

US Supreme Court considering end to “one person, one vote” principle

By John Burton
15 December 2015

Last week the Supreme Court heard oral arguments in a Texas case challenging the settled practice of using the total population size, rather than the so-called “voting population” count, to apportion state legislative districts. A ruling for the plaintiffs would undermine more than 50 years of precedent protecting the bedrock democratic principle known as “one person, one vote.”

Congressional districts would not be affected by any decision in the case, however, in that Article 1, Section 2 of the United States Constitution provides for allocating seats in the House of Representatives by total population, as determined through the national census, a literal head count that the same provision of the Constitution requires of the federal government every 10 years.

When the Constitution became effective in 1789, there were large discrepancies between the total population and the number of eligible voters because most states imposed property and other qualifications, and all states disenfranchised women entirely. In a notorious accommodation to the southern states, the Constitution provided that Congressional apportionment be based on “the whole Number of free Persons” and “three fifths of all other Persons,” namely slaves.

The Fourteenth Amendment eliminated the odious “three fifths” compromise, making apportionment based explicitly on total population, as determined by the Decennial US Census.

In 1964, the Supreme Court established in *Reynolds v. Sims* the principle of “one person, one vote” for state legislative districts. For more than 50 years, virtually all states have interpreted *Reynolds* to require reapportionment of their legislative districts every 10 years based on the most recent US census data.

Such apportionments, usually carried out by the state

legislatures, are highly politicized and generally result in the creation of multiple “safe” district where functionaries of one party or the other are immune from any meaningful electoral challenge. The party in power seeks to cram as many opposition voters as possible into a few districts while spreading its supporters across other districts to create smaller, but still safe, majorities in more places, a practice known as “gerrymandering.”

The population sizes do not need to match exactly. According to existing law, districts with populations within 10 percent of each other satisfy the “one person, one vote” requirement.

Evenwel v. Abbott originated in Texas where, due to immigration, family size, and other demographic factors, compounded by extreme gerrymandering of predominantly Latino districts, some districts have fewer registered voters than others. The plaintiffs, voters from high registration districts, with the backing of the Cato Institute and other reactionary organizations, filed suit, claiming that under the reapportionment plan their ballots count less than those cast in districts with the same number of people but fewer voters.

A three-judge lower court dismissed the lawsuit, noting that the plaintiffs no legal authority supports the proposition that drawing districts for state legislators based on census data violates the United States Constitution’s Equal Protection Clause, especially as that same method is constitutionally required for allocating members of the House of Representatives. Moreover, ruling in favor of the plaintiffs would invalidate virtually all current state apportionment schemes along with 50 years of precedent.

The issue appeared so clear-cut that many commentators registered surprise when the Supreme

Court accepted review of the Texas case last May. Because changing from census data to the “voting population” would tend to increase the representation of the Republican Party in most state legislatures, short term political advantage likely influenced the Supreme Court.

A similar unprecedented and convoluted invocation of “equal protection” was used to halt the counting of Florida ballots for president exactly 15 years ago last Friday.

Since the infamous ruling in *Bush v. Gore*, the Supreme Court struck down a key provision of the 1965 Voting Rights Act, and virtually all laws intended to prevent campaign contributions from exerting undue influence on elections.

At the same time, the Supreme Court has refused to curtail measures such as voter identification laws that prevent people from voting.

At last week’s oral argument, however, the moderate Supreme Court justices dominated the arguments. Both Ruth Bader Ginsburg and Sonia Sotomayor focused on the established principle that equal representation means that the same number of inhabitants should have the same number of representatives, an equal “representative voice.” Elena Kagan questioned “why it would be the case that the Constitution requires something with respect to one apportionment that it prohibits with respect to another.”

Other than Samuel Alito, the right-wing justices were unusually subdued. The bellicose and bullying Antonin Scalia sat uncharacteristically mute throughout the argument.

The justices referred to the substantial practical difficulties posed by a switch to “voting population.” While census data counts each inhabitant down to individual city blocks, there is no similar counting of eligible voters. Figures would have to be extrapolated from sampling, the most accurate of which are based on only 2.5 percent of the population. Voter registration rolls fluctuate widely, especially around the dates of major elections, and are notoriously inaccurate and incomplete. One state, North Dakota, does not require voters to register at all, and 14 others permit election-day registration.

While it is often hard to predict Supreme Court rulings from oral arguments, there appears to be little chance that the plaintiffs will prevail in substituting a

new constitutional rule, especially given the practical difficulties of determining “the voting population,” as opposed to the physical presence of individuals within a geographic area.

The Supreme Court, however, may well decide the case with a rationale that waters down “one person, one vote,” and moves the United States further from the basic principles of democratic rights.

Ironically, in a second state redistricting case argued Tuesday, *Harris v. Arizona Independent Redistricting Commission*, the Supreme Court heard arguments from Republican voters in Arizona that a nonpartisan state commission diluted their political influence by overpopulating certain districts, although the deviations were well within the existing 10 percent rule.

Last term the Supreme Court upheld the right of a state to use such a commission for apportionment to minimize partisanship.

The Arizona case was complicated by the commission’s reason for adopting slightly unequal districts: to obtain preclearance under the Voting Rights Act. While that requirement was in effect when the districts were adopted, in 2013 the Supreme Court eliminated preclearance (*Shelby v. Holder*). Surprisingly, none of the justices raised *Shelby v. Holder* at the oral argument.

Decisions in both cases are expected well before the current Supreme Court ends next June.

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