

CAPTIVE CONSTITUENTS: PRISON-BASED GERRYMANDERING AND THE CURRENT REDISTRICTING CYCLE

Dale E. Ho*

INTRODUCTION

On August 3, 2010, the New York State Senate approved legislation¹ to end the practice known as “prison-based gerrymandering,”² making it the third state—along with Maryland³ and Delaware⁴—to eliminate this potential source of liability in the next redistricting cycle. Meanwhile, however, all other states (and many localities) continue to count incarcerated persons at their places of confinement rather than at their home addresses during redistricting, a practice that artificially inflates the population count and the concomitant political representation of the districts where prisons and jails are located.

As several commentators have noted, the result is a distortion of the distribution of political representation in a manner that violates fundamental

* Assistant Counsel and Fried, Frank Fellow, NAACP Legal Defense & Educational Fund, Inc. I offer my deepest gratitude to Peter Wagner, Farhang Heydari, and Ryan Haygood for reviewing earlier drafts of this Article and/or discussing with me the substantive issues herein, and for providing helpful suggestions. All errors are my own. The views expressed in this Article are my own and should not be attributed to the Legal Defense Fund.

1. See Act of Aug. 11, 2010, Part XX, 2010 N.Y. Sess. Laws 57 (McKinney) (bill number S. 6610-C, 233d Legislative Session); see also Stephen Ceasar, *Inmate Residency Law May Remap State Politics*, N.Y. TIMES, Aug. 7, 2010, at A14. Full disclosure: I consulted on the final language of this legislation, and lobbied on behalf of it.

2. Brent Staples, *The Census: Phantom Constituents*, N.Y. TIMES: THE BOARD BLOG (Feb. 6, 2009, 5:55 PM), <http://theboard.blogs.nytimes.com/2009/02/06/the-census-phantom-constituents/>.

3. See No Representation Without Population Act, S.B. 400, 2010 Leg., 427th Sess. (Md. 2010); see also Carol Morello, *Maryland Changes How Prisoners Are Counted in Census*, WASH. POST, Apr. 15, 2010, at B5.

4. See H.R. 384, 145th Gen. Assemb., Reg. Sess. (Del. 2010); see also Peter Wagner, *Delaware Passes Law to Count Incarcerated Persons at Their Home Addresses for Redistricting*, PRISONERS OF THE CENSUS (July 7, 2010), http://www.prisonersofthecensus.org/news/2010/07/07/delaware_law/.

principles of equality in the democratic process.⁵ The communities that suffer most from prison-based gerrymandering are undoubtedly urban communities of color, whose members are disproportionately represented in the incarcerated population. But they are not the only victims of this practice; collectively, all individuals living outside of prison districts suffer a proportionate dilution in voting power. Moreover, because it enhances the political power of districts that house prisons, prison-based gerrymandering has real-world policy consequences by incentivizing opposition to criminal justice reforms that would decrease reliance on mass incarceration.⁶

This Article argues that, in addition to being fundamentally unfair, prison-based gerrymandering also exposes state and local governments to liability in the coming redistricting cycle. Although this Article examines prison-based gerrymandering at the national level, I rely on data from New York to illustrate the democracy-distorting effects of prison-based gerrymandering, and conclude that the New York State Legislature was wise to end prison-based gerrymandering before the current redistricting cycle.

This Article proceeds in five parts. In Part I, I describe the prison-based gerrymandering phenomenon and explain its impact on the political process. The incarcerated population in the United States has exploded in the past half-century, rising to over two million,⁷ and standing approximately equal to that of our three smallest states *combined*.⁸ Thus, the location at which incarcerated persons are counted during redistricting, which for much of the nation's history may have been nothing more than a curiosity for demographers, has now become an issue of vital importance for the shape of our democracy.

In Part II, I examine the rationale for counting incarcerated persons at their home addresses rather than at their places of confinement. Most tellingly, nearly all states have constitutional provisions or statutes expressly providing that a person does not gain or lose legal residence by virtue of being incarcerated, which comports with the general legal principle that a person's domicile is the place where a person lives voluntarily and intends to remain.

5. See Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587 (2004); Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 VA. J. SOC. POL'Y & L. 229 (2004); David Hamsher, Comment, *Counted Out Twice—Power, Representation, and the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299 (2005); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PA. L. REV. 431 (2003).

6. See *infra* Part I.3.C.; see also Hamsher, *supra* note 5, at 322-23.

7. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 8 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763> (tabulating the total incarcerated population at 2,304,115).

8. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, at 17 tbl.12 (2009), available at <http://www.census.gov/prod/2008pubs/09statab/pop.pdf>.

This nearly universal legal rule is consistent with the understanding that a person does not become a constituent of a place simply by being incarcerated there.

In Part III, I address the principal counterargument for maintaining the prison-based gerrymandering system: namely, that individuals should always be counted where they are physically present. While physical presence is undeniably related to the concept of legal residence, this argument ignores the fact that neither state law nor the Census Bureau has ever treated physical presence as determinative of residence; overseas federal employees and military personnel, for instance, are counted in the states that they consider home, even though they are not physically present. And while incarcerated individuals are frequently compared to groups like students or domestic military personnel, who are and should be counted where they are physically present, there are many differences that set incarcerated persons apart.

In Part IV, I turn to legal issues related to the counting of incarcerated populations during the redistricting process. I conclude that states and localities that fail to allocate incarcerated persons to their home addresses during the redistricting process could be vulnerable in at least two ways: (1) for violation of the “one person, one vote” principle of the Equal Protection Clause; and (2) for minority vote dilution under section 2 of the Voting Rights Act of 1965 (VRA).⁹ The redistricting process is almost always fraught with litigation,¹⁰ and thus, states and localities would be wise to eliminate a potential source of liability by not engaging in prison-based gerrymandering during the current redistricting cycle.

Finally, in Part V, I address various technical issues connected with ending prison-based gerrymandering, including whether incarcerated persons should simply be excluded from the redistricting population base altogether, rather than reallocated to their home addresses.

In sum, state and local governments that continue to engage in prison-based gerrymandering may be exposed to additional liability during the already litigious redistricting process. Fortunately, states and localities have an opportunity to join Maryland, New York, and Delaware by refusing to engage in prison-based gerrymandering during the current redistricting cycle. Such a move would comport not only with basic legal rules of residence and domicile, but also with broader principles of fairness and equality in the democratic process.

9. 42 U.S.C. § 1973 (2006).

10. See, e.g., Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 899-900 (2001) (describing the litigious nature of the redistricting process).

I. THE PRISON-BASED GERRYMANDERING PHENOMENON

A. Incarceration Trends

To understand the magnitude of the prison-based gerrymandering problem, it must be placed within the context of incarceration trends over the past several decades. The 2000 Census counted the number of incarcerated persons in the United States at approximately 1.99 million;¹¹ more recent statistics place the number at about 2.3 million.¹² These numbers represent an explosion from just a few decades ago. For instance, the state prison population,¹³ which was approximately 218,000 in 1974, grew to over 1.3 million in 2000.¹⁴ Over the last twenty years, the number of state prisons has grown from fewer than 600 to nearly 1000.¹⁵ Today, the total incarcerated population of the United States is roughly equal to our fourth-largest city (Houston); it is larger than that of fifteen individual states, and larger than the three smallest states combined.¹⁶ If the incarcerated population could form its own state, it would have qualified for five votes in the Electoral College after the 2000 reapportionment.¹⁷

These trends are mirrored in New York. From 1980 to 2000, the number of prisons in New York more than doubled, from thirty to sixty-five facilities.¹⁸ The rate of imprisonment in New York has grown from 123 out of 100,000 citizens in 1980 to three times that rate in 2000.¹⁹

As we shall see below, fairness in the democratic process is a casualty of our policies of mass incarceration.

11. See KIMBALL JONAS, U.S. CENSUS BUREAU, CENSUS 2000 EVALUATION E.5, REVISION 1: GROUP QUARTERS ENUMERATION 55 (2003).

12. See BUREAU OF JUSTICE STATISTICS, *supra* note 7.

13. Figures for state prison populations exclude incarcerated individuals held in other types of facilities, such as local jails and federal prisons. State prisoners are only about 55% of all incarcerated individuals in the United States. See NAT'L RESEARCH COUNCIL, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 82 (Daniel L. Cork & Paul R. Voss eds., 2006) [hereinafter NRC], available at http://print.nap.edu/web_ready/0309102995.pdf.

14. See SARAH LAWRENCE & JEREMY TRAVIS, URBAN INST., THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION 2 (2004).

15. *Id.*

16. See U.S. CENSUS BUREAU, *supra* note 8; see also Hamsher, *supra* note 5, at 299.

17. See Hamsher, *supra* note 5, at 299 (citing Burt Constable, *Some Arresting Facts About Our Fastest-Growing, Fourth-Largest City*, CHI. DAILY HERALD, June 30, 2001, § 1, at 11).

18. See LAWRENCE & TRAVIS, *supra* note 14, at 27.

19. See PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK, § I (2002), available at <http://www.prisonpolicy.org/importing/>.

B. The Census Bureau's Method of Counting Incarcerated Persons

State and local governments generally rely on data compiled by the Census Bureau when drawing election district lines. The Bureau produces several data sets for this purpose, including one data set created pursuant to Public Law 94-171 (the P.L. 94-171 data file).²⁰ In compiling the P.L. 94-171 data file, the Bureau enumerates most individuals according to the "usual residence rule"; that is, it allocates each person to "the place where a person lives and sleeps most of the time" as of Census Day.²¹ The Bureau classifies certain living arrangements as "group quarters" (GQs), such as military barracks, dormitories, and prisons.²² Individuals living in GQs pose a special challenge for the application of the usual residence rule, because such individuals frequently consider their "homes" to be someplace other than where they usually live and sleep. Nevertheless, the Bureau's P.L. 94-171 data file counts GQ residents where they sleep, which, for incarcerated persons, is at the correctional institutions where they are confined.

The P.L. 94-171 data file does not distinguish between who is a GQ resident and who is not. In other words, states and localities relying on the data file have no way of knowing which individuals are incarcerated and which are not. The result is a distorted view of actual population and demographic trends. As tabulated by the Census, there are more than twenty counties in the United States where more than one-fifth of the population is actually comprised of prisoners.²³

The current redistricting cycle, however, presents states and localities with a unique opportunity to count incarcerated individuals differently, as the Census Bureau has announced that it will, for the first time, release GQ data in time for state and local governments to utilize that information during the redistricting cycle.²⁴ As explained in a statement by Census Bureau Director Robert Groves, the Bureau is releasing this data for the express purpose of giving states and localities the ability to reallocate incarcerated populations.²⁵

20. See *Public Law 94-171*, U.S. CENSUS BUREAU: AMERICAN FACTFINDER, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_lang=en&_sse=on&_content=sp4_decennial_pl.html&_title=Public+Law+94-171 (last modified Nov. 10, 2003).

21. U.S. Census Bureau, *Residence Rules*, UNITED STATES CENSUS 2000, http://www.census.gov/population/www/censusdata/resid_rules.html#usual (last visited Nov. 6, 2010).

22. JONAS, *supra* note 11, at v.

23. ROSE HEYER & PETER WAGNER, PRISON POLICY INITIATIVE, TOO BIG TO IGNORE: HOW COUNTING PEOPLE IN PRISONS DISTORTED CENSUS 2000 (2004), available at <http://www.prisonersofthecensus.org/toobig/size.html>; Hamsher, *supra* note 5, at 310-11.

24. See Sam Roberts, *New Option for the States on Inmates in the Census*, N.Y. TIMES, Feb. 11, 2010, at A18.

25. Robert Groves, *So, How Do You Handle Prisons?*, 2010 CENSUS: THE DIRECTOR'S BLOG (Mar. 1, 2010, 8:35 AM), <http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html>; see also Roberts, *supra* note 24; Hope Yen, ASSOCIATED PRESS, *States Get New Leeway to Tally Prisoners in Census*, Feb. 11, 2010,

Thus, states and localities that rely exclusively on Census data when redistricting will have a new opportunity to correct for the miscount of incarcerated persons.

