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Rounding Up the Three-Fifths Clause: Eradicating Prison Gerrymandering in the South

Abigail N. Falk

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Rounding Up the Three-Fifths Clause: Eradicating Prison Gerrymandering in the South

Abstract

This Comment examines the phenomenon of prison gerrymandering, a practice that involves counting prisoners as residents of the counties where their state correctional facilities are located—rather than in their home communities—for redistricting and representational purposes. This practice of counting inflates the voting power of rural, white districts with large prison complexes and diminishes the voting power of minority communities. Prison gerrymandering has become especially pervasive across southern states while many of the South’s northern counterparts have eradicated this practice through legislative reform. This Comment proposes a solution to stop prison gerrymandering in the South, arguing a strategy to produce a circuit split to prime the Supreme Court to address the constitutionality of prison gerrymandering. The Comment covers a variety of topics that either directly or indirectly contribute to prison gerrymandering, such as the Three-Fifths Compromise, the Census Bureau’s “usual residence rule,” sentencing disparities, felon disenfranchisement, and malapportionment claims.
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I. INTRODUCTION

“No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.”
— Justice Hugo Black, dissenting in Colegrove v. Green

The Supreme Court requires states to continuously redraw their electoral districts to reflect each district’s total population, and all districts must be generally equal to each other—establishing a “one person, one vote” formula. However, prison gerrymandering violates this formula of equal representation for equal numbers of people because mass incarceration has created “nonvoter population pockets in white, rural areas.” Prison gerrymandering involves counting prisoners as residents of the counties where their state correctional facilities are located (rather than in their permanent legal residence) for redistricting and representational purposes.

This practice of counting inflates the voting power of districts with large correctional facilities by using the prison population to gain more representatives, even though the persons inside the prisons cannot vote. In turn, the usually white residents of these districts are given more voting power than their neighboring districts because their vote holds more weight, considering a vast percentage of their district’s population—its prison population—cannot vote. Not only are white, rural votes becoming inflated, but voting power is being taken away from the districts where prisoners permanently reside because prisoners are counted in their correctional facilities, often far away from their homes, resulting in their communities losing the opportunity to obtain

1. 328 U.S. 549, 569 (1946) (Black, J., dissenting) (arguing that the federal judiciary had no power to remedy malapportioned Congressional districts).
2. Reynolds v. Sims, 377 U.S. 533, 551, 558, 566–68 (1964) (holding that the proposed plans for seat apportionment of houses of the Alabama Legislature were invalid under the Equal Protection Clause due to the apportionment not being based on population).
5. See id.
6. See id.
equitable political representation.\textsuperscript{7}

More often than not, prisoners have no ties to the communities where they are incarcerated and will not return to these counties after they are released.\textsuperscript{8} However, prisoners’ bodies continue to give these rural counties power long after their sentence has ended because redistricting occurs only once every ten years.\textsuperscript{9} Examining the implications of prison gerrymandering reveals parallels between the Three-Fifths Compromise—white people counting black and brown bodies to inflate their own political power.\textsuperscript{10}

Prison gerrymandering continues to occur for a variety of reasons, but the U.S. Census Bureau’s “usual residence rule,” which counts individuals in the location where they usually sleep at night, has historically been the driving factor for counting individuals inside prisons rather than at their permanent residence.\textsuperscript{11} However, in 2011, the Census Bureau began to release “group quarter data” earlier than the rest of the population data considered in redistricting to allow states to count prison populations where they see fit.\textsuperscript{12} Many

\textsuperscript{7} See id. at 1496–97 (“Prison gerrymandering implicates the rights of minority communities, the very groups our modern constitutional and statutory voting rights infrastructure most aims to protect.”).

\textsuperscript{8} See id. at 1484 (“That is because prisoners’ ‘usual residence’ is wherever they are locked up on census day, and most states and localities therefore draw districts that treat prisoners as residents of the census tracts where their correctional facilities are located. They do so even though incarcerated constituents—with very limited exceptions—cannot vote and generally do not have roots or futures in the prison’s host community.”) (footnotes omitted).

\textsuperscript{9} See id. at 1482.

\textsuperscript{10} Stachulski, \textit{supra} note 3, at 405 (“People describe this practice as being worse than the three-fifths compromise: Prison gerrymandering is arguably worse because people in prison—like the slaves—can’t vote but they count as an entire person. So they have even more electoral weight with the same lack of voice.”) (internal quotations omitted); see also Emmanuel Felton, \textit{As Redistricting Begins, States Tackle Issue of ‘Prison Gerrymandering’}, \textit{WASH. POST} (Sept. 28, 2021, 6:00 A.M.), https://www.washingtonpost.com/national/as-redistricting-begins-states-tackle-the-issue-of-prison-gerrymandering/2021/09/28/917f9670-167a-11ec-ae9a-9c36751cf799_story.html?nrid=top_pb_signin&arcId=SF7ZM4AWPI6ZLU2TQ3HKHHXTE&account_location=ONSITE_HEADER_ARTICLE (“Brianna Remster, an associate professor in Villanova University’s Department of Sociology and Criminology, likens prison gerrymandering to the Three-Fifths Compromise, where the framers of the Constitution agreed to count enslaved Black people, who had no political power, as three-fifths of a person for the purposes of determining the number of congressional seats allocated to Southern states.”).

\textsuperscript{11} Stachulski, \textit{supra} note 3, at 403–04 (“Since 1790, the Census Bureau uses the concept of ‘usual residence’ as its main principle in determining where people are to be counted on Census Day.”).

\textsuperscript{12} See Ben Peck, \textit{The Census Count and Prisoners: The Problem, the Solution, and What the Census Can Do}, DEMOS (Oct. 26, 2012), https://www.demos.org/testimony-and-public-comment/census-count-and-prisoners-problem-solutions-and-what-census-can-do (allotting states more discretion on whether to “leave the prisoners counted where the prisons are, delete them from the redistricting
northern states have changed their counting practices and have begun counting prisoners inside their permanent residences rather than in their correctional facilities.\textsuperscript{13} However, many states across the South have been slow to implement this change.\textsuperscript{14} This Comment suggests a solution to end prison gerrymandering not only in the South but across the country: a proposed strategy to produce a circuit split that would force the Supreme Court to evaluate the constitutionality of prison gerrymandering.\textsuperscript{15}

Part II discusses the historical implications of the Three-Fifths Compromise and the evolution of the right to vote through Supreme Court precedent.\textsuperscript{16} Partisan gerrymandering is discussed at length, merging into a breakdown of prison gerrymandering and its implications.\textsuperscript{17} Prison gerrymandering is detrimental to democracy largely due in part to its roots in sentencing disparities between white and minority communities, mass incarceration, and felon disenfranchisement.\textsuperscript{18} Part II concludes with a discussion of the Census Bureau’s “usual residence rule,” and how states now have the power to eradicate prison gerrymandering.\textsuperscript{19}

Part III of this Comment identifies which states have and have not taken action and discusses various reasons why states may be hesitant to count prisoners in their homes.\textsuperscript{20} This Comment argues that the solution lies with an

\begin{itemize}
\item[14.] See generally Robert P. Alvarez, \textit{VOICES: Prison Gerrymandering is the Modern Three-Fifths Compromise}, FACING S. (Dec. 6, 2021), https://www.facingsouth.org/2021/12/voices-prison-gerrymandering-modern-three-fifths-compromise (“Both parties do [use partisan gerrymandering], but Republicans are taking it to extremes that their own voters don’t even support. A majority of Republican voters, like Democrats and independents, favor independent redistricting commissions. . . . The Supreme Court has resisted attempts to fix partisan gerrymandering, let alone prison gerrymandering, and Republicans have uniformly filibustered attempts to address the problem in Congress. After all, those with power rarely give it up willingly.”).
\item[15.] See infra Section III.D (proposing a strategy to arrive at a circuit split in the Fifth Circuit).
\item[16.] See infra Sections II.A–B (discussing the role the Three-Fifths Compromise and the right to vote has in understanding the vast implications of prison gerrymandering).
\item[17.] See infra Section II.C (analyzing the history of gerrymandering, its origin, and how the Supreme Court has handled partisan gerrymandering issues).
\item[18.] See infra Sections II.D–H (highlighting the various facets that have an effect on prison gerrymandering).
\item[19.] See infra Section II.I (showing that states now have the ability to choose for themselves how they want to implement the Census Bureau information).
\item[20.] See infra Section III.B (discussing the legislative actions that have been taken by the Northern
\end{itemize}
impartial court, but difficulty arises in achieving justice through the judiciary.\textsuperscript{21} A strategy is proposed for how to implement nationwide change on the prison gerrymandering front: forcing a circuit split.\textsuperscript{22} Part IV concludes with a discussion about how prison gerrymandering continues to threaten our democratic institutions by not allowing persons a voice in our representative system.\textsuperscript{23}

II. BACKGROUND

A. The Three-Fifths “Compromise”: The Past’s Reflection in the Present Day

Article I, Section 2 of the U.S. Constitution contains the Three-Fifths Clause.\textsuperscript{24} This Clause mandated that the government must count the South’s enslaved population as three-fifths of a person in determining the number of representatives for each state.\textsuperscript{25} The Three-Fifths Clause is often referred to as a “compromise” because southern, slave-holding states wanted to count their entire slave population to increase their number of congressional representatives, and the Northern States wanted to ensure the ratification of the new Constitution.\textsuperscript{26} Although the Fourteenth Amendment nullified the Three-

\textsuperscript{21} See infra Section III.C (emphasizing the importance of an impartial court due to many legislators’ refusal to give up power).

\textsuperscript{22} See infra Section III.D (initially proposing a circuit split).

\textsuperscript{23} See infra Part IV (concluding the article by reiterating the harms that prison gerrymandering creates).

\textsuperscript{24} U.S. CONST. art. 1, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, 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.”).


\textsuperscript{26} David H. Gans, Op-Ed: Celebrate the Whole Constitution, CONST. ACCOUNTABILITY CTR. (Sept. 21, 2018), https://www.theusconstitution.org/news/op-ed-celebrate-the-whole-constitution/; see also Nadra Kareem Nittle, The History of the Three-Fifths Compromise, THOUGHTCO. (Oct. 30, 2020), https://www.thoughtco.com/three-fifths-compromise-4588466 (“The three-fifths compromise was an agreement reached by the state delegates at the 1787 Constitutional Convention. Under the compromise, every enslaved American would be counted as three-fifths of a person for taxation and representation purposes. This agreement gave the Southern states more electoral power than they would have had if the enslaved population had been ignored entirely.”).
Fifths Clause in 1868, 27 this pervasive practice of counting disenfranchised bodies to increase democratic power still continues today through prison gerrymandering. 28 Prison gerrymandering affects various sects in our country, leading to an inability to obtain equal representation—prominently evolving from the right to vote. 29

B. Does the “Right” to Vote Exist in the Constitution?

The original U.S Constitution does not broadly give citizens the right to vote. 30 When ratified in 1788, the Constitution did not franchise all citizens. 31 Indeed, there is no “free-floating ‘right’ to vote” in the U.S. Constitution. 32 Instead, the Constitution granted individual states the power to determine which citizens should be allowed to vote and, notably, which ones should not. 33 Although some states made their determinations based on whether voters were “quiet and peaceable” or owners of a “freehold estate,” nearly all required their voting population to be white and male. 34 Even after the

27. See Andrée L. Maddan, Enslavement to Imprisonment: How the Usual Residence Rule Resurrects the Three-Fifths Clause and Challenges the Fourteenth Amendment, 15 Rutgers Race & L. Rev. 310, 312 (2014) (“The 14th Amendment, ratified in 1868, removed the fractional count of the number of slaves from the procedure. However, the Amendment did not remedy disenfranchisement because abrogating the fraction did not provide slaves with their own representation as individuals. Instead, their political value reverted back to naught. Slaves still lacked the right to vote until the adoption of the 15th Amendment, which ‘nullifie[d] sophisticated as well as simple-minded modes of discrimination.’”).


