, 2991 (June 6, 1866).

<sup>43</sup> *Evenwel*, 136 S.Ct. at 1147.

<sup>44</sup> *Id.* at 1129.

<sup>45</sup> *Reynolds*, 377 U.S. at 568.

<sup>46</sup> *Id.*; Brief for the Appellants, *Evenwel*, 136 S.Ct. (No. 14-940) at 26.

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<sup>47</sup> *Reynolds*, 377 U.S. at 568.

<sup>48</sup> *State of Alabama v. United States*, 371 U.S. 37 (1962) (*per curiam*).

<sup>49</sup> *Evenwel*, 136 S.Ct. at 1133.

<sup>50</sup> Michele Hayslett and Lynda Kellam, *The American Community Survey: Benefits and Challenges*, IASSIST QUARTERLY 31 (Winter/Spring 2010).

<sup>51</sup> Constance F. Citro and Graham Kalton, eds., National Research Council Committee on National Statistics, USING THE AMERICAN COMMUNITY SURVEY: BENEFITS AND CHALLENGES 33-36 (The National Academies Press: Washington, D.C. 2007).

<sup>52</sup> *Id.*

<sup>53</sup> Block groups typically consist of contiguous census blocks containing between 600 and 3,000 persons. U.S. Census Bureau, *Geography*, [https://www.census.gov/geo/reference/gtc/gtc\\_bg.html](https://www.census.gov/geo/reference/gtc/gtc_bg.html). There are a little more than 11 million census blocks in the U.S. and just under 218,000 census block groups. U.S. Census Bureau, *2010 Census Tallies of Census Tracts, Block Groups & Blocks*, <https://www.census.gov/geo/maps-data/data/tallies/tractblock.html>. Thus, on average, there are about 50 blocks in a block group, although that can vary widely, as urban areas have many fewer blocks in a block group (due to higher population), while rural areas have many more. The average number may be somewhat misleading because many census blocks have no population.

<sup>54</sup> When the Census Bureau publishes ACS estimates, it almost always includes a margin of error for each estimate. The margin of error for the ACS is computed at the 90 percent confidence level, indicating that one can be confident that the true value falls within the confidence interval derived from the margin of error 90 percent of the time. In contrast, the gold standard in survey research is a confidence level of 95 percent. The difference is significant. Since the 90 percent margin of error is computed by multiplying the standard error by 1.65, while the 95 percent margin of error is derived by multiplying the standard error by 1.96, using the 95 percent margin of error would produce a margin that is about 19 percent higher.