PRISON GERRYMANDERING: LOCKING UP ELECTIONS AND DILUTING REPRESENTATIONAL EQUALITY

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Mass incarceration and the continuous rise of the prison population has created nonvoter population pockets in white, rural areas. As district lines get redrawn every ten years, those living in prison districts gain a representational and electoral advantage over those living in non–prison districts. The Census Bureau should revise its "usual residence" policy and count prisoners at their prior address before they entered prison. In addition, states should take legislative action and adjust how they account for prisoners when redrawing district lines. Since advocacy has yet to result in a policy shift by either the Census Bureau or state legislatures, reformers must rely on litigation to eradicate this issue. As the 2020 census nears, it is expected that both state and federal courts will face multiple challenges to the practice of prison gerrymandering within the next decade. Relying on the one person, one vote doctrine and the representational nexus test, courts will be more inclined to protect the rights of citizens whose representational and electoral power have been diminished.

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I. INTRODUCTION

The United States has the highest incarceration rate in the world.[1] In fact, the rate of incarceration is five times higher than most other countries.[2] It is estimated that the American criminal justice system holds more than 2.3 million people in federal, state, and local facilities, and that number continues to rise.[3] In forty-eight states, prisoners are barred from voting.[4] As a result, prisons, housing a high number of individuals, become nonvoter population pockets.[5] When district lines are redrawn by state and local legislatures, this phenomenon becomes critical in determining which populations gain an electoral and representational advantage.

The Census Bureau treats prisoners as residents of their prison facility.[6] As a result, when state and local legislatures redraw district lines, they inflate the representational power of the prisons' host communities while diminishing

1. *States of Incarceration: The Global Context*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/global/ (last visited Nov. 6, 2018).

2. *Id.*

3. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POL'Y INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html.

4. *Prison Gerrymandering Project: The Problem*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/impact.html (last visited Nov. 6, 2018).

5. *Id.*

6. *Id.*

the power of the prisoners' home communities.[7] A majority of prisoners come from urban, low-income, and minority communities, and prisons are generally located in white, rural towns.[8] As the prison population continues to grow, white, rural communities obtain more electoral and representational power at the expense of low-income, minority communities.[9]

Multiple organizations continue to bring this issue to light and campaign for the Census Bureau to change its policy.[10] Since advocacy has yet to result in a policy shift by either the Census Bureau or state legislatures, reformers must rely on litigation to eradicate this issue.[11] As the 2020 census nears, it is expected that both state and federal courts will face multiple challenges to the practice of prison gerrymandering within the next decade.[12]

This Note argues that prison gerrymandering violates the one person, one vote doctrine and that a prisoner's residence should be determined by his or her address before entering prison.[13] When analyzing challenges to prison gerrymandering, courts should implement the "representational nexus test" outlined by Judge Mark Walker in *Calvin v. Jefferson Cty. Bd. of Comm'rs*.[14] Part II reviews the current statistics of the criminal justice system and the country's prison population, the methods and policies the Census Bureau uses to count the country's total population, the common ways state and local legislatures draw district lines, the impacts of prison gerrymandering on electoral and representational power, and how states and courts have addressed challenges to prison gerrymandering thus far.

Part III reviews the case law on the one person, one vote doctrine, which can ultimately be used to curb the practice of prison gerrymandering, and how this doctrine interacts with the state and federal courts' prison gerrymandering precedent. Part IV recommends a litigation strategy and policy approaches to combat the practice of prison gerrymandering and to ensure a fair count of votes.

II. BACKGROUND

A. The Census Bureau: "Usual Residence"

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

7. Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1475–76 (2017).

8. *Id.* at 1486–87.

9. *Id.*

10. *See Prison Gerrymandering Project: The Problem*, *supra* note 4; *see also Prison-Based Gerrymandering Reform*, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/case/prison-based-gerrymandering (last visited Nov. 6, 2018).

11. Skocpol, *supra* note 7, at 1478.

12. *Id.* at 1479.

13. *See* Baker v. Carr, 369 U.S. 186, 207–08 (1962) (establishing the one person, one vote doctrine).

14. 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016).

Day.[15] "Usual residence" is defined as the "place where a person lives and sleeps most of the time."[16] The Census Bureau clarifies this in regards to prisoners: "People in certain types of facilities or shelters . . . on Census Day should be counted at the facility or shelter."[17] As a result, a prisoner's place of residence is considered to be the prison facility he is housed in on Census Day.[18] This method is not constitutionally or statutorily mandated, but rather, is a policy decision by the Census Bureau.[19]

Relying on the Census Bureau's data, most state and local legislatures count incarcerated persons as residents of the facilities in which they are housed when redrawing district lines.[20] This, essentially, is the definition of prison gerrymandering. Thus, the Census Bureau's "usual residence" criteria and the reliance on the Bureau's census data to redraw district lines, make prison gerrymandering a "default setting" throughout the country.[21]

The Census Bureau receives feedback regarding its criteria and methods for counting the country's population on Census Day.[22] Through the Federal Register, multiple public comments express concern over counting a prison facility as a prisoner's "usual residence."[23] Despite a commitment to "fair and equitable apportionment," it does not appear the Census Bureau will change its policy before the 2020 census.[24] A 2006 Census Bureau report concluded that counting inmates at their home address would likely increase census-related costs and burden prison facilities that would be required to collect that data.[25]

The Supreme Court endorsed the use of census data as a basis for drawing legislative districts, while acknowledging its shortcomings.[26] In the Court's eyes, the census data is the only reliable, although imperfect, way to obtain the most accurate relative population levels.[27] The Court, however, has also recognized that "blind reliance on census data can lead to unconstitutional results."[28]

B. Current Status of the U.S. Prison System

Applying the "usual residence" rule to prisoners in the past may have been sufficient, but since 1980, the percentage of incarcerated Americans in-

15. *Residence Rules and Residence Situations for the 2010 Census*, U.S. CENSUS BUREAU, https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html (last visited Nov. 6, 2018).

16. *Id.*

17. *Id.*

18. Skocpol, *supra* note 7, at 1484.

19. *Id.* at 1483.

20. *Id.* at 1483–84.

21. *Id.*

22. *The 2020 Census Residence Criteria*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html (last updated Nov. 6, 2018).

23. *Id.*

24. *Id.*

25. *Why the Census Bureau Can and Must Start Collecting the Home Addresses of Incarcerated People*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/homeaddresses/report.html (last visited Nov. 6, 2018).

26. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016).