C. Distortions Caused By Census Bureau's Rules on Counting Incarcerated Persons

As discussed in greater detail in Subpart IV.B below, the “one person, one vote” principle of the Equal Protection Clause requires that election districts contain roughly the same number of people so that everyone is represented equally in the political process. As long as states and localities continue to rely on the raw P.L. 94-171 data file when drawing election districts, however, the redistricting process will remain distorted by the inflation of population numbers in electoral districts where prisons are located.²⁶

The National Research Council has concluded that “[t]he evidence of political inequities in redistricting that can arise due to the counting of prisoners at the prison location is compelling.”²⁷ But the distortion of the redistricting process is not random—rather, it has specific and identifiable effects, transferring political power from certain types of communities—namely, urban districts and communities of color—to others—generally rural and predominantly white areas. As Lani Guinier and Gerald Torres have put it: “[t]he strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation.”²⁸

The specific contours of these distortions are described in further detail below.

<http://abcnews.go.com/Politics/wireStory?id=9803416>.

26. I note that although these effects are quite powerful on the *intrastate* level, they do not raise much concern at the present time on the *interstate* level. That is, very few state prisoners are transferred to other states. The national average for state prisoners held out of state is 0.9%. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2001, at 5 tbl.5 (2002). Meanwhile, federal prisoners, who are often held in different states, make up only a very small part of the overall prison population—less than 10% (or 188,288 federal inmates out of a total incarcerated population of 2,267,787) in 2004. See NRC, *supra* note 13, at 82-83. Thus, the counting of prisoners probably raises no substantial concerns about the apportionment of U.S. congressional representation amongst the states, but it does raise serious questions about the drawing of electoral districts within states.

27. See NRC, *supra* note 13, at 246.

28. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY 189-90 (2002).

1. Racial Disparities

African Americans are 12.7% of the general population, but are 41.3% of the federal and state prison population²⁹; nearly 9% of all African-American men in their twenties or thirties live in prison.³⁰ The sharp rise in racial disparities in the criminal justice system roughly correlates with the “war on drugs,” as African Americans and Latinos are disproportionately imprisoned for drug-related offenses, accounting for nearly 90% of prison sentences for drug offenses.³¹ The rate of prison admissions for Latinos for drug-related offenses in 2000 was twenty-two times the rate in 1983; for African Americans, the 2000 rate was more than twenty-six times the level in 1983.³²

As with total incarceration trends, New York’s prison population mirrors the national demographics. New York State is approximately 68% white,³³ but 77% of its prison population is African-American (51.3%) or Latino (25.9%).³⁴ African Americans and Latinos constituted 85% of the growth in the incarcerated population from 1970 to 2000 in New York.³⁵

Generally speaking, prisons are located in predominantly white areas. In 173 counties nationwide, more than 50% of the purported African-American “residents” are behind bars.³⁶ In New York, 98% of prison cells are located in disproportionately white State Senate districts.³⁷ New York’s 114th State Assembly District holds the highest percentage of state prisoners of any district in the legislature, 6.99%; of the 5594 African Americans who are counted as

29. See NRC, *supra* note 13, at 86 (citing F.T. CULLEN & J.L. SUNDT, *IMPRISONMENT IN THE UNITED STATES* 485 (2000)).

30. See *id.* (citing Lotke & Wagner, *supra* note 5, at 593-94).

31. See MARC MAUIER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 12-13* (1995), available at http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf (noting that African Americans and Latinos accounted for nearly 90% of state prison sentences for drug offenses in 1992). African Americans account for 35% of drug arrests, but 74% of drug-related sentences. See *id.* at 12.

32. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 96 (2010).

33. See *New York Data Set*, U.S. CENSUS BUREAU: AMERICAN FACTFINDER, http://www.factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-qr_name=DEC_2000_SF1_U_QTP5&-ds_name=DEC_2000_SF1_U&-CONTEXT=qt&-tree_id=4001&-all_geo_types=N&-geo_id=04000US36&-search_results=01000US&-format=&-_lang=en (last visited Nov. 1, 2010).

34. See N.Y. STATE DEP’T OF CORR. SERVS., *HUB SYSTEM: PROFILES OF INMATES UNDER CUSTODY ON JANUARY 1, 2008*, at i (2008), available at http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf.

35. See WAGNER, *supra* note 19.

36. See HEYER & WAGNER, *supra* note 23; Hamsher, *supra* note 5, at 315.

37. See Peter Wagner, *98% of New York’s Prison Cells Are in Disproportionately White Districts*, PRISONERS OF THE CENSUS (Jan. 17, 2005), <http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/>.

“constituents” in that district, 82.6% are incarcerated.³⁸

Thus, the Bureau’s method of counting prisoners has the unquestionable effect of transferring political power from communities of color to predominantly white communities. There has only been one other instance in American history where disfranchised, captive populations of people of color were used to artificially inflate political strength: the infamous three-fifths compromise enshrined in Article I, Section 2 of the Constitution.³⁹

2. The Rural / Urban Divide

Generally speaking, incarceration in the United States involves a massive transfer of population from urban areas to rural ones.⁴⁰ Rural communities make up only about 20% of the U.S. population, but an estimated 40% of all incarcerated persons are held in facilities located in rural areas.⁴¹ For example, New York City is the home of residence for 66% of all prisoners in New York State, but 91% of these prisoners are incarcerated outside of the city.⁴² The net result is that, during the 2000 Census, approximately 43,000 New York City residents were counted in various upstate communities for redistricting purposes.⁴³ Thirty percent of the purported “population growth” in upstate New York during the 1990s was attributable to prisons.⁴⁴

These trends are mirrored elsewhere. Cook County, where Chicago is located, is home to 60% of Illinois’s prison population, but physically holds only 1% of its prisoners.⁴⁵ Los Angeles is home to 34% of California’s prisoners, but holds only 3% of them.⁴⁶

I note, however, that although prison-based gerrymandering often results in a transfer of political power from urban centers to sparsely populated rural areas, its distorting effects are in some senses felt most keenly by the rural communities that house prisons. Most (in)famously, during the 2002 election cycle, the town of Anamosa, Iowa was divided into four City Council wards of about 1370 people each. Ward 2, however, contained a state penitentiary that housed over 1320 prisoners. Thus Ward 2’s actual population was comprised of

38. See WAGNER, *supra* note 19, § IV.

39. U.S. CONST. art. 1, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV.

40. See NRC, *supra* note 13, at 86.

41. See PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CTR. FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE AND THE CENSUS 6 (2004), *available at* http://www.brennancenter.org/page/-/d/RV4_AccuracyCounts.pdf.

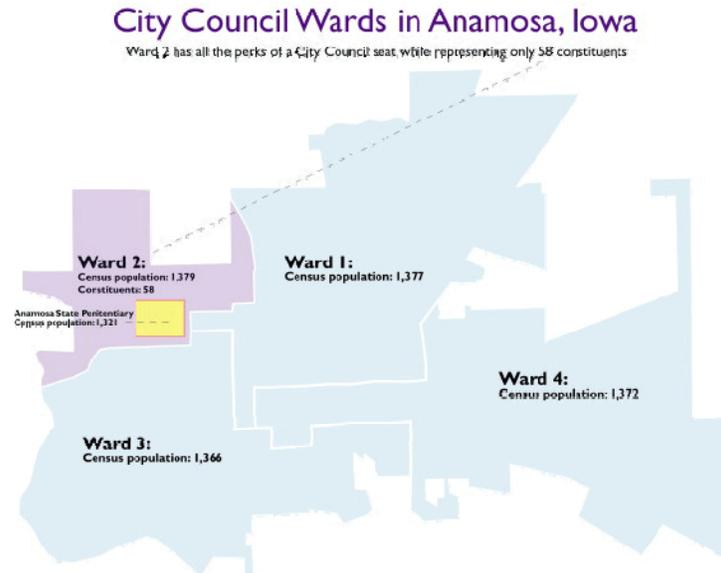
42. See WAGNER, *supra* note 19, § I.

43. See *id.*

44. See NRC, *supra* note 13, at 89 (citing ROLF PENDALL, THE BROOKINGS INSTITUTION, UPSTATE NEW YORK’S POPULATION PLATEAU (2003), *available at* http://www.brookings.edu/~media/Files/rc/reports/2003/08demographics_pendall/200308_Pendall.pdf).

45. See NRC, *supra* note 13, at 86 (citing HEYER & WAGNER, *supra* note 23).

46. *Id.*



fewer than sixty non-incarcerated residents.⁴⁷

Anamosa's districting plan (pictured above) therefore granted the approximately sixty actual constituents of Ward 2 the same level of political representation accorded to over 1300 people living in each of the other wards. Remarkably, a man was elected to Anamosa's City Council from Ward 2 on the strength of two write-in votes.⁴⁸ Thus, while it is fair to say that prison-based gerrymandering generally results in a transfer of political power at the statewide level away from urban centers, it is important to recognize that its distorting effects on the democratic process are perhaps most significant *within* rural areas themselves.

3. Policy Consequences

This distortion has real-world policy consequences. Given that, generally speaking, urban areas tend to be more liberal, and rural areas more conservative,⁴⁹ prison-based gerrymandering tends to involve a shift in political power from more liberal-leaning districts to more conservative-leaning ones. But more specifically, because their political power depends in some measure

47. Peter Wagner, *New York Times Profiles Anamosa Iowa, Where a District Is Almost Entirely People in Prison* (Oct. 24, 2008), <http://www.prisonersofthecensus.org/news/2008/10/24/anamosa/>.

48. See Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES, Oct. 23, 2008, at A12.

49. See Jowei Chen & Jonathan Rodden, *Tobler's Law, Urbanization, and Electoral Bias: Why Compact, Contiguous Districts are Bad for the Democrats* 12 (Nov. 4, 2009) (unpublished manuscript), available at <http://www.stanford.edu/~jowei/identified.pdf>.

on a continuing influx of prisoners, legislators from prison districts have a strong incentive to oppose criminal justice reforms that might decrease incarceration rates. For example, the two state senators in New York who led the opposition to efforts to reform New York's harsh Rockefeller drug sentencing laws represented districts that were home to more than 17% of the state's prisoners.⁵⁰ In fact, arguably all politicians have a perverse incentive to seek the construction of prison facilities in their districts, as prisons translate into enhanced political power for their constituents. The result is a positive feedback loop: mass incarceration results in districts where the representatives are incentivized to favor policies that favor even more mass incarceration.

II. DETERMINING THE PLACE OF RESIDENCE FOR INCARCERATED PERSONS

The foundational premise of any critique of the current method of counting incarcerated persons is that they are not properly understood as constituents of the districts where they are confined, and should either be counted at their last addresses prior to arrest or, alternatively, should not be counted at all for redistricting purposes. As explained below, there are three basic rationales for counting incarcerated persons at their home addresses.

A. Residency Rules

The first factor that weighs in favor of counting incarcerated persons at their last address prior to arrest is that nearly every state has a constitutional provision or statute providing that the fact of incarceration does not change a person's residence, which reflects a universal recognition that incarcerated persons are properly thought of as constituents in their home communities.

Although most prisoners in New York, like those in many other states, cannot vote,⁵¹ New York law defines the residence of incarcerated persons for purposes of voting and elections. Both the New York Constitution and the Election Law deem incarcerated persons to be residents of their last place of residence prior to arrest and incarceration. Article II, section 4 of the New York State Constitution provides that, "[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence . . . while confined in any public prison."⁵²

A person's residence is defined under New York Election Law section 1-

50. See WAGNER, *supra* note 19, § 5.

51. See N.Y. CONST. art. II, § 3. At present, forty-eight states and the District of Columbia do not permit incarcerated felons to vote. See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2010), available at http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMarch2010.pdf.

52. *Id.* § 4; see also N.Y. ELEC. LAW § 5-104(1) (McKinney 2010) ("For the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while confined in any public prison.").

104(22) as “that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return.”⁵³ But the crucial factor, however, is that, for purposes of construing the New York Election Law, an incarcerated person’s residence is determined *prior* to confinement. In other words, even though an incarcerated person is no longer physically present at his old address, the old address remains determinative of his residence. As New York’s highest court has explained, an “inmate of an institution does not gain or lose a residence or domicile, but *retains the domicile he had when he entered the institution.*”⁵⁴

The only case to engage in a thorough analysis of the effect of incarceration under New York’s residency rules for voting purposes is *People v. Cady*.⁵⁵ Although the case is over one hundred years old, it is still cited in the twenty-first century.⁵⁶ In *Cady*, the defendant registered to vote at a prison where he was incarcerated for vagrancy. In upholding Cady’s conviction for an illegal voter registration, the New York Court of Appeals emphasized that incarcerated persons cannot be legal residents of a prison for purposes of voting, because they are confined involuntarily:

The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses, and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it. The prison is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot under the guise of confinement, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there.⁵⁷

Other courts construing the residency provisions of article II, section 4 have similarly observed that incarceration does not affect a person’s residency for voting purposes.⁵⁸

Thus, under New York’s residency rules for voting, incarcerated persons are properly considered residents of their last home prior to arrest.⁵⁹ These

53. N.Y. ELEC. LAW § 1-104(22) (McKinney 2010).

54. *Corr v. Westchester Cnty. Dep’t of Soc. Servs.*, 305 N.E.2d 483, 485 (N.Y. 1973) (emphasis added).

