NOTES

Where Does a Prisoner Live?: Furthering the Goals of Representational and Voter Equality Through Counting Prisoners

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INTRODUCTION

Until the past few decades, the question of where to count prisoners[1] for purposes of districting was a relatively benign inquiry, if it came up at all. However, an explosion of mass incarceration beginning in the 1980s has resulted in the imprisonment of a huge percentage of the United States population: in 1978, approximately 307,000 people were incarcerated; in 2016, over 1.5 million

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1. For the purposes of this Note, the term "prisoners" is used to denote those who are incarcerated at a prison or penitentiary, as opposed to a jail. Because jails tend to hold members of the local population and are used to house people for short periods of time, or prior to trial, they do not present the same issues that prisons do for the following analysis.

people were incarcerated.[2] With incarceration having thus become a pervasive issue, the question of where and how to count this ever-increasing number of people has become political and thorny.[3] Due to the reliance on the decennial Census for districting, much of the discussion has centered around the proper application of the "usual residence" rule, which counts a person at the place where he or she "lives and sleeps most of the time."[4] Although such a standard may produce a clear location for the majority of the population, the "usual residence" Census standard presents real issues when considering prisoners, who usually reside in a specific location, for a relatively short period of time, against their will.[5]

Multiple issues are raised by the application of the usual residence rule. Do we count prisoners at the prison on Census Day? If not at the prison, then where? Is it lawful to alter the data from the Census? Is it lawful to *not* alter the data from the Census? Which option most comports with our ideas of what it means to be a citizen in a democracy? What are the consequences for districts and citizens if we count prisoners in either the location of the prison, or their home prior to incarceration?

The goal of this Note is not to state what we *must* do in regard to these questions, but only what we *should* do if we are attempting to adhere to either of the two democratic theories of representation suggested by the one-person, one-vote principle from *Reynolds v. Sims*.[6] This Note addresses the current state of the law and the Census, and analyzes the two democratic theories of representation: Voter Equality and Representational Equality. This Note argues that the current regime of counting prisoners does not successfully adhere to either of the two theories, and that counting prisoners in their pre-incarceration address, although imperfect, adheres more closely to both theories.

Part I will discuss the current state of the law of counting incarcerated persons, and will show that case law, coupled with the Census Bureau's assistance in identifying prison populations, makes counting prisoners—in either the location of the prison facility or at their pre-incarceration address—both feasible and legal. Part II will outline the two theories of representation, Voter Equality and Representational Equality. Since *Evenwel v. Abbott*, it is permissible to equalize total population under the Representational Equality theory, and the Supreme

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2. *See* BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICAL ANALYSIS TOOL (CSAT) – PRISONERS: YEAREND JURISDICTION POPULATION: PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, DECEMBER 31, 1978–2016 (2018), https://www.bjs.gov/index.cfm?ty=nps [https://perma.cc/7XJY-9HQZ]; *see also* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 358 (2011).

3. *See* Complaint at 27, Little v. N.Y. State Legislative Task Force on Demographic Research & Reapportionment, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).

4. *2020 Census Residence Criteria and Residence Situations*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html [https://perma.cc/VZV5-QWCW] (last updated February 9, 2018).

5. *Cf.* Jonathan Tilove, *Minority Prison Inmates Skew Populations as States Redistrict*, PRISON POL'Y INITIATIVE (Mar. 12, 2002), http://www.prisonpolicy.org/news/newhousenews031202.html [https://perma.cc/F5B9-A2EX].

6. 377 U.S. 533, 560–61, 579 (1964).

Court has left open the question of the permissibility of equalizing voter-eligible population.[7]

Part III will apply both theories to each locational option for counting prisoners: the location of the prison and the location of the prisoner prior to incarceration. Under the theory of Voter Equality, prisoners should be excluded from the count regardless of location because they cannot vote while imprisoned (with the exception of Maine and Vermont, as discussed below). Conversely, although it may be counterintuitive, counting prisoners at their pre-incarceration address better adheres to and most furthers the principles of the Representational Equality theory. Based on this analysis, this Note will argue that neither theory is furthered by the current method of counting prisoners for the purposes of districting, and that counting them at their pre-incarceration address more successfully furthers both theories.

I. THE CURRENT STATE OF COUNTING INCARCERATED PERSONS

Every ten years, the United States Census Bureau conducts the Census, which is the most comprehensive count of the U.S. population and is mandated by the Constitution.[8] The Census count determines the apportionment of seats to the House of Representatives,[9] as well as the allocation of more than $675 billion of federal funds to state and local governments.[10] It is also used by state and local governments to plan and provide local services, such as transportation, healthcare, and emergency response services.[11] The importance of getting an accurate count is highlighted not only by the numerous and varied ways that Census data are used,[12] but especially by its importance for state and local districting. Currently, a majority of state and local governments rely on Census data to create electoral districts.[13]

To count each person for the Census, the Census Bureau uses the usual residence rule, which is defined as the place where a person "lives and sleeps most of

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7. 136 S. Ct. 1120, 1132–33 (2016); *see also* Burns v. Richardson, 384 U.S. 73, 92–93 (1966) (noting that Hawaii's apportionment based on a population of eligible voters, although potentially problematic because of the possibility of improper influences on people's eligibility to vote or their level of political participation, was nonetheless permissible because "it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis").

8. U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration [of the respective number of persons of each state] 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."); *see also About the Census*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about.html [https://perma.cc/R6U4-PUXL] (last updated Mar. 3, 2018).

9. U.S. CONST. art. I, § 2, cl. 3; *About the Census*, *supra* note 8.

10. *Why a Census?*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/why.html [https://perma.cc/2XSS-MVNC] (last updated Mar. 27, 2018).

11. *See 50 Ways Census Data Are Used*, STATE OF N.J. DEP'T OF LABOR & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/lpa/census/2010/50WaysDataUsed.html [https://perma.cc/NU3M-YEYP] (last visited Mar. 19, 2018).

12. *See About the Census*, *supra* note 8; *50 Ways Census Data Are Used*, *supra* note 11.

13. Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. L.F. 35, 41 (2012).

the time."[14] This definition presents many issues, including how to count college students or overseas military personnel.[15] Most relevant here, however, the usual residence rule raises the issue of where to count prisoners—either at the facility where they are housed on Census Day, or somewhere else, such as their residence prior to incarceration.[16] Currently, the Census Bureau counts prisoners in the location of the facility where they are located on Census Day.[17] Although this Note only attempts to discern which location better adheres to the democratic principles discussed below, it should be noted that many states and localities have chosen to deviate from the Census's usual residence rule data for prisoners,[18] and that the Census Bureau is also attempting to ease the administrative difficulties of doing so following the 2020 Census.[19]

An alternative option for counting prisoners would be to count them in their home location—their last known residence prior to incarceration.[20] Currently, New York, Maryland, Delaware, and California have passed legislation that

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14. *2020 Census Residence Criteria and Residence Situations*, *supra* note 4; *see also* Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU: CENSUS BLOGS (Mar. 1, 2010), https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html [https://perma.cc/44LY-YTSD].

15. David Hamsher, *Counted Out Twice—Power, Representation & the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 307 (2005) (noting that originally students were not being counted either in their parents' location or their school location, and that overseas military personnel would be counted at their "home of record," which is "the address at which those individuals resided prior to taking up their job overseas"); *see also* Hamsher, *supra* at 307 (noting that students and overseas military personnel "differ[] from prisoners in important respects").

The use of the usual residence rule as applied to counting prisoners in the prison facility where each individual is housed has been upheld by courts. *See, e.g.*, District of Columbia v. U.S. Dep't of Commerce, 789 F. Supp. 1179, 1190 (D.D.C. 1992) (holding that the usual residence rule did not violate the Constitution).

16. *See* Groves, *supra* note 14. The Census Bureau, in response to comments on the residence requirements used in the 2010 Census, noted that for the 2020 Census

> the practice of counting prisoners at the correctional facility . . . would be consistent with the concept of usual residence . . . . '[U]sual residence' is defined as the place where a person lives and sleeps most of the time, which is not always the same as their legal residence, voting residence, or where they prefer to be counted.

Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42,577, 42,578 (June 30, 2016) (to be codified at 15 C.F.R. ch. 1).

17. *See* Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578. This choice has been upheld by courts. *See, e.g.*, *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. at 1190.

18. *Solutions*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT, https://www.prisonersofthecensus.org/solutions.html [https://perma.cc/5QFP-U6JN] (last visited July 28, 2018); *Local Governments that Avoid Prison-Based Gerrymandering*, PRISON POL'Y INITIATIVE: PRISON GERRYMANDERING PROJECT, https://www.prisonersofthecensus.org/local/ [https://perma.cc/MFF9-2UFK] (last updated Nov. 19, 2016) (noting some of these deviations, including some local governments that exclude prisoners from the districting count altogether, or do so when the percentage of prisoners exceeds twelve percent of the local population).

19. Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578–79.

20. Groves, *supra* note 14. There are additional options for which location to count: "Where the prisoner lived at the time of the arrest. Where the prisoner lived at the time of the sentencing. Where the prisoner's former household now lives. Where the prisoner wants to live after exiting the institution." *Id.*

requires prisoners to be counted in that location,[21] and the legality of those laws have been upheld by courts.[22] Indeed, the legality of choosing either option has been established by cases in jurisdictions around the country.[23] Supporters of the current application of the usual residence rule are generally concerned that such a change would be impracticable to administer.[24] In Maryland, for example, state officials were required to verify and reformat over 20,000 inmate names and addresses to implement Maryland's No Representation Without Population Act.[25] Maryland federal prisons refused to provide any information, effectively excluding federal prisoners from being counted.[26] However, the states that have implemented this change have been able to effectively remove prisoners from the prison facility population and count them in their previous location for purposes of districting, although the initial process may be tedious and expensive.[27] Another option is to remove prisoners from the districting count completely, which is not too difficult[28] but may present other issues besides administrability.[29]

Although many states still rely on the Census Bureau's usual residence data for districting purposes,[30] states that choose to count prisoners in locations other than the prison facility will be aided by the Census Bureau in two ways following the 2020 Census. First, as it did following the 2010 Census, the Bureau will provide group quarters data,[31] allowing states to identify correctional facilities, which

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21. Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1249–50 (2012).

22. *See, e.g.*, Fletcher v. Lamone, 831 F. Supp. 2d 887, 893–95 (D. Md. 2011) (finding it constitutional to adjust census data under Maryland law that counted inmates at their last known address); Little v. N.Y. State Task Force on Demographic Research & Reapportionment, No. 2310-2011, slip op. at 5, 10 (N.Y. Sup. Ct. Dec. 1, 2011) (upholding a New York state law requiring prisoners to be counted at their pre-incarceration address).

23. *See, e.g.*, *Fletcher*, 831 F. Supp. 2d at 897; District of Columbia v. U.S. Dep't of Commerce, 789 F. Supp. 1179, 1190 (D.D.C. 1992); *Little*, slip op. at 10.

24. *See* Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578.

25. MD. COD ANN., ELEC. LAW § 8-701 (West 2011); *see also* Davis, *supra* note 13, at 46–47.

26. Davis, *supra* note 13, at 47.

27. *Id*. at 48.

28. This option may not be the best, but it is easily administrable given the Census Bureau's willingness to help with delineating the location of prison facilities. *See* Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578. It may also serve the goals of Voter Equality, discussed *infra* Section III.A, in states where felons are disenfranchised.

Military personnel are counted this way as well, showing the feasibility of this process. *See* Wagner, *supra* note 21, at 1257. *But see* Ho, *supra* note 2, at 392 (arguing that excluding prisoners from redistricting counts "seems uncomfortably close to the notion that people suffer a 'civil death' upon a felony conviction—and when groups of individuals no longer count as 'persons,' it becomes easier in some sense to treat them as though they have no rights that society is bound to respect").

29. *See infra* note 107 and accompanying text.

