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Wisconsin's 3/5 Compromise: Prison Gerrymandering in Wisconsin Dilutes Minority Votes to Inflate White Districts' Population

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WISCONSIN'S 3/5 COMPROMISE: PRISON GERRYMANDERING IN WISCONSIN DILUTES MINORITY VOTES TO INFLATE WHITE DISTRICTS' POPULATION

Adam Johnson[‡]

"'If you cannot afford an attorney, one will be appointed for you.' Unless you're losing your children, or your home, or your healthcare . . . ."
– National Coalition for a Civil Right to Counsel[1]

I. INTRODUCTION

> 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.[2]

James Madison wrote The Federalist No. 54 defending the infamous three-fifths compromise, which allowed White southern slaveowners to aggregate political power on the backs of their Black slaves, without representing their interests in any substantive way.[3]

Prison gerrymandering—using prison populations as part of the underlying population for redistricting—is a modern manifestation of the same concept. Prisons, and the people who are currently incarcerated within, are uniquely productive in many aspects of society.[4] Prisoners may

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[1] NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/ [https://perma.cc/RR2B-FADJ].

[2] THE FEDERALIST NO. 54 (James Madison) (The Avalon Project, https://avalon.law.yale.edu/18th_century/fed54.asp [https://perma.cc/5VDM-M5U5]). While there is some debate over whether this was written by Hamilton or Madison, most say Madison is the author. Joerg Knipprath, *Federalist No. 54 – The Apportionment of Members Among the States, From the New York Packet (Madison or Hamilton)*, CONSTITUTING AM. (July 12, 2010), https://constitutingamerica.org/july-12---federalist-no-54---the-apportionment-of-members-among-the-states-from-the-new-york-packet-madison-or-hamilton---guest-blogger-joerg-knipprath-professor-of-law-a/ [https://perma.cc/5H2M-ABV7].

[3] THE FEDERALIST NO. 54 (James Madison) (The Avalon Project, https://avalon.law.yale.edu/18th_century/fed54.asp [https://per cma.cc/5VDM-M5U5]).

[4] *See, e.g.*, Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473 (2017) (discussing prison gerrymandering broadly); Faith Stachulski, *Prison Gerrymandering: Locking Up Elections and Diluting Representational Equality*, 2019 U. ILL. L. REV. 401, 407 (2019) (examining court decisions related to prison gerrymandering).

be paid a lower wage than a similarly employed individual outside of prison.[5] They are almost never allowed to vote.[6] Federally, slavery itself is not prohibited for incarcerated individuals.[7] Prison gerrymandering similarly co-opts prisoners as a resource to be used for another party's benefit.[8]

This concept is particularly harmful to minority populations when amplified by a dramatic rise in incarceration rates generally, exemplified in both racial disparities in incarceration rates and racial segregation.[9] Due to a confluence of extreme racial disparities in incarceration rates and a well-earned reputation of racial segregation, Wisconsin provides a dramatic example of this problem.[10]

Wisconsin, like many states, has historically counted prisoners for redistricting purposes at their location of incarceration instead of the community that they originated in. This practice continues to be justified based on an incorrect interpretation of the state's constitution, which likely violates the Fourteenth Amendment's Equal Protection Clause. To avoid perpetuating this flawed method, the state should change how it interprets "inhabitants" for the purpose of redistricting before the 2021 redistricting cycle. Following the Supreme Court's rejection of federal court review for political gerrymandering issues,[11] prison gerrymandering will be a heavily litigated area of law at the state level, particularly in states like Wisconsin, where the impact is drastic.

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[5] Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE: PUBL'NS (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/7YTF-PWU3].

[6] Only Maine and Vermont permit some convicted felons to vote from prison. ME. STAT. tit. 21-A, § 112(14) (2016); VT. STAT. ANN. tit. 17, § 2122(a) (2016); Vermont residents imprisoned outside of the state may vote absentee. Jane Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison.*, NBC NEWS (Feb. 26, 2018), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406 [https://perma.cc/SR3B-R9LV].

[7] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[8] *The Problem,* PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/impact.html [https://perma.cc/LT4W-5CL2] ("Because prisons are disproportionately built in rural areas but most incarcerated people call urban areas home, counting prisoners in the wrong place results in a systematic transfer of population and political clout from urban to rural areas.").

[9] *See* Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1486 (2017); Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 417, 418 (2018) ("Until the 1980s there were so few prisoners that this policy likely had little impact.").

[10] *Wisconsin*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/wisconsin.html [https://perma.cc/QJQ8-NFGS].

[11] *See generally* Whitford v. Gill, 138 S. Ct. 1916 (2018).

This Note has six parts. Part II describes the concept of prison gerrymandering. Part III distinguishes incarcerated individuals from other analogous populations. Part IV describes prison gerrymandering in Wisconsin, specifically. Part V explains how Wisconsin's interpretation of "inhabitants" is inconsistent and erroneous. Part VI suggests that litigation based on the Equal Protection Clause might be the best avenue to sue a state based on prison-oriented gerrymandering. Finally, Part VII suggests two options for Wisconsin to resolve this issue for the 2021 redistricting plan: legislative action to prohibit prison gerrymandering or executive action by the governor to veto any redistricting plans that uses prison populations to inflate districts.

II. THE CENSUS, STATE REDISTRICTING PRACTICES & HISTORY OF PRISON GERRYMANDERING

Article I, Section 2 of the United States Constitution requires an "actual enumeration" of persons within the several states to be conducted every ten years in a manner specified by Congress.[12] Congress has specified several mechanisms to perform the "actual enumeration" since 1790.[13] Currently, the process is known as the U.S. Census (Census) and is administered by the U.S. Census Bureau (Census Bureau), which conducts a decennial enumeration as required by the Constitution along with supplemental surveys to gather more detailed statistical information during the interim periods.[14] This part has five sections. The first will briefly examine state redistricting processes generally. The second covers Wisconsin's redistricting process specifically. The third section highlights how the federal courts examine districts with unequal population distributions. The fourth section provides an overview of prison gerrymandering generally, and the final section briefly reviews the current federal precedent for prison gerrymandering cases.

A. State Redistricting Processes

States are given great discretion in determining how to reapportion their legislative and congressional districts.[15] Generally, "[u]nless a choice is one the Constitution forbids, the resulting apportionment base offends no

[12] U.S. CONST. art. I, § 2.

[13] *See generally Through the Decades*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/ [https://perma.cc/8H6H-MLCM].

[14] *Id.*

[15] *See generally* Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301 (2016).

constitutional bar . . . ."[16] In the 1960s, the Supreme Court established in *Baker v. Carr* that the Equal Protection Clause of the Fourteenth Amendment requires legislative districts to be roughly equal in population.[17] Subsequently, the Court in *Reynolds v. Sims* required states to equalize population in legislative districts "as nearly as is practicable."[18] The Supreme Court's decision in *Reynolds* established the principle of "one person, one vote" to guide states in determining valid redistricting schemes.[19]

Every state uses the national Census in some capacity for their redistricting process, although "[s]tates are [not] required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed."[20] Seven states (Washington, California, Nevada, Maryland, Delaware, New York, and New Jersey) have prohibited the practice of using prison populations when redistricting.[21] Several others, including Tennessee, Colorado, Michigan, Virginia, and Massachusetts, have enacted some measure of limiting the impact of prison populations on redistricting.[22] In Wisconsin, lack of political will stifled the efforts to prohibit this practice within the legislature during the 2009 and 2011 sessions.[23]

Outside of the few states that recently adopted changes related to counting prisoners in upcoming redistricting cycles, states have largely remained stagnant on the issue.[24] "Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism."[25]

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[16] Burns v. Richardson, 384 U.S. 73, 92 (1966). A full discussion of the Court's evolving jurisprudence on redistricting generally is outside the scope of this Note. For a more thorough discussion, *see* Thomas L. Brunell, *The One Person, One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting*, 62 CASE W. RES. L. REV. 1057 (2012).

[17] Baker v. Carr, 369 U.S. 186, 208 (1962).

[18] Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[19] *Id.* at 570.

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

[21] *See* Ludwig Hurtado, *States 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 [https://perma.cc/P66E-CK5K]; Brent Johnson, *N.J. Will Soon Allow You to Register to Vote Online*, NJ.COM (Jan. 21, 2020), https://www.nj.com/politics/2020/01/nj-will-soon-allow-you-to-register-to-vote-online.html [https://perma.cc/84L9-7N8B].

[22] Hurtado, *supra* note 20; Johnson, *supra* note 20.

[23] *See* Assemb. J. Res. 63, 2009–10 Assemb. (Wis. 2009); Assemb. J. Res. 122, 2011–12 Assemb. (Wis. 2011).