55. 37 N.E. 673 (N.Y. 1894).

56. *See, e.g., Muntaqim v. Coombe*, 449 F.3d 371, 375-76 (2d Cir. 2006).

57. 37 N.E. at 674-75.

58. *See, e.g., Muntaqim*, 449 F.3d at 375-76 (quoting *Corr*, 305 N.E.2d at 485, and *Cady*, 37 N.E. at 674); *In re Berge*, 260 N.Y.S. 227 (Sup. Ct. 1932) (“[T]he inmates of this institution . . . do not gain a residence by their presence therein”); *Laurence C. v. James T.R.*, 785 N.Y.S.2d 859, 861 (Fam. Ct. 2004) (noting that “for other purposes, such as voting . . . it is a person’s domicile rather than his or her place of incarceration that is determinative”).

59. I note one possible caveat: in *Longway v. Jefferson County Board of Supervisors*, 628 N.E.2d 606 (N.Y. 1993), the New York Court of Appeals addressed whether certain non-residents—including prisoners, group home residents, and military personnel—are

residency rules are consistent with the understanding that representation is properly ascribed to incarcerated individuals where they would vote if they could. Of course, as noted above, incarcerated felons in most states, including New York, are not permitted to vote at present. But if New York were to restore voting rights to incarcerated felons tomorrow, they would vote by absentee ballot at their last address prior to arrest and not in the districts where they are held, which is the practice in the two states that permit incarcerated individuals to vote without limitation (Maine and Vermont),⁶⁰ as well as in states where some incarcerated felons can vote,⁶¹ and in all states with respect to pre-trial detainees and incarcerated misdemeanants, who are permitted to vote nationwide.⁶² It is in their home communities that incarcerated individuals are properly thought of as *constituents*.

This analysis holds true for nearly every other state: most other states have similar constitutional or statutory provisions expressly stating that a person does not gain or lose residence by virtue of incarceration,⁶³ or defining

“necessarily excluded” from the “population” base to be used for municipal election districting under New York Municipal Home Rule Law § 10(1)(ii)(a)(13)(c). *Longway*, however, is no longer good law, as it has been overruled by statute. See Act of Aug. 11, 2010, Part XX, 2010 N.Y. Sess. Laws 57 (McKinney) (bill number S. 6610-C, 233d Legislative Session). *Longway* involved a question of state statutory interpretation—the meaning of “resident” within the Municipal Home Rule Law; it did not presume to answer the question of whether incarcerated persons should be counted for purposes of federal requirements. Thus, Judge Feinberg of the Second Circuit subsequently noted that “[i]n *Longway*, the New York Court of Appeals did not address whether the exclusion of inmates from an apportionment base was constitutional. The court merely held . . . that under [the New York Municipal Law], incarcerated felons were not necessarily excluded from the population base.” *Kaplan v. County of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (Feinberg, J.). Indeed, that the Second Circuit in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), invited consideration of a possible vote dilution claim premised on the counting of prisoners establishes that *Longway* does not foreclose a constitutional or VRA claim in this context.

60. See ME. REV. STAT. ANN. tit. 21-A, § 112 (2010); VT. STAT. ANN. tit. 17, § 2122 (2010).

61. Moreover, even though all states other than Maine and Vermont have some sort of felon disfranchisement laws, some states (e.g., Alabama and Mississippi) disfranchise individuals only for commission of certain felony offenses, as prescribed by statute. See ALA. CONST. art. VIII; MISS. CONST. art. 12; ALA. CODE § 17-3-31 (2010); MISS. CODE ANN. § 23-15-19 (2010). In those states, individuals convicted of other felony offenses retain the right to vote, and vote by absentee ballot where they are legal residents.

62. Some states (Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont) have integrated prison/jail systems where misdemeanants and felons are held together, such that even misdemeanants can be held quite far away from home. See *Appendix 15: Correctional Populations in the United States*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, <http://www.albany.edu/sourcebook/app15.html> (last visited Nov. 6, 2010).

63. See ARIZ. CONST. art. VII, § 3; COLO. CONST. art. IV, § 4; MINN. CONST. art. VII, § 2; MO. CONST. art. VIII, § 6; NEV. CONST. art. II, § 2; OR. CONST. art. IV, § 4; WASH. CONST. art. VI, § 4; CAL. ELEC. CODE § 2025 (West 2010); CONN. GEN. STAT. § 9-14 (2010); HAW. REV. STAT. § 11-13(5) (2010); IDAHO CODE ANN. § 34-405 (2010); KAN. STAT. ANN. § 11-205(f) (2010); ME. REV. STAT. ANN. tit. 21-A, § 112(14) (2010); MICH. COMP. LAWS § 168.11(2) (2010); MISS. CODE ANN. § 47-1-63 (2010); MONT. CODE ANN. § 13-1-112(2)

residence or domicile in terms of voluntary choice of and intention to remain in a place, which would exclude prisons as a place of residence.⁶⁴ These residency rules properly determine where individuals should be counted for redistricting purposes. As one Illinois court has observed, “[i]t would certainly be an anomaly to hold that these persons are not residents for the purpose of determining the population of the district, but that they are residents for the purpose of voting”⁶⁵

The rules on residence and incarceration for voting purposes are consistent with more general legal principles on residence.⁶⁶ Incarceration does not affect a person’s residence for a wide variety of purposes, including federal diversity jurisdiction,⁶⁷ divorce proceedings,⁶⁸ and school residency proceedings.⁶⁹ There

(2010); N.H. REV. STAT. § 654:2-a(1) (2010); N.M. STAT. ANN. § 1-1-7(D) (2010); 25 PA. CONS. STAT. § 1302(iii) (2010); R.I. GEN. LAWS § 17-1-3.1 (2010); TENN. CODE ANN. § 2-2-122(7) (2010); TEX. ELEC. CODE ANN. § 1.015(e) (West 2010); UTAH CODE ANN. § 20A-2-101(2)(a) (West 2010); VT. STAT. ANN. tit. 17, § 2122(a) (2010); WYO. STAT. ANN. § 22-1-102(a)(xxx) (2010); *cf.* *Kissi v. Wilson*, No. PJM-08-1638, 2008 WL 7555488 (D. Md. Aug. 29, 2008); *County of Franklin v. County of Henry*, 26 Ill. App. 193 (1887); *Cepelonis v. Sec’y of Commonwealth*, 389 Mass. 930 (1983).

64. *See* ALA. CODE § 17-3-32 (2010); ALASKA STAT. § 15.05.020 (2010); ARK. CODE ANN. § 7-5-201(a)(1-2) (2010); GA. CODE ANN. § 21-2-217(3) (2010); IND. CODE § 3-5-5-4 (2010); KY. REV. STAT. ANN. § 116.035 (West 2010); LA. REV. STAT. ANN. § 18:101(B) (2010); NEB. REV. STAT. § 32-116 (2010); N.C. GEN. STAT. § 163-57 (2010); N.D. CENT. CODE § 54-01-26 (2010); S.C. CODE ANN. § 7-1-25 (2009); S.D. CODIFIED LAWS § 12-1-4 (2010); WIS. STAT. § 6.10 (2010); *cf.* *State v. Savre*, 105 N.W. 387, 387 (Iowa 1905) (construing residence in voting statute as place where voter intends to return); *Wickham v. Coyer*, 30 Ohio C.C. 765, 769 (1900) (holding that removal and intention to remain must be found for a new residence to be acquired); *Kegley v. Johnson*, 147 S.E.2d 735, 737 (Va. 1966) (construing Virginia constitutional provision to mean that, absent intent to remain, student relinquishes prior residence by attending institution); *State v. Beale*, 141 S.E. 7, 11 (W. Va. 1927) (holding that an individual’s intent to change residency is controlling in determining the residence of a potential juror).

65. *Oswego Cmty. Consol. Sch. Dist. No. 434 v. Goodrich*, 171 N.E.2d 816, 820 (Ill. App. Ct. 1961) (holding that all individuals who are registered to vote in election to create new school district should be counted towards population requirement necessary to form district).

66. *Compare Stifel v. Hopkins*, 477 F.2d 1116, 1124 (6th Cir. 1973) (observing that, for purposes of establishing diversity jurisdiction, “[i]t makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile”), *and* 25 AM. JUR. 2D DOMICIL § 29 (2010) (“Since the location of domicil is voluntary, a forcible change in one’s state of residence does not affect one’s domicil. Thus, a prisoner’s domicil ordinarily remains what it was before his or her imprisonment and does not change to the location of his or her confinement.”), *with Farrell v. Lautob Realty Corp.*, 612 N.Y.S.2d 190, 191 (App. Div. 1994) (“[I]t is long-established law in New York that a person does not involuntarily lose his domicile as a result of imprisonment.”), *and* 49 N.Y. JUR. 2D DOMICIL & RESIDENCE § 36 (2010) (footnotes omitted) (“A prison is not a place of residence; it is a place of confinement, and a person cannot go there as a prisoner and gain a residence. The freedom of choice to come and go at one’s whim or pleasure are bona fide elements of determining residence and are not present in a prison setting.”).

67. *See, e.g., Stifel*, 477 F.2d at 1124 (holding that incarceration does not establish

is simply no reason why a person's residence for purposes of apportioning representation should be treated any differently.

B. Residence as "Allegiance or Enduring Tie"

A second factor that favors counting incarcerated persons in the places they lived prior to arrest is that those are the communities to which they have an "enduring tie." The concept of "enduring tie" was articulated in *Franklin v. Massachusetts*,⁷⁰ where the Supreme Court rejected a challenge to the Census Bureau's method of enumerating federal employees working overseas (most typically military personnel). The plaintiffs alleged that the Bureau's practice of counting more than 900,000 overseas federal employees at their "home of record"—which resulted in Massachusetts's loss of a congressional seat—was arbitrary and capricious.⁷¹ The Court, however, reasoned that, for purposes of apportioning congressional representation, a person's "residence" "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place."⁷² The Court then held that enumerating federal employees at their "home of record" provided at the time of entering federal employment was "consonant with, though not dictated by, the text and history of the Constitution," and "the underlying constitutional goal of equal representation."⁷³

Franklin relied on several historical examples from the earliest days of the Census. It cited the First Decennial Census Act, which permitted individuals to be counted at a residence even if "occasionally absent at the time of the enumeration,"⁷⁴ and which "placed no limit on the duration of the absence."⁷⁵ The Court also observed that President Washington was counted at Mount

residence in a state for purposes of establishing diversity jurisdiction).

68. See, e.g., *Beckett v. Beckett*, 520 N.Y.S. 674, 675 (App. Div. 1987) (holding prisoner is not a resident of the county where he is incarcerated for purposes of proceeding in a divorce action as a poor person). In New York, prisoners seeking a divorce have even been told that they have to file in the county where they lived prior to incarceration, even if the marriage took place in the county where the prison is located. See Peter Wagner, *Local Officials Tell Prisoners, "You Don't Live Here,"* PRISONERS OF THE CENSUS (June 7, 2009), <http://www.prisonersofthecensus.org/news/2004/06/07/youdontlivehere/> (quoting Letter from Kathleen M. Labelle, Chief Clerk, Wash. Cnty. Supreme & Cnty. Courts, to Troy Johnson (Feb. 27, 2003) (on file with the Prison Policy Initiative)).

69. See, e.g., *Westbury Union Free Sch. Dist. v. Amityville Union Free Sch. Dist.*, 431 N.Y.S.2d 641, 643-44 (Sup. Ct. 1980) (holding a child born to incarcerated mother is domiciled at mother's original residence before imprisonment because incarceration did not change mother's domicile).

70. 505 U.S. 788 (1992).

71. *Id.* at 791.

72. *Id.* at 804.

73. *Id.* at 806.

74. *Id.* at 804 (quoting Act of Mar. 1, 1790, § 5, 1 Stat. 103).

