
CONSTITUTIONAL LAW — EQUAL PROTECTION — FIRST
CIRCUIT HOLDS THAT PRISON GERRYMANDERING DOES NOT
VIOLATE THE EQUAL PROTECTION CLAUSE. — *Davidson v. City
of Cranston*, 837 F.3d 135 (1st Cir. 2016).

In a nation with extraordinarily high¹ — and racially disparate² — incarceration rates, decisions about where to count incarcerated people for the purpose of redistricting implicate issues of equal protection, political power, and racial equality.³ Consequently, prison gerrymandering — the practice of counting incarcerated people as residents of prisons when drawing electoral districts⁴ — has become an issue that has divided courts and led to calls for reform at the federal,⁵ state,⁶ and local⁷ levels. Recently, in *Davidson v. City of Cranston*,⁸ the First Circuit held that the City of Cranston, Rhode Island did not violate the Equal Protection Clause by counting prison inmates as residents of one of the City's six wards when it redistricted.⁹ To reach this conclusion, the court relied on the Supreme Court's decision in *Evenwel v. Abbott*,¹⁰ which approved broadly of total-population-based approaches to redistricting.¹¹ While *Evenwel* might appear to sanction Cranston's redistricting plan, the First Circuit's decision is at odds with *Evenwel*'s underlying reasoning and emphasis on representational equality. In addition, it is critical to note that even if the First Circuit had resolved this tension by requiring Cranston to exclude inmates from its popula-

¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 7–8 (2010).

² See, e.g., Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 165, 166–70 (Marc Mauer & Meda Chesney-Lind eds., 2002).

³ See *Prison-Based Gerrymandering Reform*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/case/prison-based-gerrymandering> [https://perma.cc/H8CM-R4ZX]; see also Sean Suber, Note, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471, 475 (2014).

⁴ See *Prison-Based Gerrymandering Reform*, *supra* note 3.

⁵ See, e.g., Letter from Senator Christopher A. Coons et al., to Karen Humes, Chief, Population Div., U.S. Census Bureau (Sept. 21, 2016), <http://www.prisonersofthecensus.org/letters/2016/13senators2016.pdf> [https://perma.cc/PTF6-LH3G].

⁶ Peter Wagner, Opinion, *Beginning of the End for 'Prison-Based Gerrymandering'*, WASH. POST (July 13, 2012), https://www.washingtonpost.com/opinions/beginning-of-the-end-for-prison-based-gerrymandering/2012/07/13/gJQAJp7fiW_story.html [https://perma.cc/25QD-M944] (noting that Maryland now adjusts Census data to count incarcerated people in their home districts).

⁷ See, e.g., Editorial, *Correcting the Prison Imbalance*, TRIB. STAR (May 16, 2012), http://www.tribstar.com/opinion/editorials/editorial-correcting-the-prison-imbalance/article_113c3c63-3750-5ef6-bof2-8ad4ce28c285.html [https://perma.cc/LS6E-TPHY] (noting that the city of Terre Haute, Indiana now excludes federal prisoners from the populations of the city's six City Council districts).

⁸ 837 F.3d 135 (1st Cir. 2016).

⁹ *Id.* at 137.

¹⁰ 136 S. Ct. 1120 (2016).

¹¹ *Id.* at 1132–33.

tion baseline, only partial relief from the distortions of prison gerrymandering would result; to fully remedy the systemic harms at issue, the state legislature must require that prisoners be counted as residents of their home communities at both the state and local level.

The City of Cranston is divided into six municipal wards from which residents elect representatives to Cranston's City Council and School Committee.¹² In 2012, the City adopted a redistricting plan that redrew boundaries for the wards based on new U.S. Census data.¹³ Those boundaries placed Rhode Island's state prison, the Adult Correctional Institution (ACI), and its 3433 prisoners in Ward Six.¹⁴ The inclusion of the prison comported with the Rhode Island Constitution, which stipulates that "state legislative districts 'shall be constituted on the basis of population and . . . shall be as nearly equal in population . . . as possible,'"¹⁵ and with the City's charter, which states that wards shall have "as nearly as possible an equal number of inhabitants as determined by the most recent federal decennial census."¹⁶ Each ward included approximately 13,500 people; thus, ACI inmates comprised approximately twenty-five percent of the population of Ward Six.¹⁷

In 2014, the American Civil Liberties Union of Rhode Island (ACLU) and a group of Cranston residents filed a complaint against the City in the United States District Court for the District of Rhode Island.¹⁸ They asserted that Cranston's redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment¹⁹ because counting inmates as part of Ward Six "inflates the voting strength and political influence of the residents" in that ward, thereby diluting the political power of people living outside the ward.²⁰ After the City filed a motion to dismiss, which was denied, both parties filed cross motions for summary judgment.²¹ The following year, the district court granted summary judgment for the ACLU and Cranston residents.²²

In its analysis, the district court looked to the Supreme Court's decision in *Evenwel v. Abbott* and to a pre-*Evenwel* redistricting case in

¹² *Davidson*, 837 F.3d at 137–38.

