

DISTRICTLY SPEAKING: *EVENWEL V. ABBOTT* AND THE APPORTIONMENT POPULATION DEBATE

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INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides in pertinent part: “Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state [T]he basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.”¹ This portion of the Fourteenth Amendment, combined with the Equal Protection Clause, has resulted in the “one-person, one-vote” rule.² This rule promises substantial equality of population within any of a state’s voting districts.³ Federal courts have largely granted the states great deference in choosing a measure of population that provides the most equal voting districts.⁴ Historically, most states have used total population to satisfy “one-person, one-vote,” but particular circumstances have warranted use of state citizenship and voter registration to achieve the most equitable apportionments.⁵

Despite the Supreme Court’s previous reticence to define which population bases are acceptable for state districting, a recent dispute now before the Court gives it an opportunity to settle once and for all the nuances and boundaries of the Court’s previous demands for

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1. U.S. CONST. amend. XIV.
2. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).
3. *Id.*
4. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973).
5. *See, e.g.*, *Burns v. Richardson*, 384 U.S. 73 (1966).

“substantial equality” in districting.⁶ This Commentary will explore *Evenwel v. Abbott*,⁷ a case in which the Supreme Court has an opportunity to synthesize the “one-person, one-vote” doctrine. The Court will rule on the constitutionality of Texas’s total population districting plan and whether it must be replaced with a plan that better distributes registered voters across the state.⁸ Part I presents the factual and procedural background to *Evenwel*. Part II details the history of “one-person, one-vote” doctrine under the Equal Protection Clause and provides a snapshot of current controlling precedent. Part III briefly outlines the Western District of Texas’s holding⁹ before Part IV discusses the arguments raised by the parties. Finally, Part V argues that the Supreme Court should uphold Texas’s total population apportionment or else risk frustrating a large portion of controlling Equal Protection doctrine.

I. FACTS AND PROCEDURAL HISTORY

On June 17, 2011, Texas Governor Rick Perry signed into law a reapportionment plan for state senatorial districts.¹⁰ That reapportionment scheme, Plan S148, was eventually challenged in federal district court and struck down¹¹ for violating the Voting Rights Act of 1965 (VRA).¹² The District Court for the Western District of Texas required implementation of a new plan ahead of the 2012 state senate elections because Plan S148 failed to achieve preclearance¹³ from the District Court for the District of Columbia.¹⁴ That court then implemented Plan S172 for the 2012 state senate elections.¹⁵

6. *Reynolds*, 377 U.S. at 577.

7. 135 S. Ct. 2349 (2015).

8. *See id.*

9. Because this is a case under the Voting Rights Act, the case was heard by a three-judge panel of the District Court in the Western District of Texas. The case was directly appealed from the district court to the Supreme Court.

10. *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *1 (W.D. Tex. Nov. 5, 2014), *prob. juris. noted* 135 S. Ct. 2349 (2015).

11. *Id.*

12. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.) (VRA).

13. Section 5 of the VRA requires all states who previously used unconstitutional voting tests to *ex ante* seek and be granted declaratory judgments validating the legality of any voting-related legislation. 52 U.S.C. § 10304 (2012). *See also id.* § 10303. Texas is subject to this requirement and failed to achieve such preclearance for Plan S148.

14. *Davis v. Perry*, 991 F. Supp. 2d 809, 816 (W.D. Tex. 2014).

15. *Id.* at 817.

Plan S172 was formulated with the help of the Texas Legislative Council, a nonpartisan entity tasked with compiling all relevant data for redistricting efforts.¹⁶ The Texas Legislative Council provided the state legislature with Census and American Community Survey data relevant to total population, voting age population (VAP), and citizen voting age population (CVAP).¹⁷ Ultimately, Plan S172 divided Texas into thirty-one districts of equal total population.¹⁸ The average deviation for each district from the ideal total population was 8.04%.¹⁹ On June 21, 2012, the Texas legislature and Governor Perry signed Plan S172 into law as the “official Texas Senate districting plan.”²⁰

On April 21, 2014, Texas citizens Sue Evenwel and Edward Pfenniger filed an action against Governor Perry and Texas Secretary of State Nandita Berry in their official capacities.²¹ Evenwel and Pfenniger alleged that the implementation of Plan S172 violated their rights under the Equal Protection Clause of the Fourteenth Amendment and the “one-person, one-vote” requirement.²² Both Evenwel and Pfenniger identify as registered voters who “regularly vote[] in Texas Senate elections and plan[] to do so in the future.”²³ In their complaint, Evenwel and Pfenniger claimed that their districts were “among the most overpopulated with eligible voters.”²⁴ Evenwel and Pfenniger alleged that apportioning districts by equalizing total population unconstitutionally dilutes their voting power and violates “one-person, one-vote.”²⁵ Specifically, they claim that total population equalization renders their votes between 1.41 and 1.84 times less powerful than voters in other districts.²⁶

16. *See generally* TEXAS LEGISLATIVE COUNCIL, DATA FOR 2011 REDISTRICTING IN TEXAS (Feb. 2011), http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf.