27. *Id.*

28. *Id.*

creased four-fold.[29] As the number of prisoners rises from the current estimation of 2.3 million people, prison gerrymandering will have a greater impact on electoral and representational power.[30]

The racial makeup of the country's prison population is the primary reason why using a prison facility as a prisoner's place of "usual residence" is flawed. Low-income, minority populations make up the majority of the U.S. prison population.[31] African-Americans account for 12.7% of the general population but are 41.3% of the federal and state prison population.[32] According to the Census Bureau's data, African-Americans are incarcerated five times more than Whites, and Latinos are almost twice as likely to be incarcerated as Whites.[33] Twelve states have prison populations that are more than half African-American, and the state of Maryland has a prison population that is 72% African-American.[34]

Prisons are generally located in rural areas, but those who are incarcerated are likely to come from urban communities.[35] Rural communities make up about 20% of the United States' population, but about 40% of incarcerated individuals are held in facilities located in rural areas.[36] The combination of the prison population's racial makeup and the location of prisons is the main reason why prison gerrymandering diminishes the representational power of low-income, minority communities, while empowering rural, white communities.[37] 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."[38]

Due to the racial makeup of the prison population and prison towns, representative democracy is tilted away from already suffering communities.[39] "The effect is a thumb on the scale for white, rural interests, obtained by work-

29. *Id.*; Skocpol, *supra* note 7, at 1482 n. 49.

30. Wagner & Rabuy, *supra* note 3.

31. *Id.*

32. *Id.*

33. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-By-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html.

34. Caroline Simon, *There Is a Stunning Gap Between the Number of White and Black Inmates in America's Prisons*, BUS. INSIDER (June 16, 2016, 12:13 PM), http://www.businessinsider.com/study-finds-huge-racial-disparity-in-americas-prisons-2016-6.

35. Skocpol, *supra* note 7, at 1487.

36. *Id.*; *see also* Kasey Henricks, Jose Acosta-Cordova & Amanda E. Lewis, *How Prisons Inflate White Voting Power in Downstate Illinois*, CHI. REP. (Oct. 9, 2017), http://www.chicagoreporter.com/how-prisons-inflate-white-voting-power-in-downstate-illinois/ ("When lawmakers use census counts like these to draw electoral districts without regard for prison gerrymandering, the effects are clear. White votes in downstate Illinois are inflated at the disproportionate expense of folks of color in the Chicago area.").

37. Skocpol, *supra* note 7, at 1487–88.

38. Keri Blakinger, *What Is Prison Gerrymandering and How Does It Impact Elections? Criminologist John Pfaff Explains*, CHRON (Mar. 6, 2018, 11:47 AM), https://www.chron.com/news/houston-texas/article/What-is-prison-gerrymandering-and-how-does-it-12731429.php.

39. Skocpol, *supra* note 7, at 1488.

ing a sort of collective punishment on communities elsewhere: a neighborhood already hard-hit by crime finds that its political voice 'gradually dwindles . . . through the forcible removal of its members.'"[40]

Other statistics describing the criminal justice system also show why the Census Bureau's definition of "usual residence" is flawed. The census count has implications over the course of a decade, but a typical state prison sentence lasts only two to three years.[41] This means an individual who is counted at a prison facility on Census Day will likely return to his or her home community in a few years.[42] In addition, people are often shuffled amongst prison facilities while they serve their sentence.[43] For example, in New York the median time an individual remains at the same prison facility is only seven months.[44] As prisoners get transferred to different facilities, only one address remains consistent: their home address.[45]

C. Prison Gerrymandering in Practice

1. Marshall County

Judge Mark Walker of the United States District Court for the Northern District of Florida in *Calvin v. Jefferson Cty. Bd. of Comm'rs* provided a picture of prison gerrymandering in action.[46] Imagine Marshall County, which has a total population of 12,000 people.[47] The County is run by a Board of Commissioners comprised of five people, each of whom are elected from a single district with a total census population of 2,400 people.[48] Marshall County also has a prison with 2,200 people incarcerated.[49] The vast majority of these individuals are not from Marshall County.[50]

This correctional facility is located in District 3 of the County Commission districts.[51] As a result, only 200 of the 2,400 people who are residents of District 3 are not incarcerated and vote to elect a County Commissioner.[52] In the other four districts, 2,400 people are eligible to vote to elect a County Commissioner.[53] In this scenario, the votes of District 3 are weighed more

40. *Id.*
41. Letter from Sherrilyn A. Ifill & Leah C. Aden, NAACP Legal Def. & Ed. Fund, to Karen Humes, Chief of the Population Div., U.S. Census Bureau, in Response to the Bureau's Federal Register Notice (Sept. 1, 2016) (available at https://www.prisonersofthecensus.org/letters/2016/NAACPLDFCensus2016.pdf).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016).
47. *Id.* at 1294–95.
48. *Id.* at 1295.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

heavily than the votes in the other districts.[54] Less obviously, the non-incarcerated population of District 3 gains an "increased ability to access and influence their representatives and increased opportunities to reap the benefits of that influence."[55]

Further, the non-incarcerated population of District 3 is incentivized to maintain and grow the prison.[56] Rural communities suffering from declines in farming, mining, and manufacturing need prisons to be built in their backyard.[57] "Hundreds of small rural towns and several whole regions have become dependent on an industry that itself is dependent on the continuation of crime-producing conditions."[58] It is estimated that about 350 rural counties have acquired prisons since 1980, and "more than half of all rural counties added prison work to their available employment mix during the final two decades of the century just past."[59] Thus, prison facilities located in districts similar to District 3, provide good-paying jobs and benefits in communities where employment is scarce.[60] This pattern shows how representatives of prison districts are not concerned with the interests of prisoners, but rather, exploit the prison facility by expanding it for jobs and economic gains.

2. Anamosa, Iowa

The notable and commonly cited example of prison gerrymandering is Anamosa, Iowa.[61] At the time, the state's largest prison constituted 96% of the city's second ward.[62] In 2005, no candidates from the second ward ran for city election and the winner won with two write-in votes: one from his wife and one from his neighbor.[63] In response, citizens detested the fact that some residents had twenty-five times as much political influence as other voters in Anamosa.[64] With approximately 1,400 people in each ward, the second ward only had fifty-eight non-prisoners.[65] When asked if he represented the prisoners, the newly elected official stated: "They don't vote, so, I guess, not really."[66] Anamosa

54. *Id.*

55. *Id.*

56. Tracy Huling, *Building a Prison Economy in Rural America*, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197 (Marc Mauer & Meda Chesney-Lind eds., 2002).

57. *Id.*

58. *Id.*

59. *Id*. at 199.

60. *Id.*

61. Letter from Peter Wagner, Exec. Dir., Prison Policy Initiative, to Karen Humes, Chief of the Population Div., U.S. Census Bureau, in Response to the Bureau's Federal Register Notice (July 20, 2015) (available at https://www.prisonersofthecensus.org/letters/prison_policy_frn_census_july_20_2015.pdf).

62. *Id.*

63. *Id.*

64. *Id.*

65. Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES (Oct. 23, 2008), http://www.nytimes.com/2008/10/24/us/politics/24census.html.

