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## Locked Up and Counted Out: Bringing an End to Prison-based Gerrymandering

John C. Drake  
*Washington University School of Law*

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# Locked Up and Counted Out: Bringing an End to Prison-based Gerrymandering

John C. Drake\*

## INTRODUCTION

At America's founding, representatives of slave-holding and free states debated how and whether to count slaves in allocating each state's representation in Congress.<sup>1</sup> Their compromise became the much-maligned three-fifths clause to Article I, Section 2 of the U.S. Constitution.<sup>2</sup> This clause mandated that the government count three-fifths of the enslaved population in determining each state's legislative apportionment. Many people continue to believe that this apparent degradation of slaves as fractional human beings was the ultimate insult to black Americans.<sup>3</sup> The Constitution counted enslaved Africans as only three-fifths of a person. The real injustice, however, is that the founders *counted slaves at all* for purposes of legislative apportionment.<sup>4</sup> Historian Donald L. Robinson wrote that

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\* J.D. Candidate (2012), Washington University School of Law; B.A. (2002), Baylor University. I thank my wife, Bettina F. Drake, for her love and encouragement throughout law school and during my work on this Note, which I dedicate to her. I also thank my daughter, Amelia E. Drake, for her sweet spirit, and my mother Charlene C. Drake, for her love and support. I am grateful to the editors of the *Journal of Law & Policy* for their help in writing this Note and for the opportunity to have it published.

1. See DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS* 179–81 (1971).

2. U.S. CONST. art. I, § 2, cl. 3; see also ROBINSON, *supra* note 1, at 205.

3. See, e.g., Brooke E. Newborn, *Correcting the Common Misreading of the “Three-Fifths” Clause of the U.S. Constitution: Clarifying the “Hostile Fraction,”* 80 PA. B. ASS'N Q. 93, 93 (2009) (describing the frequent refrain following President Barack Obama's election that the nation had advanced from a time when a black man counted as “three-fifths” of a person to a time when a black man could be elected president).

4. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 89 (2005) (“The precise Article I question concerned Congress's proportions, not the slaves'. The principled antislavery answer to this question in 1787 was that *for legislative apportionment purposes*, slaves should be valued not at five-fifths, or even three-fifths, but rather zero-fifths.”).

the three-fifths clause “established the principle, new in republican theory, that a man who lived among slaves had a greater share in the election of representatives than the man who did not.”<sup>5</sup> The Fourteenth Amendment to the Constitution nullified the three-fifths clause in 1868,<sup>6</sup> but many rural regions in the United States continue to leverage a captive, disenfranchised population for political power.<sup>7</sup>

Relying on the U.S. Census Bureau’s usual-residence rule, which counts prisoners as residents of their prison communities, nearly all states credit prison towns with their prison populations in drawing lines for federal, state, and local political districts.<sup>8</sup> The process by which communities increase their political clout on the backs of their prison populations has come to be known as prison-based gerrymandering.<sup>9</sup>

This Note discusses the Census Bureau’s application of the usual-residence rule to prisoners, explains how states use this data in redistricting, and describes recently enacted laws in three states that represent an effort to change the process. This Note further links prison-based gerrymandering to the legacy of the three-fifths clause and provides a constitutional and common-sense rationale for all states to begin counting prisoners as residents of their preincarceration addresses, if they count prisoners at all.

## I. HISTORY

### A. *The Usual-Residence Rule*

The process of legislative redistricting is historically tied to the decennial census. The Constitution requires that every ten years the U.S. Census Bureau count all people residing in the United States

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5. ROBINSON, *supra* note 1, at 201. Constitutional law scholar Akhil Reed Amar further described the cynical motive behind counting people who could not participate in American democracy for representational purposes: “the more slaves a given state’s master class bred or bought, the more seats the state could claim in Congress, for every decade in perpetuity.” AMAR, *supra* note 4, at 88.

6. *See infra* note 54.

7. *See infra* notes 61–65, 88–90 and accompanying text.

8. *See infra* notes 86–89, 107–24 and accompanying text.

9. *See infra* note 97 and accompanying text.

every ten years.<sup>10</sup> The government conducts the count for the express purpose of determining the number of representatives that each state will have in Congress.<sup>11</sup> Because people are transient and often spend substantial amounts of time away from “home,” the early census counters established the usual-residence rule in order to determine the state in which mobile residents should be counted.<sup>12</sup> The rule, put into place for the first census in 1790, requires that a person be counted as a resident of the place where he lives and sleeps most of the time.<sup>13</sup>

The Census Bureau has applied the usual-residence rule to prison inmates since at least 1850 when it first counted prisoners as members of a “prison household” in which the jailor was the head.<sup>14</sup> Only in the 1900 census did the Census Bureau instruct counters to note in the margin of a special census form the “permanent place of residence” of prisoners.<sup>15</sup> In 1910, the Census Bureau reverted back to ignoring prisoners’ preincarceration addresses and counted prisoners as residents of their prison addresses in each decennial census since.<sup>16</sup>

Today, a series of Census Bureau guidelines applies the usual residence rule to transient populations, those living away from home,

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10. Article I of the Constitution states:

The House of Representatives shall be composed of Members . . . apportioned among the several States . . . according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . .

U.S. CONST. art. I, § 2.

11. *Id.*

12. *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992) (“‘Usual residence’ was the gloss given [to] the constitutional phrase ‘in each State’ by the first enumeration Act and has been used by the Census Bureau ever since to allocate persons to their home States.”).

13. *Residence Rule and Residence Situations for the 2010 Census*, U.S. CENSUS BUREAU, [http://www.census.gov/population/www/cen2010/resid\\_rules/resid\\_rules.html](http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html) (last visited Sept. 23, 2011) [hereinafter *Residence Rule*]. The Census Bureau’s guidelines do not further define the phrase “most of the time” other than to indicate that it is not necessarily the same as one’s “voting residence or legal residence.” *Id.*

14. PANEL ON RESIDENCE RULES IN THE DECENNIAL CENSUS, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *ONCE, ONLY ONCE, AND IN THE RIGHT PLACE* 84–85 (Daniel L. Cork & Paul R. Voss eds., 2006).

15. *Id.*

16. *Id.*

and others.<sup>17</sup> The Census Bureau's categorizations show that, in some instances, the Bureau has been willing to consider the fact that even when a person spends most of his time away from his home, he maintains an allegiance to his home community and should be counted there.<sup>18</sup> However, the Bureau has not done so in the context of incarcerated persons. Across-the-board, the Census counts people who are incarcerated on Census Day<sup>19</sup> as residents of the facilities in which they are incarcerated, without regard to where they may have lived for most of the year.<sup>20</sup> For example, while the Census Bureau counts children attending boarding schools below the college level as residents of the parental home, it counts juvenile offenders housed in juvenile detention centers on Census Day as residents of the facility.<sup>21</sup>

The Census Bureau defends its practices. In 2003, the Census Advisory Committee on the African American Population<sup>22</sup> recommended that the Bureau count prisoners as residents of the communities where they lived before their incarceration.<sup>23</sup> In 2005,

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17. *Residence Rule*, *supra* note 13. For example, the Census Bureau counts college students as residents of their on- or off-campus housing, and it counts people who own multiple homes where they live most of the year. *Id.*

18. For example, the Census Bureau counts students in boarding schools below the college level, for example, as residents of the parental home. *Residence Rule*, *supra* note 13.

19. In 2010, Census Day was April 1, 2010. 13 U.S.C. § 141(a) (2006) (requiring that the government conduct a census in 1980 and every 10 years thereafter "as of the first day of April of such year").

20. *Residence Rule*, *supra* note 13 (requiring that residents of federal detention centers, state and local jails, juvenile correctional facilities and other places of incarceration be counted as residents of the facilities in which they are incarcerated on Census Day). While the rules appear inflexible, the Bureau has directed that people incarcerated in short-term jails awaiting hearing should be counted at the residence that they usually occupied before being jailed. Robert M. Groves, *So, How do You Handle Prisons?*, DIRECTOR'S BLOG, U.S. CENSUS BUREAU (Mar. 1, 2010, 8:35 AM), <http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html>.

21. *Residence Rule*, *supra* note 13.

