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The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation

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THE GEOGRAPHY OF MASS INCARCERATION: PRISON GERRYMANDERING AND THE DILUTION OF PRISONERS' POLITICAL REPRESENTATION

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INTRODUCTION

Mass incarceration not only disenfranchises millions of Americans, disproportionately people of color, it also increases the voting power of predominantly white rural areas where prisons are located. People in prison are counted towards representation while being excluded from the franchise.

Every ten years, the Census Bureau counts the entire United States population.[1] Each individual is counted at his or her "usual residence," the home where he or she lives or sleeps most of the time.[2] Legislative seats are apportioned, and electoral district lines drawn, based on that Census count.[3] For purposes of the Census, the approximately 2.2 million people in prison in the United States are counted as residents of the district in which they are incarcerated, not

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1. U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years . . . ."); *see Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census.html [https://perma.cc/3STB-HZUU].

2. *See* U.S. CENSUS BUREAU, RESIDENCE RULE AND RESIDENCE SITUATIONS FOR THE 2010 CENSUS, at para. 2 [hereinafter RESIDENCE RULE AND RESIDENCE SITUATIONS], https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html [https://perma.cc/63W7-X8T4].

3. 2 U.S.C.A. § 2a(a) (West 2017).

of their home prior to incarceration.[4] In all but two states, individuals incarcerated for a felony conviction are also ineligible to vote.[5] Consequently, they become non-voting "residents" of the district in which they are incarcerated, represented by a legislator over whom they have no electoral influence.

The practice of counting people who are incarcerated and ineligible to vote as residents of their prison cell inflates the population count in districts where prisons are located.[6] It increases the voting strength of those districts' other residents relative to the residents of neighboring districts, and dilutes the voting strength of prisoners' home communities.[7] At the same time, correctional facilities are not dispersed evenly throughout most states, but are often found in more rural, predominantly white areas, while people incarcerated in these facilities are disproportionately people of color from comparatively urban areas.[8] Counting prisoners as residents of the district where they are incarcerated shifts political power from urban to more rural areas.[9] The confluence of prisoners' ineligibility to vote, an increase in the United States' prison population in recent decades, and the treatment of people in prison as "residents" of the district where they are incarcerated has skewed legislative apportionment and the distribution of political power. Counting people in prison as residents of their home prior to incarceration will begin to address this imbalance.

This Article proceeds as follows: Part I provides background on felony disenfranchisement, mass incarceration, and the cascading effects of both on electoral apportionment. Part II discusses the decennial Census, its application of the "usual residence" rule to other people who live in "group quarters," including military

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4. *See* RESIDENCE RULE AND RESIDENCE SITUATIONS, *supra* note 2, at para. 16.

5. *See* ACLU ET AL., DEMOCRACY IMPRISONED: A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, at app. B (2013) [hereinafter DEMOCRACY IMPRISONED], http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15128_E.pdf [https://perma.cc/2HK5-EDQW] (highlighting that only Maine and Vermont residents maintain their right to vote despite a felony conviction).

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

7. *See id.* at 360.

8. *See Impact on Demographic Data*, PRISON POLICY INITIATIVE, https://www.prisonersofthecensus.org/problem/statistics.html [https://perma.cc/GXG5-CSNF] ("According to Department of Agriculture Demographer Calvin Beale, although most prisoners are from urban areas, 60% of new prison construction takes place in non-metro regions.").

9. *See* Ho, *supra* note 6, at 364.

personnel and college students, and how these groups are treated for purposes of legislative apportionment. Part III then analyzes the application of the "usual residence" rule to prisoners, and reviews recent federal court challenges to apportionment schemes that count people in prison as "residents" of the district in which they are incarcerated. Part IV discusses how New York and Maryland have successfully addressed the issue of counting people in prisons by designating them as residents of their prior address for purposes of legislative apportionment. Part V discusses states' and localities' options for improving equality in apportionment before redistricting based on the 2020 Census.

I. MASS INCARCERATION: DISENFRANCHISEMENT AND THE DISTORTION OF DEMOCRACY

Mass incarceration, combined with felony disenfranchisement, compromises the most fundamental aspect of democracy by removing the right to vote from millions of Americans. Section I.A provides basic statistics about the acceleration in the United States' use of prisons and the resulting era of mass incarceration. Section I.B discusses the racially discriminatory roots of laws that remove citizens' eligibility to vote after a criminal conviction, commonly referred to as "felony disenfranchisement," and the electoral impact of felony disenfranchisement in the era of mass incarceration.

A. Mass Incarceration

The United States currently convicts and incarcerates its citizens at an historically unparalleled rate. In the United States, 85.9 million people have a criminal record.[10] Today, almost 2.2 million people are being held in prisons or jails,[11] and over 4.6 million are under some other sort of community supervision, such as parole or probation.[12] The United States' incarceration rate increased sharply beginning in

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10. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, at tbl.21 (2015), http://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf [https://perma.cc/P35X-AKWE].

11. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY STATISTICS: TOTAL ADULT CORRECTIONAL POPULATION, 1980–2015 [hereinafter KEY STATISTICS], https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487 [https://perma.cc/7JTA-5KD3] (follow link next to "download data") (data on file with the Fordham Urban Law Journal).

12. *See id.*; *see also* Danielle Kaeble & Lauren Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Correctional Populations in the United States, 2015*, BULL. NO. NCJ 250374, Dec. 2016, at 2 tbl.1, https://www.bjs.gov/content/pub/pdf/cpus15.pdf [https://perma.cc/8GDX-Y96B].

the 1980s, with the "war on drugs."[13] In 1980, approximately 500,000 people were incarcerated.[14] The number of people reached over 1.1 million in 1990, and more than 1.9 million in 2000.[15] By the close of 2010, 1,404,000 people were behind bars in state prisons, 748,700 in local jails, and 209,800 in federal facilities, totaling more than 2.2 million people incarcerated.[16] At the same time, the number of people under criminal justice supervision was almost 7 million.[17]

Mass incarceration and its collateral consequences, such as loss of voting rights, disproportionately affect people of color.[18] There are significant racial disparities at nearly every stage of the criminal justice system, including, *inter alia*, disparities in police stops,[19] arrests,[20] prosecutions,[21] convictions,[22] imprisonment,[23] and length of

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13. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2011).

14. *See* KEY STATISTICS, *supra* note 11; *see also* Lauren E. Glaze & Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, *Probation and Parole in the United States, 2010*, BULL. NO. NCJ 236019, Nov. 2011, at 3, https://www.bjs.gov/content/pub/pdf/ppus10.pdf [https://perma.cc/225G-DZ37] (noting that about 1.3 million people were under some form of community supervision in 1980).

15. *See* KEY STATISTICS, *supra* note 11. *See generally* Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2000*, BULL. NO. NCJ 88207, Aug. 2001, at 1, https://www.bjs.gov/content/pub/pdf/p00.pdf [https://perma.cc/899A-4W3X].

16. *See* KEY STATISTICS, *supra* note 11; *see also Mass Incarceration*, ACLU, https://www.aclu.org/issues/mass-incarceration [https://perma.cc/PNT3-EADW].

17. *See* KEY STATISTICS, *supra* note 11; *see also* DEMOCRACY IMPRISONED, *supra* note 5, at 1.

18. *See* Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (SUPPLEMENT) 87S, 89S–92S (2011), http://www.sentencingproject.org/publications/addressing-racial-disparities-in-incarceration [https://perma.cc/8Q72-DBNA] (noting that in examining arrest rates, racial disparities in the arrests may reflect law enforcement behavior in the arrest and prosecution stages, in addition to involvement in crime).

19. *See* Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts Between Police and the Public Declined from 2002 to 2008*, BULL. NO. NCJ 234599, Oct. 2011, at 1, https://www.bjs.gov/content/pub/pdf/cpp08.pdf [https://perma.cc/H8KV-8KZ3] (finding that black drivers were three times more likely to be searched during a stop than white drivers.); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013) (finding disproportionate suspicionless stops or frisks of African-Americans in Fourteenth Amendment selective law enforcement case).

20. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 4 (2013) [hereinafter SENTENCING PROJECT UNHRC REPORT] (citing Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 106 (2006)), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf [https://perma.cc/F3T3-8SWP] (providing a striking example: "[b]etween 1980 and 2000, the U.S. black drug arrest rate rose from

sentence.[24] These disparities lead to the disproportionate imprisonment of people of color.[25] For example, Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white offenders,[26] and receive longer sentences than their white counterparts.[27]

At the same time, prisons are often located in predominantly white, rural areas.[28] Despite studies that show better outcomes when individuals convicted of a crime are treated in smaller community-based programs,[29] people are often incarcerated far from their home.[30] Rural areas suffering from the loss of farming or

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6.5 to 29.1 per 1,000 persons; during the same period, the white drug arrest rate increased from 3.5 to 4.6 per 1,000 persons").

21. *See id.* at 9–10.

22. *See id.* at 1.

23. *See* ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 4–5 (2016) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL PRISONER STATISTICS, 1978–2014), http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/HUJ7-DZ3K] (noting that African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites).

24. *See* SENTENCING PROJECT UNHRC REPORT, *supra* note 20, at 12–16.

25. *See id.* at 3, 14.

26. *Id.* at 2 (citing E. Ann Carson & William J. Sabol, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2011*, BULL. NO. NCJ 239808, Dec. 2012, at tbl.8).

27. *See generally* Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 428 (2000), http://www.justicestudies.com/pubs/livelink3-1.pdf [https://perma.cc/H5RQ-X27D].

28. *See* Ho, *supra* note 6, at 362–63; *see also infra* Sections IV.A, IV.B (discussing with greater particularity prisons housing primarily urban and disproportionately African American persons in rural areas).

29. *See* James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES (Dec. 19, 2012), https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works [https://perma.cc/B2HT-ENPK]; Brian Kincade, *The Economics of the American Prison System*, SMART ASSET (Feb. 3, 2017), https://smartasset.com/mortgage/the-economics-of-the-american-prison-system [https://perma.cc/9SC5-RJ4K]; *see also* John M. Eason, *The Prison Business Is Booming in Rural America and There's No End in Sight*, BUS. INSIDER (Mar. 13, 2017), http://www.businessinsider.com/prison-industry-boom-rural-america-2017-3 [https://perma.cc/CMX9-KCYA]; Peter T. Kilborn, *Rural Towns Turn to Prisons to Reignite Their Economies*, N.Y. TIMES (Aug. 1, 2001), http://www.nytimes.com/2001/08/01/us/rural-towns-turn-to-prisons-to-reignite-their-economies.html [https://nyti.ms/2lt3Kug].

30. *See, e.g.*, PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTED "CONSTITUENTS": INCARCERATED PEOPLE AND POLITICAL CLOUT IN CONNECTICUT 5 (2013), https://www.prisonersofthecensus.org/ct/report_2013.pdf [https://perma.cc/8KSK-TWM9] (discussing the status of gerrymandering in multiple states). For more examples, see generally *Importing Constituents Series*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports.html#electoral-issues [https://perma.cc/Y77Q-3S5A] (detailing reports on Massachusetts, California, Minnesota, Wisconsin,

manufacturing jobs have seen prisons built in their areas, based, in part, on the promise that prisons provide local economic development.[31] Although prison companies have invested heavily in selling the development myth,[32] corrections-related jobs arguably do not compensate local economies for the counterbalancing tax breaks and economic incentives and, more broadly, do not account for the financial and social costs of incarceration.[33]

The geographic location of prisons not only separates people incarcerated from their families and communities, it also results in the reallocation of political power from cities to more rural areas. A series of Prison Policy Initiative reports illustrate this point: in Connecticut, for example, the prison population disproportionately comes from the five largest cities (Bridgeport, Hartford, New Haven, Stamford, and Westbury), but prisons are concentrated in just a few areas, with sixty-five percent of the state's prison beds located in just five towns (Cheshire, East Lyme, Enfield, Somers, and Suffield).[34] In Massachusetts, prisons' locations have led to electoral inequality in the seven towns that use a "representative town meeting" form of government, where prisoners are counted as members of the district but cannot participate in the town meetings where decisions are made.[35] In Pennsylvania, forty percent of the people in state prisons are from Philadelphia, while all but one percent are incarcerated outside of the city and counted in the eight state house districts where they are incarcerated.[36] The same pattern was seen in New York and

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Tennessee, New York, Nevada, and Montana); DAVID SHAPIRO, ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION (2011), https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration?redirect=prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration [https://perma.cc/T8AD-SW3D].

31. *See* SHAPIRO, *supra* note 30, at 18; *see also Who Benefits When a Private Prison Comes to Town?*, NPR (Nov. 5, 2011), https://www.npr.org/2011/11/05/142058047/who-benefits-when-a-private-prison-comes-to-town [https://perma.cc/8F9F-7J4E].

32. *See* SHAPIRO, *supra* note 30, at 38.

33. *See id.* at 18–31, 40.

34. *See* WAGNER, *supra* note 30, at 2.