66. *Id.*

changed its form of city government by eliminating the district system altogether in order to eliminate the effects of prison gerrymandering.[67]

D. State Legislatures Responding to Prison Gerrymandering

Currently, New York, Maryland, and seven other states have enacted legislation to end or combat prison gerrymandering and to count incarcerated people at their home address for redistricting purposes.[68] Both New York and Maryland ensured that the home residence would be used for both state and local redistricting purposes for the 2010 census cycle.[69] Two other states passed laws that apply to redistricting after the 2020 census; however, other states have only helped eliminate prison gerrymandering from local governments.[70]

The New York Supreme Court upheld New York's law finding that it aligned with the New York State Constitution's explicit provision that incarceration does not change an individual's residence.[71] A New York State Senator, Elizabeth Little, filed the claim that challenged the law: "Sen. Little's lawsuit seeks to have the new legislation struck down, the effect of which would require legislative districts – most notably her own, which contains 12,000 incarcerated persons – to include prison populations in their apportionment counts to the detriment of all other districts without prisons."[72] This ruling brought consistency to the redistricting process in New York, and "prohibit[ed] both the state and local governments from giving extra political influence to districts that contain prisons."[73]

A challenge to Maryland's law went to the Supreme Court and was ultimately upheld.[74] At the time, the decision in *Fletcher v. Lamone* was seen as the most significant court ruling on the legal justification for states to count incarcerated individuals at their home residences for redistricting purposes.[75] The Supreme Court noted that "the Act is intended to 'correct for the distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration.'"[76]

Advocates saw this as a huge victory for the campaign to end prison gerrymandering and hoped it would encourage other states to reform their redis-

67. *Id.*

68. *Prison Gerrymandering Project: Legislation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/legislation.html (last visited Nov. 6, 2018).

69. *Prison Gerrymandering Project: Solutions*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/solutions.html (last visited Nov. 6, 2018).

70. *Id.*

71. *Albany Judge Upholds Law Ending Prison-Based Gerrymandering*, PRISON POL'Y INITIATIVE (Dec. 2, 2011), https://www.prisonersofthecensus.org/news/2011/12/02/ny-victory/.

72. *Little v. LATFOR Documents*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/little/ (last visited Nov. 6, 2018).

73. *Id.*

74. Fletcher v. Lamone, 567 U.S. 930, 930 (2012).

75. *Supreme Court Upholds Maryland Law Ending Prison-Based Gerrymandering; Huge Victory for Fair Representation*, PRISON POL'Y INITIATIVE (June 25, 2012), https://www.prisonersofthecensus.org/news/2012/06/25/scotus-upholds/.

76. Fletcher v. Lamone, 831 F. Supp. 2d 887, 893 (D. Md. 2011).

tricting laws.[77] States are encouraged to standardize the collection of home address information when people enter prison facilities and to prevent state, county, and municipal legislative districts from using prisons as a place of residence.[78] Although some states have taken action, others have yet to enact legislegislation to address prison gerrymandering at any level.[79]

The states that adopted reforms lean heavily Democratic, as are most of the states following their lead.[80] Conservative and middle-of-the-road states "have little interest in adopting such laws," creating a partisan divide around the issue of prison gerrymandering.[81] "[T]he very structure of the problem - bestowing a concentrated windfall on certain communities and legislators while imposing a diffuse and hard-to-quantify harm on others suggests a built-in tendency toward legislative inertia."[82] Due to the partisan divide on the issue and inaction by the Census Bureau, advocates must rely on litigation to eradicate prison gerrymandering's effects.

E. How the Courts Have Addressed Challenges to Prison Gerrymandering

1. Calvin v. Jefferson Cty. Bd. of Comm'rs

This case involved a prison gerrymandering situation similar to the one Judge Walker described.[83] The plaintiffs, the private citizens of Jefferson County, claimed that the districting scheme diluted their voting power and political influence, thus, denying them equal protection of the laws in violation of the Fourteenth Amendment.[84] The inclusion of a prison facility's population in one of the districts weighed the nonprisoners' votes more heavily than the plaintiffs' votes.[85] According to the plaintiffs this violated the one person, one vote doctrine.[86]

The eighty-six page opinion by the court includes a "systematic overview of redistricting case law" and a "thorough analysis of prisoner-community relations."[87] The court ultimately struck down the prison-gerrymandered redistricting plan and ordered the county to base its redistricting on population data that does not include the people in state prison as if they were all of the same district.[88]

77. *Supreme Court Upholds Maryland Law Ending Prison-Based Gerrymandering; Huge Victory for Fair Representation*, *supra* note 75.

78. *Prison Gerrymandering Project: Solutions*, *supra* note 69.

79. *Id.*

80. Skocpol, *supra* note 7, at 1496.

81. *Id.*

82. *Id.*

83. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016).

84. *Id.* at 1298.

85. *Id.*

86. *Id.*

87. Aleks Kajstura, *Federal Judge Holds Prison Gerrymandering Unconstitutional*, PRISON POL'Y INITIATIVE (Mar. 21, 2016), https://www.prisonersofthecensus.org/news/2016/03/21/calvin/.

88. *Id.*; s*ee Calvin*, 172 F. Supp. 3d at 1312.

The court determined that the Constitution forbids a redistricting choice that violates both representational and electoral equality.[89] In this case, the court concluded, "[a]n apportionment base for a given legislative body cannot be chosen so that a large number of nonvoters who also lack a meaningful representational nexus with that body are packed into a small subset of legislative districts."[90] This practice dilutes the voting and representational strength of citizens in other districts and violates the Equal Protection Clause.[91]

Using the "representational nexus"[92] test, the court held that excluding the inmates from the population base for districting purposes was arbitrary. "To treat the inmates the same as actual constituents makes no sense under any theory of one person, one vote, and indeed under any theory of representative democracy."[93] This ruling gave reformers hope that other courts would look to Judge Walker's opinion as guidance on how to determine the outcome of prison gerrymandering cases.

2. Evenwel v. Abbott

Registered Texas voters challenged Texas's redistricting scheme alleging that the one person, one vote doctrine required Texas to equalize voter population and the weight of each vote within a district.[94] Texas, like all other states, uses the total-population numbers from the census when redrawing districts.[95] In *Evenwel*, the Supreme Court considered whether the Equal Protection Clause requires apportionments designed to equalize the number of eligible voters in each district or to equalize the total population in each district.[96] The Court rejected the idea that the Constitution requires states to equalize voter population, and held that Texas's scheme was constitutional.[97] The Court based its holding on a "combination of history, precedent, and 'longstanding practice.'"[98]

The Court left open whether a jurisdiction could ever permissibly choose a voter equality baseline.[99] Still, "for the purposes of constructing a prison gerrymandering claim, the crucial holding was clear: one person, one vote protects representational equality, at least in the typical case."[100] Although the case did not rule on a prison gerrymandering issue, its precedent potentially impacts fu-

89. *Calvin*, 172 F. Supp. 3d at 1312, 1326.
90. *Id.* at 1315.
91. *Id.*
92. *Id.*
93. *Id.* at 1326.
94. Skocpol, *supra* note 7, at 1504.
95. Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).
96. Skocpol, *supra* note 7, at 1503.
97. *Id.* at 1503–04.
98. *Evenwel*, 136 S. Ct. at 1123 ("We hold, based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population."); *see also Constitutional Law – Equal Protection – First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, 130 HARV. L. REV. 2235, 2237 (2017).
99. Skocpol, *supra* note 7, at 1504.
100. *Id.* at 1505.

