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NOTE

The Emerging Constitutional Law of Prison Gerrymandering

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Abstract. Most prisoners in the United States are counted where they are incarcerated for the purposes of legislative redistricting. This practice—which critics label "prison gerrymandering"—inflates the representation of mostly white, rural prison host communities at the expense of the urban and minority communities from which prisoners disproportionately hail. A battle to reform the practice has intensified in recent years, with federal courts on the front lines; the first federal court to invalidate a prison gerrymander did so in 2016, invoking the Equal Protection Clause's one-person, one-vote principle, and a division of authority has since emerged. As things stand, courts can expect a wave of these claims after the 2020 Census, but they are divided and ill equipped to resolve them.

This Note undertakes an in-depth analysis of one-person, one-vote challenges to prison gerrymanders and is the first scholarly work to analyze this emerging body of law. It argues that the Equal Protection Clause does limit prison gerrymandering, advocating a novel approach for adjudicating these claims—one that looks principally to community ties (or the absence thereof) between prisoners and the localities that house them. It considers the impact of the Supreme Court's recent landmark decision in *Evenwel v. Abbott* and other key precedents. It also discusses relevant voting rights scholarship that courts have thus far overlooked. Ultimately, this Note aims to shed light on an underexamined constitutional right—the right to equal representation, as opposed to an equal vote—and to provide courts and litigants with the tools they need to effectively tackle prison gerrymandering claims going forward.

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Introduction

Imagine that one morning 1.5 million Americans disappear from their beds. Breakfast tables nationwide are missing sons and daughters, and newly vacant homes dot neighborhoods. Fortunate communities are largely untouched by the disappearances; others bear the brunt more heavily.[1] Imagine further that those 1.5 million Americans resurface far from home. They are found concentrated in blocs—a few thousand here, several hundred there—and walled off from whatever new and unfamiliar communities happen to be nearby. The human and sociological consequences of such an abrupt dislocation are the stuff of heart-wrenching fiction.

Set aside the melodramatic abruptness, and this is precisely the change that mass incarceration has wrought in this country over the past several decades.[2] A vast literature grapples with the effects of that dislocation, the political and sociological consequences of which have inspired numerous policy critiques and reform proposals.[3] This Note deals with one consequence in particular: the phenomenon known as "prison gerrymandering."

"Prison gerrymandering" is shorthand for the side effects of mass incarceration when states and localities draw electoral districts.[4] For decades, the U.S. Census Bureau has counted prisoners where they "reside": their places of incarceration.[5] Though administrable for census-takers, this practice has

1. This is essentially the premise of the novel and eponymous television show *The Leftovers*. *See* TOM PERROTTA, THE LEFTOVERS (2011); *The Leftovers*, IMDB, http://www.imdb.com/title/tt2699128 (last visited May 5, 2017).

2. The Bureau of Justice Statistics estimated that 1,561,500 people were incarcerated in state and federal prisons as of 2014. Danielle Kaeble et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 2014, at 2 (2016), http://www.bjs.gov/content/pub/pdf/cpus14.pdf. Another 744,600 were in local jails. *Id.* In total, nearly 7,000,000 people were under some form of correctional supervision. *See id.*

3. *See generally* Nicole P. Dyszlewski et al., *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016) (collecting sources).

4. *See* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 355 (2011) (defining "prison gerrymandering" as "count[ing] incarcerated persons at their places of confinement rather than at their home addresses during redistricting"); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1242 (2012) (defining "prison gerrymandering" as "[t]he practice of using prison populations to dilute the votes of residents in other districts"); Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 180 (2015) (defining "prison gerrymandering" as "count[ing] incarcerated individuals as residents of the prison, grouping them together with non-incarcerated individuals living in the surrounding community to form legislative districts").

5. *See infra* Part I.A.

potentially troubling consequences when census data provide the baseline for apportioning democratic representation. Prisons house dense agglomerations of nonvoters, which can create anomalies among districts if prisons boost the census populations of their host communities, entitling them to more representation than they would otherwise enjoy. Two districts with ostensibly equal numbers of *people* may differ significantly in the proportion of *voters* within their boundaries if one is partly populated with prisoners and the other is not.[6] Conversely, counting inmates at their prison "residences" deprives their home communities—disproportionately minority, urban, and poor—of political clout they might otherwise enjoy if prisoners were counted at their preincarceration addresses.[7] Reformers argue that the result is a subtle shift of political power—an electoral windfall for mostly rural, white, conservative districts at the expense of urban and minority voters with different political preferences.[8]

In recent years, a movement to end prison gerrymandering has been growing. The run-up to the 2010 Census and the wave of redistricting that followed brought sustained attention to the problem for the first time. That is thanks largely to the work of policy entrepreneurs like Peter Wagner and his Prison Policy Institute, which have shined a spotlight on the issue and pushed for administrative and legislative reforms.[9] Major progressive nonprofits, such as the ACLU and NAACP, have also taken up the cause.[10]

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6. For example, when the city of McAlester, Oklahoma began including prison populations before its redistricting in 2006, one city councilor went from representing a pool of 3000 nonprisoner constituents to representing just 1300 such constituents—less than half the potential voting pool in his colleagues' districts—alongside around 1500 nonvoting prisoners. Kate Carlton Greer, *How Political Districts with Prisons Give Their Lawmakers Outsize Influence*, KOSU (Nov. 7, 2016), http://kosu.org/post/how-political-districts-prisons-give-their-lawmakers-outsize-influence.

7. *See infra* Part I.A.

8. *See infra* Part I.A.

9. *See* Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. L.F. 35, 38 (2012) ("A key to educating the public and drawing attention to the prisoner problem in representation has been the Prison Policy Initiative."); *Staff & Volunteers: Peter Wagner*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/staff.html#wagner (last visited May 5, 2017). For more information on the Prison Policy Initiative's current activities in this area, see *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, http://www.prisonersofthecensus.org (last visited May 5, 2017).

10. *See* Alexander Shalom, Testimony in Support of Assembly Bill No. 659, at 2 (2014), https://www.aclu-nj.org/files/3713/9203/7464/2014_02_10_test_659.pdf ("New Jersey should count prisoners in their home districts as a way to protect the decades-old United States Supreme Court instruction on apportionment: one person, one vote."); Michael Abrams, *Because Incarcerated People Matter: ACLU-MD Concerns with the 2020 Census Proposal*, ACLU MD. (Aug. 3, 2016), http://www.aclu-md.org/blog/2016/08/03/because_incarcerated_people_matter_aclu-md_concerns_with_the_2020_census_proposal_ (describing a partnership between the NAACP and the ACLU in Maryland

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Those efforts have enjoyed some success: New York, Delaware, California, and Maryland have all passed legislative reforms that reallocate prisoners to places of previous residence for redistricting purposes.[11] And the movement won changes to how and when the Census Bureau makes data about prisoners available, a tweak that helped enable the state-level reforms.[12] But the Bureau has so far been unwilling to alter the status quo of where it enumerates prisoners, and it recently dampened hopes of a nationwide administrative quick fix for the 2020 Census when its proposed rules for that count did not alter the usual residence rule as it applies to prisoners.[13] These efforts should intensify in the next redistricting cycle.

This Note addresses a newly emerging battleground in the prison gerrymandering fight: lawsuits mounting constitutional challenges to the practice. In March 2016, a federal district court in Florida became the first to hold that a districting plan violated the Constitution by using unadjusted census data to count prisoners at their places of incarceration.[14] Specifically, it found a violation of the Equal Protection Clause's one-person, one-vote principle,[15] which requires states and localities to craft electoral districts of roughly equal population.[16] A second district court soon followed suit, invalidating a municipal districting scheme in Rhode Island[17]—but the First Circuit has since reversed that decision.[18] Two cases and two opposite results: courts are already divided over how to handle these novel claims.

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beginning in 2008 and 2009 to advocate for prison gerrymandering reform in that state); *Prison-Based Gerrymandering Reform*, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/case/prison-based-gerrymandering (last visited May 5, 2017).

11. Wood, *supra* note 4, at 192 & n.69 (citing CAL. ELEC. CODE § 21003 (West 2013); DEL. CODE ANN. tit. 29, § 804A (2010); MD. CODE ANN., STATE GOV'T § 2-2A-01 (West 2010); and N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2011)).

12. *See* Peter Wagner, *What the Census Bureau Proposes to Do on Prison Gerrymandering and Why It Is Inadequate*, PRISON POL'Y INITIATIVE (July 1, 2016), http://www.prisonersofthecensus.org/news/2016/07/01/inadequate (noting "two encouraging announcements" made by the Census Bureau).

13. *See Census Bureau Proposes to Count Incarcerated People in the Wrong Place Once Again in 2020 Census, Continues to Distort Democracy*, PRISON POL'Y INITIATIVE (June 30, 2016) [hereinafter *Census Bureau Continues to Distort Democracy*], http://www.prisonersofthecensus.org/news/2016/06/30/ppi-demos-statement.

14. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1326 (N.D. Fla. 2016).

15. *Id.*

16. For a quick primer on one person, one vote, see notes 37-47 and accompanying text below.

17. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 149-52 (D.R.I.), *rev'd*, 837 F.3d 135 (1st Cir. 2016); *see also* Davidson v. City of Cranston, 42 F. Supp. 3d 325, 332 (D.R.I. 2014) (denying the city's motion to dismiss).

18. *Davidson*, 837 F.3d at 146.

The constitutional issues that other courts will confront when more such cases arrive have so far garnered too little attention from legal scholars. The related but distinct issue of felon disenfranchisement, for example, has received much more extensive scrutiny.[19] Scholars who have zeroed in on prison gerrymandering specifically have mostly followed reformers' lead by focusing on policy critiques and possible legislative solutions: Why is prison gerrymandering bad public policy?[20] What are the prospects for legislative reform?[21] And so on. Potential affirmative litigation has received short shrift in that conversation, and the legal issues that drive such litigation remain mostly unanalyzed.[22] A few student notes have argued, albeit at a high level of generality, that prison gerrymandering is contrary to constitutional values, but even those focus largely on legislative or administrative issues as opposed to doctrine.[23] One voting rights practitioner sketched, in general contours,

19. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1159-61 (2004) (devoting a single paragraph to prison gerrymandering within an article primarily focused on felon disenfranchisement). For additional examples of scholarship focused on felon disenfranchisement, see Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349 (2012); Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109 (2008); William Walton Liles, Comment, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615 (2007); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); and George Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851 (2005).

20. *See* Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come from*, 24 PACE L. REV. 587, 589 (2004); Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 591 (2011).

21. *See* Thompson, *supra* note 20, at 626-37; Wagner, *supra* note 4, at 1249-55; Wood, *supra* note 4, at 190-202, 210-12.

22. *See, e.g.*, Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 786-89 (2011) (asking, but not answering, questions about the potential for such litigation).

23. *See* John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237, 238, 256-64 (2011) (providing the broad contours of "a constitutional and common-sense rationale" for counting prisoners in their home districts); David Hamsher, Comment, *Counted Out Twice—Power, Representation & the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 322-27 (2005) (surveying the problem but focusing mainly on the prospects for state-level legislative fixes); Andréa L. Maddan, Note, *Enslavement to Imprisonment: How the Usual Residence Rule Resurrects the Three-Fifths Clause and Challenges the Fourteenth Amendment*, 15

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what constitutional one-person, one-vote or statutory vote dilution challenges to prison gerrymanders might look like, writing before people began litigating such cases.[24] But since the rubber met the road, no systematic scholarly analysis grappled with the courts' potential role or provided them tools to craft a workable doctrine.[25]

The time is ripe to do so. While the pathbreaking decisions in Florida and Rhode Island ushered courts into the fray, two other recent developments increase the likelihood of future litigation. First, the Supreme Court revisited the fundamental underpinnings of the governing one-person, one-vote doctrine in *Evenwel v. Abbott*,[26] a decision that churns the relevant doctrinal soil and might guarantee fertile ground for future prison gerrymandering challenges, as this Note argues[27]—or else might have salted the earth for such claims, as the First Circuit recently concluded.[28] Meanwhile, the Census Bureau appears to be digging in on the status quo: barring a last-minute change of heart, it will again count prisoners behind bars for the 2020 Census.[29] This state of affairs suggests that prison gerrymandering suits will multiply in coming years.

This Note attempts to give courts the tools they need to adjudicate equal protection challenges to prison gerrymanders. Specifically, it undertakes the first scholarly examination of the emerging case law of prison gerrymandering—analyzing two leading cases that stake out sharply divergent views of how the Equal Protection Clause governs such claims. It also applies scholars' insights about the nature of vote dilution claims to illuminate the tricky questions on which prison gerrymandering challenges turn.[30]

RUTGERS RACE & L. REV. 310, 330-35 (2014) (presenting a mostly descriptive approach focused primarily on legislative reforms, with limited legal analysis); Sean Suber, Note, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471, 477-78 (2014) (focusing exclusively on administrative challenges to the "usual residence rule").

24. Ho, *supra* note 4, at 379-91.

25. The only other analysis that focuses specifically on the one-person, one-vote doctrine's application to prison gerrymandering is more than a decade old; it predates the 2010 redistricting cycle and the recent cases this Note analyzes. *See* Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 VA. J. SOC. POL'Y & L. 229 (2004).

26. 136 S. Ct. 1120 (2016).

27. *See infra* Part III.A.

28. *See* Davidson v. City of Cranston, 837 F.3d 135, 141-45 (1st Cir. 2016).

29. *See Census Bureau Continues to Distort Democracy*, *supra* note 13.

30. In particular, this Note builds on Joseph Fishkin's and Heather Gerken's insights into the inherently communal nature of the right to an undiluted vote. *See* Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1893 (2012) ("[I]n one person, one vote cases, in contrast to vote denial cases, the real action is *not* in the domain of individual rights, but rather in structural questions about the allocation of group political power."); *footnote continued on next page*

Part I of this Note offers a primer on prison gerrymandering. Part II introduces *Calvin v. Jefferson County Board of Commissioners*,[31] the first decision to uphold a constitutional challenge to a prison gerrymander; the Supreme Court's decision in *Evenwel v. Abbott*,[32] and the First Circuit's subsequent decision in *Davidson v. City of Cranston*,[33] which disagreed with *Calvin*.[34] Part III examines the foundational issues on which *Calvin* and *Davidson* part ways and concludes that *Davidson* was too dismissive of the novel claim that *Calvin* recognized. Contrary to the First Circuit's view, the Court's precedents, including *Evenwel*, permit one-person, one-vote challenges to prison gerrymanders. Finally, Part IV refines the framework *Calvin* proposed for adjudicating such challenges by engaging with scholarship relevant to the most difficult open question at the heart of these cases: What does the right to equal representation protect? The result is a novel proposal for how courts should adjudicate these claims in the future.

I. Background

Inmates were enumerated in prisons as early as the Founding.[35] For most of this practice's history, it was uncontroversial and generally unproblematic.[36] In the last half-century, however, two developments have made the practice a source of concern.

First, in the 1960s, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment mandates that legislative districts be roughly equipopulous—a principle now known as "one person, one vote."[37]

Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666-67 (2001) ("What makes dilution claims unusual is that the individual injury at issue cannot be proved without reference to the status of the group as a whole; no individual can assert that her vote has been diluted unless she can prove that other members of her group have been distributed unfairly within the districting scheme.").

31. 172 F. Supp. 3d 1292 (N.D. Fla. 2016).

32. 136 S. Ct. 1120 (2016).

33. 837 F.3d 135.

34. *Id.* at 146.

35. *See* Wagner, *supra* note 4, at 1242; *see also* Borough of Bethel Park v. Stans, 449 F.2d 575, 578 (3d Cir. 1971) (describing the "usual place of abode" provisions of the First Decennial Census Act of 1790). Strict application of the usual residence rule to prisoners has not always been the norm, however; the 1900 Census, for instance, allowed for the possibility of counting prisoners at home. *See* Ho, *supra* note 4, at 372.

36. *See* Wagner, *supra* note 4, at 1242.

37. Reynolds v. Sims, 377 U.S. 533, 577 (1964); *see also* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.35 (5th ed. 2013) (summarizing the early history of one person, one vote).

That doctrine originated with *Baker v. Carr*,[38] in which the Supreme Court departed from its earlier stance that unequally populated legislative districts—and the dilution of some voters' representation that resulted—raise nonjusticiable questions that must be left to the political process.[39] Then, in *Reynolds v. Sims*, the Warren Court laid down what it hoped would be an administrable[40] and relatively uncontroversial rule to govern such disputes: state legislative districts must equalize population, at least "as nearly . . . as is practicable."[41] That rule was quickly extended to local governments[42] and congressional districts.[43] Because long-frozen district lines and urbanization had caused huge disparities to build up among state legislative districts over time, the new constitutional rule had huge short-term impacts on state electoral processes.[44] But today—with the pent-up malapportionment the Court confronted in the 1960s long since dissipated—its simplicity allows it to operate as a subtle background constraint on redistricting decisions.[45] That is

38. 369 U.S. 186 (1962).

39. *See id.* at 209, 237.

40. Even math-apprehensive law students can learn how to implement one-person, one-vote doctrine with enough consistency that "almost every student" can correctly diagnose the presence or absence of a violation with the benefit of "about forty-five minutes" of instruction. Michael J. Pitts, *One Person, One Vote: Teaching "Sixth Grade Arithmetic,"* 56 ST. LOUIS U. L.J. 759, 762, 766 (2012).

41. 377 U.S. at 577.

42. *See* Avery v. Midland County, 390 U.S. 474, 485-86 (1968).

43. *See* Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). *Wesberry*'s equalization mandate, unlike *Reynolds*'s, is grounded in Article I of the Constitution, not the Fourteenth Amendment. *See id.* at 7-8, 8 n.10. One consequence of that difference is that the equal population requirement for congressional districts is much firmer, approaching strict numerical equality. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 740-44 (1983); *see also* Pitts, *supra* note 40, at 760 ("When it comes to congressional districts, the one person, one vote doctrine comes fairly close to mandating that every congressional district have the exact same amount of population or, if exact equipopulousness is impossible, to have the bare minimum population differential between districts.").

44. *See* Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949, 954-55, 955 n.36 (2005) (describing disparities prior to *Baker* and *Reynolds* on the order of nineteen-, forty-one-, or even one-thousand-to-one between state legislative districts in the 1960s); J. Douglas Smith, *The Supreme Court Could Send America Back a Century*, TIME (Dec. 8, 2015), http://ti.me/1SK0dkz ("By 1960 malapportionment had produced staggering inequality in virtually every state in the union.").

45. Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847, 1854 (1978) ("By adopting an individual emphasis, and leaving to chance the relative electoral strengths of competing groups, the Court arrived at an easily enforceable objective standard. . . . The one person, one vote standard and the prohibition of invidious intent in the districting process provide constraints on districting by state legislatures, but within these broad limits, legislatures are free to resolve the political questions whose answers determine the relative electoral strengths of competing racial, ethnic, religious, or economic groups."); *see also*

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because later cases have broadly interpreted the Court's "as nearly as practicable" hedge: when it comes to state-level redistricting, courts will generally uphold any plan that manages to stay within a 10% deviation of perfect equality, giving redistricters significant leeway.[46] But one person, one vote nevertheless laid down a foundational principle: equal population is the basis of equal representation.[47]

The second development took place soon after the *Baker* and *Reynolds* revolution: prison populations exploded in the latter decades of the twentieth century, ushering in an era of "mass incarceration."[48] The United States now locks up many, many more people than it once did—to such an extent that it leads the globe in prisoners per capita by a significant margin.[49]

Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1459 (2008) (noting that "[b]ecause the one-person, one-vote standard must be met after each decennial census, redistricting . . . ha[s] become routine" and that "[a]lthough the one-person, one-vote principle does impose certain constraints on redistricting, it also frees legislators from abiding by others"); Fishkin, *supra* note 30, at 1906 ("[T]he beauty of the one person, one vote rule is that it provides at least some minimal degree of constraint on politicians' ability to decide which groups will be represented."). For a nuanced, empirical assessment of *Baker* and its progeny's practical implications today, see Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002).