22. The committee is one of five race and ethnic advisory committees made up of academics, community leaders, and others who advise the Census Bureau director on increasing participation by racial and ethnic minorities in the census and who offer recommendations to ensure that the census count accurately reflects those groups. *Census Advisory Committees: African American Advisory Committee*, U.S. CENSUS BUREAU, [http://www.census.gov/cac/race\\_ethnic\\_advisory\\_committees/african\\_american\\_advisory\\_committee/](http://www.census.gov/cac/race_ethnic_advisory_committees/african_american_advisory_committee/) (last visited Sept. 23, 2011).

23. *Recommendations of the Census Advisory Committee on the African American Population Made as a Result of Meeting on October 1-3, 2003*, U.S. CENSUS BUREAU (Jan. 26, 2005), [http://web.archive.org/web/20050513183534/http://www.census.gov/cac/www/Recommendation\(AA\)Fall2003.html](http://web.archive.org/web/20050513183534/http://www.census.gov/cac/www/Recommendation(AA)Fall2003.html) [hereinafter *Recommendations of the Census Advisory Committee*].

Congress ordered the Census Bureau to look into the feasibility of counting prisoners at their “permanent homes of record” rather than at their place of incarceration.<sup>24</sup> The Census Bureau reported several impediments to counting prisoners as residents of any place other than their places of incarceration.<sup>25</sup> The Bureau’s arguments included concerns that such a count would be inaccurate because prison officials do not keep standardized addresses,<sup>26</sup> that it would be costly to send census counters into prisons to interview inmates and to verify any self-reported data,<sup>27</sup> that such a change would have policy implications for how other group quarters were counted,<sup>28</sup> and that it would violate the Census Bureau’s duties under the Constitution.<sup>29</sup>

### *B. One Person, One Vote*

While the federal government determines the apportionment of Congressional seats among states via the decennial census, it is up to

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The committee recommended counting prisoners at their preincarceration addresses “for purposes of Congressional apportionment, state redistricting, the distribution of financial aid to their home communities, and to permit those communities to have more resources to meet their needs upon their return.” *Id.*

24. H.R. REP. NO. 109-272, at 140 (2005) (Conf. Rep.). The directive came in the conference report on the appropriations bill covering the Census Bureau. *Id.*

25. U.S. CENSUS BUREAU, U.S. CENSUS BUREAU REPORT: TABULATING PRISONERS AT THEIR “PERMANENT HOME OF RECORD” ADDRESS (2006), available at [http://www.census.gov/newsroom/releases/pdf/2006-02-21\\_tabulating\\_prisoners.pdf](http://www.census.gov/newsroom/releases/pdf/2006-02-21_tabulating_prisoners.pdf) [hereinafter CENSUS BUREAU REPORT].

26. In considering the feasibility of using preincarceration addresses, the Census Bureau reported that state and local correctional facilities generally did not keep “detailed address information for all prisoners in correctional facilities” and that for federal facilities, 60 percent of the addresses in its prisoner database were not useable because they did not match an address in a master address file. *Id.* at 8–9.

27. The Census Bureau estimated that it would cost \$250 million to “interview all prisoners in all federal, state, and local correctional facilities and to process the address information reported by the prisoners,” which the Bureau indicated would constitute a “1,200 percent increase over the cost of enumerating prisoners in Census 2000.” CENSUS BUREAU REPORT, *supra* note 25, at 10.

28. The Census Bureau did not describe its concerns in this regard, other than to state that to count prisoners in a manner inconsistent with how other “group quarters” populations were counted would have “serious implications for the methods used to tabulate college students, nursing home residents, and other persons that reside in Group Quarters.” CENSUS BUREAU REPORT, *supra* note 25, at i.

29. “It is unclear how the Census Bureau can satisfy its legal obligation to report the whole number of persons in each State for apportionment purposes if it tabulates prisoners at an address other than where they are confined.” CENSUS BUREAU REPORT, *supra* note 25, at ii.

the states to draw the boundaries of legislative districts through redistricting at least every ten years.<sup>30</sup> In fact, the Constitution does not require states to use census data at all in redistricting.<sup>31</sup> Until its landmark decision in *Baker v. Carr*,<sup>32</sup> the Supreme Court stayed out of the “political thicket” of legislative redistricting.<sup>33</sup> With *Baker*, the Court affirmed the “one person, one vote” principle as a constitutionally guaranteed right that would form the basis of a series of challenges to state legislative redistricting schemes over the next decade.<sup>34</sup> The “one person, one vote” principle represents the proposition that each person’s vote is protected under the Constitution and that each citizen has a right to have his vote counted equally.<sup>35</sup> “The weight of a citizen’s vote,” the Court has said, “cannot be made to depend on where he lives.”<sup>36</sup> In the legislative apportionment context, the Court has held that the Constitution requires states to make a “good-faith effort” in order to ensure that legislative districts are “as nearly as is practicable” equal in size.<sup>37</sup>

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30. See 13 U.S.C. § 141(c) (2006) (requiring the Census Bureau to send to states within one year of Census Day population data for use in legislative redistricting); see also *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body . . .”).

31. See *Mahan v. Howell*, 410 U.S. 315, 330–32 (1973) (upholding District Court’s rejection of Virginia’s legislative redistricting plan that counted Navy personnel as residents of the senate district in which the ship was docked in reliance on census figures).

32. 369 U.S. 186 (1962).

33. *Colegrove v. Green*, 328 U.S. 549, 556 (1946). “The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.” *Id.*

34. In *Baker*, the Tennessee legislature failed to reapportion districts for some six decades despite substantial growth in urban communities. 369 U.S. at 192. This neglect led to the state having substantially more people in its urban districts than in its rural districts such that the vote of a rural voter was “worth more” than the vote of an urban voter. *Id.* at 254–55 (Clark, J., concurring) (noting the “wide disparity of voting strength between the large and small counties”).

35. *Baker* dealt primarily with disposing of the political-question barrier to justiciability of legislative apportionment challenges. 369 U.S. at 196–98. The Court, however, would later clearly state the principle that the “right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

36. *Reynolds*, 377 U.S. at 567. The Court went on to assert the fundamental character of the one-person, one vote principle, “[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution’s Equal Protection Clause.” *Id.* at 568.

37. *Karcher v. Daggett*, 462 U.S. 725, 730, 738 (1983).

The principle applies with varying force to apportionments for state legislative purposes and Congressional purposes.<sup>38</sup> The Court has allowed more deviation among state legislative districts than among Congressional districts.<sup>39</sup>

With the Supreme Court establishing a constitutional requirement of parity among legislative districts, Congress stepped in with the Voting Rights Act of 1965 to prohibit states from using redistricting schemes to dilute the voting power of racial minorities.<sup>40</sup> Pursuant to amendments to the Act in 1982, state legislatures must not apportion districts so as to dilute the strength of minority voters.<sup>41</sup>

The political nature of the redistricting process, the inherently high stakes, and the infrequency of the opportunity have led to efforts by state legislatures to gerrymander districts—carve out districts intended to give some group, either political or demographic, an advantage.<sup>42</sup> The Supreme Court has pointedly defined gerrymandering as the "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."<sup>43</sup> In spite of this pejorative characterization, the Court has generally upheld the use of political considerations in redistricting, viewing political gerrymandering as inherent in the allocation of the apportionment duty to elected officials.<sup>44</sup> Lawmakers are eager to use

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38. *Compare id.* (finding a deviation of 0.7% in the sizes of congressional districts to be unconstitutional), *with Mahan v. Howell*, 410 U.S. 315, 319, 329–30 (1973) (approving a deviation of 16.4% in the relative sizes of state House of Delegates districts in Virginia).

39. *Karcher*, 462 U.S. at 732–33. The Supreme Court explained that the Constitution required greater parity in congressional districts:

[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, § 2 as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures . . . .

*Id.*

40. 42 U.S.C. § 1973 (2006).

41. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

42. BLACK'S LAW DICTIONARY 756 (9th ed. 2009). The word, gerrymander, was coined in 1812 to describe a Massachusetts district designed to help the party of then Governor Elbridge Gerry. *Id.* Gerry's opponents said the district resembled a salamander. *Id.*

43. *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring)).

44. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."). In upholding an Indiana



advantages gained in election cycles in order to cement their hold on power.<sup>45</sup> While the Supreme Court has said political gerrymandering would be unconstitutional if the effect were “continued frustration of the will of a majority of voters or effective denial of a minority of voters of a fair chance to influence the political process,”<sup>46</sup> in practice, one scholar called the Court’s regulation of the practice “largely toothless.”<sup>47</sup>

In fact, racial gerrymandering is allowed, subject to exacting scrutiny by the courts, where necessary to comply with the federal Voting Rights Act or to otherwise ameliorate past dilution of minority voting rights.<sup>48</sup>

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redistricting plan drawn by Republican politicians against claims that it unfairly abridged the right of state Democrats to participate in the political process, the majority rejected the view of dissenting Justice Powell that “at least in some cases—the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself.” *Davis*, 478 U.S. at 138–39. The case involved a redistricting scheme in which the dominant party was upfront and candid about the political nature of its line-drawing as illustrated by the following excerpt from the deposition of the then Speaker of the Indiana House:

MR. SUSSMAN: What I would like you to do here again is to give me whatever reasons were operative to your mind in maintaining or creating multi-member districts with regard to (Districts) 48 through 52 [the Marion County districts].

“MR. DAILEY: Political.

“MR. SUSSMAN: What were the political factors?

“MR. DAILEY: We wanted to save as many incumbent Republicans as possible.

478 U.S. at 117 n.5.

45. After gaining control of the Texas Legislature for the first time in more than a century, Republican lawmakers famously set their sights on redrawing congressional districts so that their party would have a better chance at winning seats in Congress even though they came to power in a noncensus year. STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* 19 (2007) (“The battle cry of some House Republicans in 2003 was that the Democrats had controlled the House of Representatives ‘since God made dirt,’ or at least for the past ‘130 years,’ and now that Republicans at last controlled the House, it was payback time.”). The tactic worked. In 2002, Democrats had a 17–15 edge in Texas’s House delegation. *Id.* at 264. In 2004, after the redistricting, Republicans held a 21–11 advantage. *Id.*

46. *Davis*, 478 U.S. at 133.

47. THOMAS E. MANN & BRUCE E. CAIN, *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 78 (2005) (suggesting that the effect of the Court’s test in *Davis* was to “create a partisan gerrymandering cause of action in name only, because no one could find a plan that met [*Davis*’s] high threshold”).

48. See *Miller v. Johnson*, 515 U.S. 900 (1995) (striking down a Georgia redistricting plan on the basis that race was the predominant factor in creating districts).

### C. Unique Status of Imprisoned Citizens

Most states do not allow imprisoned felons to vote.<sup>49</sup> Only Maine and Vermont allow then-incarcerated felons to vote.<sup>50</sup> Others only allow felons to vote once they are released,<sup>51</sup> and other states disenfranchise felons for life.<sup>52</sup> The Supreme Court has held that felon disenfranchisement laws are constitutional.<sup>53</sup> In *Richardson v. Ramirez*, the Supreme Court stated that the Fourteenth Amendment explicitly contemplates felon disenfranchisement.<sup>54</sup> In light of the

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49. *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942 (2002) [hereinafter *One Person, No Vote*] (surveying state laws on felon disenfranchisement and concluding that “[t]he nation seems to be nearing a consensus that the presently incarcerated should not have the right to vote”).

50. *Id.* Vermont law requires prisoners to register to vote absentee in the town they lived in prior to incarceration. *Opinions of Opinions, OPINIONS* (Office of the Vermont Secretary of State, Montpelier, Vt.), May 2010, at 4, available at [http://www.sec.state.vt.us/secdesk/opinions/2010/May\\_2010\\_Opinions.pdf](http://www.sec.state.vt.us/secdesk/opinions/2010/May_2010_Opinions.pdf) (noting that state law also forbids a prisoner from registering to vote in the prison town). In Maine, prisoners may register to vote in “any municipality where that person has previously established a fixed and principal home to which the person intends to return.” ME. REV. STAT. tit. 21-A, § 112(14) (2008).

51. *One Person, No Vote*, *supra* note 49 (noting that as of 2002, fifteen states and the District of Columbia allowed felons to vote after their release from prison).

52. *Id.* at 1943.

53. *E.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the franchise has an affirmative sanction in section 2 of the Fourteenth Amendment.”).

54. *Id.* The Fourteenth Amendment’s often-overlooked section 2 reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added). The effect of this provision is to diminish a state’s representation in Congress when it disenfranchises any of its citizens, unless that disenfranchisement is based on criminal status. *Richardson*, 418 U.S. at 43. The Court’s reading of section 2 as an affirmative sanction of felon disenfranchisement was challenged by Justice Marshall, who, in a dissent joined by Justice Brennan, suggested that the provision merely acknowledged the existence of felon disenfranchisement laws in many states. *Id.* at 75 (Marshall, J., dissenting). Justice Marshall further noted that the Court previously ruled that, while section 2 also acknowledges a voting age restriction of twenty-one, Congress had the power under the Equal Protection Clause to lower the voting age to eighteen. *Id.* at 74–75. He urged scrutiny of felon disenfranchisement laws under section 1’s Equal Protection Clause,

presumptive validity of felon-disenfranchisement laws, courts have characterized these laws only during their periods of incarceration as constitutionally unassailable.<sup>55</sup>

This disenfranchised population has another notable characteristic—namely that it includes a disproportionate number of racial minorities.<sup>56</sup> The Justice Department reported that in the period from October 1, 2006, to September 30, 2007, the federal prison population nationwide was 38.7% black,<sup>57</sup> a figure that was more than three times the representation of blacks in the U.S. population at the time.<sup>58</sup> Also, the Justice Department reported that during the same

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which he said would lead to felon disenfranchisement laws being struck down. *Id.* at 77. Nevertheless, the right of states to disenfranchise felons appears to be settled law. See Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 (2006) (noting that courts have rejected claims that criminal disenfranchisement laws represent bills of attainder or ex post facto laws, and that the court have rejected challenges based on the First, Eighth, Nineteenth, Twenty-Fourth, Fourteenth, and Fifteenth amendments, absent an intent by the state to discriminate on the basis of race).

55. A law disenfranchising then-incarcerated felons was recently upheld in Massachusetts, which allowed prisoners to vote until voters approved a referendum in 2001 disenfranchising them. *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009), *cert. denied*, 131 S.Ct. 412 (2010). In *Simmons*, the First Circuit noted, in denying challenges under the Voting Rights Act and the Constitution's Ex Post Facto Clause, that "[b]ecause the disqualification is confined to currently imprisoned felons, the state interests it serves are clearly at their strongest." *Id.* at 33.

56. It is not the purpose of this Note to address the threshold question of whether racial characteristics should be considered when looking at the effects of gerrymandering. While the Voting Rights Act rests on the premise that diluting the voting power of racial minorities is morally repugnant, the argument that black voters share common interests is not without controversy. Compare *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting as "impermissible racial stereotypes" the "perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls"), with Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 516, 523–24 (1996) (commenting on the "unfortunate fact" that "interests in this society, where race still matters, will sometimes track racial lines" and arguing that, for example, "interests will track racial lines to the extent that racial minorities have a special interest in fighting racial discrimination—just as farmers will have a special interest in certain issues of agricultural policies, such as price subsidies for crops").

57. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF FEDERAL PRISON POPULATION, OCTOBER 1, 2006–SEPTEMBER 30, 2007 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2007/tables/fjs07st710.pdf> [hereinafter CHARACTERISTICS OF FEDERAL PRISON POPULATION].

58. In 2007, the Census Bureau estimated that blacks made up 12.7% of the U.S. population. *United States: ACS Demographic and Housing Estimates: 2007*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name)

2006–2007 period, the federal prison population was 31.4% Hispanic/Latino,<sup>59</sup> a figure that was about two times the representation of Hispanics in the U.S. population at the time.<sup>60</sup> A 2008 report of state prison populations showed a similar racial disparity, with black prisoners making up 38.2% of the population of state prisons at the end of 2006.<sup>61</sup>

Another dynamic of this disenfranchised population is that prisoners are disproportionately urban while the prisons that the Census Bureau call their “homes” are often in rural areas.<sup>62</sup> As one commentator noted, in Pennsylvania, the “state banishes many of its urban offenders to prisons in rural areas . . . .”<sup>63</sup> Texas also exemplifies this dynamic. Twenty-one percent of state prisoners in Texas come from Harris County (home to Houston), but only 2.1 percent of state prisoners are housed in Harris County jails.<sup>64</sup> Fifteen percent of state prisoners are from Dallas County, 7.7% from Tarrant County (Fort Worth), and 6.1% from Bexar County (San Antonio); however, no state prisoners are housed in any of those counties.<sup>65</sup> Five rural Texas counties combined—Walker, Anderson, Brazoria, Coryell, and Bee—play host to 36.6% of the state prison population

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=ACS\_2007\_1YR\_G00\_DP5&-ds\_name=&-\_lang=en&-redoLog=false&-format= (last visited Sept. 23, 2011) [hereinafter *ACS Demographic and Housing Estimates*].

