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A Modern-Day 3/5 Compromise: The Case for Finding Prison Gerrymandering Unconstitutional Under the Thirteenth Amendment

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A MODERN-DAY 3/5 COMPROMISE: THE CASE FOR FINDING PRISON GERRYMANDERING UNCONSTITUTIONAL UNDER THE THIRTEENTH AMENDMENT

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Vestiges of slavery and systemic disenfranchisement of people of color persist in the United States. One of these remnants is the practice of prison gerrymandering, which occurs when government officials count incarcerated individuals as part of the population of the prison's location rather than the individual's home district. This Article argues that prison gerrymandering functions as a badge of slavery that should be prohibited under the Thirteenth Amendment.

First, this Article provides background on prison gerrymandering and charts its impact through history, particularly on Black communities. Moreover, this Article analyzes how litigation under the Fourteenth Amendment has not yielded meaningful results. Though the issue of prison gerrymandering has been written about extensively, most legal arguments rely on the Fourteenth Amendment, and there has been little scholarship on abolishing the practice through the Thirteenth Amendment. Acknowledging this gap, this Article argues that prison gerrymandering is a vestige of slavery rooted in the Three-Fifths Clause of the Constitution. Therefore, this Article concludes that prison gerrymandering is unconstitutional under the Thirteenth Amendment.

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INTRODUCTION

Floyd Wilson was sentenced to prison at seventeen and has never been able to vote.[1] After thirty-five years of incarceration, Wilson learned that despite never being able to vote, the state was counting him in the voting population of a community where he would never cast a ballot.[2] Through the practice of prison gerrymandering, Pennsylvania's District 150 counts Wilson toward the district's total population.[3] To make matters worse, a 2019 study found that District 150's total population would likely be too small without counting incarcerated people to meet the federal minimum requirements for a state representative.[4]

Wilson's case exemplifies how vestiges of slavery and systemic disenfranchisement of people of color persist in the United States. One of these remnants is the practice of prison gerrymandering, which occurs when government officials count incarcerated people as part of the population of the prison's location

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[1] *See* Sanya Mansoor & Madeleine Carlisle, *When Your Body Counts but Your Vote Does Not: How Prison Gerrymandering Distorts Political Representation*, TIME (July 1, 2021, 3:19 PM), https://time.com/6077245/prison-gerrymandering-political-representation [https://perma.cc/TK8B-B27Q].

[2] *See id.*

[3] *See id.* In general, gerrymandering is the practice of dividing up an electoral district to give one political party an unfair advantage by diluting the other party's voting strength. Prison gerrymandering, however, occurs when jurisdictions count incarcerated persons in the district where their prison is located. *See* Wilson T. Carroll, *Prison Gerrymandering Reform in Connecticut*, 38 QUINNIPIAC L. REV. 579, 580–84 (2020).

[4] *See* Carroll, *supra* note 3, at 587.

rather than their home district.[5] This practice is widespread and occurs in numerous states.[6]

In Connecticut,[7] for instance, Black Americans are 10.6 times more likely to be incarcerated than their white counterparts.[8] While 80 percent of Connecticut's population is white, nearly 65 percent of the state's prison population is non-white.[9] Further, while 47 percent of incarcerated people in Connecticut come from the state's five most populous cities,[10] the state formerly counted 65 percent of its prison population as residing in five predominately white, rural districts where the state's prisons are located.[11] Fortunately, Connecticut recently abolished prison gerrymandering.[12]

Prison gerrymandering is a common practice among states in redistricting. This practice inflates the political representation of primarily white, rural prison "host communities" at the expense of minority, urban communities from which incarcerated individuals disproportionately hail.[13] This tool creates a political incentive for increased rates of incarceration and the development of more prisons. And so far, its prominence as a tool that further segregates and disempowers people of color has been unsuccessfully challenged in courts.

This Article argues that prison gerrymandering functions as a badge of slavery that is unconstitutional under the Thirteenth Amendment. First, Part I defines prison gerrymandering and charts its impact through history—focusing particularly on Black

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[5] *See generally Prison Gerrymandering Explained*, DEMOCRACY DOCKET (Oct. 4, 2021), https://www.democracydocket.com/analysis/prison-gerrymandering-explained [https://perma.cc/2WJC-XM3M].

[6] In 2021, however, at least four states banned prison gerrymandering. *See* Mac Brower, *These 24 States Improved Access to Voting This Year*, DEMOCRACY DOCKET (Dec. 28, 2021), https://www.democracydocket.com/analysis/these-24-states-improved-access-to-voting-this-year [https://perma.cc/VZA4-E9CJ]. As of this writing, among a dozen states and over 200 local government have ended the practice. *See* Aleks Kajstura, *What are States Saying About Their Experience Addressing Prison Gerrymandering?*, PRISON POL'Y INITIATIVE (Feb. 24, 2023), https://www.prisonersofthecensus.org/news/2023/02/24/states-reports [https://perma.cc/8HMB-QZ89].

[7] In May 2021, Connecticut became the eleventh state to abolish prison gerrymandering. *See Connecticut Gov. Ned Lamont Signs Bill Ending Prison Gerrymandering*, PRISON POL'Y INITIATIVE (May 27, 2021), https://www.prisonersofthecensus.org/news/2021/05/27/connecticut-victory [https://perma.cc/U73V-QMBM].

[8] *See* Carroll, *supra* note 3, at 587.

[9] *Id.* at 587–88.

[10] *Id.*

[11] *Id.*

[12] *See supra* note 7.