46. *See* Brown v. Thomson, 462 U.S. 835, 842 (1983) (explaining that the Court's Fourteenth Amendment cases "have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations"); Pitts, *supra* note 40, at 761 (explaining that as a general rule, there is a "safe harbor" that means "state legislative districts cannot be successfully challenged if the overall range of deviation of the plan is less than ten percent"); Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1826 (2010) ("Though the Court devised the ten percent rule to be a flexible guideline for lower courts and redistricting legislatures, in practice it has become an uncrossable bright line—state reapportionment plans that fall below the ten percent threshold are virtually impervious to one person, one vote claims."). As noted above, the rule for congressional districts is much stricter. *See Karcher*, 462 U.S. at 740-44 (requiring near-perfect equality for congressional districts); *supra* note 43.

47. *See* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 215 (2003) ("The one person, one vote principle was at the heart of the early reapportionment cases and has since become the sine qua non of democracy. One of the primary reasons for its success is that it appears to be an objective or neutral way of parsing out political power. That is, unlike the other two types of voting rights—which involve the normatively loaded issues of who receives the right to vote and which groups deserve the right to a qualitatively undiluted vote—the quantitative cases can be resolved by mere reference to what is viewed as an elemental component of democracy." (footnote omitted)).

48. *See generally* Dyszlewski et al., *supra* note 3 (collecting sources on mass incarceration).

49. *See* Stephanos Bibas, *The Truth About Mass Incarceration*, NAT'L REV. (Sept. 16, 2015, 4:00 AM), http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform ("America has the highest incarceration rate in the world, outstripping even Russia, Cuba, Rwanda, Belarus, and Kazakhstan. Though America is home to only

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Reformers argue that these twin developments make prison gerrymandering outmoded and unjust. This Part offers background on prison gerrymandering, elaborates critiques of the practice, and surveys recent administrative and legislative reform efforts.

A. What Is Prison Gerrymandering?

Prison gerrymandering is pervasive thanks to the Census Bureau's "usual residence rule," which since 1950 has made the place a person "lives and sleeps most of the time" his or her location for purposes of the decennial census.[50] This rule applies naturally and uncontroversially to most (but not all) Americans.[51] It is not constitutionally or even statutorily compelled; it is a choice of the Census Bureau, designed to achieve reasonably accurate counts with minimal logistical headaches.[52] But because virtually all jurisdictions

about one-twentieth of the world's population, we house almost a quarter of the world's prisoners. Since the mid 1970s, American prison populations have boomed, multiplying sevenfold while the population has increased by only 50 percent."); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america ("The accelerating rate of incarceration over the past few decades is just as startling as the number of people jailed: in 1980, there were about two hundred and twenty people incarcerated for every hundred thousand Americans; by 2010, the number had more than tripled, to seven hundred and thirty-one. No other country even approaches that."); *see also Mass Incarceration in the USA*, AMNESTY INT'L USA, http://www.amnestyusa.org/our-work/issues/military-police-and-arms/police-and-human-rights/mass-incarceration-in-the-usa (last visited May 5, 2017) ("[S]ince 1980, the US prison population has quadrupled, an increase largely driven by heavier penalties for non-violent offenses.").

50. Ho, *supra* note 4, at 359 (quoting *Residence Rules: Facts About Census 2000 Residence Rules*, U.S. CENSUS 2000, https://www.census.gov/population/www/censusdata/resid_rules.html#usual (last visited Nov. 6, 2010)); *see also* Lotke & Wagner, *supra* note 20, at 589-90 (summarizing the usual residence rule). For a deeper treatment of the usual residence rule, see Persily, *supra* note 22, at 781-89.

51. *See* 2020 Decennial Census Residence Rule and Residence Situations, 80 Fed. Reg. 28,950, 28,950 (proposed May 20, 2015) ("Determining usual residence is straightforward for most people. However, given our Nation's wide diversity in types of living arrangements, the usual residence for some people is not as apparent. A few examples are people experiencing homelessness, people with a seasonal/second residence, people in prisons, people in the process of moving, people in hospitals, children in shared custody arrangements, college students, live-in employees, military personnel, and people who live in workers' dormitories.").

52. That basis in Census Bureau policy makes prison gerrymandering a sort of "historical accident." *See* Wagner, *supra* note 4, at 1259. The usual residence rule was adopted at a time when one person, one vote was not yet the law of the land and, in any event, prison populations were much smaller. *Id.* at 1242-43. Back then, no one could have anticipated the rule's modern-day democratic ramifications. *See id.* at 1242 ("For more than a century, the impact of the Census Bureau's method of counting people in prison on the distribution of political power was about zero.").

work from census data when they draw legislative districts, the rule makes prison gerrymandering a default setting throughout the country.

That is because prisoners' "usual residence" is wherever they are locked up on census day,[53] 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[54] and generally do not have roots or futures in the prison's host community. Most prisoners are in effect "ghost constituents," whose interests can be ignored by their representatives with little fear of electoral repercussions.[55]

Because the Constitution requires that states and localities draw legislative districts of roughly equal population,[56] these large concentrations of disenfranchised "residents" exert a sort of representational push and pull: they increase the ostensible population of prisons' host communities, tugging inward the boundaries of the districts in which they are located. At the same time, prisoners' absence from their home communities thins those communities' enumerated populations, meaning that district lines must expand geographically to encompass an equivalent number of persons.[57] Prisoners thus become "inert ballast in the redistricting process."[58]

Prisoners are unique in this regard. The disenfranchisement of prisoners distinguishes them from other transitory, self-contained groups like college students and members of the armed forces, who may be enumerated on campuses or in barracks and thus might be seen to raise comparable concerns. Prisoners are different because members of those other groups can assert their voices in the legislative districts where they are located, and elected representatives accordingly disregard their preferences at their own peril, just as with any other subset of the community.[59] They also have more

53. *See* Drake, *supra* note 23, at 240 ("Across-the-board, the Census counts people who are incarcerated on Census Day as residents of the facilities in which they are incarcerated, without regard to where they may have lived for most of the year." (footnote omitted)).

54. Only Maine and Vermont permit some convicted felons to vote from prison. ME. STAT. tit. 21-A, § 112(14) (2016); VT. STAT. ANN. tit. 17, § 2122(a) (2016); *see* Wagner, *supra* note 4, at 1241 n.2.

55. *See* Wood, *supra* note 4, at 184-85.

56. *See supra* notes 37-42 and accompanying text.

57. *See* Wood, *supra* note 4, at 205-07.

58. Karlan, *supra* note 19, at 1160.

59. *See* Fletcher v. Lamone, 831 F. Supp. 2d 887, 896 (D. Md. 2011) ("College students and members of the military are eligible to vote, while incarcerated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners."), *aff'd mem.*, 133 S. Ct. 29 (2012).

opportunities to interact with their nonstudent or nonmilitary neighbors.[60] Additionally, students and servicemembers exercise voluntary choice in deciding both *whether* to relocate and, in the case of college students, *where* to make their temporary home; at least to an extent, that element of voluntariness further differentiates them from prisoners.[61]

60. *See id.*; Kenneth Prewitt, *Foreword* to PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS, at i (2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf ("Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration. (In these, and in additional ways, prisoners differ from college students, the other sizable group living, though in their case voluntarily so, away from 'home.')").

61. On this point, the involuntariness of incarceration, there is a robust counterargument: prisoners *do* voluntarily choose to be incarcerated, in the sense that the choice to commit a crime punishable by imprisonment is voluntary. That is true enough; that criminals exercise free will is a fundamental precept that no coherent theory of the U.S. criminal justice system can ignore. *See* United States v. Grayson, 438 U.S. 41, 52 (1978) ("A 'universal and persistent' foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the 'belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" (quoting Morissette v. United States, 342 U.S. 246, 250 (1952))); *see also* Matthew Jones, Note, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031, 1033 (2003) ("The American criminal justice system largely relies on the notion that individuals are responsible for their actions, and, thus, can be punished when they choose to violate societal standards. In other words, American criminal jurisprudence is firmly rooted in the concept of individual free will."); *id.* at 1033 n.6 (collecting sources). On the other hand, modern scholarship has complicated the notion that people who commit crimes necessarily are independent moral agents in the purest sense. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 349-52 (1997) (describing how contextual features of social and community life influence individuals' decisions to offend); Stephen O'Hanlon, *Towards a More Reasonable Approach to Free Will in Criminal Law*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 395, 410-18 (2009) (discussing how "addiction, economic deprivation, gender, and culture" are contributing "causes" of criminal behavior that undermine assumptions of free will). Some thinkers even take the argument a step further by proposing that criminal law should embrace shades of determinism. *See, e.g.*, Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1409 ("[P]unishment should be reconceptualized as a type of quarantine in which individuals who are not responsible for the conditions that make them dangerous are deprived of certain liberties for the protection of others."); Judge Richard Lowell Nygaard, Freewill, Determinism, Penology, and the Human Genome: Where's a New Leibniz When We Really Need Him?, Keynote Address at the University of Chicago Law School Roundtable Symposium: Genetics and the Law (Jan. 19, 1996), *in* 3 U. CHI. L. SCH. ROUNDTABLE 417, 437 (1996) ("It would be pleasant to believe that Kant and Descartes were right that you and I are fully in control of our rational choices and that thought, reason, and a free will are what make us human. However comforting these beliefs are, they defy what we, at the close of the twentieth century, now know about human nature and some of what we are discovering about human genetics. Penology must recognize this because it is both morally indefensible and penologically unproductive to simply punish those whose actions are determined, at least to the degree

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Treating prisoners as representational filler has democratic consequences. If prisons and prisoners were evenly distributed throughout the demographic landscape, choices about where to count the prisoners might not matter much. But two demographic realities make the practice politically salient: First, there are stark racial disparities in who gets incarcerated. Second, the geography of imprisonment is uneven; prisons are disproportionately located in rural areas, while the individuals who fill the beds are more likely to come from urban communities.

The racial disparities in incarceration are pronounced and known to anyone familiar with the critique that mass incarceration is "the new Jim Crow."[62] Black men face the steepest disparities, incarcerated at quintuple the rate of their white counterparts: "On any given day, one out of every ten African American men in their thirties is in prison or jail."[63] More generally, African Americans constitute over 40% of all Americans behind bars but less than 13% of the national population.[64] Add in Latinos, and the disparities swell: racial minorities make up a quarter of the national population but nearly two-thirds of prisoners.[65] This means "the extent of racial disparity in imprisonment rates is greater than in any other major arena of American social life."[66] At the same time, many communities where prisons are built are dispropor-

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their actions are truly determined." (footnote omitted)). But one need not embrace determinism or disavow personal moral culpability to conclude that a convict's place of residence is *less* voluntary than that of a college student or a military enlistee. I say so for three reasons. First, one who chooses to commit a crime can more readily be presumed to have done so *in spite of* the risk of (forcible) relocation than someone who opts to go away for college or serve in the U.S. military; for the latter, an adventurous notion of leaving home may be bound up in the undertaking. Second, college students have volition to decide where to go to school, whereas prisoners are at the mercy of the state on the crucial question *where* they will be locked up. And finally, the ability to choose whether and how to interact with the community in which one ends up means college students and military personnel retain a significant residuum of voluntary choice: whether to engage with the community where they find themselves. Opting to do so may, in a sense, ratify the place, making it a voluntarily chosen community even if geographical happenstance led them there.

62. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (arguing that the U.S. criminal justice system functions as a contemporary system of racial control by targeting black men through the war on drugs and decimating communities of color, even as it formally adheres to the principle of colorblindness).

63. Wood, *supra* note 4, at 182.

64. Ho, *supra* note 4, at 361.

65. Gary Hunter & Peter Wagner, *Prisons, Politics, and the Census*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 80, 81 (Tara Herivel & Paul Wright eds., 2007).

66. GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 22 (2008).

tionately white.[67] New York State provides an extreme illustration of a national trend: as of 2005, 98% of the state's prisoners were located in state senate districts that were whiter than the state average.[68]

These racial imbalances are related to another trend: prisons tend to be located in rural areas where land is cheap and jobs are needed, while many arrests and convictions take place in areas of concentrated urban poverty. During the prison boom of recent decades, rural communities clamored to host prisons, viewing them as potential "source[s] of economic development."[69] Areas classified as rural are home to 20% of the overall U.S. population but 40% of all prisoners.[70] Population transfers due to incarceration are unidirectional in many states; urban areas lose population while rural jurisdictions swell. For example, Dallas County "convicts 15.1% of the people in Texas state prisons but confines none of them. In contrast, Walker County confines 10.4% of the state prison population but convicts hardly anybody."[71] The pattern is especially pronounced in states like Illinois and New York that feature large urban cores and sizeable rural peripheries.[72] Fifty-one of New York's fifty-five state prison facilities are located upstate.[73] Thus, although New York City supplies two-thirds of the state's prisoners, 91% of them serve their time upstate.[74] Similarly, 60% of Illinois's prison population hails from Cook County (which includes Chicago), but Cook County "physically holds only 1% of [Illinois's] prisoners."[75] And even within cities, crime—and thus punishment—may be concentrated. In Baltimore, for example, 75% of incarcerated residents come from twenty-five

67. *See* Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL'Y INITIATIVE, http://www.prisonpolicy.org/racialgeography/report.html (last visited May 5, 2017) (providing a variety of data and interactive graphs establishing that "prisons are disproportionately located in majority-white areas" and setting forth findings such as "in 2010 there were 161 counties spread across 31 states where the incarcerated Black population outnumbers the number of free Blacks"); *see also Appendix D: Portion of Each State's Incarcerated Population That Is Incarcerated in Disproportionately White Counties*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/racialgeography/incarcerated_in_disproportionately_white_counties.html (last visited May 5, 2017) (setting forth data showing that in roughly two-thirds of the states, including Illinois, Pennsylvania, and Texas, a majority of prisoners are incarcerated in counties that are whiter than the statewide average).

68. Peter Wagner, *98% of New York's Prison Cells Are in Disproportionately White Senate Districts*, PRISON POL'Y INITIATIVE (Jan. 17, 2005), http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts.

69. *See* ALLARD & LEVINGSTON, *supra* note 60, at 5-7.

70. Ho, *supra* note 4, at 362.

71. Lotke & Wagner, *supra* note 20, at 592.

72. *See* Ho, *supra* note 4, at 362.

73. Wood, *supra* note 4, at 188.

74. Ho, *supra* note 4, at 362.

75. *Id.*

of the city's two hundred neighborhoods.[76] A pattern emerges from these data: rural communities on balance come out ahead in prison gerrymandering, while urban communities with high crime rates bear the worst effects.

B. What Are the Harms of Prison Gerrymandering?

Prison gerrymandering's detractors identify at least three distinct harms the practice wreaks. The first is "manipulation" of communities' "collective voice."[77] When prison gerrymandering, line-drawers pick winners and losers—some communities gain representational weight, while others lose it. This harm, reformers argue, erodes "the building blocks of democratic representation."[78] To be sure, this is a basic, if somewhat abstract, harm of all legislative malapportionment, not just prison gerrymandering. But it is particularly troubling in the prison gerrymandering context because the demographic realities described above imbue this harm with racial and cultural salience. A statewide gerrymander may cause the entire edifice of representative democracy to tilt away from communities that already have reason to feel disenfranchised. The effect is a thumb on the scale for white, rural interests, obtained by working a sort of collective punishment on communities elsewhere: a neighborhood already hard-hit by crime finds that its political voice "gradually dwindles, not through its own choice, . . . but through the forcible removal of its members."[79] This critique gains force from the clear racial and political divides between the winners and losers in this voice transfer, but it does not depend on them.

The second harm is dehumanization of the prisoners themselves. Critics of prison gerrymandering argue that it is troubling to pretend that human beings who cannot vote, whose freedoms are heavily circumscribed, and who have little meaningful stake in community debates are equal "constituents" of representatives who have no incentive to heed their views. Critiques that label prisoners "ghost[s]" or "ballast" evoke this personhood-based harm,[80] as do arguments that ending prison gerrymandering will "signal[] a shift away from viewing the goal of incarceration as isolation and segregation and towards

76. Wood, *supra* note 4, at 186.

77. *See id.* at 210.

78. *Id.*

79. *Id.* at 209; *see also* Thompson, *supra* note 20, at 590 (calling the usual residence rule "an unseen but potent means of political disempowerment for communities of color").

80. *See supra* notes 55, 58 and accompanying text; *see also* Joan Barron, *Barron: Wyoming's 'Ghost Constituents,'* CASPER STAR-TRIB. (Oct. 1, 2016), http://trib.com/opinion/columns/barron-wyoming-s-ghost-constituents/article_845be839-07e2-5f64-b27d-750382498146.html.

viewing the goal as rehabilitation and reintegration."[81] These critiques recall the comparable argument that our modern penal regime imposes a humiliating and excessive "civil death"[82] or "civic excommunication"[83] that is unmoored from legitimate penological rationales.[84] The most forceful version of this argument analogizes prison gerrymandering to the notorious Three-Fifths Clause,[85] which treated slaves as less than full persons.[86]

Finally, reformers argue that the distortive effects of prison gerrymandering are not merely abstract or theoretical: they *matter* in policy terms. Dale Ho of the NAACP Legal Defense Fund has summed up the argument as follows: "[B]ecause their political power depends in some measure on a continuing influx of prisoners, legislators from prison districts have a strong incentive to oppose criminal justice reforms that might decrease incarceration rates."[87] Ho uses the example of two New York state senators "who led the opposition to efforts to reform New York's harsh Rockefeller drug sentencing laws" while at the same time "represent[ing] districts that were home to more than 17% of the state's prisoners."[88] Moreover, Ho notes, "arguably all politicians have a perverse incentive to seek the construction of prison facilities in their districts, as prisons translate into enhanced political power for their constituents."[89] This leads to "a positive feedback loop: mass incarceration results in districts where the representatives are incentivized to favor policies that favor even more mass incarceration."[90]

Gary Hunter and Peter Wagner also draw on the experience of New York as real-world evidence of these kinds of effects: representatives in districts with high prison populations "do not merely ignore their incarcerated constituents,

81. *See, e.g.*, Wood, *supra* note 4, at 181.

82. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1792-93 (2012).

83. *See* LOURY, *supra* note 66, at 21; *see also* Cammett, *supra* note 19, at 352 ("Criminal convictions set in motion a variety of social conditions and regulatory schemes that are mutually and negatively reinforcing and, taken together, render convicted felons 'shadow citizens.'").

84. This stigmatic harm of prison gerrymandering arguably adds a twist to the similar phenomena identified by Chin, Loury, and Cammett. *See supra* notes 81-83 and accompanying text. Whereas the stigma of "civil death" or "civic excommunication" is targeted directly at individual offenders ("you did *X*, so you must suffer *Y* consequence"), prison gerrymandering dehumanizes prisoners en masse by treating blocs of prisoners as inert political pawns.

85. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV.

86. *See, e.g.*, Ho, *supra* note 4, at 362; Maddan, *supra* note 23, at 310.

87. Ho, *supra* note 4, at 363-64.

88. *Id.* at 364.

89. *Id.*

90. *Id.*

but advocate policies inimical to their interests."[91] Hunter and Wagner link the effects of prison gerrymandering to support for the draconian drug laws and mandatory minimums that fueled and sustain the incarceration boom. They note, for example, that reform in New York State was "stalled for years by a small number of powerful state senators with large prisons in their districts."[92]

C. Where Does Prison Gerrymandering Occur?

Prison gerrymandering may occur at all three levels of government. A wide range of county and municipal governments have legislative bodies of various stripes that require drawing district lines.[93] States draw districts for their state legislatures.[94] And they also draw districts for the federal House of Representatives (assuming the state in question is populous enough to have multiple representatives).[95]

For local redistricting, practices vary. Some jurisdictions include prisons in their local counts, and some do not. Many states give localities no instruction on the issue, but those that do provide divergent guidance: at least two states—Minnesota and Wisconsin—expressly require localities to use prisoner-inclusive data;[96] some states, such as Tennessee and Virginia, permit localities to opt out of counting prisoners;[97] and Colorado and Michigan expressly prohibit including prisoners in local districts.[98] The most precise nationwide estimation seems to be that "many" local jurisdictions already exclude prisoners when redistricting, but reformers have identified hundreds that do not.[99]

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91. Hunter & Wagner, *supra* note 65, at 86.

