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Who Counts for One Person, One Vote?

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INTRODUCTION

The Supreme Court's recent decision in *Evenwel v. Abbott*¹ answered a question that had lurked beneath the surface of redistricting law for the past half century. Does the one person one vote rule require states to draw districts around equal numbers of people or equal numbers of voters? The Court ruled that the Constitution, at the very least, permitted a state to draw districts around equal numbers of people.² In so ruling, it upheld the near-uniform practice of the states since the Court's "reapportionment revolution" of the 1960s.

The case would seem significant, if at all, as one where the dog didn't bark. Had the Court struck down the challenged Texas legislative plan it would have sent a shockwave throughout the political system. A great number of redistricting plans — from state legislative to local school boards — would have been called into question and needed to be redrawn. By upholding the status quo, the Court's decision led mostly to sighs of relief, rather than signs of outrage.

The dodged-bullet that was the *Evenwel* case provoked some deep thinking about the values inherent in the one person, one vote cases. Were those canonical decisions about equal representation or equal voting power? How could that constitutional rule not resolve definitively what the basis for redistricting must be, especially when using voters or people would have such dramatically different results as it did in Texas? And given the way the Court resolved the case — merely upholding the widely employed option of using total population as the redistricting basis — was this case only the first battle, soon to be followed by efforts to use other population bases, such as citizens or voters, for purposes of redistricting?

Because the Court resolved the case on the expected constitutional grounds, it did not need to deal with the practical questions as to what redistricting on a basis other than population would entail. But the practical consequences were an independent reason to dispose of the case. Indeed, they might even have provided narrower grounds for doing so. In short, even if the appellants had won, the state could not have remedied the alleged constitutional infirmity in its plan — or at least, not with available data.

The debate over the constitutionality of Texas's redistricting plan assumed that the state could comply with a ruling requiring equal numbers of voters per district. But no national enumeration of citizens, voters, or eligible voters exists. The United States

¹ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

² *Id.* at 1126-27.

Constitution requires the creation of a single population dataset: the decennial Census's "actual Enumeration" of persons.³ As such, states and localities, almost without exception, have used this dataset to build redistricting plans, and courts have repeatedly upheld plans that do so. Neither the federal government, nor any state, maintains an address list of eligible voters that would allow for redistricting on that basis. Surveys, funded by congressional whim, that provide partial estimates of eligibility based on citizenship are a poor substitute for the census redistricting dataset. An interpretation of the Fourteenth Amendment that would have prohibited the use of the most accurate and only constitutionally mandated population dataset and, in effect, mandated the creation of some new count of eligible voters would have been both unprecedented and incredibly destabilizing to the U.S. Census and redistricting process.

The appellants' constitutional argument was predicated on the notion that it is possible to draw districts around equal numbers of eligible voters. If the Fourteenth Amendment requires that only people who can vote should be equally represented, then redistricting, under this view, should be based on equal numbers of eligible voters and no one else. For most states, that means the census enumeration of the total population, plus voting eligible military and overseas voters not counted at their voting address in the census, minus children, noncitizens, prisoners and disenfranchised felons, and those ineligible because of mental disability. No state maintains a dataset of eligible voters, as such.

The *Evenwel* appellants, therefore, urged the Court to mandate, as a constitutional rule, the use of currently available second-best alternatives that would not satisfy the rigid legal standard they proffered. Estimates of the citizen voting age population ("CVAP") derived from the yearly American Community Survey ("ACS") of 2.5 percent of households do not provide current, accurate data at the levels of geography (census block level or precinct) where most redistricting is conducted.⁴ At best, the ACS five-year averages give ballpark estimates of previous citizenship rates, several years before redistricting is conducted. The ACS could also be eliminated by the government at any time, as the House of Representatives has voted to do, or be fully or partially defunded, as has happened twice since its inception.⁵

³ U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2.

⁴ See *infra* Part III.

⁵ See Catherine Rampell, *The Beginning of the End of the Census?*, N.Y. TIMES (May 19, 2012), <http://www.nytimes.com/2012/05/20/sunday-review/the-debate-over-the->

Registered voter lists invite a different set of problems and could only be used for redistricting if they match up well with more reliable population statistics. They are ripe for political manipulation and highly variable depending on the temporal proximity of the list to a given election. Moreover, at least one state does not keep a voter registration list, and another dozen allow for Election Day registration, which can lead to substantial changes in voter registration data in a short period of time.

This Article examines these important practical considerations that underlay the *Evenwel* litigation. Part I briefly describes the *Evenwel* litigation and details how the Supreme Court resolved the constitutional issues involved. Part II explains why no available data exist that could have satisfied *Evenwel*'s constitutional claims. Part III analyzes the available second-best datasets (specifically, the American Community Survey data concerning the citizen voting age population) that were used in the litigation and explains why they are inadequate for redistricting. Part IV explains why voter registration statistics are equally unreliable.

The final Part presents the conclusion, which can be stated succinctly here. The one person, one vote rule is not broken, and the Court was right not to try to fix it. The collateral damage caused by a rejection of the census as the basis for redistricting could not have been easily contained. But the issues raised by *Evenwel* will not die with the case. Jurisdictions might now experiment with different population bases for redistricting. They should be aware of the shortcomings — philosophical, legal, and practical — of the available datasets. Unless a jurisdiction is willing to conduct a census of its own, it will be forced to rely on available data the use of which would undermine the values inherent in one person, one vote.

american-community-survey.html (noting the vote in Congress and quoting Representative Daniel Webster as saying “We’re spending \$70 per person to fill this out. That’s just not cost effective”); U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: RESPONSE RATES, <http://www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/> (noting a 7.4 percentage point drop in the response rate from the previous year and explaining “[a]s a result of the 2013 government shutdown, the ACS did not have a second mailing, a telephone followup, or a person followup operation for the October 2013 housing unit panel”); *see also id.* (“Similarly, due to a reduction in funding in 2004, the telephone and personal visit followup operations for the January 2004 panel were dropped, which resulted in a comparable effect on the overall 2004 response rate.”). The response rate for Texas in 2013 was 88.4 percent. *See id.*

I. UNDERSTANDING *EVENWEL*

The argument of the plaintiffs in *Evenwel v. Abbott* was a unique kind of constitutional argument, especially so given that it was at least portrayed as conservative in its foundations and aspirations. The argument had no basis in the text or original meaning of any constitutional provision, let alone the Fourteenth Amendment it attempted to interpret.⁶ It could not claim a historical pedigree, since the established historical practice was to draw districts on the basis of people. It could not even pretend to be based on contemporary practices or evolving understandings, since all existing redistricting plans were based on total population.⁷

Instead, the argument emerged from a kind of meta-analysis of precedent, in which the one person, one vote cases should be read to mean something that had never been applied. Not without reason, the plaintiffs read the earlier cases as suggesting that equal voting power was the goal of the one person, one vote cases. *Reynolds v. Sims*, itself, they quoted for the proposition that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.”⁸ Thus, the material is certainly there to make the case that the Court believed the one person, one vote rule would equalize voting power.

