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Incarcerated and Unrepresented: Prison-Based Gerrymandering and Why Evenwel's Approval of "Total Population" as a Population Base Shouldn't Include Incarcerated Populations

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INCARCERATED AND UNREPRESENTED: PRISON-BASED GERRYMANDERING AND WHY *EVENWEL*'S APPROVAL OF "TOTAL POPULATION" AS A POPULATION BASE SHOULDN'T INCLUDE INCARCERATED POPULATIONS

Emily J. Heltzel*

INTRODUCTION

In 2005, in a small town in Jones County, Iowa, called Anamosa, Danny R. Young was elected to the Anamosa City Council after garnering a grand total of two votes: write-in votes from his wife and a neighbor.[1] Mr. Young's ward, Ward 2, purportedly had a population approximately equivalent to the populations of the other wards in his town: somewhere around 1,400 people.[2] However, because the United States Census Bureau counts incarcerated individuals as residents of their location of incarceration, included in that 1,400 population figure for Ward 2 were about 1,300 inmates who were incarcerated in a prison located within Mr. Young's ward.[3] Although these 1,300 inmates could not vote in Ward 2 and would not, in any meaningful way, be represented by Mr. Young, their presence was nevertheless included when calculating the ward's population and drawing the district lines that created the wards.[4] Accordingly, while the census numbers suggested a total population of approximately 1,400, the reality was that Mr. Young was effectively elected—by his wife and neighbor—to represent only fifty-eight people: the non-incarcerated citizens of Ward 2.[5] As a result, Mr. Young's fifty-eight constituents enjoyed approximately twenty-five times more "political clout" than the residents of Anamosa's other wards, whose representatives had the needs of all 1,400 constituents to address.[6]

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

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See id.*

As a further, unintended result, Anamosa became a national symbol for the issue of prison-based gerrymandering.[7]

Based on the principle of "one-person, one-vote," first espoused by the United States Supreme Court in *Wesberry v. Sanders*,[8] jurisdictions are required to design their legislative districts with equal populations.[9] To do this, most jurisdictions rely on population data from the U.S. Census Bureau.[10] Because the Census Bureau counts prison inmates as residents of the districts where they are incarcerated, voting-eligible residents of legislative districts with correctional facilities tend to be over-represented in terms of voting power.[11] This practice—using prison populations to dilute the votes of residents in other districts—is referred to as "prison-based gerrymandering."[12] Although states are not *required* to use the Census Bureau data, most do.[13]

This Note is divided into four Parts. Part I examines the problem of prison-based gerrymandering, focusing on the impact of the Census Bureau's method for counting incarcerated populations in the decennial census and the possibility of state-level solutions to the problem.[14] Part II explores the Supreme Court's recent decision in *Evenwel v. Abbott*,[15] which upheld the use of total population as an apportionment base.[16] More specifically, Part II examines the potential implications of the *Evenwel* decision on lower courts by analyzing two district court rulings, *Calvin v. Jefferson County*

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[7] *Id.* For a discussion of the Anamosa situation, as well as a comprehensive survey of the effect that prison-based gerrymandering has on local and state governments throughout the country, see *The Problem*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT, https://www.prisonersofthecensus.org/impact.html [https://perma.cc/RH3X-MV5J] (last visited Dec. 4, 2017).

[8] 376 U.S. 1 (1964); *see also* Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote*," 11 VA. J. SOC. POL'Y & L. 229, 229 n.2 (2004).

[9] *Wesberry*, 376 U.S. at 7–9.

[10] 13 U.S.C. § 141 (2012); 15 C.F.R. § 101.1 (2017). *See generally* Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42577 (proposed June 30, 2016) (to be codified at 15 C.F.R.) [hereinafter Proposed 2020 Census Residence Criteria] (explaining how the census is conducted).

[11] *See* Stinebrickner-Kauffman, *supra* note 8, at 230.

[12] Ben Peck, Senior Legislative & Policy Assoc., Dēmos, Testimony Before the National Advisory Committee on Racial, Ethnic and Other Populations of the U.S. Census Bureau: The Census Count and Prisoners: The Problem, the Solutions and What the Census Can Do (Oct. 22, 2012), http://www.demos.org/sites/default/files/publications/BenPeck_Testimony_PrisonBasedGerrymandering101212.pdf [https://perma.cc/33R7-C8CH].

[13] *See* Brenda Wright & Peter Wagner, *States Are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do*, PRISON POL'Y INITIATIVE & DĒMOS, http://www.prisonersofthecensus.org/factsheets/adjusting.pdf [https://perma.cc/9G9Z-UQKS] (last updated Sept. 22, 2010).

[14] *See infra* Part I.

[15] 136 S. Ct. 1120 (2016).

[16] *Id.* at 1123; *see infra* Part II.

Board of Commissioners[17] and *Davidson v. City of Cranston*,[18] that invalidated redistricting plans in Florida and Rhode Island, respectively, because of the plans' utilization of prison-based gerrymandering.[19]

Part III argues that the Supreme Court in *Evenwel* deliberately crafted its holding in terms of representational equality, noticeably—and purposefully—leaving open the question of who is being represented.[20] Accordingly, the decision in *Evenwel* did not mandate reversal of the district courts' decisions in *Calvin* and *Davidson*, because the *Evenwel* Court's representational theory does not stretch far enough to include incarcerated populations. Finally, the Conclusion states that in a challenge to a ruling similar to the First Circuit's reversal of the District Court of Rhode Island's decision in *Davidson*,[21] the Supreme Court can further expand on and solidify the representational theory it relied on in *Evenwel* by holding that the approved "total population" apportionment base refers to the total *represented* population, which definitively does not include incarcerated populations.[22]

I. BACKGROUND

Voters are often grouped into districts for the purpose of electing many democratic representatives—ranging from county and municipal officials to state legislators and members of Congress.[23] These districts have been called the "building blocks . . . of our representative democracy."[24] Jurisdictions are required to design their legislative districts with roughly equal populations.[25] Although precise mathematic equality is not required, the Supreme Court has established an "as nearly as practicable" standard.[26] Established in *Wesberry v. Sanders*[27] and clarified in subsequent cases,[28] this standard

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[17] 172 F. Supp. 3d 1292 (N.D. Fla. 2016).

[18] 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

[19] Both district courts found that the inclusion of prison populations unconstitutionally diluted the voting strength of others. *See Davidson*, 188 F. Supp. 3d at 152; *Calvin*, 172 F. Supp. 3d at 1323–26.

[20] *See infra* Part III.

[21] *See* Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).

[22] *See infra* Conclusion.

[23] *See 7 Things to Know About Redistricting*, BRENNAN CTR. FOR JUST. (Oct. 28, 2013), https://www.brennancenter.org/analysis/7-things-know-about-redistricting [https://perma.cc/KPU6-QE7G] [hereinafter *7 Things*].

[24] Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 209 (2015).

[25] *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964); Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[26] *Wesberry*, 376 U.S. at 7–8.

[27] 376 U.S. 1 (1964).

[28] *See, e.g.*, Graham v. Thornburgh, 207 F. Supp. 2d 1280, 1291 (D. Kan. 2002) (finding

requires that states make a "good-faith effort to achieve precise mathematical equality" in dividing their districts.[29] After a careful examination of the history behind the enactment of Article I, Section 2 of the Constitution, the Court concluded in *Wesberry* that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[30] The Supreme Court then observed that James Madison's comments on the subject in *The Federalist* ("Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.") could fairly be interpreted as meaning "one-person, one-vote."[31] While the Court's decision in *Wesberry* addressed the selection of members of the federal House of Representatives, the Court subsequently noted in *Reynolds v. Sims*[32] that *Wesberry* definitively established that the fundamental principle of representative government is "one of equal representation for equal numbers of people, without regard to race, sex, [or] economic status . . . ."[33] Accordingly, the Court concluded that the one-person, one-vote principle from *Wesberry* was properly encompassed by the Equal Protection Clause of the Fourteenth Amendment.[34]

In order to maintain the constitutionally mandated standard of roughly equal populations in each district, jurisdictions must periodically redraw their district lines.[35] This is done through a process known as redistricting.[36] The specific interests that an elected official of a given district will represent are dictated by how the district lines are drawn, because these district lines define the community to be represented.[37] The

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that the "as nearly as practicable" standard required a "good-faith effort"); Adams v. Clinton, 90 F. Supp. 2d 35, 66–67 (D.D.C. 2000) (distinguishing between *Wesberry* and *Reynolds*).