[24] Hurtado, *supra* note 21 (outlining the changes that seven states, including New York and California, will make to their redistricting process following the 2020 census).

[25] Reynolds v. Sims, 377 U.S. 533, 570 (1964).

B. Redistricting in Wisconsin

Wisconsin's redistricting process has been consistent in the post-*Reynolds* era.[26] District lines are reevaluated and adjusted every ten years to reflect population changes by balancing principles of equal population, compactness, contiguity, shared communities of interest, unity of political subdivisions, and minority protection.[27] The process is simple: the legislature makes the maps, and the governor signs them into law.[28] Wisconsin's process is entirely political, originating with the elected legislature, then culminating with the governor's approval or veto.[29] This process is the most common approach to redistricting in the United States.[30] Prior to the 1960s, Wisconsin's redistricting process created districts with dramatic differences in population, despite state constitutional requirements for districts to be equally-populated.[31] In the years since, consistent with guidance from the Supreme Court, Wisconsin's redistricting efforts have largely played out in the court system as political parties sought to challenge individual districts.[32]

C. Unequal Redistricting

Though the courts have generally allowed states discretion in determining their redistricting process, there is some recent guidance on how those processes may be challenged. In *Harris v. Arizona Independent Redistricting Commission*, voters in Arizona challenged the state's redistricting plans following the 2010 redistricting cycle.[33] In 2000, Arizona

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[26] *See generally* Michael Keane, *Redistricting in Wisconsin*, WIS. LEGIS. REFERENCE BUREAU, (2016), https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf [https://perma.cc/G47R-9DYQ].

[27] *Id.* at 1–5.

[28] WIS. CONST. art. IV, § 3.

[29] *See, e.g.*, *The "Iowa Model" for Redistricting*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 6, 2018), https://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx [https://perma.cc/F6GB-TPLN].

[30] Justin Levitt, *Who Draws the Lines?*, LOYOLA L. SCH.: ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/who.php [https://perma.cc/7WVR-NE9U] (providing an overview of the different methods of redistricting across the United States).

[31] Keane, *supra* note 25, at 6.

[32] *See, e.g.*, State *ex rel.* Reynolds v. Zimmerman, 23 Wis. 2d 606 (1964); Wisconsin AFL-CIO v. Elections Bd., 543 F. Supp. 2d 630 (1982); Prosser v. Elections Bd., 793 F. Supp. 859 (1992); Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002). For a thorough discussion of Wisconsin's contentious history of redistricting, see KEANE, WIS. LEGIS. REFERENCE BUREAU, REDISTRICTING IN WISCONSIN (2016), https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf [https://perma.cc/A7TM-AURF].

[33] Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1306 (2016).

adopted an independent redistricting commission to draw its maps, using this same commission in 2010.[34] The developed maps, after attempting to compensate for Voting Rights Act concerns, created districts with a total population deviation of 8.8%.[35] That is, the largest districts deviated from the average by a maximum of that amount. The *Harris* Court declined to reject Arizona's maps. Instead, it required that any challenge to a state-approved plan must show that it is "more probable than not that a population deviation [from absolute equality of districts] of less than 10 percent reflects the predominance of illegitimate reapportionment factors rather than the legitimate considerations."[36] This means that if the total population difference between districts is less than ten percent, any challenge must show that it was predominantly based on illegitimate factors.[37] While the Court did not enumerate an exhaustive list of illegitimate factors, it specified that legitimate factors for redistricting could include traditional concerns such as compactness, contiguity, and the integrity of political subdivisions.[38] As a result, the challenge failed, and Arizona's maps were upheld.[39]

D. Political Gerrymandering

Gerrymandering is a practice as old as our country itself. In 1789, Thomas Jefferson wrote, "[Virginia Governor Patrick] Henry has so modelled the districts for representatives as to tack Orange [County] to counties where he himself has great influence that [John] Madison may not be elected into the lower federal house."[40] Despite some efforts to wrangle the gerrymander, the Supreme Court has limited its own role in dictating how Congressional representational maps are created to cases involving population disparities or race.[41]

Most recently, in *Rucho v. Common Cause*, the Court held that political gerrymandering was a nonjusticiable issue for the federal courts so

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[34] *Id.*

[35] *Id.* at 1309.

[36] *Id.* at 1307. The Court also noted that the Voting Rights Act sections that prompted Arizona to create districts with 8.8% total population variance were held unconstitutional by *Shelby County v. Holder*, 570 U.S. 529 (2013). *Harris*, 136 S. Ct. at 1307. The Court declined to reject Arizona's maps on this ground as Arizona developed the maps in 2010, prior to the *Shelby County* decision. *Id.* at 1308.

[37] *Id.* at 1307.

[38] *Id.* at 1306–07.

[39] *Id.*

[40] Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)).

[41] *See id.* at 2495–97 (highlighting actions Congress took throughout the 1800s and 1900s to limit the impact of gerrymandering, the efforts by the Court in *Baker v. Carr*, and the racial discrimination line of cases to eliminate these types of gerrymanders).

long as the jurisdiction did not depart from the traditional "one person, one vote" standards and otherwise engage in unlawful discrimination.[42] In *Rucho*, a consolidation of separate cases, voters in Maryland and North Carolina challenged their states' redistricting maps as unconstitutional gerrymanders based on partisanship.[43] The Maryland plaintiffs complained that their state maps favored Democrats by an unfair margin, and the North Carolina plaintiffs complained that their state maps favored Republicans.[44] Specifically, voters challenged the maps on the basis of the Equal Protection Clause of the Fourteenth Amendment, claiming the maps unfairly diluted their votes.[45] The Court declined to extend the Equal Protection Clause to partisan gerrymandering on the basis that partisan gerrymanders "rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence."[46] The Court continued to explain that partisan gerrymandering claims "invariably sound in a desire for proportional representation," which the Equal Protection Clause does not require.[47] Eventually, all of the partisan gerrymandering claims were held to be "beyond the reach of the federal courts."[48]

However, prison gerrymandering is not as neat an issue, particularly with disproportionate rates of incarceration. Black individuals make up twelve percent of the national population, but thirty-three percent of the prison population nationwide is Black.[49] Hispanic individuals are sixteen percent of the national population and twenty-three percent of the prison population.[50] This disparity may be sufficient to constitute an impermissible racial gerrymander.

E. Prison Gerrymandering in the Federal Courts

The federal courts have considered several cases in recent years; however, there is no consensus.

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[42] *See id.* at 2501–02.
[43] *Id.* at 2491.
[44] *See id.*
[45] *Id.* Plaintiffs from North Carolina also put forward claims based on the First Amendment, the Elections Clause, and violations of Article I, Section 2 of the United States Constitution. Maryland plaintiffs primarily put forward First Amendment claims. *Id.* The Fourteenth Amendment argument is most directly relevant to prison gerrymandering.
[46] *Id.* at 2486.
[47] *Id.* (quoting Mobile v. Bolden, 446 U.S. 55, 75–76, (1980)).
[48] *Id.* at 2506–07.
[49] John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/ [https://perma.cc/74CF-QHMP].
[50] *Id.*

1. *The Calvin v. Jefferson County Board of Commissioners Decision*

In *Calvin v. Jefferson County Board of Commissioners*, a rural county was determined to have violated the Equal Protection Clause due to prison gerrymandering.[51] Jefferson County, Florida, is governed by a five-person Board of Commissioners elected from districts of roughly equal population. However, one district included the Jefferson Correctional Institute (JCI), which housed over 1,100 incarcerated individuals.[52] These districts were created by the Board of Commissioners pursuant to Florida state law, dividing the territory "into districts of contiguous territory as nearly equal in population as practicable."[53] Throughout the redistricting process, the Board sought advice on how to accommodate JCI's large prison population. It ultimately decided to try equalizing the total population without regard to how many prisoners were in any single district.[54] For one district, the subsequent maps produced its total population to be roughly equal to the others, but it contained nearly thirty percent fewer individuals when the JCI population was not included.[55] *Calvin* was brought by voters in a district neighboring the one containing the JCI population, claiming that including so many prisoners in one district unfairly inflated its residents' voting power, violating the claimants' rights under the "one person, one vote" principle of the Equal Protection Clause.[56]

To answer this question, the court deconstructed the "one person, one vote" concept and how individuals interacted with each other, the community, and their representatives.[57] It then clarified when states have the flexibility in determining which populations ought to be equalized when drawing districts.[58]

The court ultimately broke down existing Equal Protection Clause jurisprudence into the dueling concepts of representational equality and electoral equality.[59] While the *Calvin* Court was unable to state an affirmative bright-line rule, it did clarify that existing jurisprudence did not permit

