

# THE RACIAL INJUSTICE AND POLITICAL PROCESS FAILURE OF PROSECUTORIAL MALAPPORTIONMENT

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*District attorneys are responsible for the vast majority of criminal prosecutions in the United States, and most of them are elected by the public from prosecutorial districts. Yet these districts are massively malapportioned, giving rural, disproportionately white voters significantly more voting power over their district attorneys than urban voters, who are more likely to be voters of color. At the same time, our district attorney system is characterized by the sorts of political process failures that both triggered the Supreme Court’s Apportionment Revolution—requiring that legislative and executive districts comply with one-person, one-vote—and justify judicial intervention in other voting rights contexts. This Note argues that extending one-person, one-vote to prosecutorial districts would meaningfully address prosecutorial political process failure and have a number of salutary effects on our democracy: It would rebalance the distribution of voters’ influence over district attorneys, producing salutary downstream effects on our criminal justice system; it may increase challenger rates, leading to healthier levels of prosecutorial democratic competition; and it would further core democratic norms, including respect for the equal dignity of voters.*

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\* Copyright © 2022 by Michael Milov-Cordoba. J.D., 2021, New York University School of Law; M.A., 2018, Columbia University Graduate School of Arts and Sciences; B.A., 2014, Amherst College. Thank you to my Note Editors, Jessica Li and Thomas Hislop, for your care in shepherding this Note to publication and to the rest of the editorial team for excellent editing of this Note. Thank you to Colin Bradley, Claire Groden, Nina Loshkajian, Karena Martin, Eleuthera Sa, Taylor Spencer, and Rupali Srivastava for enormously helpful feedback during the early stages of this Note. Thank you also to my mom and dad for your unwavering support and to Tatiana Baccari for always believing in me. This Note is dedicated to my abuela, Rosa Gregoria Cordova. I sit in the shade of your tree.

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INTRODUCTION

In recent years, racial justice advocates have turned their attention to district attorneys’ offices.<sup>1</sup> From Philadelphia to San Francisco to Athens, Georgia, voters have elected progressive district attorneys with platforms explicitly committed to racial justice principles.<sup>2</sup> Although it is still too early to assess the precise impacts of this sea-change, the initial effects have been promising.<sup>3</sup> Prosecutors committed to racial justice can and have chosen to leverage their wide discretion to limit enforcement of or to categorically not enforce criminal laws that have had a disproportionate impact on communities of

<sup>1</sup> See, e.g., Sam Levin, *How Black Lives Matter Reshaped the Race for Los Angeles’ Top Prosecutor*, GUARDIAN (Oct. 15, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/oct/15/los-angeles-district-attorney-black-lives-matter> [<https://perma.cc/ZJ2Y-6J8U>]. A word about terminology. This Note recognizes that some states use terms other than district attorney to refer to their local public prosecutor, such as county attorney or state attorney. This Note uses “district attorney” as a shorthand for all local public prosecutors.

<sup>2</sup> See Derek Hawkins, *Progressive Lawyer Wins San Francisco District Attorney Race, Continuing National Reform Trend*, WASH. POST (Nov. 10, 2019), <https://www.washingtonpost.com/nation/2019/11/10/progressive-lawyer-wins-san-francisco-district-attorney-race-continuing-national-reform-trend> [<https://perma.cc/73FL-9HQB>] (“In the past three years, voters in Chicago, Boston, Philadelphia and other large cities have elected reform-minded prosecutors who built their campaigns around issues such as ending racial disparities in sentencing, reducing prison populations and declining to pursue nonviolent drug cases.”); see also Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, CONVERSATION (Nov. 18, 2020, 8:22 AM), <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322> [<https://perma.cc/A95K-FTPA>].

<sup>3</sup> See Allison Young, *The Facts on Progressive Prosecutors: How and Why Prosecutors Should Help End Mass Incarceration*, CTR. FOR AM. PROGRESS (Mar. 19, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice> [<https://perma.cc/V98T-W5WF>] (describing the success of reform-minded prosecutors across the country). *But see* Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/2Y7D-B5L8>] (describing how Philadelphia District Attorney Larry Krasner’s progressive policies put him “at odds with police officers, judges, and his own line attorneys”).

color, such as drug possession or low-level misdemeanors.<sup>4</sup> In this way, district attorneys' offices across the country are in the midst of an experiment that could transform them from one of the primary sources of mass incarceration to possible allies in the fight to end society's reliance on prisons and prosecutorial power as solutions to social problems.<sup>5</sup>

Although scholars are beginning to devote attention to the normative implications of the progressive prosecution movement,<sup>6</sup> the structure of prosecutorial electoral districts is an underappreciated element of the current debate on progressive prosecution and on prosecutorial power more broadly. The majority of district attorneys

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<sup>4</sup> See generally W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (summarizing examples of categorical prosecutorial nonenforcement and providing a framework for its evaluation).

<sup>5</sup> Observers have also begun noting some of the limitations of the progressive prosecution movement. See Madison McWithey, Essay, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography, Part One: Internal Constraints*, 61 B.C. L. REV. (ELEC. SUPP.) I-49 (2020), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3844&context=bclr> [<https://perma.cc/4BUE-SAEJ>] (noting internal constraints that progressive prosecutors face in implementing progressive prosecutorial policies from actors within the criminal justice system, including resistance from line prosecutors); *id.* (noting external constraints that limit the ability of progressive prosecutors to enact progressive prosecutorial policies, including resistance from the police); Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018) (documenting the limitations of progressive prosecutors to deliver on promises to transform the criminal justice system); Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 187 ("[I]f you are a prosecutor truly committed to transforming the criminal system, relinquish your power."); Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141> [<https://perma.cc/8T7L-PLHR>] (arguing that the goals of the progressive-prosecutor movement would be better achieved by focusing on reducing prosecutorial power rather than harnessing it for racial justice ends). In addition, there are some concerns that progressive prosecution is simply infeasible as a matter of national campaign strategy in many jurisdictions across the country. Thus far, racial justice movements have supported or mounted successful progressive prosecution campaigns in largely—though not exclusively—liberal, diverse, urban, and highly populated districts. Although the success of progressive challengers across the suburbs of Virginia and in rural Mississippi in 2018, as well as in smaller cities throughout Georgia in 2020 and 2021, provided a glimmer of hope that progressive prosecutors can win outside of major cities, some remain skeptical that there is sufficient appetite among the electorate for progressive prosecutors to win in less urban, less diverse, and less college-educated districts across the country. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540–41, 1547 (2020) (noting the electoral challenges progressive prosecutors face). This Note hypothesizes that reapportioning prosecutorial districts could redistribute voters supporting progressive prosecutors in a more electorally efficient manner, thereby expanding the playing field for the progressive prosecution movement.

<sup>6</sup> See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019) (arguing that the electoral process has failed to hold prosecutors accountable); Murray, *supra* note 4, at 176–78 (examining recent efforts by prosecutors who are engaging in prosecutorial nullification of state laws).

are elected by the public from prosecutorial districts, which track county lines and encompass either a single county or multiple counties.<sup>7</sup> Like legislative districts, prosecutorial districts are drawn by state legislatures. Yet unlike legislative districts, prosecutorial districts are egregiously malapportioned. For instance, Alabama's smallest prosecutorial district has 25,471 voters, whereas Alabama's largest prosecutorial district has 658,466 voters,<sup>8</sup> meaning that, with respect to district attorneys, voters in Alabama's smallest prosecutorial district hold over twenty-five times the voting power as voters in Alabama's largest prosecutorial district.<sup>9</sup> And Alabama is no outlier: Among the fourteen states analyzed in detail in this Note, all of them have similar levels of malapportionment.<sup>10</sup> No state has anything remotely approximating equal apportionment across prosecutorial districts.<sup>11</sup> Many of them have a level of malapportionment that exceeds the level of malapportionment that persisted among state legislative districts prior to the Supreme Court's apportionment revolution,<sup>12</sup> which began the process that forced states to transition from malapportioned legislative districts lines to substantially equipopulous districts.

Historically, malapportionment in legislative districts has been used to deprive voters of color of a meaningful opportunity to participate as equals in the political process.<sup>13</sup> Prior to the Court's apportionment revolution, migration patterns, coupled with refusals by state legislatures to reapportion legislative districts, frustrated the ability of urban, disproportionately non-white voters to translate numerical

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<sup>7</sup> See CARISSA BYRNE HESSICK, *THE PROSECUTORS AND POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS* 4, 10 (2020) [hereinafter *NATIONAL PROSECUTOR STUDY*], <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/F42Q-RESF>].

<sup>8</sup> See *infra* Table 1.

<sup>9</sup> See *infra* Table 1.

<sup>10</sup> See *infra* Table 2. This Note focuses on states that use a meaningful number of prosecutorial districts that encompass multiple counties because apportionment reform, either through the courts or state legislature, is most plausible where states have already deviated from single-county districting.

<sup>11</sup> See generally *NATIONAL PROSECUTOR STUDY*, *supra* note 7 (summarizing prosecutorial election data from every jurisdiction that elects local prosecutors).

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 *IND. L.J.* 1033, 1041 (2018) (discussing how malapportionment has been used to dilute the voting power of communities of color); J. Douglas Smith, *The Supreme Court Could Send America Back a Century*, *TIME* (Dec. 8, 2015, 10:14 EST), <https://time.com/4139409/one-person-one-vote> [<https://perma.cc/CJ7S-T6DE>] (“In the American South, where labor unions were weak, malapportionment served as a cornerstone of white supremacy, ensuring the overrepresentation of the most ardent segregationists and thus further delaying the realization of civil and voting rights for African Americans.”).

majorities into legislative majorities.<sup>14</sup> State legislative majorities benefiting from malapportionment lacked incentive to reapportion. Voters were thus unable to rely on the political process to express and respond to the preferences of political majorities, creating a textbook case of political process failure,<sup>15</sup> understood as “an electoral majority’s willingness to consistently impose material or symbolic costs upon a disfavored minority.”<sup>16</sup> In response to this political process failure, the Court infamously entered the political thicket, instructing legislative districts to comply with the principle of one-person, one-vote,<sup>17</sup> which requires that legislative districts be drawn with substantially or precisely equal populations depending on the type of legislative district. Among other effects, this intervention broke up closed political systems and led to more equitable access to the political process.<sup>18</sup>

Today, our system for electing district attorneys—and our criminal justice system more broadly—evinces many of the symptoms of political process failure that triggered the apportionment revolution and that, today, compel court intervention in voting rights cases more broadly.<sup>19</sup> These include entrenched incumbency, extraordinarily low challenger rates, dismally few district attorneys of color, and, perhaps

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<sup>14</sup> See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Reconsidered*, 67 ALA. L. REV. 485, 486 (2015) (“Mass migrations to the cities, coupled with refusals to redraw districting lines, had left state legislatures in the hands of entrenched political minorities with no incentive to vote themselves out of political power.”); Ostrow, *supra* note 13, at 1041 (noting that malapportionment caused “urban voters, who were disproportionately members of minority groups, [to have] their votes numerically diluted”).

<sup>15</sup> See Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045, 1057 (2008) (describing “political process failure” as “extreme population disparities borne of legislative inaction and no recourse for popular majorities to effect change”).

<sup>16</sup> Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 30 (2014) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78–87 (1980)).

<sup>17</sup> See *Reynolds v. Sims*, 377 U.S. 533, 561–68 (1964).

<sup>18</sup> See generally Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1309 (2002).

<sup>19</sup> Criminal justice scholars have analyzed various ways in which our criminal justice system suffers from a variety of process failures, “creat[ing] outcomes that are suboptimal or unjust when it comes to criminal law . . . because voters and legislators, for one reason or another, have insufficient regard for the interests of criminal suspects and defendants.” Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1115 (2015); see also *id.* at 1115–21 (assessing criminal justice process failures and collecting scholarship on the subject). While these scholars identify criminal justice process failures and propose doctrinal changes in criminal procedure to account for them, by contrast, this Note contends that the *electoral system* overseeing our criminal justice system is, itself, a political process failure, that may be partially remedied through voting rights doctrine and judicial intervention.

most significantly, decades of discriminatory prosecutorial policy unresponsive to the needs of communities of color.<sup>20</sup> This Note contends that we are in the midst of another major political process failure—prosecutorial political process failure—and that, as with legislative districts in the 1960s, malapportionment is one of the key structural barriers causing the process failure.

This Note is the first piece of scholarship to examine the possibility and normative implications of extending the Fourteenth Amendment's guarantee of one-person, one-vote to prosecutorial districts. It argues that using one-person, one-vote to force states to draw equitably apportioned prosecutorial districts would meaningfully address prosecutorial political process failure and have a number of salutary effects on our democracy: It would provide voters with an equal opportunity to exert influence over their district attorney; it would rebalance the distribution of voters' influence over district attorneys which, due to severe malapportionment, currently dilutes the voting power of communities of color and gives white voters a disproportionate influence over our elected prosecutors and thus our criminal justice system more broadly; it may increase challenger rates, producing healthier levels of prosecutorial democratic competition; it may lead to an increase in the number of district attorneys of color; and it would further core democratic norms, including respect for the equal dignity of voters.<sup>21</sup>

This Note proceeds as follows. Part I briefly examines the history and role of district attorneys in our democratic system to sketch a democratic theory of district attorneys. This Part draws out the link between the district attorney's key defining power—prosecutorial discretion in the enforcement of the law—and the primary mechanism that shapes the exercise of this power: prosecutorial elections.<sup>22</sup>

Part II assesses the extent and magnitude of prosecutorial malapportionment. To do so, this Part provides high-level demographic statistics on population disparities between districts within states. Given the historical ties between malapportioned districts and issues of descriptive representation, this Part also highlights disparities between the racial demographics of prosecutors within a state and the state's overall population.<sup>23</sup> The picture painted is stark: Our district attorney system features shockingly few district attorneys of color and, because

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<sup>20</sup> See *infra* Section III.C.

<sup>21</sup> See *infra* Section III.C.

<sup>22</sup> See *infra* Part I.

<sup>23</sup> See *infra* Part II.

of malapportionment, systematically undervalues the voting power of voters of color.<sup>24</sup>

Part III makes the case that prosecutorial districts should be subject to the requirements of one-person, one-vote. To do this, Section III.A summarizes the jurisprudence on one-person, one-vote. Given the absence of precedent applying these principles to prosecutorial districts, this Part looks to reason by analogy from the broader universe of one-person, one-vote cases challenging non-legislative offices, such as elected judges. Although one-person, one-vote does not apply to judicial districts and a few opinions have, in dicta, grouped prosecutors and judges together in one-person, one-vote challenges to judicial districts, this Section argues one-person, one-vote should apply to elected prosecutors because elected prosecutors' role in our democracy is both fundamentally different from that of elected judges and more akin to the sorts of legislative and executive officers to whom one-person, one-vote applies. This is particularly true today, as increasingly more progressive prosecutors maximally flex their discretionary enforcement powers in quasi-legislative ways in the service of their constituents.<sup>25</sup>

After demonstrating that precedent does not foreclose extending one-person, one-vote to prosecutorial districts, Section III.B analyzes whether extending one-person, one-vote to a single-member body is appropriate, given that most offices to which the doctrine currently applies are multi-member bodies. This Part argues that despite the fact that district attorneys are single-member bodies, malapportionment resulting from deliberate districting choices by state legislatures still inflicts the principal harm that one-person, one-vote mitigates: inequality of voter influence over elected officials.<sup>26</sup> Thus, the fact that district attorneys are single-member offices should not be regarded as an insurmountable barrier to applying one-person, one-vote to prosecutorial districts.

