

Prison Gerrymandering in the Context of One Person, One Vote

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ABSTRACT

Every ten years, the Census Bureau sets out to “count everyone once, only once, and in the right place,”¹ and then political power is apportioned based on who is counted by the census. But where is “the right place” to count people who are incarcerated? Since the Founding, the census has counted individuals who are incarcerated as living at the prison where they are confined, despite often having no ties to the community in which the prison is located or an intent to remain in that community after release. States and local governments draw boundaries for political districts based on this census data, thus granting greater political influence to communities that have prisons at the expense of all other communities. This phenomenon is called prison gerrymandering.

To combat this phenomenon, activists have called on states and local governments to end the practice of prison gerrymandering, and they have had some success: eighteen states and many smaller localities have taken steps towards limiting the effect of prison gerrymandering. This Article seeks to document the current landscape of prison gerrymandering in two important ways. First, this Article conducts a close examination of the history of prison gerrymandering and specific state responses to the issue. Second, this Article assists in the work to end prison gerrymandering by centering the One Person, One Vote principle to determine where efforts to limit prison gerrymandering will have the maximum impact and by providing data and arguments that can be raised in an upcoming notice and comment period to compel the Census Bureau to change how it counts people who are incarcerated.

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¹ Ron Jarmin, *Counting Everyone Once, Only Once, and in the Right Place*, U.S. CENSUS BUREAU (Nov. 5, 2018), https://www.test.census.gov/newsroom/blogs/director/2018/11/counting_everyoneon.html [<https://perma.cc/U3SP-BN7U>].

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INTRODUCTION

Every ten years, following the decennial census, states and local governments around the country redraw the boundaries of voting districts to reflect population changes that occurred in the preceding decade. During this process in 2021, the City Council of Concord, the capital of New Hampshire, was tasked with ensuring that the 44,000 people who call Concord home² were evenly divided between Concord's ten voting wards. But not all of Concord's population lives there by choice. One in thirty-two people who live in Concord are caged in either the New Hampshire State Prison for Men or the New Hampshire Correctional Facility for Women and are unable to vote due to their incarceration status.³ During the redistricting process, the City Council assigned both prisons, and the 1,379 people incarcerated within, to Ward 5.⁴ At a redistricting meeting, one member of the public complained that the

² *Concord City, New Hampshire*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Concord_city_New_Hampshire?g=160XX00US3314200 [https://perma.cc/QX4G-P9P4] (last visited Jan. 12, 2024).

³ NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, 2021 ANNUAL REPORT 57–59 (2021) (noting that there were 1,379 people incarcerated in the two prisons on June 30, 2020).

⁴ Previously the prisons were located in Ward 3, but during the 2020 redistricting cycle they were moved into Ward. See Tony Schinella, *Concord City Council Approves New Voting Ward Maps*, PATCH (Nov. 11, 2021), <https://patch.com/new-hampshire/concord-nh/>

inclusion of the prisons made the votes of the non-incarcerated population of Ward 5 “twice as valuable as everyone else’s votes.”⁵ In reality, the voices of the individual voters in Ward 5 are 45% more valuable than those of their neighbors in the other districts, because over 30% of the population of Ward 5 is incarcerated. But the point remains the same: the voters who live in a district with a prison receive greater representation in government relative to voters in all other districts, because a significant portion of the population of their district is behind bars.

This phenomenon is called prison gerrymandering. It occurs because the Census Bureau counts individuals who are incarcerated as living in the prisons where they are confined, despite typically having no connection to the surrounding communities. While this is always how the census has counted people who are incarcerated, mass incarceration magnified the distorting effect of the policy.⁶ This article seeks to demonstrate the distorting effect of prison gerrymandering and call for an end to the process. To do so, Part I will introduce the constitutional standards that have governed the redistricting process for six decades. Part II will then discuss how prison gerrymandering operates in the abstract and how it undermines constitutional standards. Part III will then turn to the concrete, using data from nine states to demonstrate how prison gerrymandering has altered the political landscape in favor of rural, white communities at the expense of urban communities and communities of color. Part IV will then turn to a discussion of how felon disenfranchisement exacerbates the effect that prison gerrymandering has. Part V will then introduce potential solutions to the problem of prison gerrymandering, some of which could (and have) been implemented by the states themselves. Ultimately, however, this article will call for federal action, whether from the Census Bureau or from Congress, as the only way to guarantee uniformity in ending the process of prison gerrymandering.

I. THE EMERGENCE OF THE ONE PERSON, ONE VOTE PRINCIPLE

As will be detailed below,⁷ prison gerrymandering shifts the balance of power in states away from urban communities and toward rural ones. Incidentally, this is the exact effect that the U.S. Supreme Court developed the One Person, One Vote principle to counter. This Part traces the historical development of the One Person, One Vote principle from the post-Civil War political system that propped up rural interests to the 1960s when the Court developed the One Person, One Vote principle over the course of four cases. The final Section of the Part will explain how the One Person, One Vote principle is applied by courts.

concord-city-council-approves-new-voting-ward-maps [https://perma.cc/MQ8K-SGHM] (“The changes shifted Ward 5 north, absorbing a large chunk of Ward 3, around Penacook Lake.”).

⁵ *Id.*

⁶ See discussion *infra* Section II.B.1.

⁷ See *infra* Section II.B.1.

A. *The Postbellum Era*

At the national level, the years immediately following the end of the Civil War and Reconstruction were some of the most politically competitive in American history.⁸ The Democratic Party dominated in the South, Republicans were strong in the North, and the two parties competed over the Midwestern and border states.⁹ Both parties embraced partisan gerrymandering—the manipulation of district lines to guarantee a party’s electoral success—to gain a competitive edge.¹⁰ Republicans in Maine, for instance, were able to redistrict the state so as to prevent a Democrat from winning a House of Representatives seat for five successive elections, despite Republicans averaging just 54% of the statewide vote over those elections.¹¹ Democrats in Alabama, meanwhile, had drawn the map for the U.S. House of Representatives in such a way that each county likely favoring Republicans was placed in one easily winnable district, thus weakening Republicans throughout the rest of the state.¹²

State elections were similarly competitive, especially in the former Confederate states, due to the enfranchisement of Black men. The Fifteenth Amendment guaranteed that no man could be denied the right to vote on account of his race,¹³ while the Fourteenth Amendment created a punishment mechanism for what would occur if a state denied or abridged an eligible male voter’s right to vote for any reason other than “participation in rebellion, or other crime.”¹⁴ These two amendments, combined with Congress’s willingness to pass broad election protections, resulted in the proportion of Black men eligible to vote increasing from 0.5% to 80.5%.¹⁵ The extension of the franchise to Black men led to electoral successes for Black politicians; for example, during Reconstruction, nearly half of South Carolina’s lower house was Black, along with 29% of Mississippi’s house.¹⁶

This changed in the 1890s, when Southern legislatures and constitutional conventions—dominated by white Democrats—began systematically disenfranchising Black men.¹⁷ One example of this was the Mississippi Plan, “a dizzying array of poll taxes, literacy tests, understanding clauses, newfangled

⁸ ERICK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 82 (2013).

⁹ *Id.* at 84.

¹⁰ *Id.*

¹¹ *Id.* at 85.

¹² *Id.* at 84–85.

¹³ U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”).

¹⁴ *Id.* amend. XIV, § 2 (noting that representation would be reduced in proportion to the present of men who were disenfranchised). The phrase “or other crimes” in the amendment would later be litigated in the future to determine if it applied to conviction for any crime, or just those related to rebellion. *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (interpreting “other crimes” broadly).

¹⁵ RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 3 (2004).

¹⁶ *Id.*

¹⁷ *Id.*

voter registration rules, and ‘good character’ clauses,” that was implemented throughout the former Confederate states to keep Black men from voting with the thinnest veneer of doing so on a basis other than race.¹⁸ These laws were extraordinarily effective. In Louisiana, for instance, the number of Black men registered to vote fell from over 130,000 in 1896 to 1,342 just eight years later.¹⁹ The embrace of Jim Crow voter disenfranchisement ultimately led to the precipitous decline of *any* electoral competition in the former Confederate states. Between 1900 and 1964, a Republican never held a single seat in either house of Louisiana’s legislature.²⁰ Republicans, meanwhile, came to dominate in the Northern states during the first half of the 20th century.²¹

Historically, one of the key triggers for redistricting was a change of party control in the state legislature.²² If Democrats had drawn the previous map, but Republicans won a majority in the legislature, Republicans were incentivized to pass a new plan, one that favored their party.²³ When the fierce competition of the 19th century gave way to one-party rule in many states following the turn of the century, any incentive to redraw district boundaries dissipated.²⁴ Many states eschewed redistricting for decades, recognizing that there was nothing to gain from doing so. Wisconsin went thirty years without redistricting, Illinois went forty-six years, Connecticut went fifty years, and Ohio—which had redistricted “on an almost biannual basis in the 1870s and 1880s”—went nearly 40 years, not redistricting at all between 1914 and 1952.²⁵

At this same time, there was a profound reordering of where Americans lived. Spurred on by the Industrial Revolution and immigration, America’s urban centers grew rapidly around the turn of the century.²⁶ 1920 marked the first census in which a majority of Americans were classified as living in urban areas.²⁷ This would have a significant impact on congressional reapportionment—the determination of how many Representatives each state will have in Congress. The basis of reapportionment is the census: states that have grown in population may receive additional Representatives, while those that have lost population may lose Representatives. As the nation continued to become an increasingly urban one, disproportionately rural states were set to have their representation in Congress, and therefore their influence, reduced. These rural states banded together and successfully blocked the reapportionment process for the only time in American history.²⁸ As a result of this maneuvering, rural states exerted outsized influence within Congress during the 1920s.

¹⁸ CAROL ANDERSON, *ONE PERSON, NO VOTE* 3 (2018).

¹⁹ *Id.* at 4.

²⁰ ENGSTROM, *supra* note 8, at 172.

²¹ *Id.*

²² *Id.* at 173 (“When a new party came into control of state government, and the prior congressional-district map was drawn by the opposition party, the probability of redrawn congressional districts grew.”).

²³ *Id.*

²⁴ *Id.* at 173–74.

²⁵ *Id.* at 171–72.

²⁶ *Id.* at 174.

²⁷ *Id.*

²⁸ *Id.*

This effect was mirrored at the state legislative level. By the 1960s, inequality of populations between state legislative districts affected nearly every state in the country.²⁹ A state senator in New Jersey could represent anywhere from 48,000 to 923,000 constituents.³⁰ The largest district for the Georgia House of Representatives contained roughly 100 times as many people as the smallest district.³¹ In Florida, meanwhile, it was possible for “legislative majorities in both branches of the legislature . . . [to] represent less than 20% of the residents.”³²

Parties repeatedly turned to the judiciary to challenge such patently unequal districts, but the United States Supreme Court consistently refused to intervene.³³ In 1946, for example, the Court declined to strike down Illinois’ redistricting plan that was adopted in 1901—which had become grossly malapportioned in the intervening decades—because doing so would involve becoming entangled in the “political thicket.”³⁴ In Justice Frankfurter’s view, granting the plaintiffs their requested remedy would require the Court to cut to “the very being of Congress.”³⁵ The Court was still unwilling to enter the political thicket as late as 1956, when the full court dismissed a malapportionment claim from Tennessee without dissent.³⁶ This changed in 1962, when the Court issued the first in a line of cases recognizing the justiciability of gerrymandering claims in federal court and creating a standard by which such claims could be assessed.

B. *The Redistricting Revolution*

In the landmark case *Baker v. Carr*, in an opinion authored by Justice Brennan, the Court for the first time held that challenges to redistricting plans do not constitute nonjusticiable political questions.³⁷ The plaintiffs in *Baker* challenged the redistricting plan that had been in place for over fifty years, arguing that it diluted their vote in violation of the Fourteenth Amendment.³⁸ At the time *Baker* was handed down in 1962, Tennessee’s legislature had failed to redraw the districts for either house since 1901.³⁹ The district court dismissed the plaintiffs’ claims, finding that the court lacked subject matter jurisdiction and that, even if the court had jurisdiction, the plaintiffs’ claims were nonjusticiable.⁴⁰ As to the first point, the Supreme Court noted that the plaintiffs’ claim, that the 1901 plan violated the Fourteenth Amendment,

²⁹ J. Douglas Smith, *The Supreme Court Could Send America Back a Century*, TIME (Dec. 8, 2015), <https://time.com/4139409/one-person-one-vote/> [<https://perma.cc/AV7L-8GXC>].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

³⁴ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

³⁵ *Id.*

³⁶ *Baker*, 369 U.S. at 280 (Frankfurter, J., dissenting).

³⁷ *Id.* at 209.

³⁸ *Id.* at 187–88.

³⁹ *Id.* at 191.

⁴⁰ *Id.* at 196.

arose under the Federal Constitution, and the Court therefore had jurisdiction.⁴¹ As to the second point, Justice Brennan first noted that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”⁴² Instead, political questions are those in which—were the Court to act—it would implicate the separation of powers.⁴³ Justice Brennan went on to identify common characteristics of political question cases, and ultimately decided that none applied to the plaintiffs’ allegation that the state redistricting plan violated the Federal Constitution.⁴⁴

Baker was followed just two years later by a pair of redistricting cases, the first of which was *Wesberry v. Sanders*.⁴⁵ Whereas the Court in *Baker* heard a challenge to malapportioned districts for the state legislature, *Wesberry* was a challenge to Georgia’s malapportioned districts for U.S. House of Representatives.⁴⁶ The Georgia districts, which had not been redrawn since 1931, were so unequal by the 1960s that the Fifth District (containing Fulton, Dekalb, and Rockdale Counties) contained three times as many people as the Ninth District.⁴⁷ In finding that this challenge was justiciable, the Court noted that allowing one district to contain three times as many people as another “would not only run counter to our fundamental ideas of democratic government, [but] it would cast aside the principle of a House of Representatives elected ‘by the People.’”⁴⁸ The Court ultimately found that the reasons for granting relief in *Baker* applied with equal force in *Wesberry*.⁴⁹ To do otherwise would be counter to notions of common sense and justice.⁵⁰

Baker and *Wesberry* granted the federal judiciary the power to hear claims of malapportionment in both state legislative and congressional redistricting contexts, but the Court failed to set out a clear standard for the lower courts to use when assessing whether a redistricting plan complied with the Constitution. That standard came several months after *Wesberry* was handed down in the case *Reynolds v. Sims*.⁵¹ *Reynolds* was a challenge to the Alabama legislature’s apportionment plan, arguing that it violated the Equal Protection Clause.⁵² Like many other states, Alabama failed to redistrict between 1900 and 1960, despite the state constitution requiring that district maps be redrawn every decade.⁵³ The lower court, relying on *Baker*, noted that the plaintiffs met the requirements for standing, justiciability, and jurisdiction.⁵⁴

⁴¹ *Id.* at 200.

