Essay

States, the Final Frontier: How Minnesota's State Constitution Can Serve as New Ammunition in the Fight Against Prison Gerrymandering

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INTRODUCTION

Minnesota barely retained is current eight Congressional districts after the 2020 census, snagging the 435th of the 435 seats in the House of Representatives allotted by a margin of 89 people.[1] Though Minnesota has retained all eight districts, the upcoming redistricting process is still likely to be fraught with disagreement.[2] Some districts have an advantage: prisons. While incarcerated prisoners typically cannot vote, they still count in the United States census.[3] When Minnesota redraws its district lines, it will have to decide where to count these prisoners: their incarceration site or their home.[4]

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1. Briana Bierschbach & Patrick Condon, *Minnesota Won't Lose Eighth Congressional Seat, Census Bureau Rules*, STAR TRIB. (Apr. 26, 2021, 2:34 PM), https://www.startribune.com/minnesota-won-t-lose-eighth-congressional-seat-census-bureau-rules/600050299 [https://perma.cc/ZCM9-FZLU].

2. *Id.* (stating that a group of citizens has already filed a lawsuit asking for the courts to take over the redistricting process).

3. Hansi Lo Wang & Kumari Devarajan, *'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts*, NAT'L PUB. RADIO: CODE SWITCH (Dec. 31, 2019), https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts [https://perma.cc/D5LU-QYRY].

4. *See, e.g.*, *Ending Prison Gerrymandering in Minnesota*, PRISON POL'Y INITIATIVE (Jan. 25, 2013), https://www.prisonersofthecensus.org/factsheets/mn/MN_bill_factsheet.pdf [https://perma.cc/K3AA-EYK6] (giving examples of current districts in Minnesota that benefit from prison gerrymandering and proposing a legislative change).

"Prison gerrymandering" is the term for the United States Census Bureau's practice of counting incarcerated individuals toward the population of the district where they are incarcerated, not the district where they resided before incarceration.[5] When state legislatures draw district lines, districts with prisons see their census numbers inflated by their incarcerated population.[6] Prison gerrymandering systematically transfers population and political power from urban districts to rural districts, as the majority of prisoners are from cities while prisons are disproportionately located in rural areas.[7] Additionally, predominantly white towns see their population numbers boosted by prisoners who are disproportionately Black and Latinx.[8]

There are a number of potential routes to challenge prison gerrymandering. While many states have proposed laws to curtail the practice,[9] most states have not succeeded in abolishing the practice entirely.[10] Although a federal court case challenging prison gerrymandering via the Equal Protection Clause has found some recent success,[11] it appears that federal courthouse doors may be closing to prison gerrymandering cases of this nature due to current Fourteenth Amendment Supreme Court precedent.[12] While additional federal claims could challenge prison gerrymandering for violating the right to vote or the Voting Rights Act,[13] these claims are untested and uncertain. With the 2020 census wrapping up and redistricting

5. *See The Problem*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/impact.html [https://perma.cc/K2FU-USH2].

6. *See* Wang & Devarajan, *supra* note 3.

7. *The Problem*, *supra* note 5.

8. Wang & Devarajan, *supra* note 3.

9. *Legislation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/legislation.html [https://perma.cc/P77F-3ZYW].

10. *See Ending Prison Gerrymandering in Your Community, Your State and in the Nation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/action.html [https://perma.cc/FX53-RBYB] (stating that only California, Colorado, Delaware, Maryland, Nevada, New Jersey, New York, Virginia, and Washington have passed statewide legislation ending, prison gerrymandering). Illinois recently became the tenth state to eliminate prison gerrymandering. *Illinois Governor J.B. Pritzker Signs Law Ending Prison Gerrymandering*, PRISON POL'Y INITIATIVE (Feb. 25, 2021), https://www.prisonersofthecensus.org/news/2021/02/25/illinois-victory [https://perma.cc/Q38W-3USC].

11. NAACP v. Merrill, 939 F.3d 470 (2d Cir. 2019).

12. *See, e.g.*, Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1496–1508 (2017) (examining case law around the Equal Protection clause and one-person one-vote at the federal level).

13. Tatiana S. Laing, Comment, *Seeing in Color: The Voting Rights Act as a Race-Conscious Solution to Prison-Based Gerrymandering*, 50 SETON HALL L. REV. 499, 512 (2019).

right around the corner,[14] it is essential that legal challengers present their strongest claims.

Absent an effective remedy through the federal courts, this Essay proposes that using state constitutions in state courts provides a better route to challenge prison gerrymandering. Oftentimes, state constitutions grant broader protections to voting rights and have more expansive Equal Protection clauses that can serve as a strong legal foundation for challenging prison gerrymandering.[15] Additionally, some state constitutions protect prisoners' residency status,[16] further bolstering such claims. This Essay uses Minnesota's Constitution to demonstrate this potential. Challenges based on state constitutions have a higher chance of prevailing and eliminating prison gerrymandering on a state level until a federal law passes to eliminate this practice altogether. Reformers in Minnesota and across the country should seriously consider launching state constitution-based challenges to prison gerrymandering, given the importance of the upcoming redistricting cycle.

THE LAW OF PRISON GERRYMANDERING

This Part demonstrates how the practice of prison gerrymandering, which unjustly transfers power and resources from urban, diverse communities to rural, white communities has its roots in the Census Bureau's Policies. Section A lays out research on how prison gerrymandering shifts the place the U.S. Census counts an individual from their home district to the district where they are imprisoned and what implications that shift brings. Section B outlines the Census Bureau's policies that underpin prison gerrymandering.

A. THROUGH VOTER DILUTION AND SKEWED FEDERAL FUNDING DISTRIBUTION, PRISON GERRYMANDERING UNJUSTLY TRANSFERS POWER AND RESOURCES

The United States census has counted incarcerated people in the district where they are imprisoned since the first census in 1790.[17] Until the 1970s, the incarcerated population was low enough that it did not significantly impact redistricting when prisoners were

14. *Important Dates*, U.S. CENSUS BUREAU, https://2020census.gov/en/important-dates.html [https://perma.cc/2NYR-X7LF].

15. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114 (2009).

16. *See, e.g.*, MINN. CONST. art. VII, § II.

