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Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement

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ARTICLES

HANDCUFFING THE VOTE: DILUTING MINORITY VOTING POWER THROUGH PRISON GERRYMANDERING AND FELON DISENFRANCHISEMENT

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INTRODUCTION

In the second largest state in the union, approximately 145,000 individuals are incarcerated in state prisons for felony convictions.[1] These prisoners hail primarily from Texas's largest and most diverse cities.[2] Prisons, on the other hand, are located primarily in rural, sparsely populated, and demographically homogeneous areas of the state.[3] The movement that results when individuals are incarcerated impacts redistricting lines, which are premised on state and federal representation being proportional to the total population of a given area—in short: more population, more power.

What happens when 141,500 or so Texans are not counted in the areas in which they are from?[4] What happens when, instead, they are counted amongst the population of a community they do not participate in and are

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1. TEX. DEP'T OF CRIMINAL JUSTICE, FY 2018 STATISTICAL REPORT 1 (2018), http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2018.pdf [https://perma.cc/H2FZ-H8TJ] (reporting a total of 145,019 individuals "on hand" for Texas Department of Criminal Justice demographics analysis and breaking the total number down into the following categories: 134,152 (prison), 7,433 (state jail), and 3,434 (Substance Abuse Felony Punishment Facility Offenders)).

2. *Id.* at 13-15.

3. *Unit Directory*, TEX. DEP'T. CRIM. JUST., https://www.tdcj.texas.gov/unit_directory/ [https://perma.cc/V596-MWC6].

4. *See* TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW GOVERNING REDISTRICTING IN TEXAS 13, 15-16 (2011), https://tlc.texas.gov/redist/pdf/2011_0819_State_Federal_Law_TxRedist.pdf [https://perma.cc/ST2Z-DZ7Q] [hereinafter TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW] ("[N]o court case has mandated that prison populations be reallocated or excluded from the population counts used for redistricting."); *see Texas Redistricting*, TEX. LEGIS. COUNCIL, https://tlc.texas.gov/redist/requirements/summary.html ("Redistricting is the revision or replacement of existing districts, resulting in new districts with different geographical boundaries. The basic purpose of decennial redistricting is to equalize population among electoral districts after publication of the United States census indicates an increase or decrease in or shift of population."). As the Texas Constitution mandates redistricting following the publication of each federal decennial census, this issue is of utmost importance in the coming years, as the next decennial census takes place in 2020. *See also* U.S. CONST. art. I, § 2 (requiring the reapportionment of congressional seats according to population from the decennial census); TEX. CONST. art. III, § 28 (requiring redistricting of state legislative seats during the legislature's first regular session following the publication of each United States decennial census).

merely used as a means to make money and secure jobs?[5] Through prison gerrymandering, certain individuals in rural communities obtain political power beyond their "one person, one vote" share.[6] Take the commonplace example: a jurisdiction in Texas has a total population of 10,000 non-incarcerated individuals, but when the incarcerated population is added, the total skyrockets to 15,000. Since Texas felons are ineligible to vote while in prison,[7] this effectively provides the 10,000 non-incarcerated individuals with more political power than another jurisdiction with no prison population.[8] Texas's redistricting practice of including prisoners in the population count based on where they reside on census day, which means where they are imprisoned, in combination with its felon disenfranchisement law, unnecessarily obliterates "one person, one vote" and reduces accountability for elected officials.[9]

I. GERRYMANDERING PRISONS

A. Gerrymandering

Manipulation of the political process is the scourge of democracy. Arguably, the worst of these manipulations is gerrymandering. The United States Supreme Court has held that electoral districts require

5. *See* Jonathan Tilove, *Prisoners Can't Vote, But They Can Subtly Shift Political Power*, AUSTIN AMERICAN-STATESMAN, https://www.statesman.com/news/20131201/prisoners-cant-vote-but-they-can-subtly-shift-political-power [https://perma.cc/4QRX-3N8R] (last updated Sept. 25, 2018, 9:45 AM) (noting a consensus among local officials to exclude the incarcerated population in local redistricting, at odds with state officials who include the incarcerated population in their redistricting).

6. *See* Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1241-42 (2012) ("When district population counts include incarcerated populations, people who live close to the prison are given more of a say in government than everybody else. The practice of using prison populations to dilute the voices of residents in other districts is referred to as 'prison gerrymandering.'").

7. TEX. ELEC. CODE ANN. § 11.002(a)(4) (West 2017); *see* TEX. ELEC. CODE ANN. §§ 11.001-11.002 (West 2017) (defining eligibility and qualifications for voting).

8. TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW, *supra* note 4, at 15 ("Prisons are not distributed uniformly throughout districts used to elect government officials, and thus some districts rely more on their prison population to make up their total population than others. . . . [S]ince prisons are more likely to be located in rural areas and inmates are likely to be from urban areas, the presence of a prison may artificially enhance the voting strength of rural voters.").

9. *Id.* ("As the number of persons incarcerated has grown, concentrations of prison populations may dilute the influence of some voters and enhance the influence of others.").

continuous redrawing to reflect population shifts.[10] This process is more commonly known as redistricting.[11] Additionally, the population of these districts must be generally equal to each other.[12] The individuals tasked with drawing state and federal districts, often politicians, rely on the population figures provided every ten years by the United States Census.[13]

Politicians, however, often use redistricting as an opportunity to gerrymander.[14] Gerrymandering occurs when a political faction attempts to solidify power by drawing district maps in ways that are racially and politically discriminatory.[15] These politicians effectively choose their voters, rather than the voters choosing them. Unfortunately, gerrymandering is almost as old as the United States.[16] For hundreds of years, politicians have drawn district maps with one goal in mind: to stay in power.[17] Texas politicians are no exception.[18]

B. Gerrymandering in Texas

Any discussion of redistricting in Texas necessarily takes place against the backdrop of the state's controversial history with impermissible

10. Reynolds v. Sims, 377 U.S. 533, 561-66, 577 (1964).

11. TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW, *supra* note 4, at 23-24.

12. *See* Reynolds v. Sims, 377 U.S. 533, 561-66, 577 (1964) (holding the Equal Protection Clause of the United States Constitution requires "that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.").

13. U.S. CONST. art. I, § 2; TEX. CONST. art. III, § 28.

14. *See* Al Kauffman, Opinion, *Supreme Court Sets Stage for Partisan Gerrymandering Standards*, SAN ANTONIO EXPRESS-NEWS (June 30, 2018, 12:00 AM), https://www.mysanantonio.com/opinion/commentary/article/Supreme-Court-sets-stage-for-partisan-13038365.php [https://perma.cc/8MHK-AF2R] (alleging the Wisconsin, Texas, and Maryland legislatures engaged in gerrymandering for partisan benefit and to discriminate along racial and ethnic lines).

15. *Id.*

16. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 97-98 (2018) ("In 1810, when Massachusetts governor Elbridge Gerry drew a district in the shape of a salamander to corral his rivals and neutralize their influence, the term 'gerrymander' became a descriptive and ongoing part of the American political lexicon and life.").

17. *Id.*

18. Stephen Young, *Texas Legal Fight Over Redistricting Isn't Over*, DALL. OBSERVER, (Dec. 3, 2018, 4:00 AM), https://www.dallasobserver.com/news/texas-redistricting-fight-is-never-going-to-die-11396118 [https://perma.cc/BT6G-7KLY].

gerrymandering and voting-related discrimination. The Supreme Court repeatedly struck down all-White Democratic primaries in Texas,[19] which paved the way for later landmark decisions that established the "one person, one vote" standard.[20] Testimony on anti-Latinx discrimination in Texas was a central component of expanding the coverage of the Voting Rights Act in 1975.[21] The Texas legislature's efforts to disenfranchise through redistricting gave the state an ignominious reputation for repeatedly engaging in gerrymandering. For example, in *White v. Regester*, the Supreme Court held unconstitutional multimember legislative districts in Dallas and Bexar Counties because the scheme diluted the votes of certain minority racial groups,[22] subsequently setting the groundwork for the modern "discriminatory effects" test contained in Section Two of the Voting Rights Act.[23] In every decennial redistricting cycle since 1970, courts have found Texas's proposed legislative districts to violate the Voting Rights Act of 1965.[24] After the Supreme Court struck down the Voting Rights Act's preclearance formula,[25] Section Two became one of the primary tools used to fight discriminatory redistricting practices.

More recently, in *Evenwel v. Abbott*, Texans who live in Texas Senate districts with large registered voter populations unsuccessfully

19. Nixon v. Herndon, 273 U.S. 536, 541 (1927); Smith v. Allwright, 321 U.S. 649, 664-65 (1944); Terry v. Adams, 345 U.S. 461, 469-70 (1953).

20. *See* Baker v. Carr, 369 U.S. 186, 247 (1962) (Douglas, J., concurring) (citing the White primary cases as precedent establishing the Court's authority to strike down unconstitutional electoral practices).

21. *See* Charles L. Cotrell & R. Michael Stevens, *The 1975 Voting Rights Act and San Antonio, Texas: Toward a Federal Guarantee of a Republican Form of Local Government*, 8 PUBLIUS 79, 90 (1978) (recognizing a shift from an individualistic to cultural application of the Equal Protection Clause by adding "language minorities" as a component of race).

22. White v. Regester, 412 U.S. 755, 765 (1973) ("Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups.").

23. *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*[.]").

24. Veasey v. Abbott, 830 F.3d 216, 240 (5th Cir. 2016) (en banc) (quoting Veasey v. Perry, 71 F. Supp. 3d 627, 635 (S.D. Tex. 2014), *aff'd in part*, *vacated in part*, *rev'd in part*, 830 F.3d 216 (5th Cir. 2016).).