59. CHARACTERISTICS OF FEDERAL PRISON POPULATION, *supra* note 57.

60. The Census Bureau reported that, in 2007, Hispanics made up 15.1% of the U.S. population. *ACS Demographic and Housing Estimates*, *supra* note 58.

61. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2008, 37 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (reporting that of the 1,331,100 sentenced prisoners estimated to be in state prisons at the end of 2006, 508,700 were black).

62. Anecdotal evidence about where prisoners who hail from urban areas are locked up tells the tale. In Illinois, for example, 60 percent of its prisoners are from Cook County, while 99 percent of its prisons are outside Cook County. Rose Heyer & Peter Wagner, *Too Big to Ignore: How Counting People in Prisons Distorted Census 2000*, PRISONERS OF THE CENSUS (Apr. 2004), <http://www.prisonersofthecensus.org/toobig/toobig.html#ftnref3>. Thirty-four percent of California’s prisoners are from Los Angeles County, but only 3 percent of the state’s prisoners are jailed there. *Id.* Philadelphia accounts for 40 percent of Pennsylvania’s prison population, but not one of the state’s prisons is located there. *Id.*

63. Marie Gottschalk, Op-Ed., *No Prison Like Home: For the U.S. Census, Convicts are Counted as “Residents” of Towns and Counties Outside the Walls*, PITT. POST-GAZETTE, Aug. 15, 2007, <http://www.post-gazette.com/pg/07227/809461-109.stm>.

64. 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, 593 (2004).

65. *Id.* at 592.

while less than 1.5% of the state prison population actually comes from those counties.<sup>66</sup>

In the 1980s and 1990s, states built hundreds of new prisons, mostly in rural areas of the country.<sup>67</sup> With these prisons came an influx of prisoners into rural areas, driving up populations in rural counties.<sup>68</sup> Concurrent with the construction of new prisons, the total prison population rose dramatically by more than 500 percent between 1970 and 2000 to the point that there are about 2.1 million people in U.S. jails and prisons today.<sup>69</sup>

The Census Bureau counts incarcerated people as residents of the districts in which they are incarcerated, but states often view them differently. The laws in many states require that officials count prisoners as residents of their preincarceration homes for state administrative purposes.<sup>70</sup> Texas law, for example, indicates that “a person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or eleemosynary [charitable] institution does not, while an inmate, acquire residence at the place where the institution is located.”<sup>71</sup> Kansas law has a similar provision indicating that “the residence of persons living in . . . correctional institutions shall be the place such persons resided before entering the

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66. *Id.*

67. Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197* (Marc Mauer & Meda Chesney-Lind eds., 2002). Economic development officials promised rural counties that new prisons would bring jobs and other economic incentives, benefits that Huling writes often fail to materialize. *Id.*

68. *E.g.*, Rolf Pendall, *Upstate New York's Population Plateau: The Third-Slowest Growing "State,"* BROOKINGS (Aug. 2003), [http://www.brookings.edu/reports/2003/08demographics\\_pendall.aspx?p=1](http://www.brookings.edu/reports/2003/08demographics_pendall.aspx?p=1). In upstate New York, for example, nearly 30 percent of new residents in a fifty-two county area during the 1990s were prisoners. *Id.*

69. RYAN S. KING ET AL., *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1* (2005), available at [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf). A concern that an increasing number of prisoners have been wrongfully or unjustly convicted and sentenced has accompanied this era of mass incarceration. *See, e.g.*, Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 339 (2006).

70. *See, e.g.*, *infra* notes 71–73 and accompanying text.

71. TEX. ELEC. CODE ANN. § 1.015(e) (West 2010); *see also* Julian Aguilar, *Lawmakers Urge a Change in How Inmates are Counted*, THE TEXAS TRIBUNE (Sept. 9, 2010), <http://www.texastribune.org/texas-counties-and-demographics/census/lawmakers-urge-a-change-in-how-inmates-are-counted/> (describing the tension between Texas state law and the practice of counting prisoners as residents of the prison).

. . . institution unless such residence has been abandoned and new legal residence established.”<sup>72</sup> Arizona includes such a provision in its constitution.<sup>73</sup>

Many opponents of counting prisoners as residents of their prison locations point out that, unlike college students and other groups covered by the usual-residence rule, prisoners have not chosen to live in their temporary location.<sup>74</sup> Prisoners typically maintain an intent to return to the communities from which they were removed.<sup>75</sup> Further, legislators often acknowledge that they do not treat the prisoners in their districts as constituents.<sup>76</sup> The amount of time prisoners spend locked up is relatively brief.<sup>77</sup>

#### *D. Effect of Census Count on Redistricting*

The policy of counting prisoners as residents of the communities in which they are imprisoned has profound consequences. It results in population data about communities—both the prison communities

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72. KAN. STAT. ANN. § 11-205 (2010).

73. ARIZ. CONST. art. VII, § 3 (“For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of being present or absent . . . while confined in any public jail or prison.”).

74. PETER WAGNER ET AL., PRISON POLICY INITIATIVE, WHY THE CENSUS CAN AND MUST START COLLECTING THE HOME ADDRESSES OF INCARCERATED PEOPLE 3 (2006), available at <http://www.prisonpolicy.org/homeaddresses/CollectingHomeAddresses.pdf>; see also PATRICIA ALLARD ET AL., BRENNAN CTR. FOR JUSTICE, ONE SIZE DOES NOT FIT ALL: WHY THE CENSUS BUREAU SHOULD CHANGE THE WAY IT COUNTS PRISONERS 3 (2004), available at [http://brennan.3cdn.net/c81dbb2c77b9439d8f\\_ylm6bxclw.pdf](http://brennan.3cdn.net/c81dbb2c77b9439d8f_ylm6bxclw.pdf) (“[C]orrections officials assign prisoners to . . . institutions . . . without regard for the individual’s interest or needs . . . Without any control over their location or their right to stay in a location, prisoners cannot be said to ‘reside’ in their place of incarceration.”).

75. See WAGNER ET AL., *supra* note 74, at 4 (“When a prisoner’s sentence is completed, he or she will not be permitted to stay in the facility and will most likely return to the community that he or she was removed from when the incarceration began”); see also ALLARD ET AL., *supra* note 74, at 4 (“Prisoners overwhelmingly return to where they lived prior to their incarceration.”).

76. See, e.g., Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, NEWHOUSE NEWS SERVICE (Mar. 12, 2002), <http://www.prisonpolicy.org/news/newhousenews031202.html> (quoting two state legislators of rural counties with large prison populations as stating that they “do get letters from inmates with a variety of complaints, but . . . their real attention is directed toward corrections workers, with whom both have forged strong relationships”).

77. See PANEL ON RESIDENCE RULES IN THE DECENNIAL CENSUS, *supra* note 14, at 93 (noting that the median time behind bars for prisoners released in 2002 was seventeen months).

and the communities of origin—that, while relied on by policy makers, does not accurately reflect the needs of those communities.<sup>78</sup> Depending on the specific state formula for distribution of tax revenue, counties with prisons can get bumps in education funding,<sup>79</sup> sales tax revenue,<sup>80</sup> and targeted funding for communities with sizable low-income populations.<sup>81</sup> “The imagination,” the Census Bureau itself has noted, “is the only limit upon the use of the statistics that come out of the census.”<sup>82</sup>

Most directly, release of the results of the decennial census triggers the legislative redistricting process in every state. At the Congressional level, shifts in population size lead to states gaining or losing seats in Congress every ten years.<sup>83</sup> Because of the sheer size of Congressional districts—about 647,000 people per district in 2000<sup>84</sup>—adding or subtracting a few thousand prisoners would be unlikely to affect Congressional lines.<sup>85</sup> But apportionment of state legislative districts and local political bodies is another story. States rely heavily on the results of the decennial census to apportion their state legislative seats.<sup>86</sup> The impact of prison populations on how

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78. See WAGNER ET AL., *supra* note 74, at 3 (“The result of counting large external populations of prisoners as local residents leads to misleading conclusions about the size and growth of communities . . . . Counties that see prisons close their doors report that their Census populations declined when in fact their actual population did not. Conversely, population growth reported by some counties is due to the importation of prisoners to a new correctional institution.”).