[29] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969) (citing *Reynolds*, 377 U.S. at 577).

[30] 376 U.S. at 17.

[31] *See id.* at 18 (quoting THE FEDERALIST NO. 57, at 385 (James Madison) (Jacob E. Cooke ed., 1961)).

[32] 377 U.S. 533 (1964).

[33] *Id.* at 560–61.

[34] *See* U.S. CONST. amend. XIV, § 1; *Reynolds*, 377 U.S. at 560–61.

[35] *See, e.g.*, *7 Things*, *supra* note 23.

[36] Although sometimes used interchangeably to more easily facilitate discussion, *see, e.g.*, Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1824 n.9 (2010), the terms "reapportionment," "redistricting," and "gerrymandering" have three distinct definitions. *See* JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 6–7 (2010), http://www.brennancenter.org/sites/default/files/legacy/Democracy/2008redistrictingGuide.pdf [https://perma.cc/DC9W-PG4L]. "Reapportionment" is the process of deciding, based on population, how many representatives a particular state or district receives. *Id.* "Redistricting" is the process of redrawing legislative district lines. *Id.* "Gerrymandering" is the process of redrawing district lines for the purpose of increasing a group's political power. *Id.*

[37] Wood, *supra* note 24, at 209.

concept of "one-person, one-vote" is often at the center of litigation surrounding redistricting plans,[38] and litigation tends to track the decennial census.[39] Redistricting plans must comport with the idea that, under the Constitution, each citizen has the right to have her vote counted equally.[40] Challenges to redistricting plans tend to focus on vote dilution—the diminution of group voting power.[41] As Stanford Professor Pamela Karlan has observed, "genuinely meaningful political participation implicates groups of voters, rather than only atomistic individuals."[42] Stated otherwise, the concept of "representation" applies to groups, rather than individual voters, because it is *groups* of voters—not each individual voter—who ultimately elect representatives.[43] Thus, the one-person, one-vote challenges to redistricting plans are driven by the contention that because of the way the new districts have been drawn, certain groups of people are denied their right to "democratic representation in proportion to their numbers."[44]

As noted above, only "a good-faith effort to achieve precise mathematical equality" of district populations—and not precise mathematical equality itself—is required in redistricting.[45] The Supreme Court has provided a rule of thumb (the "ten percent rule") for what constitutes a "minor" deviation from mathematical equality of populations.[46] As the Court explained in *Brown v. Thomson*, minor deviations are considered insufficient to establish a prima facie case of invidious discrimination under the Fourteenth Amendment: "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan

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[38] *See* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 379–81 (2011).

[39] Nathanial Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 756 (2011) ("[T]he controversies surrounding the census have remained linked to the unique place of the census in the constitutional design.").

[40] *See* Reynolds v. Sims, 377 U.S. 533, 560–61 (1964); Wesberry v. Sanders, 376 U.S. 1, 8–9 (1964). The Court's earlier decision in *Baker v. Carr*, 369 U.S. 186 (1962), paved the way for these decisions, holding that redistricting cases present justiciable issues and thus "dispos[e] of the political-question barrier to justiciability of legislative apportionment challenges." John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237, 242 n.35 (2011).

[41] Wood, *supra* note 24, at 207 ("[V]ote dilution is about the interests of groups coming together to elect a representative of choice."); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (observing that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot").

[42] Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004).

[43] *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part)).

[44] Wood, *supra* note 24, at 208.

[45] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969) (citing *Reynolds*, 377 U.S. at 577); *see also Wesberry*, 376 U.S. at 18.

[46] *See* Brown v. Thomson, 462 U.S. 835, 842–43 (1983).

with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[47]

A crucial interplay exists between the principle of one-person, one-vote and the redistricting process: depending on how district lines are drawn and how voters are grouped within districts, "the district lines can make it much easier or much harder to elect any given representative, or to elect a representative responsive to any given community."[48] Left unchecked, the redistricting process provides a tempting opportunity for legislators to manipulate the voting power of individuals and groups in a given district.[49]

A. The Increased Impact of the United States Census Bureau's "Usual Residence" Rule in the Era of Mass Incarceration

In pursuit of its fundamental goal of counting "each person living in the country once, only once, and in the correct place,"[50] the U.S. Census Bureau counts people at their "usual residence," a concept established in the Census Act of 1790 that has been followed in all subsequent censuses.[51] The Census Bureau defines "usual residence" as "the place where a person lives and sleeps most of the time," which it acknowledges does not necessarily coincide with the person's legal residence or voting residence.[52] Perhaps unsurprisingly, "nonhousehold populations"—populations of group quarter facilities such as college and university dormitories, military bases with on-base housing, and jails and prisons—present unique cases of "residential ambiguity."[53] After wrestling with how to handle the issue of incarcerated populations, the Census Bureau ultimately decided to count incarcerated individuals' "usual residence" as their location of incarceration.[54] After all, in line with the Census Bureau's chosen internal definition for "usual residence," prisoners admittedly *do "*generally eat, sleep and work in their place of confinement."[55]

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[47] *Id.* (internal citations omitted).

[48] LEVITT, *supra* note 36, at 10.

[49] *See id.*

[50] NAT'L RESEARCH COUNCIL, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 1 (Daniel L. Cork & Paul R. Voss eds., 2006).

[51] Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 101, 103 (stating that rules for ascertaining a person's residence for enumeration purposes would be based on the concept of "usual place of abode": "[E]very person occasionally absent at the time of the enumeration [will be enumerated] as belonging to that place in which he usually resides in the United States."); *see, e.g.*, Proposed 2020 Census Residence Criteria, *supra* note 10.

[52] Proposed 2020 Census Residence Criteria, *supra* note 10.

[53] *See* NAT'L RESEARCH COUNCIL, *supra* note 50, at 62–63.

[54] *See* Proposed 2020 Census Residence Criteria, *supra* note 10.

[55] *See* Persily, *supra* note 39, at 786.

Federal law does not require states to use the exact population data gathered by the Census Bureau.[56] The Supreme Court has confirmed this, noting that "[t]he decision to include or exclude [groups such as short-term or temporary residents] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[57] Nevertheless, although states are not required to use the Census Bureau's population data when they draw their districts, most do.[58] Because most states use the census figures when drawing their districts, the resulting total population figures used as the apportionment base in districting plans are inflated in districts that house correctional facilities.[59] The result is that non-incarcerated residents of legislative districts that happen to have correctional facilities are over-represented in terms of both voting and representational power.[60] As one critic has noted, "[t]his bogus inflation gives prison districts undeserved strength in the state legislature and more influence than they would otherwise have in state affairs."[61] Consider the case of Cranston, Rhode Island, the town whose redistricting plan is at issue in *Davidson v. City of Cranston*.[62] In a hotly contested race for state House Speaker (considered "arguably the most powerful political position in Rhode Island"),[63] the Democratic incumbent Nicholas Mattiello and his challenger Steven

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[56] *See* Mahan v. Howell, 410 U.S. 315, 331–32 (1973) (rejecting Virginia's assertion that the lower courts erred in "declining to accord conclusive weight to the legislative reliance on census figures" and finding that the district court was justified in disallowing a legislative plan that resulted in "significant population disparities and the assignment of military personnel to vote in districts [where] they admittedly did not reside"); *see also* Wright & Wagner, *supra* note 13.