⁴² *Id.* at 209.

⁴³ *Id.* at 210.

⁴⁴ *Id.* at 226.

⁴⁵ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁴⁶ *Id.* at 2.

⁴⁷ *Id.*

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 18.

⁵¹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁵² *Id.* at 537.

⁵³ *Id.* at 540.

⁵⁴ *Id.* at 542.

The court went on to find that, due to population changes of the preceding decades, the Alabama legislature was not apportioned based on population.⁵⁵

The Supreme Court, in striking down the 1901 redistricting plan and two remedial plans that the Alabama legislature sought to implement, noted that “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”⁵⁶ The Equal Protection Clause thus requires that districts be apportioned based upon equal population.⁵⁷ Critically, the Court held that the Fourteenth Amendment requires that the state draw districts for each house of the state legislature that are as close in population as they can be.⁵⁸ The Court explicitly noted that mathematical precision was not the sole consideration in redistricting; respect for political subdivisions within a state could justify some flexibility in reapportioning.⁵⁹ Critically, the Court would allow greater variance between state legislative districts than in congressional districts.⁶⁰ Deviation, however, must be based on “legitimate considerations incident to the effectuation of a rational state policy.”⁶¹ This principle would be summarized simply as “one man, one vote.”⁶²

Redistricting was again before the Supreme Court in the 1968 case *Avery v. Midland County* challenging malapportionment at the local government level.⁶³ Midland County’s governing body—the Commissioner Courts—was made up of five members: a County Judge who was to be elected at large, and four Commissioners who each represented a district.⁶⁴ When drawing those four districts, the Commissioner Court placed virtually all of the county’s population in a single district representing 67,906 people, while the other three districts represented a total of 2,094 people.⁶⁵ The Texas Supreme Court struck down the maps, but failed to require that local government districts be composed of substantially equal populations. Instead the Court permitted redistricting officials at the local level to consider other factors, such as “land areas, geography, miles of county roads and taxable values.”⁶⁶ The Supreme Court disagreed with this approach and, in striking down the district maps, held that because the Fourteenth Amendment applies not just to state governments, but also to local governments,⁶⁷ the One Person, One Vote principle applies to local governments.⁶⁸

⁵⁵ *Id.*

⁵⁶ *Id.* at 567.

⁵⁷ *Id.* at 568.

⁵⁸ *Id.* at 577.

⁵⁹ *Id.* at 578.

⁶⁰ *Id.*

⁶¹ *Id.* at 579.

⁶² *Avery v. Midland County*, 390 U.S. 474, 476 (1968) (“[T]he one man, one vote principle of *Reynolds v. Sims*.”). Despite the Court referring to this as the One Man, One Vote principle, this Article refers to it as the more inclusive (and accurate) One Person, One Vote principle.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 478.

⁶⁷ *Id.* at 480 (“The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.”).

⁶⁸ *Id.* at 479–80.

C. How Courts Apply the One Person, One Vote Principle

Taken together, *Baker*, *Wesberry*, *Reynolds*, and *Avery* developed the One Person, One Vote principle for assessing whether a redistricting plan complies with the Equal Protection Clause and held that the standard applies in the U.S. House of Representatives, state legislative, and local government contexts. In the decades following these cases, the Court continued to clarify exactly what this standard requires. In the congressional redistricting context, the Supreme Court allows only “population variances which are *unavoidable* despite a good-faith effort to achieve *absolute* equality, or for which justification is shown.”⁶⁹ For comparison, a New Jersey congressional redistricting plan that had a 0.6984% deviation between its largest and smallest districts was struck down for failing to meet this standard, while a West Virginia redistricting plan, with a deviation of 0.79%, was upheld as the deviation was necessary to further legitimate state objectives.⁷⁰ In the context of state and local government redistricting, meanwhile, the Supreme Court allows greater deviation between districts. To establish a *prima facie* violation of the Equal Protection Clause, there must be a deviation of at least 10% between the largest and smallest districts.⁷¹ If a plaintiff seeks to challenge a plan that deviates by less than 10%, they bear the burden of demonstrating that “it is more probable than not that” the deviation “reflects the predominance of illegitimate reapportionment factors,” as opposed to the use of “legitimate considerations.”⁷²

II. PRISON GERRYMANDERING AND THE DISTORTION OF THE ONE PERSON, ONE VOTE PRINCIPLE

This Part details how prison gerrymandering is antithetical to the One Person, One Vote framework. To do so, this Part begins by explaining how prison gerrymandering operates, followed by a discussion of how prison gerrymandering shifts the balance of power between communities and creates problems for those who represent districts that contain prisons and those who represent districts with high incarceration rates.

A. How Prison Gerrymandering Works

When a state or local government sets out to redistrict in accordance with the One Person, One Vote principle, or when a court analyzes whether that

⁶⁹ *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (italics added).

⁷⁰ L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10639, CONGRESSIONAL REDISTRICTING 2021: LEGAL FRAMEWORK 2 (2021) (pointing to compactness, respect for municipal boundaries, the preservation of previous districts, and avoiding races between two incumbents as potential legitimate objectives).

⁷¹ *See, e.g., Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 259 (2016) (noting that in the context of state and local government redistricting, deviations of less than 10% are considered “minor deviations,” which “do not, by themselves, ‘make out a *prima facie* case of invidious discrimination.’”).

⁷² *Id.*

standard has been met, each will rely on data collected by the Census Bureau during its decennial census. Not only does this data inform how many people must be in each district, but it also enables redistricting officials to determine where district boundaries should be placed by providing extensive detail as to where in a state/county/city people are located. The Census Bureau does this via the “Usual Residence” rule, which requires that individuals be counted as living in the “place where a person lives and sleeps most of the time.”⁷³

For most Americans, this is a straightforward analysis—they live and sleep most of the time at their home. This analysis is more difficult when applied to groups like college students, boarding school students, or incarcerated individuals, all of whom may be living away from the place that they would consider their “home.”⁷⁴ For purposes of the census, college students who are living in dormitories are counted at their school.⁷⁵ Likewise, incarcerated people are counted where they are confined, rather than the community they lived in prior to incarceration.⁷⁶ The problem, however, is that the circumstances of incarcerated individuals are so distinct from college students, that it is unreasonable to count them the same way. First, people in prison are confined against their will, while students choose to attend university. Second, the vast majority of people who are incarcerated for felonies are barred from voting,⁷⁷ while university students may still exercise their right to vote. The inability to vote places incarcerated individuals more in line with boarding school students, most of whom are under 18 and therefore cannot vote. Boarding school students are counted by the Census as living at their parents’ homes, rather than at the schools that they attend and on whose campuses they live for the majority of the year.⁷⁸

While this is always how the Census Bureau has counted incarcerated individuals, it made little difference in an era in which the United States incarcerated a relatively small portion of its population. When the U.S. Supreme Court created the One Person, One Vote principle in 1964, the number of people in the United States who were incarcerated was 214,336.⁷⁹ When the Census was conducted in 2020, the number of people incarcerated in state and federal prisons had jumped to 1,215,800,⁸⁰ an almost six-fold increase from 1964. The rapid growth in the number of people incarcerated precipitated a

⁷³ U.S. CENSUS BUREAU, RESIDENCE CRITERIA AND RESIDENCE SITUATIONS FOR THE 2020 CENSUS OF THE UNITED STATES 1 (2020), <https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf> [https://perma.cc/6KPK-VBZE] [hereinafter 2020 Residence Criteria].

⁷⁴ *See id.*

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 6–7 (correctional facilities for adults and for juveniles).

⁷⁷ *See* Section IV.A (discussing felon disenfranchisement).

⁷⁸ 2020 Residence Criteria, *supra* note 73, at 4.

⁷⁹ BUREAU OF JUST. STAT., U.S. DEPT OF JUST., NCJ-85861, PRISONERS 1925–81, at 2 (1982).

⁸⁰ E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., NCJ 302776, PRISONERS IN 2020—STATISTICAL TABLES 1 (2021).

dramatic rise in the construction of new prisons, most of which were built in rural communities.⁸¹

By the 1990s, twenty-five prisons were constructed in rural communities annually, with a new one opening every fifteen days.⁸² This trend in prison construction, spurred by donated land and promises of economic growth,⁸³ made it so that prisons are now disproportionately located in rural areas.⁸⁴ At the same time, people from urban areas are incarcerated at a disproportionate rate compared to those in rural areas.⁸⁵ Taking these two occurrences together, a growing number of people are displaced from urban areas into rural communities for their incarceration. This process systematically decreases the population of urban communities and artificially inflates the populations of rural ones.

B. Prison Gerrymandering's Harms

The population distortion between districts is then embedded in the census data and distorts all of the work that redistricting officials engage in, because officials rely on the Census Bureau's data when drawing districts. This has profound impacts on our representative form of government, on both a macro and micro scale. On the macro scale, prison gerrymandering causes communities with prisons to have an outsized influence over politics at the expense of urban communities and other rural communities without prisons. On the micro scale, prison gerrymandering treats incarcerated individuals as residents of districts whose representatives may see the interests of the incarcerated population as being at odds with the needs of their district.

1. The Distorting Effect Between Communities

By apportioning power on the basis of distorted populations, states are arguably violating the One Person, One Vote principle.⁸⁶ Take, for instance, Concord, New Hampshire's Ward 5, where roughly 31% of the population of the Ward is incarcerated.⁸⁷ While the voters in Concord's other nine wards are one of 4,400, the voters in Ward 5 are effectively one of 3,021⁸⁸ because

⁸¹ Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION 197, 198* (Marc Mauer & Meda Chesney-Lind eds., 2002).

⁸² *Id.*

⁸³ *Id.* at 200 (discussing how prison officials sought to convince local communities that prisons were good for their economies and how communities often donated land to prisons to incentivize prisons to locate to their town).

⁸⁴ SONYA R. PORTER, JOHN L. VOORHEIS, & WILLIAM SABOL, U.S. CENSUS BUREAU, *CORRECTIONAL FACILITY AND INMATE LOCATIONS: URBAN AND RURAL STATUS PATTERNS 12* (Working Paper 2017-08, 2017).

⁸⁵ *Id.*

⁸⁶ Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PENN. L. REV. 431, 434 (2003).

⁸⁷ See *supra* notes 3–5 and accompanying text.

⁸⁸ See *supra* notes 3–5 and accompanying text.

one third of the population cannot vote. Thus, the voices of each individual in Ward 5 hold greater sway over the political process than do those of other voters in the state due to the effects of prison gerrymandering. A similar effect has been documented in other jurisdictions. Perhaps most notoriously, one Iowa city council member was elected after receiving just two write-in votes because only fifty-eight people (in a district of roughly 1,400) were not incarcerated.⁸⁹ In one Tennessee county commissioner district, 88% of the population was incarcerated as of 2008.⁹⁰ Finally, a county in Wisconsin had a district for local supervisor that was 72% incarcerated.⁹¹ In each of these instances, the nonincarcerated people living in a district that contains a prison are advantaged relative to all other people within the state, county, or municipality.

Additionally, counting incarcerated people from urban areas in the rural areas where they are incarcerated, and not where they are actually from, transfers political power from urban areas to rural areas and from rural communities without prisons to rural communities with them.⁹² One Texas report found that if people who are incarcerated were counted as living in their home communities rather than the prisons where they are confined, “Harris County (containing the city of Houston) and Dallas County would likely have received an additional state house seat each.”⁹³ As a result of prison gerrymandering and the geography of mass incarceration, the pro-rural population bias that the Supreme Court sought to eliminate in the 1960s has been restored.

Beyond exacerbating an abstract “urban/rural divide,” prison gerrymandering has profound impacts on representation for people of color. The rural communities that prisons are located in are disproportionately white, while the people who are incarcerated are disproportionately people of color.⁹⁴ Black men are four times more likely than white men—and Black women are 1.6 times more likely than white women—to become incarcerated at some point over the course of their lifetime.⁹⁵ Meanwhile, “[i]n 2021, American Indian and Latinx people were imprisoned at 4.2 times and 2.4 times the rate of whites, respectively.”⁹⁶

The discrepancy can be seen at the national level, but also within individual cities by comparing incarceration rates—the proportion of residents who are incarcerated, often in prisons very far from their home—between

⁸⁹ Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES, Oct. 23, 2008, <https://www.nytimes.com/2008/10/24/us/politics/24census.html> [https://perma.cc/9WYS-EHZQ] (noting that the two votes he received were from his wife and neighbor).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Garrett Fisher, Taylor King, & Gabriella Limón, *Prison Gerrymandering Undermines Our Democracy*, BRENNAN CTR. FOR JUST. (Oct. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy> [https://perma.cc/UY9Q-HXY5].

⁹³ *Id.* See JOAQUIN GONZALEZ, CAMERON D. CLARK, ALESANDRA LOZANO, KATYA EHRESMAN, JOSHUA MOSES, REID PILLFANT, MIGUEL RIVERA, & ELENA THOMPSON, TEX. CIVIL RIGHTS PROJECT, PRISON GERRYMANDERING REPORT 2021 6 (2021).