79. Lotke & Wagner, *supra* note 64, at 601.

80. WAGNER ET AL., *supra* note 74, at 8.

81. Lotke & Wagner, *supra* note 64, at 604–05.

82. U.S. CENSUS BUREAU, U.S. CENSUS BUREAU REPORT: STRENGTH IN NUMBERS: YOUR GUIDE TO CENSUS 2010 REDISTRICTING DATA FROM THE U.S. CENSUS BUREAU (2010), available at <http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf>.

83. See, e.g., Jay Root, *Texas Will See Dramatic Gains in US House Seats*, YAHOO! NEWS (Dec. 3, 2010), <http://news.yahoo.com/texas-see-dramatic-gain-us-house-seats.html> (noting that Texas was expected to gain an additional three or four seats in Congress when the 2010 Census figures were released).

84. *Congressional Apportionment*, NATIONALATLAS.GOV, [http://www.nationalatlas.gov/articles/boundaries/a\\_conApport.html](http://www.nationalatlas.gov/articles/boundaries/a_conApport.html) (last visited Sept. 23, 2011).

85. See Lotke & Wagner, *supra* note 64, at 594.

86. See S. REP. NO. 94-539, at 2 (1975), reprinted in 1975 U.S.C.C.A.N. 2100, 2101–02. Congress formalized the process by which states provided to the Census Bureau their needs for legislative districts so that the Census reports could be used by states for the purposes of redistricting and apportionment. *Id.* The U.S. Constitution does not require state legislatures to use the census for the purposes of apportionment or districting. See Groves, *supra* note 20 (describing the Census Bureau as “not involved” in redistricting). Instead, reliance on the

state legislative seats are divvied up can be stark.<sup>87</sup> One reporter called the inclusion of a prison in a state legislative district “a coveted prize.”<sup>88</sup> In upstate New York, for example, the Prison Policy Initiative identified seven rural state-senate districts that likely would not be large enough to qualify as individual districts without their prison populations.<sup>89</sup> More than 10 percent of the populations in two state legislative districts in Texas comprises prisoners.<sup>90</sup> At the local level, officials have instituted a patchwork of policies to address the question of whether to count prison populations for drawing district boundaries.<sup>91</sup> In Florida’s Calhoun County, there is a county commissioner who represents a district in which 48 percent of the residents are incarcerated.<sup>92</sup> Four other Florida counties have commission seats representing prison populations that account for more than 18 percent of the district.<sup>93</sup> But in at least five other counties in Florida, officials excluded prisoners from their population tallies for purposes of drawing district boundaries for county commission seats.<sup>94</sup> At least 100 counties across the country have made the independent decision to exclude prisoners from their populations for purposes of redistricting.<sup>95</sup> Critics such as the NAACP Legal Defense and Educational Fund have said that counting

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Census was spurred in part by *Baker v. Carr* and its progeny, in which the Supreme Court heightened the burden on state legislatures to ensure that there is roughly equal representation in state legislative districts. *Baker v. Carr*, 369 U.S. at 186, 186 (1962); see also *supra* notes 36–39 and accompanying text.

87. See Lotke & Wagner, *supra* note 64, at 594 (noting that because the median size of a state House district is under 40,000, the presence or absence of a few thousand prisoners could, and does, affect where district lines are drawn).

88. Tilove, *supra* note 76 (reporting on the effect of prison populations on the redistricting process that followed the 2000 census and commenting that “[p]risoners can be a coveted prize in this process, swelling a district’s population with constituents who cannot vote”).

89. Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POLICY INITIATIVE (Apr. 22, 2002), <http://www.prisonpolicy.org/importing/importing.shtml>.

90. *Fixing Prison-Based Gerrymandering after the 2010 Census: Texas*, PRISONERS OF THE CENSUS (March 2010), <http://www.prisonersofthecensus.org/50states/TX.html>.

91. See *Local Governments that Exclude Prison Populations*, PRISONERS OF THE CENSUS, <http://www.prisonersofthecensus.org/local/> (last updated Sept. 20, 2011).

92. *Fixing Prison-Based Gerrymandering after the 2010 Census: Florida*, PRISONERS OF THE CENSUS (Mar. 2010), <http://www.prisonersofthecensus.org/50states/FL.html>.

93. *Id.*

94. *Id.*

95. *Local Governments that Exclude Prison Populations*, *supra* note 91.



prisoners toward a community's population for redistricting purposes "artificially inflates the population count—and thus, the political influence—of the districts where prisons and jails are located."<sup>96</sup> The increase in population attributable to prisoners in rural prison towns comes at the expense of the urban communities from which prisoners typically hail, a dynamic that has led critics to call the effect prison-based gerrymandering.<sup>97</sup>

#### *E. Impact of Three-Fifths Compromise on Representation*

As a result of the three-fifths compromise brokered during the Constitutional Convention, slave states won the right to count three-fifths of their slave populations for purposes of legislative apportionment.<sup>98</sup> They reaped the benefits in political power. In 1793, Southern states had forty-seven seats in Congress compared to fifty-eight for the North.<sup>99</sup> Had the slaves not counted, then the allotment would have been thirty-three seats for the South compared to fifty-seven seats for the North.<sup>100</sup>

The opportunity to count slaves for legislative apportionment—even at three-fifths their total population—was, in the words of one scholar, "a political gift that kept giving."<sup>101</sup> Unburdened at the time by the "one-person, one-vote" principle, slave-holding states drew political-district maps that maximized the political potency of their slave-holding regions.<sup>102</sup> For example, in Virginia "fifteen Virginia districts with the highest percentage of slaves averaged only 25,000

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96. NAACP LEGAL DEF. AND EDUC. FUND, CAPTIVE CONSTITUENTS: PRISON-BASED GERRYMANDERING & THE DISTORTION OF OUR DEMOCRACY (2010), available at [http://naacpldf.org/files/publications/captive\\_constituents.pdf](http://naacpldf.org/files/publications/captive_constituents.pdf).

97. The moniker was assigned because of the increased political influence attained by communities with prison populations. NAACP LEGAL DEF. AND EDUC. FUND, *supra* note 96; see also PRISONERS OF THE CENSUS, <http://www.prisonersofthecensus.org> (last visited Sept. 23, 2010).

98. See *supra* notes 1–2 and accompanying text. Slave states, most adamantly South Carolina, advocated for an allowance of "equal representation" for slaves and free persons. ROBINSON, *supra* note 1, at 199.

99. AMAR, *supra* note 4, at 94.

100. *Id.*

101. *Id.* at 97.

102. *Id.*

free folk compared to an average 37,000 in the other districts, all in the west.”<sup>103</sup>

#### F. State Legislative Changes

Even though the Census Bureau declined entreaties to change its method of counting prisoners, it did, for the first time, give states specific population data necessary to do so on their own. The Census Bureau provided early counts of prison populations and other group quarters to states to use in crafting their redistricting plans.<sup>104</sup> Advocates for changing how prisoners are counted noted that the change gave states the tools, for the first time, to apply their own standards.<sup>105</sup> And for the redistricting process following the release of the 2010 Census, at least three states—Maryland, New York, and Delaware—are departing from the Census Bureau’s standard for counting prisoners.<sup>106</sup>

Maryland Governor Martin O’Malley signed into law the “No Representation Without Population Act” in April of 2010.<sup>107</sup> The law made Maryland the first state to count prisoners anywhere other than their incarceration address for redistricting.<sup>108</sup> The law requires that

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103. *Id.*

104. Groves, *supra* note 20 (explaining that the purpose of releasing the early data on group quarters was to give states the options to either “leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale”).

105. See Sam Roberts, *New Option for the States on Inmates in the Census*, N.Y. TIMES, Feb. 11, 2010, at A18. The paper quoted one advocate’s lukewarm praise of the move:

“This removes a technical problem,” said Peter Wagner, executive director of the Prison Policy Initiative, an advocacy group that favors alternatives to prison sentences and urges that inmates be counted in their hometowns. “The census is going to say where the prisons are and how many people are in them, which will enable states the practical choice of counting them in the wrong place or not counting them at all.”

*Id.* The change fell short of advocates’ request that the Census Bureau provide home address information for prisoners but did give states enough data to exclude prisoners for the counts of their prison communities and thus “avoid prison-based gerrymandering.” *Id.*

106. See *infra* notes 107, 117–19, 123.

107. Press Release, Office of Governor Martin O’Malley, Bills to be Signed by the Governor on April 13, 2010, at 20 (Apr. 13, 2010), available at <http://www.governor.maryland.gov/documents/100413billsigned.pdf>.