Section III.C then assesses whether our district attorney system is evincing the sort of political process failure that compelled judicial intervention during the apportionment revolution and that triggers judicial intervention in voting rights doctrine more broadly. It argues that our district attorney system is exhibiting core symptoms of political process failure, including entrenched incumbency, low challenger rates, poor descriptive representation of voters of color, dog whistle campaigning, and significant disconnects between prosecutorial poli-

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<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Section III.A.

<sup>26</sup> See *infra* Section III.B.

cies and the needs of communities of color. Although district attorneys are not responsible for drawing their own districts' lines—and thus our district attorney system is not exhibiting this particular element of political process failure that, in part, triggered the apportionment revolution—courts have not regarded that element of political process failure as a necessary condition to extend one-person, one-vote to other bodies or to trigger judicial intervention in the political thicket when there are other salient factors indicating political process failure. For these reasons, courts should once again enter the political thicket and demand that states reapportion prosecutorial districts in a manner that adheres to one-person, one-vote.<sup>27</sup>

The Conclusion briefly analyzes what would follow if one-person, one-vote applied to prosecutorial districts. It argues that reapportioning prosecutorial districts to produce less malapportioned prosecutorial districts would fundamentally reshape the voting public's relationship to district attorneys, which would lead to more democratic outcomes and produce normatively desirable consequences that are consistent with the goals of contemporary racial justice movements.<sup>28</sup>

## I

### A DEMOCRATIC THEORY OF DISTRICT ATTORNEYS

In order to understand why voting rights doctrine should apply at all to district attorneys, it is helpful to first understand the particular role that elected prosecutors play in the American polity. This Part looks to craft a democratic theory of the district attorney by examining the history of elected district attorneys and the key power defining them: prosecutorial discretion in the enforcement of the law.

The United States arrived at its present system of district attorneys being elected from prosecutorial districts as a result of two major shifts. The first was a shift from private prosecution to public prosecution. Prior to its founding, the United States inherited the English system of private prosecution.<sup>29</sup> Under this system, there were no public prosecutors—and certainly no elected public prosecutors.<sup>30</sup> Instead, victims of crimes would hire private attorneys to prosecute their assailants.<sup>31</sup> In the eighteenth century, the United States began to shift from a model of private prosecution to one of public prosecu-

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<sup>27</sup> See *infra* Conclusion.

<sup>28</sup> See *infra* Conclusion.

<sup>29</sup> See Murray, *supra* note 4, at 190.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*



tion. This shift resulted in prosecutors who were generally appointed.<sup>32</sup>

The second major shift—from appointed to elected prosecutors—took place during the Jacksonian Revolution.<sup>33</sup> Beginning in the 1820s, populist movements catalyzed democratic reform across many institutions and elected offices, including district attorney offices.<sup>34</sup> As with many Jacksonian reforms, the goal was both to reduce the corrupting influence of patronage appointments<sup>35</sup> and to give the public more power to hold district attorneys accountable.<sup>36</sup>

During the transition from appointed prosecutors to prosecutors selected largely by popular election, the powers of the elected prosecutor also changed in a corresponding manner. The district attorney's role shifted from an administrative role involving "nondiscretionary duties" to one in which discretion on whether and how to prosecute is central to the nature of the office.<sup>37</sup> Today, as Justice Jackson once put it, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."<sup>38</sup>

This discretion generally encompasses the discretion to choose who, what, when, and how to charge, solicit a plea deal, and grant immunity.<sup>39</sup> As laid out later in this Note, the decisions that fall within

<sup>32</sup> See Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012) (noting that prosecutors were appointed government officers).

<sup>33</sup> *Id.* ("Between 1820 and 1860, states across the country adopted new constitutions to enlarge voting franchises, reapportion legislatures, and make many more government offices, including governors and judges, elected.").

<sup>34</sup> See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 57–58 (1998) ("The elected prosecutor emerged during the rise of Jeffersonian democracy in the 1820s, when the system of popularly elected officials was adopted. No longer beholden to the governor or the court, the prosecutor was deemed accountable to this amorphous body called 'the people,' specifically his constituents." (footnotes omitted)).

<sup>35</sup> See Ellis, *supra* note 32, at 1531 (noting that supporters of elected prosecutors argued that it would provide citizens with more control, eliminate patronage appointments, and align the interests of prosecutors with their communities).

<sup>36</sup> See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 76 (2011) ("The transition to elected prosecutors was designed to hold prosecutors accountable to local voters.").

<sup>37</sup> See Ellis, *supra* note 32, at 1538 (describing how, before the shift in role, prosecutors had mainly "nondiscretionary duties"); see also Gold, *supra* note 36, at 75 ("With this transition [to elected prosecutors], the public vested locally elected prosecutors with authority to act on its behalf and exercise control that private citizens previously held. Yet, the people retained the ultimate check on these elected prosecutors.").

<sup>38</sup> Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

<sup>39</sup> See Ellen S. Podgor, "What Kind of a Mad Prosecutor" Brought Us This White Collar Case, 41 VT. L. REV. 523, 523 (2017) (describing a prosecutor's discretion as the "discretion to pick and choose whom to charge, what to charge, when to charge, and

a prosecutor's discretion are largely free from external constraints.<sup>40</sup> Prosecutorial discretion can even encompass total nullification of valid state law.<sup>41</sup>

The precise boundaries of prosecutorial discretion are far beyond the scope of this Note. Key for this Note, however, are the minimal structural constraints that district attorneys have in exercising their discretion. District attorneys have such broad discretion in the exercise of prosecutorial power because the exercise of a district attorney's discretion is largely unreviewable by a court. The Supreme Court articulated the minimal constraints on prosecutorial discretion and the rationale for limited judicial review of exercises of prosecutorial discretion in *Wayte v. United States*. According to the Court, separation of powers principles, ensuring judicial and executive efficiency, and the challenges of crafting criteria for judicial review of exercises of prosecutorial discretion compel judicial deference toward prosecutors in this area of law. As the Supreme Court put it in *Wayte*:

[Prosecutors'] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.<sup>42</sup>

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whether to proceed against individuals or entities[.] . . . who will receive immunity, who will get a plea benefit, and whether a pending case will be dismissed" (footnotes omitted)).

<sup>40</sup> See Angela J. Davis, *Prosecutors, Democracy, and Race* (explaining that prosecutors, in deciding who to charge, are neither "required to explain or justify their decisions to anyone . . . nor are they required to follow rules or guidelines when making the decision" and how "[t]hese decisions are made behind closed doors, in the prosecutor's office, without any transparency"), in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 195, 197 (Máximo Langer & David Alan Sklansky eds., 2017).

<sup>41</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 *ALB. L. REV.* 239, 294–96 (2020) (arguing that nullification may be justified on expressive grounds as "acknowledging the damaging role law enforcement played" in pursuing certain policies, on movement-building grounds as a test case for future decriminalization, and on democratic grounds as "giv[ing] expression to local concerns about the application of statewide criminal statutes"); Murray, *supra* note 4, at 180 (theorizing the concept of populist prosecutorial nullification and arguing that nullification can be justified as a "hydraulic descendent" of jury nullification).

<sup>42</sup> *Wayte v. United States*, 470 U.S. 598, 607–08 (1985); see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("Judicial deference to the decisions of [prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts. . . . It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.").

Under this background understanding, there are few legal limits on exercises of prosecutorial discretion. Prosecutors operate with a strong presumption of constitutionality and thus generally are permitted to act in arbitrary ways.<sup>43</sup> Selective prosecution claims—claims that “the prosecutor has brought the charge for reasons forbidden by the Constitution”<sup>44</sup>—are unsurprisingly very difficult to win.<sup>45</sup> In an Equal Protection selective prosecution claim, for example, “[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary’”<sup>46</sup>—something which is “virtually impossible to establish.”<sup>47</sup>

On the other side, courts are equally hesitant to compel prosecution.<sup>48</sup> As the Second Circuit noted in a 1973 case regarding a federal prosecution, “[t]his judicial reluctance to direct federal prosecutions . . . has been applied even in cases . . . [in which] serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system.”<sup>49</sup> Similarly, courts have held that writs of mandamus can virtually never be issued to compel prosecution.<sup>50</sup>

In addition to having largely unreviewable discretion, prosecutors’ immunities provide an additional shield from accountability via the courts. Prosecutors have absolute immunity from civil suits over “activities [that are] intimately associated with the judicial phase of the criminal process.”<sup>51</sup> This functionalist approach to immunity casts an extraordinarily wide net. Under Second Circuit precedent, for example, it includes evidence falsification, witness coercion, sollicita-

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<sup>43</sup> See Podgor, *supra* note 39, at 524 (“It is not prohibited for prosecutors to act arbitrarily.”).

<sup>44</sup> *Armstrong*, 517 U.S. at 463.

<sup>45</sup> See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 4 (2009) (“The limits that exist stem from other areas of law—equal protection and due process—and these constraints rarely lead to successful prosecutorial misconduct claims.”); see also Podgor, *supra* note 39, at 524 (“[F]ew defendants have succeeded in the dismissal of an indictment absent a showing that the alleged conduct did not match the crime charged or was a result of vindictive action.”).

<sup>46</sup> *Armstrong*, 517 U.S. at 465 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

<sup>47</sup> Ahmed, *supra* note 41, at 300 n.354.

<sup>48</sup> See Krauss, *supra* note 45, at 5 (“If a prosecutor decides not to pursue a case, the federal courts are reluctant to interfere.”).

<sup>49</sup> *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973).

<sup>50</sup> See Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 401–02 (2008) (“[Courts] have ruled in categorical terms that writs of mandamus can never be issued to compel prosecution[,] . . . mean[ing] . . . that while a decision not to prosecute, in theory, can be declared illegal, it generally cannot be overturned or remedied as a matter of fact.”).

<sup>51</sup> *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

tion of perjured testimony, and introducing illegally seized evidence, among other acts.<sup>52</sup>

Prosecutors are often also entitled to assert qualified immunity. Unlike absolute immunity, which operates as a total shield from litigation, qualified immunity is a defense allowing civil officers, including prosecutors, to escape civil liability unless the prosecutor reasonably should have known that their conduct violated clearly established law.<sup>53</sup> Although a modest standard in theory, in practice courts grant qualified immunity for all but the most egregious constitutional violations.<sup>54</sup> With victims often powerless to pursue oversight of prosecutorial conduct via the courts,<sup>55</sup> this leaves only one meaningful check against prosecutorial misconduct: the voting public. Upon seeing that district attorneys have nearly unbounded enforcement discretion, and that the only significant check on exercises of this discretion is the ballot box, one begins to view democratic representatives as not unlike legislators, who derive their legitimacy from and whose actions are constrained by the voting public.<sup>56</sup> As with legislators, one

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<sup>52</sup> See Taylor v. Kavanagh, 640 F.2d 450, 452 (2d Cir. 1981); see also Kate Levine & Joanna Schwartz, *Hold Prosecutors Accountable, Too*, BOSTON REV. (June 22, 2020), <https://bostonreview.net/law-justice/kate-levine-joanna-schwartz-hold-prosecutors-accountable-too> [<https://perma.cc/GRN4-GPH8>] (recognizing that “[p]rosecutors are absolutely immune from liability . . . no matter how outrageous their conduct” and that courts have granted absolute immunity to prosecutors “who have falsified evidence, coerced witnesses, and known but failed to disclose police misconduct”).

<sup>53</sup> See Hope v. Pelzer, 536 U.S. 730 (2002) (declining qualified immunity because the officer should reasonably have known that the alleged conduct was unlawful). Denials of qualified immunity usually require identifying an identical, factually similar case finding officer conduct unlawful that put future officers on notice that their conduct was unlawful. See Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 613 (2021) (“Current Supreme Court doctrine suggests that an officer violates clearly established law only if there is a prior court of appeals or Supreme Court decision holding virtually identical facts to be unconstitutional.”).

<sup>54</sup> See, e.g., Connick v. Thompson, 563 U.S. 51, 54, 62–63 (2011) (upholding district attorneys’ qualified immunity despite line attorneys’ previous *Brady* violations); see also Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (“[T]his Court routinely displays an unflinching willingness ‘to summarily reverse courts for wrongly denying officers the protection of qualified immunity’ but ‘rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.’” (second alteration in original) (quoting Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari))); Levine & Schwartz, *supra* note 52 (“Without a mechanism to deter prosecutors individually, or a means to challenge widespread misconduct in prosecutors’ offices, these types of injustices will go without remedy.”).

<sup>55</sup> See Levine & Schwartz, *supra* note 52 (“Despite years of evidence of an epidemic of prosecutorial misconduct, there is almost no way for victims of such injustice to seek redress.”).

<sup>56</sup> Máximo Langer & David Alan Sklansky, *Epilogue: Prosecutors and Democracy – Themes and Counterthemes* (“[L]ocal prosecutors in the United States are political figures who get at least part of their legitimacy from the same sources than [sic] other local

important source of a district attorney's legitimacy is the shape and size of their district and whether that district complies with the requirements of the Constitution. The next Part examines prosecutorial districts in more detail.

## II

### MALAPPORTIONED CRIMINAL JUSTICE: AN OVERVIEW OF PROSECUTORIAL DISTRICTS

Our criminal justice system is overseen by about 2,300 district attorney offices.<sup>57</sup> They oversee over 2,300,000 felony cases each year, which amounts to ninety-five percent of all criminal prosecutions.<sup>58</sup> District attorneys are appointed in Alaska, Connecticut, Delaware, and New Jersey, and three additional states allow counties to decide whether to elect or appoint their district attorney.<sup>59</sup> In all other states, the American polity elects its district attorneys in local elections.<sup>60</sup> Most of these prosecutors serve four-year terms.<sup>61</sup>

Like legislative districts prior to the apportionment revolution, prosecutorial districts track county lines and, for this reason, are hugely malapportioned.<sup>62</sup> Approximately 1,700 prosecutors oversee districts with fewer than 100,000 people, while 43 prosecutors have jurisdiction over districts with more than one million residents.<sup>63</sup> The largest prosecutorial district is Los Angeles County—containing almost ten million voters—while the smallest prosecutorial district is located in Arthur, Nebraska and has a population of just 460 people.<sup>64</sup> In addition to population disparities between districts of different states, there are also huge population disparities between districts within the same state.<sup>65</sup> For example, Florida's smallest prosecutorial district has a population of 73,090, while its largest prosecutorial district has a population of 1,748,066.<sup>66</sup>

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political officials.”), in *PROSECUTORS AND DEMOCRACY* 300, 302 (Máximo Langer & David Alan Sklansky eds., 2017).

<sup>57</sup> See Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 *PUB. CHOICE* 141, 141 (2014).

<sup>58</sup> *Id.*

<sup>59</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 9, 18, 39, 40, 207, 266.