29. See infra Section II.B (discussing at length the evolution of the right to vote).

30. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).


32. Id.; see also Bush v. Gore, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”).

33. See Minor v. Happersett, 88 U.S. 162, 178 (1874) (“Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we AFFIRM THE JUDGMENT.”).

34. Id. at 176–77 (“Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years who

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ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, very little progress was made to change voting.\(^35\) However, the evolving interpretation of the Equal Protection Clause in the Fourteenth Amendment began to place limitations on the states’ ability to choose who could vote: “Once a state chooses to let any particular group or class of people vote, it may not deny the vote to others in a way that denies them equal protection of the laws.”\(^36\) Additionally, the four separate amendments that address the right to vote—the Fifteenth,\(^37\) Nineteenth,\(^38\) Twenty-Fourth,\(^39\) and Twenty-Sixth\(^40\)—add additional constitutional support to protecting the right to vote.\(^41\)

As the right to vote began to evolve to include more people, in 1927, the United States Supreme Court recognized that an “outright denial of the ability to vote” could violate the Equal Protection Clause.\(^42\) In *Nixon v. Herndon*, the Supreme Court struck down a statute that forbade black Americans from taking part in primary elections.\(^43\) However, for many years, the Court refused
to apply the same equal protection analysis to “claims of vote dilution resulting from malapportioned legislative districts.” When vote dilution occurs, minority voters’ ability to elect the candidate of their choice as a whole is “reduce[d] or nullif[ied].” In Colegrove v. Green, the Court held that vote-dilution claims were “political,” and therefore, unfit for judicial determination. Justice Hugo Black disagreed with this application and dissented in Colegrove v. Green, stating that giving one person more voting power than another was a clear violation of the Equal Protection Clause.

In 1962, twenty years after the Colegrove decision, the Supreme Court readdressed the issue of vote-dilution claims in Baker v. Carr. In Baker, Baker complained that Tennessee had not redistricted since 1901. By the time Baker sued over sixty years later, voters of rural districts were overrepresented in comparison to urban citizens because Tennessee’s population had grown exponentially, especially in urban areas. The Court held that apportionment, the act of dividing seats for the House of Representatives among the fifty states, is not precluded by the political question doctrine. Although the Court decided that individuals could bring vote-dilution claims under the Equal Protection Clause, it offered no guidance as to how to analyze these cases.

44. See Calvin, 172 F. Supp. 3d at 1300; Colegrove v. Green, 328 U.S. 549, 552 (1946) (claiming voter dilution from gerrymandering was too “political [in] nature and therefore not [fit] for judicial determination”).

45. Shaw v. Reno, 509 U.S. 630, 641 (1993) (striking down a North Carolinian congressional re-apportionment plan where the plan created only one black-majority district as a byproduct of racial gerrymandering).

46. Colegrove, 328 U.S. at 550–51, 556 (holding that congressional districts, which lack “compactness of territory and approximate equality of population,” were precluded from judicial intervention because vote-dilution claims were too political, and “[c]ourts ought to not enter this political thicket”).

47. 328 U.S. at 569 (Black, J., dissenting) (“No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.”).


49. Id.

50. Id. at 191 (“In 1901 the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census and passed the Apportionment Act here in controversy. In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.”).


claims due to the Court’s focus on reformulating the political question doc-
trine.\textsuperscript{53}

Two years later, in \textit{Reynolds v. Sims}, the Court applied an equal protection
analysis to vote-dilution claims.\textsuperscript{54} Writing for the Court, Chief Justice Warren
held that the Constitution required state legislatures to be apportioned by a
“population basis” and that a state must make an “honest and good faith effort
to construct districts . . . as nearly of equal population as practical.”\textsuperscript{55} \textit{Reyn-
olds v. Sims} fully established the concept of “one person, one vote,” evolving
from \textit{Baker v. Carr}, and radically held that the Constitution “forbids weighing
citizens’ votes differently, by any method, merely because of where they re-
side.”\textsuperscript{56} These cases established the idea of representational equity in America; all votes should be given equal weight.\textsuperscript{57} However, a pattern of discrimi-
ination that continues to upset this notion, by giving some votes more weight
than others, is “prison gerrymandering.”\textsuperscript{58}

\section{C. Gerrymandering and its Generations of District Manipulation}

Prison gerrymandering finds its name from the decades-old redistri-
tecting tradition known as “gerrymandering.”\textsuperscript{59} Under \textit{Reynolds v. Sims}, states must
continuously redraw their electoral districts to properly reflect their popula-
tion, and these districts must be generally equal to each other.\textsuperscript{60} This process
is known as “redistricting.”\textsuperscript{61} When redistricting, states often rely on the

\textsuperscript{53} Id.
\textsuperscript{54} 377 U.S. 533 (1964) (holding that the existing and proposed plans for seat apportionment of
houses of the Alabama Legislature were invalid under the Equal Protection Clause due to the appor-
tonment not being based on population).
\textsuperscript{55} Id. at 577.
\textsuperscript{56} Stachulski, supra note 3, at 416.
\textsuperscript{57} See Chapter 14: Establishing Equality in Voting and Representation, ANNEBERG PUB. POL’Y
chapter-14-establishing-equality-voting-representation/ (analyzing various cases dealing with
representational equality, including \textit{Baker v. Carr} and \textit{Reynolds v. Sims}).
\textsuperscript{58} See generally supra Section IIA (defining the concept of prison gerrymandering).
\textsuperscript{59} See infra Section II.C (describing gerrymandering and the role it plays on the impact of prison
gerrymandering).
\textsuperscript{60} 377 U.S. at 577.
\textsuperscript{61} See What is Redistricting and Why Should We Care?, ACLU (Aug. 23, 2021), https://www.
aclu.org/news/voting-rights/what-is-redistricting-and-why-should-we-care/ (“Redistricting is the pro-
cess of drawing the lines of districts from which public officials are elected. When it’s conducted
fairly, it accurately reflects population changes and racial diversity, and is used by legislators to equi-
tably allocate representation in Congress and state legislatures. When politicians use redistricting to
information provided by the U.S. Census Bureau to match population. However, during the redistricting process, many politicians attempt to use this data to their advantage and draw the districts in a manner to inflate certain constituents’ voting powers in a process known as “gerrymandering.”

The term “gerrymandering” comes from Elbridge Gerry, a Founding Father who signed a bill “creating [a] misshapen Massachusetts district.” The new, counterintuitive map, which allegedly resembled a salamander, was designed to give the Democratic-Republicans three senators and break up the county’s previous five Federalist senators. Following the tradition set by Elbridge Gerry, both Democrats and Republicans alike use this practice today in order to gain political advantages over certain districts. In the process of redrawing the districts, plans can be “gerrymandered” in attempts to “dilute racial or political minorities’ votes by ‘packing’ minority voters into a few districts or ‘cracking’ minority groups across many districts.” Leaders of political parties will draw lines around areas that did not vote for their party.


63. Id. (“Politicians, however, often use redistricting as an opportunity to gerrymander. Gerrymandering occurs when a political faction attempts to solidify power by drawing district maps in ways that are racially and politically discriminatory. These politicians effectively choose their voters, rather than the voters choosing them. Unfortunately, gerrymandering is almost as old as the United States. For hundreds of years, politicians have drawn district maps with one goal in mind: to stay in power.”).


65. See generally id. (“The word ‘gerrymander’ was coined at a Boston dinner party hosted by a prominent Federalist in March 1812, according to an 1892 article by historian John Ward Dean. As talk turned to the hated redistricting bill, illustrator Elkanah Tisdale drew a picture map of the district as if it were a monster, with claws and a snake-like head on its long neck. It looked like a salamander, another dinner guest noted. No, a ‘Gerry-mander,’ offered poet Richard Alsop, who often collaborated with Tisdale.”).

66. See Christopher Ingraham, What is Gerrymandering and Why is it Problematic?, WASH. POST (June 27, 2019), https://www.washingtonpost.com/business/2019/06/27/what-is-gerrymandering-why-is-it-problematic/ (“There’s less information about Democratic gerrymandering simply because Democrats were in control of fewer statehouses after 2010 and, hence, had less ability to redraw districts to their liking. But Maryland stands out as a prime example of Democratic gerrymandering. In 2016, Republicans won 37 percent of the statewide House popular vote, which translated into just one of the state’s eight House seats.”).

to exclude them from the district, and these leaders will go out of their way to ensure that members of their own party are included in the district.\textsuperscript{68} Gerrymandering leads to the drastically misshapen districts that we have today.\textsuperscript{69} Partisan gerrymandering inflates the votes of the current majority party’s own constituents and virtually erases any political power of minority voters by ensuring their votes will not affect elections; the district lines are drawn to make certain they do not have enough numbers to sustain a majority.\textsuperscript{70}

D. \textit{Prison Gerrymandering: A Dirty Old Trick for a New Day}

“Prison gerrymandering” resembles the process of partisan or racial gerrymandering, both which have been deemed to be unconstitutional.\textsuperscript{71} Prison gerrymandering involves drawing district lines to count prisoners as residents of the counties where their state correctional facilities are located for redistricting and apportionment purposes.\textsuperscript{72} This practice inflates the voting power of districts with large correctional facilities by using the prison population to gain more representatives.\textsuperscript{73} In turn, the residents of these districts are given more voting power than their neighboring districts because their vote holds

\textsuperscript{68} See Christopher Ingraham, \textit{This is the Best Explanation of Gerrymandering You Will Ever See}, WASH. POST (Mar. 1, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/ (depicting a chart that illustrates how parties often draw lines).

\textsuperscript{69} See Ariel Zych, \textit{Drawing Congressional Districts is Like Sudoku}, SCIFRIDAY (May 22, 2018), https://www.sciencefriday.com/educational-resources/district-drawing-is-like-sudoku/ (describing the different ways politicians shape districts to encompass the most constituents of their same party).


\textsuperscript{71} See L. Paige Whitaker, CONG. RESEARCH SERV., LSB10324, \textit{PARTISAN GERRYMANDERING CLAIMS NOT SUBJECT TO FEDERAL COURT REVIEW: CONSIDERATIONS GOING FORWARD} 1 (2019) (defining partisan gerrymandering as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”). In 2019, the Supreme Court held that partisan gerrymandering is not subject to review by federal district courts due to the political question doctrine. \textit{See Rucho v. Common Cause}, 139 S. Ct. 2484, 2506–07 (2019). However, the Supreme Court did clarify that disputes regarding partisan gerrymandering shall be addressed by the state legislatures, subject to a check by Congress. \textit{Id.} at 2488. In 1993, in \textit{Shaw v. Reno}, the Supreme Court declared that racial gerrymandering—the act of racially segregated political districts—is unconstitutional and subject to strict scrutiny. 509 U.S. 630, 656 (1993).