17. Wang & Devarajan, *supra* note 3.

counted in the prison's district, not their home district.[18] However, due to the rise of mass incarceration, over 2.3 million incarcerated individuals are counted in places they almost certainly do not consider home.[19]

Statistics show how prison gerrymandering disproportionately benefits some communities while disadvantaging others. For example, sixty percent of Illinois's prisoners are from Cook County (home to Chicago), yet ninety-nine percent of them are counted outside Cook County.[20] A recent study of Pennsylvania's state legislative districts highlights the impact this process has on the political voice of incarcerated people's home communities.[21] The study found that the districts which gain the most residents due to prison gerrymandering are concentrated in central and western Pennsylvania, the more rural portions of the state, and the districts that lose the most residents are located in southwestern (Pittsburgh), eastern (post-industrial cities like Allentown and Reading), and southeastern Pennsylvania (Philadelphia).[22] This dynamic demonstrates that the impacts of prison gerrymandering are not evenly distributed among rural and urban districts.

Additionally, the study revealed troubling racial patterns as well. The average white Pennsylvanian's district would lose roughly 59 individuals if prisoners were counted in their pre-incarceration districts, and the average Black and Latinx voter's district would gain approximately 353 and 313 members, respectively.[23] While "differences of a few hundred residents are relatively small compared to the average size of a district (roughly 60,000), some districts in Pennsylvania have as few as 41,000 voting age adults and fewer than 20,000 votes were cast in approximately 78% of the competitive races in 2014 . . . ."[24] Thus, prison gerrymandering makes a big difference in elections, especially in rural areas where prisons are located and

18. *Id.*

19. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/DKW4-J8XV] (compiling the total number of incarcerated persons in America across all jurisdictions and systems of confinement).

20. *The Problem*, *supra* note 5.

21. Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REV. 417 (2018).

22. *Id.* at 427 (presenting a counterfactual where incarcerated persons are counted in their pre-prison districts).

23. *Id.* at 430–31.

24. *Id.* at 431.

urban areas where prisoners predominantly resided pre-incarceration.[25]

If prisoners were counted in their pre-incarceration districts, the districts would have uneven populations. In *Reynolds v. Sims*, the Supreme Court held that courts could address the issue of gerrymandering via a one-person one-vote standard.[26] Also known as the theory of equal representation, *Reynolds* means that districts must have equal numbers of residents, and deviations from this standard are only permitted if they effectuated rational state policy.[27]

Because prisoners, who cannot vote in all states except for two,[28] are typically counted in their incarcerated district rather than their home district, districts with prisons gain a disproportionate say in electing legislators. Additionally, voters in a prisoner's pre-incarceration district lose some say in electing legislators, as more people "live" in the district than are reflected in census count. Perhaps most importantly for a theory of equal representation, the Pennsylvania study found a "substantial likelihood" that Philadelphia would gain an additional majority-minority state house seat if incarcerated prisoners were counted as residents of their last known addresses.[29] If prisoners were counted at their pre-incarceration addresses, the districting of the entire state of Pennsylvania would better reflect the realities of the individuals who live and vote in each district.

In addition to redistricting consequences, prison gerrymandering also results in siphoning political and financial resources away

25. *See The Impact on Local Democracy*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/problem/local.html [https://perma.cc/3JFS-86DQ] (providing a list of places with prison gerrymanders). This phenomenon occurs in Minnesota as well. In Waseca, Minnesota, thirty-five percent of Ward 3 is incarcerated in a federal prison. *See Ending Prison Gerrymandering in Minnesota*, *supra* note 4. Sometimes this effect is even more extreme. For example, one city council ward in a small Iowa city with a prison housing 1,300 prisoners contained just 60 people who were not incarcerated, while the other wards had about 1,400. 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 [https://perma.cc/ARD9-RA6W].

26. 377 U.S. 533, 579 (1964).

27. *Id.*

28. *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 8, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/V9HV-YJRJ].

29. Remster & Kramer, *supra* note 21, at 431 ("Additionally, three of the four districts that grow too large are majority-minority districts; if prisoners are counted as living in their residence of origin, there is a substantial likelihood that an additional majority-minority district in Philadelphia would be necessary to satisfy the Voting Rights Act requirements.").

from already underfunded neighborhoods.[30] Small towns with large prison populations receive inflated amounts of federal grant money, as the amount given is in part determined by the census count.[31] "Prison gerrymandering also skews political priorities, often hindering criminal justice reform."[32] Before it ended prison gerrymandering, seven of New York's state senate districts drawn after the 2000 census reached the minimum population requirements only because they used prison populations to pad their numbers.[33] Furthermore, four senators from these districts opposed reforming the state's drug laws that directly contributed to the state's prison numbers.[34] This example demonstrates that certain politicians are incentivized to protect prison gerrymandering. Thus, vote dilution is just the tip of the iceberg when it comes to the negative impacts of prison gerrymandering.

B. THE CENSUS BUREAU'S POLICIES UNDERPIN PRISON GERRYMANDERING

Currently, the Census Bureau's policy is to count prisoners in the district where they are imprisoned.[35] The Census Bureau rationalizes this decision by citing its roots—"The practice of counting prisoners at the correctional facility is consistent with the concept of usual residence, as established by the Census Act of 1790"—and by relying on strict definitions—"'usual residence' is defined as the place where a person lives and sleeps most of the time, which is not always the same as their legal residence, voting residence, or where they prefer to be

30. *See, e.g.*, Grace Dixon, *How Prison Gerrymandering Strips Power from Communities of Color*, IN THESE TIMES (Aug. 16, 2018), http://inthesetimes.com/article/21388/prison-gerrymandering-communities-of-color-voting-rights-2018-lawsuit [https://perma.cc/E5EZ-L5T7] (citing American Community Survey data that show that rural communities—which house forty percent of the nation's predominantly Black and Latinx prison population and count these individuals as residents—are seventy-nine percent white, while urban areas are fifty-six percent people of color).

31. Wang & Devarajan, *supra* note 3**Error! Bookmark not defined.**; *see also* ANDREW REAMER, GEORGE WASHINGTON INST. FOR PUB. POL'Y, BRIEF 7: COMPREHENSIVE ACCOUNTING OF CENSUS-GUIDED FEDERAL SPENDING (FY2017) (2019), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%202020%20Brief%207A%20-%20Comprehensive%20Accounting.pdf [https://perma.cc/J9GU-GSRF] (documenting the $970.3 billion in federal spending from fiscal year 2017 that relied at least in part on local-level census data).