30. Davis, *supra* note 13, at 41.

31. *Group Quarters Information*, U.S. CENSUS BUREAU, https://www.census.gov/2018censustest/gq [https://perma.cc/Z2FK-HHH7] (last updated June 13, 2018) ("Group quarters are places where people live or stay in a group living arrangement. These places are owned or managed by an entity or organization providing housing and/or services for the residents. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those

enables states to accurately remove prisoners from the districting count.[32] The Bureau plans to provide this data earlier than it did following the 2010 Census, which would allow states to more quickly use that information to either remove prisoners from the count or to change their location.[33] Second, the Bureau plans to offer a product that allows states to reallocate their prisoner population counts using supplemental information.[34] However, due to the Bureau's current understanding of the usual residence rule, the increased administrative costs to change the method of counting, and the current underfunding of the 2020 Census,[35] it is unlikely that the Bureau will change its method of counting prisoners for the purpose of the Census. Additionally, an underfunded Census leads to undercounting of hard-to-count populations—homeless people, transient populations, minorities, and immigrants.[36] Because counting prisoners in the prison facility is much easier than counting them in their pre-incarceration location,[37] the Census Bureau has even less of an incentive to make that change. Therefore, the onus will be on the states to change the method of counting prisoners.

The Supreme Court has recognized that Census data may be the "best population data available" for determining population for the purposes of state-level districting,[38] but does allow for Census data to be modified to correct perceived

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receiving these services. This is not a typical household-type living arrangement. People living in group quarters are usually not related to each other.").

32. Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578.

33. *Id.*

34. *Id.* ("Therefore, following the 2020 Census, the Census Bureau plans to offer a product that states can request, in order to assist them in their goals of reallocating their own prisoner population counts. Any state that requests this product will be required to submit a data file (indicating where each prisoner was incarcerated on Census Day, as well as their pre-incarceration address) in a specified format. The Census Bureau will review the submitted file and, if it includes the necessary data, provide a product that contains supplemental information the state can use to construct alternative within-state tabulations for its own purposes.").

35. *See The Risks of an Underfunded Census*, NPR (May 13, 2017, 8:04 AM), https://www.npr.org/2017/05/13/528236687/the-risks-of-an-underfunded-census [https://perma.cc/BY43-QL5U]; *see also* U.S. CENSUS BUREAU, U.S. CENSUS BUREAU REPORT: TABULATING PRISONERS AT THEIR "PERMANENT HOME OF RECORD" ADDRESS 1 (2006), https://www.prisonlegalnews.org/media/publications/u.s.%20census%20report%20on%20addresses%20of%20prisoners%2C%202006.pdf ("Counting prisoners at a 'permanent home of record' address, rather than at their place of incarceration, would result in increased cost both to the decennial census program and to the federal, state, and local correctional facilities that would be required to participate in data collection efforts. Our study raises concerns that this change would result in decreased accuracy for a possibly large proportion of millions of individuals confined on Census day.").

36. *See* Leigh Anderson, *Why the Underfunded 2020 Census Is a Civil Rights Issue*, LIFEHACKER (Sept. 13, 2017, 1:30 PM), https://lifehacker.com/why-the-underfunded-2020-census-is-a-civil-rights-issue-1802729730 [https://perma.cc/F8H3-WMXR].

37. *See* Davis, *supra* note 13, at 46–47 (discussing the challenges of verifying prisoners' pre-incarceration addresses for redistricting purposes in Maryland).

38. Kirkpatrick v. Preisler, 394 U.S. 526, 528 (1969). It should be noted, however, that the Court in *Kirkpatrick* found that the Census data were the best available option at that time, leaving open the option of a different, even more accurate type of data set to be used in the future.

districting flaws, as long as such modifications are done systematically.[39] Since *Baker v. Carr*, legal challenges to redistricting are justiciable under the Equal Protection Clause.[40] In *Burns v. Richardson*, the Court upheld a Hawaii redistricting plan that counted registered voters rather than the total population to account for the state's high concentration of nonresident military personnel.[41] The Court noted, however, that the apportionment satisfied the Equal Protection Clause "only because . . . it was found to have produced a distribution of legislators not *substantially different* from that which would have resulted from the use of a permissible population basis."[42]

Although most states use unadjusted Census data to count prisoners for districting purposes,[43] multiple states and many localities have adjusted the Census data to move prisoners from the prison location, or to remove them from the count altogether.[44] Counting prisoners at the location of the prison shifts political power from urban communities to rural communities,[45] and diminishes the political power of minority groups that are disproportionately incarcerated.[46] The legality of changing the count by altering the location of prisoners has been uniformly upheld.[47] In *Fletcher v. Lamone*, plaintiffs sought to challenge Maryland's No Representation Without Population Act, which required that inmates be counted as residents of their last known address prior to incarceration.[48] The district court, in applying the precedents of *Kirkpatrick* and *Karcher*, upheld the state law, noting that "a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution."[49] Thus, the legality of altering Census data to count prisoners in their home location for purposes of state-level districting is well established.[50] The question, then, is which method of counting best adheres to the democratic principles of representation.

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39. Karcher v. Daggett, 462 U.S. 725, 732 n.4 (1983) ("If a State does attempt to use a measure other than total population or to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." (citing *Kirkpatrick*, 394 U.S. at 534–35)).

40. 369 U.S. 186, 237 (1962).

41. 384 U.S. 73, 90, 93 (1966).

42. *Id.* at 93 (emphasis added).

43. Davis, *supra* note 13, at 41.

44. Wagner, *supra* note 21, at 1250; *Local Governments that Avoid Prison-Based Gerrymandering*, *supra* note 18 (noting that multiple states and local governments require prison populations to be excluded for purposes of redistricting).

45. Ho, *supra* note 2, at 363.

46. *Id.* at 361–62.

47. *See, e.g.*, Fletcher v. Lamone, 831 F. Supp. 2d 887, 893–95 (D. Md. 2011); Perez v. Texas, No. 11-CA-360-OLG-JES-XR, 2011 WL 9160142, at *12 (W.D. Tex. Sept. 2, 2011) (holding that "the State *could* enact a constitutional amendment or statute that modifies the count of prisoners as residents of whatever county they lived in prior to incarceration . . . [but] there is no federal requirement to do so" (emphasis added)).

48. *Fletcher*, 831 F. Supp. 2d at 893.

49. *Id.* at 894–95.