35. *See* Aleks Kajstura, *Prison Gerrymandering in Massachusetts: How the Census Bureau Prison Miscount Invites Phantom Constituents to Town Meeting*, PRISON POL'Y INITIATIVE (Oct. 13, 2010), https://www.prisonersofthecensus.org/ma/towns.html [https://perma.cc/6362-6QEE].

36. In one district—District 69—ninety-two percent of the district's African American population cannot vote because they are incarcerated. *See* PETER WAGNER & ELENA LAVARREDA, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN PENNSYLVANIA, at pt. II (2009), https://www.prisonersofthecensus.org/pennsylvania/importing.html [https://perma.cc/3P54-Q5RT].

Maryland, until they reformed their methods of apportionment, as discussed in Sections IV.A and IV.B.

The United States' overuse of incarceration and the shift of electoral power from urban to rural areas has skewed legislative apportionment and equitable electoral districting.

B. Felony Disenfranchisement

Felony disenfranchisement is the loss of a citizen's eligibility to register and vote due to a criminal conviction.[37] In all but two states, citizens lose the right to vote upon conviction of a felony. Four states permanently ban all persons with a felony conviction from voting.[38] Twenty states ban all persons with a felony conviction from voting until they have completed their sentence, including prison, parole, and probation.[39] Six states require completion of sentence and impose post-sentence restrictions, such as a waiting period, before voting rights can be restored.[40] Four states prohibit those with a felony conviction from voting while in prison or on parole.[41] And fourteen states ban voting with a felony conviction while incarcerated.[42] Only Maine and Vermont allow all eligible citizens to vote, even if they are incarcerated.[43]

Felony disenfranchisement severely alters our democratic model. The numbers are stark. If all of the citizens nationwide who are disenfranchised due to a prior conviction populated their own state, it would be the twentieth largest state in the country and would have ten votes in the Electoral College.[44] Without felony

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37. *See* DEMOCRACY IMPRISONED, *supra* note 5.

38. *See Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/criminal-re-enfranchisement/state-criminal-re-enfranchisement-laws-map [https://perma.cc/6RWQ-8YYP] (showing the four states, Florida, Iowa, Kentucky, and Virginia, in red); *see also* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 3–4 (2016) [hereinafter 6 MILLION LOST VOTERS], http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf [https://perma.cc/GJH5-VTT4].

39. *Felony Disenfranchisement Laws (Map)*, *supra* note 38 (showing states in yellow).

40. *Id.* (showing states in orange).

41. *Id.* (showing states in dark blue).

42. *Id.* (showing states in light blue).

43. *Id.* (showing states in green).

44. Chris Kirk, *How Powerful Is Your Vote*, SLATE (Nov. 2, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/11/presidential_election_a_map_showing_the_vote_power_of_all_50_states.html [https://perma.cc/8WC5-2NFQ].

disenfranchisement, the large number of citizens with a conviction could affect not only local, but state and federal electoral outcomes, were they permitted to vote.

Compared to other democratic nations, the United States is an outlier in how it treats citizens with a conviction.[45] In broad terms, other democracies' disenfranchisement policies range from no ban on voting to limited, targeted bans, often only during a term of incarceration.[46] Other nations' courts have limited disenfranchisement to circumstances where the state could demonstrate that it was justified,[47] or prohibited disenfranchisement outright.[48] In all, the United States not only leads the world in its rate of incarcerating its citizens,[49] it is also one of the strictest democracies in terms of denying citizens the right to vote due to a conviction, which skews democratic representation and diminishes representation of the interests of citizens with a felony conviction.[50]

1. Historical Origins of Felony Disenfranchisement

Felony disenfranchisement has a long, shameful history in the United States. It proliferated soon after the Civil War, when white voters sought to block Black citizens from gaining political power.[51] The United States Constitution was amended to provide specific

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45. *See* LALEH ISPAHANI, ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006), http://felonvoting.procon.org/sourcefiles/aclu-felon-voting-report-2006.pdf [https://perma.cc/M4Z5-6X3H]; Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 210 (2011) (arguing that "an identifiable global trajectory has emerged towards the expansion of felon suffrage. American jurisprudence lies outside of this global trajectory . . . ").

46. *See* ISPAHANI, *supra* note 45, at 6 tbl.1.

47. *See* Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 31–33 (Can.) (holding that the "universal franchise has become . . . an essential part of democracy . . . if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows"); HCJ 2757/06 Hilla Alrai v. Minister of the Interior 50(2) PD 18 (1996) (Isr.).

48. *August v. Electoral Commission*, 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

49. *See* SENTENCING PROJECT UNHRC REPORT, *supra* note 20, at 1.

50. *See* ISPAHANI, *supra* note 45, at 33; ACLU OF FLORIDA, JOINT SUBMISSION TO ICCPR: UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2–3 (2012), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14528_E.pdf [https://perma.cc/P94B-WW9W]; *see also* Ziegler, *supra* note 45, at 265–66.

51. Angela Behrens & Christopher Uggen, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 561 (2003).

protections for voting in the Fourteenth and Fifteenth Amendments,[52] which recognized the citizenship of all persons "born or naturalized in the United States," provided all persons with "equal protection of the laws," and prohibited the denial or abridgement of the right to vote on account of race.[53] These amendments, known as the "Reconstruction Amendments," superseded state laws that explicitly prohibited African-Americans from voting. Effective enforcement, however, was a different story.[54] The Fourteenth Amendment left open the ability to deny or abridge the right to vote for "participation in rebellion, or other crime."[55] In the wake of these amendments, Southern states used criminal disfranchisement and other policies to roll back the expansion of the franchise.[56]

Despite the racially discriminatory effects of felony disenfranchisement, challenges to state disenfranchisement regimes were largely unsuccessful based on courts' interpretation of the Fourteenth Amendment provision allowing states to deny the right to vote for "participation in . . . crime."[57] In *Richardson v. Ramirez*,[58] the Supreme Court dealt a heavy blow to voting rights when it decided that "the exclusion of felons from the vote has an affirmative sanction in [Section] 2 of the Fourteenth Amendment," which distinguished the constitutional protection against felony disenfranchisement laws from other state limitations on the franchise.[59]

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52. *See Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm [https://perma.cc/UQR2-R6Q9].

53. U.S. CONST. amend. XIV, XV (alterations in original).

54. Although this Article focuses on formal legal protections for voting rights, a prominent source of disenfranchisement during this era came from terrorist organizations such as the Ku Klux Klan that, often sanctioned by local officials, used violence and intimidation to prevent African American citizens from voting. For additional historical information outside the scope of this Article, see generally ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015); *Introduction to Federal Voting Rights*, U.S. DEP'T OF JUST. (Aug. 6, 2016), https://www.justice.gov/crt/introduction-federal-voting-rights-laws [https://perma.cc/N895-CL8Y].

55. U.S. CONST. amend. XIV § 2; *see Richardson*, 418 U.S. at 56.

56. *See* ALEXANDER, *supra* note 13, at 30; BERMAN, *supra* note 54, at 11.

57. U.S. CONST. amend. XIV § 2; *see Richardson*, 418 U.S. at 54.

58. 418 U.S. 24 (1974).

59. *Id.* at 54 (alterations in original). In *Richardson*, plaintiffs with felony convictions who had completed their sentences argued that California's disenfranchisement law violated their Equal Protection rights. *Id.* The Court held, "the exclusion of felons from the vote has an affirmative sanction particular to [Section] 2 of the Fourteenth Amendment." *Id.* Section 2 provides: "[b]ut when the right to vote at any election . . . is denied . . . or in any way abridged, except for

It was not until the 1985 decision in *Hunter v. Underwood*[60] that the Supreme Court held a criminal disenfranchisement law intentionally racially discriminatory and therefore unconstitutional. The Alabama Constitution, approved in 1901, disqualified from voting any citizen convicted of a "crime involving moral turpitude."[61] Although the provision "may at first seem racially neutral . . . the drafters intentionally sought to subvert the [Fourteenth] and [Fifteenth] Amendments' protection against racial discrimination in voting by using the moral turpitude provision, in conjunction with discriminatory criminal justice enforcement, to target Alabama's Black citizens."[62] The provision provides an example of how purportedly race-neutral criminal disfranchisement laws were tailored to principally affect African-Americans and have had the greatest impact on African-Americans.[63] The Court in *Hunter* held that, consistent with *Richardson*, "[Section] 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates [Section] 1 of the Fourteenth Amendment."[64]

2. Electoral Impact of Felon Disenfranchisement in an Era of Mass Incarceration

Over six million Americans are currently disenfranchised due to a felony conviction.[65] The overall disenfranchisement rate has increased dramatically in conjunction with the growing United States

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participation in rebellion, or other crime[.]" U.S. CONST. amend. XIV § 2. The Court determined that Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from" Section 2. *Richardson*, 418 U.S. at 55. Justices Marshall and Brennan dissented, asserting that the proper test should be whether a State could show a "compelling state interest" to justify exclusion of ex-felons from the franchise. *Id.* at 77–78 (Marshall, J., dissenting). Justice Douglas dissented as well, but did not join in this portion of Justice Marshall's dissent. *See id.* at 86.

60. 471 U.S. 222, 223 (1985).

61. *See id.* at 223.

62. *See id.* at 229 (explaining the state's moral turpitude provision was meant "to establish white supremacy").

63. *See id.*

64. *Id.* at 233 (alterations in original) (regarding the argument that Section 2 of the Fourteenth Amendment authorized the disfranchisement of persons convicted of crimes, the Court held, "we are confident that [Section] 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [state law] which otherwise violates [Section] 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests to the contrary.").

65. *See* 6 MILLION LOST VOTERS, *supra* note 38, at 3.

prison population.[66] The number of citizens disenfranchised has more than quadrupled in the past few decades—from approximately 1.17 million in 1976 to 3.34 million by 1996, and to 6.1 million by 2016—with the unprecedented growth in the sheer number of Americans incarcerated or kept under criminal justice supervision.[67]

Felony disenfranchisement laws have continued to disproportionately impact people of color. At present, for example, 7.7% of the African-American voting-age population, or one out of every thirteen Black adults is disenfranchised due to a conviction.[68] This rate is four times greater than the rest of the voting-age population, which has a disenfranchisement rate of 1.8%.[69] Nationwide, 2.2 million African-Americans are disenfranchised on the basis of a conviction, more than 40% of whom have completed the terms of their sentences.[70] Felony disenfranchisement also has a pronounced impact in individual states, particularly those with large prison populations, disenfranchisement that extends beyond an incarcerative sentence, and exceedingly restrictive voting rights restoration processes.[71]

The assault on voting rights is threefold. First, state felony disenfranchisement laws remove a citizen's eligibility to vote,[72] which prevents democratic participation. Second, mass incarceration removes people, and disproportionately people of color, from their home communities and holds them in prisons. Third, redistricting and prison gerrymandering then dilutes the electoral power of those same citizens' home communities, and hands their electoral power to the residents of the district in which they are incarcerated.[73]

Policy choices about where and how individuals are incarcerated matter for voting rights. Incarcerating people far away from their

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66. *See supra* Section I.A.

67. *See* 6 MILLION LOST VOTERS, *supra* note 38, at 3; *see also* Hadar Aviram et al., *Felon Disenfranchisement*, 13 ANN. REV. SOC. SCI. 295, 300 (2017).

68. *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1–2 (2012), http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf [https://perma.cc/W5MZ-RERY].

69. *Id.*

70. *Id.* at 17.

71. This includes, most prominently, the three states with permanent disenfranchisement (Florida, Iowa, and Kentucky). *See Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE (Oct. 6, 2016), http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states [https://perma.cc/Q48A-NXUL].

72. *See* DEMOCRACY IMPRISONED, *supra* note 5; *see also supra* Section I.B.

73. *See* Ho, *supra* note 6, at 364; *see also supra* Section I.B.2.

homes effectively removes residents—disproportionately people of color—from urban areas and credits their voting strength to more rural areas, thus altering the composition of electoral districts and according more power to the votes in districts with prisons and prisoners who cannot vote.[74] This gives the votes of voters in a district containing a prison more weight because the total population (including non-voting prisoners) has grown, even though the *voting* population has not changed.[75] At the same time, it deflates the weight of votes in areas targeted for criminal justice enforcement, which tend to include urban areas, exacerbating the cycle of democratic exclusion.[76] By relocating a concentration of disenfranchised citizens from primarily urban areas to rural areas where they do not have a representative accountable to their interests, the combination of felony disenfranchisement and prison districting severely disrupts representational democracy.[77]

II. REDISTRICTING AND COUNTING PRISONERS

Section II.A provides background on the explicit constitutional requirements related to counting the population, apportionment, and redistricting. Section II.B explains the "usual residence" rule, established by the Census Act of 1790. Section II.C explains how the "usual residence" rule has been applied to other inhabitants of "group quarters," specifically overseas federal employees, residents of domestic military bases, and college students. This Article argues that courts' treatment of these groups demonstrates that careful review and consideration of groups' insularity or community ties should factor into the determination of whether they should be considered residents for purposes of apportionment. This Article concludes that the same consideration should be made for prisoners, which will often result in their exclusion from the population base of the place that they are incarcerated.