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[51] Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1295 (N.D. Fla. 2016).
[52] *Id.* at 1295–96.
[53] *Id.* at 1296; FLA. CONST. art. VIII, § 1(e) ("After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable.").
[54] *Calvin*, 172 F. Supp. 3d at 1297.
[55] *Id.*
[56] *Id.* at 1298.
[57] *Id.* at 1303–11.
[58] *See id.* at 1312–14.
[59] *Id.*

redistricting plans that violate both representational and electoral equality.[60] Put succinctly,

> An apportionment base for a given legislative body cannot be chosen so that a large number of nonvoters who also lack a meaningful representational nexus with that body are packed into a small subset of legislative districts. Doing so impermissibly dilutes the voting *and* representational strength of denizens in other districts and violates the Equal Protection Clause.[61]

Accordingly, the court rejected the district lines, finding them unconstitutional, as the "true denizen" population of the district containing the prison was two-thirds the population of other districts which is far greater than the ten percent threshold identified in *Harris*.[62]

2. The Evenwel v. Abbott Decision

The Supreme Court again addressed how populations should be counted for redistricting purposes in *Evenwel v. Abbott*.[63] During 2010 redistricting, Texas drew its legislative districts based on a roughly equalized total population, without consideration for the equalization of the eligible voter population.[64] Like Arizona in *Harris*, Texas was subject to sections of the Voting Rights Act requiring federal approval before implementing voting changes.[65] Texas's eventual maps were based on equalizing the total population of each district, and it achieved that goal with a *Harris*-approved population deviation of an average 8.04%.[66] However, when measured by eligible voter population, the maximum deviation exceeded forty percent.[67] In *Evenwel*, the plaintiffs—residents of districts with particularly large eligible voter populations relative to the total population—sued the state of Texas for creating districts in violation of the Equal Protections Clause.[68]

The Court analyzed the constitutional history of how congressional districts ought to be apportioned, and determined that the original intent was for reapportionment to be based on total population without regard for

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[60] *Id.*
[61] *Id.* at 1315 (internal footnote omitted).
[62] *Id.* at 1323–24. However, the court did caution that the result may have come out differently had *Calvin* concerned a state redistricting plan since the "representational nexus" analysis would change. *Id.* at 1324.
[63] Evenwel v. Abbott, 136 S. Ct. 1120 (2016).
[64] Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1306 (2016); *Evenwel*, 136 S. Ct. at 1125.
[65] *Evenwel*, 136 S. Ct. at 1125.
[66] *Id.*
[67] *Id.*
[68] *Id.*

voter eligibility, citing the three-fifths compromise as evidence.[69] This original constitutional position was revisited following the passage of the Fourteenth Amendment and subsequent debates over voter-based apportionment, which ultimately resulted in retaining the total voter basis for apportionment.[70] The Court declined to read a requirement for equal districts based on total voting population instead of total population into the Equal Protection Clause.[71]

> Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services . . . . By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.[72]

Subsequently, the Court declined to decide if states may permissibly draw districts to equalize eligible voter population instead of total population.[73] However, it did note that in some rare circumstances, a different standard for redistricting may be adopted so long as that standard is nondiscriminatory.[74] Without explicitly stating what factors might create these rare situations, the Court held that "'[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.'"[75] This suggests that it is permissible to draw districts based on a measure other than total population if the alternative would result in a "debasement" of voting power for a community.[76]

3. The Davidson v. City of Cranston Decision

In a more recent decision post-*Evenwel*, the First Circuit came to the opposite conclusion than in *Calvin* when confronted with a similar situation and remarkably similar facts.[77] The City of Cranston has six wards, one of which was redistricted to include all 3,433 prisoners at the Adult

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[69] *Id.* at 1127.
[70] *Id.* at 1128.
[71] *Id.* at 1132.
[72] *Id.*
[73] *Id.* at 1133.
[74] *Id.* at 1142 (citing Burns v. Richardson, 384 U.S. 73, 75 (1966), wherein Hawaii's large military base population created a situation justifying the exclusion of the members of the armed forces from state redistricting) (Thomas, J., concurring).
[75] *Id.* at 1131 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).
[76] *See id.*
[77] Davidson v. City of Cranston, 837 F.3d 135, 138–40 (1st Cir. 2016).

Correctional Institutions (ACI).[78] Subtracting the prisoners from the ward's population would have created a roughly thirty-five percent population deviation from the city's other wards.[79] Four residents of those wards complained that this redistricting plan violated the Equal Protection Clause by diluting their voting power in comparison with the ward containing ACI.[80]

For similar reasons as the *Calvin* court, the district court upheld the plaintiff's challenge as:

> "[t]he inmates at the ACI share none of the characteristics of the [historically nonvoting] constituencies [such as women, children, slaves, taxpaying Indians, and non-landholding men] described by the Supreme Court" . . . to deserve representation in apportionment [and that] the inmates have no interest in Cranston's public schools, receive few services from the City, and have no contact with Cranston's elected officials.[81]

On appeal, the First Circuit reversed the district court's decision.[82] Acknowledging that *Evenwel* did not address the precise question of prison gerrymandering, the First Circuit nevertheless upheld the redistricting based on equalized total population, noting the process could only be deemed discriminatory based on a showing that racial groups have been disadvantaged.[83] As the court explained, "[t]he more natural reading of *Evenwel* is that the use of total population from the Census for apportionment is the constitutional default, but certain deviations are permissible, such as the exclusion of non-permanent residents, inmates, or non-citizen immigrants."[84]

The *Calvin*/*Davidson* split highlights the tension created by the unique position of prisoners in a district's total population. In the coming years, the Supreme Court will likely be called upon to decide this unique and narrow situation.

III. DISTINGUISHING INCARCERATED INDIVIDUALS FROM OTHER NON-VOTING OR TRANSIENT POPULATIONS

[78] *Id.*
[79] *Id.*
[80] *Id.* at 139.
[81] *Id.* at 139–40.
[82] *Id.* at 146.
[83] *Id.* at 142–43 ("It is true that *Evenwel* did not decide the precise question before us. Nevertheless, we hold that its methodology and logic compel us to hold in favor of Cranston. *Evenwel* dictates that we look at constitutional history, precedent, and settled practice. Doing so leads us to find the inclusion of the ACI prisoners in Ward Six constitutionally permissible." (internal citations omitted)).
[84] *Id.* at 144.

Prison populations share similarities with other populations that have a temporary residence or are non-voting, but the circumstances of their incarceration warrant different treatment for representation purposes. Consistent with *Evenwel*, moving to redistricting based entirely on the total number of voters is undesirable when it results in a "debasement of voting power and diminution of access to elected representatives."[85] Mass incarceration, working in conjunction with rurally placed prisons, debases voting power and reduces access to actual representation for the incarcerated individuals and the communities from which they are incarcerated.[86] This Part distinguishes prisoners from frequently analogized populations.

A. Usual Residence Rule for Group Quarters

To count individuals, the Census Act of 1790 established the "usual residence" rule, defining residence as the place "where a person lives and sleeps most of the time."[87] One of the most substantive challenges facing the Census Bureau is determining how to count individuals who are living in temporary group quarters, college students, members of the military, or incarcerated individuals. In 1950, the Census Bureau explicitly declared that college students should be counted at their "usual residence," which was typically their college location.[88] Since 1970, the Census Bureau has counted service members serving overseas as residents of their home state, while counting service members serving at a domestic base as residents of that military base.[89] Similarly, prisoners have been counted as residents of their prison's location, and the Census Bureau recently announced that this practice would continue for the 2020 Census.[90]

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[85] Evenwel v. Abbott, 136 S. Ct. 1120, 1131 (2016) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).

[86] *See* Remster & Kramer, *supra* note 8, at 4 (stating, "[f]or example, were the U.S. to prioritize vote equality over representational equality, at least 13 congressional districts would move from states with large non-voting immigrant populations such as Texas and California to states with relatively low immigrant populations like Kentucky and Montana. . . . Hyperincarceration may subtly, but perniciously, violate the constitutional right to equal representation for all persons.").

[87] *2020 Census Residence Criteria and Residence Situations*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html [https://perma.cc/3EBV-H2Z8].

[88] D'vera Cohn, *College Students Count in the Census, but Where?*, PEW RSCH. CTR. (Mar. 15, 2010), https://www.pewsocialtrends.org/2010/03/15/college-students-count-in-the-census-but-where/ [https://perma.cc/9WTE-VF3G].

[89] Richard Sisk, *Census to Count Troops by Base Home Address, Officials Say*, MILITARY.COM (Aug. 12, 2019), https://www.military.com/daily-news/2019/08/12/census-count-troops-base-home-address-officials-say.html [https://perma.cc/EEL7-754T].