⁹⁴ Fisher et al., *supra* note 92.

⁹⁵ NAZGOL GHANDNOOSH, THE SENT'G PROJECT, ONE IN FIVE: ENDING RACIAL INEQUITY IN INCARCERATION 3 (2023).

⁹⁶ *Id.*

communities. City-wide, the incarceration rate in New Orleans is 652 for every 100,000 residents.⁹⁷ But many of New Orleans's predominantly Black neighborhoods have incarceration rates in excess of 1,000 prisoners per 100,000 residents.⁹⁸ In Los Angeles, meanwhile, "the 14 neighborhoods with the highest imprisonment rates are all clustered in South Central Los Angeles, a part of the city where 57% of residents are Latino, 38% are Black, and 2% are white."⁹⁹ In Las Vegas and North Las Vegas, the most incarcerated part of the cities are the neighborhoods that are historically Black.¹⁰⁰

Prison gerrymandering thus strips political power from urban areas—especially those areas that are predominantly composed of people of color—and transfers it to rural, disproportionately white areas. This political power is then delegated to representatives who, because of the financial and political benefits of incarceration in their communities, are incentivized to push for longer sentences and more policing—policy outcomes that directly harm incarcerated individuals (who are a significant portion of their ostensible constituents) and communities whose political power has been stripped from them.

2. Representation Problems

When Danny Young, the Iowa City Council member who won his election after receiving just two write-in votes, was asked whether he considered the incarcerated population of his ward to be his constituents, he responded: "They don't vote, so, I guess, not really."¹⁰¹ Evidence from legislators and legislative staffers suggests that the lawmakers who represent districts containing prisons do not always consider the incarcerated people in their communities to be "real constituents."¹⁰² As Keith Cunningham, the Director of Allen County Ohio's Board of Elections explained, "prisoners have no communications, no voting rights, and are not a constituency."¹⁰³

Much of the dismissiveness toward incarcerated individuals stems from the economics of incarceration that led to the rapid construction of prisons in rural communities in the first instance. Since the 1990s, prison construction has been pitched to local governments as a driver of economic growth for

⁹⁷ Spencer Nelson & Peter Horton, *Where People in Prison Come From: The Geography of Mass Incarceration in Louisiana*, PRISON POL'Y INITIATIVE (July 2023), <https://www.prisonpolicy.org/origin/la/2022/report.html> [<https://perma.cc/3JUW-GFBT>].

⁹⁸ *Id.*

⁹⁹ Emily Widra & Felicia Gomez, *Where People in Prison Come From: The Geography of Mass Incarceration in California*, PRISON POL'Y INITIATIVE (Aug. 2022), <https://www.prisonpolicy.org/origin/ca/2020/report.html> [<https://perma.cc/435J-NM6A>].

¹⁰⁰ Emily Widra, Noé Orosco, & Athar Haseebullah, *Where People in Prison Come From: The Geography of Mass Incarceration in Nevada*, PRISON POL'Y INITIATIVE (Aug. 2022), <https://www.prisonpolicy.org/origin/nv/2020/report.html> [<https://perma.cc/UGX7-7PUP>].

¹⁰¹ Roberts, *supra* note 89 (internal quotation marks omitted).

¹⁰² Fisher et al., *supra* note 92.

¹⁰³ John Hejduk, *Census Bureau's Prisoner Count Hurts Ohio Democracy*, PRISON POL'Y INITIATIVE (Oct. 24, 2007), <https://www.prisonersofthecensus.org/news/2007/10/24/ohiocities/> [<https://perma.cc/MKP3-DA3N>].

rural, depressed areas.¹⁰⁴ Local governments, in order to entice the construction of prisons in their communities make significant concessions, including land donations and tax abatements.¹⁰⁵ These concessions are made in the hope that the prisons will ultimately lead to significant payoffs in the form of good jobs for their residents and, relatedly, increased tax revenue for their local government.

Despite the promises from prison officials that people would be working and spending money in the communities, the benefits of prisons have been less than expected.¹⁰⁶ Most of the jobs in the prison, and almost all of the high-paying management positions, go to people who live outside of the communities.¹⁰⁷ Prisons are also not strong drivers of economic progress in rural areas, as they are not linked to the local economy and do not attract associated businesses.¹⁰⁸ At the same time, the development of prisons is associated with the replacement of local businesses by chains that do not reinvest profits back into the local community, thus actually reducing the total economic circulation of money within a community.¹⁰⁹

Notwithstanding these findings, many still believe that prisons are a good investment for their host communities.¹¹⁰ This belief can lead legislators who represent prison districts to oppose criminal justice reform and push for more harsh criminal sanctions to keep prisons at full capacity.¹¹¹ A group of political science researchers dubbed this phenomenon the “carceral representation hypothesis,” after finding strong support for the belief that “having a privately owned or managed ICE detention facility in a legislator’s district” was correlated with that legislator supporting harsher immigration laws.¹¹² The same is true of criminal justice reform generally; “political representatives in more rural areas with prison infrastructure support punitive criminal justice policies more than their partisan allies and their rural counterparts without any prison site.”¹¹³ Higher incarceration rates continued to spur demand for more prisons, while prison development in depressed, rural areas strengthened

¹⁰⁴ Huling, *supra* note 81, at 199 (“prisons are now heralded by economic development professionals and politicians of all stripes as beneficial economic engines for depressed rural economies.”).

¹⁰⁵ *Id.* at 200.

¹⁰⁶ *Id.* at 201.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 202.

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Tom Meagher & Christie Thompson, *So You Think a New Prison Will Save Your Town?*, THE MARSHALL PROJECT (June 14, 2016) (quoting the Federal Bureau of Prisons (BOP)), <https://www.themarshallproject.org/2016/06/14/so-you-think-a-new-prison-will-save-your-town> [<https://perma.cc/R7YV-YZUU>] (“The BOP’s positive impact on rural communities is significant.”). The belief among government officials turning to prisons as economic drivers can be summed up this way: “[T]he prison business is essentially recession-proof and they are built to last.” *Id.*

¹¹¹ Rebecca U. Thorpe, *Perverse Politics: The Persistence of Mass Imprisonment in the Twenty-first Century*, 13 PERSPS. ON POL. 618, 629 (2015).

¹¹² Loren Collingwood, Jason L. Morin, & Stephen Omar El-Khatib, *Expanding Carceral Markets: Detention Facilities, ICE Contracts, and the Financial Interests of Punitive Immigration Policy*, 10 RACE & SOC. PROBS. 275, 275 (2018).

¹¹³ Thorpe, *supra* note 111, at 631–32.

the retributive views of policymakers, leading to support for policies that drive incarceration rates.¹¹⁴

Meanwhile, the representatives of urban districts, who have had their populations reduced by prison gerrymandering, are frequently the ones who provide constituent services for people who are incarcerated and their loved ones.¹¹⁵ Tellingly, legislators are more likely to perceive people from their district who are incarcerated outside of the district as their constituents, than people originally from outside of their district who are incarcerated within it.¹¹⁶ One Texas state representative from Houston even employed a staffer whose entire responsibility was to respond to requests from individuals who were originally from Houston but were incarcerated elsewhere in the state.¹¹⁷

The view that people who are incarcerated are still residents of their home communities, not the communities in which they are incarcerated, complies with how people who are incarcerated are treated for residency purposes in nearly all other facets. A 2010 decision from the First Circuit Court of Appeals, for example, dismissed a lawsuit filed by a man incarcerated in New York against a New Hampshire resident for lack of diversity jurisdiction, because the plaintiff lived in New Hampshire prior to incarceration.¹¹⁸ The First Circuit held that “the courts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration, even if he is subsequently incarcerated in a different state.”¹¹⁹ Likewise, when people who are incarcerated are eligible to vote cast their ballots, they do so at their last known address before incarceration—not the prison they are incarcerated in.¹²⁰

Prison gerrymandering is thus an outlier in how people who are incarcerated are considered for purposes of residency. What is essentially a policy fluke resulting from a centuries old interpretation of the phrase “usual residence” has the practical effect of shifting considerable amounts of political power away from already marginalized communities. This can magnify the natural electoral bias that tends to favor the Republican Party, as Republican voters tend to live in more rural and sparsely populated areas.¹²¹ The following

¹¹⁴ *Id.* at 632. For example, before New York ended the practice of prison gerrymandering, two Republican Senators who together represented 23% of the state’s incarcerated population used their influential positions in the New York State Senate to oppose the repeal of the drug laws that fueled an incarceration boom in New York. See Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POL’Y INITIATIVE (April 22, 2002), <https://www.prisonpolicy.org/importing/importing.html> [<https://perma.cc/39QZ-J5R7>].

¹¹⁵ Fisher et al., *supra* note 92.

¹¹⁶ Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REV. 417, 421 (2018).

¹¹⁷ *Id.* See also Jonathan Tilove, *Prisoners Can’t Vote, but They Can Subtly Shift Political Power*, AUSTIN AMERICAN-STATESMAN (Sept. 25, 2018), <https://www.statesman.com/story/news/2013/12/01/prisoners-cant-vote-but-they-can-subtly-shift-political-power/10138058007/> [<https://perma.cc/RV2L-UMKE>].

¹¹⁸ Aleks Kajstura, *Person’s Home Does Not Change with Incarceration*, PRISON POL’Y INITIATIVE (March 26, 2010), <https://www.prisonersofthecensus.org/news/2010/03/26/hall/> [<https://perma.cc/2DKV-MC2N>]; see also Hall v. Curran, 599 F.3d 70 (1st Cir. 2010).

¹¹⁹ Hall, 599 F.3d at 72.

¹²⁰ Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355, 366 (2011).

¹²¹ Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 239 (2013).

Part will leverage data from nine states to demonstrate the distorting effects prison gerrymandering has within states.

III. PRISON GERRYMANDERING—IN PRACTICE

When discussing prison gerrymandering, it is important to move beyond an abstract discussion to concrete examples of how prison gerrymandering operates on the various states. This is because each state's individual nuances determine the impact prison gerrymandering has on that state. Statistics including the number of people incarcerated, the number of prisons, and the geography of incarceration each play a prominent role, but so too do institutional factors like what body draws political boundaries and whether that body requires bipartisan cooperation to adopt those boundaries. Discussing individual states also allows for inclusion of the One Person, One Vote principle to help contextualize the conversation.

Including the One Person, One Vote analysis is critical, because activists opposed to prison gerrymandering often focus their reform efforts at the state legislative or local levels. The logic behind this strategy is that these districts are smaller, so incarcerated populations have a larger statistical impact during elections. The problem with this strategy, however, is that the Supreme Court allows for greater deviation at the state and local level than for U.S. House of Representatives districts.¹²² It is possible for the state legislature to continue apportioning political power to favor prison districts, even in areas where activists are successful in eliminating the practice of prison gerrymandering. The legislature could do so by drawing districts with prisons to have slightly fewer people, while drawing urban districts with slightly more people. As the data below will demonstrate, this is not an outside possibility.

Finally, it is important to examine prison gerrymandering at the state level, because it allows for a discussion of the efforts that some states have taken to reform prison gerrymandering. As will be discussed later, eighteen states have taken steps to limit prison gerrymandering in some way and at some level of government.¹²³

The next Section will present four detailed case studies that demonstrate the effect that prison gerrymandering has on those states (New York, Pennsylvania, Texas, and Georgia),¹²⁴ including mention of reforms adopted

¹²² WHITAKER, *supra* note 70, at 2.

¹²³ See *infra* Sections V.A–B.

¹²⁴ These four states were selected for a variety of reasons. First, the two earliest studies seeking to quantify the effect that prison gerrymandering has on states were conducted in New York and Pennsylvania. Second, these are several of the largest states in the country, representing tens of millions of people. Third, each of these states is in the top 10 in terms of number of people incarcerated by state. See *Prison Population by State*, WISEVOTER, <https://wisevoter.com/state-rankings/prison-population-by-state/> [<https://perma.cc/67QC-JZ6Q>] <https://wisevoter.com/state-rankings/prison-population-by-state/> (last visited Nov. 8, 2024). Fourth, these states present a range of potential actions that can be taken to address prison gerrymandering—from doing nothing to implementing changes at the redistricting commission level to passing legislation. Finally, the four states demonstrate the potential limitations of focusing solely on the size

by those states where relevant. The following Section will present the data from the four case study states and five additional states.

A. Case Studies

1. New York

One of the earliest studies into prison gerrymandering demonstrated how the practice effectively transferred political power in the New York Senate away from New York City to the rural areas upstate.¹²⁵ Without taking prison gerrymandering into account, the New York Senate reapportionment plan already pushed the limits of what is constitutionally permissible under the One Person, One vote principle. The deviation between the largest and smallest district was 9.78%, just shy of the 10% *prima facie* threshold for showing unconstitutional gerrymandering.¹²⁶ The plan sought to favor rural voters over urban ones by making rural districts as small as possible to strengthen the relative weight of rural votes, while diluting urban votes by packing as many people into those district as possible.¹²⁷ Several rural districts, for instance, had reported populations that were almost 5% less than the target population of 306,072, while a number of urban districts in Queens were over 4% greater than the target population.¹²⁸ Because of this, even small changes in district populations, whether adding people to the urban districts or removing people from the rural districts, would be enough to support a claim of vote dilution under the Fourteenth Amendment.

Peter Wagner, co-founder of the Prison Policy Initiative whose work helped launch the movement to eliminate prison gerrymandering, demonstrated that prison gerrymandering was the only reason that the New York redistricting plan was constitutionally permissible. At the time of his study, just one in four people who were incarcerated in New York were originally from upstate New York, but nine of every ten incarcerated individuals were confined there.¹²⁹ The net effect of prison gerrymandering on New York City was the loss of 43,740 people from the city, often to the rural prisons in the north.¹³⁰ After removing the incarcerated populations from the rural prison districts, the deviation between the least populated and most populated Senate districts increases to 10.84%, enough to establish a *prima facie* claim of vote dilution.¹³¹ In total, there are five rural Senate districts that, without the incarcerated population, caused a deviation greater than 10%, even without

of the effect that prison gerrymandering has without taking into consideration the One Person, One Vote principle.

