

THE NUMBERS MATTER: AN UPDATE TO THE IMPLEMENTATION OF NEW YORK’S PRISON GERRYMANDERING LAW

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To combat the rise of “Prison-Based Gerrymandering”, the New York State Assembly enacted a law requiring prisoners to be counted in their “home” districts. These laws changed the Census Bureau’s “usual residence rule”, which required the Bureau to count prisoners in their places of incarceration. While the law has been a firm step forward to combat prison gerrymandering, the law excludes from reapportionment prisoners who cannot provide a known address. This Note argues that New York has provided no legal justification for excluding prisoners from reapportionment, especially given the fact that there are many in similar situations who are counted. The Note also proposes some solutions to make sure that other states passing these reforms are not excluding prisoners from the census count for unwarranted reasons.

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I. INTRODUCTION

In 2011, New York and Maryland passed reapportionment laws requiring prisoners to be counted in their “home” districts rather than their place of incarceration.¹ Designed to end prison-based

¹ See Act of Aug. 11, 2010, Part XX, 2010 N.Y. Sess. Laws 57 (McKinney) (bill number S. 6610-C, 233d Legislative Session); No Representation Without Population Act. S.B. 400, 2010 Leg., 427th Sess. (Md. 2010).

gerrymandering,² the laws deviated from the Census Bureau's policy of the "usual residence rule," which dictated that the Bureau must count prisoners in the places where they are incarcerated. Maryland in particular received great praise for its new law, even after enduring legal challenges from the legislators who lost a large part of their constituency from the reform.³

Nonetheless, as with most laws, prison gerrymandering reforms have faced numerous implementation problems. News stories have highlighted the difficulty prison administrators have had with tracing the home addresses of some prisoners.⁴ Some prisoners in one state's prison system were residents of another state. Other prisoners provided addresses that, when checked, were found to be incomplete.⁵ Finally, hundreds of prisoners were homeless when they were arrested and thus had no addresses to provide.

New York and Maryland addressed this problem in different ways. For those prisoners who cannot provide a traceable address, Maryland's "No Representation Without Population" law counts those prisoners in the district in which they are incarcerated. On the other hand, New York's prison gerrymandering reform, Part XX, approaches this issue as follows:

For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph.⁶

Hence, prisoners without a traceable New York address are not counted for purposes of redistricting. While this may make sense in order to stop the issue of prison gerrymandering, New York has weak political justifications for excluding prisoners from the redistricting count given the fact that there are people who are similarly situated but are included in reapportionment.

Hence, this Note will address three questions. First, what was the problem Maryland and New York were trying to fix in the first place? Second, does New York have a valid reason for not counting these prisoners so that it can avoid an Equal Protection violation? Finally, if New York has not done enough, what else, if anything, can New York do in order to provide a model solution for other states?

² Gerrymandering is the manipulation of election districts in order to give political advantages to a particular group (including a political party, race, or other social class). Usually this involves two maneuvers. First, gerrymandering involves creating districts so that the favored group will have electoral majorities in as many districts as possible. Second, it may involve concentrating the opponent's voting strength to as few districts as possible. The article below will explain how gerrymandering applies in the prison context.

³ See, e.g., Peter Wagner, *Beginning of the End for "Prison-Based Gerrymandering,"* WASH. POST (July 13, 2011), http://www.washingtonpost.com/opinions/beginning-of-the-end-for-prison-based-gerrymandering/2012/07/13/gJQAJP7fiW_story.html; *Supreme Court Uphold Maryland Law Ending Prison-Based Gerrymandering; Huge Victory for Fair Representation,* DEMOS (June 25, 2012), <http://www.demos.org/press-release/supreme-court-upholds-maryland-law-ending-prison-based-gerrymandering-huge-victory-fai>; Tricia Bishop, *High Court Affirms Maryland's Redistricting Map,* THE BALTIMORE SUN (June 25, 2012), <http://www.baltimoresun.com/news/maryland/politics/bs-md-redistricting-plan-affirmed-20120625,0,5168003.story>.

⁴ Joseph Spector, *About 20,000 Prisoners May Go Uncounted in Redistricting,* POLITICS ON THE HUDSON, (Nov. 18, 2011, 4:20 PM), <http://polhudson.lohudblogs.com/2011/11/18/about-20000-prisoners-may-go-uncounted-in-redistricting/>.

⁵ "Incomplete" refers to an address that, when traced, leads to a resident being unrelated to the prisoner or to an abandoned or non-existent building.

⁶ N.Y. LEGIS. LAW § 83-m (McKinney 2011).

This Note will begin by assessing Equal Protection jurisprudence and the rise of the “one person, one vote” standard. This standard is not only crucial toward understanding why New York and Maryland passed prisoner gerrymandering reform in the first place, but also key to understanding the deficiencies in New York’s implementation of the law. Next, this Note explains how prison gerrymandering became such a problem. The Note then analyzes New York’s prison gerrymandering reform, and argues that there is an Equal Protection violation by not counting traceable prisoners. Finally, the Note concludes that New York should follow Maryland’s example and count those prisoners without a traceable New York address. In fact, this Note asserts that Maryland’s implementation of its prison gerrymandering reform can be a model other states can adopt to stop prison gerrymandering while at the same time fulfill the major purpose of “one person, one vote”: to make sure that every person that can be counted *is* counted.

II. BACKGROUND

A. Reapportionment and the Rise of “One Person, One Vote”

1. Districting Before *Baker v. Carr* & “One Person, One Vote”

Every year, Americans fill out their census forms, leading to many consequences not only for themselves, but also for those around them. For example, federal, state, and local governments use census data for a variety of reasons, including citywide planning,⁷ verification for government benefits, and the distribution of “over \$400 billion in federal funds to local, state, and tribal governments each year”.⁸ Most importantly, the Constitution requires a national census for the purposes of reapportionment.⁹ In this reapportionment process, many districts are created, erased, and combined to form new districts reflecting the changes in the state’s population.

However, until the 1960s, the districting system was wrought with many problems. First, there were large discrepancies between different districts. This was a problem not only for the districts drawn for the House of Representatives, but also for state and local legislatures.¹⁰ The first reason for this problem was the role of state power in redistricting, and the perverse incentives it created. Taking advantage of the Constitution’s few requirements for redistricting, many states, through their own constitutions, placed the power of redistricting to their legislatures, the same body that was benefitting from this severe malapportionment.¹¹ Before “one person, one vote,” hundreds of Congressmen and state legislators benefitted from gross malapportionment between districts.

Judicial deference was the second cause leading to gross malapportionment pre-*Baker*. The prime example of this was the Court’s decision in *Colegrove v. Green*.¹² In *Colegrove*, three Illinois voters challenged

⁷ *About Us*, U.S. CENSUS BUREAU (last updated Aug. 27, 2012), <http://www.census.gov/aboutus>.

