

SEEING IN COLOR: THE VOTING RIGHTS ACT AS A RACE-CONSCIOUS SOLUTION TO PRISON-BASED GERRYMANDERING

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I. INTRODUCTION

In today's political climate, the debate about whether to aspire to colorblindness or race-consciousness continues to create tension.¹ To some, our country's progression away from overtly racist policies may signal the need for a parallel progression away from directly discussing or addressing racial issues. The Supreme Court is no stranger to this debate. In its jurisprudence regarding the Fourteenth Amendment and the scope of the Equal Protection Clause, the Court has determined that the Constitution generally requires states to pursue colorblind policies and state actions.² Nevertheless, the lived experience of Black and brown people in this country continues to underscore the need for race-conscious policymaking and legal analysis.³ Perhaps the only way to remedy the ongoing discrimination felt by communities of color today is to undertake more nuanced analyses of complex problems—analyses that the Court's current

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¹ See generally *Race and Discrimination, Opinions About Immigrants and Islam*, in THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER: SHARP SHIFTS AMONG DEMOCRATS ON AID TO NEEDY, RACE, IMMIGRATION, PEW RES CTR. 31 (2017); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2003); Ryan Struyk, *Blacks and Whites See Racism in the United States Very, Very Differently*, CNN (Aug. 18, 2017, 9:41AM), <https://www.cnn.com/2017/08/16/politics/blacks-white-racism-united-states-polls/index.html>.

² See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 230 (1995) (“[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be”). See also Eddie Kim, *What the Courts Make of ‘Reverse Discrimination’ Complaints*, MEL MAG. (June 14, 2018), <https://melmagazine.com/what-the-courts-make-of-reverse-discrimination-complaints-9672e9b9d5c>.

³ See generally MICHELLE ALEXANDER, THE NEW JIM CROW (2010); LEWIS GORDON, BAD FAITH AND ANTI-BLACK RACISM (1995); Stanley Fish, *Reverse Racism, or How the Pot Got to Call the Kettle Black*, ATLANTIC (Nov. 1993), <https://www.theatlantic.com/past/docs/politics/race/fish.htm>.

constitutional framework largely precludes.⁴

The mostly unfamiliar problem of prison-based gerrymandering poses the kind of complex issue that requires nuanced analysis to remedy the racialized harms that it causes and perpetuates. Prison-based gerrymandering occurs when states count people who are incarcerated as belonging to the population of the voting districts where they are incarcerated, rather than the districts where they would otherwise reside.⁵ The practice thus expands 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.⁶ Indeed, the practice most severely dilutes the representation of the majority-minority districts that are home to most of this country's incarcerated population.⁷

Prison-based gerrymandering is fundamentally a byproduct of our country's current mass incarceration and segregation practices, and it exacerbates the vote dilution problem caused by felon disenfranchisement laws.⁸ Although the Census Bureau has always counted incarcerated persons as belonging to the districts of their incarceration, the effects of this determination with the recent explosion in the U.S. prison population seriously impact voting districts and voting power.⁹ As to the problem of

⁴ See William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015) (“The majority of society, which the Supreme Court reflects, misperceives racism as merely hateful individuals engaging in overtly racist acts. . . . But racism extends beyond blatant acts by individuals. Racism encompasses covert individual behavior, institutional processes, and systemic dynamics.”); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 9–10 (2012) (“Just as requiring a showing of intent to cause global warming is pointless for collective action in responding to climate change, so is it useless for reforming the structural bases of racial inequities. By mandating a showing of intent, the Court has potentially foreclosed relief for the actions of all but the most overtly bigoted, those stupid enough to provide evidence of their malevolence.”).

⁵ See, e.g., Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 327–30 (2018).

⁶ Ebenstein, *supra* note 5, at 334–35.

⁷ See Ebenstein, *supra* note 5, at 335 (“By relocating a concentration of disenfranchised citizens from primarily urban areas to rural areas where they do not have a representative accountable to their interests, the combination of felony disenfranchisement and prison districting severely disrupts representational democracy.”); Peter Wagner, *Breaking the Census: Redistricting in the Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1244–45 (2012).

⁸ Ebenstein, *supra* note 5, at 334–35.

⁹ Wagner, *supra* note 7, at 1243 (“The 1990 Census was the first to show a sudden increase in the rate of incarceration, with the rate more than doubling over the previous decade to 292 people incarcerated per 100,000 residents. By 2000, the number of prisons had skyrocketed to 1,668, and the prison incarceration rate had risen to 478 per 100,000. That's almost one half of one percent of the U.S. population incarcerated in state or federal

segregation, this country's struggles have been constant over our entire history.¹⁰ People of color tend to be concentrated in urban areas, while rural areas tend to be predominately white.¹¹ Prisons tend to be in rural areas.¹² These facts, coupled with the additional fact that our country disproportionately polices communities of color,¹³ mean that people of color end up being systematically assigned to voting districts that have little in common with their home districts.¹⁴ Moreover, since in nearly every state the incarcerated population does not have the right to vote, its presence artificially inflates the population of prison districts without correspondingly changing their political identity.¹⁵ This phenomenon is unsettling not only because of the distortion of voting power but also because it harkens back to unsavory census procedures from our country's early history.¹⁶ Fortunately, this important issue has resurfaced in the news, as both the 2020 census and the 2020 election draw nearer, and several states have acted to end the practice through new legislation.¹⁷ The

prisons.”). States, however, make the ultimate decision for where to count people on their district maps. See Ebenstein, *supra* note 5, at 361–66.

¹⁰ See Brentin Mock, *The Impacts of Segregation on Discrimination in America*, CITYLAB (Nov. 6, 2017), <https://www.citylab.com/equity/2017/11/the-impacts-of-segregation-in-discrimination-in-america/544970/>; Alexander Nazaryan, *School Segregation in America is as Bad Today as It Was in the 1960s*, NEWSWEEK (Mar. 22, 2018, 10:46 AM), <https://www.newsweek.com/2018/03/30/school-segregation-america-today-bad-1960-855256.html>; Richard Rothstein, *America is Still Segregated. We Need to Be Honest About Why*, GUARDIAN (May 16, 2017), <https://www.theguardian.com/commentisfree/2017/may/16/segregation-us-neighborhoods-reasons>. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

¹¹ See Abdre M. Perry, *Recognizing Majority-Black Cities, When Their Existence Is Being Questioned*, BROOKINGS (Oct. 5, 2017), <https://www.brookings.edu/blog/the-avenue/2017/10/04/recognizing-majority-black-cities-when-their-existence-is-being-questioned/>.

¹² There are other potential reasons that prisons tend to be located in rural areas. See David Gutierrez, *Mass Incarceration in Rural Communities: Out of Sight, Out of Mind*, HARV. POL. REV. (May 27, 2016), <http://harvardpolitics.com/united-states/48325/> (discussing both the phenomenon of rural prison towns and the economic benefits that prison towns reap from mass incarceration).

¹³ See, e.g., Valarie Strauss, *Mass Incarceration of African Americans Affects the Racial Achievement Gap—Report*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/03/15/mass-incarceration-of-african-americans-affects-the-racial-achievement-gap-report/?utm_term=.30b99e1c158f.