75. *Id.*

Vernon even though he spent thirty-one of the thirty-six weeks of the enumeration period away from Virginia.⁷⁶ *Franklin* also cited the residence qualifications for holding congressional office, and observed that if “the mere living in a place constituted inhabitancy,” such a definition would “exclude sitting members” of the early House.⁷⁷ Similarly, at present, members of Congress, who are physically present in Washington, D.C. for most of the year, can be enumerated in their home states.⁷⁸

Applying the logic of *Franklin*, it would appear that incarcerated persons should be counted at their home addresses for several reasons. *First*, prisoners do not gain an “allegiance” or develop an “enduring tie” to a particular county by being incarcerated there. Unlike, for instance, temporary visitors such as students or military personnel, or non-voting populations such as children or resident aliens, a prisoner can have *no* contact with the surrounding community and cannot develop any relationships with it.

Thus, as Judge Feinberg of the Second Circuit has observed, “prisoners live in a separate environment and do not participate in the life of [the] County.”⁷⁹ The National Research Council, in its report evaluating the Census Bureau’s methods of enumeration, has similarly noted:

[Incarcerated persons] do not—and cannot—live day-to-day in the communities from which they were sent to prison, and yet their possible eventual return creates demands for such local services as parole monitoring, substance abuse rehabilitation, and job counseling social services. They also do not live day-to-day in the communities in which the prisons are located, in that they do not drive on the roads or use other services. Yet they may be counted in those locations for purposes of legislative representation—even though they may be prohibited from voting for said representatives.⁸⁰

Second, an incarcerated person is not present in a particular county by choice. In New York, for instance, prisoners are located at the discretion of the Commissioner of the Department of Correction and can be moved at any time for any reason.⁸¹

Third, the only opportunity for incarcerated persons to have any contact with the outside world is with their home communities, through relationships prior to arrest. That incarcerated individuals are likely to maintain enduring ties to their home communities is evidenced by the fact that the majority of inmates

76. *Id.* (citing T.G. Clemence, Place of Abode (1986) (unpublished manuscript).

77. *Id.* (quoting M. CLARKE & D. GALL, CASES OF CONTESTED ELECTIONS IN CONGRESS 497 (1834)).

78. *Id.* at 806.

79. *Kaplan v. County of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (Feinberg, J.).

80. NRC, *supra* note 13, at 83.

81. *See* N.Y. CORRECT. LAW § 23(1) (McKinney 2010) (stating that Commissioner of Department of Correctional Services has authority to transfer prisoners).

in both state (55%) and federal (63%) custody have minor children.⁸²

Fourth, the vast majority of incarcerated individuals return to their home communities upon release from custody, such that it is possible to draw maps predicting where they will move upon release with a high degree of statistical certainty.⁸³ Recognition of the fact that incarcerated individuals almost always return to their home communities is reflected in the fact that nearly every state has adopted a policy of releasing parolees back to the counties in which they were sentenced.⁸⁴ It is in those communities where “educational and transportation systems will have to meet the needs of returning prisoner populations.”⁸⁵

Kenneth Prewitt, who had opposed the enumeration of incarcerated persons at their home addresses while he was Director of the Census Bureau from 1998 to 2001, subsequently reversed his views, and summarizes these points as follows:

Changes in the criminal justice system over the last three decades call into question the fairness of counting persons where they are imprisoned rather than where they were living when arrested, and to which they return on release. Current census residency rules ignore the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration. (In these, and in additional ways, prisoners differ from college students, the other sizeable group living, though in their case voluntarily so, away from “home.”) . . . Counting people in prison as residents of their home communities offers a more accurate picture of the size, demographics, and needs of our nation’s communities, and will lead to more informed policies and a more just distribution of public funds.⁸⁶

C. Representational Equality

A third factor weighing in favor of counting incarcerated individuals at their home addresses is that legislators from election districts with prisons do not generally consider incarcerated persons to be among their constituents, and thus, cannot be understood as *representing* them. For instance, State Senator Dale Volker, who represented New York’s 59th State Senate District—a district that only satisfies the minimum population threshold because of its

82. See NRC, *supra* note 13, at 93 (citing CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (2000)).

83. See KIRSTEN D. LEVINGSTON & CHRISTOPHER MULLER, BRENNAN CTR. FOR JUSTICE, “HOME” IN 2010: A REPORT ON THE FEASIBILITY OF ENUMERATING PEOPLE IN PRISON AT THEIR HOME ADDRESSES IN THE NEXT CENSUS 9 (2006), available at http://www.brennancenter.org/page/-/d/download_file_36223.pdf.

84. *Cf. id.* (explaining federal policy is to release parolees in the districts where they were sentenced and noting that state parole “operates similarly”).

85. NRC, *supra* note 13, at 88.

86. Kenneth Prewitt, *Foreword* to ALLARD & LEVINGSTON, *supra* note 41, at i (2004).

prison⁸⁷—has stated that his community has “more cows than people,” and that he would choose the cows over incarcerated people as his constituents because “they would be more likely to vote for me.”⁸⁸ Similarly, in a survey of the Indiana State Legislature, representatives were asked the following question:

Which inmate would you feel was more truly a part of your constituency?

a) An inmate who is currently incarcerated in a prison located in your district, but has no other ties to your district.

b) An inmate who is currently incarcerated in a prison in another district, but who lived in your district before being convicted and/or whose family still lives in your district.⁸⁹

All forty respondents—regardless of political affiliation or whether their district contains a prison—chose (b).⁹⁰

This anecdotal evidence suggests that legislators do not consider individuals incarcerated in their districts to be their constituents, do not represent their interests, and do not attend to their needs. These legislators literally do not *represent* prisoners.

III. PHYSICAL PRESENCE AND RESIDENCE

To counter the analysis above, defenders of prison-based gerrymandering might argue that physical presence should determine where a person is counted for districting purpose because the mere fact of a person’s physical presence places demands on certain services in the district. This argument, however, is unavailing, for reasons set forth below.

A. The Census Bureau’s Treatment of Physical Presence

As an initial matter, it bears emphasis that the Supreme Court made clear in *Franklin* that a proper enumeration for the purposes of apportioning legislative representation does not require *any* nexus to an individual’s physical presence. There was no indication that the overseas federal employees in *Franklin* had *any* physical presence in their “home” states at the time of enumeration—rather, the mere fact of their “allegiance or enduring tie” to those states merited counting them in their home states for apportionment purposes.

The Census Bureau itself rejects physical presence as determinative of where a person should be counted. In its brief in *Franklin*, the Bureau stated:

It is far too late in the Nation’s history to suggest that enumeration of

87. See *infra* Part IV.B.2.

88. Jonathan Tilove, *Minority Prison Inmates Skew Populations as States Redistrict*, NEWHOUSE NEWS SERV., Mar. 12, 2002, available at <http://www.prisonpolicy.org/news/newhousenews031202.html>.

89. Stinebrickner-Kauffman, *supra* note 5, at 302.

90. See *id.*

the population of the States must be based on a rigid rule of physical presence on the census date—a rule that has never been applied and that is especially out of place in an age of ever-increasing mobility.⁹¹

Indeed, it is worth noting that the Census Bureau's own definition of "residence" has changed over time. From 1920 to 1940, "residence" was defined as a person's "permanent home," but that definition was changed in 1950 to the current formulation of where a person "lives or sleeps most of the time."⁹²

In this context, it is perhaps unsurprising that incarcerated persons have not always been enumerated at their place of confinement. During the 1900 Census, which involved the first express mention of counting prisoners, incarcerated individuals were required to be enumerated in the "county and state in which the prisoner is known, or claims, to reside," and the Census Bureau directed prisons filling out Census forms that, "if [prisoners] have some other permanent place of residence," that address should be listed on the appropriate Census form.⁹³ And, before 1990, incarcerated individuals were not expressly excluded from being counted at their home residences.⁹⁴ It seems clear, therefore, that physical presence has not always been central to the notion of residence for purposes of the Census enumeration.

B. Duration

Nevertheless, even if physical presence is not the sole criterion for determining residence, some might argue that the fact that incarcerated individuals are away from their homes for extended stretches of time warrants counting them at their institutions. Thus, the Third Circuit has held that, for the purposes of the Census count, there is a reasonable basis for treating them differently from, for instance, temporarily hospitalized individuals, who are allocated to their home addresses.⁹⁵

91. Brief of Appellants at 37, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502), 1992 WL 672615.

92. LEVINGSTON & MULLER, *supra* note 83, at 6 (quoting Letter from Charles Louis Kincannon, Dir., Census Bureau, to Rep. William Lacy Clay and Rep. Adam Putnam (Apr. 9, 2004) (on file with the Brennan Ctr. for Justice)).

93. NRC, *supra* note 13, at 84-85.

94. See Peter Wagner, *Prior to 1990 Census, Prisoners Were Not Explicitly Excluded from Census Counts*, PRISONERS OF THE CENSUS (Dec. 8, 2003), <http://www.prisonersofthecensus.org/news/2003/12/08/priorto1990/>.

95. See *Borough of Bethel Park v. Stans*, 449 F.2d 575, 582 (3d Cir. 1971) (holding that incarcerated persons "as distinguished from, for example, those temporarily in a hospital for a short duration, often have no other fixed place of abode, and the length of their stay is often indefinite"). Even the Court in *Franklin*, which held that physical presence should not be dispositive of residence, seemed to distinguish temporary displacement from moves of a more permanent nature. The *Franklin* Court observed that "[t]hose persons who are institutionalized in out-of-state hospitals or jails for short terms are also counted in their home States," 505 U.S. at 806, but by treating only those prisoners who are jailed outside of

The duration of a person's absence from a place, however, has never been treated as determinative of residence. The first Enumeration Act placed no durational limitations on the time that an individual could spend away from his residence for enumeration purposes. And indeed, in *Franklin*, there was no suggestion that the residence of overseas servicemen and women was in any way related to the length of their time abroad. Rather, the Court endorsed the proposition that length of stay should be irrelevant to the residency determination.⁹⁶

In any event, the median time served for prisoners released in 2002 was only seventeen months.⁹⁷ The Census count is the basis for redistricting plans that remain in effect for ten years, long after most prisoners return to their home communities, and it is not clear why a person's involuntary stay at a facility for one to three years should affect the distribution of political power throughout the state for a decade. And there is no reason why individuals held away from home involuntarily for such a short length of time should be treated any differently than, for instance, foreign service members, who spend an average of twenty years out of a thirty-year career abroad.⁹⁸

C. Analogy to Other Non-Voters and Effect on Services

Some would also argue that many groups other than the incarcerated—such as minors, unregistered voters, or non-incarcerated felons (who are ineligible to vote in some states, even after completion of sentence)—are not permitted to vote and yet are counted where they are physically located for redistricting purposes. These non-enfranchised populations are considered legitimate constituents of the lawmakers who represent the districts where they live, and therefore, one could argue that incarcerated persons should be deemed no different.

For instance, in *Federation for American Immigration Reform v. Klutznick*,⁹⁹ a district court in Washington, D.C. rejected a challenge to the Census Bureau's count of undocumented immigrants, who are ultimately included in the P.L. 94-171 data file. In rejecting the plaintiffs' claim that undocumented immigrants should not be counted because they do not vote, the

their home states only "for short terms" as continuing residents of their home states, the implication could be that persons incarcerated for lengthier sentences are in fact properly enumerated where they are incarcerated.

96. See *Franklin*, 505 U.S. at 804 (noting that first Enumeration Act, in allowing people to be counted as residents of places from which they were absent at the time of enumeration, placed "no limit on the duration" of a person's absence); see also NRC, *supra* note 13.

97. See NRC, *supra* note 13, at 93.

98. See AM. FOREIGN SERV. ASS'N, THE FOREIGN SERVICE OVERSEAS PAY GAP 3 (2009), available at <http://www.afsa.org/congress/paygap09.pdf>.

99. 486 F. Supp. 564 (D.D.C. 1980).

district court observed in dicta:

We also note that the phrase [one person, one vote] itself is inaccurate shorthand for the concept of equal representation for equal numbers of people, insofar as it is possible. State districts drawn strictly on the basis of population would clearly be constitutional, *Reynolds v. Sims*, 377 U.S. 533, 567 (1964), in spite of the fact that concentrations of non-voting residents in a few districts (such as where prisons or orphanages are located) would make the ballots of voters in those districts more “valuable” than voters’ ballots in other districts.¹⁰⁰

Anti-immigrant groups have continued to litigate the issue of the inclusion of undocumented immigrants in the redistricting population base,¹⁰¹ with no success.¹⁰²

But if aliens, despite their status as non-voters, should be included in the redistricting population base where they are physically present, why should incarcerated individuals be any different? As one district court has observed, groups such as students, military personnel, and prisoners, while distinct from ordinary private residents, “draw upon the services of the communities in which their military installations, colleges, and institutions are located. The communities in which these persons are residing must plan and develop their public resources to provide for all residents.”¹⁰³

This analogy, however, has its limits. Incarcerated persons are unlike transients and non-voters in four crucial respects. *First*, as discussed above in Subpart II.A, they are not domiciled where they are physically present. *Second*, incarcerated persons have no choice in where they are located. *Third*, they are physically prohibited from integrating into their surrounding communities. *Fourth*, although incarcerated persons undoubtedly have an effect on some local services—for example, utilities like electricity and water—these sorts of financial considerations are accounted for in the cost of operating a prison. It is not clear why, for instance, the water usage of a prison facility should entitle the other residents of a prison district to enhanced political representation in the state legislature. Suburban residents who commute into cities for work also have an effect on a city’s services that must be taken into account by urban planners, but that effect is hardly a reason to grant cities increased political representation. And, in any event, incarcerated persons cannot in fact utilize the

100. *Id.* at 577 n.16.

101. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *Lepak v. City of Irving*, No. 3:2010CV00277 (N.D. Tex. filed Feb. 11, 2010).

102. Not only have such efforts failed time and again as a one person, one vote challenge, *see id.*, but legislative efforts that involve the discriminatory exclusion of only non-citizens will likely trigger strict scrutiny based on alienage. *See* Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L.J. 1441, 1454 (1995).

103. *District of Columbia v. Dep’t of Commerce*, 789 F. Supp. 1179, 1187 (D.D.C. 1992) (quoting *Borough of Bethel Park v. Stans*, 319 F. Supp. 971, 979 (W.D. Pa. 1970)).

same array of services as ordinary non-voting residents: they cannot use nearby parks, schools, libraries, and highways—or otherwise engage in civic life. On the other hand, their only connection to the outside world is in their home communities, through family or personal relationships that pre-date their incarceration.

The question is not whether incarcerated persons have an effect in the district in which they are incarcerated, which they surely do—rather, the question, for purposes of allocating representation, is whether they are properly thought of as *constituents* there, which they surely are not. While there are certainly legitimate rationales for counting, for instance, aliens as among a legislator's constituents in his or her electoral district, any analogy to incarcerated persons is inapt. Indeed, unlike aliens, if incarcerated persons could vote, they would, in almost all cases, have to vote by absentee ballot in entirely separate districts from where they are physically present.

D. Viable Alternatives?

Finally, one could argue that physical presence should determine the residence of incarcerated persons because, despite its flaws, there are no better alternatives. As a preliminary matter, if prisoners are reallocated to another address, it is not necessarily clear which address should be used. Some incarcerated persons (for instance, those who are homeless) may lack an address at time of arrest; others may have lived in a place only for a short time prior to arrest, or may have plans to move elsewhere after release from physical custody. Finally, counting incarcerated individuals at their former addresses creates an analytical problem: the incarcerated person would be counted in addition to the home's current occupant, essentially double-counting inhabitants at a single address. The sum total of these observations is that although counting individuals where they are incarcerated may seem unreasonable, counting them someplace where they do not eat and sleep raises a host of other potential problems.¹⁰⁴

There are at least three responses to the analytic difficulties posed by counting incarcerated individuals at their home addresses. *First*, the counting of multiple persons at a single address did not bother the Census Bureau or the Supreme Court in *Franklin*, which permitted the enumeration of overseas federal employees at their last domestic addresses prior to moving overseas.¹⁰⁵ *Second*, although the reallocation of prisoners to their home addresses is a complicated solution, it hardly makes less sense than counting them as though

104. See *id.* at 1189 n.19 (“There are . . . substantial problems with deviation from the usual residence rule. Where would inmates actually be counted, where they lived prior to incarceration? And what of the current residents of that address? How would they be counted for representation purposes?”).

105. See discussion *supra* Part II.B.

they were ordinary constituents in the districts where their prisons are located. *Third*, those incarcerated individuals who do not have useable address information are hardly unique—they can be treated as “address unknown,” just as are other individuals who cannot be allocated to specific census tracts.¹⁰⁶ In sum, the analytic difficulties posed by reallocating incarcerated individuals are overstated.

IV. LIABILITY FOR PRISON-BASED GERRYMANDERING

Plaintiffs seeking to challenge prison-based gerrymandering could aim their efforts at either (a) the Census Bureau itself or (b) states and localities that engage in prison-based gerrymandering. As described below, I conclude that, although litigation against the Census Bureau under the Administrative Procedure Act would be unlikely to succeed, states and municipalities that engage in prison-based gerrymandering could be subject to liability on at least two grounds: (1) the one person, one vote principle under the Equal Protection Clause and (2) minority vote dilution under section 2 of the Voting Rights Act. I address these bases for liability in turn below.

A. The Administrative Procedure Act

Because states and localities rely on Census data when redistricting, the Bureau could be described in some sense as the cause of the prison-based gerrymandering problem. The natural question, therefore, is whether litigation challenging the Bureau’s enumeration could be successful.

The Census Bureau’s enumeration of the population is subject to judicial review¹⁰⁷ and can be challenged under the Administrative Procedure Act (APA),¹⁰⁸ which provides for judicial review of an administrative agency determination where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁰⁹ Plaintiffs alleging injury in the form of a skewed redistricting process due to inaccurate Census figures would have standing to challenge the Census Bureau’s counting methodology under the APA.¹¹⁰

106. Such individuals can either be allocated to the state as a whole (the same way that overseas federal employees are currently treated) and divided proportionally amongst districts, or simply subtracted from the total population of the state when calculating ideal district size. See Justin Levitt & Peter Wagner, *Address Unknown: Podcast Episode 1, PRISONERS OF THE CENSUS* (May 20, 2010), <http://www.prisonersofthecensus.org/news/2010/05/20/podcast1/>.

107. See *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329-30 (1999); *Texas v. Mosbacher*, 783 F. Supp. 308, 315-16 (S.D. Tex. 1989).

108. 5 U.S.C. § 701, *et seq.* (2006).

109. *Id.* § 706(2)(A).

110. See *Dep’t of Commerce*, 525 U.S. at 332 (holding that plaintiffs had standing to challenge Census Bureau’s plan to use statistical sampling because of the redistricting

A challenge to the Bureau's enumeration of incarcerated persons, however, would face a high hurdle, as the Bureau need only state a rational reason for its method of enumeration in order to survive judicial scrutiny under the APA.¹¹¹ Indeed, the Bureau's enumeration has only been found to run afoul of the APA on one occasion: when it sought to use statistical sampling during the 2000 Census to adjust figures from the actual enumeration.¹¹²

Two lower courts have rejected challenges to the Census Bureau's method of counting incarcerated persons. In *Borough of Bethel Park v. Stans*,¹¹³ the Third Circuit rejected a challenge brought by plaintiffs claiming injury as the redistricting consequences of the Census Bureau's enumeration of students, military personnel, and incarcerated persons. The Court observed that the Bureau's method of counting these individuals where "they generally eat, sleep and work" is a "historically reasonable means"¹¹⁴ of discharging the Census Bureau's legislative and constitutional mandate to enumerate the "whole number of persons in each State."¹¹⁵

Similarly, in *District of Columbia v. Department of Commerce*,¹¹⁶ a district court rejected a challenge brought by the District of Columbia to the Bureau's enumeration of the individuals held at a prison located in Virginia, which housed offenders solely from Washington, D.C., and which was supported

consequences, as "appellees who live in the aforementioned counties have a strong claim that they will be injured by the Bureau's plan because their votes will be diluted vis-à-vis residents of counties with larger 'undercount' rates"); see also *Carey v. Klutznick*, 637 F.2d 834, 836, 838 (2d Cir. 1980) (plaintiffs alleging "the dilution of the votes of New York City residents particularly members of minority groups vis-à-vis those of other residents of the state with respect to the state legislature" had sufficiently "alleged concrete harm in the form of dilution of their votes"). I note that in *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981), the Sixth Circuit held that the redistricting effects of the Census's counting methodology were not sufficient to establish standing for an APA claim, because a "state legislature is not required by the Constitution to accept in all respects the census data supplied by the Bureau." *Id.* at 625; see also *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1106 (S.D.N.Y. 1987) ("New York State does not have to utilize the census figures in apportioning its legislative districts," and therefore "lacks standing to complain about the Bureau's decision not to adjust since it can easily avoid the consequences of that decision by apportioning its districts on a different basis"). These cases, however, appear to be superseded by the Supreme Court's holding in *Department of Commerce*, insofar as the latter case definitively established that a plaintiff alleging that the Census Bureau's enumeration methodology resulted in a skewed redistricting process has standing to sue the Bureau and suffers actionable injury in the form of vote dilution.

111. See *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (rejecting claim that the Bureau's failure to use sampling was arbitrary and capricious, and holding that "the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census").

112. See *Dep't of Commerce*, 525 U.S. at 332.

113. 449 F.2d 575 (3d Cir. 1971).

114. *Id.* at 578.

115. *Id.* (quoting U.S. CONST. amend. XIV, § 2; 2 U.S.C. § 2(a) (2006)).

116. 789 F. Supp. 1179 (D.D.C. 1992).

almost exclusively by funds from the District of Columbia. While there were no electoral consequences to the Bureau's enumeration of the D.C. prisoners in Virginia, the District alleged injury in the form of lost federal funding due to the undercount of its population. The court, however, rejected the District's claim, stating that "[t]he Constitution makes clear that the Census is to be used to determine congressional representation,"¹¹⁷ and the court found it "impossible to say that the Census Bureau acted arbitrarily and capriciously."¹¹⁸

But while *Bethel Park* and *District of Columbia* suggest that an APA challenge to the Bureau's enumeration methods would be difficult, these cases do not foreclose the possibility of a challenge to a state's adoption of a redistricting plan that is based on Census data, and even suggest that states could be liable for prison-based gerrymandering. The key to the holdings in *Bethel Park* and *District of Columbia* is that they evaluated the validity of the Census Bureau's method of enumeration in light of the Bureau's express duties alone. Although Census data are ultimately used by an array of other government agencies and institutions for a variety of purposes, the express duty of the Census Bureau is merely to enumerate the "whole Number of free Persons"¹¹⁹ of each state for purposes of congressional apportionment among the states—and the courts in *Bethel Park* and *District of Columbia* found that the Bureau's current method of counting prisoners is a reasonable means of discharging that duty.

Such a holding, however, says nothing about where, *within a state*, incarcerated individuals should be counted when drawing legislative districts. More precisely, these cases concern the level of discretion that the Census Bureau has in enumerating people, but not the constitutional question of whether it is appropriate for a state or locality, consistent with its obligation under the Equal Protection Clause to draw legislative districts that are roughly equal in size, to use Census data that count incarcerated persons where they are confined. Indeed, the Third Circuit expressly noted this point in its decision in *Bethel Park*, essentially inviting a challenge to a state's districting plan that relies on the Census's method of counting incarcerated persons:

Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature. Therefore, appellants' contention that they will suffer injury because of Pennsylvania's reliance on the federal census for the apportionment of its legislative bodies is *properly directed at the appropriate state law . . . not the method of enumeration used in the*

117. *Id.* at 1187.

118. *Id.* at 1188.

119. *Id.* at 1181 n.3 (quoting U.S. CONST., art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2).

federal census.¹²⁰

Thus, *Bethel Park* should be read as acknowledging that a plaintiff could bring litigation against a state for drawing unequal legislative districts based on Census data that miscount incarcerated persons as residents of the places where they are confined.¹²¹

B. One Person, One Vote

1. The Legal Standard for a One Person, One Vote Claim

The Equal Protection Clause of the Fourteenth Amendment requires that electoral representation—other than to the United States Senate—“be apportioned on a population basis.”¹²² The “one person, one vote” rule is a bedrock principle of political equality. Chief Justice Warren described *Baker v. Carr*,¹²³ which laid the groundwork for the one person, one vote rule by holding that state apportionment decisions are subject to judicial review, as “the most important case of [his] tenure on the Court.”¹²⁴

As articulated in the landmark decision *Reynolds v. Sims*,¹²⁵ the one person, one vote principle requires “that a [s]tate [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.”¹²⁶ Of course, “[m]athematical exactness or precision is hardly a workable constitutional requirement,”¹²⁷ and states may therefore construct state legislative districts that are roughly—though not exactly—equal in size

120. *Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 n.4 (3d Cir. 1971) (emphasis added).