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74. *See* Ho, *supra* note 6, at 370–71.

75. If three voters and a prison population of seven constitute one district, and ten voters constitute a neighboring district, the three voters' votes have more weight than the ten neighboring voters: the three voters' representative has equal authority as the representative from the neighboring district, who represents ten voters.

76. *See* Ho, *supra* note 6, at 370–71, 390.

77. *See infra* Part III.

A. Constitutional Requirements

The decennial Census is a full count of the nation's population.[78] It is constitutionally required: an "actual enumeration" of persons in each state must be conducted every ten years, in the manner prescribed by federal law,[79] and the apportionment of congressional representatives must be determined every ten years on the basis of that count.[80]

For purposes of redistricting, the Supreme Court has interpreted the Equal Protection clause to require jurisdictions to abide by the one-person, one-vote principle.[81] That principle requires states to draw congressional districts with populations that are as close to equal as possible,[82] but may also accommodate traditional districting principles, such as compactness, maintaining communities of interest, observing political subdivisions, and considering incumbents, particularly in state and local districting plans, which are given more leeway.[83]

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78. *See Decennial Census of Population and Housing*, *supra* note 1.

79. U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years . . . .").

80. *Id.* ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."); *see* 2 U.S.C.A. § 2a(a) (West 2017).

81. *See* Tennant v. Jefferson Cty. Comm'n, 567 U.S. 758, 760–63 (2012) (holding that states must justify population deviations among districts with "legitimate state objectives"); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (requiring that states apportion seats in the state legislature on the basis of the population); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that Congressional districts must be drawn with equal populations); Gray v. Sanders, 372 U.S. 368, 381 (1963) (establishing the "one person, one vote" theory); Baker v. Carr, 369 U.S. 186, 191–92 (1962) (holding that malapportionment claims are justiciable). *See generally* Evenwel v. Abbott, 136 S. Ct. 1120, 1123–24 (2016).

82. Karcher v. Daggett, 462 U.S. 725, 730, 734 (1983) (establishing that for congressional reapportionment "there are no de minimis population variations . . . which could practicably be avoided"). Any deviation, "no matter how small," must be justified by a legitimate state interest. *Id.* at 730. State and local redistricting plans are given slightly more leeway.

83. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969). Districting plans must satisfy both the constitutional one-person, one-vote requirement and requirements that ensure that they satisfactorily maintain actual communities of interest, for example, balancing the number of schools across districts in a school board districting plan; that they are contiguous (all parts of a district are connected at some point with the rest of the district); that they do not unnecessarily pit incumbents against one another in a combined district; and that they are reasonably compact according to a visual inspection of district lines. *See* Bush v. Vera, 517 U.S. 952, 977–78 (1996). Another measure used to examine a districting plan is the Reock scores for each of the districts. *See* Daniel McGlone, *Measuring District Compactness in PostGIS*, AZAVEA (July 11, 2016), https://www.azavea.com/blog/2016/07/11/

For state and local district drawing, the Supreme Court established a "safe-harbor" rule: if the maximum deviation between the most and least populated districts is less than ten percent, the plan is presumptively compliant with one-person, one-vote.[84] Deviations of more than ten percent are not strictly prohibited, but they are presumptively impermissible and shift the burden to the defendant jurisdiction to prove that legitimate interests justify the deviation.[85] And deviations of less than ten percent are not necessarily constitutional if the deviations do not serve a legitimate state purpose.[86]

The Court has not, however, decided many cases regarding which population base jurisdictions must equalize in redistricting and who should be counted in the population base.[87] While congressional jurisdictions use the total population, determined by the decennial Census, as the base population for apportionment,[88] some circumstances warrant the use of a more narrowly defined population.[89] Although the Court has not identified which factual circumstances warrant using a base other than total population, it has recognized that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."[90]

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measuring-district-compactness-postgis/ [https://perma.cc/H7FX-PYXU]. Reock scores are generated from the Reock test, which is an area-based measure that compares each district to a circle, which is considered to be the most compact shape possible. *Id.* For each district, the Reock test computes the ratio of the area of the district to the area of the minimum enclosing circle for the district. *Id.* The measure is always between 0 and 1, with 1 being the most compact. *Id.* The Reock test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan. *Id.*

84. *See Kirkpatrick*, 394 U.S. at 531.

85. *See* Mahan v. Howell, 410 U.S. 315 (1973) (approving a state-legislative map with a deviation of 16%). The Court has not set a numerical level above which the population disparity is per se intolerable, but cautioned that the 16% deviation "may well approach tolerable limits." *Id.* at 329.

86. *Tennant*, 567 U.S. at 760–63 (holding that states must justify population deviations among districts with "legitimate state objectives").

87. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

88. *Id.*

89. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 90–97 (1966) (holding that Hawaii could use the registered voter population because of the particular factual circumstances of having a substantial resident military population who were residents of other states for the purposes of voting and were registered to vote elsewhere).

90. *Evenwel*, 136 S. Ct. at 1132 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).

B. The "Usual Residence" Rule

The "usual residence" rule enables the Census Bureau to determine where people live for purposes of counting the population.[91] The First Congress interpreted the Constitution as requiring that persons be counted at their "usual residence."[92] The Census Act of 1790, also referred to as the Enumeration Act, was passed to effectuate that mandate. The Enumeration Act provided that "every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States."[93] It is notable that the Enumeration Act placed no limit on the duration of a resident's absence, which, "considering the modes of transportation available at the time, may have been quite lengthy."[94]

The term "usual residence" "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place."[95] How, then, should jurisdictions determine "usual residence," defined as "the place where a person lives and sleeps most of the time," for the purposes of identifying the constitutionally appropriate population base to apportion legislative districts?

When Congress passed the Enumeration Act, the population count was used only to determine a state's population to allocate congressional representation, and the prison population was comparatively small.[96] But with the unprecedented growth in incarceration in recent decades, and the reliance on Census data for state and local legislative redistricting, the inclusion of prison cells in our definition of "usual residence" fails to account for prisoners' experience of incarceration far from home, to which they are likely to return. The notion that a prison cell qualifies as a residence is outdated and ripe for reconsideration.

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91. Census Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 101, 103 (alterations in original).

92. *See generally id.*

93. *See id.*

94. Franklin v. Massachusetts, 505 U.S. 788, 804 (1992).

95. *Id.*

96. *See* Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1242 (2012) [hereinafter Wagner, *Breaking the Census*].

C. How Is the Usual Residence Rule Applied to Other Group-Quartered Persons for Purposes of Apportionment?

The "usual residence" definition presents a challenge for counting categories of persons, including prisoners, who live in "group quarters." The Census defines group quarters as "a place where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents."[97] This definition includes federal personnel stationed abroad or on military bases, college students, and those staying in hospitals.[98] Because there is limited case law specific to the treatment of prisoners' residence for the purpose of apportioning state and local legislative districts, this section will describe other "group quarters" contexts to provide insight into the factors courts have used to determine a person's usual residence when they are not in a typical household living arrangement.

This Article argues that prisons are different from the other "group quarters" in a variety of ways. First, prisoners are not in prison by choice.[99] Second, due to the severe and purposeful isolation of prisons, prisoners lack economic, social, or civic ties to the communities just beyond the prison walls.[100] Third, due to disparities in the criminal justice system and political dimensions to prison

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97. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY/PUERTO RICO COMMUNITY SURVEY, GROUP QUARTERS DEFINITIONS 1 (2010), https://www2.census.gov/programs-surveys/acs/tech_docs/group_definitions/2010GQ_Definitions.pdf [https://perma.cc/QF3V-T3FD].

98. *Id.* The Census Bureau's definition of a group quarters is:

> [A] place where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories.

Id.

99. *See* SENTENCING PROJECT UNHRC REPORT, *supra* note 20, at 1. While individuals who are incarcerated made a choice to violate state or federal laws, law enforcement policies and practices, in many ways, determine who among those who break the law are prosecuted or convicted. *See supra* Section I.A. Once an individual has been convicted and incarcerated, they may be transferred at will among state prisons or between federal prisons without choice or consent.

100. *See* Ho, *supra* note 6, at 374–75. There are some criminal justice programs that allow or encourage contact and continued engagement with the community. *See* discussion *supra* note 29 (discussing individuals convicted of a crime being treated in smaller community-based programs and facilities close to their homes).

locations, the demographic incongruity between the prison population and the surrounding community is stark.[101] All three factors should caution against counting prisoners as residents of their cells for purposes of redistricting.

1. Allocation of Overseas Federal Employees

Just after the 1990 Census, the Supreme Court decided *Franklin v. Massachusetts*.[102] In *Franklin*, the state of Massachusetts and two individual voters sued the Department of Commerce, which houses the Census Bureau, claiming it had erred in deciding to include overseas federal employees[103] in the state population count.[104] Due to the Census designation of 922,819 overseas federal employees as residents of the state designated as their "home of record" in their personnel file, Massachusetts lost a seat in the House of Representatives after the 1990 decennial Census.[105] Plaintiffs sought to have the Secretary of Commerce eliminate overseas federal employees entirely from the apportionment count and recalculate the number of Representatives per state.[106] The Department of Defense, however, argued that "its employees should not be excluded from

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101. *See id.* at 361 ("In 173 counties nationwide, more than 50% of the purported African-American 'residents' are behind bars. In New York, 98% of prison cells are located in disproportionately white State Senate districts.").

102. 505 U.S. 788 (1992).

103. *See Will 2010 Census Apportionment Population Counts Also Include Any Americans Overseas*, U.S. CENSUS BUREAU, https://ask.census.gov/prweb/PRServletCustom/YACFBFye-rFIz_FoGtyvDRUGg1Uzu5Mn*/!STANDARD?pyActivity=pyMobileSnapStart&ArticleID=KCP-2692 [https://perma.cc/M9P6-W5U2] ("Federal employees (military and civilian) and their dependents living overseas with them that can be assigned to a home state. These data are provided to the Census Bureau by the employing Federal departments and agencies through their administrative records. Private U.S. citizens living abroad who are not affiliated with the Federal government (either as employees or their dependents) will not be included in the overseas counts. These overseas counts are used solely for reapportioning seats in the U.S. House of Representatives.").

104. *See Franklin*, 505 U.S. at 802. The Census Bureau did not allocate overseas federal employees to particular states for reapportionment until 1970. *See id.* at 792–93. In 1970, the Bureau allocated members of the Armed Forces to their "home of record" using their Defense Department personnel records, which requires service members to declare their "home of record" upon entry into the military. *See id.* at 793. In 1980, the Bureau did not allocate overseas federal employees to a particular state. *See id.* In 1990, the Census Bureau decided to allocate the Department of Defense's overseas employees to their "home of record" again, declining to use a survey to determine their last six months of residency in the United States, their legal residence, or their last duty station due to practical constraints and the similarities between "usual residence" and "home of record" definition. *See id.* at 794.

105. *Id.* at 790–91.

106. *See id.* at 791.

apportionment counts because of the *temporary* and *involuntary* residence oversees."[107] Ultimately, the Department of Defense's argument prevailed.[108]

The Supreme Court in *Franklin* found the interpretations of the Constitution by the First Congress to be persuasive in the context of congressional redistricting.[109] The Court determined that using "home of record" data to count federal employees serving overseas complied with Article I, Section 2 of the Constitution's command to allocate congressional representatives by counting persons "in" each state through an "actual Enumeration" of "their respective Number."[110] The Court declined to disturb the Secretary of Commerce's judgment that "federal employees *temporarily* stationed overseas had *retained their ties* to the States," a determination made with reference to the individuals' subjective intent.[111] It held that the Secretary's determination that "[m]any, if not most, of these military overseas *consider themselves to be* usual residents of the United States, even though they are temporarily assigned overseas," is "consonant with, though not dictated by, the text and history of the Constitution."[112] The Court noted that the determination "does not hamper the underlying constitutional goal of equal representation, but, *assuming that employees temporarily stationed abroad have indeed retained their ties to their home States*, actually promotes equality."[113]

A number of the Court's observations in this case are relevant to the question of how to count prisoners. First, the term "usual residence" in the "first enumeration Act" is related to the constitutional phrase "in each state" and pertains to dividing congressional representation among states.[114] In the context of *Franklin*, this simply implies that each individual must be counted somewhere. Left with a choice between assigning overseas military personnel to the state they have designated as their "home of record" or not counting them at all, the Census Bureau understandably made the choice, approved by the Court, to include individuals stationed

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107. *Id.* at 793 (emphasis added).
108. *Id.* at 806.
109. *See id.* at 804.
110. *See id.* at 806.
111. *Id.* (emphasis added).
112. *Id.* (alterations in original) (emphasis added).
113. *Id.* (emphasis added).
114. *Id.* at 804.

overseas.[115] In the context of state and local apportionment, the question is *where* to count prisoners, not *whether* to count them.