Of course, as the Court majority explained in an opinion written by Justice Ginsburg, there are a similar number of quotes supporting the equal representation theory of one person, one vote.⁹ *Reynolds* also said that “the fundamental principle of representative government in

⁶ Indeed, Justice Thomas’s concurrence effectively makes this point, even though he also quite rightly notes the anti-originalism and anti-textualism of the one person one vote cases themselves. See *Evenwel*, 136 S. Ct. at 1133-42 (Thomas, J., concurring).

⁷ See *id.* at 1124 (majority opinion) (“[I]n the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. Today, all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way.”).

⁸ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); see also *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970) (“[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.”); *Gray v. Sanders*, 372 U.S. 368, 379-380 (1963) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”).

⁹ See *Evenwel*, 136 S. Ct. at 1131-32.

this country is one of equal representation for equal numbers of people.”¹⁰ More to the point, the later malapportionment cases that relied on *Reynolds* all found constitutional infirmities in redistricting plans precisely because they contained different numbers of people.¹¹ As the *Evenwel* opinion put it, “[i]t would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule.”¹²

For good measure, the Court made clear that the other canons of constitutional interpretation pointed in the direction of upholding the Texas plan and accepting the use of total population as the metric for measuring compliance with one person, one vote. Perhaps the highest obstacle to the plaintiffs’ case came from the text of the Constitution itself. Specifically, its provision concerning congressional apportionment, Article I Section 2, provides “Representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.”¹³ “Respective numbers” and “Persons” is quite different than voters. Moreover, the infamous three-fifths clause regarding representation of slaves should have settled the issue as to whether the Framers thought voting representation was the basis for reapportionment.¹⁴ As the Court concluded, the *Evenwel* appellants’ argument boiled down to an implausible assertion that what the Constitution demanded for congressional apportionment it simultaneously prohibited for state redistricting.¹⁵

¹⁰ *Reynolds*, 377 U.S. at 561-62.

¹¹ See *Evenwel*, 136 S. Ct. at 1131-32; *Connor v. Finch*, 431 U.S. 407, 416-17 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *Whitcomb v. Chavis*, 403 U.S. 124, 161-62 (1971); *Kilgarlin v. Hill*, 386 U.S. 120, 122-26 (1967); *Swann v. Adams*, 385 U.S. 440, 442-45 (1967); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 728-29, 734-35 (1964); *Roman v. Sincock*, 377 U.S. 695, 708-10 (1964); *Davis v. Mann*, 377 U.S. 678, 688-92 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 664-65, 673-74 (1964). *But see* *Brown v. Thomson*, 462 U.S. 835, 837-41 (1983); *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 745-50 (1973); *Mahan v. Howell*, 410 U.S. 315, 328-30 (1973).

¹² *Evenwel*, 136 S. Ct. at 1131.

¹³ U.S. CONST. art. I, § 2, amended by U.S. CONST. amend. XIV (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

¹⁴ See *id.* art. I, § 2, cl. 3; *Evenwel*, 136 S. Ct. at 1127.

¹⁵ *Evenwel*, 136 S. Ct. at 1129-30. The *Evenwel* Appellants tried to evade this argument by noting that the one person, one vote cases have always rejected the

An interesting debate occurred between the majority and Justice Alito in concurrence regarding how to discern the Framers' intent behind the apportionment clause in the Constitution.¹⁶ Both agreed that nothing in the originalist materials suggested that the Framers would have thought the Constitution would bar representation based on total population.¹⁷ They differed as to the significance they attached to the political compromise that undergirded the reapportionment clauses.¹⁸ For Justice Alito in concurrence, the Framers did not express a philosophical preference for equal representation.¹⁹ Rather, their compromise revealed that "apportionment in the new National Government would be the outcome of a contest over raw political power, not abstract political theory."²⁰ For the majority, the political explanation for the relevant clauses was beside the point: even if "politics" explained the basis for apportionment, the Framers considered alternatives and did not express a preference for apportionment based on voters, let alone a preference for barring apportionment (or redistricting) based on total population.²¹

federal analogy — e.g., that the malapportionment of the U.S. Senate could justify malapportionment of one or another house of a state legislature. *Id.* at 1130. But as, the Court responded, "the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting. The Framers' answer to the apportionment question in the congressional context therefore undermines appellants' contention that districts must be based on voter population." *Id.*

¹⁶ Compare *id.* at 1127-30, with *id.* at 1144-49 (Alito, J., concurring).

¹⁷ See *id.* at 1128-29 (majority opinion); *id.* at 1149 (Alito, J., concurring).

¹⁸ Compare *id.* at 1127 n.9 (majority opinion), and *id.* at 1129 n.11 ("That politics played a part, however, does not warrant rejecting principled argument."), with *id.* at 1145 (Alito, J., concurring) ("[T]he overwhelming concern [in allocating House seats] was far removed from any abstract theory about the nature of representation. Instead, the dominant consideration was the distribution of political power among the States.").

¹⁹ See *id.* at 1145 (Alito, J., concurring) (noting that "slave-state delegates did not demand slave representation based on some philosophical notion" about representation); see also *id.* at 1146 (arguing that in debates over the Fourteenth Amendment, "it was power politics, not democratic theory, that carried the day.").

²⁰ *Id.* at 1146; see also *id.* at 1147-49 (describing how the Fourteenth Amendment's apportionment clause reflected an attempt to maintain Northern political power).

²¹ See *id.* at 1129 (majority opinion) ("One can accept that federalism — or, as Justice Alito emphasizes, partisan and regional political advantage . . . — figured in the Framers' selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.").

That debate and Justice Alito's concurrence only in the judgment reveal potential future controversies over the population basis for redistricting. Justice Alito read the Solicitor General's brief as suggesting that total population was the only constitutionally permissible basis for redistricting.²² He disagreed with that argument and emphasized the "political" explanation for the Framers' choices so as to undercut any future reliance on originalist arguments to foreclose the use of some other basis for redistricting.²³ In the end, *Evenwel*, which removed some uncertainty, in that it reaffirmed that total population is a permissible basis for redistricting, left open the possibility that some other basis might also be permissible. As such, the debate over whether a jurisdiction can redistrict employing a population statistic, other than the census enumeration, to comply with one person, one vote, remains a live controversy. The logistical and statistical concerns surrounding redistricting based on other statistics, therefore, require careful consideration, in the event jurisdictions interpret the Court's acquiescence as an invitation to experiment.