<sup>60</sup> See *id.* at 4.

<sup>61</sup> See *id.* at 9; see also Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *OHIO ST. J. CRIM. L.* 581, 589 (2009) (noting that about eighty-five percent of local prosecutors serve four-year terms).

<sup>62</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 10; see also *infra* Table 1.

<sup>63</sup> NATIONAL PROSECUTOR STUDY, *supra* note 7, at 5.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 43.

Malapportionment is often a function of a state choosing to assign one district attorney per county, but this is not always the case.<sup>67</sup> For example, Texas uses a mix of single-county and multi-county districts, but the population disparity between the largest and smallest county is over 4,000,000.<sup>68</sup> Fifteen other states use a mix of single-county and multi-county districts, and in each of these states, prosecutorial districts are significantly malapportioned.<sup>69</sup>

Table 1 in the appendix provides an overview of the degree of malapportionment in every county that uses a meaningful number of multi-county prosecutorial districts.<sup>70</sup> The sheer size of the population disparities across districts in each of these states is alarming. In Georgia, for example, voters in the smallest prosecutorial district have over eighteen times the voting power of voters in Georgia's largest prosecutorial district to hold their district attorney accountable.<sup>71</sup> Among all multi-county prosecutorial districts—that is, states where one might expect to find districts with substantially equal populations given the deviation from solely using single-county districting—voters in the smallest prosecutorial districts have *at least* 3.92 times the voting power, with respect to district attorneys, as voters in the largest counties. Setting aside Texas, which has an unusually large disparity between the population of the smallest and largest districts of nearly 1,993.38, the average disparity in voting power between voters in the smallest and largest districts in these states is 26.24.<sup>72</sup> While in several states, one or more highly populated counties with large urban centers and a few unusually small rural counties accentuate these figures, the breakdown in Table 1 shows that significant malapportionment is endemic across all prosecutorial districts.<sup>73</sup> In virtually none of the states analyzed in this Note does the median district, let alone the smallest and largest districts, fall within the ten percent range devia-

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<sup>67</sup> See *id.* at 41, 43 (illustrating the vastly different populations of districts in Florida despite the fact that Florida prosecutors oversee multi-county districts).

<sup>68</sup> See *id.* at 283, 298, 301 (noting that Oldham County has a population of 2,052, and Harris County has a population of 4,092,459).

<sup>69</sup> See *id.* at 11, 22, 35, 41, 45, 117, 125, 132, 138, 163, 208, 220, 246, 267, 278. These are Alabama, Arkansas, Colorado, Florida, Georgia, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, and Tennessee. I did not include Massachusetts in Table 1 because it does not use a meaningful number of multi-county districts.

<sup>70</sup> See *infra* Table 1. The states analyzed in this Note were selected on the theory that states that use multi-county districting are places in which one would expect to find the weakest case of malapportionment, since district lines could accommodate less populated districts by adding more counties into the districts.

<sup>71</sup> See *infra* Table 1.

<sup>72</sup> See *infra* Table 1.

<sup>73</sup> See *infra* Table 1.

tion from hypothetical equipopulous districts that would be permissible for state legislative districts under one-person, one-vote.<sup>74</sup> In fact, as shown in Table 1, the vast majority of prosecutorial districts in states with a meaningful number of multi-county districts fall outside of the permissible ten percent range: In Alabama, 39 of 42 districts are non-compliant with one-person, one-vote; in Arkansas, 23 of 28 districts are non-compliant; in Colorado, 21 of 22 districts are non-compliant; in Florida 17 of 20 districts are non-compliant; in Georgia, 41 of 49 districts are non-compliant; in Kentucky, 51 of 57 districts are non-compliant; in Louisiana, 41 of 42 districts are non-compliant; in Maine, 6 of 8 districts are non-compliant; in Mississippi, 25 of 28 districts are non-compliant; in North Carolina, 41 of 49 districts are non-compliant; in New Mexico, 16 of 16 districts are non-compliant; in Oklahoma, 25 of 27 districts are non-compliant; in South Carolina, 13 of 16 districts are non-compliant; in Tennessee, 26 of 31 districts are non-compliant; and in Texas, 162 of 163 districts are non-compliant.

In the past, malapportionment has been leveraged to frustrate the election of representatives of color.<sup>75</sup> As with legislative districts in the 1960s, the modern district attorney system features both severe malapportionment and overwhelmingly white representatives. In 2014, although only 60.96% of the U.S. population was white, 92.65% of elected district attorneys were white.<sup>76</sup> Of the remaining 7.35% elected district attorneys of color, only 2.44% were Black, compared to 12.29% of the U.S. population;<sup>77</sup> 4.28% of district attorneys were Latinx,<sup>78</sup> compared to 17.95% of the U.S. population; only 0.28% of district attorneys were Asian American or Pacific Islander, compared to 5.53% of the U.S. population;<sup>79</sup> and only 0.23% American Indian or Alaska Native district attorney, compared to 0.73% of the U.S. population.<sup>80</sup>

The national deficit of prosecutors of color is also evident when one examines the problem at the county level. In counties in which people of color constitute 50–60% of the population, just 19% of dis-

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<sup>74</sup> See *infra* Table 1; *infra* Section III.A.1 (explaining that under the one-person, one-vote doctrine, the population disparity between the least and most populated districts should not be greater than ten percent).

<sup>75</sup> See Ostrow, *supra* note 13, at 1041 (noting that malapportionment caused “urban voters, who were disproportionately members of minority groups, [to have] their votes numerically diluted”).

<sup>76</sup> Kate Stohr & Deirdra Funcheon, *America’s Prosecutor Problem*, FUSION, <http://interactive.fusion.net/how-to-rig-an-election/district-attorney-race.html> [<https://perma.cc/6Q7G-ML35>].

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

trict attorneys are people of color.<sup>81</sup> In counties more heavily populated by voters of color (80–90%), just over half of the district attorneys are people of color.<sup>82</sup> And among all counties in which people of color constitute at least half of the population, still only 42% of district attorneys are people of color.<sup>83</sup>

Using a comprehensive 2015 study on elected prosecutors, Table 2 in the appendix provides an overview of the racial makeup of elected prosecutors as of 2014 for the states that use a meaningful number of multi-county prosecutorial districts and compares that data to 2019 census data on the racial demographics of these states.<sup>84</sup> Like the data on population disparities, the racial disparities here are quite stark. In no state does the proportion of district attorneys of color even approach the state's overall racial demographics.<sup>85</sup> Despite voters of color constituting a significant share of the overall population among most of the states analyzed in this Note, in all but two states, white district attorneys constitute at least 86% of the overall district attorney composition.<sup>86</sup> For example, in Georgia, although Black people constitute 32.6% of the population, as of 2015, only 6.5% of district attorneys in Georgia were Black.<sup>87</sup> Similarly, in Alabama, although Black people constitute 26.8% of the total population, just 2.4% of Alabama district attorneys in 2015 were Black.<sup>88</sup>

This Note contends that severe malapportionment and the dismal statistics on district attorneys of color express precisely the sorts of political process failures that one-person, one-vote—and voting rights doctrine more broadly—aims to remedy.<sup>89</sup> But before assessing the

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *infra* Table 2. In the data I rely on, not all prosecutors are categorized by race. Where that is the case, I do not factor them into the percentage calculation. The data also includes attorneys general. I have removed attorneys general from the calculation. I also acknowledge that since 2015, the demographics have likely changed for the better, at least at the margins, given the new efforts of racial organizations to mount challenges and the increasing salience of district attorney races. See *infra* note 214.

<sup>85</sup> See *infra* Table 2.

<sup>86</sup> See *infra* Table 2.

<sup>87</sup> See *infra* Table 2.

<sup>88</sup> See *infra* Table 2.

<sup>89</sup> One possible alternative explanation for the lack of meaningful descriptive representation of voters of color among district attorneys is the pool of eligible candidates—namely, the racial makeup of state bars. Attorneys of color are also significantly unrepresented in state bars, with white attorneys constituting eighty-five percent of the state bar nationally as of 2021. See AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY (2021), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/2021-national-lawyer-population-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf) [<https://perma.cc/D3QX-22LY>]. While the pool of eligible candidates may be part of the descriptive representational problem, it alone cannot explain the severity of the problem.



degree of prosecutorial political process failure, the next Part examines what courts have had to say about applying one-person, one-vote to a range of political offices and argues that one-person, one-vote should be extended to prosecutorial districts.

### III

#### APPLYING ONE-PERSON, ONE-VOTE TO PROSECUTORIAL DISTRICTS

This Part lays out the doctrine on one-person, one-vote. It then examines the doctrine's applicability to non-legislative offices. It argues that precedent does not foreclose the application of the one-person, one-vote principle to prosecutorial districts and that there are powerful normative reasons to extend it to prosecutorial districts grounded in both the absence of meaningful legal constraints on prosecutorial misconduct and the uniquely representative role that elected prosecutors play in American democracy. Finally, it addresses the challenges of applying a doctrine that was generated to remedy political process failure in multi-member bodies to a single-member body, and it concludes by analyzing contemporary prosecutorial political process failure.

##### A. *The One-Person, One-Vote Principle*

The Court's one-person, one-vote revolution was catalyzed by widespread political process failure.<sup>90</sup> By the 1960s, urbanization and migration patterns had created large population disparities between urban and rural counties.<sup>91</sup> Many states were choosing not to reapportion to accommodate this shift, granting rural voters—and, due to the mass migration of people of color to urban centers, white voters—a hugely disproportionate share of legislative power relative to non-rural, non-white voters.<sup>92</sup>

Due to malapportionment, numerical majorities were facing impossible climbs to obtain majority political power. Take Alabama—the target of the challenge in *Reynolds v. Sims*, where the Court first applied the one-person, one-vote principle to a districting scheme. At

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Moreover, as I show in Section III.C, the absence of meaningful descriptive representation among district attorneys is just one among many symptoms of prosecutorial political process failure in need of redress.

<sup>90</sup> See *Reynolds v. Sims*, 377 U.S. 533, 553 (1964) (“No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.”); see also notes 15–16 and accompanying text.

<sup>91</sup> See Charles & Fuentes-Rohwer, *supra* note 14, at 486, 490 (stating that by the 1960s, as the Black population became much more concentrated in cities, white people moved to the suburbs and rural areas in part due to this mass migration).

<sup>92</sup> See *id.* at 486.

the time of *Reynolds*, Alabama had not redistricted for over sixty years.<sup>93</sup> As a result of this inaction and population changes in the state, the Court was confronted with a clear case of political process failure. A majority of Alabama's Senate and State House represented just over a quarter of the state's total population. The population disparity between some of the smallest and largest districts was as high as 41:1.<sup>94</sup> Numerical majorities could not translate into political majorities without reapportionment, and political majorities had no incentive to reapportion, absent court intervention.

This form of white, rural minority rule pervaded the United States, from Colorado to Maryland.<sup>95</sup> In the face of schemes like Alabama's, the Court entered the political thicket, announcing its one-person, one-vote rule requiring that legislative districts be "as nearly of equal population as is practicable."<sup>96</sup> As a result of the Supreme Court's intervention, legislative districts became equally apportioned, and the Court broke up political processes that were structurally closed to contestations to political power due to malapportionment.

### 1. *One-Person, One-Vote and Legislative Districts*

Today, under the Supreme Court's one-person, one-vote doctrine, the Fourteenth Amendment "requires that election districts be drawn without substantial variations in population between districts."<sup>97</sup> Precisely how much deviation is permitted depends on the type of district at issue. Federal congressional districts must have populations "as nearly as practicable" to mathematical equality, with essentially no de minimis exception.<sup>98</sup> By contrast, state legislative districts can have some deviation in population equality—that is, the "sum of the percentage deviations from perfect population equality of the most- and least-populated districts"<sup>99</sup>—when necessary to

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<sup>93</sup> See *Reynolds*, 377 U.S. at 545.

<sup>94</sup> See *id.* at 545. As laid out in Table 1, prosecutorial districts in many states today actually have more significant malapportionment than Alabama did at the time of *Reynolds*. See *infra* Table 1.

<sup>95</sup> See Charles & Fuentes-Rohwer, *supra* note 14, at 491.

<sup>96</sup> *Reynolds*, 377 U.S. at 577.

<sup>97</sup> MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12:8 (3d ed.), Westlaw (database updated Sept. 2021) (citing *Avery v. Midland County*, 390 U.S. 474, 484–85 (1968) (holding that the Constitution "permits no substantial variation from equal population in drawing districts for units of local government")).

<sup>98</sup> See *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969)); *Kirkpatrick*, 394 U.S. at 530 (holding that states must justify population variances, no matter how small).

<sup>99</sup> *Evenwel v. Abbott*, 578 U.S. 54, 60 n.2 (2016).

“accommodate traditional districting objectives.”<sup>100</sup> However, significant population disparities are impermissible.<sup>101</sup> A significant population disparity for the purposes of one-person, one-vote is generally understood to mean a population disparity between the least and most populated districts of greater than ten percent, though the Supreme Court and Courts of Appeals have occasionally upheld state legislative districting plans with greater than ten percent population deviation to preserve the lines of political subdivisions.<sup>102</sup> Courts sometimes show more deference to local legislative districting plans.<sup>103</sup>

In an Equal Protection challenge to a state or local districting plan, courts apply a burden-shifting approach. If a districting plan falls within the ten percent play-in-the-joints, then a court will deem the districting plan presumptively valid. In this situation, “the state is entitled to a presumption that the apportionment plan was the result of an ‘honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.’”<sup>104</sup> When a court finds that a districting plan exceeds the ten percent threshold and that the deviation is not reasonably justified on the basis of traditional districting principles, the court assumes that plaintiffs have established a prima facie case of discrimination under the Fourteenth Amendment.<sup>105</sup> At this stage, the burden shifts to the state to justify the population deviation on the basis of traditional districting principles.

When the ten percent threshold is crossed and plaintiffs establish a prima facie case of discrimination, circuit courts appear to be divided on which level of scrutiny applies.<sup>106</sup> For example, the Eighth Circuit has held that strict scrutiny applies to one-person, one-vote challenges.<sup>107</sup> The Tenth Circuit recently applied the less scrutinious *Anderson-Burdick* review, which is the standard of review courts typi-

<sup>100</sup> *Id.* at 59–60 (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)).

<sup>101</sup> See *Brown*, 462 U.S. at 842–43 (stating that an apportionment plan with large disparities would create a prima facie case of discrimination (citing *Swann v. Adams*, 385 U.S. 440, 444 (1967))).

<sup>102</sup> See *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (“While [deviation of sixteen] percentage may well approach tolerable limits, we do not believe it exceeds them.”).

<sup>103</sup> See *Ostrow*, *supra* note 13, at 1043 (“The Court has embraced an even more flexible approach in its review of local districting plans . . .”).

<sup>104</sup> *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

<sup>105</sup> See, e.g., *Fairley v. Hattiesburg*, 584 F.3d 660, 675 (5th Cir. 2009) (“If a population deviance exceeds 10%, it constitutes a *prima facie* case of invidious discrimination . . .”).