121. Moreover, to the extent that courts are tempted to look to *Bethel Park* for guidance on the ultimate constitutional and statutory questions, the reasoning in *Bethel Park* could be described as dated because it does not take into account the explosion of prison populations, which are more than six times the size that they were in 1964 when the Supreme Court first articulated the one person, one vote principle. In 1964, when the Court decided both *Reynolds* and *Wesberry v. Sanders*, 376 U.S. 1 (1964), federal and state correctional institutions held only 214,336 prisoners. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 490 (Kathleen Maguire & Ann L. Pastore eds., 1999).

122. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

123. 369 U.S. 186 (1962).

124. Bernard Schwartz, *How Justice Brennan Changed America*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 33 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (quoting EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN (1977)). Chief Justice Warren believed that if representation had been truly democratic in the sense that access to the ballot were open to all and representation apportioned equally amongst all citizens, then many of the civil rights problems experienced by the country could have been prevented.

125. *Reynolds*, 377 U.S. at 533.

126. *Id.* at 577.

127. *Id.*

without running afoul of the one person, one vote rule.¹²⁸

In examining a state legislative districting plan under the one person, one vote standard, courts measure the “total deviation” of the plan, which is calculated as follows. First, the total population of the electorate is divided by the number of districts in the plan to calculate the “ideal” population size of an individual district. Total deviation is then calculated by taking the percentage by which the largest district deviates from the ideal-sized district and adding it to the percentage by which the smallest district deviates from the ideal. A deviation less than 10% “falls within” the category of acceptable “minor deviations,” but any “plan with larger disparities in population creates a prima facie case of discrimination and therefore must be justified by the State.”¹²⁹ Putting the 10% benchmark another way, legislatures engaged in redistricting have sometimes attempted to ensure that no district deviates from the ideal population size by more than 5%.¹³⁰

But I note a few caveats. First, the standards are even stricter for a state’s congressional districting plan (as opposed to the plan for the state’s own legislature). Moreover, the Supreme Court has intimated that, even in non-federal districting plans, deviations smaller than 10% can be unconstitutional if the jurisdiction has made no good faith effort to ensure that all districts are as equal in size as possible.¹³¹ And, at the other end of the spectrum, a deviation of 16% “may well approach tolerable limits,”¹³² even if a state can proffer valid reasons for the total deviation in its districting plan. Finally, I note that courts look unfavorably on plans that exhibit the “taint of arbitrariness or discrimination.”¹³³

128. I note that this discussion is limited to districting plans enacted by a state or local government as to the allocation of *intrastate* representation, but does not apply to congressional apportionment *among* states. See *Dep’t of Commerce v. Montana*, 503 U.S. 442 (1992). Courts require a greater degree of congruence amongst the size of congressional election districts *within* an individual state than is expected between congressional districts in *different* states. See *id.*

129. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977)); *White v. Regester*, 412 U.S. 755, 764 (1973).

130. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339-40 (N.D. Ga. 2004) (three-judge court), *aff’d*, 542 U.S. 947.

131. See *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down a state’s congressional districting plan that had a total deviation of only 0.7%).

132. *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

133. *Roman v. Sincock*, 377 U.S. 695, 710 (1964). I note one caveat: the level of scrutiny employed by courts is stricter in challenges involving a congressional redistricting plan than it is with respect to a redistricting plan of the state’s own legislature, as the Court has held that states may have a legitimate interest in creating state legislative districts, which generally outnumber a state’s U.S. congressional districts, to reflect political subdivision lines, which can sometimes trump the need for strict adherence to the one person, one vote principle. See *Mahan*, 410 U.S. at 321. Compare *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (rejecting the adherence to political subdivision lines as a rationale for population deviation in congressional districting plan), with *Abate v. Mundt*, 403 U.S. 182 (1971) (upholding New York state districting plan with 11.9% variance where the state pointed to

Thus, there are three basic scenarios for a one person, one vote violation for a state legislative districting plan:

- (1) If the total deviation exceeds 16%, a state may be unable to justify it under any circumstances;
- (2) If the total deviation is greater than 10% but less than 16%, plaintiffs have made a prima facie case of a violation;
- (3) If the total deviation is less than 10%, plaintiffs can only state a claim alleging that the state failed to make any good faith effort to eliminate the population deviation under the redistricting plan.

In situations (2) and (3), the state can attempt to justify the population deviation by reference to a rational state policy. The “ultimate inquiry” will be “whether the state’s redistricting plan may reasonably be said to advance a rational state policy and, if so, whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.”¹³⁴

2. Application in New York

The New York Legislature was wise to end prison-based gerrymandering for the upcoming redistricting cycle, as its previous state legislative redistricting plans were vulnerable to a one person, one vote challenge. If we assume that, absent corrective legislation, New York’s next redistricting would have looked like the previous one, then it is certainly possible the state would have faced liability under the one person, one vote rule.¹³⁵

The following discussion focuses on state legislative districts, as opposed to federal congressional districts. The former present an ideal vehicle for application of the one person, one vote principle in this context, because they tend to be much smaller than congressional districts, and the effects of population deviations are easier to see. However, I also note that, although the following discussion focuses on challenges to statewide redistricting plans, analogous challenges could be made to any municipal districting plan that includes incarcerated persons in the population base.

long history of maintaining integrity of existing governmental units).

134. *Brown*, 462 U.S. at 843 (citing *Mahan*, 410 U.S. at 328); see also *Reynolds v. Sims*, 377 U.S. 533, 568, 578-79 (1964) (holding that population deviations must be justified by the state by reference to “legitimate considerations incident to the effectuation of a rational state policy”).

135. Although my discussion is limited to New York, studies of statewide legislative redistricting plans in other states have found similar results. See, e.g., Stinebrickner-Kauffman, *supra* note 5, at 266-67 (observing that, if prisoners are subtracted from the population base, Connecticut’s House districting plan would suffer from a deviation of 19.3%, and that in four House districts, prisoners make up 10% of the population). The disparities in the Connecticut House districting plan exceed those exhibited in New York, and would be near or would exceed what the Supreme Court has described as the “tolerable limit[]” for population deviation under *Mahan*. 410 U.S. at 329.

Peter Wagner of the Prison Policy Initiative has performed a thorough analysis of New York's state legislative districts from the 2000 redistricting cycle, and found that, once incarcerated individuals are subtracted from the population counts of each State Senate district, the New York Senate districting plan exhibited a total deviation of 11.62%.¹³⁶ Seven of New York's sixty-two State Senate Districts are more than 5% below the ideal average of 306,072.¹³⁷ Similarly, subtracting prison populations from New York's State Assembly districting plan yields a total population deviation of 10.95%.¹³⁸ These numbers are sufficient to make out a prima facie one person, one vote claim. Standing for a challenge would be easy to establish, as all constituents living in overpopulated districts suffer actionable injury in the form of diminished political power because of prison-based gerrymandering.¹³⁹ This kind of injury is precisely what the Court described as unconstitutional in *Reynolds*: "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status."¹⁴⁰

Moreover, regardless of the state's proffered justification for such deviations, these districting plans display a "taint of arbitrariness or discrimination"¹⁴¹ by diluting the representation of identifiable groups in a systematic fashion. The seven underpopulated Senate districts display the characteristics one might expect based on the discussion above in Subpart I.A. All seven districts are located in upstate rural areas;¹⁴² six out of the seven are 91% white, with the last district standing at over 80% white.¹⁴³ Meanwhile, the majority of the most highly overpopulated senate districts are predominantly African-American and Latino: six of the eight senate districts that are overpopulated by more than 4% are majority non-white.¹⁴⁴ In sum, the New York state districting plans were highly vulnerable to a one person, one vote challenge. Without corrective legislation, it is easy to imagine that the next districting plan would have been similar, and that the state would have been

136. See WAGNER, *supra* note 19, at fig.10.

137. These are the 45th, 47th, 48th, 49th, 51st, 54th, and 59th Districts. See *id.* § 5.

138. See *id.* at fig.11. In ten Assembly districts, more than two percent of the population consists of prisoners.

139. See *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (finding "concrete harm" where plaintiffs alleged that the Bureau's undercounting of minorities resulted in "the dilution of the votes of New York City residents particularly members of minority groups vis-à-vis those of other residents of the state with respect to the state legislature"). The injury alleged is of the highest order—the dilution of the right to vote—which amounts to "a substantial constitutional claim and are not merely [a] quibbl[e] over the office procedures used by the Census Bureau." *Id.*

140. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (citations omitted).

141. *Roman v. Sincok*, 377 U.S. 695, 710 (1964).

142. See WAGNER, *supra* note 19, at fig.10 (identifying relevant districts as "rural").

143. See *id.* at fig.13.

144. See *id.* at figs.10 & 13.

subject to liability.

3. A Note on Representational Equality

At this point, however, it is important to note that, although the case law is clear that the one person, one vote rule requires that election districts hold the same number of constituents,¹⁴⁵ some judges and commentators have expressed different views. For instance, Judge Kozinski observed in his dissent in *Garza v. County of Los Angeles*¹⁴⁶ that the one person, one vote principle can be interpreted in two different ways: (1) as a “principle of equal representation,” whereby the total number of residents in each district must be equal such that “constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy”; or (2) as a “principle of electoral equality,” whereby the total number of voters in each district must be equal in order to “assure[] that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.”¹⁴⁷

Of course, the U.S. Supreme Court and several courts of appeals have suggested that the choice of which of these theories to adopt for purposes of compliance with the one person, one vote rule should be left to states and localities themselves.¹⁴⁸ And, in any event, under both a theory of

145. See, e.g., *Reynolds*, 377 U.S. at 542 n.7, 545-46; *Avery v. Midland County*, 390 U.S. 474, 475 (1968). In *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court made clear that total population is an appropriate basis for apportioning representation in a statewide redistricting plan, despite the fact that “total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because ‘census persons’ are not voters.”

146. 918 F.2d 763 (9th Cir. 1990).

147. *Id.* at 781-82 (Kozinski, J., dissenting).

148. See, e.g., *Burns v. Richardson*, 384 U.S. 73, 84-86 (1966); *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). But see *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969) (“There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2.”) (emphasis added); *Garza*, 918 F.2d at 787. Thus, a state could then conceivably claim that whether or not to include prisoners in the redistricting population base is a political question insulated from judicial review. The issue here, however, is not *whether* incarcerated persons should be counted, but *where*. That is, even assuming *arguendo* that the decision to count incarcerated persons in the redistricting population base should be left to the state, the choice of *where* to count them should not be insulated from judicial review. If a group of persons is to be included in the redistricting population base, those individuals should be counted where they are properly understood as “residents” within the meaning of *Franklin*, i.e., the place where they have an “allegiance or enduring tie[s].” *Franklin v. Massachusetts*, 505 U.S. 788, 789 (1992). Otherwise, a state could simply count prisoners anywhere—for instance, where they committed their offenses or where they were born. Likewise, although one could argue that the decision of whether or not to include aliens in the redistricting population base is a “political question,” this would not mean that the state could then choose to count aliens in any place other than where they reside, for instance, at their port of entry to the United States (although I note that, while this

representational equality and a theory of electoral equality, prison-based gerrymandering contravenes the one person, one vote rule. As we have seen, districts that hold prisons and jails are underpopulated in terms of both total population (because incarcerated individuals are not residents of the districts where they are held) and total voters (because incarcerated individuals cannot vote in the districts where they are confined).

Regardless, although a complete discussion of this issue is beyond the scope of this Article, it must be addressed briefly, because if election districts only need to have the same number of *voters*, then it could be the case that most incarcerated individuals need not be counted during the redistricting process at all, because, but for a few exceptions, prisoners generally cannot vote. Initially, I note that although Judge Kozinski concluded that the one person, one vote principle most literally means equality of voters per district,¹⁴⁹ his view was rejected by the majority on the *Garza* panel.¹⁵⁰ This is hardly surprising; despite some rhetoric to the contrary, the one person, one vote principle has generally been interpreted to require that election districts hold the same number of constituents, and not the same number of voters. Non-voters such as minors and non-citizens have always been included in the population base, out of recognition that all residents merit representation in the political process. Indeed, the apportionment of seats in the House of Representatives is based on “whole Number of free Persons,”¹⁵¹ not the number of eligible voters, in each state. Thus, the one person, one vote principle likely embodies a notion of representational, rather than political, equality.