108. Carol Morello, *Maryland to Count Prisoners in Home Towns; Shift in Census Redistricting Baltimore Stands to Gain Amid Outcry*, WASH. POST, Apr. 15, 2010, at B5.

the population counts used for creating congressional districts,<sup>109</sup> state legislative districts,<sup>110</sup> and county and municipal legislative districts<sup>111</sup> count prisoners in state and federal correctional facilities “at their last known residence before incarceration if the individuals were residents of the State.”<sup>112</sup> Out-of-state prisoners are excluded from the count altogether.<sup>113</sup> Among critics of the change were rural lawmakers who called it a “power-grab” by urban lawmakers from places such as Baltimore.<sup>114</sup> But civil-rights leaders praised the change.<sup>115</sup>

New York Governor David Paterson signed a bill into law on August 11, 2010, that requires legislative line-drawers to count prisoners as residents of their preincarceration addresses.<sup>116</sup> The law, which is only effective as long as the Census Bureau continues to count prisoners as residents of their prisons, requires the Corrections Department to report to the legislature following each census the “residential address of [each prisoner] prior to incarceration (if any).”<sup>117</sup> The law further requires a “legislative taskforce” to assign each prisoner to a census block based on their preincarceration

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109. MD. CODE ANN., ELEC. LAW § 8-701 (LexisNexis 2003 & Supp. 2009).

110. MD. CODE ANN., STATE GOV'T § 2-2A-01 (LexisNexis 2009).

111. MD. CODE ANN., § 1-111 (LexisNexis 2005 & Supp. 2009).

112. ELEC. LAW § 8-701(a)(2).

113. *Id.* § 8-701(a)(1)(II).

114. Morello, *supra* note 108, at B5.

115. *See id.*

116. A.B. 9710, 233rd Leg., 2010 Reg. Sess. (N.Y. 2010); *see also* Editorial, *An End to Prison Gerrymandering*, N.Y. TIMES, Aug. 23, 2010, at A22.

117. N.Y. CORRECT. LAW § 71(8)(a) (McKinney 2010). The statute lays out specific requirements for the state corrections department to follow in order to provide usable address information:

In each year in which the federal decennial census is taken but in which the United States bureau of the census does not implement a policy of reporting incarcerated persons at each such person's residential address prior to incarceration, the department of correctional services shall by September first of that same year deliver to the legislative task force on demographic research and reapportionment the following information for each incarcerated person subject to the jurisdiction of the department and located in this state on the date for which the decennial census reports population:

- (i) A unique identifier, not including the name, for each such person;
- (ii) The street address of the correctional facility in which such person was incarcerated at the time of such report;
- (iii) The residential address of such person prior to incarceration (if any);
- and (iv) Any additional information as the task force may specify pursuant to law.

*Id.*

address, make the information available to municipalities for local redistricting purposes, and to use the data for redistricting of state legislative seats.<sup>118</sup> The sponsor of the bill cited his belief that relying on census data led to “dilution of minority voting strength in violation of Section 2 of the Voting Rights Act,” that it “violat[e] the ‘one person, one vote’ principle,” and that it violated the state constitutional provision asserting that a prisoner does not become a resident of his prison.<sup>119</sup> The *New York Times* editorial board heralded the end of “the cynical practice of counting prison inmates as ‘residents,’ to pad the size of legislative districts.”<sup>120</sup> The paper said that the law “deserves to be emulated all across the country.”<sup>121</sup> Rural lawmakers, who stood to see the size and influence of their districts diminished because of the new law, sued to block its enforcement.<sup>122</sup> Less than a month after Paterson signed New York’s law, Delaware Governor Jack Markell signed legislation that was substantially similar to Maryland’s.<sup>123</sup>

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118. N.Y. LEGIS. LAW § 83-m(13)(b) (McKinney 2010). The statute requires:

[T]he task force shall determine the census block corresponding to the street address of each such person’s residential address prior to incarceration (if any), and the census block corresponding to the street address of the correctional facility in which such person was held subject to the jurisdiction of such department . . . [T]he task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities. The task force shall develop and maintain such amended population data set and shall make such amended data set available to local governments, as defined in subdivision eight of section two of the municipal home rule law, and for the drawing of assembly and senate districts. The assembly and senate districts shall be drawn using such amended population data set. The assembly and senate districts shall be drawn using such amended population data set.

*Id.*

119. N.Y. Sponsors Memorandum, Assemb. 223-9380, 2010 Reg. Sess. (N.Y. 2010). The state constitutional provision states that “no person shall be deemed to have gained or lost a residence . . . while confined in any public prison.” N.Y. CONST. art. 2, § 4.

120. Editorial, *supra* note 116.

121. *Id.*

122. Complaint, *Little v. N.Y. Leg. Task Force*, No. 2310/2011 (N.Y. Sup. Ct. filed April 4, 2011), available at <http://www.prisonersofthecensus.org/little/complaint.pdf>.

123. DEL. CODE ANN. tit. 29, § 804A (2006 & Supp. 2010).

## II. ANALYSIS &amp; PROPOSAL

By maintaining an internally inconsistent set of practices for counting group quarters, the Census Bureau has ensured that prisoners remain isolated, not just physically, but statistically, from their home communities; and this has substantial implications for representative democracy. Despite calls from activists, academics, policy makers, and lawmakers to change the manner of counting prisoners, the Bureau continues to defend its policy. Among those calling for change are the NAACP Legal Defense Fund,<sup>124</sup> the American Civil Liberties Union,<sup>125</sup> Demos,<sup>126</sup> the National Black Caucus of State Legislators,<sup>127</sup> the Brennan Center for Justice,<sup>128</sup> the Census Bureau's African American Advisory Committee,<sup>129</sup> and the Prison Policy Initiative.<sup>130</sup>

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124. NAACP LEGAL DEF. AND EDUC. FUND, *supra* note 96. The organization has stated that a permanent solution to prison-based gerrymandering requires Census action:

Advocates are engaged in a long-term campaign to encourage the Census Bureau to implement a permanent solution, in which the decennial census would identify the home communities of incarcerated persons and count them appropriately. An accurate population count during the next Census can solve the problem of prison-based gerrymandering once and for all.

*Id.*

125. Michael Cummings, *Imprisoned by the Census*, BLOG OF RIGHTS, ACLU.ORG (Apr. 2, 2010, 4:45 PM), <http://www.aclu.org/blog/prisoners-rights-racial-justice/imprisoned-census>.

126. *A Dilution of Democracy: Prison-Based Gerrymandering*, DEMOS (2010), [http://www.demos.org/pubs/prison\\_gerrymand\\_factsheet.pdf](http://www.demos.org/pubs/prison_gerrymand_factsheet.pdf) (“The optimal solution is for the Census Bureau to change its outdated practice and begin counting incarcerated persons as residents of the community where they resided prior to incarceration, and to which they overwhelmingly return upon their release.”).

127. THE NAT'L BLACK CAUCUS OF STATE LEGISLATORS, *SEEING BEYOND—A NEW DECADE DEFINING OUR NEW LEGACY, 2011 RATIFIED POLICY RESOLUTIONS 41* (2010), available at [http://www.nbcsl.org/2011\\_Resolutions.pdf](http://www.nbcsl.org/2011_Resolutions.pdf) (calling on the Census Bureau to count prisoners at their preincarceration addresses in all future censuses).

128. ALLARD ET AL., *supra* note 74, at 1 (“Counting prisoners in their homes of record is the most fair and accurate procedure, and is the best vehicle to ensure the Bureau meets its strategic goals.”).

129. *Recommendations of the Census Advisory Committee*, *supra* note 23; see also *supra* text accompanying note 23.