25. Shelby Cty. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 2631 (2013).

challenged Texas's use of total population for redistricting.[26] They argued that the eligible voter population is a more appropriate metric, as opposed to the total population figure, because the total population figure dilutes the votes of citizens that belong to districts where large numbers of registered voters reside.[27] Although the districts' total population size varies by about 8%, the districts "measured by a voter-population baseline—eligible voters or registered voters—the map's maximum population deviation exceeds 40%."[28] By upholding the Texas Legislature's map, districts with low voter-populations held as much voting power as districts with almost double the number of registered voters.

Texas does not limit the practice of gerrymandering to only congressional offices.[29] Countless local political subdivisions run afoul of the United States Constitution and the Voting Rights Act.[30] Given the demographic characteristics of Texas prison populations,[31] the choice by Texas lawmakers on where to allocate prison populations for redistricting and whether to grant prisoners voting rights cannot be considered in a vacuum. The state's official history of voting-related discrimination underscores the combined discriminatory effect of prison gerrymandering and felon disenfranchisement.

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26. Evenwel v. Abbott, 578 U.S. __, 136 S. Ct. 1120, 1123, 1126, 1131 (2016) ("As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts" and doing so "serves *both* the State's interest in preventing vote dilution *and* [the Court's] interest in ensuring equality of representation.") (emphasis in original).

27. Evenwel v. Abbott, 578 U.S. __, 136 S. Ct. 1120, 1125 (2016).

28. *Id.*

29. *See* TOM HOWE, H. RESEARCH ORG., INTERIM NEWS, NO. 81-5, WHERE SHOULD INMATES BE COUNTED FOR REDISTRICTING? 8 (2010), https://hro.house.texas.gov/pdf/interim/int81-5.pdf [https://perma.cc/CC2U-XA3F] (indicating it can also affect precincts for county commissioners, justices of the peace, and constables).

30. *See, e.g.*, LULAC v. N.E. Indep. Sch. Dist., 903 F. Supp. 1071, 1093 (W.D. Tex. 1995) (finding that North East Independent School District's at-large electoral system violated section two of the Voting Rights Act of 1965, denying Hispanics and Blacks an equal opportunity to elect school board candidates of their choice); *see also, e.g.*, Patino v. City of Pasadena, 230 F. Supp. 3d 667, 674 (S.D. Tex. 2017) (holding the City of Pasadena's map and plan for electing its city council violated section two of the Voting Rights Act and the Fourteenth Amendment because Pasadena specifically intended to dilute Latino voters).

31. TEX. DEP'T OF CRIMINAL JUSTICE, *supra* note 1 (finding that 66% of inmates in Texas are Black or Hispanic).

C. Gerrymandering Correctional Facilities

Gerrymandering correctional facilities is the practice of counting inmate populations towards the district that physically houses the correctional facility, despite the fact that the inmate did not reside in that district prior to their incarceration.[32] Given Texas's history of impermissible gerrymandering and overt racial discrimination, the issue of gerrymandering correctional facilities requires an approach that considers how past and present socio-political-economic conditions intertwine to create racial disparities.[33] Ultimately, the focus should be on the underlying intent of state and local redistricting policies.

In Texas, the total population of a given jurisdiction, not the total number of eligible voters, governs representation.[34] For the purpose of redistricting, Texas counts inmates towards the population where they are incarcerated.[35] Counting inmates in this manner artificially increases the total population of representative districts that operate a correctional facility, giving these districts greater representational power.[36] The increase in population figures for these districts negatively affects representation for districts whose residents are incarcerated in a different district. This distortion is particularly unjust when the inmate intends to return home after serving their sentence.[37] There can be dramatic concrete implications to this practice. For instance, in 2011, the exclusion of incarcerated individuals from the population count in Harris County resulted in the county losing one seat in the Texas House of

32. TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW, *supra* note 4, at 15.

33. TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW, *supra* note 4, at 15 ("[B]ecause prisoners are disproportionately likely to be members of racial or ethnic minority groups, the presence of a prison could give the appearance that a district is a minority opportunity district when it is not.").

34. Evenwel v. Abbott, 578 U.S. __, 136 S. Ct. 1120, 1123 (2016).

35. *See* TEX. CONST. art. III, § 26 (apportioning representation based on " . . . the population of the State, as ascertained by the most recent United States census . . ."); *see also* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018) ("Prisoners are counted at the facility.").

36. Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 599 (2004).

37. *See* TEX. DEP'T OF CRIMINAL JUSTICE, *supra* note 1, at 13-15 (showing 58,537 people incarcerated in TDCJ facilities who were convicted in Bexar, Dallas, Harris, Tarrant, and Travis counties).

Representatives.[38] This loss was used as a justifications by state lawmakers to combine two Harris County districts with large minority populations, resulting in an overall dilution of voting power for these historically disenfranchised communities.[39]

The way the state treats prison populations when drawing state and federal legislative districts contrasts with how local political subdivisions, such as counties, treat prison populations. Generally, local jurisdictions do not include inmate populations when redistricting. Many local Texas voting precincts count inmates towards the voting precinct where the inmate resided before their incarceration.[40] In fact, several counties in Texas already remove inmates from the population count for the purpose of redistricting for county commissioner.[41] Notably, districts in Concho County and Garza County could, if drawn to include the incarcerated population, consist almost entirely of inmates.[42] Thus, to protect the "one person, one vote" standard, redistricting should exclude the incarcerated population from the total population count in the area of the correctional facility, unless the inmate previously resided in the district where the correctional facility exists.[43] Furthermore, at least until the inmate serves their sentence, the district where the inmate resided prior to incarceration should continue to count the inmate towards their

38. Ross Ramsey, *Prisoners Don't Vote, but They Sometimes Count*, TEX. TRIB. (Sept. 30, 2011, 5:00 AM), https://www.texastribune.org/2011/09/30/prisoners-dont-vote-they-sometimes-count/ [https://perma.cc/9NNP-6RFK].

39. *See id.* ("On the new maps recently approved by the Republican-dominated Legislature, lawmakers drew Reps. Scott Hochberg and Hubert Vo, both Democrats, into the same district, knowing only one can survive the election year.").

40. *Compare* TEX. ELEC. CODE ANN. § 1.015(e) (West 2017) ("A person who is an inmate in a penal institution . . . does not, while an inmate, acquire residence at the place where the institution is located."), *with* TEX. CONST. art. III, § 26 (apportioning representation based on " . . . the population of the State, as ascertained by the most recent United States census . . ."), *and* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018) ("Prisoners are counted at the facility."); *see also* Tilove, *supra* note 5 (quoting then-Judge Bill Coleman of Hale County).

41. *See Fixing Prison-Based Gerrymandering After the 2010 Census: Texas*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/TX.html [https://perma.cc/8DK9-ABAU] (stating Anderson, Bee, Brazos, Childress, Concho, Coryell, Dawson, Grimes, Karnes, Madison, Mitchell, Pecos, Walker, and Wood Counties excluded prison populations for County Commissioner precincts after the 2000 census, especially noting that excluding the prison population in Concho County avoided a County Commissioner precinct of only incarcerated persons).

42. *Id.*; Tilove, *supra* note 5.

43. TEX. LEGIS. COUNCIL, STATE AND FEDERAL LAW, *supra* note 4, at 16.

population.[44] As mass incarceration balloons, Texas must address the issue of properly counting the inmate population at all levels of the voting redistricting scheme.

II. UN-HANDCUFFING THE VOTE

Solution: Count Inmates Towards Their Home Populations

An appropriate remedy to the disproportionate representation created by prison gerrymandering would require the National Census Bureau ("Census Bureau") to amend its counting procedure to count prisoners based on their residence prior to incarceration rather than the voting precinct where they are incarcerated.[45] This would prevent the over-representation of rural, less-populated districts and the under-representation of urban districts struggling with mass incarceration.[46]

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44. *See* TEX. ELEC. CODE ANN. § 1.015(a) (West 2017) (defining residence as "one's home and fixed place of habitation to which one intends to return after any *temporary* absence.") (emphasis added); *see also* Doyle v. State, No. 09–14–00458–CR, 2016 WL 908299, at *3 (Tex. App.—Beaumont Mar. 9, 2016, pet. denied) (mem. op., not designated for publication) *cert. denied sub nom.* Doyle v. Texas, 137 S. Ct. 581 (2016) (overruling a void for vagueness challenge on the Texas Election Code's residence definition); *see also* TEX. ELEC. CODE ANN. § 1.015(e) (West 2017) (indicating only that inmates do not acquire residence in the "penal institution" by incarceration); *but see* TEX. CONST. art. III, §26 (deferring to the U.S. census), *and* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018) (counting prisoners as residents of the prison). *See* TEX. DEP'T OF CRIMINAL JUSTICE, *supra* note 1, at 2-3 (showing the amount of inmates received by TDCJ facilities in 2018 was roughly equivalent to inmates released in the same year); *see also* HOWE, *supra* note 29, at 11 ("When these inmates return [home], they will need services and resources their home districts might not have been able to secure due to the temporary loss of population and political power.").

45. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5527 (Feb. 8, 2018) ("Of the 77,887 comments pertaining to prisoners, 77,863 suggested that prisoners should be counted at their home or pre-incarceration address."); *see also* Peter Wagner & Rose Heyer, *Importing Constituents: Prisoners and Political Clout in Texas*, PRISON POL'Y INITIATIVE (Nov. 8, 2004), https://www.prisonersofthecensus.org/texas/importing.html [https://perma.cc/UR2V-XGV9] (observing that in the past the Census Bureau changed its policy to address evolving demographics, such as college students attending school in places other than their hometowns).

46. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 2-2A-01(2) (West 2018) (counting "individuals incarcerated in the State of federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the State."); *see also, e.g.*, N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2019) ("[A]ll incarcerated persons shall be, where possible, allocated for redistricting purposes . . . at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities. For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall

In 2011, the Census Bureau took a small step forward and released data on "group quarters" counts earlier than usual, which gave states more discretion on whether to "[l]eave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale."[47] The Census Bureau counts inmates towards the city where they bunk for "pragmatic and administrative reasons, not legal ones."[48] Moreover, the Census Bureau said that each state can define population for redistricting purposes.[49] In doing so, the Census Bureau addressed criticism that the method of counting inmates detrimentally affected state representation.[50] The 2011 release of group quarters data provided Texas with an opportunity to reevaluate the way it counts inmates in redistricting schemes. States like Maryland and New York took advantage of this opportunity by enacting legislation to end the practice of counting inmates towards their location of incarceration.[51]

Maryland's law, appropriately named the "No Representation Without Population Act," counts inmates that are residents of Maryland towards their home district.[52] The Act excludes from the population count inmates incarcerated in Maryland that resided outside of Maryland prior

consider those persons to have been counted at an address unknown[.]"). *See also* ERIKA L. WOOD, DĒMOS, IMPLEMENTING REFORM: HOW MARYLAND & NEW YORK ENDED PRISON GERRYMANDERING 3 (2014), https://www.demos.org/sites/default/files/publications/implementingreform.pdf [https://perma.cc/CG9C-UY6E] ("A legislator whose district depends on the people incarcerated in a correctional facility to meet[] its population requirement has every incentive to keep that prison not just open, but filled to capacity.").

47. WOOD, *supra* note 46, at 6; *see also Poverty: Group Quarters/Residence Rules*, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html [https://perma.cc/PW5H-8LCP] ("The Census Bureau classifies all people not living in housing units (house, apartment, mobile home, rented rooms) as living in group quarters. There are two types of group quarters: Institutional such as correctional facilities . . . [and] Non-Institutional, such as college dormitories . . . [.]").

48. Fletcher v. Lamone, 831 F. Supp. 2d 887, 895 (D. Md. 2011) (concluding states' adjustment of census data during the redistricting process is consistent with the practices of the Census Bureau itself).

49. Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU (Mar. 1, 2010), https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html [https://perma.cc/M6S9-8YPV] (stating the Bureau planned to release counts of inmates early in the 2010 Census so that states could use the data for redistricting purposes).

50. WOOD, *supra* note 46, at 6.

51. MD. CODE ANN., STATE GOV'T § 2-2A-01(2) (West 2018); N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2019).

52. MD. CODE ANN., STATE GOV'T § 2-2A-01(2) (West 2018)

to their incarceration.[53] The law offers significant correction to disproportionate districts when reasonable efforts to locate a prisoner's last known address fail.[54]

The Supreme Court found Maryland's "No Representation Without Population Act" constitutional, affording protection for other states to enact similar legislation.[55] The Supreme Court rejected the argument that states are constitutionally required to use the data provided by the Census Bureau without deviation in order to comply with the "one person, one vote" standard.[56] Thus, if states choose to make adjustments, they must develop a non-arbitrary, systematic process.[57]

New York's law requires counting inmates in state correctional facilities towards their home districts and only counting them towards state and local districts if they were residents of New York prior to incarceration.[58] Meanwhile, inmates in federal correctional institutions, inmates with a residency address outside of the State of New York prior to their incarceration, or inmates with an unknown address are not included in the redistricting count.[59] New York's counting of inmates

53. *Id.*

54. *Id.*

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

56. Fletcher v. Lamone, 831 F.Supp.2d 887, 894-95 (D. Md. 2011) ("We believe that the plaintiffs fail to read the *Karcher* and *Kirkpatrick* statements in their fuller context. Although *Karcher* and *Kirkpatrick* do require states to use census data as a *starting point,* they do not hold, as the plaintiffs maintain, that states may not modify this data to correct perceived flaws. A more complete reading of the opinion in *Karcher* makes this point clear. The Court there recognized that 'the census may systematically undercount population, and the rate of undercounting may vary from place to place.' It cautioned, however, that '[i]f a State does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.' . . . . Taken together, these *Karcher* statements suggest that a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution.") (first quoting *Karcher v. Daggett,* 462 U.S. 725, 738 (1983); then quoting *Karcher*, 462 U.S. at 732 n. 4 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969))).

57. Fletcher v. Lamone, 831 F. Supp. 2d 887, 894-95 (D. Md. 2011); *Karcher v. Daggett,* 462 U.S. 725, 738 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969).

58. N.Y. LEGIS. LAW § 83-m (Consol. 2011) ("The task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities.").

59. *Id.* ("For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall consider

for redistricting purposes is different from Maryland's because Maryland requires counting inmates with unknown addresses towards the facility's address.[60] In 2011, the New York State Supreme Court found the New York law did not violate the New York State Constitution, which requires that the legislature use the census to appropriate inhabitants for the purpose of drawing districts within the state.[61]

As discussed in Part I, some local officials recognize that part of protecting "one person, one vote" requires that prisoners be removed from the total population count of the district within which they are imprisoned.[62] State officials, however, are not as amenable to the exclusion of inmate populations for the purpose of drawing state districts.[63] While the Texas Constitution does not explicitly define "population,"[64] the Texas Election Code provides that, "A person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or an eleemosynary institution does not, while an inmate, acquire residence at the place where the institution is located."[65] In light of this discrepancy, one Texas district court interpreted the Texas Constitution to require a strict application of the data provided by the Census Bureau.[66] The New York Supreme Court reached the opposite

those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph.").

60. MD. CODE ANN., STATE GOV'T § 2-2A-01(2) (West 2018).

61. Order and Decision, Little v. LATFOR, No. 2310-2011, at 7-8 (N.Y. App. Div. Dec. 1, 2011), https://www.brennancenter.org/sites/default/files/legacy/Decision%20and%20Order_1%20(2).pdf [https://perma.cc/K7YG-RV7S] (explaining how inmates may be physically present in the locations of the correctional facilities at the time of the census count, however, they lack actual permanency as they can be transferred between the state's many correctional facilities at DOCCS's discretion).

62. HOWE, *supra* note 29 (estimating more than 100 local governments exclude inmate populations when drawing representative districts).

63. *Id.* ("During the 2009 regular session of the 81st Texas Legislature, the House Corrections Committee heard testimony on . . . HB 2855 . . . which would have required Texas to count inmates at their addresses before incarceration. During the 2001 regular session, the House Elections Committee favorably reported a similar bill, HB 2639 . . . which the House rejected by 48-91-3. In addition, U.S. Rep. Gene Green, D-Houston, has filed a bill in Congress (H.R. 2075) that would require the Census Bureau to count inmates at their previous addresses for the 2020 Census.").

64. TEX. CONST. art. III, §§ 25-26 (amended Nov. 6, 2001).

65. TEX. ELEC. CODE ANN. § 1.015(e) (West 2017).

66. Perez v. Texas, Nos. 11–CA–360–OLG–JES–XR, SA–CA–361–OLG–JES–XR, SA–11–CA–490–OLG–JES–XR, SA–11– CA–592–OLG–JES–XR, SA–11– CA–615–OLG–JES–XR, SA–11–CA–635–OLG–JES–XR, 2011 WL 9160142, at 12 (W.D. Tex. Sept. 2, 2011) (unpublished

conclusion from that of the Texas court, despite having very similar constitutions.[67] The New York Constitution states:

> Except as herein otherwise provided, 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 of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.[68]

In *Little v. LATFOR,* the New York Supreme Court noted that the Census Bureau directed that states exercise discretion to "create their own methodology for counting inmates for apportionment purposes."[69] While the New York Constitution mandated the use of census data for redistricting purposes, the Court found that the inmates were not within the meaning of "inhabitants" because they lacked "actual permanency" or an "intent to remain" incarcerated.[70] Thus, the court found that a deviation from the strict application of the census data did not violate the state's constitution.[71]

The Texas Constitution is similar to the New York Constitution because they both require the use of census data to calculate the number of inhabitants for redistricting purposes.[72] Texas must use the numbers

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table decision) ("The Texas Election Code states that prisoners are not residents, for voting purposes, of the county where they are incarcerated. Nevertheless, the U.S. Census Bureau counts them as such, and the Texas Constitution requires use of the census count as the basis for redistricting.") (citation omitted) (citing TEX. ELEC. CODE ANN. § 1.015(e) (West 2017) (citing TEX. CONST. art. III, § 26).

67. Order and Decision, Little v. LATFOR, No. 2310-2011, at 7-8 (N.Y. App. Div. Dec. 1, 2011), https://www.brennancenter.org/sites/default/files/legacy/Decision%20and%20Order_1%20(2).pdf [https://perma.cc/K7YG-RV7S].

68. N.Y. CONST. art. III, § 4 (amended 2014).

69. Order and Decision, Little v. LATFOR, No. 2310-2011, at 6 (N.Y. App. Div. Dec. 1, 2011), https://www.brennancenter.org/sites/default/files/legacy/Decision%20and%20Order_1%20(2).pdf [https://perma.cc/K7YG-RV7S] ("In March 2010, Groves stated that the Census Bureau counts individuals at their 'usual residence' and that, for inmates in particular, states were free to decide the manner in which prisoners were counted, namely, at the prisons, at their pre-incarceration addresses or altogether removed from 'redistricting formulas' where residential information was unavailable.").

70. *Id.* at 5.

71. *Id.* at 6.

72. *Compare* N.Y. CONST. art. III, § 4 (amended 2014) ("[E]ach federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part

provided by the Census Bureau to draw its districts. The requirement by the Texas Constitution does not, however, prohibit redistricting schemes to count inmates as residing in their home districts. Who counts as "population" is the relevant inquiry.