32. Aleks Kajstura, *Summary of Remarks on Prison Gerrymandering*, 19 J.L. SOC'Y 226, 227 (2019).

33. *Id.*

34. *Id.*

35. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5527–28 (Feb. 8, 2018) [hereinafter 2020 Residence Criteria].

counted."[36] The Census Bureau states that: "Counting prisoners anywhere other than the [prison] facility would be less consistent with the concept of usual residence, since the majority of people in prisons live and sleep most of the time at the prison."[37]

While this reasoning may sound persuasive, the Census Bureau does not uniformly apply this definition. The Census Bureau selectively interprets "usual residence" to allow other populations, such as overseas federal employees, domestic military personnel, and college students to be counted in places where they do not live or sleep most of the time.[38] Yet current Census Bureau policy stands firm on counting prisoners where they are imprisoned, not where they lived pre-imprisonment, despite these internal inconsistencies.[39]

Unsurprisingly, prison gerrymandering is not a popular practice. More than ninety-nine percent of the 77,887 comments collected on the classification of prisoners for the 2020 census "suggested that prisoners should be counted at their home or pre-incarceration address."[40] However, the Census Bureau resisted redefining its policy.

To mitigate this disapproval, the Census Bureau stated that, following the 2020 census, it plans to offer a data product to states that will enable them to reallocate their incarcerated population to their pre-incarceration addresses.[41] If a state wants this data, the Census Bureau will require states to provide the pre-incarceration address of prisoners and the location of incarceration on Census Day so that states and localities can adjust their counts themselves.[42] Additionally, "[t]hey are speeding up select data publication, which will make the data adjustments easier for states that ended prison gerrymandering on their own, and will be particularly useful for states with short redistricting deadlines."[43] However, acknowledging the issues that

36. *Id.* at 5528.

37. *Id.*

38. Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 339–47 (2018).

39. Some reformers have advocated an administrative challenge to Census Bureau policy as a way to end prison gerrymandering. For a summary of this argument, see Sean Suber, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471 (2014).

40. 2020 Residence Criteria, *supra* note 35, at 5527.

41. *Id.* at 5528. For a discussion of why this tool from Census Bureau is not enough by itself to end prison gerrymandering and the other effects of counting prisoners in their prisons, see Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1434 (2019).

42. 2020 Residence Criteria, *supra* note 35, at 5528.

43. Kajstura, *supra* note 32, at 227. However, due to the COVID-19 pandemic,

come with prison gerrymandering and collecting this data is only the first step toward ending this regressive policy.

While the Census Bureau may hold the line at the national level, states and localities across the United States are altering the way prisoners are counted in their interpretations of census data.[44] For example, Maryland drew districts based on the 2010 census numbers with prisoners re-allocated to their pre-incarceration districts.[45] Additionally, over 200 local governments have ended the practice of prison gerrymandering.[46] Some localities, for example, decline to count prisons in their districting, so prison districts are not weighted heavier than surrounding districts without prisons.[47] These initiatives show that states and localities can act to change or eliminate prison gerrymandering even in the face of inaction at the federal level.

redistricting data has been delayed by six months, and states will not receive it until September 30, 2021. *Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/
statement-redistricting-data-timeline.html [https://perma.cc/A3ZC-9J3H].

44. *Momentum is Building*, PRISON POL'Y INITIATIVE (2020), https://www.prisonpolicy.org/graphs/momentum.html [https://perma.cc/BBF5-PRCA].

45. ERIKA L. WOOD, DEMOS, IMPLEMENTING REFORM 8–15 (2014), https://www.demos.org/sites/default/files/publications/implementingreform.pdf [https://perma.cc/J2XG-D3U6] (discussing implementation of Maryland's prison gerrymandering reform law after the 2010 census).

> In April 2010, Maryland's governor signed into law the No Representation without Population Act, H.B. 496.36. The No Representation Act required that the population count used to create legislative districts for the General Assembly, counties and municipalities, as well as for the U.S. House of Representatives, not include individuals incarcerated in state or federal correctional facilities or those individuals who were not residents of the state before their incarceration. The Act further required that incarcerated individuals be allocated to their last known residence before incarceration if the individuals were residents of the state. Maryland's law was broader than New York's law, in that it applied to both state and federal prisons and applied to congressional as well as state and local legislative districts.

Id. at 8.

46. *Local Government That Avoid Prison-Based Gerrymandering,* PRISON POL'Y INITIATIVE (Jan. 7, 2019), https://www.prisonersofthecensus.org/local [https://perma.cc/58PL-RVHY] (listing places that have avoided prison gerrymandering). It is unclear how states who have abolished prison gerrymandering count prisoners who have been sent out of state.

47. Aleks Kajstura, *An Easy Way to Avoid Prison Gerrymandering*, PRISON POL'Y INITIATIVE (May 16, 2013), https://www.prisonersofthecensus.org/news/2013/05/16/excluding-avoiding-redistricting [https://perma.cc/RD3J-M2PV].

II. EXISTING EFFORTS TO END PRISON GERRYMANDERING ARE FLAWED

The simplest solution to prison gerrymandering is for the Census Bureau to count prisoners in their pre-incarceration districts so that rural districts with prisons do not have their numbers artificially padded by prisoners who have no ties to that community.[48] That way, incarcerated individuals keep resources and voting power in their home district even while they are temporarily gone.

There are many ways to implement this solution. While national legislation is ideal, states and reformers should not count on that solution given current Congressional gridlock and the Senate filibuster.[49] Some states have passed their own state laws ending prison gerrymandering,[50] but even that is difficult to achieve. Federal lawsuits offer a potential route around reluctant state legislators (who may benefit from prison gerrymandering themselves), but recent cases demonstrate that the federal courthouse doors may be closing or already closed to such a legal battle.[51] This section evaluates each option in turn and demonstrates their respective flaws.