<sup>106</sup> See *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1283 (10th Cir. 2019) (acknowledging the circuit split on the appropriate level of scrutiny for one-person, one-vote challenges and applying *Anderson-Burdick* review without deciding “which level of scrutiny applies to all one-person, one-vote challenges”).

<sup>107</sup> See *Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012) (“[D]eviations from [one-person, one-vote] are subject to strict scrutiny.”).

cally apply to any constitutional challenge to generally applicable election laws that burden constitutional rights,<sup>108</sup> such as challenges to voter ID laws.<sup>109</sup> *Anderson-Burdick* review is less stringent than strict scrutiny,<sup>110</sup> but even under *Anderson-Burdick* review, courts have found malapportionment schemes violated the Equal Protection Clause.<sup>111</sup>

## 2. *One-Person, One-Vote and Judicial Districts*

When the Supreme Court announced the one-person, one-vote principle, it was not clear at the time which elected offices would be subject to the requirement. The challenge in *Reynolds v. Sims* concerned state legislative apportionment.<sup>112</sup> Shortly thereafter, in *Wesberry v. Sanders*, the Court extended the one-person, one-vote requirement to federal legislative districts.<sup>113</sup>

Since then, the Court has pronounced broadly on the scope of one-person, one-vote. In *Hadley v. Junior College of Metro Kansas City*, the Court laid down a general limiting principle to one-person, one-vote: “[W]henever a state or local government decides to select persons by popular election to perform *governmental functions*, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . .”<sup>114</sup>

The key operative phrase here is “governmental functions.”<sup>115</sup> The Court has defined this phrase to mean offices whose “‘powers are general enough and have sufficient impact throughout the district’ to require that elections to the body comply with equal protection strict-

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<sup>108</sup> See generally Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 674–78 (discussing *Anderson-Burdick* review).

<sup>109</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (holding that Indiana’s interests in requiring a government ID to vote were sufficient to justify any limitation imposed on voters).

<sup>110</sup> See *Navajo Nation*, 929 F.3d at 1285 (stating that under *Anderson-Burdick* review, a state or county “must show something more than a rational motivation for drawing unequal districts; it must provide a reason or reasons that are strong enough to justify the significant dilution of its citizens’ right to vote”).

<sup>111</sup> See *id.* (holding that a malapportionment scheme violated the Equal Protection Clause under *Anderson-Burdick* review).

<sup>112</sup> See 377 U.S. 533, 566 (1964) (holding that Alabama’s malapportioned state legislative map violated the Fourteenth Amendment).

<sup>113</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (extending one-person, one-vote to federal congressional districts).

<sup>114</sup> 397 U.S. 50, 56 (1970) (emphasis added).

<sup>115</sup> *Id.*

tures.”<sup>116</sup> The Court later contrasted elections for offices that perform governmental functions with “special interest elections,” which are elections for an office with two characteristics: a “special limited purpose” and a “‘disproportionate effect’ on a definable group of constituents.”<sup>117</sup> Examples include the board of directors of a water storage district<sup>118</sup> and a state commission, the sole function of which is to screen judicial candidates for appointment by the Governor of the state.<sup>119</sup>

Although the elected offices listed above by definition serve a special limited purpose and, as a result, the conduct of these elected officers could have a disproportionate effect on a specific group of constituents, the Court has sometimes excepted certain elected officials from the requirements of one-person, one-vote notwithstanding the fact that such officials appear to exercise governmental functions in a general manner. Despite the *Hadley* majority’s broad interpretation of the scope of one-person, one-vote,<sup>120</sup> today it is black letter law that one-person, one-vote does not apply to judicial districts.<sup>121</sup>

While the judicial exception to one-person, one-vote is now widely accepted, its origins are surprisingly indirect. In 1973, in *Wells v. Edwards*, the Supreme Court summarily affirmed a district court decision which held that one-person, one-vote did not apply to judicial districts.<sup>122</sup> In that district court opinion, the judge held that the exception laid down in *Hadley*—that “there might be some case in which a [s]tate elects certain functionaries whose duties are so far removed from normal governmental activities . . . that a popular election in compliance with [one-person, one-vote] might not be required”<sup>123</sup>—encompassed elected judges.

The district court supported this holding on two grounds. The first dealt with precedent. According to the court, past apportionment cases “ha[d] always dealt with elected officials who performed legisla-

<sup>116</sup> See *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 696 (1989) (quoting *Hadley*, 397 U.S. at 54).

<sup>117</sup> See *Carlson v. Wiggins*, 675 F.3d 1134, 1140 (8th Cir. 2012) (quoting *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973)).

<sup>118</sup> See *Salyer Land Co.*, 410 U.S. at 724, 728.

<sup>119</sup> See *Carlson*, 675 F.3d at 1141.

<sup>120</sup> See *Hadley*, 397 U.S. at 54–56 (“[T]he Equal Protection Clause . . . requires that each qualified voter must be given an equal opportunity to participate . . . and . . . each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.”).

<sup>121</sup> See *Chisom v. Roemer*, 501 U.S. 380, 402 (1991) (citing *Wells v. Edwards*, 409 U.S. 1095 (1973)).

<sup>122</sup> See 409 U.S. 1095 (1973).

<sup>123</sup> See *Wells v. Edwards*, 347 F. Supp. 453, 454–55 (M.D. La. 1972) (quoting *Hadley*, 397 U.S. at 56), *aff’d*, 409 U.S. 1095 (1973).

tive or executive type duties, and in no case ha[d] the one-man, one-vote principle been extended to the judiciary.”<sup>124</sup> The second dealt with the role of elected judges in our democratic system. The court distinguished the function of elected judges from the functions of elected legislative and executive branch officials. According to the court, judges “are not representatives in the same sense as are legislators or the executive” because “[t]heir function is to administer the law, not to espouse the cause of a particular constituency.”<sup>125</sup> Unlike the legislature, a state’s judicial branch “is not the organ responsible for achieving representative government”—“[j]udges do not represent people, they serve people.”<sup>126</sup> Because judges do not exercise the same type of representational governmental power that the legislative and executive bodies found subject to one-person, one-vote exercise, the court held that one-person, one-vote does not apply to elected judges.<sup>127</sup>

Justice White, joined by Justices Douglas and Marshall, dissented over the summary affirmance.<sup>128</sup> They critiqued the lower court opinion for reading the non-governmental function exception far too broadly. According to Justice White, judges “are state officials, vested with state powers and elected (or appointed) to carry out the state government’s judicial functions. As such, they most certainly ‘perform governmental functions.’”<sup>129</sup> Many scholars have either furthered this line of argument, claiming that the rule against applying one-person, one-vote to judicial districts is based on a fundamental misunderstanding of the representative role of elected judges in our democracy,<sup>130</sup> or at least acknowledged the peculiar, seemingly contradictory ways in which voting rights doctrine treats judges as both popular representatives and pure administrators of the law.<sup>131</sup> Despite these argu-

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<sup>124</sup> *Id.* at 455.

<sup>125</sup> *Id.* (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)).

<sup>126</sup> *Id.* at 455–56 (quoting *N.Y. State Ass’n of Trial Laws. v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967)).

<sup>127</sup> *See id.* at 454.

<sup>128</sup> *Wells v. Edwards*, 409 U.S. 1095, 1096 (1973) (White, J., dissenting).

<sup>129</sup> *Id.* at 1096–97.

<sup>130</sup> *See, e.g.,* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 133 (1997) (“[The *Wells* majority] failed . . . to define why the elected judiciary is not an important feature of state representative government.”); Alec Webley, *Judges Are (Not?) Politicians: Williams-Yulee v. The Florida Bar and the Constitutional Law of Redistricting of Judicial Election Districts*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 851, 897–98 (2016) (arguing that the *Wells* court erred in conceptualizing elected judges as less representative than elected legislators).

<sup>131</sup> *See, e.g.,* Richard Briffault, *The Supreme Court, Judicial Elections, and Dark Money*, 67 DEPAUL L. REV. 281, 281 (2018) (“Judicial elections are subject to the same constitutional doctrines that govern voting on legislators, executives, and ballot propositions. Except when they are not.”); Pamela S. Karlan, *Electing Judges, Judging*

ments to the contrary, the Supreme Court reaffirmed the *Wells* holding in *Chisom v. Roemer*, a 1991 Voting Rights Act (VRA) challenge to Louisiana's districted state supreme court map, where it recognized that one-person, one-vote does not apply to judicial districts.<sup>132</sup>

### 3. *One-Person, One-Vote and Prosecutorial Districts*

Bracketing for a moment the seeming peculiarity of applying one-person, one-vote to a single-member body, given that the Supreme Court has treated executive bodies like legislative bodies for the purposes of one-person, one-vote,<sup>133</sup> it would seem natural to extend the doctrine to prosecutorial districts, since it is reasonable to regard district attorneys as local executive officers.<sup>134</sup>

Yet in the line of cases establishing that one-person, one-vote does not apply to elected judges, there is a small amount of dicta arguing that elected prosecutors should be regarded like judges and, therefore, one-person, one-vote should not apply to prosecutorial districts. In *Stokes v. Fortson*, a 1964 voting rights case challenging Georgia judicial election procedures, a district court held that elected judges were not representatives in the same way as members of the legislative or executive branches and, for this reason, not subject to the requirements of one-person, one-vote.<sup>135</sup> But in so holding, the court, in dictum, grouped elected prosecutors with elected judges, opining that prosecutorial districts too should not be subject to one-person, one-vote: "Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a partic-

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*Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 83–84 (2009) (acknowledging the tension between the Supreme Court's treatment of judges as insufficiently representative for the purposes of one-person, one-vote "because '[t]heir function is to administer the law, not to espouse the cause of a particular constituency,'" yet also sufficiently representative to be treated as representatives under section 2 of the VRA (quoting *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972))); cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) ("This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system.").

<sup>132</sup> 501 U.S. 380, 402 (1991); see also *Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp. 3d 395, 424 (M.D. La. 2017) ("Judicial districts . . . are not required to comply with the principle of one person, one vote as a matter of constitutional law."), *rev'd sub nom. Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020).

<sup>133</sup> See, e.g., *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688 (1989) (striking down a malapportioned executive body that gave each borough of New York City one representative, regardless of borough population, as a violation of one-person, one-vote).

<sup>134</sup> See *infra* notes 139–41 and accompanying text.

<sup>135</sup> 234 F. Supp. 575, 577 (N.D. Ga. 1964).

ular constituency.”<sup>136</sup> This dictum about prosecutors has been cited in a few mostly dated district court cases, a single court of appeals case, and in *Wells* itself, none of which involved challenges to prosecutorial districts.<sup>137</sup> Hence, across all cases, this language is dicta and non-binding.

Contrary to the dictum of the district court judge in *Stokes*, there are important reasons to treat elected district attorneys differently than elected judges in voting rights jurisprudence. For starters, district attorneys are not judicial officers in the same way that judges are judicial officers. Courts—including the district courts in *Stokes* and *Wells*—have consistently held that, unlike judicial districts, local executive and legislative districts are subject to one-person, one-vote.<sup>138</sup> Yet unlike judges, district attorneys hold local executive powers.<sup>139</sup> As Justice Scalia noted in a dissenting opinion in *Morrison v. Olson*, regarding the role of federal prosecutors, “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function.”<sup>140</sup> Like federal prosecutors, elected district attorneys exercise, and are largely defined by, this “quintessentially executive function.”<sup>141</sup>

But more important than the semantics of whether district attorneys are members of the judicial branch or the executive branch of government, district attorneys play a fundamentally different representative role than elected judges. Courts have defended the proposition that one-person, one-vote does not apply to judicial districts on the grounds that “[v]oters do not elect a judge to ‘represent’ them—that is, to serve as their voice in government and advance their inter-

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<sup>136</sup> *Id.*

<sup>137</sup> *Gilday v. Bd. of Elections of Hamilton Cnty.*, 472 F.2d 214, 218 (6th Cir. 1972); *Pub. Integrity All. Inc. v. City of Tucson*, No. CV 15-138, 2015 WL 10791892, at \*4 (D. Ariz. May 20, 2015); *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F. Supp. 928, 931 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972); *N.Y. State Ass’n of Trial Lavs. v. Rockefeller*, 267 F. Supp. 148, 154 (S.D.N.Y. 1967).

<sup>138</sup> *See, e.g., Holshouser v. Scott*, 335 F. Supp. 928, 931 (M.D.N.C. 1971) (“[O]ne man-one vote [sic] doctrine . . . is [applicable] to selection of legislative and executive officials . . . .” (quoting *Stokes*, 234 F. Supp. at 577)), *aff'd*, 409 U.S. 807 (1972); *Fairley v. Hattiesburg*, 584 F.3d 660, 674 (5th Cir. 2009) (explaining that the Equal Protection Clause of the Fourteenth Amendment “guarantees the opportunity for equal participation by all voters in local government elections”).

<sup>139</sup> *See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895 (2009) (“[W]e have long recognized that prosecutors are exercising executive powers . . . .”); *see also Ellis, supra* note 32, at 1528–38 (documenting the history of district attorneys and noting that increased cooperation with police departments aligned district attorneys with the executive branch).

<sup>140</sup> 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

<sup>141</sup> *Id.*



ests.”<sup>142</sup> The same cannot be said of elected district attorneys. District attorneys, like judges, are in some ways challenged by their “total indifference to the popular will while simultaneously [being] requir[ed] . . . to run for elected office.”<sup>143</sup> But, as laid out in earlier sections of this Note, district attorneys play a more direct representative role in expressing and channeling the local popular will through enforcement decisions than judges do through opinion-writing. When district attorneys make decisions about whom to prosecute and whom not to prosecute, they are exercising “delegated sovereign authority”<sup>144</sup> because decisions about who is excepted from the law—and who is not—are the hallmarks of sovereign authority.<sup>145</sup> Indeed, unlike judges, part of the role of elected prosecutors is “to espouse the cause of a particular constituency”<sup>146</sup>—namely, the voters of their local jurisdiction, who in the American system serve as the primary check against abuse of this authority.<sup>147</sup> They quite literally represent the people in court. As Justice Scalia noted in his dissenting opinion in *Chisom*, where he contrasted the role of judges from prosecutors: “[I]t is the prosecutor who represents ‘the People’; the judge represents the Law—which often requires him to rule against the People.”<sup>148</sup>

Recent electoral campaigns for district attorney provide particularly clear illustrations of their uniquely representative role and of the theory that district attorneys represent “the People” in ways that elected judges do not. Consider the relatively recent phenomenon of “populist prosecutorial nullification,” in which district attorney candidates explicitly run on policy platforms of refusing to enforce valid state law in their local jurisdiction and, when elected, refuse to enforce that law based on their pre-election commitment.<sup>149</sup> Such actions

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<sup>142</sup> *Blankenship v. Bartlett*, 681 S.E.2d 759, 768 (N.C. 2009) (Timmons-Goodson, J., dissenting).

<sup>143</sup> *Chisom v. Roemer*, 501 U.S. 380, 400–01 (1991).

<sup>144</sup> See Gold, *supra* note 36, at 84 (arguing that the sovereign authority granted to prosecutors is acceptable only if those prosecutors remain democratically accountable to voters who may disapprove of prosecutorial job performance).