The Texas Legislature has the authority to define "population" in a manner that counts inmates towards their home district, and not towards the district where the correctional facility is located. In doing so, the Texas Legislature can correct the disproportional representation afforded to mostly rural districts and help restore the "one person, one vote" principle. Undoubtedly, the Texas Legislature uses redistricting as a mechanism to retain power almost exclusively within one party. The current redistricting approach creates a supermajority in the hands of one political party, and there is little incentive to change the way redistricting schemes use correctional facilities to curve the population figures in their favor. With one legal challenge to the current map held in their favor, the prison gerrymandering practice is likely to remain in place in Texas, at least for the foreseeable future.[73]

Solution: Restoring Voting Privileges

Turning to another aspect of the gerrymandering conundrum and the vestiges of Jim Crow: Texans lose their right to vote upon felony conviction.[74] These two issues—gerrymandering and felon disenfranchisement—work in tandem to strip inmates of representation. The Eighth Amendment provides the best vehicle for abolishing felon disenfranchisement.

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thereof for the purposes of the apportionment of member of assembly and readjustment or alteration of senate and assembly districts . . . ."), *with* TEX. CONST. art. III, § 26 ("The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census . . . .").

73. Fletcher v. Lamone, 831 F. Supp. 2d 887, 895-96 (citing U.S. CENSUS BUREAU, TABULATING PRISONERS AT THEIR "PERMANENT HOME OF RECORD" ADDRESS 10 (2006), https://felonvoting.procon.org/sourcefiles/tabulating_prisoners.pdf [https://perma.cc/6WEB-5UQJ]). In 2011, Texas State Representative Harold Dutton, filed suit to challenge the practice of counting prisoners where they are incarcerated during redistricting. The lawsuit alleged that counting prisoners where they reside instead of based on where they are from, inflated the residents of certain districts and resulted in disproportionate representation.

74. TEX. CONST. art. VI, § 1; TEX. ELEC. CODE ANN. § 11.002(a)(4) (West 2017).

1. Felon Disenfranchisement in Texas

Suffrage is the right to vote in political elections.[75] Several constitutional amendments expanded suffrage rights or removed voting barriers. Each sought to establish or protect existing voting rights for different groups of citizens.[76] These amendments represent the progression of a society that recognized, sometimes through reluctant acquiescence, the value in the right to vote.[77] The right to vote is the right from which all others flow and is the most fundamental right in our democratic government.[78] Stripping prisoners of their voting rights, while still counting them for redistricting electoral districts, undermines the principle of "one person, one vote".[79]

"Civil death" is the practice of discontinuing certain civil rights and liberties because of the person's criminal convictions.[80] The use of civil

75. TEX. CONST. art. VI (labeling Article VI of the Texas Constitution as "Suffrage," and laying out the foundations of voting and elections in Texas).

76. *See, e.g.*, U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States of by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XIX ("The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. CONST. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

77. *Cf.* Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions."); Corinna Barrett Lain, *Lessons Learned from the Evolution of Evolving Standards*, 4 CHARLESTON L. REV. 661, 666-67 (2010) (summarizing the Supreme Court's defense of a progressive reading of the Cruel and Unusual Punishments Clause as they determined whether a punishment could also be cruel and unusual if it was disproportionate to the crime).

78. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, . . . nevertheless [voting] is regarded as a fundamental political right, because [it is] preservative of all rights.").

79. Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 359 (2011).

80. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 107 (2005) ("The idea behind civil death was the destruction of the convicted felon's political existence; the death sentence imposed automatically for most felonies would destroy the person's physical existence, but the person's legal existence also had to be eliminated.").

death as a punishment began to decline in the 1950s, but the imposition of voting prohibitions for convicted felons survived.[81] Stripping people with felony convictions of their voting rights, also known as felon disenfranchisement, is one of the few remaining vestiges of civil death in the United States.[82] This practice results in far reaching collateral consequences that can cause almost insurmountable barriers for persons exiting incarceration.

Felon disenfranchisement laws served as one pretext for limiting Blacks from voting, particularly in the South.[83] Whites in the South became ever-increasingly concerned about the Black vote and employed a full array of methods to retain power. In addition to felon disenfranchisement, Southern states used poll taxes, literacy tests, and physical intimidation to keep Blacks from voting.[84]

In Texas, re-enfranchisement of post-felony conviction occurs two years "[after] the issuance of discharge papers" from felony conviction.[85] In 1997, the Texas Legislature repealed the two-year waiting period and added more precise language that allowed automatic restoration of voting rights upon completion of a felony sentence.[86] Today, Texas bars people from voting upon felony conviction until the end of his or her sentence, including the completion of probation—whether community supervision

81. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1798 (2012).

82. Wilkins, *supra* note 80 (noting loss of citizenship and loss of legal protections among other rights lost in a civil death).

83. *See* Hunter v. Underwood, 471 U.S. 222, 231 (1985) (concluding "discrimination against [B]lacks, as well as against poor [W]hites, was a motivating factor for the [Alabama] provision" that disenfranchised persons convicted of any crime involving moral turpitude); *see also* Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896) (noting the crimes that disqualified people from voting included crimes like burglary and theft—crimes Blacks were more likely to be found guilty of—while murder and robbery convictions did not disqualify people from voting).

84. *See* Ratliff v. Beale, 20 So. 865, 869 (Miss. 1896) (holding a poll tax in Mississippi was employed primarily for the purpose of restricting access to voting polls); *see also* McLaughlin v. City of Canton, 947 F.Supp. 954, 977 (S.D. Miss. 1995) ("After the Civil War, [B]lacks comprised the majority of the electorate of Mississippi, since [W]hites who had supported the Confederacy were denied the vote. . . . [T]his development was greeted by obstructionist [W]hites with . . . disenfranchising tactics and methods, including literacy and property tests, poll taxes, understanding clauses, and grandfather clauses. . . . Some historians have remarked that disenfranchising provisions in state constitutions for convictions of certain "[B]lack" crimes was one additional method explored.").

85. House Comm. on Elections, Bill Analysis, Tex. H.B. 1001, 75th Leg., R. (1997).

86. *Id.* (noting the confusion arose when paroled inmates were released from custody although not released in the sense that they had completed their felony sentence).

or deferred adjudication.[87] Therefore, people with a felony conviction in Texas suffer a temporary civil death with respect to their voting privileges.

Although temporal, the significance is profound. In light of mass incarceration and conviction rates, the implications of civil death have become even more oppressive.[88] The Texas Department of Criminal Justice has one of the largest prison population in the country in 2016.[89] Between the number of inmates incarcerated and those on probation with felony convictions, Texas barred approximately 500,000 people from voting in 2016.[90]

Demographics of Texas inmates also show a disproportionate representation of Black and Hispanic communities.[91] Thus, Black and Hispanic Texans are more likely to suffer from disenfranchisement than White Texans. Although no longer explicitly stated and more nebulous, felon disenfranchisement remains faithful to its original purpose: it removes Black communities, and now Hispanic communities too, from the voting population in significant numbers.

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87. TEX. ELEC. CODE ANN. § 11.002 (West 2017). *Cf.* TEX. ELEC. CODE ANN. § 141.001(a)(4) (West 2017) (barring a person with a felony conviction from running for office until they have completed their sentence and received a pardon); *see also* Letter from Ann McGeehan, Tex. Sec'y of State, to Voter Registrars, Effect of Felony Conviction on Voter Registration (Aug. 3, 2004), https://www.sos.state.tx.us/elections/laws/effects.shtml [https://perma.cc/RA6F-7LT8] (noting that in Texas "there is no automatic restoration of the right to be a candidate, as there is for voting purposes, after a full discharge. Absent a pardon, the candidate must have obtained a judicial release from his or her disabilities in order to run for any office to which this section applies.").

88. *See* JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 3 (July 17, 2018), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf. [https://perma.cc/P2MV-U9GA] (noting the prison population ballooned from 1976 to 2016 resulting in an imprisoned population of 6.1 million people by 2016).

89. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 4 (2018), https://www.bjs.gov/content/pub/pd£'p16.pdf [https://perma.cc/7CT3-V3NY] (listing California as the second state with the highest incarcerated population).

90. *State-by-State Data*, SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=0 [https://perma.cc/ED2R-CMEN].

91. *Compare* TEX. DEP'T OF CRIMINAL JUSTICE, *supra* note 1, at 8 (estimating the incarcerated population divided by race resulted in about 33.3% White, 32.7% Black, and 33.5% Hispanic), *with Texas Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/TX.html [https://perma.cc/RU3W-BGHQ] (finding Black and Hispanic communities are overrepresented in Texas prisons because Whites consist of 42% of the population in Texas while Blacks and Hispanics make up the remaining 38% and 12% of the population, respectively).

2. Reviewing Prior Equal Protection Arguments

Section Two of the Fourteenth Amendment of the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[92]

This has been interpreted to expressly authorize state felon disenfranchisement laws.[93] In *Richardson v. Ramirez*, the seminal felon disenfranchisement case, the Supreme Court held that California's practice of disenfranchising convicted felons was not a violation of the Equal Protection Clause.[94] The Court was convinced that Section Two of the Fourteenth Amendment provided an "affirmative sanction" and that the possible intent of Congress was to allow states the right to levy the penalty on convicted felons.[95] Disappointingly, the Court accepted the legal fiction that they had no authority to assign weight to the public policy concerns surrounding disenfranchisement.[96] Significantly, upon

92. U.S. CONST. amend. XIV § 2

93. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) ("We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [Section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court."). *Cf. id.* at 74 (Marshall, J., dissenting) ("It is clear that [Section] 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination.").

94. *Id.* at 54.

95. *Id.* (analyzing the legislative history of the passage of Section 2 of the Fourteenth Amendment).