Second, the Court recognized that the "in each state" language is more relevant when it comes to apportioning power among states (for congressional seats) than within a state.[116] The Court gave the examples of students, members of Congress (who may choose whether to be counted in the Washington, D.C. area or in their home states), and "[t]hose persons who are institutionalized in out-of-state hospitals or jails for short terms,"[117] to demonstrate that "usual residence" is more broadly understood than mere physical presence on the day of the Census.

Third, the Court determined that the Secretary of Commerce could reasonably rest on the assumption that employees abroad maintained ties to their home state when he interpreted "usual residence" to have "some element of allegiance or enduring tie to a place" beyond just physical presence.[118] The judgment to include these groups in a state population count, even if they are temporarily out of state, "does not hamper the underlying constitutional goal of equal representation," but "actually promotes equality" assuming "that employees temporarily stationed abroad have indeed retained their ties to their home states."[119] Were the same reasoning applied in the context of prisons, it is significant that incarcerated people are significantly less likely to develop ties to a community in which they are involuntarily isolated in a prison cell, but remain tied to the community from which they came.

2. Residence of Domestic Military Bases

With regard to military personnel and redistricting, the Supreme Court has held that jurisdictions can, in some circumstances, properly exclude military personnel from the apportionment base of the district in which they are stationed. In the 1966 decision *Burns v. Richardson*,[120] the Court reviewed the Hawaii legislature's interim

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115. *See id.* at 806 (noting that the plaintiffs did not demonstrate that "eliminating overseas employees entirely from state counts will make representation in Congress more equal").

116. *Id.* at 805.

117. *Id.* at 805–06 (alterations in original).

118. *Id.* at 804 ("The term can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place.").

119. *Id.* at 806.

120. 384 U.S. 73 (1966).

state senate apportionment scheme.[121] The challenged redistricting plan used registered voters as the population base rather than total population—that is, it attempted to roughly equalize the number of registered voters per district across the legislative districts.[122] Due to the presence of a large number of military personnel stationed in Hawaii but not registered to vote there, the use of a registered voter base led to "sizable differences in results [compared to those] produced by the distribution according to the State's total population, as measured by the federal census figures."[123]

The Court approved Hawaii's use of the registered-voter apportionment base as compliant with one-person, one-vote requirements,[124] despite acknowledging that using registered voters to apportion state legislative seats might result in distributions of seats that are "substantially different" from what would have resulted from using a total population base.[125] It held that states were not required to include non-voting categories in the apportionment base, such as, "aliens, transients, short term or temporary residents, or persons denied the vote for conviction of crime . . . ."[126] The Court noted that "[t]he decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[127]

Other federal courts in Hawaii have also adjudicated claims with consideration for what the *Burns* court had termed "Hawaii's special population problem"—a state of islands with a substantial temporary military population.[128] Following the 2010 Census, in *Kostick v. Nago*,[129] individual plaintiffs challenged the constitutionality of Hawaii's state legislative reapportionment plan, which had removed 108,767 active-duty military personnel, military dependents, and non-resident university students from the apportionment base for purposes of state legislative redistricting.[130] The district court denied

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121. *See id.* at 73.
122. *See id.* at 86.
123. *Id.* at 90 (alterations in original).
124. *See id.* at 97.
125. *See id.* at 93.
126. *Id.* at 92 (alterations in original).
127. *Id.* (alterations in original).
128. *Id.* at 94.
129. 878 F. Supp. 2d 1124 (D. Haw. 2012).
130. *See id.* at 1127–28. Ten years before *Kostick*, in 1992, Hawaii had amended its constitution to require that reapportionment of state legislative districts were based on permanent residents, instead of the Census count of "usual residents." *See id.* at 1127; *see also* HAW. CONST. art. IV § 4. The state used "usual residence" to draw its

the plaintiffs' motion for a preliminary injunction and approved the state's "finely tuned" work to extract permanent residents from the group not counted towards the total population (i.e., Hawaii did not exclude "the entire 'military population' but only *non-resident* military personnel and dependents, as well as non-resident students") for purposes of districting.[131] Recognizing the presence of a large non-resident military population, comprising about fourteen percent of the population, the district court approved of this fact-specific, non-discriminatory formulation of how to distribute political power in light of a large non-voting population.[132]

The *Kostick* court noted that the difficulty of counting non-voting, non-permanent residents was unavoidable.[133] If non-resident military personnel are counted in the population base, but vote elsewhere, residents in counties containing a military base have greater "voting power" than residents of other counties; but if non-resident military personnel are excluded, that county's other residents may have their representation diluted.[134]

The court also recognized the "political dimension" of districting decisions when it comes to combining two different politically insular groups or subsuming one group in another.[135] Specifically, the "unique political and socio-economic identities" between islands

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federal congressional districts, but "permanent residents" as the relevant population to draw state legislative districts. *See Kostick*, 878 F. Supp. 2d at 1129–30. All three groups—active-duty military personnel, military dependents, and non-resident university students—would have been counted in the 2010 census and used for federal districts, but were not used for state districts. *See id.* at 1129. Of course, any state plan must comply with the one-person one-vote requirements of the Equal Protection clause. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964).

131. *Kostick*, 878 F. Supp. 2d at 1142. This distinction is important for Equal Protection purposes. In *Carrington v. Rash*, 380 U.S. 89, 96 (1965), the Court struck down Texas's blanket rule denying all members of the armed services the franchise even when some of those service-men and women would have qualified as residents. The *Burns* Court distinguished Hawaii's redistricting plan from Texas's disenfranchising law in *Carrington*, finding it to be categorization based on (presumably reasonable) residency requirements, as opposed to one that is arbitrary. Burns v. Richardson, 384 U.S. 73, 92 n.21 (1966) ("The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.").

132. *See Kostick*, 878 F. Supp. 2d at 1143. A Hawaii district court had already rejected the use of a base population that excluded the entire military population, without attempting individual assignment, as a violation of the one-person, one-vote principle. *See* Travis v. King, 552 F. Supp. 554, 571 (D. Haw. 1982).

133. *See Kostick*, 878 F. Supp. 2d at 1131.

134. *Id.* at 1131–32.

135. *Id.* at 1132.

favored a rule that avoids bi-county districts where a legislator would represent very different communities on different islands.[136] Populations "have developed their own and, in some instances severable communities of interests" resulting in "an almost personalized identification" with one's island as a community of interest.[137] The court noted that residents of different islands "take great interest in the problems of their own county because of that very insularity brought about by the surrounding and separating ocean."[138] The courts may have come to a different result for the treatment of domestically stationed military personnel, were there less political or economic insularity among communities.[139]

The lesson of *Kostick*, then, is that perhaps courts should not seek to create a one-size-fits-all formula for defining whether particular groups of non-voters must be included in a population base, but instead consider the political dimensions of dilution to support the principle of equitable electoral power and access to elected representatives. Blind reliance on unadjusted Census data, or overly blunt cuts defining which population to include or exclude, can lead to problematic results.

3. Residence of College Students

College students present a similar quandary. Until the 1950s, "college students were counted as belonging to the State where their parents resided, not to the State where they attended school."[140] One-person, one-vote case law regarding college students has since developed, in local and statewide redistricting contexts, with consideration for students' relative insularity or community ties with other residents of their college town.

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136. *Id.* at 1133.

137. *Id.* at 1132 (quoting Burns v. Gill, 316 F. Supp. 1285, 1291 (D. Haw. 1970)).

138. *Burns*, 316 F. Supp. at 1291.

139. Courts have come to a different result for the treatment of domestically stationed military personnel in other factual circumstances. In a Virginia example, the Court considered a districting plan that relied on census data to count some 36,000 military personnel in the state senate district where they were "home-ported"—that is, the district containing their naval base—even though only half of those people actually resided in the district for purposes of voting. Mahan v. Howell, 410 U.S. 315, 331–32 (1973). The Court held that the scheme was unconstitutional because it "resulted in . . . significant population disparities." *Id.* Significantly, the state could not simply fall back on its reliance on Census figures without considering the factual implications and disparities in the effect. *Id.*

140. Franklin v. Massachusetts, 505 U.S. 788, 805–06 (1992).

In *Borough of Bethel Park v. Stans*,[141] for example, the Borough of Bethel Park argued that the Census Bureau erred in counting college students as residents of the town in which they attended school.[142] The district court denied plaintiffs injunctive relief and entered judgment in favor of defendants.[143] The Third Circuit affirmed and gave great deference to the Census Bureau's decision to allocate college students to their school state, reasoning that once a student has left his parental home to pursue studies at a college in another state, normally for several years, it can reasonably be concluded that "his usual place of abode ceases to be that of his parents," adding "[s]uch students usually eat, sleep, and work in the state where their college is located."[144] The court determined that the Census Bureau was entitled to limit its inquiry to objective facts as to where such a "usual place of abode" might be.[145]

In a similar case, *Boddie v. City of Cleveland*,[146] residents of Cleveland claimed that their voting rights were diluted when residents of a Delta State University dormitory were included in the apportionment base of the Cleveland School District.[147] The district court in *Boddie* denied plaintiffs summary judgment, noting that "the distinction between resident and non-resident students must be emphasized."[148] The court explained that the "concept of a non-resident dorm student . . . refer[s] to students who do not vote in local elections or consider themselves residents of the local voting district."[149] In illustrating the difference between different kinds of students, the *Boddie* court looked to the Fifth Circuit's decision in *Fairley v. Patterson*,[150] upholding a redistricting plan in which a town excluded from the apportionment population students who were unmarried, lived on the campus in dormitories or fraternity houses, and were shown in their college registration cards to have an address

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141. 449 F.2d 575 (3d Cir. 1971).

142. *See id.* at 577.

143. *See id.*

144. *Id.* at 581 (alterations in original).

145. *See id.* at 579.

146. (*Boddie II*), No. 4:07 CV 63-M-B, 2010 WL 231749 (N.D. Miss. 2010).

147. *See id.* at *1. In *Boddie v. City of Cleveland* (*Boddie I*), 297 F. Supp. 2d 901, 905–06 (N.D. Miss. 2004), the district court held that the nonresident student population residing in dormitories at the university should not be included in the apportionment base for the city's aldermanic wards.

148. *Boddie II*, 2010 WL 231749, at *3.

149. *See id.* (alterations in original).

150. *See id.* at *4–5 (citing Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974)).

outside the county.[151] *Fairley* upheld the districting plan in part because the town had made careful fine-grained distinctions between different kinds of students.[152] For example, it excluded unmarried, non-resident, dorm-living students who lived on campus but included non-resident students residing off campus.[153]

As with courts' treatment of military personnel, the college student apportionment cases demonstrate how a careful factual review of the community's insularity or community ties can be relevant to identifying non-residents. Courts approved an apportionment base in which the locality had considered students' ties to the college community versus their ties to their last address, albeit by antiquated indicators such as their marital status in *Fairley*, or the length of time that had passed since leaving a parent's home in *Stans*. These fact-driven determinations necessitate an inquiry into the strength of students' ties to their previous home versus their college home, which is also a useful analysis to perform in the prison context.

III. VOTE DILUTION AND PRISON GERRYMANDERING: RECENT ACLU LITIGATION AND DEVELOPMENTS IN PRISON GERRYMANDERING

Beginning with the 2010 Census, the Census Bureau enabled, but did not perform, population adjustments for prisoners.[154] The Bureau released the population data of "group quarters," which includes prisons, hospitals, nursing homes, college dormitories, military barracks, group homes and shelters,[155] early "to enable States to 'leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale.'"[156] For pragmatic and administrative reasons, the Census Bureau did not

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151. *See Fairley*, 493 F.2d at 602–03. Plaintiffs challenged the districting plan as unconstitutional under the one-person, one-vote standard. Plaintiffs also challenged the districting method under traditional equal protection standards alleging that the excluded students were unreasonably classified as non-residents while others were included, and on Twenty-Sixth Amendment grounds. *See id.*

152. *See id.* at 602.

153. *See id.* (decision after review of the facts at trial).

154. *See* Fletcher v. Lamone, 831 F. Supp. 2d 887, 895–96 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

155. *See Group Quarters/Residence Rules*, U.S. CENSUS BUREAU (Apr. 13, 2016), https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html [https://perma.cc/PYB9-MHRG].

156. *Fletcher*, 831 F. Supp. 2d at 896 (quoting Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU: DIRECTOR'S BLOG (Mar. 10, 2010), https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html [https://perma.cc/2H93-Y79X]).

itself make those population adjustments,[157] but the available data enables and supports adjusting the base population for a more equitable redistricting process.