¹²⁵ Wagner, *supra* note 114.

¹²⁶ *Id.*

¹²⁷ *Id.* ("Typically each chamber draws districts as numerically small as possible in areas where it is likely to be elected, and districts as numerically large as possible in areas where it is unlikely to be elected.").

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

any of the incarcerated individuals being counted at their last known address in New York City.¹³²

Due to limitations in data that Wagner had access to, he was forced to rely on averages, assuming that each New York City Senate district would contain the same number of incarcerated individuals.¹³³ The problem with this strategy, however, is that it is unrepresentative of the reality of the geography of incarceration. Subsequent research, for instance, showed that roughly four in ten people incarcerated from New York City hail from a small number of neighborhoods.¹³⁴ In Queens, the incarceration rates in the neighborhoods of South Jamaica and Baisley Park are between 422 and 722 per 100,000 residents, while other parts of the borough have incarceration rates between 9 and 65 per 100,000.¹³⁵ While this is a notable limitation of Wagner's study, it actually serves to strengthen his findings. Wagner assumed that each New York City Senate district would receive an additional 1,800 residents if incarcerated individuals were counted as living in the districts they lived in prior to incarceration, which would cause each district in Queens to be 4.45-4.64% larger than the target population.¹³⁶ Under this assumption, the largest deviation between undersized and oversized districts statewide would be 11.43%.¹³⁷ In reality, if prison gerrymandering ended, some Queens districts would see very small increases to their populations, while others would likely see increases in excess of the 1,800 assumed by Wagner. The largest deviation between districts would thus likely be even greater than 11.43%.

Wagner's findings reflected the state of prison gerrymandering in New York following the 2000 Census. Before the redistricting cycle following the 2010 Census, however, New York abandoned the practice of prison gerrymandering.¹³⁸ Two political science professors at Auburn University found that ending prison gerrymandering could alter the political landscape within the state.¹³⁹ Specifically, counting incarcerated people as living in upstate New York, rather than where they were actually from (largely New York City), "skewed the partisan vote shares across the state to the disadvantage of Democratic candidates."¹⁴⁰ Interestingly, the authors also found that abandoning the practice of prison gerrymandering led to an increase in the average margin of victory in races, likely due to the fact that increased urban populations enabled the Legislature to draw districts that complied with One Person, One Vote, without having to incorporate more suburban and rural areas into the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Emily Widra & Nick Encalada-Malinowski, *Where People in Prison Come From: The Geography of Mass Incarceration in New York*, PRISON POL'Y INITIATIVE (June 2022), <https://www.prisonpolicy.org/origin/ny/2020/report.html> [<https://perma.cc/Z3TA-YU3P>].

¹³⁵ *Id.*

¹³⁶ Wagner, *supra* note 114.

¹³⁷ *Id.* (The smallest district is 6.79% below the average.)

¹³⁸ Ryan D. Williamson & Bridgett A. King, *Redistricting and Incarceration: Examining the Electoral Consequences of New York's Prohibition on Prison Gerrymandering*, 22 STATE POL. & POL'Y Q. 418, 422 (2022).

¹³⁹ *Id.* at 433.

¹⁴⁰ *Id.* at 431.

districts.¹⁴¹ Inversely, “not having to devote suburban and rural areas to Democratic-leaning districts facilitates the creation of more uniformly Republican-friendly districts.”¹⁴²

The authors were careful to note that this outcome may not be replicated in other, particularly more electorally competitive, states.¹⁴³ New York is unique, in that it is dominated by the Democratic Party, with roughly 60% of the state voting for the Democratic presidential candidate consistently over the past quarter century.¹⁴⁴ The authors thus saw the increase in the average margin of victory not as a negative externality of abandoning prison gerrymandering, but a move toward elections being more consistent with expectations.¹⁴⁵ Abandoning prison gerrymandering thus led to New York’s legislature becoming more representative of the preferences of the voters.

2. *Pennsylvania*

Until 2018, Wagner’s study was the bar for prison gerrymandering research. Researchers were able to calculate with a high degree of certainty how many incarcerated individuals should be removed from population totals in prison districts, but they were incapable of accurately redistributing those incarcerated individuals to their last known address. At best, these researchers could demonstrate the distortion that occurs between communities that contain prisons and those communities that do not—the net-benefit that prison communities receive. Missing from this research is the other half of the story: the effect that prison gerrymandering has on urban communities with disproportionately high incarceration rates. A 2018 study from Brianna Remster and Rory Kramer, Associate Professors in the Department of Sociology & Criminology at Villanova University, was unique, in that it demonstrated the full picture of prison gerrymandering. They were able to do so by creating a counterfactual that “returns the missing persons to their previous neighborhoods.”¹⁴⁶

Incarcerated districts—those that lose more “residents” than they gain when incarcerated individuals are counted at their last known address rather than where they are incarcerated—are concentrated in the most rural parts of Pennsylvania.¹⁴⁷ On the other hand, incarcerating districts—those whose populations increase under the counterfactual—include Philadelphia, Pittsburgh, and former industrial hubs in the eastern part of the state.¹⁴⁸ Sixteen districts for the Pennsylvania State House would see their populations decrease by

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 433 (“Specifically, the results presented here may or may not hold in more competitive states.”).

¹⁴⁴ *Id.* at 431.

¹⁴⁵ *Id.* at 431–32.

¹⁴⁶ Remster & Kramer, *supra* note 116, at 419.

¹⁴⁷ *Id.* at 427.

¹⁴⁸ *Id.*

1,000 or more under the counterfactual¹⁴⁹ (almost 1.6% of the average district size of 62,573),¹⁵⁰ while the largest decrease would be 5,028 (roughly 8% of the average district size).¹⁵¹ All but two of the districts that would lose 1,000 or more people under the counterfactual are classified as nonurban, with the two urban districts being those that contain Philadelphia and Pittsburgh's county jails.¹⁵² A quarter of the districts that would lose 1,000 or more people would become legally too small under the counterfactual.¹⁵³

When people who are incarcerated are counted at their last known address, rather than where they are caged, the populations of twelve districts increase by at least 1,000 people, with two-thirds of those districts classified as urban.¹⁵⁴ The researchers found that when people who are incarcerated are counted at their home, four districts (three of which are in Philadelphia and one in a former industrial urban hub in an otherwise rural area) become legally too large under the counterfactual.¹⁵⁵

Remster and Kramer's research went on to demonstrate the disproportionate impact that prison gerrymandering has on Pennsylvania's communities of color. The seventeen districts whose populations would grow the most under the counterfactual "represent 21% of the Black and Latino population, but only 6.5% of the White population" of the state,¹⁵⁶ while the districts that would shrink the most "account for 5.6% of the Black and Latino population of Pennsylvania—including prisoners—and 9.1% of Pennsylvania's White population."¹⁵⁷ When people who are incarcerated are "returned" under the counterfactual, the average white person's district is reduced by 59 people, while "Black and Latino voter's district gains approximately 353 and 313 voters respectively."¹⁵⁸ Under the counterfactual, 20% of Philadelphia's Black population would reside in districts that contain too many people to comply with the One Person, One Vote requirement.¹⁵⁹ There would thus need to be an additional majority-minority district in Philadelphia in order for Pennsylvania to comply with the Voting Rights Act of 1965.¹⁶⁰

Following publication of Remster and Kramer's study, Pennsylvania's five-member redistricting commission voted to substantially limit prison gerrymandering in the state for the 2020 redistricting cycle.¹⁶¹ The policy

¹⁴⁹ *Id.* at 429.

¹⁵⁰ Average district size is computed by taking the population of the state according to the Census (12,702,379 on Census Day 2010) and dividing it by the number of districts in the state—203. See *QuickFacts: Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/PA/POP010210> [<https://perma.cc/U96Y-Z8RU>] (last visited Mar. 5, 2024).

¹⁵¹ Remster & Kramer, *supra* note 116, at 429.

¹⁵² *Id.* at 428.

¹⁵³ *Id.* at 429.

¹⁵⁴ *Id.* at 430.

¹⁵⁵ *Id.* at 429–30.

¹⁵⁶ *Id.* at 429.

¹⁵⁷ *Id.* at 427.

¹⁵⁸ *Id.* at 430–31.

¹⁵⁹ *Id.* at 431.

¹⁶⁰ *Id.*

¹⁶¹ Katie Meyer, *Pa. Ends 'Prison Gerrymandering' with Closely Divided Committee Vote*, WHYY (Aug. 24, 2021), <https://whyy.org/articles/pa-ends-prison-gerrymandering-with-closely-divided-committee-vote/> [<https://perma.cc/P6KM-4GQN>].

would require that anyone incarcerated in Pennsylvania be counted as living at their last known address, rather than the prison for purposes of redistricting. Exempted from this, however, are individuals serving life sentences or individuals who were unhoused prior to incarceration.¹⁶² Critically, this vote had no impact on how Pennsylvania's seventeen U.S. House districts would be drawn.¹⁶³

3. *Texas*

The geography of incarceration in Texas has resulted in a significant distortion favoring the rural eastern parts of the state over the rest of the state, largely at the expense of Texas's largest urban areas.¹⁶⁴ Roughly 15% of Texas's incarcerated population hails from Harris County which contains Houston, while another 9% hails from Dallas County.¹⁶⁵ While nearly one out of every four incarcerated Texans come from Harris or Dallas Counties, less than one out of every twenty-five incarcerated Texans are confined in one of those two counties.¹⁶⁶ The inverse effect is seen in rural parts of the state, such as Anderson County, which sentences less than 1% of the incarcerated population, but confines roughly 10% of the states incarcerated population.¹⁶⁷

Relying on a counterfactual similar to Remster and Kramer,¹⁶⁸ the Redistricting Data Hub conducted an in-depth analysis of how prison gerrymandering distorted the 2021 redistricting cycle in Texas.¹⁶⁹ They found significant variations in the incarcerated populations between U.S. House of Representative districts. For instance, District 19 contains 22,208 people who are incarcerated, while five districts statewide do not have any incarcerated individuals counted in their population.¹⁷⁰ Counting individuals at their last known address, instead of where they are incarcerated, would result in tens of thousands of people being removed from the population totals of prison districts.¹⁷¹

When Texas redistricted after the 2020 Census, their U.S. House of Representatives redistricting plan had a deviation of 0.00%.¹⁷² However, if incarcerated individuals were counted as living at their last known address,

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ GONZALEZ ET AL., *supra* note 93, at 3–5 (“[T]he most significant distortion in terms of over-counting occurs in rural East Texas.”).

¹⁶⁵ *Id.* at 4.

¹⁶⁶ *Id.* at 5 (noting that Harris and Dallas Counties each have less than 2% of the incarcerated population).

¹⁶⁷ *Id.*

¹⁶⁸ Indeed, the counterfactual dataset on which the Redistricting Data Hub relied was created by Remster, Kramer, and Denise Wilson, a Research Associate at Villanova University. See REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN TEXAS 24 (2023), <https://redistrictingdatahub.org/dataset/report-on-prison-gerrymandering-in-texas/> [https://perma.cc/RLK3-MQKJ] [hereinafter Prison Gerrymandering in Texas].

¹⁶⁹ *Id.* at 1.

¹⁷⁰ *Id.* at 7.

¹⁷¹ *Id.*

¹⁷² *Id.*

the deviation between the largest and smallest districts was estimated to be 2.21%.¹⁷³ This would be unconstitutional under the One Person, One Vote principle which requires congressional deviations be as close to zero as possible absent legitimate justifications.

As for the Texas House of Representatives, the deviation of the adopted redistricting plan between the largest and smallest districts is 9.98%.¹⁷⁴ Because of how close the plan is to the threshold for establishing a *prima facie* violation of the One Person, One Vote principle, even a relatively small change would be enough to push the plan over the edge. If prison gerrymandering ended in Texas, one State House district would see its population increase by over 3,000, while another would decrease by nearly 16,000.¹⁷⁵ This would ultimately lead the deviation between districts, as they are currently drawn, to rise to 13.28%, establishing a *prima facie* violation of the One Person, One Vote principle.¹⁷⁶

The researchers estimated that if incarcerated people were counted at their last known address rather than where they are incarcerated, the largest decreases in population would occur in Texas State House districts 12, 8, and 25.¹⁷⁷ Each of these districts are in the rural areas outside of Houston, Dallas, and Austin. The nonincarcerated residents of these and other prison districts, which are disproportionately located in the eastern part of the state, thus receive greater representation in the Texas House of Representatives, as compared to “West Texas, which faces unique issues such as drought and access to health-care.”¹⁷⁸

The added representation that these communities receive comes at the expense of those living in Texas’s urban centers. Under the Redistricting Data Hub’s counterfactual, nine of San Antonio’s ten, eleven of Austin’s twelve, and thirty-four of Dallas’s thirty-five state house districts would have their populations increased.¹⁷⁹ According to their findings, Dallas’s population, across all of its districts, would grow by roughly 24,000 people.¹⁸⁰ Austin and San Antonio’s populations, meanwhile, would grow by over 5,000 and 7,000 people, respectively.¹⁸¹

4. Georgia

When the Georgia Legislature set out to redistrict Georgia’s 14 U.S. House districts, 180 state House districts, and 56 state Senate districts following the 2020 census, they were able to ensure a significantly more equitable population distribution than Texas. There was no deviation between the

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 10.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 17–21.

¹⁷⁸ GONZALEZ ET AL., *supra* note 93, at 5.