¹⁴ Ebenstein, *supra* note 5, at 369–70.

¹⁵ Dale E. Ho, *Prison Policy: Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV 355, 362 (2011).

¹⁶ Scholars have compared prison-based gerrymandering with the Three-Fifths Compromise. See, e.g., John C. Drake, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U.J.L. & POL'Y 237, 262–63; Ho, *supra* note 15, at 362.

¹⁷ Mekela Panditharatne, *The Way the Census Counts Prison Populations Seriously Distorts Redistricting*, SLATE (July 19, 2019), <https://slate.com/news-and-politics/2019/07/census-prison-count-distorts-redistricting-gerrymandering.html>; Ludwig Hurtado, *States*

problem, however, remains unaddressed nationally and in the majority of states in this country.¹⁸

Although advocates have been aware of this problem and its racial implications, existing legal challenges to prison-based gerrymandering have centered on the primarily “colorblind” rules of constitutional doctrine.¹⁹ This Comment argues for a different approach to prison-based gerrymandering litigation that addresses the racial implications of the practice directly, by means of Section 2 of the Voting Rights Act (“VRA”). Such a VRA-based approach would eschew the colorblind constraints of constitutional equal protection analysis and embrace the more explicitly race-conscious statutory framework of the VRA.

Part II will provide an explanation and contextual background for prison-based gerrymandering. Part III will explain existing approaches to remedying prison-based gerrymandering under the Equal Protection Clause and discuss the difficulties of this approach. Part IV will introduce and explore the Voting Rights Act as an additional approach to consider for prison-based gerrymandering claims. Part V will summarize and conclude.

II. PRISON-BASED GERRYMANDERING EXPLAINED

A. Census Rules and Procedures

The United States Constitution outlines a process for counting and apportioning people in the country every ten years for representation purposes.²⁰ Implementing this mandate, Congress established the U.S. Census Bureau (“Bureau”), which is an agency of the U.S. Federal Statistical System obligated to plan, implement, and distribute the decennial census.²¹

The Census Bureau accounts for people by reference to their “usual residence,” which is the place where they eat and sleep most of the time.²² This rule allows the Census to uniformly account for populations that are

Move to Outlaw ‘Prison Gerrymandering’: Where Do Inmates Really Live?, NBC NEWS (May 23, 2019), <https://www.nbcnews.com/politics/politics-news/will-prison-gerrymandering-be-next-big-fight-n999656>.

¹⁸ Hurtado, *supra* note 17.

¹⁹ See *infra* Part III.

²⁰ U.S. CONST. art. 1, § 2, cl. 3. At the time, the framers did not intend to count every kind of person the same. *Id.* (“[A]ccording to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

²¹ *1910 Overview*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/overview/1910.html (last visited Sept. 13, 2018).

²² Final 2020 Census Residence Criteria and Residence Situation, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018).

living away from their permanent address for a significant period.²³ The populations most affected by this policy are college students, members of the military, and people who are incarcerated.²⁴ States then use total population numbers from the Census as the basis for their legislative districting maps.²⁵ While there has been some debate regarding the use of total population counts—as opposed to counts of eligible voters—for the purposes of drawing voting districts,²⁶ the Supreme Court has held that states are entitled to use population counts, which are most accurately provided by the Census.²⁷ States, though not obligated, have traditionally used Census data as provided.²⁸ Since the Census numbers are central to the process of drawing both state legislative and congressional voting districts, most states count people in the voting district where they are incarcerated and not where they previously resided.²⁹

Before the 2020 Census, the Census Bureau requested public comments regarding its residence rules but ultimately decided to keep the rules in their existing form.³⁰ In the Bureau’s response to public comments, it noted that “[o]f the 77,887 comments pertaining to prisoners, 77,863 suggested that prisoners should be counted at their home or pre-incarceration address.”³¹ The report then summarized the comments as stating that the current rules lead to the inaccurate representation of prisoners’ home communities.³² Specifically, the commenters collectively stated that “prisoners typically come from urban, underserved communities whose populations are disproportionately African-American and Latino, while prisons are more likely to be located in largely White (non-Hispanic)

²³ *Id.*

²⁴ *Id.* It is worth noting that incarcerated populations are the only ones not voluntarily located in their voting districts. There are other significant differences between the incarcerated populations and college students or the military, and they will be addressed in the discussion of *Calvin v. Jefferson Cty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) and *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016).

²⁵ States create separate maps for congressional districts than they do for state legislative or local districts. Nevertheless, states use Census data as the basis for each of these maps. *What Is Redistricting*, PUB. MAPPING PROJECT, <http://www.publicmapping.org/what-is-redistricting> (last visited Nov. 3, 2018).

²⁶ Nina Totenberg, *When Drawing Districts, Should States Count Each Person or Each Voter?*, NPR (Dec. 8, 2015), <https://www.npr.org/2015/12/08/458795687/when-drawing-districts-should-states-count-each-person-or-each-voter>.

²⁷ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016).

²⁸ *Id.* at 1142–43.

²⁹ *The Problem*, PRISON POL’Y INITIATIVE, <https://www.prisonersofthecensus.org/impact.html> (last visited Nov. 3, 2018).

³⁰ Final 2020 Census Residence Criteria and Residence Situation, 83 Fed. Reg. at 5526, 5528.

³¹ *Id.* at 5527.

³² *Id.*

rural communities, far from the actual homes of the prisoners.”³³ The comments suggested that the residence rules harmed minority communities’ representation and even funding prospects.³⁴

At the end of the comment period, the Census Bureau concluded that “[t]he practice of counting prisoners at the correctional facility is consistent with the concept of usual residence, as established by the Census Act of 1790.”³⁵ The Bureau, however, noted the distinct responsibilities that states have when it comes to legislative redistricting.³⁶ The report noted that states may choose to reallocate their prisoner populations to pre-incarceration addresses and that the Census would provide data in a way that can assist that process.³⁷

*B. Felon Disenfranchisement (And How Prison-Based
Gerrymandering Exacerbates Its Effects)*

Prison-based gerrymandering exacerbates the problems that derive from felon disenfranchisement.³⁸ If not for the practice of stripping the right to vote from people who have committed felonies, there would not be as stark of a vote dilution issue tied to mass incarceration.³⁹

Although the Fourteenth Amendment of the United States Constitution prohibits states from drawing malapportioned legislative districts,⁴⁰ it also provides the basis for withholding the right to vote from people who have committed crimes.⁴¹ Millions of people do not have the right to vote because of a felony conviction.⁴² Only two states allow people

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Final 2020 Census Residence Criteria and Residence Situation, 83 Fed. Reg. at 5528.

³⁷ *Id.*

³⁸ Ebenstein, *supra* note 5, at 334–35.

³⁹ Arguably, even if people who are incarcerated had the right to vote, it would matter where they were counted for apportionment purposes. But as discussed later in this section, where felon disenfranchisement does not exist, people who are incarcerated typically vote in their home districts.

⁴⁰ *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 558–59 (1964).

⁴¹ US CONST. amend. 14, § 2 (“But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion . . .”). The Supreme Court has interpreted section 2 of the Fourteenth Amendment as specifically authorizing disenfranchisement laws. Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . .”).