\textsuperscript{72} See Skocpol, supra note 4, at 1484.

\textsuperscript{73} See id.
more weight, as a vast percentage of their district’s population cannot vote in the first place.\textsuperscript{74}

Prison gerrymandering upsets the notions of representational equality set forth in Supreme Court precedent.\textsuperscript{75} \textit{Reynolds v. Sims} formalized the concept of “one person, one vote,” and held that the Constitution “forbids weighing citizens’ votes differently, by any method, merely because of where they reside.”\textsuperscript{76} Districts with correctional facilities are given more political power than their neighboring districts because they can include prisoners, often black and brown people, in their population count in order to grant themselves greater political power.\textsuperscript{77} How does a seemingly unconstitutional practice like prison gerrymandering continue to be used, often unchallenged, to this day?\textsuperscript{78}

This pattern of counting has been largely attributed to the Census Bureau’s “usual residence rule,” which states that a person’s residence is defined as the place where the person usually eats and sleeps.\textsuperscript{79} Because Census data is high quality and free, most state governments rely exclusively on the Census data for redistricting even though the Supreme Court has said that states are free to use other sources of data.\textsuperscript{80} Since prisoners’ “usual residence” on Census Day is the facility where they are incarcerated, they are counted in whatever county their prison is located rather than in the counties where their permanent homes are located.\textsuperscript{81} In fact, prisoners have been counted in the facilities rather than in their homes since the 1850 Census.\textsuperscript{82} Unfortunately,

\textsuperscript{74}. See Emmanuel Felton, As Redistricting Begins, States Tackle the Issue of ‘Prison Gerrymandering’, WASH. POST (Sept. 28, 2021, 6:00 A.M.), https://www.washingtonpost.com/national/as-redistricting-begins-states-tackle-the-issue-of-prison-gerrymandering/2021/09/28/917f9670-167a-11ec-ae9a-9c36751ef799_story.html (“While felon disenfranchisement laws strip voting power from convicted felons as a punishment, Kramer says prison gerrymandering strips power from entire communities because it deprives them of the full voting power, they are entitled to under the doctrine of one person, one vote.”).

\textsuperscript{75}. See infra text accompanying note 76 (highlighting the “one person, one vote” precedent set forth in \textit{Reynolds v. Sims}).

\textsuperscript{76}. Stachulski, supra note 3, at 416.

\textsuperscript{77}. See Felton, supra note 10 (“Black and Brown bodies are still being used to this day in most places around the United States to advantage White votes and White political influence . . . .”).

\textsuperscript{78}. See infra text accompanying notes 79–86 (highlighting that the “usual residence rule” has allowed prison gerrymandering to go on for so long, practically unnoticed).

\textsuperscript{79}. Stachulski, supra note 3, at 403–04 (“Since 1790, the Census Bureau uses the concept of ‘usual residence’ as its main principle in determining where people are to be counted on Census Day.”).

\textsuperscript{80}. See Peter Wagner, Breaking the Census: Redistricting in an Era of Mass Incarceration, 38 WM. MITCHELL L. REV. 1241, 1247 (2012).

\textsuperscript{81}. See Stachulski, supra note 3, at 404.

\textsuperscript{82}. See Felton, supra note 10 (“Since at least the 1850 Census, the Census Bureau has counted
what may have worked in 1850 is modernly outdated due to the advent of mass incarceration.83 Aleks Kajstura, the legal director of the Prison Policy Initiative, a think tank that researches and advocates for changing criminal justice policies, states, “[w]hat has changed is just the massive scale of incarceration in the U.S. What worked for the country in 1790 just doesn’t work anymore in terms of data methodology.”84 In 1880, when only one federal prison and sixty-one state prisons existed, the United States had “61 people in prison for every 100,000.”85 As of 2018, the U.S. incarceration rate is approximated at “639 inmates per 100,000 people.”86

E. The War on Drugs: The Government’s Hand in Mass Incarceration

The United States is the world’s leader in many things, but stands out in terms of incarceration especially.87 Since the 1980s, the incarceration rate has sharply increased, largely due to the “war on drugs” and other policies that often criminalize racial minorities at a higher rate.88 An example of a policy that criminalizes racial minorities is the vast discrepancy between minimum sentencing for crack cocaine and powder cocaine.89 Crack cocaine and inmates as residents of the communities where they are imprisoned, instead of the communities where they hail from and probably will return to after they serve their sentences.”). 83. See Hansi Lo Wang & Kumari Devarajan, “Your Body Being Used”: Where Prisoners Who Can’t Vote Fill Voting Districts, NPR (Dec. 31, 2019, 5:00 A.M.), https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-filling-voting-districts.
84. Id.
85. See Wagner, supra note 80, at 1242.
powder cocaine are the essentially same drug but have vastly different minimum sentencing requirements.\textsuperscript{90} Crack cocaine is cheaper to produce, widely available, and generally found more often in low-income areas.\textsuperscript{91} Historically, crack cocaine was the only drug that carried a five-year mandatory minimum sentence\textsuperscript{92} and “mandatory prison sentence for first offense possession.”\textsuperscript{93} Alternatively, powder cocaine is sold at the same price per unit as crack cocaine, but because powder cocaine is sold in grams, powder tends to be more “expensive.”\textsuperscript{94} In addition to the increased cost, powder cocaine tends to be “portrayed as an elite drug in popular culture, associated with luxury or glamour.”\textsuperscript{95} Powder cocaine, which differs from crack in physical substance and means of ingestion, carries a maximum sentence of only one year for simple possession.\textsuperscript{96}

The discrepancy between the minimum sentencing for the same drug seems odd until the data of who is arrested for crack cocaine versus powder cocaine is examined.\textsuperscript{97} A study by the Sentencing Project, a research and

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\textsuperscript{95} Id.

\textsuperscript{96} Cracking Cocaine Sentencing Policy: Unjustified and Unreasonable, supra note 90 ("A person convicted in federal court of possession of 5 grams of crack automatically receives a 5-year prison term. A person convicted of possessing 5 grams of powder cocaine will probably receive a probation sentence. The maximum sentence for simple possession of any other drug, including powder cocaine, is 1 year in jail.").

\textsuperscript{97} Id.
advocacy center that addresses racial disparities in the criminal legal system, found that although approximately two-thirds of crack users were white or Hispanic, the vast majority of persons convicted were black.98 On the other hand, those charged with possession of powder cocaine were often white.99 In turn, this disparity in sentencing leads to people of color serving longer prison sentences than their white counterparts for essentially the same crime.100 The war on drugs has led to a sharp increase of mass incarceration.101

F. Should Citizenship Expire Upon Imprisonment?

A byproduct of mass incarceration is vast swaths of people who are unable to vote due to either incarceration, or upon being released, having felony convictions on their records.102 Prisoners get counted in their facilities, instead of their home communities, even though “incarcerated constituents—with very limited exceptions—cannot vote and generally do not have roots or futures in the prison’s host community.”103 Due to their lack of connection to the communities where they are being counted, prisoners become “phantom constituents,” a group of people who give power to represented officials yet lack the ability to hold them accountable in office through the democratic process.104

Some argue that prisoners do not deserve the right to vote or to be represented by elected officials.105 The Heritage Foundation, a conservative think

98. Id. (“Defendants convicted of crack possession in 1994 were 84.5% black, 10.3% white, and 5.2% Hispanic. Trafficking offenders were 4.1% white, 88.3% black, and 7.1% Hispanic.”).

99. Id. (“Powder cocaine offenders were more racially mixed. Defendants convicted of simple possession of cocaine powder were 58% white, 26.7% black, and 15% Hispanic. The powder trafficking offenders were 32% white, 27.4% black, and 39.3% Hispanic.”).

100. See Aamra Ahmad & Jeremiah Mosteller, After 35 Years, Congress Should Finally End the Sentencing Disparity Between Crack and Powdered Cocaine, THE HILL (Oct. 27, 2021, 12:30 PM), https://thehill.com/blogs/congress-blog/politics/578693-after-35-years-congress-should-finally-end-the-sentencing (“These reforms were motivated by what we know now—this disparity between two chemically identical substances has done nothing to improve public safety or reduce drug use, but it does disproportionately harm communities of color.”).

101. See Taifa, supra note 89 (detailing the increase in the incarcerated population in the U.S. since the implementation of various drug control legislation, beginning in the 1980s).


103. Skopcol, supra note 4, at 1484 (footnote omitted).

104. See Felton, supra note 10.

105. See infra text accompanying note 106.
tank geared towards public policy says, “[i]f you’re not willing to follow the law, then you should not have a role in making the law for everyone else.”\textsuperscript{106} This principle mirrors the social contract theory that was first fully defined and defended by Thomas Hobbes.\textsuperscript{107} The social contract theory ascribes to the belief that a person’s moral obligations depend on a societal contract, an agreement that everyone will behave according to the same standards.\textsuperscript{108} Persons consent to relinquish some autonomy to their government in exchange for the government to protect their rights and maintain social order.\textsuperscript{109} This philosophical principle has been at the center of “moral and political theory throughout the history of the modern West.”\textsuperscript{110}

However, recent philosophers criticize the social contract theory as being an “incomplete picture” of society.\textsuperscript{111} Charles Mills’s essay, The Racial Contract, argues that the idealized social contract perpetuates a myth that all persons are equal in the eyes of the law.\textsuperscript{112} It further argues that the social contract was intended to apply to a specific person: a white, European man.\textsuperscript{113} Mills claims that viewing racism as an anomaly or an unintended result of

\textsuperscript{106} See Roger Clegg & Hans A. von Spakovsky, There are Good Reasons for Felons to Lose the Right to Vote, HERITAGE FOUND. (Apr. 10, 2018), https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote (“In fact, we do have certain minimum, objective standards of responsibility and commitment to our laws that we require people to meet before they are given a role in the solemn enterprise of self-government.”).

\textsuperscript{107} See Thomas Hobbes, LEVIATHAN (Univ. Press ed. 1904) (1651) (articulating the theory of the social contract in whole).


\textsuperscript{109} Id. (“Socrates makes a compelling argument as to why he must stay in prison and accept the death penalty, rather than escape and go into exile in another Greek city. He personifies the Laws of Athens, and, speaking in their voice, explains that he has acquired an overwhelming obligation to obey the Laws because they have made his entire way of life, and even the fact of his very existence, possible. . . . Importantly, however, this relationship between citizens and the Laws of the city are not coerced. Citizens, once they have grown up, and have seen how the city conducts itself, can choose whether to leave, taking their property with them, or stay. Staying implies an agreement to abide by the Laws and accept the punishments that they mete out. And, having made an agreement that is itself just, Socrates asserts that he must keep to this agreement that he has made and obey the Laws, in this case, by staying and accepting the death penalty.”).

\textsuperscript{110} Id.

\textsuperscript{111} Id.