<sup>145</sup> See *id.* (“Deciding whom to exempt from the reach of valid legislative enactments is the essence of sovereign prerogative.”).

<sup>146</sup> *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)), *aff’d*, 409 U.S. 1095 (1973).

<sup>147</sup> See Davis, *supra* note 34, at 57–58 (“[T]he current system of choosing state and local prosecutors through the electoral process was established [to] hold[] prosecutors accountable to the people . . . . [T]he prosecutor was deemed accountable to this amorphous body called ‘the people,’ specifically his constituents.”).

<sup>148</sup> *Chisom*, 501 U.S. at 410–11 (Scalia, J., dissenting).

<sup>149</sup> See, e.g., Matt Charnock, *Boudin Will Not Prosecute Prostitution, Public Camping, and Other ‘Quality-of-Life Crimes’ Once Sworn In*, SFIST (Nov. 16, 2019), <https://sfist.com/2019/11/16/boudin-will-not-prosecute-prostitution-public-camping-and-other-quality-of-life-crimes-once-sworn-in> [<https://perma.cc/R4NA-SYFF>] (reporting that DA Boudin will

retain democratic legitimacy, despite effectively invalidating state law, when the policy “reflects a discernible popular will,”<sup>150</sup> made manifest through “a reasoned, public, pre-election promise that context indicates was electorally salient”<sup>151</sup> and also “respects the autonomy of those whose wills it does not implement”<sup>152</sup> by “minimiz[ing] local effects on those beyond the district who literally had no say . . . .”<sup>153</sup> Populist prosecutorial nullification, according to scholars, is (or at least can be) a legitimate expression of democratic sovereign authority, akin to jury nullification: “[F]ettered to localized popular will, programmatic prosecutorial nullification acts as a hydraulic descendant of jury nullification: It facilitates wholesale the species of democratic local control that jury nullification permits retail.”<sup>154</sup>

In at least three ways, nullification clarifies the core democratic role that district attorneys play. As a result, courts should hesitate before importing the assumptions about elected judges underlying voting rights doctrine to district attorneys. First, consider nullification’s relationship to sovereignty. On the one hand, one might view a local elected official’s decision to not enforce valid state law within the local official’s jurisdiction as a negation of that law—a declaration that, in this district, the law is effectively abolished. On the other hand, one might view such action not as a negation of law, but rather as a decision to carve out an exception to valid state law under which the law remains valid but simply does not apply to the local official’s constituents. In either case, nullification operates as an expression of local sovereign authority. Such action is made possible by the discretionary enforcement power that is unique to prosecutors and is legitimate only when tied to both a campaign and the ballot box.<sup>155</sup>

By contrast, an administrator of the law, such as an elected judge, would have no such power. Judicial review resulting in the overturning of a state law on constitutional grounds—arguably the closest judicial analogue to prosecutorial nullification—is importantly different from prosecutorial nullification. While district attorneys and judges are both constrained by constitutional law in at least some contexts, when

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not pursue “the prosecution of ‘quality-of-life’ crimes,” such as unlicensed street vending and panhandling). See generally Murray, *supra* note 4, at 176–77 (“[S]ome propose to de facto decriminalize [conduct] in full or in part, through . . . categorical prospective negation of law based on per se or as applied opposition to that law.”).

<sup>150</sup> Murray, *supra* note 4, at 209.

<sup>151</sup> *Id.* at 210.

<sup>152</sup> *Id.* at 209.

<sup>153</sup> *Id.* at 214.

<sup>154</sup> *Id.* at 180; see also Ahmed, *supra* note 41, at 295–96.

<sup>155</sup> See Murray, *supra* note 4, at 209–10 (arguing that prosecutorial nonenforcement policies can be legitimized through democratic authorization).

a judge overturns a law on constitutional grounds the legitimacy of the act principally derives from the words of the Constitution and the judge's interpretation of them. In this case, a judge is bound by the words of the Constitution and the highest binding court's interpretation of them. By contrast, when a district attorney nullifies state law, the legitimacy of that act principally derives from the tie between the district attorney's "pre-election promise" of non-enforcement and her winning an election in which that promise was sufficiently salient with the voters in her district.<sup>156</sup> Populist prosecutorial nullification is more like a polity's collective choice to rewrite the law, rather than a superseding of that law by a higher law.<sup>157</sup> The legitimacy of the judicial act derives from the Constitution, whereas the legitimacy of the prosecutorial act derives from its connection to the will of the people as expressed in the results of a local election. Put simply, if someone objects to a judge overturning state law on constitutional grounds, a judge points to her citation to a constitutional amendment. If someone objects to a prosecutor nullifying state law, she points to her campaign and election results.

Second, consider the relationship between populist prosecutorial nullification and legislative power. In holding that judicial districts need not comply with one-person, one-vote, the district court in *Wells* noted contrasts drawn by previous lower courts between elected officials who performed legislative or executive functions—to whom one-person, one-vote should apply—and judges and prosecutors who apply the law but do not create it.<sup>158</sup> Contrary to the assumptions of the district court in *Wells*, the policy goals pursued by recent district attorneys, made possible solely through valid exercises of their unique discretionary enforcement power, extend far beyond applying the law. They seek to use the full range of a district attorney's enforcement powers to create new de facto law within their local jurisdiction. As Professor W. Kerrel Murray puts it: "Blossoming, it seems, is a reimagining of prosecutorial discretion that goes beyond nipping and tucking to embrace substantive reworking of the law within a district attorney's jurisdiction."<sup>159</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> See *id.* at 238 ("I have no problem assuming *arguendo* that populist prosecutorial nullification undermines the primacy of the statute nullified. . . . [A]t least sometimes we may validly do so—i.e., when we can identify a more-primary authority, such as the People from which legislative authority derives.").

<sup>158</sup> See *Wells v. Edwards*, 347 F. Supp. 453, 455–56 (M.D. La. 1972) (stating that the judiciary is not intended to achieve representative government and that the one-person, one-vote idea was designed to ensure that each member of an elected body represents a similar number of voters), *aff'd*, 409 U.S. 1095 (1973).

<sup>159</sup> Murray, *supra* note 4, at 178 (emphasis added).

Take Chesa Boudin—the recently elected district attorney of San Francisco. While running for election, Boudin vowed to abolish cash bail. This is a policy which the state legislature could have achieved and which, in fact, appeared via ballot measure in California in the 2020 election.<sup>160</sup> In a similar vein, Deborah Gonzalez, the newly elected district attorney of Georgia’s Athens County, Clarke County, and Oconee County, pledged to end marijuana prosecutions and never seek the death penalty.<sup>161</sup> A state legislature could achieve the same results by abolishing the death penalty and decriminalizing marijuana.<sup>162</sup>

Third, consider the ways in which assessing the legitimacy of an act of nullification orients our thinking about a particular act of nullification to deeply democratic questions about who the relevant polity is—that is, to the composition of a district attorney’s district. If a state legislature draws prosecutorial districts in one way rather than another, this will necessarily impact the sorts of prosecutorial policies that are electorally salient in a given district. An elected judge overturning a state law on constitutional grounds does not invoke these democratic questions about districts in quite the same way because that act has a more tenuous relationship to the will of the people in a judge’s district than an act of nullification, the legitimacy of which is tied directly to the will of the voters in a prosecutorial district.

Some may counter that we should not build constitutional and voting rights jurisprudence around “extreme” exercises of enforcement discretion. But an act of nullification is not categorically different from the sorts of powers that the median prosecutor exercises every day: It is the simply the maximalist expression of the core power defining prosecutors—prosecutorial enforcement discretion—that, as such, brings a district attorney’s inherent quasi-legislative power into

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<sup>160</sup> See Eric Westervelt, *San Francisco Elects Chesa Boudin as New District Attorney*, NPR (Nov. 20, 2019, 5:22 PM), <https://www.npr.org/2019/11/20/781358722/san-francisco-elects-chesa-boudin-as-new-district-attorney> [<https://perma.cc/6DH3-86QF>] (indicating that the elimination of cash bail was to be on the 2020 California ballot and that Boudin’s first act in office would be to tell prosecutors never to ask for cash bail).

<sup>161</sup> Katie Jane Fernelius, *New D.A. Commits to Fixing Georgia’s ‘Backdoor to Incarceration,’* APPEAL (Jan. 11, 2021), <https://theappeal.org/politicalreport/athens-georgia-probation-reform> [<https://perma.cc/7JV7-T3R8>].

<sup>162</sup> See, e.g., Eric Zorn, *Column: Abolition of the Death Penalty in Illinois Kicked off a Decade of Criminal Justice Progress*, CHI. TRIB. (Mar. 5, 2021, 2:33 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-death-penalty-abolition-ten-year-anniversary-illinois-zorn-20210305-bncz4txxijfm5iu4dwhn3zyi5y-story.html> [<https://perma.cc/37FF-JJ4C>] (reporting that the Illinois legislature abolished the death penalty); Mona Zhang, *Virginia Joins 15 Other States in Legalizing Marijuana*, POLITICO (Feb. 28, 2021, 10:19 AM), <https://www.politico.com/news/2021/02/27/virginia-legalizes-marijuana-471840> [<https://perma.cc/7LCT-XFY5>] (“The Virginia Legislature approved adult-use marijuana legalization . . .”).

sharpest relief. Reformist prosecutorial policies that fall short of nullification, such as “raising the threshold for felony charges of retail theft to \$1,000,” limiting cash bail, and increasing the use of diversion programs and restorative justice as an alternative to incarceration<sup>163</sup> also contain this quasi-legislative quality and provide additional grounds for reconceptualizing the role of district attorneys as democratic policymakers.

Finally, on precedential grounds alone, district attorneys fall more on the executive or legislative side of the one-person, one-vote spectrum than the judicial side. *Wells* made clear that one of the core “governmental functions” that would trigger the protections of one-person, one-vote was, in addition to “generally managing and governing people,” the ability to “mak[e] laws.”<sup>164</sup> As argued above, an act of prosecutorial nullification creates new de facto law in a local jurisdiction. In addition, district attorneys exhibit neither of the two defining characteristics of special interest offices. Elected prosecutors do not have a “special limited purpose.”<sup>165</sup> They enforce the law and pursue policy goals related to enforcement and non-enforcement of generally applicable law. Nor do elected prosecutors have a “disproportionate effect on a definable group of constituents.”<sup>166</sup> While they have had a deeply unjust, disproportionate impact on people of color, this disproportionate impact is not the result of the nature of the duties assigned to a district attorney: Instead, the disproportionate impact is the result of the use of the powers of the office in particular ways, distinguishing elected prosecutors from other special interest offices to which one-person, one-vote does not apply.

## *B. Applying One-Person, One-Vote to Single-Member Offices*

### *1. Inequality of Voter Influence*

One possible substantive criticism of extending one-person, one-vote to prosecutorial districts stems from the nature of the right or rights that one-person, one-vote protects. The principle of one-person, one-vote emerged out of challenges to legislative districts—that is, to multi-member bodies, in which exercises of political power require

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<sup>163</sup> See Allison Young, *The Facts on Progressive Prosecution: How and Why Prosecutors Should Help End Mass Incarceration*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice> [<https://perma.cc/66Y6-VBBR>].

<sup>164</sup> See *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973).

<sup>165</sup> *Carlson v. Wiggins*, 675 F.3d 1134, 1140 (8th Cir. 2012) (quoting *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973)).

<sup>166</sup> *Id.* (quoting *Salyer Land Co.*, 410 U.S. at 728).

legislative majorities.<sup>167</sup> District attorneys, by contrast, are single-member bodies whose conduct does not depend on having coalitional power across multiple prosecutorial districts. Critics may contend, therefore, that it does not make sense to extend one-person, one-vote to prosecutorial districts.

The force of this criticism depends in large part on how one conceptualizes the right or rights that one-person, one-vote protects. In *Evenwel v. Abbott*, the Court's most recent foray into one-person, one-vote as of the time of the writing of this Note, the Court noted that one-person, one-vote furthers two principal interests: equality of "voting power" and "representational equality."<sup>168</sup>

Application of one-person, one-vote to legislative districts orients conceptualizations of equality of voting power and equality of representation towards coalitional outcomes. That is, on this line of thought, the polity needs substantial equality of voting power and representation to ensure that numerical majorities can translate their political power into legislative majorities—or at least to ensure that numerical majorities are not entirely locked out of political power due to malapportionment, as was the case in *Reynolds*.<sup>169</sup> If one views one-person, one-vote along these lines, it is seemingly hard to square its application to a single-member body, like a district attorney.

But conceptions of equality of voting power and representation should not be confined—and, indeed, the Court has not confined its conceptions of them<sup>170</sup>—to coalitional outcomes alone. This is because when one votes, one is not only seeking majority political power: One also seeks influence over the conduct of elected officials.<sup>171</sup> In *Reynolds*, Justice Warren stressed this element of one-

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<sup>167</sup> See *Reynolds v. Sims*, 377 U.S. 533, 553–54 (1964) (describing how “[n]o effective political remedy . . . against the alleged malapportionment of the Alabama Legislature appears to have been available” where, e.g., amendment of the state constitution requires adoption “by three-fifths of the members of both houses of the legislature” and a convention call requires a majority of both state legislative houses).

<sup>168</sup> *Evenwel v. Abbott*, 578 U.S. 54, 72 (2016) (“And the Court has suggested, repeatedly, that districting based on total population serves *both* the State’s interest in preventing vote dilution *and* its interest in ensuring equality of representation.”). For a discussion of how these two interests converge and diverge in the one-person, one-vote line of cases, see J. Colin Bradley, *The Continued Relevance of the Equal Access Theory of Apportionment*, 96 N.Y.U. L. REV. ONLINE 1, 4–5 n.25 (2021) (collecting cases).

<sup>169</sup> See *Reynolds*, 377 U.S. at 553–54.

<sup>170</sup> See Persily et al., *supra* note 18, at 1309 (acknowledging that, based on the Court’s one-person, one-vote case law, one-person, one-vote helps to mitigate, among other harms, “unequal distribution of political influence [caused by] malapportionment”).

<sup>171</sup> See *id.* at 1311 (explaining that many different assumptions underlie what the Court means by an “equally weighted vote,” and that one-person, one-vote does not necessarily mean equal influence over the political process or equal chance to have a preferred candidate elected). Protecting this power to assert influence over elected officials is part of

person, one-vote, writing that “[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have *an equally effective voice in the election* of members of his state legislature.”<sup>172</sup> In a state with malapportioned prosecutorial districts, each individual voter in a highly populated district asserts considerably less influence over their district attorney’s conduct—has a less “effective voice in the election”<sup>173</sup> of their district attorney—than voters in an adjacent, less populated district.