A. THERE OUGHT TO BE A LAW, AND IN SOME PLACES, THERE IS!

Ten states have passed statewide legislation to end prison gerrymandering for redistricting following the 2020 census.[52] Maryland and New York were the first states to pass such legislation,[53] and as such, have been subject to the most extensive analyses.[54] While these analyses may help reformers in states with willing legislatures, Maryland and New York demonstrate that redistricting itself is a complicated process, and any state hoping to alter the redistricting process must deal with this complexity.[55]

48. *See Solutions*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/solutions.html [https://perma.cc/73WW-26G4].

49. The Prison Gerrymandering Project does not even include model federal legislation as a solution and only in 2021 included a federal bill as a possible solution. *Legislation,* supra note 9.

50. *E.g.*, WOOD, *supra* note 45 (discussing New York and Maryland's laws ending prison gerrymandering); *see also supra* note 10.

51. *See infra* Part II.B.1.

52. *See supra* note 10.

53. WOOD, *supra* note 45, at 1

54. *E.g.*, *id.*; Devon Galloway, Note, *The Numbers Matter: An Update to the Implementation of New York's Prison Gerrymandering Law*, 4 COLUM. J. RACE & L. 205 (2014); Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. L.F. 35 (2012).

55. WOOD, *supra* note 45, at 26.

Legislating to end prison gerrymandering can be complex as it may require addressing elections, corrections, and executive law.[56] A report documenting Maryland and New York's endeavors recommends that states seeking to end prison gerrymandering begin at least two years before Census Day.[57] In addition, many bills simply fail. For example, bills to end prison gerrymandering in Minnesota were proposed in both 2010[58] and 2015[59] and failed to pass. Thus, while state-level legislation is meaningful and impactful in the fight to end prison gerrymandering, it requires many stakeholders to come together and execute a complicated change far in advance. This is not a feasible solution for all locations.

B. FEDERAL LAWSUITS DEMONSTRATE A POTENTIAL ROUTE FOR REFORM USING THE FOURTEENTH AMENDMENT

Reformers fighting against prison gerrymandering have brought a number of cases in federal courts. Until recently, these cases have not met with much success. Subsection 1 outlines cases where the federal courts have not looked favorably on challenges to prison gerrymandering. Subsection 2 highlights a recent Connecticut case that could be a sign of hope for reformers hoping to use the federal courts to end the practice of prison gerrymandering.

1. Troubling Case Law Casts Doubt on this Option

Another potential route for reformers looking to end prison gerrymandering is a federal lawsuit. Even if a state law does pass, it will likely face a legal challenge before it can be implemented.[60] Recently, the Oklahoma Supreme Court held that a proposed initiative that would reallocate prisoners to their home districts for purposes of redistricting, did not violate the Fourteenth Amendment's Equal Protection Clause or Article I, Section 2 of the U.S. Constitution because there was a rational basis for ending prison gerrymandering.[61] This is good

56. *Id.*

57. *Id.* at 27–28. It may be too late for a state to modify any plans that include prison gerrymandering at this point for redistricting based on the 2020 census.

58. S.F. 3097, 86th Leg. (Minn. 2010).

59. H.F. 1189, 89th Leg. (Minn. 2015).

60. *See* Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (challenging Maryland's law ending prison gerrymandering); Little v. N.Y. State Task Force on Demographic Rsch. & Reapportionment, No. 2310-2011 (Sup. Ct. N.Y. Dec. 1, 2011), https://www.prisonersofthecensus.org/little/Decision_and_Order.pdf [https://perma.cc/DPN6-CVAX] (challenging New York's law ending prison gerrymandering).

61. *In re* Initiative Petition No. 426, State Question No. 810, 465 P.3d 1244, 1255 (Okla. 2020). This case involves a challenge to a ballot initiative that would have

news for reformers who challenge prison gerrymandering in federal courts. Though it is a state court decision, it demonstrates that at least one court believes that prison gerrymandering challenges stand under the federal constitution. However, the federal courts' treatment of various proposed injunctions against prison gerrymandering is far from favorable

In 2015, the American Civil Liberties Union and the Florida Justice Institute sued Jefferson County, Florida on behalf of Jefferson County residents over the county's redistricting plan, which included more than 1,000 prisoners in one of the county's five 3,000-person legislative districts.[62] The plaintiffs claimed that the plan violated the one-person one-vote protection of the Equal Protection Clause because the inmate population in one district diluted the representational and voting strength of voters in other districts.[63] The district court agreed, granted the plaintiffs' motion for summary judgment, and enjoined the county from implementing its proposed districting plan.[64] The *Calvin v. Jefferson County Board of Commissioners* Court established a test: for plaintiffs to prevail, they must show that the inmates "lack a meaningful or substantial representational nexus with" the relevant legislative body.[65] Reformers hailed this decision as a win in the fight against prison gerrymandering.[66]

Soon after *Calvin*, the Supreme Court decided *Evenwel v. Abbot*.[67] Texas voters requested a permanent injunction to replace the existing state senate map with a map that equalized voting population, as opposed to overall population, in each district.[68] The Court noted that all states use total population, but that some states "adjust those census

created a Citizens' Independent Redistricting Commission that would gather information from the Department of Corrections about the home address of state and federal inmates and add this information to the U.S. census data so that incarcerated people could be counted in their home communities. *Id.* at 1247. The measure was not voted on, as it was withdrawn by its proponents on July 14, 2020. *Search State Questions*, OKLA. SEC'Y OF STATE, https://www.sos.ok.gov/gov/questions.aspx [https://perma.cc/
V22U-69AD].

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

63. *Id.* at 1323.

64. *Id.* at 1326.

65. *Id.* at 1312.

66. *See, e.g.*, Aleks Kajstura, Federal Judge Holds Prison Gerrymandering Unconstitutional, PRISON POL'Y INITIATIVE (Mar. 21, 2016), http://www.prisonersofthecensus.org/news/2016/03/21/calvin [https://perma.cc/7GKN-QT6G].

67. 136 S. Ct. 1120 (2016).

68. *Id.* at 1125.

numbers in a[] meaningful way."[69] This holding rejected the Equal Protection claim, but left open the possibility that a jurisdiction's individual actions in counting voters for districting purposes could differ from this norm.[70] Commentators pointed out that the holding was quite narrow,[71] but the *Evenwel* ruling made clear that states may constitutionally count voters and nonvoters alike when drawing districts.