96. *Accord id.* at 56 (Marshall, J., dissenting) ("Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society."); *see, e.g.*, Lain, *supra* note 77, at 672-73, 675 (explaining how death penalty Supreme Court decisions inconsistently consider, or depart from considering, jurisdictions,

the passage of Section Two, Congress was aware of its potential for discriminatory enforcement and added the language "under laws equally applicable to all the inhabitants of said State" to protect against wholesale disenfranchisement of Black men by allowing a State to "make one set of laws applicable to white men, and another set of laws applicable to colored men."[97]

A little more than a decade later, the Supreme Court revisited the felon disenfranchisement and Equal Protection question reviewing Alabama's disenfranchisement scheme. This time, the Court found the law unconstitutional, anchoring its decision in the prohibition against intentional race-based discrimination found in Section One of the Fourteenth Amendment.[98] Reviewing the legislative record, the Court found that the goal of requiring persons to be stripped of their voting rights if convicted of certain crimes, including crimes of moral turpitude, was to disenfranchise Black and poor White people.[99] This provision ran afoul the Equal Protection Clause and Section Two of the Fourteenth Amendment which was not designed to allow intentional racial discrimination.[100]

However, the Fifth Circuit Court of Appeals, which has appellate jurisdiction over federal district courts in Texas, has not always invalidated disenfranchisement laws passed with racial animus.[101] In fact, while examining the legislative record of the passage of Mississippi's felon disenfranchisement law, the Court determined that the original discriminatory purpose of the law—to disenfranchise Black people—was miraculously cured by a later amendment that added murder and rape (and removed burglary) to the list of crimes for which voting

trends, opinions and viewpoints of relevant organizations, as the Court manipulates the meaning of "cruel and unusual punishment" according to the ideological preferences of the sitting majority).

97. CONG. GLOBE, 40th Cong., 2d Sess., 2600 (May 27, 1868).

98. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

99. *See id.* at 231-33 (emphasizing the racially discriminatory intent and effect of the statute despite having a potentially valid reason for its enactment).

100. *See id.* at 232-33 ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment.").

101. *See, e.g.*, Cotton v. Fordice, 157 F.3d 388, 389-90 (5th Cir. 1998) (complaining that appellant was not disenfranchised because "armed robbery" was not the same crime as "theft" and the discriminatory intent of section 241 of the Mississippi Constitution rendered the statute unconstitutional).

rights could be stripped.[102] The Court was convinced that the addition of murder and rape was indicia that the statute was no longer intended to reduce the number of Black people who could vote, since those crimes were not considered "Black crimes."[103]

In a limited holding, the Fifth Circuit has found that the process by which felon disenfranchisement statutes are enforced must be administered fairly, avoiding arbitrary and selective enforcement.[104] In *Williams*, the petitioner alleged that Mississippi's procedure (1) "impermissibly select[ed] blacks for disenfranchisement" and (2) the Board failed "to follow the statutory procedures in Miss. Code Ann. §§ 23-5-35, 23-5-37."[105] The Court mainly took issue with the petitioner's second allegation and stated "[a] state may make a completely arbitrary distinction between groups of felons so as to work a denial of equal protection with respect to the right to vote when it administers a statute, fair on its face, with an unequal hand."[106] With respect to the Petitioner's first claim—intentional selection of Blacks for disenfranchisement—the Court articulated a test that would likely be impossible to prove.[107]

The Fifth Circuit has additionally ruled that felon disenfranchisement laws treating persons with felony convictions differently are acceptable under rational basis scrutiny—that is, as long as there is a rational relationship between this differential treatment and a legitimate governmental interest.[108] By utilizing various re-enfranchisement processes for persons convicted of state felonies and federal felonies, the Equal Protection Clause was not violated.[109]

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102. *Id.* at 391.

103. *Id.*

104. *See* Williams v. Taylor, 677 F.2d 510, 517 (5th Cir. 1982) ("While [appellant] has no right to vote as a convicted felon . . . he has the right not to be the arbitrary target of the Board's enforcement of the statute.").

105. *Id.* at 515-16.

106. *Id.* at 515-16.

107. *See id.* at 517 ("Obviously, if the evidence at trial shows that the group of felons who have not been disenfranchised are [W]hite, then it will tend to support appellant's assertion of racial discrimination.").

108. Shepherd v. Trevino, 575 F.2d 1110, 1114-15 (5th Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979).

109. *Id.*

Other circuits have also rejected challenges to felon disenfranchisement laws. The Third Circuit rejected a challenge brought by a prisoner alleging Pennsylvania's law violated the Equal Protection Clause because it allowed non-incarcerated felons to vote while denying the right to incarcerated felons.[110] The Ninth Circuit has similarly held that Section Two did not only apply to common law felonies and refusing to restore voting rights until the completion of all conviction terms, including payment of fines and restitution, was constitutional.[111] The Sixth Circuit declined to find that Tennessee's felon disenfranchisement statute had a disparate impact on Black people due to the disproportionate number of Black people convicted of felonies in the state.[112] Although the district court found racial discrimination in the original passage of the law, and the continuation of such discriminatory effects, the Sixth Circuit stated, "such evidence of past discrimination 'cannot, in the manner of original sin, condemn action that is not in itself unlawful.'"[113]

Even though *Richardson* did not foreclose all Fourteenth Amendment challenges,[114] Equal Protection arguments have not fared well in the courts since its publication.[115] Notwithstanding the disproportionate racial impact, and at times, the racially discriminatory intent of felon disenfranchisement laws, courts have been reluctant to deviate from

110. *See* Owens v. Barnes, 711 F.2d 25 (3rd Cir. 1983) (". . . Pennsylvania could rationally determine that those convicted felons who had served their debt to society and had been released from prison or whose crimes were not serious enough to warrant incarceration in the first instance stand on a different footing from those felons who required incarceration and should therefore be entitled to participate in the voting process.").

111. *See* Harvey v. Brewer, 605 F.3d 1067, 1079-80 (9th Cir. 2010) (distinguishing plaintiff from indigent unincarcerated felons to draw support for Arizona's voting scheme under the rational basis analysis).

112. *See* Wesley v. Collins, 791 F.2d 1255, 1260-61 (6th Cir. 1986) (looking beyond evidence of historical racial discrimination in the state and viewing the issue in totality of the circumstances to come to the "inescapable conclusion" that the Voting Rights Act was not violated).

113. *Id.* at 1261 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

114. Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (remanding respondent's contention that selective enforcement by county election officials violated the Equal Protection Clause to the Supreme Court of California).

115. *See* Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is *undisputed* that a state may constitutionally disenfranchise convicted felons . . . ") (emphasis added) (citing Richardson v. Ramirez, 418 U.S. 24, 94 (1974)).

Richardson.[116] A different approach allowing courts more flexibility is required.

3. Evolving Standards of Decency and the New Suffrage Movement

Eighth Amendment case law has often evoked consideration of the "evolving standards of decency" that transforms as society matures.[117] "Evolving standards"[118] open the door for discussion about preserving the constitutional right to vote for incarcerated persons. Although this standard has usually been used to address oppressive and unconstitutionally cruel prison conditions[119] or unduly harsh punishments,[120] it is available to address the broader collateral consequences of criminal conviction.[121]

The tide of public opinion on felon disenfranchisement is changing. Recently, voters in Florida issued a resounding rejection of the state's permanent disenfranchisement of over 1.4 million people who had felony convictions, with the passage of Florida Amendment Four, or the Voting Rights Restoration for Felons Initiative.[122] Before the passage of the

116. *See* Wilkins, *supra* note 80, at 100 ("When presented with Eighth Amendment challenges to felon disenfranchisement laws, judges typically rely on . . . *Richardson v. Ramirez* for the proposition that disenfranchisement is constitutionally permitted no matter what.").

117. *See* Furman v. Georgia, 408 U.S. 238, 269-70 (1972) (Brennan, J., concurring) ("Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know 'that the words of the [Clause] are not precise, and that their scope is not static.' We know, therefore, that the Clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958))).

118. The theory that a practice may be prohibited when a "national consensus has formed against it" and "a majority of state have already done so on their own." *See* Lain, *supra* note 77.

119. *See* Gates v. Cook, 376 F.3d 323, 333-34 (5th Cir. 2004) (holding filthy cell conditions—including dried fecal matter on the walls, ceilings, and bars, as well as areas with no air-conditioning during the summer, both of which exacerbate the infestation of pests—constitute an Eighth Amendment violation).

120. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (finding the use of denationalization—stripping a native-born American of their United States citizenship—to be cruel and unusual punishment and therefore a violation of the Eighth Amendment).

121. *See generally* Wilkins, *supra* note 80, at 129 (proposing "courts should presume that a state-imposed sanction or disability triggered directly and automatically by a criminal conviction is, in fact, punishment subject to Eighth Amendment regulation.").

122. *See Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. JUST. (Nov. 7, 2018), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida [https://perma.cc/DN62-PW5Y] ("On November 6, 2018, Florida voters approved a constitutional amendment

referendum, the Eleventh Circuit had already ruled that Florida's method of restoring (or not restoring) voting rights for felons violated the First Amendment freedom of association and freedom of expression.[123] This is the latest example of the public issuing a referendum on the age old practice of civil death, but certainly not the only.[124]

Civil death is counterproductive to successful rehabilitation and re-integration into society. Recidivism increases when laws are confusing and not clarified to supervised persons[125] and criminalize positive re-entry behaviors like civic participation.[126] In Texas, voting rights are automatically restored upon the completion of one's sentence, but there has been confusion, even amongst election officials, about how to apply

automatically restoring the right to vote to 1.4 million individuals with felony convictions in their past. The amendment restores the right to vote for people with felony convictions, except individuals convicted of murder or felony sexual offenses, once they have completed the terms of their sentence, including probation and parole."); *see also* Emily Bazelon, *Will Florida's Ex-Felons Finally Regain the Right to Vote?*, N.Y. TIMES MAG. (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/magazine/ex-felons-voting-rights-florida.html [https://perma.cc/8LS2-S27C] (detailing the history of Florida's Amendment 4 and the effects it can have on former felons like Neil Volz and restoring democracy in government).