92. *Id.* at 85.

93. *See infra* notes 96-101 and accompanying text.

94. *See infra* notes 102-05 and accompanying text.

95. *See infra* note 106 and accompanying text.

96. *See* Aleks Kajstura, *Tennessee No Longer Forcing Prison Gerrymandering on County Governments*, PRISON POL'Y INITIATIVE (May 2, 2016), http://www.prisonersofthecensus.org/news/2016/05/02/tn-county.

97. *See id.*; *see also* Press Release, Prison Policy Initiative, Virginia Ends Mandatory Prison Gerrymandering (Mar. 20, 2013), https://www.prisonersofthecensus.org/news/2013/03/20/hb1339; *Legislation*, PRISON POL'Y INITIATIVE, http://www.prisonersofthecensus.org/legislation.html (last visited May 5, 2017) (listing enacted, proposed, and model legislation on prison gerrymandering).

98. *See Legislation*, *supra* note 97.

99. *See* Lotke & Wagner, *supra* note 20, at 599 ("In many cases, . . . the results [of prison gerrymandering at the local level] are so obvious, unexpected and unfair that people in prison are removed from the counts."); *The Impact on Local Democracy*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/problem/local.html (last visited May 5, 2017) (listing localities that include prisoners in redistricting); *see also Local Governments That Avoid Prison-Based Gerrymandering*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/local (last updated Nov. 19, 2016) (listing

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Though prison gerrymandering thus is not pervasive at the local level, a locality's decision to count prisoners "can have a massive effect."[100] In the most extreme example, a local ward in Anamosa, Iowa was drawn to consist of 96% prisoners; in the 2005 city election, the winner of the seat prevailed with just two write-in votes.[101]

At the state level, the vast majority of states count prisoners at their place of incarceration when drawing legislative districts.[102] To reformers, this is an area of especially great concern. Most state legislative districts are small enough that inclusion or exclusion of prisons can have a substantial effect on specific districts. Nationwide, the median state senate district has 106,362 residents, while the median district for a state house of representatives has just 37,564; the population of single prison will often number in the thousands.[103] Indeed, one state house district in Maryland during the 2000s was 18% prisoners.[104] The voice- and policy-manipulation harms are greatest at the state level, as "most criminal justice policy is made in the states."[105]

Given the sheer size of federal House of Representatives districts, which are also drawn by states, the effects of prison gerrymandering will naturally be least pronounced there. But the same principles apply, and in an era when parties maneuver for every edge while controlling the levers of redistricting, prisons—concentrated blocs of constituents who can be counted upon not to vote—are useful fodder for partisan chicanery.[106]

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localities that exclude prisoners from redistricting). "At least seven" of Florida's sixty-seven counties exclude prisoners from districting. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1296 n.2 (N.D. Fla. 2016).

100. Wagner, *supra* note 4, at 1244-45.

101. *Id.* at 1245.

102. A few recent exceptions to that prevailing practice are examined in Part I.E below.

103. *See* Lotke & Wagner, *supra* note 20, at 594. For comparison, in Illinois the average population of a state prison was approximately 1931 per facility as of the end of 2014. *Corrections Statistics by State: Illinois*, NAT'L INST. CORRECTIONS, http://nicic.gov/statestats/?st=IL (last visited May 5, 2017) (dividing 48,278 prisoners among twenty-five prisons). Pennsylvania's average was similar. *Corrections Statistics by State: Pennsylvania*, NAT'L INST. CORRECTIONS, http://nicic.gov/statestats/?st=PA (last visited May 5, 2017) (dividing 50,694 prisoners among twenty-five prisons and one "boot camp" for an approximate average of 1950 prisoners per institution). In California, the approximate average prison size was a whopping 3489 inmates. *Corrections Statistics by State: California*, NAT'L INST. CORRECTIONS, http://nicic.gov/statestats/?st=CA (last visited May 5, 2017) (dividing 136,088 prisoners among "35 adult institutions and 4 youth facilities").

104. Wagner, *supra* note 4, at 1244.

105. Lotke & Wagner, *supra* note 20, at 594.

106. *See, e.g.*, Matt Dixon, *Republican Lawmaker Says Inmates Key to Defeating Corrine Brown*, POLITICO (Sept. 23, 2015, 6:00 AM EDT), http://politi.co/21pzEVP (describing leaked audio of a Florida Republican lawmaker advocating packing prisons into the district of

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D. What Are the Remedies?

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.[107]

Exclusion is the more straightforward of the two options. Excluding prisoners from census data is a simple act of subtraction that the Census Bureau already empowers states and localities to undertake.[108] Perhaps for that reason, "over two hundred localities . . . removed people in prison when redrawing their local government districts in the 2011 redistricting cycle."[109] This remedy is the natural way to fix a local-level prison gerrymander, because state prisoners will predominantly hail from outside the specific town or county in question. But it leaves some of the harms described in Part I.B above unaddressed. Even when excluding prisoners suffices to abate manipulation of community voice and skewing of policy preferences, prisoners go uncounted and thus remain dehumanized. And if this remedy is applied statewide, it may appear to critics of prison gerrymandering to be a half-measure: it fixes the *over*representation of rural communities, but it does nothing to remedy *under*representation of urban ones.[110]

Reassignment is a more fulsome but logistically demanding way to tackle the problem. Perhaps because it more fully responds to the concerns of those who seek to end prison gerrymandering, reassigning prisoners back to their home communities is the approach that state legislative reforms (both proposed and enacted) have generally taken.[111] It fully remedies the identified harms. It is also consistent with the practical reality that the typical prisoner is (a) incarcerated for a short enough period of time that it is reasonable to assume he will still have ties to his home community when he gets out[112] and

a Democratic U.S. Representative as a strategy for maximizing the number of minority constituents who are felons and cannot vote).

107. *See, e.g.*, Wood, *supra* note 4, at 193-94 (noting that when Maryland ended prison gerrymandering, it reassigned prisoners to their last known addresses); *see also infra* note 122.

108. *See* Wood, *supra* note 4, at 191.

109. *Id.*; *see Local Governments That Avoid Prison-Based Gerrymandering*, *supra* note 99.

110. Given these shortcomings, one might wonder whether exclusion is a sufficient remedy, at least when it comes to statewide apportionments. I take up this topic in Part IV.D below.

111. *See* Wood, *supra* note 4, at 191-92.

112. The median term of incarceration for a state felon, as of 2006, was seventeen months, and the mean was thirty-eight months. Sean Rosenmerkel et al., U.S. Dep't of Justice, NCJ 226846, Felony Sentences in State Courts, 2006: Statistical Tables 6 tbl.1.3 (2010), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf. Limit the universe to felons serving time in prisons (rather than jails), and the numbers rise only to a median of

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(b) reasonably likely to return to his home community, if not the same specific address, upon release.[113] The practical challenge is pulling together the necessary data, which will typically require some expenditure of time and effort by prison staff or other government officers.[114] How difficult this proves may vary from jurisdiction to jurisdiction.

E. Administrative and Legislative Reforms

The first wave of efforts to reform prison gerrymandering proceeded through two primary channels: lobbying the Census Bureau to change the way it counts and lobbying states to change the way they redistrict. Both have received scholarly treatment, and neither is this Note's focus. A brief description will suffice to provide context.

The census. Only administrative changes within the Census Bureau promise a comprehensive, nationwide solution to the problem. If reformers had their way, the Census Bureau would simply change the usual residence rule and begin counting prisoners at their most recent nonprison address for all official purposes.[115] Despite early optimism that the Census Bureau might make such a

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thirty-six months and a mean of fifty-nine months. *Id.* Life sentences are less than 1% of all prison sentences. *Id.* at 7 tbl.1.4.

113. ALLARD & LEVINGSTON, *supra* note 60, at 1, 17 n.5 (concluding, based on the anecdotal experience of a longtime prison administrator, that released prisoners "virtually always return[] to the neighborhood they lived in before their incarceration"); *see also id.* at 13 ("The primary contact incarcerated people have with the outside world is through family members and friends from their communities of origin. As a result, incarcerated people are likely to maintain enduring ties with their hometown and return home upon release. In some cases formerly incarcerated people are even required to return to their home communities."); *cf. id.* (noting that the "presence of family and children in a home community often contributes to the maintenance of ties there" and that "55% of state prisoners and 63% of federal prisoners had a child under the age of 18" as of 1999); Urban Inst., The Challenges of Prisoner Reentry: Facts and Figures 1 (2008), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411683-The-Challenges-of-Prisoner-Reentry-Facts-and-Figures.PDF ("Two months after their release, a strong majority of released prisoners in Maryland (80 percent) and Illinois (88 percent) were living with a family member."); *U.S. Parole Commission: Frequently Asked Questions*, U.S. DEP'T JUST., https://www.justice.gov/uspc/frequently-asked-questions (last updated Sept. 29, 2015) ("[Q:] Must a [federal] parolee return to the community from which he or she came? [A:] In most instances, a parolee will be released to the Judicial District in which he or she was convicted or the Judicial District of legal residence.").

114. *See* Wood, *supra* note 4, at 193 (describing the process Maryland went through to identify and verify inmates' last known addresses, which involved supplementing an existing database with "(1) interviews with inmates; (2) pre-sentence investigation documents; and (3) correctional facility intake forms"); *id.* at 201 (describing the analogous process in New York).

115. *See* Wagner, *supra* note 4, at 1255; Wood, *supra* note 4, at 190.

change for the 2010 Census and subsequent redistricting cycle,[116] that did not come to pass.[117] However, the Census Bureau did make one small but important tweak to its practices in 2010: for the first time, it made a granular dataset concerning residents of "Group Quarters"—including prisons—available for state officials to factor into redistricting decisions if they so choose.[118] The practical effect of this change was to give states a way to exclude prisoners from their redistricting data without the prohibitive difficulty of conducting their own censuses.[119] This option freed up states to undertake the legislative reforms discussed in the second half of this Subpart.

Reformers have redoubled their efforts to get the Census Bureau to change the way it counts in 2020, but so far those hopes have not been realized. Notwithstanding a bevy of pro-reform comments on the issue, the Census Bureau is proposing to retain the status quo.[120] The Census Bureau will, however, preserve and slightly expand the state-empowering data offerings of the 2010 cycle.[121]

State legislative reforms. Aided by the Census Bureau's new data policy, a handful of states have recently taken legislative action against prison gerrymandering. In a major victory for reformers, New York and Maryland enacted legislative fixes for the 2010 redistricting cycle, while Delaware and California have enacted similar legislation to govern the redistricting that will follow the 2020 Census.[122] Reformers have promulgated model legislation[123]

116. *See* Hunter & Wagner, *supra* note 65, at 89.

117. Wood, *supra* note 4, at 190.

118. *Id.*

119. *See* Wagner, *supra* note 4, at 1248-49.

120. *Census Bureau Continues to Distort Democracy*, *supra* note 13. For a sample of the comments that have come in since the proposed rule was announced and urge the Census Bureau to reconsider before policies for the 2020 Census are finalized, see Letter from Leadership Conference on Civil & Human Rights et al. to Karen Humes, Chief, Population Div., U.S. Census Bureau (Sept. 1, 2016), http://www.naacpldf.org/files/case_issue/Leadership%20Conference%20Residence%20Criteria%20Sign%20On.pdf; and Letter from Chris Carson, President, League of Women Voters of the U.S., to Karen Humes, Chief, Population Div., U.S. Census Bureau (Aug. 31, 2016), http://lwv.org/content/league-sends-comments-census-bureau. For an extensive collection of similar letters sent prior to the Census Bureau's proposal, see *A Sample of the Comment Letters Submitted in 2015 to the Census Bureau Calling for an End to Prison Gerrymandering*, PRISON POL'Y INITIATIVE, http://www.prisonersofthecensus.org/letters/FRN2015.html (last visited May 5, 2017).

121. *See* Wagner, *supra* note 12.

122. Wagner, *supra* note 4, at 1249-50. Maryland's law requires reapportionment of prisoners for districting at all levels, local and statewide, including for federal elections. *Id.* New York's applies to state, county, and municipal districting. *Id.* at 1249. For more on the New York and Maryland legislative reforms, see Wood, *supra* note 4, at 190-212. For citations to the statutes themselves, see note 11 above.

123. *See* Wagner, *supra* note 4, at 1256 & n.86.

and generally set forth best practices for state legislative change[124] in hopes of persuading other states to follow suit. As of late 2016, similar bills were also pending in Illinois,[125] New Jersey,[126] and Connecticut.[127] And several states, including Michigan, Colorado, Mississippi, and New Jersey, have statutes requiring local jurisdictions to exclude prisoners from their counts (though these states do not make any effort to reallocate them for inclusion in counts elsewhere).[128]

Maryland's and New York's experiences give reformers cause for optimism. Citing the experience of high-crime neighborhoods in New York City and Baltimore that saw their municipal district boundaries contract in the wake of the reform laws,[129] a scholarly analysis concluded that the laws "represent a significant step in returning political power to inner-city communities."[130] Both states' reform legislation withstood legal challenges under federal and state law.[131] And though these states encountered some logistical and administrative hurdles in developing the data necessary not just to subtract prisoners from the census data but also to obtain home addresses to which they could be reassigned, both found the reassignments doable and

124. *See id.* at 1256-59.

125. *See Legislation*, *supra* note 97.

126. *See id.*

127. *See* S.B. 459, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016), https://www.cga.ct.gov/2016/FC/2016SB-00459-R000563-FC.htm. Legislation to end prison gerrymandering was also previously introduced unsuccessfully in a number of other states, including Minnesota, Oregon, Rhode Island, and Tennessee. *Compare* Wood, *supra* note 4, at 191 (listing states with pending bills as of mid-2015), *with Legislation*, *supra* note 97 (identifying pending and enacted state legislation regarding prison gerrymandering).

128. *See* Wagner, *supra* note 4, at 1250-51.

129. *See* Wood, *supra* note 4, at 205-07.

130. *Id.* at 208.

131. Maryland's law was upheld by a three-judge federal district court. Fletcher v. Lamone, 831 F. Supp. 2d 887, 890, 904 (D. Md. 2011), *aff'd mem.*, 133 S. Ct. 29 (2012). The challengers made a bevy of federal constitutional and statutory arguments against the law; for an in-depth treatment of this litigation, see Davis, *supra* note 9, at 51-59. New York's law was challenged, and upheld, in state trial court. *See* Wood, *supra* note 4, at 199-200. The challengers' principal contention was that the law violated a provision of the state constitution requiring that the census "shall be controlling as to the numbers of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts." Little v. N.Y. State Task Force on Demographic Research & Reapportionment, No. 2310-2011, slip op. at 5 & n.4 (N.Y. Sup. Ct. Dec. 1, 2011) (quoting N.Y. CONST. art. III, § 4). The state court rejected that claim because, in light of the Census Bureau's decision to disseminate Group Quarters data for these purposes, the law could not be said to have "rendered the data provided by the Census Bureau to be anything less than 'controlling' in the redistricting process." *Id.* at 7.

compiled the necessary data in time to redistrict on schedule.[132] That should reassure other states wary of red tape.

On the other hand, legislative reform is not a panacea. The states that have adopted these reforms lean heavily Democratic, as do most of the states that are considering following suit. Experience with the laws already passed suggests that deep red and middle-of-the-road states may have little interest in adopting such laws; in New York, for instance, the reform bill passed without "a single Republican vote."[133] A partisan divide on this issue makes intuitive sense; the factors that make prison gerrymandering look politically consequential suggest clear partisan interests for and against reform legislation, and legislators in prison-gerrymandered districts have a vested interest in using their (padded) clout to oppose reform.[134] Indeed, the 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[135]—suggests a built-in tendency toward legislative inertia. Additionally, even in some deep blue states, there may be practical impediments that make legislative reform more difficult. Massachusetts, for instance, has a state constitutional provision requiring use of U.S. Census data at all levels, which is impeding a legislative fix.[136]

II. Recent Litigation

Conspicuously absent from the foregoing story is any discussion of a common tool for reform movements: litigation. That might seem odd given the prominence of litigation in voting rights movements more broadly. Prison gerrymandering implicates the rights of minority communities, the very groups our modern constitutional and statutory voting rights infrastructure

132. *See* Wood, *supra* note 4, at 193-94, 200-01.

133. *Id.* at 197. *But see* Wagner, *supra* note 4, at 1254-55 (noting that "successful reform efforts to date have all been structured to maintain a broad coalition"; that Delaware and Maryland bills passed with "bipartisan" support; and that New York polls showed reform "was supported by the majority of the state, urban and rural, Democrat and Republican").

134. Interestingly, however, Erika Wood's analysis of the Maryland and New York experiences found little discernable impact on the partisan composition of either state's legislature. Wood, *supra* note 4, at 180, 202-04.

135. *See* Wagner, *supra* note 4, at 1254.

136. *Id.* at 1255-56; *see* STANLEY ROSENBERG & MICHAEL J. MORAN, MASS. GEN. COURT, REPORT FROM THE CHAIRS OF THE SPECIAL JOINT COMMITTEE ON REDISTRICTING 16 (2012), http://archives.lib.state.ma.us/bitstream/handle/2452/213880/ocn889628904.pdf (explaining that a state constitutional provision "dictates that the federal census shall be the basis for determining the representative, senatorial, and councillor districts"); *id.* at 17 ("If the federal government fails to act, then the only recourse is to amend the Massachusetts Constitution.").

most aims to protect.[137] Movement leader Peter Wagner has said that the greatest impediments to continued progress are "inertia" and "misunderstanding[]"[138]—states of affairs through which adversarial litigation is well suited to cut. And the individuals at issue are prisoners, a group one might expect to rely heavily on courts rather than on majoritarian political processes for protection.

For at least a decade, the possibility of litigating prison gerrymandering got only sporadic and conjectural consideration. In the wake of the 2010 Census, a leading voting rights scholar posed the question: "What about the *failure* to subtract prisoners? Could that now constitute the basis for either a claim of malapportionment or . . . a violation of section 2 of the [Voting Rights Act]?"[139] He supplied no answers but noted that the Census Bureau's decision to empower states to make adjustments could move the debate from the exclusive realm of Census Bureau counting judgments (which courts have traditionally treated deferentially[140]) and into the sphere of states' real-world redistricting decisions (which courts are more comfortable policing[141]). One voting rights litigator sketched the preliminary contours of the issues but went no further.[142] Reformers' early courtroom forays were mainly defensive, fending off legal challenges to legislative reforms.[143]

But 2016 saw three major developments in quick succession. In March, a federal district judge in Florida ruled in *Calvin v. Jefferson County Board of Commissioners* that a districting scheme for county commissioners in a small rural county violated the Equal Protection Clause's one-person, one-vote

137. *See* Rice v. Cayetano, 528 U.S. 495, 512 (2000) ("The design of the [Fifteenth] Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise."); Shaw v. Reno, 509 U.S. 630, 642 (1993) (calling the elimination of racial discrimination by the states the Equal Protection Clause's "central purpose"); Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969) (describing the Voting Rights Act's core purposes as being to "implement[] Congress' firm intention to rid the country of racial discrimination in voting" and to "provide[] stringent new remedies against those practices which have most frequently denied citizens the right to vote on the basis of their race").

138. Wagner, *supra* note 4, at 1251.

139. Persily, *supra* note 22, at 788.

140. *See, e.g.*, Utah v. Evans, 536 U.S. 452, 457, 472 (2002); Franklin v. Massachusetts, 505 U.S. 788, 806 (1992); *id.* at 807 (Stevens, J., concurring in part and concurring in the judgment); Borough of Bethel Park v. Stans, 449 F.2d 575, 579-81 (3d Cir. 1971); *see also* Persily, *supra* note 22, at 789 ("[C]ourts have traditionally been deferential when it comes to census counting methods.").

141. *See* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 540 (2010) ("[R]edistricting is familiar to courts.").

142. *See* Ho, *supra* note 4.