[13] Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1476 (2017).

communities. Part II then analyzes how litigation under the Fourteenth Amendment has not yielded meaningful results to combat this injustice. Though prison gerrymandering has been written about extensively, most legal arguments rely on the Fourteenth Amendment, and there has been little scholarship on abolishing the practice through the Thirteenth Amendment. Acknowledging this gap, Part III argues that prison gerrymandering is a vestige of slavery rooted in the Three-Fifths Clause of the United States Constitution. Accordingly, this Article concludes that prison gerrymandering is not only a harmful practice but is also unconstitutional under the Thirteenth Amendment.

I. THE LONG-STANDING PRACTICE OF PRISON GERRYMANDERING IN THE UNITED STATES

A. History of Prison Gerrymandering

As of 2020, one in sixteen Black Americans of voting age is disenfranchised.[14] Most often, this disenfranchisement occurs through incarceration: in state prisons across the country, Black Americans are incarcerated at nearly five times the rate of their white counterparts.[15] Currently, twenty-six states strip voting rights from people with past criminal convictions.[16] These laws deprive millions of Americans—predominantly Black men—of their right to vote.[17]

In a perfect system, government officials would not disenfranchise incarcerated individuals. If this were the case, prison gerrymandering would not be quite as egregious of an issue. At the time of this writing, only Maine, Vermont, Washington, D.C., and Puerto Rico do not restrict the voting rights of those with felony convictions—including those currently incarcerated.[18] Though full

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[14] *See* Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENT'G PROJECT 4 (2020), https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf [https://perma.cc/PYL2-GHN8] (stating that this is a rate 3.7 times greater than non-Black Americans).

[15] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prison*, THE SENT'G PROJECT 4, 18 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/LGR3-YUYG].

[16] *See, e.g.*, *Can People Convicted of a Felony Vote? Felony Voting Laws by State.*, BRENNAN CTR. FOR JUST. (Mar. 7, 2023), https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states [https://perma.cc/FRY8-SPVE].

[17] *See id.*

[18] Nazol Ghandnoosh, *Voting Rights in the Era of Mass Incarceration: A Primer*, THE SENT'G PROJECT 1 tbl.1 (2021), https://www.sentencingproject.org/app

enfranchisement for incarcerated people is an aspirational goal, this Article focuses on the unconstitutionality of prison gerrymandering within the United States' existing structural framework.

For decades, the U.S. Census Bureau has counted incarcerated individuals' prison locations as where they "reside."[19] In fact, incarcerated individuals have been counted toward prison district populations as early as the Founding.[20] Many states still use prison gerrymandering during their redistricting process, and such gerrymandering occurs at the federal, state, and local levels.[21]

As the Nation's carceral system disproportionately imprisons people of color, prison gerrymandering creates a system in which Black communities wield less political power than white host communities.[22] For example, in the 2010 Illinois redistricting, Cook County was home to 60 percent of the state's incarcerated individuals, yet the state counted over 90 percent of these individuals as outside the county.[23] In Illinois, 95 percent of the state and federal prisons are located in disproportionately white counties.[24] Effectively, this works to expand "the voting power of rural—and hence white—congressional districts that contain prisons, while correspondingly diminishing the voting power of prison-less districts in the state."[25] In an era of mass incarceration, prison gerrymandering results in Black communities wielding less political power.

B. Tangible Harms of Prison Gerrymandering

The harms of prison gerrymandering go beyond stripping marginalized communities of political agency; prison gerrymandering perpetuates the cycle of racial disparity and injustice.[26] For instance, prison gerrymandering creates an

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/uploads/2022/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf [https://perma.cc/22K6-AC4U].

[19] *See* Skocpol, *supra* note 13, at 1475.

[20] *See id.* at 1480.

[21] *See The Problem*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/impact.html [https://perma.cc/4WC3-SLSN] (last visited Mar. 20, 2023).

[22] *See* Tatiana Laing, *Seeing in Color: The Voting Rights Act as a Race-Conscious Solution to Prison-Based Gerrymandering*, 50 SETON HALL L. REV. 499, 500–01 (2019).

[23] Brett Blank & Peter Wagner, *Importing Constituents: Prisoners and Political Clout in Illinois*, PRISON POL'Y INITIATIVE (Feb. 1, 2010), https://www.prisonersofthecensus.org/illinois/importing.html [https://perma.cc/26BY-CWEQ].

[24] *See id.* ("In 20 of Illinois' 102 counties, more than half of the Black population reported in the Census as local residents are in fact incarcerated people from elsewhere in the state.").

[25] Laing, *supra* note 22, at 500.

[26] *See* Mansoor, *supra* note 1.

inaccurate picture of incarcerated individuals' home communities.[27] The government receives racial, gender, and income data that is so skewed that it impacts the resources allocated to communities of color.[28] In other words, a white, rural district may be allocated more money and resources based on inaccurate demographic data, furthering economic and racial divides between localities.[29]

Though politicians have argued that incarcerated people benefit from the resources provided in host districts,[30] those incarcerated cannot utilize resources from any of the ten most extensive programs whose funds are guided by census data.[31] This includes Medicaid, Section 8 Housing Choice Vouchers, and the Supplemental Nutrition Assistance Program.[32] After their release, formerly incarcerated people return home needing community support and reintegration resources.[33] At the same time, their home districts are unable to provide such resources due to this misallocation of funds.[34]

