AMERICAN
CIVIL RIGHTS PROJECT

WRITTEN STATEMENT FOR
THE PENNSYLVANIA HOUSE
STATE GOVERNMENT COMMITTE

"THE HISTORY OF THE COURTS' ONE-MAN, ONE-VOTE REQUIREMENT FOR CONGRESSIONAL REDISTRICTING"

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My name is Dan Morenoff. I am a graduate of Columbia College of Columbia University in the City of New York and of the University of Chicago Law School. I have practiced law for 20 years. Currently, I serve as the Executive Director of the American Civil Rights Project, a public-interest law firm dedicated to assuring the equality of all Americans before the law.

I'm honored to have been asked to testify and am happy to explain the genesis, history, and current judicial requirements of the one-man-one-vote rule for Congressional redistrictings.

NOMINAL SOURCES OF THE RULE

Since the ratification of the 14th Amendment, Congressional seats have been apportioned among the states "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."[1] Outside the following sentence of the 14th Amendment's incentivization for states to fully enfranchise American adults, the Constitutional text says nothing about *how* the states should fill those seats. While there is a clear Constitutional intimation that Congressional representation is tied to population, the interstitial threads are not to be found in the Constitutional text.

But the Constitution does put in place a mechanism for Federal law to say more. Art. I, Section 4, Clause 1 of the U.S. Constitution authorizes Congress to set additional rules for the time, place, and manner of Congressional elections. And legislation validly enacted under that authorization, indeed,

[1] U.S. Const., Amend. XIV, Section 2.

fills some of the gaps.

There have been such laws since the first was enacted in 1842. For some of that period (between 1872-1929),[2] Congress's enacted statute expressly required the drawing of single-member districts that equalized population between a state's districts. However, as you can tell from the fact that that last statement included an end-date, the current version, codified at 2 U.S.C. § 2c, no longer so requires. Instead, since 1967, Congress has required that states elect Congressmen from single-member districts while omitting any express textual equipopulation requirement.

RULE'S ANNOUNCEMENT

Since that 1967 amendment, though, no Court has interpreted that fact as a policy decision made by Congress to repeal the equipopulation requirement and so authorize the crafting of differently populated districts. Instead, Courts have followed the line of cases starting slightly earlier in the 1960s, which Constitutionalized the requirement. That line of cases shows no signs of waning and can be presumed to be binding law.

The Supreme Court first waded into related waters in *Baker v. Carr*, 369 U.S. 186 (1962). Before 1962, the Court had deemed redistricting fights a political question assigned to the elected branches, so not judiciable. However, in *Carr*, the Court changed that approach. There, it faced the following: (a) a state – Tennessee – whose state constitution required a decennial reapportionment of state legislative seats between counties, equalizing for population; and (b) a failure of the state legislature to meet that state-constitutional requirement after the U.S. Censuses conducted in 1910, 1920, 1930, 1940, 1950, and 1960. Whatever the theoretical difficulties of the U.S. Supreme Court ruling that a state Constitution required action that the state government had found it did need not take, the Court enforced the Tennessee Constitution's requirement. So was born the era of judiciable fights over apportionment.

Two years later, in *Wesberry v. Sanders*,[3] the Court began to Constitutionalize the equal-population requirement specifically for Congressional districts. Here, Justice Black announced that the Constitution required "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[4] His decision relied on no on-point Constitutional text (it does reference the Constitutional provisions quoted on p. 1, above, and notes that Article I, Section 2 provides that "Representatives shall be chosen 'by the People of the several States[,]'" but these serve as only the barest of pegs for the argument, not as its tent-poles), instead extrapolating the requirement from Madison's notes on the Constitutional Convention and the meaning of the House of Representatives in the Great Compromise, as well

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[2] See, *Colegrove v. Green*, 328 U.S. 549, 555 (1946).
[3] 376 U.S. 1 (1964).
[4] *Id.*, at 8.

as from citations to the *Federalist Papers* and to the post-ratification speeches of Justice James Wilson.

SUBSEQUENT EXTRAPOLATION DOWN TO *EVENWELL*

Later cases following *Wesberry* made clear that as it concerns *Congressional* maps, equalizing "as nearly as practicable" meant fully equalizing.

