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Prison Malapportionment: Forging a New Path for State Courts

ABSTRACT. With the 2021 redistricting cycle coming in the wake of the 2020 census, the time is ripe for reformers to tackle prison malapportionment. Prison malapportionment occurs when incarcerated individuals are counted as residents of the jurisdictions where they are incarcerated—rather than where their pre-incarceration homes are located—for purposes of redistricting. This practice thus shifts representational power from the home communities of incarcerated people to the towns where they are imprisoned. Because prisons are largely located in rural towns and communities of color are disproportionately incarcerated, prison malapportionment also results in substantial racially disparate effects. The practice offends the fundamental principle of equal representation and inflicts tangible harm upon incarcerated individuals and the communities they call home. Current scholarship addressing prison malapportionment, however, fails to engage comprehensively with state-law claims. In this Comment, I argue that state law provides a remedy for prison malapportionment that has, until now, gone largely unappreciated. By leveraging states' statutory provisions defining residency and constitutional equal-population provisions, state-court prison-malapportionment litigation can provide a viable path forward even as federal avenues continue to develop.

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INTRODUCTION

> "THE LEGAL REVOLUTION WHICH HAS BROUGHT FEDERAL LAW TO THE FORE MUST NOT BE ALLOWED TO INHIBIT THE INDEPENDENT PROTECTIVE FORCE OF STATE LAW — FOR WITHOUT IT, THE FULL REALIZATION OF OUR LIBERTIES CANNOT BE GUARANTEED."
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> - WILLIAM J. BRENNAN, JR.[1]

Just weeks after the Supreme Court in *Rucho* closed the federal courthouse doors to partisan-gerrymandering claims,[2] the North Carolina state courts rose to the occasion. In a 357-page opinion, a North Carolina court did what the Supreme Court could not, invalidating the state's legislative maps on illegal partisan-gerrymandering grounds.[3] This determination rested on the North Carolina State Constitution, reflecting a new judicial federalism,[4] and may encourage partisan-gerrymandering reformers to turn to the state courts after the 2020 census and 2021 redistricting cycle. As this litigation surges in state courts, the time is ripe for states to tackle other pressing redistricting issues, including prison malapportionment — commonly known as "prison gerrymandering."[5]

For purposes of redistricting, most states count incarcerated individuals as residents of the jurisdictions where they are incarcerated, rather than where

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).

3. *See* Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *5-10 (N.C. Super. Ct. Sept. 3, 2019); Michael Wines & Richard Fausset, *North Carolina's Legislative Maps Are Thrown out by State Court Panel*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/north-carolina-gerrymander-unconstitutional.html [https://perma.cc/DP8F-37L9]. State-court decisions interpreting their own state constitutions are final since the independent and adequate state ground doctrine generally insulates state-court decisions based on state constitutions from U.S. Supreme Court review. *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 977 (1985); *see also* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

4. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161-70 (1998) (defining "new judicial federalism" as "state judges' increased reliance on state declarations of rights to secure rights unavailable under the U.S. Constitution").

5. Indeed, the first prison-malapportionment challenge to be filed in state courts came in February 2020. *See* Complaint, Holbrook v. Commonwealth, No. 184 MD 2020 (Pa. Commw. Ct. filed Feb. 27, 2020) [hereinafter Holbrook Complaint].

their pre-incarceration homes are located. Since political districts are drawn based on population, districts with prisons—rather than the home districts of incarcerated individuals—benefit from the population bump. This practice thus shifts representational power from the home communities of incarcerated people to the towns where they are imprisoned. The final result is a malapportioned map with artificially inflated representation for prison districts.

The effects of prison malapportionment are especially pronounced in this era of mass incarceration.[6] To accommodate the modern explosive growth in prison populations, thousands of prisons were built. Between 1990 and 2005, on average, a new prison was constructed in America every ten days.[7] And this boom was geographically skewed. During the peak years of prison building between 1992 and 1994, nearly sixty percent of new prisons were built in rural areas despite the fact that such rural towns accounted for only twenty percent of the population.[8] As a result, many rural counties in America experienced a shift from population loss in the 1980s to population gain in the 1990s.[9] This growth in population in rural prison towns is largely the result of relocated incarcerated populations, which disproportionately consisted of Black and Latinx people from urban communities.[10]

Thus, this period led to a shift in political power around the country: power was systematically transferred from racial minorities and urban centers to predominantly white, rural prison towns. For example, after the 2000 census, incarcerated individuals made up one-third of the population in one district in

6. Today, America has the highest incarceration rate in the world. *See United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), https://eji.org/news/united-states-still-has-highest-incarceration-rate-world [https://perma.cc/2NC7-VA6A].

7. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 260 (2014).

8. SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, ECONOMIC IMPACTS OF PRISON GROWTH 16 (2010) ("Part of the reason that rural counties are home to so many correctional institutions is the fact that many communities actively competed for prisons, as an economic development strategy.").

9. Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 210-11 (Marc Mauer & Meda Chesney-Lind eds., 2002).

10. *See id.* at 211-12; Hansi Lo Wang & Kumari Devarajan, *'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts*, NPR: CODE SWITCH (Dec. 31, 2019, 5:00 AM ET), https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts [https://perma.cc/KD8L-ZPVH].

Jones County, Iowa.[11] In Clay County, Kentucky, individuals incarcerated in two correctional institutions accounted for nearly half of the population in one district.[12] And in Georgia, nine state house districts derived over five percent of their population from individuals in prisons.[13]

Many academics and practitioners have argued that this practice constitutes a violation of the Federal Equal Protection Clause's one-person, one-vote principle. These malapportionment challenges are just budding in federal courts, where they have been met with mixed success. The first state-court challenge to the practice was also recently filed,[14] and similar challenges will likely be brought as state courts become increasingly central to the vindication of electoral rights, especially in the wake of *Rucho*.

But despite the promise of state courts, current scholarship addressing prison malapportionment fails to comprehensively engage with state-law claims.[15] In this Comment, I argue that state constitutions and statutes provide a remedy for prison malapportionment that has, until now, gone largely unap-

11. *Fixing Prison-Based Gerrymandering After the 2010 Census: Iowa*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/IA.html [https://perma.cc/5U9L-9MJT].

12. *Fixing Prison-Based Gerrymandering After the 2010 Census: Kentucky*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/KY.html [https://perma.cc/893L-F3YH].

13. *Fixing Prison-Based Gerrymandering After the 2010 Census: Georgia*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/GA.html [https://perma.cc/K98H-WUJJ].

14. *See* Holbrook Complaint, *supra* note 5.

15. *See, e.g.*, Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355 (2011) (analyzing federal-law claims). Ho discusses state residency rules, but only to the extent they play a role in federal constitutional claims. *See id.* at 365; Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 VA. J. SOC. POL'Y & L. 229 (2004) (analyzing federal constitutional claim); Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179 (2015) (analyzing the implementation of legislation abolishing prison malapportionment); John C. Drake, Note, *Locked up and Counted out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237 (2011) (analyzing federal-law claims and state legislative practices); Caren Short, Note, "*Phantom Constituents*"*: A Voting Rights Act Challenge to Prison-Based Gerrymandering*, 53 HOW. L.J. 899 (2010) (analyzing a federal Voting Rights Act claim); Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473 (2017) (analyzing federal-constitutional claims); Sean Suber, Note, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471 (2014) (analyzing federal-law claims under the Administrative Procedure Act); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PA. L. REV. 431 (2003) (analyzing three types of federal-law claims).

preciated. Specifically, laws in forty-six states stipulate that *residency is determined by the intent of the individual*. Because incarceration involves the involuntary removal from one's home, state law generally presumes that one's pre-incarceration address fixes residency unless an individual affirmatively attests otherwise. This simple fact has enormous implications for prison malapportionment, and reformers should leverage these state-residency laws in addition to the common state-constitutional requirement that legislative districts are to be of equal populations.

This Comment thus proposes a path forward for challenging prison malapportionment in state courts. Part I considers the concept of prison malapportionment, its legal and analytical entailments, and the effects of the practice. Part II explains federal-law theories that have been used in litigation to date. Part III then evaluates the possibility of challenging prison malapportionment under state law. These state-law claims make use of statutory provisions defining residency and constitutional equal-population provisions and suggest that state-court prison-malapportionment litigation is one viable path forward.

I. BACKGROUND ON PRISON MALAPPORTIONMENT

A. Prison Malapportionment's Proper Framing

Over a century ago, in his foundational work on gerrymandering, Elmer C. Griffith remarked that "[t]he word gerrymander is one of the most abused words in the English language. . . . It has been made the synonym for political inequality of every sort."[16] So too in the prison population context evaluated here, "prison gerrymandering" is often used, though the phrase is misleading, if not a misnomer. The term "gerrymandering" refers to the formation of political districts and the alteration of geographic boundaries.[17] "Malapportionment," on the other hand, encompasses the equality of representation of voters within districts.[18] Malapportionment claims date back to the Supreme Court's seminal decision in *Reynolds v. Sims*, where the Court first articulated the one-person, one-vote principle under the Fourteenth Amendment's Equal Protec-

16. ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 15 (1907).

17. *Id.* at 21. Indeed, the term "gerrymander" was coined in Massachusetts in 1812, when a Federalist newspaper publicized the concern that one of the misshapen districts resembled a salamander. Thus, the origin of the term refers particularly to geographic boundaries and shapes. *Id.* at 16-19.

18. *See* Reynolds v. Sims, 377 U.S. 533, 567-68, 567 n.43 (1964).

tion Clause.[19] There, the Court invalidated Alabama legislative maps due to significant population disparities between districts. The Court observed that population-variance ratios of nearly five-to-one would have existed in some of the proposed districts—a disparity so substantial that it was deemed unconstitutional,[20] as the Constitution mandates an equal-population requirement for districts.[21] This requirement, the Court explained, is the "basic principle of representative government."[22]

Similarly, a prison-malapportionment suit challenges the allocation and apportionment of incarcerated individuals to achieve districts of equal population.[23] Prison malapportionment concerns *where* individuals are counted, rather than the manipulation of the geographic *boundaries* themselves. It is thus an issue of malapportionment—which defies the one-person, one-vote principle—rather than one of districting and line-drawing. The language of "prison malapportionment" is therefore more legally and analytically accurate.