⁸ *Id.*

⁹ *See* U.S. CONST. art. I, §2.

¹⁰ Article I, Section 2 of the Constitution requires that “[the] “representatives and direct Taxes shall be apportioned among the several States which may be included within this Union,” however, it does not specify how they should be apportioned. U.S. CONST. art. I, § 2. Moreover, it was unknown if Article I, Section 2 or the Fourteenth Amendment, (which basically repeats the language of Article I, Section 2), even applied to the states since the section only addresses redistricting for the House of Representatives. U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV.

¹¹ Recently states have started to grant full or partial authority in redistricting to non-partisan commissions. The power these commissions have vary from state to state. As of 2011, only Washington, New Jersey, Montana, Idaho, Hawaii, and Arizona use commissions to draw *both* congressional and state legislative districts. *See* NAT’L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 (2009), *available at* <http://www.comptroller.tn.gov/lg/PDF/NCSL%20Redistricting%202010.pdf>.

¹² *Colegrove v. Green*, 328 U.S. 549 (1946).

the state's redistricting plan arguing that the plan was suspect—it was based on a forty-six year old census. Thus, “the Federal Census of 1910, of 1920, of 1930, and of 1940, each showed...a substantial shift in the distribution of population among the districts established in 1901.”¹³ The Court even acknowledged the legislators' interest in the status quo by noting that, “the issues of state and Congressional apportionment are thus so interdependent that it is to the interest of the State Legislators to perpetuate the inequitable apportionment of both State and Congressional election districts.”¹⁴

Nonetheless, the Court upheld the lower court's dismissal. Noting famously that, “courts ought not to enter this political thicket,”¹⁵ the Court based its ruling on a lack of a judicial remedy. The opinion notes:

[a]t best, we could only declare that existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a statewide ticket. That last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than one hundred years ago, to require redistricting.¹⁶

Thus, the Court did see that malapportionment was a problem. However, the Court decided that issues in districting were not justiciable. Instead, the Court noted that Article I, Section 4 of the “Constitution has conferred upon Congress exclusive authority to secure fair representation by the State in the popular House...If Congress failed in exercising its powers...the remedy ultimately lies with the people.”¹⁷

2. *Baker v. Carr* and “One Person, One Vote”

Much would change in the fourteen years between *Colegrove* and the Court's holding in *Baker v. Carr*.¹⁸ The Warren Court was now in its eighth year and with a much different membership. In fact, only three justices remained from the *Colegrove* decision, and two of those three (Justices Black and Douglass) dissented in *Colegrove*.¹⁹ Hence, with the hundreds of legislators still benefitting from gross malapportionment in Congressional and state legislative districts, the Warren Court decided to reconsider the problem of population irregularities.

The facts in *Baker* are almost identical to *Colegrove*. *Baker* involved a challenge to Tennessee's redistricting scheme, which (due to the failure of the legislature in passing a new districting plan) used the 1901 census count for the apportionment of the state legislature in 1960.²⁰ Consequently,

Moore County ha[d] a total representation of two with a population (2,340) of only one-eleventh of Rutherford County (25, 316) with the same representation...likewise, Loudon County (13,264), Houston (3,084), and Anderson County (33,990) have the same representation, *i.e.* 1.25 each.²¹

¹³ *Id.* at 567 (Black, J., dissenting).

¹⁴ *Id.*

¹⁵ *Id.* at 556.

¹⁶ *Id.* at 553.

¹⁷ *Id.* at 554.

¹⁸ *Id.* at 549; *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁹ Justice Frankfurter (who would go on to write the dissent in *Baker*) was the only justice on the Warren Court in the *Colegrove* majority.

²⁰ *Baker*, 369 U.S. 186 (1962).

²¹ *Id.* at 255 (1962) (Clark, J., concurring).

But rather than adhering to *Colgrove*, the Court decided to go in a different direction, holding that redistricting problems could be solved through a judicial remedy. The Court noted that "judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine . . . that a discrimination reflects no policy, but simply arbitrary and capricious action."²²

However, while *Baker* was the beginning of the "one person, one vote" idea, it did not provide any standard for states to implement. The Court's progressive holding in *Baker* was clouded by its silence on how states could avoid equal protection violations during redistricting. Hence, two years later, the Court had to go back and establish a judicial standard for the malapportionment problem. For Congressional districting, the Court held in *Wesberry v. Sanders* that each Congressional district must have roughly equal populations.²³ Thus *Baker* and *Wesberry* drastically changed the way states implemented their Congressional redistricting plans. In fact, within nine months of *Baker*, litigation was underway in thirty-four states challenging the constitutionality of state redistricting schemes.²⁴ But the *Baker/Wesberry* holdings only provided a judicial remedy for *congressional* redistricting. The question was still open as to whether *Baker* applied to the drawing of state and local legislatures. Moreover, if *Baker* did apply to state legislative redistricting, could there be any deviations from the standard since redistricting for state legislatures involves more variables than congressional redistricting?²⁵

3. *Reynolds, Karcher, and Gaffney: "One Person, One Vote" to the States*

While *Baker* forever changed the way states drew their Congressional districts, districting for state and local legislatures was also rife with severe malapportionment. To take an example, the state of Tennessee failed to redraw its state legislative districts according to recent federal census data. This failure in redrawing led to some single urban districts having as many as ten times more residents than single rural districts.²⁶ In Georgia,

[o]ne unit vote in [the more rural] Echols County represented 938 residents, whereas one unit vote in Fulton County [in which Atlanta is located] represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County.²⁷

Around the same time, the Connecticut state legislature reported single districts ranging from 191 people to 81,000 people.²⁸ In California, Los Angeles (which at the time had six million people) had only one representative in the California State Senate. Meanwhile, the 14,000 people of a rural county also had one state senator.²⁹ Finally in Idaho, the smallest Senate district contained 951 people. The largest district contained 93,400 people, or ninety-eight times more than the smallest district.³⁰

²² *Id.* at 226.

²³ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁴ SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 146 (4th ed. 2007) (citing *Reynolds v. Sims*, 377 U.S. 553, 556 (1964)).

²⁵ These variables could include, for example, "political subdivision" requirements found in state constitutions, which require that county subdivisions remain intact during the redistricting process.

²⁶ *Gray v. Sanders*, 372 U.S. 368, 371 (1963).

²⁷ *Id.*

²⁸ Morris K. Udall, *Congressman's Report: "One Man, One Vote"...That's All She Wrote!*, <http://www.library.arizona.edu/exhibits/udall/congrept/88th/641014.html> (last visited Jan. 21, 2014).