143. *See supra* note 131.

principle by including inmates of a local state prison in its counts.[144] In April, the Supreme Court decided *Evenwel v. Abbott*, a case that—while it did not deal directly with prison gerrymandering claims—provided anxiously anticipated clarification of relevant one-person, one-vote issues.[145] Finally, a few months later, the First Circuit in *Davidson v. City of Cranston* invoked *Evenwel* to reject *Calvin*'s conclusion that prison gerrymanders may violate the Constitution,[146] creating a nascent division of authority over whether the Equal Protection Clause permits such claims. This Part describes all three cases and the divergent positions that *Calvin* and *Davidson* stake out.[147]

A. *Calvin v. Jefferson County Board of Commissioners*

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.[148] 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

144. 172 F. Supp. 3d 1292, 1295, 1323-24 (N.D. Fla. 2016).

145. *See* 136 S. Ct. 1120, 1124, 1126-33 (2016). *See generally* Adam Liptak, *Supreme Court Agrees to Settle the Meaning of 'One Person One Vote,'* N.Y. TIMES (May 26, 2015), http://nyti.ms/1KxJRuo (noting that *Evenwel* was expected to "answer a long-contested question about a bedrock principle of the American political system[—]the meaning of 'one person one vote'"—and that the case "could be immensely consequential").

146. 837 F.3d 135, 146 (1st Cir. 2016). Note that one-person, one-vote claims are not the only way one might challenge a prison gerrymander. Where a prison gerrymander has the effect of diluting the votes of minority communities, under certain circumstances, it might run afoul of section 2 of the Voting Rights Act. *See* Davis, *supra* note 9, at 39-40; Lotke & Wagner, *supra* note 20, at 606-07. But such claims remain conjectural. *See Davidson*, 837 F.3d at 139 n.2. They are thus beyond the scope of this Note. For one preliminary analysis of the feasibility and elements of such a claim, see Ho, *supra* note 4, at 385-91.

147. This Note will not discuss *Borough of Bethel Park v. Stans*, an early case that considered a one-person, one-vote challenge to counting prisoners (as well as college students and out-of-state servicemembers) at their "usual residence" for congressional districting purposes. 449 F.2d 575, 577, 582-83 (3d Cir. 1971). That case is decades old, focused primarily on other claims, and was brought against the Census Bureau rather than a state or local government. *See id.* at 577. It devotes only a scant paragraph to one-person, one-vote issues. *Id.* at 582-83.

148. *About Jefferson County*, JEFFERSON: THE KEYSTONE COUNTY, http://www.jeffersoncountyfl.gov/p/about-jefferson (last visited May 5, 2017); *see also Calvin*, 172 F. Supp. 3d at 1295. The county is about 66% white, with a substantial African American minority of just over 30% (excluding prisoners). *See* Complaint for Declaratory & Injunctive Relief ¶ 27, *Calvin*, 172 F. Supp. 3d 1292 (No. 4:15-cv-00131-MW-CAS), 2015 WL 1260364 [hereinafter *Calvin* Complaint].

farms."[149] Its county seat, Monticello, is an up-and-coming "bedroom communit[y]" of Tallahassee.[150] 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."[151]

Jefferson County also has a prison: the Jefferson Correctional Institution (JCI), which housed 1157 inmates on the day of the 2010 Census.[152] When the county's Board of Commissioners and School Board undertook redistricting following the 2010 Census, they relied on raw total population figures from the Census Bureau, which led them to include the 1000-plus prisoners in one of their five roughly 3000-person legislative districts.[153]

The plan passed in 2014.[154] In early 2015, the local ACLU and the Florida Justice Institute sued the county on behalf of several county residents who vote in the nonprison districts and a local nonprofit watchdog, alleging an equal protection violation.[155] Their claim was straightforward: the county's District 3 was more than one-third prisoners, the overwhelming majority of whom were not proper "residents" of the county, lacked meaningful ties to the community, could not vote because of felony convictions, and were only present in the county involuntarily. Their inclusion thus inflated District 3 residents' influence and diluted others' in violation of one person, one vote.[156] The county argued that the prisoners should not be "artificially excluded"[157] and stressed the anomalous nature of asking a court to *require* adjustment of total census population.[158] Any decision to tinker with census figures, it contended, is "best left to the political process."[159] The crux of the case, then,

149. *About Jefferson County*, *supra* note 148.

150. *Id.*

151. *Id.*

152. *Calvin*, 172 F. Supp. 3d at 1296.

153. *Id.* at 1296-97.

154. *See id.* at 1298.

155. *Id.* at 1294, 1298-99.

156. *Calvin* Complaint, *supra* note 148, ¶¶ 15-23, 40-43; *see also Calvin*, 172 F. Supp. 3d at 1298 (noting the county districts' total deviation from perfect population equality of 8.67% with prisoners and 42.63% without). The districts' skew also negatively affected the voting power of the county's black voters. *See* Aleks Kajstura, *Federal Judge Holds Prison Gerrymandering Unconstitutional*, PRISON POL'Y INITIATIVE (Mar. 21, 2016), http://www.prisonersofthecensus.org/news/2016/03/21/calvin.

157. Defendants', Jefferson County Board of County Commissioners et al., Joint Motion for Summary Judgment at 2, *Calvin*, 172 F. Supp. 3d 1292 (No. 4:15-CV-00131-MW-CAS), 2015 WL 6869093 [hereinafter *Calvin* Summary Judgment Motion].

158. *Id.* at 2, 6-8.

159. *Id.* at 8 n.1; *see id.* at 10-12.

was this: 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?[160]

The task of answering that question fell to Judge Mark Walker, who responded in March 2016 with a decision that reformers hailed as a milestone for the prison gerrymandering reform movement.[161] The opinion was as analytically rich as it was groundbreaking, a thirty-five page deep dive into the constitutional history and evolving jurisprudence of one person, one vote, at times verging into meditation on the nature of democratic representation.[162] At the end of it all, Judge Walker sent Jefferson County back to the drawing board.[163] He also formulated a test for when the Constitution might require adjustment of raw population figures: "For Plaintiffs to prevail in this case," he said, "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 [School Board and Board of Commissioners], and that they're (4) packed into a small subset of legislative districts."[164] The meat of the test lies in identifying "[p]eople who lack a *meaningful or substantial representational nexus* with" the relevant legislative body—these, according to *Calvin*, are people the Constitution forbids factoring into districts.[165]

The core of *Calvin*'s reasoning is as follows: One person, one vote protects an individual right of "representational equality" for voters and nonvoting residents of a district alike—roughly speaking, the right to an equally weighted per capita share in a representative.[166] Determining when representational equality has been diluted therefore requires arriving at some understanding of the nature of "representation," which for Judge Walker boils down to three core activities: influencing policy on constituents' behalf, helping them navigate government's bureaucratic channels, and providing them a voice in the legislative body.[167] But these are things that not everyone wants or needs. To take the easy case, a resident of Boston has no proper claim to representa-

160. *Calvin*, 172 F. Supp. 3d at 1315; *see Calvin* Summary Judgment Motion, *supra* note 157, at 8.

161. *See* Kajstura, *supra* note 156.

162. *See, e.g.*, *Calvin*, 172 F. Supp. 3d at 1307-09, 1308 n.14.

163. *Id.* at 1325.

164. *Id.* at 1315.

165. *Id.* at 1312, 1315 (emphasis added).

166. *See id.* at 1303-07. Technically, the court assumed without deciding that the Constitution *could* protect representational equality, a question that was pending in *Evenwel* at the time. *See id.* at 1305-06, 1305 n.10. This did not affect the analysis. *See id.*

167. *Id.* at 1307-08. Dilution of representation thus occurs when malapportionment provides some representatives more per capita policy influence in the legislature than others. *Id.* at 1309-10.

tion in the Nevada state legislature, while a resident of Las Vegas does. Judge Walker refers to this as lacking (or having) a "representational nexus" to the legislative body at issue.[168] For Judge Walker, the key insight is that while that "representational nexus" might *usually* flow from mere geographic presence within a district, there is no reason the two must be coextensive.[169] The key, rather, is whether the representative can "meaningfully affect" the resident's life by doing those three things a representative does.[170] Thus, Judge Walker reasons, failing to distinguish between residents who have a representational nexus and those who lack one—lumping people a representative *can* affect into a district with people a representative *cannot* affect—risks inflating some residents' per capita access to "representation." They have to jostle with fewer other individual constituents for access to, influence over, and acknowledgment from their representative.[171] So including a concentrated population of nonvoters who lack a "meaningful representational nexus"[172] alongside genuine representation-seekers in a single district makes the distribution of representation in the jurisdiction unequal and thus constitutionally impermissible.

Judge Walker also followed a second, alternative line of reasoning to the same result. He relied on *Burns v. Richardson*[173] for the proposition that a state's discretion to decide how to count is bounded by a limitation that it cannot categorize residents in an "arbitrary" and thus "constitutionally [im]permissible" manner.[174] Delving into the nuts and bolts of decisionmaking the Supreme Court has characterized as "arbitrary," Judge Walker found this standard to have more substantive bite than run-of-the-mill, deferential rational basis review.[175] As Judge Walker read them, the Court's cases—*Burns* in particular—stand for the proposition that census data are a reasonable but sometimes imperfect starting point, not an invariably suitable ending point. Requiring a jurisdiction to exercise some nonarbitrary judgment thus means

168. *Id.* at 1310-11.

169. He gives the example of a commuter from Bellville, Illinois who works in St. Louis, Missouri; such a person would have a "representational nexus" to the Missouri State Legislature even though she lives elsewhere. *Id.* at 1311; *see also* Hayden, *supra* note 47, at 256-57 (identifying residency requirements for voting as a "set of restraints on the exercise of the franchise—so widespread that they are rarely analyzed as such").

170. *Calvin*, 172 F. Supp. 3d at 1310. Judge Walker is somewhat imprecise when he says "representative." But he elsewhere makes clear that the representational nexus he refers to runs to the *legislative body*, not an individual representative. *See id.* at 1312, 1314.

171. *See id.* at 1309-10.

172. *Id.* at 1315.

173. 384 U.S. 73 (1966). *Burns* is discussed at greater length below. *See infra* Part III.B.

174. *Calvin*, 172 F. Supp. 3d at 1312-13 (quoting *Burns*, 384 U.S. at 92 n.21).

175. *See id.* at 1312-14.

that "the census baseline *itself* must be examined."[176] And once that baseline is scrutinized, Judge Walker concluded, treating residents the same when they are not at all similarly situated with respect to the relevant criterion—representation and in particular representational nexus—is too "arbitrary" to clear the bar the Court has set.[177]

The upshot is the same under either route: Jefferson County violated the constitutional rights of its bona fide, nonincarcerated citizens in districts that did not contain prisoners when it lumped prisoners into its population tally. Or, more precisely, the violation occurred because the state relied on prisoner-inclusive calculations to conclude that there was substantial population equality among the districts.[178] The *proper* baseline was the nonprisoner population of the districts. Measured against that standard, the district where the prison was located was much smaller than the other five, with a deviation of 42.63%, well outside the traditional 10% "safe harbor" for local districts.[179] Thus, Judge Walker identified a novel constitutional violation.

Three aspects of *Calvin* merit brief mention before proceeding, as they will be useful to understanding critiques of the opinion that follow. First, note that *Calvin*'s approach would likely never invalidate any *statewide* prison gerrymander. That is because the prisoners' lack of "representational nexus" to Jefferson County followed in large part from the fact that "conditions of confinement for the inmates at JCI are almost entirely determined by policies set at the state level," as opposed to county-level policies.[180] The idea is that because the local-level legislative bodies at issue had no power over decisions that meaningfully affect the prisoners, county officials could not legitimately claim to be "representing" prisoners in any way. But that logic has a flipside: prisoners by *Calvin*'s definition would seem to enjoy an extra-strong representational nexus to the state legislature, which controls (directly or indirectly) all prison policies. Following *Calvin*, the operative question in such cases would be: Do prisoners have a representational nexus to the state legislature? And the answer would invariably be yes.[181]

176. *Id.* at 1313.

177. *See id.* at 1314.

178. *See id.* at 1314-23.

179. *Id.* at 1323-24.

180. *Id.* at 1316; *see also id.* at 1324 (arguing that "the slope ahead is not so slippery" because "we are dealing with *state* prisoners and a *county* government" and "[i]t is the interplay of the limited powers of the county government, the fact that the prisoners are under state control, and the fact that the prisoners are confined that deprives the prisoners of a meaningful representational nexus").

181. Presumably, *Calvin*'s test would answer this question similarly with respect to the House of Representatives in a hypothetical challenge to congressional districts. Congress, after all, has power to—and does—legislate in ways that have profound effects on state prisons and state prisoners. *See, e.g.*, Prison Rape Elimination Act of

footnote continued on next page

Second, and relatedly, note *Calvin*'s remedy: *exclusion* of prisoners from the local enumeration, not *inclusion* anywhere else. This is either a feature or a bug depending on one's point of view. On the one hand, subtracting prisoners from census figures is easy, and requiring a state or locality to do so is a more limited and more palatable intervention than requiring a jurisdiction to reassign prisoners to their former census tracts. On the other hand, reformers might view this as a halfway solution at best: prisoners' home communities still find their voices muted by the removal of temporarily absent community members from the counts, and prisoners end up no closer to enjoying the equal representation that the Constitution arguably guarantees them.[182]

Third, note *Calvin*'s emphasis on the "personal," "individual" nature of the one-person, one-vote right at stake.[183] Grounds for critiquing that individualist view will come into focus later.[184] For now it suffices to observe that this foundational point of departure for *Calvin*'s analysis is debatable.

B. *Evenwel v. Abbott*

The Supreme Court decided *Evenwel v. Abbott* close on *Calvin*'s heels.[185] In *Evenwel*, the Supreme Court resolved a major uncertainty, putting to bed the notion that one person, one vote is a doctrine about *voting* only. The basic question in *Evenwel* was whether the Equal Protection Clause requires apportionments designed to equalize the number of eligible *voters* in each district or to equalize the total *population* (including residents who cannot vote) in each district.[186] More fundamentally, the question that confronted the Court in *Evenwel* was whether one-person, one-vote doctrine protects "voter equality" or "representational equality."[187] Requiring states to equalize numbers of voters could have represented a radical departure from how districting was conducted throughout the country,[188] but the Court rejected the claim that the Constitution demands that states equalize voter population.[189]

2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601-15609 (2015)); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of the U.S. Code).

182. *See supra* Part I.D.

183. *See Calvin*, 172 F. Supp. 3d at 1301-02.

184. *See infra* Part IV.A.

185. 136 S. Ct. 1120 (2016). *Evenwel* was decided on April 4, 2016. *Id. Calvin* was decided on March 19, 2016. 172 F. Supp. 3d at 1292.

186. *See* 136 S. Ct. at 1123.

187. *See id.* at 1126.

188. *See id.* at 1126-27, 1132-33.

189. *Id.* at 1132-33. The Court did not adopt the stronger view, urged by the United States, that equalizing total population was constitutionally mandated. *See id.* at 1126 (citing Brief for the United States as Amicus Curiae Supporting Appellees at 5, *Evenwel*, 136 S.

footnote continued on next page

The case arose out of Texas, which, in keeping with the near-universal practice among the states, assessed the equality of the state legislative districts against a total population baseline.[190] Activists challenged the resulting apportionment, alleging that one person, one vote required Texas to judge the equality of its districts by *voter* population to effectuate what they perceived to be one person, one vote's purpose: equalizing the weight of each vote within a district.[191] The Court had a range of options before it in the case. In addition to the challengers' view that one person, one vote *required* states to equalize voter population, the United States argued that one person, one vote requires equalizing total population, and Texas argued for granting states latitude to pick either baseline.[192]

In the end, the Court held that Texas's scheme was constitutional and that it was permissible for states to protect representational equality by counting voters and nonvoters alike.[193] That holding was, in one crucial respect, quite narrow: though the Court ruled against the challengers, it left open whether a jurisdiction could ever permissibly *choose* a voter equality baseline, the question that had divided Texas (the respondent) and the federal government (an interested amicus) in the case.[194] But 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.[195] In other words, nonvoters (including prisoners) have one-person, one-vote rights, too.

Ct. 1120 (No. 14-940), 2015 WL 5675829). Justice Ginsburg's majority opinion for six Justices seemed to hint at that result, *cf. id.* at 1141 (Thomas, J., concurring in the judgment) ("Although the majority does not choose among these theories, it necessarily denies that the Equal Protection Clause protects the right to cast an equally weighted ballot."); *id.* at 1144 (Alito, J., concurring in the judgment) ("The Court does not purport to decide whether a State may base a districting plan on something other than total population, but the Court, picking up a key component of the Solicitor General's argument, suggests that the use of total population is supported by the Constitution's formula for allocating seats in the House of Representatives among the States. Because House seats are allocated based on total population, the Solicitor General argues, the one-person, one-vote principle requires districts that are equal in total population."), but the majority opinion ultimately reserved the question "whether . . . States *may* draw districts to equalize voter-eligible population rather than total population" for another day, *id.* at 1133 (majority opinion) (emphasis added).

190. *Id.* at 1125 (majority opinion).

191. *Id.*

192. *Id.* at 1126.

193. *Id.* at 1126-27, 1132-33.

194. *See id.* at 1132-33; *see also id.* at 1143-44 (Alito, J., concurring in the judgment).

195. A contrary holding could have swept away any possibility of prison gerrymandering claims. Had the Court reshaped the landscape by requiring equalization of voter population, prisoners would no longer be counted *anywhere*. Along with children and immigrants, they would have been written out of the one-person, one-vote calculus entirely. *See* Derek Muller, *Could* Evenwel v. Abbott *End Prison Gerrymandering? and*
footnote continued on next page

C. *Davidson v. City of Cranston*

Not long after *Evenwel*, a second district court hopped aboard the *Calvin* bandwagon, finding a one-person, one-vote violation under similar circumstances in *Davidson v. City of Cranston*.[196] But any emerging consensus was short-lived because a few months later, the First Circuit reversed that decision.[197] In doing so, it effectively ruled that whatever opening for a new species of one-person, one-vote claim *Calvin* might have detected in the doctrine, the *Evenwel* decision had slammed it shut a few weeks later.[198]

The *Davidson* litigation arose out of Cranston, Rhode Island's third-largest municipality,[199] which had a population of 80,387 as of the 2010 Census.[200] That figure includes a sizeable inmate population. Cranston is home to Rhode Island's one and only state prison: the Adult Correctional Institutions (ACI), which housed 3433 prisoners on the day of the 2010 Census.[201] Like Jefferson County's JCI inmates, these prisoners almost all came from elsewhere in the state.[202] Cranston is divided into six wards for the purposes of electing city councilors and school committee members, and like Jefferson County, Cranston used prisoner-inclusive census figures when it redrew those wards in 2012.[203] The ACI's entire population fell within a single ward.[204] The result was a situation materially identical to that in Jefferson County: including or excluding the massive prison population produced a deviation among districts either within the one-person, one-vote safe harbor or far beyond it.[205]

Other Potential Implications, EXCESS DEMOCRACY (June 2, 2015), http://excessofdemocracy.com/blog/2015/6/could-evenwel-v-abbott-end-prison-gerrymandering-and-other-potential-implications.

196. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 149-52 (D.R.I.), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

197. *Davidson*, 837 F.3d at 146.

198. *Id.* at 145-46.

199. *About Cranston: City Statistics*, CITY CRANSTON, http://www.cranstonri.com/generalpage.php?page=8 (last visited May 5, 2017).

200. *Davidson*, 188 F. Supp. 3d at 147.

201. *Id.*

202. *Id.* The district court estimated the precise number of Cranston-resident prisoners to be "153 or 155," only eighteen of whom previously resided in the same local ward as the prison. *Id.*

203. *Davidson*, 837 F.3d at 137-38; *Davidson*, 188 F. Supp. 3d at 147.

204. *Davidson*, 188 F. Supp. 3d at 147.

205. *Id.* at 147 & n.2 (finding a total maximum deviation among the wards of less than 10% including the prisoners and over 28% excluding the prisoners); *see also supra* note 46 and accompanying text (explaining the 10% "safe harbor" in one-person, one-vote cases).