¹⁷⁹ Prison Gerrymandering in Texas, *supra* note 168, at 17–21.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

largest and smallest U.S. House districts, while the maximum deviations for the state House and state Senate redistricting plans were a modest 2.85% and 2.01%, respectively.¹⁸² But if Georgia's incarcerated population was counted at their last known addresses for purposes of redistricting, rather than the district in which they are incarcerated, there would be significant reductions in population in the southern and eastern parts of the state, and large increases in the northern and western parts of the state, particularly around Atlanta.¹⁸³

U.S. House districts 2, 8, and 12, each of which are located in the southern part of the state, would have their populations reduced by between 4,633 and 8,179 people (between 0.6% and 1.06% of the average population of 765,163), while each of Atlanta's six districts would have their populations increase, with the greatest increase being in district 6 with 3,553 people (0.46% of the average district population).¹⁸⁴ As drawn, the deviation between Georgia's largest and smallest districts would be 1.53% if the incarcerated population of the state was counted at their last known address and would therefore violate the One Person, One Vote principle.

Georgia's state House and Senate plans meanwhile would have their maximum deviations increased by 4.14% and 3.02%.¹⁸⁵ Despite the distorting effect of these plans being roughly twice as strong as the effect prison gerrymandering has on Georgia's U.S. House plan, neither of the state level plans—with resulting deviations of 6.99% for state House and 5.03% for Senate—would be unconstitutional. This means that, even if the Georgia Legislature formally ended the practice of gerrymandering, the Legislature could adopt an identical redistricting plan by drawing districts with prisons which are typically in the rural, central and southern part of the state to be slightly smaller than average, while drawing urban districts, especially in Atlanta, to be slightly larger than average.

Georgia is a clear example as to why the size of deviation cannot be considered in isolation. Activists opposed to prison gerrymandering must be able to contextualize the deviation within the One Person, One Vote framework, so as to effectively strategize where to focus limited resources. Abandoning prison gerrymandering at just the state level, while allowing it to remain in place for U.S. House redistricting (as Pennsylvania and Illinois¹⁸⁶ have done), would allow the Legislature to continue drawing unconstitutional federal districts. At the same time, it would add, at best, a procedural step legislators must

¹⁸² REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN GEORGIA 7–13 (2023) [hereinafter Prison Gerrymandering in Georgia].

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 15 (finding that districts 4, 5, 6, 7, 11, and 13 would have their populations increased by between 997 and 3,553 people).

¹⁸⁵ *Id.* at 10–13. The deviation increases are calculated by subtracting the existing deviations between districts from the deviation that would occur if incarcerated individuals were counted as living at their home districts. Georgia's House plan deviation would increase from 2.85% to 6.99% (an increase of 4.14%) and the Senate deviation would increase from 2.01% to 5.03% (a 3.02% increase). *Id.*

¹⁸⁶ Daniel Nicheanian, *Illinois Delays End of Prison Gerrymandering by a Decade*, THE APPEAL (Feb. 23, 2021), <https://theappeal.org/politicalreport/illinois-prison-gerrymandering/> [<https://perma.cc/W46B-VSUE>].

overcome to implement distorted plans for the state legislature that favor rural and white communities at the expense of urban and diverse communities.

B. The Data

Prison gerrymandering’s effect is felt far and wide beyond the four states discussed above. While those states present interesting case studies to better understand the phenomenon of prison gerrymandering, it would be a disservice to not also examine how other states are impacted. Rather than presenting narrative case studies, however, this Section will focus strictly on the data. Table 1 presents the deviations that would occur in nine states if prison gerrymandering was eliminated and notes whether the resulting redistricting plans would be unconstitutional. These nine states include the four states discussed above as well as five additional states.

TABLE 1: ASSESSING THE CONSTITUTIONALITY OF STATES’ DISTRICTS WITHOUT PRISON GERRYMANDERING¹⁸⁷

State	U.S. House Plan (change in deviation)	State House Plan (change in deviation)	State Senate Plan (change in deviation)
New York ¹⁸⁸	Not included in study	Not included in study	Unconstitutional (1.65) ¹⁸⁹
Pennsylvania ¹⁹⁰	Not included in study	Unconstitutional	Not included in study
Texas ¹⁹¹	Unconstitutional (2.21)	Unconstitutional (3.3)	Constitutional (1.0)
Georgia ¹⁹²	Unconstitutional (1.53)	Constitutional (4.14)	Constitutional (3.02)

¹⁸⁷ Redistricting plans are labelled constitutional if the study’s reported deviation between the largest and smallest district complies with the One Person, One Vote principle. *See supra* Section I.C. (explaining how the Supreme Court applies the One Person, One Vote principle). Redistricting plans are labelled unconstitutional if the deviation is greater than what the Supreme Court has historically allowed.

¹⁸⁸ Wagner, *supra* note 114.

¹⁸⁹ Wagner calculated the existing deviation between largest and smallest district to be 9.78%. *Id.* After removing the incarcerated population that is not from the prison district, the smallest district is 6.79% smaller than the target population of 306,072. *Id.* When Wagner returned the incarcerated population from NYC, the largest districts were 4.64% larger than the target population, bringing the total deviation to 11.43%. *Id.* The deviation is 1.65% larger under Wagner’s counterfactual than the existing Senate plan.

¹⁹⁰ Remster & Kramer, *supra* note 116, at 38. The Remster and Kramer study did not include the deviation between the largest and smallest district.

¹⁹¹ Prison Gerrymandering in Texas, *supra* note 168, at 7–13 (2023).

¹⁹² Prison Gerrymandering in Georgia, *supra* note 182, at 7–13.

State	U.S. House Plan (change in deviation)	State House Plan (change in deviation)	State Senate Plan (change in deviation)
Illinois ¹⁹³	Unconstitutional (1.79)	Constitutional (3.86)	Constitutional (2.33)
Ohio ¹⁹⁴	Unconstitutional (2.05)	Unconstitutional (6.7)	Unconstitutional (2.6)
South Carolina ¹⁹⁵	Unconstitutional (.97)	Unconstitutional (7.61)	Unconstitutional (2.06)
Louisiana ¹⁹⁶	Unconstitutional (1.98)	Unconstitutional (3.3)	Unconstitutional (5.35)
Wisconsin ¹⁹⁷	Unconstitutional (1.95)	Constitutional (6.27)	Constitutional (1.67)

As Table 1 demonstrates, each study that measured the effect of ending prison gerrymandering at the U.S. House level found a deviation increase that would likely be too significant to comply with the One Person, One Vote principle. Even South Carolina's 0.97% deviation, the smallest effect measured, would almost certainly be unconstitutional, because the state would be unable to point to a legitimate state objective for the deviation. Texas would have the largest increase in deviation for U.S. House districts at 2.21, while the average increase of the seven plans measured is 1.78.

The findings regarding the State House and State Senate redistricting plans constitutionality, meanwhile, demonstrate greater variation than the U.S. House plans. This variation is due to the flexibility state legislatures are afforded when redistricting at the state level. Eight of the nine studies examined how prison gerrymandering impacts the State House plans, five of which found that the only reason these plans are constitutional is prison gerrymandering, while the other three redistricting plans would be constitutional. Texas and Louisiana tied for the smallest increase in deviation (3.3), both of which would be enough to make the redistricting plan unconstitutional. Wisconsin, meanwhile, would experience the second greatest increase in deviation (6.27), but its State House plan would be permissible under One Person, One Vote. The average increase among the seven states for which a deviation increase was measured would be 5.03 with a standard deviation of roughly 1.65.

As to the State Senate deviations, four of the eight studies found that redistributing the incarcerated population of the state from their place of confinement to their last known address would increase the deviation between

¹⁹³ REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN ILLINOIS 7–13 (2023) [hereinafter Prison Gerrymandering in Illinois].

¹⁹⁴ REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN OHIO 7–13 (2023).

¹⁹⁵ REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN SOUTH CAROLINA 7–13 (2023) [hereinafter Prison Gerrymandering in South Carolina].

¹⁹⁶ REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN LOUISIANA 4 (2023).

¹⁹⁷ REDISTRICTING DATA HUB, PRISON GERRYMANDERING IN WISCONSIN 7–13 (2023).

the most and least populous districts above what is permissible under the One Person, One Vote principle. The average increase in deviation for State Senate plans (2.39) is less than half the average increase seen in the State House context due to State Senate districts typically having larger populations. The range of deviation increases is also more consistent in the State Senate context, with a standard deviation of just 1.3.

These findings further highlight the importance of contextualizing the effect that prison gerrymandering has on a redistricting plan against the backdrop of One Person, One Vote. The Wisconsin State House redistricting plan would see the second largest increase in deviation if the incarcerated population of the state was redistributed, but the map would still comply with the requirements of the Equal Protection Clause. The New York Senate after the 2000 redistricting cycle, meanwhile, would have had an unconstitutional deviation despite seeing an increase of just 1.06. It is thus critical that reformers consider not just the numerical effect, but also the constitutional effect, that ending prison gerrymandering has on a redistricting plan.

This additional step will allow activists in any state to push for reforms that will be most effective in their state. In Illinois, for instance, the Legislature passed a law ending the practice of prison gerrymandering for State House and State Senate redistricting, starting in 2031.¹⁹⁸ But when it comes time to redistrict, the State Legislature, if it so desires, could pass a new plan with the exact population distortion caused by prison gerrymandering another way (i.e. by systematically drawing rural districts to be slightly smaller than average and urban districts slightly larger than average) without violating the One Person, One Vote principle. At the same time, the Legislature will use distorted Census data to draw U.S. House districts, recreating the unconstitutional population deviation above. The same legislation in Ohio or South Carolina, however, would force substantive changes at the State House and State Senate level, while ultimately suffering from the same limitation in the U.S. House context.

IV. FELON DISENFRANCHISEMENT MAGNIFIES THE DISTORTING EFFECT OF PRISON GERRYMANDERING

Prison gerrymandering is not a phenomenon that occurs in isolation to impact how votes are counted. Less visible aspects of punishment, called the collateral consequences of incarceration, impact a wide swath of opportunities for formerly incarcerated individuals even years after release: the right to sit on a jury, challenges accessing employment, restrictions on housing, and more.¹⁹⁹ Many of these less visible forms of punishment limit the ability and

¹⁹⁸ Nichanian, *supra* note 186.

¹⁹⁹ Many of these collateral consequences are beyond the scope of this Article, as they do not impact a formerly incarcerated individual's likelihood or ability to vote. For further reading about collateral consequences not included in this Article, see Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Artika R. Tyner & Darlene Fry, *Iron Shackles to Invisible Chains: Breaking the Binds of Collateral*

likelihood of currently and formerly incarcerated individuals to vote, most especially felon disenfranchisement. It is the intersection between prison gerrymandering and disenfranchisement that makes prison gerrymandering so pernicious. Not only are individuals counted as residing in the location of the prison for the next decade (thus reducing the population and representation in their home communities), but for the extent of their incarceration and perhaps even after release, individuals convicted of felonies may be unable to cast a ballot. Thus, the bodies of these individuals are counted to apportion political districts, but their opinions may never be considered during an election.

Prison gerrymandering and felon disenfranchisement are intimately connected,²⁰⁰ such that solving one problem without solving the other would be insufficient. Addressing just prison gerrymandering would leave in place a system that strips the voting rights of millions of people. Addressing just felon disenfranchisement, meanwhile, would leave in place a system that distorts political power based on incarceration rates. Incidentally, felon disenfranchisement impacts urban communities and communities of color—the same communities most burdened by prison gerrymandering—the most.²⁰¹

Because of the important connections between prison gerrymandering and felon disenfranchisement, this Part begins by detailing the current state of felon disenfranchisement laws, before calling for an end to this practice.

A. Felon Disenfranchisement

Nationwide, an estimated 4.4 million individuals are unable to vote because of felon disenfranchisement laws. A total of 48% of these individuals have completed the entirety of their sentence, including probation and parole.²⁰² These laws disproportionately burden people of color; “[o]ne in 19 African Americans of voting age is disenfranchised, a rate 3.5 times that of non-African Americans.”²⁰³ Seven states disenfranchise more than one out of every ten African Americans of voting age.²⁰⁴ Meanwhile, at least 1.7% of the Latinx population is disenfranchised due to these laws.²⁰⁵

Consequences, 49 U. BALT. L. REV. 357 (2020); Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315 (2019).

²⁰⁰ Rebecca Harrison Stevens, Meagan Taylor Harding, Joaquin Gonzalez, & Emily Eby, *Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement*, 21 SCHOLAR 195, 208 (2019) (“These two issues—gerrymandering and felon disenfranchisement—work in tandem to strip inmates of representation.”).

²⁰¹ See NAZGOL GHANDNOOSH, LUKE TRINKA, & CELESTE BARRY, ONE IN FIVE: HOW MASS INCARCERATION DEEPENS INEQUALITY AND HARMS PUBLIC SAFETY 3 (2024) (“These laws and policies exacerbate the marginalization of justice-involved people—who are disproportionately people of color—by eroding the economic and social buffers against crime and increasing the likelihood of police contact.”).

²⁰² CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON, & ROBERT STEWART, THE SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS 6 (2022).

²⁰³ *Id.* at 2.

²⁰⁴ *Id.* (“Alabama, Arizona, Florida, Kentucky, South Dakota, Tennessee, and Virginia.”).