This language shift is not merely semantic. Issue framing can shape the legal theories attending prison-malapportionment challenges and influence whether a claim can even make it into court. Although the Supreme Court in *Rucho* recently held partisan-gerrymandering claims to be nonjusticiable, it reaffirmed the justiciability of malapportionment claims,[24] holding that for these claims, there remains "a role for the [federal] courts."[25]

Indeed, the Supreme Court and federal courts nationwide have recognized and adjudicated malapportionment claims for over six decades, and prison-malapportionment reform should be located within this broader history of courts vindicating malapportionment claims. As the Court erects barriers around certain types of redistricting claims, it is crucial that academics and practitioners accurately frame the debate. Opponents of prison-malapportionment reform are already attempting to tie prison-

19. *Id.* at 558 (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

20. *Id.* at 568-69. Such a disparity means there would be one representative assigned to represent almost five times as many individuals as a representative in another district.

21. *Id.* at 567 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

22. *Id.* The predominant representational harm, the Court explains, is that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.*

23. *See* Skocpol, *supra* note 15, at 1475-76.

24. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495-96, 2500-01 (2019). As the Court explained, "'vote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents." *Id.* at 2501.

25. *Id.* at 2495-96.

malapportionment challenges to the political-question implications of *Rucho*.[26] Distinguishing "malapportionment" from "gerrymandering" is thus both analytically appropriate and strategically beneficial.

B. Sources of Prison Malapportionment

To fulfill its constitutional mandate to conduct a decennial census,[27] the Census Bureau counts the entire United States population every ten years. The central purpose of the census is to ensure the proper enumeration of the country's population to fairly apportion congressional seats.[28] To guide this allocation of individuals, the Census Bureau applies a "usual residence" principle—a concept that dates back to the very first decennial census in 1790.[29] The Census Bureau defines "usual residence" as "the place where a person lives and sleeps most of the time."[30] Under this principle, individuals incarcerated in federal and state prisons, as well as in local jails and other municipal confinement centers, are counted not at their home residence, but at the facilities that confine them.[31]

Many activists and scholars have argued that incarcerated individuals should not be considered legal residents of the towns where they are forcibly detained. For one, incarcerated individuals maintain ties to their home communities, do not interact with the towns or services outside of the prison, and do not have the requisite intent to adopt the prison as a residence when they are forcibly detained. As Dale Ho explains, "The foundational premise of any critique of the current method of counting incarcerated persons is that they are not properly understood as constituents of the districts where they are con-

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26. *See, e.g.*, NAACP v. Merrill, 939 F.3d 470, 478 (2d Cir. 2019) (noting the Connecticut state-official defendants' argument that a prison-malapportionment claim should be nonjusticiable in the wake of *Rucho*).

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

28. *Id.*

29. *See* Census Act of 1790, ch. 2, § 5, 1 Stat. 101, 103.

30. *Residence Criteria and Residence Situations for the 2020 Census of the United States*, U.S. CENSUS BUREAU 1 (2020), https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf [https://perma.cc/4WCF-E8KA]. The "usual residence" concept also has various exceptions for those in nontraditional living conditions, such as "people experiencing homelessness, people with a seasonal/second residence, people in group facilities, people in the process of moving, people in hospitals, children in shared custody arrangements, college students, live-in employees, military personnel, and people who live in workers' dormitories." *Id.* (footnote omitted).

31. *Id.* at 6. Notably, those detained in immigration facilities, such as Immigration and Customs Enforcement detention centers, are also allocated to the facilities. *Id.*

fined."[32] The Census Bureau has not offered any legal argument to justify the practice, instead emphasizing that its policy of counting incarcerated individuals at prisons is done for pragmatic reasons.[33]

Until 2010, every state in the country relied exclusively on Census Bureau data for their reapportionment processes and allocated incarcerated individuals to the districts where they were imprisoned.[34] However, the surge in prison populations, from approximately 500,000 people incarcerated in 1980 to over 2.2 million people by 2010, has amplified and exacerbated the unequal and racialized effects of the practice, as Blacks and Latinx people face significantly greater odds of incarceration and receive longer sentences than similarly situated whites.[35]

Additionally, serious disparities exist between where many prisons are located and where most incarcerated individuals previously resided. Prisoners are often incarcerated in predominantly white, rural areas,[36] and the majority of state-incarcerated individuals are held in prisons over one hundred miles away from their homes.[37] This distance between prisons and home communities can become even more pronounced in situations of "prisoner trades," in which states trade incarcerated individuals, "either for money or for other prisoners,"

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32. Ho, *supra* note 15, at 364. Ho also provides a detailed account of why the reallocation, rather than exclusion, of incarcerated individuals is the proper relief to remedy prison malapportionment. *Id.* at 391-92. The Supreme Court in *Evenwel v. Abbott* affirmed that nonvoters need not be excluded from the apportionment base, for they "have an important stake in many policy debates." 136 S. Ct. 1120, 1132 (2016). Thus, the issue for prison malapportionment is not *whether* incarcerated individuals should be counted in a state's apportionment base, but *where*.

33. *See, e.g.*, Fletcher v. Lamone, 831 F. Supp. 2d 887, 895 (D. Md. 2011) ("According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones."), *aff'd*, 567 U.S. 930 (2012).

34. *See* Prison Gerrymandering Project, *Maryland Enacts Law to Count Incarcerated People at Their Home Addresses*, PRISON POL'Y INITIATIVE (Apr. 13, 2010), https://www.prisonersofthecensus.org/news/2010/04/13/maryland_law [https://perma.cc/XS55-CTAJ].

35. Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 327 (2018). Of those incarcerated, 1,404,000 people were in state prisons, 748,700 in local jails, and 209,800 in federal facilities. *Id.* (citing *Key Statistic: Total Correctional Population*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487 [https://perma.cc/YJV3-MX24]); *see id.* at 327-28 (citing *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, SENTENCING PROJECT 12-16 (Aug. 2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf [https://perma.cc/38V7-7S7S]).

36. *See* Ho, *supra* note 15, at 362-63.

37. U.S. DEP'T JUST., NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (2000).

subject to little, if any, regulation.[38] Consequently, an incarcerated individual may be counted in a community far away from her chosen home and in which she has no real ties.

C. Effects of Prison Malapportionment

The effects of prison malapportionment on representation are consistent with the overall history and harms of classic malapportionment cases. In *Reynolds v. Sims*, the Supreme Court was concerned that "the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value."[39] An unconstitutional dilution thus occurs when an elected official in an underpopulated district represents fewer people than officials in other more populated districts.[40] As a result, a person living in an underpopulated district has more representation and political power than other people in the state. This harm is precisely that which follows from the practice of prison malapportionment.

In Connecticut, for example, districts with prisons appear significantly underpopulated relative to other districts in the state once incarcerated people are counted in their homes rather than in their jurisdiction of imprisonment. Indeed, seven state house districts in the state "get significantly more representation in the legislature because each of their districts includes more than 1,000 incarcerated people of color from other parts of the state."[41] For instance, for every eighty-five residents in District 52, a rural district which contains three prisons, there are over one hundred residents in District 97, which is located in the urban New Haven district.[42] Residents of District 52 thus get more political representation merely because their towns contain prisons. This rural prison district is also overwhelmingly white compared to New Haven, with white

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38. *See, e.g.*, Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1816-18 (2020).

39. 377 U.S. 533, 562 (1964).

40. The Supreme Court has recently clarified that the constitutional command of equal population extends to all individuals in a district and is not only limited to equalizing voter populations. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1130 (2016) ("[T]his Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations.").

41. Peter Wagner, *Imported "Constituents": Incarcerated People and Political Clout in Connecticut*, PRISON POL'Y INITIATIVE (Apr. 17, 2013), https://www.prisonersofthecensus.org/ct/report2013.html [https://perma.cc/HNM7-U4WS] (citing tbl.1).

42. *Id.* app. H; *see also* Amended Complaint for Declaratory and Injunctive Relief at 20, NAACP v. Merrill, No. 3:18-cv-01094-JBA (D. Conn. Oct. 15, 2019) [hereinafter Merrill Complaint].

populations of eighty-nine percent and thirty-eight percent respectively.[43] Indeed, each of the five towns in Connecticut that contain the majority of incarcerated people is majority-white.[44] Meanwhile, almost two-thirds of the state's incarcerated population are people of color.[45] In the town of Somers, which District 52 encompasses, ninety-five percent of the town's recorded Black population is incarcerated.

The result is that residents of underpopulated districts receive disproportionately greater representation simply because of their proximity to a prison. Where incarcerated individuals are counted thus has a significant effect on legislative apportionment. As Julie Ebenstein explains, "The United States' overuse of incarceration and the shift of electoral power from urban to rural areas has skewed legislative apportionment and equitable electoral districting."[46] Indeed, in some instances, state legislatures strategically use prison populations to further their partisan-gerrymandering goals.[47]

Folding in the racial disparities between home communities and prison districts paints an even starker picture: communities of color disproportionately lose representation to white communities in this scheme. The fact that prison malapportionment allows certain districts to inflate population numbers and thus representation artificially, largely off the backs of disenfranchised people of color, has led commentators to compare the practice to the Three-Fifths Clause.[48]

Prison malapportionment does not just offend the fundamental principle of equal representation, particularly in a racially disparate manner; it also inflicts

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43. *Id.* The state of Connecticut as a whole was approximately 75.3 percent white in 2019. Am. Cmty. Survey, *ACS Demographic and Housing Estimates: 2015—2019 ACS 5-Year Data Profile*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2019 [https://perma.cc/8W3K-HDTR] (select "state"; then select "Connecticut"; then select "Get Data Profile Links"; then follow "Demographic Characteristics" and select "2019: ACS 5-Year Estimates Data Profile").

44. Wagner, *supra* note 41.

45. *Id.* n.7 (citing *January 1, 2010 Statistics*, CONN. ST. DEP'T CORRECTION (Jan. 1, 2010), https://portal.ct.gov/DOC/Report/January-1-2010-Statistics [https://perma.cc/9KZ6-9XJ4]).

46. Ebenstein, *supra* note 35, at 330.

47. *See* Jason P. Kelly, *The Strategic Use of Prisons in Partisan Gerrymandering*, 37 LEGIS. STUD. Q. 117, 131 (2012).

48. "There has only been one other instance in American history where disfranchised, captive populations of people of color were used to artificially inflate political strength: the infamous three-fifths compromise enshrined in Article I, Section 2 of the Constitution." Ho, *supra* note 15, at 362; *see also* Drake, *supra* note 15, at 238 (comparing prison malapportionment to the three-fifths compromise); John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 589 (2018) (same).

tangible harm to incarcerated individuals and the communities that they call home. Incarcerated individuals are forcibly detained in a location where they have minimal interaction with the surrounding community while they are denied legally recognized membership in their home communities. When individuals are released from prison, they are typically returned on buses to their home communities.[49] But their presence while incarcerated is used to amplify the political power of prison towns to which they have no connection beyond their experience of state detention.