\textsuperscript{113} MILLS, supra note 113, at 3.
imperfect men would be “a fundamental error.”114 Rather, racism exists at the center of the social contract.115

This racial contract determines who counts as a full person, and therefore “sets the parameters of who can ‘contract in’ to the freedom and equality that the social contract promises.”116 Because only white men are viewed as fully human, they are allowed to enter into the social contract and are deserving of equality and freedom.117 However, non-white people do not have the same agency afforded to others in the social contract because they are often not viewed as full individuals.118

Although the argument that people must adhere to the social contract may be persuasive, ultimately, the social contract theory hurts people who do not have the same ability to move freely within this contract, such as prisoners.119 Even though prisoners have very limited rights, the Supreme Court has affirmed a variety of constitutional rights for prisoners, including the right of freedom of religion120 and the right to free speech.121 As Justice Earl Warren wrote in Trop v. Dulles: “Citizenship is not a license that expires upon misbehavior.”122 If a prisoner retains constitutional protections and remains a

114. Mills, supra note 113, at 27 (“Rather, it needs to be realized that, in keeping with the Roman precedent, European humanism usually meant that only Europeans were human.”).
115. Id.
117. See id. (“It is an agreement, originally among European men in the beginning of the modern period, to identify themselves as ‘white’ and therefore as fully human, and to identify all others, in particular the natives with whom they were beginning to come into contact, as ‘other’: non-white and therefore not fully human. So, race is not just a social construct, as others have argued, it is more especially a political construct, created to serve a particular political end, and the political purposes of a specific group.”).
118. See id.
119. See id.
120. Holt v. Hobbs, 574 U.S. 352, 356 (2015) (holding that a Muslim prisoner could grow a half-inch beard for his religious practices). Additionally, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq., “prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest.” Id.
121. Turner v. Safley, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government for the redress of grievances; they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment; and they enjoy the protections of due process.”) (citations omitted).
citizen, then they should be afforded the basic democratic function of being equally represented by their elected official.123

G. The Exile of Prisoners to Rural Areas

Not only are prisoners seemingly excluded as citizens, but they are also physically excluded from their communities.124 In 1980, approximately 329,000 people were incarcerated;125 today, upwards of 2.3 million people are incarcerated, and that number continues to rise.126 To accommodate for this massive influx, thousands of prisons were built: “Between 1990 and 2005, on average, a new prison was constructed in America every ten days.”127 These prisons were often built in rural areas.128 Alaa Chaker notes, “[d]uring the peak years of prison building between 1992 and 1994, nearly sixty percent of new prisons were built in rural areas despite the fact that such rural towns accounted for only twenty percent of the population.”129 In fact today, although incarcerated individuals often come from more urban communities, about forty percent of incarcerated individuals are held in facilities located in rural areas.130

Many rural communities want prisons to be built in their areas to increase employment rates and stimulate their economy.131 Although towns that
constructed prisons experienced increases in median home value and median income, these benefits were short-lived and unsustainable.\textsuperscript{132} Further, the prisoners themselves often suffer from being placed in rural prisons.\textsuperscript{133} Prisoners need access to large, main roads to ensure access to courthouses and adequate services from their attorneys.\textsuperscript{134} People confined to rural prisons often lack “economic, social, or civic ties to the communities just beyond the prison walls”\textsuperscript{135} because they are, on average, being held one hundred miles away from their home community.\textsuperscript{136} Additionally, the farther prisoners are kept away from their homes, the more difficult it becomes for friends and family to visit, as distance increases transportation costs and travel time.\textsuperscript{137}

Counting people who are incarcerated as residents of these facilities means that they are still counted in these communities, often long after their sentence has ended.\textsuperscript{138} According to a Department of Justice study done in 2018, “[t]he average time served by state prisoners released in 2016 . . . was 2.6 years.”\textsuperscript{139} Because redistricting happens once every ten years, redistricting committees continue to count incarcerated individuals inside of communities they have no attachment to, even after they have gone back to their home communities.\textsuperscript{140} Further, their permanent communities lose governmental benefits and voting power because prisoners are not counted in the

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\textsuperscript{132} See Jason M. Eason, Understanding the Effects of the U.S. Prison Boom on Rural Communities, WISC. INST. FOR RSCH. ON POVERTY (Nov. 2019), https://www.irp.wisc.edu/resource/understanding-the-effects-of-the-u-s-prison-boom-on-rural-communities/.


\textsuperscript{134} See generally César Cuauhtémoc García Hernández, Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel, 21 BERKELEY LA RAZA L.J. 17, 23 (2011) (arguing that “[m]oving immigration detainees from densely populated urban areas . . . to distant rural outposts that are geographically isolated subverts the fundamental principles of justice that are the foundation of Fifth Amendment due process protections” by limiting detainees’ ability to access courts and their attorneys).

\textsuperscript{135} See Ebenstein, supra note 88, at 339.


\textsuperscript{137} See Vanden Bosch, supra note 133, at 3.

\textsuperscript{138} See Osaki, supra note 88.


\textsuperscript{140} See Osaki, supra note 88.
communities they will return to.\footnote{141} Counting prisoners in their home allows for a “more just distribution of public funds”\footnote{142} and “remedies the loss of political power from more urban communities to rural communities” by being cognizant that these persons will return to their homes after their incarceration.\footnote{143}

This era of “mass incarceration” has disproportionality affected people of color: “Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white offenders, and receive longer sentences than their white counterparts.”\footnote{144} It not only affects people of color inside prisons but also outside prisons after completing their sentence through felon disenfranchisement.\footnote{145}

H. The Continuation of Disenfranchisement Outside Prison Walls

Although some states allow felons to vote after they are released, felon disenfranchisement laws are pervasive throughout America and deny felons the right to vote.\footnote{146} Only two states, Maine and Vermont, allow currently

\begin{itemize}
  \item \footnote{141} See generally Amee Frodle, Where Does A Prisoner Live?: Furthering the Goals of Representational and Voter Equality Through Counting Prisoners, 107 Geo. L.J. 175 (2018) (discussing how the “current regime of counting prisoners does not successfully adhere to either of the two [democratic] theories [of representation], and that counting prisoners in their pre-incarceration address, although imperfect, adheres more closely to both theories”).
  \item \footnote{142} Id. at 197 (“Prisoners ‘receive few services’ from local governments, and the expenditures that do exist are the ‘sorts of financial considerations [that] are accounted for in the cost of operating a prison.’ Although prisons receive some funding from local governments, they are not receiving nearly enough to justify the influx of tax money and resources to local governments created by the inflated population numbers from counting prisoners there. Instead, monetary benefits allocated to prisoners’ home locations will ultimately improve their communities for their return and provide long-lasting benefits as these prisoners reintegrate into society.” (footnotes omitted)).
  \item \footnote{143} Id. (“Urban, suburban, and rural communities all have different interests and needs, and diluting the representation of the urban communities in favor of the rural ones violates Representational Equality.”).
  \item \footnote{144} See Ebenstein, supra note 88, at 328 (footnote omitted) (discussing how this disparity is due to various stages amidst the criminal justice system including “disparities in police stops, arrests, prosecutions, convictions, imprisonment, and length of sentence” (footnotes omitted)). This Comment discusses the effects of prison gerrymandering on people of color, rather than offering an in depth look at mass incarceration. See id. For a more detailed discussion on mass incarceration’s effect on people of color, see Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, THE SENT’G PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ (discussing at length the racial disparity of mass incarceration, supported by comprehensive research).
  \item \footnote{145} See infra Section II.H (discussing the various implications of felon disenfranchisement).
  \item \footnote{146} See Chris Uggen, et al., Locked Out 2020: Estimates of People Denied Voting Rights Due to a
incarcerated felons the right to vote.147 Today, 6.1 million Americans, or one out of every forty adults, cannot vote because of “laws restricting voting rights for those convicted of felony-level crimes.”148 Approximately one-third of all states deny voting rights to people who have completed their sentence.149 Some states have laws that allow felons to reinstate their voting rights, but such laws often involve complex processes and other often-discouraging conditions.150

Persons confined to prisons and jails are counted for representational purposes, which inflates the votes of the population surrounding the prison, yet prisoners are completely excluded from the democratic process: “Mass incarceration not only disenfranchises millions of Americans, disproportionately people of color, it also increases the voting power of predominantly white rural areas where prisons are located.”151 This process skews legislative power, leading to an unequal distribution of political power, away from the

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149. Id.

150. See generally, Restoration of Voting Rights, TENN. SEC’Y OF STATE, https://sos.tn.gov/elections/guides/restoration-voting-rights (working through the process for felons to restore their right to vote) (last visited Jan. 15, 2022). However, even if felons successfully fill out the various forms and complete court payments, other obstacles stand in the way, which often have little connection to the right to vote. Id. For example, if felons have any outstanding child support payments, they are ineligible to restore their right to vote. See CERTIFICATE OF RESTORATION OF VOTING RIGHTS FOR PERSONS CONVICTED OF A FELONY ON OR AFTER MAY 18, 1981, SEC’Y OF STATE TRE HAGGERTY, https://sosstage.tnsosgovfiles.com/s3fs-public/document/SS-3041.pdf (last visited Jan. 15, 2021) (“NOTICE: A person is not eligible to apply for a voter registration card and have their voting rights restored unless the person is current in all child support obligations. Before restoring the voting rights of an applicant, the Coordinator of Elections will verify with the Department of Human Services that the applicant does not have any outstanding child support payments or arrearages.”).

151. Ebenstein, supra note 88, at 324-25 (“It increases the voting strength of those districts’ other residents relative to the residents of neighboring districts, and dilutes the voting strength of prisoners’ home communities. At the same time, correctional facilities are not dispersed evenly throughout most states, but are often found in more rural, predominantly white areas, while people incarcerated in these facilities are disproportionately people of color from comparatively urban areas.” (footnote omitted)).
communities prisoners are from because their bodies are no longer being counted in their homes, but rather in these often-rural areas. Additionally, representatives of these communities do not see themselves accountable to their incarcerated constituents, or “phantom constituents,” because the incarcerated individuals cannot hold these representatives accountable at the voting booth.

I. The Census Bureau’s Complicated History with Prison Gerrymandering

Every ten years, the federal government conducts a census count for the purpose of determining “the number of representatives that each state will have in Congress.” To avoid the logistical difficulties of counting transient people, the U.S. Census Bureau established the “usual residence rule” for counting citizens. Although the Census Bureau has been accommodating to count college students or individuals who travel often for work in their home communities, the same latitude has not been given to incarcerated persons. On Census Day, incarcerated persons are counted in the jails or prisons in which they are held rather than in their homes like college students or traveling workers. The usual residence rule has troubling consequences, as the data gathered becomes the “baseline for apportioning democratic representation.”