123. Order Granting Summary Judgment at 8, Hand v. Scott, 285 F. Supp. 3d 1289 (N.D. Fla. Feb. 1, 2018) (No. 4:17-cv-00128-MW-CAS), http://fairelectionsnetwork.com/wp-content/uploads/144-Order-Granting-Plaintiffs-Motion-for-Summary-Judgment.pdf [https://perma.cc/CMV8-7DZ7] ("Defendants essentially argue that vote-restoration for former felons can only occur on the state's terms. ECF No. 103, at 30-31. Once a felon loses the right to vote, only the state may grant it back in a manner of its choosing. A person convicted of a crime may have long ago exited the prison cell and completed probation. Her voting rights, however, remain locked in a dark crypt. Only the state has the key—but the state has swallowed it. Only when the state has digested and passed that key in the unforeseeable future—maybe in five years, maybe in 50—along with the possibility of some virus-laden stew of viewpoint discrimination and partisan, religious, or racial bias, does the state in an "act of mercy," unlock the former felon's voting rights from its hiding place.") (citing Fla. R. Exec. Clemency 1).

124. *Felon Voting Rights*, NAT'L CONF. ST. LEGIS. (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/5N5X-GPMY] (detailing state policies regarding felon disenfranchisement and recent state efforts to towards the restoration of voting rights).

125. *See, e.g.*, Sasha von Olderhausen, *'I Wish I Could Vote': An Ex-Felon's Election Day*, TEX. OBSERVER (Nov. 8, 2016, 8:38 AM), https://www.texasobserver.org/felon-disenfranchisement-presidio/ [https://perma.cc/T5WT-JW2W] (illustrating an ex-felon's misconception of his right to vote).

126. *See, e.g.*, *id.* (finding 2.9% of eligible voters, not including eligible voters who have failed to re-enter the system, are prohibited from voting because of state felony disenfranchisement laws).

the law.[127] However, even though voting rights are eventually restored, there is the risk of prosecution if someone mistakenly believes they have the right to vote.[128] The risk of going back to prison has been actualized in Texas for casting a provisional ballot.[129]

In 2016, in Fort Worth, Texas, Crystal Mason, a Black woman, decided to vote after being persuaded by her mother.[130] Mason had been released from federal prison after serving a sentence for tax fraud and was still under federal supervision.[131] She believed she could vote and went to cast her ballot, but ultimately cast a provisional ballot (a ballot that ultimately did not count) after discovering she was not on the voter rolls.[132] No one at the polling location told her that she could not vote, even though at least one person there knew she had a felony conviction.[133] She was ultimately prosecuted for voting illegally and sentenced to five years in prison.[134] This sentence is one example of the injustice of civil death and the ways in which it can be applied harshly producing grave consequences to an individual, particularly because the sentence levied against Mason, who is both Black and a woman, was disproportionate. Sentences like these have a chilling effect. When utilizing the right to vote can potentially cost a person their freedom, especially those who have already experienced the loss of liberty in a cell,

127. Letter from Ann McGeehan, *supra* note 87 (addressing the confusion associated with voter registration and final felony convictions).

128. Brief for ACLU & Texas Civil Rights Project as Amici Curiae Supporting Defendant at 2, Texas v. Mason, No. D432-1485710-00 (432nd Dist. Ct., Tarrant County, Tex. 2018), https://www.aclutx.org/sites/default/files/field_documents/mason_amicus_brief_5.23.18_final.pdf [https://perma.cc/5NDL-5GLC] ("Any mistake—no matter how innocent—will be penalized with the full force of the criminal law. Such a message, if not rejected . . . will inevitably chill participation in elections and undermine the strength of our democracy.").

129. *Id.* (rejecting the State's position of criminalizing an "innocent mistake made is casting a *provisional ballot.*") (emphasis original).

130. Mitch Mitchell, *Texas Woman Who Got Five Years in Prison Among Six Million in U.S. Who Gave Up Right To Vote*, STAR TELEGRAM (Mar. 29, 2018, 9:50 PM), https://www.star-telegram.com/news/local/community/fort-worth/article207391024.html [https://perma.cc/3EFJ-DCP8].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

the cost can be too high to pay to participate in representative democracy.[135]

Considering the discriminatory history of felon disenfranchisement laws, the unequal practice of counting prisoners into voting populations of which they have no civic influence, and the ongoing discriminatory impact of felon disenfranchisement laws, there is only one reasonable conclusion: people with felony convictions should not be stripped of voting privileges at all. Forfeiture of voting privileges upon conviction has been widely accepted,[136] but there is no constitutional requirement that it remain in place. As opinions about voting change and the public becomes more educated about the inequities of our criminal justice system, disenfranchisement moored to criminality will likely become unpopular.

The Eighth Amendment is an appropriate vehicle to push for changes in this area because it is not "static",[137] rather, it is malleable enough to encapsulate modern changes in society.[138] This is apparent throughout Eighth Amendment case law and especially in jurisprudence outlawing once widely accepted practices like the death penalty for crimes that did not result in a death,[139] life without parole for

135. Brief for ACLU & Texas Civil Rights Project as Amici Curiae Supporting Defendant at 11, Texas v. Mason, No. D432-1485710-00 (432nd Dist. Ct., Tarrant County, Tex. 2018), https://www.aclutx.org/sites/default/files/field_documents/mason_amicus_brief_5.23.18_final.pdf [https://perma.cc/5NDL-5GLC] (suggesting there is little support explaining why a person would risk up to twenty years in prison just to cast a ballot in an election).

136. *See, e.g.*, Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1536 (2003) (finding only 9.9% of people surveyed believe that convicted felons should never lose their right to vote while 35.2% believe felons should lose their right to vote while they are incarcerated, on parole, or probation).

137. *See* Trop v. Dulles, 356 U.S. 86, 100-101 (1958) ("The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also* Wilkins, *supra* note 80, at 137 ("[T]he Eighth Amendment's scope is not static, but may expand as society progresses.").

138. Alberti v. Klevenhagen, 790 F.2d 1220, 1223 (5th Cir. 1986) (finding the Eighth Amendment to be judged under a contemporary standard of decency); *see also* Lain, *supra* note 77, at 674-75.

139. *See e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) *modified* 554 U.S. 945 (2008) (holding the Eighth Amendment barred Louisiana from imposing the death penalty for the rape of a child that did not result in death because "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.").

juveniles,[140] and the practice of executing those with intellectual development disorders.[141] In other words, Eighth Amendment case law has developed alongside society, and the Court has found many punishments to violate the Cruel and Unusual Punishment Clause once they lose public popularity.[142]

Contrary to the Court's dicta in *Richardson*,[143] the Fifth Circuit expressly stated that "while an Eighth Amendment determination must not be merely a judge's subjective views, the Constitution contemplates that ultimately a court's own judgment will be brought to bear on the question."[144] Even without express judicial acquiescence, it is axiomatic that subjective views enter judicial interpretation. In dicta, the Fifth Circuit reinforced transforming values can render once-accepted actions unconstitutional.[145] Admittedly, challenges to felon disenfranchisement have largely failed, but bringing a claim challenging the practice of gerrymandering prisons in tandem with a challenge to the loss of voting privileges might produce some favor.

First, the Court would have to determine that felon disenfranchisement in Texas was punishment, not merely regulation.[146] In other contexts,

140. *See* Miller v. Alabama, 567 U.S. 460, 477-78 (2012) (noting that sentencing a juvenile to life without parole fails to account for hallmarks of youth, like failure to appreciate consequences for actions, dysfunctional home environments that a child may not be able to remove themselves from, and peer pressures).

141. *See* Atkins v. Virginia, 536 U.S. 304, 313-16 (2002) (detailing states which changed their laws to no longer allow death penalties for those with intellectual developmental disorders after public protests called for an end to the imminent execution of a man diagnosed with intellectual developmental deficiencies).

142. Lain, *supra* note 77, at 668-69 ("For the purpose of this discussion, what mattered in Furman was that two concurring Justices—Justices Brennan and Marshall—made a bold doctrinal move in suggesting that a punishment could be "cruel and unusual" for no reason other than that it had become unpopular.") (quoting Furman v. Georgia, 408 U.S. at 270 n.10, 277-306 (Brennan, J., concurring); *id*. at 332-72 (Marshall, J., concurring)).

143. Richardson v. Ramirez, 418 U.S. 24, 55 (1974) (addressing the respondent's pleas, the Court deferred to legislative action and stated, " . . . it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view.").

144. Alberti v. Klevenhagen, 790 F.2d 1220, 1223 (5th Cir. 1986).

145. Ingraham v. Wright, 498 F.2d 248, 260-61 (5th Cir. 1974) (finding corporal punishment of school children was acceptable under the Eighth Amendment because the practice had not become "unacceptable to contemporary society" or "abhor[r]ed by popular sentiment").

146. Austin v. United States, 509 U.S. 602 (1993) (analyzing the legal grounds of forfeiture as a punishment, then referring to the legislative history of the statute in question to determine if

the Court said sanctions serve more than one purpose and sanctions partly serving as punishment are punitive.[147]

Next, the Court determines if the punishment of disenfranchisement is cruel and unusual. The Court will consider if the punishment is contrary to the "evolving standards of decency" and disproportionate.[148] In *Trop*, the court provided some contours for determining what punishment offended the standards of a civilized society.[149] The Court usually considers objective criteria such as the current position of state laws, proposed legislation, jury behavior, public opinion polls, professional organization opinions and international law.[150] These objective criteria illuminate the current climate and help judges make decisions tied to some external source. However, we must caution that the Court is privileged to decide what weight to give the evidence before it and, notably, the Court has not always weighed different criteria the same, and, finally, it is also required to find a constitutional violation if one exists, notwithstanding public opinion.[151]

Therefore, the Court could find that the punishment of disenfranchisement, combined with the unequal representation created by prison gerrymandering, is contrary to the evolving standards of decency. It could anchor its opinion in international law like it did in *Trop* or consider the wave of states loosening laws on felon disenfranchisement coupled with citizen initiatives as strong indicia that public sentiments

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Congress intended the statute to be punishing or remedial); *see also* Wilkins, *supra* note 80, at 139-41 (reviewing judicial opinions, statutory interpretation, and opinion polls to show a marked shift towards generally understanding disenfranchisement to be punitive).