Additionally, prison gerrymandering can result in the host community wielding additional political power to vote on policies explicitly detrimental to an incarcerated individual's home community. Indeed, prison gerrymandering often shifts political power from Democratic-leaning districts, often a state's more populated area and home to communities of color, to Republican-leaning districts, usually whiter and more rural districts that house prisons.[35] This creates political incentives that perpetuate the cycle of mass incarceration, prison gerrymandering, and resource misallocation. In effect, legislators are incentivized to oppose

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[27] *See* Laing, *supra* note 22, at 503.
[28] *See id.*
[29] *See id.* at 503–04.
[30] For instance, the former New Jersey Governor vetoed a 2016 bill that would have prohibited prison gerrymandering because incarcerated individuals also consume community resources. Adam Johnson, *Wisconsin's 3/5 Compromise: Prison Gerrymandering in Wisconsin Dilutes Minority Votes to Inflate White Districts' Population*, 47 MITCHELL HAMLINE L. REV. 479, 492 (2021).
[31] *See id.* at 493 (citing Tracy Gordon, *The Census Is About Nearly $1 Trillion in Federal Spending, Not Just Elections*, TAX POL'Y CTR. (June 27, 2019), https://www.taxpolicycenter.org/taxvox/census-about-nearly-1-trillion-federal-spending-not-just-elections [https://perma.cc/9FLG-KCA8]).
[32] *Id.* at 493 n.96.
[33] *See Prison Gerrymandering Undermines Our Democracy*, BRENNAN CTR. FOR JUST. (Oct. 22, 2021), https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy [https://perma.cc/CBE9-URSR].
[34] *See* Tom Howe, *Where Should Inmate be Counted for Redistricting?*, No. 81-5 H. RSCH. ORG., INTERIM NEWS, Aug. 12, 2010, at 11, https://hro.house.texas.gov/interim/int81-5.pdf [https://perma.cc/HPC7-6Q2W].
[35] *See* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN L. & POL'Y REV. 355, 362 (2011).

reforms that would decrease incarceration rates.[36] For example, two New York state senators with large prisons in their districts led efforts to stall reforms in the state for years.[37] Prison policy scholars contend that lawmakers have used prison gerrymandering to support "draconian drug laws and mandatory minimums that fueled and sustain[ed] the incarceration boom."[38]

Further, contemporary debates in state legislatures often do not address how prison gerrymandering dehumanizes incarcerated individuals.[39] State legislators often exploit the political power prisons provide without addressing the needs of the incarcerated population.[40] Some critics contend that prison gerrymandering is an example of how our Nation's carceral system fosters isolation and segregation rather than rehabilitation.[41] As civil rights lawyer Michael Skocpol explains, these critiques presume that our "modern penal regime imposes a humiliating and excessive 'civil death'. . . that is unmoored from legitimate penological rationales."[42] One iteration of this harm is demonstrated through the similarities between the Three-Fifths Compromise and prison gerrymandering.

C. Comparisons to the Three-Fifths Compromise

The disparate impact of prison gerrymandering on Black communities is reminiscent of the Three-Fifths Compromise.[43] The Three-Fifths Clause resulted from a political agreement reached during the 1787 Constitutional Convention.[44] The compromise enabled states to count three-fifths of enslaved people in their total population for apportioning seats in the U.S. House of Representatives and calculating the amount each state would pay in taxes.[45] The Fourteenth Amendment later invalidated this Clause, proclaiming that "representatives shall be apportioned . . . counting the whole number of persons in each State."[46]

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[36] *See id.* at 364 (explaining that "two state senators in New York who led the opposition to efforts to reform [the state's] . . . drug sentencing laws represented districts that were home to more than 17% of the state's prisoners.").
[37] *See id.*; Skocpol, *supra* note 13, at 1489–90.
[38] Skocpol, *supra* note 13, at 1490 (citing Gary Hunter & Peter Wagner, *Prisons, Politics, and the Census*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 80, 86 (Tara Herival & Paul Wright eds., 2007)).
[39] *See id.* at 1488–90.
[40] *See id.* at 1489–90.
[41] *See id.* at 1488–89.
[42] *Id.* at 1489.
[43] *See generally* Johnson, *supra* note 30.
[44] The Three-Fifths Clause was originally adopted in Article 1, Section 2 of the Constitution. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.
[45] *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J. L. & HUMAN. 413, 427 (2001).
[46] U.S. CONST. amend. XIV, § 2.

Slavery, broadly, is marked by forced labor and the stripping of political and civil rights.[47] In this way, the Three-Fifths Compromise was vital to maintaining slavery in the United States through the disproportionate allocation of political power.[48] The "three-fifths of all other persons" phrase gave greater representation in Congress to the slave states and protected the political interests of slave owners in elections.[49]

This political exploitation of enslaved populations is similar to the political incentives prison gerrymandering gives legislators to build prisons in their districts to gain and wield more representational power.[50] By extension, prison gerrymandering is a modern manifestation of the same premise of inferiority on which the Three-Fifths Compromise was based.[51] For instance, incarcerated people are "uniquely productive" in that they may be paid a lower wage than someone not incarcerated for similar work.[52] Simply put, prison gerrymandering, like slavery, co-opts incarcerated people "as a resource to be used for another party's benefit."[53] More recently, reform advocates have attempted to bring litigation to address prison gerrymandering.[54]

D. Prison Gerrymandering Today

The issue of prison gerrymandering gained legal traction with the advancement of the one-person, one-vote doctrine.[55] In *Baker v. Carr*,[56] the United States Supreme Court ruled that an

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[47] *See* Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 259 (2015) (defining enslaved person as being "under the control of another agent due to the threatened or actual use of violence . . . [,] dishonored by and excluded from the human community, and treated as an object.").