50. Some commentators have also suggested that counting prisoners in the location of the prison facility could sometimes violate the Voting Rights Act of 1965 (VRA of 1965). *See, e.g.*, Ho, *supra* note 2, at 385–91. Dale Ho, for instance, argues that a majority-minority district with a large prison

II. THEORIES OF DEMOCRATIC REPRESENTATION

As evidenced by the case law discussing districting and its democratic goals, there is not one constitutional theory that indicates what is required by the one-person, one-vote principle.[51] Ever since *Reynolds v. Sims* and *Wesberry v. Sanders*, the courts have required that the populations of both congressional and state legislative districts be "equal" under the one-person, one-vote principle.[52] Perfect equality is not required; a state or local legislative map presumptively complies with the one-person, one-vote principle when the maximum population deviation is less than ten percent.[53] A prima facie case can be shown by demonstrating deviations between ten percent and sixteen percent.[54] Deviations over sixteen percent can rarely be justified.[55]

However, the question of who is counted within a population remains. The two theories discussed in this Note will be the Voter Equality and Representational Equality models. Voter Equality is the idea that the goal of apportionment should be to equalize the voting power of voters, rather than the

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population may fail to provide its minority residents with the opportunity to elect candidates of their choice, thereby potentially violating the VRA of 1965. *Id.* at 387. A good example of this possibility can be found in Somerset County, Maryland where an African-American preferred candidate had never been elected to the county commission, even though the county as a whole was forty-two percent African-American and one district was seventy percent African-American. Davis, *supra* note 13, at 46. Because that district included a local prison, which accounted for 3,000 prisoners and seventy percent of the district's population, the majority-minority district was "only majority black 'on paper.'" *Id.* This potentially viable statutory challenge was preempted by Maryland's passage of the No Representation Without Population Act. *See* Ho, *supra* note 2, at 387.

The Second Circuit has acknowledged the potential viability of this issue but did not rule on it because it was not properly raised by the parties to the case. Hayden v. Pataki, 449 F.3d 305, 328–29 (2d Cir. 2006) ("It is unclear whether plaintiffs' vote dilution claim also encompasses a claim on behalf of plaintiffs who are neither incarcerated nor on parole, that their votes are 'diluted' because of New York's apportionment process . . . which counts incarcerated prisoners as residents of the communities in which they are incarcerated, and has the alleged effect of increasing upstate New York regions' populations at the expense of New York City's . . . . Inasmuch as this question was neither considered by the District Court nor briefed by defendants, we intimate no view on the question and remand to the District Court to consider whether plaintiffs have indeed properly raised the claim, and, if so, to rule on the merits of the claim.").

In regard to constitutional challenges, as opposed to VRA challenges, courts have analyzed vote dilution cases under the equal protection clause. *See* Davidson v. City of Cranston, 837 F.3d 135, 144–45 (1st Cir. 2016) (finding that there was no vote dilution when a city included prisoners in the population because choice of population data was permissible under *Evenwel v. Abbott* and no discriminatory treatment was alleged). Lower courts have also acknowledged that a vote dilution claim may be viable for districts that include prisoners as a high percentage of the population. *See* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1323 (N.D. Fla. 2016) (finding that inmates of a prison lacked representational nexus to the district representatives, and that removing them from the count resulted in a total deviation of 42.63%, thereby impermissibly diluting the votes of citizens in other districts).

51. Evenwel v. Abbott, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring).

52. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

53. *Evenwel*, 136 S. Ct. at 1124 (noting, additionally, that "[s]tates must draw *congressional* districts with populations as close to perfect equality as possible" (emphasis added)); *see* White v. Regester, 412 U.S. 755, 764 (1973).

54. Ho, *supra* note 2, at 381.

55. *Id.*

population at large.[56] Representational Equality is the idea that the goal of apportionment should be to equalize the political power of *all* people, regardless of whether they can or do vote.[57] Both theories have a basis in case law,[58] with neither predominating as the "correct" constitutional theory,[59] so both must be considered. There are strong arguments for counting only eligible voters under the Voter Equality theory, and for counting the total population under the Representational Equality theory.[60]

For many years, courts were unsure whether to require jurisdictions to count the number of eligible voters or the total population, with many courts noting that Supreme Court precedent was inconclusive.[61] Although perhaps the clear textual meaning of the one-person, one-vote principle would suggest that apportionment should be based on the eligible-voter population,[62] courts consistently allowed states to satisfy the principle based on total population.[63] Finally, in 2016, the Supreme Court addressed the question of whether total population was a constitutionally permissible method of equalizing state-level districts.[64] In *Evenwel v. Abbott*, the Court denied a challenge to Texas's legislative districting scheme that apportioned based on total population.[65] The challengers argued that Texas's use of total population devalued their votes because they resided in districts with higher percentages of eligible voters as compared to other districts.[66] Reviewing its past cases and the current state of redistricting law, the Court found that Texas did not err in using total population, and left open the possibility of apportioning based on eligible voters.[67]

The current state of case law indicates that a state may be able to apportion based on either total population or eligible voters,[68] and may deviate from Census data as long as it is done in a systematic way.[69] The Voter Equality theory,

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56. Garza v. County of Los Angeles, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

57. *Id*. at 782.

58. *See, e.g*., Reynolds v. Sims, 377 U.S. 533, 560–61, 579 (1964).

59. *Evenwel*, 136 S. Ct. at 1133 (Thomas, J., concurring).

60. It should be noted that there are a variety of population bases that may be used: eligible voters, total population, citizens, registered voters, residents, nonfelons, and more. *See* Davis, *supra* note 13, at 41. Here, however, we will only be looking at the bases used by the two dominant theories: eligible voters and total population.

61. *See, e.g*., Chen v. City of Houston, 206 F.3d 502, 524–28 (5th Cir. 2000) ("[I]n almost all cases the Court was dealing with situations in which total population was presumptively an acceptable proxy for potentially eligible voters. Under such circumstances, we would expect to find the terms used interchangeably, with perhaps a slight bias toward the more historically resonant phrase—unquestionably, one-person, one-vote.").

62. *See Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

63. *See, e.g*., *Chen*, 206 F.3d at 523, 528 ("[T]he choice of population figures is a choice left to the political process."); Daly v. Hunt, 93 F.3d 1212, 1228 (4th Cir. 1996).

64. *Evenwel*, 136 S. Ct. at 1132–33.

65. *Id.*

66. *Id*. at 1125.

67. *Id*. at 1132–33.