²⁰⁵ *Id.*

These figures, while still high, represent significant progress in the past decade. In 2016, these laws disenfranchised an estimated 6.1 million people nationwide, almost 2 million more than in 2022.²⁰⁶ Reforms reducing the number of felon disenfranchisement laws have varied—from California voters adopting a proposition restoring the right to vote when an individual is on parole to Governor Reynolds of Iowa signing an executive order re-enfranchising individuals sentenced to crimes other than homicide when their sentence (including parole and probation) is complete.²⁰⁷ Much of the momentum for reform has occurred since 2020, with eight states having taken steps to expand the right to vote for some formerly incarcerated individuals in that time.²⁰⁸

Reformers seeking to challenge these laws emphasize not just their disproportionate impact on people of color, but also their history as a tool of resisting Reconstruction. Felon disenfranchisement laws were adopted, most especially, during the Reconstruction Era in a piecemeal fashion.²⁰⁹ For example, in 1869, the state of Mississippi passed a disenfranchisement law that prevented someone convicted of “any crime” from voting.²¹⁰ This was changed in 1890, a change that was mirrored in other states, to a more targeted approach—“disenfranchisement for a narrower list of crimes which were stereotypically associated with Black people.”²¹¹ This was so pronounced, that in many states more serious crimes like rape and murder did not lead to disenfranchisement, because too many potential white voters would be impacted.²¹²

While state legislatures passed these disenfranchisement laws, they also passed many new criminal laws designed specifically to incarcerate as many Black people as possible.²¹³ The text of the Thirteenth Amendment outlawed slavery, while allowing states to impose involuntary servitude as a punishment for crimes.²¹⁴ This incentivized Southern states with failing economies after the end of the Civil War to implement convict leasing arrangements. These programs gave private parties access to cheap labor, 90% of which was performed by Black people, for a small fee to the state.²¹⁵ State governments, private parties, and law enforcement all benefitted substantially from the practice, “incentiviz[ing] baseless arrests and convictions of Black citizens.”²¹⁶

For the most part, state disenfranchisement laws no longer distinguish between crimes. Instead, the typical disenfranchisement law applies to anyone who has committed any felony. The U.S. Supreme Court upheld this practice

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 3.

²⁰⁹ Elyshia Aseltine, *The Racial History and Contemporary Impacts of Felon Disenfranchisement*, in *MASS INCARCERATION IN THE 21ST CENTURY* 182, 186 (Conyers Addrain, Vanessa Lynn, & Margaret Leigey eds., 2023).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ ERIN KELLEY, BRENNAN CENTER FOR JUSTICE, *RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY* 1 (2017).

²¹⁴ *Id.*

²¹⁵ *Id.* at 2.

²¹⁶ *Id.*

in the 1974 case *Richardson v. Ramirez*.²¹⁷ In that case, the Court heard an Equal Protection challenge to a felon disenfranchisement provision of California's Constitution brought by three plaintiffs who had completed their sentences for felony convictions.²¹⁸ Rather than deciding the case solely on Equal Protection grounds, however, the Supreme Court focused on Section 2 of the Fourteenth Amendment.²¹⁹ Section 2 notes that a state's representation in Congress will be reduced if that state abridges "the right to vote at any election for the choice of electors . . . except for participation in rebellion, or *other crime*."²²⁰

The outcome in *Richardson v. Ramirez* would largely hinge on whether "or other crime" was broad enough to include any crime for which the state chose to make disenfranchisement a punishment, or if the preceding phrase "participation in rebellion" modified "or other crime" to apply to only those narrow crimes associated with rebellion. The Supreme Court ultimately determined that the understanding of the Fourteenth Amendment's ratifiers, "as reflected in the express language of §2 and in the historical and judicial interpretation" permits the disenfranchisement of individuals convicted of any crime, not just those associated with rebellion.²²¹ In the Court's view then, it would not make any sense for the Equal Protection Clause of Section 1 to bar a form of disenfranchisement that Section 2 permits.²²² As such, the Court found that it is not a violation of the U.S. Constitution for California—or any state—to permanently bar individuals who have been convicted of felonies from voting, even after completion of their sentences.²²³

The Supreme Court found that it is constitutional for a state to bar individuals convicted of felonies from ever exercising the right to vote again, but the Constitution in no way mandates this result. Instead, states are given great leeway in devising felon disenfranchisement laws, leading to significant variation between the states. These variations fall into four broad categories: no restrictions, restrictions while in prison, restrictions for the extent of the sentence, and restrictions that extend beyond the end of the sentence.²²⁴ Maine and Vermont are the only two states that allow people who are currently incarcerated for felonies to vote.²²⁵ In these two states, individuals convicted of felonies are treated the way that individuals convicted of misdemeanors are treated in many other states; they vote via absentee ballot in the community where they lived prior to incarceration.

The next, and largest, category of disenfranchisement laws are those that prevent individuals who are incarcerated from voting only while they are in prison. As soon as they are released from prison, an individual's right to vote

²¹⁷ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

²¹⁸ *Id.* at 26–27.

²¹⁹ *Id.* at 41–42.

²²⁰ U.S. CONST. amend. XIV, § 2 (emphasis added).

²²¹ *Richardson*, 418 U.S. at 54.

²²² *Id.* at 55.

²²³ *Id.* at 56.

²²⁴ UGGEN ET AL., *supra* note 202, at 3.

²²⁵ *Id.* (noting that Washington D.C. and Puerto Rico also allow individuals to vote from prison).

is restored, even if they are still on probation or parole.²²⁶ Twenty-two states, including Pennsylvania, Illinois, New York, Connecticut, and Ohio follow this general approach with some variation.²²⁷ New York, for instance, automatically restores voting rights upon release from prison, while Connecticut, though generally re-enfranchising individuals on parole or probation, continues to disenfranchise those on parole or probation if convicted of crimes related to elections.²²⁸ Fifteen states, including Texas, South Carolina, Louisiana, Georgia, and Wisconsin, have taken a more expansive approach to felon disenfranchisement, barring individuals who have been released from prison but who remain on parole or probation from voting.²²⁹ Individuals in these states have their voting rights restored immediately once they are no longer under state supervision.

The final category of felon disenfranchisement laws is laws that continue to bar individuals from voting, even upon completion of their sentence. Eleven states fall into this category, but with even more variation between them than the second category.²³⁰ Some of these states, like Mississippi and Alabama, permanently bar only those individuals convicted of certain enumerated offenses.²³¹ Arizona, meanwhile, permanently strips the voting rights of anyone convicted of two or more felonies, regardless of the nature of the felonies.²³² Beginning in 2017, Wyoming re-enfranchises individuals five years after “complet[ing] sentences for first-time, non-violent felony convictions.”²³³

Florida, which disenfranchises 1.1 million people, or a quarter of the nationwide total of individuals disenfranchised, is also a part of this last category.²³⁴ Activists in Florida sought to remedy this by passing a constitutional amendment that “restores the voting rights of Floridians with felony convictions after they complete all terms of their sentence including parole or probation.”²³⁵ The proposed amendment passed in November of 2018, with roughly 65% of voters in support of the reform.²³⁶ Seeking to undermine the effort, Governor Ron DeSantis signed into law legislation that redefined the terms of an individual’s sentence to include the payment of legal financial

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 4.

²²⁹ *Id.* at 3–4 (classifying Louisiana as one of these states, despite some scholarly disagreement about whether Louisiana’s unique disenfranchisement law is closer to the second or third category of disenfranchisement laws).

²³⁰ *Id.* at 3 (listing Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming).

²³¹ *Id.* at 4 (noting that in Alabama, those convicted of crimes of “moral turpitude” are permanently disenfranchised).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 2.

²³⁵ VOTING RESTORATION AMENDMENT, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&xseqnum=1> [https://perma.cc/VL3L-LTFL] (last visited Apr. 2, 2024) (excluding those who had been convicted of murder or sexual offenses).

²³⁶ *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Aug. 7, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [https://perma.cc/DN9N-CKPR].

obligations (LFOs) that were imposed at the time of sentencing.²³⁷ With this change, Florida became just one of three states nationwide that “mandate[es] indefinite denial of the vote to *any* person with *any* unpaid LFOs from a disqualifying conviction.”²³⁸

Following a trial in the Northern District of Florida, the law was struck down for establishing a system wherein individuals must pay to exercise their right to vote in violation of the 24th Amendment banning poll taxes.²³⁹ On top of this, individuals often have no way of knowing how much they owe due to Florida’s poor record keeping.²⁴⁰ The district court established guidelines to assist voters in understanding whether they were eligible to vote, including a mechanism for potential voters to request advisory opinions from the state.²⁴¹ This decision was appealed by the state of Florida to the full Eleventh Circuit, which reversed and vacated the ruling, effectively guaranteeing that the 774,000 Floridians who had completed their sentence and any probation or parole—but had outstanding LFOs—would be barred from voting.²⁴² Because the vast majority of those individuals cannot afford their LFOs, this will likely be a lifetime ban on voting that will disproportionately burden Black Floridians, who “are more likely to owe money and to owe more than their white counterparts.”²⁴³

The continued existence of felon disenfranchisement laws directly prevents millions of Americans from having a say in how their government is run, particularly burdening Black Americans, roughly five percent of whom at voting age are disenfranchised due to these laws.²⁴⁴ Proponents of felon disenfranchisement laws may justify them by relying on a “Lockean understanding that those who break the social contract by committing a crime ‘have abandoned the right to further administering the compact.’”²⁴⁵ But this view fails to recognize the role that voting plays in reestablishing a commitment to the social contract. Interviews with individuals who have lost the right to vote because of a felony conviction demonstrate that those individuals see civic engagement as a way to “make amends and to become a contributing community member.”²⁴⁶ This is consistent with the burgeoning literature that demonstrates that

²³⁷ *Id.*

²³⁸ Updated: “Who Must Pay to Regain the Vote? A 50-State Survey”, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 23, 2020), <https://ccresourcecenter.org/2020/11/23/who-must-pay-to-regain-the-vote-a-50-state-survey-2/> [<https://perma.cc/XK8G-QLWZ>].

²³⁹ *Litigation to Protect Amendment 4 in Florida*, BRENNAN CTR. FOR JUST. (Sept. 11, 2020), <https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida> [<https://perma.cc/A8BW-ZLR6>].

²⁴⁰ *Id.*

²⁴¹ *Id.* (“Any voter could request an advisory opinion on their eligibility from the State and, if they did not receive a response within 21 days, could register and vote.”).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ UGGEN ET AL., *supra* note 202, at 2.

²⁴⁵ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020) (quoting *Green v. Bd. of Elections*, 280 F.2d 445, 451 (2d Cir. 1967)).

²⁴⁶ Brianna Remster & Rory Kramer, *Democracy for Whom? How Criminal Punishment Marginalizes the Political Voices of Black and Brown Americans*, 17 SOCIO. COMPASS 1, 5 (2022).

voting is correlated with lower rates of recidivism.²⁴⁷ Instead of allowing these individuals to make amends or contribute civically, felon disenfranchisement laws perpetuate the social exclusion that begins when a person is incarcerated without serving a real benefit.

Proponents would also be hard pressed to justify the impacts on voter turnout that incarceration and hyper-policing have on entire communities and the loved ones of incarcerated individuals using the Lockean view. Living in areas where many members of the community are incarcerated leads to decreased voting and civic engagement of the community as a whole.²⁴⁸ There is also evidence that “children of incarcerated parents are . . . less likely to be registered to vote, [and] less likely to have voted in the last presidential election.”²⁴⁹ The Lockean view also fails to grapple with the reality that confinement pursuant to even just a misdemeanor conviction or pretrial detention will also lead to decreased voter turnout for Black Americans,²⁵⁰ even though neither of which leads to legal disenfranchisement and therefore cannot be evidence of an individual having “abandoned” their ability to administer the social compact.

The problem of felon disenfranchisement, like the problem of prison gerrymandering, is one that particularly burdens representation for communities of color. Prison gerrymandering results in a net-decrease in population for urban communities and communities of color, causing their representation in Congress, the state legislature, or local government to be reduced. Felon disenfranchisement is different, as individuals who are disenfranchised are counted for population totals and thus are formally “represented” by the politician whose district they live in. Yet they are not actually represented, as they have no ability to influence policy. Factoring in the effect on one’s likelihood to vote of having a loved one experience incarceration or living in a heavily policed neighborhood, and it is clear that there is a disproportionate impact of these laws on racialized communities, the same communities who are most likely to be burdened by prison gerrymandering. As these are interrelated systems, reformers must advocate for change that will address both problems. The following Section will call for reform to felon disenfranchisement laws to bring the United States in line with many of its peer nations.²⁵¹

²⁴⁷ *Id.* See also KRISTEN M. BUDD & NIKI MONAZZAM, INCREASING PUBLIC SAFETY BY RESTORING VOTING RIGHTS 3 (2023).

²⁴⁸ See Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 197 (2014); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 828 (2010) (demonstrating that even just being stopped by police can lead to a decreased probability of voting).

²⁴⁹ Hedwig Lee, Lauren C. Porter, & Megan Comfort, *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 53 (2014).

²⁵⁰ Remster & Kramer, *supra* note 246, at 6.

²⁵¹ *Id.* at 2 (“[T]he U.S. disenfranchises more of its citizens for a felony conviction than any other country in the world and is the only democracy that does not restore voting rights to all individuals upon sentence completion.”).

B. *Reform Felon Disenfranchisement Laws*

When Concord, New Hampshire, was redistricting, the one member of the public who attended the meeting raised the concern over the prospect of people who are currently experiencing incarceration being allowed to vote, and noted that “[t]hey could elect whoever they want for a councilor,” perhaps even a councilor “who wanted to defund the police department or whatever,” because there are so many incarcerated people in the same district.²⁵² This statement represents a popular sentiment regarding restoring voting rights to currently incarcerated individuals, one that profoundly misunderstands what re-enfranchisement would entail. In Maine and Vermont, the two states that allow people incarcerated for felonies to vote, individuals register to vote at their “last voluntary residence,”²⁵³ which is often not in the community that they are incarcerated in.

Consequently, these statutes prevent people who are incarcerated from uniting to form a significant voting bloc in a district with a prison that is capable of electing the politician of their choosing. Individuals who are incarcerated are in fact barred from listing the prison where they are incarcerated as their address for voting or registering to vote in the prison community, “unless the person had resided in that municipality prior to incarceration.”²⁵⁴ That is consistent with how individuals who are incarcerated for misdemeanors exercise their right to vote in the forty-four states that do not disenfranchise misdemeanants.²⁵⁵ When an individual who is confined for a misdemeanor in a prison or jail fills out their absentee ballot, the ballot is counted at the address where they are registered to vote, not their place of confinement.

