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

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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*¹

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.² 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.”³ 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.⁴

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.⁵ 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.⁶ 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).

3. Faith Stachulski, Note, *Prison Gerrymandering: Locking Up Elections and Diluting Representational Equality*, 2019 U. ILL. L. REV. 401, 401 (2019).

4. See Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1484 (2017).

5. See *id.*

6. See *id.*

equitable political representation.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.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.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.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.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.¹² Many

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.”).

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).

9. *See id.* at 1482.

10. Stachulski, *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, *As Redistricting Begins, States Tackle 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-9c36751cf799_story.html?nid=top_pb_signin&arcId=SF7ZM4AWPII6ZLU2TQ3HKHHXTE&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.”).

11. 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.”).

12. *See* Ben Peck, *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.¹³ However, many states across the South have been slow to implement this change.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.¹⁵

Part II discusses the historical implications of the Three-Fifths Compromise and the evolution of the right to vote through Supreme Court precedent.¹⁶ Partisan gerrymandering is discussed at length, merging into a breakdown of prison gerrymandering and its implications.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.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.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.²⁰ This Comment argues that the solution lies with an

formulas, or assign them to some other locale.”).

13. *See generally* The Editorial Board, *You've Heard About Gerrymandering. What Happens When It Involves Prisons?*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html> (discussing the various states where prison gerrymandering is occurring, including Rhode Island, Wisconsin, Connecticut, New York, Florida, California, Virginia).

14. *See generally* Robert P. Alvarez, *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.”).

15. *See infra* Section III.D (proposing a strategy to arrive at a circuit split in the Fifth Circuit).

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).

17. *See infra* Section II.C (analyzing the history of gerrymandering, its origin, and how the Supreme Court has handled partisan gerrymandering issues).

18. *See infra* Sections II.D–H (highlighting the various facets that have an effect on prison gerrymandering).

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).

20. *See infra* Section III.B (discussing the legislative actions that have been taken by the Northern

impartial court, but difficulty arises in achieving justice through the judiciary.²¹ A strategy is proposed for how to implement nationwide change on the prison gerrymandering front: forcing a circuit split.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.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.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.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.²⁶ Although the Fourteenth Amendment nullified the Three-

States).

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

22. *See infra* Section III.D (initially proposing a circuit split).

23. *See infra* Part IV (concluding the article by reiterating the harms that prison gerrymandering creates).

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.”).

25. *See* John C. Drake, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL’Y 237, 237 (2011).

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 Andréa L. Maddan, *Enslavement to Imprisonment: How the Usual Residence Rule Resurveys 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.’”).

28. Drake, *supra* note 25, at 238.

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.”).

31. *Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292, 1299 (N.D. Fla. 2016).

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

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-Sixth⁴⁰—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

had resided in the State two years or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State or freemen being inhabitants of any one county in the State six months immediately preceding the day of election.").

35. See *id.* at 178 (denying women the right to vote); *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1875) (holding that the Fifteenth Amendment granted a right of "exemption from discrimination in the exercise of [the elective franchise] on account of race," but still refusing to grant black Americans a right to vote).

36. *Calvin*, 172 F. Supp. 3d at 1300.

37. U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

38. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.")

39. U.S. CONST. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

40. U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

41. See Stachulski, *supra* note 3, at 412 (discussing how various amendments strengthen the right to vote).

42. *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1300 (N.D. Fla. 2016).

43. 273 U.S. 536, 541 (1927) ("The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that

to apply the same equal protection analysis to “claims of vote *dilution* resulting from malapportioned legislative districts.”⁴⁴ When vote dilution occurs, minority voters’ ability to elect the candidate of their choice as a whole is “reduce[d] or nullif[ied].”⁴⁵ In *Colegrove v. Green*, the Court held that vote-dilution claims were “political,” and therefore, unfit for judicial determination.⁴⁶ 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.⁴⁷

In 1962, twenty years after the *Colegrove* decision, the Supreme Court readdressed the issue of vote-dilution claims in *Baker v. Carr*.⁴⁸ In *Baker*, Baker complained that Tennessee had not redistricted since 1901.⁴⁹ 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.⁵⁰ The Court held that apportionment, the act of dividing seats for the House of Representatives among the fifty states,⁵¹ is not precluded by the political question doctrine.⁵² 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

color cannot be made the basis of a statutory classification affecting the right set up in this case.”).

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 reapportionment 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.”).

48. 369 U.S. 186 (1962).

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.”).

51. *See SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 2* (2021).

52. *Baker*, 369 U.S. 186, 191 (1962).

claims due to the Court's focus on reformulating the political question doctrine.⁵³

Two years later, in *Reynolds v. Sims*, the Court applied an equal protection analysis to vote-dilution claims.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."⁵⁵ *Reynolds v. Sims* fully established the concept of "one person, one vote," evolving from *Baker v. Carr*, and radically held that the Constitution "forbids weighing citizens' votes differently, by any method, merely because of where they reside."⁵⁶ These cases established the idea of representational equity in America; all votes should be given equal weight.⁵⁷ However, a pattern of discrimination that continues to upset this notion, by giving some votes more weight than others, is "prison gerrymandering."⁵⁸

C. Gerrymandering and its Generations of District Manipulation

Prison gerrymandering finds its name from the decades-old redistricting tradition known as "gerrymandering."⁵⁹ Under *Reynolds v. Sims*, states must continuously redraw their electoral districts to properly reflect their population, and these districts must be generally equal to each other.⁶⁰ This process is known as "redistricting."⁶¹ When redistricting, states often rely on the

53. *Id.*

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 apportionment not being based on population).