ture challenges to the practice. *Evenwel* provided clarity going forward and "eliminates any doubt that one person, one vote protects not just voters but rather the interest of all Americans in equal representation; representational equality is here to stay as a constitutionally significant principle."[101]

3. Davidson v. City of Cranston

This case arose out of Cranston, Rhode Island, which redrew district boundaries based on new census data from 2010.[102] Cranston's Ward Six housed the state's only state prison, holding 3,433 prisoners on the 2010 Census Day.[103] Approximately 13,500 people lived in each ward, thus the inmates comprised about 25% of the population of Ward Six.[104] This situation was essentially identical to Jefferson County, however, this case was heard after the Supreme Court's decision in *Evenwel*.[105]

The District Court for the District of Rhode Island rejected the idea that *Evenwel* "endorsed the constitutionality of total-population based apportionment" for every situation.[106] The district court believed that the Supreme Court assumed nonvoters were involved in the political community when it permitted the counting of nonvoters in *Evenwel*.[107] "In the district court's understanding . . . those past holdings only extended to nonvoters who remained 'individual[s] of the community at large.' In the district court's view, prisoners did not fit that bill, so *Evenwel* changed nothing when it came to the constitutional status of prisoners under one person, one vote."[108] The district court then followed the methodology and holding of *Calvin*, agreeing that an individual citizen should have a "'representational nexus' to the relevant legislative body."[109] "The court focused on the inmates' lack of civic participation, limited contact with the surrounding community, and virtually nonexistent lines of communication with elected representatives."[110] The court held that Cranston's plan diluted the voting power of individuals not residing in Ward Six, thereby infringing on their rights.[111]

Following the district court's decision, a unanimous First Circuit panel reversed the decision ruling that this question was answered by the Supreme

101. *Id.* at 1509 (emphasis omitted).

102. *Id.* at 1505.

103. *Id.*

104. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 147 (D.R.I. 2016).

105. Skocpol, *supra* note 7, at 1505.

106. *Constitutional Law–Equal Protection–First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, *supra* note 98, at 2237.

107. Skocpol, *supra* note 7, at 1506.

108. *Id.*

109. *Id.*

110. *Id.* at 1506–07; *see also* Davidson v. City of Cranston, 188 F. Supp. 3d 146, 148 (D.R.I. 2016) ("Cranston's elected officials do not campaign or endeavor to represent their ACI constituents. Nor do they enact regulations or ordinances that bear on conditions at the ACI.").

111. *Constitutional Law – Equal Protection – First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, *supra* note 98, at 2237.

Court in *Evenwel*.[112] Acknowledging that *Evenwel* did not decide the precise question before the court, it determined that *Evenwel* gave a general approval to use the total-population data from the census in apportionment, which was what Cranston used.[113] Further, "*Evenwel* reinforced the principle established by earlier Supreme Court decisions that courts should give wide latitude to political decisions related to apportionment that work no invidious discrimination."[114]

The court reasoned "[t]he 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 nonpermanent residents, inmates, or noncitizen immigrants."[115] In the court's eyes, although these deviations were permissible, they are not constitutionally required.[116] Most states based redistricting on total-population data from the Census Bureau which includes prisoners.[117] Thus, the court reversed the district court's decision.[118]

"If, as the First Circuit held, the Supreme Court meant to endorse unmodified census figures as the metric for equalizing representation, then *Evenwel* would in fact leave prison gerrymandering uncontestable as a constitutional matter until and unless the Census Bureau changes the way it counts prisoners."[119] After taking steps forward, the First Circuit panel forced the movement to end prison gerrymandering backward.

III. ANALYSIS

A. The Right to Vote and the Judiciary

The United States Constitution does not grant citizens a general right to vote.[120] Instead, it is left to the individual states to determine which citizens are granted the right to vote in elections.[121] Thus, in the sense that there is a right to freedom of speech and religion, there is not a right to vote protected under the Constitution.[122] Yet people often characterize the "right to vote" as fundamental when ensuring groups are not denied a vote in a way that denies them equal protection of the laws.[123] Indeed, the fact that there are four separate Amendments—the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—that address and protect the right to vote indicates that a right to vote can be read into

112. Skocpol, *supra* note 7, at 1505.
113. Davidson v. City of Cranston, 837 F.3d 135, 141–42 (1st Cir. 2016).
114. *Id.* at 143.
115. *Id.* at 144.
116. *Constitutional Law–Equal Protection–First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, *supra* note 98, at 2238.
117. *Davidson*, 837 F.3d at 144.
118. *Id.* at 146.
119. Skocpol, *supra* note 7, at 1510.
120. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1299 (N.D. Fla. 2016).
121. *Id.*
122. *Id.* at 1299–1300.
123. *Id.* at 1300.

the Constitution.[124] In addition, the Equal Protection Clause places limitations on a state's ability to choose who may vote.[125] "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."[126]

For many years, the Supreme Court was hesitant "to apply an equal protection analysis to claims of vote dilution from malapportioned legislative districts."[127] This was seen as a political question and state matter that should not be interfered with by the judiciary.[128] Yet, in an early vote-dilution case in 1946, Supreme Court Justice Hugo Black exposed this flawed reasoning in his dissent: "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."[129]

It was not until 1962, in *Baker v. Carr*, when the Supreme Court held that vote dilution claims could be brought under the Equal Protection Clause, but the opinion did not provide guidance on how to analyze these claims.[130] Although the Court was originally concerned with federalism and states's rights, it realized vote dilution could violate citizens' constitutional rights.

The one person, one vote doctrine, stemming from *Baker*, has continually evolved since its inception. Judge Walker defined the judiciary's role in these types of cases: "[W]hen a suit challenging a districting scheme reaches federal court, the court does not sit as a super-legislature to question the districting choices of the legislative body from a policy standpoint. Rather, the court functions in its traditional role as a vindicator of individual rights."[131] Still, the judiciary would respect the state's role in redistricting, however, only as long as individual rights remained protected.

B. The Evolution of the One Person, One Vote Doctrine

In *Baker v. Carr*, the Supreme Court acknowledged the one person, one vote doctrine as a constitutionally guaranteed right. Under this doctrine, "the weight of a citizen's vote cannot be made to depend on where he lives."[132] As a result, this doctrine became the basis of a series of challenges to local and state redistricting schemes that diluted the representation and voting power of state residents.[133] Since this case was decided in 1962, the Supreme Court has revis-

124. U.S. CONST. amends. XV, XIX, XXIV, XXVI.
125. *Calvin*, 172 F. Supp. 3d at 1302.
126. *Id.*
127. *Id.*
128. *Id.*
129. Colegrove v. Green, 328 U.S. 549, 569 (1946).
130. *See* Baker v. Carr, 369 U.S. 186, 209–10 (1962).
131. *Calvin*, 172 F. Supp. 3d at 1302.
132. Reynolds v. Sims, 377 U.S. 533, 567 (1964).
133. Skocpol, *supra* note 7, at 1481.

ited this doctrine in a variety of different circumstances and provided reformers with legal tools to challenge the practice of prison gerrymandering.[134]