This means that the concern that granting currently incarcerated individuals the right to vote will lead to the election of a city councilor who represents a “Crime is Legal Party” or who wishes to defund the police are greatly exaggerated. As an example, take Illinois, which blocks individuals incarcerated for misdemeanors as well as felonies from voting.²⁵⁶ If prison gerrymandering ended in Illinois, most of Illinois’ 118 state House districts would have their populations increased by hundreds of people, while just thirteen districts would see decreases in excess of 1,000 people (roughly 0.92% of the average state House district size of 108,850).²⁵⁷ This applies to people who are currently incarcerated voting by mail, as they would vote in the district they lived in previously. The district that would receive the most absentee ballots would

²⁵² Schinella, *supra* note 5 (internal quotations omitted).

²⁵³ VT. STAT. tit. 28, § 807(a). *See also* ME. STAT. tit. 21-A, § 112(14).

²⁵⁴ ME. STAT. tit. 21-A, § 112(14); VT. STAT. tit. 28, § 807(b).

²⁵⁵ *Who Can Vote From Jail, and How?*, DEMOCRACY DOCKET (Apr. 7, 2023), <https://www.democracydocket.com/analysis/who-can-vote-from-jail-and-how/> [https://perma.cc/X6AU-AFRT]. The states that bar individuals incarcerated for misdemeanors from voting are Illinois, Kentucky, Indiana, Michigan, South Carolina, and Missouri. *Id.*

²⁵⁶ *Id.*

²⁵⁷ Prison Gerrymandering in Illinois, *supra* note 192, at 16–19. Districts 71, 74, 75, 85, 87, 94, 99, 102, 104, 108, 110, 115, and 117 would lose between 1,065 and 3,992 people. *Id.* All of these districts are in the rural parts of Illinois, particularly in the South, East, and West, except for districts 74 and 75 in the broader Chicago area. *Id.* at 9.

be District 34 in the Southern part of the Chicago area,²⁵⁸ but that district would only see an increase of about 775 ballots out of approximately 108,850 other people,²⁵⁹ or less than 1% of the district.

The former head of Maine's League of Women Voters chapter, Sarah Walton, explained the commonsense reason why people who are currently incarcerated should be allowed to vote: the threat of "the state's ability to silence dissent with incarceration."²⁶⁰ The bar on voting remains, even as the United States has made strides toward undoing some of the most punitive aspects of the "civic death" that incarcerated individuals are subjected to.²⁶¹ But incarcerated individuals have a very direct stake in the outcome of elections and should be permitted to vote for representatives who would act to remedy the deplorable conditions in prisons.²⁶² This does not mean that all, or even many, of the reforms would pass; the incarcerated population would be one small part of any given constituency and would, therefore, be reliant on sympathetic individuals in the community.

In 2023, Representative Ayanna Pressley, a Democrat from Massachusetts, introduced the Inclusive Democracy Act of 2023 to allow incarcerated individuals to vote from prison in all federal elections.²⁶³ The bill was not passed by the Republican-majority House, and an identical bill languished in the Democratic-controlled Senate.²⁶⁴ Even if this law passed, however, it would only impact federal elections, as that is the extent of Congress's power under the Constitution.²⁶⁵ To impact state elections, reform would have to come from the state legislature or via state constitutional amendment.

In the end, however, allowing people who are currently incarcerated to vote does not solve the problem of prison gerrymandering. This is demonstrated most clearly by Maine, which, despite allowing incarcerated people to vote via absentee ballot in the community they lived in prior to incarceration, continued to count the incarcerated population of the state as living at their place of confinement.²⁶⁶ That will change in 2031, as Governor Janet Mills signed a law requiring that the incarcerated population of the state be redistributed to their most recent address prior to incarceration for purposes of redistributing.²⁶⁷ This is why allowing people incarcerated for felonies to vote is not

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 9.

²⁶⁰ ELIZABETH HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 138 (2006).

²⁶¹ 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-in-mates-right-to-vote-enfranchise-criminal-justice-voting-rights-213979/> [<https://perma.cc/ASD3-5RBG>].

²⁶² *Id.*

²⁶³ Inclusive Democracy Act of 2023, H.R. 6643, 118th Cong. (2023).

²⁶⁴ Inclusive Democracy Act of 2023, S. 3423, 118th Cong. (2023).

²⁶⁵ See, e.g., U.S. CONST. art. 1, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.")

²⁶⁶ Haley Hersey, *New Law Changes How Prisoners in Maine are Counted in the U.S. Census*, PORTLAND PRESS HERALD, July 18, 2023, <https://www.pressherald.com/2023/07/18/new-law-changes-how-prisoners-in-maine-are-counted-in-the-u-s-census/> [<https://perma.cc/T7TZ-5EL8>].

²⁶⁷ *Id.*

a sufficient solution to the problem—the incarcerated population must also be treated for redistricting purposes as living in the community they lived in prior to incarceration. Failure to do so will leave in place a system that strengthens the voices of those who live in prison districts on the backs of the incarcerated individuals whose ostensible “representatives” do not even see as their constituents, at the expense of the residents of every other district in a state, especially urban districts. It is therefore critical for reform to felon disenfranchisement laws be accompanied by prison gerrymandering reform. The following Part will introduce the various forms that prison gerrymandering reform could take.

V. SOLUTIONS TO THE PROBLEM OF PRISON GERRYMANDERING

Prison gerrymandering reform has thus far occurred in a piece-meal, state-by-state fashion. This Part will therefore begin by identifying the two primary ways that state-level reform has developed: changes from redistricting commissions and legislation. However, while the exact mathematical effect that prison gerrymandering has on an individual state is very particularized, it is still a phenomenon that occurs all across the country. In such a situation, a change at the federal level would be the ideal solution. This Part will therefore end with a discussion of the two ways such a change could be brought about: federal legislation or the Census Bureau changing its interpretation of the usual residence rule.

A. Redistricting Commission Changes

The first way that states can act to end prison gerrymandering is via reforms adopted by a state redistricting commission. These commissions are entities other than the state legislature that have the authority to draw a state’s districts or have an advisory role in the redistricting process. Twenty-five states have such bodies, though with significant variation in authority.²⁶⁸ California, for instance has an independent commission that is capable of drawing and approving district boundaries, while Utah’s independent commission can propose maps, but the Legislature is free to disregard their plan.²⁶⁹ Pennsylvania has a redistricting commission for state legislative seats that is unique. Pennsylvania’s commission is composed of the leader of each party in each house of the legislature who then, as a group, select a fifth person to serve as the chair.²⁷⁰ This commission draws and implements the legislative maps, with no opportunity for the legislature or governor to reject them.²⁷¹

²⁶⁸ *Redistricting Commissions: State Legislative Plans*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-commissions-state-legislative-plans> [https://perma.cc/BE3U-YYB2].

²⁶⁹ *Id.*

²⁷⁰ *How Redistricting Works*, FAIR DISTRICTS PA, <https://fairdistrictspa.com/the-problem/how-redistricting-works> [https://fairdistrictspa.com/the-problem/how-redistricting-works] (last visited May 10, 2024).

²⁷¹ *Id.*

After years of Democrats failing to end prison gerrymandering in Pennsylvania through legislation, the five-member commission voted in 2021 by a 3-2 margin—with the chair casting the deciding vote to break the deadlock between the Republican and Democratic leaders—to end prison gerrymandering in state legislative redistricting.²⁷² This meant that for the first time in Pennsylvania history, the majority of the incarcerated population of the state would be counted at their last known address, rather than the prison, for legislative reapportionment.²⁷³ Critically, this change impacted only the state legislative districts—not local or congressional redistricting.

Another limitation of this approach, particularly in the Pennsylvania context, however, is that it would be very easy for the next commission to undo these changes in a decade following the 2030 Census. The commission vote was split on party lines, with Democrats in favor of ending prison gerrymandering and Republicans in opposition to ending the practice.²⁷⁴ It is possible, or perhaps even likely, that this divide will reemerge following the 2030 Census. There is a chance, then, that the decision whether to reinstate prison gerrymandering or not will come down to one individual: the chair of the commission with no opportunity for the legislature or the governor to challenge the decision.

Rhode Island, too, took steps to limit prison gerrymandering through its advisory commission in 2022. Unlike Pennsylvania's commission, Rhode Island's eighteen-member commission is independent of the legislature and is empowered to propose congressional and legislative maps that the legislature may then reject, adopt, or modify.²⁷⁵ This commission, comprised of legislators and non-legislator members appointed by each party, voted to reallocate to their last known address those who were not yet sentenced or were expected to be released by April 1, 2022.²⁷⁶ The effect of this policy was fairly limited—just 44% of the state's incarcerated population would be reallocated.²⁷⁷ What is encouraging about this reform, however, is that the vote was bipartisan, with fifteen commissioners supporting the reform and just one opposing, potentially setting the stage for more far-reaching reform for the 2031 redistricting cycle.²⁷⁸

The last state to take steps to end prison gerrymandering through a redistricting commission was Montana. After a law failed to pass in the Montana Legislature that would have ended prison gerrymandering, the independent commission voted to do so anyway in February 2023.²⁷⁹

²⁷² Meyer, *supra* note 161.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Rhode Island, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/state/rhode-island/?cycle=2020&level=Congress&startdate=2022-09-01> [https://perma.cc/YB47-ZHCR] (last visited May 10, 2024).

²⁷⁶ Mike Wessler, *Rhode Island Takes a (Small) Step Toward Ending Prison Gerrymandering*, PRISON POL'Y INITIATIVE (Jan. 10, 2022), https://www.prisonersofthecensus.org/news/2022/01/10/ri_redistricting/ [https://perma.cc/E4GW-4NES].

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Arren Kimbel-Sannit, *ICYMI: Prison Gerrymandering Could Impact Indian Country Voters*, DAILY MONTANAN (June 16, 2021), <https://dailymontanacan.com/2021/06/16/prison-gerrymandering-poses-a-question-of-fairness-and-logistics-in-montana/> [https://perma.

Throughout the redistricting process, “ending prison gerrymandering consistently received unanimous, bipartisan support from commission members.”²⁸⁰ The Montana reform went further than both the Pennsylvania and Rhode Island reforms—reallocating the entire incarcerated population for state legislative and congressional redistricting purposes.²⁸¹ But the commission was not done there. The commission called on the Census Bureau to count incarcerated individuals at their last known address and even “asked the state’s Congressional delegation to pass legislation to end prison gerrymandering, asked the state’s governor and Department of Corrections to collect home addresses for incarcerated people, and brought forward legislation to permanently address this issue in the state.”²⁸² That legislation was signed into law by Governor Gianforte after receiving almost unanimous support in the legislature.²⁸³

B. Legislative Action

On April 25, 2023, Montana Governor Greg Gianforte signed into law the reforms made by the independent commission, making Montana one of sixteen states that have passed legislation to address the problem of prison gerrymandering at some or all levels of government.²⁸⁴ This legislation varies widely between states with just seven of the sixteen states having banned prison gerrymandering at the U.S. House, state legislative, county, and city/town redistricting levels.²⁸⁵ Table 2 presents a more detailed breakdown of the variation between states.

TABLE 2: STATES THAT HAVE PASSED LEGISLATION AND TO WHICH LEVELS OF GOVERNMENTS THE LEGISLATION APPLIES²⁸⁶

State	Congressional	Legislative	County	City or Town
California	Yes	Yes	Yes	Yes
Colorado	Yes	Yes	Yes	No
Connecticut	No	Yes	N/a	Yes

cc/8246-KYTW]; *With Unanimous, Bipartisan Support, Montana Ends Prison Gerrymandering*, PRISON POL’Y INITIATIVE (Feb. 13, 2023), https://www.prisonersofthecensus.org/news/2023/02/13/montana_victory/ [<https://perma.cc/AYK3-DNV6>] [hereinafter *Montana Ends Prison Gerrymandering*].

²⁸⁰ *Montana Ends Prison Gerrymandering*, *supra* note 279.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *It’s Official: With Bipartisan Support, Montana Permanently Ends Prison Gerrymandering!*, PRISON POL’Y INITIATIVE (July 3, 2023), https://www.prisonersofthecensus.org/news/2023/04/25/montana_ends_prisongerrymandering/ [<https://perma.cc/3ZXU-APG2>].

²⁸⁴ Aleks Kajstura, *Quick-Reference Chart: State Reforms Ending Prison Gerrymandering*, PRISON POL’Y INITIATIVE (Aug. 14, 2023), <https://www.prisonersofthecensus.org/models/chart.html/> [<https://perma.cc/Q4VG-ZSRH>].

²⁸⁵ *Id.*

²⁸⁶ *Id.* (listing Massachusetts, Pennsylvania, and Rhode Island as well, though these states’ actions came from redistricting commissions, rather than the legislature).

State	Congressional	Legislative	County	City or Town
Delaware	N/a	Yes	No	No
Illinois	No	Yes	No	No
Maine	Yes	Yes	No	No
Maryland	Yes	Yes	Yes	Yes
Michigan	No	No	Yes	Yes
Minnesota	Yes	Yes	Yes	Yes
Montana	Yes	Yes	Yes	Yes
Nevada	Yes	Yes	No	No
New Jersey	Yes	Yes	Yes	Yes
New York	No	Yes	Yes	Yes
Tennessee	No	No	Yes	No
Virginia	Yes	Yes	Yes	Yes
Washington	Yes	Yes	Yes	Yes

Maryland was the first state to reallocate the incarcerated population to their last known address beyond just county and local elections.²⁸⁷ The Maryland law, called the No Representation Without Population Act, remedied the distorting effect that occurred due to 68% of the state's incarcerated population being from Baltimore, with just 17% of the incarcerated population being held there.²⁸⁸ Maryland was able to make this change, because for the first time in 2010, the Census Bureau agreed to provide data on prisons early enough for states to make use of that data when redistricting.²⁸⁹ Until that time, the Census had always collected the data, but gave it to states too late to be useful in the redistricting process.