68. *Id.*

69. *See* Karcher v. Daggett, 462 U.S. 725, 732 n.4 (1983).

as discussed below, views the ability to vote as the paramount concern for apportionment—without every vote counting equally, there is no true equality of the voting system.[70] The Representational Equality theory views other concerns as equally important, such as equalizing access to representatives and allotting an equal number of constituents to each representative, regardless of their ability to vote.[71] Both the Voter Equality and Representational Equality theories have a place in the discussion of where to count prisoners, as both have support in case law and neither is controlling.

A. VOTER EQUALITY THEORY

The theory of Voter Equality requires that only eligible voters be counted for purposes of ensuring an equal population among districts, or, at least, that if a total population base is used, it is because it will also ensure equality among eligible voters.[72]

The majority of states apportion districts using total population, measured by the Census and unaltered to remove any groups.[73] However, some jurisdictions previously relied on registered-voter or eligible-voter populations;[74] indeed, the plaintiffs in *Evenwel* argued that equalizing eligible voters was the required way to satisfy the one-person, one-vote principle.[75] *Reynolds* does contain what seems to be an explicit requirement that voter equality be the goal of one-person, one-vote: "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[76] However, *Reynolds* also contains many lines suggesting that representative equality was the goal, describing, for example, the "fundamental principle of representative government in this country" as "one of equal representation for

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70. *See Evenwel*, 136 S. Ct. at 1142 (Thomas, J., concurring).

71. *See* Chen v. City of Houston, 206 F.3d 502, 525 (5th Cir. 2000).

72. Brief for Appellants at 27–28, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940); *see also id.* ("Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa." (quoting Garza v. County of Los Angeles, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part)).

73. *Evenwel*, 136 S. Ct. at 1124.

74. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 93–94 (1966). Although no state currently relies on an explicit eligible-voter population base, multiple states—Washington, Kansas, and Hawaii—have laws requiring the removal of certain groups from the count. *See, e.g.*, *Washington*, LOYOLA LAW SCH.: ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/states-WA.php [https://perma.cc/362T-83SF] (noting that under Washington law, nonresident military personnel must be excluded for redistricting purposes); *Kansas*, LOYOLA LAW SCH.: ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/states-KS.php [https://perma.cc/HV5W-HVZ2] ("Kansas will adjust census data in order to count military personnel and college students at their permanent residence."); *Hawaii*, LOYOLA LAW SCH.: ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/states-HI.php [https://perma.cc/NV7P-P96C] (noting that under Hawaii law, only permanent residents are counted, and non-resident students and military are excluded).

75. Brief for Appellants, *supra* note 72, at 15.

76. Reynolds v. Sims, 377 U.S. 533, 579 (1964).

equal numbers of people."[77] Proponents of the Voter Equality theory would point out that the conflation of the two bases for population was likely due to "the lack of any need for further refinement,"[78] because eligible voters historically tend to track the total population—meaning the groups' sizes tend to increase in tandem—and issues like those in *Burns* and *Evenwel* crop up only where the eligible-voter numbers no longer track total population counts.[79]

For example, in *Hadley v. Junior College District of Metropolitan Kansas City*, a board of trustees for a joint junior college district was apportioned based on the relative numbers of school-aged children.[80] The Court held that this apportionment violated the Equal Protection Clause because each voter has a right to "have his own vote given as much weight . . . as that of any other voter in the junior college district," which could not be achieved through apportionment based on the number of school-aged children, a figure which presumably did not track the total population.[81] Ultimately, proponents of the Voter Equality theory assert that the goal should be to equalize the power of individual voters, which can only be done by equalizing districts based on eligible-voter or registered-voter populations.[82]

Under the Voter Equality theory, the requirement is simple: every person's vote should hold the same weight as every other person's vote.[83] This furthers the goal of giving every person the ability to participate in a republican form of government if he or she is a qualified voter.[84] Indeed, all qualified voters have a "right

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77. *Id*. at 560–61.

78. Brief for Appellants, *supra* note 72, at 27.

79. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1143 (2016) (Alito, J., concurring); *Burns*, 384 U.S. at 94; Chen v. City of Houston, 206 F.3d 502, 525 (5th Cir. 2000); WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 925 (S.D.N.Y. 1965), *aff'd*, 382 U.S. 4 (1965). This point is not uncontested, however: The Justice Department in *Evenwel* pointed out that the Court has long been aware of "large disparities between minority and white communities with respect to the number of eligible voters when it first announced the rule of population equality in *Reynolds*." Brief for the United States as Amicus Curiae Supporting Appellees at 16, Evenwel v. Abbott, 136 S. Ct. 1120 (No. 14-940). Prior to *Reynolds*, the Court considered *Gomillion v. Lightfoot*, a redistricting case where "approximately 7% of African Americans . . . were eligible voters, as compared to approximately 46% of whites." *Id*. (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960)). Therefore, the Court was at least aware that total population did not track voter-eligible population in all, or even most, cases.

80. 397 U.S. 50, 51 (1970).

81. *Id*. at 52.

82. *See Chen*, 206 F.3d at 525; Garza v. County of Los Angeles, 918 F.2d 763, 783 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part) ("Total population . . . is only a proxy for equalizing the voting strength of eligible voters.").

83. *See Evenwel*, 136 S. Ct. at 1142 (Thomas, J., concurring) ("Appellants are correct that this Court's precedents have primarily based its one-person, one-vote jurisprudence on the theory that eligible voters have a right against vote dilution." (citing *Hadley*, 397 U.S. at 52–53; *Reynolds*, 377 U.S. at 568)).