²⁹ *Id.*

³⁰ *Id.*

Hence, in August 1964, voters of Jefferson County, Alabama challenged the apportionment of the Alabama State Legislature. As in many areas of the country, Alabama's legislature was greatly distorted. Though the Alabama Constitution required that the legislature be apportioned every ten years, the apportionment of the legislature was still based on the federal census of 1900.³¹ In the sixty years since, population changes in the state made it so that some districts had as many as fourteen times as many people as other districts.

Finding that the malapportionment undervalues individuals' voting power in certain districts, the Court applied *Baker* and held that "one person, one vote" does apply to redistricting in state legislatures. At the same time, the Court did acknowledge the difference between congressional redistricting and state redistricting. The Court held that "states can rationally consider factors other than population in apportioning legislative representation."³² Noting that state legislatures tend to have more seats to be distributed, the Court acknowledged the importance of certain state goals in the redistricting process. This leeway that the Court provided for state goals gives states the authority to consider the importance of things such as keeping political subdivision lines and maintaining the compactness and contiguity of certain districts when formulating the state-districting scheme.³³ Thus, "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."³⁴

The court would expand on these important state goals in *Gaffney v. Cummings*³⁵ and *Karcher v. Daggett*.³⁶ In *Gaffney*, the Court heard a challenge to a Connecticut redistricting plan. The issue with the plan was that it was the result of a bipartisan gerrymander that considered the geographic strengths and weaknesses of both parties.³⁷ Moreover, compared to the districts drawn for the House of Representatives, the state legislative districts had substantial deviations.³⁸ Nonetheless, the court approved the plan under the *Reynolds* rationale, noting, "that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and on the other, state legislative reapportionment governed by the Fourteenth Amendment and *Reynolds v. Sims* and its progeny."³⁹ Hence, *Gaffney* reaffirmed the *Reynolds* holding by providing states some flexibility in complying with the *Baker* standard.

In *Karcher*, the New Jersey Legislature adopted the "Feldman Plan," a redistricting plan that had only a *less than one percent* population difference between the largest and smallest districts. Defenders of the plan argued that it was a good faith effort to fulfill the "one person, one vote" standard since the population deviation between the largest and smallest districts was smaller than the available census data for the state. What made the Feldman Plan constitutionally suspect, however, was that the legislature considered other plans with much smaller population deviations between the largest and smallest districts.

³¹ *Reynolds v. Sims*, 377 U.S. 533, 540 (1964).

³² *Id.* at 566.

³³ *Id.*

³⁴ *Id.* at 577.

³⁵ *Gaffney v. Cummings*, 412 U.S. 735 (1973).

³⁶ *Karcher v. Daggett*, 462 U.S. 725 (1983).

³⁷ Bipartisan gerrymandering adds a different flavor to political gerrymandering. Rather than one party gerrymandering the other out of office, the main political parties strike a deal to keep each other's incumbents protected.

³⁸ *Gaffney*, 412 U.S. at 750. Compared to the districts drawn for the House complying under the *Wesberry* rule, the state senate deviation was 1.81%. For the state assembly (the lower house), it was 7.83 percent. *Id.*

³⁹ *Id.* at 742.

Unlike *Gaffney*, the Court struck down the plan. The holding noted that New Jersey could have achieved greater population equality “merely by shifting a handful of municipalities from one district to another.”⁴⁰ Moreover, the Court held that the state did not reach its burden of showing that the population variances were necessary. The Court did reiterate possible justifications for population variances such as keeping “districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives,”⁴¹ but it noted that “the State must . . . show with some specificity that a particular objective required the specific deviations in its place, rather than simply relying on general assertions.”⁴²

Thus, in summary, *Baker* and its progeny held that redistricting for congressional districts would be held to a higher level of scrutiny than the redistricting of the state legislatures.⁴³ Districts drawn for state legislatures can deviate from the “one person, one vote” standard if they achieve certain state interests such as keeping districts compact, respecting municipal boundaries, or avoiding contests between incumbent legislatures.⁴⁴ While the states have this greater leeway, they must prove that there was a particular objective that required a deviation from “one person, one vote” in the first place.⁴⁵

The “one person, one vote” cases drastically altered the redistricting process for Congress and state legislatures. Yet, while these holdings had many effects on the *process* of reapportionment, the *means* through which people are counted for redistricting have not really changed. To this day, the census counts most people in the district in which they reside, and in general this approach has been mostly effective in attaching everyday citizens to their districts.

For prisoners, however, the method through which they are counted has led to three questions. Primarily, where should prisoners be counted? Secondly, where does the method of counting prisoners intersect with the racial disparities in the criminal justice system? Finally, what are the effects of counting these prisoners in a certain place?

B. Issues with the Census Bureau's Counting of Prisoners

1. Counting Prisoners

As stated above, states rely on Census Bureau data when they go through the redistricting process. The Bureau counts most individuals based on the “residence rule,” which counts the person in, “the place where a person lives and sleeps most of the time.”⁴⁶ As applied to certain groups, the Bureau classifies certain living arrangements such as prisons, military barracks, and dormitories as “group quarters” for the usual residency requirement.⁴⁷

⁴⁰ *Karcher*, 462 U.S. at 739.

⁴¹ *Id.* at 740.

⁴² *Id.* at 741. The Court seemed to have provided much deference to what a “specific justification” is. The Court explains that “the showing required to justify population deviations is flexible, depending on the size of the deviation, the importance of the state’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.” *Id.*

⁴³ *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁴⁴ *Gaffney v. Cummings*, 412 U.S. 735 (1973).

⁴⁵ *Karcher v. Daggett*, 462 U.S. 725 (1983).

⁴⁶ *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. (last visited Apr 21, 2014).

⁴⁷ *2010 American Community Survey/Puerto Rico Community Survey Group Quarters Definitions*, U.S. CENSUS BUREAU, available at http://www.census.gov/acs/www/Downloads/data_documentation/GroupDefinitions/2010GQ_

To the states that are redistricting, this “group quarters” classification brings up many issues of representation. First, there are many prisoners who consider their place of residence as somewhere different from where they have been incarcerated. Second, the Census Bureau’s records do not distinguish who is a “group quarter” resident from who is not. Moreover, much of the group quarters data was not given to states until very recently.⁴⁸

2. Prisoner Counting and Racial Disparities in the Criminal Justice System

Though deciding how to count prisoners is already a difficult issue, it becomes an even more complex problem due to the racial disparities in the criminal justice system. Blacks make up 41.3% of the federal and state prison population.⁴⁹ In 2012 in the state of New York, the general population was 71.2% white, but approximately seventy-seven percent of its prison population was either Black or Latino.⁵⁰ In Georgia, Blacks make up about thirty percent of the general population but over sixty percent of the prison population.