147. United States v. Halper, 490 U.S. 435, 448 (1997), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997) (". . . it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.").

148. Gates v. Cook, 376 F.3d 323, 332-333 (5th Cir. 2004) (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

149. Trop v. Dulles, 356 U.S. 86, 100-101 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

150. Wilkins, *supra* note 80, at 139 (analyzing the courts using these methods, but also pointing out Chief Justice Rehnquist's dissent in *Atkins v. Virginia*, 536 U.S. 304, 322 (2002), arguing that other countries should not determine the United States response).

151. Lain, *supra* note 77, at 672-673 & nn. 52-55 (comparing Supreme Court decisions that either rejected or leaned heavily on various sources of arguments in determining whether there was an Eighth Amendment violation).

have changed.[152] Undoubtedly, reclaiming the franchise of incarcerated persons poses a great challenge because the public has not yet made formidable attempts to restore the vote for prisoners.[153] Only two states allow prisoners to vote currently, but others are taking notice and reconsidering civil death in light of massive incarceration rates.[154] Still, change is often incremental and the legal and public challenges to felon disenfranchisement laws for previously incarcerated persons could produce more public scrutiny of the process overall.

4. Texas Must Change Its Ways: Unlock the Vote for Prisoners

Texas need not wait for litigation or subsequent court action. Rather, Texas should be required to make a choice: either count prisoners in their home jurisdictions or allow them to vote. The reasons for allowing prisoners to vote are manifold and manifest, and they have been expounded upon at length in law review articles and news articles

152. Sarah C. Grady, *Civil Death Is Different: An Examination of a Post Graham Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441, 464-65 (2013).

153. *See* Pinaire et al., *supra* note 136 (finding 9.9% of persons surveyed said that they believed convicted felons should never lose their right to vote). *But see State Advocacy News: Strategies to End Life Imprisonment, Expand the Vote, and Strengthen Reentry Policies*, SENTENCING PROJECT (Feb. 1, 2019), https://www.sentencingproject.org/news/state-advocacy-news-strategies-end-life-imprisonment-expand-vote-strengthen-reentry-policies/ (discussing Florida voters' passage of Amendment Four to the Florida Constitution, enfranchising around one million Floridians who had lost the right to vote due to felony convictions, sparking lawmakers and advocates in California, Iowa, Minnesota, New Mexico, New Jersey, and Kentucky to advance similarly restorative measures); Exec. Order No. 181, *Restoring the Right to Vote for New Yorkers on Parole* (Apr. 18, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf (Governor Andrew Cuomo expanded voting rights to those on parole, voting rights to those on probation had already been granted); Brianne Pfannenstiel, *Exclusive: Gov. Kim Reynolds to Propose Constitutional Amendment Lifting Felon Voting Ban in Condition of the State*, DES MOINES REG. (Jan. 15, 2019, 6:00 AM), https://www.desmoinesregister.com/story/news/politics/2019/01/15/kim-reynolds-felon-voting-rights-constitutional-amendment-lift-ban-iowa-legislature-proposal-2019/2572308002/?eType=EmailBlastContent&eId=83282a7b-68d9-4309-a713-c9eae9e97829 [https://perma.cc/X2X6-QESY] (broadcasting an interview with Governor Kim Reynolds of Iowa on future legislative agendas that would restore voting rights to felons).

154. *See* Jane Timm, *Most States Disenfranchise Felons*, NBC NEWS (Feb. 26, 2018), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406 [https://perma.cc/39RV-QP4N] (reporting that New Jersey's legislature plans on proposing a bill that would allow prisoners to vote, modeled on Maine and Vermont where prisoners can currently vote).

alike.[155] But since only Maine and Vermont allow currently incarcerated persons to vote (and both Massachusetts and Utah recently *revoked* such a right), the reasons evidently still bear repeating. If one of the goals of prison time is rehabilitation, one of the best ways to produce civic responsibility is to get incarcerated persons in the habit of voting as soon as possible. Prisoners must be allowed to vote for the very reasons that all United States citizens are allowed and encouraged to vote: voting integrates and entrenches the voter in society, voting connects voters to one another as co-citizens and participants, and voters with experience in a system are the most qualified to vote on policies to guide that system. If prisoners are meant to become productive members of society, why wouldn't that journey begin as soon as possible?

The United States prison system is either meant to be rehabilitative or punitive, depending on who and when you ask. Some prisons in the United States once aimed for rehabilitation, becoming places in which inmates were "encouraged to develop occupational skills and to resolve psychological problems—such as substance abuse or aggression—that might interfere with their reintegration into

155. *See, e.g.*, Anthony Gray, *Securing Felons' Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 3, 19 (2014) ("[Article I, Section 2 of the United States Constitution] is indicative of the fact that a universal franchise is fundamental to the representative system of government for which the Constitution provides . . . numerous amendments . . . prohibit denial of voting rights, for example due to race, 'previous servitude,' gender, age or failure to pay tax are constitutionally forbidden."); Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOWARD L.J. 549, 559 (2011) (" . . . [Disenfranchisement] policies exacerbate many of the problems associated with disenfranchisement . . . they create significant limitations on full democratic participation by citizens, run counter to efforts to promote public safety, and exacerbate existing inequalities in the criminal justice system. These include limitations on the electorate, enhanced racial disparity, and exacerbating challenges for reentry."); Gregg Caruso, *Why Prisoners and Ex-Felons Should Retain the Right to Vote*, PSYCHOL. TODAY (Nov. 6, 2016), https://www.psychologytoday.com/us/blog/unjust-deserts/201611/why-prisoners-and-ex-felons-should-retain-the-right-vote [https://perma.cc/9NSJ-R2UY] ("[D]isempowering and disenfranchising prisoners and ex-felons has the effect of dehumanizing and marginalizing them, sometimes permanently. Philosophically arbitrary and perpetual punishment, including the denial of voting rights to people who have paid their debt, imposed second-class citizenship on millions of citizens."); Corey Brettschneider, *Why Prisoners Deserve the Right to Vote*, POLITICO MAG. (June 21, 2016), https://www.politico.com/magazine/story/2016/06/prisoners-convicts-felons-inmates-right-to-vote-enfranchise-criminal-justice-voting-rights-213979 [https://perma.cc/7RT6-3DSN] ("Prison is itself already severe punishment. The deprivation of liberty and the loss of control over everyday interaction, including the ability to see one's loved ones on a daily basis, are all severe constraints imposed by incarceration. One can be punished without being subjected to civic exile.").

society."[156] In the 1970s, the emerging (and persisting) "tough on crime" political tactic meant that prisons became merely punitive for those housed within;[157] incarceration was "an instrument of society's retributive vengeance" for harming those whom it viewed as dangerous, while simultaneously exorcising that danger from the lives of the supposedly righteous.[158] More recently, advocates have pushed for a return to the rehabilitative prison model, citing both moral[159] and economic advantages.[160] The United States does an abysmal job of rehabilitating its prisoners,[161] especially compared to more intentionally palliative European programs.[162] This Article assumes, arguendo, that rehabilitation is *supposed* to be the U.S. prison system's primary goal.

Inmate participation in democracy would create reintegration for inmates rejoining American society at large. Voters are more invested in the workings of their government, the issues that affect society, and more

156. Etienne Benson, *Rehabilitate or Punish?*, AM. PSYCHOL. ASS'N, July/Aug. 2003, at 46, https://www.apa.org/monitor/julaug03/rehab.aspx [https://perma.cc/FS4Q-FJCT].

157. *See id.* ("Researchers have also found that the pessimistic "nothing works" attitude toward rehabilitation that helped justify punitive prison policies in the 1970s was overstated.").

158. Austin MacCormick, *The Prison's Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36, 37-38 (1950-1951).

159. *See, e.g.* Sri Sri Ravi Shankar, Opinion, *We Must Do More to Rehabilitate Inmates*, HILL (Jan. 26, 2018), https://thehill.com/opinion/international/370908-we-must-do-more-to-rehabilitate-us-inmates [https://perma.cc/3LEN-LBEN] (arguing that rehabilitation programs can help inmates deal with stress and emotions, and that rehabilitation should be taken with a more holistic approach like that of medical care).

160. Jacob Reich, *The Economic Impact of Prison Rehabilitation Programs*, PENN WHARTON (August 17, 2017), https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php [https://perma.cc/6FJ6-VSCE] (citing case studies showing thousands of dollars in savings for states that implement rehabilitative programs like work-release programs, drug and alcohol treatment, and education).

161. *See, e.g.*, Christopher Zoukis, *U.S. Prisoners the Least Rehabilitated in the World*, HUFFINGTON POST (Oct. 4, 2017), https://www.huffingtonpost.com/entry/us-prisoners-the-least-rehabilitated-in-the-world_us_59bd49eae4b06b71800c39d7 [https://perma.cc/QNM4-867E] ("In addition to locking people up at unprecedented rates, America also lays claim to the highest recidivism rate in the word—a staggering 76 percent. Compare that with Norway, which boasts the lowest rate at just 20 percent.").

162. Zeeshan Aleem, *Sweden's Remarkable Prison System Has Done What the U.S. Won't Even Consider*, MIC NETWORK INC. (Jan. 27, 2015), https://mic.com/articles/109138/sweden-has-done-for-its-prisoners-what-the-u-s-won-t#.3gRSqrXea [https://perma.cc/2L64-DFYU] ("[I]n the past decade, the number of Swedish prisoners has dropped from 5,722 to 4,500 out of a population of 9.5 million. The country has closed a number of prisons, and the recidivism rate is around 40%, which is far less than in the U.S. and most European countries.").

personally, the issues that affect them.[163] If prisoners were universally enfranchised, rehabilitation would be aided by increasing their investment in their communities and paving the way in becoming more effective members of society upon release.[164]

If prison is meant to take a transgressor and turn him into a productive member of society, then voting is an indispensable step in that process. Incarceration inherently separates the incarcerated from the rest of America in every way, including physically. That separation often continues long after release, leading to staggering levels of recidivism (nearly 77% according to a Bureau of Justice report), a massive rehabilitative failure.[165] Voting is a simple and logical way to keep inmates connected to the population they will one day rejoin.