If district attorneys merely administered the law and did no more, then inter-district inequality of voting power would not be a significant cause for concern. Yet, as laid out in earlier parts of this Note, district attorneys do more than administer the law: Today, they are leveraging their wide enforcement discretion to “embrace substantive reworking of the law within a district attorney’s jurisdiction.”<sup>174</sup> If we regard district attorneys, at least in part, as *policymakers* that exercise quasi-legislative power through enforcement decisions, then inter-district inequality of voter influence takes on greater significance. The fact that, due to immunity doctrine,<sup>175</sup> voter influence is arguably the strongest check on exercises of this quasi-legislative power raises the stakes yet further.<sup>176</sup>

Consider a hypothetical case study of the problem. Assume you are moving to Florida and can choose to live in one of two places: the city of St. Petersburg or the city of Sarasota. St. Petersburg is in Florida’s Prosecutorial District Six, which encompasses Pinellas County and Pasco County, and it has a population of 1,381,239.<sup>177</sup> Sarasota is in Florida’s Prosecutorial District Twelve, which encompasses Sarasota County, Manatee County, and DeSoto County, and it has a population of 737,143—just over half of the population of Prosecutorial District Six.<sup>178</sup> Assume further that there are upcoming district attorney races in these neighboring districts. In both races,

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why federal courts have been so hesitant to order districting remedies in racial vote dilution challenges to appellate judicial districts. *See, e.g., Ala. State Conf. of NAACP v. Alabama*, No. 16-CV-731, 2020 WL 583803, at \*68 (M.D. Ala. 2020) (justifying denial of relief in racial vote dilution challenges to appellate judicial districts in part because, if the court granted relief, “racial minorities within each [non-majority-minority] district [would] lose influence in appellate judicial elections” in non-majority-minority districts).

<sup>172</sup> *Reynolds*, 377 U.S. at 565 (emphasis added).

<sup>173</sup> *Id.*

<sup>174</sup> *See Murray, supra* note 4, at 178.

<sup>175</sup> *See Levine & Schwartz, supra* note 52.

<sup>176</sup> *See Murray, supra* note 4, at 189 (“Because state prosecutors possess nearly unbounded discretion in their charging decisions, their local election could theoretically afford a separate path to localized control of nonenforcement discretion.”).

<sup>177</sup> *See NATIONAL PROSECUTOR STUDY, supra* note 7, at 42–44.

<sup>178</sup> *See id.*

challengers are running on identical prosecutorial nullification policies that you support.

In which district attorney election would you rather vote? If the answer is District Twelve (Sarasota), ask yourself why that is the case. If the only democratic harm of malapportionment is the inability for a numerical majority to win a minimum amount of political power in a multi-member body based on their numerical majority, then here there would be no additional malapportionment-based harm in need of redress. That is, if this were true, because malapportionment is the only variable in this hypothetical, one should have no preference on voting for district attorney of District Six or District Twelve—after all, there is no multi-member body involved, and each voter in District Six has just as much voting power over their district attorney, with respect to each other, as each voter in District Twelve.

Yet I suspect most readers would rather vote in the less populated District Six.<sup>179</sup> If that is true, it means that there *are* additional representational harms inherent to malapportionment beyond the *Reynolds*-style political process failure of an inability to secure multi-member legislative majorities based on numerical voter majorities. That harm, I contend, stems from a fundamental democratic norm about fairness captured by one-person, one-vote. Under this norm, there should be *substantial equality of voting power among all voters in a state when voting for local policymakers whose electoral district is a function of districting decisions by state legislatures, even if the office at issue is a single-member policymaking body*. When dealing with a system that allocates power by districts, the power of one's vote in one's district as compared to the power of a fellow voter's vote in a neighboring district should not be determined by something as arbitrary as how many other people live within the lines drawn by state legislators—especially when voters are the primary political actors able to shape policymaking and constrain misconduct by that representative, as is the case for district attorneys. This is why most readers, I believe, would pick District Six: Simply put, one's vote for district attorney in Sarasota carries more influence—and therefore is worth more—than a vote for district attorney in St. Petersburg.

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<sup>179</sup> I acknowledge that this argument, at least from a normative perspective, could be extended to any elected office. That is, voters will always want to vote in districts where their vote has the most power, and therefore voters always incur some type of representational harm when they vote in a district that is bigger than an adjacent district. This Note contends that although courts have implicitly adopted the belief that there is no such harm when it comes to electing judges—and that therefore one-person, one-vote does not apply to them—voters do suffer a significant malapportioned-based harm when they vote in malapportioned districts for district attorneys because of their role as policymakers.



Readers who have no preference may contend that there is no harm here. They might posit a counter-hypothetical, swapping district attorney for another executive single-member body, like mayor, and contend that just as voters who vote for mayor of the more populous St. Petersburg do not suffer a “malapportionment harm” relative to voters for mayor of the less populous Sarasota, the same is true of district attorneys.

Yet the fact that district attorneys are *districted* is the crucial distinction. Many of the prosecutorial districts analyzed in this Note are not coterminous with a single existing political subdivision. Rather, these districts are the product of political choices by state legislatures to draw district lines in specific ways. Florida legislators could have chosen to draw the lines between District Six and District Twelve in ways that produced districts of substantially equal population. They did not do so. Given the inherent quasi-legislative powers of district attorneys, if those districting choices are on the table for state legislatures, then state legislatures should be constrained by one-person, one-vote, just as such choices are when state legislatures draw the district lines for other popularly elected local policymakers.

But, readers may retort, there is a relevant and respected political subdivision here, and that is the county. As noted in earlier parts of this Note, prosecutorial districts are coterminous with county lines.<sup>180</sup> Yet in sixteen states, a meaningful number of prosecutorial districts encompass multiple counties.<sup>181</sup> At least these states should not be able to rely on the defense of respect for political subdivisions to avoid complying with one-person, one-vote. At a minimum, once a state decides to divide up political power by districts that are not simply expressions of a singular pre-existing political subdivision, like a single county, under *Reynolds* it should have to do so within the constraints of one-person, one-vote in order to mitigate inequality of voter influence. Even states that only use single-county prosecutorial districts, however, should consider the ways in which adherence to county lines in districting has fueled political process failures in the past and may be contributing to analogous prosecutorial political process failures today.<sup>182</sup> These states should contemplate breaking up

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<sup>180</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 10 (noting that each district electing a prosecutor is usually a county but is sometimes made up of multiple counties).

<sup>181</sup> See *id.* These are Alabama, Arkansas, Colorado, Florida, Georgia, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas.

<sup>182</sup> See *Reynolds v. Sims*, 377 U.S. 533, 581 (1964) (expressing concern that districting schemes that too closely respect existing political subdivisions, like counties, will naturally result in unconstitutional malapportionment); see also Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 211–12 (noting

large counties into multiple prosecutorial districts to better reflect the values of local constituents and to strengthen the voting power of those who have been most impacted by prosecutorial abuse: communities of color.

If readers are still not convinced, follow me on one more hypothetical journey. Imagine you moved to sunny Sarasota, and, due to your excellent grassroots organizing, the pro-nullification district attorney wins in District Twelve (your district), but the pro-nullification district attorney in District Six loses. Imagine further that District Twelve's pro-nullification district attorney wins reelection several more times. In response, a state legislature, unhappy with the district attorney's policy decisions and aware that they are unconstrained by one-person, one-vote, redraws her district by adding 30,000 more voters to it from an adjacent conservative district. In the next election, she is defeated by a more conservative challenger.

Without the protections of one-person, one-vote, there is little to stop state legislatures from using districting to override local prosecutorial policy endorsed by a majority of voters in the district attorney's district by simply packing more opponents of such policy choices into the district. If this sounds alarmist, consider the ways in which an increase in the salience and perceived (and actual) stakes of elected offices triggers interest among state officials to leverage districting to entrench partisan power. As state supreme courts have gotten more directly involved in the political thicket, overturning partisan gerrymanders, for example, state supreme court races have been transformed from sleepy, low-salience, inexpensive, largely local affairs, to high-salience, high-profile races, costing huge amounts of money.<sup>183</sup> With the heat turned up on state supreme court races, state parties have begun looking to districting to entrench partisan power like clockwork.<sup>184</sup>

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that, prior to the apportionment revolution, legislative districts were coterminous with county lines and this led to significant malapportionment).

<sup>183</sup> See Douglas Keith, Patrick Berry & Eric Velasco, *The Politics of Judicial Elections, 2017–18*, BRENNAN CTR. FOR JUST. 1 (Dec. 11, 2019), [https://www.brennancenter.org/sites/default/files/2019-12/2019\\_11\\_Politics%20of%20Judicial%20Elections\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/2019-12/2019_11_Politics%20of%20Judicial%20Elections_FINAL.pdf) [<https://perma.cc/Z569-GBXM>] (describing the transformation of state supreme court elections from “sleepy low-dollar contests into costly races awash in dark money”).

<sup>184</sup> For example, just a year after the Pennsylvania Supreme Court overturned a Republican partisan gerrymander in Pennsylvania, the Republican majority in the state legislature is trying to pass a bill that would turn Pennsylvania's system of at-large supreme court seats into a system of districted seats, which will likely result in more Republican justices on the Pennsylvania Supreme Court. See Marie Albiges, *Pa. Could Become a National Outlier in How It Elects Appellate Judges. Here's Why Experts Are Worried*, SPOTLIGHT PA (Jan. 27, 2021), <https://www.spotlightpa.org/news/2021/01/pennsylvania-supreme-court-gerrymandering-judicial-districts> [<https://perma.cc/P2RX-KFVF>].

Even now as district attorneys are just beginning to exercise their discretionary powers in novel ways that express racial justice values, governors and state legislatures are already beginning to operate in this hydraulic manner, responding to nullification policies by slashing funding and removing pending cases to which the nullification policies would apply.<sup>185</sup> This Note contends that states may begin looking to districting to structurally kneecap prosecutors aligned with racial justice movements and entrench law-and-order politics. It is normatively desirable to have in place constitutional constraints preventing legislatures from abusing districting in this way.

## 2. *Respect for Equal Dignity of Voters*

The analysis above focused on the ways in which one-person, one-vote impacts outcomes and policymaking. Yet one-person, one-vote protects more than a voter's ability to exert influence over elected officials.<sup>186</sup> It also protects core normative democratic principles that have inherent value independent of outcomes and regardless of whether the office at stake is a single-member body or a multi-member body.

First, the rule respects the dignity of individual voters. As a group of scholars assessing the empirical and normative import of the one-person, one-vote case line have noted, the Supreme Court's opinions on malapportionment regard it not only as a "systemic ill" but also as "a form of 'invidious' discrimination and an abridgement of a fundamental right" that "constitute[s] an assault on individual dignity . . . by assigning a greater value to one member of the polity than another."<sup>187</sup> Malapportionment's dignitary harms are felt no less strongly simply because the malapportioned district elects a single-member body. Second, one-person, one-vote prevents debasement of voters' citizenship. As Justice Warren wrote in *Reynolds*, "[t]o the extent that a citizen's right to vote is debased, he is that much less a

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<sup>185</sup> See, e.g., Associated Press, *Florida's Aramis Ayala Drops Death Penalty in 3 Murder Cases as She Departs Office*, TAMPA BAY TIMES (Jan. 5, 2021), <https://www.tampabay.com/news/crime/2021/01/05/floridas-aramis-ayala-drops-death-penalty-in-3-murder-cases-as-she-departs-office> [https://perma.cc/MR72-PCGU] (reporting that after District Attorney Aramis Ayala pledged not to seek the death penalty, then Florida Governor Rick Scott "promptly reassigned 29 death penalty cases from her office to State Attorney Brad King of Ocala," and "[t]he Republican-led Florida Legislature also slashed the budget for Ayala, a Democrat, by \$1.3 million").

<sup>186</sup> See Persily et al., *supra* note 18, at 1309 (acknowledging that correcting malapportionment's "unequal distribution of political influence" is merely one among many principles that one-person, one-vote protects); see also Charles & Fuentes-Rohwer, *supra* note 14, at 524–25 ("The reapportionment revolution mattered for political representation, it mattered for politics, and it mattered for public policy.").

<sup>187</sup> Persily et al., *supra* note 18, at 1308–09.

citizen.”<sup>188</sup> Third, “malapportionment sen[ds] the voters a signal about the value of their position in the polity. By according greater weight to some citizens’ votes, the state sen[ds] a message regarding individual worth.”<sup>189</sup> One-person, one-vote prevents the state from inflicting the expressive harms inherent in both explicit and implicit choices by the state to value certain voters over others. The expressive harms here are not rooted in mere electoral outcomes: As authors assessing this dimension of one-person, one-vote note, “[t]his denial of equal protection [in malapportionment cases] occurred merely from the number of people per district, not from any subsequent effect at the level of representation or policy-making.”<sup>190</sup>

Malapportionment subjects voters to these expressive harms regardless of whether they are voting for a member of a multi-member body or for their representative in a single-member body. Whether we like it or not, Texas is sending a loud and harmful message that district attorney voters in tiny Oldham County, which is overwhelmingly white, *do* matter more than district attorney voters in Harris County, which is one of the most heavily populated and diverse counties in the country.

Whether one views one-person, one-vote as protecting the integrity of political outcomes, as guaranteeing to voters the power to exert equal influence over their elected representatives, as mitigating distortions of the political marketplace, or as embodying certain democratic norms, like respecting the individual dignity of each voter, each of these underlying principles applies with equal force to single-member bodies like district attorneys. Thus, the fact that one-person, one-vote emerged as a response to political process failure in legislative bodies should not be a barrier to extending the principle to political process failure in a single-member body.

### C. *Prosecutorial Political Process Failure*

Establishing that precedent does not foreclose extending one-person, one-vote to prosecutorial districts, that there are good normative reasons for doing so, and that the counterarguments against doing so are not insurmountable does not end the matter. Recall from Section III.A that one of the reasons that the Court in *Reynolds* decided to intervene in the political thicket at all was because the political process failure would persist, absent court action, since the political actors benefitting from malapportionment were the only

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<sup>188</sup> *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

<sup>189</sup> Persily et al., *supra* note 18, at 1310.

<sup>190</sup> *Id.* at 1310–11.

political actors with the power to reapportion. To the extent political process failure is a necessary condition to extend one-person, one-vote to new offices, there remains one additional significant question: Is there prosecutorial political process failure?

Any analogy drawn between situations like the legislative political process failure in *Reynolds* and prosecutorial political process failure will admittedly be imperfect. This is because, in *Reynolds*, one of the main reasons why the court had to intervene was because only the state legislature had the power to reapportion, yet the majorities in place benefited from the malapportionment scheme, so they had no incentive—and, in fact, a strong disincentive—to engage in reapportionment.<sup>191</sup> District attorneys, by contrast, have no power over districting lines, so a court need not worry that political self-interest will prevent state legislatures from reapportioning prosecutorial districts. This line of counterargument would hold that the current malapportionment in prosecutorial districts can be reasonably regarded as an expression of a deliberate choice by policymakers, rather than an expression of pure political self-interest by state legislators that ought to be disrupted through a legal remedy.

If that feature alone characterized the political process failures that compel judicial intervention to fix malapportioned districts, that might be the end of the matter. But the precise form of political process failure in *Reynolds* is not the only political process failure recognized in the Court's one-person, one-vote line of cases. Since *Reynolds*, the Court has extended the doctrine to federal congressional districts,<sup>192</sup> executive bodies,<sup>193</sup> and a whole host of local legislative bodies,<sup>194</sup> each of which is not directly responsible for apportionment. This is because, as explained in earlier sections, the harms of malapportionment are not limited to the inability for a numerical majority to exert influence over districting decisions—that is a particularly sinister political pathology, but it has not been a necessary condition to trigger extension of one-person, one-vote to other offices.