55. *Id.* at 577.

56. Stachulski, *supra* note 3, at 416.

57. See *Chapter 14: Establishing Equality in Voting and Representation*, ANNENBERG PUB. POL'Y CTR. (May 4, 2017), <https://www.annenbergclassroom.org/resource/the-pursuit-of-justice/pursuit-justice-chapter-14-establishing-equality-voting-representation/> (analyzing various cases dealing with representational equality, including *Baker v. Carr* and *Reynolds v. Sims*).

58. See generally *supra* Section II.A (defining the concept of prison gerrymandering).

59. See *infra* Section II.C (describing gerrymandering and the role it plays on the impact of prison gerrymandering).

60. 377 U.S. at 577.

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 process 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 equitably allocate representation in Congress and state legislatures. When politicians use redistricting to

information provided by the U.S. Census Bureau to match population.⁶² 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."⁶³

The term "gerrymandering" comes from Elbridge Gerry, a Founding Father who signed a bill "creating [a] misshapen Massachusetts district."⁶⁴ 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.⁶⁵ 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.⁶⁶ 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."⁶⁷ Leaders of political parties will draw lines around areas that did not vote for their party

manipulate the outcome of elections, however, it's called gerrymandering—a practice that undermines democracy and stifles the voice of voters.”).

62. See Rebecca Harrison Stevens et al., *Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement*, 12 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 195, 198 (2019).

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.”).

64. Erick Trickey, *Where Did the Term “Gerrymander” Come From?*, SMITHSONIAN MAG. (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/>.

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.”).

67. Note, *Fourteenth Amendment—Equal Protection Clause—Racial Gerrymandering—Cooper v. Harris*, 131 HARV. L. REV. 303, 303 (2017) (describing the process of gerrymandering).

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.⁶⁸ Gerrymandering leads to the drastically misshapen districts that we have today.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.⁷⁰

D. 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.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.⁷² This practice inflates the voting power of districts with large correctional facilities by using the prison population to gain more representatives.⁷³ In turn, the residents of these districts are given more voting power than their neighboring districts because their vote holds

68. See Christopher Ingraham, *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).

69. See Ariel Zych, *Drawing Congressional Districts is Like Sudoku*, SCI. FRIDAY (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).

70. See Annika Kim Constantino, *Gerrymandering Could Limit Minority Voters' Power Even Though Census Shows Population Gains*, CNBC (Aug. 13, 2021, 8:21 PM), <https://www.cnbc.com/2021/08/13/gerrymandering-could-limit-minority-voters-power-even-after-census-gains.html> (“Single-party control of map drawing in a state is certainly the biggest motivator and predictor of gerrymandering.”).

71. See L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10324, 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. 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. *Id.* at 2488. In 1993, in *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).

72. See Skocpol, *supra* note 4, at 1484.

73. See *id.*

more weight, as a vast percentage of their district's population cannot vote in the first place.⁷⁴

Prison gerrymandering upsets the notions of representational equality set forth in Supreme Court precedent.⁷⁵ *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.”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.⁷⁷ How does a seemingly unconstitutional practice like prison gerrymandering continue to be used, often unchallenged, to this day?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.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.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.⁸¹ In fact, prisoners have been counted in the facilities rather than in their homes since the 1850 Census.⁸² Unfortunately,

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-9c36751cf799_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.”).

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

76. Stachulski, *supra* note 3, at 416.

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 . . .”).

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).

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.”).

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

81. See Stachulski, *supra* note 3, at 404.

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-fill-voting-districts>.

84. *Id.*

85. See Wagner, *supra* note 80, at 1242.

86. John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/#:~:text=The%20World%20Prison%20Brief's%20data,564%20inmates%20per%20100%2C000%20people> (highlighting the nearly-thirty-year low incarceration rate).

87. *Criminal Justice Facts*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Oct. 30, 2021).

88. Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 *FORDHAM URB. L.J.* 323, 327 (2018); see also Samantha Osaki, et al., *New Census Bureau Data Offers a Chance to Dismantle Prison Gerrymandering*, ACLU (June 21, 2021), <https://www.aclu.org/news/prisoners-rights/new-census-bureau-data-offers-a-chance-to-dismantle-prison-gerrymandering/> (“In the 1980s and 1990s, with the rise of the ‘war on drugs’ and policies that criminalized poverty, prison populations grew by 134 percent in a single decade. In 30 years, that population has grown by 500 percent.”).

89. See Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> (“[T]he 1986 Anti-Drug Abuse Act established

powder cocaine are the essentially same drug but have vastly different minimum sentencing requirements.⁹⁰ Crack cocaine is cheaper to produce, widely available, and generally found more often in low-income areas.⁹¹ Historically, crack cocaine was the only drug that carried a five-year mandatory *minimum* sentence⁹² and “mandatory prison sentence for first offense possession.”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.”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.”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.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.⁹⁷ A study by the Sentencing Project, a research and

mandatory minimum sentencing schemes, including the infamous 100-to-1 ratio between crack and powder cocaine sentences.”).

90. *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable*, THE SENT’G PROJECT, <https://www.prisonpolicy.org/scans/sp/1003.pdf> (last visited Feb. 6, 2022) (“The result of these laws is that crack users and dealers receive much harsher penalties than users and dealers of powder cocaine.”).

91. *Id.* (“Crack is inexpensive and usually sold in small quantities, so it is often sold in open-air markets which are especially prone to violence.”).