17. *See id.*; *see also* TEXAS LEGISLATIVE COUNCIL Data for 2011 REDISTRICTING IN TEXAS—ADDENDUM ON CITIZENSHIP DATA (Feb 2011), <http://www.tlc.state.tx.us/redist/pdf/CitizenshipAddendum.pdf>.

18. *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *1 (W.D. Tex. Nov. 5, 2014).

19. *See id.* (referencing that, for purposes of state apportionment, ideal total population of a district is calculated by dividing the state’s total population by the total number of state senate districts).

20. *Davis v. Perry*, 991 F. Supp. 2d 809, 817 (W.D. Tex. 2014).

21. *Evenwel*, 2014 WL 5780507, at *1.

22. *Id.*

23. Brief for Appellants at 10, *Evenwel v. Abbott*, No. 14-940 (U.S. July 31, 2015) [hereinafter Brief for Appellants].

24. *Id.*

25. *Id.* at 11–12.

26. *Id.*

Evenwel and Pfenniger moved for summary judgment, claiming that Texas violated the Fourteenth Amendment by neglecting to apportion state senate districts without considering some form of voter population.²⁷ Concurrently, Texas filed a motion to dismiss claiming that “there was no legal basis for Plaintiff’s claim that Plan S172 is unconstitutional for not apportioning districts pursuant to Plaintiff’s proffered scheme.”²⁸ A three-judge panel on the District Court for the Western District of Texas granted the Defendants’ motion and dismissed Evenwel and Pfenniger’s claims with prejudice.²⁹ An appeal of the district court’s decision followed, and the Supreme Court noted probable jurisdiction on May 26, 2015.³⁰

II. LEGAL BACKGROUND

A. *Justiciability of State-Level Districting Schemes*

The United States Constitution protects all qualified voters’ right to vote.³¹ Moreover, all such voters have the constitutionally protected right to have their votes counted.³² Despite these pronouncements, the Supreme Court did not recognize the federal judiciary’s ability to rule on allegations of vote “debasement or dilution” until 1962.³³ That year, the Supreme Court declared that claims of vote dilution arising out of a state’s districting scheme for in-state elections were federally justiciable.³⁴ In *Baker v. Carr*, the Supreme Court declared that cases of state-level vote dilution should not be subject to ad hoc policy formulations of local courts, but instead fall within the scope of the Fourteenth Amendment’s Equal Protection Clause.³⁵ A court’s task in such a case is to “determine, if . . . a discrimination reflects *no* policy, but [rather] simply arbitrary and capricious action.”³⁶ Since *Baker*, the Supreme Court has consistently used the “judicially manageable

27. *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *1 (W.D. Tex. Nov. 5, 2014).

28. *Id.*

29. *Evenwel*, 2014 WL 5780507, at *4.

30. *See Evenwel v. Abbott*, 135 S. Ct. 2349 (2015).

31. *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

32. *United States v. Mosley*, 238 U.S. 383 (1933).

33. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

34. *See Baker v. Carr*, 369 U.S. 186 (1962).

35. *Id.* at 226.

36. *Id.*

standards” of the Equal Protection Clause to analyze districting and reapportionment disputes.³⁷

B. “One-Person, One-Vote”

After *Baker* held that courts could review state-level districting schemes, the Court provided very little guidance as to the exact standards state legislatures should follow.³⁸ Subsequently, in *Gray v. Sanders*, the Court offered some guidance by demanding that all participants in state elections have “an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, wherever their home may be in that geographical unit.”³⁹ In *Gray*, the Court faced the question of the constitutionality of Georgia’s county unit system,⁴⁰ by which an entire county’s votes would be awarded to the candidate that carried the majority in that particular county.⁴¹ The Court concluded that the system was unconstitutional because it rendered an entire class of votes valueless if they were not cast for the candidate that carried the majority in their county.⁴²

Gray was the first decision in which the Court required voting equality to reflect “[t]he conception of political equality . . . [as] mean[ing] one thing—one person, one vote.”⁴³ Although the Court emphatically articulated the notion of “one-person, one-vote,” it would subsequently issue a caveat recognizing the incompatibility of state and federal-level districting analyses.⁴⁴ Thus, in its next state districting case, the Supreme Court articulated its “judicial focus” as necessarily a fact-specific inquiry into “whether there has been any discrimination . . . which constitutes an impermissible impairment” on the right to vote.⁴⁵

37. *Reynolds*, 377 U.S. 533, 557 (1964).

38. *Id.* at 556.

39. *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

40. The county unit system is properly analogized as a state-level implementation of the Electoral College system for federal Presidential elections.

41. *See generally Gray*, 372 U.S. 368.

42. *Id.*

43. *Id.* at 381.

44. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (holding that “the federal analogy [is] inapposite and irrelevant to state legislative districting schemes”).

45. *Id.* at 561.