¹³ *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 147 (D.R.I. 2016).

¹⁴ *Id.*

¹⁵ *Davidson*, 837 F.3d at 137 (quoting R.I. CONST. art. VII, § 1) (alteration in original).

¹⁶ *Id.* (quoting CRANSTON, R.I., CITY CHARTER § 2.03(b) (2016)).

¹⁷ *See id.* at 138.

¹⁸ *Id.* at 139.

¹⁹ U.S. CONST. amend XIV, § 1. The plaintiffs sought declaratory and injunctive relief under 42 U.S.C. § 1983 (2012), a statute that allows state actors to be sued for constitutional violations. *Davidson*, 837 F.3d at 139.

²⁰ *Davidson*, 837 F.3d at 139.

²¹ *Id.*

²² *Id.* The court also entered declaratory judgment for the plaintiffs and enjoined the City and other relevant parties from holding elections under the existing districting plan. Later, the court vacated the declaratory judgment through a separate order. *Id.* at 140.

Florida, *Calvin v. Jefferson County Board of Commissioners*,²³ which also dealt with prisoners. First, the district court rejected the idea that *Evenwel* simply endorsed the constitutionality of total-population-based apportionment. It noted that such a perspective “overlook[s] the Supreme Court’s emphasis on the conceptual basis of representational equality.”²⁴ It then observed that the judge in *Calvin* had found that inmates lacked a “fundamental and necessary ‘representational nexus’” with the political district in which they had been counted.²⁵ The district court determined that the same conclusion also applied to the ACI inmates.²⁶ Putting these ideas together, the district court held that Cranston’s plan diluted “the voting strength” of residents of wards other than Ward Six, thereby infringing on the rights of residents of those wards.²⁷ In addition to granting summary judgment, the district court required the City Council to propose a new districting plan in which the ACI inmates were subtracted from the total population.²⁸ The City appealed.²⁹

The First Circuit reversed. Writing for the panel, Judge Lynch³⁰ noted that the “methodology and logic” of *Evenwel* required the court to conclude that Cranston had not violated the Equal Protection Clause.³¹ In *Evenwel*, a group of Texas voters challenged the state’s practice of drawing legislative districts on the basis of total population; they urged that the voter-eligible population be used instead.³² The Supreme Court rejected this argument, grounding its decision in a combination of history, precedent, and “longstanding practice.”³³ In its reading of *Evenwel*, the First Circuit emphasized the fact that the Court’s decision had not unsettled the presumption that “invidious discrimination” is typically required when apportionment claims implicate only “minor deviations” from equality.³⁴ Because the deviations be-

²³ 172 F. Supp. 3d 1292 (N.D. Fla. 2016). While *Calvin* was decided just days before the Supreme Court announced its decision in *Evenwel*, the *Calvin* court engaged directly with many of the arguments advanced by *Evenwel*’s amici and with the opinion of the *Evenwel* district court, which the Supreme Court affirmed. See, e.g., *id.* at 1305 n.10, 1306 n.11.

²⁴ *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 150 (D.R.I. 2016).

²⁵ *Id.* at 151 (quoting *Calvin*, 172 F. Supp. 3d at 1316).

²⁶ *Id.* at 151–52.

²⁷ *Id.* at 152.

²⁸ See *Davidson*, 837 F.3d at 140.

²⁹ *Id.*

³⁰ Judge Lynch was joined by Chief Judge Howard and Judge Kayatta.

³¹ *Davidson*, 837 F.3d at 137. The panel began by discussing the court’s jurisdiction to hear the case. Although the district court’s order had been vacated, and thus no final order existed from which to appeal, the First Circuit concluded that the district court’s use of injunctive relief gave the court jurisdiction to hear the appeal. See *id.* at 140–41.

³² *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126 (2016).