II. THE ABSENCE OF A DATABASE OF ELIGIBLE VOTERS

The *Evenwel* appellants described the key issue in the case as "whether the one person, one vote rule protects the right of eligible voters to an equal vote."²⁴ "Yet, nowhere in the briefing before [the] Court or the litigation below [had] anyone identified a dataset that present[ed] the eligible voting population of Texas communities in a way that would allow for redistricting on that basis. Texas is not unique in this regard: No state keeps track of its eligible voter population, let alone in a dataset usable for redistricting."²⁵

The absence of an eligible voter dataset should not surprise anyone familiar with the census and redistricting process in the United States. Virtually all states and localities draw districts based on the Census Redistricting Dataset — the P.L. 94-171 datafile distributed within one year of the decennial census to each state in time for its redistricting.²⁶

²² See *id.* at 1144 (Alito, J., concurring).

²³ See *id.* at 1149 ("It is impossible to draw any clear constitutional command from this complex history.")

²⁴ Brief for Appellant at 14, *Evenwel*, 316 S. Ct. 1120 (No. 14-940), 2015 WL 4624625.

²⁵ Brief of Nathaniel Persily & Bernard Grofman et al. as Amici Curiae in Support of Appellees at 6-8, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719746.

²⁶ See U.S. CENSUS BUREAU, 2010 CENSUS REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE: TECHNICAL DOCUMENTATION (2011) [hereinafter 2010 DATA],

The Census Redistricting Datafile is derived from the “short form” of the census, distributed to all U.S. households every ten years in fulfillment of the Constitution’s requirement of an “actual Enumeration.”²⁷ The short form includes ten questions concerning the respondent’s name, phone number, age, gender, and race, as well as whether the residence is owned or rented.²⁸ It contains no questions regarding citizenship or other criteria of voter eligibility except for age.

The Census Redistricting Datafile is both over- and under-inclusive of the voting-eligible population. The datafile includes an enumeration of the voting age population, by providing population statistics for all those over the age of 18.²⁹ But those counts, like those of the total population, include a myriad of groups ineligible to vote. Not only are non-citizens included in the redistricting data, but so are prisoners and disenfranchised felons, and those disenfranchised because of mental disability. Moreover, the redistricting dataset excludes a large group of voters (military and overseas voters) who are not at a residence on Census Day, but are nevertheless eligible to vote in elections.³⁰

These problems of over- and under-inclusion are not unique to the Census Redistricting Dataset. The American Community Survey citizenship estimates, blessed by the *Evenwel* appellants and described in greater detail below, also include prisoners, disenfranchised felons, and those ineligible because of mental disability, and exclude most eligible overseas and military voters. These are not nit-picky statistical arguments. The differences between the allegedly ideal, constitutionally mandatory (according to the appellants) statistic of eligible voters and the available datasets are considerable.

Data from Texas demonstrate the impossibility of satisfying a constitutional standard based on the citizen voting age population. Even if the ACS estimates of CVAP were accurate, they would still erroneously include the 173,649 Texans in prison (which itself

<https://www.census.gov/prod/cen2010/doc/pl94-171.pdf>.

²⁷ U.S. CONST. art. I, § 2; *id.* amend. XIV.

²⁸ See *Explore the Form: One of the Shortest Forms in History — 10 Questions in 10 Minutes*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/about/interactive-form.php> (last visited Feb. 17, 2017).

²⁹ See U.S. CENSUS BUREAU, 2010 DATA, *supra* note 26, at 1-1 (describing datafile’s contents).

³⁰ Because the census operates under the “usual residence rule,” it counts every person at the location where they “live[] and sleep[] most of the time” as of Census Day. See *How We Count America*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/about/how-we-count.php> (last visited Feb. 17, 2017). Prisoners are therefore counted in prison. *Id.*

exceeds the population of a Texas legislative district) and the more than 350,000 others who are disenfranchised because of a felony conviction.³¹

CVAP statistics not only include ineligible voters, they also exclude eligible ones, such as U.S. citizens living abroad. Although we do not know with specificity the number of eligible overseas and military voters, the counts used for apportionment of seats in the U.S. House of Representatives (as compared to the PL 94-171 datafile) include overseas U.S. military and federal civilian employees and their dependents.³² For Texas, the 2010 Census counted 122,857 overseas military and federal employees and their dependents.³³ But that estimate includes children and excludes several hundred thousand overseas voters who do not work for the government, but are nevertheless eligible to vote. For the 2008 Election, Professor Michael McDonald of the University of Florida, the foremost expert on the differences between the voting eligible population and the voting age population, estimated the size of the overseas voting eligible population for Texas to be 549,216, constituting 3.68% of the state's eligible voter population.³⁴

³¹ See PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, PRISONERS IN 2010, U.S. DEPT. OF JUSTICE, 14 (2011), <https://www.bjs.gov/content/pub/pdf/p10.pdf>; CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, STATE LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 16 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf>.

³² See *Congressional Apportionment: Who's Counted*, U.S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/about/who.html> (last visited Feb. 17, 2017).

³³ *Table 3: Overseas Population of the 50 States and the District of Columbia: 2010 Census*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/population/apportionment/files/Overseas%20Population%202010.pdf> (last visited Feb. 17, 2017).

³⁴ See Michael McDonald, *2008 November General Election: Turnout Rates*, https://docs.google.com/spreadsheets/d/1deCSqgLqrzFgpUa_S8Gk-8mKrPq47pkx1eqKwZGtSqA/edit#gid=1424011440 (last visited Feb. 17, 2017, 2016); see also Michael P. McDonald, *Redistricting Developments of the Last Decade — and What's on the Table in This One*, 10 ELECTION L. J. 313, 316-17 (2011) [hereinafter *Redistricting Developments*]; Michael P. McDonald, *The 2010 Midterm Election: Signs and Portents for Redistricting*, 44 PS 311, 314 (2011) [hereinafter *2010 Election*]; Michael P. McDonald, *The True Electorate: A Cross-Validation of Voter Registration Files and Election Survey Demographics*, 71 PUB. OP. Q. 588, 589-92, 599-600 (2007); Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 964-65, 971-72 (2001); Michael P. McDonald, *The Turnout Rate Among Eligible Voters in the States*, 2 ST. POL. & POL'Y Q. 199, 201-05, 210 (2002) [hereinafter *Turnout Rate*]; Michael McDonald, *How Is the Overseas Eligible Population Estimated?*, U.S. ELECTION PROJECT (July 17, 2017 3:00 PM), <http://www.electproject.org/home/voter-turnout/faq/overseas>.

Despite the best efforts of political scientists and data analysts, these partial estimates of the voting eligible population remain ballpark figures, at best, and are available, if at all, at the state level. None are available in a format or at a level of geography that could be used for redistricting.³⁵ No state can identify with precision the number of eligible voters in particular neighborhoods, let alone census blocks or precincts used to build redistricting plans. As the Texas data demonstrate, these discrepancies between the eligible voter population in the state and any available redistricting data can be quite large: differences amounting to several million people. Therefore, the argument that the Constitution requires redistricting on the basis of equal numbers of eligible voters necessarily implies a new and radical constitutional mandate that forces the government to collect heretofore unavailable information about the eligibility and location of any potential voter. Under current circumstances, that constitutional standard simply cannot be satisfied.