[48] Though this Article argues that there are courses of action to upend vestiges of slavery through the Constitution, various scholars have argued that the Constitution itself is a proslavery document. *See, e.g.*, Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 45 U.C. DAVIS L. REV. 1081, 1087 (2018) (arguing that the Apportionment Clause is proof of the document's "proslavery essence.").

[49] *See id.*

[50] *See* Johnson, *supra* note 30, at 480.

[51] *See id.* ("Let the case of the slaves be considered, as it is in truth, a peculiar one. Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the Slave as divested of two fifths of the Man." (citing THE FEDERALIST NO. 54 (James Madison)).

[52] Johnson, *supra* note 30, at 480–81.

[53] *Id.* at 481.

[54] *See, e.g.*, Calvin v. Jefferson County Bd. of Commissioners, 172 F. Supp. 3d 1292 (N.D. Fla. 2016); Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).

[55] *See generally* Skocpol, *supra* note 13, at 1481–83.

[56] 369 U.S. 186 (1962).

apportionment scheme that deprives plaintiffs of equal protection of the laws under the Fourteenth Amendment is justiciable.[57] Specifically, the plaintiff's constitutional claim was based on an asserted right to equal representation in the legislature under the Fourteenth Amendment.[58] The *Baker* ruling meant that redistricting cases could be litigated in federal courts—providing an avenue to challenge state apportionment schemes. Ultimately, *Baker*'s one-person, one-vote principle laid a critical foundation: "Equal population is the basis of equal representation."[59]

Since *Baker*, several cases concerning racial gerrymandering and vote dilution have reached the Supreme Court.[60] Advocates against prison gerrymandering, however, have more often used legislation rather than the courts to remedy harms.[61] Since 2010, about a dozen states have passed legislation to end prison gerrymandering.[62] But the legislative process is slow, and not all states will demonstrate the political will to adopt such measures through the political process. Understanding these challenges, advocates must consider the role courts can play in the context of prison gerrymandering.

II. THE LIMITED FOURTEENTH AMENDMENT JURISPRUDENCE ON PRISON GERRYMANDERING

Federal courts have heard several challenges to the constitutionality of prison gerrymandering.[63] Litigants in these cases have largely relied on arguments based on the Fourteenth Amendment.[64] Thus far, there is no clear consensus on where the federal courts have landed on this issue. Two recent cases, *Calvin v. Jefferson Board of Commissioners*[65] and *Davidson v. City of*

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[57] *See id.* at 196.

[58] *See* Notes & Comments, Baker v. Carr *and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968, 986 (1963).

[59] Skocpol, *supra* note 13, at 1482 (citing Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 215 (2003)).

[60] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015); Cooper v. Harris, 137 S. Ct. 1455 (2017).

[61] *See generally* Uggen et al., *supra* note 14.

[62] *See* Andrea Fenster, *How Many States Have Ended Prison Gerrymandering? About a Dozen*!*, PRISON POL'Y INITIATIVE (Oct. 26, 2021), https://www.prisonersofthecensus.org/news/2021/10/26/state_count [https://perma.cc/HS7K-TJA9].

[63] *See, e.g.*, Calvin v. Jefferson County Bd. of Commissioners, 172 F. Supp. 3d 1292 (N.D. Fla. 2016); Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016).

[64] *See, e.g.*, *Calvin*, 172 F. Supp. 3d 1292; *Davidson*, 837 F.3d 135.

[65] 172 F. Supp. 3d 1292 (N.D. Fla. 2016).

Cranston,[66] demonstrate the limited success of equal protection arguments under the Fourteenth Amendment in challenging the constitutionality of prison gerrymandering.

A. Calvin v. Jefferson

Considered a "groundbreaking prison districting challenge,"[67] the plaintiffs in *Calvin* successfully used the Fourteenth Amendment to overturn a single prison gerrymandering scheme.[68] Though the federal district court suggested a workable standard for determining when prison gerrymandering violates the Equal Protection Clause's one-person, one-vote requirements,[69] the court did not go so far as to address the harm of the practice overall.

The *Calvin* plaintiffs challenged a county commission districting scheme where non-voting incarcerated individuals made up approximately 42 percent of the one single-member district.[70] In the county at issue, residents elect five county board commissioners in single-member districts.[71] The plaintiffs, who were residents of the four single-member districts that did not contain the prison, argued that "their voters were diluted by the inclusion of the prison population in the base apportionment population" for the district in which the prison was located.[72] The federal district court agreed: holding that the county's districting scheme violated the one-person, one-vote doctrine.[73]

The *Calvin* court relied on precedent and applied rational basis review.[74] Specifically, this inquiry examined whether the legislative apportionment scheme could advance a rational state

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[66] 837 F.3d 135 (1st Cir. 2016).

[67] Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 349 (2018).

[68] 172 F. Supp. 3d at 1326.

[69] *See id.* at 1292.

[70] *See id.* at 1298; Ebenstein, *supra* note 67, at 349. At the time of the challenge, Jefferson County, Florida had a population of 14,761, while the prison at issue had 1,157 incarcerated individuals. *Calvin*, 172 F. Supp. 3d at 1296–97 (noting that nine of the incarcerated individuals were convicted in the county at issue while the rest were convicted in other parts of the state).

[71] *See id.* at 1295.