At the same time, the hometowns that most directly feel the negative economic and social effects of mass incarceration are additionally stripped of their proportional share of political power. It is the home community that typically shoulders the financial and resource-intensive costs of reentry work once incarcerated individuals are released. Indeed, incarcerated individuals "typically return to a relatively few neighborhoods, which are already experiencing significant disadvantage."[50] These communities with high rates of removal and return of offenders thus face destabilization from the high rates of incarceration, while also falling victim to decreased political representation.

Meanwhile, prison malapportionment ties mass incarceration to electoral advantage, such that representatives of prison districts are incentivized to support pro-incarceration policies to guarantee more political power to their constituents.[51] Peter Wagner and Gary Hunter explain how this phenomenon played out in New York, where representatives of prison districts advocated for harsh sentencing and incarceration policies.[52] Indeed, criminal-justice reform in the state was "stalled for years by a small number of powerful state senators with large prisons in their districts."[53] Prison malapportionment, therefore, is not only a misalignment in apportionment, but also a practice that carries sig-

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49. Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, URB. INST. JUST. POL'Y CTR. 19 (June 2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf [https://perma.cc/4DEW-VJAQ]; *see also Returning Home Study: Understanding the Challenges of Prisoner Reentry*, URB. INST., JUST. POL'Y CTR., https://www.urban.org/policy-centers/justice-policycenter/projects/returning-home-study-understanding-challenges-prisoner-reentry [https://perma.cc/27JP-EJME] (noting that individuals who exit prison often return to their families, which "provide the greatest tangible and emotional support after release").

50. Travis et al., *supra* note 49, at 40. In Baltimore, for instance, "15 percent of the neighborhoods accounted for 56 percent of prison releases." *Id.* at 42.

51. Ho, *supra* note 15, at 363-64.

52. Gary Hunter & Peter Wagner, *Prisons, Politics, and the Census*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 80, 85 (Tara Herivel & Paul Wright eds., 2007).

53. *Id.*

nificant perverse incentives by tying greater representation to increased incarceration.

Recognizing these inequalities, activists have pushed for state legislative reform to address the issue. In 2010, Maryland was the first state to ban the practice via legislation.[54] Moreover, in a challenge to Maryland's legislation abolishing the practice, the Supreme Court in 2012 summarily affirmed the constitutionality of the legislative fix.[55] Since then, eight other states—New York, California, New Jersey, Colorado, Delaware, Nevada, Virginia, and Washington—have passed legislation ending the practice.[56] Two of these states, New Jersey and Colorado, abolished it in the past year.[57] For the forty-one remaining states, however, incarcerated individuals are still counted towards the apportionment base of the districts where they are held, rather than the towns they call home.[58]

II. FEDERAL CHALLENGES TO PRISON MALAPPORTIONMENT

Given the stark representational and practical harms accompanying prison malapportionment, several legal theories have been proposed in the literature to challenge the practice. Thus far, all of these theories embrace federal-constitutional claims under the Equal Protection Clause or statutory claims under the Voting Rights Act (VRA) or the Administrative Procedure Act (APA). These theories have experienced mixed success in practice. In what follows, I consider each theory in turn, and conclude that as federal challenges continue to develop, state law offers a supplementary path.

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54. *See* Press Release, Prison Policy Initiative, Maryland Enacts Law to Count Incarcerated People at Their Home Addresses (Apr. 13, 2010), https://www.prisonersofthecensus.org/news/2010/04/13/maryland_law [https://perma.cc/XS55-CTAJ].

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

56. *Legislation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/legislation.html [https://perma.cc/MV9U-7FUV].

57. *Id.*

58. Within states, certain counties and cities have decided to exclude prison populations in their electoral districts. Leah Sakala, *200+ Communities Around the Nation Reject Prison-Based Gerrymandering*, PRISON POL'Y INITIATIVE (Nov. 26, 2012), https://www.prisonersofthecensus.org/news/2012/11/26/200 [https://perma.cc/WBY3-HAJ7]. This exclusion, however, is limited to the municipality and does not cover the statewide practice of prison malapportionment, nor does it properly reallocate incarcerated individuals to their homes.

A. One-Person, One-Vote

One-person, one-vote claims under the Equal Protection Clause are the most common vehicle for challenging prison malapportionment. The crux of the argument is as follows: incarcerated individuals are incorrectly counted as residents of prison districts, the result of this counting is a malapportioned map where the populations of prison districts are artificially inflated, and this map ultimately leads to unequal representation and unconstitutional deviations in population between districts.[59] The theory turns on articulating a legal standard, yet to be adopted by federal courts, that defines where incarcerated individuals should be counted for apportionment; namely, that incarcerated individuals should properly be counted at their pre-incarceration residences rather than at their site of detainment, given how the former is a more factually and legally accurate representation of their residence. Thus, under one person, one vote, not only must population counts be equal under the Fourteenth Amendment, but they must also be an accurate reflection of *where* people are residents.

Initially, this argument has some precedential support. In *Mahan v. Howell*, the Supreme Court upheld a district-court order invalidating Virginia's legislative map because fact-finding showed that only half the military personnel allocated to the disputed district were in fact residents.[60] The Court explained that it was insufficient for the legislature simply to rely on where the Census Bureau counted the personnel on their home-ported ships.[61] Instead, they should have been allocated to where they actually resided, such as with their "wives and families."[62] *Mahan* thus affirmed that, in a one-person, one-vote challenge, individuals must be allocated to a district where they are accurately legal residents.[63] It is not enough for a map to have districts of equal population, even relying purely on census data, if the individuals are not also properly allocated.

Mahan's logic is intuitive. Suppose, for instance, New York State decided that anyone who worked in Manhattan, even residents of other towns or boroughs, would be counted in its population. During an average day, the population of Manhattan doubles from 1.6 million to 3.1 million from commuters who

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59. *See* Ho, *supra* note 15, at 379-85; Skocpol, *supra* note 15, at 1480-83.

60. Mahan v. Howell, 410 U.S. 315, 332 (1973).

61. *Id.* at 330 n.11.

62. *Id.*

63. *Id.* at 330-33. The Court, however, did not articulate a general standard for defining actual residence in *Mahan* since where the personnel lived in the case was "undisputed" by both parties. *Id.* at 330.

live in other New York City boroughs.[64] In this hypothetical scenario, all of these commuters would be allocated to Manhattan's population base. Each federal congressional district in New York represents approximately 717,707 people.[65] As such, Manhattan would balloon from a population entitled to about two representatives to one entitled to four.[66] Manhattan would thus double its claim to congressional seats through an artificial inflation of its population. And, on the flip side, the boroughs that commuters actually call home would be deprived of their proportional fair share of representation. The issue of where individuals are to be counted, then, makes all the difference.

Even if all districts technically had equal populations of 717,707 people, the result would still be a malapportioned map. It cannot be enough for New York to achieve districts with roughly equal populations if it does not also properly allocate residents to where they belong. Similarly, counting incarcerated people where they are being forcibly detained, rather than in their home communities, results in a map that does not reflect equal representation. Thus, a prison-malapportionment challenge, under the one-person, one-vote principle, proposes that incarcerated individuals are not *residents* of the districts where the prisons are located.

However, this theory is still developing in federal courts. Beyond *Mahan*, the Supreme Court has not expounded significantly on the legal standard for determining where an individual is a legal resident for the purposes of apportionment. To establish this standard, academics and practitioners have proposed multipronged tests for determining residence under the Fourteenth Amendment.[67] One of these factors, proposed both in the literature and in practice, involves looking to state-law residency provisions as evidence of resi-

64. Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. TIMES (June 3, 2013, 11:56 AM), https://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says [https://perma.cc/MJZ3-2ZPD].

65. New York has twenty-seven congressional districts and a population of approximately 19.4 million people. Ctr. for Urban Research, *2010 Census Population for NYS Legislative Districts and Congress*, CUNY, https://www.gc.cuny.edu/Page-Elements/Academics-Research-Centers-Initiatives/Centers-and-Institutes/Center-for-Urban-Research/CUR-research-initiatives/2010-Census-population-for-NYS-legislative-distric [https://perma.cc/5PJJ-8ET4].

66. This is merely a simplified illustration and does not fully capture the nuances of districting across towns.

67. *See, e.g.*, Ho, *supra* note 15; Skocpol, *supra* note 15, at 1532 (proposing a three-part constitutional test to determine the baseline for allocating incarcerated individuals).

dence.[68] However, state-law provisions, while a helpful guide to determine residence in the federal context, cannot be directly enforced by federal courts.[69] Thus, state residency provisions merely provide proxy evidence of residency in the federal context.[70] Reformers, therefore, also point to additional factors that establish incarcerated individuals' "representational nexus"[71] and community ties to their home districts.

Thus far, the one-person, one-vote claim has been the basis of all three federal challenges to prison malapportionment.[72] Two of these cases were limited to challenging municipal-level prison malapportionment and one challenged the statewide practice in Connecticut.[73] A Second Circuit per curiam panel—the first federal appellate court to hear a statewide claim—held that state officials were not immune from a prison-malapportionment suit and recognized that the claim was "substantial."[74] However, federal courts have yet to adopt a

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68. *See, e.g.*, NAACP v. Merrill, 939 F.3d 470, 473-74 (2d Cir. 2019) (per curiam) (demonstrating that the challenged Redistricting Plan deviated from Connecticut law); Ho, *supra* note 15, at 364-68 (detailing the role of residency requirements in the reapportionment process); Skocpol, *supra* note 15. For an in-depth analysis of state residency provisions, see *infra* Section III.A. Prior consideration of state residency provisions in the literature, however, has mostly been limited to the context of claims under federal law, to the neglect of state-law claims.

69. The Supreme Court has held that federal courts do not have the power to enforce state statutes against state officials. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars suits in federal court that order state officials to conform their conduct to state statutes).

70. Federal courts, however, may still look to state statutes as a matter of guidance. For example, "[t]he determination of a litigant's state citizenship for purposes of diversity jurisdiction is a matter of federal law, although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies." Stifel v. Hopkins, 477 F.2d 1116, 1120 (6th Cir. 1973).

71. Davidson v. City of Cranston, 837 F.3d 135, 140 (1st Cir. 2016) (quoting Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016)); *see also* Franklin v. Massachusetts, 505 U.S. 788, 804-06 (1992) (affirming the Secretary of Commerce's decision to allocate overseas federal workers to the states where they had "enduring ties" for enumeration).