⁴² Jean Chung, *Felony Disenfranchisement: A Primer*, SENT’G PROJECT 1 (June 27, 2019), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf>.

with felonies to vote while they are incarcerated, and the remaining states either withhold the right until parole, the end of probation, or indefinitely.⁴³ Because of these laws and the racialized nature of the criminal justice system, as of 2016, one in every thirteen Black adults in the United States was unable to register to vote.⁴⁴

While felon disenfranchisement on its own disproportionately dilutes the voting power of Black people across the country,⁴⁵ prison-based gerrymandering further exacerbates that core issue by counting these millions of Americans in voting districts other than their pre-incarceration districts.⁴⁶ In the states that do not withhold the right to vote because of a felony, people who are incarcerated vote by absentee ballot at their pre-incarceration address.⁴⁷ It follows that these individuals count as part of their pre-incarceration district for legislative purposes. In those states, there is no prison-based gerrymandering issue at all.⁴⁸ Although it is true that solving the vote dilution issues that arise from prison-based gerrymandering will not fully restore the representation of minority communities, addressing prison-based gerrymandering at least mitigates the problem by ensuring that majority-minority communities are more fairly and effectively represented in legislative assemblies.

C. Consequences of Prison-Based Gerrymandering

The National Association for the Advancement of Colored People (“NAACP”) recently filed a lawsuit, the first of its kind against a state, alleging that Connecticut’s electoral maps violate the “one person, one

⁴³ *Id.* Puerto Rico also allows people to vote while incarcerated. Ann Ravel, *Puerto Rico as a Blueprint for Voter Engagement*, PAC. STANDARD (July 24, 2017), <https://psmag.com/news/puerto-rico-as-a-blueprint-for-voter-engagement>.

⁴⁴ Chung, *supra* note 42, at 6. See also Reginald Jr. Thedford, *Ex-Felon Disenfranchisement and the Fifteenth Amendment: A Constitutional Challenge to Post-Sentence Disenfranchisement*, 6 IND. J.L. & SOC. EQUAL. 92, 94 (2018) (“Historically, confederate states created various schemes to keep black people politically silent. Although courts have rejected the claim that felon disenfranchisement is a racially discriminatory practice, African Americans continue to be negatively impacted disproportionately compared to other races.”).

⁴⁵ Caren E. Short, “Phantom Constituents”: *A Voting Rights Act Challenge to Prison-Based Gerrymandering*, 53 HOW. L.J. 899, 909 (2010).

⁴⁶ Short, *supra* note 45, at 928–29.

⁴⁷ Leon Neyfakh, *How Do You Vote in Prison and Jail?*, SLATE (Nov. 8, 2016), http://www.slate.com/articles/news_and_politics/explainer/2016/11/most_inmates_in_prisons_and_jails_dont_vote.html.

⁴⁸ It is also worth noting that these two states are the whitest in the country, isolating them from the racialized nature of criminal justice in the rest of the country. Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here’s Why Few Do*, MARSHALL PROJECT (June 11, 2019), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do>.

vote” promise of the Fourteenth Amendment because of prison-based gerrymandering.⁴⁹ Although the complaint highlights the ways in which prison-based gerrymandering harms Black and Latino communities,⁵⁰ the NAACP advances its argument within the “one person, one vote” framework that governs legislative malapportionment claims under the Fourteenth Amendment’s Equal Protection Clause.⁵¹ Even so, the complaint manages to illustrate both the general harm that prison-based gerrymandering imposes on everyone and the particular harms that it imposes on minority communities.

In Connecticut, there are three times as many white people as Black and Latino people, while there are twice as many Black and Latino people in prison as there are white people.⁵² In addition, despite the concentration of the prison population in three rural towns,⁵³ a “disproportionate number of Connecticut prisoners are African American or Latino persons who maintained a permanent address, pre-incarceration, in one of the State’s three urban centers of Hartford, Bridgeport, and New Haven and their immediate suburbs.”⁵⁴

As a result of these practices, District 59, which includes three correctional facilities, has 100 true residents for every 85 true residents in District 97, which includes New Haven.⁵⁵ Consequently, the vote of a resident in District 97 “counts for less than 85% of the vote of a District 59 resident.”⁵⁶ The NAACP argues that because districts like District 97 are overpopulated relative to districts like District 59, residents of the former have to work harder than residents of the latter in order to elect their representatives of choice.⁵⁷ Furthermore, the representative of District 97 must work harder to represent a surplus of voting constituents compared to

⁴⁹ Susan Haigh, *NAACP Sues Connecticut Over ‘Prison Gerrymandering’*, ASSOCIATED PRESS (Jun. 28, 2018), <https://www.apnews.com/f28f3eeacd9e443681421a9bede7aaca>; Complaint at ¶ 10, NAACP v. Merrill, No. 3:18-cv-01094 (D. Conn. June 28, 2018) [hereinafter NAACP Complaint].

⁵⁰ NAACP Complaint, *supra* note 49, at ¶¶ 11, 36.

⁵¹ See NAACP Complaint, *supra* note 49, at ¶¶ 7–8.

⁵² NAACP Complaint, *supra* note 49, at ¶ 37.

⁵³ NAACP Complaint, *supra* note 49, at ¶¶ 44–45.

⁵⁴ NAACP Complaint, *supra* note 49, at ¶ 47.

⁵⁵ NAACP Complaint, *supra* note 49, at ¶ 76. For the purposes of this Comment, the phrase “true resident” refers to residents allocated to the voting district that they live in and believe to be home. With respect to incarcerated individuals, they are not considered true residents in a prison-based gerrymandering system that allocates them as residents of the district where they are incarcerated.

⁵⁶ *Id.* Interestingly enough, people who are incarcerated in Connecticut but who have not been convicted of a felony register and vote “as residents of their pre-incarceration domiciles.” NAACP Complaint, *supra* note 49, at ¶ 70. This calls into question the state’s rationale for counting incarcerated individuals where they are imprisoned.

⁵⁷ NAACP Complaint, *supra* note 49, at ¶ 77.

representatives of prison districts.⁵⁸ Lastly, the state lacks a potential majority-minority voting district because it counts so many minorities in distant rural districts.⁵⁹ The complaint describes this vote dilution in general terms, but in reality, the harm is specific to communities of color; without counting those displaced by incarceration, District 97 contains the city in Connecticut with one of the largest concentrations of Black people in the state.⁶⁰

This ongoing case in Connecticut illustrates exactly how prison-based gerrymandering expands the power of prison-districts while harming communities of color.

II. EQUAL PROTECTION REMEDIES FOR PRISON-BASED GERRYMANDERING

To date, litigants have only pursued prison-based gerrymandering claims using the framework based on the Equal Protection Clause of the Fourteenth Amendment.⁶¹ This section will explain how courts typically handle such claims. In addition, this section will analyze the efficacy of this framework for prison-based gerrymandering claims. Because this framework has not been successful thus far and because of its lack of direct remedy for communities of color, litigants should consider an additional approach.