And, indeed, to truly equalize districts in terms of voters would raise further questions—must districts have the same number of citizens? Adult citizens? *Eligible* voters (i.e., excluding minors and those otherwise disqualified from voting)? *Registered* voters? Or *actual* voters? To truly equalize the weight of each person’s vote would seem to require that districts have the same number of actual voters—an empirical calculation that would depend on variables such as turnout rates that shift from election to election. While such fact-intensive determinations might be appropriate in some contexts,¹⁵² such calculations seem inappropriate for the constitutional context,

discussion is beyond the scope of this Article, there is in my view no constitutionally valid basis for excluding non-citizens from the population base). Nor could a state, for instance, transfer all prisoners to a single county and thereby grant that county outsized political influence that does not correlate to that county’s true number of actual constituents. Rather, once the state has made the decision to include prisoners in the redistricting population base, those prisoners must be counted where they truly are constituents, i.e., at their home addresses prior to arrest.

149. *Id.* at 785.

150. *Id.* at 775-76 (majority opinion).

151. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

152. For instance, under some circumstances, section 2 of the VRA requires the drawing of majority-minority election districts, where minority voters will have the opportunity to elect their candidates of choice. *See* *Bartlett v. Strickland*, 129 S. Ct. 1231,

as “[m]athematical exactness or precision is hardly a workable constitutional requirement.”¹⁵³

C. Section 2 of the Voting Rights Act

In addition to, or in lieu of, a one person, one vote claim, states and localities that engage in prison-based gerrymandering could also be liable for minority vote dilution under section 2 of the Voting Rights Act.¹⁵⁴

1. The Standard for Minority Vote Dilution under Section 2

Section 2 of the Voting Rights Act prohibits any “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.”¹⁵⁵ Thus, as amended in 1982, section 2 prohibits not only those voting practices that were enacted with racially discriminatory intent, but also, under some circumstances, those that have racially discriminatory effects.¹⁵⁶

One of the purposes of the 1982 amendments to section 2 was to make it easier for plaintiffs to challenge minority vote dilution—situations where minority voters are “submerg[ed]” in an electoral district controlled by a white majority.¹⁵⁷ As set forth in the seminal case *Thornburg v. Gingles*,¹⁵⁸ a standard vote dilution claim involves the allegation that minority voters have been denied an opportunity to elect a candidate of their choice because the majority votes as a bloc to minimize or cancel the effectiveness of minority votes, thus effectively locking minority-preferred candidates out of the political process.¹⁵⁹ Since *Gingles*, the Court has explained that actionable minority vote dilution can occur in both an at-large voting system and a districting plan involving single-member districts, where election lines have been drawn in such a way

1241 (2009). Whether or not a particular district will truly offer such an opportunity depends on a host of empirical factors such as turnout and registration rates. While such empirical calculations are necessary in enforcing a statute that seeks to implement a clear policy goal (namely, effective representation for minority voters), they seem inappropriate in the constitutional context.

153. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

154. Although I do not explore this theory in this Article, I also note that, in some circumstances, states and localities that engage in prison-based gerrymandering could, in theory, also be liable under the VRA for intentional discrimination against minority voters.

155. 42 U.S.C. § 1973(a) (2006).

156. The 1982 amendments to section 2 overruled the Supreme Court’s decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had limited section 2 liability to situations involving discriminatory intent. See S. REP. NO. 97-417, at 27-28 (1982).

157. *Bartlett*, 129 S. Ct. at 1241.

158. 478 U.S. 30 (1986).

159. *Id.* at 56-58.

that has the same effect of canceling minority votes.¹⁶⁰

As explained in *Gingles*, plaintiffs pressing a standard vote dilution claim need to establish the presence of three factors at the outset, before they are even permitted to submit proof of a violation: (1) the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district,” (2) the minority group is “politically cohesive,” and (3) the majority votes “as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”¹⁶¹ These three requirements are generally referred to as the “*Gingles* preconditions” or the “*Gingles* prerequisites.” After they have been established, plaintiffs may then attempt to establish a violation of section 2, under another framework known as the “totality of the circumstances analysis,” or the “Senate Factors,” which are discussed below.¹⁶²

The reason that plaintiffs are required to demonstrate the *Gingles* preconditions is clear—it is only where these conditions are present that minority vote dilution, as traditionally understood, both (a) exists and (b) can be remedied. The second and third *Gingles* preconditions (minority vote cohesion and majority bloc voting) establish that dilution exists—that minority voters typically vote together and can thus be said to have preferred candidates, but that their candidates of choice are typically blocked by the majority. The first *Gingles* precondition, meanwhile, establishes that this situation is remediable—that district lines can be redrawn around a minority community that is large enough to elect candidates of their choice in a single-member district.¹⁶³ A standard vote dilution claim, therefore, is premised on the ultimate remedy of the creation of a new minority opportunity district.

Of course, not every practice that diminishes the voting power of minority

160. See, e.g., *Grove v. Emison*, 507 U.S. 25 (1993).

161. 478 U.S. at 50-51.

162. See *infra* note 164.

163. I note that this is something of an oversimplification. The first *Gingles* prong requires that a minority population constitute at least 50% of the voting age population of a proposed remedial district. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009). This 50% threshold, however, is meant to serve a litigation gatekeeping function only; it is a bright-line rule of administration that courts can apply in order to limit the universe of possible section 2 claims. See *id.* at 1244-45. In practice, however, whether minority voters in a given district will actually have an opportunity to elect a candidate of their choice depends on an array of variables on the ground, such as registration and turnout rates, and the degree of racially polarized voting in the district. There may be contexts in which minority voters have an opportunity to elect candidates of their choice, even where they do not constitute a numerical majority of the district, if there is a small group of non-minority voters who reliably “cross over” to support the minority-preferred candidate. Thus, as *Bartlett* makes clear, it might be the case that, under appropriate circumstances, states can satisfy their section 2 obligations by creating districts where minority voters do not reach the 50% threshold—provided that there is sufficient crossover support from non-minority voters for minority-preferred candidates. See *id.* at 1248-49. In other words, although plaintiffs bringing a section 2 claim must show that minority voters reach the 50% threshold in order to initiate litigation, it may be the case that, under appropriate circumstances, a remedial district drawn at the conclusion of litigation might not in fact meet the 50% threshold.

voters runs afoul of section 2. Even if a plaintiff establishes the presence of all three *Gingles* prerequisites, a court can only find a violation of section 2 based on a “totality of the circumstances” analysis, the starting point of which is a set of non-exclusive factors (the “Senate Factors”) outlined by the Senate in its report on the 1982 amendments to the VRA.¹⁶⁴ These include factors such as the history of official voting-related discrimination in the state or political subdivision; the extent to which voting in the elections of the state or political subdivision is racially polarized; and the extent to which minority group members bear the effects of discrimination in areas external to voting, such as housing and employment.¹⁶⁵

2. Applying Section 2 in the Context of Prison-Based Gerrymandering

Because no plaintiffs challenging prison-based gerrymandering have ever litigated a VRA claim to a final judgment, there is no case law in this context to guide our discussion. A challenge to prison-based gerrymandering could be shoehorned into the structure of a standard section 2 claim in at least two ways. First, if an existing remedial majority-minority district contains a large prison population, it could be the case that the district fails in practice to provide its minority residents with an effective opportunity to elect candidates of their choice. This was the case, for instance, in Somerset, Maryland, where a majority-minority district was created after successful section 2 litigation, but 64% of the district’s African-American population consisted of prisoners.¹⁶⁶ Without a sufficient number of African-American voters to constitute a majority of the electorate, the district had never elected an African-American representative.¹⁶⁷ Thus, in Somerset, an effective remedy for minority vote dilution was thwarted by prison-based gerrymandering; had Maryland not enacted corrective legislation, it is easy to imagine how this situation may have become the subject of future litigation.

Second, one could imagine a scenario in which, under the Census Bureau’s existing usual residence rule, a minority community is not large enough to constitute the majority of an election district, but could reach the 50% threshold necessary to state a claim under section 2 once the community’s incarcerated members are reallocated to their homes. In this case, plaintiffs could bring a section 2 claim arguing that prison-based gerrymandering artificially deflates

164. See *Section 2 of the Voting Rights Act*, U.S. DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/voting/sec_2/about_sec2.php (last modified July 25, 2008) (quoting S. REP. NO. 97-417, at 28-29 (1982)).

165. See *id.*

166. See Letter from Deborah A. Jeon, Legal Dir. & Ajmel Quereshi, Skadden Fellowship Attorney, Am. Civil Liberties Union of Md., to Douglas F. Gansler, Att’y Gen., Md. (Feb. 19, 2010), at 4-5, available at http://www.aclu-md.org/aPress/Press2010/ACLU_NAACP_Letter_AG.pdf.

167. See *id.* at 2-3.

the population numbers of their community, but that a proper enumeration would enable them to satisfy the first *Gingles* prong.¹⁶⁸ One would imagine that such a scenario would be uncommon, because it would be premised on a rather large concentration of incarcerated individuals from a single election district that is currently just below the 50% minority population threshold. It is, however, difficult to know at this time whether such circumstances might in fact be present in any particular place without having access to the home address information of the incarcerated population in a particular state.

These two scenarios present rather extreme factual contexts that do not necessarily capture the essence of the harms of prison-based gerrymandering. In a broad sense, the damage to minority voting power resulting from prison-based gerrymandering is quite different from minority vote dilution as traditionally conceived under section 2. The injury from prison-based gerrymandering is not so much that minority voters in one particular community have been denied the ability to elect their candidates of choice, but that the voting power of minority communities generally has been systematically diluted vis-à-vis districts with prisons. Although this is a problem that is somewhat different from a standard section 2 claim, at an intuitive level, it certainly sounds like an instance of “vote dilution.” As the Supreme Court has explained, “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”¹⁶⁹ The effect of prison-based gerrymandering, which has resulted in the overpopulation of minority districts, and enabled the creation of underpopulated, predominantly white districts, would seem to fall within that language.

Thus, a novel vote dilution claim in the context of prison-based gerrymandering might not follow the exact contours of the standard *Gingles* formula. Rather, a claim in this context would allege that, although minority voters in a particular election district already have an opportunity to elect candidates of their choice, it is not an *equal* opportunity to do so, because many constituents of the district have been counted in other districts to inflate political representation elsewhere. Such a claim would therefore not seek the creation of a new majority-minority district; rather, it would seek to put an existing majority-minority district on more equal footing with majority-

168. There is obviously some tension between the scenario I have just outlined and the Somerset example. After all, if the only way that a minority community can reach the 50% threshold is to count a large number of non-voting incarcerated individuals, then that community, although a majority of the population, might not form a majority of the *electorate* in the district. Plaintiffs pressing a claim in this situation could only obtain effective relief if they sought a remedial district that featured some degree of crossover support from non-minority voters. *Cf. supra* note 163. Such circumstances, of course, may not always be present.

169. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

majority districts.

The Second Circuit has invited the consideration of a claim challenging prison-based gerrymandering as a form of vote dilution on two separate occasions.¹⁷⁰ Indeed, the language of section 2 supports the cognizability of such a claim, as its vote dilution language is not limited to situations where the only proper remedy is the creation of a *new* majority-minority district. Rather, section 2 provides that there is a violation wherever it is shown that:

[T]he political processes leading to nomination or election in the State or political subdivision are *not equally open* to participation by members of a [protected] class of citizens . . . in that its members *have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.¹⁷¹

The legislative history of section 2 also indicates a broader understanding of vote dilution liability. The Senate Report accompanying the 1982 amendments to section 2 speaks in broad terms:

The “results” standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White v. Regester* . . . discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one’s vote fully count, just as much as outright denial of access to the ballot box.¹⁷²

Thus, it seems clear that both the text and legislative history of section 2

170. See *Hayden v. Pataki*, 449 F.3d 305, 328-29 (2d Cir. 2006) (en banc) (noting that “[i]t is unclear whether plaintiffs’ vote dilution claim also encompasses a claim on behalf of plaintiffs who are neither incarcerated nor on parole, that their votes are ‘diluted’ because of New York’s apportionment process, see N.Y. CONST. art. III, § 4, which counts incarcerated prisoners as residents of the communities in which they are incarcerated, and has the alleged effect of increasing upstate New York regions’ populations at the expense of New York City’s,” and remanding for consideration of that claim); *Baker v. Cuomo*, 58 F.3d 814, 823 (2d Cir. 1995) (observing that, where plaintiffs alleged that “‘approximately 75 percent of New York State’s prison population consists of persons from [14 state] assembly districts . . . which are located in New York City[,]’ [a] black or hispanic voter from one of these assembly districts might well have standing to assert a cause of action for vote dilution” (internal citation omitted) (first alteration and omission in original)), *vacated in part sub nom. Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc). As one judge asked during oral argument in *Hayden*, “[I]sn’t [this situation] exactly a vote dilution claim?” Transcript of Oral Argument at 75, *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006). The merits of the vote dilution claim, however, were not reached in either case. The panel opinion in *Baker* was vacated when the Second Circuit ordered rehearing en banc, but the Court deadlocked 5-5 on the merits. See *Baker v. Pataki*, 85 F.3d at 921. In *Hayden*, the Second Circuit remanded to the district court for consideration of the vote dilution claim, but plaintiffs declined to press it. See *Hayden v. Pataki*, No. 00CIV8586 (LMM), 2006 WL 2242760, at *1 (S.D.N.Y. Aug. 4, 2006).