While there are a number of causes for the racial disparity in the prison population, one of the main causes has been the implementation of the War on Drugs. In the United States, drug offenders comprise almost half of America’s federal prison capacity.⁵¹ However, the mass incarceration of drug offenders has a racial aspect. Though statistics show that drug usage is about the same across racial lines, Blacks make up a large proportion of those imprisoned for drug offenses.⁵² Moreover, due to overcrowded prisons, the rapid increase of drug offenders in prison has necessitated the release of more violent offenders, such as those convicted of murder.⁵³ As this Note explains further below, race disparities in the prison system are important in the prison-gerrymandering context since they produce a race-based voting disparity problem. Since most of the prisoners are Black and Latino, not counting these constituents in their home districts (or at all) could potentially take away a substantial amount of voting power from certain districts with large Black and Latino voting strength.

3. Prisoner Vote Dilution and Prison-Based Gerrymandering

As stated above, only New York, Maryland, and Delaware have passed laws to stop counting prisoners in the districts in which they are incarcerated. Thus, for states that still accept the usual residence rule, there remain even more issues. Most importantly, counting prisoners using the usual residence rule transfers political power from urban communities of color to rural white communities.⁵⁴ This problem exists because most prisons are located in rural areas. Rural communities make up 20% of the US population, but these communities are home to 60% of new prison construction.⁵⁵ To take a

Definitions.pdf.

⁴⁸ In this current redistricting cycle, the census bureau will release its “group quarter” data to the states. However, it is far too early to decide if this will ameliorate the problem.

⁴⁹ See *Prison Based Gerrymandering Legislative Reform*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/case/prison-based-gerrymandering>.

⁵⁰ *State and County Quick Facts for New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited April 20, 2014).

⁵¹ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, CAPTIVE CONSTITUENTS: PRISON-BASED GERRYMANDERING & THE DISTORTION OF OUR DEMOCRACY 4-5 (2010), available at <http://www.naacpldf.org/files/publications/Captive%20Constituents%20Report.pdf>.

⁵⁵ Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POLICY INITIATIVE (last visited Jan. 13, 2014), <http://www.prisonpolicy.org/importing/importing.html/>.

local example, only 24% of New York's prisoners are from upstate New York, yet about 91% of the state's prisoners are incarcerated there.⁵⁶ 66% of New York's prisoners are from New York City, meaning that numerous prisoners from the city are being sent to rural locations upstate.⁵⁷

Second, distortions arising from prison-based gerrymandering can lead to extreme disparities between the number of people counted and the number of people who can actually vote in the district. The most infamous example of this came in Anamosa, Iowa. There the town was divided into four wards for elections to its city council. However, while each ward contained approximately 1370 people (thus fulfilling the one person, one vote standard), Ward 3 contained a penitentiary that housed over 1320 prisoners. Thus if one removes the prison population from Ward 3, there were fewer than 50 people in the district.⁵⁸ This is especially problematic when state legislatures take race into account during redistricting. For example, District 1 in Somerset County, Maryland, was drawn as a majority-minority district in order to remedy a Voting Rights Act violation in the 1980's.^{59,60} However, since the prisoners of the Eastern Correctional Institute (who were overwhelmingly Black and Latino) were counted for redistricting, only a few blacks who lived in District 1 were actually eligible to vote. Thus, a district that may have been created to elect a minority candidate to the legislature ended up not electing a Black candidate until 2010.⁶¹

Finally, distortions based on using the usual residency rule also provide legislators a disincentive toward prison reform. Dale Ho notes that "because their political power depends in some measure on a continuing influx of prisoners, legislators from prison districts have a strong incentive to oppose criminal justice reforms that might decrease incarceration rates."⁶² Prison reformer, Peter Wagner, also noted this issue when talking about New York's districting system before its prison-based gerrymandering reforms.

Seven New York state senate districts drawn after the 2000 Census met minimum population requirements only because they use prison populations as padding.⁶³ Of the seven New York senate districts discussed above, four of the senators sat on the powerful Codes Committee where they opposed reforming the state's draconian Rockefeller drug law that boosted the state's prison population.⁶⁴ The inflated populations of these senators' districts gave them little incentive to consider or pursue policies that might reduce the numbers of people sent to prison or the length of time they spend there. One of them, Republican New York state Senator Dale Volker,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *Testimony of Dale Ho* (2011), available at http://www.naacpldf.org/files/case_issue/Dale%20Ho%20Testimony%20Kentucky.pdf. Furthermore, the number of voters in Ward 3 may have been even fewer, since the Census counts many people who are not voting age (such as children or prisoners).

⁵⁹ *Fletcher v. Lamone*, 831 F. Supp. 2d 887, (D. Md. 2011).

⁶⁰ The reasons legislatures draw majority-minority districts are manifold. Optimists say that these districts aid in the election of either a minority member to the legislature or a white candidate who is amenable to the views of the minorities. Pessimists would say that these districts are a way to dilute the voting power of minorities.

⁶¹ *Fletcher*, 831 F.Supp.2d at 887.

⁶² Dale Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 363-64 (2011).

⁶³ Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1243 (2012).

⁶⁴ *Id.* at 1244.

boasted that he was glad that the almost 9,000 people confined in his district cannot vote because “they would never vote for me.”⁶⁵

Hence, the rise of prison-based gerrymandering has undermined the purpose of “one person, one vote.” While these gerrymandered districts are numerically equivalent to the other districts in their state, many of these districts only exist due to their prison populations. Finally, prison-based gerrymandering leads to many issues that are extrinsic to voting power itself, since it may contribute towards sustaining mass incarceration.

III. ARGUMENT

This section argues that while these reforms have been a step forward toward ending the problems associated with prison-based gerrymandering, New York violated the Constitution’s Equal Protection Clause by refusing to count prisoners to whom the state could not attach an address. This section of the Note addresses what New York and Maryland have done to solve the problem. Second, this section analyzes potential justifications that New York may proffer in order to defeat an equal protection claim. Finally, this section explores ways toward perfecting New York’s system so that the purpose of “one person, one vote” can be fulfilled.

A. The Problems of the Census Process in Counting Prisoners

In 2011, New York and Maryland passed legislation changing where prisoners are counted for reapportionment.⁶⁶ As of November 2012, approximately twenty states have either introduced legislation abolishing prison-based gerrymandering or are considering resolutions that would ask the Census Bureau to change where incarcerated people are counted.⁶⁷ The solution to combat prison-based gerrymandering that New York and Maryland decided upon was to count prisoners in their home districts rather than the districts in which they have been incarcerated. These states still accept the data from the Census Bureau for counting most of the population. However, to achieve the objective of their prison-based gerrymandering reforms, the states obtain different sets of data for their prisoners. The states receive this data from their Departments of Corrections and create a database with the pre-incarceration addresses of every prisoner. While these changes were easy to implement for a majority of prisoners, the law has not been without problems.