[72] Ebenstein, *supra* note 67, at 349. In other words, the residents' equal protection claim argued that including the incarcerated population in one district inflated that district's influence, thereby diluting the representational and voting strength of voters in other districts. *See Calvin*, 172 F. Supp. 3d at 1298.

[73] *See Calvin*, 172 F. Supp. 3d at 1298.

[74] *See id.* at 1301. Rational basis review is a judicial test where the legislature must demonstrate that the statute advances a legitimate state interest through reasonably connected means, as opposed to a more exacting strict scrutiny test, where the legislature must demonstrate a compelling government interest that is narrowly tailored by the statute. *See id.* at 1312–13.

policy and, if so, whether the population disparities exceeded constitutional limits.[75] Equal Protection Clause jurisprudence led the *Calvin* court to weigh the difference between electoral and representational equality.[76] The court determined that the scheme "served neither representational nor electoral equality."[77] First, the court reasoned that the scheme failed to promote electoral equality because voters in the prison's district "had more weight to their votes than voters in the other districts."[78] Second, the scheme also failed to serve representational equality because the incarcerated individuals lacked a "representational nexus" to the elected county commissioner representing the prison.[79] Thus, the court found that the challenged redistricting plans diluted both the electoral and representational strength of citizens.[80]

But *Calvin*'s precedential value of fighting prison gerrymandering is limited. Skocpol argues that *Calvin's* approach "would likely never invalidate any *statewide* prison gerrymander."[81] The court's issue with the scheme specified that incarcerated individuals lacked a representational nexus due to policies set at the state level, leaving counties with no power over decisions that meaningfully affected those individuals.[82] Further, however, Skocpol explains that this logic has a flip side: "[P]risoners by *Calvin*'s definition would seem to enjoy an extra-strong representational nexus to the state legislature, which controls

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[75] *Id.* at 1302 ("For cases involving state and local governmental bodies, a one person, one vote claim requires an inquiry into whether the apportionment scheme being challenged 'may reasonably be said to advance [a] rational state policy and, if so, whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'" (quoting Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004))).

[76] *See id.* at 1304 (explaining that an apportionment scheme that "effectively weighs one voter's vote more heavily than another's can be said to violate the principle of electoral equality, while an apportionment scheme that effectively gives one denizen greater 'representational strength' than another can be said to violate the principle of representational equality").

[77] Ebenstein, *supra* note 67, at 349 (citing *Calvin*, 172 F. Supp. 3d at 1326).

[78] *Id.* at 350 (citing *Calvin*, 172 F. Supp. 3d at 1323–24).

[79] *See Calvin*, 172 F. Supp. 3d at 1310. In *Calvin*, this "representational nexus" was a key competent of the relationship between a constituent and commissioner. *See id.* at 1310–11.

[80] *See id.* at 1315 ("An apportionment base for a given legislative body cannot be chosen so that a large number of nonvoters who also lack a meaningful representational nexus with that body are packed into a small subset of legislative districts.").

[81] Skocpol, *supra* note 13, at 1502 (explaining that the incarcerated population's "lack of 'representational nexus' to Jefferson County followed in large part from the fact that 'conditions of confinement . . . at [the prison] are almost entirely determined by policies set at the state level,' as opposed to county-level policies." (quoting Calvin, 172 F. Supp. 3d at 1316)).

[82] *See id.*

(directly or indirectly) all prison policies."[83] In examining another issue with *Calvin*, Skocpol contends that the remedy the court provides is not the inclusion of the incarcerated individuals in their home community's population, but merely their exclusion from "the local enumeration" of the host community.[84]

Finally, it is essential to note that the *Calvin* plaintiffs did not pursue a facial challenge to prison gerrymandering. The plaintiffs did not argue broadly that the Equal Protection Clause forbids local governments from counting incarcerated individuals in their prison location when redistricting. Instead, the plaintiff's choice to challenge their districts' specific appointment scheme ultimately weakens *Calvin*'s holding. Simply put, the plaintiffs succeeded only in claiming that this isolated instance of prison gerrymandering resulted in an equal protection violation.[85]

Though the ruling defeated the redistricting plan, it did not prevent election officials from creating a new plan based on a less egregious prison gerrymander.

B. Davidson v. City of Cranston

A similar apportionment issue arose in the First Circuit's decision in *Davidson*. At first, the lower court in *Davidson* relied on *Calvin*, holding that the inclusion of over 3,000 incarcerated individuals in Cranston, Rhode Island's population diluted the votes in the city's other five wards—and thus violated the Equal Protection Clause.[86] The First Circuit, however, reversed this ruling, limiting the potential for Fourteenth Amendment-based arguments on the issue.[87]

The *Davidson* court reached its decision by relying on U.S. Supreme Court precedent set in *Evenwel v. Abbott*,[88] decided after *Calvin*. *Evenwel*, though not a prison gerrymandering case, held that states could rely on total population for drawing electoral maps.[89] The Court reasoned that, in part, this allows representatives to manage the concerns of all people—not just voters.[90] In reversing the lower court's decision, the First Circuit determined that the city was not required to exclude incarcerated individuals from the

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[83] *Id.*
[84] *Id.* at 1503.
[85] *Calvin*, 172 F. Supp. 3d at 1298.
[86] *See* Davidson v. City of Cranston, 42 F. Supp. 3d 325, 331–32 (D.R.I. 2014).
[87] Davidson v. City of Cranston, 837 F.3d 135, 145–46 (1st Cir. 2016); Laing, *supra* note 22, at 509 (noting that the First Circuit's application of the Equal Protection Clause "highlight[s] the potential rigidness and inflexibility of that particular framework.").
[88] 136 S. Ct. 1120 (2016).
[89] *Id.* at 1132.
[90] *Id.*

apportionment scheme "and that the Constitution does not give the federal courts the power to interfere" with a local government's decision to include them.[91]