72. *See Merrill*, 939 F.3d at 473; *Davidson*, 837 F.3d at 139; *Calvin*, 172 F. Supp. 3d at 1298.

73. *See Merrill*, 939 F.3d at 473 (statewide); *Davidson*, 837 F.3d at 139 (citywide); *Calvin*, 172 F. Supp. 3d at 1295 (countywide).

74. *Merrill*, 939 F.3d at 479. *Merrill* was not resolved on the merits, however, as both parties filed a joint stipulation of dismissal in April 2020. Joint Stipulation of Dismissal, NAACP v. Merrill, No. 01094-JBA-PWH-JMW (D. Conn. Apr. 14, 2020), https://www.brennancenter.org/sites/default/files/2020-04/2020-04-14-75-Joint%20Stipulation%20of%20Dismissal.pdf [https://perma.cc/CCE5-8VZ3].

particular standard for determining the residence of incarcerated individuals for apportionment given how nascent these challenges are.

These federal challenges are additionally complicated by 28 U.S.C. § 2284's three-judge district-court requirement. The statute mandates that a three-judge district court be convened when "an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."[75] Judgments from three-judge district courts are immediately and mandatorily reviewable by the U.S. Supreme Court.[76] Direct appeal to the Supreme Court can thus limit the percolation of challenges and development of standards. And at a time when the modern Supreme Court may be less welcoming to novel voting-rights claims in the wake of *Rucho*,[77] even a favorable ruling could likely be overturned on appeal.[78]

Given this procedural context, state law can offer a supplementary path as the federal residency standards continue to develop. While federal district courts are subject to direct Supreme Court review, developing the record in state-law litigation could allow a particular standard to be first developed by state courts over the course of multiple lawsuits.[79] Indeed, parallel apportionment litigation in both state and federal courts is not uncommon.[80] The Su-

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75. 28 U.S.C. § 2284(a) (2018). Three-judge district courts are made up of the district judge originally assigned to the matter and "two other judges, at least one of whom shall be a circuit judge" that are designated by the chief judge of the circuit. *Id.* § 2284(b).

76. 28 U.S.C. § 1253 (2018). Note that because *Davidson* was a challenge only to *municipal*-level prison malapportionment, not *statewide* apportionment, it was not subject to the § 2284 requirement. Although *Merrill* was a statewide apportionment challenge subject to § 2284, the Second Circuit considered only an interlocutory appeal regarding sovereign immunity, not the final merits of the matter.

77. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

78. *See, e.g.*, Ari Berman, *A 5-4 Supreme Court Threatened Voting Rights. A 6-3 Court Could Finish Them off*, WASH. POST (Sept. 24, 2020, 11:41 AM EDT), https://www.washingtonpost.com/outlook/2020/09/24/trump-roberts-supreme-court-conservative-majority [https://perma.cc/LR4J-XZBT] (discussing the hostility of the current Court to voting-rights cases).

79. Note although the reemergence of the "independent legislature doctrine" has been relevant to recent 2020 election law cases, the further development of this doctrine will not affect this Comment's analysis about the insulation of state court decisions on prison malapportionment from Supreme Court review. Prison malapportionment is not about the "times, places, and manner" of holding elections at all. U.S. CONST. art. 1, § 4. It is about state residency requirements for apportionment. Achieving equal representation is unrelated to administering elections.

80. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 102 (1996); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1727-28 (1993) (describing the consequences of "the overlapping regulation of voting rights").

preme Court has enabled this dual-track approach by holding that federal courts must first defer to state-court adjudication of apportionment disputes.[81]

B. Other Theories: Voting Rights Act and Administrative Procedure Act

Other academics have also proposed challenges to prison malapportionment under section 2 of the VRA, focusing on the vote dilution and disparate racial impacts of the practice.[82] Traditionally, under the Court's seminal *Thornburg v. Gingles* decision, section 2 "protects the votes of racial minorities from wastage, either through cracking or packing."[83] These proposals argue that prison malapportionment can be shoehorned to fit the classic *Gingles* factors,[84] or, in the alternative, that the classic factors should be expanded.[85] Both paths offer persuasive accounts, though other theories are even clearer.[86] No lawsuit to date has included a VRA claim.

Finally, commentators have also proposed directly challenging the census's method of counting incarcerated individuals under the APA.[87] Since the Census Bureau is an executive agency, its decisions and regulations remain subject to the APA's arbitrary and capricious standard.[88] While advocates have challenged the reasonableness of the Census Bureau's choice to count incarcerated

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81. *See, e.g.*, Growe v. Emison, 507 U.S. 25, 33 (1993) ("In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." (emphasis omitted)).

82. *See, e.g.*, Drake, *supra* note 15, at 259-63; Short, *supra* note 15, at 912-22, 929-39; Taormina, *supra* note 15, at 431-35.

83. Karlan, *supra* note 80, at 1732 (1993) (citing Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986)).

84. The factors are as follows: (1) The group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

85. *See* Ho, *supra* note 15, at 388 ("[A] novel vote dilution claim in the context of prison-based gerrymandering might not follow the exact contours of the standard *Gingles* formula."); Short, *supra* note 15, at 936.

86. Moreover, the current Supreme Court continues to chip away at the protections of VRA section 2. *See, e.g.*, Jeremy Duda, *A Supreme Court Ruling on the Voting Rights Act Opened the Floodgates for New Restrictions*, AZ MIRROR (Oct. 7, 2020), https://www.azmirror.com/2020/10/07/a-supreme-court-ruling-on-the-voting-rights-act-opened-the-floodgates-for-new-restrictions [https://perma.cc/B33B-XFS5].

87. *See, e.g.*, Suber, *supra* note 15, at 486-509; Taormina, *supra* note 15.

88. 5 U.S.C. § 706(2)(A) (2018); Suber, *supra* note 15, at 483-84.

individuals as residents of prisons under the Bureau's "usual residence" rule, to date, two challenges to the Census Bureau's method have failed in federal courts.[89] The Third Circuit, for instance, explained that the Bureau's usual residence rule that counted incarcerated individuals where "they generally eat, sleep and work"[90] was a "historically reasonable means of interpreting the Constitutional and legislative phrase 'whole number of persons in each State.'"[91] Furthermore, the previous rulings under the APA were only limited to the Census Bureau's particular task of enumeration, and they do not extend to the legality of state apportionment of incarcerated individuals when drawing legislative districts.[92] Given these two failed challenges, most reformers have rightfully transitioned from challenging the Census Bureau directly to challenging individual state practices.[93]

The Census Bureau itself has noted that its choice to count incarcerated individuals is for primarily pragmatic and administrative convenience rather than legal purposes.[94] Indeed, the Census Bureau received thousands of comments in the 2010 and 2020 census rulemaking periods asking the Bureau to amend its usual residence rule with regard to incarcerated individuals.[95] As a result, the Bureau has announced that it will make additional data pertaining to incarcerated individuals available upon request to states that seek to redistribute in-

89. Suber, *supra* note 15, at 484-86 (discussing Borough of Bethel Park v. Stans, 449 F.2d 575 (3d Cir. 1971); District of Columbia v. U.S. Dep't of Commerce, 789 F. Supp. 1179 (D.D.C. 1992)).

90. *Bethel Park*, 449 F.2d at 578 (quoting the criterion used by the 1970 Census Bureau to determine usual place of residence).

91. *Id.*

92. Ho, *supra* note 15, at 378-79.

93. *See, e.g.*, Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1298-99 (N.D. Fla. 2016) (describing the plaintiffs' challenge to the Jefferson County districting scheme); Davidson v. City of Cranston, 188 F. Supp. 3d 146, 148 (D.R.I. 2016) (describing plaintiffs' allegation to Cranston's redistricting plan).

94. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018) (to be codified at 15 C.F.R. ch. 1); Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42,577, 42,577 (June 30, 2016) (to be codified at 15 C.F.R. ch. 1).

95. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5526 ("On June 30, 2016, the Census Bureau published a document in the Federal Register asking for public comment on the 'Proposed 2020 Census Residence Criteria and Residence Situations.' Of the 77,995 comments received, 77,887 pertained to prisoners, and 44 pertained to overseas military personnel."); *id.* at 42578 ("On May 20, 2015, the Census Bureau published a document in the Federal Register asking for public comment on the '2010 Census Residence Rule and Residence Situations.' Of the 262 comments received, 162 pertained to where prisoners are counted, and 87 pertained to where military personnel overseas are counted.").

carcerated individuals after the 2020 census.[96] Although the Bureau will make the additional data available, states retain choice as to how to implement the data in their mapmaking. The easily available data, however, removes any logistical impediments for state courts to resolve the issue.

These three federal theories have received significant study in the prison-malapportionment literature despite their mixed success in the courts. In contrast, almost none has been devoted to state-law theories.[97] This is a missed opportunity as state courts provide a unique path toward reform. Academics and reformers should continue to pursue federal-court options but should also consider state-law prison-malapportionment theories.

III. THE PROMISE OF STATE CONSTITUTIONS AND STATE COURTS

States are particularly well-suited to remedy the prison-malapportionment issue. As discussed, the core element of a prison-malapportionment challenge under one person, one vote involves establishing that incarcerated individuals are not residents of the districts where they are incarcerated.[98] Although federal law lacks a robust conception of residency from which malapportionment challenges can draw,[99] state law offers promise. State law provides a unique foundation of residency laws that overwhelmingly tie incarcerated individuals to their home addresses, not to their prisons. In addition, and consistent with the federal standard, the majority of state constitutions have an equal-protection guarantee, and many of them explicitly codify the equal-population mandate.[100] The combination of state residency rules and state equal-protection provisions provides fuel for new challenges to prison malapportionment by allowing reformers to bring claims in the state courts.

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96. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5528.

97. Although Dale Ho, in one of the first and most comprehensive articles on the topic, discusses state-law residency rules, it is within the greater context of detailing federal theories of liability. Using New York as a primary example, Ho explains how state residency rules offer the most telling rationale for counting incarcerated persons at their home addresses. *See* Ho, *supra* note 15, at 364-68. The state residency provisions, however, are not typically considered to be an element of a state-law strategy.

98. *See supra* Section II.A.

99. *See supra* notes 69-71 and accompanying text.

100. *See infra* Table 2. Although the equal-protection provision generally encompasses the equal-population requirement, certain state statutes are more explicit regarding equal population.

A. State Residency Requirements

State decisions to count incarcerated individuals as residents of their prison cells rather than their home addresses are inconsistent with not only the history and fundamental meaning of residence, but state residency laws in nearly every other legal context as well.