92. See Nina Totenberg, *Race, Drugs and Sentencing at the Supreme Court*, NPR (June 14, 2021, 3:36 PM), <https://www.npr.org/2021/06/14/1006264385/race-drugs-and-sentencing-at-the-supreme-court> (“Indeed, the ratio was 100-to-1, so that a five-year mandatory minimum penalty, for instance, was triggered by possession of 5 grams of crack, whereas the same penalty was triggered by 500 grams of powder cocaine.”); see also LISA N. SACCO & KRISTIN FINKLEA, CONG. RSCH. SERV., IF11965, COCAINE: CRACK AND POWDER SENTENCING DISPARITIES (2021) (highlighting that the Fair Sentencing Act of 2010 eradicated the mandatory five-year minimum sentence for simple possession).

93. *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable*, *supra* note 90.

94. See *Powder vs. Crack: NYU Study Identifies Arrest Risk Disparity for Cocaine Use*, N.Y. UNIV. (Feb. 19, 2015), <https://www.nyu.edu/about/news-publications/news/2015/february/-powder-vs-crack-nyu-study-identifies-arrest-risk-disparity-for-cocaine-use.html> (analyzing the disparity between powder and crack cocaine).

95. *Id.*

96. *Crack 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.”).

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).

102. See Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, THE SENT’G PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

103. Skocpol, *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.”¹⁰⁶ This principle mirrors the social contract theory that was first fully defined and defended by Thomas Hobbes.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.¹⁰⁸ Persons consent to relinquish some autonomy to their government in exchange for the government to protect their rights and maintain social order.¹⁰⁹ This philosophical principle has been at the center of “moral and political theory throughout the history of the modern West.”¹¹⁰

However, recent philosophers criticize the social contract theory as being an “incomplete picture” of society.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.¹¹² It further argues that the social contract was intended to apply to a specific person: a white, European man.¹¹³ Mills claims that viewing racism as an anomaly or an unintended result of

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.”).

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

108. See Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/soc-cont/> (last visited Mar. 19, 2022).

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.”).

110. *Id.*

111. *Id.*

112. CHARLES MILLS, *THE RACIAL CONTRACT* 3 (1st ed. 1997); see also *Overview: The Racial Contract*, CORNELL PRESS, <https://cornellpress.manifoldapp.org/read/the-racial-contract/section/4540d38b-0885-44d7-a13d-e1867c5a8fb5> (last visited Mar. 20, 2022).

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.*

116. *See* Friend, *supra* note 108 (describing Mills’s perspective on the racial contract).

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).

122. *Trop v. Dulles*, 356 U.S. 86, 92 (1958) (ruling that revoking citizenship is unconstitutional as a punishment for a crime).

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

123. See Corey Brettschneider, *Why Prisoners Deserve the Right to Vote*, POLITICO (June 21, 2016), <https://www.politico.com/magazine/story/2016/06/prisoners-convicts-felons-inmates-right-to-vote-enfranchise-criminal-justice-voting-rights-213979/>.

124. See *supra* text accompanying notes 128–137.

125. See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> (“When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000.”).

126. Stachulski, *supra* note 3, at 404–05.

127. Alaa Chaker, *Prison Malapportionment: Forging a New Path for State Courts*, 130 YALE L.J. 1250, 1253 (2021).

128. *Id.*

129. *Id.*

130. See Stachulski, *supra* note 3, at 405.

131. See Thomas Meagher & Christie Thompson, *So You Think a New Prison Will Save Your Town?*, THE MARSHALL PROJECT (June 14, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/06/14/so-you-think-a-new-prison-will-save-your-town> (“Rogers and members of the local planning commission have said staffing the facility could create up to 300 jobs, not to mention the many more needed to construct it. The median household income in Letcher County is less than \$32,000 and unemployment in 2014 was about twice the national rate. When Congress allocated \$444 million to build a new prison, the commission members called it ‘a great Christmas gift to Letcher County’

constructed prisons experienced increases in median home value and median income, these benefits were short-lived and unsustainable.¹³² Further, the prisoners themselves often suffer from being placed in rural prisons.¹³³ Prisoners need access to large, main roads to ensure access to courthouses and adequate services from their attorneys.¹³⁴ People confined to rural prisons often lack “economic, social, or civic ties to the communities just beyond the prison walls”¹³⁵ because they are, on average, being held one hundred miles away from their home community.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.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.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.”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.¹⁴⁰ Further, their permanent communities lose governmental benefits and voting power because prisoners are not counted in the

and ‘almost more than we could ask for.’”).

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/>.

133. See Matthew D. Vanden Bosch, *Rural Prison Sitting: Problems and Promises*, 4 MID-S. J. OF CRIM. JUST. 1, 4 (2020), <https://mds.marshall.edu/cgi/viewcontent.cgi?article=1003&context=msjcj>.

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).

135. See Ebenstein, *supra* note 88, at 339.

136. See Nancy G. La Vigne, *The Cost of Keeping Prisoners Hundreds of Miles from Home*, URB. INST. (Feb. 3, 2014), <https://www.urban.org/urban-wire/cost-keeping-prisoners-hundreds-miles-home>.

137. See Vanden Bosch, *supra* note 133, at 3.

138. See Osaki, *supra* note 88.

139. See Danielle Kaebler, *Time Served in State Prison, 2016*, U.S. DEPT. OF JUST. 1 (Nov. 2018) <https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf>.