Soon after, the First Circuit held that in light of *Evenwel*, it must reverse a Rhode Island Federal District Court decision that struck down a redistricting plan on Equal Protection prison gerrymandering grounds, and the First Circuit reinstated the plan.[72] In *Davidson v. City of Cranston,* the district court held that *Evenwel* only applied to nonvoters who remained "individual[s] of the community at large."[73] Because prison inmates do not "have a stake in the Cranston public school system," they are not covered by *Evenwel*.[74] The First Circuit reversed, holding that though *Evenwel* did not decide the precise question, it signaled that prison gerrymandering is constitutional.[75] Critics attacked the First Circuit's opinion in *Davidson* as an incorrect reading of *Evenwel*,[76] but the decision is an undeniable blow to any future federal court challenge of prison gerrymandering. Any future case challenging prison gerrymandering must distinguish itself from *Evenwel* to succeed in federal court.

2. Current Legal Challenge Presents Some Hope

Since *Davidson*, reformers have searched for their next court battle. In October 2019, they found it. The NAACP sued Connecticut in *NAACP v. Merrill*, claiming that Connecticut's redistricting plan for the 2020 election cycle violated the Fourteenth Amendment's one-

69. *Id*. at 1124.

70. *See id.* at 1132–33.

71. *E.g.*, Skocpol, *supra* note 12, at 1504.

72. "We now hold that the methodology and logic of the Supreme Court's decision in *Evenwel v. Abbott* . . . require us to reverse the district court and instruct it to enter summary judgment in favor of the City." Davidson v. City of Cranston, 837 F.3d 135, 137 (1st Cir. 2016). For a more in-depth dive into *Davidson*, see Recent Case, Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016)*, 130 HARV. L. REV. 2235 (2017).

73. Davidson v. City of Cranston, 188 F. Supp. 3d 146, 150 (D.R.I.), *rev'd*, 837 F.3d 135 (1st Cir. 2016).

74. *Id.*

75. *See Davidson,* 837 F.3d at 141.

76. *E.g.*, Skocpol, *supra* note 12, at 1509–19; Emily J. Heltzel, Note, *Incarcerated and Unrepresented: Prison-Based Gerrymandering and Why* Evenwel*'s Approval of "Total Population" as a Population Base Shouldn't Include Incarcerated Populations*, 26 WM. & MARY BILL RTS. J. 533, 548 (2017).

person, one-vote requirement.[77] The complaint persuasively demonstrates the disproportionate sizes of Connecticut House districts containing prisons if incarcerated individuals were counted in their home districts[78] and shows that these districts deviate from the largest district by more than ten percent.[79] Arguing against the use of unmodified census data, plaintiffs argued that "a state may not use unmodified census data to draw districts when doing so would distort representational equality by counting individuals in areas in which they are not bona fide constituents."[80] The plaintiffs called for an injunction against the use of the 2011 redistricting plan in 2020.[81]

The defendants cited *Evenwel* and *Davidson* to argue that use of unmodified census data for redistricting purposes is constitutionally permissible.[82] The Federal District Court of Connecticut denied the defendants' motion to dismiss, quoting *Reynolds v. Sims*: "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[83] The court held that the Equal Protection Clause claim is appropriate for a motion for summary judgment, and denied the motion to dismiss.[84] When defendants sought a stay pending an interlocutory appeal on an Eleventh Amendment jurisdiction issue, the district court denied the defendants' requested stay on the discovery proceedings because it found that plaintiffs sufficiently alleged enough facts to establish jurisdiction.[85]

The Second Circuit upheld the district court's decisions on the jurisdiction issue, but remanded the Equal Protection claim to be heard

77. Amended Complaint for Declaratory & Injunctive Relief at 1, NAACP v. Merrill, 2019 WL 8016631 (D. Conn. Oct, 15 2019) (No. 3:18-cv-01094) [hereinafter Amended Complaint]. For a detailed analysis of the parties' arguments in *Merrill* and the case law underpinning the dispute, see Wilson T. Carroll, Note, *Prison Gerrymandering Reform in Connecticut*, 38 QUINNIPIAC L. REV. 579 (2020).

78. Amended Complaint, *supra* note 77, at 23.

79. *Id.* at 21.

80. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 2, NAACP v. Merrill, 2019 WL 8016631 (D. Conn. Oct. 4, 2018) (No. 3:18-cv-01094) (citing Mahan v. Howell, 410 U.S. 315, 330-32 (1973)).

81. Amended Complaint, *supra* note 77, at 3–4.

82. Memorandum of L. in Support of Defendant's Motion to Dismiss at 1, NAACP v. Merrill, 2019 WL 8016631 (D. Conn. Sep. 6, 2018) (No. 3:18-cv-01094).

83. NAACP v. Merrill, No. 3:18-cv-1094, 2019 WL 4917537, at *3 (D. Conn. Feb. 15, 2019), *aff'd in part, remanded in part*, 939 F.3d 470 (2d Cir. 2019) (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).

84. *Id.* at *4.

85. NAACP v. Merrill, No. 3:18-cv-1094, 2019 WL 4917539 (D. Conn. May 8, 2019).

before a three-judge panel.[86] While it remains to be seen whether the plaintiffs will succeed in their Equal Protection claim, it is clear that an outright challenge to a state's redistricting plan in federal court takes time, and there are many procedural obstacles that defendants can employ to lengthen the process.

Key in the *Merrill* case is the existence of a Connecticut state law providing that no person is deemed to have lost his or her residence in any town by reason of that person's "absence therefrom in any institution maintained by the state," and "[n]o person who resides in any institution maintained by the state shall be admitted as an elector in the town in which such institution is located," unless that person "proves to the satisfaction of the admitting official that he is a bona fide resident of such institution."[87] Both the district court and the Second Circuit relied on this law, suggesting that its existence will help plaintiffs down the road.[88] Even more importantly, the district court relied on this Connecticut law to hold that "the instant case may be distinguishable from *Evenwel* . . . ."[89] Thus, those who seek to end prison gerrymandering may need a similar state law to rely upon if they hope to make a successful case in federal court.