152. Id.; see also Olivia Paschal, Fixing the Unfairness of Prison Gerrymandering, Facing S. (Nov. 20, 2019), https://www.facingsouth.org/2019/11/fixing-unfairness-prison-gerrymandering (“Counting prisoners as residents of prisons, rather than as residents of their home communities, tilts population counts in favor of the whiter, more rural areas where prisons tend to be located, and away from communities of color, often in more urban areas where incarceration rates have historically been much higher.”). 153. See Osaki, supra note 88. 154. Drake, supra note 25, at 239; see also U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members . . . apportioned among the several States . . . according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”). 155. Drake, supra note 25, at 239. 156. 2020 Census Residence Criteria and Residence Situations, U.S. CENSUS BUREAU 1–5, https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018-04-appendix.pdf (last visited Oct. 30, 2021). For example, college students or children attending boarding school are counted at their parents’ home, although children in juvenile facilities are counted in the detention centers as residents of the detention facility. Id. 157. Id. 158. Skocpol, supra note 4, at 1476 (“Prisons house dense agglomerations of nonvoters, which can
The Census Bureau has previously defended its actions on pragmatic and administrative grounds, rather than for political reasons: counting prisoners’ current facilities instead of their places of last residence is easier. Alaa Chaker, a lawyer who has completed extensive research regarding the intricacies of prison gerrymandering, noted, “[u]ntil 2010, every state in the country relied exclusively on Census Bureau data for their reapportionment processes and allocated incarcerated individuals to the districts where they were imprisoned.” However, in 2011, the Census Bureau began releasing data on “group quarters” counts earlier, which allotted states more discretion as to how to count their prisoners. Further, the Census Bureau recently decided that states are allowed to apportion prison populations as they wish during their redistricting processes for both local and congressional districts, allowing states to determine whether prison gerrymandering should continue. In fact, no federal law requires states to redistrict based on U.S. Census data, and the Supreme Court has stated that states are free to use other sources of data. Because there are no federal restrictions regarding how states should count create anomalies among districts if prisons boost the census populations of their host communities, entitling them to more representation than they would otherwise enjoy.”).

159. See Drake, supra note 25, at 240–41 (“In 2003, the Census Advisory Committee on the African American Population recommended that the Bureau count prisoners as residents of the communities where they lived before their incarceration. In 2005, Congress ordered the Census Bureau to look into the feasibility of counting prisoners at their ‘permanent homes of record’ rather than at their place of incarceration. The Census Bureau reported several impediments to counting prisoners as residents of any place other than their places of incarceration. The Bureau’s arguments included concerns that such a count would be inaccurate because prison officials do not keep standardized addresses, that it would be costly to send census counters into prisons to interview inmates and to verify any self-reported data, that such a change would have policy implications for how other group quarters were counted, and that it would violate the Census Bureau’s duties under the Constitution.” (footnotes omitted)).


161. See Peck, supra note 12.


163. Wagner, supra note 80, at 1247 (“One Supreme Court case, Burns v. Richardson, implicitly approved the type of adjustments for prison populations discussed here: ‘Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include . . . persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.’” (quoting Burns v. Richardson, 384 U.S. 73, 92 (1966))).
prison populations, states can either “leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale.” Therefore, states have taken a variety of approaches to counting prisoners.

III. ANALYSIS OF PRISON GERRYMANDERING

A. The Good, the Bad, and the Anti-Democratic: State Approaches to Prison Gerrymandering

Prison gerrymandering is a pervasive habit that affects all areas of the United States. After the Census Bureau changed their usual residence rule, some states took great steps to change the current environment surrounding counting prisoners’ bodies for legislative purposes. However, almost forty states still use the practice of prison gerrymandering in one way or another. Southern states have been slow to implement change. Specifically, Texas and Louisiana have some of the highest numbers of incarcerated individuals in the country and therefore hold a vast ability to inflate the political power of prison districts through prison gerrymandering. Notably, Texas holds great political importance in the South due to its recent increase in population.

A trend arising from the South is to ignore the implications of prison gerrymandering and continue to count prisoners in their place of incarceration. Professor Remster at Villanova University, as well as other lawyers and researchers, have likened the practice of prison gerrymandering to the Three-
Fifths Compromise.\textsuperscript{173} Intentional or not, the deliberate practice of counting large numbers of incarcerated individuals for representational purposes, although not allowing them to vote for their own representation, is very reminiscent of the Three-Fifths Compromise: counting slaves as three-fifths of a person for representational purposes although not allowing them to have a voice of their own.\textsuperscript{174} The South’s refusal to eradicate prison gerrymandering highlights its attempt to hold on to political power by increasing red, rural counties’ voting power while decreasing blue, urban counties’ power.\textsuperscript{175}

B. The Legislative Approach Taken by Northern States

Contrary to the South’s approach, legislative action seems to be the most common approach to a smooth eradication of prison gerrymandering based on the behavior of the Northern States.\textsuperscript{176} In 2010 and 2011, Maryland and New York became the first states to enact legislation to end the practice of prison gerrymandering by counting inmates in their place of last residence.\textsuperscript{177} As of 2020, Nevada, Washington, California, and Delaware followed Maryland and New York’s lead by passing similar legislation.\textsuperscript{178} In May 2021, Connecticut Governor Ned Lamont signed a bill “ensuring that people in state prisons will hereafter be counted as residents of their home addresses when new legislative districts are drawn.”\textsuperscript{179} This act makes Connecticut the eleventh state to eradicate prison gerrymandering via legislative means by opting to count prisoners in their permanent communities.\textsuperscript{180}

\textsuperscript{173} See Felton, supra note 10 (likening the counting of politically powerless prisoners in modern times to the counting of black Americans under the Three-Fifths Compromise, detailing how both systems take advantage of such tallies to yield political advantages in certain regions).

\textsuperscript{174} \textit{Id}.

\textsuperscript{175} See generally Alvarez, supra note 14 (detailing how although both parties implement prison gerrymandering, Republican lawmakers are especially reluctant to abandon the politically advantageous practice, even going as far as filibustering reform efforts).

\textsuperscript{176} See infra text accompanying notes 177–180 (discussing various approaches states have taken through legislation).


\textsuperscript{178} See Wang & Devarajan, supra note 83.


\textsuperscript{180} See Osaki, supra note 88.
C. Why a Legislative Solution is Wrong for the South

1. The South’s Hesitation Towards Implementing Substantial Change: Apathy or Animus?

As of 2022, sixteen states in total have taken some action against prison gerrymandering: California, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Montana, Michigan, Nevada, New Jersey, New York, Tennessee, Virginia, and Washington. About twelve states have outlawed prison gerrymandering. The vast majority of these states are northern, and Michael Skocpol, scholar and assistant counsel for the NAACP Legal Defense & Educational Fund, notes, “[t]he states that have adopted these reforms lean heavily Democratic, as do most of the states that are considering following suit.” The only two southern states in this list are Tennessee and Virginia. However, Tennessee has limited prison gerrymandering reform to state legislation, which does not apply to how districts are drawn for federal representatives in the House of Representatives and Senate. Additionally, Tennessee and Virginia have both taken a piecemeal approach to avoid prison gerrymandering, which unfortunately does not require counties to take action unless they want to.

Some counties around the South have attempted to avoid prison gerrymandering, such as counties in Texas, Louisiana, and Florida. However,
no statewide action has been taken. Some other states in the South—such as Arkansas, Florida, Georgia, Kentucky, Louisiana, and Texas—have also introduced bills to address prison gerrymandering, but these bills have continually failed to be ratified.

2. The Need of an Impartial Court to Fix Prison Gerrymandering

The lack of progress being made by southern states is evident in their failure to pass any type of meaningful legislation to eradicate prison gerrymandering. The majority of southern states are Republican and “have little interest in adopting such laws,” as prison gerrymandering tends to fall along party lines. The partisan factor of prison gerrymandering is seemingly intuitive since prison gerrymandering has historically garnered more support with left-leaning politicians, who tend to be more oriented toward criminal justice reforms. But, left-leaning politicians have a self-interest in adopting increased voter policies because they believe that increased voter turnout will help the Left win more elections. Although politics motivate many social
reforms, prison gerrymandering should not be a one-sided issue.196 Both sides should have an interest in helping our democratic institutions do their constitutional job.197

As previously discussed, most states have approached changing prison gerrymandering through legislative means.198 However, change via the legislature requires representatives—who oftentimes can gain power through prison gerrymandering—to act in ways that could potentially diminish their political power, and thus, may be hesitant to enact legislation that ends prison gerrymandering.199 Because prison gerrymandering centers around representation, the courts need to step in, as the current hegemony controls the legislature.200 Action by an impartial court is not only the most effective strategy, but also “an appropriate and well-considered exercise of judicial power.”201

Important to note is that, in Abbott v. Perez, the Supreme Court stated that redistricting is primarily the duty of the states and emphasized that federal practices they want to enshrine (like ballot harvesting, in which other people collect ballots for delivery to polling places), frankly, reek of the corrupt practices that political machines have long employed.”).196 See generally Dewan, supra note 194 (highlighting the bipartisan support for criminal justice reforms).

197. See Joshua J. Dyck, et al., Republicans and Democrats Both Say They Support Democratic Freedoms—But That the Other Side Doesn’t, WASH. POST (Aug. 3, 2017, 8:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/both-republicans-and-democrats-say-they-support-democratic-freedoms-but-that-the-other-side-doesnt/ (discussing issues that both Democrats and Republicans hope to establish in our country such as “minority expression of rights, majority voting, free speech for all, due process [and] legal protections, expression of unpopular opinions and media censorship.”).

198. See supra Section III.B (discussing how most of the Northern states have banned prison gerrymandering via legislative action).

199. See Lee Hamilton, et al., How Congress Can Stop Gerrymandering: Deny Seats to States That Do It, WASH. POST (July 17, 2020), https://www.washingtonpost.com/outlook/gerrymandering-redistricting-census-congress/2020/07/17/d1002146-c6f5-11ea-8ffe-372be8f82298_story.html (“The Supreme Court rued [sic] excessively partisan district boundaries and applauded other approaches to dealing with them, including state court actions and independent districting commissions, which exist in some states. But since the legislatures involved in these approaches are so often gerrymandered themselves, the problem remains thorny.”).

200. See supra text accompanying note 199.

201. See Reynolds v. Sims, 377 U.S. 533, 586–87 (1964) (“We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well-considered exercise of judicial power.”); see generally Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (“At argument on appeal in this case, counsel for the plaintiffs argued that this Court can address the problem of partisan gerrymandering because it must: The Court should exercise its power here because it is the ‘only institution in the United States’ capable of ‘solv[ing] this problem.’”).
court intervention is an intrusion upon state power. However, in *Burns v. Richardson*, the Supreme Court held that redistricting challenges are subject to constitutional challenge upon a demonstration that the apportionment would “minimize or cancel out the voting strength of racial or political elements of the voting population.” Further, courts have subject matter jurisdiction to hear such issues. Although the Eleventh Amendment provides immunity for states from suit, the *Ex parte Young* exception allows states to be sued upon a demonstration of an ongoing constitutional violation. Therefore, because prison gerrymandering apportionment minimizes another group’s voting power, and it is an ongoing violation of individuals’ constitutional rights under the Equal Protection Clause, a suit claiming that prison gerrymandering violates the Fourteenth Amendment’s Equal Protection Clause would be properly heard in the courts.