1. Prisoners Without Addresses

The largest issue that arises from anti-prison gerrymandering laws is that there are many prisoners who could not be traced back to a home district. This is especially a problem for the hundreds of prisoners who are homeless. Homelessness is a leading catalyst for incarceration due to a number of local laws prohibiting sleeping, standing, and panhandling in public areas. Moreover, a homeless person being imprisoned leads to a vicious cycle. Past imprisonment tends to lead to more homelessness, since released prisoners usually do not have a home to return to. Moreover, released prisoners usually face many difficulties securing new housing. For example, many states either must or have the discretion to exclude former convicts from all public housing. This in turn leaves them homeless, and thus more likely to be arrested and imprisoned again under a variety of local laws. Are there citations these statements? If not it’s fine because it’s so late but it would be good to have citations for these statements.

⁶⁵ *Id.*

⁶⁶ Delaware also passed an anti-prison gerrymandering law in 2011. However, this Note will focus on the responses from New York and Maryland.

⁶⁷ Peter Wagner, *Momentum is Building to End Prison-Based Gerrymandering*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/atlas/momentum.html> (last visited Jan. 20, 2014).

Further, outside of the homeless, there are still many problems with addresses. Hundreds of prisoners are incarcerated in states in which they do not live. Moreover, if a prisoner does provide an address, there is a chance that someone else may be living at that address.

The data in Maryland underscore this point. In a court challenge against Maryland's "No Representation Without Population" Act, the director of Maryland's prisoner reallocation adjustment program noted that of the 22,064 prisoners under Maryland's Division of Corrections, 111 had incomplete addresses, 1,321 had addresses that were out of state, and 1,635 either had no addresses or were homeless when incarcerated.⁶⁸ These prisoners were eventually counted in the district in which they were incarcerated.

New York's prison-based gerrymandering reform, however, treats those prisoners without addresses differently. The New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) stipulates that "in the event the inmates' prior residential addresses are unknown...[or] were outside the state...LATFOR 'shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set' to be used to draw legislative districts."⁶⁹ As of the 2010 redistricting, 46,003 of the 58,237 state prisoners were successfully traced back to a home address. Thus, 12,234 prisoners (or just over 21% of the total number of state prisoners) had no traceable address. Unlike Maryland's procedure of just counting the prisoners in the places where they are incarcerated, New York's Part XX removes these prisoners from the counting process altogether.

2. Problems with Federal Prisoners

Another problem with implementing prison-based gerrymandering reform is that it requires cooperation between state and federal government. In Maryland, there has been minimal cooperation. The state filed a Freedom of Information Act request to the Federal Bureau of Prisons for information on the home addresses of federal prisoners. However, the Bureau rejected the request, forcing Maryland to exclude approximately 1,500 prisoners from its Division of Correction database.⁷⁰ Similarly, New York's Part XX also requires LATFOR to not count federal prisoners. In New York's redistricting plan, 2,471 federal prisoners were not counted.^{71,72} Hence, due to a failure in federal and state government cooperation, hundreds of prisoners, some of whom can most likely be traced to a home address, will be excluded from redistricting count.

B. *Little v. LATFOR*: The New York Courts Approve Part XX

In 2011, a group of state senators from New York challenged Part XX. However, rather than basing their argument on the Equal Protection Clause, the group of senators declared, "Part XX violates Article III, §4 of the state constitution because the method of counting inmates in their prior residences

⁶⁸ Fletcher v. Lamone. (Civil Action No: 8:11-cv-03220-RWT); *Declaration of James Cannistra, Head of Maryland's Redistricting Project*, available at http://www.prisonersofthecensus.org/fletcher/AG_exhibit_2.pdf (last visited: Jan 22, 2014).

⁶⁹ Little v. N. Y. State Legislative Task Force on Demographic Research and Reapportionment, available at http://www.prisonersofthecensus.org/little/Decision_and_Order.pdf

⁷⁰ *Fletcher*, 831 F. Supp. 2d at n.3.

⁷¹ The reasons behind this are not totally clear. It is possible, however, that the Federal Bureau of Prisons also refused New York's request for the addresses of the federal prisoners residing in its five facilities.

⁷² See *Read Me File for 2010 Redistricting Data*, available at <http://www.latfor.state.ny.us/data/?sec=2010amend> pop (last visited Feb. 1, 2013).

rather than their place of incarceration deviated from that recommended by the Census Bureau in 2006.”⁷³

New York’s Supreme Court upheld the law and refuted many of the senators’ arguments. First, the Court found that the senators did not demonstrate that Part XX made “the data provided by the Census Bureau to be anything less than “controlling” in the redistricting process.”⁷⁴ Second, the senators argued that “[excluding the] inmates whose addresses cannot be determined or are from outside the state contravene that part of Article III that require all “inhabitants” be counted for apportionment purposes.”⁷⁵ The Court found this unavailing. The Court argued that while “[the] inmates may be physically found in the locations of their respective facilities, . . . there is nothing in the record to indicate that such inmates have any actual permanency in the location or have an intent to remain.”⁷⁶ Moreover, “[the] plaintiffs have not proffered evidence that inmates have substantial ties to the communities in which they are involuntarily and temporarily located.”⁷⁷

These statements from the Court are not unwarranted. The state senators’ complaint offered no justifications as to why prisoners without a New York address should have been counted beyond a reading of the legal text, which said:

Part XX also bars enumeration of persons found in the state . . . whose prior addresses cannot be identified because of missing information. The Federal Census found them present in the state for the purpose of being enumerated, and thus they should be counted by the explicit terms of Article III §4, yet Part XX edits the census numbers to exclude them. The editing of the census to add or subtract inhabitants violates the explicit constitutional provision that the Federal Decennial Census “shall be controlling” and cannot be harmonized in the face of a direct constitutional command.⁷⁸

Hence, the plaintiffs failed to introduce any arguments for why those prisoners without a traceable New York address should be counted. This Note will present these potential arguments below.

C. Legal Issues With New York’s Gerrymandering Law

As stated above, equal protection jurisprudence gives states more flexibility to deviate from the “one person, one vote” standard when drawing state legislative districts, given that the state provides a valid political reason to deviate from population equality. This gives the state the ability to pay more respect to the compactness and contiguity of political subdivisions that have greater importance in local elections than congressional elections, among other considerations.⁷⁹ Thus, the key issue in a potential suit against LATFOR would be whether the state could provide a valid reason for not counting prisoners

⁷³ *Little, supra* note 69, at 5; Article 3, §4 of the New York Constitution says that the federal census “shall be controlling as to the numbers of inhabitants in the state or any part thereof for the purposes of the apportionment of members and assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.”