C. “*One-Person, One-Vote*” in *Reynolds v. Sims*

In *Reynolds v. Sims*, the Supreme Court held that “the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis.”⁴⁶ Writing for the majority, Chief Justice Warren Burger advocated a nuanced balancing of existing districting precedent and ordinary notions of equality.⁴⁷ While the Court took notice of states’ need to “rationally consider factors other than population in apportioning legislative representation,” it held that the “domain of state interest” must never be used as an “instrument for circumventing a federally protected right.”⁴⁸ In other words, the Court would never tolerate anything less than “an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”⁴⁹ The Court did, however, admit the “practical impossibility [of arranging] legislative districts so that each one has an identical number of residents, or citizens, or voters.”⁵⁰

The Supreme Court also took notice of the impracticability of holding all state legislatures to the same standard.⁵¹ The Court clarified that each state’s “overriding objective must be substantial equality of population 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.”⁵² Chief Justice Burger reasoned that “[s]o long as the divergences from a strict population standard are based on legitimate considerations,” the Constitution allows states to accomplish substantial equality by “whatever” means.⁵³ Finally, the Court interpreted the Equal Protection Clause to require such reapportionment to occur every ten years after the release of the decennial census population statistics.⁵⁴

46. *Id.* at 576.

47. *Id.* at 561 (framing the question presented as the need to “ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures”).

48. *Id.* at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

49. *Id.* at 577.

50. *Id.*

51. *Id.* at 578 (“[W]hat is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.”).

52. *Id.* at 579.

53. *Id.*

54. *Id.* at 583 (reasoning that decennial reapportionment “appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth”).

D. Burns and the First True Test of Reynolds’s “Substantial Equality”

The Court used *Reynolds’s* “substantial equality” analysis to determine the constitutionality of a Hawaii districting scheme designed to remedy large variations in total population and voting registration.⁵⁵ In *Burns v. Richardson*, the Hawaiian State Legislature adopted a districting plan based on voting registration statistics after a district court ordered that the state’s pre-existing geography-based districting scheme be abandoned.⁵⁶ Hawaii used voting registration figures to allay fears that a total population regime would bestow an unfair advantage upon the district of Oahu.⁵⁷ Oahu was heavily populated with unregistered military personnel and tourists, which resulted in a six percent disparity between total population (79% of Hawaii’s total population) and voter registration (73% of registered voters in Hawaii).⁵⁸

The Supreme Court began its analysis of the voting registration scheme by restating the comprehensive analysis mandated by *Reynolds* and reinforcing the importance of measured judicial deference.⁵⁹ The Court declared that review must “consider the scheme as a whole” so as to allow “the body creating an apportionment plan in compliance with a judicial order [to be] left free to devise proposals for apportionment on an overall basis.”⁶⁰ The Court expanded upon *Reynolds’s* “substantial equality” standard by declaring that “a State’s freedom of choice to devise substitutes for an apportionment plan found unconstitutional either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.”⁶¹

Of paramount importance in *Burns* was Equal Protection Clause precedent that had established safeguards against “invidious discrimination.”⁶² Districting schemes violate the prohibition on invidious discrimination “only if it can be shown that designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial

55. See *Burns v. Richardson*, 384 U.S. 73, 91–92 (1966).

56. *Id.* at 77.

57. *Id.* at 90.

58. *Id.*

59. *Id.* at 83.

60. *Id.*

61. *Id.* at 85.

62. *Id.* at 88–89.

or political elements of the voting population.”⁶³ The plaintiff has the burden to offer “evidence in the record,” rather than mere speculation, to prove that “districting was designed to have or had the invidious effect necessary.”⁶⁴ Without evidence of such invidiousness, “[t]he decision to include or exclude any such group involves choices about the nature of the representation with which [the Supreme Court has] been shown no constitutionally founded reason to interfere.”⁶⁵

The Court acknowledged that *Reynolds* analyzed a total population regime, but “the Equal Protection Clause does not require the States to use” total population instead of voter or citizen population.⁶⁶ Rather, the Court merely surmised that total population was typically the most stable metric for accomplishing voting equality.⁶⁷ To this end, the Court identified “an additional problem” associated with districting regimes that rely on “a registered voter or actual voter basis.”⁶⁸ Not only are voter-based metrics subject to quirks of a state’s own citizenship criteria, but they are also heavily influenced by volatile trends in political activity.⁶⁹ Considering the *Reynolds* requirement that states redistrict every ten years, voting-based metrics have the potential to differ greatly each year depending on the existence of controversial election issues, on highly popular candidates, or even on unusual weather.⁷⁰

As a result, the Court cautiously held that the registered voter basis for reapportionment satisfied the Equal Protection Clause *on these specific facts* because “it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.”⁷¹

63. *Id.* at 88 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). *See also* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (holding that the Equal Protection clause and its prohibition on invidious discrimination requires evidence of a discriminatory purpose that belies selection or reaffirmation of “a particular course of action at least in part ‘because of’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

64. *Burns*, 384 U.S. at 88.

65. *Id.* at 92.

66. *Id.* at 91.

67. *See id.* at 92–93.

68. *Id.*

69. *Id.* (remarking that registered voter and actual voter measurements are “susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process”).

70. *Id.* at 93 (quoting *Ellis v. Mayor & City Council of Balt.*, 352 F.2d 123, 130 (4th Cir. 1965)).