Taking into account the disenfranchisement of people with a prior conviction, the usual residence rule, how the geography of mass incarceration has skewed electoral district lines, and the fact that States now have the data and capacity to make population adjustments before redistricting, should jurisdictions change how they determine the residency of incarcerated persons? States, in the first instance, should seek to equalize the weight of votes to prioritize representational equality, as explained below.[158] Voting rights advocates, in a series of cases, have argued that representational equality is not appropriately served when prisoners are treated as residents of the district in which they are incarcerated.[159]

This section addresses questions as to how localities can use Census data to allocate prison populations to serve the principles of equity of representation. Sections III.A through III.C review two significant redistricting challenges to apportionment schemes where large prison populations were counted as residing at their place of incarceration. Section III.A discusses *Calvin v. Jefferson County Board of Commissioners*,[160] a challenge to the apportionment of prisoners in county commission districts. Section III.B introduces *Evenwel v. Abbott*,[161] a recent Supreme Court decision reviewing the appropriate base for state legislative redistricting (unrelated to counting prisoners). Section III.C discusses *Davidson v. City of Cranston*,[162] a challenge to the apportionment of prisoners in local city ward districts. Section III.D assesses the impact of the viability of the two prison districting decisions in light of the decision in *Evenwel*.

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157. *Id.* at 895 (quoting U.S. CENSUS BUREAU, TABULATING PRISONERS AT THEIR "PERMANENT HOME OF RECORD" ADDRESS 10 (2006), https://www.prisonlegalnews.org/media/publications/u.s.%20census%20report%20on%20addresses%20of%20prisoners%2C%202006.pdf [https://perma.cc/7QV3-VZNG]) ("The Bureau has explained that counting prisoners at their home addresses would require 'collecting information from each prisoner individually' and necessitate 'an extensive coordination procedure' with correctional facilities."); *id.* at 896 ("Such an effort would likely cost up to $250 million.").

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

159. *See infra* Sections III.A–C.

160. 172 F. Supp. 3d 1292.

161. 136 S. Ct. 1120 (2016).

162. 837 F.3d 135 (1st Cir. 2016).

A. *Calvin v. Jefferson County Board of Commissioners*: Understanding the Equal Protection Clause to Protect Representational Equality, as well as Electoral Equality

A groundbreaking prison districting challenge, litigated by the ACLU of Florida, is *Calvin v. Jefferson County Board of Commissioners*,[163] in which the federal district court suggested a workable standard for determining when prison gerrymandering violates the one-person, one-vote requirements of the Equal Protection Clause.[164]

In *Calvin*, plaintiffs challenged a Florida county commission districting scheme where non-voting prisoners constituted around forty-two percent of the population of one single member district.[165] Jefferson County, in the Florida panhandle, has a population of 14,761, as determined by the 2010 Census.[166] The county elects five county board commissioners in single-member districts.[167] The county contains Jefferson Correctional Institution ("JCI"), a state prison run by the Florida Department of Corrections, which incarcerates 1157 people.[168] Nine of those prisoners were convicted in Jefferson County, and the rest were convicted in other parts of the state.[169]

Plaintiffs were residents of the four single-member districts in Jefferson that did not contain JCI, and claimed that their votes were diluted by the inclusion of the prison population in the base apportionment population for District 3, the district in which JCI is located.[170] The district court ruled in the plaintiffs' favor and held that the county commission districting scheme violated the one-person, one-vote standard.[171] The court determined that the apportionment scheme served neither representational nor electoral equality.[172] The scheme did not promote electoral equality because

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163. *See Calvin*, 172 F. Supp. 3d at 1292.

164. *See id.*

165. *See id.* at 1298.

166. *See id.* at 1297.

167. *See id.* at 1295.

168. *See id.* at 1296.

169. See *id.*; *see also* Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment, and in Opposition to Defendants' Joint Motion for Summary Judgment, Calvin v. Jefferson Cty. Bd. of Comm'rs, No. 4:15-cv-00131-MW-CAS, 2015 WL 12777334, at *2 (N.D. Fla. Sep. 18, 2015) ("The overwhelming majority of JCI prison inmates are not residents of Jefferson County, much less District 3.").

170. *See Calvin*, 172 F. Supp. 3d at 1298.

171. *See id.* at 1326.

172. *See id.*

voters in District 5 had more weight to their votes than voters in the other districts.[173] It also did not serve representational equality because the District 5 commissioner could not fairly be said to represent JCI prisoners who lacked any "representational nexus" to the elected commissioner in their district.[174]

The *Calvin* court described a "representational nexus" as a significant component of the relationship between constituent and representative.[175] A representational nexus does not simply rely on a person's physical location within a representative's district, but looks instead at "the ability of the representative to meaningfully affect that person's life[.]"[176] As described by the court, representatives serve multiple functions: as a participant in decision making on behalf of her district, as an advocate connecting those within her district to government, and as a provider of government services.[177] The *Calvin* court explained that the personal interest in representational equality, or the "right to be represented,"[178] was only served if those counted as constituents of a district had some representational nexus to the representative elected from that district.[179]

To address the importance of a representational nexus as the focal point of the judicial inquiry, the court posed two questions: "[f]irst, what does a representative do for those he represents?"[180] The court outlined three duties of a representative to his or her constituents: (1) she translates her constituents' interests, explicitly or by her determination of what is most beneficial, when she helps make or influence policy decisions, including voting for or against laws; (2) she is an ombudsman and guide for her constituents to access the complex channels of government; and (3) she articulates the interests of her constituents, often publicly and on official records, even when she is

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173. *See id.* at 1323–24.

174. *Id.* at 1311 ("This case [is] . . . one in which a group of people lives full-time within a geographical boundaries of a district and yet has little, if any, representational nexus with the representative from that district or the legislative body to which he belongs.").

175. *See id.* at 1310–11.

176. *Id.* at 1310 (alterations in original).

177. *See id.*

178. *See id.* at 1307. The court recognized that whether it is a cognizable legal right is an open question, but noted that it is difficult to see why a non-voter in a district with an excess of people would have standing to bring an Equal Protection claim alleging "dilution of her representational strength," without a comparable right to bring a claim for "dilution of her vote." *See id.* at 1307 n.12.

179. *See id.* at 1310–11.

180. *Id.* at 1307.

unable to influence policy decisions, providing an "expressive element separate and apart from any policy-related utilitarian benefit."[181]

Second, the court asked "in what ways (besides voting) can someone affect the performance of the representative's functions?"—or what services do representatives provide their constituents?[182] The *Calvin* court explained that constituents have the right to interact with their elected officials in a number of ways, such as through written communications, fundraising, protests, and at official events.[183] Consequently, constituents can be sure their representative has "'an intimate sympathy with' those she represents."[184] Apportionment directly affects whether a citizen's efforts to engage their public officials are likely to be effective: an increase in the number of people in a district means each person will get "a lower level of services per denizen,"[185] as representatives with larger constituencies will find themselves pulled in an increasing number of directions.[186] Because a large population without any nexus to its designated representative loses the opportunity for representation, counting that population within the representative's district does not serve the principle of representational equality behind equalizing districts' populations.[187]

Next, to determine whether the apportionment scheme serves representational equality, the court asked whether there is "a large number of nonvoters whose representational nexus with the legislative body is substantially different—different in kind, not just degree—from the typical person present in the legislative body's jurisdiction."[188] This begs the question of whether a category of residents, here prisoners, has a very different relationship with the representative—unable to vote for, engage with, or seek effective assistance from him or her—than other residents. Or, as the court explained, "whether the population at issue is similarly situated in any relevant way to the typical denizens and/or voters of the jurisdiction with respect to the legislative body."[189]

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181. *Id.* at 1307–08.
182. *Id.* at 1307.
183. *See id.* at 1308–09.
184. *Id.* at 1309.
185. *Id.* (characterizing Garza v. Cty. of Los Angeles, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., dissenting in relevant part)).
186. *See id.* at 1309 (citations omitted).
187. *See id.* at 1321.
188. *Id.* at 1315 n.20.
189. *Id.*

Based on this line of inquiry, the court found that prisoners indeed lack a representational nexus to their elected representatives.[190] It reasoned that all aspects of prison life are controlled by prison officials and state level administrators.[191] While prisoners are not completely divorced from the outside world—they have access to medical care and fire-fighting and trash collection services—the isolation and control by state-level entities, particularly the state Department of Corrections, renders the commissioners relatively impotent to regulate inmates' lives.[192] Additionally, county social and economic policy decisions do not meaningfully affect inmates.[193] This observation should be unsurprising: it is consistent with the *purpose* of incarceration, which is to isolate incarcerated persons from society.[194] Prisoners' isolation from the surrounding community prevents nearly all political engagement with their representatives.

With regard to equalizing total population, the court held that an equal population did not always adequately serve representational equality.[195] The court explained, "disparities in total census population . . . are not in and of themselves unconstitutional."[196] The safe harbor rule in one-person, one-vote cases is a rebuttable presumption that a deviation of less than ten percent of total population is permissible for state and local districts.[197] The safe harbor rule is an evidentiary rule of burden-shifting and not a substantive constitutional construction.[198] The safe harbor rule cannot possibly cover every circumstance, since population deviations must serve a legitimate state interest.[199] The court in *Calvin* found that the rule could not be mechanically applied in Jefferson County—with a relatively small district and a comparatively large block of non-voters—because it was "not designed to be used in a factual situation

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190. *See id.* at 1316.

191. *See id.*

192. *See id.* at 1316–18.

193. *See id.* at 1317.

194. *See id.* at 1319.

195. *See id.* at 1314–15; *see also* Karcher v. Daggett, 462 U.S. 725, 740 (1983). For proponents of electoral equality, equalizing total population is also not an end in itself, but instead the means of achieving electoral equality. *Calvin*, 172 F. Supp. 3d at 1311 (citing Garza v. Cty. of Los Angeles, 918 F.2d 763, 783 (9th Cir. 1990) (Kozinski, J., dissenting in relevant part)).

196. *Calvin*, 172 F. Supp. 3d at 1311.

197. *See id.*

198. *See id.* at 1314.

199. *See generally* Tennant v. Jefferson Cty. Comm'n, 567 U.S. 758 (2012).

such as this one."[200] Applying the fact-intensive representational nexus test will avoid this pitfall.

Overall, the court sets forth a three-part methodology to determine whether the population base used for districting violates one-person one-vote principles: (1) start with the Census total population;[201] (2) identify what group is excluded and determine "if it is not similarly situated to the remainder of the population either with respect to citizenship (that is, ability to vote), residency, or denizenship . . . the fit has to be fairly good—better than would be required for rational basis review";[202] and (3) even if no group is sought to be excluded, a review of the factual circumstances of the claim is still necessary.[203] The Census baseline must be examined because "it may be the case that the census count itself makes choices inconsistent with the Equal Protection Clause."[204] Put another way, the Census might include a group not similarly situated in any relevant respect.[205] This inquiry seeks to determine whether a category of "residents" have a very different relationship to the local democratic process and their assigned representative than other residents in the district to apply the "representational nexus" criteria to the established one-person one-vote framework.[206]

Ultimately, the court held that Jefferson County's inclusion of prisoners in its redistricting population base diluted the representational strength of individuals in other districts, and violated the Equal Protection Clause.[207] The *Calvin* court reached this conclusion because the prisoners "comprise a (1) large number of (2) nonvoters who (3) lack a meaningful representational nexus with the [County] Boards, and . . . [are] (4) packed into a small subset of legislative districts."[208] *Calvin* could be seen as a special case because the incarcerated population was so large relative to the small district that it created a population deviation of 42.63% among districts.[209] Critics also might claim that this case could create a slippery slope, forcing courts to contemplate which individuals are "worthy" of being considered part of a locality's population data in an increasing

200. *Calvin*, 172 F. Supp. 3d at 1315.
201. *See id.* at 1313.
202. *Id.* (alterations in original).
203. *See id.*
204. *Id.*
205. *See id.* at 1313–14.
206. *See id.*
207. *Id.* at 1315.
208. *Id.* (alterations in original).
209. *See id.* at 1323.

number of contexts, for example: should an apportionment base include minors, non-citizens, or citizens disenfranchised due to a conviction.[210] This case does not, however, raise the specter of a slippery slope because prisoners are different than other non-voting groups[211] and the court reviewed the facts specific to state prisoners, their nexus to representatives in local government, and substantial population disparities created by counting prisoners as residents.[212]

But even if *Calvin* presents a relatively extreme set of facts, the same principles apply to most prison contexts. The factors that lead courts to exclude other groups from the apportionment base are all present in incarcerated populations.[213] A case decided by the Supreme Court two weeks after the district court's decision in *Calvin* would not necessitate a different result.

B. Does *Evenwel v. Abbott* Change the Analysis of Whether Persons Incarcerated Are Residents of Their Prison Cell or Home Address?

Between the District Court's decision in *Calvin* and the Court of Appeals for the First Circuit's decision in a similar case later that same year, the Supreme Court decided *Evenwel v. Abbott*,[214] which did not raise prison districting questions, but addressed the appropriate base for state legislative apportionment.[215] Although this case does not involve prison gerrymandering, it addresses some of the principles at issue in prison gerrymandering cases.

In *Evenwel*, the plaintiffs, Texas voters, argued that only the vote-eligible population should be included in the apportionment base for redistricting.[216] They claimed that one-person, one-vote constitutional principles prohibited Texas from drawing its legislative district lines on the basis of total population because doing so would violate "voter equality."[217] Instead, plaintiffs argued that the State should use eligible voters as the applicable population base, removing

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210. *See id.* at 1324 (referencing defendants' "slippery slope" argument regarding apportionment).