⁷⁴ *Little, supra* note 69, at 7.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Compl. Little v. LATFOR*, (Index No. 2310-2011) (2012), available at <http://www.prisonersofthecensus.org/little/complaint.pdf>.

⁷⁹ States may also have to respect issues such as political boundaries (e.g. city, state and county lines), social, racial, and ethnic communities and making sure party considerations do not dominate the districting plan. All of these other state guidelines are usually dictated by the state’s constitution.

without addresses. However, as New York's Supreme Court noted in *Little*, those challenging Part XX will have to provide "evidence that inmates have substantial ties to the communities in which they are involuntarily and temporarily located."⁸⁰ Without this evidence, it is likely that the Court would lean toward approving New York's plan. Thus the point of this section is to demonstrate that while these prisoners are not as integrated into the communities where their prisons are located, they are not so detached from the community that the state should refuse to count them at all.

1. **What Reasons Could New York Proffer for Not Counting Prisoners Who Are Homeless or Had Incomplete Addresses?**

Even though they are barred from voting, New York prisoners without home addresses are not counted for the purposes of redistricting. This seems like a peculiar step for the state for two reasons. First, many localities have decided to count the homeless and transient in their population censuses. This makes New York's decision not to count these prisoners questionable since prisoners who have no home address are not transient. They remain in the same known place for the duration of their sentence. Moreover, while these prisoners may not claim the prison as their domicile, the fact that these prisoners receive some benefit from the area in which they live suggests that the state should not exclude them from the districting process. Second, the other major state to pass an anti-prison gerrymandering law, Maryland, did decide to count those prisoners without addresses in the places where they are incarcerated. If Maryland counts these prisoners in their imprisoned districts, what political reasons does New York have to not count these prisoners at all?

a. **The Non-Voter Argument**

One political reason defenders of the law may bring up is that counting prisoners without addresses in their prison districts would ruin the purpose behind its prison gerrymandering reform. Thus, since prisoners cannot vote, the purpose of the anti-prison gerrymandering law outweighs the necessity of counting these prisoners in their first place.

While it is true that New York does not allow prisoners to vote, it is not a valid political reason to exclude them from the count completely. In fact, many groups who are not incarcerated, "such as minors, unregistered voters, or non-incarcerated felons (who are eligible to vote in some states, even after the completion of a sentence) ... are counted where they are physically located for redistricting purposes."⁸¹ Thus, the central question is whether a state could use "voting population" as the standard for redistricting if total population could lead to voting disparities. If the state can use voting populations as a means of redistricting, then New York has every right to not count those prisoners without addresses.

While the Supreme Court has not decided on this question, lower courts have denied numerous challenges to districting plans that counted non-voters. A prime example comes from a Washington D.C. district court in *Federation for American Immigration Reform v. Klutznick*. In that case, the organization challenged the Census Bureau's counting of undocumented immigrants who were later included in a data file that was used for a redistricting plan. Though the court dismissed the case for lack of standing, the court did note in dicta:

We also note that the phrase itself is inaccurate shorthand for the concept of equal representation for equal numbers of people, insofar as it is possible. State districts drawn

⁸⁰ *Little*, *supra* note 69, at 7.

⁸¹ *Ho*, *supra* note 62, at 364.

strictly on the basis of population would clearly be constitutional, . . . in spite of the fact that concentrations of non-voting residents in a few district's (such as where prisons or orphanages are located) would make the ballots of voters in a few districts more "valuable" than voters' ballots in other districts.⁸²

Hence, while the Supreme Court has remained silent on the issue, lower federal courts have protected the identity of undocumented immigrants with regard to being counted in the census. If New York assumes that it can exclude prisoners from being counted because they cannot vote, *Klutznick* strongly suggests that this argument would not be a valid political motivation.

b. The "Lack of Integration" Argument

A second argument LATFOR can aver (and the court supported in *Little*) is that the state does not want to undermine its prison gerrymandering reform in order to count prisoners who are not as integrated into the community as other non-voting groups, such as college students or even undocumented immigrants. LATFOR could argue that prisoners are "physically prohibited from integrating into their surrounding communities."⁸³ Moreover, unlike anyone else who is counted for reapportionment, "incarcerated persons have no choice in where they are located."⁸⁴ The prisoners tend to reside in their prison district temporarily,⁸⁵ and unlike many people who are counted for the purpose of redistricting, prisoners cannot enjoy many of the benefits the state and federal governments provide, such as parks, public schools, and highways.

However, while these arguments have some merit, it is a stretch to assume that community integration is the key factor to being counted. Small children are usually in the house most of the time, and yet the Census Bureau requires that parents report them for housing.⁸⁶ Moreover, thousands of people who are under hospice care are also counted for the U.S. Census, yet most of them are physically restrained from going out into their surrounding communities.⁸⁷ Finally thousands of men and women who serve in the military are assigned to bases in which they do not choose to go, however, the census counts them under the "group residence" rule.

Moreover, this argument ignores the vast amount of resources prisoners do use every day. In the 2010 fiscal year, New York spent a total of 3.6 billion dollars to incarcerate an average daily population of 59,327 prisoners. This comes to about 60,076 dollars per inmate.⁸⁸

Thus, while prisoners may not be able to enjoy the same parks, public schools, and roadways as the members of their community, they are economically integrated in the community because it is where

⁸² *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577 n.16.

⁸³ Ho, *supra* note 62, at 374.

⁸⁴ *Id.*

⁸⁵ *Little*, *supra* note 69, at 7.

⁸⁶ U.S. CENSUS BUREAU, *supra* note 47.

⁸⁷ In 2010, 292,759 people were counted under the Hospice Census. This census counts those who remained in hospice care at the end of that year. See NAT'L HOSPICE AND PALLIATIVE CARE ORG, NHPCO FACTS AND FIGURES: HOSPICE CARE IN AMERICA (2011), http://www.nhpc.org/sites/default/files/public/Statistics_Research/2011_Facts_Figures.pdf.