³³ *Id.* at 1123; see also *Davidson*, 837 F.3d at 141.

³⁴ *Davidson*, 837 F.3d at 141; see also *id.* at 143 (“[A]pportionment schemes . . . will constitute . . . invidious discrimination only if it can be shown that . . . [they] would operate to minimize

tween Cranston's six wards were less than ten percent,³⁵ the First Circuit concluded that the city's redistricting plan fell "safely within the presumptively permissible . . . range."³⁶ And because the plaintiffs did not allege invidious discrimination,³⁷ the court was inclined to accept the City's districting plan.³⁸ In addition, the court emphasized that every state uses the Census's total-population numbers when constructing electoral districts and that only seven states modify those baseline numbers in a "meaningful way."³⁹ In light of these ideas, the court found that the "natural reading of *Evenwel*" led to the conclusion that relying on total population for apportionment is "the constitutional default," and that deviations — to exclude inmates or noncitizens, for example — might be permissible, but are not constitutionally required.⁴⁰

While the facts in *Davidson* might appear to fit within the ambit of *Evenwel*'s broad holding, the First Circuit's decision is discordant with *Evenwel*'s underlying reasoning. Counting prisoners as part of a total-population baseline is inconsistent with the equal-representation reasoning emphasized by the Supreme Court, and doing so makes prisoners the constituents of elected officials with no power to address their needs and no inclination to respond to their requests. However, it is also important to note that even if the First Circuit had avoided this tension by requiring Cranston to exclude inmates from its population baseline, only partial relief from the problems caused by prison gerrymandering would result. In order to fully respond to such distortions, the legislature must require that prisoners be counted as residents of their home communities at all electoral levels. Only this step can stop the siphoning of political power from those areas.

or cancel out the voting strength of racial or political elements of the voting population." (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)).

³⁵ *Id.* at 138. The Supreme Court recognized ten percent as the threshold under which population deviations are presumptively constitutional in *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

³⁶ *Davidson*, 837 F.3d at 142 (quoting *Evenwel*, 136 S. Ct. at 1125).

³⁷ *Id.* at 143.

³⁸ *Id.* The court further emphasized that, where no invidious discrimination exists, courts should "give wide latitude" to legislative apportionment plans, *id.*, as "paradigmatically political decisions," *id.* at 144. See also *id.* at 141 ("*Evenwel* reinforces that federal courts must give deference to decisions by local election authorities related to apportionment.").

³⁹ *Id.* at 144 (quoting *Evenwel*, 136 S. Ct. at 1124). It also observed that "only four states (California, Delaware, Maryland, and New York) 'exclude inmates who were domiciled out-of-state prior to incarceration.'" *Id.* (quoting *Evenwel*, 136 S. Ct. at 1124 n.3); see also Fletcher v. Lamone, 831 F. Supp. 2d 887, 896 (D. Md. 2011) ("[A]lthough the Census Bureau was not itself willing to undertake the steps required to count prisoners at their home addresses, it has supported efforts by States to do so."); Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU DIRECTOR'S BLOG (Mar. 1, 2010), <https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html> [https://perma.cc/4SZ5-CCEE] (discussing steps taken to enable states to utilize prison-population data for the purpose of decennial redistricting).

⁴⁰ *Davidson*, 837 F.3d at 144.

The First Circuit believed that *Evenwel* compelled approval of Cranston's redistricting plan, but this conclusion sweeps too far. The court found it "implausible that the [Supreme] Court would have observed that the majority of states use unadjusted total population [that] includ[es] prisoners . . . [and] upheld the constitutionality of apportionment by total population as a general proposition" while simultaneously implying that including prisoners in total population count is "constitutionally suspect."⁴¹ However, the issue of whether to count prisoners as part of a population baseline was not squarely before the *Evenwel* Court. While the Court did acknowledge — in a footnote — that some states "exclude inmates who were domiciled out of state prior to incarceration,"⁴² that observation did not constitute an attempt to resolve the issue of how to count prisoners. Concluding otherwise requires "stretch[ing] the holding of *Evenwel*"⁴³ to cover an issue too dissimilar to the one that was before the Court. As the judge in *Calvin* noted, "[r]ules are attractive devices . . . [b]ut a rule applied to circumstances remote from those contemplated when it was adopted can produce perverse results."⁴⁴ Indeed, prison is precisely the type of circumstance that generates such an outcome.