Though the facts were similar, a key difference between *Calvin* and the *Davidson* litigation is that the *Davidson* decisions postdated *Evenwel*.[206] The city argued throughout that *Evenwel* foreclosed the plaintiffs' challenge by sanctioning the use of total population *as determined by the census*,[207] which is (after all) the constitutionally mandated mechanism for determining the populations of states and apportioning representation among them.[208]

The district court rejected this argument, believing that the reasoning of the Supreme Court in *Evenwel* that permitted counting nonvoters generally (as well as prior cases that endorsed including out-of-state military personnel and college students) relied on nonvoters' involvement with the political communities of which they are a part.[209] In the district court's understanding (quoting *Evenwel* and borrowing a phrase from Alexander Hamilton), those past holdings only extended to nonvoters who remained "individual[s] of the community at large."[210] 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.[211] Having brushed *Evenwel* aside, the court endorsed and followed both the methodology and ultimate holding of *Calvin*, praising it as "well-reasoned and extensive."[212] It shared the *Calvin* court's view that the rights at stake were fundamentally individual, and its inquiry turned on the same requirement that each individual citizen counted in districting have a "representational nexus" to the relevant legislative body.[213] For much the same reasons that the JCI inmates lacked a representational nexus to Jefferson County, the court found the ACI inmates likewise lacked a representational nexus to Cranston.[214] The court focused on the inmates' lack of civic participation, limited contact with the surrounding community, and

206. *See Davidson*, 837 F.3d at 135 (listing September 21, 2016 as the date of decision); *Davidson*, 188 F. Supp. 3d at 146 (listing May 24, 2016 as the date of decision). *Evenwel* was decided on April 4, 2016. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1120 (2016).

207. *See Davidson*, 188 F. Supp. 3d at 150; Brief of Defendant-Appellant City of Cranston, Rhode Island at 4-6, *Davidson*, 837 F.3d 135 (No. 16-1692), 2016 WL 3682738.

208. *See* U.S. CONST. art. I, § 2, cl. 3.

209. *See Davidson*, 188 F. Supp. 3d at 150-51.

210. *Id.* at 150 (quoting *Evenwel*, 136 S. Ct. at 1127).

211. *Id.* ("Defendant in the present case argues that *Evenwel* stands simply for the constitutional propriety of drawing district lines based on Census population data. But to stop at that holding is to overlook the Supreme Court's emphasis on the conceptual basis of representational equality."); *id.* at 150-51 ("[T]he Court cannot stretch the holding of *Evenwel* to cover the inmate population at ACI.").

212. *See id.* at 151-52.

213. *Id.* (quoting Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016)).

214. *Id.*

virtually nonexistent lines of communication with elected representatives.[215] In particular, it noted that "Cranston's elected officials do not campaign or endeavor to represent their ACI constituents," that "[t]he [c]ity provides only minimal services" to the prison, and that even if city governing bodies attempted to legislate regarding the prison, their efforts to do so would likely be preempted by state law.[216]

Not so fast, said a unanimous panel of the First Circuit after the city appealed.[217] Without directly passing judgment on whether *Calvin*'s conclusions were well grounded in the case law that existed at the time,[218] the First Circuit ruled that its assessment of the question could begin and end with the Supreme Court's intervening guidance in *Evenwel*.[219] Though it acknowledged that "*Evenwel* did not decide the precise question" at hand,[220] it nevertheless found, in a close reading of that opinion, clear signals that prison gerrymandering is constitutional.

One thread of the First Circuit's decision in *Davidson* implied, without directly saying, that the doctrinal aperture that *Calvin* pried open was illusory. It read *Burns* and related precedents differently from the *Calvin* court, finding in them a robust limitation on the courts' power to meddle in decisions about the structure of apportionment: "[W]here *Reynolds*'s requirements of population-based apportionment are met, a plaintiff usually must show invidious discrimination to make out an apportionment claim under the Equal Protection Clause,"[221] and courts should accordingly "give wide latitude to political decisions related to apportionment that work no invidious discrimination."[222] But those arguments are somewhat question-begging for the reasons identified in *Calvin*. They rely on the assumption that "*Reynolds*'s requirements of population-based apportionment are met" and thus ignore the

215. *Id.* at 147-48.

216. *Id.* at 147-48, 150.

217. Davidson v. City of Cranston, 837 F.3d 135, 137, 146 (1st Cir. 2016).

218. The court did not comment upon or expressly disagree with *Calvin*, though it strongly implied that it would not have decided the issue differently even pre-*Evenwel*. *See id.* at 142-43 ("*Evenwel* . . . did not disturb precedents holding that . . . a plaintiff usually must show invidious discrimination to make out an apportionment claim under the Equal Protection Clause."); *id.* at 143 ("*Evenwel* reinforced the principle . . . that courts should give wide latitude to political decisions related to apportionment that work no invidious discrimination.").

219. *See id.* at 141-42 (beginning its analysis with a discussion of *Evenwel*); *id.* at 145-46 (ending with a discussion of *Evenwel*).

220. *Id.* at 141.

221. *Id.* at 142-43 (citing Gaffney v. Cummings, 412 U.S. 735, 754 (1973); and Burns v. Richardson, 384 U.S. 73, 88 (1966)).

222. *Id.* at 143 (citing Brown v. Thomson, 462 U.S. 835, 847-48 (1983); and *Burns*, 384 U.S. at 92).

antecedent nature of the real question presented in such cases: When it comes to prisoners, what is the proper baseline against which to judge whether *Reynolds*'s fundamental requirement of numerical equality has been met?

The meat of the opinion, then, was its aggressive reading of *Evenwel*, which the First Circuit said "approved the status quo of using total population from the Census for apportionment."[223] It noted that *Evenwel* placed great emphasis on the fact that total census population was the go-to baseline for all fifty states and considered it "implausible that the Court would have observed that the majority of states use unadjusted total population (including prisoners) . . . , upheld the constitutionality of apportionment by total population as a general proposition, and yet implied that the inclusion of prisoners . . . , without any showing of discrimination, is constitutionally suspect."[224] The court instead relied on what it saw as a "more natural reading of *Evenwel*": when the Court endorsed the use of total population rather than voter population, it meant to affirm that "the use of total population from the Census is the constitutional default."[225] To conclude otherwise, the First Circuit feared, would "invite[] federal courts to engage in what have long been recognized as paradigmatically political decisions, best left to local officials."[226] A brief survey of pre-*Evenwel* precedents did not dislodge this conclusion.[227]

As eagerly as the *Calvin* court dug into meaty questions concerning the nature of representation to declare the Jefferson County plan unconstitutionally arbitrary, then, the First Circuit in *Davidson* staked out a position at the opposite extreme: doubts about courts' ability to make sensitive judgments about who counts and who does not, on the one hand, and fears about intruding into areas that have traditionally been the prerogative of state-level democratic processes, on the other, pervaded the opinion.[228] Two cases and two very different conclusions; battle lines were drawn.

223. *Id.*

224. *Id.* at 144.

225. *Id.*

226. *Id.*

227. *Id.* at 145 (rejecting an argument advanced by the plaintiffs that Mahan v. Howell, 410 U.S. 315, *modified*, 411 U.S. 922 (1973), in particular, compelled a different result). *Mahan* and its implications for these questions are discussed in Part III.B below.

228. *See Davidson*, 837 F.3d at 144 ("Plaintiffs' analysis invites federal courts to engage in what have long been recognized as paradigmatically political decisions, best left to local officials . . . ."); *id.* ("The decision whether to include or exclude the ACI prisoners in Cranston's apportionment is one for the political process.").

III. Census Data Are Not a "Constitutional Default"

At first glance, one person, one vote's elegant simplicity may obscure the opening that *Calvin* spotted for prison gerrymandering claims. Despite the doctrine's catchy moniker[229] and its enticing promise of reducing constitutional law to arithmetic, at least two murky questions lurk just below the surface: First, how equal is equal enough? Second, what precisely must be equalized? Most of the Court's one-person, one-vote jurisprudence to date has revolved around the first question, calibrating the circumstances under which deviation from perfect equality is acceptable and placing outer bounds on those deviations. But understanding why prison gerrymandering challenges might be cognizable at all requires a close reading of the sparse and delphic body of Supreme Court precedent concerning that second, underdeveloped[230] question: What is the proper baseline from which to evaluate the equality of districts? This Part undertakes such an analysis and concludes that, even after *Evenwel*, *Calvin* is on to something. There *is* room in the doctrine for courts to police how states count prisoners, even while the census creates a default presumption that they will be counted where they are locked up. *Davidson*, this Part further argues, was both overzealous in reading *Evenwel* to foreclose prison gerrymandering claims and overly dismissive of claims that earlier one-person, one-vote cases point toward a more active role for courts in policing the baseline.

A. After *Evenwel*, One Person, One Vote Protects Representational Equality—Not Reliance on the Census

The place to start assessing the viability of one-person, one-vote challenges to prison gerrymanders is *Evenwel*. *Evenwel* provides needed clarity going forward. It 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. Such clarity resolves a threshold ambiguity that would otherwise

229. In *Evenwel v. Abbott*, Justice Ginsburg called the "one person, one vote" label a "slogan." 136 S. Ct. 1120, 1131 (2016).

230. *See* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1414-15 (2002). This underdevelopment stems, in part, from the fact that for years the only realistic option was to work from census total population figures. *Compare Evenwel*, 136 S. Ct. at 1124 (noting that since the introduction of one person, one vote, "the overwhelming majority of . . . jurisdictions have equalized total population, as measured by the decennial census"), *with* Brief of Nathaniel Persily et al. as Amici Curiae in Support of Appellees at 6-10, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719746 (noting that logistical impediments have made it difficult or impossible for states to use voter-eligible population datasets during that same timeframe).

muddy consideration of prison gerrymandering claims.[231] It invites courts to grapple with the status of prisoners and other nonvoters under the doctrine by reaffirming that they are, in fact, within the protection of one-person, one-vote doctrine. That much is clear and uncontroversial.

Far trickier is whether *Evenwel* should also be read to vindicate the use of total population, as determined by the Census Bureau, as a "constitutional default."[232] Using raw census figures is the predominant and traditional practice the Court seemed to green-light in *Evenwel*, and the decision makes reference to "total population" as a permissible baseline for reapportionment.[233] 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. There is undeniable tension between the plaintiffs' position in *Davidson* and other prison gerrymandering cases and the conclusion in *Evenwel*.[234]

But *Davidson* ultimately reads too much into *Evenwel*'s limited holding, because it assumes the answer to a question that was not before the Court. Instead, a proper reading of the decision starts from the premise—consistent with the issue the Court was actually tasked with deciding—that the Court used the term "total population" in *Evenwel* simply to distinguish between "total population" and "voter-eligible population."[235] It did not purport to determine where to count individuals for the purposes of determining "total population," nor did it declare that unadjusted census figures—while admittedly the prevailing norm—are the sole constitutionally permissible measure of "total population." On the contrary, the opinion uses the choice to rely on "total population" as a proxy for a decision to protect representational equality,[236] the underlying structural principle that the decision vindicates.[237]

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231. *See* Ho, *supra* note 4, at 383-85; *see also* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1303-07 (N.D. Fla. 2016).

232. *See Davidson*, 837 F.3d at 144.

233. *See Evenwel*, 136 S. Ct. at 1126-27. In describing the case, although not in describing its own holding, the decision even makes direct reference to census determinations of total population. *See id.* at 1124 ("[I]n the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. Today, all States use total-population numbers from the census . . . .").

234. *See* Adam Liptak, *A.C.L.U.'s Own Arguments May Work Against It in Voting Rights Case*, N.Y. TIMES (Oct. 12, 2015), https://nyti.ms/2nK9d0Z.

235. *See Evenwel*, 136 S. Ct. at 1133.

236. *See id.* at 1132 ("[T]he Court in *Gaffney* recognized that the one-person, one-vote rule is designed to facilitate '[f]air and effective representation,' and evaluated compliance with the rule based on total population alone." (second alteration in original) (citations omitted) (quoting Gaffney v. Cummings, 412 U.S. 735, 748 (1973))); *see also id.* at 1131

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The First Circuit advanced two broad reasons for reading *Evenwel* as a full-throated endorsement of census data, even though it acknowledged that "*Evenwel* did not decide the precise question" *Davidson* presented.[238] Its first argument was that "*Evenwel* dictates that [courts] look at constitutional history, precedent, and settled practice."[239] With regard to precedent, the next Subpart introduces earlier cases in which the Court confronted this question more directly and reached a different conclusion.[240] But set that aside for now; the First Circuit does correctly identify in *Evenwel* a strong desire on the part of the Court not to disturb either historical or, especially, current "settled practice" among the states.[241] *Davidson* accordingly attached great weight to the fact, recognized in *Evenwel*, that "all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way."[242]

But it is not clear that either history or current consensus compel the First Circuit's conclusion in *Davidson* to the same extent they compelled the answer in *Evenwel*. The "history" the Court discussed in *Evenwel* was first and foremost the "constitutional history" surrounding the adoption of the Fourteenth Amendment, specifically what the Congress that enacted it thought about the status of nonvoters.[243] The First Circuit engaged in no similar analysis of what the drafters of the Fourteenth Amendment might have thought about the constitutional status of nonvoting *prisoners* or whether the principle of representational equality might apply differently to the different categories of nonvoters that *Evenwel* identified.[244] And even historical practice is a relatively unhelpful guide here. The usual residence rule, at least in its current form, has not been the uniform practice of census-takers since the adoption of the Fourteenth Amendment.[245] And mass incarceration is a relatively new phenomenon from the standpoint of constitutional history. Even since the

("For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality.").

237. *See* Davidson v. City of Cranston, 188 F. Supp. 3d 146, 150 (D.R.I. 2016), *rev'd*, 837 F.3d 135.

238. *Davidson*, 837 F.3d at 141.

239. *Id.*

240. *See infra* Part III.B.

241. *See Evenwel*, 136 S. Ct. at 1132-33.

242. *Davidson*, 837 F.3d at 144 (quoting *Evenwel*, 136 S. Ct. at 1124).

243. *See Evenwel*, 136 S. Ct. at 1127-30.

244. This history would be an interesting topic for future scholarship, but it is beyond the scope of this Note.

245. *See supra* note 35; *see also* Suber, *supra* note 23, at 480 (describing evolving definitions of "usual place of abode" and "usual residence" over the course of the twentieth century).

Warren Court introduced one person, one vote in the 1960s,[246] the 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.[247] Historical practices, then, did not account for concerns about prison gerrymandering, whereas they more plausibly took account of the difference between equalizing voters and equalizing representation.[248]

As for the modern consensus, current practices regarding both whether to adjust raw census data generally and how to treat prisoners in redistricting specifically are much less "settled" than current practice regarding whether to equalize total population or voter population, a question on which there is unanimous and uncontroversial consensus.[249] By contrast, how to count prisoners is a question over which states now differ.[250] And though it is only a minority of states that adjust census figures to account for prisoners, that minority includes major population centers like New York and California, such that 66 million Americans—roughly one-fifth of the country—live in states that will reassign prisoners to their home addresses during the redistricting to follow the 2020 Census.[251] States may also be more apt to

246. *See supra* notes 37-43 and accompanying text.

247. Sentencing Project, Fact Sheet: Trends in U.S. Corrections 1 (2017), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

248. *See Evenwel*, 136 S. Ct. at 1131-32 (expressing skepticism about the petitioners' contention that a similar shift has occurred since the 1960s in how evenly voters are distributed among the population).

249. *See id.* at 1124 (emphasizing that "all States" equalize total, rather than voter, population—the consensus the Court was concerned with in this case—while noting that "seven States adjust those census numbers" in meaningful ways). While a small group of activist litigants petitioned the Court to hear *Evenwel* at a time when all states agreed that they should equalize residents, not voters, *see id.*; Stephanie Mencimer, *The Craziest Thing About This Supreme Court Case Isn't That One Plaintiff Believes Unicorns Are Real*, MOTHER JONES (Dec. 4, 2015), http://www.motherjones.com/politics/2015/12/evenwel-abbott-supreme-court-redistricting (describing the plaintiffs and lawyers behind *Evenwel*), by contrast, there is a growing grassroots movement to *un*settle the reflexive manner in which states have treated prisoners in redistricting, and that movement has had some success, *see supra* Part I.E.

250. *See supra* Part I.E.

251. That number, 66 million, is the estimated combined population of California, New York, Delaware, and Maryland. *See Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU: AM. FACTFINDER (2016), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRES (estimating populations as of July 1, 2016 for California, Delaware, Maryland, and New York of 39,250,017; 952,065; 6,016,447; and 19,745,289, respectively); *see also id.* (listing a total estimated U.S. population of 323,127,513, of which 66 million is approximately 20.4%). The states that are actively considering similar legislation—Illinois, New Jersey, and Connecticut—comprise an additional 25.3 million Americans. *See id.* (estimating populations as of July 1, 2016 for Connecticut, Illinois, and New Jersey of 3,576,452; 12,801,539; and 8,944,469,

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practice prison gerrymandering without much active consideration, in contrast to equalizing voter population—a high-salience choice affecting major constituencies such as immigrant communities.[252] Prisoners, as a smaller and politically disempowered group, are likely to have a harder time focusing state-level political decisionmakers on the question how to treat prison gerrymandering, which after all sprung up recently and almost by historical accident.[253] There is thus a danger that inertia and indifference created—and, in many states, could perpetuate—the "settled practice" to which the First Circuit would have courts defer.[254] Lastly, what the Court actually *liked* about the settled practice of using total population was its recognition that "[n]onvoters have an important stake in many policy debates . . . and in receiving constituent services."[255] As the district court in *Davidson* pointed out in finding *Evenwel* inapplicable, this rationale does not extend to prisoners.[256] *Calvin*, anticipating this aspect of *Evenwel*, set forth a strong argument of its own, explaining that prisoners are different from other nonvoters because of their unique lack of civic engagement opportunities.[257]

There are also reasons to think the Court's interest in not disturbing "settled practice" might have reflected a passing mood rather than a timeless constitutional edict. *Evenwel* was decided just a few months after the passing of Justice Antonin Scalia, a time when, in the estimation of at least one prominent commentator, the shorthanded Court was gun-shy about issuing major or activist rulings.[258] In the particular case of *Evenwel*, the Court had already faced

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respectively). For the identification of these states as the ones that either currently have this legislation or are considering adopting it, see Part I.E above.

252. *See* Robert Barnes, *Supreme Court to Hear Challenge to Texas Redistricting Plan*, WASH. POST (May 26, 2015), http://wapo.st/1duVCV1 ("A shift from using total population would have an enormous impact in states with large immigrant populations because of the greater numbers of children and noncitizens."); Richard Wolf, *'One Person, One Vote' Case Could Upend Politics*, USA TODAY (Dec. 7, 2015, 1:42 PM ET), http://usat.ly/1QruxBj (describing *Evenwel*'s potential impact on "Hispanic immigrants," among other groups).

253. *See supra* notes 35-49 and accompanying text.

254. Davidson v. City of Cranston, 837 F.3d 135, 142 (1st Cir. 2016) (quoting *Evenwel*, 136 S. Ct. at 1132).

255. *Evenwel*, 136 S. Ct. at 1132.

256. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 150 (D.R.I. 2016), *rev'd*, 837 F.3d 135.

257. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1318-19 (N.D. Fla. 2016); *see also supra* notes 59-61 and accompanying text.