84. *Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part) ("[The principle of voter equality] recognizes that electors—persons eligible to vote—are the ones who hold the ultimate political power in our democracy. This is an important power reserved only to certain members of society; states are not required to bestow it upon aliens, transients, short-term residents, persons convicted of crime, or those considered too young.").

to have one's vote 'counted once' and [to be] protected against dilution."[85]

The theory of Representational Equality relies on counting the total population of an area, including persons ineligible to vote. In *Reynolds v. Sims*, the Court suggested that the number of constituents was an important consideration, noting that "[l]egislators represent people, not trees or acres."[86] The Court rejected state districting schemes that "give the same number of representatives to unequal numbers of constituents."[87] Courts have referenced the allocation of seats for the U.S. House of Representatives to support the claim that total population is the correct method of apportionment.[88] The Supreme Court in *Evenwel v. Abbott* attached great significance to an unsuccessful proposition by Thaddeus Stevens, where he proposed, while debating the Fourteenth Amendment, that apportionment be based on eligible voters rather than total population.[89] The rejection of the proposal signified to the Court that "representatives are properly understood to represent all of the residents of their districts, whether or not they are eligible to vote."[90] Courts also have evaluated jurisdictions' compliance with the one-person, one-vote principle by looking to total population, even when that measurement might result in population

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85. *Evenwel*, 136 S. Ct. at 1135 (Thomas, J., concurring) (quoting Gray v. Sanders, 372 U.S. 368, 380 (1963)).

86. *Reynolds*, 377 U.S. at 562.

87. *Id*. at 563.

88. *See id*. at 560–61; *Garza*, 918 F.2d at 774; *see also* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."). Indeed, James Madison stated that "[i]t is a fundamental principle of the proposed constitution, that . . . the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants . . . ." THE FEDERALIST NO. 54, at 284 (James Madison) (George W. Carey & James McClellan eds., 2001). However, other justices disagree about whether there can be an analogy made between federal apportionment of representatives and state apportionment. *Evenwel*, 136 S. Ct. at 1145 (Alito, J., concurring) (noting that the Court in *Reynolds* concluded that "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted" (quoting *Reynolds*, 377 U.S. at 573)).

89. 136 S. Ct. at 1128–29. Representational Equality seemed to be the basis of the main opposition to Stevens' proposal, with one opponent stating, "no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id*. at 1128 (quoting CONG. GLOBE, 39th Cong., 1st Sess., at 141 (1866)). Additionally, when the final version of the Fourteenth Amendment was introduced, Senator Jacob Howard stated: "Numbers, not voters; numbers, not property; this is the theory of the Constitution." *Id*. at 1128 (quoting CONG. GLOBE, 39th Cong., 1st Sess., at 2767 (1866)). *But see Evenwel*, 136 S. Ct. at 1136 (Thomas, J., concurring) ("The Constitution lacks a single, comprehensive theory of representation.").

90. *Evenwel*, 136 S. Ct. at 1146 (Alito, J., concurring). Justice Alito would not, however, attach such significance to the rejection of Stevens's proposal. *Id*. at 1146–47. Stevens had candidly admitted that his aim was to "perpetuate the dominance of the . . . Northern States" because "if House seats were based on total population, the power of the former slave States would be magnified" because freed slaves, no longer counted as three-fifths of persons, would greatly inflate the voting power of Southern states. *Id*. Therefore, democratic theories of representation were not really on Stevens's mind. *See id*.

deviations over ten percent for eligible voters.[91]

Additionally, proponents of Representational Equality argue that total population serves equality of representation *and* prevents vote dilution.[92] Because eligible voters track total population,[93] using total population tends to prevent vote dilution for eligible voters *and* more accurately count constituents of representatives, including those unable to vote. The Court stated in *Evenwel*:

> Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.[94]

The goal of Representational Equality is to ensure that each representative has an equal number of constituents, rather than an equal number of voters from whom he or she must garner votes.[95] Ideally, this ensures that representatives are responsive to their constituents, regardless of their ability to vote, and that representatives with a lower number of eligible voters will not represent a much larger percentage of the total population. [96] This may occur where there is a larger-than-average number of nonvoters, so that a representative may represent an equal number of voters but far more nonvoters than a neighboring representative and,

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91. *See, e.g.*, Connor v. Finch, 431 U.S. 407, 416–19 (1977); Chapman v. Meier, 420 U.S. 1, 21–22, 26–27 (1975); Gaffney v. Cummings, 412 U.S. 735, 746–47, 750–51 (1973). In *Evenwel v. Perry*, the district court precursor to *Evenwel v. Abbott*, the court stated that:

> The Plaintiffs . . . admit that Texas redrew its senate districts to equalize total population, and they present facts showing that PLANS172's total deviation from ideal, using total population, is 8.04%. Given that this falls below 10%, the Plaintiffs' own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle.

Evenwel v. Perry, No. A-14-CV-335-LY-CH-MHS, 2014 WL 5780507, at *3 (W.D. Tex. Nov. 5, 2014), *aff'd sub nom.* Evenwel v. Abbott, 136 S. Ct. 1120 (2016). This was in response to the plaintiffs' complaint, which indicated that the citizen voting age population deviation between districts reached as high as 55.06% when using the Total Voter Registration from the 2010 general election. Complaint at 8, Evenwel v. Perry, No. 1:14-cv-00335 (W.D. Tex. Apr. 21, 2014).

92. *See, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.").

93. Burns v. Richardson, 384 U.S. 73, 94 (1966).

94. *Evenwel*, 136 S. Ct. at 1132.

95. Chen v. City of Houston, 206 F.3d 502, 525 (5th Cir. 2000) (noting that the principle of Representational Equality is "that representatives are chosen by a district's voters, but should represent all persons resident therein").

96. *See* Calderon v. City of Los Angeles, 481 P.2d 489, 493–94 (Cal. 1971) ("Thus a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area. Furthermore, much of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.").

thus, far more constituents in total. Additionally, "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and *diminution of access to elected representatives*."[97] Regardless of whether an individual voted for a representative, the assumption is that the representative will advocate for the interests of all his or her constituents.[98]

    As discussed above, both of these theories have support from case law and the history of the Constitution and the Fourteenth Amendment. The Supreme Court, however, has not prescribed one or the other for apportioning state legislative districts. As the Ninth Circuit noted, "[*Burns*] seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. It does not, however, *require* states to do so."[99] Therefore, the ultimate question of this Note is not which of the two theories is compelled by current precedent, but rather which of the two options for counting prisoners—at the prison or at their pre-incarceration address—best furthers the goals of the two theories.