Evenwel has significantly impacted the one-person, one-vote precedent. In *Evenwel*, Texas voters sued the governor and secretary of state.[92] After the 2010 census, Texas adopted a state senate map with an 8.04 percent maximum population deviation based on *total* population.[93] The *Evenwel* Court held that where the maximum population deviation between the largest and smallest district is less than 10 percent, a state or local legislative map presumptively complies with the one-person, one-vote rule.[94] Thus, on its face, Texas met this range. But when the Court measured the map's apportionment scheme by *voter* population, the maximum population deviation exceeded 40 percent.[95]

The *Evenwel* plaintiffs argued that basing the districts on the total population violated the one-person, one-vote doctrine because the apportionment scheme diluted their votes in relation to voters in other districts.[96] The Court, however, held that a state or locality could draw its legislative districts based on total population unless voters established a reason, such as discrimination, for the Court to depart from the long-standing practice of states using total population.[97] In sum, the Court held that Texas's scheme was constitutional and permissible for states to protect representational equality by counting voters and nonvoters alike.[98]

Davidson affirmed this notion as applied to the prison gerrymandering scheme, finding that "apportionment claims involving only minor deviations normally require a showing of invidious discrimination."[99] Without such a showing, the prison gerrymandering scheme in Cranston, Rhode Island, was constitutional under the Fourteenth Amendment.[100]

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[91] Ebenstein, *supra* note 67, at 357 (citing *Davison*, 837 F.3d at 144).
[92] *See Evenwel*, 136 S. Ct. at 1121.
[93] *Id.* at 1125.
[94] *Id.*
[95] *Id.*
[96] *See id.*
[97] *See id.* at 1123.
[98] *See* Skocpol, *supra* note 13, at 1482 n.46 (explaining that "as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations" under the Fourteenth Amendment. (quoting Brown v. Thompson, 462 U.S. 835, 842 (1983))).
[99] Davidson v. City of Cranston, 837 F.3d 135, 141 (1st Cir. 2016).
[100] *See id.* at 143.

C. Unclear Prison Gerrymandering Jurisprudence Under the Fourteenth Amendment

Fourteenth Amendment arguments have yet to provide a clear path to dismantle prison gerrymandering, and the precedent set in *Davidson* does not seem promising. *Davidson* also left the simplicity of one-person, one-vote even murkier. Still, some legal scholars are optimistic that one-person, one-vote challenges provide fertile grounds.[101] For example, Skocpol argues that *Davidson* was a misapplication of *Evenwel*, and that the ruling can be corrected in future litigation.[102] Specifically, Skocpol contends that *Evenwel* expands the one-person, one-vote doctrine to include a right of "representational equality."[103] Additionally, Skocpol maintains that the First Circuit in *Davidson* interpreted the *Evenwel* decision too narrowly, explaining that it invites courts to grapple with the status of incarcerated people by including them within the protection of the one-person, one-vote doctrine.[104]

But even if *Davidson* were reversed, *Calvin* is still good law, suggesting that the one-person, one-vote doctrine can only challenge individual prison gerrymanders.[105] While these cases, of course, are binding in specific jurisdictions, future litigants risk the *Davidson* approach becoming law if the Supreme Court rules on a similar case. The Fourteenth Amendment precedent on this issue also does not seem to bear the weight of the legacy of slavery entrenched in this practice vis-à-vis the Three-Fifths Clause. Perhaps, a constitutional challenge explicitly focused on the vestiges of slavery could prohibit prison gerrymandering.

III. PRISON GERRYMANDERING AS A "BADGE AND INCIDENT OF SLAVERY"

A. Thirteenth Amendment Jurisprudence: Challenges and Opportunities

The Thirteenth Amendment has produced mixed success when used in cases that are not literally about forms of slavery as understood at the time of the Civil War.[106] Historian Amy Dru

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[101] *See, e.g.*, Skocpol, *supra* note 13, at 1479, 1509–19.
[102] *See id.* at 1510.
[103] *See id.* at 1510–11.
[104] *See generally* Skocpol, *supra* note 13, at 1509–19.
[105] *See* Calvin v. Jefferson County Bd. of Commissioners, 172 F. Supp. 3d 1292 (N.D. Fla. 2016).
[106] *See, e.g.*, Clyatt v. United States., 197 U.S. 207 (1905) (finding debt peonage to be a form of involuntary servitude prohibited by the Thirteenth Amendment). *See also* United States v. Kozminski, 487 U.S. 931 (1988) (finding that

Stanley explains that, beyond a few landmark rulings that ban instances of debt peonage, the Thirteenth Amendment has never been a "potent source of rights claims."[107] Indeed, early cases shortly after the enactment of the Thirteenth Amendment interpreted its reach narrowly.[108]

In *The Civil Rights Cases* of 1883, the U.S. Supreme Court held that the Thirteenth Amendment did not grant Congress power to enact the Civil Rights Act of 1875, which made racial discrimination unlawful in public accommodations.[109] The Court found that using the Thirteenth Amendment so broadly would be "running the slavery argument into the ground to make it apply to every act of discrimination that a person may see fit."[110] In effect, the ruling constrained applications of the Thirteenth Amendment to protect against discrimination beyond how slavery was then understood.[111]

The legislative history of the Thirteenth Amendment, however, points to a much broader application. During debates on the House and Senate floors, for example, members of Congress argued that the Amendment could end any form of oppression associated with slavery.[112] Senator James Harlan believed the Amendment would end the "incidents of slavery," such as discriminatory jury selection[113] and barriers to property ownership.[114]

In some instances, the Thirteenth Amendment's Enforcement Clause[115] has been interpreted broadly for anti-

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involuntarily servitude violative of the Thirteenth Amendment included respondents' forcing two intellectually disabled men to labor on his farm).