C. OTHER FEDERAL CLAIMS DEMONSTRATE LITTLE PROMISE

The above cases brought Equal Protection challenges on the one-person one-vote theory. While these claims have enjoyed varying levels of success, it is important to evaluate other potential claims that plaintiffs could bring in federal court against prison gerrymandering. This Section analyzes potential right to vote and Voting Rights Act claims.

The United States Constitution does not grant citizens a general right to vote.[90] Instead, individual states grant their citizens the right to vote in their state constitutions.[91] Yet many Americans characterize the "right to vote" as fundamental.[92] Because four amendments

86. NAACP v. Merrill, 939 F.3d 470, 479 (2d Cir. 2019).

87. CONN. GEN. STAT. § 9-14 (2018).

88. *Merrill*, 939 F.3d at 474; *Merrill*, 2019 WL 4917537, at *1.

89. *Merrill*, 2019 WL 4917537, at *4.

90. Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1299 (N.D. Fla. 2016).

91. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2019) ("The U.S. Constitution merely implies the right to vote, while almost all state constitutions explicitly enumerate this right.").

92. *See, e.g.*, Faith Stachulski, Note, *Prison Gerrymandering: Locking Up Elections and Diluting Representational Equality*, 2019 U. ILL. L. REV. 401, 412 (2019) (noting that the Fourteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth amendments address

address and protect the right to vote, some argue that the right to vote can be read into the Constitution.[93] In addition, the Equal Protection Clause limits states' ability to choose who may vote: "Once a state chooses to let any particular group or class of people vote, it may not deny the vote to others in a way that denies them Equal Protection of the laws."[94]

While constitutional challenges to prison gerrymandering have been based solely on the Fourteenth Amendment, challengers could possibly base claims on a general right to vote granted implicitly in the Constitution. However, given the way that federal courts have dismissed prison gerrymandering challenges under *Evenwel*, these claims are unlikely to succeed.

Other commentators suggest that the Voting Rights Act (VRA) could be used to successfully challenge prison gerrymandering.[95] They argue that the apportionment process falls squarely within the scope of activity that Congress intended to address with the VRA,[96] and that prison gerrymandering could fit into existing VRA case law because prison gerrymandering "hinders minorities from equally accessing the political process."[97] While this is a creative solution, it has yet to be tested, and its success remains doubtful given the current composition of the Supreme Court and how the Supreme Court has handled recent VRA cases.[98]

D. HOLDING OUT FOR A HERO

These solutions, from state legislatures passing individual laws to the various federal court claims against prison gerrymandering, are imperfect. The first relies on state legislatures to act, when at least some legislators benefit from prison gerrymandering.[99] Relying on federal courts is also a risky bet after *Evenwel* and its recent

voting rights).

93. *Id.*

94. *Calvin*, 172 F. Supp. 3d at 1300.

95. *E.g.*, Laing, *supra* note 13.

96. *Id.* at 515.

97. *Id.* at 515–22.

98. *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529 (2013); Abbott v. Perez, 138 S. Ct. 2305 (2018).

99. Moreover, the current trend in many states to implement laws restricting the right to vote and to implement aggressive gerrymanders suggests that state legislatures may not be a viable path to end prison gerrymandering in many states. *Cf.* Michael Wines, *In Statehouses, Stolen-Election Myth Fuels a G.O.P. Drive to Rewrite Rules*, N.Y. TIMES (Feb. 27, 2021), https://www.nytimes.com/2021/02/27/us/republican-voter-suppression.html [https://perma.cc/38MA-9N4P].

interpretation in *Davidson*.[100] Though *Merrill* offers hope, federal courts are trending toward narrowing constitutional protections for voters, which bodes ill for prison gerrymandering opponents. Even additional claims under the right to vote theory of Voting Rights Act will face these same challenges, and though untested, they are unlikely to stand up to *Evenwel* either.

III. STATE CONSTITUTIONS AS A VEHICLE FOR A PRISON GERRYMANDERING CHALLENGE

While reformers should continue to pursue the strategies discussed above—especially state legislative action where state legislatures may be supportive—this Essay proposes that reformers may also be successful in abolishing prison gerrymandering by bringing suits under state constitutions. State constitutions often grant more and broader rights than the United States Constitution, so reformers will be on stronger legal footing.[101] Additionally, some state constitutions contain provisions that arguably proscribe prison gerrymandering. This Essay will use the Minnesota Constitution to demonstrate these benefits. When considering a potential state claim in contrast to a potential federal claim, the benefits are apparent, and reformers should take note.

A. STATE CONSTITUTIONS OFTEN GRANT ADDITIONAL AND BROADER RIGHTS

New Judicial Federalism is the doctrine describing how state judges have interpreted their state constitutional provisions to grant more protection of rights than the federal Constitution.[102] State constitutions may provide less protection, but the national standard from the federal Constitution still applies.[103] So, decisions ruling against

100. *See* Adam Johnson, *Wisconsin's 3/5 Compromise: Prison Gerrymandering in Wisconsin Dilutes Minority Votes to Inflate White Districts' Population*, 47 MITCHELL HAMLINE L. REV. 479, 505 (2021).

101. WILLIAMS, *supra* note 15, at 115–18.

102. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–70 (1998) (providing an explanation and history of New Judicial Federalism).

103. *See* State v. Jackson, 503 S.E.2d 101, 103 (N.C. 1998). In *Jackson*, the North Carolina Supreme Court noted that

> [s]trictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights it guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States

asserted federal constitutional rights do not end a claim, but rather leave the question to the fifty states to interpret their respective state constitutions.[104] Hardly new anymore, the doctrine dates to the early 1970s and the jurisprudence of Justice William Brennan.[105] Notably, this doctrine evolved after the appointment of Chief Justice Warren Burger and a renewed conservative direction for the Supreme Court.[106] Thus, it is no surprise that as the current Supreme Court gains more conservative justices, reformers may once again turn to their state constitutions.[107]

Almost all "[s]tate constitutions explicitly confer voting rights, while the U.S. Constitution merely implies the right to vote through negative language."[108] Many state constitutions contain Equal Protection clauses.[109] Thus, if reformers bring claims against prison gerrymandering under state constitutions, the state court would have to wrestle with how to interpret the state constitutional provisions against the background of the federal Constitution.