211. *See supra* Section II.C.

212. *See Calvin*, 172 F. Supp. 3d at 1324.

213. *See id.* at 1325.

214. 136 S. Ct. 1120 (2016).

215. *See id.* at 1123.

216. *See id.*

217. *See id.* at 1126.

others—including non-citizens and minors—from the districting count.[218]

The State of Texas took the slightly different position that its "use of total-population data from the census was permissible," but that the Constitution also allows for it to use Census survey estimates of the citizen voting age population ("CVAP")[219] as the redistricting base.[220] The United States filed a statement of interest that agreed with Texas that the Equal Protection Clause does not mandate the use of the voter-eligible population for apportionment, and urged the Court not to address the question of whether the Constitution allows States to use the voter-eligible population as an alternative population base for redistricting.[221]

The Court held that Texas's practice of drawing its legislative districts based on total population, rather than the voter-eligible population, satisfied one-person, one-vote principles and was therefore permissible.[222] The decision recognized principles consistent with representational equality.[223] As the Supreme Court explained in *Kirkpatrick v. Preisler*,[224] the principle that there ought to be equal representation for equal numbers of people is designed to prevent debasement of voting power and diminution of access to

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218. *See id.*

219. This is administered using the American Community Survey ("ACS"). For more information, see *American Community Survey*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/acs/ [https://perma.cc/4CGB-NGKR].

220. *See Evenwel*, 136 S. Ct. at 1126.

221. *See id.* The United States has authority to file a Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. *See* 28 U.S.C. § 517 (2012).

222. *See Evenwel*, 136 S. Ct. at 1132–33.

223. *See* Evenwel v. Perry, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *4 (W.D. Tex. Nov. 5, 2014).

224. 394 U.S. 526 (1969).

elected representatives.[225] *Evenwel* maintained the import of the principles in *Kirkpatrick*.[226]

C. *Davidson v. City of Cranston*

While the district court in *Calvin* relied on the concept of representational equality, in a similar case, *Davidson v. City of Cranston*,[227] the First Circuit rejected a district court's decision that was similar in its reasoning to *Calvin* and instead held that including non-voting prisoners in an electoral apportionment base was consistent with one-person, one-vote requirements.[228]

Davidson involved a challenge to a redistricting plan that included 3433 incarcerated people of the Adult Correctional Institution ("ACI") in the population count for a local city ward in the City of Cranston, Rhode Island.[229] With this allocation, a full twenty-five percent of the ward population was incarcerated and could not vote.[230] The district court denied the city's motion to dismiss the lawsuit, finding that its redistricting plan—in which the ACI population was counted within one of the city's six wards—was not justified by principles of electoral equality since the people incarcerated at ACI "do[ ] not participate in any aspect of the City's civic life."[231] The district court held that "the inclusion of the ACI prison population is not advancing the principle of electoral equality because the majority of prisoners, pursuant to the State's Constitution, cannot vote, and those who can . . . vote by absentee ballot from their pre-incarceration address."[232]

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225. *See id.* at 531 (recognizing in a congressional districting case that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power"). The Court held that Missouri's redistricting plan did not satisfy the "as nearly as practicable" standard because the 25,000-plus population difference between the largest and smallest districts was avoidable. *Id.* It explained that "equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.* Prisoners' non-voting status and inability to engage and participate in civic life in other ways; the differences in the prison population and the surrounding population; and the severely separate cultures, at the very least provide justification. *See id.* at 536.

226. *See Evenwel*, 136 S. Ct. at 1131.

227. 837 F.3d 135 (1st Cir. 2016).

228. *See id.* at 137.

229. *See id.*

230. *See* Davidson v. City of Cranston, 42 F. Supp. 3d 325, 331 (D.R.I. 2014).

231. *Id.* at 332.

232. *Id.* at 331 (alterations in original).

The First Circuit reversed the district court and determined that the City of Cranston was not required to exclude people in prison from the apportionment process and that the Constitution does not give the federal courts the power to interfere with Cranston's decision to include them.[233] The First Circuit interpreted *Evenwel* to stand for three propositions. First, in its view, *Evenwel* "did not disturb Supreme Court precedent that apportionment claims involving only minor deviations normally require a showing of invidious discrimination."[234] So long as equal population distribution requirements are met, the First Circuit held that a plaintiff must show intentional discrimination to make out an Equal Protection claim.[235] Second, absent a showing of intentional discrimination, the First Circuit held that "*Evenwel* reinforces the principle that federal courts must give deference to decisions by local election authorities related to apportionment."[236] Third, the First Circuit determined that *Evenwel* "approved the status quo of using total population from the Census for apportionment."[237]

D. Reconciling *Calvin*, *Evenwel*, and *Davidson* to Create a Functional Framework for Apportioning Incarcerated Persons

The federal courts that have addressed the issue of prison districting did not resolve the question of whether, for apportionment purposes, prisoners *should* be counted in the place where they lived prior to incarceration or in the place where they were involuntarily confined at the time of the Census. The *Evenwel* decision likewise does not answer this question, only a far more general question of whether a state's use of total population is a permissible apportionment base for drawing state legislative districts.[238]

Permitting the use of total population in Evenwel is not inconsistent with challenging prison districting in the *Calvin* case and the *Davidson* case.[239] The Court in *Evenwel*, although it did not

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

234. *Id.* at 141.

235. *See id.* at 142 (discussing the requirements of *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964), as articulated in *Burns v. Richardson*, 384 U.S. 73, 88 (1966), that were left undisturbed by the Court in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)).

236. *Davidson*, 837 F.3d at 141; *see also id.* at 143 ("[C]ourts should give wide latitude to political decisions related to apportionment that work no invidious discrimination.").

237. *See id.* at 143.

238. 136 S. Ct. 1120, 1123 (2016).

239. *See* Sean Young, *"Home" Is Not Where You Are Involuntarily Confined*, ACLU (Oct. 15, 2015, 5:45 PM), https://www.aclu.org/blog/voting-rights/

address prison gerrymandering, articulated general apportionment goals and principles that can be read to support counting prisoners in their home districts in most instances.[240] *Evenwel* maintained the equal population rule that "[s]tates must draw congressional districts with populations as close to perfect equality as possible,"[241] but its reasoning in support of population equality does not undermine claims of unlawful dilution due to prison gerrymandering.[242]

While the Court in *Evenwel* rejected plaintiffs' argument that the Constitution requires states to exclude ineligible voters from their population counts, it did not specifically address the appropriate place to count any particular group of non-voting persons.[243] Where then should prisoners be counted for apportionment purposes: the place where they lived prior to incarceration, or the place where they were involuntarily confined at the time of the Census?

In many ways, the principles articulated in *Evenwel* could support the exclusion of prison populations from the districts in which they are incarcerated.

The Court's support for total population as a permissive apportionment base does not conflict with the representational and electoral equality principles, as articulated in *Calvin*, in the prison gerrymandering context. In *Evenwel*, the Court highlighted states' "interest in taking reasonable, nondiscriminatory steps to facilitate access [to representatives] for all its residents" in response to Texas's argument that constituents (presumably the non-voting variety) "have

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gerrymandering/home-not-where-you-are-involuntarily-confined?redirect=blog/speak-freely/home-not-where-you-are-involuntarily-confined [https://perma.cc/C7P5-88F3]. The article clarifies:

> The ACLU believes that for the 2.4 million individuals now incarcerated in this country, their "home" should be counted as being the place where they lived prior to incarceration. Counting these incarcerated individuals as "residents" of the district where they have been involuntarily confined artificially inflates the population of the districts in which the prison is based. This type of prison-based gerrymandering results in an unequal system of representation where, after prisoner bodies are siphoned into the district where the prison is based, their numbers are used to increase the district's political power at the expense of the communities from which these incarcerated individuals had lived.

Id.

240. *See generally Evenwel*, 136 S. Ct. at 1123.

241. *Id.* at 1124 (alterations in original) (citing Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969)).

242. *See id.* at 1131; *see also Kirkpatrick*, 394 U.S. at 531 (recognizing in a congressional districting case that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives").

243. *See Evenwel*, 136 S. Ct. at 1132–33.

no constitutional right to equal access to their elected representatives."[244] The Court explained that non-voters have an "important stake in many policy debates . . . and in receiving constituent services, such as help navigating public-benefits bureaucracies."[245] It concluded that "by ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."[246]

This reasoning does not necessarily support an apportionment base that includes prisoners, who are distinct from other non-voting groups in three ways. First, they are subject to a different system of services from those living around them because they are dependent on the company imprisoning them for all of their needs. With few exceptions, they are prohibited from accessing external public benefits.[247] Second, prisoners do not become eligible voters again until after they complete their sentence and re-locate, so unlike minors or non-citizens, they cannot become a voter over the course of their "residence" (for prisoners, their incarceration) in the district. Indeed, even if they later become vote-eligible constituents, their voting rights are revived only upon relocation to their post-incarceration home community. Third, in other contexts, members of the same family or community, who often share interests, can advocate for the non-voters in their community, including their children or other family members and neighbors, with whom they have close ties. Prisoners cannot form community ties with the community surrounding the prison because they are, by design, kept isolated.

Moreover, even though the *Evenwel* Court declined to mandate using the vote-eligible population as a redistricting base, the Court left the door open to other approaches. It recognized that many states adjust total population data according to states' other constitutional or statutory requirements.[248] Evenwel noted that ten states authorize the removal of certain groups from the total-population apportionment base; three states exclude certain non-permanent residents, including nonresident members of the

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244. *Id.* at 1132 n.14 (alterations in original).

245. *Id.* at 1132 (alterations in original).

246. *Id.*

247. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1322 (2016).

248. *See Evenwel*, 136 S. Ct at 1124.

military.[249] The Court specifically recognized that four states—California, Delaware, Maryland, and New York—adjust total population data to exclude incarcerated persons who were domiciled out-of-state prior to incarceration.[250] And the *Evenwel* decision seemingly left in place the expectation that adjustments must be systematic, an undertaking that presents less of a problem for group residencies like prisons than it would for, say, students,[251] since apportionment base adjustments for prisoners became readily administrable with the 2010 Census.[252] In all, the principles behind a representational nexus and representational equality, described in *Calvin*, gain support in *Evenwel*. Those principles cannot be served unless prisoners are appropriately assigned to their home district.

IV. DEVELOPMENTS IN NEW YORK AND MARYLAND SINCE 2010

Despite challenges to the more pronounced instances of prison gerrymandering like *Calvin* and *Davidson*, litigation alone cannot solve all the permutations of representational inequity. Litigating in each of the 5393 Census blocks that contain prisons would be impossible.[253] A combination of litigation and legislative campaigns are necessary to mitigate the problem of representational inequality due to prison gerrymandering. Improvements in New York and Maryland since the last decennial Census provide some examples.

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249. *See id.* at 1124 n.3.

250. *See id.* The Court noted: "Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries." *Id.* at 1132. That the Court recognized this fact immediately after noting that some states count prisoners differently, suggests that the Court considers voter eligibility not to be the only factor to consider in assessing the constitutionality of prison gerrymandering. Even the *Davidson* court recognized that an adjustment of total population data to exclude prisoners with out-of-state domiciles could be permitted, despite its determination that there is no "constitutional requirement even for in-state prisoners." Davidson v. City of Cranston, 837 F.3d 135, 144 (1st Cir. 2016).

251. *Evenwel*, 136 S. Ct at 1131–32.

252. Revisiting the discussion of student populations in Cleveland, students may share a non-resident status, but with some living in dorms (which the Census would capture as a group residence) and some off-campus, they are inter-mingled with the rest of the town's population, whereas prisoners are easy to exclude as a group using the Census group residence data. *See* discussion *supra* Section II.C.3.

253. *See* Letter from Michael W. Macleod-Ball & Ruthie Epstein, ACLU, to Karen Humes, Chief, U.S. Census Bureau, at 2 (July 20, 2015) [hereinafter ACLU Comment on 2020 Census Residence Rule], http://riaclu.org/images/uploads/ACLU_Comments-_Census_Residence_Rule_FINAL.pdf [https://perma.cc/H5LJ-2KM4].

Part IV examines statutory changes and state court challenges since 2010 that improved methods for determining prisoners' homes. Section IV.A describes legislation and state court litigation resulting in changes to the apportionment of prisoners in New York. Section IV.B reviews state legislation and federal litigation to count prisoners at their home addresses in Maryland.