[90] Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018), *available at* https://www.federalregister.gov/documents/2018/02/08/2018-

The Census count has a substantial impact on a community, particularly in locations where the atypical "usual residence" situations apply. College towns, military bases, and prisons can inflate the resident count, which may impact federal funding eligibility, voting power, and district shapes during state and local redistricting processes. Former New Jersey Governor, Chris Christie, cited prisoner's consumption of community resources and services as a reason for vetoing a bill that would have banned prison gerrymandering in 2016.[91]

Despite similar treatment by many states, the assumption that the three groups are "similarly situated" is "questionable at best."[92] Prisoners are distinctly different from college students and members of the armed forces in three critical ways: they do not engage with the community in any meaningful way; they are unable to politically express themselves or manifest their political goals; and there is a lack of meaningful choice on behalf of prisoners in determining their location.

1. Lack of Community Engagement

Prisoners are distinct from both college students and members of the armed forces in their ability to engage with their local communities. Students who are counted at their university address are integral to their local communities. Businesses are established to cater to their needs. Students and members of the armed forces work in the community, buy goods and services in the community, and are otherwise members of the community like anyone else.[93] Conversely, instead of being capable of engaging and integrating with local communities for shared benefit,

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02370/final-2020-census-residence-criteria-and-residence-situations [https://perma.cc/546P-DY8S].

[91] Hurtado, *supra* note 21. New Jersey has since banned prison gerrymandering after electing a new governor in 2018. Johnson, *supra* note 21.

[92] Fletcher v. Lamone, 831 F. Supp. 2d 887, 896 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012) (stating, "[w]e also observe that the plaintiffs' argument on this point implies that college students, soldiers, and prisoners are all similarly situated groups. This assumption, however, is questionable at best. College students and members of the military are eligible to vote, while incarcerated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners."). *But see* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[93] *See e.g.*, Borough of Bethel Park v. Stans, 449 F.2d 575, 579 (3rd Cir. 1971) (focusing on the importance of students ability to "eat, sleep, and work" in a community); Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 368 (2018) (quoting language from *Fletcher*, 831 F. Supp. 2d at 896).

prisoners are purposefully and intentionally kept apart from the communities that neighbor the prison.[94]

Governor Christie's argument for retaining prison gerrymandering was that prisoners consumed resources that communities receive, in part, based on the Census population results, and it would therefore be unfair to reduce that funding.[95] However, prisoners cannot utilize resources from any of the ten largest programs whose funds are guided by Census data.[96] While the additional money derived from counting prisoners in the location of their incarceration benefits that community, it does not benefit the prisoners who are artificially inflating that Census count.[97]

2. Lack of Political Power and Expression

As articulated in *Calvin*, prisoners lack a "representational nexus" to their elected officials.[98] In short, representational equity is only met if prisoners have some sort of connection to their representatives.[99] Unlike other transitory communities, most incarcerated individuals cannot vote in the communities in which they purportedly reside.[100] Combined with a lack of visibility and engagement within the prison's community, there is little incentive for elected officials to consider the incarcerated population as constituents. In Dodge County, Wisconsin, where three large prison populations comprise a large proportion of the total population, an elected official said "he doesn't consider that large demographic when governing. The prisoners don't contact him, and he doesn't reach out to them."[101] It is likely a common perspective among elected officials.[102] Indeed, "[w]hen

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[94] Ebenstein, *supra* note 92.

[95] *See* Hurtado, *supra* note 21.

[96] The top ten programs guided by census data are Medicaid, Federal Direct Student Loans, Supplemental Nutrition Assistance Program, Medicare Supplement Insurance (Part B), Highway Planning and Construction, Federal Pell Grant Program, Section 8 Housing Choice Vouchers, Temporary Assistance to Needy Families, Very Low to Moderate Income Housing Loans, and Title I Grants to Local Education Agencies. 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].

[97] *See id.*

[98] Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1310 (N.D. Fla. 2016).

[99] *See id.*

[100] Timm, *supra* note 5.

[101] Tim Damos, *In Depth: Feds Won't Change How Prisoners Counted in 2020*, BARABOO NEWS REPUBLIC (Jan. 12, 2019), https://www.wiscnews.com/baraboonewsrepublic/news/local/govt-and-politics/in-depth-feds-won-t-change-how-prisoners-counted-in/article_1f4f2dbf-5a0f-549e-8766-ca928fd437e6.html [https://perma.cc/ZTT7-2JVG].

[102] The nationwide "Visit a Prison Challenge" promoted by Families Against Mandatory Minimums strongly suggests that it is unusual for elected officials to truly consider prisoners

polled, legislators view prisoners from their home districts who are incarcerated elsewhere as their constituency more so than prisoners incarcerated in their districts who otherwise have no ties there."[103]

Students and members of the armed forces can engage politically in other ways as well. They can organize advocacy campaigns that include canvassing, phone banking, letter writing, advertising, attending local advocacy events, and they can simply knock on their representative's door and ask to be heard. Prisoners do not have opportunities to tie themselves to the representation of the community.[104]

3. Lack of Meaningful Choice in Location

There is precedent for counting populations living in group quarters from their prior, permanent location instead of their temporary locations. In *Franklin v. Massachusetts*,[105] the court addressed the question of how to appropriately count members of the armed forces stationed overseas while the Census occurred. Massachusetts lost a congressional seat after the 1990 Census and brought action against the Census Bureau for counting overseas soldiers at their "home of record" instead of as residents of the overseas location.[106] Massachusetts argued that this practice violated the "usual residence" rule and was unconstitutional in conducting an "actual Enumeration" as required by the United States Constitution.[107] The Court rejected this argument unanimously.[108]

> [Usual residence] can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place . . . .The Act placed no limit on the duration of the absence,

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or their needs when governing. FAMS. AGAINST MANDATORY MINIMUMS, https://famm.org/visitaprison/ [https://perma.cc/AR4P-8E5A]; *see also* Stephanie Wykstra, *The Growing Push for Politicians to #VisitAPrison*, THE PROGRESSIVE (Aug. 20, 2019), https://progressive.org/dispatches/growing-push-for-politicians-visit-prison-wykstra-190829/ [https://perma.cc/D24L-QGYN] ("It's our job. We represent them, too. So whether or not they're enfranchised or disenfranchised, we are still their representative, . . . [t]o not pay any attention, to not come and listen to and speak to such a huge portion of our population in some of these districts, is egregious and unacceptable.").

[103] Remster & Kramer, *supra* note 8, at 421.

[104] Ebenstein, *supra* note 93, at 369–70 ("Prisons allow for only a limited connection between people incarcerated and the residents of the community surrounding the prison and few opportunities to politically engage. By contrast, college students and military personnel can choose to engage their surrounding communities in civic life.").

[105] 505 U.S. 788 (1992).

[106] *Id.* at 790–91.

[107] *Id.* at 795.

[108] *Id.* at 806.

> which, considering the modes of transportation available at the time, may have been quite lengthy.[109]

Relying on the same logic, counting prisoners as residents of their communities prior to incarceration "does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality."[110] Both groups lack a meaningful say in where they go after leaving their home communities, and likely have retained ties to those communities.

B. Non-Voting Populations

A representative democracy includes representation for individuals who are not able to cast a ballot for a variety of reasons. While it may seem comical to group minors with undocumented immigrants, immigrants on a visa, and disenfranchised ex-offenders, all of those populations, like incarcerated individuals, are unable to vote for their representation. *Evenwel* made it clear that redistricting based on total population without regard for voter population is constitutionally permissible.[111] However, prisoners can and should be distinguished from these other non-voting groups. Prisoners "are a unique non-voting population in terms of representation in that they are moved without their consent, sequestered from outside interaction, and disconnected from the local community and official representatives."[112]

The *Calvin* Court considered other groups of non-voters under the same "representational nexus" framework that it applied to the community at large.[113] As is the case for minors who do not wield the ability to vote, non-voting individuals may still engage with the political process by speaking out on political issues, organizing in their communities, and encouraging their representatives to be responsive to their needs. Other non-voting communities, such as students here on visas, or non-citizen residents, often live, work, eat, and sleep in the same communities as voter-eligible populations and have functionally the same opportunities to engage with and benefit from the communities they live in. Individuals who qualify for a path to citizenship under the DREAM Act are a paradigmatic example of the opportunities available to engage with the larger community.[114] Since

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[109] *Id.* at 804. The Court shares an anecdote about President George Washington residing primarily at the seat of government or travelling instead of at Mount Vernon, yet he was counted as a resident of Mount Vernon in the Census. *Id.*
[110] *Id.* at 806.
[111] *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).
[112] Remster & Kramer, *supra* note 8, at 12.
[113] Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1310 (N.D. Fla. 2016).
[114] *See, e.g.*, DREAM Act, S. 874, 116th Cong. (2019).