A. “One Person, One Vote”

The Supreme Court has interpreted the Equal Protection Clause to require states to create voting districts that provide equal representation through an equal distribution of population across districts.⁶² This rule of “one person, one vote” requires that states allocate representation across equipopulous voting districts,⁶³ permitting substantial deviations in size only insofar as the state has a legitimate policy rationale for doing so.⁶⁴

⁵⁸ NAACP Complaint, *supra* note 49, at ¶ 78.

⁵⁹ NAACP Complaint, *supra* note 49, at ¶ 93.

⁶⁰ Chris Kolmar, *These Are the 10 Connecticut Cities with the Largest Black Population for 2018*, ROAD SNACKS (Jan. 27, 2018), <https://www.roadsnacks.net/most-african-american-cities-in-connecticut>. The only cities with larger numbers of African Americans are Hartford and Bridgeport, two cities that, according to the NAACP, also steadily supply the incarcerated population counted in rural Connecticut. *Id.*; NAACP Complaint, *supra* note 49, at ¶ 47.

⁶¹ My research did not reveal any cases with a different approach.

⁶² *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 558–59 (1964).

⁶³ *See, e.g.*, *Tennant v. Jefferson Cty. Comm’n*, 567 U.S. 758, 760 (2012). The phrase originates in the holding in *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (“We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”).

⁶⁴ *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (“[W]e are willing to defer to state

Courts apply the “one person, one vote” standard by means of a multistep analysis:

- (1) The court looks to the difference between the populations of the largest and smallest districts in a state;⁶⁵
- (2) if the difference is 10% or less of the total population, the district allocations are generally presumed constitutional;⁶⁶
- (3) if the court finds that the state did not make a good-faith effort to create equal districts, it can hold that a state’s map is unconstitutional despite a deviation less than 10%;⁶⁷
- (4) If the difference exceeds 10%, then the state must explain the legitimate reason for the deviation.⁶⁸

In these scenarios, vote dilution occurs when a state draws some districts with fewer people in it than others; this results in inflated political power for the smaller districts and diluted power for the larger ones.⁶⁹

Because the “one person, one vote” framework presumes no dilution if the total populations of each district are within 10% of each other,⁷⁰ and because the voting districts at issue in the prison-gerrymandering context typically fall within the 10% threshold,⁷¹ malapportionment-based challenges to prison-based gerrymandering will often fail to satisfy the threshold requirements. In regard to prison-based gerrymandering, what makes the voting districts unequal is the fact that large incarcerated populations are misplaced in the population counts, which causes the boundary lines to be drawn in the wrong places (and not affirmative action by redistricting bodies).⁷²

This scenario played out in *Davidson v. Cranston*, the only prison-based gerrymandering case to make it to the circuit level on the merits. In

legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts.”).

⁶⁵ *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

⁶⁶ *Id.* at 842.

⁶⁷ *Karcher*, 462 U.S. at 744–45.

⁶⁸ *Brown*, 462 U.S. at 843–44.

⁶⁹ For example, representatives of the districts with fewer people will enjoy an equal vote in the state legislator as a representative of a district with significantly more people. This results in the members of the smaller district having their voices heard “louder” by those drowned out in a larger district. *See Reynolds v. Sims*, 377 U.S. 533, 556–61 (1964) (describing the nature of vote dilution cases).

⁷⁰ *Brown*, 462 U.S. at 842.

⁷¹ Maps being challenged for prison-based gerrymandering have districts that, on their face, are equipopulous. *See e.g., infra* note 73 and accompanying text.

⁷² *See Short, supra* note 45, at 902 (“When conducting the decennial census, the Census Bureau counts prisoners as residents of the town in which their prisons are located. State legislators then use the data compiled from the Census Bureau to draw legislative districts, counting the prison population in the prison district—even though prisoners in the majority of states cannot vote.”).

holding that the City of Cranston was not in violation of the Equal Protection Clause, the First Circuit noted that the municipal districts' populations were within the 10% safe harbor.⁷³ The court also reasoned that because the City was simply using the population numbers from the Census, the maps were presumptively valid.⁷⁴ The court dismissed the plaintiff's arguments regarding the unique form of vote dilution that occurred because of prison-based gerrymandering⁷⁵ and held instead that the maps were constitutional.⁷⁶ The First Circuit's analysis is not necessarily the correct application of the Equal Protection Clause in this context,⁷⁷ but it does highlight the potential rigidity and inflexibility of that particular framework.

Even if the Supreme Court were willing to resolve the prison-based gerrymandering issue under the Equal Protection framework, but without reliance on the formalistic 10% rule, a colorblind remedy would be inadequate.⁷⁸ The solution of excluding prisoners from population counts does not directly remedy the harm that the practice imposes on communities of color. In *Calvin v. Jefferson*, the court held that the 10% standard was inapplicable as a threshold matter in the context of prison-based gerrymandering because the basis of that threshold, how the populations were counted, was being challenged.⁷⁹ This reasoning allowed

⁷³ Davidson v. City of Cranston, 837 F.3d 135, 138 (1st Cir. 2016) ("The City's population in the 2010 Census was 80,387, and each of the City's six wards includes approximately 13,500 persons, with a 'total maximum deviation among the population of the six wards [of] less than ten percent.'").

⁷⁴ *Id.* at 145 ("The inclusion of the prisoners in the 2010 Census data for the City affords a presumptively valid reason for including them in the City's Redistricting Plan. Nothing argued by the plaintiffs or found by the district court casts doubt on that presumptive validity.").

⁷⁵ The court was unwilling to embrace what they called an "unusual" form of vote dilution. *Id.* at 144 ("This conclusion becomes more obvious when one considers the unusual nature of the plaintiffs' vote-dilution claim.").

⁷⁶ *Id.* at 144–45. It is worth noting here that the plaintiffs did not advance a claim of invidious discrimination specifically. *Id.* at 141. They brought the case solely based on the alleged vote inflation and dilution. *Id.* This is yet another reason to take a race-conscious approach to litigation because there would have been further discussion and potentially a different outcome had the plaintiffs argued the effects of prison-based gerrymandering on the voting power of Black and brown communities specifically.

⁷⁷ See the discussion of *Calvin v. Jefferson*, *infra* notes 79–80 and accompanying text.

⁷⁸ The Supreme Court's jurisprudence generally favors color-blind application of the law. See, e.g., Fisher v. Univ. of Tex., 570 U.S. 297, 307–08 (2013) ("Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'"). I assume courts would continue that Equal Protection trend in remedying prison-based gerrymandering.