Judge Walker in *Calvin* summarized the one person, one vote line of cases: "[I]njury in a case involving malapportioned districts is personal, not structural. The constitutional infirmity in a set of malapportioned legislative districts lies not in the failure to equalize some population measure, but in the infringement of some peoples' rights to participate in our form of representative democracy."[135]

1. Gray v. Sanders

In *Gray v. Sanders*, the Supreme Court reiterated similar language and conceptions from *Baker*. This case did not involve redistricting but instead examined the way Georgia counted ballots in a primary.[136] The Court determined this issue did not fall under *Baker's* line of reasoning; however, the Court still showed consideration and reaffirmed its support for the one person, one vote doctrine and its sentiment:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . . This is required by the Equal Protection Clause of the Fourteenth Amendment.[137]

The Court emphasizes that every voter is equal to every other voter in his or her state.[138]

In the Court's view, "we the people" established the importance of equality among all and visualized no preferred class of voters.[139] "[*Gray*] established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections."[140] This language can be applied to the prison gerrymandering context, and it can be argued that voters of non–prison districts are required to have an equal vote compared to those living in prison districts under the Equal Protection Clause.

2. Wesberry v. Sanders

In *Wesberry v. Sanders*, the Supreme Court examined the historical context of the Constitution and determined Article 1, Section 2 of the Constitution commands that "[r]epresentatives be chosen 'By the People of the several

134. *See infra* Section III.B.
135. *Calvin*, 172 F. Supp. 3d at 1301–02.
136. Gray v. Sanders, 372 U.S. 368, 370 (1963).
137. *Id.* at 379.
138. *Id.*
139. *Id.* at 380.
140. Reynolds v. Sims, 377 U.S. 533, 560 (1964).

States' mean[ing] that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[141] This case examined congressional districts in Georgia and held that the votes of inhabitants of some parts of the state cannot be weighed three times the value of the votes of people living in more populous parts of the state.[142] "To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle . . . established at the Constitutional Convention."[143] This is the first case in which the Court builds on the one person, one vote doctrine established in *Baker*.[144]

The Court in *Wesberry* examined the history of the Constitutional Convention and contrasted the thoughts of the framers to state districting schemes.[145] One fact was made clear by the delegates of the Constitutional Convention: the House should represent the people, and the number of Congressmen assigned to each state should be determined by the number of inhabitants in each state.[146] The Court stated:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[147]

Throughout the one person, one vote line of cases, the Supreme Court conducts similar historical analyses as in *Wesberry*. "[*Wesberry*] established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[148] In sum, the Court in this case concluded that malapportionment of congressional districts offends Article 1, Section 2 of the Constitution.

Early one person, one vote cases identify two personal interests that are impacted by malapportionment: (1) the interest in voting and in having one's vote on an equal footing with others and (2) the interest in being represented on an equal basis as one's neighbors.[149] Thus, an apportionment scheme that weighs one voter's ballot more heavily than another, and a scheme that gives one person greater representational power than another, can be said to deny people equal protection under the laws.[150] This resembles residents living in

141. 376 U.S. 1, 7–8 (1964).
142. *Id.* at 8.
143. *Id.*
144. *Calvin*, 172 F. Supp. 3d at 1301.
145. *Wesberry*, 376 U.S. at 8–11.
146. *Id.* at 13.
147. *Id.* at 14.
148. Reynolds v. Sims, 377 U.S. 533, 560–61 (1964).
149. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016).
150. *Id.* at 1304.

prison districts, whose representational and electoral power is increased, compared to residents living in non–prison districts.

3. Reynolds v. Sims

In *Reynolds v. Sims*, the Supreme Court examined whether there are any constitutional principles that "would justify departures from the basic standard of equality among voters in apportionment of seats in state legislatures."[151] In the Court's eyes it is "inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied . . . while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable."[152] The Constitution forbids weighing citizens' votes differently, by any method, merely because of where they reside.

The Court emphasized the importance of state legislatures describing them as the "fountainhead of representative government in this country."[153] Every citizen has an inalienable right to "full and effective participation in the political processes of his State's legislative bodies."[154] Recognizing it is entering a political area, the Court responds by stating that a denial of a constitutional right demands judicial protection.[155] "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest . . . effort to construct districts . . . as nearly of equal population as is practicable."[156]

In sum, the Court concluded that malapportionment of state legislative districts offends the Equal Protection Clause. As the prison population continues to rise, states will need to make an honest and good faith effort to ensure that people living in non–prison districts will have the same electoral power as those living in prison districts.

4. Burns v. Richardson

This Supreme Court case involved a districting plan for Hawaii's state legislature.[157] The plan used registered voters as a population base rather than census data, meaning it attempted to equalize the number of registered voters per representative across the legislative districts.[158] Due to a large presence of military personnel located in Hawaii, this districting scheme led to a sizable

151. *Reynolds*, 377 U.S. at 561.
152. *Id.* at 562.
153. *Id.* at 564.
154. *Id.* at 565.
155. *Id.* at 566.
156. *Id.* at 577.
157. Burns v. Richardson, 384 U.S. 73, 75 (1966).
158. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1304 (N.D. Fla. 2016).

difference between the state's total population and the federal census figures.[159] The Court upheld the scheme against a one person, one vote challenge:

> [T]his Court [never] suggested that the States are required to include aliens, transients, short-term or temporary residents, or 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.[160]

In this case, the use of registered voters as a population base led to similar results if Hawaii had used the state citizen population base as the guide.[161] In the Court's eyes, this scheme complied with the one person, one vote doctrine.[162]

5. Garza v. Cty. of Los Angeles

Lower courts have addressed the one person, one vote doctrine in multiple ways. In *Garza v. Cty. of Los Angeles*, the Ninth Circuit examined a redistricting scheme in Los Angeles County which had been ordered by a district court.[163] Since the city had a large number of nonvoters, the use of a total population base for redistricting led to different results than using a voter population base.[164] The court held that the districting plan violated the one person, one vote doctrine by giving voters living in districts with nonvoter population pockets more voting strength than voters in other districts.[165]

In the dissent, Judge Kozinski concluded that electoral equality is the principle that lies at the heart of the one person, one vote jurisprudence.[166]

> While the Court has repeatedly expressed its concern with equalizing the voting power of citizens as an ultimate constitutional imperative . . . its various statements in support of the principle of equal representation have been far more conditional. Indeed, a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality.[167]

As a result of this view, Judge Kozinski examined the voter deviation numbers and determined the district court's plan fell outside the permissible range.[168] Judge Kozinski, however, acknowledged the Supreme Court would likely favor representation equality: "Were the Supreme Court to take up the

159. *Id.*
160. *Burns*, 384 U.S. at 92.
161. *Calvin*, 172 F. Supp. 3d at 1305.
162. *Id.*
163. 918 F.2d 763, 765 (9th Cir. 1990).
164. *Id.*
165. *Calvin,* 172 F. Supp. 3d at 1305.
166. *Garza*, 918 F.2d at 785 (Kozinski, J., dissenting).
167. *Id.* at 783.
168. *Id.* at 786.