As the district court noted, *Evenwel*'s ubiquitous emphasis on the idea of representational equality suggests that applying *Evenwel*'s holding to the prison context makes little sense. In looking to constitutional history, the *Evenwel* Court observed that opposition to other apportionment schemes focused primarily on the notion of equality of representation.⁴⁵ When examining legal precedent, the Supreme Court highlighted the idea that the core notion of representative government is "one of *equal representation* for equal numbers of people."⁴⁶ In examining common state practice, the Court emphasized that elected officials serve all the people in their districts, not only those who can and do vote.⁴⁷ The First Circuit also acknowledged this emphasis, noting that the Supreme Court decisively determined that "the principle of representational equality figured prominently in the decision to count people regardless of voter status,"⁴⁸ and that "districting based on total

⁴¹ *Id.* (internal punctuation omitted).

⁴² *Evenwel*, 136 S. Ct. at 1124 n.3.

⁴³ *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 150–51 (D.R.I. 2016).

⁴⁴ *Calvin v. Jefferson Cty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016) (quoting *Frank v. Forest County*, 336 F.3d 570, 572–73 (7th Cir. 2003)).

⁴⁵ See *Evenwel*, 136 S. Ct. at 1128.

⁴⁶ *Id.* at 1131 (emphasis added) (quoting *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964)); see also *id.* (describing one-person, one-vote precedents as focusing on equal representation).

⁴⁷ *Id.* at 1132.

⁴⁸ *Davidson*, 837 F.3d at 142 (quoting *Evenwel*, 136 S. Ct. at 1129).

population serves . . . the State's interest . . . in ensuring equality of representation."⁴⁹

However, relying on total population fails to achieve the goal of representational equality when applied to prisons. For one thing, inmates are a uniquely disenfranchised group, one which elected officials commonly ignore. In upholding Cranston's redistricting scheme, the *Davidson* court quoted *Evenwel*: "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."⁵⁰ But this reasoning ignores the fact that elected officials do not typically value "requests and suggestions" from inmates. As advocates have observed: "[L]egislators often acknowledge that they do not treat the prisoners in their districts as constituents."⁵¹ Indeed, the district court noted that ACI inmates "are not making requests of . . . Cranston elected officials (or if they are, they are receiving no response), nor are they receiving 'the protection of government'" from them.⁵² Cranston's mayor, the Ward Six School Committee member, and the City's four at-large elected leaders couldn't recall any contact with ACI inmates during their tenures.⁵³

Moreover, in a case like *Davidson*, in which prisoners are included in City Council and School Committee districts, elected officials have good reason to ignore communications from inmates: there is little or nothing those officials can do for them.⁵⁴ Because inmates' lives are governed exclusively by state laws and prison policies, should city officials enact laws pertaining to the ACI, those laws would be preempted and rendered unenforceable.⁵⁵ The judge in *Calvin* reached a similar conclusion, noting that when one local elected official "received letters

⁴⁹ *Id.* (quoting *Evenwel*, 136 S. Ct. at 1131).

⁵⁰ *Id.* (quoting *Evenwel*, 136 S. Ct. at 1132). The United States advanced a similar argument in its brief as amicus curiae for the appellees in *Evenwel*: "Equalizing total population . . . vindicates [the principle of equal representation by] . . . ensur[ing] that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives." Brief for United States as Amicus Curiae Supporting Appellees at 5, *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

⁵¹ John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237, 249 (2011).

⁵² *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 150 (D.R.I. 2016). The federal judge in *Calvin* also observed that "inmates are not true constituents" in prison districts. *Calvin v. Jefferson Cty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1317 (N.D. Fla. 2016) (quoting Supplemental Brief in Further Support of Plaintiffs' Cross-Motion for Summary Judgment at 8, *Calvin*, 172 F. Supp. 3d 1292 (No. 4:15-cv-00131)).

⁵³ *Davidson*, 188 F. Supp. 3d at 148.

⁵⁴ Admittedly, it may be that inmates who live in Cranston when not incarcerated would be invested in the actions of Cranston's City Council and School Committee, but experts retained by the parties to the case estimated that less than five percent of the inmates at the ACI came from Cranston. *Id.* at 147.

⁵⁵ *Davidson*, 837 F.3d at 140.

from . . . inmates, he put those letters aside because there was nothing he could do for them in his capacity as a County Commissioner.”⁵⁶ Observations like these clash with the statements in *Evenwel* that support total-population-based approaches to redistricting. In *Evenwel*, the Court emphasized that “[n]onvoters have an important stake in many policy debates,”⁵⁷ adding that “non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”⁵⁸ This reasoning, which makes sense when applied to many classes of nonvoters, crumbles when applied to prisoners; the legislation being passed simply does not touch them.