III. THE PROBLEMS WITH SURVEY DATA AS THE POPULATION BASIS FOR DETERMINING COMPLIANCE WITH ONE PERSON, ONE VOTE

In the *Evenwel* litigation, the appellants and their supporting *amici* relied on citizenship data derived from ACS as a second-best attempt to approximate the eligible voter population. As noted above, such data do not come close to representing the eligible voter population. ACS data have additional shortcomings as the population standard for one person, one vote, however. The ACS is a very valuable and important survey, but it is not a census. It is not mandated by the Constitution and could be eliminated at any time. In fact, the House of Representatives has previously voted to end it, and due to the government shutdown in 2013 and a reduction in funding in 2004, the survey suffered from low response rates.³⁶

³⁵ See, e.g., McDonald, *2010 Election*, *supra* note 34, at 314 (discussing high levels of uncertainty in ACS citizenship data); McDonald, *Redistricting Developments*, *supra* note 34, at 316-17 (explaining five limitations of ACS citizenship data, including the “unknown error” introduced when disaggregating data reported at the block group level to the census block level needed for redistricting); see also *infra* Part III.C (explaining that margins of error in survey data, such as the ACS, increase as the level of geography — and thus the population — decreases); *infra* Part III.D (explaining that the ACS’s smallest level of geography — the census block group — is too large for redistricting); *infra* Part IV (explaining problems with using voter registration data); cf. McDonald, *Turnout Rate*, *supra* note 34, at 201-05 (explaining method for converting voting-age population to voting-eligible population and discussing data limitations at the state level).

³⁶ See *supra* note 5 and sources cited therein (discussing House votes to defund

The ACS, while revolutionary and essential as a tool to inform public policy, is not designed to produce districts that conform to constitutional requirements. Its yearly estimates of CVAP come with an impermissibly high margin of error to serve as the standard for one person, one vote. If used as the touchstone for judging malapportionment, five-year averages of yearly ACS surveys would lead to districts based on stale data that are half a redistricting-cycle old. In short, even if one were to ignore the mismatch between the ACS data and the eligible voter population, requiring that districts be drawn on the basis of survey results introduces new errors and controversies into the redistricting process.

Virtually all data concerning the current rates of citizenship of the U.S. population come from ACS.³⁷ The ACS draws from a sample of approximately 2.5 percent of American households, derived from rolling surveys of roughly 295,000 people per month throughout the year. The Census Bureau publishes yearly estimates of the relevant survey items, as well as three- and five-year averages of those items, along with accompanying margins of error.³⁸ However, highlighting the uncertain future of the ACS, the Census Bureau itself has now even proposed eliminating the three-year averages of the ACS due to “tight budgetary considerations.”³⁹

The ACS is not a survey primarily concerned with issues related to citizenship, let alone the redistricting process. It replaced what was

and even eliminate the ACS).

³⁷ See Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *CARDOZO L. REV.* 755, 773-74 (2011); see also Jennifer Van Hook & James D. Bachmeier, *How Well Does the American Community Survey Count Naturalized Citizens?*, 29 *DEMOGRAPHIC RES.* 1, 6 (2013) (describing the ACS as “the only large U.S. sample with questions about naturalization and citizenship”). While the Census Bureau’s Current Population Survey (CPS) collects citizenship data in its March supplement, it uses a much smaller sample and is designed to produce national estimates, making it insufficiently granular for use in redistricting. See U.S. CENSUS BUREAU, *CURRENT POPULATION SURVEY: 2016 ANNUAL SOCIAL AND ECONOMIC (ASEC) SUPPLEMENT 1-1, 2-1, 2-8* (2016), <https://www2.census.gov/programs-surveys/cps/techdocs/cpsmar16.pdf> (explaining CPS sample and cautioning against use of estimates for metropolitan areas with populations under 500,000); see also Van Hook & Bachmeier, *supra*, at 6 (comparing ACS and CPS citizenship data).

³⁸ U.S. CENSUS BUREAU, *A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL DATA USERS NEED TO KNOW 3* (2008), https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSAIAN_Handbook.pdf [hereinafter *UNDERSTANDING SURVEY DATA*].

³⁹ *Census Bureau Statement on American Community Survey 3-Year Statistical Product*, U.S. CENSUS BUREAU (Feb. 4, 2015, 2:20 PM), <http://content.govdelivery.com/accounts/USCENSUS/bulletins/eeb4af>.

known as the census “long form,” which had been given to one out of every six Americans at the time of the decennial census.⁴⁰ The ACS provides information concerning all matter of population and housing characteristics. The survey asks questions on everything from a house’s plumbing, heating fuel, internet connectivity, and tax rates, to its occupants’ citizenship, marital, employment, and veteran status.⁴¹ “The ACS puts this up-to-date information about important social issues at the fingertips of people who need it, including policymakers, researchers, businesses and nongovernmental organizations, journalists, teachers, students, and the public.”⁴²

The American Community Survey does not provide reliable, up-to-date estimates of CVAP at the level of granularity most appropriate for redistricting at lower levels of geography. The data released in time for redistricting are derived from data half a census cycle old or released at too high a level of geography to be useful. Redistricting based on ACS CVAP will introduce new types of errors into the redistricting process and create great uncertainty as to the appropriate benchmarks for evaluating compliance with one person, one vote.

A. *The Uselessness of ACS Yearly Estimates of the Citizen Voting Age Population*

No one suggests that the ACS one-year estimates would be appropriate for redistricting.⁴³ Due to the annual survey’s small sample size, ACS one-year estimates are only released for census places (usually cities and towns), county subdivisions, and other levels of geography that have a total population in excess of 65,000 people.⁴⁴ Even assuming that such estimates provided accurate coverage to an entire state, one cannot patch together large population units to build redistricting plans that comply with one person, one vote. In fact, for the majority of states, districts for the lower house of the state legislature have fewer than 60,000 people.⁴⁵ In other words, the

⁴⁰ See Persily, *supra* note 37, at 774, 776, 779.

⁴¹ See *American Community Survey: Subjects Included*, U.S. CENSUS BUREAU, <http://www.census.gov/programs-surveys/acs/guidance/subjects.html>.

⁴² U.S. CENSUS BUREAU, UNDERSTANDING SURVEY DATA, *supra* note 38, at 2.

⁴³ See Brief for Appellant, *supra* note 24, at 8-9 (presenting only five-year ACS CVAP averages).

⁴⁴ See *American Community Survey: 2010 Release Schedule*, U.S. CENSUS BUREAU, <http://www.census.gov/programs-surveys/acs/news/data-releases/2010/release-schedule.html>.