⁷⁹ Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1314 (N.D. Fla. 2016).

the court to hold that the inclusion of prison populations in voting maps was unconstitutional under the Equal Protection Clause because it diluted the vote and representation of prison-less districts.⁸⁰

Although the voting districts would appear equal after excluding prison populations completely, minority voting districts would still be missing thousands of people.⁸¹ States would still be drawing maps to appear equipopulous, which would necessarily require the majority-minority districts to include more people who are not minorities. This practice would still dilute the voting power of these communities in relation to communities that are not disproportionately incarcerated. Furthermore, there is a larger historical context to how communities of color are counted,⁸² and any solution that simply eliminates large swaths of these communities from population counts is offensive given that history. Since the ratification of this country's constitution, Black people were undercounted by 40% because of the Three-Fifths Compromise.⁸³ Even after the three-fifths counting process was abandoned, Black people have been undercounted at rates higher than white people.⁸⁴

The exclusionary remedy also undermines our country's foundational right of representation. The Supreme Court, in *Evenwel v. Abbot*, held that states could rely on total population for drawing electoral maps, in part because accounting for non-voters allowed the allocation of representatives

⁸⁰ *Id.* at 1315. In reaching this holding, the court focused on the fact that the incarcerated population lacked a representational nexus with the districts that they were being included in. *Id.* at 1316. The court was convinced that the harm of prison-based gerrymandering was that the people in prison were not being properly represented by the districts that enjoyed an inflation of voting power. *See id.* at 1317–20. This conclusion is one that is generally correct but lacks the specificity of who is being harmed. I argue that the harm is most significantly felt by communities of color.

⁸¹ *See* Wagner, *supra* note 7, at 1244–45 (discussing the impact of prison-based gerrymandering in terms of the number of individuals that are displaced from communities of color).

⁸² *See* Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 208 (2015) (“By reallocating incarcerated residents back to their home districts, the laws in Maryland and New York represent a significant step in returning political power to inner-city communities whose voice has long been weakened and diluted by the intersection of the Census and mass incarceration.”).

⁸³ Robert B. Hill, *Counting and Undercounting Diversity in the 21st Century*, 32 U. TOL. L. REV. 29, 30 (2000).

⁸⁴ Shane T. Stansbury, *Making Sense of the Census: The Decennial Census Debate and Its Meaning for America's Ethnic and Racial Minorities*, 31 COLUM. HUM. RTS. L. REV. 403, 409–10 (2000) (noting the persistent undercount of Black Americans as exceeding the undercount of non-black people by 5.8%). *See also* Benjamin J. Razi, Comment, *Census Politics Revisited: What to Do When the Government Can't Count?*, 48 AM. U.L. REV. 1101, 1108 (1999) (“Although nearly all of America's white population is counted every ten years, our censuses consistently fail to count a significant percentage of the nation's minority population.”).

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to effectively manage the concerns and suggestions of all people.⁸⁵ The Court noted that “nonvoters have an important stake in many policy debates,” and that counting them “promotes equitable and effective representation.”⁸⁶ Although people who are incarcerated are non-voters, they should be able to have a stake in policy debates. Counting them in the communities in which they truly belong would promote equitable and effective representation.

If a court were willing to abandon the 10% threshold and remedy the problem by redistributing the incarcerated population back to their home districts, that would be sufficient to solve the problem, but it would still avoid addressing the racial undertones of the issue.

B. Equal Protection Relief for Intentional Racial Classifications

Courts also interpret the Equal Protection Clause to prohibit states from intentionally discriminating on the basis of race with respect to the drawing of voting districts.⁸⁷ These cases can raise constitutional concerns even where the relevant districts survive the “one person, one vote” analysis, as they center on the question of whether the legislature has drawn maps in a way that dilutes the voting power of a particular group.⁸⁸ Typically, states dilute the votes of a group by either “packing” or “cracking” it on the voting map. Packing occurs when redistricting bodies concentrate the members of the group in one voting district, so as to reduce their influence in other districts.⁸⁹ Cracking occurs when boundary lines are drawn to break up the group among a number of districts (thus preventing that group from holding the majority in any one district).⁹⁰ When plaintiffs can prove, directly or through circumstantial evidence, that the packing and cracking were done in an intentionally race-based manner, courts review the maps under strict scrutiny.⁹¹

This approach provides a solution that accounts for racial discrimination in theory but still does not account for structural forms of vote dilution.⁹² Prison-based gerrymandering is more of a structural

⁸⁵ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

⁸⁶ *Id.*

⁸⁷ *Shaw v. Reno*, 509 U.S. 630, 640–41 (1993).

⁸⁸ *Id.*

⁸⁹ *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018).

⁹⁰ *Id.*

⁹¹ *Shaw v. Hunt*, 517 U.S. 899, 905 (1996).

⁹² This phenomenon is part of a larger conversation about the efficacy of the Equal Protection Clause when it comes to structural disadvantage or discrimination. *See* Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1813 (2012) (“By making a showing of intent a necessary prerequisite for establishing unconstitutionality, it sought to close off equal protection as a means of challenging structural harms to non-Whites. . . . [I]t

problem than traditional packing or cracking of minority or other kinds of groups and thus lacks the requisite intent.⁹³ Because litigants must prove intent, which is difficult even in the traditional racial gerrymandering context, prison-based gerrymandering claims will be nearly impossible within this framework.⁹⁴

III. THE VOTING RIGHTS ACT AS A WORKABLE RACE-CONSCIOUS SOLUTION

To date, no one has litigated a prison-based gerrymandering case using Section 2 of the VRA. That fact makes it impossible to know for certain what the benefits and drawbacks of this approach would be. However, the Supreme Court has a robust history of applying Section 2 of the VRA, and there exists a wide range of legal scholarship that might be leveraged on behalf of such an approach. This section explores the possibility of using the VRA for prison-based gerrymandering claims. The novelty of this issue also presents an opportunity to reassess the Court's current framework for VRA analysis for applicability in the context of systemic rather than specific discrimination.

A. *Section 2 of the Voting Rights Act*

The VRA requires states and political subdivisions to provide equal opportunity to racial minority communities to elect a representative of their choice.⁹⁵ Section 2 of the VRA specifically prohibits any standard, practice, or procedure related to voting that discriminates on the basis of race.⁹⁶ Congress amended Section 2 in 1982 to lessen the burden on the plaintiff.⁹⁷ Before the 1982 amendments clarified Congress's intent, courts required plaintiffs to show that voting maps were intentionally discriminatory.⁹⁸ Section 2 of the VRA now provides relief to communities

did renounce a constitutional commitment to ensuring equitable outcomes.”).

⁹³ See *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (“Shape is relevant . . . because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”).

⁹⁴ See, e.g., *id.*

⁹⁵ E.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

⁹⁶ 52 U.S.C. § 10301 (2018).

⁹⁷ *Section 2 of the Voting Rights Act*, U.S. DEPT. JUSTICE, <https://www.justice.gov/crt/section-2-voting-rights-act> (last visited Sept. 13, 2018). See also *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”).

⁹⁸ See, e.g., *Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (holding that “the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse

of color on a showing of disparate impact instead.⁹⁹ When Congress amended the VRA in 1982, it specifically repudiated the intent-based framework that courts had been using to effectuate Section 2's protections.¹⁰⁰ Following Congress's lead, courts now utilize a framework that does not require litigants to show a discriminatory purpose and instead allows evidence of the disparate impact.¹⁰¹ Given the systemic nature of discrimination, which often occurs without an overt intention, this approach is especially important.¹⁰²

In *Thornburg v. Gingles*, the Supreme Court interpreted the newest version of Section 2 for the first time.¹⁰³ The Court relied on both the legislative history and the accompanying regulations of the VRA to create a general test for liability under Section 2.¹⁰⁴ Under this test, the plaintiff bears the burden of making out a prima facie case of vote dilution, which can be shown by demonstrating that: (1) the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district,"¹⁰⁵ (2) the group is "politically cohesive,"¹⁰⁶ and (3) the white voters vote "as a bloc to enable it . . . usually to defeat the minority's preferred candidate."¹⁰⁷ If a plaintiff can establish a prima facie case, the plaintiff must then go on to establish minority vote dilution by a totality of the circumstances.¹⁰⁸ The totality of the circumstances test is broad, but employs nine factors found in the regulations of the VRA to

legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."). *See also* U.S. CONST. amend. XV.