issue, I would not be surprised to see it limit or abandon the principle of electoral equality in favor of a principle of representational equality."[169]

The majority suggested that equalizing voter population would violate the one person, one vote doctrine by diminishing the ability of nonvoters to access their representatives.[170] "The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'"[171] Much of a legislator's time is devoted to accessing information and providing resources to constituents whether they are voters or nonvoters. As a result, the "right to petition is an important corollary to the rights to be represented."[172]

In his dissent, Judge Kozinski elaborates on this point and describes the difference between representational and electoral equality. In describing representational equality Judge Kozinksi states:

> [Equal representation] assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy. Also, assuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, it assures that constituents are not afforded unequal government services depending on the size of the population in their districts.[173]

Electoral equality ensures that political power is "equalized as between districts holding the same number of representatives."[174] It also ensures that those eligible to vote have their vote given the same weight as those of electors in another location.[175]

This opinion supports the importance of representational equality and protecting the nonvoter population. Judge Walker describes the majority opinion: "The majority, despite its description of 'protect[ing] the voting power of citizens' and 'ensur[ing] equal representation for equal numbers of people' as 'coequal goals,' basically held that representational equality trumps electoral equality."[176] Considering that prisoners are usually not from their prison districts, it is important to ensure their interests are represented, despite not having the ability to vote. With this in mind, it makes more sense for prisoners to be counted in their home communities, since representatives of prison districts will likely not adhere to the needs and concerns of the prison population.

169. *Id.* at 785.
170. *Id.* at 774–75 (Schroeder, J., majority opinion).
171. *Id.* at 775 (citation omitted).
172. *Id.*
173. *Id.* at 781 (Kozinski, J., dissenting).
174. *Id.* at 782.
175. *Id.*
176. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1305 (N.D. Fla. 2016) (citations omitted).

6. Daly v. Hunt *and* Chen v. City of Houston

In *Daly v. Hunt*, the Fourth Circuit considered a challenge to the districting scheme for a board of county commissioners and a school board.[177] This court rejected both *Garza's* majority and dissent approach, and instead determined that courts should defer to a state or local government's choice to favor electoral or representational equality if both cannot be achieved: "In the absence of a clear pronouncement from the Supreme Court on this issue," "[t]his is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment."[178]

In *Chen v. City of Houston*, the Fifth Circuit follows what the Fourth Circuit decided in *Daly*:

> [G]iven the Court's failure, on our reading, to speak clearly to such a vital question, we see no justification to depart from the position of *Daly*. We reject the conclusions of both the dissent in *Garza* and any reading of the majority opinion in that case that would mandate the use of total population figures on equal protection grounds.[179]

Wrapping up this analysis of the one person, one vote line of cases, it can be said that the Equal Protection Clause protects both representational and electoral equality. If a state or local government knows it cannot serve both principles, then the choice of which principle should prevail should be left up to the state or local government to decide.

C. One Person, One Vote Mechanics: Safe Harbor Rule

A one person, one vote claim requires an inquiry into whether the apportionment scheme reasonably advances a rational state policy and "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."[180] "If the total deviation is under 10%, the population disparities are considered minor," and a challenger to the scheme must provide further proof that the scheme is "arbitrary or discriminatory" to prevail on its claim.[181] When the total deviation is above 10%, then the state or local government must justify the disparity or the scheme will be invalidated.[182] Some possible justifications are: "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives."[183]

The fact that the districting scheme, however, has population deviations smaller than 10% does not insulate it from judicial review.[184] "The safe harbor

177. *Id.*
178. Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996).
179. 206 F.3d 502, 528 (5th Cir. 2000).
180. *Calvin*, 172 F. Supp. 3d at 1302.
181. *Id.*
182. *Id.*
183. Karcher v. Daggett, 462 U.S. 725, 740 (1983).
184. *Calvin*, 172 F. Supp. 3d at 1314.

rule is designed to be used when a challenge is brought to the way district lines are drawn, not when a challenge is brought to what population is equalized within a set of district lines."[185] Judge Walker expands on this idea:

> [T]he safe harbor rule was designed to be used for relatively large districts, not small districts. For districts of the size at issue in this case, blocks of nonvoters as found in a prison may greatly distort the rough equivalence between total population and voter population that the Supreme Court presumed existed, and which did in fact exist, in its early one person, one vote cases. To mechanically apply the rule in this case would be to ignore this dramatic difference in factual scenarios.[186]

If challengers can show that the practice of prison gerrymandering is a choice that the Constitution forbids, then they are entitled to relief.

What *Garza*, *Daly*, and *Chen* make clear is that "representational equality is not a structural or administrative state interest . . . that justifies deviations in the number of voters, but rather a principle that reflects the existence of an underlying personal interest or right in being represented."[187] Lacking representational equality infringes on the ability to influence a representative's policy choice and the ability of representatives to voice all of their constituents' views. "[R]epresentatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative."[188]

D. Davidson *Misreads* Evenwel

1. Evenwel *Does Not Answer This Specific Question*

Examining the one person, one vote precedent, it invites state and federal courts to struggle with the status of prisoners and other nonvoters and how previous case law applies to these two groups. The Supreme Court has not ruled on a challenge to a redistricting scheme based on the practice of prison gerrymandering. Yet the First Circuit in *Davidson* assumes *Evenwel* answered a question that was not before the Supreme Court.[189]

The Supreme Court in *Evenwel* merely upheld the decision to rely on total population data from the census as a "proxy for a decision to protect representational equality."[190] In other words, the Court did not (1) "determine where to count individuals for the purposes of determining 'total population'" or (2) "declare that unadjusted census figures . . . are the sole constitutionally permissible measure of 'total population.'"[191] To conclude that *Evenwel* answered the

185. *Id.* at 1315.
186. *Id.*
187. *Id.* at 1307.
188. *Id.* at 1310.
189. Skocpol, *supra* note 7, at 1510.
190. *Id.*
191. *Id.*

question of how to count prisoners when redrawing districts is stretching the holding of *Evenwel*.

The First Circuit reads too much into the Court's reliance on constitutional history and settled practice.[192] In *Evenwel*, the Court examines what the framers of the Fourteenth Amendment intended and what they thought about the status of nonvoters generally.[193] Yet the First Circuit did not engage in a similar analysis of what the drafters of the Fourteenth Amendment might have thought about nonvoting prisoners.[194] Further, historical practice is not a helpful guide in prison gerrymandering cases. "[M]ass incarceration is a relatively new phenomenon from the standpoint of constitutional history . . . . [T]he country has seen a massive increase in incarceration – prison populations only peaked in the last decade, following a steep increase in the 1980s and 1990s."[195]

The First Circuit's reasoning runs contrary to previous one person, one vote case law: "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."[196] The District Court for the District of Rhode Island noted that the emphasis of representational equality by the Supreme Court suggests that applying *Evenwel's* holding to prisoners makes little sense.[197]

Although using total population data for redistricting is settled practice, the methods in how to count prisoners when redistricting are far from settled.[198] Many states differ in how to treat prisoners and where to count them, if at all. Only a small number of states have adjusted census figures to account for prisoners, however, those states include major population centers.[199] As a result, roughly one-fifth of the country lives in a state that will reassign prisoners to their home address for the 2020 census.[200] Thus, the questions of if total population data should be used and how to count prisoners are two separate questions. Only one of which, the former, was answered by *Evenwel*. The Court in *Evenwel* emphasized:

> As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible to vote. Nonvoters have an important stake in many policy debates — children, their parents, even their grandparents, for example, have a stake in a strong public-education system — and in receiving constituent services,

192. *Id.* at 1511.