B. MINNESOTA'S SUPREME COURT GRANTS BROADER INDIVIDUAL RIGHTS

State-level claims will likely invoke at least two parts of a state constitution: (1) the Right to Vote clause and (2) the Equal Protection clause. The Minnesota Constitution declares that Minnesotans over eighteen years of age who are U.S. citizens and have resided in their

> Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.

Id.

104. WILLIAMS, *supra* note 15, at 115.

105. *See* Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism*," 8 U. PUGET SOUND L. REV. vi, viii (1985).

106. John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 914–15 (1995).

107. Although this concept comes from the jurisprudence of Justice Brennan and liberal reformers may be inclined to turn to state constitutions as the United States Supreme Court has become more conservative, using state constitutions to protect rights has support across the ideological spectrum. *See, e.g.,* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018). Judge Sutton argues that attorneys should raise state constitutional claims more often and that state courts should not reflexively move in lockstep with the "federal courts' interpretation of the Federal Constitution" even when the state and Federal constitutions have similar or identical provisions. *Id.* at 8–10, 16–21, 174.

108. Douglas, *supra* note 91, at 90; *see also id.* at 144–49 (listing each state's right to vote clause).

109. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1029–43 (2003) (providing examples of states with Equal Protection provisions in their state constitutions).

precinct for thirty days prior to an election "shall be entitled to vote in that precinct."[110] Additionally, the Minnesota Bill of Rights holds that: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."[111] This is most frequently cited as Minnesota's Equal Protection clause.[112] These two clauses in the Minnesota Constitution create two ways to challenge prison gerrymandering, despite recent interpretations of the Federal Equal Protection clause. First, since the United States Constitution does not grant the right to vote, the state court must decide independently how to interpret its Right to Vote clauses. Second, although the United States Constitution does have an Equal Protection clause, the Minnesota court's analysis of the Minnesota Equal Protection clause may differ.

In Minnesota, the Minnesota Supreme Court construes the Minnesota State Constitution as providing more protection for individual rights than the federal Constitution for a number of reasons.[113] The Minnesota Supreme Court sees a United States Supreme Court decision interpreting a provision of the federal Constitution that is identical to the Minnesota Constitution as "inherently persuasive, although not necessarily compelling."[114] However, where appropriate, the Minnesota Supreme Court can interpret the state constitution to afford greater protections of individual civil and political rights than the federal Constitution.[115] The Minnesota Supreme Court holds itself out as the "first line of defense for individual liberties within the federalist system,"[116] because it is " independently responsible for safeguarding the rights of [our] citizens."[117] As the court said in *Kahn v. Griffin*:

110. MINN. CONST. art. VII, § 1.

111. MINN. CONST. art. I, § 2.

112. *See* Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 337, 339 n.4 (1994).

113. State v. Harris, 590 N.W.2d 90, 97–98 (Minn. 1999) (listing reasons that include "variations in text, constitutional history, early state precedent construing the applicable provision of the state constitution, relatedness of the subject matter to state-level enforcement, presence of issues that are unique to the state, and a determination that a more expansive reading of the state constitution represents the better rule of law.").

114. State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985).

115. *See Harris*, 590 N.W.2d at 97 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)); *Fuller*, 374 N.W.2d at 726.

116. *Harris*, 590 N.W.2d at 97 (quoting *Fuller*, 374 N.W.2d at 726).

117. *Fuller*, 374 N.W.2d at 726 (quoting O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979)) (alteration in original).

> [W]e will not, on some slight implication and vague conjecture, depart from federal precedent or the general principle that favors uniformity with the federal constitution. But, when we reach a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution, we will not hesitate to interpret the constitution to independently safeguard those rights. On all occasions, we will exercise our independent judgment as to how to interpret the Minnesota Constitution.[118]

Thus, there is room for Minnesota courts to interpret more protections for individual rights into the provisions of the Minnesota Constitution, no matter if the language is identical, similar, or distinct from the federal Constitution.

1. The Minnesota Constitution Could Grant a Broader Right to Vote

When it comes to the right to vote, the Minnesota Supreme Court will defer to Supreme Court precedent as long as it does not provide inadequate protection for Minnesota citizens' individual rights or the United States Supreme Court is not making a sharp and radical departure from precedent on individual rights.[119] The Minnesota Supreme Court, however, has suggested that it may go even further than this, stating that it does "not foreclose the possibility that under other facts and circumstances, a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution."[120] Thus, reformers would likely have to argue that prison gerrymandering requires greater Minnesota Supreme Court intervention.

This argument is supported by other state courts that use their state Right to Vote clauses to strike down laws that infringed on the franchise. For example, the Arkansas Supreme Court struck down a voter identification law because it imposed additional requirements on voters beyond those recognized by the Arkansas Constitution.[121] A Pennsylvania Appellate Court found that a voter identification law should be analyzed under strict scrutiny because it burdened the right

118. Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005) (footnote omitted).

119. *Id.* at 828.

> It is undisputed that the right to vote is a fundamental right under both the federal and state constitutions . . . . We have cited to the Supreme Court's analytical approach with approval when deciding whether a state election law violates the U.S. Constitution . . . . We conclude that it is appropriate to apply a similar test when analyzing plaintiffs' right-to-vote claims under the Minnesota Constitution.

Id. at 832–33.

120. *Id.* at 834.

121. Martin v. Kohls, 444 S.W.3d 844, 852–53 (Ark. 2014).

to vote under the Pennsylvania Constitution.[122] The court found the law unconstitutional under the state Right to Vote Clause,[123] but found it passed rational basis review under the state Equal Protection Clause.[124] Thus, a state Right to Vote clause on its own may be enough to strike down a law that disenfranchises state voters.

If reformers in Minnesota could convincingly argue that prison gerrymandering burdens the right to vote in Minnesota, the Minnesota Supreme Court could follow other state supreme courts, find greater protection for the right to vote in Minnesota, and strike down a redistricting plan based on prison gerrymandering.