⁴⁵ See *2010 Constituents Per State Legislative District Table*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/2010-constituents->

released one-year data are for levels of geography that themselves are larger than most lower house state legislative districts. The same can be said for the thousands of towns (census places) that need to redistrict, but population data from the ACS are released only for the town as a whole. Even in the unlikely event the Census continues to provide them, the three-year averages, which are released for areas of 20,000 or more people, would be inappropriate building blocks for redistricting for the same reasons.⁴⁶

In addition, data from the yearly ACS are not compiled and delivered in time to complete redistricting for upcoming elections for some jurisdictions. ACS estimates are released approximately nine months after the end of the survey year. For example, 2010 ACS estimates were released in September 2011.⁴⁷ States, such as Virginia and New Jersey, need to redistrict well in advance of that date in order to prepare for their legislative elections that year.⁴⁸ The ACS yearly surveys cannot be released in as timely a fashion as the decennial census, given that the survey is taken each month throughout the year, and some period must be allowed for compiling the data for the previous twelve-month period.

B. The “Staleness” of ACS CVAP Data

Because the single-year ACS data, as well as the three-year averages, are insufficiently granular for use in redistricting, the *Evenwel* appellants and their supporting *amici* suggested using the five-year averages of ACS data.⁴⁹ Five-year averages are unfit for redistricting for

per-state-legislative-district.aspx.

⁴⁶ See *Census Bureau Statement on American Community Survey 3-Year Statistical Product*, *supra* note 39 (“As a result of tight budgetary considerations, the U.S. Census Bureau has proposed permanently discontinuing [the 3-year] statistical product from the American Community Survey beginning in fiscal year 2016.”).

⁴⁷ See *American Community Survey: 2010 Release Schedule*, *supra* note 44.

⁴⁸ See Justin Levitt, *New Jersey: Timing*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/states-NJ.php#timing> (last visited Nov. 15, 2016) (noting that New Jersey received 2010 Census data on Feb. 3, 2011 and set a redistricting deadline of April 3, 2011 for state legislative districts to ensure completion in time for the primary election filing deadline on April 10, 2011); Justin Levitt, *Virginia: Timing*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/states-VA.php#timing> (last visited Nov. 15, 2016) (noting that Virginia received 2010 Census data on Feb. 3, 2011 and had a June 15, 2011 filing deadline for state legislative primaries); see also Justin Levitt, *When Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/when.php> (last visited Nov. 15, 2016) (compiling date of 2010 Census data delivery, redistricting deadline, and map completion date for each state).

⁴⁹ See Brief for Appellant, *supra* note 24, at 9-13 (including voting and population data based on the five-year ACS averages to support their claims); Brief of

similar reasons as the other data releases, but also for the added fact that the averages are not fresh enough to ensure that plans actually reflect the population at the time of redistricting.

Five-year averages, by their very nature, describe what the citizenship rate *was*, not what it *is*. Under the best of circumstances, a jurisdiction would redistrict on the basis of data, some of which is more than five years old at the time of the line-drawing. To draw districts for the 2012 elections, for example, the “best” ACS five-year averages available would have been for the period 2006 to 2010.⁵⁰ Unlike the decennial census, which provides a snapshot of the population at the time, averages of the rolling ACS surveys give only a rough sense of what the population may have been, sometime in the past.

Indeed, the situation is even worse. The stated CVAP for a given geography may *never* have been accurate, even if we assume each survey was performed perfectly. An average — as opposed to a median, for example — is simply the sum of all the years’ estimates, divided by the number of years. As such, significant, recent changes in the CVAP would not be accurately reflected in the multiyear averages. For this reason, the Census Bureau itself cautions against their use for such purposes: “Multiyear estimates cannot be used to say what is going on in any particular year in the period, only what the average value is over the full period.”⁵¹

C. *The Margins of Error for ACS CVAP Data*

Redistricting with survey data, instead of the census enumeration, necessarily invites new controversies concerning the margin of error in surveys and the related uncertainty of the population estimates for districts. Even though the one person, one vote rule permits departures from precise mathematical equality in district populations, never has the Supreme Court engaged with the question of the degree of uncertainty

Demographers Peter A. Morrison, Thomas M. Bryan, William A. V. Clark, Jacob S. Siegel, David A. Swanson, and The Pacific Research Institute as Amici Curiae in Support of Appellants at 12-15, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) [hereinafter PRI Br.].

⁵⁰ See *American Community Survey: 2010 Release Schedule*, *supra* note 44 (noting release of five-year ACS averages from 2006 to 2010 on December 8, 2011, which would still have been too late for states such as New Jersey and Virginia, which held state legislative elections one month prior).

⁵¹ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: MULTIYEAR ACCURACY OF THE DATA 1 (2014) http://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/MultiyearACSAccuracyofData2013.pdf [hereinafter MULTIYEAR ACCURACY OF THE DATA].

the Constitution would permit for the reported population estimates of such districts. In other words, redistricting on the basis of survey results requires some new constitutional rule, not about how equal districts must be, but rather how confident courts must be that the reported estimates reflect the “true” population counts.

Uncertainty in the ACS CVAP estimates is expressed by confidence intervals and related margins of error. Margins of error are familiar to any consumer of public opinion polls — such as when a poll says “45 percent of Americans approve of the job the President is doing, plus or minus three percentage points.”⁵² Ordinarily, such statements reflect the conclusion that the observer is ninety-five percent confident that the true value is somewhere within the margin of error — in this example, somewhere between forty-two percent and forty-eight percent. The ninety-five percent confidence interval is the standard normally used to establish “statistical significance.”⁵³

The American Community Survey provides margins of error for each estimate and states the confidence interval. The ACS releases data and error margins at the ninety percent confidence interval.⁵⁴ The ACS should not be faulted for doing so; it simply reflects the degree of statistical confidence the Census Bureau has in the numbers it is releasing based on the size of the sample. In other words, ten percent of the time, one should expect the CVAP estimates to be outside the stated margin of error.⁵⁵

⁵² See, e.g., Matt Peckham, *Congress Now Less Popular than Head Lice, Cockroaches and the Donald*, TIME (Jan. 8, 2013), <http://ti.me/VNlqE> (reporting that a poll found Congress had a 9 percent approval rating, with a margin of error of plus or minus 3.4 percent).

⁵³ See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FED. JUDICIAL CTR.: REFERENCE MANUAL ON SCI. EVIDENCE 83, 124 (2d ed. 2000); Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in FED. JUDICIAL CTR.: REFERENCE MANUAL ON SCI. EVIDENCE 179, 194 (2d ed. 2000).

⁵⁴ U.S. CENSUS BUREAU, MULTIYEAR ACCURACY OF THE DATA, *supra* note 51, at 11 (“All ACS published margins of error are based on a 90 percent confidence interval.”); *American Community Survey: Sample Size Definitions*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html> (“You can be 90 percent confident that the interval within the margin of error from the estimate includes the true value.”).