140. See Osaki, *supra* note 88.

communities they will return to.¹⁴¹ Counting prisoners in their home allows for a “more just distribution of public funds”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.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.”¹⁴⁴ It not only affects people of color inside prisons but also outside prisons after completing their sentence through felon disenfranchisement.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.¹⁴⁶ Only two states, Maine and Vermont, allow currently

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”).

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)).

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.”).

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).

145. See *infra* Section II.H (discussing the various implications of felon disenfranchisement).

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

Felony Conviction, THE SENT’G PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> (“As of 2020, an estimated 5.17 million people are disenfranchised due to a felony conviction, a figure that has declined by almost 15 percent since 2016, as states enacted new policies to curtail this practice. There were an estimated 1.17 million people disenfranchised in 1976, 3.34 million in 1996, 5.85 million in 2010, and 6.11 million in 2016.”).

147. See Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison*, NBC NEWS (Feb. 26, 2018, 1:43 A.M.), <https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406>.

148. Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1073 (2019).

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://sos-stage.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.¹⁵² 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.¹⁵³

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.”¹⁵⁴ To avoid the logistical difficulties of counting transient people, the U.S. Census Bureau established the “usual residence rule” for counting citizens.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ The usual residence rule has troubling consequences, as the data gathered becomes the “baseline for apportioning democratic representation.”¹⁵⁸

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.¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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)).

160. Chaker, *supra* note 127, at 1258; see also *Maryland Enacts Law to Count Incarcerated People at Their Home Addresses*, PRISON POL’Y INITIATIVE: PRISON GERRYMANDERING PROJECT (Apr. 13, 2010), https://www.prisonersofthecensus.org/news/2010/04/13/maryland_law/.

161. See Peck, *supra* note 12.

162. Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU (Mar. 1, 2010), <https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html>.

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.”¹⁶⁴ Therefore, states have taken a variety of approaches to counting prisoners.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷ However, almost forty states still use the practice of prison gerrymandering in one way or another.¹⁶⁸ Southern states have been slow to implement change.¹⁶⁹ 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.¹⁷⁰ Notably, Texas holds great political importance in the South due to its recent increase in population.¹⁷¹

A trend arising from the South is to ignore the implications of prison gerrymandering and continue to count prisoners in their place of incarceration.¹⁷² Professor Remster at Villanova University, as well as other lawyers and researchers, have likened the practice of prison gerrymandering to the Three-

164. See Peck, *supra* note 12.

165. See *infra* Section III.A (discussing the various state approaches to counting prisoners).

166. See Wang & Devarajan, *supra* note 83 (discussing prison gerrymandering in Wisconsin, Arizona, and Pennsylvania).

167. See *infra* Section III.B (highlighting the vast steps the North has made via legislative means).

168. See Felton, *supra* note 10.

169. See *infra* text accompanying notes 170–171.

170. See generally Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> (ranking states with the highest number of incarcerated individuals).

171. See David Grasso & Hannah Buczek, *Census Confirms Texas and Florida Are America’s Future*, THE HILL (May 1, 2021, 9:00 A.M.), <https://thehill.com/opinion/finance/551216-census-confirms-texas-and-florida-are-americas-future/> (discussing Texas and Florida’s population increase due to low taxes, low cost of living, various corporations such as Tesla, and their large blue-collar population).

172. See Paschal, *supra* note 152.

Fifths Compromise.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.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.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.¹⁷⁶ In 2010 and 2011, Maryland and New York became the first states to enact legislation to end of the practice of prison gerrymandering by counting inmates in their place of last residence.¹⁷⁷ As of 2020, Nevada, Washington, California, and Delaware followed Maryland and New York's lead by passing similar legislation.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."¹⁷⁹ This act makes Connecticut the eleventh state to eradicate prison gerrymandering via legislative means by opting to count prisoners in their permanent communities.¹⁸⁰

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).

174. *Id.*

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).

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

177. MD. CODE ANN., STATE GOV'T § 2-2A-01(2) (West 2018); N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2019); see also Erica L. Wood, *Implementing Reform: How Maryland & New York Ended Prison Gerrymandering*, DEMOS (Aug. 15, 2014), <https://www.demos.org/policy-briefs/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering>.

178. See Wang & Devarajan, *supra* note 83.

179. See *Connecticut Gov. Ned Lamont Signs Bill Ending Prison Gerrymandering*, PRISON POL'Y INITIATIVE (May 27, 2021), <https://www.prisonersofthecensus.org/news/2021/05/27/connecticut-victory/>.

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.¹⁸¹ About twelve states have outlawed prison gerrymandering.¹⁸² The vast majority of these states are northern,¹⁸³ 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.”¹⁸⁴ The only two southern states in this list are Tennessee and Virginia.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

Some counties around the South have attempted to avoid prison gerrymandering, such as counties in Texas, Louisiana, and Florida.¹⁸⁸ However,

181. See Andrea Fenster, *How Many States Have Ended Prison Gerrymandering? About a Dozen*!*, PRISON POL'Y INITIATIVE (Oct. 26, 2021), https://www.prisonersofthecensus.org/news/2021/10/26/state_count/ (explaining that the exact number of states to have eradicated prison gerrymandering is difficult to quantify because “[p]rison gerrymandering can occur at different levels of government, be solved by different bodies of government, and be eliminated or mitigated through different methods”).

182. *Id.*

183. See *The North*, BRITANNICA, <https://www.britannica.com/place/the-North> (defining the North as Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Wisconsin).