Voting involves the voter in their respective communities in distinct ways other civic activities do not. Voting is more intentional than paying taxes, more convenient than attending a city council meeting, and more enjoyable than getting a speeding ticket. Even before elections were widely available to non-White non-males, those who examined American democracy expounded upon the uniquely participatory power of the vote. In 1835, Alexis de Tocqueville's *Democracy in America* credited "the interrelationship between the self and the community" as the cornerstone of American democracy, enabling Americans to "reconcile their personal well-being with the common welfare of the people."[166] If inmates were

163. *See* PEW RES. CTR., MOST VOTERS HAVE POSITIVE VIEWS OF THEIR MIDTERM VOTING EXPERIENCES 14 (2018), http://www.people-press.org/wp-content/uploads/sites/4/2018/12/12-17-18-Voter-experiences-upt.2.pdf [https://perma.cc/VL4V-PDTA] (reporting that a large portion of those who did not vote in the midterm elections in 2018 did not like politics, felt their vote did not matter, or did not care who won).

164. *See* Brettschneider, *supra* note 155 ("As prisons have grappled with the explosion in their populations in the past 20 years, allegations of prisoner maltreatment multiply, and criminal justice reform moves to the fore of our political debate, we should consider that one of the best ways to solve these intractable and expensive problems would be to listen to those currently incarcerated—and to allow them to represent themselves in our national political conversation. . . . A prison constituency with rights to vote and related rights of free speech can engage in civic activism that will continue after release.").

165. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* U.S. DEPT. OF JUST. OFF. OF JUST. PROGRAMS 7 (Apr. 2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (reporting that rearrests after release of inmates was 43.4% one year after release, rising to 67.8% three years after release, and finally 76.6% five years after release).

166. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 72 (trans. Henry Reeve, ed. Francis Bowen, 3d ed. 1863) (1835).

allowed to vote while incarcerated, they would be consistently connecting their choices and personal well-being to the good of the community they are meant to rejoin. Such a connection has great potential to set a pattern of involvement and empathy with the larger population that will continue long after an inmate has been released. In other words, what the crime has torn asunder, voting can glue together.

In addition to reintegrating inmates into society, the right to vote humanizes those who possess it. Voting is "regarded as a fundamental political right, because it is preservative of all rights."[167] These truths were known to the Women's Suffrage and Civil Rights Movements alike, and America has seen them borne as non-White non-males gained the right to vote.

Much like the fight for inmate suffrage, the war for women's suffrage was waged on many fronts—litigation, policy, public opinion, and state policy—for many years, propelled by the notion that women would not be full citizens until they were awarded full participation. Susan B. Anthony's argument for women's suffrage articulated this idea perfectly:

> It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union. And we formed it, not to give the blessings of liberty, but to secure them; not to the half of ourselves and the half of our posterity, but to the whole people.[168]

Other suffragists improved upon Anthony's limited platform of suffrage which, unfortunately, involved opposition to the Fourteenth Amendment because of its inclusion of the word "male."[169] The successful Black publisher and activist Josephine St. Pierre Ruffin declared herself "justified in believing that the success of this movement, for equality of the sexes means more progress toward equality of the races."[170] But the fight was not over once women won the right to vote. Suffragettes still had to convince womankind to show up to the polls.

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167. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

168. Susan B. Anthony, *On Women's Right to Vote* (1873), http://www.historyplace.com/speeches/anthony.htm [https://perma.cc/AH9P-RE5F].

169. Jone Johnson Lewis, *Women's Rights and the Fourteenth Amendment*, THOUGHTCO. (June 4, 2018), https://www.thoughtco.com/womens-rights-and-the-fourteenth-amendment-3529473 [https://perma.cc/J7PE-SYTH].

170. Josephine St. Pierre Ruffin, *Trust the Women!*, *in* 10 THE CRISIS: VOTES FOR WOMEN no. 1, at 188 (May 1915).

Author Louisa May Alcott, the first woman to register in Concord, Massachusetts, groused in her journal about the reluctance of her fellow Concord women to cast a ballot, and even "offered to drive the timid sheep to the fatal spot where they seem to expect some awful doom."[171] Eventually, women began to show up on their own free will, and they began electing women whose policies reflected their own.[172] Similarly, the struggle for Black men's suffrage only began with the ratification of the Fifteenth Amendment in 1870, which was followed by a long period of poll taxes, literacy test, grandfather clauses, and other barriers to voting.[173] The road has been long, and is paved with the blood of innocent protestors and leaders seeking the participation that the Constitution already promised them.[174] More so than women's suffrage, Black Americans' rights to vote are still under attack, and the Prison-Industrial complex exacerbates the challenge.[175] But the Congress elected in November was the most diverse yet, leaving open the possibility that the policies passed by that Congress will expand opportunities for People of Color in the future.[176]

171. LOUISA MAY ALCOTT, THE JOURNALS OF LOUISA MAY ALCOTT (Joel Myerson & Daniel Shealy eds., 1989).

172. *See History of Women in the U.S. Congress*, CTR. FOR AM. WOMEN & POL., http://cawp.rutgers.edu/history-women-us-congress [https://perma.cc/UKH5-58XS] (showing the number of women in both the House and Senate from one woman in the House of Representatives during the sixty-fifth legislature to a total of 110 women in the 150th legislature).

173. Libr. of Congress, *15th Amendment to the U.S. Constitution*, WEB GUIDES, https://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html [https://perma.cc/RD7K-28 2S].

174. *See From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Representative Hon. John Lewis) ("In many parts of this country, people were denied the right to register to vote simply because of the color of their skin. They were harassed, intimidated, and fired from their jobs and forced off of farms and plantations. Those who tried to assist were beaten, arrested, jailed, or even murdered. Before the Voting Rights Act, people stood in unmovable lines.").

175. *See* Vann R. Newkirk II, *In the Georgia Governor's Race, the Game is Black Votes*, THE ATL. (Oct. 12, 2018), https://www.theatlantic.com/politics/archive/2018/10/georgia-race-mired-minority-vote-suppression-charges/572854/ [https://perma.cc/W3N5-S8RK] (describing the difficulties Black people faced registering and voting for Georgia's 2018 midterm and gubernatorial races).

176. Richie Zweigenhaft, *The 116th Congress Has More Women and People of Color Than Ever*, THE CONVERSATION (Nov. 8, 2018, 2:12 PM), https://theconversation.com/the-116th-congress-has-more-women-and-people-of-color-than-ever-but-theres-still-room-to-improve-1059 30 [https://perma.cc/L89H-W3BJ].

Inmate suffrage is no different from the movements before it. It is simply the next frontier. Prisoners are notoriously neglected by politicians. Giving them the right to vote would require politicians to visit prisons, see the conditions, and advocate policies that improve the lives of the incarcerated citizens of their district.[177] Accountability is even more reduced in Texas since prisoners are counted where they bunk when drawing electoral districts.[178] Incarcerated people are full citizens, but since they cannot vote, their representatives have no incentive to actually represent them.[179] Prisons are like neighborhoods entirely zoned out of voting. Inmates deserve the right to vote for candidates of their choice whom they believe will represent their interests and, if they desire, reflect their own community.

CONCLUSION

Leaders of all parties and persuasions sound the call to United States citizens to get out and vote.[180] Inmates are in a unique situation among Americans in that they are acknowledged as full citizens, but unable to claim a right to participate in running their own nation. To paraphrase a quote from suffragette Amelia Bloomer: it will not do to say that it is out of the inmate's sphere to assist in making laws, for if that were so, then it

177. Brettschneider, *supra* note 155.

178. Ramsey, *supra* note 38.

179. Brettschneider, *supra* note 155.

180. *See, e.g.*, Barack Obama, *Barack Obama: You Need to Vote Because Our Democracy Depends on It*, GUARDIAN (Sept. 8, 2018, 6:22 AM), https://www.theguardian.com/commentisfree/2018/sep/08/barack-obama-you-need-to-vote-because-our-democracy-depends-on-it [https://perma.cc/KC8Q-5KV3] ("But when there's a vacuum in our democracy, when we don't vote, when we take our basic rights and freedoms for granted, when we turn away and stop paying attention and stop engaging and stop believing and look for the newest diversion . . . then other voices fill the void."); Patrick Svitek, *In U.S. Senate Race, Both Sides Take Heart in Massive Early Voting Numbers*, TEX. TRIB. (Oct. 27, 2018), https://www.texastribune.org/2018/10/27/us-senate-ted-cruz-beto-orourke-see-promise-massive-early-voting/ [https://perma.cc/S8UQ-3ZKS] (statement by Ted Cruz during 2018 midterm elections: "I have always said if Texans show up and vote, we are going to have a very good election. Texans are showing up to vote."). *But see* David C. Barker & Christopher Jan Carman, *This is Why So Many Republicans Are Ready to Ignore Public Opinion on Health Care*, WASH. POST (June 27, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/27/this-is-why-so-many-republicans-are-ready-to-buck-public-opinion-on-health-care/?noredirect=on&utm_term=.ef9a0fa9b37c [https://perma.cc/GD8N-AVHY] (describing a study showing that Republican representatives do not often lead in accordance with their constituents polling preferences, exercising "trustee-style" representation).

should be also out of her sphere to submit to them.[181]

181. *Amelia Bloomer*, ATHENA UNLIMITED (Aug. 26, 2018), https://www.athenaunlimited.com/empowerher-blog/amelia-bloomer [https://perma.cc/ELF9-CK2M].