A. New York: *Little v. LATFOR*

Until 2010, New York counted prisoners as residents of the location in which they were incarcerated, not in their home districts where they are likely to return after serving their sentence.[254] In 2012, following the 2010 decennial Census, the New York State legislature passed section 71(8) of the New York Corrections Law, requiring the state to count prisoners in their home communities for the purposes of state redistricting.[255] The statute put the onus on the Department of Corrections to report each prisoner's residential address prior to incarceration to the state legislative task force on demographic research and reapportionment.[256] The independent redistricting commission would then allocate the imprisoned population accordingly.[257]

The legislation was a long time coming. In years prior, when New York State counted prisoners as residents of the prison in which they were incarcerated, the misallocation severely skewed the state legislative districting lines throughout the state. For example, seven of New York's sixty-three state senators only met the safe-harbor population requirement because the state considered incarcerated persons residents of the prison district.[258] Had prisoners been counted in their home district, the population in those seven districts containing prisons would have been underpopulated (deviated more than ten percent from the population of other districts).[259] This is a

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254. *See id.*

255. *See* N.Y. CORRECT. LAW § 71(8) (McKinney 2017); ACLU Comment on 2020 Census Residence Rule, *supra* note 253, at 2.

256. *See* N.Y. CORRECT. LAW § 71(8)(a)(iii) (McKinney 2017).

257. *See* N.Y. LEGIS. LAW § 94(1) (McKinney 2017).

258. *See* ACLU Comment on 2020 Census Residence Rule, *supra* note 253, at 2 (citing Wagner, *Breaking the Census*, *supra* note 96, at 1243, 1241–60); *see also New York's Census Adjustment Act*, PRISON POLICY INITIATIVE (June 16, 2010), http://www.prisonersofthecensus.org/factsheets/ny/NY_census_adjustment_act.pdf [https://perma.cc/6BJ4-FEJT].

259. *See* PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK (2002),

result of the state imprisoning individuals far from their home communities. Although forty-five percent of all people in New York State prisons came from New York City, only four of the state's fifty-five prisons are located in New York City.[260] The remainder of state prisons are located in upstate, rural, predominantly white communities: "approximately seventy-five percent of New York's prisons are located more than one hundred miles from New York City, more than sixty percent are located over two hundred miles from the city, and over a third are located more than three hundred miles from the city."[261]

Given racial disparities in incarceration, imprisoning individuals far from their home communities produces a large, racially disproportionate effect. "The incarceration rate for African Americans in New York is nine and a half times that of whites; for Latinos it is four and a half times that of whites."[262] These disparities result in an incarcerated population in New York that is around seventy-three percent African-American or Latino.[263] At the same time, "virtually all—[ninety-eight percent]—of New York state's prison cells were located in state senate districts that are disproportionately White, diluting the votes of African-American and Latino voters."[264]

Counting prisoners as residents of their prison district strengthens the vote of non-incarcerated residents of the prison district, even though those residents lack any engagement with the prison population and may have interests diametrically opposed to those of the prisoners. At the same time, this practice dilutes the vote of prisoners' home communities, despite even a short stay in prison,[265] during which they are disenfranchised.[266] This is particularly stark in New York: nearly a quarter of those incarcerated come from only

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https://www.prisonpolicy.org/importing/importing.html [https://perma.cc/HX2M-JSL8].

260. Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 187–88 (2015).

261. *See id.* at 188 (alterations in original).

262. *Id.*

263. *See id.* ("Seventy-three percent of those currently incarcerated in New York are African American and Latino.").

264. Wagner, *Breaking the Census*, *supra* note 96, at 1241, 1244.

265. *See* Wood, *supra* note 260, at 188 ("The average length of time served in New York prisons is 3.5 years.").

266. *See* S. 6610C, 231st Leg. Sess., A. 9710D, 234th Leg. Sess. (N.Y. 2010) (demonstrating this gap through an explanation of the process by which the legislative task force determines the incarcerated person's residential address prior to incarceration for redistricting purposes).

seven out of sixty-three state senate districts representing minority communities in New York City.[267]

Following the passage of *Part XX*, the legislative precursor to section 71(8) of the New York Corrections Law, Republican State Senator Elizabeth Little of the 45th District—which contains 12,000 incarcerated persons—and others challenged the constitutionality of the new law in *Little v. Legislative Task Force on Demographic Research and Reapportionment* ("*LATFOR*").[268] Plaintiffs argued that the new law violated the New York constitutional requirement that "the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment."[269] The New York Civil Liberties Union, along with fourteen other organizations and individuals, intervened for defendants, arguing that treating them or their members as residents of a prison "artificially inflates the voting strength of those who live in districts where prisons are located, and dilutes the voting strength of every New Yorker who lives in a district that does not house a state prison."[270]

On December 1, 2011, a New York state trial court upheld the law as constitutional.[271] The court noted that while the Census Bureau found it would be highly difficult to collect residential data for every incarcerated person, it agreed that states were free to decide what constituted an incarcerated person's "usual residence" for redistricting purposes, whether it is the prison location, their pre-incarceration address, or another formula altogether.[272] The court recognized the Census Bureau's 2010 early release of "group quarters" data to allow states to count incarcerated persons at their home locations, if they choose to.[273] With regard to the one-person, one-vote question, the court determined that counting prisoners at their home address was permissible and distinct from treatment of

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267. *See* Wood, *supra* note 260, at 187–88.

268. *See* Complaint at 1, Little v. N.Y. Legislative Task Force on Demographic Research & Reapportionment (*Little v. LATFOR*), No. 2310-2011 (N.Y. Sup. Ct. Apr. 4, 2011).

269. *See* N.Y. CONST. art. III, § 4.

270. Memorandum in Support of Motion to Intervene at 5, Little v. LATFOR, No. 2310-2011 (N.Y. Sup. Ct. May 17, 2011).

271. Decision and Order at 9, Little v. LAFTOR, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011), https://www.prisonersofthecensus.org/little/Decision_and_Order.pdf [https://perma.cc/7BG9-NV7L].

272. *Id.* at 6.

273. *Id.* at 6–7.

both college students and military personnel because prisoners' stays within their prison districts lack permanency.[274] Most significantly, the court recognized prisoners' lack of ties to, and the separation of their interests from, the community surrounding the prison: for instance, incarcerated persons do not attend local schools or use other public facilities.[275] The court notes that the sponsor of the challenged legislation "sought to rectify 'electoral inequalities'" that were created by counting incarcerated individuals as part of the districts in which they are temporarily and involuntarily held.[276] Like *Calvin*, the *LATFOR* decision was a decisive victory for both electoral and representational equality.

On February 14, 2012, the New York Court of Appeals declined to hear an appeal.[277] And on March 13, 2012, the plaintiffs withdrew their appeal.[278] The 2012 cycle of redistricting proceeded under the new law.

B. Maryland: *Fletcher v. Lamone*

Another example of courts' willingness to rectify the vote dilution from miscounting people in prisons occurred in *Fletcher v. Lamone*.[279] The case addressed a 2010 Maryland law, the No Representation Without Population Act, which was enacted to "correct census data for the distortional effects of the Census Bureau's practice of counting prison inmates as residents of their place of incarceration."[280] The No Representation Without Population Act removed incarcerated citizens from the population count of where they were incarcerated and instead reassigned them to their home address.[281]

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274. *See id.* at 7 ("Though inmates may be physically found in the locations of their respective correctional facilities at the time the Census is conducted, there is nothing in the record to indicate that such inmates have any actual permanency in these locations or have an intent to remain. In fact, it is undisputed that inmates are transferred among the states correctional facilities at the discretion of DOCCS and plaintiffs have not proffered evidence that inmates have substantial ties to the communities in which they are involuntarily and temporarily located.").

275. *See id.* at 8.

276. *Id.*

277. Little v. LATFOR, 18 N.Y.3d 902, 902 (N.Y. 2012).

278. Letter to Court, Little v. LAFTOR, No. 2301-2011 (Mar. 13, 2012), https://www.prisonersofthecensus.org/little/LATFORletter-dropAppeal.pdf [https://perma.cc/6TNW-KLY4].

279. 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

280. *Id.* at 890.

281. *See id.* at 893; *see also* Wood, *supra* note 260, at 180.

The distortional effects of Maryland's prior method of apportionment stemmed from the fact that the majority of Maryland's state prisoners come from areas with a majority Black population, and the state's prisons are located primarily in the majority white districts.[282] Specifically, the incarcerated population in Maryland comes largely from the state capital, Baltimore, an urban hub.[283] After the 2000 Census, however, the state's largest prisons were (and are still) "located in the overwhelmingly White First and Sixth districts on the Eastern Shore and in Western Maryland, respectively."[284] For example, District 6 contained 6754 incarcerated people.[285] Both of these districts are in rural parts of the state. If those prisoners were properly "credited" to their home districts, the two majority African American districts, Districts 4 and 7, would receive 1629 and 4832 people, respectively.[286]

The distortive effect of counting people where they are incarcerated results in particularly perverse outcomes in Maryland. The court raised one such example: District 1 of the Somerset County Council was created in the 1980s as a majority-minority district in order to settle a Voting Rights Act lawsuit.[287] Soon after it was created, "because the largely minority population of Eastern Correctional Institute was counted in the district's population for redistricting purposes, only a small number of African Americans who 'reside' in the district were actually eligible to vote. As a result, an African-American was not elected to fill the seat until 2010."[288]

As a result of Maryland counting people where they are incarcerated, residents of districts with prisons were systematically "overrepresented" compared to other districts.[289] To rectify the imbalance, the No Representation Without Population Act required that for local, state, and federal redistricting, "inmates of state or federal prisons located in Maryland must be counted as residents of

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282. *See Fletcher*, 831 F. Supp. 2d at 893.

283. Brief of Howard University School of Law Civil Rights Clinic et al. as Amici Curiae Supporting Defendants at 7, *Fletcher*, 831 F. Supp. 2d 887 [hereinafter Brief of Howard Law Civil Rights Clinic et al.], https://www.prisonersofthecensus.org/fletcher/Final_Fletcher_amicus_with_affidavit_and_service.pdf [https://perma.cc/6KD8-WTKF].

284. *Id.* at 14.

285. *Id.* at 28 n.42.

286. *See id.* at 11.

287. *See Fletcher*, 831 F. Supp. 2d at 893 n.2.

288. *Id.*

289. *See id.*

their last known residence before incarceration."[290] Moreover, "[p]risoners who were not Maryland residents prior to incarceration are excluded from the population count, and prisoners whose last known address cannot be determined are counted as residents of the district where their facility is located."[291] The subsequent lawsuit sought to maintain the pre-2010 power imbalance.[292] Not one of the plaintiffs lived in District 4 or 7, the majority-minority districts that would be "credited" the most residents and whose residents would regain the equal strength of their voting rights.[293]

The court granted summary judgment to defendants and upheld the Act as constitutional.[294] Like *LATFOR*, *Fletcher* provides an example of a state legislative initiative to address inequity, which was approved by a court. Following the decision in *Fletcher*, Maryland has created more equitable districts by counting prisoners as members of their home community.[295] At the same time, Maryland has also liberalized its felony disenfranchisement laws. Effective March 10, 2016, citizens convicted of a felony who completed their prison term automatically had their right to vote restored and immediately became eligible to register and vote upon release.[296] The new law immediately restored voting rights to approximately 40,000 people.[297] Together, these two remedial measures in Maryland began to restore democracy.

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290. *Id.*

291. *Id.* (alterations in original).

292. *See id.* at 890.

293. *See* Brief of Howard Law Civil Rights Clinic et al., *supra* note 283, at 8.

294. *See Fletcher*, 831 F. Supp. 2d at 890.

295. *See generally* PETER WAGNER & OLIVIA CUMMINGS, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: INCARCERATED PEOPLE AND POLITICAL CLOUT IN MARYLAND (2010), https://www.prisonersofthecensus.org/md/report.html [https://perma.cc/7HNR-3PEY].

296. MD. CODE ANN., ELEC. LAW § 3-102 (West 2016).

297. *Voting Rights Restoration in Maryland*, BRENNAN CTR. FOR JUSTICE (Mar. 10, 2016), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-maryland [https://perma.cc/GB5N-3YZ3]. Before the law was passed, from 2007 to 2016, returning citizens did not become eligible to vote until they completed all aspects of their sentence, including parole, probation, and payment of fines and fees. *Id.*

V. USING REPRESENTATIONAL EQUALITY FRAMEWORK: PRISONERS' "USUAL RESIDENCE" SHOULD BE THEIR HOME, NOT THEIR CELL, AND REDISTRICTING SHOULD BE UNDERTAKEN ACCORDINGLY

If there ever were "severable communities of interest" with unique political and socio-economic identities,[298] it is prisoners and the community that surrounds a prison. When the interests of people in prisons are diametrically opposed to others within their district, including those who are in the business of imprisoning them (for example, corrections, healthcare, or catering contractors of the prison), local elected representatives have little incentive to serve the interests of their temporary, non-voting, incarcerated constituents.

Section V.A explains why prisons are substantively different from other "group quartered" residents and why people in prison should, as a default rule, be considered residents of the home they inhabited prior to their incarceration or intend to return to, not their prison cell. Sections V.B and V.C explain why the data collected and produced by the Census Bureau are administratively expedient, but not determinative of the appropriate base population for redistricting. Section V.D looks forward to the 2020 Census and describes, briefly, options for states to 'move' their prisoner population back to the prisoners' pre-incarceration addresses for purposes of redistricting.