2. The Minnesota Constitution Could Grant Broader Equal Protection Rights

When it comes to its state Equal Protection clause, the Minnesota Supreme Court holds that the Minnesota Constitution establishes a higher standard of rational basis review than does the Equal Protection Clause of the U.S. Constitution.[125] In Minnesota, the reasonable connection between the statutory goals and government action must be actual, not hypothetical where the plaintiff has shown an arbitrary and irrational classification.[126] Additionally, any legislative effort that infringes on a fundamental right will trigger strict scrutiny analysis.[127] Though the right to vote is a fundamental right, some election laws have been found to not impact the right itself, and they have been subject to rational basis review.[128]

Other states use broader interpretations of their Equal Protection clauses to protect the franchise. The Missouri Supreme Court invoked its state constitution in 2006 when it struck down state voter ID laws.[129] The court found that a photo-ID requirement violated Missouri's Equal Protection Clause[130] because voting is a fundamental

122. Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014).

123. *Id.* at *24.

124. *Id.* at *26.

125. State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991).

126. *Id.* at 888–89.

127. *See* Women of the State of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995).

128. *See* Meyers v. Roberts, 246 N.W.2d 186, 187 (Minn. 1976).

129. Weinschenk v. State, 203 S.W.3d 201, 219 (Mo. 2006).

130. "[T]hat all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design." MO. CONST. art. I, § 2.

right under the Missouri Constitution,[131] and the law did not meet strict scrutiny review required for a law that burdens a fundamental right.[132] Though Missouri's constitutional provisions differ from Minnesota's, this case bodes well as it demonstrates a state supreme court's power to overturn laws that restrict the franchise on the basis of a state Equal Protection clause.

Thus, a challenge to a new redistricting plan in Minnesota based on prison gerrymandering should invoke the Minnesota Equal Protection Clause and should argue both that the legislation impacts the fundamental right to vote by diluting some communities' political power[133] and that absent that impact, the legislation still does not meet this heightened standard of rational basis review. Minnesota would have a harder time defending its redistricting policies against a challenge of this nature.

C. THE MINNESOTA CONSTITUTION PRESENTS A THIRD POTENTIAL CLAIM

Additionally, in Minnesota a third claim exists to challenge prison gerrymandering under Article VII, Section 2 of the Minnesota Constitution. This provision states:

> *For the purpose of voting no person loses residence* solely by reason of his absence while employed in the service of the United States; nor while engaged upon the waters of this state or of the United States; nor while a student in any institution of learning; nor while kept at any almshouse or asylum; *nor while confined in any public prison*. No soldier, seaman or marine in the army or navy of the United States is a resident of this state solely in consequence of being stationed within the state.[134]

This constitutional provision can serve as a strong basis to challenge prison gerrymandering because it expressly demonstrates that the framers of the Minnesota Constitution did not intend for prisoners to lose their residence while incarcerated. In Minnesota, "the question of franchise residency primarily is intent and only secondarily physical presence."[135] Minnesota's practice of counting prisoners in the census based on where they are incarcerated, not at their prior residence,

131. "That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." MO. CONST. art. I, § 25.

132. *Weinschenk*, 203 S.W.3d at 218–19.

133. Amee Frodle, *Where Does A Prisoner Live?: Furthering the Goals of Representational and Voter Equality Through Counting Prisoners*, 107 GEO. L.J. 175, 197–98 (2018).

134. MINN. CONST. art. VII, § II (emphasis added).

135. MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE 210 (2002).

directly contravenes the clear words and intent of the Minnesota Constitution.

This argument is similar to the successful argument in the Connecticut Federal District Court decision against the motion to dismiss in *NAACP v. Merrill*.[136] That court relied on a similar Connecticut state law in its reasoning, suggesting that Article VII, Section 2 of the Minnesota Constitution may be helpful to challenge prison gerrymandering.[137] Importantly, the Connecticut District Court relied on the Connecticut law when it held that "the instant case may be distinguishable from *Evenwel*."[138] So, Minnesota courts, who have already demonstrated their readiness to depart from Supreme Court precedent when it comes to interpreting the Minnesota Constitution, could rely on Section 2 to distinguish prison gerrymandering challenges from *Evenwel*. This provision is an incredible talisman against the specter of Supreme Court precedent and increases the chances of success for ending prison gerrymandering in Minnesota.

The potential for success under state constitutional claims is potentially high in other states.[139] In Minnesota, three provisions could help reformers challenge prison gerrymandering successfully. Because of Minnesota's more expansive interpretation of its own constitution, right to vote, Equal Protection, and residency claims may prove successful weapons against prison gerrymandering, especially given the way other states have interpreted similar state constitutional provisions to guard against other restrictions on the franchise.

CONCLUSION

Prison gerrymandering is a problem across the United States. Counting incarcerated individuals in the district where they are incarcerated instead of their residence prior to incarceration dangerously shifts power from racially diverse urban districts to white rural districts. There are many strategies reformers are employing to end this

136. *See supra* Part II.B.2.

137. *See* NAACP v. Merrill, No. 3:18-cv-1094, 2019 WL 4917537, at *1 (D. Conn. Feb. 15, 2019) (citing CONN. GEN. STAT. § 9-14), *aff'd in part, remanded in part*, 939 F.3d 470 (2d Cir. 2019).

138. *Id.* at *4.

139. *See, e.g.*, OR. CONST. art. II, § 4 ("For the purpose of voting, no person shall be deemed to have gained, or lost a residence . . . while confined in any public prison."); Johnson, *supra* note 100, at 501–03 (arguing that Wisconsin's prison gerrymandering likely violates the Wisconsin Constitution by misinterpreting the meaning of "inhabitant"); *see also Ending Prison Gerrymandering in Your Community, Your State and in the Nation*, *supra* note 10 (listing states with active campaigns to end prison gerrymandering).

practice such as state-level legislation, ballot initiatives, and lawsuits in federal court. While these options have found some success, challengers should sue in individual state courts under state constitutions. Oftentimes, state constitutions grant broader protections for individual rights than the federal constitution, so lawsuits invoking Right to Vote and Equal Protection clauses have a higher likelihood of success. In Minnesota, a lawsuit calling on these provisions of the Minnesota Constitution is more likely to succeed because of Minnesota's demonstrated willingness to grant broader protections to individual rights and because an additional constitutional provision mandates that imprisonment not remove residence. This combination of factors presents a promising opportunity for reformers hoping to end the practice of prison gerrymandering in Minnesota. Given the importance of the upcoming redistricting cycle, it is imperative that reformers in Minnesota and around the country move quickly to sue under state constitutions.