

Redefining Redistricting

The Supreme Court will decide this term if states should change their methods for drawing legislative boundaries

By **TODD RUGER** and **RANDY LEONARD**

Democratic Rep. Gene Green has grown used to the unsettled nature of redistricting in Republican-dominated Texas, where ongoing legal battles over the district maps are almost a way of life. In 2003, his home ended up outside of his district's lines.

"I moved. I joked with them, I said, 'Do I need to get a pickup truck and a camper on the back?'" Green says. "I'll move to wherever you put my district."

But Green and other lawmakers see no fodder for jokes in a Supreme Court case from Texas that could change the way all states draw congressional districts. A decision changing current practices would disproportionately hurt Democrats, and could make elections more challenging for them in states with high numbers of immigrants.

The justices in December will hear arguments in *Evenwel v. Abbott*, a case questioning the meaning of the long-standing "one-person, one-vote" standard that guides how states create balanced state and local legislative districts.

Almost all states have counted everyone in their borders as a "person" in that equation



MAPMAKER: Texas state Sen. Juan Hinojosa looks over a redistricting plan in May 2013.

for decades, which is the basis in the Constitution for deciding how many congressional districts each state gets. A series of Supreme Court rulings in the 1960s, such as *Reynolds v. Sims*, applied the standard to state legislatures and other governmental bodies.

But two voters argue now that when drawing legislative districts, states should base their accounting on a more limited metric, such as registered voters or citizens who are of voting

age. That practice would leave uncoun­ted the undocumented and some documented immigrants, children and felons who lost the right to vote. These people are more often found in Democratic districts, particularly in urban areas with large numbers of poor people.

A ruling that requires states to carve districts with an equal number of voters — or even one that clarifies that states can choose whether to use voters or total population —

could upend state legislative redistricting practices across the nation.

While the Texas case involves districts for the state legislature, a broad ruling, depending on how it is written, could apply to House districts or be used to argue that the same new standard should apply to Congress as well, legal experts say.

The challengers have the better legal argument that “one person, one vote” is about the strength of the individual vote, says Kannon Shanmugam, head of Williams & Connolly’s Supreme Court practice. But it’s hard to measure the number of eligible voters, or citizens,

district 1, which has 557,525 voters. Another Texas Senate district has the same population, but only 358,205 voters. The fewer the voters, the more each vote counts, the argument goes.

The plaintiffs say while states can consider total population when drawing districts, “what a state may not do, as Texas did here, is elevate that policy interest above the fundamental constitutional protection the one-person, one-vote rule affords to eligible voters.”

The plaintiffs were recruited by Edward Blum, director of the Project on Fair Representation at the American Enterprise Institute. Blum was also behind other cases such

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— Kannon Shanmugam, Williams & Connolly

and that could make it impractical for the court to say that metric should be used.

“I think this is a case that may pit the court’s intellectual and pragmatic instincts against each other,” Shanmugam says.

The case asks one big question: Is the purpose of the one-person, one-vote standard to equalize voting power or equalize representation? In other words, should voters be equally distributed in districts so that each person’s vote carries the same weight, or should all people be equally distributed in districts so each lawmaker represents an equal number of people?

For decades, there wouldn’t have been much difference between the two measurements. But with an estimated 11 million undocumented immigrants now living in the United States, there can be wide disparities between districts.

The two voters in Texas say their legislative districts are overstuffed with voters after a redistricting in 2013, which means that their votes for the Texas Senate are relatively weaker than votes in other districts. The named plaintiff, Sue Evenwel, says voters in her district have about half as much power as voters in districts with fewer voters.

While districts have relatively similar total populations, Evenwel lives in state Senate Dis-

trict 1, which has 557,525 voters. Another Texas Senate district has the same population, but only 358,205 voters. The fewer the voters, the more each vote counts, the argument goes.

Civil rights groups have lined up on the other side. The American Civil Liberties Union filed a brief pointing out that the Founding Fathers used total population to apportion representatives among the states.

“Nothing suggests that the republican principle of universal and equal representation animating the design of the House of Representatives was limited to the federal government, and thus nothing suggests that the states cannot also reflect these republican principles by modeling their apportionment systems after the House,” the ACLU wrote.

Texas Democratic Rep. Sheila Jackson Lee told CQ that the 2013 voting rights decision, which means states like Texas no longer need preclearance for voting law changes, could leave Democrats more vulnerable if the Supreme Court ultimately decides that states can use voters instead of total population as a way to redraw districts.

“I think we are lost and we are left without armor for those who believe in one vote, one person,” Lee says.