⁵⁵ Another source of error in the CVAP estimates comes from nonresponse to the citizenship question on the ACS. When a respondent does not respond, sometimes the Census will then fill in a response based on the best guess (using standard statistical imputation techniques) as to what the citizenship of the respondent is. These errors are not insignificant. In the 2013 ACS, 5.2% of responses to the citizenship question were “allocated” by the Census because the respondent did not answer the question. See *American Community Survey: Item Allocation Rates*, U.S. CENSUS BUREAU, <http://www.census.gov/acs/www/methodology/sample-size-and-data-quality/item->

The size of the margins of error in the stated CVAP averages, moreover, will depend on the size of the average population of the given geography. For areas with larger numbers of people, a greater number of ACS respondents should be expected and the estimates of the average population over the time period should be more reliable. The building blocks of a district will have greater margins of error than the district itself, just as districts within a city or state will have greater margins of error than the city or state itself.

As an example, consider a small city, such as Alamo, Texas, which has a large noncitizen population. The 2009 to 2013 ACS five-year averages suggest that the total estimated population was 18,660 (with a margin of error of 43), with a total estimated CVAP of 10,580 (with a margin of error of 826).⁵⁶ In other words, it would be accurate to say, with ninety percent confidence, that the “true” average CVAP of Alamo over that five-year period was somewhere between 11,406 and 9,754. Even if a city like Alamo were not further divided into districts, the error in the estimated CVAP is plus or minus 7.8 percentage points. Were it divided into districts, the estimated errors for the CVAP within such districts would be much greater.

The *amici* supporting Evenwel were incorrect to suggest that existing one person, one vote jurisprudence accommodates such margins of error.⁵⁷ First, as the example above suggests, for many jurisdictions, let alone the districts within them, the error margins would be well outside the presumptively constitutional range of plus or minus five percentage points.⁵⁸ Second, even if the range of CVAP estimates between districts is within those bounds, margins of error

allocation-rates/#note1; *American Community Survey: Item Allocation Rates Definitions*, U.S. CENSUS BUREAU, <http://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/item-allocation-rates-definitions.html> (“Allocation . . . involves using statistical procedures, such as within-household or nearest neighbor matrices populated by donors, to impute for missing values.”); *cf.* *Utah v. Evans*, 536 U.S. 452, 506 (2002) (Thomas, J., dissenting) (“I am persuaded that much like the earlier methods of estimation, hot-deck imputation — a modern statistical technique that the Census Bureau refers to as ‘estimation’ — is not constitutionally permissible.”); *id.* at 508-09 (“Because hot-deck imputation is an estimation procedure that includes persons not ‘actually’ counted, its use to adjust the census for apportionment purposes runs afoul of the Constitution.”).

⁵⁶ See *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU, http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Jan. 19, 2017, 10:00 AM) (downloaded ZIP file of 2009–2013 ACS estimates).

⁵⁷ See PRI Br., *supra* note 49, at 29-31.

⁵⁸ See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993); *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

are different than principled departures from population equality. A plan with purportedly equal CVAP districts with a five percent margin of error (based on a ninety percent confidence interval) is different than a redistricting plan with districts that depart from population equality by five percent. With redistricting based on ACS survey results, the disparity between districts represents the lack of confidence as to what the true population of the districts actually is. In the familiar situation courts confront, in contrast, the population difference between districts represents the variance from the ideal population per district. In evaluating those departures from population equality, the courts can then decide whether such departures are justified by legitimate districting principles.⁵⁹ The fact that courts ordinarily allow for departures from perfect equality in order to accommodate other state interests is not a license, then, to draw districts, in which the population estimates are themselves surrounded by considerable uncertainty.

D. *The Superior Granularity of the Census Enumeration*

ACS data, unlike decennial census data, are not released at the census block level. Census blocks are the smallest level of geography for which the Census releases data. Census blocks “nest” in all other levels of census geography, such as block groups, tracts, county subdivisions, and counties. Census blocks are the atoms, in other words, out of which all other data aggregations are produced. Because the ACS — even the five year averages — rely on yearly 2.5 percent samples of the population, the Census Bureau does not release citizenship estimates at the census block level.

Some have suggested that redistricting plans could, instead, be built from data at the census block group level.⁶⁰ Because the Census releases five-year ACS CVAP averages for block groups, some argue that a jurisdiction need only aggregate these block groups together to form districts. Several problems occur, however, when one attempts to do so.

First, as with the single-year ACS data, many block groups are too large to serve as effective building blocks for redistricting plans. ACS CVAP data from Texas illustrate the point. Fort Bend County has two block groups, in which the estimated CVAP was 19,300 and 14,030.⁶¹

⁵⁹ See, e.g., *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004).

⁶⁰ See, e.g., PRI Br., *supra* note 49, at 23-27.

⁶¹ See *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)*,

These block groups are at the extreme high end of the range, but hundreds more Texas block groups exist with CVAP estimates exceeding 3,000 people.⁶² Texas is not unique in this respect.⁶³

Because block groups contain many more people than do blocks, it is necessarily more difficult to draw a redistricting plan that will have relatively equal districts. As with a building that needs to be certain dimensions, it will always be easier to achieve a desired configuration if the bricks one can choose are relatively small, rather than ones that are relatively large. Districting for local bodies or small state legislative districts might be impossible with such data as inputs. Even when it is possible to draw plans (such as for larger state legislative districts) with roughly equal estimated CVAP, all other legitimate redistricting goals would become more difficult to achieve.

One such goal is respect for precincts. Census block groups do not “nest” in voter tabulation districts (the census geography that usually refers to precincts).⁶⁴ To be sure, some states (such as Texas) ignore precinct lines when they redistrict, while others pay great attention to them.⁶⁵ But when the geographic layer used for redistricting does not nest within precincts, districts will be more likely to cross more

supra note 56 (providing CVAP estimates for Block Group 1, Census Tract 6729, Fort Bend County, Texas and Block Group 1, Census Tract 6731.01, Fort Bend County, Texas).

⁶² *Amici* were, therefore, off the mark when they said that, “[a] block group is a cluster of census blocks that contains between 600 and 3,000 people.” *PRI Br.*, *supra* note 49, at 12.

⁶³ See *supra* note 56 (providing data for block groups with high CVAP estimates, such as block groups in Orange and San Diego counties in California).

⁶⁴ See *Standard Hierarchy of Census Geographic Entities*, U.S. CENSUS BUREAU (Oct. 27, 2010), <http://www2.census.gov/geo/pdfs/reference/geodiagram.pdf>.