Prison gerrymandering has deep roots in the South, yet this practice is still ongoing across the entire country, requiring a national solution. Though Congress has the means to remedy this injustice, the judicial branch may be the proper course of action. Just as Southern state legislative districts have an incentive to continue prison gerrymandering as a means of controlling political influence, so too does Congress. Resolution by an impartial court is paramount for this reason. In justifying the Court's intervention of a state’s

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203. 384 U.S. 73, 88, 89 (1966) (stating that redistricting challenges are “subject to constitutional challenge . . . upon a demonstration that the . . . apportionment . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”).
204. NAACP v. Merrill, 939 F.3d 470, 476 (2d Cir. 2019) (finding an ongoing constitutional violation when plaintiffs properly alleged that “the Redistricting Plan violates the Fourteenth Amendment and will continue to do so as long as it remains in place”).
205. Id. at 475 (“The Eleventh Amendment bars suits against states and their officials unless the state consents to suit, Congress abrogates the state's immunity, or the case falls within the *Ex parte Young* exception.”).
206. But see NAACP, 939 F.3d at 478–79 (concluding that the case could not be heard on the merits because it was improperly brought before a single district court judge instead of a three-judge panel).
208. See supra text accompanying note 199.
209. See supra text accompanying note 199.
210. See also Hamilton, supra note 199.
drawing of electoral boundaries in *Baker v. Carr*, Justice Brennan cited past examples of the Court correcting constitutional violations pertaining to state elections and redistricting.\(^{211}\) Ultimately, Justice Brennan concluded that the equal protection claims raised by Baker’s challenge to state apportionment merited judicial evaluation, expanding the Court’s authority to hear cases regarding state legislative districting.\(^{212}\) Due to the concern that Congress may be unable to appropriately remedy prison gerrymandering, the Supreme Court should step in, as it has before, to resolve the issue of prison gerrymandering and ensure proper instructions across our nation.\(^{213}\)

**D. Forcing the Supreme Court to Resolve Prison Gerrymandering**

Although a Supreme Court opinion might be the answer to many issues in our country due to the Court’s ability to make lasting, national change,\(^{214}\) even getting the chance to be heard by the Supreme Court poses immense difficulties.\(^{215}\) Due to the Certiorari Act of 1925, the Court has discretion to decide if it wants to hear particular cases or not.\(^{216}\) Because of this, the Court usually hears a case only if it could “have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value.”\(^{217}\) One of the most commonly used vehicles to arrive at the

\(^{211}\) 369 U.S. 186, 201 (1962) ("An unbroken line of our precedents sustains the federal courts’ jurisdiction of the subject matter of federal constitutional claims of this nature.").

\(^{212}\) Id.

\(^{213}\) See generally Nikolos Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy/ (arguing that the Supreme Court might not be the best choice for being the guardians of the Constitution but still acknowledging, “the Supreme Court has often been heralded as democracy’s guardian. Decisions dating from 1954’s Brown v. Board of Education are seen by many as essential responses to the tyranny of the majority.”).

\(^{214}\) See *The Court and Constitutional Interpretation*, SUP. CT. (last visited Feb. 9, 2022), https://www.supremecourt.gov/about/constitutional.aspx#:~:text=As%20the%20final%20arbiter%20of%20Constitution%20and%20the%20Constitution%20("The%20Court%20is%20the%20highest%20tribunal%20in%20the%20Nation%20for%20all%20cases%20and%20controversies%20arising%20under%20the%20Constitution%20or%20the%20laws%20of%20the%20United%20States.%20As%20the%20final%20arbiter%20of%20the%20law%2C%20the%20Court%20is%20charged%20with%20ensuring%20the%20American%20people%20the%20promise%20of%20equal%20justice%20under%20law%20and%2C%20thereby%2C%20also%20functions%20as%20guardian%20and%20interpreter%20of%20the%20Constitution.").


\(^{216}\) Id.

Supreme Court is a circuit split among the U.S. Courts of Appeals. Because the Supreme Court has already addressed issues of partisan gerrymandering, the Court could tackle prison gerrymandering, as it has been ruled as a non-political question.

In 2016, the First Circuit held that prison gerrymandering did not violate the Equal Protection Clause. If another circuit had the opportunity to grapple with the constitutionality of prison gerrymandering, a split could arise and force the Supreme Court’s hand to resolve this pressing issue. Before discussing a circuit split, a discussion of the First Circuit’s 2016 decision is crucial to understand why its reasoning is incorrect, and why other circuits should not follow its precedent.


The First Circuit dealt a blow to representational equality by giving the practice of prison gerrymandering its stamp of approval. With its decision in Davidson v. City of Cranston, the First Circuit ignores the fact that prison gerrymandering turns prisoners into “phantom constituents”: a group of people who give power to elected officials yet are refused meaningful representation because of their inability to hold their elected officials accountable at...
the voting booth.\textsuperscript{224}

In Davidson, Rhode Island’s City of Cranston was divided into six wards, which elect Cranston’s City Council and School Committee.\textsuperscript{225} The redistricting plan, created to include numbers from the 2010 Census, counted prisoners of Rhode Island’s only state prison as residents of Ward 6, even though the 3,433 prisoners were not “true residents” of this ward; they remained residents of their pre-incarceration community for all other legal purposes.\textsuperscript{226} Because each ward included around 13,500 residents, the prison population comprised close to 25\% of Ward Six’s population.\textsuperscript{227} The ACLU of Rhode Island sued the City of Cranston, alleging that the redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{228} The ACLU claimed that the plan inflated the voting strength and political influence of the residents in Ward Six, and in turn, diluted the political power of people living outside said ward.\textsuperscript{229} The district court agreed with the ACLU and held that the city council needed to propose a new redistricting plan that excluded inmates from the total population.\textsuperscript{230}

The First Circuit disagreed and reversed the district court’s decision by using the “methodology and logic” of Evenwel v. Abbott.\textsuperscript{231} In Evenwel, the Supreme Court unanimously approved Texas’s use of a broad, “total

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\item \textsuperscript{224} See Felton, supra note 10 (“‘They’ve got 6,000 people that they don’t have to respond to, that they don’t have to answer to,’ said McClinton. ‘An inmate can send them a correspondence. They can call their office, but they’re not able to get any type of response because there’s not even a connectivity to voting power.’”).
\item \textsuperscript{225} Davidson, 837 F.3d at 137.
\item \textsuperscript{226} Id. at 138.
\item \textsuperscript{227} Id.; see also Note, Davidson v. City of Cranston: First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause, 130 HARV. L. REV. 2235, 2236 (2017) (“Each ward included approximately 13,500 people; thus, ACI inmates comprised approximately twenty-five percent of the population of Ward Six.”).
\item \textsuperscript{228} Davidson, 837 F.3d at 139; U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
\item \textsuperscript{229} Davidson, 837 F.3d at 139.
\item \textsuperscript{230} Davidson v. City of Cranston, 188 F. Supp. 3d 146, 152 (D.R.I. 2016), rev’d sub nom. Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).
\item \textsuperscript{231} Davidson, 837 F.3d at 137 (“We now hold that the methodology and logic of the Supreme Court's decision in Evenwel v. Abbott require us to reverse the district court and instruct it to enter summary judgment in favor of the City.” (citation omitted)).
\end{itemize}
population” based approach to redistricting, as opposed to eligible-voter-only redistricting schemes. Based on the Supreme Court’s requirement for states to use population-based metrics, the First Circuit upheld the constitutionality of prison gerrymandering in Davidson because prisoners were counted as part of the “total population.” Therefore, the First Circuit concluded that the “natural reading of Evenwel” is that total-population apportionment is the “constitutional default.” An initial reading of Evenwel might seem to support the First Circuit’s conclusion, but a closer examination reveals that the First Circuit completely missed the Supreme Court’s core reasoning: representational equality.

The Supreme Court’s opinion in Evenwel was focused on “equal representation for equal numbers of people” and did not address how to count the unique population of prisoners. Although the facts of Davidson might appear to fit within the scope of Evenwel’s broad holding, the First Circuit misplaced its reliance on Evenwel because total-population schemes are inconsistent with the Supreme Court’s representational equality focus when prisoners are left with virtually no representation at all. So-called representatives should represent all the people in their districts, not just the constituents who can vote. Because prisoners are included in the total population

233. Davidson, 837 F.3d at 144 (“It is implausible that the Court would have observed that the majority of states use unadjusted total population (including prisoners) from the Census for apportionment, upheld the constitutionality of apportionment by total population as a general proposition, and yet implied that the inclusion of prisoners in total population for apportionment, without any showing of discrimination, is constitutionally suspect. The more natural reading of Evenwel is that the use of total population from the Census for apportionment is the constitutional default, but certain deviations are permissible, such as the exclusion of non-permanent residents, inmates, or non-citizen immigrants.” (emphasis added)).
234. Id.
236. Evenwel, 578 U.S. at 68 (“[T]here is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”).
237. See Davidson v. City of Cranston: First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause, supra note 227, at 2238. (“Counting prisoners as part of a total-population baseline is inconsistent with the equal-representation reasoning emphasized by the Supreme Court, and doing so makes prisoners the constituents of elected officials with no power to address their needs and no inclination to respond to their requests.”).
238. Id.
239. See id.
of prison districts, they should be afforded equal representation. With this decision, the First Circuit ignores the fact that prisoners become “phantom constituents” of elected officials “with no power to address their needs and no inclination to respond to their requests.”

2. Setting the Stage for a Strategy: Two Southern Case Studies

The First Circuit creates a complex problem for other courts. Should they approve prison gerrymandering schemes because prisoners are counted in the “total population,” or should they re-examine *Evenwel*, focusing on the Supreme Court’s concern with representational equality? If courts take a closer look at *Evenwel*, they will see that the Supreme Court’s concern with representation equality yet approval of total-population redistricting schemes seems conflicting when placed in the context of prisoners. Because of this, courts should refer to the Supreme Court’s holding in *Reynolds* that voter dilution is unconstitutional: the Constitution “forbids weighing citizens’ votes differently, by any method, merely because of where they reside.” This holding should persuade other courts to divert from the First Circuit’s approach. The Supreme Court has established the idea of representational equity in America; all people’s votes should be given the same value, including prisoners.

Courts must correctly apply the Supreme Court’s *Evenwel* decision to emphasize representational equality. However, before addressing the merits

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240. *Id.* (“However, it is also important to note that even if the First Circuit had avoided this tension by requiring Cranston to exclude inmates from its population baseline, only partial relief from the problems caused by prison gerrymandering would result. In order to fully respond to such distortions, the legislature must require that prisoners be counted as residents of their home communities at all electoral levels. Only this step can stop the siphoning of political power from those areas.”).

241. *Id.; see also* Drake, *supra* note 25, at 249 (“[L]egislators often acknowledge that they do not treat the prisoners in their districts as constituents.”).

242. See supra text accompanying note 235.

243. See Davidson v. City of Cranston: First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause, *supra* note 227, at 2242 (“The Court’s emphasis on representational equality militates against relying on total-population baselines when prisons are involved.”).

244. See *id.*


246. See Reynolds, 377 U.S. at 268.

247. See Chapter 14: Establishing Equality in Voting and Representation, *supra* note 57 (analyzing various cases dealing with representational equality, including *Baker v. Carr* and *Reynolds v. Sims*).