⁹⁹ *See, e.g., Gingles*, 478 U.S. at 43 ("Subsection 2(a) prohibits all States and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities.") (emphasis in original).

¹⁰⁰ *Id.* at 44 (quoting S. REP. NO. 97-417, at 28 (1982) ("[The intent test] is 'unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,' it places an 'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question.'").

¹⁰¹ *See id.* ("The 'right' question, as the Report emphasizes repeatedly, is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"); *Chisom v. Roemer*, 501 U.S. 380, 394 (1991) ("Under the amended statute, proof of intent is no longer required to prove a § 2 violation. Now plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race.").

¹⁰² *See supra* note 3.

¹⁰³ *Gingles*, 478 U.S. at 34.

¹⁰⁴ *Id.* at 36–37.

¹⁰⁵ *Id.* at 50.

¹⁰⁶ *Id.* at 51.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 36.

focus the analysis.¹⁰⁹ Thus, under *Gingles*, a Section 2 claim of vote dilution can succeed only upon the satisfaction of the so-called *Gingles* factors, accompanied by a “totality-of-the-circumstances” demonstration of vote dilution.

The Section 2 framework differs from the “one person, one vote” framework in that it does not rely as heavily on broad quantitative metrics. The only broad numerical requirement of the *Gingles* factors is the requirement that the voting age minorities constitute a sufficiently large majority within a district to elect a candidate of their choice. The other factors consider the specific racial polarization of the relevant majority and minority voting blocks.¹¹⁰ The “totality of the circumstances” prong of the test, meanwhile, allows courts to consider how historic and present policies and conditions interact to create instances of minority vote dilution despite the lack of state intent or action.¹¹¹ But perhaps most importantly, the VRA provides a clear opportunity to remedy the harm that communities of color suffer because of prison-based gerrymandering by reallocating the incarcerated population to pre-incarceration voting districts. A vindicated Section 2 challenge to prison-based gerrymandering would require the relief to be specific to people of color, the people who brought the suit, instead of papering over the surface-level problems by excluding prison populations from voting districts altogether. For the reasons discussed in the section above, the solution to prison-based gerrymandering must be the reallocation of prison populations to their home voting districts.¹¹²

Although the Supreme Court has recently limited the scope of the VRA,¹¹³ the Court has also asserted support for Section 2 as an important nationwide protector of minority voting rights.¹¹⁴ Prison-based gerrymandering and other complex issues of systemic minority vote dilution can and should be litigated using the malleable framework

¹⁰⁹ *Gingles*, 478 U.S. at 36–37 (quoting S. REP. NO. 97-417, at 28–29 (1982)).

¹¹⁰ Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) (“*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act.”).

¹¹¹ Franita Tolson, *What Is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 449–50 (2015) (discussing the role of the totality of the circumstances analysis and the lack on a requirement for discriminatory intent).

¹¹² See Wood, *supra* note 82.

¹¹³ See *e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 14–15 (2009) (limiting Section 2 of the VRA to addressing dilution of only one minority group at a time); *Holder v. Hall*, 512 U.S. 874, 881–82 (1994) (choosing not to apply Section 2 of the VRA to a county’s choice to have a single county commissioner form of government).

¹¹⁴ *Shelby Cty. v. Holder*, 570 U.S. 529, 537 (2013) (“Section 2 is permanent, applies nationwide, and is not at issue in this case.”). The court later stated, “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2.” *Id.* at 557.

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provided by Section 2 of the VRA.

B. Hayden v. Pataki Suggests the Potential of the VRA to Operate as a Remedy for Prison-Based Gerrymandering

Although courts have not undertaken a VRA prison-based gerrymandering claim, the Second Circuit has alluded to the possibility of such a claim in *Hayden v. Pataki*.¹¹⁵ In that case, the plaintiffs, who were a mix of incarcerated and free people, only alluded to a prison-based gerrymandering claim.¹¹⁶ As such, the Second Circuit made a determination only on the claim that the state's felon disenfranchisement laws violated the VRA.¹¹⁷ The Court held that the challenged disenfranchisement was not unlawful because it was not the intention of Congress to address disenfranchisement policies under the VRA.¹¹⁸

This case is relevant not because of any precedential value, but because it suggests that claims challenging practices that are more obviously related to election processes are easier for courts to fit within the framework of the VRA. Arguably, a properly raised prison-based gerrymandering claim should be more readily accepted by courts as within the scope of the VRA because it deals directly with the redistricting process. Unlike disenfranchisement policies overall, which arguably deal with criminal sanctions, the apportionment process falls squarely within the scope of state activity that the VRA was enacted to regulate.¹¹⁹

C. Surpassing the Gingles Factors

As a threshold matter, any voting rights claim must surpass the *Gingles* factors.¹²⁰ But prison-based gerrymandering may present a novel enough concept to require a slightly adjusted application of these factors. The Supreme Court has noted the flexibility of the factors in stating that,

¹¹⁵ *Hayden v. Pataki*, 449 F.3d 305, 329 (2d Cir. 2006).

¹¹⁶ *Id.* at 328–29 (“It is unclear whether plaintiffs’ vote dilution claim also encompasses a claim on behalf of plaintiffs who are neither incarcerated nor on parole, that their votes are ‘diluted’ because of New York’s apportionment process, *see* N.Y. CONST. art. III, § 4, which counts incarcerated prisoners as residents of the communities in which they are incarcerated, and has the alleged effect of increasing upstate New York regions’ populations at the expense of New York City’s.”).

¹¹⁷ *Id.* at 329.

¹¹⁸ *Id.*

¹¹⁹ Voter disenfranchisement laws directly affect the relative weight of voters from majority-minority communities. But those policies typically exist in state constitutions among criminal sanctions, which is sufficiently outside of the administration or regulation of elections. The process of redistricting, in contrast, exists almost solely to create fair elections. This should make prison-based gerrymandering arguments more palatable to courts than the voter disenfranchisement arguments have been. *See supra* Part IV-b.

¹²⁰ *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1006–07 (1994).

“[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.”¹²¹ Litigants can thus proceed in at least two ways to overcome this threshold issue: (1) characterizing of prison-based gerrymandering as a modern form of cracking, or (2) adjusting the third *Gingles* factor to better address a prison-based gerrymandering claim. Under either theory, prison-less majority-minority districts supply the basis for this analysis because those are the communities that are being harmed.¹²²

1. Prison-Based Gerrymandering as a Modern-Day Form of Impermissible Cracking

Litigants who present this issue in terms of cracking will argue that counting people where they are imprisoned deprives that state of majority-minority districts. In essence, a district might constitute a majority-minority district but for the fact that a segment of the population is counted elsewhere. Such a claim could fit into the traditional application of the *Gingles* factors if the number of incarcerated people from a community of color is large enough.