[57] *See* Burns v. Richardson, 384 U.S. 73, 92 (1966). It is worth noting that at least one state has concluded that its own state *law* mandates the use of the Census Bureau count. *See* STANLEY ROSENBERG & MICHAEL J. MORAN, MASS. GEN. COURT, REPORT FROM THE CHAIRS OF THE SPECIAL JOINT COMMITTEE ON REDISTRICTING 15–17 (2012), http://archives.lib.state.ma.us/bitstream/handle/2452/213880/ocn889628904.pdf [https://perma.cc/FVA9-24U6]. The fact nevertheless remains that the Supreme Court has determined that there is no federal constitutional mandate that requires the use of the Census Bureau figures.

[58] *See* 13 U.S.C. § 141 (2012); 15 C.F.R. § 101.1 (2017); Proposed 2020 Census Residence Criteria, *supra* note 10; Wright & Wagner, *supra* note 13.

[59] Drake, *supra* note 40, at 249–50 (observing that "[t]he policy of counting prisoners as residents of the communities in which they are imprisoned has profound consequences . . . result[ing] in population data about communities—both the prison communities and the communities of origin—that, while relied on by policy makers, does not accurately reflect the needs of those communities"). Although it is beyond the scope of this Note, it is important to recognize not only the resulting inflation of population figures in districts that house correctional facilities, but also the *deflation* of the population figures—and thus, the decrease of the corresponding representational power—in the inmates' respective communities of origin.

[60] *See* Stinebrickner-Kauffman, *supra* note 8, at 230.

[61] Editorial, *Phantom Constituents in the Census*, N.Y. TIMES (Sept. 26, 2005), http://www.nytimes.com/2005/09/26/opinion/phantom-constituents-in-the-census.html [hereinafter *Phantom Constituents*].

[62] See 188 F. Supp. 3d 146 (D.R.I. 2016), discussed *infra* Section II.B.

[63] Kim Kalunian, *Non-Voting Inmates Count as Constituents for Mattiello, Frias*, WPRI.COM (Nov. 5, 2016, 12:34 PM), http://wpri.com/2016/11/05/non-voting-inmates-count-as-constit

Frias could narrow their focus to a smaller pool of voters, since many of their "constituents" were actually inmates of the Adult Correctional Institution (ACI).[64] Telling of the lack of representation for the incarcerated inmates, when Mr. Frias was asked about the topic, "he [did not] have a comment on the topic, [stating that he was] 'focused on the residents that can vote in [the] district.'"[65]

Prison-based gerrymandering, generally speaking, refers to the practice of specifically using the presence of incarcerated populations to dilute the votes of residents in other districts.[66] As it has been put more bluntly, communities engaged in prison-based gerrymandering "increase their political clout on the backs of their prison populations."[67] Without the boost from including incarcerated populations in their numbers, many of these districts would fall far short of meeting minimum population requirements, which would mandate that the district lines be redrawn.[68] Prior to New York's enactment of a law ending the state's practice of prison-based gerrymandering,[69] for example, the population base for a city council district in Rome, New York, was comprised of about fifty percent inmates of correctional facilities.[70] Approximately thirty percent of upstate New York's "population growth" during the 1990s was actually attributable to the presence of correctional facilities.[71] Strikingly, although New York City counts as the "home of residence" for sixty-six percent of all prisoners incarcerated in the state of New York, ninety-one percent of these prisoners are incarcerated outside of New York City.[72]

For an even more illustrative example, consider Jefferson County, a county in northern Florida.[73] Jefferson County is governed by a "Board of County Commissioners . . . whose five members are each elected from a single-member district."[74] The

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uents-for-mattiello-frias/ [https://perma.cc/X2WJ-G8J2].

[64] *Id.*; *see also* Aleks Kajstura, *Rhode Island Candidates Race to Represent Phantom Constituents*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT (Nov. 7, 2016), https://www.prisonersofthecensus.org/news/2016/11/07/mattiello-frias/ [https://perma.cc/R2P5-QYDN].

[65] Kalunian, *supra* note 63.

[66] *See, e.g.*, *Prison-Based Gerrymandering Reform*, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/case/prison-based-gerrymandering [https://perma.cc/U9GG-HDR5] (last visited Dec. 4, 2017).

[67] *See* Drake, *supra* note 40, at 238. In similarly unforgiving language, prison-based gerrymandering has also been called "an unacceptable stain on American democracy." *See* Peter Wagner, *Delaware House Passes Bill to Count Incarcerated People at Home*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT (June 2, 2010), http://www.prisonersofthecensus.org/news/2010/06/02/delaware-house/ [https://perma.cc/47AS-G6EM].

[68] *See, e.g.*, Editorial, *An End to Prison Gerrymandering*, N.Y. TIMES (Aug. 22, 2010), http://www.nytimes.com/2010/08/23/opinion/23mon3.html.

[69] *See infra* Section I.B.

[70] *See An End to Prison Gerrymandering*, *supra* note 68.

[71] *See* Ho, *supra* note 38, at 362 (citing NAT'L RESEARCH COUNCIL, *supra* note 50, at 89).

[72] *See id.*

[73] *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1295 (N.D. Fla. 2016).

[74] *Id.*

districts were drawn using the populations received from census data.[75] District 3's census population was 3,070: a number roughly equivalent to the populations of the other four districts, and a four percent deviation from ideal,[76] thus easily considered a "minor deviation" for purposes of the ten percent rule.[77] If the incarcerated population of the state prison located within District 3 were properly accounted for and removed from the total population, however, the district's population number would drop to 1,913 and its deviation from the ideal would skyrocket to -29.69%.[78] Consequently, as a result of using the census population, the 1,913 *actual* residents of District 3 are able to elect a commissioner—responsive to their specific needs—who has the same influence as, for example, the commissioner tasked with representing all 3,073 non-incarcerated individuals in District 4.[79] District 3 thus disproportionately benefits from having a prison population that accounts for almost forty percent of its "residents."[80]

The severity of the problems resulting from the utilization of the Census Bureau's methodology for counting incarcerated populations is greatly exacerbated in the era of mass incarceration.[81] Thus, while it has always been problematic, the inclusion of populations housed in correctional facilities in the total population of a given district previously affected comparably fewer people and districts than present-day.[82] In stark contrast, the total number of incarcerated individuals at the end of 2014 was estimated to be 2,306,100.[83] This explosion in the incarcerated population caused the Census Bureau's method of counting incarcerated persons to go from being a "minimal blip[ ]" in redistricting data to having a major impact on districting.[84]

Because of its wide-reaching impact, the Census Bureau is facing growing opposition to this counting practice.[85] Of the 262 comments received in response to the

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[75] *Id.* at 1297.

[76] *Id.*

[77] Brown v. Thomson, 462 U.S. 835, 842–43 (1983).

[78] *Calvin*, 172 F. Supp. 3d at 1297.

[79] *See id.*

[80] *Id.* For a further discussion of the implications of Jefferson County's redistricting plan, see *infra* Section II.B.

[81] Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1251 (2012).

[82] *Id.* at 1242–43.

[83] The total number of state and federal prisoners at the end of 2014 was estimated to be 1,561,500. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 1 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf [https://perma.cc/B49G-ZGDU]. Additionally, the Bureau of Justice Statistics estimated that the total population of county and city jails in mid-year 2014 was 744,600. Press Release, Bureau of Justice Statistics, The Nation's Jails Held Fewer Inmates at Midyear 2014 Compared to Their Peak Count in 2008 (June 11, 2015), http://oip.gov/newsroom/pressrelease/2015/oip06102015.pdf [https://perma.cc/SLR5-8HS4]. Therefore, the total number of incarcerated individuals in 2014 was estimated by the Bureau of Justice Statistics to be 2,306,100.

[84] *See* Wagner, *supra* note 81, at 1243.