71. *Id.*

Voter registration was permissible solely because it “was chosen as a reasonable approximation of both citizen and total population.”⁷² Ultimately, the Court concluded its opinion by clarifying that *Burns* must not “be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances.”⁷³

E. Current “One-Person, One-Vote” Doctrine for State Districting

Reynolds and *Burns* may be the most prominent “one-person, one-vote” cases, but other federal decisions inform the Supreme Court’s current standards for apportionment equality.⁷⁴ In the 1973 case *Mahan v. Howell*,⁷⁵ the Court emphatically foreclosed any applicability of federal apportionment equality tests to state-level districting schemes. Later, in *Gaffney v. Cummings*,⁷⁶ the Supreme Court substantiated the state-federal distinction when it upheld a Connecticut scheme by using *Reynolds* doctrine as applied in *Burns* rather than the “more stringent standards” applied to federal districting disputes.⁷⁷

In state-level districting cases, not all deviations from perfect population equality make out prima facie equal protection violations.⁷⁸ Instead, judicial intervention is reserved for cases of substantial vote dilution to keep the task of reapportionment within the realm of state legislatures.⁷⁹ Not only was the Court concerned about “making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly [sic] removed from legislative hands” but it also addressed the possibility that such high standards would allow “plaintiffs who may have wholly different goals from those embodied in the official plan” to abuse the fact that equal protection challenges could be brought with ease.⁸⁰

72. *Id.*

73. *Id.* at 96.

74. *See* *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *2–4 (W.D. Tex. Nov. 5, 2014).

75. 410 U.S. 315 (1973).

76. 412 U.S. 735 (1973).

77. *See id.* at 741 (alluding to both *Mahan* and *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), where the Court held that “one-man, one-vote” for federal apportionment requires that population variances be unavoidable despite a good faith effort to cure them).

78. *Id.* at 743.

79. *Id.* at 749.

80. *Id.*

In *Brown v. Thomson*,⁸¹ the Supreme Court solidified its objective test for determining which population equality deviations established prima facie cases for equal protection violations and thus warranted adequate justification by state governments.⁸² Ideal population of a district is to be calculated by dividing the state's total population by the total number of state senate districts.⁸³ The Court determined that any deviation less than ten percent from the ideal population for a given district would be considered "minor."⁸⁴

Following *Thomson*, two notable cases in the Ninth and Fifth Circuits provided additional perspectives for analyzing violations of the Equal Protection Clause's "one-person, one-vote" rule.⁸⁵ In *Garza v. County of Los Angeles*, the Ninth Circuit interpreted *Reynolds* and its progeny to require use of total population equality among districts.⁸⁶ *Garza* is also notable for Justice Alex Kozinski's vehement dissent against the notion that the Fourteenth Amendment requires representational (population-based) rather than electoral (voting-based) equality.⁸⁷ Justice Kozinski reasoned that although the choice to use total population is usually not problematic, voting registration metrics must be used when there is any imbalance of voting power.⁸⁸

Ten years later, the Fifth Circuit ruled on *Chen v. City of Houston*, which posed similar questions of vote dilution. Unlike the Ninth Circuit, the Fifth Circuit in *Chen* interpreted *Reynolds* and its progeny to allow for districting that provided for representational and electoral equality so long as there was a good faith effort to avoid substantial vote dilution.⁸⁹ The *Chen* court reasoned that a decision to require use of a citizenship-based metric such as CVAP might foreclose the opportunity (which is not prohibited in the Constitution) for state legislatures to exercise their right to extend the right to vote to aliens.⁹⁰

81. 462 U.S. 835 (1983).

82. See *id.* at 852 (describing the Court's test).

83. *Id.* at 842.

84. *Id.* at 842–43; see also *Connor v. Finch*, 431 U.S. 407 (1977).

85. *Chen v. City of Hous.*, 206 F.3d 502 (5th Cir. 2000); *Garza v. Cty. of L.A.*, 918 F.2d 763 (9th Cir. 1990).

86. 918 F.2d at 774 (discussing the need for individuals in more populous areas to have equal access to their state government).

87. See generally *id.* at 778–88 (Kozinski, J., concurring in part and dissenting in part).

88. *Id.* at 780–81.

89. *Chen*, 206 F.3d at 524.

90. *Id.* at 523.