171. 42 U.S.C. § 1973(b) (2006) (emphasis added).

172. S. REP. NO. 97-417, at 27-28 (1982).

support the cognizability of a vote dilution claim in this context.

Applying this discussion to New York is a relatively simple matter.¹⁷³ New York City, for example, has long been a majority-minority city, and many of its state legislative districts are majority-minority. During the 2009 citywide elections, minorities constituted a majority of the electorate for the first time.¹⁷⁴ Many of the State Assembly districts in New York City are majority-minority, and it is relatively easy to make the case that the current method of counting prisoners has the effect of diluting the voting power of these districts: as described above, the City is the home of residence for nearly two-thirds of the prisoners in New York State (66%), but more than 90% of these individuals are incarcerated outside of the City.¹⁷⁵ The state prison population is disproportionately comprised of people of color—African Americans and Latinos make up 30% of the state's population but 77% of its prisoners¹⁷⁶—but 98% of all prison cells in New York State are located in disproportionately white State Senate districts.¹⁷⁷ It is simply indisputable that prison-based gerrymandering resulted in a systematic dilution of minority voting power in New York during the last redistricting cycle.

Thus, it seems clear that New York's previous districting plan was vulnerable to challenge under section 2 of the VRA. Again, if we assume that, absent the newly enacted legislation, New York's next redistricting would have looked similar to the last one, section 2 litigation could have been in New York's future. Prison-based gerrymandering in New York created a structural

173. It seems unlikely that courts would require plaintiffs in this context to allege the *Gingles* preconditions, given that a claim arising from prison-based gerrymandering would be quite different from a standard vote dilution claim. If a court, however, were to determine that it were necessary to place some sort of practical limits on the universe of claims that could be brought in this context, it is conceivable that plaintiffs could be required to establish the presence of some versions of the *Gingles* preconditions. But the *Gingles* preconditions would have to be slightly modified, given that the harm alleged is different. Here, a functional majority-minority district already exists, but voters in that district simply lack the same voting power as voters in majority white districts. Thus, plaintiffs would have to demonstrate: (1) that their minority group is the majority in an existing electoral district; (2) that minority voters in the district vote cohesively, so as to have preferred candidates; and (3) that voting is racially polarized such that there are real differences between majority- and minority-preferred candidates. Together, these modified *Gingles* prerequisites would establish the necessary elements to claim: (1) minorities in a particular majority-minority district have recognizable preferences that differ from those of white voters, but (2) because of prison-based gerrymandering, they have not been given the same level of voting power as has been allocated to white voters in majority-white districts. Once the hurdle of the *Gingles* preconditions has been satisfied, plaintiffs would then have to prove liability in the same manner as any other party bringing a section 2 claim: by demonstrating the presence of a number of the relevant Senate Factors.

174. See Sam Roberts, *For First Time, Minority Vote Was a Majority*, N.Y. TIMES, Dec. 25, 2009, at A19.

175. See WAGNER, *supra* note 19, § I.

176. See *supra* text accompanying notes 33-34.

177. See Wagner, *supra* note 37.

inequality, whereby minority voters from affected districts had, in a very literal sense, less of an opportunity to elect their preferred representatives.

V. OTHER ISSUES

In adjudicating challenges to prison-based gerrymandering, courts will be confronted with two additional, but related, challenges: (1) whether the proper form of relief is to reallocate prisoners to their home addresses or simply to exclude them from the population base; and (2) if reallocation is the proper relief, how to address the technical difficulties raised by re-enumerating prisoners at their home addresses. I address each of these concerns below and conclude that neither represents a significant hurdle for litigation in this area.

A. Relief: Exclusion or Reallocation of Prison Populations?

As an initial matter, I note that it does not necessarily follow from the analysis above that prisoners must be counted at any particular location. We can think of prison-based gerrymandering as distorting political power in two ways: (1) by inflating the population numbers in prison districts; and (2) by diminishing the count in incarcerated individuals' home districts. In many places, the first of these two harms alone is of sufficient magnitude so as to constitute actionable injury, and merely subtracting prisoners from the population base could conceivably remedy the problem entirely by bringing the population deviation in a districting plan back to acceptable levels. Seeking relief along these lines would not be tantamount to arguing that prisoners should not be counted *at all*, as incarcerated persons would continue to be counted as inhabitants of a state for purposes of apportioning congressional representation amongst the states, in much the same way that overseas federal employees are currently allocated by the Census Bureau to the various states, but are not enumerated in particular counties within individual states.

Excluding incarcerated individuals from the redistricting population base could seem attractive for several reasons. *First*, it is a more limited form of relief than allocating them back to their home addresses, both in terms of the logistical difficulties involved and in terms of the magnitude of political representation that would be redistributed as a result of successful litigation. *Second*, excluding rather than reallocating incarcerated persons might be the only solution to districting problems at the municipal level. When a county or city that contains a prison creates a districting plan, it often might be unable to reallocate incarcerated persons back to their home addresses when the vast majority of them come from outside of the jurisdiction entirely. Excluding incarcerated individuals entirely from districting decisions may be the only way to correct for the power imbalances created at the local level by prison-based

gerrymandering.¹⁷⁸ And, indeed, more than one hundred counties nationally¹⁷⁹ (including thirteen in New York¹⁸⁰) currently exclude incarcerated persons from the population base when engaging in redistricting.

But while exclusion of incarcerated populations might make sense at the municipal level, excluding them altogether from the population base at the statewide level does not feel like a wholly satisfactory response to the prison-based gerrymandering phenomenon. Although most incarcerated persons cannot vote, they are still “persons” requiring enumeration in the Census. As we have seen, the one person, one vote principle encompasses a notion of representational, not voting, equality.¹⁸¹ Because all individuals, regardless of voting status, are entitled to representation in our political process, incarcerated persons should be counted. Indeed, given that all states currently count incarcerated individuals during redistricting, it seems that the pertinent question is not whether to count them, but *where*.

At a policy level, extracting all incarcerated persons from the population base while they are incarcerated seems uncomfortably close to the notion that people suffer a “civil death” upon a felony conviction—and when groups of individuals no longer count as “persons,” it becomes easier in some sense to treat them as though they have no rights that society is bound to respect.¹⁸² Once we acknowledge, as we must, that incarcerated individuals remain “persons” subject to enumeration in the Census, the best course cannot be for states to simply exclude all incarcerated individuals from the redistricting population base.¹⁸³

178. Two courts have held that a municipality is permitted to exclude prisoners from the population count. *See Kaplan v. County of Sullivan*, 74 F.3d 398 (2d Cir. 1996) (rejecting challenge to Sullivan County’s *exclusion* of prisoners from population count for municipal districting purposes); *Knox Cnty. Democratic Cent. Comm. v. Knox Cnty. Bd.*, 597 N.E.2d 238, 239 (Ill. App. Ct. 1992) (“[T]o require that ineligible voters must always be included in the apportionment base merely because they were included in the census would violate the Equal Protection Clause.”). I note that these decisions further bolster the point, discussed above, that physical presence is not necessarily determinative of residence for districting purposes.

179. *See* PRISON POLICY INITIATIVE, LOCAL GOVERNMENTS THAT EXCLUDE PRISON POPULATIONS (Sept. 9, 2010), <http://www.prisonersofthecensus.org/local/>.

180. *See* PETER WAGNER ET AL., PRISON POLICY INITIATIVE, PHANTOM CONSTITUENTS IN THE EMPIRE STATE: HOW OUTDATED CENSUS BUREAU METHODOLOGY BURDENS NEW YORK COUNTIES 1 (2007), *available at* <http://www.prisonersofthecensus.org/nycounties/report.html>.

181. *See supra* Part II.C.

182. *See, e.g.,* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *CARDOZO L. REV.* 755 (2011) (arguing that it is politically and morally unacceptable to exclude prisoners from the redistricting data file).

183. *Cf. Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990) (holding that a failure to count non-citizens in redistricting plan “would constitute a denial of equal protection” because “[n]on-citizens . . . have a right to petition their government for services and to influence how their tax dollars are spent. . . . [B]asing districts on voting population

B. Technical Challenges

As the National Research Council has pointed out, “any prospect for counting prisoners at locations other than [where they are] present] depends vitally on the completeness, consistency, and accessibility of records maintained by individual prisons or by state and federal departments of corrections.”¹⁸⁴ The Census Bureau has studied this issue, and, in a 2006 report, claimed that, at present, it is not feasible for the Bureau to reallocate prisoners back to their home addresses.¹⁸⁵ According to the Bureau’s report, 25% of states either do not keep such information or only keep it in paper form.¹⁸⁶

Others who have analyzed the availability of address information for prisoners in New York, however, have reached a different conclusion. According to a report by the New York City Bar Association, the New York Department of Correctional Service could compile a list of the home addresses of all inmates who are in state prisons on Census Day, and “it would be a simple matter—a few hours’ work with readily available software—to determine the census block number of each such address, and thus the number of prisoners to be reattributed to each census block. The latter tabulation could then be made available to the districting commission”¹⁸⁷ Indeed, the feasibility of performing such an analysis has already been demonstrated by the Justice Mapping Center at Columbia University.¹⁸⁸ And the Bureau itself often relies on reporting from correctional institutions to enumerate incarcerated individuals.¹⁸⁹ The problem in the past may have been one that was more of

rather than total population would disproportionately affect these rights. . . . To refuse to count people in constructing a districting plan ignores these rights in addition to burdening the political rights of voting age citizens in affected districts.”)

184. NRC, *supra* note 13, at 244.

185. See U.S. CENSUS BUREAU, TABULATING PRISONERS AT THEIR “PERMANENT HOME OF RECORD” ADDRESS 1 (2006), available at http://www.census.gov/newsroom/releases/pdf/2006-02-21_tabulating_prisoners.pdf. Given the unavailability of complete administrative records for tabulating prisoners at their home addresses, the Bureau concluded that the only way to determine prisoners’ home addresses would be for enumerators to conduct individual interviews of all prisoners, which the Bureau estimates would cost approximately \$250 million nationally. See *id.* at 10. This estimate, however, has been criticized for greatly exaggerating the cost of enumerating incarcerated persons. See Press Release, Brennan Ctr. for Justice, Census Bureau Releases Superficial Report, (Feb. 23, 2006), available at http://www.brennancenter.org/content/resource/census_bureau_releases_superficial_report/.

186. U.S. CENSUS BUREAU, *supra* note 185, at 7.

187. See N.Y. CITY BAR ASS’N, A PROPOSED NEW YORK STATE CONSTITUTIONAL AMENDMENT TO EMANCIPATE REDISTRICTING FROM PARTISAN GERRYMANDERS app. C-5 (2007), available at http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

188. See *id.* (citing *New York City Analysis*, JUSTICE MAPPING CENTER (Oct. 2006), <http://www.justicemapping.org> (click on “NYC Analysis” in “Project Gallery” on right side of page)).

189. *Prison Populations and the Census—FAQ*, PRISONERS OF THE CENSUS, <http://www.prisonersofthecensus.org/faq.html> (click on “How Does the Census Count Incarcerated People?”) (last updated Jan. 3, 2011).

political will rather than of technical capacity. While the Bureau itself might not currently have access to incarcerated persons' home addresses, such information is obtainable by the states themselves (which could even make that information available to the Bureau itself in the future, if necessary). In sum, it seems that a reallocation of incarcerated persons to their home addresses is feasible from a technical standpoint, and, in any event, may even be required by federal law.

CONCLUSION

Prison-based gerrymandering distorts our democratic process. It makes a mockery of the one person, one vote principle and dilutes the voting strength of communities of color, implicating concerns under both the U.S. Constitution and the Voting Rights Act. The good news is that, during the current round of redistricting, the Census Bureau will be providing states and localities data that will help them end prison-based gerrymandering during the next redistricting cycle. Doing so is not only eminently feasible from a technical standpoint, it is essential to eliminating a source of contention in the always litigious redistricting process.