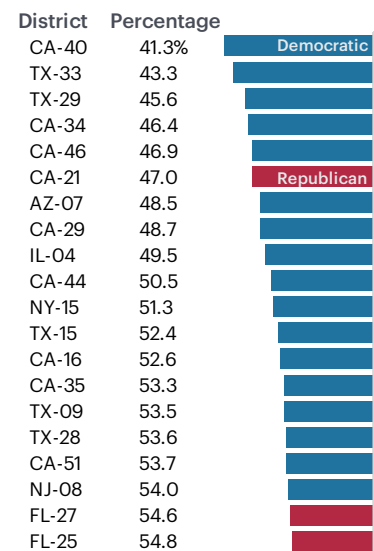
Although Texas is defending its current

Advantage GOP

Democrats have 17 of the 20 districts with the lowest percentages of citizens above voting age and only five of the districts with the highest numbers of citizens age 18 and older.

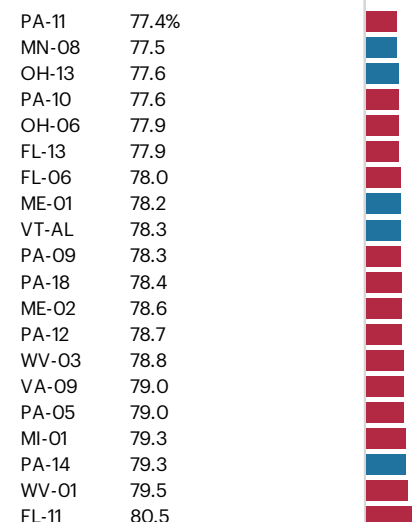
CQ used data from the Census Bureau’s 2013 American Community Survey estimates to calculate the percentage of the population in each congressional district who are voting age citizens. The Census Bureau uses the acronym CVAP to designate its estimates.

Fewest Voting Age Citizens



Average 70.9%

Most Voting Age Citizens



plan as constitutional, the state's lawmakers would likely be interested in changing the way they draw districts to help Republicans, if given the chance by the Supreme Court, Green says. "I think the majority in Austin now would do anything they could to elect less Democrats," he says.

A change to using eligible voters as the standard would make it even tougher for Democrats to reclaim control of the House, because their districts, on average, have lower numbers of voting age citizens. As a result, many of those districts might potentially have to be merged with others or expanded to include voters more likely to be conservative.

Big Gaps

Nationwide, the portion of citizens of voting age population — called CVAP by the Census Bureau — ranges between roughly 40 and 80 percent in congressional districts, with an average just above 70 percent.

Because the voting age population is generally lower in urban areas, there is a significant correlation to political party representation:

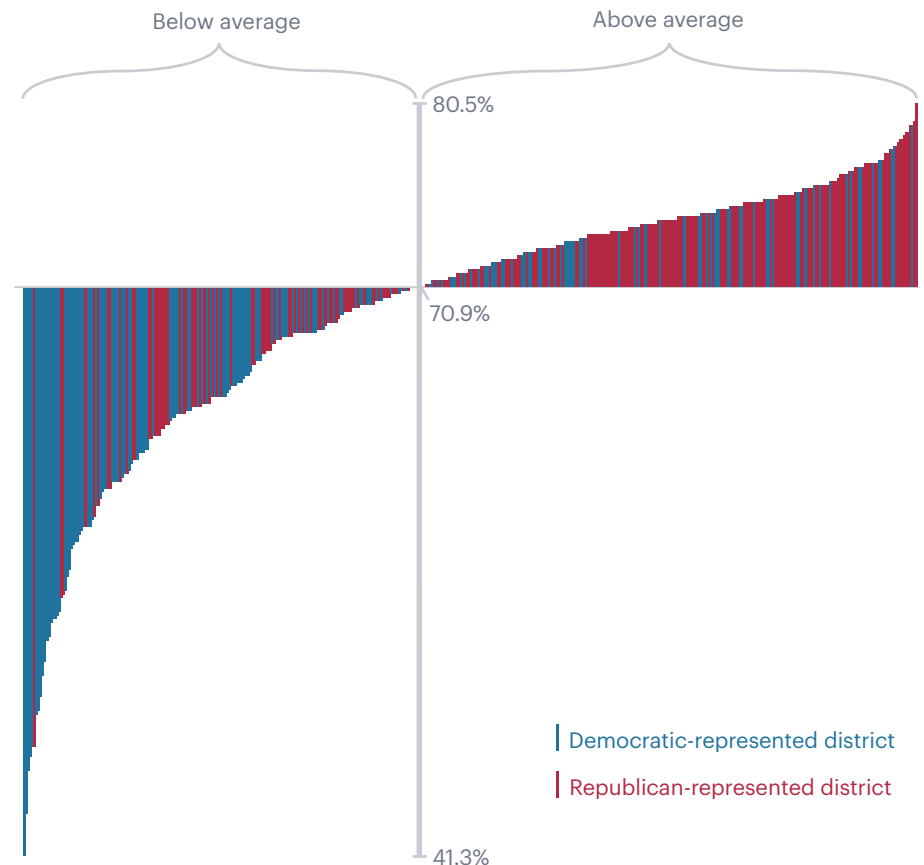
- More than 60 percent of Democratic-held House districts are below average in voting age population;
- Only a third of Republican districts are below average;
- Democrats hold 17 of the 20 districts with the lowest voting age populations;
- Republicans control three-quarters of districts with the highest voting age populations.