[85] *See, e.g.*, Proposed 2020 Census Residence Criteria, *supra* note 10; PATRICIA ALLARD ET AL., BRENNAN CTR. FOR JUSTICE, ONE SIZE DOES NOT FIT ALL: WHY THE CENSUS

Census Bureau's request for public comment on the 2010 Census Residence Rule and Residence Situations, 162 pertained to the policy concerning where prisoners are counted.[86] Dr. Kenneth Prewitt, who served as the Director of the Census Bureau from 1998–2001,[87] has summed up the basic argument against the current method as follows:

> Current census residency rules ignore the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration. . . . Counting people in prison as residents of their home communities offers a more accurate picture of the size, demographics, and needs of our nation's communities, and will lead to more informed policies and a more just distribution of public funds.[88]

Financially, the current system disadvantages the under-counted home communities of incarcerated individuals by denying them their fair allocation of public funds.[89] However, the financial inequities, although significant, are not the end of the problem. In a September 2016 letter to the Census Bureau, Senators Christopher Coons and Sheldon Whitehouse, along with eleven other senators, specifically addressed additional redistricting concerns that arise from the Census Bureau's policy, noting that "[w]hen the Census counts individuals who are in a correctional facility on Census Day as if that correctional facility is their home, legislative redistricting can inflate the political power of areas around prisons with added 'residents' who often cannot vote while simultaneously disempowering the communities these individuals consider home."[90] Despite

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BUREAU SHOULD CHANGE THE WAY IT COUNTS PRISONERS 1 (2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV3_OneSize.pdf [https://perma.cc/PPG7-368F] (advocating for a change in the "usual residence" policy used by the Census Bureau because of the fundamental differences between students and prisoners); Drake, *supra* note 40, at 238 (discussing the counting of incarcerated populations as residents of their prison cells as the successor to the counting of slaves as three-fifths of a person for the purposes of legislative reapportionment: "The Fourteenth Amendment to the Constitution nullified the three-fifths clause in 1868, but many rural regions in the United States continue to leverage a captive, disenfranchised population for political power." (citation omitted)); Aleks Kajstura, *13 United States Senators Ask Census Bureau to Count Incarcerated People at Home*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT (Sept. 30, 2016), http://www.prisonersofthecensus.org/news/2016/09/30/13-senators/ [https://perma.cc/FPT2-NFRX]; Kenneth Prewitt, *Foreword* to PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS, at i (2004).

[86] Proposed 2020 Census Residence Criteria, *supra* note 10.

[87] Prewitt, *supra* note 85, at i.

[88] *Id.*

[89] *See* PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS 1 (2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf [https://perma.cc/CGQ2-G4FJ].

[90] Letter from 13 U.S. Senators to Karen Humes, Chief, Population Division, U.S. Census Bureau (Sept. 21, 2016), https://www.prisonersofthecensus.org/letters/2016/13senators2016

this growing opposition, the Census Bureau continues to defend its decision to count incarcerated populations as residents of the communities where their correctional facilities are located.[91]

B. State-Level Solutions to Prison-Based Gerrymandering

The most obvious, and arguably the most ideal, solution simply would be for the Census Bureau to recognize its central role in the problem and to change the way incarcerated populations are counted in future censuses.[92] However, states are not required to use data that is—for their purposes—known to be flawed, simply because it comes from the Census Bureau.[93] Because states are not required to use this data, they are correspondingly not absolved from action in addressing the constitutional implications that arise from prison-based gerrymandering.[94] In the absence of Census Bureau action, the solution is for states themselves to address this inequity; conveniently, the Census Bureau provides tools for just this purpose.[95] Further attempting to allow the states to take the lead, the Census Bureau released early counts of inmate populations following the 2010 Census to aid the states in implementing alternative districting plans, if a state so chose.[96] As explained by the Prison Policy Initiative, this option allows "[s]tates [to] correct the Census data by creating a special state-level census that collects the home addresses of people in prison and then adjusts the U.S. Census counts prior to redistricting."[97]

Some states have already made the wise decision to address the issues created by prison-based gerrymandering.[98] Maryland was the first state to do so; on April 13, 2010,

.pdf [https://perma.cc/2Y42-VCY9].

[91] U.S. CENSUS BUREAU, TABULATING PRISONERS AT THEIR "PERMANENT HOME OF RECORD" ADDRESS 10–11 (2006), http://felonvoting.procon.org/sourcefiles/tabulating_prisoners.pdf [https://perma.cc/X9SU-P9EC] (arguing that the alternative to the usual residence rule, collecting "permanent home of record" addresses for incarcerated individuals, "presents major operational issues for both the correctional facilities and the Census Bureau").

[92] *See, e.g.*, Wagner, *supra* note 81, at 1255–60; *Phantom Constituents*, *supra* note 61 ("[T]he Census Bureau should simply change its procedures now. Counting inmates where they live would cure what has clearly become a troubling flaw in the census process.").

[93] *See* Fletcher v. Lamone, 831 F. Supp. 2d 887, 893–94 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012) (upholding Maryland's "No Representation Without Population Act," which was enacted to counteract the "distortional effects" of the Census Bureau's standard counting practice).

[94] *See* Wagner, *supra* note 81, at 1247–48.

[95] *See* Proposed 2020 Census Residence Criteria, *supra* note 10.

[96] *See* Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU DIRECTOR'S BLOG (Mar. 1, 2010), https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html [https://perma.cc/NDP7-KTQS].

[97] *Solutions*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT, https://www.prisonersofthecensus.org/solutions.html [https://perma.cc/U7TG-AF6V] (last visited Dec. 4, 2017).

[98] *See, e.g.*, *Maryland and New York Have Taken the Lead*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/factsheets/national/NY-MD-leading.pdf [https://perma

then-Governor Martin O'Malley signed the "No Representation Without Population Act"[99] into law;[100] the Maryland district court's decision upholding the law was subsequently affirmed by the U.S. Supreme Court.[101] New York soon followed Maryland's lead, enacting similar legislation on August 3, 2010;[102] this law has been upheld by the New York State Supreme Court.[103] Although only the Maryland and New York laws were implemented in time for the wave of redistricting that followed the 2010 Census, two additional states, Delaware[104] and California,[105] have passed laws aimed to end prison-based gerrymandering starting after the 2020 Census. New Jersey was the most recent state to attempt to address the problem. In May 2017, the state legislature passed legislation that would have "require[d] that incarcerated individuals in State and Federal facilities in New Jersey . . . be counted at their last known complete address."[106] New Jersey Governor Chris Christie, however, vetoed the bill on July 13, 2017.[107] If other states and localities do not follow these states' leads in addressing representational inequities—instead choosing to continue to engage in the inequities of prison-based gerrymandering—they are opening the door for liability during the "already litigious redistricting process."[108]

As Dale Ho, the current Director of the American Civil Liberties Union's Voting Rights Project, has observed, refusal to engage in prison-based gerrymandering comports not only with "basic legal rules of residence and domicile, but also with broader principles of fairness and equality in the democratic process."[109] As Mr. Ho predicted,[110] and as we are starting to see,[111] states are vulnerable to litigation on the

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.cc/3TN6-B2BF] (last visited Dec. 4, 2017) (noting that Maryland and New York, by passing "historic" legislation in 2010, "were the first two states to resolve the democratic inequities caused by the Census Bureau's method of tabulating prison populations").

[99] *See* No Representation Without Population Act, S.B. 400, 2010 Leg., 427th Sess. (Md. 2010).

[100] Carol Morello, *Maryland Changes How Prisoners Are Counted in Census*, WASH. POST (Apr. 15, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/14/AR2010041404600.html [https://perma.cc/F7MA-QXAY].

[101] Fletcher v. Lamone, 567 U.S. 930 (2012).

[102] Act of Aug. 11, 2010, Part XX, 2010 N.Y. Sess. Laws 57 (McKinney) (bill number S. 6610-C, 233d Legislative Session).

[103] Little v. LATFOR, No. 2310-2011, at *7–8 (N.Y. Sup. Ct. Dec. 1, 2011).

[104] H.B. 384, 145th Gen. Assemb., Reg. Sess. (Del. 2010).