Lastly, it is important to note that the First Circuit was ultimately powerless to resolve the deeper, more systemic problems that prison gerrymandering creates. As advocates point out, the biggest problem with this practice is not vote dilution in Cranston’s wards, but the transfer of political power that occurs when prisoners are counted as prison residents for reapportionment and redistricting.⁵⁹ Over the last three decades, the Census has “counted more than two million individuals as residents of their prison cells rather than their home communities,”⁶⁰ and tabulating population in this way makes it more likely that areas with prisons will be assigned representatives during reapportionment processes. This can happen at the local level, as illustrated in Cranston, where nearly 90% of the roughly 155 inmates who originally came from Cranston were from wards other than Ward Six.⁶¹ But the distortions can be equally, if not even more pernicious at the state level. Because the majority of inmates come from urban communities, but are held in institutions primarily in rural areas,⁶² counting prisoners as prison residents has a tendency to transfer political power from cities to rural communities. Additionally, this geographic transfer often translates to a reallocation of power from locations with large racial minority populations to predominantly white areas.⁶³

⁵⁶ *Calvin*, 172 F. Supp. 3d at 1324.

⁵⁷ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

⁵⁸ *Id.* at 1128. Typically, the term “nonvoters” refers to children and noncitizens, *see, e.g.*, *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), although historically it has also included women, slaves, and non-landowners, *see Evenwel*, 136 S. Ct. at 1127 n.8.

⁵⁹ Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc. et al., in Support of Plaintiffs-Appellees at 9–11, *Davidson*, 837 F.3d 135 (No. 16-1692) [hereinafter NAACP Brief]; Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355, 355–56 (2011).

⁶⁰ Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 184 (2015).

⁶¹ *See Davidson*, 837 F.3d at 138.

⁶² Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland’s Test Case*, 43 U. BALT. L.F. 35, 35 (2012).

⁶³ Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 757 (2011); *see also* Devon Galloway, Note,

As the First Circuit noted, only the state legislature has the power to fully remedy these problems. While the court could have required the exclusion of inmates from Cranston's population baseline, it is the legislature that can require the state and local governments to count prisoners as residents of their home communities. Indeed, in response to the NAACP's argument that inclusion of inmates in Ward Six "significantly and impermissibly weakens the political power of communities of color,"⁶⁴ the First Circuit declared that "such an argument should be addressed to the Rhode Island legislature."⁶⁵ Unfortunately, by approving the City's districting plan, the *Davidson* decision may have made such legislative relief harder to come by. More specifically, legislators may be less sympathetic to calls for reform now that they know the 2012 plan is constitutional. As Justice Kennedy has noted: "Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible."⁶⁶ By concluding that *Evenwel* and other apportionment precedents indicate that Cranston's redistricting plan is constitutional,⁶⁷ the First Circuit may have made a legislative remedy less attainable at the very moment it denied judicial relief.

While the precedent upon which the First Circuit relied could be read to permit counting prisoners as residents of prisons during redistricting, the First Circuit's decision exemplifies the many ways in which Supreme Court holdings addressing malapportionment claims do not fit the prison context. The Court's emphasis on representational equality militates against relying on total-population baselines when prisons are involved. For one thing, total-population-based approaches to redistricting make little sense when elected officials have no power to support or respond to their constituents. More importantly, such policies are unjust because of the transfer of political power they entail. To stop this unjust transfer, legislatures must act. Until they do, the way prisoners are counted for electoral purposes will continue to belie the goals that districting is meant to achieve.

The Numbers Matter: An Update to the Implementation of New York's Prison Gerrymandering Law, 4 COLUM. J. RACE & L. 205, 213 (2014) ("Most importantly, counting prisoners using the usual residence rule transfers political power from urban communities of color to rural white communities. . . . Rural communities make up 20% of the US population, but these communities are home to 60% of new prison construction." (footnotes omitted)).

⁶⁴ *Davidson*, 837 F.3d at 139 n.2 (quoting NAACP Brief, *supra* note 59, at xiii).

⁶⁵ *Id.*

⁶⁶ Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 [<https://perma.cc/R6N9-8ERQ>].

⁶⁷ *Davidson*, 837 F.3d at 144.