III. HOLDING

The Western District of Texas dismissed Evenwel and Pfenniger’s suit, finding that they failed to state a claim that Plan S172 violated the Equal Protection Clause’s “one-person, one-vote” rule.⁹¹ The court confined its analysis to the issue of whether the plan achieved “substantial equality of population among districts when measured using a permissible population base.”⁹² Because Evenwel and Pfenniger chose not to allege “the apportionment base employed by Texas involves a choice the Constitution forbids,” the court held that it lacked the authority to invalidate Plan S172 on the grounds that “it does not achieve equality as measured by [Evenwel and Pfenniger’s] chosen metric.”⁹³ The court reasoned that such a theory had “never before [been] accepted by the Supreme Court or any circuit court.”⁹⁴ The relevant constitutional principle was framed as “whether to include or exclude groups of individuals ineligible to vote from an apportionment base.”⁹⁵ Consequently, the court read *Burns v. Richardson* to require deference to the choices made by the state legislature in the absence of a constitutionally forbidden act of discrimination.⁹⁶

IV. ARGUMENTS

A. *Arguments of Evenwel and Pfenniger*

Appellants Evenwel and Pfenniger frame their argument by asking “whether the one-person, one-vote principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.”⁹⁷ Evenwel and Pfenniger argue that the lower court’s ruling is entirely irreconcilable with a determination that “one-person, one-vote” protects the right of individuals to have an equal vote.⁹⁸ If the Supreme Court does not find that Plan S172 violates this principle, it is argued that “the Texas Legislature could have adopted a Senate map containing 31 districts

91. *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *4 (W.D. Tex. Nov. 5, 2014).

92. *Id.* at *2.

93. *Id.* at *2–3.

94. *Id.*

95. *Id.* at *4 (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)).

96. *Id.*

97. Brief for Appellants, *supra* note 23, at *i*.

98. *Id.* at 3.

of equal total population without violating the one-person, one-vote rule—even if 30 of the districts each contained one eligible voter and the 31st district contained every other eligible voter.”⁹⁹

Evenwel and Pfenniger argue that the districts created by Plan S172, “while roughly equal in terms of total population, were grossly malapportioned in terms of eligible voters.”¹⁰⁰ They provided figures that show that if CVAP, Total Voter Registration, and Non-Suspense Voter Registration (total registration minus voters who failed to respond to a confirmation of residence notice) are used, Plan S172 produces districts that deviate from the ideal district¹⁰¹ by a value of between 45.95% and 55.06%.¹⁰² As a result, Evenwel and Pfenniger allege that their votes have been diluted compared to the average citizen by a factor of between 1.41 and 1.84.¹⁰³

Drawing heavily from *Baker v. Carr* and *Reynolds v. Sims*, Evenwel and Pfenniger fear that an affirmation of the lower court’s holding will result in “the choice of a population base [being] unreviewable no matter how much vote dilution it causes.”¹⁰⁴ In general, they do not oppose the choice to use total population as a basis for reapportionment, but when eligible voters are not given equal voting power “demographic data that ensures the vote of any citizen is approximately equal in weight to that of any other citizen in the State must be used.”¹⁰⁵ Accordingly, Evenwel and Pfenniger adamantly oppose the lower court’s decision to give deference to the Texas legislature.¹⁰⁶ While the legislature should be afforded the ability to consider factors such as integrity of political subdivisions, political compactness, and even representational equality (ability of non-voters to access government), Evenwel and Pfenniger maintain that population of eligible voters must be given controlling consideration.¹⁰⁷ It follows that Evenwel and Pfenniger allege that the lower court’s refusal to overturn Plan S172 reflects a failure to

99. *Id.* at 2–3.

100. *Id.* at 8.

101. *See supra* note 19 (explaining how deviation from the ideal is calculated).

102. *See* Brief for Appellants, *supra* note 23, at 9.

103. *Id.* at 11–12.

104. *See id.* at 14; *see* discussion *supra* Section II.A.

105. *Id.* at 15 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

106. *See id.* at 14; *see* discussion *supra* Section II.A.

107. *Id.* at 18.

address a plainly justiciable constitutional claim under *Baker* and *Reynolds*.¹⁰⁸

Evenwel and Pfenniger also oppose the lower court's interpretation of *Burns v. Richards*.¹⁰⁹ Unlike the lower court, Evenwel and Pfenniger believe that *Burns* advocates for use of an alternative population base *even if* total district populations do not deviate by more than the required ten percent.¹¹⁰ In other words, Evenwel and Pfenniger argue that every districting review must account for population deviations when measured using CVAP and other registered voter bases.¹¹¹ Thus, even if the average total population deviation from ideal is below ten percent, deviations resulting from voting-based metrics that exceed that threshold are per se unconstitutional and illustrative of the absence of good faith.¹¹²

Evenwel and Pfenniger recognize that *Burns* allowed the use of a registered voter base for reapportionment only because it substantially mimicked what the outcome would have been if a citizenship-based metric were used.¹¹³ Nevertheless, they draw on *Chen v. City of Houston* and Judge Kozinski's dissent in *Garza v. County of Los Angeles* to illustrate the context in which the current case arises.¹¹⁴ Just as the circumstances in *Burns* warranted apportionment according to registered voters, the Supreme Court is urged to accept that "eligible voters will frequently track the total population evenly."¹¹⁵ Mandating that Texas redraw districts according to CVAP, total voter registration, or non-suspense voter registration ensures that "the Court's primary concern [of] equalizing the voting power of electors" is fulfilled.¹¹⁶

Evenwel and Pfenniger urge the Supreme Court to fashion a decision recognizing that "requiring the States to apportion approximately the same number of eligible voters to each district is the only way to enforce that constitutional right."¹¹⁷ Extending the

108. See Brief for Appellants, *supra* note 23, at 19. See discussion *supra* Section II.A.

109. *Id.* at 15–17. See also *id.* at 32–37.