248. See supra Section III.D.2 (discussing why courts should consider what equal representation
of what claims should be used, the venues where prison gerrymandering is most at work must be addressed. Two southern states have risen to infamy with their prison gerrymandering practices: Texas, a state with some of the most political power, and Louisiana, the state with the highest number of incarcerated individuals. Both Texas and Louisiana hold a lot of potential for a successful case at the federal courts. Additionally, both states are within the Fifth Circuit; therefore, regardless of which area the controversy arises, the result could still end in a circuit split. Prison gerrymandering influences each of the states’ political power in an inequitable manner.

a. Texas

As of 2018, an estimated 281,000 Texans were incarcerated, varying from state prisons to federal to local jails. On top of that, upwards of 475,000 people are still under criminal justice supervision, all without the ability to vote. The Prison Gerrymandering Project recorded that “[i]n two districts...”
.. almost 12% of each district’s 2000 Census population is incarcerated. Effectively each group of 88 actual residents in these two districts is given as much political clout as 100 people elsewhere in Texas.258 Further, the Texas Civil Rights Project discovered that only two percent of prisoners in the Texas Department of Criminal Justice (TDCJ) who were arrested in either Harris or Dallas County are held there.259 However, Anderson County holds around ten percent of prisoners (roughly 16,072 prisoners), although only one percent of the prison population comes from Anderson County, contributing to the over-counting issues in East Texas.260 To illustrate, if Texas House District 8 removed the prison population of approximately 21,112 people from their representational redistricting count, District 8 would become “12.59% smaller than the average state house district.”261

Prison gerrymandering in Texas vitally impacts how national policy is shaped because Texas continues to gain political power.262 In late April of 2021, the U.S. Census Bureau announced that Texas would be gaining two additional House of Representatives seats through reapportionment after the 2020 Census.263 David Byler, a data analyst and political columnist, notes that this is not a one-off event, but rather a “generation-long trend; since 1990, Texas has gained eight House seats.”264 However, as the representative numbers increase, so does the number of phantom constituents.265 Since the 1970s, the incarcerated population of jails in Texas has increased upwards of vote.”).

258. Fixing Prison-Based Gerrymandering After the 2010 Census: Texas, PRISON POL’Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/TX.html (highlighting the power discrepancy between rural areas, such as District 13 near Walker County and District 8 near Anderson County, being overcounted and urban areas being undercounted).

259. See Gonzalez, supra note 255 (“Currently, the majority of Texas prisoners hail from the most populous counties in the state. Recent TDCJ population data, obtained by TCRP in February 2021, confirms this. Accounting for nearly 15% of the state prison population, over 16,000 currently incarcerated Texans were convicted in Harris County. This is followed by Dallas County, where 9% of TDCJ’s population (over 10,000 people) were convicted.”).

260. Id.

261. See id.

262. See supra text accompanying notes 252–253.

263. See David Byler, Opinion: Texas’s Population and Political Power are Growing. Here’s Why., WASH. POST (May 3, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/05/03/texass-population-political-power-are-growing-heres-why/.

264. Id.

265. See Felton, supra note 10.
500%,\textsuperscript{266} with local populations at 64,024 detainees.\textsuperscript{267} Since the 1980s, the incarcerated population of prisons has increased by around 329%, with a population of 151,213 inmates.\textsuperscript{268} Equity in the political process demands prison gerrymandering to be addressed at a statewide level to ensure proportional representation for the incarcerated, rather than a piecemeal approach through counties and local government.\textsuperscript{269}

\textit{b. Louisiana}

Louisiana holds the highest incarceration rate in the United States, incarcerating 683 per 100,000 people as of 2021.\textsuperscript{270} Following the 2010 Census, Allen Parish did not exclude incarcerated persons in the redrawing of its representative districts.\textsuperscript{271} Due to this, two districts included large prisons, “with prisoners making up 66 percent of the population of District 1 and 39 percent of District 6,” continuing to inflate the political power of people in those districts.\textsuperscript{272} However, not all parishes in Louisiana practice gerrymandering: “The West Feliciana Parish Police Jury and the school boards in Iberville and Evangeline Parishes avoided prison-based gerrymandering after the 2000 Census by excluding the prison population prior to drawing districts. In Iberville’s case, including the prison population would have meant drawing a

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\item \textsuperscript{267} \textit{Id.}
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} See Paschal, \textit{supra} note 152 (discussing the need for statewide change, rather than piecemeal approaches in Tennessee).
\item \textsuperscript{270} See \textit{Prison Population by State 2022}, \textsc{World Population Rev.}, https://worldpopulationreview.com/state-rankings/prison-population-by-state (last visited Jan. 10, 2022); see also Widra & Herr, \textit{supra} note 170 (noting that Louisiana retained the record for the “highest incarceration rate in the U.S.”).
\item \textsuperscript{271} See Paschal, \textit{supra} note 152; see also Hilary Fenton, \textit{Louisiana Local Governments’ Struggles with Prison-Based Gerrymandering Could Be Eased By State}, \textsc{Prison Pol’y Initiative} (Aug. 22, 2012), https://www.prisonersofthecensus.org/news/2012/08/22/la-local-gov/ (“Allen Parish has the most acute prison-based gerrymandering vote distortion of any parish in the state. Two of its seven districts contain large corrections facilities: 66% of District 1 is incarcerated in FCI and FDC Oakdale, and 39% of District 6 is incarcerated in the state-run Allen Correctional Center. This means that the non-incarcerated populations of these districts are substantially smaller than the populations of the districts without prisons.”).
\item \textsuperscript{272} See Paschal, \textit{supra} note 152; see also Fenton, \textit{supra} note 271 (“In District 1 for example, one voter in that district has the same political power as three voters in other districts.”).
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district that contained only two voters.”

Louisiana’s high incarceration rate impacts redistricting, as it affects the way that parish lines are drawn to include more than two people in a district. If left unresolved, prison gerrymandering in Louisiana will continue to inflate the political power of districts using prisoners’ bodies to count towards their representative numbers while continuing to take power away from prisoners’ home communities.

3. The Path Forward

Both Texas and Louisiana offer great places to start litigation involving prison gerrymandering. These states possess immense ability to adjudicate the issue of prison gerrymandering due to either vast amounts of political power (illustrating the harm of diluting votes) or high incarceration rates (highlighting vast amounts of improvement that could occur). Although both Texas and Louisiana offer strong opportunities to file a challenge under the Equal Protection Clause, either state would be effective because both states are in the Fifth Circuit. The only thing to ensure is that a challenge arises in the right place.

274. See supra text accompanying notes 229–261.
276. See supra Section III.D.2.a.
277. See supra Section III.D.2.a.
278. See Fifth Circuit Court of Appeals, LIBR. OF CONG., https://guides.loc.gov/federal-appellate-court-records-briefs/fifth-circuit (last visited Feb. 8, 2022). This Comment does not address the political leanings of the courts. If the judges of the Fifth Circuit follow the later discussed Evenwel precedent of representational equality, then the court should determine that prison gerrymandering is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it violates the principle of one-person, one-vote. See generally supra notes 232–238 and accompanying text.
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For a circuit split to occur, the proposed case must first start in a federal district court.280 Federal courts have jurisdiction to hear constitutional issues, especially regarding the constitutionality of congressional districts.281 Further, in Rucho v. Common Cause, the Supreme Court acknowledged that, while partisan gerrymandering is nonjusticiable in federal courts, “there are two areas relating to redistricting where the Court has a unique role in policing the states—claims relating to (1) inequality of population among districts or ‘one-person, one-vote’ and (2) racial gerrymandering.”282 Challenging the constitutionality of prison gerrymandering would be an equal protection claim, stating that prison gerrymandering violates the right to equal representation due to malapportionment.283 Thus far, the three federal challenges to prison gerrymandering have all arisen as malapportionment claims.284

Although federal courts are preferable due to the ability to appeal to the Federal Circuit, federal courts still pose many difficulties.285 Under Rule 56, federal courts are more likely to enter summary judgment or grant motions to dismiss a case.286 Matters are further complicated by 28 U.S.C. § 2284, which mandates a three-judge district court for “challenging the constitutionality of the apportionment of congressional districts or the apportionment of any

280. See supra text accompanying notes 270–272.
281. See Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (holding that the constitutionality of congressional districts could be decided by the courts); see also Federal Courts & the Public, U.S. Cts., https://www.uscourts.gov/about-federal-courts/federal-courts-public (last visited Feb. 8, 2022) (“Federal courts have jurisdiction over cases involving: the United States government, the Constitution or federal laws, or controversies between states or between the U.S. government and foreign governments.”).
282. 139 S. Ct. 2484, 2495 (2019); see Whitaker, supra note 71, at 3.
283. See Chaker, supra note 127, at 1263 (“One-person, one-vote claims under the Equal Protection Clause are the most common vehicle for challenging prison malapportionment.”).
285. See supra text accompanying notes 274–277 (discussing challenges that arise in federal court).
statewide legislative body.” In fact, if an apportionment case is brought before a district court judge, the “district judge is required to refer the case to a three-judge court.”

The requirement of a three-judge panel is crucial to the success of the case. A recent case, NAACP v. Merrill, was unable to be heard on the merits by the Second Circuit due to improper procedure; the original case was heard in front of a single district court judge rather than a three-judge panel. The Second Circuit judges affirmed the district court’s decision to deny the defendant’s motion to dismiss, acknowledging that the plaintiffs properly alleged an ongoing constitutional violation because the redistricting plan would “operate to minimize representational strength in prisoners’ urban home districts, which they allege are predominantly Black and Latino, in favor of the predominantly White rural prison districts.” Unfortunately, the Second Circuit could not decide the case on the merits and remanded the case back to a three-judge panel.

Although it may be difficult to arrive at a three-panel federal district court, judgments from such courts may be appealed to the U.S. Court of Appeals and are mandatorily reviewable by the U.S. Supreme Court. Ultimately, federal courts are an appropriate starting ground for this case due to the ability to appeal to the U.S. Court of Appeals.

b. Framing the Issue: Gerrymandering vs. Malapportionment

Chaker properly rephrases the issue of prison gerrymandering as “prison malapportionment.” Chaker argues that the term prison “gerrymandering”...
is incorrect because gerrymandering involves drawing districts and altering geographic boundaries. 296 “Malapportionment” more accurately describes the issue because it “encompasses the equality of representation of voters within districts.” 297 Reynolds v. Sims, where the principle of “one person, one vote” began, was based on a malapportionment claim, so it is more appropriate going forward in courts to refer to prison gerrymandering as prison malapportionment. 298 Adding support to this framing, the Supreme Court has affirmed the justiciability of malapportionment claims. 299 Rucho v. Common Cause held partisan gerrymandering claims to be nonjusticiable, as such claims remained a political question; however, the Court held that malapportionment claims belong in courts. 300 Reframing the issue as malapportionment will refine the legal standard to ensure the Fifth Circuit could find prison gerrymandering unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. 301

c. The Argument: Equal Protection and One Person, One Vote

The crux of the argument for a violation of the Equal Protection Clause would lie in a malapportionment claim—counting incarcerated persons in their correctional facilities inflates the votes of the residents in those districts, while diluting the voting power of residents of the incarcerated individual’s home community. 302 This practice leads to “unequal representation” and “unconstitutional deviations in population between districts,” violating the one-person, one-vote framework. 303

Prison malapportionment claims are most commonly litigated under the “one person, one vote,” vote-dilution argument, alleging a violation the Equal

296. Id. (“Over a century ago, in his foundational work on gerrymandering, Elmer C. Griffith remarked that ‘[t]he word gerrymander is one of the most abused words in the English language . . . . It has been made the synonym for political inequality of every sort.’ So too in the prison population context evaluated here, ‘prison gerrymandering’ is often used, though the phrase is misleading, if not a misnomer.”).
297. Id.
300. Id. (“In two areas—one person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.”).
301. See Chaker, supra note 127, at 1263.
302. Id.
303. Id.
Protection Clause. The legal argument of vote-dilution claims finds support in Supreme Court precedent established in *Mahan v. Howell*. In *Mahan*, a Virginian legislative map counted 36,700 naval personnel, who were “homeported” at the U.S. Naval Station in Norfolk, in the Fifth Senatorial District because the Census originally counted naval personnel in Norfolk. However, only about half of the naval personnel actually lived within the Fifth District. Interestingly, the Supreme Court held that it was insufficient for the legislature to rely on Census Bureau statistics alone as it “resulted in . . . significant population disparities.” Instead, the Court argued that naval personnel should have been counted where they “actually” resided, such as with their “wives and families.” Therefore, the Supreme Court’s opinion in *Mahan* affirmed the principle that “in a one-person, one-vote challenge, individuals must be allocated to a district where they are accurately legal residents.”