The debate over the residence of incarcerated people is not new. Indeed, courts have been wrestling with how to determine the domicile of those in prison for over a century, largely in the context of diversity jurisdiction. In many cases, whether a federal court can recognize diversity jurisdiction turns on determining the incarcerated person's residence.[101] Generally, an intent standard governs residence. That is, domicile requires voluntary choice. Justice Joseph Story, in an 1834 essay on domicile, stated the general standard: "Residence in a place by constraint, or involuntarily, will not give the party a domicil [sic] there; but his antecedent domicil [sic] remains."[102] This rule, as one commentator explains, was "based on the proposition that, if a person is forced to do a certain act, he cannot at the same time be doing the thing of his own free will. Intent, which is of its very nature voluntary, cannot coexist with compulsion."[103]

The dominant rule as described by Justice Story was codified in the *Restatement (Second) of Conflict of Laws*: "A person does not acquire a domicil of choice by his presence in a place under physical or legal compulsion."[104] The *Restatement* explains, "Acquisition of a domicil of choice requires some free exercise of the will on the part of the person involved."[105] Since incarcerated individuals are forcibly removed from their homes, they cannot choose a prison as

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101. *See, e.g.*, Brimer v. Levi, 555 F.2d 656, 658 (8th Cir. 1977); Jones v. Hadican, 552 F.2d 249, 250-51 (8th Cir. 1977); Stifel v. Hopkins, 477 F.2d 1116, 1120-21 (6th Cir. 1973); Cohen v. United States, 297 F.2d 760, 774 (9th Cir. 1962) ("One does not change his residence to . . . prison by virtue of being incarcerated there."); Abreu v. United States, 796 F. Supp. 50, 52 (D.R.I. 1992) ("Under the venue statute, a prisoner does not change residence to prison simply because she is incarcerated there."); Shaffer v. Tepper, 127 F. Supp. 892, 894 (E.D. Ky. 1955).

102. John C. Hogan, *Joseph Story's Essay on "Domicil,"* 35 B.U. L. REV. 215, 221 (1955). Justice Story explains that the choice of domicile must be voluntary; it cannot be determined "by constraint or involuntarily, as by banishment, arrest, or imprisonment." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 47, at 46 (1834).

103. Anne H. Erving, Note, *Domicile as Affected by Compulsion*, 13 U. PITT. L. REV. 697, 699 (1952).

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 (AM. LAW INST. 1971).

105. *Id.* at cmt. a.

their residence.[106] Courts consider the rule that legal compulsion, such as imprisonment, could not change an individual's domicile to be "black-letter law."[107] Federal courts have long followed a voluntary-choice standard with regard to determining domicile for the purposes of diversity jurisdiction.[108] Thus, when an individual is forcibly detained, he or she "retains the domicile he or she had at the time of incarceration."[109] While courts have recently allowed incarcerated persons to make a showing that they have intentionally chosen their place of incarceration as a domicile—there remains a presumption in favor of the pre-incarceration residence.[110] Even the Census Bureau has not always counted incarcerated individuals at prisons. Indeed, in the 1900 census, examiners counted incarcerated individuals based on the places where they were "permanent residents," rather than their places of incarceration.[111]

Discussion of the domicile of incarcerated individuals, however, has not been limited to the context of diversity jurisdiction. Many state courts have also passed judgment. Determining an incarcerated person's residence within a state extended well beyond sorting out diversity. For instance, state courts have

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106. The *Restatement* clarifies that "[u]nder the rule of this Section, it is impossible for a person to acquire a domicil [sic] in the jail in which he is incarcerated. To enter jail, one must first be legally committed and thereby lose all power of choice over the place of one's abode." *Id.* at cmt. c.

107. Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973); *see also* 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 21.1, at 154 (1935) ("The law has always made a sharp distinction between duress or compulsion, on the one hand, and motive or desire, however strong, on the other."). Even the Supreme Court recognized that the "essence of domicil[e]" was that a person had "no present intention of changing" their residence. Gilbert v. David, 235 U.S. 561, 570 (1915).

108. *See, e.g.*, United States v. Stabler, 169 F.2d 995, 998 (3d Cir. 1948); Neuberger v. United States, 13 F.2d 541, 542 (2d Cir. 1926); Shaffer v. Tepper, 127 F. Supp. 892, 894 (E.D. Ky. 1955); Hiramatsu v. Phillips, 50 F. Supp. 167, 168 (S.D. Cal. 1943); Wendel v. Hoffman, 24 F. Supp. 63, 64-65 (D.N.J. 1938).

109. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.37[8][a] (Martin H. Redish ed., 3d ed. 1999).

110. *Stifel*, 477 F.2d at 1124. This showing usually requires "facts sufficient to indicate a *bona fide* intention to change his domicile to the place of his incarceration." Jones v. Hadican, 552 F.2d 249, 251 (8th Cir. 1977) (emphasis added); *see also* Sullivan v. Freeman, 944 F.2d 334, 337 (7th Cir. 1991) (holding the presumption that "domicile is a voluntary status" to be "rebuttable"); Housand v. Heiman, 594 F.2d 923, 925 n.5 (2d Cir. 1979) ("While some courts have held that a prisoner may not claim newly acquired citizenship in the state in which he is imprisoned, the more recent trend seems to be in the direction of allowing a prisoner to try to show that he has satisfied the prerequisites for establishing domicile in his place of incarceration." (citations omitted)).

111. *See* NAT'L RESEARCH COUNCIL, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 84-85 (Daniel L. Cork & Paul R. Voss eds., 2006).

faced questions of residency of incarcerated individuals in the context of divorce proceedings.[112] Pennsylvania divorce law abides by a definition of domicile that is also tied to an individual's intent.[113] The issue has also come up in the context of wills and estates. The Kentucky Appellate Court, in a case involving naming an executor for a will, explained that "[a] person's domicile is not changed by his involuntary confinement in a penitentiary or other prison."[114] For venue purposes, the Alabama Supreme Court has held that because incarceration is involuntary, with "neither the right nor the power to resist," it does "not constitute a change of residence."[115]

Importantly, evaluating an incarcerated person's residence has also been important for electoral purposes. In states that allow or have allowed incarcerated people to vote, the nearly universal rule is for incarcerated individuals to vote in their home districts.[116] Indeed, almost every state has a constitutional or statutory provision that codifies this residence standard.[117] How states have interpreted residence in electoral contexts, namely voting, is particularly relevant to the issue of prison malapportionment since it is the closest analogue to redistricting.

In the electoral context, most states apply an intent standard similar to the federal diversity-jurisdiction standard discussed above.[118] States thus continue to apportion incarcerated individuals to their prison districts while at the same time tying their residence to their home addresses for voting purposes. South Carolina's electoral statute defines residence as a person's domicile, which is "a person's fixed home where he has an intention of returning when he is absent."[119] The statute also restricts each person to only one domicile.[120] In Ten-

112. *See, e.g.*, *Ex parte* Weissinger, 22 So. 2d 510, 513 (Ala. 1945); McKenna v. McKenna, 422 A.2d 668, 668 (Pa. Super. Ct. 1980).

113. *McKenna*, 422 A.2d at 669; *see also* Bernhard v. Bernhard, 668 A.2d 546, 550 (Pa. Super. Ct. 1995) (holding that a change in domicile requires intent in a case involving an active service person).

114. Ferguson's Adm'r v. Ferguson's Adm'r, 73 S.W.2d 31, 32 (Ky. 1934).

115. *Ex parte* Sides, 594 So. 2d 93, 96 (Ala. 1992). The court's decision was based on interpreting its venue statute that provides that "[e]xcept as may be otherwise provided, actions must be commenced in the county in which the defendant or a material defendant resides." ALA. CODE § 6-3-2(b)(3) (1975).

116. *See, e.g.*, Tate v. Collins, 622 F. Supp. 1409, 1412 (W.D. Tenn. 1985); *see also infra* tbl.1.

117. *See infra* tbl.1.

118. State legal disputes over residency in the electoral context also include disputes over residency for college students. *See, e.g.*, Hall v. Wake Cty. Bd. of Elections, 187 S.E.2d 52, 54 (N.C. 1972).

119. S.C. CODE ANN. § 7-1-25(A) (2011).

nessee, courts also consider residence to be the same as domicile and consider "intention [to be] the most important principle or element in the determination of a person's residence."[121] Courts in Virginia have interpreted residence to be "substantially synonymous" with domicile as used in Virginia election laws and have tied it to an intent standard.[122] Similarly, West Virginia courts recognize that intention is the "fundamental and controlling element" of determining "a change of residence or domicile."[123]

Forty-five states have integrated in their election laws an intent standard for defining residence.[124] Twenty-five of those states have constitutional or statutory provisions expressly providing that a person does not gain or lose residence by reason of incarceration at a prison or state institution.[125] Texas's statutory provision is illustrative: "'[R]esidence' means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence. . . . A person who is an inmate in a penal institution . . . does not, while an inmate, acquire residence at the place where the institution is located."[126] And yet, these laws continue to fail incarcerated people because states do not apply them in the context of redistricting.

Not only are these state residency rules legal mandates, but they also stem from sound policy. The previous Mississippi Attorney General, for instance, has captured the rationale of these provisions, explaining that incarcerated people "are not deemed 'residents' of that county or locality [where their prison is located], as incarceration cannot be viewed as a voluntary abandonment of residency in one locale in favor of residency in the facility or jail."[127] Thus, in-

120. *Id.*

121. Ray v. Gantte, 1987 Tenn. LEXIS 926, at *3 (Tenn. July 6, 1987). The Tennessee Supreme Court similarly has said that domicile is "the home or habitation fixed in any place, without a present intention of removing therefrom." Brown v. Hows, 42 S.W.2d 210, 211 (Tenn. 1931) (quoting Stratton v. Brigham, 34 Tenn. (2 Sneed) 420, 422 (1854)).

122. Kegley v. Johnson, 147 S.E.2d 735, 736 (Va. 1966) ("A change of place without the intent to abandon the old and acquire a new domicile will not work a change of legal residence.") (quoting Bruner v. Bunting, 15 Va. Law Reg. 514, 516-18 (1909)).

123. State v. Beale, 141 S.E. 7, 11 (W. Va. 1927).

124. *See infra* tbl.1; *see also* Peter Wagner, Aleks Kajstura, Elena Lavarreda, Christian de Ocejo & Sheila Vennell O'Rourke, *Fixing Prison-Based Gerrymandering After the 2010 Census: A 50 State Guide*, PRISONERS GERRYMANDERING PROJECT (Mar. 2010), https://www.prisonersofthecensus.org/50states [https://perma.cc/C3FP-FPD4] (summarizing how each state defines residence for incarcerated people).