A. Prisoners Are Different

Federal courts have, in many instances, recognized characteristics of students and military base residents that resonate for prisoners, such as ties to a prior residence from which they came and to which they likely intend to return.[299] Put simply, treating students, military base residents, and prisoners differently than other residents makes sense. But even the assumption that college students, military base residents, and prisoners are similarly situated to each other is

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298. Kostik v. Nago, 878 F. Supp. 2d 1124, 1132 (D. Haw. 2012).

299. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 95 (1996); Fairley v. Patterson, 493 F.2d 598, 602–03 (5th Cir. 1974); *Kostick*, 878 F. Supp. 2d at 1144; Boddie v. Cleveland Sch. Dist., NO. 4:07CV63-M-B, 2010 WL 231749, at *3 (D. Miss. Jan. 14, 2010); discussion *supra* Sections II.B.2, II.B.3; *see also* Borough of Bethel Park v. Stans, 449 F.2d 575, 582 (3d Cir. 1971) (holding that there is a rational basis for counting inmates as residents of their prison because they "usually stay for long periods of time"). The Court of Appeals for the Third Circuit presumed in *Borough of Bethel Park* that "[p]eople in this category [prisoners] as distinguished from, for example, those temporarily in a hospital for a short duration, often have no other fixed place of abode, and the length of their institutional stay is often indefinite." *Id.* Even if this presumption was accurate at the time, it no longer is accurate today.

"questionable at best."[300] Both students and military base residents have a more "substantial connection to, and effect on, the communities where they reside than do prisoners."[301] Indeed, one of the purposes of incarceration is to isolate prisoners from surrounding populations.

Prisoners have no choice but to "reside" at their prison location, distinguishing them from, for instance, students who may choose where to eat, sleep, and work, as referenced by the Third Circuit in *Borough of Bethel Park*.[302] Prisoners are prohibited from deciding where they are held and can be transferred at the discretion of corrections officials.[303] Often they are held far from their home communities, despite the strain this places on maintaining familial relationships.[304]

More significantly, prisoners cannot vote.[305] Both students and military service members and their dependents not only have a choice in where they live, but, depending on what they consider their permanent home, they choose where they vote, whereas prisoners convicted of a felony in all but two states do not have the right at all.[306] Treating non-voting prisoners as residents of their true home district, therefore, serves the representational equality principles discussed in *Calvin* and *Fletcher*.[307] Prisoners' status as distinct, insular, and non-voting constituents is significant in three ways.

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300. Fletcher v. Lamone, 831 F. Supp. 2d 887, 896 (D. Md. 2011).

301. *Id.*

302. *See Borough of Bethel Park*, 449 F.2d at 579.

303. *See* SENTENCING PROJECT UNHRC REPORT, *supra* note 20, at 1.

304. *See* Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMPORARY CRIM. JUST. 31, 34–35 (2005) (noting that, in the case of New York City, while there "is a small cluster of facilities relatively close," some of the other facilities are over 100 miles away, some taking over a 6.5 hour drive to get to).

305. U.S. CONST. amend. XIV § 2; *see* Richardson v. Ramirez, 418 U.S. 24, 76 (1974).

306. For military service members, see *Voting Residency Guidelines: Members of the Uniformed Services and Their Eligible Family Members*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/info/laws/voting-residency-guidelines [https://perma.cc/SUN2-UKUM]. For students, see Richard Niemi et al., *Where Can College Students Vote? A Legal and Empirical Perspective*, 8 ELECTION L.J. 327, 335–36 (2009) (noting that while there are permissible evidentiary requirements states can enact for students to vote in their jurisdictions, generally, students can choose where to register to vote).

307. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1307 (D. Fla. 2016); Fletcher v. Lamone, 831 F. Supp. 2d 887, 896 (D. Md. 2011); *see also* discussion *supra* Section III.D.

First, prisoners are non-voting constituents without a representational nexus to local representatives, whereas military personnel and students have a stronger nexus, particularly if they vote locally, or have the option to vote locally by self-defining their permanent home. In *Fletcher*, the Court found the "assumption" that "college students, soldiers, and prisoners are all similarly situated groups" to be "questionable at best,"[308] specifically because "college students and members of the military are eligible to vote, while incarcerated persons are not."[309] In that sense, districts containing non-voting prisoners create more robust representation for the residents of the district who are not incarcerated. This takes representational weight away from the residents of districts from which the prisoners came and to which they are likely to return.

Second, because of the disparities in the criminal justice system, the people incarcerated often hail from communities extremely different from the prison towns in which they are incarcerated.[310] The interests of the imprisoned population and the population of towns surrounding prisons diverge substantially.[311] Prisons are often placed in disproportionately white, more rural districts than prisoners' home districts.[312] Between skewed criminal justice enforcement and the skewed incentives to build prisons to stimulate local economies, there is often a vast divide between incarcerated people and the residents surrounding a prison.

Third, not only do people in prison lose their right to vote, they also lose the ability to participate in outside community life. Prisons

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308. *Fletcher*, 831 F. Supp. 2d at 896.

309. *Id.*

310. *See* discussion *supra* Part I.

311. *See* Ho, *supra* note 6, at 371.

312. In the state of New York, all new prisons constructed since 1982 have been built upstate, in predominantly white districts represented by a Republican in the state legislator. *See* WAGNER, *supra* note 259. Until New York became one of the few states to count the prison population at their home address, seven districts would have been under-populated and fifteen down-state districts are right up against the allowable deviation from population equality. *See* S. 6610C, 231st Leg. Sess., A. 9710D, 234th Leg. Sess. (N.Y. 2010). This means the entire district map changed when the change in law required the use of a non-prison base population. In Maryland, a disproportionate percentage of the state's imprisoned population comes from Baltimore. *See* Brief of Howard Law Civil Rights Clinic et al., *supra* note 283, at 14 ("The state's largest prisons are located in the overwhelmingly White First and Sixth districts on the Eastern Shore and in Western Maryland, respectively. Given that incarcerated persons in these prisons are not permitted to vote, the only result of including their population numbers as part of the prison districts is to use this population to increase the representation of the overwhelmingly White First and Sixth districts.").

allow for only a limited connection between people incarcerated and the residents of the community surrounding the prison and few opportunities to politically engage. By contrast, college students and military personnel can choose to engage their surrounding communities 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."[313] According to the factors federal courts have considered as relevant to cases challenging how college students, military base residents, and overseas federal employees are counted,[314] prisoners should, by default, be counted in their home community to serve principles of representative equality.

B. The Census Bureau's Continued Use of the "Usual Residence" Rule Is Not Determinative

As explained above, the "usual residence" rule does not reflect the living situation of the nation's more than two million prisoners, nor does it take into account the significant growth of the prison population over the past thirty years and its distortive effect on democracy. By calling prison cells residences, "the Census Bureau concentrated a normally city-based population that is disproportionately male and African-American or Latino into just 5393 Census blocks that are located far from their actual homes and often in rural areas."[315] In fact, to determine a person's legal residence outside of the apportionment context, "most states have explicit constitutional provisions or statutes that declare that a prison cell is not a residence."[316] Moreover, the Census Bureau's use of "usual residence" is at odds with other governmental uses of the term,

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313. *Fletcher*, 831 F. Supp. 2d at 896.

314. *See* discussion *supra* Sections II.C.1–3.

315. *See* ACLU Comment on 2020 Census Residence Rule, *supra* note 253.

316. Wagner, *Breaking the Census*, *supra* note 96, at 1241–60, 1252 n.67 ("In most states, constitutions and statutes go even further, explicitly declaring that incarceration does not change a person's legal residence. *See, e.g.*, Ariz. Const. art. VII, § 3; Colo. Const. art. VII, § 4; Minn. Const. art. VII, § 2; Mo. Const. art. VIII, § 6; Nev. Const. art. II, § 2; N.Y. Const. art. II, § 4; Or. Const. art. II, § 4; Wash. Const. art. VI, § 4; Alaska Stat. § 15.05.020(1) (2011); Cal. Elec. Code § 2025 (2011); Conn. Gen. Stat. § 9-14 (2011); D.C. Code § 1-1001.02(2) (D) (2011); Haw. Rev. Stat. § 11-13(5) (2011); Idaho Code Ann. § 34-405 (2011); Me. Rev. Stat. tit. 21-A, § 112(7) (2011); Mich. Comp. Laws § 168.11 (2011); Miss. Code Ann. § 47-1-63 (2011); Mont. Code Ann. § 13-1-112(2) (2011); N.H. Rev. Stat. Ann. §654:2-a (2011); N.M. Stat. Ann. § 1-1-7(D) (2011); Pa. Cons. Stat. § 1302(a)(3) (2011); R.I. Gen Laws § 17-1-3.1 (2011); Tenn. Code Ann. § 2-2-122(7) (2011); Tex. Elec. Code Ann. § 1.015(e) (2011); Utah Code Ann. § 20A-2-101(2)(a), - 105(4)(c) (iii) (2011); Vt. Stat. Ann. tit. 17, § 2122 (2011).").

which, for example, do not consider a person's location in prison as sufficient for diversity jurisdiction in federal courts or sufficient to allow their children to attend a local public school.[317] Redistricting should follow the trend of counting incarcerated people at a home location.

The Census Bureau data are just that: data. Even if the Census does not directly calculate adjustments for people in prison, the data it provides enables states to do so.[318] The Bureau counts people where they are incarcerated for pragmatic and administrative reasons, not legal ones.[319] "The Bureau has explained that counting prisoners at their home addresses would require 'collecting information from each prisoner individually' and necessitate 'an extensive coordination procedure'" with correctional facilities, which would cost upward of $250 million.[320] For the 2010 Census, the Bureau made the tools available for states to make those adjustments by releasing its population data for "group quarters" early to enable states to "leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale."[321] States should use the available data to reconsider their treatment of people in prison in the redistricting process.

CONCLUSION

In forty-four states, prisoners are treated as residents of their prison cell for the purposes of creating electoral districts, although they themselves cannot vote, and are likely to return to their home community after serving their term of incarceration.[322] Those sent to prison are disproportionately people of color and disproportionately come from urban areas.[323] Prisons, however, are increasingly located in more rural areas, among disproportionately white, more conservative populations.[324] Given the potential incongruity between non-voting prisoners' political interests and the political interests of residents of the districts where prisons are located, peoples' homes

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317. Prison Policy Initiative, Comment Letter on the Census Bureau's Proposed 2020 Residence Criteria and Residence Situations, 81 Fed. Reg. 42577 (June 30, 2016), https://www.prisonersofthecensus.org/letters/2016/PPI_Demos_2016_FRN_comment.pdf [https://perma.cc/7PVR-BJ52].

318. *See Fletcher*, 831 F. Supp. 2d at 895.

319. *See id.*

320. *Id.* at 895–86 (citing U.S. CENSUS BUREAU, *supra* note 157, at 10).

321. *Id.* at 896 (citing Groves, *supra* note 156).

322. *See supra* Introduction; *see also supra* Part V.

323. *See supra* Section I.A.

324. *See supra* Section I.B.2.

prior to their incarceration, not their prison cells, should be treated as their usual residence to serve constitutional principles underlying the one-person, one-vote requirements.[325]

Designating peoples' pre-incarceration home as their usual residence is consistent with the factors considered in courts' treatment of residents of other group quarters, including college students, residents of military bases, and overseas federal employees.[326] Due to prisoners' severe isolation from, and lack of ties to, surrounding communities, the finite term of their incarceration, their lack of agency in deciding the location of their incarceration, and importantly, their status as non-voters in forty-eight states, their home prior to incarceration would be more appropriately designated as their usual residence than a prison cell.[327]

A district's residents who are able to vote for, access, and hold accountable local representatives often have interests divergent from their incarcerated neighbors, correlating, in part, to the urban-rural and racial differences in those two populations.[328] Legislators in districts containing a prison have no representational nexus to their incarcerated constituents who cannot vote, take their concerns to their representatives, or seek redress for the issues that affect their daily lives.[329] The court's decision in *Calvin*, finding that local district lines violated one-person, one-vote constitutional requirements is consistent with principles of representational equality, electoral equality, and the requirements of the *Evenwel* decision recently announced by the Supreme Court.[330]

Counting incarcerated people as residents of their cells over-weights the voting strength of a prison district's non-incarcerated residents and dilutes the voting strength of the residents of surrounding districts.[331] As we look toward the 2020 decennial Census and subsequent redistricting, states and localities have an opportunity to promote representational equality by "moving" the prison population for purposes of apportionment back to a home address. Doing so serves the principles of representational and electoral equality underlying the one-person, one-vote standard, and the values of a fair and representative democracy.

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325. *See supra* Sections II.A, II.B.
326. *See supra* Section II.C.
327. *See supra* Section V.A.
328. *See supra* Section V.A.
329. *See supra* Sections III.A, V.A.
330. *See supra* Section III.A.
331. *See supra* Section I.B.2.