110. *Id.* at 16.

111. *Id.* at 34–37.

112. *Id.* at 18.

113. *Id.* at 27–28.

114. See Brief for Appellants, *supra* note 23, at 27–28.

115. *Id.* at 28 (quoting *Chen v. City of Hous.*, 206 F.3d 502, 525 (5th Cir. 2000)).

116. *Id.* at 27 (quoting *Garza v. Cty. of L.A.*, 918 F.2d 763, 782 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part)).

117. *Id.* at 19.

judiciary's lens through which it seeks out gross deviations that violate "one-person, one-vote" is the only way to ensure "some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications."¹¹⁸ Allowing Plan S172 to continue as the current redistricting plan would ensure that Texas would be rewarded for giving "no consideration to voter equality."¹¹⁹

B. Arguments of Texas

Texas frames its argument by asking "whether the three-judge district court correctly held that the 'one-person, one-vote' principle under the Equal Protection Clause allows states to use total population, and does not require states to use voter population, when apportioning state legislative districts."¹²⁰ Texas views any challenge to Plan S172 as necessarily one of invidious vote discrimination under the Equal Protection Clause.¹²¹ Evenwel and Pfenniger must therefore prove that Plan S172 resulted from a lack of a good faith effort to equalize districts according to population.¹²² Consequently, a failure to prove irrationality or a purpose of diluting votes must result in an affirmation of the lower court.¹²³

Citing *Reynolds v. Sims* and *Brown v. Thomson*, Texas first establishes that any challenge to a districting scheme on "one-person, one-vote" grounds is a justiciable claim so long as the complaining party provides the required proof of invidiousness.¹²⁴ Texas contends that invidiousness must be understood in terms of Equal Protection precedent that recognizes certain state action will inevitably affect some individuals differently than others.¹²⁵ Therefore, invidiousness only exists when the difference in treatment is the result of a decision-maker seeking out the particular outcome to achieve adverse effects for an identifiable group.¹²⁶ Texas adamantly contends that Evenwel

118. *Id.* at 49 (quoting *Brown v. Thomson*, 462 U.S. 835, 849–850 (O'Connor, J., concurring)).

119. *Id.* at 50.

120. Brief for Appellees at (i), *Evenwel v. Abbott*, No. 14-940 (U.S. Sept. 18, 2015) [hereinafter Brief for Appellees].

121. *Id.* at 10.

122. *Id.*

123. *Id.* at 1–2.

124. *Id.* at 10–11.

125. *Id.* at 16–17.

126. Brief for Appellees, *supra* note 120, at 16–17 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

and Pfenniger have failed to allege with specificity any such intention on behalf of the State.¹²⁷

Next, Texas contends that a showing of a good faith effort to equalize total, citizen, or voting-eligible populations can effectively rebut any claimed invidiousness.¹²⁸ Texas uses *Burns* to support the proposition that the judiciary has historically been hesitant to interfere with legislative decisions regarding reapportionment of state voting districts.¹²⁹ Given the abundance of policy outcomes states must consider when redrawing districts, the courts have accepted use of both total population or citizen population so long as arbitrariness, irrationality, or invidiousness are not present.¹³⁰ Furthermore, Texas contends that the Supreme Court's allowance for voting population in *Burns* does not "cast[] doubt on the validity of total population as a permissible apportionment base."¹³¹ Rather, the Court in *Burns* accepted voter population solely on the grounds that it substantially mimicked the effect of an otherwise permissible population base (such as total or citizen population).¹³² Texas suggests that the decision to use total population rather than voter registration statistics was entirely rational considering the "additional problem" of political volatility.¹³³

Texas also argues that Plan S172's use of total population does not substantially dilute the votes of its citizens and therefore does not require a complete change in the "one-person, one-vote" rule.¹³⁴ First, Texas places Plan S172 in the context of the ten percent rule for total population deviations from the ideal district.¹³⁵ It is submitted that requiring use of alternative bases for apportionment whenever non-total population deviations exceed ten percent would be both practically and substantively wrong.¹³⁶ Texas posits that "[s]tates typically apportion their legislative seats based on total population," to the extent that "line-drawers across the nation rely almost uniformly on total population."¹³⁷ Here, Plan S172's average deviation

127. *Id.* at 17–18.

128. *Id.* at 18; *see* discussion *supra* Part II.

129. *Id.* at 21–23.

130. *Id.*

131. Brief for Appellees, *supra* note 120, at 23.

132. *Id.* at 22–23.

133. *Id.* at 22.

134. *See* discussion *supra* Section II.B.

135. *Id.* at 26–28.

136. *See id.* at 28–31.