[107] Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights*, 115 AM. HIST. REV. 732, 735 (2010).

[108] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

[109] *Id.* at 20.

[110] *Id.* at 23.

[111] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (finding that a Louisiana law requiring that railway passenger cars have equal but separate accommodations based on race did not conflict with the Thirteenth Amendment because the statute did not have to do with slavery).

[112] Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1339 (2009).

[113] The Thirteenth Amendment has failed to be expanded in other contexts beyond prison gerrymandering. For instance, *Batson v. Kentucky* held that removing a potential juror based on race violates the Fourteenth Amendment Equal Protection clause. *See* 476 U.S. 79 (1986).

[114] Tsesis, *supra* note 112, at 1339 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864)).

[115] *See* U.S. CONST. amend. XIII, § 2. Section 2 gives Congress the power "to enforce . . . by appropriate legislation." *Id.* Further, Section 1 states that "neither slavery nor involuntary servitude . . . shall exist within the United States." U.S. CONST. amend. XIII, § 1.

discrimination statutes.[116] Legal challenges concerning §§ 1981 and 1982 of Title 42 have deferred to Congress's civil rights authority under Section 2 of the Thirteenth Amendment.[117] These statutes bar racial discrimination in the making and enforcing of contracts and in the purchase and sale of real property.[118] But these statutes address issues of *discrimination*, not outright slavery. As constitutional law scholar Alexander Tsesis argues, the Court has recognized that the Thirteenth Amendment can be used to prevent housing discrimination and private school segregation, despite neither being a direct form of slavery.[119] Thus, he reasons, the scope of the Amendment must also encompass liberty interests beyond "receiving reasonable compensation for work."[120]

It was not until 1968 that the Court broadened the scope of the Thirteenth Amendment beyond ending peonage.[121] Since then, a few cases have broadened the scope of the Thirteenth Amendment to include "badges and incidents" of slavery that might apply to the prison gerrymandering context.[122]

B. "Badges and Incidents" Jurisprudence

The *Jones v. Alfred H. Mayer Company*[123] decision broadened Thirteenth Amendment jurisprudence to include harms beyond enslavement.[124] In *Jones*, the plaintiff brought suit under § 1982 after a homeowner refused to sell a home in a private subdivision to a Black buyer because of his race.[125] The Court held that § 1982 bars all racial discrimination—private and public—in the sale or rental of property.[126] Importantly, the Court stated that § 1982 is a valid exercise of Congress's power to enforce the Thirteenth Amendment.[127] The Court also added that this application of the Thirteenth Amendment is squarely in line with its legislative history discussed in Part III.A.[128]

The Court's opinion cited Justice Harlan's dissent in *The Civil Rights Cases*.[129] Justice Harlan explained that discrimination in the exercise of public or quasi-public functions is a badge of

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[116] *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
[117] *See* Tsesis, *supra* note 112, at 1344.
[118] *See* 42 U.S.C. § § 1981, 1982.
[119] *See* Tsesis, *supra* note 112, at 1344.
[120] *Id.*
[121] *See id.* at 1343.
[122] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).
[123] 392 U.S. 409.
[124] *See id.* at 413–17.
[125] *See id.* at 412.
[126] *See id.* at 413.
[127] *See id.*
[128] *See id.* at 436–44.
[129] *See id.* at 441 n.78.

servitude, "the imposition of which congress may prevent under its power . . . to enforce the thirteenth amendment."[130] *Jones* held that Congress had power under the Thirteenth Amendment to determine badges and incidents of slavery and also the authority to legislate under Section 2's enforcement power.[131] Professor William Carter contends that the *Jones* Court was less interested in whether a Black person's inability to purchase real property from a white seller amounted to actual enslavement, but instead focused on the "dehumanizing vestiges and stigmas arising out of slavery that African Americans still suffered."[132]

Justice Douglass wanted to broaden the scope of what should be considered badges and incidents of slavery in his concurrence in *Jones*.[133] Specifically, Justice Douglass listed the badges of slavery that remain "in the mind and hearts of white men," even if slavery itself was outlawed.[134] The first example he listed, "spectacles of slavery unwilling to die," was in reference to states denying suffrage to Black people.[135] Though yet to be used much by courts, Justice Douglass's concurrence can serve as a persuasive source to broaden the use of the Thirteenth Amendment in prohibiting voting and representational rights violations.

Though *Jones* remains good law, the Court has not seized the opportunity to broaden the application of the Thirteenth Amendment under its authority. For instance, in *City of Memphis v. Greene*,[136] the Court held that closing a two-lane city street, which traversed a white residential community and which residents of an adjoining Black community used, did not violate the Thirteenth Amendment.[137] The Court determined that the disparate impact on Black citizens could not be fairly characterized as a badge or incident of slavery.[138] Moreover, the *Greene* Court noted that *Jones* left open whether Section 1 of the Amendment did anything more than abolish slavery.[139] As such, the Court held out the possibility

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[130] *Id.* (citing The Civil Rights Cases, 109 U.S. 3, 43 (1883)).
[131] *See id.* at 443 (explaining that racial discrimination in the sale of property is protected under the Thirteenth Amendment because "[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."). The *Jones* Court expanded: "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." *Id.*
[132] William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1322 (2007).
[133] *See Jones*, 392 U.S. at 445.
[134] *Id.*
[135] *Id.*
[136] 451 U.S. 100 (1981).
[137] *Id.* at 125–26.
[138] *See id.*
[139] *Id.*

that some sort of racially disparate impact might violate Section 1: "To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself."[140] Section 1 jurisprudence, or lack thereof, is ripe for test cases.