⁶⁵ See Justin Levitt, *Where the Lines Are Drawn: Congressional Districts*, ALL ABOUT REDISTRICTING (last visited Dec. 22, 2016, 4:15 PM), <http://redistricting.lls.edu/where-tablefed.php> (cataloging criteria for congressional districts in the 2010 cycle); Justin Levitt, *Where the Lines Are Drawn: State Legislative Districts*, ALL ABOUT REDISTRICTING (last visited Dec. 22, 2016, 3:39 PM), <http://redistricting.lls.edu/where-tablestate.php> (cataloging states’ redistricting criteria for state legislative districts in the 2010 cycle); see also, e.g., TEX. CONST. art. 3, § 26 (requiring only county-level consideration of existing political boundaries in state legislative redistricting); WIS. CONST. art. IV, § 4 (requiring consideration of precinct lines when creating state assembly districts); Ross Ramsey, *Redistricting Experts Struggling to Set Maps*, TEX. TRIB., <https://www.texastribune.org/2012/02/14/redistricting-experts-struggle-fix-maps-elections/> (last updated Feb. 14, 2012, 3:44 PM) (reporting that planned districts in El Paso ignored precinct lines); cf. *Vera v. Richards*, 861 F. Supp. 1304, 1333, 1340 (S.D. Tex. 1994) (noting that Texas has historically “eschewed tying districts to pesky constraints like . . . political subdivision boundaries” but finding that districts at issue were highly irregular relative to earlier redistricting cycles, with most voters in two of the districts living in split precincts after redistricting), *aff’d sub nom.* *Bush v. Vera*, 517 U.S. 952 (1996).

precincts, requiring that precinct boundaries be redrawn following the redistricting.

This particular critique is indicative of the larger problem of drawing districts with large population building blocks. The “chunkier” the building blocks for redistricting plans, the more difficult it will be to accommodate any number of other redistricting concerns while also complying with one person, one vote. Whenever block groups cross the geographic boundary of some community, the data constraints imposed by the choice to use the ACS will take precedence over those other concerns.

Of course, one could use different statistical techniques to break block groups into their component blocks.⁶⁶ In doing so, however, one must make certain assumptions about the distribution of the citizen population within the block group among its component blocks. Doing so introduces further error into the CVAP estimates and the resulting districts. Indeed, were this process free of error, the Census Bureau would release averaged CVAP data at the block level.

E. CVAP and the Voting Rights Act

The ACS dataset is incredibly valuable for certain purposes, just not for redistricting in compliance with one person, one vote. As the Census promotional materials for the ACS argue, “the ACS enables decision-makers to appropriately fund school-lunch programs, place new hospitals, build new businesses and take other actions that lead to healthy towns and cities.”⁶⁷ One other purpose for which ACS data can be valuable is to demonstrate a violation and a potential remedy under section 2 or, previously, section 5 of the Voting Rights Act (“VRA”).⁶⁸

The legal questions to which CVAP data provide an answer are different for VRA litigation than for malapportionment cases. In both section 2 cases, and previously, section 5 enforcement actions, citizenship data are employed to demonstrate the ability of a minority community to elect its candidate of choice.⁶⁹ Those provisions require

⁶⁶ See, e.g., PRI Br., *supra* note 49, at 26-27, 27 n.29 (describing “raking” process).

⁶⁷ See *How Do We Know? An American Community*, U.S. CENSUS BUREAU (last visited Jan. 12, 2017, 12:23 PM), <https://www.census.gov/schools/resources/visualizations/acs.html>.

⁶⁸ See 52 U.S.C. §§ 10301, 10304 (2012). See generally Persily, *supra* note 37, at 776, 778-80.

⁶⁹ Here, I only discuss section 2 cases because the issues with section 5 enforcement actions were very similar. Moreover, following the Court’s decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), jurisdictions no longer need to

some assessment as to whether a redistricting plan is, independently, responsible for a minority group's inability to elect its preferred candidates. CVAP data can be useful in proving (or disproving) whether the minority community is large enough to elect its preferred candidates.

Section 2 redistricting litigation requires an immense amount of data from varied sources. Census population data are the starting point, but much more information is necessary for courts to assess compliance with section 2. Data regarding citizenship, voter turnout, primary and general election returns, voter registration, and any number of other sociopolitical variables concerning the community at issue will be relevant to the litigation.⁷⁰ In addition, to demonstrate the "Senate Factors" relating to historical discrimination in voting, section 2 litigation often features historians and political scientists as expert witnesses offering detailed examinations of the relationship of different election regulations to rates of minority political participation and representation.⁷¹

Citizenship data can come into the litigation at different stages. Plaintiffs alleging the illegality of a redistricting plan or at-large scheme under section 2 must show that their community is (1) large enough to constitute a majority in a single member district; (2) votes cohesively; and (3) is systematically outvoted by the majority racial group, which also engages in bloc voting.⁷² These threshold considerations must be satisfied because, otherwise, no remedy will be available to ensure that minorities can elect their preferred candidates. If the minority group has very low rates of citizenship, then the redistricting plan is not to blame for their lack of representation. Rather, their lack of sufficient voters is. Likewise, if election returns show that the minority community does not vote together, then it is the community's lack of political cohesion, rather than the redistricting plan, that is responsible for their lack of electoral success. As with citizenship data, no one believes that the proffered data

submit their redistricting plans for preclearance.

⁷⁰ See generally J. GERALD HEBERT ET AL., *THE REALIST'S GUIDE TO REDISTRICTING* (2d ed. 2010) (providing a summary of the evidence needed for different types of redistricting lawsuits); Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 197, 200-01* (Bernard Grofman & Chandler Davidson eds., 1992); ELLEN KATZ ET AL., *DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982* (2005).

⁷¹ See generally S. REP. NO. 97-417, at 45 (1982); KATZ ET AL., *supra* note 70, 20-50 (assembling cases that discuss each Senate Factor).

⁷² See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

concerning previous election results constitutes a precise predictor of how a given candidate will fare in an election in a hypothetical district.

The Supreme Court has never had occasion to grapple with the statistical issues concerning the ACS CVAP data, because the Court has not considered a section 2 case since the ACS was developed.⁷³ The CVAP estimates for every section 2 case considered by the Court were based on results from the Census long form, distributed to one-sixth of the U.S. population at a single time along with the decennial U.S. Census. Therefore, no previous case in the Court has had to deal with the problems detailed here concerning the staleness, variability, and margins of error in the ACS data, or the small size of the ACS sample and the problems involved in averaging such data over several years.

This is not to say that a court should disregard ACS CVAP data were it to entertain a section 2 challenge involving a community with low rates of citizenship. Those data, constituting as they do the best and only information on citizenship rates, will be indispensable for both plaintiffs and defendants in section 2 challenges. Ballpark CVAP estimates of the style provided by the ACS will often be necessary to show that the plaintiffs' lack of electoral success is not due to widespread voter ineligibility and that a remedial districting plan is feasible. The concerns related here, however, only demonstrate the importance of not treating the ACS data as unreasonably precise. Plaintiffs' section 2 claims should not rise or fall on the basis of demonstrating, according to ACS data, that their community is exactly fifty percent plus one of a hypothetical district's CVAP. Like the many other sources of information involved in a section 2 case, ACS CVAP data should be viewed in context and considered alongside the body of information concerning the history of minority electoral success in the relevant jurisdiction.