Although the Supreme Court’s rationale in *Mahan* follows logical reasoning in recognizing the importance of counting individuals in their home communities, the Court has yet to clarify what the legal standard is to determining where an individual is a “legal resident” in terms of apportionment. Even so, prison malapportionment claims can still ground their footing in *Mahan* and one-person, one-vote claims from *Reynolds*. If the Supreme Court held that naval personnel should be counted in their home communities, rather than where they were temporarily living, the same logic should be extended to
prisoners who are counted in their temporary living quarters.  
Some scholars argue that prisoners should just be excluded completely from the redistricting count, but full exclusion of prisoners creates an entirely separate issue.  
Eliminating the prison population does not fully remedy the implications of prison gerrymandering; it is only a “half-measure: it fixes the overrepresentation of rural communities, but it does nothing to remedy underrepresentation of urban ones.”  
Although simple subtraction of the prison population from Census counts would provide an easy solution, this action still dilutes representation of prisoners’ home communities by proxy and further dehumanizes prisoners in the process by choosing to ignore their existence for the sake of ease.  
To attempt to resolve the detrimental effects of prison gerrymandering, reassignment helps reenforce the reality that prisoners are full humans who deserve the opportunity to be represented by their government.

d.  A Bright Start in an Unlikely Place: Florida

Achieving a circuit split to encourage the Supreme Court to resolve the constitutionality of prison gerrymandering is a lofty, yet not impossible goal.  
Some progress in recognizing the importance of representational

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313. See Chaker, supra note 127, at 1263 (“Thus, under one person, one vote, not only must population counts be equal under the Fourteenth Amendment, but they must also be an accurate reflection of where people are residents.”).

314. Skocpol, supra note 4, at 1492 (“Once a prison gerrymander has been identified, there are two ways one might seek to remediate it: either exclude prisoners from the count or reassign them back to their home communities—typically determined by their last known addresses. Exclusion is the more straightforward of the two options.”).

315. Id.

316. See Owen Bacska, Now’s the Time for States to End Prison Gerrymandering, BIPARTISAN POL’Y CTR. (May 3, 2021), https://bipartisanpolicy.org/blog/ending-prison-gerrymandering/; see also Skocpol, supra note 4, at 1492 (“Even when excluding prisoners suffices to abate manipulation of community voice and skewing of policy preferences, prisoners go uncounted and thus remain dehumanized.”).

317. See Skocpol, supra note 4, at 1492; see also Sanya Mansoor & Madeleine Carlisle, When Your Body Counts But Your Vote Does Not: How Prison Gerrymandering Distorts Political Representation, TIME (July 1, 2021, 3:19 PM), https://time.com/6077245/prison-gerrymandering-political-representation/ (“[That] sounds a little scary to people,” says Jackson-Gleich. “But because those people in those prisons have no constituent relationship with those elected officials, the best thing for them to do is just to take the prison population out and redistrict among the people who really are constituents.”).

318. See supra text accompanying notes 309–317 (analyzing the case of Calvin v. Jefferson Cnty Bd. of Comm’rs, 172 F. Supp. 3d 1292 (N.D. Fla. 2016), which found prison gerrymandering
equality has been made in a federal district court in northern Florida. In 2016, *Calvin v. Jefferson City Board of Commissioners* arose out of Jefferson County, a rural community located outside of Tallahassee, Florida. Jefferson County is home to Jefferson Correctional Institute (JCI), “which housed 1157 inmates on the day of the 2010 Census.” However, only nine of those prisoners were convicted in Jefferson County. Relying on the Census Bureau figures for redistricting, the County Board of Commissioners included the total population of JCI in “one of their five roughly 3,000-person legislative districts.” The local ACLU and Florida Justice Institute sued on behalf of citizens in other districts under an equal protection claim. The suit alleged the county’s District 3 was over thirty percent prisoners, and the “overwhelming majority” of prisoners were (1) not residents of the county, (2) lacked meaningful ties to the community, (3) could not vote due to felony convictions, and (4) were inside the county involuntarily. Plaintiffs grounded their equal protection claim in the fact that the votes in District 3 were inflated by the prison population, and thus, diluted votes from other districts—violating *Reynolds*’ “one person, one vote” principle.

319. See infra text accompanying notes 311–317.
321. See Skocpol, supra note 4, at 1498–99 (“Jefferson County is quintessentially rural and quintessentially southern. Spanning the Florida panhandle from the Georgia border to the Gulf Coast just east of Tallahassee, it comprises just over 13,000 residents. It is a place with ‘plenty of elbow room’: a landscape of ‘rolling hills and stately oaks draped in wispy Spanish moss,’ ‘majestic plantations,’ and a patchwork of ‘horse farms, large private hunting preserves, and large-acreage nursery, beef, dairy and crop farms.’ Its county seat, Monticello, is an up-and-coming ‘bedroom community’ of Tallahassee. The county’s sales pitch to potential new residents—particularly ‘retirees and others weary of the crowded, crime ridden population centers’—focuses on its ‘[l]ow taxes, reasonable land prices[,] and . . . low crime rate.’”).
322. Id. at 1499.
323. *Calvin*, 172 F. Supp. 3d at 1296 (“The rest were convicted elsewhere in Florida and sent to JCI; a prisoner in the custody of the Florida Department of Corrections (‘DOC’) has no say where he will serve his sentence”).
324. See Skocpol, supra note 4, at 1498–99.
325. See id.
326. See id.
327. Id. at 1498–99; see also *Reynolds v. Sims*, 377 U.S. 533, 562–63 (establishing the principle of “one person, one vote”); see also John Hejduk & Peter Wagner, *Importing Constituents: Prisoners and Political Clout in Wisconsin*, PRISON POL’Y INITIATIVE (Mar. 2008), https://www.prisonersofthecensus.org/wisconsin/one-person-one-vote.html (“The Court struck down an apportionment scheme for the Alabama state legislature that was based on counties and not population. In 1960 Alabama, Lowndes County, with 15,417 people, had the same number of state senators as Jefferson...
Refining the core question of *Calvin*, Michael Skocpol astutely asked: “Is it always constitutionally permissible for the county to rely on unadjusted total population as reported by the census? Or could one person, one vote actually compel it to exclude the JCI prisoners?”328 The presiding federal judge over *Calvin*, Judge Mark Walker of the Northern District of Florida, answered this question with an informed, yet nuanced approach.329 His well-researched, eighty-six-page opinion walked through a thorough analysis of constitutional law, the evolving precedent of “one person, one vote,” and what democratic representation looks like in actuality.330 Echoing the majority opinion in *Mahan*, Judge Walker concluded his opinion by stating that “blind reliance on census data can lead to unconstitutional results.”331 Jefferson County was sent back to redraw the districts according to a “representational nexus” test that Judge Walker created: “For Plaintiffs to prevail in this case, they have to show that the JCI inmates comprise a (1) large number of (2) nonvoters who (3) lack a meaningful representational nexus with the Boards, and that they’re (4) packed into a small subset of legislative districts.”332 Judge Walker held that the prison gerrymandering scheme violated the Equal Protection Clause and was unconstitutional because “tre[at[ing] the inmates the same as actual
constituents makes no sense under any theory of one person, one vote, and indeed under any theory of representative democracy."

Judge Walker’s decision has vast implications for the future of prison malapportionment claims. Although the First Circuit declined to follow the framework set forth in Calvin, other federal district courts are not precluded from applying Judge Walker’s rationale and concluding that prison gerrymandering is unconstitutional. Though only a district court opinion, the geographic proximity and the situational similarity of Calvin may entice federal district courts in the Fifth Circuit, as it did for Rhode Island’s district court, to find Calvin more persuasive than the First Circuit did in Davidson.

IV. CONCLUSION

In Colegrove v. Green, a malapportionment case, Justice Hugo Black dissented: “No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.”

The promise of representational equality essentially rings hollow when confronted with prison gerrymandering. A representative government is at the heart of

333. Id. at 1326. Judge Walker continued, stating, “Furthermore, such treatment greatly dilutes the voting and representational strength of denizens in other districts. Jefferson County’s districting scheme for its Board of County Commissioners and School Board therefore violates the Equal Protection Clause.” Id.
334. Id. at 1500.
335. Id.
336. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 151–52 (D.R.I. 2016), rev’d sub nom. Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016) (finding Calvin persuasive by concluding “[i]ke the inmates in at the Jefferson County prison, the ACI’s inmates lack a ‘representational nexus’ with the Cranston City Council and School Committee, as demonstrated by the facts set forth above”). In 2021, the Virginia Supreme Court rejected a petition filled by Virginia State Senator T. Travis Hackworth, arguing that “new redistricting laws in Virginia violate the state constitution” because “counting prisoners at their last known address (as opposed to the prison in which they are incarcerated) will dilute the voting power of Republicans in rural Virginia.” Virginia Supreme Court Rejects Case Seeking to Reinstate Prison Gerrymandering, DEMOCRACY DOCKET (Sept. 22, 2021), https://www.democracydocket.com/alerts/virginia-supreme-court-rejects-case-seeking-to-reinstate-prison-gerrymandering/.
337. 328 U.S. at 569.
338. See Mansoor & Carlisle, supra note 317 (“In a 2020 report, [Prison Policy Initiative] pointed out that the 2010 census counted more than 2 million people in the wrong place as a result of the practice.”).
democracy. Can there be an authentic representative democracy if there is no equal representation? Can the government truly be fair if the interests of some voters hold more weight than others to influence the decisions of their representatives? How can America continue to claim democracy when the basic functions of a representative government fail to do their job adequately? Prisoners deserve the chance to be represented by their elected officials; they deserve the chance to be recognized as people. Elected officials represent all the people in their districts, even the ones who cannot hold them accountable in office through the democratic process.

Abigail Falk*

340. See Chapter 14: Establishing Equality in Voting and Representation, supra note 57 (highlighting the importance of a representative democracy).
341. Id.
342. Id.
343. Id.
344. See Felton, supra note 10.

* J.D. 2023, Pepperdine Caruso School of Law; B.A. 2020, Lipscomb University. I would like to thank my supportive family for always being there for me. I am indebted to Maribeth Beyer and Gracie Koonce for their encouragement during the writing and editing process of this Comment. Thank you, Joe Castro, for your instructive feedback and guidance. Thank you, Professor Nancy Hunt, for teaching me how to become a better writer. Thank you, Pepperdine Law Review editors of Volume XLIX and Volume L, for your dedicated work and thoughtful critiques. Lastly, thank you, Roberto Clemente Orozco, for your consistent love and support.
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