C. Avenues for Future Litigation Under Section 1

As discussed in Part II, the gap in jurisprudence may create an opportunity to ban prison gerrymandering as a badge of slavery.[141] Yet it is unclear whether Section 1 of the Thirteenth Amendment includes the abolition of badges and incidents of slavery. As Professor James Gray Pope argues, the Court has no current position on whether Section 1 by itself outlaws anything more than "full-fledged slavery," and if so, whether the section bans "some or all of the badges and incidents of slavery."[142] *Jones* leaves room for the Court in future cases to expand on the scope of the Thirteenth Amendment.

With this in mind, a future litigant can and should test the scope of Section 1. For example, a currently incarcerated person in a prison gerrymandered district can bring a claim that their representation in a district in which they cannot vote is akin to the Three-Fifths Compromise.[143] By relying on *Jones*, litigants could argue that this is an incident of slavery prohibited under Section 1. A litigant could also rely on Justice Douglass's concurrence in *Jones* to argue that prison gerrymandering is an example of Black disenfranchisement, whereby Black voters are stripped of their right to vote in their home district and counted instead in a white-majority district.[144] The argument could be further grounded in examining the Thirteenth Amendment's historical context, its drafters' intent,[145] and the precedents set in *Jones* and *Greene*.[146]

Likely, such an approach would only gain traction if a federal judge expanded on the *Jones* decision and adopted new

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[140] James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 473 (2018) (citing City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981)).
[141] *See supra* Part II.
[142] Pope, *supra* note 140, at 485.
[143] *See supra* Part I.
[144] *See supra* text accompanying notes 124–140.
[145] The Amendment's drafters intended for the legislation to "remov[e] every vestige of African slavery from the American Republic by obliterat[ing] the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it." Carter, *supra* note 132, at 1339 (describing statements of Senator Wilson of Massachusetts (citing CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864))).
[146] *See* Carter, *supra* note 132, at 1317.

interpretive understandings of the Thirteenth Amendment. Judges willing to take those risks do exist, but litigants may need to be strategic in where they choose to challenge prison gerrymandering schemes.[147]

D. Potential Pitfalls

Unfortunately, there is little likelihood that the Supreme Court would expand the meaning of the Thirteenth Amendment to ban prison gerrymandering in the short term. Lower courts have refrained from applying Section 1 to anything besides coerced labor.[148] This pattern, realistically, is likely to continue given the makeup of federal judges and Supreme Court Justices. Justice Scalia's textualist approach has left a big imprint on interpretative methods used by federal judges over the last several years.[149] Simply put, the Thirteenth Amendment's prohibition of the badges and incidents of slavery is not explicit in the Constitution, and from a textualist viewpoint, this would "admittedly end the matter."[150]

Though the intention of the Thirteenth Amendment demonstrably had a broader vision of the evils the Amendment intended to prevent, the text does not convey as much. Additionally, as discussed in Part I, there are political incentives to maintain prison gerrymandering for conservatives seeking to preserve political power in rural districts.[151] Although there is flexibility in the caselaw to take on such an approach, the current makeup of the judicial system makes this path realistically unlikely to happen soon.

CONCLUSION

This Article argues that prison gerrymandering functions as a badge of slavery that should be prohibited under the Thirteenth Amendment. Part I considered the impact and harm the practice has created, particularly on the Black community. Part II addressed how Fourteenth Amendment arguments have not been a successful means to end prison gerrymandering. Acknowledging this gap, Part

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[147] For instance, in August 2021, Judge Du of the United States District Court for the District of Nevada, recently broke new constitutional ground in her opinion in *United States v. Carrillo-Lopez*, 2021 WL 3667330, at *1 (D. Nev. 2021), finding that a racially discriminatory immigration statute violated the Equal Protection clause of the Fifth Amendment. Judge Du's approach, however, is not how many federal judges utilize equal protection jurisprudence.

[148] Pope, *supra* note 140, at 485–86.

[149] *See* Jonathon R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSBLOG (Nov. 14, 2017, 10:48 AM), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy [https://perma.cc/CP2U-EAGA].

[150] Carter, *supra* note 132, at 1365.

[151] *See* Laing, *supra* note 22, at 500.

III argued that prison gerrymandering is a vestige of slavery rooted in the Three-Fifths Clause of the Constitution that could be ended by utilizing Section 1 of the Thirteenth Amendment.

By subjugating enslaved people and exploiting their enslavement for political gain, the Three-Fifths Clause was one of the core political evils of slavery. Though the Fourteenth Amendment's enactment was presumed to end the Three-Fifths Clause, it presently upholds one of its most prominent remnants. The *Jones* decision left open the possibility for Section 1 of the Thirteenth Amendment to prohibit conduct that continues the same types of harms as slavery. If applied in the prison gerrymandering context, the federal courts could prohibit the practice, and fully realize the true purpose of the Thirteenth Amendment.