184. Skocpol, *supra* note 4, at 1496.

185. See *The South*, BRITANNICA, <https://www.britannica.com/place/the-South-region> (defining the South as the federal government does by including Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

186. See Fenster, *supra* note 181.

187. See Paschal, *supra* note 152.

188. See Peter Wagner, et al., *Fixing Prison-Based Gerrymandering After the 2010 Census: A 50*

no statewide action has been taken.¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ The majority of southern states are Republican and “have little interest in adopting such laws,” as prison gerrymandering tends to fall along party lines.¹⁹² The partisan factor of prison gerrymandering is seemingly intuitive since prison gerrymandering has historically garnered more support with left-leaning politicians,¹⁹³ who tend to be more oriented toward criminal justice reforms.¹⁹⁴ 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.¹⁹⁵ Although politics motivate many social

State Guide, PRISON POL’Y INITIATIVE (Mar. 2010), <https://www.prisonersofthecensus.org/50states/> (using a map to analyze all fifty states’ approaches to dismantling prison gerrymandering).

189. *Id.*

190. See Paschal, *supra* note 152 (“Two Southern states, Tennessee and Virginia, have passed laws explicitly allowing counties and cities to discount prison populations when drawing district lines; these laws were prompted by the need to avoid creating state legislative or local city council districts that would be composed entirely of a prison and no eligible voters.”).

191. See *supra* Section III.C.1 (highlighting the minimal success of the few attempts the South has made to eradicate prison gerrymandering).

192. Skocpol, *supra* note 4, at 1496 (“[I]n New York, for instance, the reform bill passed without ‘a single Republican vote.’”).

193. See generally H.R. 6550, 117th Cong. (2022) (proposing the End Prison Gerrymandering Act, which is cosponsored by seventeen Democrats, all from northern states, except Georgia Rep. Johnson).

194. *But cf.* Shaila Dewan, *Here’s One Issue That Could Actually Break the Partisan Gridlock*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2020/11/24/us/criminal-justice-reform-republicans-democrats.html> (“But outside of bitter political contests, criminal justice reform offers something for just about everyone: social justice crusaders who point to yawning racial disparities, fiscal conservatives who decry the extravagant cost of incarceration, libertarians who think the government has criminalized too many aspects of life and Christian groups who see virtue in mercy and redemption.”).

195. See Tamir Kalifa, *Democrats, Voting Rights Are Not the Problem*, N.Y. TIMES (Jan. 3, 2022), <https://www.nytimes.com/2022/01/03/opinion/voting-rights-democrats.html> (“Democrats want fewer constraints and more time for more people to vote in more ways. They say that broader participation is essential to a stronger democracy and that restrictions on some modes of voting amount to suppression. They also assume that higher turnout will help the left win more elections, and some of the

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-372be8d82298_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.²⁰² 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.”²⁰³ Further, courts have subject matter jurisdiction to hear such issues.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

Prison gerrymandering has deep roots in the South, yet this practice is still ongoing across the entire country, requiring a national solution.²⁰⁷ Though Congress has the means to remedy this injustice, the judicial branch may be the proper course of action.²⁰⁸ Just as Southern state legislative districts have an incentive to continue prison gerrymandering as a means of controlling political influence, so too does Congress.²⁰⁹ Resolution by an impartial court is paramount for this reason.²¹⁰ In justifying the Court’s intervention of a state’s

202. 138 S. Ct. 2305, 2324 (2018) (“Redistricting ‘is primarily the duty and responsibility of the State,’ and ‘[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.’”) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)).

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).

207. *See generally* Editorial Board, *You’ve Heard About Gerrymandering. What Happens When It Involves Prisons?*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html> (discussing the various states currently engaging in prison gerrymandering, including Rhode Island, Wisconsin, Connecticut, New York, Florida, California, Virginia).

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 Nikolas 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,and%20interpreter%20of%20the%20Constitution> (“The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.”).

215. *About the Supreme Court*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> (last visited Feb. 8, 2022).

216. *Id.*

217. See *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Feb. 8, 2022).

Supreme Court is a circuit split among the U.S. Courts of Appeals.²¹⁸ 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.²¹⁹

In 2016, the First Circuit held that prison gerrymandering did not violate the Equal Protection Clause.²²⁰ 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.²²¹ 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.²²²

1. The Abysmal Decision of *Davidson v. City of Cranston*: The First Circuit's Misinterpretation of Representational Equality

The First Circuit dealt a blow to representational equality by giving the practice of prison gerrymandering its stamp of approval.²²³ 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

218. See John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, U.S.L.W. 393, 394 (Sept. 7, 2011), <https://www.sixthcircuitappellateblog.com/wp-content/uploads/sites/11/how%20appealing.pdf> (finding that during the Supreme Court's merit decisions between 2005 and 2010, 37.8% of the cases presented circuit splits).

219. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2485, 2506–07 (2019) (holding that partisan gerrymandering was beyond the reach of the federal courts because it addresses a political question).

220. *Davidson v. City of Cranston*, 837 F.3d 135, 146 (1st Cir. 2016) ("The Constitution does not require Cranston to exclude the ACI inmates from its apportionment process, and it gives the federal courts no power to interfere with Cranston's decision to include them.").

221. See *Supreme Court Procedures*, *supra* note 217 ("This is a request that the Supreme Court order a lower court to send up the record of the case for review. The Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value. . . . Typically, the Court hears cases that have been decided in either an appropriate U.S. Court of Appeals or the highest Court in a given state (if the state court decided a Constitutional issue).").