The most populous states tend to have the lowest percentages of voting age citizens and therefore would be most affected if redistricting methods are no longer based solely on total population:

- California has nine of the 20 districts with the lowest percentages of voting age citizens, and all but one of those are currently held by Democrats (in all, 47 of California's 53 districts have CVAPs that are below average);
- All but two of Texas' 36 districts are below average in voting age populations, and five of those districts — the 9th, 15th, 28th, 29th and 33rd, all held by Democrats — are among the 20 lowest in the country.
- New York has 16 districts below average and Florida has 12.

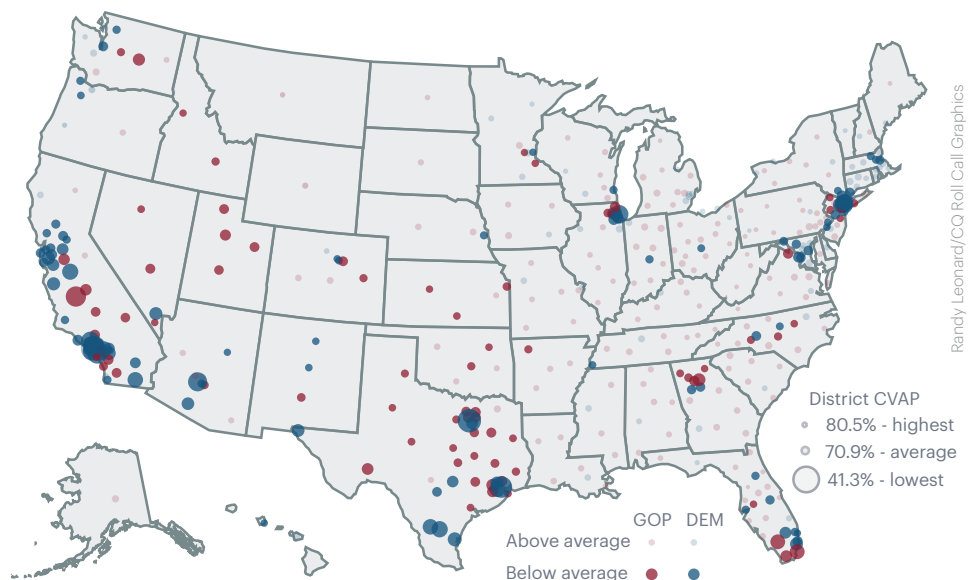
Partisan Divide

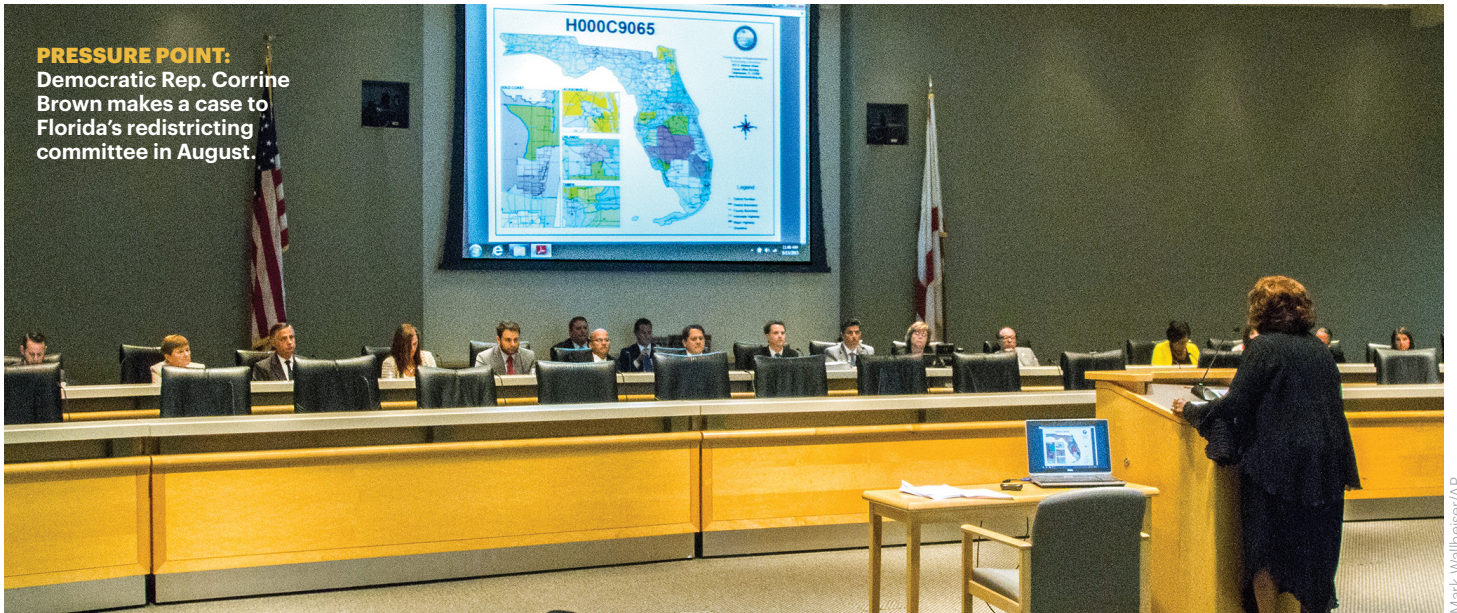
Most districts with lower percentages of voting age citizens are now held by Democrats, while most with higher percentages of voting age citizens are seats held by Republicans.



Where the Voters Aren't

Metropolitan areas and Southwest states have lower percentages of voting age citizens.





Mark Wallheiser/AP

Twenty states have no districts with lower than average numbers of voting age citizens.

The districts with fewer than the average number of voting age citizens tend to be clustered within urban areas and throughout the Southwest. The lowest percentage is California's 40th District with a voting age population of 41 percent, barely half that of the top-ranked district, Florida's 11th, with a CVAP of 80 percent.

New Math

The major problem with redrawing state or congressional districts based on voters is a basic one: How do you do it?

Almost all redistricting systems are based on census data. But the decennial census does not seek information about voter registration or citizenship status, largely out of fear that people worried about their status will not participate in the survey.

There are "serious practical concerns about using citizen voting age population or registered voters," former Census Bureau directors said in an amicus brief. The Census Bureau's periodic American Community Survey provides some data on citizens but "was not designed with redistricting in mind," the brief states. Further, it produces only estimates that are reported at large geographic levels, which means they carry large error margins.

Requiring the census to count citizenship status would likely lower participation, par-

ticularly among non-citizens, and therefore would reduce the rate and accuracy of response, the brief states.