President Trump's termination of the Deferred Action for Childhood Arrivals program in 2017, the individuals who qualified ("Dreamers") could engage with their political representatives to look after the Dreamers' needs.[115] If their needs were not met, Dreamers could even organize mass action such as protests and other political activities.[116] This type of engagement is simply not possible for prisoners.

Prisoners are distinct from other non-voting and group quarters populations and should be treated as such in redistricting efforts. However, despite the recent attention given to prison gerrymandering cases in the federal court systems,[117] and a potential stand-off between conflicting circuit law,[118] violations of state constitution claims may prove to be the superior method of defeating these discriminatory schemes.

IV. PRISON GERRYMANDERING IN WISCONSIN

Wisconsin's constitution stipulates when redistricting should occur. "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants."[119] Despite the simplicity of the constitutional requirement, the Wisconsin Constitution does not define inhabitants or otherwise clarify the mechanisms of redistricting beyond simply charging the legislature to do it.[120] Despite a dearth of textual constitutional guidance to resolve the complex issues of who, precisely, is an inhabitant, in 1981, Wisconsin Attorney General Bronson La Follette (Attorney General) issued an opinion stating that the term "inhabitants," as used at the time of adoption, was intended to be based on all residents regardless of their eligibility to vote.[121] Therefore, "it would be inappropriate to exclude any institutional population" when redistricting the legislature.[122] Though the intent of the framers is a powerful

[115] *See, e.g.*, Cheyenne Haslett, *Dreamers Protest on Capitol Hill on DACA Deadline Day*, ABC NEWS (Mar. 5, 2018), https://abcnews.go.com/Politics/dreamers-protest-capitol-hill-daca-deadline-day/story?id=53539262 [https://perma.cc/NU7X-Q5ES].

[116] *See id.*

[117] *See, e.g.*, Davidson v. City of Cranston, 837 F.3d 135, 144 (1st Cir. 2016).

[118] *Compare Davidson*, 837 F.3d at 144, *with Calvin*, 172 F. Supp. 3d at 1292, Though *Calvin* was a district court decision, it would serve as precedent if the Eleventh Circuit took up a similar case.

[119] WIS. CONST. art. IV, § 3.

[120] *See id.*

[121] *See* Bronson La Follette, *Opinion No. OAG 22-81*, 70 Op. Att'y Gen. 80, 88–89 (1981) [hereinafter Attorney General 1981 Opinion].

[122] *Id.* at 91.

argument, the Wisconsin legislature and, subsequently, the Wisconsin courts have interpreted and defined inhabitants consistently.[123]

Revisiting the opinion is critical for Wisconsin's democracy. Since the Attorney General's opinion, Wisconsin's prison population has grown from under 4,000 in 1980[124] to over 23,000 in 2019,[125] and is projected to rise to 25,000 by 2021.[126] Put another way, Wisconsin incarcerated 84 out of every 100,000 residents in 1980 compared to 378 per 100,000 in 2019.[127] This is a sizeable population that is being counted in a different location than where they have previously resided and to where they presumably will return.

A. Attorney General's 1981 Opinion

The 1981 Attorney General opinion is the only official direct legal interpretation of "inhabitant."[128] At the time of its writing, the effect of the prison population on districts was likely small.[129] The Attorney General's opinion relies on three primary arguments. First, the Census counts prisoners at their incarcerated locations due to the usual residence rule. Second, the historical usage of "inhabitant" in contemporary statutes suggests that prisoners are residents of their prisons. Third, several Wisconsin Supreme Court decisions at the turn of the century determined the constitutional requirements of redistricting in Wisconsin.[130]

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[123] *See infra* Section II.B.

[124] *Prisoners in 1980*, U.S. DEP'T. OF JUST.: BUREAU OF JUST. STAT. (May 1981), https://www.bjs.gov/content/pub/pdf/p80.pdf [https://perma.cc/6WH3-YD75].

[125] *Corrections at a Glance*, WIS. DEP'T OF CORR. (Dec. 2019), https://doc.wi.gov/DataResearch/DataAndReports/DAIAtAGlance.pdf [https://perma.cc/SXD9-NTTS].

[126] *See* Ximena Conde, *Report Shows Record Number of Adults in Wisconsin Prisons*, WIS. PUB. RADIO (Oct. 31, 2018), https://www.wpr.org/report-shows-record-number-adults-wisconsin-prisons [https://perma.cc/G4SV-CR2Z] (projecting a 5.7% increase in 2021 from the amount of adult prisoners in 2017, which was 23,687).

[127] E. Ann Carson, *Corrections Statistical Analysis Tool: Imprisonment Rate of Sentenced Prisoners Under the Jurisdiction of State or Federal Correctional Authorities per 100,000 U.S. Residents, December 31, 1978-2018*, BUREAU OF JUST. STAT. (Dec. 9, 2019), https://www.bjs.gov/index.cfm?ty=nps [https://perma.cc/V7BG-7AF8] (for the year 1980); E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2019 11–12 tbl. 7 (Oct. 2020), https://www.bjs.gov/content/pub/pdf/p19.pdf [https://perma.cc/T58N-USDJ].

[128] Based on a search of Wisconsin's Annotated Statutes and Westlaw for Wisconsin state courts and federal court cases. *See* Attorney General 1981 Opinion, *supra* note 120, at 88–89. *Compare* State *ex rel.* Att'y Gen. v. Cunningham, 51 N.W. 724 (1892), *with* State *ex rel.* Lamb v. Cunningham, 53 N.W. 35 (1892) (both discussing the importance of the census in the reapportionment process).

[129] *See* Remster & Kramer, *supra* note 9, at 9–10 ("Until the 1980s there were so few prisoners that this policy likely had little impact.").

[130] *See* Attorney General 1981 Opinion, *supra* note 120, at 84, 87, 89.

1. Usual Residence and "Other Aliens"

The Attorney General placed great stock in the Census practice of counting individuals at their usual residence. Quoting the Census Bureau: "These are persons under care or custody at the time of enumeration. They are persons in . . . correctional institutions. These persons are enumerated as residents of an institution—regardless of their length of stay in a particular place."[131] In support, the Attorney General cited *Borough of Bethel Park v. Stans*,[132] where the Third Circuit upheld the Census usual residence practice for individuals confined to an institution.[133]

In *Borough of Bethel Park*, the city challenged the Census Bureau's practice of counting college students, members of the armed forces, and prisoners as inhabitants of their respective institutions, arguing it was unconstitutional under the First and Fourteenth Amendments for the purposes of congressional reapportionment.[134] The Third Circuit proceeded to review how the earliest Congress empowered the Census to determine an individual's location based on their "usual residency."[135] In analyzing how college students, members of the armed forces, and prisoners have historically been counted, the court rejected the plaintiff's complaints by narrowly focusing on the logistical difficulty faced by the Census Bureau in correctly counting and allocating individuals, and that the Constitution did not require anything else.[136] "The enormous task which the [Census] Bureau must complete in enumerating people according to each state can reasonably necessitate the use of a definite, accurate and verifiable standard."[137] However, the court cites to *Burns v. Richardson* in a footnote,[138] where the court clarifies that its holding is only true for congressional apportionment, while *Burns* was focused on state legislative redistricting.[139]

The Attorney General also dismissed the distinction between non-voting incarcerated individuals and the surrounding community by citing *Federation for American Immigration Reform v. Klutznick*, which held that the U.S. Constitution's "whole number of persons" requirement

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[131] *Id.* at 84 (quoting U.S. BUREAU OF THE CENSUS, *20th Decennial Census—1980, Questionnaire Reference Book* (D-561), at 90).
[132] 449 F.2d 575, 578 (3rd Cir. 1971).
[133] *See* Attorney General 1981 Opinion, *supra* note 120 (including other institutions such as mental institutions, senior care facilities, and long-term care hospitals).
[134] *See Borough of Bethel Park*, 449 F.2d at 577.
[135] *See id.* at 578.
[136] *See id.* at 581.
[137] *Id.* at 579.
[138] 384 U.S. 73, 92 n.21 (1966).
[139] *Borough of Bethel Park*, 449 F.2d at 582 n.4 (citing Burns v. Richardson, 384 U.S. 73, 86 (1966)) ("The Court indicated that a state legislature must be apportioned substantially on a population basis but did not say that a particular population measure was required.").

for congressional apportionment includes both "illegal as well as legal aliens."[140]

Generally, this analysis tracks with federal jurisprudence, as discussed in *Evenwel* and *Harris*.[141] However, the Attorney General's analysis makes little mention of *Burns*, decided fourteen years prior, which explicitly allowed some form of redistricting based on factors other than total population.[142] Since *Klutznick* is a case from the district court of the District of Columbia, it is non-binding on Wisconsin. For that reason, these deficits in the Attorney General's opinion could be corrected, if revisited.