III. HOW EACH THEORY APPLIES TO REPRESENTATION OF INCARCERATED PERSONS

    For many years, no obvious issue existed with using total population as the metric for apportionment. This was evidenced by language from cases that conflated both Representational Equality and Voter Equality. In *Reynolds*, for example, the court stated that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment . . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen."[100] Later in *Reynolds*, the Court "[held] that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . . . must be apportioned on a population basis."[101] Courts presumably did not feel the need to distinguish between those two objectives because, ordinarily, total and voter-eligible populations track each other,[102] so no tension is created between the two theories. However, the theories are at odds when the two population bases deviate substantially, which happens frequently in districts where prisons are located.[103]

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    97. *Kirkpatrick*, 394 U.S. at 531 (emphasis added).

    98. *See* Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality); Marsha D. Bilzin, Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 B.U. L. REV. 231, 247 (1970) ("Whatever his voting situation, the government's actions affect every person, and every person should be able to affect his representative. The representative process is twofold—*elect* and *affect*. Ideally a representative takes into account the views of his constituents, whether they voted for him or not, and whether they voted or not. Indeed, if a person has not participated in electing his representative, for whatever reason, affecting his representative becomes the only important part of the representative process. This is, in fact, the only important consideration if an office is not elected, but by function and purpose, it is designed to represent people." (citing Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963))).

    99. Garza v. County of Los Angeles, 918 F.2d 763, 774 (9th Cir. 1990).

    100. Reynolds v. Sims, 377 U.S. 533, 566–67 (1964).

    101. *Id*. at 568.

    102. Chen v. City of Houston, 206 F.3d 502, 525 (5th Cir. 2000); *Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part).

    103. *See* Davis, *supra* note 13, at 46.

In the following discussion, both theories will be applied to the question of where to count prisoners. As discussed below, the theory of Voter Equality does not lend itself to counting prisoners at all, because they are disenfranchised in all but two states.[104] There may still be an argument for including them in the count, but in a different location. The theory of Representational Equality applies to both methods of counting prisoners, to varying degrees of success; however, counting them in their pre-incarceration address more faithfully furthers the goals of Representational Equality.

A. VOTER EQUALITY

In general, adhering to the theory of Voter Equality would require states to simply remove incarcerated persons from the redistricting count for state and local districting, a choice that some state and local jurisdictions already make.[105] Most states currently do not allow felons to vote, or restrict their right to vote until after they have completed their sentences, so they would no longer be living in the prison facility when they were eligible to vote.[106] Although this may seem like a simple solution, it may present practical issues if a state chooses to exclude all nonvoters. If a state made this choice, the Census data may not suffice to identify all those groups—for example, those adjudged to be mentally incompetent, a group commonly barred from voting by states, do not show up on the Census in any way that would allow them to be removed from the data on a geographic basis.[107] Therefore, states will have to conduct their own analysis and identify the

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104. *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (Apr. 28, 2014), http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/ [https://perma.cc/M25S-ZJ8L].

105. *See Local Governments that Avoid Prison-Based Gerrymandering*, *supra* note 18 (noting that some state governments, like Colorado, Mississippi, and Virginia, have suggested or required that prison populations be excluded from county districting). It should be noted that apportionment for the House of Representatives must use total population figures from the Census, and this Note does not argue against that requirement. *See* Wesberry v. Sanders, 376 U.S. 1, 13 (1964) ("[W]hen the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants."). Also, the issues presented by counting prisoners at the prison location are significantly lessened when apportioning between states rather than within states because many prisoners are incarcerated in prisons in their home states. *See Interstate Transfer of Prison Inmates in the United States*, U.S. DEPARTMENT OF JUSTICE: NATIONAL INSTITUTE OF CORRECTIONS, at 11 (2006), https://s3.amazonaws.com/static.nicic.gov/Library/021242.pdf [https://perma.cc/TFL6-DQRC] (finding that less than 0.5% of the U.S. male prison population has been moved to other state Departments of Corrections, to the Federal Bureau of Prisons, or to private, out-of-state facilities).

106. *Felony Disenfranchisement Laws in the United States*, *supra* note 104.

107. A majority of states have some rule that bars those adjudged to mentally incompetent from voting. *See* Bazelon Center for Mental Health Law, *State Laws Affecting the Voting Rights of People with Mental Disabilities*, ELECTION PROTECTION, http://www.bazelon.org/wp-content/uploads/2017/11/2016_State-Laws-Affecting-Voting-Rights-of-PWD.pdf [https://perma.cc/Y8J5-43HC]. Unlike the group quarters data used to identify prison populations, college students, and others, the Census and the American Community Survey (ACS), the new program as of 2010 that allows for more thorough demographic data than the decennial count, do not identify those adjudged by state law to be mentally incompetent. *How Disability Data are Collected from the American Community Survey*, U.S. CENSUS BUREAU, https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html [https://

subgroups and their locations to accurately remove them from the districting count. Additionally, if states choose to remove only prisoners from the Census data, they will be required to identify a reasonable basis for distinguishing between prisoners and other nonvoters, such as noncitizens.[108]

Looking past the point of incarceration, in states where prisoners can vote once they have completed their sentences, there may be an argument for counting them in their pre-incarceration location. Prisoners tend to spend a short period of time in prison—for the majority, two or fewer years—and many of them return to their previous address after release.[109] The Census runs every ten years,[110] so if those prisoners who are newly freed can vote, they will likely do so in the district in which they lived prior to incarceration. Therefore, they should be counted there under the Voter Equality theory. Additionally, for the two states where currently incarcerated persons *are* able to vote—Maine and Vermont[111]—prisoners already vote absentee in their pre-incarceration districts, rather than the district in which the prison is located and in which they are counted.[112] Thus, those voters should be counted in the location where they vote—otherwise, there is a mismatch between the number of voters "counted" for purposes of districting and the number of voters actually able to vote in that district.

If the goal is to have equal numbers of voters within districts under the Voter Equality theory, localities that count prisoners in their districts may be failing miserably. A study conducted after the 2000 Census, which analyzed New

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perma.cc/WV9K-52Z9] (last updated Oct. 17, 2017). The ACS identifies six types of disability, including "cognitive disability," which is defined as a disability where, "[b]ecause of a physical, mental, or emotional problem, [a person has] difficulty remembering, concentrating, or making decisions." *Id.* This is a far different definition than that used to deny voting rights to those considered mentally incompetent—states deny the right to vote to those who are "idiots or insane persons," those of "unsound mind," and those who are not "of quiet and peaceable behavior." *The Right to Vote*, DISABILITY JUSTICE, http://disabilityjustice.org/right-to-vote/ [https://perma.cc/B9MA-L5ZY] (last visited July 30, 2018). Therefore, it is up to the states to identify those subgroups and where they reside, which is no easy task.