[105] Assem. B. 420, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

[106] Press Release, N.J. Senate Democrats, Cunningham Bill to End Prison-Based Gerrymandering for Redistricting Purposes Goes to Governor (May 22, 2017).

[107] Aleks Kajstura*, Governor Christie Refuses to End Prison Gerrymandering in New Jersey*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT (July 14, 2017), https://www.prisonersofthecensus.org/news/2017/07/14/nj-veto/ [https://perma.cc/Q9SY-9MPV].

[108] *See* Ho, *supra* note 38, at 357.

[109] *Id.*

[110] *See generally id.*

[111] *See, e.g.*, Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292 (N.D. Fla.

basis of violation of the Equal Protection Clause's one-person, one-vote principle if they continue to engage in prison-based gerrymandering.[112] While the Supreme Court's decision in *Evenwel v. Abbott* upheld the use of total population as an apportionment base,[113] the representational theory expounded by the Court does not extend far enough to cover incarcerated populations, and consequently does not shield states engaged in prison-based gerrymandering from constitutional challenges.[114]

II. THE IMPLICATIONS OF *EVENWEL V. ABBOTT* FOR LOWER COURT CHALLENGES TO PRISON-BASED GERRYMANDERING

A. Evenwel v. Abbott *and the Permissible Use of Total Population as an Apportionment Base*

The appellants in *Evenwel v. Abbott* challenged Plan S172, a Texas Senate apportionment plan that created Senate districts with roughly equal total populations.[115] Because their respective Senate districts had comparatively high populations of eligible voters, the appellants argued that eligible voters in other Senate districts (specifically, those districts with fewer eligible voters) had substantially more voting power than voters in appellants' districts, thus violating the constitutional principle of one-person, one-vote.[116] As the Supreme Court noted, the appellants argued that in order to protect "voter equality," the proper apportionment base is *voter-eligible* population, not *total* population.[117] The Court expressly rejected this argument, agreeing instead with a position advanced by the United States's amicus brief that "[e]qualizing total population across districts . . . ensures that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives."[118]

By holding in *Evenwel* that total population is a permissible apportionment base, the Supreme Court rejected the appellants' urging to mandate voter-eligible apportionment.[119] In doing so, the Court took careful pains to note that elected representatives

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2016); Davidson v. City of Cranston, 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016). Both cases are discussed in Section II.B.

[112] Dale Ho also identifies a second vulnerability for states continuing to engage in prison-based gerrymandering: minority vote dilution under Section 2 of the Voting Rights Act of 1965. Ho, *supra* note 38, at 385–91; *see* 52 U.S.C. § 10301 (2012).

[113] 136 S. Ct. 1120, 1123 (2016).

[114] *See id.*

[115] Brief for Appellants at 2, *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

[116] *Id.* at 10.

[117] *Evenwel*, 136 S. Ct. at 1126.

[118] *Id.* at 1126–27 ("As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts."); Brief for the United States as Amicus Curiae Supporting Appellees at 5, *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

[119] *Evenwel*, 136 S. Ct. at 1132–33.

represent their entire constituency—not just the voting population.[120] For example, the Court noted that "children, their parents, even their grandparents . . . have a stake in a strong public-education system" and that nonvoters have an important stake "in receiving constituent services, such as help navigating public-benefits bureaucracies."[121] Relying on this representational theory, the Court declined to hold that the principle of one-person, one-vote was an absolute mandate to use eligible voters as an apportionment base.[122] Accordingly, the Court upheld Plan S172's total population apportionment base.[123] The Court's carefully considered reliance on this representational theory is crucial for understanding the decision's potential impact on prison-based gerrymandering.[124] It is also important to note that this decision only answers the question of what states *may* do—not what they must do. The Court expressly left open the question of what other apportionment bases would be similarly permissible under the Constitution.[125]

B. Challenges to Prison-Based Gerrymandering in the District Courts

In *Calvin v. Jefferson County Board of Commissioners*, the United States District Court for the Northern District of Florida, Tallahassee Division, undertook a painstakingly careful analysis of the issues surrounding prison-based gerrymandering when faced with a challenge to a redistricting plan implemented by Jefferson County, Florida following the 2010 Census.[126] Jefferson Correctional Institution (JCI) was a state prison located within Jefferson County;[127] under the challenged redistricting plan, JCI was located entirely within District 3.[128] The plaintiffs, residents of Districts 1, 2, and 4 and a not-for-profit organization based in Jefferson County, challenged the plan as violating the principle of one-person, one-vote.[129] The crux of the plaintiffs' argument was that, because the Board of Commissioners chose to include the population of 1,157 individuals incarcerated at JCI in its apportionment base—and because the prison was located entirely within one district—the districting plan "effectively weigh[ed] the votes of the (nonprisoner) voters of that district more heavily than [the] [p]laintiffs' votes, and also [gave] the nonprisoners living in that district greater political influence."[130]

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[120] *Id.* at 1132.
[121] *Id.*
[122] *Id.* at 1132–33.
[123] *See generally id.* at 1132.
[124] *See infra* Part III.
[125] *Evenwel*, 136 S. Ct. at 1133.
[126] *See* 172 F. Supp. 3d 1292 (N.D. Fla. 2016).
[127] *Id.* at 1296.
[128] *See id.* at 1297.
[129] Plaintiffs Calvin and Nelson were both residents of District 2; Plaintiffs Parrish and Griffin were residents of Districts 4 and 1, respectively; Plaintiff Concerned United People was a not-for-profit organization based in Jefferson County. *Id.* at 1298–99.
[130] *Id.* at 1298.

As explained by Judge Walker's decision in *Calvin*, in order for a population to be affected by malapportionment, there must be some kind of representational nexus between the representative and the individual.[131] This is because representational injuries that are caused by malapportionment (including, but not limited to, "reduced access, reduced influence, [and] a reduced portion of government services") only affect people who are meaningfully impacted by a representative's actions.[132] While physical presence is typically a good proxy for this—because a representative will usually have the ability to meaningfully impact individuals physically located within his district—it is crucial to recognize that this representational nexus does not exist *because* of a given individual's physical presence.[133] Including in the apportionment base for a legislative body a large group of individuals who lack a meaningful representational nexus with that given legislative body dilutes both the voting power and the representational strength of individuals in other districts.[134] Such a dilution entirely undermines the fair and effective representation sought through the constitutional principle of one-person, one-vote.[135]

In finding a lack of a representational nexus between the individuals incarcerated in JCI and the legislative bodies created through the redistricting plan, the district court relied on three conclusions drawn from a comprehensive review of the record.[136] The district court found that (1) the JCI confinement conditions were "almost entirely determined by policies set at the state level and by prison officials acting under state law";[137] (2) there was a lack of meaningful opportunity for JCI inmates to engage with members of the non-incarcerated public, except under stringent conditions prescribed by prison officials;[138] and (3) the District 3 "representatives" had not made any meaningful effort to engage with the JCI population.[139]

In *Davidson v. City of Cranston*, the District Court for the District of Rhode Island, citing heavily to *Calvin*, made similar findings in rejecting the City of Cranston's 2012 Redistricting Plan.[140] According to the Rhode Island district court, the inmate population of Adult Correctional Institutions (ACI)—the Rhode Island state prison at the center of *Davidson*'s redistricting challenge—did not participate in Cranston civic life and received only minimal services from the City of Cranston.[141] Because

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[131] *Id.* at 1310.
[132] *Id.*
[133] *Id.* at 1310–11.
[134] *Id.* at 1312.
[135] *See* Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973).
[136] *Calvin*, 172 F. Supp. 3d at 1316.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] 188 F. Supp. 3d 146, 151–52 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016).
[141] *Id.* at 147–48 (observing that the Rhode Island State Police maintained an office at ACI and handled most requests for police services at the institution). Additionally, while it conceded

ACI was a state-run prison, the elected officials of Cranston did not enact regulations or ordinances that affected ACI's conditions; relatedly, these elected officials neither campaigned nor "endeavor[ed] to represent their ACI constituents."[142] Accordingly, the District Court of Rhode Island held:

> An apportionment base for a given legislative body cannot be chosen so that a large number of nonvoters who also lack a meaningful representational nexus with that body are packed into a small subset of legislative districts. Doing so impermissibly dilutes the voting *and* representational strength of denizens in other districts and violates the Equal Protection clause.[143]

On appeal, the Court of Appeals for the First Circuit reversed, finding that the district court's reasoning was difficult to differentiate from the "voter population" argument that the Supreme Court considered and then expressly rejected in *Evenwel*.[144] However, a closer examination of the representational theory expounded by the *Evenwel* Court, as well as a further exploration of what it means to "represent," provides significant support to the holdings of both of the district courts in *Calvin* and *Davidson*.[145] Accordingly, reversal of the District Court of Rhode Island's decision in *Davidson* was *not*, as the First Circuit ultimately held, mandated by the Supreme Court's decision in *Evenwel*.[146]

III. THE REPRESENTATIONAL THEORY RELIED ON BY THE *EVENWEL* COURT—THAT ELECTED OFFICIALS ARE REPRESENTATIVES OF THEIR ENTIRE CONSTITUENCY—DOES NOT EXTEND FAR ENOUGH TO INCLUDE INCARCERATED POPULATIONS

A. What It Means to "Represent"

The right to vote encompasses more than casting a ballot.[147] As Kathleen Barber has posited, "the right to vote is the right to cast an effective vote, and implied in

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that "[t]he Cranston Fire Department does provide services to the ACI," the Court observed that, "calls to the ACI represent only a negligible percentage of the Department's total calls per year." *Id.* at 148.

[142] *Id.*

[143] *Id.* at 151 (quoting *Calvin*, 172 F. Supp. 3d at 1315).

[144] Davidson v. City of Cranston, 837 F.3d 135, 145–46 (1st Cir. 2016).

[145] *See generally Calvin*, 172 F. Supp. 3d 1292; *Davidson*, 188 F. Supp. 3d 146.

[146] *See* Evenwel v. Abbott, 136 S. Ct. 1120 (2016); *Davidson*, 837 F.3d 135.

[147] *See* KATHLEEN L. BARBER, A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY xii (2000).

'effective' is the right to representation."[148] At its most basic level, the concept of representation connotes an individual or group speaking for or acting on behalf of another individual or group.[149] The late Justice Antonin Scalia observed that "the word 'representative' connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people."[150] The representative's purpose is to secure and protect the rights of the people.[151] Essentially, a representative must act in a responsible manner, in the interest of those she purports to represent.[152] While this basic understanding of representation is arguably well-established, in practice, the idea of political representation remains an oft-debated topic.[153] Critics—including Supreme Court Justices themselves—have argued that the Court has been woefully unsuccessful in effectively articulating "a single, well-defined principle of political equality" at the base of the one-person, one-vote doctrine.[154] However, as Justice Clarence Thomas conceded in his concurrence in *Evenwel*, the Court *has* remained faithful to the notion "that eligible voters have a right against vote dilution."[155] Furthermore, at a bare minimum, representatives should at the very least view themselves as representatives of their "represented" population: something which legislators with correctional facilities located in their districts typically do not do.[156]

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[148] *Id.*

[149] *Representation*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/representation [https://perma.cc/LU2A-W3ES] (last visited Dec. 4, 2017).

[150] Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).

[151] Harvey C. Mansfield, Jr., *Impartial Representation*, *in* REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE 91, 98 (Robert A. Goldwin ed., 1968).

[152] HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 209–10 (1967) (further observing that "[the representative] must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interest").

[153] "[R]elations between the democratic ideal and the everyday practice of political representation have never been well defined and remain the subject of vigorous debate among historians, political theorists, lawyers, and citizens." Evenwel v. Abbott, 136 S. Ct. 1120, 1143 n.1 (2016) (Alito, J., concurring in the judgment) (alteration in original) (quoting POLITICAL REPRESENTATION i (Ian Shapiro et al. eds., 2009)).

[154] *See* Stinebrickner-Kauffman, *supra* note 8, at 236; *see also Evenwel*, 136 S. Ct. at 1142 (Thomas, J., concurring in the judgment) ("[T]his Court's jurisprudence has vacillated too much for me to conclude that the Court's precedents preclude States from allocating districts based on total population . . . .").

[155] 136 S. Ct. at 1142 (Thomas, J., concurring in the judgment) (citing Hadley v. Junior Coll. Dist., 397 U.S. 50, 52–53 (1970); Reynolds v. Sims, 377 U.S. 533, 568 (1964)).

[156] PITKIN, *supra* note 152, at 209–10. The idea that an elected representative would actively seek to represent the incarcerated population in her district is, sadly, almost laughable. *See, e.g.*, Kate Carlton Greer, *How Political Districts with Prisons Give Their Lawmakers Outsize Influence*, KOSU (Nov. 7, 2016), http://kosu.org/post/how-political-districts-prisons-give-their-lawmakers-outsize-influence [https://perma.cc/F3YU-ZQJG] (discussing the effect of prison-based gerrymandering in McAlester, Oklahoma, and noting the ongoing joke amongst the other councilmen that the inmates housed in the correctional facility in City Councilman Robert Karr's district are his "constituents").

In discussing the role of legislators, the *Evenwel* Court noted that the legislator's "everyday business" is "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein."[157] According to the Court's rationale, elected representatives' constituents are comprised of more than only eligible or registered voters, because nonvoters are similarly invested in policy debates and in receiving constituent services.[158] The Court accordingly upheld contested Plan S172's reliance on total population apportionment as promoting effective representation by making sure that each representative is accountable to roughly the same number of constituents.[159] This rationale—that elected officials represent not just the voting population, but the entire population—is in line with earlier representational theories previously advanced by courts.[160] For example, in *Davidson*, the court stated that "[t]he right to petition elected officials, *a right not limited to voters,* is also fundamental to representative government, and is equally vulnerable to unconstitutional dilution if an official in one district represents more people than those represented by the official the next district over."[161] Similarly, discussing its earlier holding in *Gaffney v. Cummings*,[162] the *Evenwel* Court observed that in *Gaffney*, "the Court . . . recognized that the one-person, one-vote rule is designed to facilitate '[f]air and effective representation,' and evaluated compliance with the rule based on total population alone."[163] Thus, the *Evenwel* holding that permits the use of total population is anchored in the basic understanding that elected officials represent the total population.[164]

As previously noted, while the *Evenwel* holding permits the use of total population—thus providing one answer to the question of what states *can* do—it does little in the way of providing an answer to the question of what states *must* do in order to comply with the one-person, one-vote principle.[165] The Supreme Court has previously recognized that an apportionment base of a population other than total population may be appropriate in certain contexts.[166] In *Burns v. Richardson*,[167] acknowledging

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[157] 136 S. Ct. at 1132 (quoting McCormick v. United States, 500 U.S. 257, 272 (1991)).

[158] *Id.*

[159] *Id.* at 1132–33.

[160] *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[161] 188 F. Supp. 3d 146, 149 (D.R.I. 2016) (emphasis added) (citing *Cal. Motor Transp. Co.*, 404 U.S. at 510), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

[162] 412 U.S. 735 (1973).

[163] 136 S. Ct. at 1132 (alteration in original) (internal citations omitted) (referencing the holding in *Gaffney*).

[164] *See id.*

[165] *See, e.g.*, Lyle Denniston, *Opinion Analysis: Leaving a Constitutional Ideal Still Undefined*, SCOTUSBLOG (Apr. 4, 2016, 1:16 PM), http://www.scotusblog.com/2016/04opinion-analysis-leaving-a-constitutional-ideal-still-undefined/ [https://perma.cc/NJG7-HMJ9] ("The only thing settled constitutionally now is that the states also are not *required* to divide up districts by using the voting population to be assigned to each, making them equal. Should a state do it that way, the opinion seems to say, the Court will then face that issue." (emphasis added)).