Moreover, voting rights doctrine more broadly recognizes several other types of political process failures warranting judicial intervention. Consider section 2 of the VRA. Section 2 prohibits states from

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<sup>191</sup> See *supra* Section III.A (discussing the Court's clear confrontation with a political process failure: numerical majorities not translating into political majorities without reapportionment, coupled with a lack of incentive to reapportion).

<sup>192</sup> See *supra* note 98 and accompanying text.

<sup>193</sup> See, e.g., *supra* note 133 and accompanying text.

<sup>194</sup> See *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (acknowledging one-person, one-vote applies to "local legislative districts").

using a “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .”<sup>195</sup> In *Thornburg v. Gingles*, the Supreme Court interpreted this provision to prohibit the drawing of district lines that have the effect of diluting the vote of communities of color.<sup>196</sup> Courts determine whether district lines impermissibly dilute the vote of communities of color in a two-step inquiry. First, plaintiffs must establish the *Gingles* preconditions: a community of color must be sufficiently numerous—50% + <sup>1</sup><sup>197</sup>—and compact to constitute a majority-minority district (*Gingles* I); the community of color must be politically cohesive (*Gingles* II); and there must be a history of racially polarized voting that, in combination with the districting lines, has frustrated the ability of the voters of color to elect candidates of their own choosing (*Gingles* III).<sup>198</sup> If the plaintiffs satisfy this burden, plaintiffs then must convince a court that “the political process is [not] equally open to minority voters”<sup>199</sup> on the basis of what is known in vote dilution doctrine as the “Senate Factors,” each of which helps courts determine the extent to which voters of color have been able to exert influence in the political process in the challenged jurisdiction. The Senate Factors include, among other considerations, “the extent to which the state or political subdivision has used unusually large election districts,” the denial of communities of color of access to “candidate slating process[es]” to get on the ballot, “the extent to which members of the minority group have been elected to public office in the jurisdiction,” “whether political campaigns have been characterized by overt or subtle racial appeals,” “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process,”

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<sup>195</sup> See 52 U.S.C. § 10301.

<sup>196</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 55–56 (1986) (explaining that a significant number of minority group members usually voting for the same candidates is one way of proving political cohesiveness for a vote dilution claim within the meaning of section 2 and that a white bloc vote that normally defeats this minority is legally significant white bloc voting).

<sup>197</sup> See *Bartlett v. Strickland*, 556 U.S. 1, 18–20 (2009) (rejecting the theory that plaintiffs can trigger section 2 liability under *Gingles* with cross-over districts and affirming that *Gingles* requires that a reasonably compact district contain a minority population of 50% + 1).

<sup>198</sup> See Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 661, 661–64 (2006) (explaining the components of *Gingles* I and *Gingles* II).

<sup>199</sup> *Gingles*, 478 U.S. at 79.

and “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.”<sup>200</sup>

As with one-person, one-vote, the *Gingles* test attunes courts to political process failure. When *Gingles* is satisfied, voting is racially polarized and voters of color, though sufficiently numerous, can neither elect candidates of their own choosing nor assert meaningful influence over their elected representative due to the combination of racially polarized voting, racial discrimination, and the structure of their district. This suggests racially-based political lockup, in which an “electoral majority . . . consistently impose[s] material or symbolic costs upon a disfavored minority,”<sup>201</sup> requiring court intervention to open the channels of democratic contestation.<sup>202</sup> In this way, the process failure targeted by section 2 of the VRA is, like malapportioned maps, a species of political process failure.

To the extent that each of the Senate Factors represents a symptom of the sort of political process failure that should compel judicial intervention in the political thicket, prosecutorial elections exhibit nearly all of these symptoms. Consider first the factor of “unusually large election districts.”<sup>203</sup> Voters of color are disproportionately concentrated in urban cities.<sup>204</sup> Because most prosecutorial districts track one or more county lines, cities tend to be located in the largest prosecutorial districts.<sup>205</sup> Thus, voters of color are more likely to find themselves voting for district attorneys in “unusually large election districts”<sup>206</sup> containing millions of people, where their influ-

<sup>200</sup> *Id.* at 36–37.

<sup>201</sup> Sekhon, *supra* note 16, at 30 (2014) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78–87 (1980)).

<sup>202</sup> See generally Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 589–90 (2016) (explaining the purpose of the *Gingles* test).

<sup>203</sup> *Gingles*, 478 U.S. at 37.

<sup>204</sup> See *Racial and Ethnic Minorities Made Up About 22 Percent of the Rural Population in 2018, Compared to 43 Percent in Urban Areas*, U.S. DEP’T AGRIC., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=99538> [<https://perma.cc/TWA4-JXWU>].

<sup>205</sup> According to a recent study on prosecutorial elections, of the over 1,700 prosecutorial districts in the United States, forty-three have over one million people. These include Maricopa County (AZ), in which Phoenix is located; Los Angeles County (CA), in which Los Angeles is located; Circuit 17 (FL), in which Miami is located; Cook County (IL); and Kings County (NY), in which Brooklyn is located. See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 357–58; see also WORLD POPULATION REV., US COUNTY POPULATIONS 2021 (2021), <https://worldpopulationreview.com/us-counties> [<https://perma.cc/7VYL-CW4B>] (listing the most populated counties in the country, many of which contain large metropolitan centers).

<sup>206</sup> *Gingles*, 478 U.S. at 37.

ence over the conduct of their district attorney is weaker than that of voters in neighboring suburban and rural districts.

Consider next the related factors of the “extent to which members of the minority group have been elected to public office in the jurisdiction”<sup>207</sup> and the denial of access to candidate slating. Regarding the former, just five percent of elected district attorneys are non-white,<sup>208</sup> and, as discussed in Part II, there are large disparities between the racial makeup of our elected district attorneys and the racial demographics of the voting age population in virtually all states.<sup>209</sup> Regarding the latter, while denial of access to candidate slating per se is not a major issue in district attorney races, one can reasonably read the denial of access to candidate slating as a particular manifestation of a broader problem: the inability of candidates of color to mount successful challenges to incumbents. If that is correct, then district attorney races may also exhibit this sign of political process failure. The challenger rates against incumbent district attorneys are astoundingly low. As of 2020, in the most recent election cycle for district attorneys across all fifty states, incumbents ran unopposed most of the time.<sup>210</sup> These challenger rates are significantly lower than, for example, the challenger rates in state legislative elections.<sup>211</sup> Even when incumbents do face challengers, they rarely lose,<sup>212</sup> with approximately ninety-six percent of incumbent district attorneys winning reelection.<sup>213</sup> While racial justice organizations have propelled many challengers of color into office across the country,<sup>214</sup> these

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<sup>207</sup> *Id.*

<sup>208</sup> See Joe Watson, *Study: 95 Percent of Elected Prosecutors Are White*, PRISON LEGAL NEWS (Feb. 8, 2017), <https://www.prisonlegalnews.org/news/2017/feb/8/study-95-percent-elected-prosecutors-are-white> [<https://perma.cc/ZZB3-8ZGK>].

<sup>209</sup> See *supra* Part II; see also *infra* Table 2.

<sup>210</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 5 (“Of the more than 2,300 jurisdictions that elect their prosecutor, fewer than 700 presented voters with more than a single candidate on the ballot in the election cycle we studied.”).

<sup>211</sup> See Wright, *supra* note 61, at 582.

<sup>212</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7 (noting the incumbency or challenger status of each district attorney in every state throughout).

<sup>213</sup> See Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 238 (2012).

<sup>214</sup> See, e.g., Arisha Hatch & Terri Gerstein, *Representing the People*, STAN. SOC. INNOVATION REV., Winter 2020, at 13, 13–14, [https://ssir.org/articles/entry/re-envisioning\\_the\\_roles\\_of\\_prosecutors\\_and\\_attorneys\\_general\\_to\\_make\\_the\\_justice\\_system\\_work\\_for\\_everyone](https://ssir.org/articles/entry/re-envisioning_the_roles_of_prosecutors_and_attorneys_general_to_make_the_justice_system_work_for_everyone) [<https://perma.cc/QE2M-7F5Q>] (locating the origins of the progressive prosecution movement with Color of Change, “the nation’s largest online racial justice organization,” and detailing its continued leadership on progressive prosecution election strategy, such as “compiling a first-of-its-kind database of elected prosecutors, including centralized contact information and a means to track prosecutors’ commitment to the [organization’s] six [racial justice] demands” and “reaching out to black voters nationwide with contested prosecutor races on the ballot, knocking on doors, [and]



important victories remain exceptions to the rule of entrenched incumbency and the backdrop of hundreds of district attorneys not being challenged each election cycle.<sup>215</sup> Notwithstanding these success stories, low challenger rates coupled with significant disparities between the racial make-up of elected prosecutors and the country as a whole suggest there may be a deficit of non-white challengers to incumbent district attorneys—and certainly a deficit of successful non-white challengers—falling within the spirit of this Senate Factor. The VRA instructs that courts regard such phenomena as suspect.

Consider next the use of “overt or subtle racial appeals”<sup>216</sup> in political campaigns. For many years, district attorney candidates have deployed “law and order” politics and “tough on crime” policies to win power.<sup>217</sup> This mode of politics “empower[s] . . . [district attorneys] to use their discretion to levy harsh punishments that have disproportionately affected low-income communities of color, especially Black communities.”<sup>218</sup> In this form of campaign messaging, which exploits unfounded stereotypes of Black or Latinx criminality to mobilize white voting power, “overt or subtle racial appeals”<sup>219</sup> are central.<sup>220</sup> Until breakthrough progressive prosecution victories in the mid 2010s, it was a baseline assumption that winning district attorney races required deploying “law and order” and “tough on crime” politics involving coded racial appeals. That assumption persists across hundreds of prosecutorial districts with unchallenged, entrenched

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sending text messages”). For a list of these success stories, see Daniel Nichanian & Anna Simonton, *How Criminal Justice Reform Fared at the Ballot Box on Tuesday*, APPEAL (Nov. 5, 2020), <https://theappeal.org/politicalreport/criminal-justice-reform-2020-election-results> [<https://perma.cc/52T9-6UVG>] (reporting on the election of new sheriffs and prosecutors who aim to challenge mass incarceration).

<sup>215</sup> See Hatch & Gerstein, *supra* note 214, at 13 (noting that eighty-five percent of district attorneys run unopposed).

<sup>216</sup> Thornburg v. Gingles, 478 U.S. 30, 37 (1986).

<sup>217</sup> See Paige St. John & Abbie Vansickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, MARSHALL PROJECT (May 23, 2018), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars> [<https://perma.cc/4FDX-TW7C>] (characterizing “conventional” prosecutorial politics as “law-and-order” politics); Sam Mellins, *Will Manhattan’s Next D.A. Break Ranks with Tough-on-Crime Colleagues?*, APPEAL (Feb. 2, 2021), <https://theappeal.org/politicalreport/manhattan-candidates-district-attorney-association> [<https://perma.cc/VD4N-X9UT>] (noting that the District Attorneys Association of New York “generally takes tough-on-crime stances”).

<sup>218</sup> Young, *supra* note 3.

<sup>219</sup> Gingles, 478 U.S. at 37.

<sup>220</sup> See Beth Schwartzapfel, *What Trump Really Means When He Tweets “LAW & ORDER!!!”*, MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order> [<https://perma.cc/4V2V-YFWH>] (documenting the history of law-and-order politics and conceptualizing it as a “socially permissible” way “for polite White people to say they opposed equal rights for Black Americans”).

incumbents who rode the coattails of “law and order” politics to victory.

Consider next the extent to which discrimination has “touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.”<sup>221</sup> Felon disenfranchisement, a descendent of slavery barring those convicted of felony convictions from voting,<sup>222</sup> has had a large and disproportionate impact on Black and—to a lesser but still significant extent—Latinx communities.<sup>223</sup> As of 2020, 5.17 million Americans were barred from voting due to prior felony offenses.<sup>224</sup> Yet the rate of felon disenfranchisement among Black voters is 3.7 times the rate of felon disenfranchisement for non-Black voters.<sup>225</sup> Over six percent of *all* Black voters are disenfranchised due to felony disenfranchisement.<sup>226</sup> In addition to felon disenfranchisement, other collateral consequences of interaction with the criminal justice system, such as difficulty finding housing and employment,<sup>227</sup> make it more difficult for justice-impacted citizens to vote.<sup>228</sup> Because disproportionate

<sup>221</sup> *Gingles*, 478 U.S. at 36–37 (quoting S. REP. NO. 97-417, at 28–29 (1982)).

<sup>222</sup> See Garrett Epps, *The ‘Slave Power’ Behind Florida’s Felon Disenfranchisement*, ATLANTIC (Feb. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-slave-power-behind-floridas-felon-disenfranchisement/552269> [<https://perma.cc/RP7W-G4AG>] (detailing the historical connection between slavery, “Black codes,” and felon disenfranchisement laws).

<sup>223</sup> See CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDONAVA, SENTENCING PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/HT5X-7SPN>] (finding that over 560,000 Latinx Americans are disenfranchised). While the overall number of disenfranchised felons has been trending downward over the past four years, the number is still egregiously high. *See id.* (comparing 2020’s 5.17 million disenfranchised felons to 2016’s 6.11 million and to 1976’s 1.17 million).

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> See Deborah N. Archer, ‘Crime-Free’ Housing Ordinances, Explained, APPEAL (Feb. 17, 2021), <https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained> [<https://perma.cc/TJQ7-KUZU>] (analyzing the ways in which crime-free housing ordinances make it more difficult for justice-impacted tenants to find housing); Lisa McCorkell & Sara Hinkley, *Finding Employment After Contact with the Carceral System*, INST. FOR RSCH. ON LAB. & EMP. (May 13, 2019), <https://irle.berkeley.edu/finding-employment-after-contact-with-the-carceral-system> [<https://perma.cc/99DX-NJH7>] (describing the challenges that individuals with a criminal record face in obtaining employment after incarceration).

<sup>228</sup> See Gianna Kinchen & Catherine O’Connell, *The Barriers to Voting in Low-Income Communities*, TEMP. NEWS (Jan. 14, 2020), <https://temple-news.com/the-barriers-to-voting-in-low-income-communities> [<https://perma.cc/6K35-8JMS>] (describing barriers low-income people face in voting); *see also* Nathalie Baptiste & Will Peischel, *Voting Can Be Hard. If You’re Homeless, It’s Nearly Impossible*, MOTHER JONES (Nov. 7, 2019), <https://www.motherjones.com/politics/2019/11/voting-can-be-hard-if-youre-homeless-its-nearly->

incarceration rates of Black and Latinx Americans are at least in part a product of discriminatory enforcement by district attorneys,<sup>229</sup> it is difficult to argue against the proposition that discriminatory district attorney conduct has, at least in part, impeded the ability of communities of color to “participate in the democratic process.”<sup>230</sup> Whether through felon disenfranchisement or through more subtle—but no less powerful—collateral effects, discriminatory prosecutorial conduct has had a direct impact on political participation by voters of color.