222. See *infra* Section III.D.1 (breaking down the First Circuit's decision regarding a prison gerrymandering case).

223. *Davidson*, 837 F.3d at 146 (reversing and remanding the district court's opinion, which held that prison gerrymandering was a violation of the Equal Protection Clause).

the voting booth.²²⁴

In *Davidson*, Rhode Island's City of Cranston was divided into six wards, which elect Cranston's City Council and School Committee.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.²²⁶ Because each ward included around 13,500 residents, the prison population comprised close to 25% of Ward Six's population.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.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.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.²³⁰

The First Circuit disagreed and reversed the district court's decision by using the "methodology and logic" of *Evenwel v. Abbott*.²³¹ In *Evenwel*, the Supreme Court unanimously approved Texas's use of a broad, "total

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.").

225. *Davidson*, 837 F.3d at 137.

226. *Id.* at 138.

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, ACL inmates comprised approximately twenty-five percent of the population of Ward Six.").

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.").

229. *Davidson*, 837 F.3d at 139.

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).

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)).

population” based approach to redistricting, as opposed to eligible-voter-only redistricting schemes.²³² 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.”²³³ Therefore, the First Circuit concluded that the “natural reading of *Evenwel*” is that total-population apportionment is the “constitutional default.”²³⁴ 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.²³⁵

The Supreme Court’s opinion in *Evenwel* was focused on “equal representation for *equal numbers of people*”²³⁶ and did not address how to count the unique population of prisoners.²³⁷ 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.²³⁸ So-called representatives should represent all the people in their districts, not just the constituents who can vote.²³⁹ Because prisoners are included in the total population

232. *Evenwel v. Abbott*, 578 U.S. 54, 74–75 (2016).

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.*

235. See *Davidson v. City of Cranston: First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, *supra* note 227, at 2238.

236. *Evenwel*, 578 U.S. at 68 (“[There] 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.²⁴⁰ 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.”²⁴¹

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

The First Circuit creates a complex problem for other courts.²⁴² 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?²⁴³ 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.²⁴⁴ 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.”²⁴⁵ This holding should persuade other courts to divert from the First Circuit’s approach.²⁴⁶ The Supreme Court has established the idea of representational equity in America; all people’s votes should be given the same value, including prisoners.²⁴⁷

Courts must correctly apply the Supreme Court’s *Evenwel* decision to emphasize representational equality.²⁴⁸ However, before addressing the merits

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.*

245. Stachulski, *supra* note 3, at 416; *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

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.²⁴⁹ Two southern states have risen to infamy with their prison gerrymandering practices: Texas, a state with some of the most political power,²⁵⁰ and Louisiana, the state with the highest number of incarcerated individuals.²⁵¹ Both Texas and Louisiana hold a lot of potential for a successful case at the federal courts.²⁵² 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.²⁵³ Prison gerrymandering influences each of the states' political power in an inequitable manner.²⁵⁴

a. *Texas*

As of 2018, an estimated 281,000 Texans were incarcerated, varying from state prisons to federal to local jails.²⁵⁵ On top of that, upwards of 475,000 people are still under criminal justice supervision,²⁵⁶ all without the ability to vote.²⁵⁷ The Prison Gerrymandering Project recorded that “[i]n two districts .

should look like).

249. See generally Brad W. Keller, *The Importance of Venue in Litigation*, NAT'L L. REV. (July 8, 2015), <https://www.natlawreview.com/article/importance-venue-litigation> (highlighting why choosing the right venue is paramount to the proper outcome).

250. See Adam McCann, *States with the Most & Least Powerful Voters*, WALLETHUB (Oct. 26, 2020), <https://wallethub.com/edu/how-much-is-your-vote-worth/7932> (using the electoral college to rank states in terms of voting power and placing both Florida and Texas within the top ten most powerful states).

251. See Widra & Herring, *supra* note 170 (“Louisiana once again has the highest incarceration rate in the U.S., unseating Oklahoma to return to its long-held position as ‘the world’s prison capital.’”).

252. See *infra* Sections III.B.1–3.

253. See *A Brief History*, U.S. CT. OF APPEALS FOR THE FIFTH CIR., <https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history> (last visited Feb. 8, 2022) (stating that the Fifth Circuit includes federal courts in Louisiana, Texas, and Mississippi).

254. See *infra* Sections III.D.1–3.

255. See Alexi Jones, *How Many Texas Residents are Locked Up and Where?*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/graphs/correctional_control2018/TX_incarceration_2018.html; see also Joaquin Gonzalez, et. al., *Prison Gerrymandering Report 2021*, TEX. CIV. RTS. PROJECT, https://txcivilrights.org/wp-content/uploads/2021/04/Prison_Gerrymandering_Report.pdf (last visited Jan. 10, 2022) (“Texas currently incarcerates approximately 112,000 people in state prisons.”).

256. See *Texas Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html> (last visited Jan. 10, 2022).

257. See *Voting Rights for People with a Felony Conviction*, NONPROFITVOTE (August 2021), <https://www.nonprofitvote.org/voting-in-your-state/voting-as-an-ex-offender/> (“Individuals convicted of a felony are ineligible to vote while in prison, on parole, or on probation. Voting rights are automatically restored upon completion of all supervised release. Ex-offenders should re-register to

... 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 overcounting 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/texas-population-political-power-are-growing-heres-why/>.

264. *Id.*

265. See Felton, *supra* note 10.

500%,²⁶⁶ with local populations at 64,024 detainees.²⁶⁷ Since the 1980s, the incarcerated population of prisons has increased by around 329%, with a population of 151,213 inmates.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.²⁶⁹

b. Louisiana

Louisiana holds the highest incarceration rate in the United States, incarcerating 683 per 100,000 people as of 2021.²⁷⁰ Following the 2010 Census, Allen Parish did not exclude incarcerated persons in the redrawing of its representational districts.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.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

266. See *Incarceration Trends in Texas*, VERA INST. OF JUST. (Dec. 2, 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf>.