[166] *See* Burns v. Richardson, 384 U.S. 73, 94 (1966).

[167] 384 U.S. 73 (1966).

"Hawaii's special population problems" (specifically, the substantial population of temporary military personnel living in the state), the Supreme Court held that Hawaii could use a registered-voter population base as its apportionment base.[168] Noting its holding in *Reynolds v. Sims* that "both houses of a bicameral state legislature must be apportioned on a population basis,"[169] the Court emphasized that in its discussion in *Reynolds*, it "carefully left open the question what population was being referred to. At several points, [the Court] discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."[170] Thus, answering the question that it deliberately left open in *Reynolds*, the Court held in *Burns* that unless the decision to include or exclude a particular class in an apportionment base is one that the Constitution forbids, the resulting apportionment base "offends no constitutional bar."[171]

Just as the Supreme Court's discussion in *Reynolds* "carefully left open the question" that it ultimately addressed in *Burns*,[172] the Court in *Evenwel* carefully crafted its holding in terms of equality of representation, noticeably leaving open the question: representation of whom?[173] Rejecting the appellants' "selectively chosen language" that strategically advanced their argument that the principle of one-person, one-vote necessitated the conclusion that non-voters should not be included in the apportionment base, the Court noted, "[f]or every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of *representation*, not voter equality."[174] The Court further observed that it had previously described "equal representation for equal numbers of people" as the "fundamental principle of representative government in this country."[175] The Court ended its carefully constructed discussion by concluding that "[a]dopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting."[176] Thus, the Court fastidiously narrowed its holding to the rejection of a mandate requiring voter-eligible apportionment.[177] The Court left for another day the resolution of the question of what other population bases may be utilized.[178] Writing separately to concur in the judgment, Justice

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[168] *Id.* at 94.

[169] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[170] *Burns*, 384 U.S. at 91 (citing *Reynolds*, 377 U.S. at 576–79). For a discussion of this point, see Thomas A. Berry, *The New Federal Analogy:* Evenwel v. Abbott *and the History of Congressional Apportionment*, 10 N.Y.U. J.L. & LIBERTY 208, 217 (2016).

[171] *Burns*, 384 U.S. at 92.

[172] *Id.* at 91 (discussing the Court's decision in *Reynolds*, 377 U.S. 533).

[173] *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1132–33 (2016).

[174] *Id.* at 1131 (emphasis added).

[175] *Id.* (quoting *Reynolds*, 377 U.S. at 560–61).

[176] *Id.* at 1132.

[177] *Id.*

[178] *Id.* at 1132–33. It has been suggested that in order for a particular population base to be deemed unconstitutional, it must fail two tests: (1) "the population base must be prima

Alito further underscored the narrowness of the holding reached by the unanimous majority.[179] Justice Alito observed that the question of whether a state may use a measure other than total population "is an important and sensitive question that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts."[180]

B. As Recognized by District Courts in Both Rhode Island and Florida, Incarcerated Populations Lack a Meaningful Representational Nexus[181] *with the Communities Where They Are Incarcerated, and Thus Should Not Be Included in the Total [Represented] Population Base*

While the Court of Appeals for the First Circuit held that the District Court of Rhode Island's holding in *Davidson* was incompatible with *Evenwel*, this Note argues that a careful examination of the Supreme Court's rationale in *Evenwel* calls into question the assumptions underlying that holding and ultimately leads to a different conclusion.[182] In finding that incarcerated populations located in a district should not be included in the calculation of that district's total population, the district courts in both *Calvin* and *Davidson* readily acknowledged, and attempted to emulate, the Supreme Court's continued emphasis on the crucial importance of fair and effective representation to the one-person, one-vote principle.[183]

As discussed previously,[184] district courts in both Rhode Island and Florida found that elected officials had not made any meaningful effort to engage with the individuals incarcerated within their districts.[185] This is entirely unsurprising. In almost

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facie unconstitutional, . . . it cannot be inferred from any principle of political equality that could serve as a foundation for the one person, one vote rulings"; and (2) it "must not closely approximate any prima facie constitutional population base" (that is, it must have some *actual* effect on redistricting as compared to the use of a population base that would be held constitutional). Stinebrickner-Kauffman, *supra* note 8, at 232.

[179] *See Evenwel*, 136 S. Ct. at 1142–49 (Alito, J., concurring in the judgment).

[180] *Id.* at 1144.

[181] As noted in *Calvin v. Jefferson County Board of Commissioners*, the term "representational nexus" was first used in a reported case by Judge Kozinski. 172 F. Supp. 3d 1292, 1310 n.18 (N.D. Fla. 2016). In *Public Integrity Alliance, Inc. v. City of Tucson*, Judge Kozinski used the term to describe the relationship between an elected official and his constituency. 805 F.3d 876, 881 (9th Cir. 2015). This Note adopts the slightly different meaning of the term employed by Judge Walker in *Calvin*: a relationship between an official and an individual "denizen" of a particular area. 172 F. Supp. 3d at 1310 n.18.

[182] *See generally Evenwel*, 136 S. Ct. 1120; Davidson v. City of Cranston, 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

[183] *See Calvin*, 172 F. Supp. 3d 1292; *Davidson*, 188 F. Supp. 3d 146; *see, e.g.*, *Evenwel*, 136 S. Ct. 1120; Gaffney v. Cummings, 412 U.S. 735 (1973); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[184] *See supra* Section II.B.

[185] *Calvin*, 172 F. Supp. 3d at 1325; *Davidson*, 837 F.3d at 140.

every state, if an inmate has been sentenced following a felony conviction, he cannot vote while incarcerated.[186] Even if they are incarcerated for non-felonies, for the purposes of voting, inmates do not gain the residence of their place of incarceration (see discussion below) and therefore will almost certainly not be voting in their place of incarceration.[187] Most incarcerated individuals are not imprisoned in their home districts.[188] For example, although Cook County, Illinois, which includes the city of Chicago, was listed as the committing county for just over half of the Illinois prison population as of 2015, the vast majority of the Illinois prison population remains incarcerated *outside* of Cook County.[189] It is not simply the fact that inmates are incarcerated outside of their true home districts that leads to the lack of a representational nexus between incarcerated populations and "their" representatives; the mere fact that they are incarcerated at all is usually sufficient.[190] Michelle Alexander has written about the "civic death" that typically follows time spent in prison.[191] As a result of the label of "convicted felon," individuals lose the right to serve on juries and the right to vote; discrimination in housing, employment, and elsewhere becomes legal.[192] As Alexander observes, these restrictions (commonly referred to as "collateral consequences"[193]) "amount to a form of 'civic death' and send the unequivocal message that 'they' are no longer part of 'us.'"[194] It is axiomatic that this crystal clear "us versus them" message is at its most pronounced when the individual is actively (and involuntarily) locked up.

In addition to the inmates themselves, the people most likely to advocate on an incarcerated individual's behalf (such as family and friends) are also unlikely to be

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[186] Only Maine and Vermont allow individuals convicted of a felony offense to vote while incarcerated; the other 48 states, and the District of Columbia, prohibit individuals from voting while incarcerated for a felony offense. *Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Apr. 28, 2014), http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/ [https://perma.cc/56CE-LQYR].

[187] *See* Wagner, *supra* note 81, at 1252 (noting that "in the rare cases where people in prison can vote, they must always vote absentee at home, not in the district in which the prison is contained").

[188] *See* Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 197 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the fact that "while most prisoners in America are from urban communities, most prisons are now in rural areas").

[189] *See* ILL. DEP'T OF CORRECTIONS, FISCAL YEAR 2015 ANNUAL REPORT 75, 80–81 (2016), https://www.illinois.gov/idoc/reportsandstatistics/Documents/FY2015%20Annual%20Report.pdf [https://perma.cc/L26F-4W63].

[190] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 141–42 (2010).

[191] *Id.* at 142.

[192] *Id.* at 141–42.