137. Brief for Appellees, *supra* note 120, at 28 (quoting J. Fishkin, *Weightless Votes*, 121

from ideal voting districts based on total population is only 8.04%, a figure similar to the one that the Supreme Court summarily declared insubstantial in *Gaffney v. Cummings*.¹³⁸ Additionally, Texas points to a non-exhaustive list of fourteen Supreme Court decisions as evidence that total population, and its accompanying ten percent deviation test, has been the controlling “one-person, one-vote” metric since the Court first examined the issue.¹³⁹

Texas argues that the importance of total population equality results in the principle “that [s]tates cannot subordinate population equality to other concerns when apportioning.”¹⁴⁰ Historically speaking, “if a [s]tate creates districts of substantially equal population, it has generally satisfied the Equal Protection Clause and cannot be charged with invidious vote dilution.”¹⁴¹ Texas interprets *Reynolds* to accept good faith efforts to reapportion based on total population, citizen population, or voter population.¹⁴² Texas suggests that a Supreme Court decision to strike down Plan S172 would break from overwhelming Supreme Court precedent that has never considered a good faith effort to equalize total population as constitutionally infirm.¹⁴³ Texas even maintains that while total population equality is not a constitutional requirement, the history of the Fourteenth Amendment suggests that the Framers of that Amendment favored it over strict electoral equality.¹⁴⁴ Thus, while Texas is careful to agree that the Ninth Circuit’s decision in *Garza* mandating total population equality is not doctrinally correct, it correctly supports the notion that the Framers of the Fourteenth Amendment at least accepted that representational equality was a major factor in state districting decisions.¹⁴⁵

Finally Texas directly attacks the apportionment methods Evenwel and Pfenniger urge the Supreme Court to support.¹⁴⁶ Texas

YALE L.J. 1888, 1890 (2012)). See also *id.* at 1a–46a (displaying the statutes for the majority of states that use total population to reapportion their districts every ten years).

138. *Id.* at 26–27.

139. *Id.* at 29–31.

140. *Id.* at 34.

141. *Id.*

142. *Id.* at 38.

143. Brief for Appellees, *supra* note 120, at 38–39.

144. *Id.* at 40–41 (referencing the Fifth Circuit’s discussion in *Chen* of evidence suggesting that a proposed draft of the Fourteenth Amendment that required electoral equality was rejected by the Framers, 206 F.3d at 527).

145. *Id.* at 41–42.

146. *Id.* at 55–57.

argues that, insofar as Evenwel and Pfenniger suggest abandonment of total population, their suggested alternatives are too varied to warrant a Supreme Court order mandating use of CVAP, voter registration, or non-suspense voter registration.¹⁴⁷ The range of voting strength deviations according to CVAP, voter registration, and non-suspense voter registration is itself ten percent.¹⁴⁸ This constitutionally significant discrepancy should in and of itself be enough to trigger judicial suspicion.¹⁴⁹ In any event, Texas maintains that there is a dearth of evidence regarding any lack of a good faith effort behind the implementation of Plan S172.¹⁵⁰

V. ANALYSIS

Evenwel v. Abbott presents the Supreme Court's first opportunity to define exactly what type of population equality the Equal Protection Clause requires states to use for districting and to determine whether the Court's historically deferential rulings are still good law. Despite the superficially convincing statistical arguments provided by Evenwel and Pfenniger, their constitutional claim must fail. The Equal Protection Clause requires a successful "one-person, one-vote" claim to be accompanied by evidence that either proves an invidious intent to dilute votes or undermines the notion of a state government's good faith effort to equalize voting power. Evenwel and Pfenniger have failed to provide either. Additionally, mandating the use of the voting statistics proffered by Evenwel and Pfenniger will result in the type of arbitrary administration the Equal Protection Clause is supposed to protect against. Accordingly, the Supreme Court should affirm the lower court's ruling and uphold Plan S172 as satisfactory under the "one-person, one-vote" doctrine. A contrary ruling would defy established Equal Protection Clause doctrine and leave the important issue of state reapportionment in uncharted judicial waters.

A. *Evenwel and Pfenniger Do Not Provide Sufficient Evidence To Prove a Violation of the Equal Protection Clause*

First, Evenwel and Pfenniger summarily fail to assert that Texas purposely singled out a particular, identifiable group of individuals for

147. *Id.* at 55.

148. *Id.*

149. Brief for Appellees, *supra* note 120, at 55–56.

150. *Id.* at 56–57.

vote dilution. Instead, they merely claim that their particular voting districts had been treated differently than other districts when analyzed using three voting-based metrics.¹⁵¹ Moreover, the Supreme Court has previously only accepted one of the voting-based frameworks through which Evenwel and Pfenniger advance their argument, and on an extremely limited basis.¹⁵² Even if each of the three voting-based metrics volunteered by Evenwel and Pfenniger were constitutionally permissible, the Equal Protection Clause only protects against purposeful discrimination.¹⁵³ There is simply no evidence that Texas purposefully chose to apportion its districts in a manner that diluted the votes of Evenwel and Pfenniger's respective districts.