2. Wisconsin's Statutory Usage of "Inhabitant"

The Wisconsin Constitution was adopted in 1848 and the relevant section on reapportionment originally read:

> The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter, and at their first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants . . . .[143]

This is substantially similar to the revised version that exists today.

> At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.[144]

Statutes passed contemporaneously with the Wisconsin Constitution also use the term "inhabitant," defining it as "a resident in the particular locality . . . ."[145] This is consistent with other contemporaneous laws defining that residents included everyone regardless of whether they were able to vote.[146] The Attorney General pointed out four sections in the

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[140] *See* Attorney General 1981 Opinion, *supra* note 120 (quoting Fed'n for Am. Immigr. Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980)).
[141] *See generally supra* Section II.E.
[142] *See supra* text accompanying note 73; Attorney General 1981 Opinion, *supra* note 120, at 87 n.2.
[143] Attorney General 1981 Opinion, *supra* note 120, at 87 (showing the effective version in 1981 when the Attorney General wrote the opinion is identical to the modern version with "excluding soldiers, and officers of the United States army and navy" appended to the end).
[144] WIS. CONST. art. IV, § 3.
[145] Attorney General 1981 Opinion, *supra* note 120, at 88 (citing 1849 Revised Statutes, Ch. 4, § 1).
[146] *See id.* at 89 (excluding "certain Indians").

Laws of 1855 that focus on counting residents "within their city, town, or division," or "at every dwelling."[147]

3. Wisconsin Supreme Court Precedent

The Attorney General next argued that the Wisconsin Supreme Court determined that, due to language specifying reapportionment should come after the enumeration in the Census, this decennial Census is "evidently intended as the basis of apportionment."[148] This language comes from two 1892 Wisconsin Supreme Court cases on reapportionment.[149] The Attorney General then continued to discuss equal apportionment and its interpretation by the state and federal courts.[150] However, only the 1892 cases directly apply to prison gerrymandering.[151]

B. Race and Residency

Where prisoners are counted for representation is more relevant in Wisconsin due to the overwhelming concentration of minorities in Milwaukee—Wisconsin's largest city.[152] Wisconsin also disproportionately incarcerates Black residents, at a rate of 11.5 times more than white residents.[153] Though the state as a whole is largely White, rural communities are experiencing population decline, while the urban counties where Black residents predominantly live are growing.[154] Counting incarcerated individuals in the county of incarceration, instead of county of residence, inflates the residency numbers in shrinking rural counties with large prisons,

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[147] *Id.*

[148] *Id.* at 90 (quoting State *ex rel.* Lamb v. Cunningham, 53 N.W. 35 (Wis. 1892)).

[149] *See State ex rel. Lamb v. Cunningham*, 53 N.W. at 35; State *ex rel.* Att'y Gen. v. Cunningham, 51 N.W. 724, 738 (Wis. 1892).

[150] Attorney General 1981 Opinion, *supra* note 120, at 91–93.

[151] *See id.*

[152] Katherine J. Curtis & Sarah E. Lessem, *2010 Census Chartbook*, WIS. APPLIED POPULATION LAB 30 (Dec. 2014), https://cdn.apl.wisc.edu/publications/2010_census_chartbook_wi.pdf [https://perma.cc/36ZW-JYNG] ("Today, Wisconsin's African Americans live primarily in the southeast and in rural counties that have prisons.").

[153] *See, e.g.*, Mary M. Prosser & Shannon Toole, *Wisconsin's Mass & Disparate Incarceration*, 91 WIS. LAW. (Apr. 2018), https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=91&Issue=4&ArticleID=26275 [https://perma.cc/E7PC-SLNC].

[154] *See, e.g.*, Chris Hubbuch, *Census: Dane County Leads State in Population Growth; More than Double Any Other County in Wisconsin*, WIS. ST. J. (Apr. 18, 2019), https://madison.com/wsj/news/local/govt-and-politics/census-dane-county-leads-state-in-population-growth-more-than/article_3ae7268e-8f02-52e3-a599-8787064dcf60.html [https://perma.cc/6QCS-UJVX] (reporting and visualizing raw data from the Census Bureau).

distorting overall legislative maps. The true populations of Black communities in Wisconsin are undercut because the disproportionately Black prison population contributes instead to the "population" in primarily White districts.

Though statewide efforts to legislatively change this practice have failed, some localities in Wisconsin have responded to their incarcerated populations by splitting out the population among several districts to dilute the distortional effects. Specifically, pursuant to the *Calvin* decision, Dodge County, Wisconsin, has drawn its supervisor districts to split large correctional facilities among six districts so that voters in one district do not have disproportionate weight given to their votes.[155] This county-level solution mirrors solutions pursued elsewhere nationally.[156]

V. WISCONSIN'S CONSTITUTION REQUIRES "RESIDENCY" FOR REDISTRICTING

By counting incarcerated individuals at their place of incarceration, Wisconsin is likely violating its own constitutional requirements for redistricting. The Wisconsin Constitution requires that districts be reapportioned "according to the number of inhabitants."[157] The Attorney General's opinion is an incorrect reading based on historic Census practice and convenience, without regard to the distorting effects of such a policy and the legislative usage of "inhabitants."[158]

As of February 28, 2020, Wisconsin has incarcerated 23,471 individuals.[159] Of these individuals, over 43% are Black,[160] despite comprising only 6.1% of Wisconsin's population.[161] Wisconsin's Black population is also highly concentrated in six counties in Wisconsin's southeast.[162] Milwaukee County alone is home to nearly seventy percent of Wisconsin's

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[155] *See* Damos, *supra* note 101.
[156] *See, e.g.*, Stachulski, *supra* note 4, at 407.
[157] WIS. CONST. art. IV, § 3.
[158] *Id.*
[159] *Weekly Population Report for Friday, Feb. 28, 2020*, WIS. DEP'T OF CORR. (2020), https://doc.wi.gov/DataResearch/WeeklyPopulationReports/02282020.pdf [https://perma.cc/Y5XZ-JFAX].
[160] *2019 Profile of Persons in Our Care*, WIS. DEP'T OF CORR. 2 (July 2020), https://doc.wi.gov/DataResearch/DataAndReports/2019%20PIOC%20Profile.pdf [https://perma.cc/JM75-DM2W].
[161] *African Americans in Wisconsin: Overview*, WIS. DEP'T OF HEALTH SERVS. (Sept. 10, 2018), https://www.dhs.wisconsin.gov/minority-health/population/afriamer-pop.htm [https://perma.cc/JNN7-M63G].
[162] *Id.* ("Nearly 90 percent of Wisconsin's African American population lives in the following six counties, all of which are located in Southeastern or Southern Wisconsin: Milwaukee, Dane, Racine, Kenosha, Rock, and Waukesha.").

Black population.[163] Without further statistical information from Wisconsin's Department of Corrections, a precise match of the incarcerated population back to their home county is not possible. For illustrative purposes only, I assume a proportionate distribution of Wisconsin's Black prison population from each county.[164] For example, assuming 70 percent of Wisconsin's Black prison population comes from Milwaukee County, that would mean roughly 6,600 Black individuals from Milwaukee County are currently being counted externally in other counties.[165]

A. Legislative Definition

The Wisconsin Constitution requires that districts are reapportioned "according to the number of inhabitants."[166] The Attorney General's opinion on how the constitution interprets "inhabitant" contradicts decades of Wisconsin's statutory interpretation of "inhabitants." The Wisconsin Legislature has weighed in on how to define "inhabitants" in other contexts. Wisconsin's Constitution requires apportionment based on all inhabitants.[167] Wisconsin law regarding statutory construction defines "inhabitant" to mean "resident."[168] Throughout the statutes, residence is defined six separate times as the "voluntary concurrence of physical presence with intent to remain in a place of fixed habitation . . . ."[169] This definition predates Attorney General La Follette's 1981 opinion, but he makes no reference to the Legislature's consistent interpretation in insisting upon a different definition of "inhabitant" for this specific clause in the constitution.[170]

Subsequently, the Wisconsin Legislature has continued to support the interpretation that prisoners are not residents—and therefore, not inhabitants—of the prisons where they are incarcerated. In Chapter 51 of

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[163] *Id.*

[164] This is a rough approximation to help illustrate the argument in the absence of proper statistical demographic information. Determining the true extent of prison gerrymandering in Wisconsin requires further analysis.

[165] For a more thorough statistical analysis of Pennsylvania, which considers the precise issue this Note addresses, *see* Remster & Kramer, *supra* note 9.