IV. THE DRAWBACKS OF VOTER REGISTRATION DATA FOR USE IN REDISTRICTING

The other second-best solution proposed as a proxy for eligible voters is registered voters. Some of the same problems regarding CVAP also arise with this alternative, such as the lack of an existing database in some states. Different problems arise as well, though, such

⁷³ Cf. *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (opinion of Kennedy, J.) (noting the ACS, but rejecting it because only decennial census data were presented to the District Court).

as the dramatic yearly variability in voter registration estimates and the risk that such data would be politically manipulated.

It might appear that the *Evenwel* appellants were on safer ground with this alternative, given that the Court, in *Burns v. Richardson*,⁷⁴ considered registered voters as the redistricting basis. However, the *Burns* Court merely held that registered voters *could* be the population basis for redistricting, not that it was mandatory.⁷⁵ Indeed, it only upheld the use of registered voters there, given the unique challenges Hawaii faced in its interim redistricting plan and the fact that registered voters served as an adequate proxy for the state's citizen population.⁷⁶

The reservations the *Burns* Court expressed continue to ring true. In particular, the Court worried about political manipulation of voter registration data.⁷⁷ Those concerns have only increased since 1966, as issues of voter eligibility and access have become a political flashpoint in recent years.⁷⁸ Voter registration data are inherently manipulable, as states can time purges of voter databases in the run up to redistricting.⁷⁹

Second, voter registration data vary tremendously depending on the election calendar. As the *Burns* Court rightly noted, “fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even

⁷⁴ See *Burns v. Richardson*, 384 U.S. 73, 96 (1966).

⁷⁵ See *id.* at 91-92, 96 (noting that *Reynolds* left open the question of which population bases were permissible and upholding the use of a registered voter basis in the apportionment plan at issue).

⁷⁶ See *id.* at 93, 96 (noting that they “are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere,” and holding “that the present apportionment 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”).

⁷⁷ *Id.* at 92-93 (“[Such data 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, or perpetuate a ‘ghost of prior malapportionment.’” (alteration in original)).

⁷⁸ See, e.g., *Arizona v. Intertribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (discussing litigation and political fights concerning voter identification requirements, early voting rules, and similar issues).

⁷⁹ Such purges must comply with the National Voter Registration Act, 52 U.S.C. §§ 20501–20511, and cannot be done close to an election. Nothing prevents an otherwise legal purge, however, from being timed to coincide with a redistricting process.

weather conditions.”⁸⁰ In particular, the voter registration lists that coincide with a presidential election year will differ dramatically from those in an off-year election.⁸¹ Depending on the level of competitiveness of the races on the ballot, moreover, the rates of registration could vary considerably within a state in a given year, as political parties and other groups initiate registration drives in anticipation of the election.

Third, voter registration lists are notoriously inaccurate. As the Report of the Presidential Commission on Election Administration detailed, roughly eight percent (or sixteen million) voter registration records are invalid or significantly inaccurate.⁸² The degree of inaccuracy varies considerably by state and over time. For some states, as many as fifteen percent of the names on their voter registration list constitute “deadwood”: names of people who have likely moved or died since they were registered at the given address.⁸³ As a result, states conduct periodic purges of their voter rolls, as regulated by the National Voter Registration Act of 1993 (NVRA).⁸⁴ Whether a jurisdiction redistricts on the basis of a list before or after a purge can lead to different results. To guard against disenfranchisement by way of purging, furthermore, states retain different lists of voters: an active voter list of those who have regularly voted and an inactive voter list, which includes people who have missed voting in the last few elections.⁸⁵ As with the ACS citizenship data, mandating redistricting based on “registered voters” does not settle the question concerning the proper population base for redistricting: it would require further decisions as to which voter registration list, at which time.

Finally, as with the collection of citizenship or eligible voter data, in general, the Constitution does not require voter registration or the

⁸⁰ *Burns*, 384 U.S. at 93 (quoting *Ellis v. Mayor & City Council of Baltimore*, 352 F.2d 123, 130 (4th Cir. 1965)).

⁸¹ See *Historical Reported Voting Rates*, U.S. CENSUS BUREAU, <http://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html> (last updated Mar. 21, 2016) (presenting tables demonstrating consistently lower registration rates for congressional election years than presidential election years).

⁸² See PRESIDENTIAL COMM’N ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 23* (2014), <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

⁸³ *Id.*

⁸⁴ See 52 U.S.C. §§ 20501–20511 (2012).

⁸⁵ See, e.g., Brief of Appellants at 9, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 4624625 (presenting Texas data concerning total voter registration and “non-suspense” voter registration).

collection of voter registration data. North Dakota, in fact, does not require voter registration, and so could not redistrict on that basis. More than a dozen other states allow for Election Day registration.⁸⁶ In those states, registration statistics will vary considerably in the period before and after an election.⁸⁷ In such states, were voter registration the touchstone for one person, one vote, the population basis for redistricting for a given area may change a substantial amount in a single day.

CONCLUSION

Rarely can one say of a constitutional argument that it is not only wrong, but it is impossible. Such was the case in *Evenwel*. Even if the appellants there received the ruling they sought, districts could not then have been drawn on the basis of equal numbers of eligible voters. A national database of eligible voters does not exist and will not exist in the foreseeable future.

Second-best solutions, such as drawing districts based on available survey data concerning the citizen voting age population, do not satisfy the suggested constitutional standard. Even if a survey, like the ACS, continues to be funded in its current form, the propriety, timeliness, and accuracy of the data it produces prevent it from serving as a standard for redistricting compliant with one person, one vote. Worse still, a move away from the census enumeration, will inevitably force courts into the kinds of knotty questions of survey design and statistics described here. The *Evenwel* appellants' proposal, thereby, raises concerns reminiscent of those involved with the Supreme Court's consideration of sampling and the census:

The prospect of this Court's reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one. (I foresee the new specialty of "Census Law.") Indeed, it is doubtful whether — separation-of-powers considerations aside — the Court would even have available the raw material to conduct such review effectively.⁸⁸

⁸⁶ See *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Nov. 23, 2016), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

⁸⁷ See DEMOS, SAME-DAY REGISTRATION 1-2 (2014), <http://www.demos.org/sites/default/files/publications/SameDayRegistration-2015.pdf> (noting that, on average, ten percent of voters in same-day registration states register on Election Day).

⁸⁸ *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 349 (1999)

The Supreme Court was wise to reject the invitation to destabilize redistricting jurisprudence, and jurisdictions should be similarly wary to upset the established practice of drawing districts around equal numbers of people.