The clearest Court language to this effect lies in *Karcher v. Daggett*, 462 U.S. 725, 727 (1983), where the Court ruled unconstitutional Congressional districts where "the population of the largest district is less than one percent greater than the population of the smallest district." At present, this line of cases is understood to require that Congressional districts be so drawn as to allocate population equally between districts, to the person or (if necessitated by the math) with a variance of no more than 1.

That still left open a fight as to *what* population needed to be equalized between districts.

Most famously, the options played out in *Evenwell v. Abbott*.[5] There, the State of Texas had drawn State Senate districts[6] largely equalizing total population between districts.[7] The Plaintiffs in *Evenwell* were concerned that, due to the presence of large numbers of non-citizens and age-disparities between regions, while the resulting map acceptably equalized *total* population between districts, it left massive disparities between districts in the numbers of both registered voters and citizens of voting age.[8] Drawing on the language of earlier cases, the plaintiffs argued that it was (or perhaps should be) unconstitutional for a map to so allocate non-citizens as to result in so different a weighting of different citizens' votes. The case squarely raised the issue of whether the Constitution *required* states to equalize the citizen-voting-age populations of districts and, with it, the relative value of different citizens' votes.

It is important to note what Justice Ginsberg's majority *Evenwell* opinion does and does not say. It expressly held that a State's decision to draw maps equalizing total population is Constitutional and cannot be upset by the Courts: as a result, we know that a State *may* draw such a map. It did *not* reach whether a State *must* equalize total population or *could* have instead permissibly drawn a map equalizing citizen-voting-age population or registered voters between districts – Justice Thomas's concurrence *does* reach these issues, expressly stating both that: (a) "the Constitution does not prescribe any one basis for apportionment within States[;]" and (b) "It instead leaves States significant leeway in apportioning their own districts to equalize total

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[5] 136 S. Ct. 1120 (2015).

[6] While *Evenwell* involved state-house maps, not Congressional seats, there is little reason to believe that this distinction was material to the case's result.

[7] *Id.*, at 1125.

[8] *Id.* (for both "the map's maximum population deviation exceeds 40%.").

population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government."

So *Evenwell*, finally, leaves open the question of whether a state *could* choose to equalize something other than total population in drawing maps. Without a prior decision announcing that other options will be respected, one should expect that, if one were pursued, it would almost certainly trigger litigation over the Constitutionality of the resulting map. It is worth noting that, in the Congressional-map context, with its theoretical peg to the language of Section 2 of the 14th Amendment – "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" – that litigation would likely present greater judicial hostility than would litigation over a state-house or local-government map.

It is also worth noting that equalizing total population and equalizing citizen-voting-age population are *not* mutually exclusive goals: a demographer could equalize total population (as allowed by *Evenwell*) *and also* seek to equalize the allocation of citizen-voting-age population between districts (perhaps as a "traditional redistricting criteria," like contiguity and maintaining the integrity of recognized, historical communities of interest). I am not such a demographer and cannot speak to the ease of achieving that end, but as a litigator in redistricting litigation, I've instructed demographers to pursue it in local-level maps and know it to be within the realm of possibility.

CURRENT STATUS OF RULE, AND SAFEST COURSE OF ACTION

As of this writing, it is reasonably clear that, following the 2020 census, Pennsylvania *must* redistrict to equalize the population of its Congressional districts. Equalization will mean literal equalization, down to differences of no more than 1, according to the Census totals (and should be understood to mean equal distribution of the full population totals, at that).[9] And while Pennsylvania *may* have the option available to equalize citizen-voting-age population instead of total population in drawing a map, it would be far safer to include this consideration as a second-tier redistricting principal, rather than as an alternative to equalizing total population.

[9] It is also worth noting in passing that, because there are populations entitled to vote in Congressional elections who are not included in the total population count of the decennial Census (most prominently, expatriates and overseas governmental personnel), even if Pennsylvania draws a map precisely equalizing the Census's total population between districts, and even if there were no non-citizens or minors present in the population, such a map would *still* not equalize the number of potential voters in each district.