130. See WAGNER ET AL., *supra* note 74.

*A. Usual-Residence Rule is Internally Inconsistent*

While the Census Bureau suggests that the usual-residence principle is a straightforward matter of counting people where they live and sleep most of the time,<sup>131</sup> the principle that makes this method logical for other group quarters and transient populations does not apply to prisoners. Even under the Census Bureau's residence rules, the agency realizes that where a person may have stronger ties to another place and the intent to return there, it makes logical sense to count the person as a resident of his or her permanent home.<sup>132</sup> It does so for people who are traveling on business or pleasure on Census Day, for boarders, for residents of mental health treatment facilities, and for people in workers' group living quarters.<sup>133</sup> In each case, the person filling out his census form weighs his personal situation and identifies the address at which he will be counted for the census.<sup>134</sup>

The starkest illustration of the Census Bureau making allowances for nonprison populations but not for prison populations is seen in its treatment of the way it treats juveniles. The Census Bureau counts juveniles away from home at boarding school as residents of the parental home but counts juveniles in juvenile detention centers as residents of the detention centers.<sup>135</sup> One may ask whether this distinction speaks to Census Bureau views about the level of involvement of parents in the lives of juveniles away at boarding school compared to the involvement of parents whose children are locked in juvenile detention centers. While both groups live and sleep outside the home for an extended period of time, the guidelines acknowledge the enduring ties to home for the boarding-school students but not for the incarcerated juveniles.<sup>136</sup> As it relates to where they should be counted, the primary difference is that the

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131. See *supra* note 13 and accompanying text.

132. See *supra* notes 8–13 and accompanying text.

133. *Residence Rule*, *supra* note 13.

134. *Id.*

135. *Id.*

136. See PANEL ON RESIDENCE RULES IN THE DECENNIAL CENSUS, *supra* note 14, at 93, for arguments that the “enduring ties” test should be applied to counting prisoners at their permanent homes.

boarding-school students are away from home voluntarily, whereas juveniles in juvenile detention centers are involuntarily confined.

The issue of voluntariness has frequently been cited in critiques of the Census Bureau's prisoner residence rules.<sup>137</sup> It is unclear why people who voluntarily leave home would nevertheless be counted as residents of the home while people who would remain home but for their incarceration are counted as residents of a place they have not chosen.<sup>138</sup>

### *B. Objections to Feasibility of Change are Addressable*

In the Census Bureau's 2006 response to Congress's admonition to consider the feasibility of counting prisoners at their "permanent home of record,"<sup>139</sup> the Bureau noted that there was no generally accepted definition of "permanent home of record," which was the term that Congress used in making its request.<sup>140</sup> The Census Bureau also pointed to the unreliability of prison address records and the high cost of personally interviewing every prisoner.<sup>141</sup> The Prison Policy Initiative rebutted those arguments.<sup>142</sup> As to the unreliability of prisoner address records, the Prison Policy Initiative noted that distributing census forms directly to prisoners would be safe and accurate and that most states' prison records include home addresses reflecting prisoners' homes at the time of incarceration.<sup>143</sup> For those states that do not have computerized records of prisoners' preincarceration addresses, some cost would be associated with

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137. *E.g.*, WAGNER ET AL., *supra* note 74, at 3. The Prison Policy Initiative noted that "unlike other 'group quarters' populations, prisoners do not choose to be at the facility and are not considered part of the surrounding community." *Id.*

138. *See* ALLARD ET AL., *supra* note 74, at 3 (noting that prison assignments are made "without regard for the individuals' interests or needs" and concluding that "without any control over their location or their right to stay in a location, prisoners cannot be said to 'reside' in their place of incarceration").

139. CENSUS BUREAU REPORT, *supra* note 25.

140. *Id.* at 10.

141. *Id.* The Census Bureau noted that, as of 1998, 25 percent of states either did not record information on the preincarceration addresses of prisoners or only had such information in paper form. CENSUS BUREAU REPORT, *supra* note 25, at 7; *see also supra* notes 26–29 and accompanying text.

142. WAGNER ET AL., *supra* note 74.

143. *Id.* at 15–25.

compiling the data, but one state that has analyzed the cost found that it would not be substantial.<sup>144</sup> It is true that some of these addresses may represent homes that have been sold or to which a prisoner is otherwise unlikely to return to upon completion of his sentence.<sup>145</sup> However, to the extent that this is the case, it would make the census a mildly lagging indicator of prisoners' addresses, but would still paint a more realistic picture than would counting prisoners as residents of the prisons.

### *C. Census Policy is Problematic for State Policy*

The Census Bureau's policy of counting prisoners as residents of their prisons forces many states to choose between following the Census Bureau or following their own laws.<sup>146</sup> Many states have constitutional and statutory provisions declaring that prisoners maintain their residency at their preincarceration addresses.<sup>147</sup> One sponsor of the legislation that changed New York's system for counting prisoners in redistricting identified this problem as the primary justification for change.<sup>148</sup> However, particularly in light of the Census Bureau providing early data to states on prison populations,<sup>149</sup> there is a third alternative.

### *D. "One Person, One Vote" Compels States to Change*

States can, and under the Constitution should, count prisoners as residents of their preincarceration addresses for redistricting purposes despite the Census Bureau's policy. In states that continue to count prisoners as residents of their prisons for legislative redistricting purposes, the weight of a citizen's vote in the state depends on where

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144. Maryland estimated the cost to develop a database including the name and last known address of prisoners in state prisons to be \$50,000. DEP'T OF LEG. SERV., MD. GEN. ASSEMB., FISCAL AND POLICY NOTE, HB 496, 2010 Sess. (2010).

145. See CENSUS BUREAU REPORT, *supra* note 25, at 11 ("[S]ome addresses could be outdated by several years.").

146. See *supra* notes 71–73 and accompanying text.

147. *Id.*

148. See *supra* note 119 ("This bill seeks to . . . bring current census practices in New York State back in line with the State Constitution.").

149. See *supra* note 104 and accompanying text.



he or she lives.<sup>150</sup> A citizen who has the good political fortune of living in the same legislative district as a prison has greater political representation than a citizen who lives in a community that is an exporter of prisoners.<sup>151</sup> To believe otherwise would require one to accept that a prisoner is a constituent of the politician who represents his prison community. Candidly, many politicians admit that they do not view the prisoners inside the walls of their districts' prisons as constituents.<sup>152</sup> Further, considering the political realities of the rural districts that tend to house large prisons, some see it as absurd to view prisoners as the rural politicians' constituents.<sup>153</sup> Further, the disenfranchisement of these prisoners in all but two states also counsels against viewing them as constituents of their prison districts.<sup>154</sup> And the fact that prisoners stay locked up for a relatively short period of time<sup>155</sup> also points to the inappropriateness of counting them as prison residents for a redistricting scheme that will last, in most cases, until the next census, ten years later.<sup>156</sup>

Since the only real constituents of these prison districts are the voting residents who live outside the prison walls, it is their political power that must be weighed against others in the state for the "one person, one vote" analysis. Prison-district legislators answer to fewer real constituents than legislators outside of prison districts and thus give their constituents relatively more say in state business.<sup>157</sup>

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150. See *supra* notes 83–95 and accompanying text (demonstrating areas where it takes fewer constituents to elect a representative in prison districts than in nonprison districts).

151. *Id.*

152. *E.g.*, Tilove, *supra* note 76.

153. See, *e.g.*, Drake Bennett, *Head Count: The Census Counts Prisoners as Residents of the Towns Where They're Incarcerated. One Crusading Lawyer from Northampton Thinks This Little Clerical Matter is a Big Problem for American Democracy*, BOSTON GLOBE, Sept. 26, 2004, at D1 ("[P]risoners' interests, [Peter Wagner] argues, tend to be especially divorced from those of their legislators. The weight of the prison population strengthens the very districts and legislators with the most stake in tough-on-crime policies that create and fill more prisons . . .").

154. See *supra* notes 49–55 and accompanying text. In the two states that allow prisoners to vote, they are required to vote absentee at their preincarceration addresses, making the suggestion that they would be constituents of their prison districts even more tenuous. See *supra* note 50.

155. See *supra* note 77 and accompanying text.

156. See *supra* note 83 and accompanying text.

157. See, *e.g.*, *supra* note 90 and accompanying text.

*E. The Voting Rights Act Compels Change*

The dilutive effect of prison-based gerrymandering on the political influence of the largely urban, majority-minority communities from which a disproportionate number of prisoners hail, invokes the protections of the Voting Rights Act.<sup>158</sup> Section 2 of the Voting Rights Act prohibits legislative apportionment schemes that dilute the voting power of minority communities.<sup>159</sup> Because prisons are disproportionately located in rural, mostly white communities,<sup>160</sup> and prisoners are disproportionately minority residents of urban areas,<sup>161</sup> counting prisoners as residents of their prison towns dilutes the voting strength of minority communities. Whether a court would find a particular state's redistricting scheme violative of the Voting Rights Act on this basis would be a highly fact-intensive determination subject to scrutiny of legislative intent, minority voting patterns, discriminatory effect, and other factors beyond the scope of this Note.<sup>162</sup> Nevertheless, the indisputable fact of minority vote dilution—a circumstance section 2 of the Voting Rights Act was created to prevent—should compel states to pause before perpetuating legislative redistricting schemes that inflate the populations of prison towns at the expense of urban areas.