258. Thomas Goldstein, publisher of SCOTUSblog, expressed this sentiment on Dahlia Lithwick's podcast *Amicus*. *See* Dahlia Lithwick, *2016 Term Preview* 17:18, SLATE (Oct. 1, 2016, 10:01 AM), http://www.slate.com/articles/podcasts/amicus/2016/10/a_preview_of_the_2016_17_supreme_court_term.html ("The court put itself on lockdown when Justice Scalia passed away, and you had four more conservative justices and four more liberal justices. And each side was saying, 'Mm, I really don't feel like taking any

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vehement criticism for its decision to take the case at all. After all, the consensus around including nonvoters in the one-person, one-vote calculus was absolute and, as such, there was no circuit split over the issue.[259] To the

chances today, and we don't even know when we're going to get a ninth justice . . . . So, let's go to Dullsville . . . ."'); *see also* Ariane de Vogue, *Eight Is Enough?: Supreme Court Adjusts to the New Normal*, CNN (May 31, 2016, 9:00 AM ET), http://cnn.it/1RIeiMN ("Behind closed doors, the justices are dealing with a handful cases [sic] and among the options in a very small number of them is to either divide 4-4 (which automatically upholds the lower court opinion) or to find an area of consensus to rule narrowly and duck a broad opinion."); Adam Liptak, *Supreme Court Is Working Hard to Avoid Deadlocks, Kagan Says*, N.Y. TIMES (Apr. 4, 2016), https://nyti.ms/2nK88Gz ("The Supreme Court, facing the prospect of an extended stretch with an eight-member bench, is 'working really hard' to reach consensus and avoid deadlocks, Justice Elena Kagan said on [the day *Evenwel* was decided]."). The make-no-waves 8-0 opinion in *Evenwel* fit that narrative of a consensus-based, minimalist post-Scalia court. *See* Adam Liptak, *Supreme Court Rejects Challenge on 'One Person One Vote,'* N.Y. TIMES (Apr. 4, 2016), https://nyti.ms/2ooDh5b (noting that *Evenwel* "was more notable for what it did not do than for what it did" and quoting voting rights expert Richard L. Hasen's view that the Court "simply put off the issue for another day"). In fact, some commentators drew a direct connection between Justice Scalia's empty chair and the deferential-to-states holding the Court settled upon; these observers speculated that, had the four more liberal Justices sought to *require* states to use total population, Chief Justice Roberts and Justice Kennedy would have left the fold to join Justices Alito and Thomas, creating an embarrassing 4-4 split in a major case. *See* Lyle Denniston, *Opinion Analysis: Leaving a Constitutional Ideal Still Undefined*, SCOTUSBLOG (Apr. 4, 2016, 1:16 PM), http://www.scotusblog.com/2016/04/opinion-analysis-leaving-a-constitutional-ideal-still-undefined; Alex Twinem, *In with a Bang, out with a Whisper:* Evenwel v. Abbott *as a Win for Everyone*, STAN. DAILY (Apr. 12, 2016), http://www.stanforddaily.com/2016/04/12/in-with-a-bang-out-with-a-whisper-evenwel-v-abbott-as-a-win-for-everyone.

259. *See* Richard Pildes, *Symposium: Misguided Hysteria over* Evenwel v. Abbott, SCOTUSBLOG (July 30, 2015, 12:01 AM), http://www.scotusblog.com/2015/07/symposium-misguided-hysteria-over-evenwel-v-abbott ("As soon as the Court decided to hear *Evenwel*, a barely suppressed anger emerged in many quarters, on grounds of both process and substance. On process: how dare the Court address this issue, when a 1966 precedent seemingly settled the issue, and no conflict existed in the lower courts, to boot."); *see also* Barnes, *supra* note 252 (noting that "lower courts have never found that any state violated the Constitution by using the total population" and that "[e]lection law experts were somewhat surprised by the court's decision to take the case, given the lack of disagreement in the lower courts"); Richard L. Hasen, *Only Voters Count?: Conservatives Ask the Supreme Court to Restrict States' Rights and Overturn Precedent*, SLATE (May 26, 2015, 6:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/evenwel_v_abbott_supreme_court_case_state_districts_count_voters_or_total.html ("[A]ll the courts of appeal[s] to consider the question have ruled that total population is a permissible basis for drawing district lines."). The case was brought by conservative activists, and some commentators decried the case as a cynical "power grab" by Republican interests. *See* Richard Hasen, *Symposium: Ideology, Partisanship, and the New "One Person, One Vote" Case*, SCOTUSBLOG (July 31, 2015, 12:01 AM), http://www.scotusblog.com/2015/07/symposium-ideology-partisanship-and-the-new-one-person-one-vote-case (calling the case a "Republican power grab"); Mencimer, *supra* note 249 (noting that "many civil rights groups see [*Evenwel*] as nothing but a GOP power grab").

extent *Evenwel* read like a paean to the virtues of settled practice, the Court may have been speaking more to its contemporary critics in an effort to calm and reassure *them*, rather than laying down a hard-and-fast rule that *courts* must interpret the Equal Protection Clause to freeze the redistricting status quo.[260] In other words, the Court may have been tapping the brakes on its *own* doctrinal innovation in this sphere, not erecting a permanent roadblock to *Calvin*-style percolation in the lower courts.

The other major principle that the First Circuit distilled from *Evenwel* was that "federal courts must give deference to decisions by local election authorities."[261] It concluded that the *Calvin* approach "would turn one of the arguably permissible adjustments to total-population data *Evenwel* described briefly in a footnote . . . into a constitutional requirement"—an outcome that would be at odds with the deference it felt required to afford.[262] The First Circuit here was referring to *Evenwel*'s passing mention—without overt approval or disapproval—of both the general fact that some states "adjust . . . census numbers" for purposes of districting and the specific fact that California, Delaware, Maryland, and New York "exclude inmates who were domiciled out-of-state prior to incarceration."[263] This footnote is a difficult tea leaf to read. The second statement is especially puzzling because it is an incomplete characterization of what the state legislative reforms actually do. As discussed above, these laws *reallocate* prisoners back to their last known addresses, and they do so for *all* prisoners, whether they hail from inside the state or out.[264] Perhaps this characterization was a signal that the Court was conscious of these issues and did not want to be perceived as prejudging the validity of reassignments. Perhaps it was an oversight. Either way, the brief, descriptive, incomplete, and thus cryptic nature of the footnote in question probably means that the Court either did not intend to speak at all on the question how prisoners should be treated, or at least did not speak very clearly. This is unsurprising because, again, the issue was not before it. This rationale cannot carry much weight.

The First Circuit's larger concerns about federal overreach and deference to local judgments are legitimate. But such concerns seem overblown in this context. The *Davidson* stance represents an overly narrow view of prison gerrymandering litigation, treating it as a two-way tug-of-war for authority

260. Such a rule would be contrary to the spirit in which the one-person, one-vote doctrine was conceived—*Reynolds* dramatically upended a widespread and longstanding status quo in how virtually all states approached districting. *See* Smith, *supra* note 44.

261. Davidson v. City of Cranston, 837 F.3d 135, 141 (1st Cir. 2016).

262. *Id.* at 144.

263. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 & n.3 (2016).

264. *See supra* Part I.E; *see also supra* Part I.D (discussing the difference between exclusion and reassignment).

between the federal courts and the states and ignoring a crucial third player: the Census Bureau. 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[265] decision to apply the usual residence rule to prisoners.[266] So any encumbrance of states' redistricting processes would be short-lived. That kind of surgical correction is consistent with the history of one person, one vote: correct a structural imbalance by establishing a constitutional principle, as the Court first did in *Reynolds*, then step back and let the system bake in the rule while courts recede into the background.[267]

Indeed, there is an irony at the heart of the First Circuit's understanding of *Evenwel*. The *Davidson* decision is meant as a defense of the principle that

265. *See supra* note 120 and accompanying text.

266. *Cf.* Suber, *supra* note 23, at 480 (noting that the Census Bureau took into account "the intention of the Founding Fathers" in formulating the usual residence rule (quoting U.S. Census Bureau, U.S. Census Bureau Report: Tabulating Prisoners at Their "Permanent Home of Record" Address 3 (2006))).

267. *See* Smith, *supra* note 44. The stronger version of the argument for local deference is that states need more than just leeway to make pragmatic judgment calls about what data to use and which groups to include; they also need the more abstract freedom to experiment with different "theories of representative government" when they redistrict. *See, e.g.*, Derek Muller, *One Man, One Vote in Texas*, ONLINE LIBR. L. & LIBERTY (May 29, 2015), http://www.libertylawsite.org/2015/05/29/one-man-one-vote-in-texas; *see also* Lyle Denniston, *The New Look at "One Person, One Vote," Made Simple*, SCOTUSBLOG (July 27, 2015, 12:01 AM), http://www.scotusblog.com/2015/07/the-new-look-at-one-person-one-vote-made-simple ("The question of the starting point, of course, gets quickly into the democratic theory of who is supposed to be—or entitled to be—represented in elected chambers."). This freedom was more directly implicated in *Evenwel* than in prison gerrymandering cases, which presuppose the state has opted for a "representational equality" model. Courts that, like the one in *Calvin*, opt to police prison gerrymanders, then, are perhaps better understood as holding states to the political-theoretical choices they have already made—not forcing a particular abstract theory of government on them. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1306 (N.D. Fla. 2016) (endorsing the principle that "[i]f a state or local government chooses a population base that appears to serve either [representational or electoral equality], or even one that serves both imperfectly, it is not the job of a court to step in and enforce its particular theory of representative democracy"). On this view, courts are serving a valuable backstopping function: ensuring that states do not rely on the abstract notion that they enjoy freedom to choose a theory of representation in order to behave like "cafeteria" champions of representational equality, picking and choosing the aspects of a "representational equality" approach they find convenient or politically expedient while rejecting others. *Cf.* ANDREW M. GREELEY, CHICAGO CATHOLICS AND THE STRUGGLES WITHIN THEIR CHURCH 21-25 (2011) (noting the use of the term "Cafeteria Catholics" to refer to Catholics who "mak[e] their own decisions on which Catholic rules . . . they would obey and which they would reject"). One might also argue that the courts have long since "crossed [the] Rubicon" of making these kinds of choices. *See* Pildes, *supra* note 259.

calibrating the apportionment baseline is "best left to local officials."[268] True enough; as the next Subpart will explain, the Supreme Court has held that states and localities need some leeway to tinker with census data where rational, articulable anomalies exist and must be corrected for.[269] Yet *Davidson*'s holding assigns the most expansive power—to affix the default baseline from which states and localities must justify any deviations—to *federal* bureaucrats at the Census Bureau. To cast this as a vindication of local-control federalism is a stretch, and it obscures the real structural principles that are at stake. 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. Granting that authority to the Census Bureau is in at least some tension with the principle that courts are the ultimate and best arbiters of constitutional meaning[270] and thus should not defer to executive agencies when the underlying question is one of constitutional interpretation.[271] In other words, granting the Census Bureau unreviewable authority to set the one-person, one-vote baseline raises both vertical (federalism) and horizontal (separation of powers) concerns that *Davidson* did not address.

Finally, there are pragmatic reasons to be troubled by the First Circuit's conclusion that the Census Bureau is the constitutionally entrenched arbiter of the one-person, one-vote baseline. First, we might worry that the Census Bureau is at risk of capture by narrow or partisan interests, no less than any

268. Davidson v. City of Cranston, 837 F.3d 135, 144 (1st Cir. 2016).

269. *See infra* Part III.B.

270. This principle has been vigorously invoked in the context of interpreting the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 524 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (declaring "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" to be "a permanent and indispensable feature of our constitutional system").

271. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2073 n.283 (2011) ("Because agencies lack any special competence to interpret the Constitution, courts should not defer excessively to an agency's constitutional judgments, even where the agency *has* considered constitutional norms."); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 194 (1998) ("[C]ourts never defer to agencies in reading the Constitution."); Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedure Act, and* Chevron*: Now and Then*, 64 EMORY L.J. 1529, 1540 (2015) ("[T]here is . . . de novo review when agencies interpret the Constitution and statutes they have no special responsibility for administering."); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010) ("De novo review is appropriate when agencies are interpreting laws that they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.").

other agency.[272] One need not doubt the Census Bureau's track record of integrity to acknowledge the simple truth that when making difficult and politically fraught judgment calls, census officials are as likely as any other bureaucrats to have motivations more complex than unadulterated truth-seeking.[273] Second, even assuming an enlightened and perfectly apolitical Census Bureau, we might doubt that its decisions would yield the best-tailored dataset for redistricters to work from. Though one of the census's primary uses is political apportionment, it has other intended functions, including, for example, distributing funding[274]—and practical considerations related to those other uses of the data might override consideration of what is ideal from a good-representative-government perspective. Indeed, that seems to be the case when it comes to counting prisoners.[275]

In sum, *Evenwel* simply did not ask—and thus did not answer—whether the use of unadjusted census figures "promotes equitable and effective *representation*."[276] Yes, there is language in *Evenwel* that sounds like a blanket endorsement of raw census data as a reapportionment baseline. Perhaps that signals that the Court would, if confronted with the question tomorrow, be tempted to hold that total census population is, in every case, sufficient, even when its use leads to prison gerrymanders. But those vague signals are not the edict the First Circuit perceived. And, as the next Subpart argues, any such holding would contradict earlier Supreme Court precedent, which long ago

272. *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21-24 (2010) (discussing the concept of agency "capture" and the mechanisms by which it operates before concluding that "[p]olitics cannot be removed from agency decision making, so of course one can never hope to avoid all hints of capture"); *id.* at 21 n.23 (collecting sources discussing the concept of capture).

273. *See* Fletcher v. Lamone, 831 F. Supp. 2d 887, 895-96 (D. Md. 2011) (noting that one reason the Census Bureau doesn't count prisoners at their home addresses is because "[s]uch an effort would likely cost up to $250 million"), *aff'd mem.*, 133 S. Ct. 29 (2012).

274. *About the Bureau: What We Do*, U.S. CENSUS BUREAU, http://www.census.gov/about/what.html (last visited May 5, 2017) (noting that census data are also used for "planning decisions about community services" and "[t]o distribute more than $400 billion in federal funds"); *see* ALLARD & LEVINGSTON, *supra* note 60, at 2 ("Notwithstanding the limited constitutional mandate—congressional redistricting and apportionment—in practice 'the Census Bureau is the premier source of information about the American people and the economy. More than just numbers, this information shapes important policy decisions that help improve the nation's social and economic conditions.'" (quoting U.S. Census Bureau, U.S. Census Bureau Strategic Plan: FY 2004-2008, at 1 (2003))).

275. *See Fletcher*, 831 F. Supp. 2d at 895 ("According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones.").

276. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016) (emphasis added).

recognized the Constitution may sometimes require states to second-guess the Census Bureau.

B. Earlier Precedents Hold that Census Figures Are Not Talismanic

Another principle explains the viability of one-person, one-vote challenges to prison gerrymanders: census figures are not a constitutional be-all and end-all. Though true, this principle cuts somewhat against the grain of one person, one vote, which aims at giving states an administrable and easy-to-implement rule, thereby minimizing the second-guessing in which courts must engage. *Evenwel* was, at heart, a pragmatic decision that draws force from the ease and ubiquity of total census population as an apportionment baseline. Telling states they cannot rely on the most readily available data might seem to destabilize the whole edifice.

This was Jefferson County's primary argument in support of its plan in *Calvin*,[277] and the First Circuit took up the same mantle in *Davidson*.[278] Jefferson County protested that equalizing total census population must suffice to satisfy the Constitution, or else it would be open season for second-guessing legitimate redistricting choices in the courts.[279] The *Calvin* court properly rejected that argument, and the First Circuit was overly credulous in embracing it. A key building block of *Calvin*'s analysis is its conclusion that state officials are neither constitutionally required *nor permitted* to treat census population totals as the final word on the size of a state's districts.[280] That conclusion was correct.

Despite total census population's ubiquity as a reapportionment baseline, the Court has had few opportunities to consider whether that dataset is *always* acceptable as a one-person, one-vote yardstick. Early cases, however, establish two basic principles: First, where total census population is likely to misrepresent the reality of a political community, the Constitution grants leeway to choose other population measures. Second, the Constitution can, at least in special circumstances, *require* such a departure. In short, the infallible census-taker is a myth. And total population figures are not constitutional get-out-of-jail-free cards.

The Court first signaled that census figures were a starting point, not an ending point, in *Burns v. Richardson*.[281] *Burns* applied the then-novel one-

277. *See Calvin* Summary Judgment Motion, *supra* note 157, at 12-13.

278. Davidson v. City of Cranston, 837 F.3d 135, 144 (1st Cir. 2016).

279. *See Calvin* Summary Judgment Motion, *supra* note 157, at 8-13.

280. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016) ("[W]hile 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.").

281. 384 U.S. 73 (1966).

person, one-vote doctrine to a Hawaii scheme that used a baseline of registered voters, rather than total population, to district the state legislature.[282] Hawaii chose to do so in large part because of the large, transient, and fluctuating population of nonresident military personnel in major bases on Oahu.[283] "Total population figures," the Court explained, "may thus constitute a substantially distorted reflection of the distribution of state citizenry."[284] The Court held that under the circumstances at hand, the Hawaiians were justified in measuring the equality of districts in terms of registered voter population.[285]

The ruling, however, was hesitant and purposefully narrow. The Court took pains to state that it was not endorsing the registered voter baseline under most circumstances.[286] Rather, the Court explained, the district scheme was valid "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[287] As the Court viewed the record at hand, the number of "[r]egistered voters was chosen as a reasonable approximation of both citizen and total population"—a handy and administrable proxy for the true distribution of the state's nontransient residents that could be relied upon not to introduce the same imperfections that military fluctuations caused in census population figures.[288] In other words, the Court made clear that it was not holding that one person, one vote required the equalization of registered voter population, or even that Hawaii had free rein to equalize that population. Rather, under the particular circumstances Hawaii confronted, registered voter population happened to be a useful and close approximation of whatever that elusive thing-to-be-equalized is—something the Court carefully refused to specify, punting the question *Evenwel* revisited decades later.

Burns signals that states can—and probably should—be pragmatic rather than reflexive in approaching their one-person, one-vote responsibilities. The Court was reluctant to insist that states rely on a particular metric when doing so would force a state to bake artificial distortions into its political structure, especially when sound alternatives exist. There is no one magic dataset that, when equalized, always leads to constitutionally sound results, and *Burns* suggests that the strictures of the Constitution can and sometimes do turn on

282. *Id.* at 81-82.

283. *Id.* at 94.

284. *Id.* For a snapshot of the extent of those distortive effects in particular districts, see *id.* at 90-91.

285. *See id.* at 91-93, 96-97.

286. *Id.* at 96.

287. *Id.* at 93.

288. *Id.* at 93-94.

the relative merits of the various datasets states have available to them. Finally, the Court left open the potential for closer scrutiny of a state's choice of population baseline in a future case. It characterized Hawaii's decision to use a metric that excludes transient military personnel as a "choice[] about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[289] Implicit was the possibility that it could be shown such a reason in the future.

Seven years later, in *Mahan v. Howell*,[290] the Court went a step further in another case about military personnel. In *Mahan*, the point of contention was a specific naval base in Norfolk, Virginia, where about 36,700 seamen were "home-ported" and thus required to be counted by the Census Bureau.[291] The apportionment plan at issue relied on census data to count all 36,700 seamen as residents of the Virginia state senate's Fifth District.[292] About half of those personnel in fact lived off-base in neighboring state senatorial districts, but Census Bureau policy called for commanding officers to claim them as residents of the ship and instruct their families to leave them off their home address census forms.[293] The lower court decision under review had held that the result was impermissible and, as an interim remedy, ordered the Norfolk region consolidated into a single, multimember district.[294]

The Court upheld that interim plan as within the district court's discretion and, in so doing, rejected the argument that Virginia had "validly used census tracts in apportioning the area."[295] The Virginia plan under challenge would be well within the bounds of one person, one vote if the baseline were total census population figures, but the Court endorsed the lower court's conclusion that the challenged plan in fact contained "significant population disparities."[296] The legislature's uncritical reliance on census data, the Court explained, "placed upon the census figures a weight that they were not intended to bear."[297]

As in *Burns*, the Court in *Mahan* envisioned some underlying constitutionally proper distribution of people that it wanted equalized, and again the way the Census Bureau counted people introduced flaws that caused raw census figures to approximate that distribution poorly. But now it was not the state

289. *Id.* at 92.

290. 410 U.S. 315, *modified*, 411 U.S. 922 (1973).

291. *Id.* at 330 & n.11, 331 & n.12.

292. *Id.* at 330.

293. *Id.* at 330 & n.11.

294. *See id.* at 330-32; Howell v. Mahan, 330 F. Supp. 1138, 1149-50 (E.D. Va. 1971), *aff'd in part and rev'd in part*, 410 U.S. 315.

295. *Mahan*, 410 U.S. at 331, 333.

296. *Id.* at 331-32.

297. *Id.* at 331 n.11.

but rather a court that diagnosed the deficiency. For the first time, the Court found a one-person, one-vote violation where a state relied on validly collected and reported census population data.