267. *Id.*

268. *Id.*

269. See Paschal, *supra* note 152 (discussing the need for statewide change, rather than piecemeal approaches in Tennessee).

270. See *Prison Population by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/prison-population-by-state> (last visited Jan. 10, 2022); see also Widra & Herring, *supra* note 170 (noting that Louisiana retained the record for the “highest incarceration rate in the U.S.”).

271. See Paschal, *supra* note 152; see also Hilary Fenton, *Louisiana Local Governments’ Struggles with Prison-Based Gerrymandering Could Be Eased By State*, 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.”).

272. See Paschal, *supra* note 152; see also Fenton, *supra* note 271 (“In District 1 for example, one voter in that district has the same political power as three voters in other districts.”).

district that contained only two voters.”²⁷³

Louisiana’s high incarceration rate impacts redistricting, as it affects the way that parish lines are drawn as to include more than two people in a district.²⁷⁴ 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.²⁷⁵

3. The Path Forward

Both Texas and Louisiana offer great places to start litigation involving prison gerrymandering.²⁷⁶ 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).²⁷⁷ 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.²⁷⁸ The only thing to ensure is that a challenge arises in the right place.²⁷⁹

273. See *Fixing Prison-Based Gerrymandering After the 2010 Census: Louisiana*, PRISON POL’Y INITIATIVE (Mar. 2010), <https://www.prisonersofthecensus.org/50states/LA.html>.

274. See *supra* text accompanying notes 229–261.

275. See *Voting Rights After a Louisiana Felony Conviction*, LA. EXPUNGEMENT ASSISTANCE & ADVOC. CTR. (Sept. 2015), <http://www.leaac.com/faq-resources/voting-rights-after-a-louisiana-felony-conviction/>.

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.

279. Cf. *Federal or State Court: Subject Matter Jurisdiction*, FINDLAW (Jan. 18, 2017), <https://www.findlaw.com/litigation/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html> (discussing the issues that could arise if a case is filed in the wrong court).

a. *A Start in Federal Courts*

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.”).

284. See *NAACP v. Merrill*, 939 F.3d 470, 473 (2d Cir. 2019); *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016); *Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292, 1298 (N.D. Fla. 2016).

285. See *supra* text accompanying notes 274–277 (discussing challenges that arise in federal court).

286. See Fed. R. Civ. P. 56; see generally William Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, FED. JUD. CTR. (1991), <https://www.ojp.gov/pdffiles1/Digitization/134865NCJRS.pdf> (“Summary judgment under Rule 56 of the Federal Rules of Civil Procedure has been a source of controversy and confusion. Some have viewed it as a meretricious shortcut depriving litigants of their right to trial by jury, while others have seen it as a powerful docket-clearing device essential to overburdened courts. Disparities in judicial attitudes have contributed to widely differing interpretations and applications, resulting in much confusion over proper use of the summary judgment procedure.”).

statewide legislative body.”²⁸⁷ 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.”²⁸⁸

The requirement of a three-judge panel is crucial to the success of the case.²⁸⁹ 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.²⁹⁰ 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.”²⁹¹ Unfortunately, the Second Circuit could not decide the case on the merits and remanded the case back to a three-judge panel.²⁹²

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.²⁹³ Ultimately, federal courts are an appropriate starting ground for this case due to the ability to appeal to the U.S. Court of Appeals.²⁹⁴

b. Framing the Issue: Gerrymandering vs. Malapportionment

Chaker properly rephrases the issue of prison gerrymandering as “prison malapportionment.”²⁹⁵ Chaker argues that the term prison “gerrymandering”

287. 28 U.S.C. § 2284(a) (2018).

288. *NAACP*, 939 F.3d at 474 (quoting *Shapiro v. McManus*, 577 U.S. 39, 43 (2015)).

289. *Id.*

290. *Id.* at 478 (“We again emphasize that we do not take any position on the ultimate merits of the case and nothing in this opinion shall be construed to indicate otherwise.”).

291. *Id.* at 477.

292. *Id.* at 479 (“We REMAND the case to the district court. Because this case falls within § 2284(a) and Plaintiffs’ claim presents a substantial federal question, on remand the district court shall refer the matter to a three-judge court for further proceedings.”).

293. 28 U.S.C. § 1253 (2018).

294. *See Circuit Split*, CORNELL L., https://www.law.cornell.edu/wex/circuit_split (last visited Feb. 8, 2022) (explaining that a circuit split arises when there are conflicting holdings across federal U.S. Courts of Appeals).

295. Chaker, *supra* note 127, at 1255.

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.*

298. *See Reynolds v. Sims*, 377 U.S. 533, 558, 567–68, 567 n.43 (1964).

299. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2495–96 (2019).

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.³⁰⁴ The legal argument of vote-dilution claims finds support in Supreme Court precedent established in *Mahan v. Howell*.³⁰⁵ 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.³⁰⁶ However, only about half of the naval personnel actually lived within the Fifth District.³⁰⁷ 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.”³⁰⁸ Instead, the Court argued that naval personnel should have been counted where they “actually” resided, such as with their “wives and families.”³⁰⁹ 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.”³¹⁰

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.³¹¹ Even so, prison malapportionment claims can still ground their footing in *Mahan* and one-person, one-vote claims from *Reynolds*.³¹² 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

304. *See id.* at 1265 (“Thus far, the one-person, one-vote claim has been the basis of all three federal challenges to prison malapportionment.”).