Evenwel and Pfenniger also argue that Plan S172 must be invalidated because it could hypothetically allow the Texas Legislature to adopt "a Senate map containing 31 districts of equal total population without violating the one-person, one-vote rule—even if 30 of the districts each contained one eligible voter and the 31st district contained every other eligible voter in the State."¹⁵⁴ This argument fails because it is exactly the type of speculative evidence the Supreme Court explicitly rejected in *Burns*.¹⁵⁵ Furthermore, this reasoning is troublesome because it disregards the second portion of the "one-person, one-vote" Equal Protection test that requires a good faith effort to equalize a permissible population base.¹⁵⁶

Just as Evenwel and Pfenniger have failed to satisfactorily allege an invidious purpose behind Plan S172, they have failed to provide substantial evidence to undermine Texas's assertion that the plan represents an honest and good faith effort to create fair districts. Aside from the evidence illustrating Plan S172's deviations from the ideal in terms of their hand-picked voting-based metrics, the only other attempt to undermine the good faith behind Plan S172 is a set of conclusory statements regarding the capability to create more

151. See Brief for Appellants, *supra* note 23, at 11–12.

152. *Burns v. Richardson*, 384 U.S. 73, 93 (1966) (declaring that use of registered voters for Hawaii's apportionment plan satisfies the Equal Protection Clause "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis").

153. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

154. See Brief for Appellants, *supra* note 23, at 2–3.

155. 384 U.S. at 88–89 ("Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting.").

156. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

equal districts.¹⁵⁷ According to Evenwel and Pfenniger, there are “many feasible ways” to “minimize” both total population deviations and CVAP deviations.¹⁵⁸ Unfortunately, the actual figures of these alternate plans were not presented to the legislature nor were they appended to Evenwel and Pfenniger’s brief.¹⁵⁹ Instead, these conclusory statements were provided in the form of a demographer’s two-page sworn statement.¹⁶⁰ Without proof of invidious dilution or substantial evidence undermining the good faith of the state legislature, the 8.04% average deviation from ideal total population of Plan S172 must be understood as constitutionally minor and consonant with the Equal Protection Clause.¹⁶¹

B. Requiring Reapportionment Based on Voting-Based Statistics May Result in Arbitrary, Irrational Administration of the “One-Person, One-Vote” Principle.

If the Supreme Court were to rule in favor of Evenwel and Pfenniger and require states to “apportion approximately the same number of eligible voters to each district,”¹⁶² the Court would necessarily rely on a body of statistical evidence that is both volatile and difficult to ascertain.¹⁶³ The Supreme Court has recognized the difficult problems posed by voter-based reapportionment and has even characterized state voter registration policies as a threat to perpetuate the “ghost of malapportionment.”¹⁶⁴ For the Supreme Court to order every state to apportion its districts according to voter registration statistics would be to put electoral equality at the mercy of “fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather considerations.”¹⁶⁵

Also, a Supreme Court mandate to reapportion according to even CVAP would require reliance on a body of data that is far from reliable. The Supreme Court has previously lauded census data as the most reliable indicator of population.¹⁶⁶ On the other hand, citizenship

157. See Brief for Appellants, *supra* note 23, at 46.

158. *Id.*

159. See Brief for Appellees, *supra* note 120, at 5–6.

160. *Id.*

161. *Id.* at 8.

162. *Id.* at 19.

163. See *Burns v. Richardson*, 384 U.S. 73, 93 (1966) (quoting *Ellis v. Mayor & City Council of Balt.*, 352 F.2d 123, 130 (4th Cir. 1965)).

164. *Id.* at 92–93 (quoting *Buckley v. Hoff*, 243 F. Supp. 873, 876 (D. Vt. 1965)).

165. *Id.* at 93 (quoting *Ellis*, 352 F.2d at 130).

166. *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969). See also *Karcher v. Daggett* 462 U.S.

data was not included on the most recent Federal Census.¹⁶⁷ In fact, citizenship data is provided by the American Community Survey, a 90% confidence-level estimation of citizenship based on a sample of two million interviews per year.¹⁶⁸ While citizenship is indeed a permissible population base with which to draw districts, extrapolating an additional subpopulation of voting-aged citizens surely compounds the existing risks. It follows that a decision to abandon the total population formula used almost uniformly by states¹⁶⁹ in favor of either registered voters or voting-aged citizens would itself be an irrational, arbitrary choice.

CONCLUSION

Evenwel v. Abbott provides the Supreme Court an opportunity to examine a very provocative Equal Protection issue. Unfortunately for *Evenwel* and Pfenniger, there is too much established precedent that raises the standards for successful “one-person, one-vote” challenges far above the evidence they have provided. History weighs on the side of allowing states to choose which populations they wish to use to formulate their voting districts. Therefore, proof of questionably disparate treatment of two districts in Texas does not warrant the dismantling of historically coherent Equal Protection doctrine.

725, 738 (1983) (declaring that “the census data provide the only reliable—albeit less than perfect—indication of the districts’ ‘real’ relative population levels”).

167. See U.S. CENSUS BUREAU, UNITED STATES CENSUS 2010 (2009), https://www.census.gov/2010census/pdf/2010_Questionnaire_Info.pdf.

168. See U.S. CENSUS BUREAU, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL DATA USERS NEED TO KNOW 10 (Oct. 2008), <https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSAIANHandbook.pdf>.

169. See Fishkin, *supra* note 137, at 1890.