Perhaps most significant of all, consider the ways in which district attorneys have evinced “a significant lack of responsiveness . . . to the particularized needs of the members of the minority group.”<sup>231</sup> For decades, district attorneys have been not only unresponsive to the needs of communities of color but also actively antagonistic to them. It is difficult to overstate the toll that mass incarceration—a product of specific prosecutorial policymaking<sup>232</sup>—has exacted in communities of color along nearly every dimension of life, from employment to housing, education, and healthcare.<sup>233</sup> Given that most criminal justice outcomes ultimately derive from a prosecutor’s exercise of their discretion,<sup>234</sup> it is reasonable to view the collateral effects of mass incarceration, disproportionately experienced by communities of color, as particularly egregious examples of “a significant lack of responsiveness . . . to the particularized needs of the members of the minority

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impossible [<https://perma.cc/CY4L-XBBP>] (describing barriers that housing-insecure individuals face in voting).

<sup>229</sup> See VERA INST. OF JUST., A PROSECUTOR’S GUIDE FOR ADVANCING RACIAL EQUITY (2014), [https://www.vera.org/downloads/publications/prosecutors-advancing-racial-equity\\_0.pdf](https://www.vera.org/downloads/publications/prosecutors-advancing-racial-equity_0.pdf) [<https://perma.cc/8M6V-E2QR>] (concluding on the basis of an empirical study that race is a factor contributing to overenforcement by district attorneys in New York County against Black and Latinx individuals, leading, in turn, to higher incarceration rates for Black and Latinx individuals); Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn’t Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<https://perma.cc/WEG5-Y8CR>] (reporting on studies that show that Black people are charged for crimes at higher rates than white people in San Francisco).

<sup>230</sup> *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (quoting S. REP. NO. 97-417, at 28–29 (1982)).

<sup>231</sup> *Id.* (quoting S. REP. NO. 97-417, at 28–29).

<sup>232</sup> See Young, *supra* note 3 (noting that prosecutors’ “tough-on-crime . . . priorities and policies have contributed to the explosion of mass incarceration in the United States, which has the largest incarcerated population of any country in the world and more than 10.6 million admissions to prison each year”).

<sup>233</sup> See *Community Impact*, PRISON POL’Y INITIATIVE, [https://www.prisonpolicy.org/research/community\\_impact](https://www.prisonpolicy.org/research/community_impact) [<https://perma.cc/KT2U-KE64>] (collecting articles on the community impact of mass incarceration).

<sup>234</sup> See Davis, *supra* note 34, at 18 (“Through the exercise of prosecutorial discretion, prosecutors make decisions that . . . often predetermine the outcome of criminal cases . . .”).

group.”<sup>235</sup> Under *Gingles*, in VRA cases, courts regard decades of policymaking that is directly adverse to the interests and needs of communities of color as evidence of political process failure in need of redress by courts.

The factors analyzed above have focused on a particular test under a particular provision of the VRA, which the Supreme Court has noted applies to elected prosecutors,<sup>236</sup> and the ways in which district attorney elections and conduct satisfy nearly every factor under its test that attunes courts to political process failure. But it is also worth briefly acknowledging the broader political process failure that the VRA targets as a whole and the ways in which, here too, the system for electing prosecutors evinces such a failure. Prior to the passage of the VRA, voters of color—primarily though not exclusively in the South—were suffering systematic disenfranchisement due to private and state-sanctioned harassment, intimidation, and violence at the ballot box.<sup>237</sup> The passage of the Act was famously catalyzed by the violence of Bloody Sunday and the bravery of the foot soldiers who were subjected to white supremacist violence at the hands of both the state and private actors.<sup>238</sup> Viewed in this light, the VRA thus serves at least two related purposes: enfranchising voters of color and reducing violence inflicted against them. The VRA serves these purposes by ensuring that voters of color are able to assert local political control as a bulwark against racially motivated state-sanctioned violence, private violence, and extra-judicial violence inflicted against them.<sup>239</sup>

If one views the political process failure that the VRA targeted in this light, it becomes clear that in yet another way our district attorney system is characterized by political process failure. The conduct of district attorneys has a substantial impact on punishing and thus discour-

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<sup>235</sup> *Gingles*, 478 U.S. at 37 (quoting S. REP. NO. 97-417, at 28–29); see also David Garland, *The Road to Ending Mass Incarceration Goes Through the DA's Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office> [<https://perma.cc/8KQM-BCAA>] (emphasizing the potential role of prosecutors in ending mass incarceration).

<sup>236</sup> See *Chisom v. Roemer*, 501 U.S. 380, 399 (1991) (holding that “executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers” are “representatives” within the meaning of section 2 of the VRA).

<sup>237</sup> See Erin Blakemore, *How the U.S. Voting Rights Act Was Won—and Why It's Under Fire Today*, NAT'L GEOGRAPHIC (Aug. 6, 2020), <https://www.nationalgeographic.com/history/article/history-voting-rights-act> [<https://perma.cc/84S5-WEAE>].

<sup>238</sup> See *id.*

<sup>239</sup> See Jean Lacroix, *Violence in the US: What We Can Learn from the 1965 Voting Rights Act*, VOXEU (June 17, 2020), <https://voxeu.org/article/violence-us-lessons-1965-voting-rights-act> [<https://perma.cc/PNS3-W68K>] (noting that the VRA reduced political violence from groups hostile to racial justice).

aging—or turning a blind eye to and encouraging—violence against people of color.<sup>240</sup> Yet as the current crisis in police brutality against people of color has made abundantly clear, perhaps more than any other elected office, by and large prosecutors have not translated the power to prosecute and deter police abuse and misconduct against people of color into actual prosecution and deterrence.<sup>241</sup> Prosecutors fail to impose these consequences over and against the wishes of over-policed communities, allowing a cycle of violence against people of color to repeat. Decades of systemic violence by the state and private actors against people of color was one of the major crises that motivated passage of the VRA. I contend that the systemic violence that the police inflict upon people of color should be viewed as a contemporary iteration of the type of problem that the VRA targets.

In sum, viewed from the perspective of one-person, one-vote and from voting rights doctrine more broadly, our system of elected prosecutors is showing significant signs of political process failure of the sort that has compelled judicial intervention in the past and that should compel intervention today.

#### CONCLUSION: REAPPORTIONING CRIMINAL JUSTICE AND REIMAGINING PROSECUTORIAL ACCOUNTABILITY

Reapportioning prosecutorial districts to comply with the principle of one-person, one-vote would remedy many of the political process failures highlighted above. It would equalize voter influence over district attorneys, making it easier for many communities to hold their district attorneys accountable. Because voters who live in large urban cities are both disproportionately non-white<sup>242</sup> and, because those cities are in the largest districts, hold the least influence over district

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<sup>240</sup> See Kristy Parker, *Prosecute the Police*, ATLANTIC (June 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997> [<https://perma.cc/64Z8-PU2Y>] (“Prosecutions send a message, in a way nothing else can, that police will face significant consequences if they abuse their power.”); Nicole Gonzalez Van Cleve & Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away with Murder*, SLATE (June 5, 2020, 5:50 AM), <https://slate.com/news-and-politics/2020/06/why-prosecutors-keep-letting-police-get-away-with-murder.html> [<https://perma.cc/LZY7-TJPR>] (describing prosecutors’ unwillingness to challenge a police culture of “silence and violence”).

<sup>241</sup> See Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES, <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> (Apr. 12, 2021) [<https://perma.cc/QGU9-KKEY>] (“Few police officers are ever charged with murder or manslaughter when they cause a death in the line of duty . . .”).

<sup>242</sup> See *supra* note 204 and accompanying text.

attorneys,<sup>243</sup> reapportioning district attorney districts would transfer voting power from those least impacted by the criminal justice system to those most impacted by it. With communities of color holding more electoral power over their district attorneys, district attorneys may be more incentivized to wield their broad enforcement discretion in the service of communities of color. Reapportioning district attorney districts to comply with one-person, one-vote would better respect voters' dignity as equal members of the polity. In many ways, it would simply accelerate the transformation of the district attorney into a pure democratic representative—a transformation which already appears to be occurring.

Given the extent of malapportionment, if some form of the principle of one-person, one-vote applied to prosecutorial districts, nearly all prosecutorial districts would need to be reapportioned and redrawn.<sup>244</sup> The chart in Table 1 makes clear that even in the states that use multi-county districts—places one might expect states to be the most compliant with one-person, one-vote given the more tenuous ties between a district and a single county<sup>245</sup>—prosecutorial districts would have to be redrawn. All states would be forced to recombine existing counties into new multi-county districts and engage in a significant amount of intra-county districting. Large cities would need to contain multiple prosecutorial districts.

This Note acknowledges that these changes would present modest or even significant administrative hurdles. In particular, having multiple prosecutorial districts within a single county, which would be required in most states, would present law enforcement challenges, given many states' reliance on county-level governing entities. But the magnitude of prosecutorial political process failure in our criminal justice system demands that we think big. District attorneys are uniquely responsible for our alarming incarceration rates, yet they are also uniquely positioned to reverse the tide of mass incarceration. The new generation of progressive prosecutors has shown that district attorneys can choose to wield their broad, essentially unreviewable discretion as a force consistent with racial justice or as an antagonist to racial justice. Under immunity doctrine, courts will not interfere with this choice one way or the other: Only the people can shape it. This Note contends that all voters deserve an equal voice in this democratic project, yet in many districts our current system devalues the voting power of those most impacted by the criminal justice system.

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<sup>243</sup> See NATIONAL PROSECUTOR STUDY, *supra* note 7.

<sup>244</sup> See *id.*

<sup>245</sup> See *infra* Table 1.

Extending one-person, one-vote to prosecutorial districts would fix this. Doing so would be a boon for democracy and for racial justice alike.

APPENDIX  
TABLE 1. STATE POPULATION TOTALS<sup>246</sup>

State	2019 Population Estimate	Number of Prosecutorial Districts	Number of Multi-County Districts	Smallest District Size	Median District Size	Largest District Size
AL	4,903,185	42	16	25,471	82,537	658,466
AR	3,017,804	28	19	19,019	88,680	393,193
CO	5,758,736	22	17	19,573	98,390	886,021
FL	21,477,737	20	16	73,090	910,393	2,496,435
GA	10,617,423	49	34	48,592	145,400	920,581
KY	4,467,673	57	36	24,519	50,780	741,096
LA	4,648,794	42	15	6,839	50,078	440,171
ME	1,344,212	8	5	71,870	172,919	281,674
MS	2,976,149	22	19	46,779	108,185	255,183
NC	10,488,084	44	26	60,585	174,444	919,628
NM	2,096,829	14	10	11,758	77,893	662,564
OK	3,956,971	27	24	32,436	73,335	718,633
SC	5,148,714	16	16	133,748	256,223	570,449
TN	6,829,174	31	22	45,387	160,645	927,644
TX <sup>247</sup>	28,995,881	163	45	2,052	41,280	4,092,459

<sup>246</sup> U.S. CENSUS BUREAU, STATE POPULATION TOTALS AND COMPONENTS OF CHANGE: 2010-2019 (2021), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html> [<https://perma.cc/XBG9-ZNQV>]. These data tables remain on file with the *New York University Law Review*.

<sup>247</sup> Texas has eighty-two district attorneys and eighty-one county attorneys. Only the district attorneys serve multi-county districts. See NATIONAL PROSECUTOR STUDY, *supra* note 7, at 283-305.

TABLE 1. STATE POPULATION TOTALS CONTINUED

<b>State</b>	<b>Population Disparity Between Largest and Smallest Districts</b>	<b>Ratio Between Largest and Smallest Districts (Voting Power Ratio)</b>	<b>Estimated District Size For Equipopulous Districts</b>	<b>One-Person, One-Vote Range - 10%)</b>	<b>One-Person, One-Vote Range +10%)</b>	<b>Number of Districts With &gt;10% Population Disparity Compared to Hypothetical Equipopulous District</b>
<b>AL</b>	632,995	25.85	116,743	105,068	128,417	39
<b>AR</b>	374,174	20.67	107,779	97,001	118,557	23
<b>CO</b>	866,448	45.27	261,761	235,585	287,937	21
<b>FL</b>	2,423,345	34.16	1,073,887	966,498	1,181,276	17
<b>GA</b>	871,989	18.95	216,682	195,014	238,350	41
<b>KY</b>	716,577	30.23	78,380	70,542	86,218	51
<b>LA</b>	433,332	64.36	110,686	99,617	121,754	41
<b>ME</b>	209,804	3.92	168,027	151,224	184,829	6
<b>MS</b>	208,404	5.46	106,291	95,662	116,920	25
<b>NC</b>	859,043	15.18	238,366	214,529	262,202	41
<b>NM</b>	650,806	56.35	149,774	134,796	164,751	14
<b>OK</b>	686,197	22.16	146,554	131,899	161,210	25
<b>SC</b>	436,701	4.27	321,795	289,615	353,974	13
<b>TN</b>	882,257	20.44	220,296	198,266	242,326	26
<b>TX</b>	4,090,407	1993.38	177,889	160,100	195,678	162



TABLE 2. STATE DEMOGRAPHIC BREAKDOWN<sup>248</sup>

Demographic/State	AL <sup>249</sup>	AR	CO	FL	GA	KY <sup>250</sup>	LA	ME	MS <sup>251</sup>	NC <sup>252</sup>	NM <sup>253</sup>	OK <sup>254</sup>	SC	TN	TX
<b>Percent White (Alone) Population</b>	65.3	72	67.7	53.2	52	84.1	58.4	93	56.4	62.6	36.8	65	63.7	73.5	41.2
<b>Percent White Prosecutors</b>	97.6	95.8	100	94.4	93.5	97.8	97.6	100	75.0	95.3	61.5	95.2	87.5	100	86.5
<b>Percent Black or African American (Alone) Population</b>	26.8	15.7	4.6	16.9	32.6	8.5	32.8	1.7	37.8	22.2	2.6	7.8	27	17.1	12.9
<b>Percent Black Prosecutors</b>	2.4	4.3	0	0	6.5	2.2	2.4	0	25.0	4.7	0	0	12.5	0	1.9
<b>Percent Hispanic or Latino Population</b>	4.6	7.8	21.8	26.4	9.9	3.9	5.3	1.8	3.4	9.8	49.3	11.1	6	5.7	39.7
<b>Percent Hispanic or Latino Prosecutors</b>	0	0	0	5.6	0	0	0	0	0	0	38.5	0	0	0	9.6
<b>Percent Asian (Alone), Native Hawaiian, or Pacific Islander (Alone) Population</b>	1.6	2.1	3.7	3.1	4.9	1.7	1.9	1.3	1.2	3.3	2	2.6	1.9	2.1	5.3
<b>Percent Asian American or Pacific Islander Prosecutors</b>	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1.9
<b>Percent American Indian and Alaska Native (Alone) Population</b>	0.7	1	1.6	0.5	0.5	0.3	0.8	0.7	0.6	1.6	11	9.4	0.5	0.5	1
<b>Percent American Indian or Alaska Native Prosecutors</b>	0	0	0	0	0	0	0	0	0	0	0	4.8	0	0	0