The first factor requires that the plaintiffs prove that the relevant minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district.”¹²³ Typically, courts make this determination by looking to the demographics of the relevant population, usually a proposed district, to see if the minority group is sufficiently large.¹²⁴ Courts disagree as to whether the basis of that inquiry should be based on total population or voting-age population.¹²⁵ Nevertheless, a minority group that is over 50% of the voting-age population of a community typically satisfies this part of the inquiry.¹²⁶ Even after losing a significant number of voting-aged people to incarceration elsewhere, many communities of color around the country qualify as majority-minority districts.¹²⁷ Because similar communities of color tend to be the communities affected by prison-based

¹²¹ *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

¹²² It is true that prison-based gerrymandering harms other prison-less districts regardless of the racial makeup, but the nature of those harms is not the subject of this comment. The proposed solution would also remedy harm to those districts.

¹²³ *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

¹²⁴ *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 12 (2009).

¹²⁵ Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 661 (2006).

¹²⁶ *See, e.g., Bartlett*, 556 U.S. at 19–20 (“[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.”).

¹²⁷ *See Majority-Minority Districts*, BALLOTPEdia, https://ballotpedia.org/Majority-minority_districts (last visited Apr. 18, 2019).

gerrymandering,¹²⁸ many of these communities will satisfy this first requirement.

Next, courts require plaintiffs to prove that the relevant minority group is “politically cohesive”¹²⁹ and that the white voters’ votes will act “as a bloc to . . . defeat the minority’s preferred candidate.”¹³⁰ The purpose of the second and third factors is to show that racially polarized voting warrants ensuring that the minorities could elect a representative of their choice.¹³¹ Traditionally, addressing these factors involves showing that the state’s apportionment plan either cracked the minority group into more than one district, creating white majority blocs across multiple districts, or packed the minority group into as few districts as possible, thus ensuring a high number of majority-white districts elsewhere in the state.¹³²

Despite the narrative that voting is no longer racially polarized,¹³³ the voting habits of communities of color are still noticeably different than rural white communities.¹³⁴ Communities affected by prison-based gerrymandering are likely to be able to satisfy part of the inquiry into racially polarized voting by showing the different voting habits and values in their communities compared to the prison-communities.¹³⁵ Additionally, the plaintiffs would reiterate that if not for counting so many Black people outside of the district, there would be a majority-minority district whose minority voting population would be large enough to secure election of its preferred candidate.

Although this approach seems simple, it depends on the willingness of courts to consider the manner of accounting for people in population counts as analogous to traditional cracking. Courts should consider this approach because it does not require much deviation from previous applications of the *Gingles* factors.

¹²⁸ See *supra* Parts I, II-b.

¹²⁹ *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

¹³⁰ *Id.*

¹³¹ *Id.* at 55–56 (discussing the Senate Report’s focus on racially polarized voting).

¹³² See *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

¹³³ See, e.g., Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2219 (2003) (“[M]ost studies do indicate that there are areas of the country in which racially polarized voting, at least by whites, has declined to the point that minority candidates are able to win elections in districts that have significant minority populations but are still majority-white.”).

¹³⁴ See John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 891 (2014) (“[R]acially polarized voting is not an aberration but a longstanding, pervasive, and continuing feature of numerous jurisdictions’ electoral histories—both at statewide and local levels . . .”).

¹³⁵ See, e.g., Short, *supra* note 45, at 938.

2. Adjusting the Third Factor

In the alternative, litigants can ask courts to adjust the application of the *Gingles* factors to best fit the problem. The litigants can frame the prison-based gerrymandering claim differently by focusing on the relationship between the prison district and the home majority-minority district. The first and second *Gingles* factors would remain the same, but the difference would be in *how* the majority bloc injures the minority's ability to elect a representative of their choice. Here, the majority bloc exists as the prison district whose vote is inflated at the expense of the minority district. In other words, minority voters' votes would "weigh less" than the votes of the voters in the prison district in the sense of operating to secure the election of a candidate who represents a larger share of the state's overall electorate.¹³⁶ Practically speaking, this inequity requires more minority votes than it should in a prison-less district to overcome the will of the majority.¹³⁷ This injury is just as real to the minority community as the traditional inequality that courts have remedied through Section 2 of the VRA.

Given the novelty of prison-based gerrymandering claims, courts should make a minor adjustment to how they apply the third *Gingles* factor. Such an adjustment would simply consider the inflated vote of the prison district, in combination with a showing of racially polarized voting, as representing a form by which a white voting bloc can "defeat" the preferences of a minority voting bloc. Courts should not fear that such an adjustment would impermissibly expand the scope of the VRA because plaintiffs would still have to show that, by a totality of the circumstances, the minority voters are not able to participate equally in an election.

D. *Leaning Into the Totality of the Circumstances Test*

In order to establish liability under section 2 of the VRA, plaintiffs must prove that based on a totality of the circumstances, the political process is "not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."¹³⁸ Although this is a broad and fact-intensive test, courts have employed nine factors in their analysis which are listed below:

¹³⁶ See *supra* Part II-c.

¹³⁷ See *supra* Part II-c.

¹³⁸ 52 U.S.C. § 10301 (2018).

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- (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;¹³⁹
- (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;¹⁴⁰
- (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;¹⁴¹
- (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;¹⁴²
- (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;¹⁴³
- (6) whether political campaigns have been characterized by overt or subtle racial appeals;¹⁴⁴
- (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;¹⁴⁵
- (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;¹⁴⁶ and
- (9) whether the policy underlying the state or political subdivision's use of such voting qualification, a prerequisite to voting, or standard, practice or procedure is tenuous.¹⁴⁷

Courts do not require a particular number of these factors to be considered.¹⁴⁸ Courts also do not limit the inquiry to these nine factors.¹⁴⁹ In the end, the goal of this inquiry is to determine whether the political

¹³⁹ *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986).

¹⁴⁰ *Id.* at 37.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Gingles*, 478 U.S. at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 45.

¹⁴⁹ *Id.*

process is truly open to every voter equally based on “a searching practical evaluation” of both “past and present reality.”¹⁵⁰ In a prison-based gerrymandering case, courts should consider the factors that focus on a history of discrimination, the current effects of discrimination, racial appeals in elections, and elected officials’ lack of responsiveness to minority voters. The court would have considered the second factor, racially polarized voting, in the threshold consideration of the *Gingles* factors.