A state's biggest obstacle to change may be the political self-interest of rural legislators. The areas likeliest to gain political advantage as a result of ending prison-based gerrymandering are urban communities—areas in which Democrats tend to have an advantage.<sup>163</sup> The areas with the most to lose are rural communities, which Republicans are more likely to represent.<sup>164</sup> With Republicans

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158. See Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PA. L. REV. 431, 434 (2004) (arguing that the application of the usual-residence rule to prisoners "effectively runs afoul of Section 2 of the Voting Rights Act of 1965").

159. See *supra* notes 40–41 and accompanying text.

160. See *supra* notes 68–71 and accompanying text.

161. See *supra* notes 57–62 and accompanying text.

162. See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986).

163. See, e.g., Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES, May 20, 2006, at A12 ("Prison-based gerrymandering has helped Republicans in the northern part of New York maintain a perennial majority in the State Senate and exercise an outsized influence in state affairs.").

164. *Id.*

controlling a majority of state legislatures and taking over from Democrats in one or both chambers in fifteen states in the 2010 elections,<sup>165</sup> political considerations could lead to resistance to changing the method of how prisoners are counted.<sup>166</sup> Thus, it will be important for legislators to set aside partisan considerations on the issue of prison-based gerrymandering. Advocates suggest that at least one of the states to have successfully tackled the issue did so.<sup>167</sup>

#### *F. Comparisons to Three-Fifths Clause are Inescapable*

Critics have frequently compared the practice of propping up the populations of rural districts with disenfranchised prisoners to the three-fifths clause of the Constitution,<sup>168</sup> through which slave states increased their political clout in Washington by counting three-fifths of their slaves as part of their populations.<sup>169</sup> When the debates that gave rise to the three-fifths clause, the characteristics of the slave population, and the effect of the compromise on legislative apportionment are considered, it becomes clear that the comparison is more than a rhetorical device. Historian Donald L. Robinson said one momentous element of the three-fifths clause was the notion that a person who lived among slaves had greater political representation

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165. *Map of Post 2010 Election Partisan Composition of State Legislatures*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/tabid/21253/default.aspx> (last visited Sept. 23, 2011).

166. See *supra* notes 42–47 and accompanying text for a discussion of influence of politics on redistricting.

167. See PRISON POLICY INITIATIVE, WHY OUR OPPONENTS SHOULD SUPPORT ENDING PRISON-BASED GERRYMANDERING IN NEW YORK STATE, <http://www.prisonersofthecensus.org/factsheets/ny/opponents.pdf> (last modified May 20, 2010) (noting Maryland's "No Representation Without Population Act" passed with bipartisan support, including the support of rural lawmakers with prisons in their districts). But see *supra* note 122 and accompanying text for an example of a state where apparent partisan considerations have led to legal challenge.

168. "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons . . . three fifths of all other persons." U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

169. See, e.g., NAACP LEGAL DEF. AND EDUC. FUND, *supra* note 96, at 2 (calling the use of the "captive" prison population for redistricting purposes "all too reminiscent" of the three-fifths compromise); Editorial, *Phantom Constituents in the Census*, N.Y. TIMES, Sept. 26, 2005, at A16 (saying use of "phantom constituents" by rural legislators bears an "unfortunate resemblance to early America under slavery").

than a person who did not.<sup>170</sup> Likewise, a citizen who has the political fortune to live near a prison has greater political representation than a person who does not. In fact, it is striking that the three-fifths clause has been characterized as “a political gift”<sup>171</sup> and the inclusion of prisons in a political district as “a coveted prize.”<sup>172</sup> Prisoners are counted for redistricting purposes despite the fact that they cannot vote on the politicians who represent their districts. Slaves were counted for redistricting purposes even though they, too, were denied the franchise. By definition, slaves remained in the custody of their owners involuntarily, just as prisoners are involuntarily incarcerated. Historically, under the three-fifths clause, and currently by way of prison-based gerrymandering, the effect on representation is mathematically verifiable.<sup>173</sup> The comparison is not perfect,<sup>174</sup> but the parallels are such that prison-based gerrymandering can plausibly be viewed as a descendant of the three-fifths compromise in America’s lineage of injustices.

### *G. Changing State Laws*

Faced with a census that counts prisoners at their places of incarceration, the options that state legislatures have considered can be broken into three categories. First, states may rely on the data as it is provided, continuing to count prisoners where they are incarcerated and leaving it to local counties to decide how to deal with those populations for redistricting purposes.<sup>175</sup> Second, states may simply exclude inmates from their tallies<sup>176</sup> as a number of counties have

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170. See ROBINSON, *supra* note 5, at 201.

171. AMAR, *supra* note 4, at 97.

172. Tilove, *supra* note 76.

173. See *supra* notes 86–94, 99–04 and accompanying text.

174. It must be noted that slaves, unlike prisoners, were wholly blameless in their captivity. However, when one considers the theories of wrongful convictions and mass incarceration proffered by commentators such as Bryan Stevenson, the force of this distinction loses its impact. See *supra* note 69 and accompanying text.

175. See Tom Howe, *Where Should Inmates be Counted for Redistricting?*, INTERIM NEWS, Aug. 12, 2010, at 1, available at <http://www.hro.house.state.tx.us/interim/int81-5.pdf>.

176. *Id.*

done.<sup>177</sup> Third, they may develop a process for counting prisoners as residents of their preincarceration and/or permanent homes.<sup>178</sup>

The first option, which represents the default option adopted by most states, is unjust for the constitutional and practical reasons that this Note describes. The second option, which has been adopted by a number of counties,<sup>179</sup> is preferable to the first, but addresses only half of the problem. It prevents the inflation of political power in rural districts directly attributable to counting their prison populations, but it does not correct the dilution of power in nonprison districts attributable to the exportation of their prisoners.<sup>180</sup>

The third option—the one adopted by the states of New York, Delaware, and Maryland—is, while not perfect, the one that is most fair and administratively feasible. It is not perfect because it will inevitably count as residents of their former communities some prisoners who will never return.<sup>181</sup> However, this concern presumes a level of perfection in the methods now relied upon—primarily dependence on Census Bureau figures—that does not square with reality. In fact, the Census Bureau director himself has acknowledged that because of the ever-changing nature of the U.S. population, “there is no single right answer of what the population on April 1, 2010 was.”<sup>182</sup> The lack of precision that may inhere in counting prisoners at their preincarceration addresses pales in comparison to the absence of justice in counting disenfranchised prisoners as residents of communities that they did not choose, where they do not intend to stay, and in which they cannot participate as citizens.

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177. See *supra* text accompanying note 95.

178. Howe, *supra* note 175.

179. See *supra* text accompanying notes 94–95.

180. See DEMOS, *supra* note 126 (“This does not put the prisoners back into their rightful residential communities, but it eliminates the large and unjustifiable vote enhancement created by crediting their numbers to prison districts.”). *But cf.* NAACP LEGAL DEF. AND EDUC. FUND, *supra* note 96, at 8 (rejecting exclusion of prisoner populations altogether on the basis that “[e]verybody counts, whether they can vote or not. The issue is not whether prisoners should be counted, but where”).

181. See *supra* note 145 and accompanying text.

182. Robert M. Groves, *Quality in a Census, Some Overview Thoughts*, DIRECTOR’S BLOG (Sept. 9, 2010, 8:16 AM), <http://blogs.census.gov/directorsblog/2010/09/quality-in-a-census-some-overview-thoughts.html> (“[T]he ideal of ‘count every resident once, and only once, and in the right place’ is the correct target. I also must admit that the US Census never has, and likely never will, achieve that goal.”).

## CONCLUSION

Mass incarceration has exacerbated an injustice in how the U.S. Census Bureau counts prisoners. It is an injustice that harkens to a time when slave-holding states deprived slaves of all civil and human rights but fought to have them counted to protect those same states' political clout in the new Republic.<sup>183</sup> But states have the tools at hand to ensure that America's commitment to "one person, one vote" is not thrown away with the key as its citizens are locked up. Even as the Census Bureau continues to resist calls to stop counting prisoners as residents of their prison communities, states can follow the lead of Maryland, New York, and Delaware and begin to count prisoners as residents of their preincarceration addresses.

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183. *See supra* notes 1–5, 84–87, 104–21 and accompanying text.