⁸⁸ This number takes into account the 2.7 billion dollars that is part of the New York Department of Correction's Budget plus the 812.5 million in prison-related costs that are outside the department's budget. These outside budget costs may include prison-related costs paid by state agencies outside of the Department of Corrections and costs related to the paying of benefits (such as health care and pensions) for prison employees. See VERA INSTITUTE FOR JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS (2012), *available at* <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

they consume most of their resources. Much of the \$60,076 that each inmate receives goes towards medical care, food, hygiene, living facilities, and recreation. Moreover, much like everyone else in the community, they use the same licensed medical staff for health services, the same utilities (such as water and electricity), and the same roads to get to and from places.⁸⁹ Thus, similar to everyone else in their communities, prisoners live their lives using resources and personal services. And while these services may not include access to a community college or a stadium, the community benefits prisoners receive are actually much more important than a stadium is to an unincarcerated person.

c. The Duration/Intent Argument

Finally, New York could advance Judge Devine's argument in the *Little* opinion that there was "nothing in the record to indicate that such inmates have any actual permanency in these locations or have intent to remain."⁹⁰ This argument makes sense if one looks at prisoners as a single group. However, the argument becomes tenuous when one looks at other groups that the Census Bureau counts in their districts that are unlikely to reside in those areas long-term. United States military personnel, individuals living in military barracks, and individuals incarcerated in disciplinary barracks and jails in the United States are counted at their respective facilities.⁹¹ College attendees who live away from their parents' homes are counted at their colleges.⁹² Likewise, foreign students, some of whom most likely have visas that expire after their course of study, are also counted on campus.⁹³

Hence, when looking at the people who are likely to be temporary residents but are nevertheless still counted where they presently reside, the "intent-to-stay" argument is inconsistent. Moreover, an argument that posits that these students or military men may end up staying long-term is flawed. First, the argument is simply speculative. Military men may be called overseas at any time, and students often obtain employment or attend graduate school elsewhere after graduation. The second problem with this argument is that, even assuming that some students or military members intend to stay in the areas in which they are counted, there are hundreds of prisoners who will have to stay in their areas for a long time. As of last year, 61.3% of New York state prisoners are serving *minimum* sentences beyond forty-eight months, the usual time it takes to get a bachelor's degree.⁹⁴ For all New York state prisoners, the average minimum sentence is close to ten years, and the median minimum sentence is approximately five years.⁹⁵ Thus, it would be inconsistent for the State to argue that it cannot count these prisoners because they do not intend to stay while simultaneously accepting Census data that counts other temporary residents who remain for a shorter period of time.

Finally, this argument is not novel. As Dale Ho notes, "the Third Circuit has held that, for the purposes of the Census count, there is a reasonable basis for treating [inmates] differently from, for instance, temporarily hospitalized individuals, who are allocated to their home addresses."⁹⁶ The Court held that incarcerated persons, "as distinguished from . . . those temporarily in a hospital for a short duration, often have no other fixed place of abode, and the length of their institutional stay is often

⁸⁹ Prisoners may have to be transported for multiple reasons such as appearing in court, laboring at a work farm, or being released.

⁹⁰ *Little*, *supra* note 69, at 7.

⁹¹ U.S. CENSUS BUREAU, *supra* note 47.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ STATE OF NEW YORK DEPT. OF CORRECTIONS, UNDER CUSTODY REPORT: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2011 10 (2011), *available at* http://www.doccs.ny.gov/Research/Reports/2011/UnderCustody_Report_2011.pdf.

⁹⁵ *Id.*

⁹⁶ Ho, *supra* note 62, at 372.

indefinite.”⁹⁷ Moreover, while the Supreme Court has not provided a definite holding on the duration issue, the Court has noted in dicta there may be a difference between long and short-term displacement.

The Court in *Franklin v. Massachusetts* held that physical presence should not be a determining factor in identifying a person’s residence.⁹⁸ However, the Court in *Franklin* did note that “those persons who are institutionalized in out of state hospitals or jails for short terms are also counted in their home states.”⁹⁹ From this dictum, Ho concludes, “the implication could be that persons incarcerated for lengthier sentences are in fact properly enumerated where they are incarcerated.”¹⁰⁰

Thus, upon looking at the three potential “political reasons” for not counting prisoners for the purposes of redistricting, it is clear there is some inconsistency. New York counts numerous people who are in living situations that are similar to prisoners. And while it is true that students or military members are not behind bars, many of these people either tend to stay where they are counted temporarily or were placed there by some authority. If New York really wants to look at issues of duration, disenfranchisement, and lack of integration with regard to prisoners, the state must also consider the fact that it counts a large number of people who have similar issues.

D. What Should Be Done?

This next section details not only what New York can do to make its prisoner gerrymandering reform better, but also what the Census Bureau can do to facilitate the prison gerrymandering reforms that are gradually permeating throughout the country. Thus, the following section will posit federal and state solutions that can create a better model for prisoner gerrymandering reform for other states to adopt.

1. States Should Count Prisoners Who Have No Attributable Home Address in the Districts Where They are Incarcerated Unless They Provide Evidence Substantiating a Proffered Interest

As explained above, states should count any untraceable prisoners in the districts where they are incarcerated. While New York’s experience with Part XX envisions prison gerrymandering reform as a binary decision (either count them in the districts or not), prison gerrymandering reform comes through a variety of plans. In fact, some states have proposed prison gerrymandering reforms that would remove *all* prisoners from the redistricting plan.¹⁰¹

Nonetheless, as explained above, these prisoners should be counted for the purposes of redistricting mostly on the principle of consistent treatment for those who are similarly situated. As a resident from Michigan City noted in response to a proposal excluding prisoners from redistricting,

. . . if we were to exclude prisoners from a redistricting count on the grounds that they cannot vote, we should also exclude people under the age of 18, who also cannot vote. The

⁹⁷ *Borough of Bethel Park v. Stans*, 449 F.2d 575, 582 (1971).

⁹⁸ *Franklin v. Massachusetts*, 505 U.S. 788, 789 (1992).

⁹⁹ *Id.*

¹⁰⁰ Ho, *supra* note 62, at n. 96.

¹⁰¹ The author believes that these reforms are a worse violation of equal protection assuming that the states are able to attribute those prisoners to a traceable address. In fact, these reforms are susceptible to a Section 2 claim under the Voting Rights Act (which covers voting dilution). Moreover, if this change involves a covered jurisdiction then these reforms could also be open to a Section 5 Voting Rights Act claim, which provides remedies for any changes in a covered jurisdiction specified in the Act.

Census gives us a block-by-block breakdown of the population under 18 just as it provides data on so-called “Advanced Group Quarters” for prisoners.

And what about members of Jehovah’s Witness, whose faith does not permit them to vote? Their numbers may be harder to exclude since we’ve not had a religious census since 1970. Still, you’d have to be consistent.¹⁰²

This lack of consistency with regard to counting prisoners is even more problematic when one takes into account the racial disparities of the criminal justice system. Many advocates of prison gerrymandering reform have argued that prison gerrymandering “weakens minority voting strength and transfers political power from urban communities of color to predominantly white areas.”¹⁰³ However, this argument also cuts the other way: if counting minority prisoners in predominantly white areas is a dilution of voting power, then *excluding* minority prisoners from the process altogether seems to be a more egregious dilution. Hence, regarding untraceable prisoners, the issue is not whether the reform could halt the dilution itself. Instead, it is a matter of *how best to reduce* dilution of the voting strength of these prisoners.