To be sure, the Court's opinion called the facts "unusual, if not unique,"[298] and the primary focus of the Court's ruling was not the underlying violation but rather its holding that the district court had not abused its discretion in fashioning a multimember district as a remedy.[299] But even that limited holding plants a clear flag in the case law: states *can* be held accountable for deficiencies in census figures if they uncritically rely on those figures when choices embedded within them shrink the apparent size of some communities and inflate others impermissibly. Until and unless the Court disavows *Mahan*, it is difficult to argue, as Jefferson County did, that there is an absolute constitutional green light when a total population baseline yields the appearance of equality.

Taken together, *Burns* and *Mahan* make clear that one-person, one-vote doctrine has never treated total population as the be-all and end-all, because either requiring or allowing states to blindly rely on census data would oversimplify their Equal Protection Clause obligation to strive for equality across districts. As the *Calvin* court put it, "census data . . . need not, and in some cases cannot, be the ending point" of the equalization analysis.[300] That principle is submerged in the mine-run case, where there is no question that standard census figures are the best baseline available. But cases like *Burns* and *Mahan* show what happens when the Court confronts circumstances in which the limitations of available population data sources become clear: it concludes that the data are just that—mere data, which may or may not adequately reflect whatever it is one person, one vote *really* demands be equalized.[301]

The hard task, to which the next Part turns, is defining the representational rights at issue and deciding when they have been abridged.

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298. *Id.* at 331. The First Circuit in *Davidson* focused on this language while distinguishing *Mahan*. Davidson v. City of Cranston, 837 F.3d 135, 145 (1st Cir. 2016). But its curt explanation of why that case was inapposite—it apparently sufficed that those plaintiffs aimed to "eliminate 'discriminatory treatment' of the military personnel" whereas the *Davidson* plaintiffs did not, *see id.* (quoting *Mahan*, 410 U.S. at 331-32)—was frustratingly perfunctory. It failed to explain why the disparities produced by the ACI in Cranston were less anomalous than the distortions wrought by the naval base in *Mahan*.

299. *See Mahan*, 410 U.S. at 331-32.

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

301. The *Calvin* court divided the question what population one person, one vote requires states to equalize into two parts: "First, who are the people who should *in theory* be counted for determining equality of population? Second, what source(s) of data are acceptable for determining this population?" *Id.* at 1302-03.

IV. Building a Better Framework

Building a durable rule for adjudicating one-person, one-vote challenges to prison gerrymanders is a daunting challenge. As the previous Part showed, the path forward for such claims begins with weak footholds in shifting sands, thanks to the Supreme Court's reluctance to define precisely what one person, one vote requires equalizing. A necessary starting point, then, is to identify what we already know about the rights one-person, one-vote doctrine protects and how those insights might apply to "representational equality," as distinguished from voter equality.

Here, voting rights scholarship can help. This Part builds on scholars' insights to glean lessons about how prisoners' representational rights should be understood. It then proposes and discusses the *Calvin* court's different approach. The key insight from the scholarship is that courts can and should demand a justification for counting prisoners at their place of incarceration, and those justifications must center on prisoners' ties to their surrounding communities.

A. Representational Equality Is an "Aggregate Right"

The *Calvin* court proceeded from the explicit premise that one-person, one-vote rights are purely individual.[302] 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. This is indeed part of the doctrine's branding—it is written into the "one person, one vote" slogan.[303] But *Calvin*, in accepting that packaging uncritically, overlooked or brushed aside a body of voting rights scholarship that questions, or at least complicates, that premise.[304] Closer attention to leading voting rights scholarship on the topic can provide a sounder foundation for future prison gerrymandering cases.

One longstanding insight in voting rights scholarship is that the ostensibly singular "right to vote" is multifaceted: there are actually multiple "rights to vote."[305] Pamela Karlan disaggregates the right to vote into three distinct interests: participation, aggregation, and governance.[306] "Participation" may be the most familiar. It comprises various aspects of the right to cast a ballot and

302. *See id.* at 1301-02.

303. *See supra* note 166 and accompanying text.

304. *See Calvin*, 172 F. Supp. 3d at 1301 & n.8 (citing Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888 (2012)) (asserting that one-person, one-vote violations cause "*personal*, not structural," harms while providing only a "*but see*" citation to Fishkin arguing the opposite).

305. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707-08 (1993) (capitalization altered).

306. *Id.* at 1709-20.

otherwise to be formally included in the electoral process of a particular jurisdiction.[307] "Aggregation" claims, meanwhile, are those "assert[ing] that the voter has been denied a fair opportunity to elect her preferred representative," via line-drawing or other electoral-structural decisions made by the state.[308] Most traditional gerrymandering claims fit into this bucket. Finally, "governance" interests concern "the overall composition of the governing body" and related considerations that dictate "the practical effectiveness of the representatives who champion [a voter's] interests."[309]

Participation rights are the most conventionally individualistic. Protecting each voter's participatory rights promotes "civic inclusion" values, Karlan argues—the voter whose right to participate is protected enjoys the benefit of feeling "equal political dignity" and "connectedness to the community."[310] When poll taxes and outright racial exclusion threatened this aspect of the right to vote, the Court afforded it robust protection.[311] Robust—but not universal. As Karlan notes, the Court categorically excludes certain groups, including felons, from this protection.[312] The Supreme Court's decision in *Richardson v. Ramirez* upholding felon disenfranchisement[313] leaves anyone convicted of a serious crime without any individual participatory voting rights of this sort under the Constitution.[314] On some level, this makes sense: a major objective of incarceration in the United States is to brand a transgressor with reduced political dignity and enforce a temporary disconnection from the community at large.[315]

But one-person, one-vote claims belong to the aggregation and governance realms. Most gerrymandering claims and other disputes about line drawing fall into the category of "aggregation" claims, and Karlan argues that the seminal

307. *Id.* at 1709-10.

308. *Id.* at 1713-14.

309. *Id.* at 1717.

310. *Id.* at 1710 (quoting Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 180 (1989)).

311. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (ruling poll taxes unconstitutional); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (invalidating a Texas statute that barred African Americans from voting in primary elections).

312. Karlan, *supra* note 305, at 1710-11, 1710 n.20.

313. 418 U.S. 24, 56 (1974).

314. *See* Karlan, *supra* note 19, at 1153-54.

315. *See* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 948 (2016) (noting that, in the United States, "the crime or series of crimes is taken to justify, not just imposing hard treatment on the offender, but banishing him from social life"); *id.* at 949 (describing an "exclusionary aspect" of U.S.-style criminal punishment, which "draws a line between the offender and the community"); *see also supra* notes 82-83 (describing the consequences of felony conviction as "civic excommunication" and "civil death").

one-person, one-vote case, *Reynolds v. Sims*,[316] was at bottom a classic "governance" claim.[317] In *Reynolds*, "[d]espite the Court's individualist rhetoric, the system it overturned was one that systematically biased the overall legislative complexion in favor of identifiable groups—white rural voters—rather than one in which atomistic individuals were arbitrarily deprived of equal voting power."[318] Prison gerrymandering claims are similar; that description of *Reynolds* fits modern critiques of the practice to a T.

Distinguishing aggregation and governance claims from participation claims matters because other scholars have shown that claims of this ilk, in contrast to participation claims, fit the individual rights mold uneasily at best.[319] Rather, the argument goes, these rights are most coherent when understood as belonging to groups or collectives, not just to individuals.

The richest model for understanding such claims comes from Heather Gerken, who has elaborated a theory of "aggregate rights" by examining the dynamics of vote dilution claims.[320] Gerken argues that vote dilution cases pose vexing problems for the Supreme Court because they do not square comfortably with the Court's stubbornly individualistic conception of the rights at stake. Rather than fitting neatly on either side of a conventional individual rights/group rights dichotomy, she argues, vote dilution claims fall on a continuum between the two. This is what Gerken means when she refers to vote dilution protection as an "aggregate right."[321]

Though Gerken's "aggregate rights" formally belong to an individual rightsholder, they nevertheless have three characteristics that make them seem more group-like upon closer examination: (1) when dilution is claimed, "fairness is measured in group terms"; (2) the claim "rises and falls with the treatment of the group"; and (3) "the right is unindividuated among members of

316. 377 U.S. 533 (1964).

317. Karlan, *supra* note 305, at 1717.

318. *Id.* at 1718 (footnote omitted); *see also* Smith, *supra* note 44 (describing the interest groups that benefited from unequal apportionment before *Reynolds*).

319. *See* Fishkin, *supra* note 30, at 1891-93; Gerken, *supra* note 30, at 1681-89; Hayden, *supra* note 47, at 260 ("Qualitative vote dilution . . . occurs when people are unable to combine their votes with those of other like-minded people in a way that allows them to have a chance of electing a candidate of their choice. The presence of a group of like-minded people, then, is a necessary prerequisite to any claim of qualitative dilution." (footnote omitted)); *see also infra* notes 320-31 (discussing Gerken's work), 332-335 (discussing Fishkin's work).

320. *See* Gerken, *supra* note 30, at 1666-69. Though Gerken's principal focus is on dilution claims under section 2 of the Voting Rights Act, her theoretical insights apply with equal force to one-person, one-vote claims. *See id.* at 1688, 1709, 1737-38.

321. *Id.* at 1666-69. This is distinct from Karlan's concept of an "aggregation" claim, but the similar phrasing likely reflects Gerken and Karlan's common recognition of the communal nature of the right. *See supra* notes 308, 318 and accompanying text.

the group."[322] The injury "is not the state's frustration of particular individuals' preferences."[323] Instead, the harm *only* emerges from the aggregate treatment of many different individuals who share a common interest.[324]

This disconnect is key to understanding how courts manage such claims, Gerken argues. Because the relevant harm is bigger than any one person, appropriate relief (such as the reshaping of a particular district) may appear to inure to only certain group members (specifically, those who happen to live in that district), even though in fact all members of the group (even those who do not live in that district) benefit in the eyes of the law. Gerken's core example is the racial vote dilution that occurs when a state fails to create a majority-minority district when voting rights law says it should have[325]: just as all black voters in a state share the harm of a redistricting plan that underrepresents them, they all (in Gerken's conception) share in the benefits of the majority-minority district that voting rights law prescribes as a remedy, and that is true even for black voters who live outside the particular district in question.[326]

Though Gerken discusses these issues in the specific context of racial vote dilution, she makes clear that her theoretical framework does not depend on the racial nature of the claim—groups of all sorts can claim aggregate harms.[327] Moreover, some of the biggest obstacles Gerken identifies to the Court's recognition and protection of aggregate rights like the right to an undiluted vote are less worrisome when the group is defined in terms of neighborhoods and communities. For example, "essentialization" of group identity—assuming that it necessarily correlates to political preferences—is a concern when it comes to aggregate rights,[328] but such worries are much less troubling with regard to identification with a particular neighborhood or other geographically defined community than with regard to racial classifications. That kind of geographic "essentialization" is, after all, written into the Constitution.[329]

One-person, one-vote doctrine richly illustrates the tension Gerken identifies between the shared nature of the underlying rights and the Court's individual-rights framing of its doctrine.[330] She criticizes the doctrine as

322. Gerken, *supra* note 30, at 1681-89.

323. *Id.* at 1687.

324. *Id.* at 1687-88; *see also* Hayden, *supra* note 47, at 260 ("The presence of a group of like-minded people, then, is a necessary prerequisite to any claim of qualitative dilution.").

325. *See* Gerken, *supra* note 30, at 1698-716.

326. *Id.* at 1703-04.

327. *See id.* at 1688. Aggregate harm is not limited to the electoral sphere, either. Rights to, for instance, desegregated housing can also follow an aggregate rights framework. *See id.* at 1684.

328. *See id.* at 1727.

329. *See id.* at 1678 n.50.

330. *Id.* at 1730-32.

evincing a "thin"—in other words, simplistic and underdeveloped—"conception of voting" and democratic legitimacy; she suggests thickening it by "accepting that courts cannot remedy the aggregate harm of dilution without indulging in some assumptions about the political preferences" of the groups at issue.[331]

Joseph Fishkin recently took a version of Gerken's critique one step further in the specific context of one-person, one-vote claims, concluding that there is nothing individual about the one-person, one-vote right.[332] In his view, "no coherent account can be reconstructed of a nontrivial, non-tautological *individual* interest in the 'weight' of a vote that one person, one vote protects."[333] The "individual rights story" the Court tells about the Warren Court's crowning achievement is just that—a useful fable.[334] In Fishkin's view, the "real action" of such claims lies "in structural questions about the allocation of group political power."[335]

In summary, it appears that scholars have been fleshing out an increasingly communal understanding of the one-person, one-vote right. And they have drawn a sharp contrast between these aggregate-style voting rights and more traditional voting rights that the "right to vote" typically evokes.[336]

The scholarship suggests that those aggregative aspects of the right have remained underappreciated and underdeveloped in the doctrine for two related reasons: the Court's stubborn affinity for individualistic rights conceptions and its unwillingness to grapple with the thorniest questions about what, exactly, the one-person, one-vote rule is designed to equalize.[337] This sleight of hand has muddled one-person, one-vote doctrine, with the courts inappositely treating such claims as "analogous to" traditional voter disenfranchisement.[338]

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331. *Id.* at 1732 (emphasis omitted). An important caveat is that, as Gerken sees them, aggregate harms are not completely irreconcilable with more traditional individualistic rights conceptions: "[A]lthough an analysis of group treatment is necessary to assess the injury, the harm remains an individual one." *Id.* at 1724. Threading the needle between individual and group rights in this way gives rise to a doctrine that requires an unconventional approach to issues like standing because the aggregate harms at issue tend to look less concrete and particularized than those in which the courts prefer to traffic. *See id.* at 1724-25. But Gerken's underlying theory helps explain and justify the expansive and seemingly anomalous approaches courts have taken to access-to-courts issues like standing and class certification in these cases. *See id.* at 1690-91. It also helps explain why the communal features of the underlying right can coexist with rhetoric from the Court that purports to reject them.

332. *See* Fishkin, *supra* note 30, at 1892.

333. *Id.*

334. *See id.*

335. *Id.* at 1893.

336. *See id.*

337. *See id.* at 1891-92.

338. *Id.* at 1891.

So the *Calvin* court's confident assertion that the right it was tasked with elucidating was "*personal*, not structural"[339] was understandable—it accurately caught the Supreme Court's rhetorical drift—but it may not withstand deeper scrutiny. Courts that want a robust framework for addressing these cases need to reassess *Calvin*'s core assumption.

To be clear, most of the above scholarship does little to address issues of diluted representation, specifically distinguished from diluted votes.[340] It explicitly considers issues through the lens of ballot-casters, not nonvoters who must rely on virtual representation mechanisms to be heard.[341] That is in keeping with a larger reality: the right to representation explicitly conceived as such is undertheorized relative to the more familiar right to vote. But for the same reason, there is currently no reason to assume that the lessons do *not* transfer. This Note therefore assumes that the dynamics of diluting representational rights are comparable to the dynamics of diluting traditional voting rights.[342] The next Subpart thus takes up the implications of these lessons for prison gerrymandering claims in particular.

B. Prisoners Share Representational Equality Rights with Communities

If scholars are correct that one-person, one-vote rights are best understood as guarding against aggregate, group-based harms, two conclusions follow. First, representational rights do not merely belong to, or benefit, individual prisoners. Rather, entire communities share them and suffer from their abridgment, and properly defining and protecting these rights requires identifying the communities affected. Second, the mere fact of an individual person's criminal conviction and subsequent incarceration does not provide an adequate basis for suspending the right, because the harm of that suspension will be felt communally.

To assess the impact of prison gerrymandering on representational rights, it is useful to first ask what those rights look like before an individual is incarcerated. Before imprisonment, an individual—call her Constance—will have been living in a particular community. Maybe Constance could vote there, but maybe not. Perhaps she was not a citizen, or she already had her

339. Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1301 (N.D. Fla. 2016).

340. *But see* Fishkin, *supra* note 30, at 1899-903.

341. *See, e.g.*, *id.* at 1893-99 (exploring the contours of "the weight of a vote"); Gerken, *supra* note 30, at 1671-72 (speaking in terms of "[v]ote dilution," what occurs "at the polls," and "voters . . . cast[ing] their votes").

342. This may be a contestable premise, and future scholarship might explore the validity of this assumption. But because no reason *not* to proceed from this premise is self-evident, and because doing so helps plug gaps in what we know about the nature of representational equality, this Note indulges the assumption.

voting rights suspended because of a previous conviction. For one-person, one-vote purposes, it does not matter; either way, Constance had representational rights that one person, one vote protects. And, more to the point, so did—and do—her family, friends, and neighbors, whose rights exist in a state of codependence with hers. If she is excluded from the population base used in redistricting for any reason other than conviction and subsequent imprisonment, or especially for no reason at all, her rights are diluted. And—this is Gerken's insight—she, her next door neighbor, her kids, and the family living three blocks away suffer a common injury as a result. It is of no consequence that she happened to be the individual who went uncounted and her neighbor did not—both suffered the same constitutional harm. With representation as with voting power, "all group members are injured equally by dilution, and all benefit equally from a remedy."[343] In important ways, Constance's rights are her community's rights and vice versa.[344]

The questions then become: What happens to that equilibrium when Constance is sent elsewhere to serve a sentence? Does her right to equal representation follow her to prison? Can it be temporarily abridged, like her right to vote? Understanding one person, one vote as an aggregate right provides useful answers to these questions.

First, it militates against finding that Constance's representational equality rights vanish simply by dint of her incarceration, even though (in most states) her ability to vote would. As Part IV.A noted, the traditional justifications for felon disenfranchisement sound in individualistic arguments—reflecting the underlying "participation"-style rights at stake.[345] Aggregate rights like one person, one vote call for a different approach. Specifically, to have meaning, they require reference to a community beyond the prisoner himself. Even if criminal disenfranchisement is legal,[346] justifications for limiting prisoners' participatory rights to personally exercise the franchise do not extend to representational equality rights.

Karlan identifies two potential justifications for restrictions on felon voting: either they operate as a species of punishment[347] or else—as the traditional understanding would have it—they represent regulations of the franchise designed to ensure its intelligent exercise, akin to excluding

343. Gerken, *supra* note 30, at 1687.

344. *Cf.* Fishkin, *supra* note 30, at 1898-99 (noting that in vote dilution cases individuals "provid[e] a convenient rights-holder with legal standing on whose behalf the Court can implement a group-based conception of equality").

345. *See supra* notes 310-15 and accompanying text.

346. States have wide latitude to exclude felons from voting, though some critics would like that to change. *See, e.g.*, Karlan, *supra* note 19, at 1169-70.

347. *See id.* at 1164-69.

teenagers from the right to vote.[348] Both justifications are quintessentially individual; neither provides any basis for abridging the rights of communities. The regulatory justification, for instance, makes sense only with reference to "participation" rights. A conviction reveals individual character flaws that render a convict's putative ballot suspect; there is no similar justification for denying a community equal representation. It would be unseemly to question one community's "fitness" to be represented as compared to another's, especially by reference to how many community members break the law. The lens of punishment casts such an exclusion in no better light: because a prisoner's representational rights exist in codependence with those of a wider community, there is no way to "punish" only the prisoner—denying the prisoner representational rights inevitably operates as a distasteful collective punishment. The fact that it may be appropriate to revoke a prisoner's participatory rights, then, cannot justify revoking rights that fit the aggregate or governance molds.

This argument might seem to battle a straw man. At least after *Evenwel*, one could reasonably protest, no court would argue that prisoners do not enjoy one-person, one-vote rights; the real issue is *where* they enjoy the representation those rights guarantee. But dispensing with the notion that such rights can be suspended by imprisonment establishes a key premise: any coherent account of the one-person, one-vote issues in prison gerrymandering cases must reflect the reality that prisoners must enjoy representational rights *somewhere*.[349]

The question remains: Where? We now have some tools for answering it. Understanding that representational rights are *not* personal at their core—that they require some reference to a wider community to gain meaning—suggests that a proper approach to answering the question would identify the communities to which the prisoners meaningfully belong and with whom those rights can be meaningfully shared.