For the first factor, litigants can show the specific history of official discrimination and minority voter suppression in the relevant state or subdivision. For instance, litigants could trace back to Jim Crow-era voting requirements and include any official acts that negatively affected the minority’s access to the democratic process.¹⁵¹ For example, courts have considered as part of this analysis: resistance to integrating public schools¹⁵² and lack of support for minority candidates by major parties.¹⁵³ Plaintiffs should introduce such historical evidence as part of their prison-based gerrymandering claims because it not only provides context for how the state or subdivision could allow discriminatory practices today, but also shows another contributor to the alleged vote dilution.¹⁵⁴

As to the fifth factor, courts inquiring into the effects of discrimination have considered: (1) a history of discrimination and current depressed socioeconomic status of the minority group, (2) the nexus between the alleged discrimination and participation in the political process, or (3) whether there is causation between the discrimination and participation.¹⁵⁵ Regardless of the specific approach that a court may take, litigants could provide evidence that past and present discrimination hinders the relevant minority group from fully participating in the political process. Within the context of prison-based gerrymandering, evidence of disparities in the prison-less district arising from criminal policies established by the legislature elected in a prison-based gerrymandering system, or the enforcement of those policies, may be especially relevant. In addition, litigants could provide evidence about discrimination arising from

¹⁵⁰ *Id.*

¹⁵¹ Katz, *supra* note 125, at 676.

¹⁵² United States v. Marengo Cty. Comm’n, 731 F.2d 1546, 1567–68 (11th Cir. 1984).

¹⁵³ Quilter v. Voinovich, 794 F. Supp. 695, 731 (N.D. Ohio 1992).

¹⁵⁴ See, e.g., Marengo Cty. Comm’n, 731 F.2d at 1567 (“[P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.” (citing Zimmer v. McKeithen, 485 F.2d 1297, 1306 (5th Cir. 1973))).

¹⁵⁵ Katz, *supra* note 125, at 703–07.

housing policies that result in both housing and school segregation. Most essentially, litigants should argue that as a result of segregation and mass incarceration in the state or subdivision, the minority group is less able to participate in the political process. This point can be made by pointing to, for example, the resulting socio-economic status of families both broken up by criminal justice policy and deprived of opportunity by an underserved school system.¹⁵⁶ There are a number of other ways that these issues of socio-economic status could affect the ability of voters to participate, including lack of transportation to the polls,¹⁵⁷ and even lack of ability to take time off from work to vote.¹⁵⁸

For the sixth factor, litigants can provide any evidence of overt or subtle racial appeals in political campaigns of those empowered by the prison-based gerrymandering system. For example, courts have considered candidates being on opposite sides of racially-charged political issues.¹⁵⁹ This kind of inquiry will require litigants to show a court how racially neutral comments about being “tough on crime,” for example, are actually racialized.¹⁶⁰ They can show that this is especially true when a rural representative has a prison in their district filled with people from majority-minority communities. When that representative makes those statements, he or she is not only supporting a policy that will keep the prison industry in the district strong, but a policy that thrives off discriminating against Black and brown people. Such political positions are not only racially charged in theory but in practice as well.

As to the eighth factor, litigants can show the lack of responsiveness in the prison district to the concerns of the minorities wrongly counted

¹⁵⁶ See Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 348 (2011) (“Today, these two systems—the education and justice systems—have developed a ‘symbiotic relationship,’ effectively working together to lock out large numbers of youth of color from societal opportunity and advantage.”).

¹⁵⁷ Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, ATLANTIC (Jan. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/> (“Black and Hispanic citizens, for whom the poverty rate is close to three times that of whites, were three times as likely as whites to not have the requisite I.D. and to have difficulty finding the correct polling place. . . . They were also substantially more likely than whites to report transportation problems and bad time and location as reasons for not getting to the polls, while white voters were the most likely to cite disapproval of candidate choices.”).

¹⁵⁸ Christopher Ingraham, *A Ton of People Didn’t Vote Because They Couldn’t Get Time Off from Work*, WASH. POST (Nov. 12, 2014), https://www.washingtonpost.com/news/work/wp/2014/11/12/a-ton-of-people-didnt-vote-because-they-couldnt-get-time-off-from-work/?utm_term=.4f10f627e22f.

¹⁵⁹ Katz, *supra* note 125, at 709.

¹⁶⁰ See Julia Azari, *From Wallace to Trump, the Evolution of “Law and Order”*, FIVETHIRTYEIGHT (Mar. 13, 2016), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order/>.

there. To be clear, this particular argument is not directly about the harm to the voters currently counted in the majority-minority community. But because even those who do not have the right to vote are guaranteed representation, this kind of injury is relevant to a prison-based gerrymandering claim in that it shows that people would be better represented in their home communities. Because people who are incarcerated do not have the right to vote, it is unsurprising that they belong to a constituency that is not catered to during political campaigns. But is not the entire purpose of including this population in the apportionment context in the first place to *not* deprive the population of the opportunity to be represented? The fact that representatives enjoy power because of having a prison in their district, but do not care to represent the concerns of that population,¹⁶¹ can and should be circumstantial evidence of a lack of responsiveness to the concerns of the disproportionately Black and brown prisoners. Given that these unrepresented individuals could be included in a district in a way that would better empower that district to represent the collective concerns of minorities, their inclusion in the prison district is even more questionable.

In considering each of these factors individually and collectively, courts should be able to see that under a totality of the circumstances, prison-based gerrymandering, in combination with other historic and present forms of systemic discrimination, hinders minorities from equally accessing the political process.

V. CONCLUSION

Issues of vote dilution can seem philosophical or insubstantial to the average person. But what is at stake when states choose to count the prison population where they are incarcerated, and not in the communities that they know as home, is the battered right to vote of people of color in this country. Litigants have an opportunity to bring a claim in a manner that directly addresses the fact that the current apportionment process in most states dilutes the vote within communities of color. Courts have an

¹⁶¹ See Letter from Justin Levitt, Professor, Loyola Law School, to Karen Humes, Chief, Population Division, U.S. Census Bureau, at 4 (July 20, 2015), <http://redistricting.lls.edu/other/2015%20census%20residence%20comment.pdf> (“[A] New York state legislator representing a district housing thousands of incarcerated individuals said that given a choice between the district’s cows and the district’s prisoners, he would ‘take his chances’ with the cows, because ‘[t]hey would be more likely to vote for me.’”); Sam Roberts, *Census Bureau’s Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES (Oct. 23, 2008), <https://www.nytimes.com/2008/10/24/us/politics/24census.html> (“‘Do I consider them my constituents?’ Mr. Young said of the inmates who constitute an overwhelming majority of the ward’s population. ‘They don’t vote, so, I guess, not really.’”).

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opportunity to address a form of discrimination that, though lacking in hard evidence of discriminatory intent, systemically harms the most vulnerable communities in the nation.

It would be overstating things to suggest that the proposed solution in Section 2 of the VRA is the only way to solve this problem. But this solution at least allows both state governments and advocates to put their cards on the table, and allows courts, for the first time, to make a statement about whether this kind of discrimination is fixable by using civil rights legislation instead of—or in addition to—the Equal Protection Clause. People of color in this country deserve to have their issues addressed directly and not swept under the rug in the name of aspirational colorblindness.

If such a claim is heard by the Supreme Court, and the resulting holding is one that continues the recent trend of limiting the scope of VRA claims, advocates can take that unfortunate holding and instead lobby more states to change their legislation on this issue. Like many racial justice issues that have had their day in court, whatever the holding, advocates can use it to motivate change in the consciousness of the average American. Perhaps that is the sort of change that will motivate the Census Bureau to wipe this problem away completely by adjusting their antiquated “Usual Residence Rule.”