A group of prominent political academics filed an amicus brief raising questions about data validity. "At best, the [American Community Survey] five-year averages give ballpark estimates of previous citizenship rates, several years before redistricting is conducted," the academics wrote. "The ACS could also be eliminated by the government at any time, as the House of Representatives has voted to do, or fully or partially defunded, as has happened twice since its inception."

Registered voter lists invite a different set of problems, the professors said. "They are ripe for political manipulation and highly variable depending on the temporal proximity of the list to a given election," they wrote. "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."

The Supreme Court previously had turned down a chance to weigh in on the one-person, one-vote requirement in 2001. Justice Clarence Thomas dissented from that decision, pointing out that the justices never said what population should be counted, and therefore have "left a critical variable in the requirement undefined."

"The one-person, one-vote principle may, in the end, be of little consequence if we

decide that each jurisdiction can choose its own measure of population," Thomas wrote. "But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to states and localities what it actually means."

The justices did not explain why they took the case this time, but the court generally has been interested in voting rights cases under Chief Justice John G. Roberts Jr.

Some legal experts are predicting that the justices won't go all the way and require states to use eligible voters to draw districts, since it would mean upsetting the redistricting practices of almost every state for 50 years.

"That's not something the court is going to be eager to do," says Martin Lederman, a professor at the Georgetown University Law Center. "The real action, I think, will be whether and how the court agrees with Texas, that states have the discretion to deviate from total population."

He adds that many people worry that giving discretion to states "will be an incentive or message to state legislatures in states that are in this case predominately Republican-controlled to make such moves in a way that could radically affect the makeup of state legislatures."

Whether states get the same message when it comes to congressional districts will depend on how the justices decide the case. A decision is expected by the end of the term in June. ■