[166] WIS. CONST. art. IV, § 3.

[167] *Id.*

[168] WIS. STAT. § 990.01(15) (2019) (noting this definition predates Attorney-General La Follette's opinion and the Legislature's online statutory history does not have a scanned copy of its enactment. As noted in the Attorney-General's opinion, the 1849 Revised Statutes define inhabitant as a resident, as well).

[169] *See, e.g.*, WIS. STAT. §§ 980.105(1m)(a) (2019); 49.001(6); 46.27(1)(d); 46.272(1)(e); 55.01(6t); 252.16(1)(e).

[170] The phrase "voluntary concurrence of physical presence with intent to remain" has existed in statute since at least 1959. *See* WIS. STAT. § 49.10(12)(c) (1959).

the Wisconsin Statutes, established in 1987, an individual who is in a state facility—which includes incarcerated individuals in a state prison as established in section 302.01 of the Wisconsin Statutes—is a resident of the county in which they were a resident at the time the admission the state facility was made.[171] Also supporting the interpretation that incarcerated individuals are not residents of the prison is section 6.10(1) of the Wisconsin Statutes, which states that residency is the place where the person's habitation is fixed and, "when absent, the person intends to return."[172] Section 51.40(2)(b) of the Wisconsin Statutes directly addresses how to determine county of residence for individuals admitted to a state prison, and this interpretation is supported by section 6.10(1) of the Wisconsin Statutes which provides for temporary absenteeism.

Wisconsin statutes defining "residence" closely comports with the federal definition of domicile as interpreted by federal circuit courts.[173] In a variety of contexts, federal courts have held an individual does not change residence to the prison's location simply because they are incarcerated there.[174] As the Sixth Circuit noted, "[t]he rule shields an unwilling sojourner from the loss of rights and privileges incident to his citizenship in a particular place, such as, for example, paying resident tuition at a local university, invoking the jurisdiction of the local divorce courts, or voting in local elections."[175]

It is unlikely that an incarcerated individual would intend to remain in the community that incarcerated them and, without such a showing, it is unlikely that the individual has changed their domicile as defined by the federal courts and the Wisconsin Legislature. It seems unlikely that the Legislature would have chosen a word that has a key place in the state constitution, defined it consistently as it has been defined since the 1840s, and still intend for the constitutional version to mean something different.

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[171] WIS. STAT. § 51.40(2)(b)(1) (2019).
[172] WIS. STAT. § 6.10(1) (2019).
[173] *See* Denlinger v. Brennan, 87 F.3d 214, 216 (7th Cir. 1996) (stating that domicile is a voluntary status and a forcible change of residence does not alter domicile); Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973) (holding that prisoners may acquire a domicile in their incarcerated community only by express showing of intent to remain); Ellingburg v. Connett, 457 F.2d 240, 241 (5th Cir. 1972) (holding that one does not change residence by virtue of incarceration and residence for venue purposes must be determined by facts); Cohen v. United States, 297 F.2d 760, 774 (9th Cir. 1962) (stating a prisoner's pre-incarcerated residence is more appropriate than a temporary prison resident for giving of notice); United States v. Stabler, 169 F.2d 995, 998 (3d Cir. 1948) (holding that both residence and domicile require some individual choice and that domicile cannot be acquired while in prison); Neuberger v. United States, 13 F.2d 541, 543 (2nd Cir. 1926) (". . . his residence, once established, was not lost by his enforced absence . . .").
[174] *African Americans in Wisconsin: Overview*, *supra* note 160.
[175] *Stifel*, 477 F.2d at 1121.

B. Wisconsin Supreme Court Precedent

The Attorney General's argument rests on two cases decided within months of each other in 1892, each devoting a single line for how "inhabitant" was intended to be used.[176] Each case is primarily about gerrymandering and the concerns the court has for districts that are wildly disproportionate to others.[177]

State ex rel. Attorney General v. Cunningham is the first of the two cases dealing with gerrymandering cited by the Attorney General. In it, the attorney general at the time asked the court to invalidate the legislature's recently passed redistricting plan which had apportioned some districts without regard to local government borders nor to the population in each district.[178] The court rejected the reapportionment plan as unconstitutional.[179] In relevant part:

> If, as in this case, there is such a wide and bold departure from this constitutional rule [of equal districts] that it *cannot possibly be justified by the exercise of any judgment or discretion*, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever.[180]

This holding binds the legislature to adhere to constitutional rules of equalized total population in districts, but implicitly allows for the legislature to justify departures in the exercise of "judgment or discretion" which the Attorney General fails to acknowledge in his opinion.[181]

The second case, *State ex rel. Lamb v. Cunningham*, was brought after the 1892 legislature had reconvened and passed a new redistricting plan that also had greatly uneven districts because the legislature did not split counties or other local units of government.[182] Again, the court determined the plan to be unconstitutional and that apportionment "according to the number of inhabitants" requires an approximate equalization of people in each district.[183] The holding in *Lamb* concerns a

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[176] State *ex rel.* Lamb v. Cunningham, 53 N.W. 35, 54 (Wis. 1892); State *ex rel.* Att'y Gen. v. Cunningham, 51 N.W. 724, 738 (Wis. 1892) (Pinney, J., concurring).
[177] *State ex rel. Lamb v. Cunningham*, 53 N.W. at 59; *State ex rel. Att'y Gen. v. Cunningham,* 51 N.W. at 738.
[178] *State ex rel. Att'y Gen. v. Cunningham,* 51 N.W. at 725.
[179] *Id.* at 730.
[180] *Id.* (emphasis added).
[181] *Id.*
[182] *State ex rel. Lamb v. Cunningham,* 53 N.W. at 35.
[183] *Id.* at 59.

very large disparity in total population between districts, and goes to ensuring that districts are roughly equal and follow both county and local government lines as practicably as possible.[184] The Attorney General emphasizes that the apportionment is to be "'according to the number of inhabitants'. . . *and the enumeration is evidently intended as the basis of apportionment*."[185]

However, the Attorney General does not distinguish between using the enumeration as the "basis of apportionment" or the "judgment or discretion" of the legislature as specified in the Attorney General 1981 Opinion.[186] Each case was decided by the same group of judges in the same year, with similar issues leading up to the eventual decision.[187] It is unlikely that legislative discretion would be suitable for reasonable, minor deviations from total population equality among districts, and then change so quickly without being explicitly addressed. A more natural reading is that the districts must be practically equalized in population to avoid a situation like *Baker v. Carr* where populations among districts radically varied, while still allowing some discretion to the legislature to use their judgment.[188]

From these decisions, the Attorney General determined that total population, "according to the federal decennial census, must be used for legislative redistricting purposes."[189] This conclusion is unsupported when considered in light of other Wisconsin constitutional jurisprudence.

C. Wisconsin's Equal Protection Clause

Though Wisconsin's Constitution does not contain the exact language from the U.S. Constitution's Fourteenth Amendment, the state has long considered an article of its own constitution as a "substantially equivalent limitation."[190] As the Fourteenth Amendment's jurisprudence developed, Wisconsin courts formally tied their own jurisprudence for Article I, Section 1 of the Wisconsin Constitution to the federal Fourteenth Amendment.[191]

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[184] *Id.*

[185] *See* Attorney General 1981 Opinion, *supra* note 120, at 90 (emphasis in original).

[186] *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. at 738.

[187] *See State ex rel. Lamb v. Cunningham*, 53 N.W. 35; *State ex rel. Att'y Gen. v. Cunningham,* 51 N.W. 274.

[188] *See supra* Section II.A for a discussion of *Baker v. Carr*.

[189] Attorney General 1981 Opinion, *supra* note 120, at 91.

[190] Kellogg v. Currens, 87 N.W. 561, 562 (1901) (stating that WIS. CONST. art. I, § 1 is a substantially similar limitation to the Fourteenth Amendment).

[191] *See* Reginald D. v. State, 533 N.W.2d 181, 184 (Wis. 1995) ("'[T]here is no substantial difference' between its equal protection and due process protections and that of the Fourteenth Amendment.").

Given the open question as to whether prison gerrymandering could constitute a violation of the Fourteenth Amendment, it seems likely that the Attorney General's conclusion that Wisconsin's Constitution requires something more is erroneous. This Note encourages Wisconsin to revisit the 1981 opinion.