The primary limitation of the state legislative approach to remedying prison gerrymandering is the lack of uniformity between states. Sixteen states, eighteen if including the states that have addressed prison gerrymandering through redistricting commissions, have taken some step toward ending prison gerrymandering, but those states vary significantly in how they have addressed prison gerrymandering. Michigan's legislation, for example, applies only to county and local redistricting, allowing the practice to continue in congressional and legislative redistricting, Connecticut's legislation applies only to legislative and local redistricting, while the Illinois law applies solely at the

²⁸⁷ Garima Malhotra, *Maryland Ends Prison-Based Gerrymandering*, BRENNAN CTR. FOR JUST. (May 4, 2010), <https://www.brennancenter.org/our-work/analysis-opinion/maryland-ends-prison-based-gerrymandering> [https://perma.cc/G2KR-RYBU].

²⁸⁸ *Id.*

²⁸⁹ *Id.*

legislative level.²⁹⁰ While the number of states that have ended the practice continues to grow with each redistricting cycle, the majority of states still continue to rely on the Census Bureau's distorted data. But variations exist even within states that have taken no steps to remedy prison gerrymandering, because many county or local jurisdictions within those states have taken it upon themselves to do so.²⁹¹ This lack of uniformity is an inefficient way to remedy a situation that affects all states at all levels of government. What is needed is a truly national approach to ending prison gerrymandering and there are two forms that such a change could take. The following Sections will detail these potential reforms.

C. Federal Action

1. The End Prison Gerrymandering Act

The first national solution would be to pass the End Prison Gerrymandering Act, introduced in Congress in April 2023.²⁹² If passed, this law would require the Census Bureau to attribute individuals who are incarcerated in any correctional facility or detention center to their last known address.²⁹³ In effect, the law would supersede the Census Bureau's definition of "usual residence." The law would then require that states utilize the data stemming from the Census's new definition of "usual residence" for purposes of congressional redistricting.²⁹⁴

One potential limitation of the End Prison Gerrymandering Act is that it would only apply to congressional redistricting, as the U.S. Constitution only allows Congress to alter regulations for elections for Senators and Representatives, not for state-level officers.²⁹⁵ Even if passed, states, in theory, could use Census data to reallocate individuals from their last known address back to the facility where they are incarcerated—the inverse of what states are doing currently to end prison gerrymandering. While this is a concern, it is unlikely to occur. As the states that have taken steps to remedy prison gerrymandering have demonstrated, it can often be difficult, costly, and time-consuming to reallocate individuals from one part of the state to another.²⁹⁶ The majority of states simply rely on the data that is provided to them by the Census Bureau for all levels of redistricting and would likely continue to

²⁹⁰ Kajstura, *supra* note 284.

²⁹¹ *Local Governments That Avoid Prison-Based Gerrymandering*, PRISON POL'Y INITIATIVE (Aug. 31, 2022), <https://www.prisonersofthecensus.org/local/> [<https://perma.cc/35HP-5ALG>].

²⁹² End Prison Gerrymandering Act, H.R. 2905, 118th Cong. (2023).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ U.S. CONST. art. 1, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.").

²⁹⁶ See, e.g., Kimbel-Sannit, *supra* note 279 ("[R]eallocating people incarcerated in Montana's prisons and other secure facilities poses a time-consuming and costly data collection challenge.").

do so if the End Prison Gerrymandering Act redefined usual residence. If a state wanted to reallocate the incarcerated population from their last known address back to their place of confinement, they would have to affirmatively take this step via legislation or through the state redistricting commission, which would likely be politically toxic. In South Carolina, for example, ending prison gerrymandering would benefit 110 of the 124 State House districts, while just 14 districts would benefit from reimposing prison gerrymandering in the event of passage of the End Prison Gerrymandering Act.²⁹⁷ Significant resources would have to be spent to benefit the small fraction of the state that would have its population decreased absent prison gerrymandering.

By default, then, the End Prison Gerrymandering Act would likely have a significant impact on state and local redistricting, even if, due to the federal structure of election law, the End Prison Gerrymandering Act could not *require* states and local governments to use this data. The problem, however, is that this law is unlikely to be passed by Congress. As of early 2024, just eleven representatives cosponsored the End Prison Gerrymandering Act,²⁹⁸ and support from the new Congress is unlikely. But Congressional action is not the sole way to change the interpretation of usual residence; the Census Bureau can choose to interpret their own rule in a different way and has considered doing so recently.

2. Census Bureau Action

Following the 2010 Census, the Census Bureau sought feedback from the public regarding its interpretation of usual residence—that comment period began in May 2015.²⁹⁹ The Census Bureau received 262 comments, 162 of which spoke to where the incarcerated population of each state is counted.³⁰⁰ All but six of those comments were strongly in favor of the Census reinterpreting its usual residence rule to count incarcerated individuals at their last known address, rather than at their place of confinement.³⁰¹ Those in favor of the change relied on many of the same arguments that this Article has included: inflating rural populations at the expense of urban areas, especially in the context of mass incarceration; equal representation; the way states consider residency for other contexts; and the fact that incarcerated individuals are not truly a part of the community in which they are incarcerated.³⁰² Those opposed to the rule, however, primarily relied on the cost and complexity of

²⁹⁷ Prison Gerrymandering in South Carolina, *supra* note 195, at 16–19.

²⁹⁸ *H.R.2905—End Prison Gerrymandering Act*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/2905?s=1&cr=1> [<https://perma.cc/824D-VQPX>] (last visited Apr. 13, 2024).

²⁹⁹ Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42577, 42577 (June 30, 2016).

³⁰⁰ *Id.* at 42578.

³⁰¹ *Id.*

³⁰² *Id.*

reallocating the incarcerated population to their last known address and raised the prospect that altering the definition of usual residence in this context might “open the door to future census population count adjustments motivated by political gain.”³⁰³ In considering all comments, the Census Bureau noted that counting incarcerated individuals at their place of confinement is consistent with the historic interpretation of usual residence, and therefore declined to change its interpretation, but invited further comment from the public as to how incarcerated individuals are counted.³⁰⁴

In response, the Census received 77,887 comments related to incarcerated individuals, all but twenty-four of which were in favor of the Census amending its interpretation of usual residence to reallocate incarcerated individuals to their home community.³⁰⁵ As with the previous round of comments, the vast majority of the responses focused on the way that the usual residence rule distorts populations, and therefore political power, within a state.³⁰⁶ Many commenters also pointed to the impracticality of the piecemeal approach that is currently being used. Some states reallocate incarcerated individuals at their own expense while others do not, but communities within those states exclude incarcerated individuals from their population totals anyway.³⁰⁷ Meanwhile, even if a state chose to reallocate the incarcerated population, there is difficulty in accessing the needed information for individuals incarcerated in federal prison or incarcerated outside of the state boundaries that makes an already costly and confusing process even more difficult.³⁰⁸ A nationwide approach could address these concerns and do so more efficiently than the current state-by-state approach.³⁰⁹

Of the remaining twenty-four comments, twenty expressed no opinion as to whether incarcerated individuals should be counted at their last known address or at their place of confinement.³¹⁰ In these comments, many noted the value of equal representation, some invoking it to argue that incarcerated individuals should have the right to vote as they are counted as residents for redistricting.³¹¹ One commenter argued the inverse, that incarcerated individuals, by virtue of being unable to vote, should not be counted by the Census at all.³¹² Finally, just four comments were in favor of the Census continuing to

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5527 (Feb. 8, 2018).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 5528.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* In 2016, the Supreme Court rejected a challenge to Texas’s 2010 redistricting plan that was based on total population, rather than the population of registered voters. *Evenwel v. Abbott*, 578 U.S. 54, 57 (2016). This decision affirmed the longstanding practice of basing district populations on total populations, including those who are ineligible to vote, such as noncitizens, children, and incarcerated individuals, even if there is significant variation in the number of people registered to vote between districts. *Id.* at 61.

count incarcerated individuals at their place of confinement.³¹³ Each of these commenters pointed to a plain reading of usual residence, noting that regardless of other considerations, incarcerated individuals “live and sleep most of the time” at the facilities where they are incarcerated.³¹⁴ Other considerations that were raised included emergency and road maintenance services being provided to the prison by the community, the difficulty on the part of the Census and facility administrators in determining the home address of each incarcerated individual, and the difficulty in tracking incarcerated individuals who are in transit.³¹⁵

In the face of the overwhelming support for amending the Census’s interpretation of usual residence, the Census ultimately decided to count incarcerated individuals the way they have always been counted, but reaffirmed its commitment to providing the necessary data to states early in the redistricting process.³¹⁶ Nevertheless, the Census Bureau has already begun to solicit comments ahead of the 2030 Decennial Census as to how the delivery of the Census could be improved.³¹⁷

While this work is in early stages and has yet to specifically address how various residence situations will be considered, that process will begin soon. If the preparation for the 2020 Census is any indication, the first round of comments for residence criteria will likely be solicited in 2025. While it was discouraging that the Census declined to change its interpretation for the 2020 census, even as over 99.9% of respondents were in favor of such a change, the momentum for counting incarcerated individuals at their home has only grown. More and more states have taken steps to end prison gerrymandering, including a number of states that Donald Trump won in the 2024 election.³¹⁸ While his administration may not be the most sympathetic to arguments from activists opposed to prison gerrymandering (indeed, his previous administration adopted the final residence rules counting incarcerated individuals at their place of confinement for the 2020 census),³¹⁹ the growing support for change, including in red states, could lead the administration to take these arguments seriously. It is still possible, then, for 2030 to be the watershed moment in which the Census Bureau finally counts incarcerated individuals in their communities, not their cages.

³¹³ Final 2020 Census Residence Criteria and Residence Situations, *supra* note 305, at 5528.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Soliciting Input or Suggestions on 2030 Census Preliminary Research, 87 Fed. Reg. 50599 (Aug. 17, 2022). These early comment periods relate to budget constraints, changes in technology, a growing distrust of government, increasing concerns regarding data privacy, and complex living arrangements—such as joint custody of children, cohabitation, or multigenerational households—that are not as easily counted. *Id.*

³¹⁸ Donald Trump won Michigan, Montana, Nevada, and Tennessee, each of which has taken steps to limit prison gerrymandering at some level of government. See Kajstura, *supra* note 284.

³¹⁹ See Final 2020 Census Residence Criteria and Residence Situations, *supra* note 305, at 5526 (noting the effective date of the final rules as March 12, 2018).

CONCLUSION

Prison gerrymandering is a profound transfer of political power to politicians whose self-interest compels them to pass policies detrimental to a significant share of their ostensible constituents. It is for that reason that prison gerrymandering is frequently analogized to the Three-Fifths Compromise struck during the drafting of the U.S. Constitution.³²⁰ The Three-Fifths Clause, which counted enslaved people as three-fifths of a person for Congressional reapportionment, delivered political clout to states with large populations of enslaved (and disenfranchised) people, enabling the powerful slave-owning class to obstruct abolition for decades. Similarly, prison gerrymandering gives power to districts with large populations of incarcerated (and typically disenfranchised) people, incentivizing those districts' representatives to increase mass incarceration.

It thus makes sense that the history of prison gerrymandering begins in the Postbellum Era, when the former Confederate states were successfully able to undo many of the most important advances of Reconstruction. Two Civil War Amendments—the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment forbidding disenfranchisement—became the architecture for modern prison gerrymandering, as each amendment provided an exception from their general proscriptions if done as punishment for a crime.³²¹ Because of these two amendments, states were able to incarcerate would-be Black voters and profit handsomely from doing so. This incentive structure caused a surge in incarceration that disproportionately relocated individuals from urban areas to rural communities. The Census Bureau then apportions power on the basis of the distorted populations, which in turn incentivizes politicians who represent prison districts to pursue policies that will increase incarceration and lengthen sentences; policies that directly harm a significant share of their ostensible constituency.

But while prison gerrymandering has roots in the Southern Postbellum reaction to Reconstruction, it is a problem that, until recently, has impacted every state to some degree. Recognizing the disparities caused by prison gerrymandering and the perverse incentive structure it fosters, some states have begun to limit—or eliminate altogether—its operation. But while these are positive steps toward ameliorating this anti-democratic feature of modern politics, national problems require national solutions. That is why the most effective solution to the problem of prison gerrymandering would be for the Census Bureau to reinterpret the usual residence rule in the context of incarceration. The opportunity for the Census Bureau to make this change will likely happen soon; in May 2015, the Census Bureau requested feedback on the 2010 residence rule,³²² with a more formal notice and comment period to

³²⁰ See, e.g., Leah Sakala, *Prison-Based Gerrymandering's Striking Resemblance to the Infamous Three-Fifths Clause*, PRISON POL'Y INITIATIVE (Sept. 9, 2011), <https://www.prisonersofthecensus.org/news/2011/09/09/three-fifths/> [<https://perma.cc/MS3P-A8WG>].

³²¹ U.S. CONST. amend. XIII, § 1; *id.* amend. XIV, § 2.

³²² 2020 Decennial Census Residence Rule and Residence Situations, 80 Fed. Reg. 28950 (May 20, 2015).

respond to the proposed residence rule for the 2020 Census beginning in June 2016.³²³ During the comment periods for the 2030 Census, potentially beginning as early as 2025, it will be critical for those who support fair representation to provide informed comments detailing the effect that prison gerrymandering has on communities and calling for reform. Exuberant comments coming out against prison gerrymandering can help finally eliminate this modern day Three-Fifths Compromise on a national level.

³²³ Proposed 2020 Census Residence Criteria and Residence Situations, *supra* note 299.