[193] *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (exploring the pervasive impact of the modern era of mass incarceration).

[194] ALEXANDER, *supra* note 190, at 142.

constituents of the district where the correctional facility is located.[195] This further differentiates incarcerated populations from other non-voting populations[196] and reinforces the idea that in all respects that matter for representation, incarcerated populations are not constituents of the representatives of their places of incarceration.

Unlike the voters challenging the districting plan in *Evenwel*, the appellants challenging the redistricting plans at issue in *Calvin* and *Davidson* are not advocating for mandating eligible voter-based apportionment, nor are they advocating that true total population is an improper apportionment base;[197] their argument is more aptly characterized as an argument for a more effective means of determining the *actual* total population.[198] Common law and virtually all states define "residence" as the place a person chooses to be without a current intention to go elsewhere.[199] Prisoners do not lose their former residency upon incarceration.[200] For example, New York's State Constitution states that "no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence . . . while confined in any public prison."[201]

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[195] *See* Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 589 (2004) (observing that imprisonment tends to move people "out of large urban centers and into rural communities").

[196] *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016) (providing as examples of "[n]onvoters [that] have an important stake in many policy debates—children, their parents, [and] even their grandparents").

[197] *See id.*; Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292 (N.D. Fla. 2016); Davidson v. City of Cranston, 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

[198] *See, e.g.*, Brief of Plaintiffs-Appellees at 9, Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016) (No. 16-1692) (summarizing the argument against the redistricting plan by explaining that "[c]ounting the entire population of Rhode Island's prison facilities in a single City ward specifically undermines Cranston's asserted goal of representational equality").

[199] *See, e.g.*, Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974) (establishing that "[a] person's domicile is the place of 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom'" (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954))). Notice that this understanding of residency is in conflict with the Census Bureau's defining of "usual residence" as "the place where a person lives and sleeps most of the time." Proposed 2020 Census Residence Criteria, *supra* note 10. This definitional incongruity is a major reason why using the Census data for redistricting purposes is the source of so many problems.

[200] Sean Suber, Note, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471, 473–75, 473 n.4 (2014) (observing that "[i]n all states, either the state's constitutional provisions, statutes, or common law—and in some instances all three—support the contention that prisoners do not lose their former residency upon incarceration"). Further supporting this notion is the obvious fact that incarceration is, by its very nature, involuntary. Regardless of views on the efficacy or validity of incarceration as punishment, it would strain logic and good sense to argue that an inmate serving a sentence in a correctional facility "chooses" to be there. *See generally Mas*, 489 F.2d 1396 (establishing requirements for a person's legal domicile).

[201] N.Y. CONST. art. II, § 4.

Similarly, Vermont's annotated statutes state that "[a] person shall not gain or lose a residence solely by reason of presence or absence . . . while confined in a prison or correctional institution."[202]

Admittedly, the Census Bureau's continued use of the "usual residence" rule in determining where individuals should be counted will frequently—if not usually—result in an incarcerated individual being counted in his place of incarceration.[203] However, as previously noted, states are not required to use the Census Bureau data for purposes of redistricting.[204] Indeed, the information gathered through the decennial census is compiled for purposes other than state redistricting, and as it currently stands, is not the best means to count total population in accordance with the one-person, one-vote principle.[205] Furthermore, specifically in response to concerns about an individual's "usual residence" being the correctional facility where she is involuntarily incarcerated, the Census Bureau has worked to provide states with resources to ensure that their "inmate guests"—although counted as residents of their correctional facilities for purposes of the Census—are not considered part of the population when it comes to drawing new district lines.[206] While the 2020 Census will still count inmates at their "usual residence" (and subsequently, most likely at their place of incarceration), the Census Bureau plans to offer a product that will aid states that make the prudent decision to "move" their incarcerated population back to the incarcerated individuals' pre-incarceration addresses for redistricting and other purposes.[207]

By rejecting the City of Cranston's inclusion of incarcerated populations in its redistricting numbers, the district court in *Davidson* was not proscribing the use of total population, which would—as the First Circuit correctly observed—mandate reversal as incompatible with the Supreme Court's holding in *Evenwel*.[208] The district court simply held that inmates must be counted out of the "total population" numbers because they are not, in fact, part of the total population.[209] Just as the Supreme

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[202] VT. STAT. ANN. tit. 17, § 2122(a) (2017). For a comprehensive list of similar state authorities, see Suber, *supra* note 200, at 473 n.4.

[203] Proposed 2020 Census Residence Criteria, *supra* note 10.

[204] 13 U.S.C. § 141 (2012); 15 C.F.R. § 101.1 (2017); Proposed 2020 Census Residence Criteria, *supra* note 10; Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

[205] *See Fletcher*, 831 F. Supp. 2d at 895 ("The conclusion that States may adjust census data during the redistricting process is also consistent with the practices of the Census Bureau itself. According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones.").

[206] The Census Bureau acknowledged potential problems with the impact of its "usual residence" rule on incarcerated populations during the 2010 Census and released early counts of prisoners. *See* Groves, *supra* note 96.

[207] Proposed 2020 Census Residence Criteria, *supra* note 10.

[208] *See generally* Evenwel v. Abbott, 136 S. Ct. 1120 (2016); Davidson v. City of Cranston, 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

[209] *Davidson*, 188 F. Supp. 3d at 152.

Court ultimately answered in *Burns* the question that it had "carefully left open" in *Reynolds*,[210] the question left open by the Court in *Evenwel* can be answered in a challenge to a ruling similar to the First Circuit's decision in *Davidson*.[211] A total population apportionment base, as approved by the *Evenwel* Court, refers to the total represented population of a district—a population that definitively excludes incarcerated populations.[212]

CONCLUSION

The impact of the U.S. Census Bureau's method for counting the location of an inmate's involuntary confinement as his "usual residence" increased exponentially when incarceration rates exploded around the country in this current era of mass incarceration.[213] Given the significant impact that the inclusion of incarcerated populations in the total population figures has on the always-contentious redistricting process, it is far past time for this problem to be addressed.[214] Although, arguably, the ideal solution would be for the Census Bureau to change its counting methods, states and local districts are not powerless to address the problems arising from prison-based gerrymandering on their own;[215] correspondingly, the states and local districts are not protected from resulting constitutional challenges if they choose to remain complacent and allow the problems to persist. While the U.S. Supreme Court in *Evenwel v. Abbott* upheld the use of total population as an apportionment base,[216] the representational theory relied on by the Supreme Court makes it clear that the total population referred to is the total *represented* population. Because elected officials do not represent the incarcerated populations located within their districts, these incarcerated populations should not be included in a total population apportionment base. Their inclusion impermissibly dilutes the voting power of other districts in a clear violation of the constitutional principle of one-person, one-vote.

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[210] The question left open in *Reynolds* was, namely, what population base the Court was referring to when it mandated apportionment substantially "on a population basis." Reynolds v. Sims, 377 U.S. 533, 568 (1964). For additional insights, see Burns v. Richardson, 384 U.S. 73 (1966).

[211] *See Evenwel*, 136 S. Ct. 1120; *Davidson*, 837 F.3d 135.

[212] *See generally Evenwel*, 136 S. Ct. 1120.

[213] *See* Ho, *supra* note 38, at 358 (opining that "fairness in the democratic process is a casualty of our polices of mass incarceration"); *see also* ALEXANDER, *supra* note 190; INVISIBLE PUNISHMENT, *supra* note 193.

[214] *See, e.g.*, Stinebrickner-Kauffman, *supra* note 8, at 282 ("There is no reason to think that the political effects of the Census Bureau's inmate enumeration method will lessen in the foreseeable future, and every reason to think they will increase. . . . [C]urrent trends indicate that there is much to be said for preventative measures."). Stinebrickner-Kauffman's assertion, written in 2004, has only increased in importance in the thirteen years since its publication.

[215] Fletcher v. Lamone, 831 F. Supp. 2d 887, 895 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

[216] *See* 136 S. Ct. 1120 (2016).