305. *See id.* at 1263; *see also* *Mahan v. Howell*, 410 U.S. 315, 332 (1973).

306. *Mahan*, 410 U.S. at 330–31 (“It was undisputed that only about 8,100 of such personnel lived aboard vessels assigned to the census tract within the Fifth District. The court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk and Virginia Beach areas that, if true, indicated a malapportionment with respect to such personnel.”).

307. *Id.*

308. *Id.* at 331–32 (“We conclude that under the unusual, if not unique, circumstances in this case the District Court did not err in declining to accord conclusive weight to the legislative reliance on census figures.”).

309. *Id.* at 330 n.11.

310. *See* Chaker, *supra* note 127, at 1263.

311. *Id.* at 1264. *But see* *Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292, 1293 (N.D. Fla. 2016) (holding that “inmates lacked meaningful representational nexus with Boards, as required for scheme to violate ‘one person, one vote’ principle of Equal Protection Clause,” and thus, should be counted in their home communities where they are legal residents).

312. *See* Chaker, *supra* note 127, at 1264; *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

prisoners who are counted in their temporary living quarters.³¹³

Some scholars argue that prisoners should just be excluded completely from the redistricting count, but full exclusion of prisoners creates an entirely separate issue.³¹⁴ 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 *under*representation of urban ones.”³¹⁵ 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.³¹⁶ 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.³¹⁷

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.³¹⁸ Some progress in recognizing the importance of representational

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 remedy 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 Bacskai, *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.³¹⁹ In 2016, *Calvin v. Jefferson City Board of Commissioners*³²⁰ arose out of Jefferson County, a rural community located outside of Tallahassee, Florida.³²¹ Jefferson County is home to Jefferson Correctional Institute (JCI), “which housed 1157 inmates on the day of the 2010 Census.”³²² However, only nine of those prisoners were convicted in Jefferson County.³²³ 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.”³²⁴ The local ACLU and Florida Justice Institute sued on behalf of citizens in other districts under an equal protection claim.³²⁵ 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.³²⁶ 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.³²⁷

unconstitutional).

319. See *infra* text accompanying notes 311–317.

320. 172 F. Supp. 3d 1292 (N.D. Fla. 2016).

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,’ ‘[m]ajestic 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 communit[y]’ 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. *Id.*

327. See *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 “treat[ing] the inmates the same as actual

County, with 634,864 people, giving the residents of sparsely-populated Lowndes County 41 times as much political power as the residents of densely-populated Jefferson County. The Supreme Court ruled that the 14th Amendment’s equal protection clause required that districts be drawn to be substantially equal in population.”).

328. Skocpol, *supra* note 4, at 1500.

329. See *supra* text accompanying notes 314–320.

330. See Aleks Kajstura, *Federal Judge Holds Prison Gerrymandering Unconstitutional*, PRISON POL’Y INITIATIVE (Mar. 21, 2016), <https://www.prisonersofthecensus.org/news/2016/03/21/calvin/> (analyzing the groundbreaking opinion written by Judge Mark Waller).

331. *Calvin*, 172 F. Supp. 3d at 1303 (“But while census data is almost always the starting point for determining a population base, it need not, and in some cases cannot, be the ending point. The Court has recognized that blind reliance on census data can lead to unconstitutional results. In *Mahan v. Howell*, for instance, the Court considered a districting plan that relied on census data to count some 36,000 military personnel in the state senate district where they were ‘home-ported’—that is, the district containing their naval base. However, only about half of these people actually lived in the district, either on the naval base or off the base but still within the district. The Court held that the scheme was unconstitutional. The scheme ‘resulted in . . . significant population disparities,’ and the state could not fall back on its reliance on census figures to justify these disparities because ‘[t]he . . . use of [a] census enumeration to support a conclusion that all of the Navy personnel on a ship actually resided within the state senatorial district in which the ship was docked placed upon the census figures a weight that they were not intended to bear.’”) (internal citations omitted).

332. *Id.* at 1315. Judge Walker found that elements two and four were undisputed, and therefore, the crux of the case was “whether Plaintiffs have shown that the JCI inmates lack a meaningful representational nexus with the Boards.” *Id.* at 1315–16.

constituents makes no sense under any theory of one person, one vote, and indeed under any theory of representative democracy.”³³³

Judge Walker’s decision has vast implications for the future of prison malapportionment claims.³³⁴ 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.³³⁵ 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*.³³⁶

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.”³³⁷ The promise of representational equality essentially rings hollow when confronted with prison gerrymandering.³³⁸ 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. Skocpol, *supra* note 4, 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 “[l]ike 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 filed 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.³³⁹ Can there be an authentic representative democracy if there is no equal representation?³⁴⁰ Can the government truly be fair if the interests of some voters hold more weight than others to influence the decisions of their representatives?³⁴¹ How can America continue to claim democracy when the basic functions of a representative government fail to do their job adequately?³⁴² Prisoners deserve the chance to be represented by their elected officials; they deserve the chance to be recognized as people.³⁴³ Elected officials represent all the people in their districts, even the ones who cannot hold them accountable in office through the democratic process.³⁴⁴

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339. See Lee Hamilton, *Why Representative Democracy Matters*, CTR. ON REPRESENTATIVE GOV. (June 3, 2020), <https://corg.iu.edu/programs/hamilton-views/comments-on-congress/Why%20Representative%20Democracy%20Matters.html>.

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.

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