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348. *See id.* at 1150 ("One of the linchpins of current doctrines regarding criminal disenfranchisement statutes is the assumption that these laws are essentially regulatory, rather than punitive.").

349. Note that *Calvin*'s "representational nexus" approach, by focusing on individuals who can be "meaningfully affected by a representative's actions," *see* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1310-14 (N.D. Fla. 2016), arguably fails this litmus test. The issue in that case was not apparent because the case dealt with a question of exclusion versus inclusion that did not require the court to grapple with the question where the prisoners at issue *did* enjoy representation. The plaintiffs just had to establish that the prisoners were not enjoying representation from the Jefferson County government. But one possible extension of *Calvin*'s logic is that, at least in matters of local governance, the prisoners enjoyed *no* representation *anywhere*—school board members in their home communities hold no more sway over prison officials than those in Jefferson County. (On the other hand, it is possible that prisoners would be found to enjoy a representational nexus to the local government back home if, say, enough of them have children or spouses who rely on services there.)

Before the moment of incarceration, the prisoner's home community fit the bill and, but for incarceration, it would have continued to do so. At the same time, had the prisoner voluntarily moved her residence, there would be little question that her doing so sufficed to re-yoke her representational rights to those of her new neighbors. That would make sense—she arrives at her new community as a full member, unfettered in her ability to engage, interact, and participate in civic life to whatever extent she wishes. This all suggests a useful way to frame the question: When someone goes to prison, does he become enough a member of his new community to enjoy representation there? If not, he ought to presumptively continue to enjoy it back home.

Contrast *Calvin*'s test, which focused on individual prisoners' connections (or lack thereof) to their purported representatives.[350] This follows from an "individual rights" lens—it is a test that views the voter's relationship to government as quintessentially personal. But framing the question in light of the aggregate nature of the underlying right yields a test with a different focus: What is a prisoner's connection to the nearby community? These two factors partly overlap—the lack of one suggests the lack of the other—but the next Subpart explores how framing the question differently has benefits once these insights are translated into a modified test.

The reasons to follow such an approach are both practical and profound. On a practical level, as will be discussed in more detail below, it is easier for the judges who have to make these difficult determinations. Assessing the extent of a prison population's ties to the surrounding community is a relatively straightforward task compared with scrutinizing the nature of the political ties between a heterogenous group of individual prisoners and their nominal representatives. And, more meaningfully, focusing on community ties makes the doctrine more responsive to what is actually troubling about prison gerrymandering in the first place: it identifies ersatz communities where prison populations and unfamiliar neighbors are artificially grafted together and distinguishes them from districting schemes that respect genuine commonalities of interest and experience.[351] These are the types of ties that make aggregated electoral rights meaningful, and they are the types of ties that allow individuals without votes to exercise their voice indirectly through friends and neighbors.

350. *See id.*

351. *Cf.* ALLARD & LEVINGSTON, *supra* note 60, at 13 ("Incarcerated people do not vote, or use local parks, schools or libraries in prison towns. Nor do they join in the civic life of the prison town. The primary contact incarcerated people have with the outside world is through family members and friends from their communities of origin." (footnote omitted)).

C. The Proper Test Is Community-centric

This Subpart argues that applying these lessons yields the following rule for determining when the Equal Protection Clause requires adjustment of a total population baseline: "Population data are not a constitutionally permissible one-person, one-vote baseline if they count a discrete group of persons (a) where the government has involuntarily relocated them, (b) where they do not regularly interact with the surrounding community, and (c) where they cannot vote." Focusing on specific facets of this rule, as the remainder of the Subpart will do, illuminates its rationales and illustrates how it differs from *Calvin*'s test.

1. "... a constitutionally permissible one-person, one-vote baseline ..."

This rule is couched in terms of identifying appropriate and inappropriate baselines, rather than—as *Calvin* framed its rule—a binary yes-or-no test for one-person, one-vote violations.[352] This framing is perhaps less elegant, but it serves to universalize the test and better reflects the dynamics of the existing doctrine. Whether a violation has occurred depends upon an already well-developed body of law that determines when "substantial equality" exists among districts.[353] That will vary between, for example, federal congressional and state legislative districts,[354] and the benefit of a distinct standard for what is and is not an appropriate baseline is that it applies consistently no matter what the overlaying "substantial equality" rule is now or in the future.

2. "... a discrete group of persons ..."

This language stands in contrast to the first two prongs of the *Calvin* test, which require "a (1) large number of (2) nonvoters" for the rule to apply.[355] To some extent, this reflects the difference identified above: *Calvin* is purporting to identify violations, whereas the test proposed here is about distinguishing

352. *See Calvin*, 172 F. Supp. 3d at 1315 ("For Plaintiffs to prevail in this case, they have to show [a series of factors].").

353. *See, e.g.*, Brown v. Thomson, 462 U.S. 835, 842-46 (1983). *Calvin* discarded the "safe harbor" approach that generally governs this question as a "pesk[y] . . . pin bone[]" that was largely irrelevant to the case at hand. *See* 172 F. Supp. 3d at 1314-15. True enough on the facts that confronted that court, but a properly framed approach need not dispense with this useful body of law.

354. *Compare Brown*, 462 U.S. at 842 (explaining that, for states and localities, "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10%" is permissible), *with* Karcher v. Daggett, 462 U.S. 725, 740-44 (1983) (requiring near-perfect equality for congressional districts).

355. 172 F. Supp. 3d at 1315.

suitable from unsuitable baseline data. In the *Calvin* test, the "large number" requirement is part makeweight and part placeholder. To answer the next question—"how large, exactly?"—requires looking to the body of law governing "substantial equality," much as one would do once this Note's proposed test identifies the appropriate baseline. Rather than a genuine prong of the *Calvin* test doing independent work, the "large number" requirement simply bakes in the commonsense intuition that one cannot successfully challenge a misenumeration of prisoners (or anyone else) if the resulting scheme falls within the bounds of permissible variation, regardless of which baseline one uses—as will almost always be the case unless the number of prisoners at issue happens to be "large" relative to the overall size of the districts.[356] Eliminating the "large number" requirement in this test makes the universe of potential challenges wider in theory but similarly limited in practice, while also being more forthright about the nature of the question being asked.[357]

3. "... where the government has involuntarily relocated them ..."

Here we arrive at the meat of the proposed approach. This involuntariness requirement reflects the understanding, developed above,[358] that prison gerrymanders alter a state of representational equality that existed before incarceration intervened. This requirement does double duty. First, consistent with the Fourteenth Amendment's state-action requirement,[359] states can only be held accountable for their own actions and decisionmaking. Second, this requirement recognizes that people, along with their representational rights, relocate to new geographic areas all the time. But there is something meaningfully different when the state effects that relocation against an individual's will. These two considerations work in tandem. Precisely because the state is more deeply implicated in the relocation of a prisoner from his home community to a faraway prison cell, it both can and should be held to account for that decision.

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356. The possible exception to this might be in a challenge to a congressional districting scheme, for which the rule has been something approaching perfect equality. *See Karcher*, 462 U.S. at 740-44.

357. The reason for discussing "persons" rather than "nonvoters" simply contemplates the very unlikely possibility of a state *counting* prisoners where they are incarcerated even as they *cast votes* in their home districts. The test nevertheless shares *Calvin*'s commonsense intuition that a prisoner who *can* vote receives constitutionally adequate representation wherever that vote may be cast; hence the later requirement that the person be counted "where they cannot vote." Because the need for this particular limitation seems more or less self-evident, this Note will not elaborate upon it any further.

358. *See supra* Part IV.B.

359. *See generally* Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 594-96 (1991).

The involuntariness factor also addresses a persistent slippery slope concern that looms over prison gerrymandering claims: whether the same rule would apply to college students and military personnel and their families.[360] But the decisions to attend a particular college or join the military are personal and volitional in a way that being arrested, prosecuted, convicted, and sentenced are not.[361] True, in-state tuition and other incentives may nudge a college student toward one particular school over others. And yes, any fairly tried and duly convicted prisoner bears personal responsibility for his choice to offend. But the hand of the state still lies much more heavily on the geographic fate of the prisoner. And the prisoner's decision to offend is separable from the state's decision whether, where, and how to incarcerate her. States have discretion whether to incarcerate someone far from home or place her in a local facility, release her on probation, or pursue alternative sentencing.[362] If the state uproots a prisoner from a community with which she shared a mutually reinforcing interest in representational equality, then its doing so triggers an obligation to either justify the distortive effects of that relocation or ameliorate them.

4. "... where they do not regularly interact with the surrounding community ..."

This prong causes the propriety of counting prisoners where they are incarcerated to turn on one consideration above all others: the extent and nature of prisoners' links to the host community. It is the crux of the novel approach this Note advances and the sharpest departure from *Calvin*'s approach. It principally reflects the insight, developed above, that a prisoner's representational rights are only coherent if understood to exist by reference to a broader community of which the prisoner is meaningfully a part.[363] There are also at least two other salutary effects of focusing on community ties rather than a "representational nexus" to a representative.

First, courts can easily administer a community-centric rule without wading into sensitive political judgments. From a judge's perspective, it is easier, more objective, and less fraught to determine the extent and nature of a

360. *See, e.g.*, Davidson v. City of Cranston, 188 F. Supp. 3d 146, 150 (D.R.I.) (noting, and rejecting, an analogy Cranston drew between ACI prisoners and students at a local university), *rev'd*, 837 F.3d 135 (1st Cir. 2016); *Calvin*, 172 F. Supp. 3d at 1318-19.

361. *See supra* notes 59-61 and accompanying text.

362. For example, "realignment" in California recently shifted many thousands of people from overcrowded state prisons to county jails and community supervision. *See* Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 184-96 (2013).

363. *See supra* Part IV.B.

prisoner's ties to the surrounding community than to assess the extent of representational benefit they are getting from a purported representative. Consider two of the three factors *Calvin* investigates as part of its "representational nexus" analysis: (1) to what extent policies enacted by the Jefferson County government "determine[]" the daily living conditions of the prisoners in question and (2) to what extent elected representatives have in fact "made any meaningful effort to engage with [those] prisoners."[364] These questions raise other profound questions about whether and how government impacts the lives of its constituents—questions to which courts should be wary of claiming to provide objective answers.

It is easier and less controversial to focus on interaction with the community, which is already *Calvin*'s third "representational nexus" factor.[365] Apart from the theoretical bases for such a focus, it makes intuitive sense as a prerequisite of the so-called virtual representation that nonvoters enjoy: if you cannot interact with your neighbors, you cannot be meaningfully represented by the people they elect. In other words, if a prison is cut off from the surrounding community, there is no mechanism by which the fulfillment or frustration of prisoners' interests can lead to electoral accountability. And more pragmatically, contact with (or isolation from) neighbors—or at least the opportunity to have such contact—can be determined with reference to objective, easily evidenced, and relatively uncontroversial factors: Do prisoners do community service? How many community members and organizations come into the facility to engage the prisoners with educational or social opportunities? What structured events occur on a regular basis to bring prisoners and nonprisoner community members into contact? In *Calvin*, the evidence relevant to this factor was straightforward: community organizations visited the prison for interactive programming, but prisoners' opportunities to spend time outside the facility were limited to a single work release program, the policies governing which forbade them to "approach" or "communicate with" any citizen.[366]

Second, a community-centric test eliminates the sharp disparities between statewide and local challenges that *Calvin*'s approach creates.[367] By hinging the question whether prisoners can reasonably be enumerated in their place of incarceration on the nature and extent of prisoners' ties to their voting neighbors, the test ensures consistent results across state and local schemes. It is an oddity of the *Calvin* test that as surely as the JCI inmates in that case were

364. *See* 172 F. Supp. 3d at 1316.

365. *See id.*

366. *Id.* at 1317 (quoting Deposition of Chris Hodgson at 62, *Calvin*, 172 F. Supp. 3d 1292 (No. 4:15-cv-00131-MW-CAS)).

367. *See supra* Part II.A.

improperly counted as residents for the purpose of local elections, it would have been entirely proper to count them as residents of the county in a state scheme.[368] This makes sense within the logic of the "representational nexus" test, which more or less demands that such differences arise. Absent some conjectural pocket of genuine anarchy, the inability of one level of government to influence the lives of the subpopulation in question simply ensures that another level of government will have greater influence.[369]

Such differential outcomes are undesirable. In an ideal world, states and localities would work from the same datasets and have a consistent policy about whom to count and where to count them. More generally, there is something incongruous and unappealing about prisoners being counted in one place for state purposes while simultaneously being nonentities where a locality is concerned. If prisoners should not *forfeit* a right to representation when they go behind bars,[370] it remains troubling if that right is limited to certain levels of government.

This approach is open to an obvious criticism: it is consistent principally because it is hard to imagine a prison gerrymander that would not flunk this test. But, as noted above, it does not follow that such a rule would lock federal courts and local officials in perpetual battle or bog down the courts in litigation; to the contrary, there is every reason to think that the Census Bureau would take account of a rule like this and adjust the usual residence rule's applicability to prisoners accordingly once a critical mass of successful suits were brought.[371] In that sense, a constitutional test that is more binary and yields consistent results when applied to most prison gerrymanders may be preferable to a more fact-bound, multifactor approach like *Calvin*'s: it sends a clearer message that can be more quickly incorporated into real-world practices both at the Census Bureau and in the states.

To put it succinctly, focusing on community ties will require courts to intervene more often, at least in the short run. But it also means those interventions will require fewer sensitive judgments, better suit courts' institutional competence, and eliminate the need for the political-scientific contortions that the *Calvin* court put itself through. One person, one vote could remain relatively objective and mechanical in its application—a valuable nod to the minimalist values that animated its original design.[372]

368. *See supra* Part II.A.

369. *See supra* Part II.A.

370. *See supra* Part IV.B.

371. *See supra* notes 265-66 and accompanying text.

372. *See, e.g.*, Gerken, *supra* note 230, at 1419-29.

D. The Remedy Should Be Reassignment Whenever Possible

When states cannot show meaningful ties between prisoners and their nonincarcerated neighbors, the final choice courts confronting these claims must make is what the remedy should be. Several considerations point to reassigning inmates to their last known addresses whenever it is feasible to do so.

Calvin did not have to grapple with this issue because, as will be typical of challenges to electoral districts at the local level, the plaintiffs sought exclusion of the prisoners from their district, not inclusion elsewhere, and the vast majority of the prisoners were from outside the jurisdiction rather than elsewhere within it.[373] This will usually be the case with one-off challenges to various local- or county-level gerrymanders—prisons large enough to raise one-person, one-vote concerns are generally statewide institutions that draw outsiders into a specific locality. The only sensible remedy in those cases is to exclude those populations from the count.[374]

But statewide challenges would force courts to confront more challenging "where" questions. In such cases, requiring states to reassign inmates to the best of their ability makes the most sense, for two reasons.

First, as already discussed, the fact that justifications for disenfranchising individual voters do not extend to representational rights suggests that prisoners should always get representation somewhere.[375] Because their representational rights are only coherent with reference to communities of other individuals with whom these rights are shared, it is not appropriate to "punish" prisoners by depriving them of representation altogether. Relatedly, the fact that prisoners effectively enjoy their representational rights in a state of codependence with other members of their communities points clearly toward the need for remedies that "restore" their status as members of those communities whenever possible. The remedy of exclusion in cases like *Calvin* fits more comfortably with both the assertedly individual nature of the right and the fact that rightsholding plaintiffs will almost invariably not be the prisoners but rather members of neighboring districts. Prisoners are excluded or included as a bloc, and they have no skin in the game themselves—the decisive premise is that their interests are not implicated, nor are those of their friends and family back home. But where the charge is that the state has

373. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1296, 1298-99 (N.D. Fla. 2016).

374. Even if a few local residents are mixed in, the number will rarely be consequential. *Cf. id.* at 1323 n.31 (noting that the number of JCI inmates who resided in Jefferson County before incarceration "is so small that accidentally excluding some of these inmates from the count would not appreciably dilute anyone's . . . representational rights").

375. *See supra* Part IV.B.

uprooted them from one community without integrating them into another, the interdependent effects are clearer. The core lesson of this Part is that prisoners and their communities are mutually harmed by the prisoners' relocation. That harm is felt at home, and it is at best half-remedied if prisoners are merely stricken from the population rolls.

The second reason to favor reassignment is that exclusion does not address—and arguably exacerbates—the dehumanizing effects of prison gerrymandering. Not counting prisoners at all puts them in limbo, treating them as nonentities.[376] This takes the already dubious practice of prisoner disenfranchisement and civic excommunication to an extreme.[377] It may be a practical necessity when existing records fail to disclose a prisoner's previous address.[378] But establishing a presumption of reassignment whenever possible more fully remedies the harms of prison gerrymandering.[379]

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376. *See supra* Part I.B.

377. *See supra* notes 82-83, 315 and accompanying text.

378. This should be rare; states may already keep a variety of data that can reasonably indicate a prisoner's most recent address. *See* Wood, *supra* note 4, at 193-94 (describing Maryland's use of such data); *id.* at 201 (describing New York's use of such data); *supra* note 114.

379. One might reasonably ask: If—as this Note argues—it may be unconstitutional for a state to count prisoners where they are incarcerated, is it similarly unconstitutional for the same state to fail to count prisoners at all? In other words, do prisoners and the residents of their home communities have a constitutional right to demand the prisoners be counted at a last known address? This is a trickier question. If a state had a sufficiently compelling practical justification for why reassignment was infeasible, the foundational premise of one person, one vote that states need only seek districts that are equal "as nearly . . . as is practicable" would likely kick in and bar the claim. *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964). But in the more typical case where a state could reassign but chooses not to, the answer is probably: yes, the Constitution requires prisoners to be included in their home districts, at least theoretically. The practical significance of that right may nevertheless be quite limited for three reasons: First, such suits are, at this point, purely conjectural; all fifty states today either practice prison gerrymandering or actively reassign prisoners to their home addresses. Second, whereas prison beds are concentrated, last known home addresses are more likely to be diffuse. *See* Wood, *supra* note 4, at 201 (noting that the process of correcting prison gerrymandering in New York involved assigning "46,003 incarcerated individuals to 24,245 unique census blocks statewide"). So excluding a particular prison or set of prisons can have a large, concentrated influence on district sizes that including prisoners elsewhere will not necessarily have. It may be that only communities with extremely high concentrations of absent, incarcerated individuals have any real incentive to bring such a suit, or—given the safe harbor rule—much chance of identifying a violation if they do. And, third, such suits might prove prohibitively difficult to bring. A state that opts to exclude rather than reassign may not keep data on prisoners' addresses in any centralized way, making it hard for prospective plaintiffs to identify the relief they are seeking with the necessary precision. Discovery in such cases could be time consuming and expensive, with plaintiffs not knowing in advance whether it is likely to bear fruit. Because such suits are purely conjectural at this point,

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The value of such a community-centric approach may be easier for courts to see if and when such statewide challenges are brought. So far, they are merely conjectural. But (in keeping with the courts' flexible approach to standing in aggregate rights cases described above[380]) it is likely that when such cases are brought, plaintiffs can, will, and should be voters from prisoners' home communities. If so, their stronger and more intuitive claim for relief will be reassignment rather than exclusion of prisoners. Exclusion only indirectly aids the plaintiffs by reducing the weight of another community's votes—a leveling-down approach with which courts may be uncomfortable.[381] Reassignment, by contrast, restores the community to full strength and secures for its members an affirmative benefit they were unconstitutionally denied by the state's intervention. Courts should be more comfortable with the latter litigation structure.

Conclusion

This Note has sought to give judges and litigators the tools they need to police prison gerrymandering. Now that pioneering cases have highlighted the tension between prison gerrymandering and one-person, one-vote principles, reformers should take a hard look at making litigation a more prominent part of their strategy. The 2020 Census looms, and another round of redistricting battles will follow.

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how easily courts and litigants might resolve this cart-before-the-horse problem remains to be seen.

380. *See supra* note 331 and accompanying text.

381. *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 537 (2004) ("Some judges . . . express discomfort with leveling down and seek ways to thwart it. Such an inclination is easy to understand if leveling down leaves some people worse off, and no one better off, in terms of access to benefits and resources.").