125. *See infra* tbl.1.

126. TEX. ELEC. CODE ANN. § 1.015(a), (e) (West 2020).

127. Inmate Population in Cty. Redistricting, Op. Att'y Gen. No. 2002-0060, 2002 WL 321998, at *1 (Feb. 22, 2002).

carcerated individuals who are forcibly removed from their homes without choice cannot qualify as residents of prisons even under state statutes that adopt the broader intent standard. This reasoning is consistent with all the other rationales reformers cite to explain why incarcerated individuals are not considered residents of their places of confinement. Not only do incarcerated individuals have little choice as to where they are confined, but they also "lose the ability to participate in [the] outside community life [where imprisoned]."[128] To the extent incarcerated individuals maintain connections and ties to communities outside prisons, it is with their families and home communities.[129] Moreover, their political interests are likely to be more aligned with their home communities than the prison towns that are incentivized to increase incarceration. These state residency standards, thus, track the fundamental harms of prison malapportionment. "As former Census Bureau director Kenneth Prewitt has explained: 'Current census residency rules ignore the reality of prison life. . . . 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.'"[130]

TABLE 1.

STATE ELECTORAL LAWS DEFINING RESIDENCE

State statute or constitutional provision expressly states that a person does not gain or lose residence by reason of incarceration at a prison or institution.	Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington, Wyoming.[131]

128. Ebenstein, *supra* note 35, at 369.

129. The vast majority of formerly incarcerated individuals do not remain in the places they were incarcerated, with approximately half returning to their home communities upon release. *See, e.g.*, Justice Policy Ctr., *Returning Home Study: Understanding the Challenges of Prisoner Reentry*, URB. INST., https://www.urban.org/policy-centers/justice-policy-center/projects/returning-home-study-understanding-challenges-prisoner-reentry [https://perma.cc/27JP-EJME].

130. Peter Wagner, *Beginning of the End for 'Prison-Based Gerrymandering,'* WASH. POST (July 13, 2012), https://www.washingtonpost.com/opinions/beginning-of-the-end-for-prison-based-gerrymandering/2012/07/13/gJQAJP7fiW_story.html [https://perma.cc/C8ET-BDRU].

131. ARIZ. CONST. art. VII, § 3; COLO. CONST. art. VII, § 4; MINN. CONST. art. VII, § 2; MO. CONST. art. VIII, § 6; NEV. CONST. art. II, § 2; N.Y. CONST. art. II, § 4; OR. CONST. art II, § 4; WASH. CONST. art. VI, § 4; ALASKA STAT. § 15.05.020 (2020); CAL. ELEC. CODE § 2025 (West 2020); CONN. GEN. STAT. § 9-14 (2020); HAW. REV. STAT. § 11-13(5) (2020); IDAHO

State statute defines residence or domicile in terms of voluntary choice and intention to remain in a place.	Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Wisconsin.[132]
State-court decision defines residence or domicile in terms of voluntary choice and intention to remain in a place.	Illinois,[133] Iowa,[134] Maryland,[135] Massachusetts,[136] Ohio,[137] Virginia,[138] West Virginia.[139]
No state provision on intent standard or on residence of incarcerated individuals.	Delaware, Florida, New Jersey, Oklahoma.

The trove of state-law residency rules, which in many instances explicitly mandate that incarcerated individuals maintain their home residence, can therefore serve an integral role in prison-malapportionment challenges. These residency provisions shed light on one of the fundamental inconsistencies of prison malapportionment: incarcerated individuals, in nearly every legal context of residency—especially electoral—do not lose their home residence by reason of incarceration. Yet, with the practice of prison malapportionment, states continue to count the incarcerated at their prison districts and *not* where state

CODE § 34-405 (2020); ME. STAT. tit. 21-A, § 112(14) (2019); MICH. COMP. LAWS § 168.11(2) (2020); MISS. CODE ANN. § 47-1-63 (2020); MONT. CODE ANN. § 13-1-112(2) (2019); N.H. REV. STAT. ANN. § 654:2-a(I) (2020); N.M. STAT. ANN. § 1-1-7(D) (2020); 25 PA. CONS. STAT. § 2813 (2020); 17 R.I. GEN. LAWS § 17-1-3.1(a)(2) (2020); TEX. ELEC. CODE ANN. § 1.015(e) (West 2019); UTAH CODE ANN. § 20A-2-101(2)(a) (West 2020); VT. STAT. ANN. tit. 17, § 2122(a) (2020); WYO. STAT. ANN. § 22-1-102(xxx)(B)(III) (2020).

132. ALA. CODE § 17-3-32 (2020); ARK. CODE ANN. § 7-5-201(b)(1)-(2) (2020); GA. CODE ANN. § 21-2-217(a)(2)-(3) (2020); IND. CODE § 3-5-5-4 (2020); KAN. STAT. ANN. § 11-205(f) (2020); KY. REV. STAT. ANN. § 116.035(1)-(2) (West 2020); LA. STAT. ANN. § 18:101(B) (2019); NEB. REV. STAT. § 32-116 (2020); N.C. GEN. STAT. § 163-57(2)-(3) (2020); N.D. CENT. CODE ANN. § 54-01-26(1), (7) (2020); S.C. CODE ANN. § 7-1-25(A)-(B) (2020); S.D. CODIFIED LAWS § 12-1-4 (2020); WIS. STAT. § 6.10(1), (5), (7m), (11) (2019).

133. "A person confined in prison under the judgment and sentence of a court does not thereby change his residence . . . ." Cty. of Franklin v. Cty. of Henry, 26 Ill. App. 193, 195 (1887).

134. State v. Savre, 105 N.W. 387, 387-88 (Iowa 1905).

135. Wamsley v. Wamsley, 635 A.2d 1322, 1324 (Md. 1994).

136. Dane v. Bd. of Registrars of Voters of Concord, 371 N.E.2d 1358, 1365 (Mass. 1978).

137. Wickham v. Coyner, 30 Ohio C.C. 765, 769 (Ohio Ct. App. 1900).

138. Kegley v. Johnson, 147 S.E.2d 735, 737 (Va. 1966).

139. State v. Beale, 141 S.E. 7, 11 (W. Va. 1927).

law recognizes their legal residence to be. While their legal residence is their home, incarcerated individuals are counted for purposes of representation in their prison. Thus, a residence-representation divide persists.

For instance, nearly a third of Connecticut's prison population retains the right to vote,[140] and state law assigns their voter registration to their home addresses.[141] Yet, at the same time, the state continues to count incarcerated individuals towards the population of their prison district rather than their homes for apportionment. As an Illinois court emphasized, "[I]t would certainly be an anomaly to hold that [] persons are not residents for the purpose of determining the population of the district, but that they are residents for the purpose of voting."[142] Yet this contradiction remains the norm, making it a fertile ground for legal challenge.

Despite these clear residency rules, most states today incorrectly characterize incarcerated individuals as legal residents of prison districts when redistricting. Prison-malapportionment challengers can more effectively ask for enforcement of state statutory provisions regarding residency in state courts than in federal courts.[143] The residency statutes themselves can be a direct cause of action in state courts—a straightforward path not available in federal courts. While academics have proposed complicated, multipronged tests for determining residence under the Fourteenth Amendment,[144] state law offers an uncomplicated standard for state claims. The clear state legal provisions on residence provide a consistent, objective standard that states are already familiar with and readily apply. The rich history of these residency standards also reinforces the

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140. Only those incarcerated for felony convictions are prohibited from voting. CONN. GEN. STAT. § 9-46 (2020). Twenty-eight percent of the state's prison population are people who are either incarcerated for misdemeanors or not yet convicted and awaiting trial. Wagner, *supra* note 41, at n.11 (citing *July 1, 2010 Statistics*, CONN. ST. DEP'T CORRECTION (July 1, 2010), https://portal.ct.gov/DOC/Report/July-1-2010-Statistics [https://perma.cc/LV2C-UW82]).

141. *See* CONN. GEN. STAT. § 9-14 (2020) ("No person who resides in any institution maintained by the state shall be admitted as an elector in the town in which such institution is located, unless he proves to the satisfaction of the admitting official that he is a bona fide resident of such institution.").

142. Oswego Cmty. Consol. Sch. Dist. No. 434 v. Goodrich, 171 N.E.2d 816, 820 (Ill. App. Ct. 1961) (holding that individuals registered to vote in an election to create a new school district should be counted towards the population requirement necessary to form that district).

143. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars suits in federal court that order state officials to conform their conduct to state statutes).

144. *See*, *e.g.*, Skocpol, *supra* note 15, at 1532 (proposing a three-part constitutional test to determine the baseline for allocating incarcerated individuals).

rationale upon which reformers already rely to explain why incarcerated individuals should properly be assigned as residents of their home districts instead.[145]

B. State Equal-Population Requirements

State equal-population requirements offer further substantive support to the promise of state-law claims. Not only can the residence statutes serve as direct causes of action themselves, but they complement malapportionment challenges as well. The Fourteenth Amendment imposes a population-equality requirement on all legislative districts, known as the one-person, one-vote principle.[146] This constitutional requirement is binding on the states as it applies to both federal and state legislative districts.[147] The Supreme Court has also extended the one-person, one-vote requirement to local governments.[148] Additionally, forty-eight states have constitutional equal-protection provisions.[149]

Many state constitutions and courts have taken a more aggressive stance on protecting rights than the Federal Constitution.[150] Indeed, state courts have found violations of state-constitutional equal-protection provisions, even when the same conduct was not violative of the Federal Equal Protection Clause.[151] For instance, of the forty-eight states, more than twenty have explicitly held that their state equal-protection standard affords greater protections than the

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145. *See, e.g.*, Merrill Complaint, *supra* note 42, at 2 ("Persons incarcerated in districts far from their home communities have no meaningful connection to the towns in which they are incarcerated.").

146. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964); *supra* Section III.A.

147. *Reynolds*, 377 U.S. at 564-65 (stating that, as "the fountainhead of representative government in this country," state legislatures must be subject to the equal-population requirement). Note, however, that malapportionment of congressional districts violates Article I, § 2 of the Constitution, *see* Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964), while malapportionment of state legislative districts offends the Equal Protection Clause, *see Reynolds*, 377 U.S. at 568. As such, the Supreme Court has tolerated larger deviations in the context of state legislative districts than in congressional districts. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 322-23 (1973).

148. *See* Avery v. Midland Cty., 390 U.S. 474, 476 (1968). Notably, however, the constitutional one-person, one-vote principle does not apply to judicial districts.

149. *See* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 254 (1999).

150. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS, 171-209 (1998) (explaining the added protections many state constitutions offer).

151. *See, e.g.*, Kenai Peninsula Borough v. State, 743 P.2d 1352, 1370-73 (Alaska 1987).

federal provision.[152] Courts in the other twenty-seven states interpret the state equal-protection guarantee more similarly to and consistently with the federal standard.[153] In those states, the federal equal-protection standard still operates as the minimum.[154] Importantly, even if states' equal-protection provisions mirror the Federal Equal Protection Clause, states are not subject to the same jurisdictional constraints.[155]

Moreover, beyond the federal one-person, one-vote rule, at least thirty state constitutions also independently impose an equal-population requirement for election districts.[156] Indeed, two of those states, Colorado and Ohio, impose a stricter requirement than that of the U.S. Constitution.[157] State supreme courts have also tied their constitutional-apportionment standards to broader principles of equal representation and political equality. The Supreme Court of Colorado, for instance, has emphasized that "[t]he basic purpose of the constitutional standards for reapportionment is to assure equal protection for the right to participate in the . . . political process and the right to vote."[158] Pennsylvania's highest court, in invalidating a 2011 redistricting plan, stressed that "[l]egislative redistricting 'involves the basic rights of the citizens . . . in the election of their state lawmakers.'"[159] State law is especially significant in the reapportionment context as even the Supreme Court "has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself."[160]

TABLE 2.

STATE CONSTITUTIONAL EQUAL-PROTECTION PROVISIONS

State-constitutional provision that	Alabama, Alaska, Arizona, Arkan-

152. Jeffrey, *supra* note 149, at 254 & n.67.

153. *Id.* at 254-57.

154. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 115-16 (2009).

155. For instance, the federal political-question doctrine is not binding on state courts, unless a state has independently adopted its own version of the doctrine. Arizona, for instance, applies its own political-question doctrine, while Pennsylvania does not. *See, e.g.*, ARIZ. CONST. art. III.

156. *See infra* tbl.2.

157. *See* COLO. CONST. art. V, § 44.3(1)(a); OHIO CONST. art. XI, §§ 3, 4 (requiring greater mathematical equality than the federal standard).

158. *In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1241 (Colo. 2002).

159. Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 716 (Pa. 2012) (quoting Butcher v. Bloom, 203 A.2d 556, 559 (Pa. 1964)).

160. Growe v. Emison, 507 U.S. 25, 33 (1993).

imposes equal-population requirement.	sas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia.[161]
State-constitutional provision that explicitly ties apportionment standards to the federal constitution.	Connecticut, Idaho, Iowa.[162]
No state-constitutional provision on equal population.	Georgia, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin, Wyoming.

Generally, under an equal-population provision, a malapportioned map is one that defies the particular state's deviation and justification rules. Under the federal one-person, one-vote principle, for instance, the rule of thumb is the ten-percent overall deviation rule.[163] Once plaintiffs establish this prima facie case, the burden shifts to the state to justify the disparities or else the maps will

161. ALA. CONST. art. IX, § 4 (state senate); ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. IV, pt. 2, § 1(14)(B); ARK. CONST. art. VIII, § 3 (state senate), amend. LV, § 2(a) (county Quorum Courts); CAL. CONST. art. XXI, § 2(d)(1); COLO. CONST. art. V, § 44.3(1)(a); DEL. CONST. art. II § 2A; FLA. CONST. art. III, § 21(b); HAW. CONST. art. IV, § 6; ILL. CONST. art. IV, § 3(a); KY. CONST. § 33; ME. CONST. art. IV, pt. 1, § 2 (state house of representatives); MD. CONST. art. III, § 4; MASS. CONST. amend. art. CI, § 1 (state house of representatives); MICH. CONST. art. IV, § 6(13)(a); MO. CONST. art. III, § 2, *id.* § 5 (state senate); MONT. CONST. art. V, § 14(1); NEB. CONST. art. III, § 5; N.H. CONST. pt. 2, art. XXVI (state senate); N.J. CONST. art. IV, § 2, ¶ 3; N.Y. CONST. art. III, § 4; N.C. CONST. art. II, §§ 3, 5; OHIO CONST. art. XI, §§ 3, 4; PA. CONST. art. II, § 16, art. IX, § 11 (local); R.I. CONST. art. VII, § 1 (state house of representatives); S.D. CONST. art. III, § 5; TENN. CONST. art. II, § 4; VT. CONST. ch. II, §§ 13, 18; WASH. CONST. art. II, § 43(5); W. VA. CONST. art. I, § 4 (Congress), art. VI, § 4 (state senate).

162. CONN. CONST. art. III., § 5; IDAHO CONST. art. III, § 5; IOWA CONST. amend. XXVI.

163. If the absolute value of the sum of the deviation from the ideal of the most underpopulated and most overpopulated districts exceeds ten percent, that suffices to establish a prima facie case of malapportionment. *See* Brown v. Thomson, 462 U.S. 835, 842-43 (1983).

be invalidated. As justification, a state may invoke one or more of a number of well-recognized state interests, including the interests in "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives."[164] For deviations below ten percent, plaintiffs must provide additional proof that the districting scheme is arbitrary or discriminatory.[165]

Although the Federal Constitution sets a floor for acceptable population deviations, certain states offer stricter standards for what constitutes an equal-population violation. Ohio's provision provides a bright-line rule that "in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives."[166] Colorado's constitution requires that the redistricting commission "[m]ake a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small."[167]

Thus, while deviations of more than ten percent are necessary for a federal prima facie claim, deviations of less than ten percent are actionable in the states with stricter standards, providing great opportunities for litigation. Moreover, since the Census Bureau will provide additional data that will assist states with redistributing incarcerated individuals post-2020 census, potential state attempts to justify the practice based on logistical concerns will be significantly undermined.[168]

Overall, the population-equality element is necessary to an effective prison-malapportionment argument, though it is not sufficient. The key obstacle in prison-malapportionment challenges under the one-person, one-vote rule is not in establishing the population inequality, but in establishing *where* incarcerated individuals are residents. On that question, federal law only goes so far.[169] Yet, that is precisely the place where state law can play a bigger role. States have rich statutory and legal histories that consistently recognize incarcerated individuals as residents of their hometowns, not their places of incar-

164. Karcher v. Daggett, 462 U.S. 725, 740 (1983).

165. *Brown*, 462 U.S. at 847.

166. OHIO CONST. art. XI, § 3.

167. COLO. CONST. art. V, § 44.3(1)(a).

168. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525, 5,528 (Feb. 8, 2018).

169. *See, e.g.*, Skocpol, *supra* note 15, at 1532-36 (attempting to synthesize federal law regarding the determination of residence and proposing a three-part constitutional test to determine the baseline for where to allocate incarcerated individuals); *see also* Ho, *supra* note 15, at 364-71 (arguing that the law requires counting prisoners at their pre-incarceration addresses).

ceration. The combination of these provisions provides the starting point for reformers to turn to state courts.

C. Pursuing the State-Law Path

The post-2020 census redistricting process in 2021 will present a window of opportunity for prison-malapportionment challenges in state courts. Reformers seeking to mount a state-prison malapportionment claim should draw from the residency provisions in forty-six states to ground an explanation as to where incarcerated individuals should properly be counted. These provisions offer a straightforward, objective state-law argument and rationale for counting incarcerated individuals in their home communities that is not as readily available in the federal-law sphere. Thus, the basis of the claim is that once incarcerated individuals are properly counted where state law rightfully defines as their residence, the result is a malapportioned map that violates the state's equal-population requirement.

After the census reveals updated population figures, reformers can analyze state prison populations to flag prison-malapportioned maps. The greater the disparity between where prisons are located and where most incarcerated people come from, the more malapportioned the map will be. States with clear quantitative disparities are particularly open targets. For example, following the 2000 census, one particular prison district in Ohio had only ninety-one actual residents for every 100 people in other districts in the state—a disparity that would fail even the minimum federal equal-population prima facie requirement.[170] Considering that Ohio's state equal-population mandate is stricter than the Federal Constitution's makes the potential even greater for challenging such disparities.

Reformers should also consider bringing prison-malapportionment claims in states with more robust equal-representation protections.[171] Similarly, states with the most explicit provisions regarding the residence of incarcerated individuals are promising targets.[172] Residence provisions can both provide a direct cause of action and supplement equal-representation guarantees. With the release of 2020 census data, advocates will also be able to use the information to

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170. *Fixing Prison-Based Gerrymandering After the 2010 Census: Ohio*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/OH.html [https://perma.cc/C927-AT9J].

171. *See* Jeffrey, *supra* note 149, at 254 & n.67.

172. *See supra* tbl.1. However, as explained in Section III.A, even residency provisions that rely on intent, without explicitly mentioning incarceration, are still a compelling source.

better target states with greater deviations in their maps as a result of the misallocation of incarcerated individuals. States with the most egregious malapportionment will be prime targets.

1. Case Study: Michigan

Michigan has both an explicit state residency provision and a separate state equal-population provision. The combination of these two provisions makes it a viable target for state litigation. Although full analysis of the state's current redistricting data and legal precedents is beyond the scope of this Comment, it serves as an illustrative example.

Michigan's prison population is disproportionately from Detroit. Nearly a third of the state's incarcerated population is from Wayne County, although it is home to only about a fifth of the state's population.[173] Although Black people constitute fourteen percent of Michigan's total population, they make up nearly half of its incarcerated population.[174] In contrast, seventy-seven percent of Michigan's total population is white, compared to only forty-six percent of its incarcerated population.[175] Michigan's statewide districts are also malapportioned as a result of its incorrect allocation of incarcerated individuals. For instance, after the 2000 census, four State Senate districts and five State House districts only met federal minimum-population requirements by padding their population numbers with incarcerated individuals.[176] After the 2010 census, incarcerated individuals in three house districts made up five percent or more of the total population in those districts.[177]

Michigan presents a strong opportunity for reformers to file a challenge under state-residency claims. Michigan counts incarcerated individuals as resi-

173. *Fixing Prison-Based Gerrymandering After the 2010 Census: Michigan*, PRISON POL'Y INITIATIVE (Mar. 2010), https://www.prisonersofthecensus.org/50states/MI.html [https://perma.cc/9V6D-4RYC]. Note that the data presented in this example, which are limited to the 2010 census, would be subject to any shifts from 2020 census data not yet available at the time of publication.

174. *Blacks Are Overrepresented in Michigan Prisons and Jails*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/2010percent/MI_Blacks_2010.html [https://perma.cc/8M2P-E9AA] (visualizing data from the 2010 Census that illustrates how Black people make up forty-nine percent of the state's prison population).