When it comes to redistricting, prisoners without a traceable address have no home. It would be infeasible to count them where they have committed their crimes, where they have been sheltered, or where the police find them. The only traceable place to which the state can trace these homeless prisoners is their place of incarceration. However, while these prisoners are not as integrated into the community as those who are not imprisoned, one should not ignore the variety of resources that prisoners use within the community. If physical restraint and lack of integration are the standards that decide whether one is counted for redistricting, then states must reexamine those who are similarly situated but are counted anyways.

2. The Census Bureau Should Coordinate with the States on a Proper Method for Collecting Addresses

As of this writing, the Census Bureau still adheres to the usual residency rule when it counts prisoners. Proponents of prison gerrymandering reform argue that the Bureau should try to collect the pre-incarceration addresses of prisoners and integrate those addresses in the data files that the Bureau gives to the states. However, as the trend of prison gerrymandering reform permeates through the country, it runs into a potential problem. Prison gerrymandering reforms assume that the states have adequate information about prisoners before incarceration. The Census Bureau believes that some states may not have this information. According to a Census Bureau’s report in 2006, twenty percent of the states either do not keep the pre-incarceration addresses of prisoners or only keep this information in paper form.¹⁰⁴

On the other hand, some contend that the Bureau’s qualms about the states’ lack of information may be overstated. The New York City Bar Association analyzed New York’s available prisoner addresses. According to the New York City Bar, “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

¹⁰² Beryle Burgwald, *Some Thoughts on Who to Exclude in Redistricting*, THE NEWS DISPATCH (Jan. 8, 2013, 5:06 PM), http://thenewsdspatch.com/articles/2013/01/08/news/opinion/local_guest_editorials/doc50eb83ee855a0537877070.txt.

¹⁰³ See NAACP LEGAL DEFENSE FUND, *supra* note 49.

¹⁰⁴ See U.S. CENSUS BUREAU, 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.

would be a simple matter—a few hours’ work with readily available software—to determine . . . the number of prisoners to be attributed to each census block.”¹⁰⁵

Regardless of who is right in this debate, the Census Bureau can still ameliorate many issues that could arise as more states decide to engage in prison gerrymandering reform. First, it can encourage states to submit the pre-incarceration addresses that could later be integrated into the same file that the Bureau produces to the states. For those states that say that they do not have this information, there is nothing preventing them from obtaining it. It is not beyond reason for these states to start a plan in obtaining these addresses. In fact, these correction departments could possibly coordinate with other state agencies to find traceable addresses for a large segment of their prison populations.

A second issue that arises pertains to who should have control of the data once the correction departments collect them. One possibility is that the Census Bureau should keep the data and integrate them into its numeration files that it gives to the states. Another option is that if the states adopt prison gerrymandering reform then they should also have the choice to decide what to do with their data. Many issues regarding this question are still unresolved. However, going forward there will likely be much litigation over what states can and cannot do with data they collect for redistricting. Many courts have held that states do not have to follow the Census Bureau’s data files for their redistricting plans. What the state can use, however, remains unknown.

IV. CONCLUSION

The purpose of this Note was not only to critique New York’s prison gerrymandering reform, but also to provide a model that other states can use for their own reforms to stop prison-based distortions. This Note acknowledges that Part XX has been a firm step forward toward fulfilling the “one person, one vote” standard set out in *Baker*. However, not counting prisoners who have no traceable addresses is an unjustified treatment to the over 12,000 prisoners removed from New York’s redistricting plan. The state can argue that its purpose lies in implementing its prison gerrymandering reform, but this argument is tenuous in the face of how it counts others. LATFOR counts others who are similarly situated such as undocumented immigrants, students, and military members. Like prisoners, many of these people stay in their areas for a short period of time, have no intent on staying where they reside, and use the same resources (such as utilities, roads, and government funded facilities) as prisoners. Moreover, the common argument about prisoners not being able to vote is inapplicable here, since there are numerous groups of people who cannot vote yet are still counted.

In sum, it will come down to whether a court believes that New York’s interest in implementing Part XX outweighs the counting of over 12,000 prisoners. *Baker* and its progeny held that population equality is a central idea to the Constitution. Yet, at the same time, these cases have given states much more leeway to deviate from the standard. The bounds of how much freedom the states have are fairly unknown. What we do know is that states cannot deviate from population equality for arbitrary or discriminatory reasons, such as a racial group’s voting strength.¹⁰⁶ What we also know is that courts have accepted certain state interests (such as keeping districts compact, maintaining political subdivisions, and avoiding contests between incumbent legislators) as valid reasons to deviate from the *Reynolds* rule. What

¹⁰⁵ See NEW YORK CITY BAR, A PROPOSED NEW YORK STATE CONSTITUTIONAL AMENDMENT TO EMANCIPATE REDISTRICTING FROM PARTISAN GERRYMANDERS: PARTISAN CHANNLED FOR FAIR LINE-DRAWING C-5 (2007), available at http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

¹⁰⁶ While powerful voting blocs cannot be excluded from the districting process itself, it can be “packed”, “cracked”, or “gerrymandered out” in the districting process. However, the drawing of districts itself is subject to other Supreme Court precedent and is not within the scope of this Note.

makes this case so novel is that “preventing prison-based distortions” has not been a recognized state interest by the Supreme Court. Moreover, even if the Court recognizes this interest, how small does the exclusion have to be before the significant interest becomes an insignificant one?

Regardless, the meaning behind the “one person, one vote” standard should not be a rubber stamp to a stated governmental interest. The standard should require more than that. Instead, “one person, one vote” should require close judicial scrutiny not only to a state’s proffered interest, but also to how the facts presented support that interest.

In this case, New York has provided no evidence supporting the fact that excluding over 12,000 prisoners from redistricting furthers their interest in implementing Part XX. Some may note that 12,000 prisoners are a large number, but it is unknown how this number may affect the redistricting process. Are these 12,000 prisoners so spread out amongst the prison districts that their effect is negligible? Or are enough prisoners concentrated in a certain area that a district may not exist without counting them? Only New York knows. Thus, unless there is evidence proving otherwise, New York should follow Maryland’s lead and not exclude unassigned prisoners from the vote count. Doing so underscores the constitutional guarantee that states will make that “honest and good faith effort” to ensure that every person is counted, regardless of where they reside.