193. *Id.*

194. *Id. See generally* Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).

195. Skocpol, *supra* note 7, at 1511–12.

196. *Constitutional Law–Equal Protection–First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, *supra* note 98, at 2238.

197. *Id.* at 2239.

198. Skocpol, *supra* note 7, at 1512–13.

199. *Id.* at 1512.

200. *Id.*

> such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.[201]

Davidson reads this rationale as not applying to prisoners.[202] Yet *Calvin* addressed how prisoners are different from other nonvoters because of their lack of civic engagement opportunities.[203] "Prisoners are not like minors, or resident aliens, or children—they are separated from the rest of society and mostly unable to participate in civic life."[204] Elected officials do not typically value or heed to the requests, suggestions, and needs of the inmate population.

2. Misguided Reliance on State Powers vs. Federal Powers

The First Circuit wrongly simplifies the challenges to prison gerrymandering as a state versus federal court issue: "Plaintiffs' analysis invites federal courts to engage in what have long been recognized as paradigmatically political decisions, best left to local officials, about the inclusion of various categories of residents in the apportionment process."[205] This simplification ignores the major role the Census Bureau plays.[206] "If the Supreme Court or even a consensus of the lower courts were to hold that one person, one vote requires counting prisoners at home, that development would likely cause the Census Bureau to reconsider its already much-criticized decision to apply the usual residence rule to prisoners."[207]

Thus, the tension at issue is not federal courts trying to exert authority over the states' redistricting process, but rather a correction to a structural issue in how the total population is counted.[208] "The question is less whether federal courts will interfere in state processes and more which branch of the federal government is the appropriate institutional actor to determine the one-person, one-vote baseline: the courts or the Census Bureau."[209] Breaking the issue down to state versus federal powers ignores the complexity of prison gerrymandering and the Census Bureau's involvement in states using its population data to redraw district lines.[210]

The Census Bureau has acknowledged the flaws of the "usual residence" rule; however, like any other bureaucrat, census officials are likely to have political motivations.[211] Thus, it does not make sense for the Bureau to be the ar-

201. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).
202. Skocpol, *supra* note 7, at 1513.
203. *Id.*
204. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1324 (N.D. Fla. 2016).
205. Davidson v. City of Cranston, 837 F. 3d 135, 144 (1st Cir. 2016).
206. Skocpol, *supra* note 7, at 1516.
207. *Id.* at 1515–16.
208. *Id.* at 1517.
209. *Id.* (emphasis omitted).
210. *Id.* at 1515–16.
211. *Id.*

bitrator of the one person, one vote baseline.[212] The courts "should not defer to executive agencies when the underlying question is one of constitutional interpretation."[213] *Davidson* failed to address separation of powers concerns or explain why federalism concerns should lead to deferring to an executive agency's policy.[214]

The Supreme Court previously recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites . . . ."[215] Thus, the issue of vote dilution caused by prison gerrymandering falls under the judiciary's purview when it affects electoral and representational power.

E. Census Bureau Data Is Not Mandatory

State legislatures are not required to treat census total population data as the final determination in drawing district lines. Since the Bureau's data is an easy way to access population data, the courts have not engaged in second-guessing the states' reliance on it.[216] The Supreme Court, however, has had few opportunities to consider whether this data is always permissible in one person, one vote cases.[217] Previous cases suggest that states do have leeway in choosing other population measures if the total census population will misrepresent the political reality of the drawn districts.[218]

IV. RECOMMENDATION

A. The Representational Nexus Test

In future prison gerrymandering cases, the courts should use the "representational nexus test" to determine whether there is an equal protection violation.[219] In *Calvin*, Judge Walker creates the representational nexus test in order to determine whether the nonvoter, prison population is equally represented by the elected officials of the district.[220] "The *Calvin* court proceeded from the explicit premise that one-person, one-vote rights are purely individual. In other words, each individual voter (or, as the case may be, nonvoting resident) suffers a concrete, personal, unique injury when her vote (or representation) is diluted."[221] Judge Walker writes:

212. *Id.* at 1517.
213. *Id.*
214. *Id.*
215. White v. Weiser, 412 U.S. 783, 794 (1973).
216. Skocpol, *supra* note 7, at 1519.
217. *Id.*
218. *Id.*
219. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016).
220. *Id.*
221. Skocpol, *supra* note 7, at 1523

> A person does not have a representational nexus with a representative because of that person's physical location, but rather because of the ability of the representative to meaningfully affect that person's life, and the representative will normally have such an ability as to all people physically located in her district.[222]

If representational equality is nonexistent, then the Equal Protection Clause has been violated.[223]

To determine whether a representational nexus exists in a prison gerrymandering case, the challenging party must show that inmates comprise a "(1) large number of (2) nonvoters who (3) lack a meaningful representational nexus with the [representatives], and that they're (4) packed into a small subset of legislative districts."[224] To determine whether a meaningful representational nexus exists, a court must examine the background, adjudicative, and legislative facts.[225]

Essentially, Judge Walker examines three activities associated with representation: whether the representative body influences policy on the constituents' behalf, helps constituents navigate government's bureaucratic channels, and provides them with a voice in the legislative body.[226] If the governmental body does not perform these three functions for the inmate population, then a representational nexus is lacking.[227]

In *Calvin*, Judge Walker found that the inmates did not have a representational nexus with their Board representatives.[228] "The Boards possess little legal authority or practical ability to substantially affect the JCI inmates' lives through their policies" and it appears the Boards have made little effort to "solicit the input of JCI inmates."[229] In addition, any government benefits that the representatives could provide would likely be unavailable to the inmates because of their isolation from the community.[230]

B. Census Bureau Reform

The Census Bureau is in the best position to end prison gerrymandering. Some of the worst cases of prison gerrymandering occur in a handful of states where their state constitutions or laws appear to prohibit cities and counties from adjusting the Bureau's data.[231] For example, Massachusetts's state constitutional provision requires the use of Census Bureau data at all levels, which impedes a legislative fix.[232]

222. *Calvin*, 172 F. Supp. 3d at 1310.
223. *Id.* at 1315.
224. *Id.*
225. *Id.* at 1315–16.
226. *Id.* at 1316.
227. *Id.*
228. *Id.* at 1321.
229. *Id.*
230. *Id.*
231. Wagner, *supra* note 61.
232. Skocpol, *supra* note 7, at 1496.

Redistricting officers in local governments are likely to use the Bureau's numbers, thus, the best solution is for the Bureau to change the residence rule for incarcerated people and count them at their home address.[233] The inmate population does not live day-to-day in the communities in which they are imprisoned. They are unable to use the roads or use any other services that the local government provides.