VI. EQUAL PROTECTIONS CLAUSE REQUIRES BLACK VOTES HAVE EQUAL IMPACT

The Supreme Court has made it clear that gerrymandering is constitutionally permissible unless it is specifically prohibited.[192] More recently, the Court upheld districts drawn without consideration for the equalization of eligible voter population.[193] Given the current state of the law post-*Evenwel*, it is likely that prison-based gerrymandering is facially permissible on a federal level. However, the *Evenwel* Court noted that in areas with large numbers of temporary residents, eligible voter population, instead of total population, may be the appropriate standard for constitutionally permissible districts.[194]

Despite the unlikelihood of a facial challenge being successful, there may be some unusual situations where the facially-permissible prison gerrymandering results in an impermissible gerrymander, such as one based on race. Challenging the process as discriminatory may prove to be more successful in Wisconsin. The state's demographic, geographic, and incarceration practices result in primarily Black individuals from primarily Black counties to be counted in primarily White counties far from their actual homes, but these individuals are neither allowed to vote in these counties nor meaningfully connect with them.

The standards set forth in *Calvin* would serve as a good starting point for any potential legal challenge to a state's prison gerrymandering process. Specifically, a state that could show their prisoners "comprise a (1) large number of (2) nonvoters who (3) lack a meaningful representational nexus with the[ir] [representatives], and . . . [are] (4) packed into a small subset of legislative districts."[195] Wisconsin's profile may be a good opportunity to see whether the Seventh Circuit will follow *Calvin* or *Davidson*, or otherwise chart its own path.

VII. WHAT'S NEXT?

[192] Burns v. Richardson, 384 U.S. 73, 92 (1966).
[193] Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).
[194] *Id.* at 1124 (citing *Burns*, 384 U.S. at 73).
[195] Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016).

Any change is likely to prove contentious. Despite consistent polls showing that seventy percent of Wisconsinites would prefer a less partisan process for redistricting,[196] the Republican-controlled Legislature has rejected attempts to de-politicize the process.[197] Wisconsin is currently under a divided government,[198] and it seems likely that whatever redistricting plan is put into place will end up before the state's Supreme Court once again.

While it is likely inevitable that other partisan disputes will result in a lawsuit, the state can rectify a long history of miscounting its prison population by passing a reform such as the one recently passed in New Jersey.[199] The data collection is not onerous. New Jersey law requires its Department of Corrections to keep a database of the last known residence for each person within their system that can then be used during redistricting to ensure an accurate count.[200] Wisconsin's Department of Corrections likely already keeps this information or, if it does not, could collect it going forward. In fact, a group of legislators introduced Assembly Bill 400 in the 2020 session. It is simpler than New Jersey's law in that it does not specify how the prisoner's information is to be collected, granting the governor and legislature further discretion in developing those processes.[201]

However, it is not easy to divorce prison gerrymandering from its typical partisan nature, so the likelihood of such a proposal passing a Republican-controlled Legislature is reduced. A study of prison gerrymandering in Pennsylvania "suggest[s] that incarceration, like the

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[196] Charles Franklin, *New Marquette Law School Poll Finds Sanders' Support Rising Among Democrats and Tight Races Between Trump and Each Democratic Candidate for President*, MARQUETTE L. SCH. POLL (Feb. 27, 2020), https://law.marquette.edu/poll/2020/02/27/new-marquette-law-school-poll-finds-sanders-support-rising-among-democrats-and-tight-races-between-trump-and-each-democratic-candidate-for-president/ [https://perma.cc/J7TL-QKGY] ("Voters favor a non-partisan approach to redistricting over the current process in which the legislature and governor are responsible for drawing legislative and congressional districts.").

[197] Scott Bauer, *Wisconsin Republicans Dismiss Nonpartisan Redistricting Plan*, AP NEWS (Jan. 23, 2020), https://apnews.com/86670cf694caeffb440433abb2b8fed5 [https://perma.cc/VDS9-3ULF] ("Democrats have tried in vain to have the Legislature change the redistricting process and create a nonpartisan commission. . . . Republicans have rejected past attempts to amend the constitution to create a nonpartisan redistricting process.").

[198] Laurel White & Shawn Johnson, *State Legislature Convenes New Session with Divided Government*, WIS. PUB. RADIO (Jan. 7, 2019, 5:20 PM), https://www.wpr.org/state-legislature-convenes-new-session-divided-government [https://perma.cc/72UY-8ZE3].

[199] Brent Johnson & Matt Arco, *N.J. Will Soon Allow You to Register to Vote Online*, NJ.COM (Jan. 21, 2020), https://www.nj.com/politics/2020/01/nj-will-soon-allow-you-to-register-to-vote-online.html [https://perma.cc/C4RT-TKQN] ("The new law (S589) requires the Garden State's secretary of state to create and maintain a secure website to allow eligible voters to register to vote using an online form.").

[200] S. Doc. No. 758, 218th Leg. (N.J. 2018).

[201] Assemb. B. 400, 2019–2020 Leg. (Wis. 2019).

urban/rural divide in voter preference, buttresses Republican advantages even without partisan gerrymandering. The results . . . indicate that incarceration leads to an overrepresentation of non-urban voters in democratic processes via rural vote inflation due to prison location."[202]

In the absence of legislation, Wisconsin's governor, as the head of the executive branch, could consider directing the Department of Corrections to collect information regarding prior residence. Once the data is collected, the governor could give it to the legislature to use as they see fit in the redistricting process. While this is not a true "solution" to prison gerrymandering, the information would put pressure on the legislature to incorporate the data in the redistricting process or pay a potential political price for actively ignoring the information. In the absence of legislation prohibiting the practice, public pressure and an awareness campaign would center the entire redistricting conversation around fair representation.

The governor could also ask the Department of Corrections, or a different state agency, to conduct a study of the impact banning prison gerrymandering might have on Wisconsin. Wisconsin deserves a comprehensive study to determine which districts' power has been unfairly inflated by prison gerrymandering and which has been reduced. This is a critical first step to drafting fair districts going into the 2021 redistricting cycle and beyond.

Finally, the governor should ask the attorney general to revisit the Attorney General 1981 Opinion and reconsider it in light of forty years of additional case law and a growing prison population whose current residence does not meet the definition of inhabitance as used by the Wisconsin legislature. Such opinions may not bind courts to the Attorney General's interpretation but can be persuasive nonetheless.[203]

A governor-initiated proposal would also align neatly with Wisconsin Governor Tony Evers' non-partisan People's Maps Commission[204] that would place public pressure on the legislature to adopt redistricting maps more fairly representative of Wisconsin.[205]

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[202] Remster & Kramer, *supra* note 9, at 22–23 (internal citation omitted).

[203] *AG Opinions: What is an AG Opinion?,* WIS. DEP'T OF JUST., https://www.doj.state.wi.us/opinions/ag-opinions [https://perma.cc/Q6RA-5LYC] ("Wisconsin courts do not have any obligation to follow an interpretation provided by an [Opinion of the Attorney General], but they often do. As the Wisconsin Court of Appeals has written, 'Well-reasoned attorney general's opinions have persuasive value when a court later addresses the meaning of the same statute.'").

[204] For more information on the People's Maps Commission, *see* THE PEOPLE'S MAPS COMMISSION, https://govstatus.egov.com/peoplesmaps [https://perma.cc/FM75-FY7B].

[205] Laurel White, *Gov. Tony Evers Orders Creation of Nonpartisan Redistricting Commission*, WIS. PUB. RADIO (Jan. 27, 2020, 11:05 AM), https://www.wpr.org/gov-tony-evers-orders-creation-nonpartisan-redistricting-commission [https://perma.cc/VEJ7-6NZ5] ("'When 80 percent of our state supports medical marijuana, and 80 percent of our state

VIII. CONCLUSION

Prison gerrymandering is a policy issue with grave civil rights concerns. Unlike college students or members of the military, incarcerated individuals do not make use of local services, are ineligible to vote for their local representation, and are otherwise isolated from the community to which they only contribute a statistical body count.

> [I]ncarceration and American concepts of equal representation combine to create "phantom constituents" and racially unequal political representation. The incarcerated are not only missing from their communities, they are also advantaging other communities.[206]

In an era of mass incarceration, the injustice perpetuated by prison gerrymandering will continue to compound. To paraphrase the Wisconsin Supreme Court decision relied upon by Attorney General La Follette, simply because previous redistricting plans have violated the constitution, the redistricting plan of 2021 may not do so with impunity.[207] Wisconsin must act now to avoid continuing a century and a half of mistakes.

supports universal background checks, and also (extreme) risk protection orders, (and) 70 percent want Medicaid expansion, and elected officials can ignore those numbers and say, "Go jump in a lake," something's wrong,' Evers said.").

[206] Remster & Kramer, *supra* note 9, at 26.

[207] State *ex rel.* Lamb v. Cunningham, 53 N.W. 35, 63 (Wis. 1892) ("I am not claiming that because previous legislatures have violated the constitution the legislature of 1892 may do so with impunity.").