175. *Michigan Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/MI.html [https://perma.cc/766V-RR2P].

176. *Fixing Prison-Based Gerrymandering After the 2010 Census: Michigan*, *supra* note 173.

177. Ben Thorp, *Lawmakers Want to End "Prison Gerrymandering,"* WNMU-FM (Feb. 5, 2020), https://www.wnmufm.org/post/lawmakers-want-end-prison-gerrymandering#stream/0 [https://perma.cc/JQ89-ZL4V].

dents of prisons, despite state-law commands to the contrary.[178] Michigan's statute provides that "[a]n elector does not gain or lose a residence . . . while confined in a jail or prison."[179] In addition to this explicit provision, this same statute even offers further support for the conclusion that incarcerated individuals are wrongfully counted at their places of confinement. The statute also explains that residence "as used in this act, for registration and voting purposes means that place at which a person habitually sleeps."[180] This definition of residence is similar to the Census Bureau's usual residence rule.[181] And yet, despite this shared definition, the state still recognizes, at least in the electoral context, that incarcerated individuals do not assume the residence of their prisons. The logic of the residence statute should, therefore, also translate to representation.

Furthermore, the promising state residency provision can also be combined with Michigan's equal-population mandate to create a compelling state-law case. Deviations that result when incarcerated individuals are properly counted in their home districts could be actionable under this mandate. Moreover, in addition to complying with the federal equal-population requirement, the Michigan Constitution offers additional redistricting protections.[182] Although beyond the foundation this Comment lays, reformers could also leverage other relevant state provisions to build an even more compelling case.

Mainly as a response to partisan-gerrymandering concerns, Michigan voters approved an amendment in 2018 that set up an independent redistricting commission as well as an anti-gerrymandering provision.[183] In addition, the provision also requires the redistricting commission to create districts that "reflect the state's diverse population and communities of interest."[184] While this amendment is new, the communities-of-interest provision is consistent with an

178. *See supra* Section III.A.

179. MICH. COMP. LAWS § 168.11(2) (1979).

180. *Id.* § 168.11(1).

181. *See supra* Section I.B. Moreover, Michigan law also already recognizes the prison-malapportionment problem on the city and county level, where it excludes prison populations from redistricting. *See* §§ 46.404(g), 117.27a(5).

182. *See* MICH. CONST. art. IV, § 6(13).

183. Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, DET. FREE PRESS (Nov. 6, 2018, 5:23 AM ET), https://www.freep.com/story/news/politics/elections/2018/11/06/proposal-2-michigan-gerrymandering/1847078002 [https://perma.cc/625P-HF4A]. The amendment's anti-gerrymandering provision requires that "[d]istricts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness." MICH. CONST. art. IV, § 6(13)(d).

184. MICH. CONST. art. IV, § 6(13)(c).

enduring commitment articulated by the Michigan State Supreme Court, which has explained that "[s]tate legislators are to represent their constituents. A legislator can perform that function only if there is some real community of interest among the represented group—without that, the legislator cannot speak effectively on the group's behalf."[185] The judiciary's value on a robust understanding of fair representation in the state aligns with the goals of correcting prison malapportionment. This understanding of representation is complementary to the rationale as to why incarcerated individuals do not assume the residence of their prisons and instead maintain enduring connections with their home communities. The provision therefore provides further justification to bridge the residence-representation divide.

The Michigan example is just a brief glimpse into the potential for state-court prison-malapportionment claims that leverage the combination of state-law residency rules and more robust state equal-representation provisions. Reformers looking to bring state-law prison-malapportionment claims, therefore, would combine these substantive provisions with statewide analyses of the prison-population numbers and shifts in the map that would occur once incarcerated individuals are reallocated.

2. *A Promising Start*

The first state-court prison-malapportionment challenge filed in 2020 by the NAACP in Pennsylvania illustrates the practical merits of this strategy.[186] The Pennsylvania Supreme Court recently made waves when it struck down a redistricting map in 2018 as an unconstitutional partisan gerrymander under the state constitution.[187] The state judiciary's willingness to rule in favor of novel electoral legal claims under a more robust reading of its state constitution, thus, makes it a terrific venue for the challenge.

Notably, the plaintiffs in *Holbrook* bring the challenge to the practice both as a direct violation of the residency statute and as an equal representation violation under the Pennsylvania Constitution's equal-representation clauses. Plaintiffs in the complaint repeatedly emphasize that "Pennsylvania law is . . . clear that incarcerated people are not—and may not become—residents of the electoral districts in which they are incarcerated."[188] And this state statute

185. *In re* Apportionment of the State Legislature—1992, 486 N.W.2d 639, 649 (Mich. 1992).

186. Petition for Review Addressed to the Court's Original Jurisdiction, Holbrook v. Pennsylvania, No. 184 MD 2020 (Pa. Commw. Ct. Feb. 26, 2020).

187. *See* League of Women Voters v. Pennsylvania, 178 A.3d 737 (Pa. 2018).

188. Petition for Review, *supra* note 186, at 3 (citing 25 PA. CONS. STAT. § 1302(a)(3) (1970)).

makes sense, as "[i]ncarcerated people lack meaningful indicia of residency or domicile in their jurisdictions of incarceration, such as a voluntary intent to remain there."[189] They also "have no meaningful connection to the districts where they are imprisoned."[190]

When incarcerated individuals are properly allocated to where state law says is their home, the complaint alleges that "several current districts where prisons are located would be substantially underpopulated, and several urban districts would be substantially overpopulated."[191] For instance, even though "approximately 26 percent of Pennsylvania's prison population comes from Philadelphia, . . . more than 95 percent of incarcerated people in the Commonwealth are imprisoned in locations outside of Philadelphia."[192] The resulting malapportioned map, the plaintiffs argue, violates Pennsylvania's "free and equal" elections guarantee and equal-population mandate.[193]

The state-residency provision thus offers a seamless link between where incarcerated individuals should be reallocated and the resulting malapportionment that occurs. Moreover, the residency law offers its own independent ground for challenging malapportionment. Not only do the plaintiffs argue that Pennsylvania's practice violates the equal-representation mandates, but they also highlight that the practice violates the state residency provision itself. By bringing this claim in state court—in contrast to federal court—plaintiffs can use the state residency rules both as a direct cause of action and as a rationale for where incarcerated individuals should be counted under an equal-population theory. The ability to harness state residency laws as an independent legal basis exemplifies the unique power of the state-court litigation strategy. The combination of these approaches, coupled with the favorability of the venue, provides a greater probability of success.

The state-court strategy can also enable additional, collateral litigation benefits. Certain states, for instance, offer expedited opportunities for challenging prison malapportionment. In the federal context, constitutional challenges to

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189. *Id.* at 35.

190. *Id.* at 3 ("Incarcerated people cannot visit public or private establishments in the districts where they are incarcerated or use public services in the surrounding communities.").

191. *Id.* at 4.

192. *Id.* at 33.

193. PA. CONST. art. I, § 5. Plaintiffs also rely on the state supreme court's robust judicial understanding of equal representation. As the Pennsylvania Supreme Court held, the state constitution "guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government" and "mandates that all voters have an equal opportunity to translate their votes into representation." League of Women Voters v. Pennsylvania, 178 A.3d 737, 804 (Pa. 2018).

statewide legislative-apportionment maps must be heard by a three-judge district court, with direct appeal to the Supreme Court.[194] States, however, have various mechanisms for litigants to challenge redistricting maps. Connecticut, for instance, has a procedure in which any registered voter may entirely bypass the lower courts and directly petition the State Supreme Court for review of a map.[195] The Florida Constitution mandates that the State Supreme Court review and determine the validity of every new apportionment plan.[196] This is particularly significant, as the State's highest court recognized that "the Florida Constitution now imposes more stringent requirements as to apportionment than the United States Constitution."[197]

Some state courts can also offer additional litigation benefits. Importantly, there is a "widespread powerful presumption of justiciability among the states' judiciary."[198] Alaska courts, for examples, have a more relaxed standing requirement, allowing a plaintiff in a reapportionment suit to assert the rights of voters in a district in which she does not reside or vote as long as she is a qualified voter.[199] States also have different approaches to the typical political-question doctrine that can dominate federal-court consideration of election-law challenges. The Pennsylvania Supreme Court, for instance, refused to recognize a parallel political-question doctrine in the context of political gerrymandering.[200] While the core of the state-court strategy centers on the substantive advantage of state residency and equal-representation laws, reformers should consider leveraging other unique state-court opportunities.

194. 28 U.S.C. § 2284(a) (2018).

195. *Redistricting Systems: A 50-State Overview*, NAT'L CONF. ST. LEGISLATORS (June 2, 2020), https://www.ncsl.org/research/redistricting/redistricting-systems-a-50-state-overview.aspx [https://perma.cc/CD4M-DYH2].

196. FLA. CONST. art. III, § 16(c); *see also In re* Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 608 (Fla. 2012) (explaining that "[the Florida Supreme] Court is *required* by the state constitution to evaluate whether the Legislature's apportionment plans conflict with Florida's express constitutional standards").

197. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d at 598-99.

198. Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 205 (2018).

199. Carpenter v. Hammond, 667 P.2d 1204, 1208-09 (Alaska 1983).

200. League of Women Voters v. Pennsylvania, 178 A.3d 737, 801-02 (Pa. 2018); *see also* Stern, *supra* note 198, at 155 (citing *League of Women Voters* to show that "state courts are not required to slavishly adhere to the Supreme Court's interpretation of parallel constitutional provisions").

CONCLUSION

The plaintiffs in *Baker v. Carr* once urged the federal courts to intervene in redistricting cases because there was no other path to escape out of the "illegal straitjacket."[201] State constitutions or legislatures offered no hope. Decades later, state courts increasingly offer promise to litigants—especially in the modern redistricting context. State law can provide an additional avenue to effectively challenge prison malapportionment outside federal constitutional and statutory claims. The state-law route offers substantive advantages through its residency and equal-population provisions, as well as procedural advantages over modern federal challenges. For instance, state-court litigation can insulate the issue from Supreme Court review during a time when the current Court may be hostile to expanding voting-rights claims. It also is consistent with the political winds—several states have already passed legislation to address prison malapportionment and adjusted their legislative maps. As the momentum builds against this practice, and as progressives increasingly look to state courts for reform, prison-malapportionment reformers should also turn to state law.

201. Oral Argument at 25:50, Baker v. Carr, 369 U.S. 186 (1962) (No. 6), https://www.oyez.org/cases/1960/6 [https://perma.cc/X5Q2-ZEVM].