In addition, the local government and representatives will likely ignore the requests of the inmate population. "It's almost the perfect crime. A legislator gets extra influence without having to be accountable to more constituents, and the data says the district is legit."[234] Building on this point, once released from prison, former incarcerated individuals return to the communities from which they were sent to prison. "[T]heir possible eventual return creates demands for such local services as parole monitoring, substance abuse rehabilitation, and job counseling social services."[235]

A majority of released prisoners return to their home communities, thus it is possible to draw maps predicting where they will reside upon release with almost statistical certainty.[236] In addition, nearly every state enacted policies of releasing prisoners back to the counties in which they were sentenced.[237]

> [I]t is not clear why a person's involuntary stay at a facility for one to three years should affect the distribution of political power throughout the state for a decade. And there is no reason why individuals held away from home involuntarily for such a short length of time should be treated any differently than, for instance, foreign service members, who spend an average of twenty years out of a thirty-year career abroad.[238]

Simply not counting prisoners at all is not an adequate solution to prison gerrymandering. All individuals are entitled to representation in this country's political process; thus, prisoners should be counted. All states currently count incarcerated individuals during redistricting, which signals that the question is not whether or not to count them at all, but where.[239] Excluding prisoners would exacerbate the already dehumanizing effects of prison gerrymandering. Establishing a presumption of reallocation when possible is a more satisfying remedy to the harms of prison gerrymandering.

The Census Bureau previously claimed that counting prisoners at their former place of residence is not feasible.[240] Those who have analyzed the address information for prisoners in New York, however, claim otherwise.[241] A

233. Wagner, *supra* note 61.

234. Jeff Reichert, *What Is Prison-Based Gerrymandering?*, HUFFINGTON POST (Dec. 6, 2017, 11:27 AM), https://www.huffingtonpost.com/jeff-reichert/what-is-prisonbased-gerry_b_704847.html.

235. Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. POL'Y REV. 355, 369 (2011) (citation omitted).

236. *Id.* at 370.

237. *Id.*

238. *Id.* at 373.

239. *Id.* at 392.

240. *Id.* at 393.

241. *Id.*

report concluded that the New York Department of Correctional Services could compile a list of prisoners' home addresses in a matter of a few hours.[242] With modern software, the census block number of each address can be easily determined, and the numbers can be reported and the adjustment made by the districting commission.[243] This shows that the reallocation of incarcerated individuals to their home addresses is feasible from a technical standpoint and should be required by federal law.

Although reformers have doubled their efforts to convince the Census Bureau to reform its policy before the 2020 census, the Bureau announced it is leaving in place the inaccurate practice of counting incarcerated persons as residents of the prison locations.[244]

> When the Bureau asked for public comment on its residence rules two years ago, over 99% of the 77,863 comments regarding residence rules for incarcerated persons urged the Bureau to count incarcerated persons at their home address, which is almost always their legal address. By planning to once again count incarcerated people as if they were residents of correctional facilities, the Census Bureau has simply disregarded input from the public, redistricting experts, and legislators.[245]

This decision by the Bureau harms low-income, urban communities and sacrifices the accuracy of the census.[246]

C. State and Local Government Action

Most states enacted constitutional or statutory provisions defining residence in terms of voluntary choice and an intention to remain in a place, which would exclude prisons as a place of residence. "Incarceration does not affect a person's residence for a wide variety of purposes, including federal diversity jurisdiction, divorce proceedings, and school residency proceedings."[247] Thus, there is no reason for why a state should treat an individual's residence for purposes of apportioning representation any differently.

To combat the effects of prison gerrymandering, California, Delaware, Maryland, and New York stopped using Census Bureau data for redistricting.[248] "Reformers have promulgated model legislation and generally set forth best practices for state legislative change in hopes of persuading other states to follow suit."[249] These legislative fixes give reformers cause for optimism that

242. *Id.*

243. *Id.*

244. *Census Bureau Will Count Incarcerated People in the Wrong Place Once Again in 2020 Census, Continues to Distort Democracy*, PRISON POL'Y INITIATIVE (Feb. 7, 2018), https://www.prisonersofthecensus.org/news/2018/02/07/frn2018/.

245. *Id.*

246. *Id.*; Elizabeth Kneebone, *The Changing Geography of US Poverty*, BROOKINGS (Feb. 15, 2017), https://www.brookings.edu/testimonies/the-changing-geography-of-us-poverty.

247. Ho, *supra* note 235, at 367–68.

248. Skocpol, *supra* note 7, at 1476–77.

249. *Id.* at 1494–95.

while they challenge prison gerrymandering in federal court, states, in the meantime, can reform their own laws to combat prison gerrymandering now.

New York and Maryland were inspired to make a change due to the impacts on municipal district boundaries, as a result of high-crime neighborhoods in New York City and Baltimore.[250] Both states faced and overcame legal challenges to their legislative reforms and administrative hurdles to reassign the prisoners' addresses.[251] These two successes should encourage other states to make similar changes and protect the electoral and representational equality of their residents.

Over 200 rural counties ignore prison populations when redrawing district lines.[252] In general, counties are unaware they are practicing prison gerrymandering and do not realize they can legally adjust the data.[253] Luckily, the Census Bureau publishes census statistics on prisoners which enables governments to exclude those populations from their districts.[254] Local governments should take this opportunity to ensure equal representation and end the practice of prison gerrymandering.

D. Individual Activism

Individuals can join state campaigns and pressure legislators to change state and local laws. The most impactful areas are in rural counties and cities that contain large prisons. When campaigns formed in these areas, they were able to achieve victory at a quick pace.[255] It is also important to pressure elected officials to pass resolutions calling on the Census Bureau to change how it counts incarcerated individuals on Census Day.[256] Since a change in the Census Bureau's policies is the most efficient solution, individuals should also respond to the Bureau's calls for comments on residence rules in the Federal Register.[257] When awareness is raised and voters realize their electoral and representational power is diminished by prison gerrymandering, they should be eager to advocate for change in our system.

V. CONCLUSION

Mass incarceration and the continuous rise of the prison population has created nonvoter population pockets in white, rural areas. As district lines get redrawn every ten years, those living in prison districts gain a representational and electoral advantage over those living in non-prison districts. The Census

250. *Id.* at 1495.
251. *Id.*
252. *Prison Gerrymandering Project: Solutions*, *supra* note 69.
253. *Id.*
254. *Id.*
255. *Ending Prison-Based Gerrymandering in Your Community, Your State and in the Nation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/action.html (last visited Nov. 6, 2018).
256. *Id.*
257. *Id.*

Bureau should revise its "usual residence" policy and count prisoners at their prior address before they entered prison. In addition, states should take legislative action and adjust how they account for prisoners when redrawing district lines. Since the Census Bureau and most states intend to keep the status quo, challengers of prison gerrymandering will have to rely on litigation to eradicate the impacts of this practice. Relying on the one person, one vote doctrine and the representational nexus test, courts will likely be more persuaded to protect the rights of citizens whose representational and electoral power have been diminished.