108. *See* Karcher v. Daggett, 462 U.S. 725, 732 n.4 (1983) ("If a State does attempt to use a measure other than total population or to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner."); *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 534–35 (1969) (finding that Missouri's districting plan did not "attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population: overpopulation in [one district] was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis").

109. Hamsher, *supra* note 15, at 316.

110. *Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census.html [https://perma.cc/V9LE-2YKD] (last visited July 28, 2018).

111. *Felony Disenfranchisement Laws in the United States*, *supra* note 104.

112. Pam Belluck, *When the Voting Bloc Lives Inside a Cellblock*, N.Y. TIMES (Nov. 1, 2004), https://www.nytimes.com/2004/11/01/politics/campaign/when-the-voting-bloc-lives-inside-a-cellblock.html [https://nyti.ms/2xSuXws] (In Maine, "[i]nmates register in the town they lived in before they were incarcerated, so they do not become a voting bloc in the towns where prisons are located."); *see also* Ho, *supra* note 2, at 375 ("Indeed, unlike aliens, if incarcerated persons could vote, they would, in almost all cases, have to vote by absentee ballot in entirely separate districts from where they are physically present.").

York's state legislative districts, found that removing incarcerated individuals from the population counts resulted in a total deviation of 11.62% for the New York Senate districting plan and 10.95% for the New York State Assembly districting plan.[113] These numbers would constitute a prima facie case of a violation of the one-person, one-vote principle.[114] Without removing prisoners from the districting counts, districts will likely be unable to attain an equal number of voters between districts.

In sum, it may be most faithful to the theory of Voter Equality to not count prisoners in state districts at all—with the exception of Vermont and Maine, where prisoners should be counted in their pre-incarceration address because that is where they tend to vote. There may be some argument for counting all prisoners in their pre-incarceration address if their voting rights are restored post-incarceration, because when they do exercise their right to vote, it will be in that pre-incarceration location. However, there is no good reason for the current practice of counting prisoners in the location of the prison under the Voter Equality theory—in fact, it may lead to apportionment in direct violation of the one-person, one-vote principle.

B. REPRESENTATIONAL EQUALITY

Because proponents of the Voter Equality theory would not count prisoners outside the two states where prisoners may vote, the theory of Representational Equality is more applicable to the question of where incarcerated persons should be counted in redistricting. In analyzing whether prisoners should be counted in the location of the prison or at their last known address,[115] it is helpful to consider what courts have considered to be the goals of Representational Equality, and how each option furthers those goals.

The goals of Representational Equality, according to courts and scholars, are to: (i) increase access by constituents to their representatives; (ii) equalize the benefits received by each constituent; (iii) increase responsiveness of representatives to their constituents; and (iv) equalize the political power of each member of the population, rather than voters specifically, to advocate for their interests.[116] The Ninth Circuit cited "equal access" to representatives as an important purpose served by equal representation, because no representative would have a "disproportionately large number of constituents to satisfy."[117] Additionally, if

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113. Ho, *supra* note 2, at 382 (citing Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POL'Y INITIATIVE (Apr. 22, 2002), http://www.prisonpolicy.org/importing/ [https://perma.cc/UFL9-5AZR]).

114. *See id.*; *see also* White v. Regester, 412 U.S. 755, 764 (1973) (noting that a deviation of less than ten percent does not meet the "threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause").

115. Groves, *supra* note 14.

116. *See* Garza v. County of Los Angeles, 918 F.2d 763, 774, 781 (9th Cir. 1990); Calderon v. City of Los Angeles, 481 P.2d 489, 494 (Cal. 1971).

117. *Garza*, 918 F.2d at 781; *id.* at 774 ("Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative.").

representatives obtain benefits based on the proportion of their constituency to the rest of the governing body, it assures that "constituents are not afforded unequal government services depending on the size of the population in their districts."[118] Along with the increased access to representatives afforded by equal representation, the responsiveness of representatives also increases as they are more able to address their constituents' concerns. Finally, Representational Equality ensures that "political power" is ascribed proportionately by population, rather than by voters, acknowledging that nonvoters also have important interests at stake.[119]

The following discussion will apply the goals of Representational Equality to each of the two ways of counting prisoners: in the location of the prison, or in the prisoner's pre-incarceration location. Although neither is a perfect solution, counting prisoners at their pre-incarceration address ensures that their political power is not diluted and that they are represented by responsive, accessible representatives.

1. Location of Prison

Initially, counting prisoners at the location of the prison seems to further the goals of Representational Equality—prisoners literally *live* in that location at the time of the Census,[120] prisons are funded in part by local governments,[121] and although prisoners cannot vote in that jurisdiction, Representational Equality requires that nonvoters be included in the count as well.[122] Indeed, plaintiffs in New York challenging a new law that counted prisoners at their pre-incarceration address stated, "[i]nmates use community resources including the local courts, hospitals and health services, water, sewer, and other infrastructure. [Local] communities must consider incarcerated persons with their local population when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services."[123] Because prisoners reside at the location of the prison facility, they should receive the benefits of being counted in that location.

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118. *Id.* at 781; *see also id.* at 775 ("Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by [the local government]. As such, they have a right to petition their government for services and to influence how their tax dollars are spent."); Chen v. City of Houston, 206 F.3d 502, 525 (5th Cir. 2000) ("[If eligible-voter populations are used,] the area with the smaller [proportion] of voters will find itself relatively disadvantaged. Despite the fact that it has a larger population—and thus perhaps a greater need for government services than the other community—it will find that its political power does not adequately reflect its size.").

119. *See Calderon*, 481 P.2d at 494; Bilzin, *supra* note 98, at 270.

120. *2020 Census Residence Criteria and Residence Situations*, *supra* note 4.

121. Christian Henrichson et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INSTITUTE OF JUSTICE, CTR. ON SENTENCING AND CORR., at 16 (May 2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf; *see also State & Local Government Finance: 2015 State & Local Government*, U.S. CENSUS BUREAU, https://www.census.gov/govs/local/index.html [https://perma.cc/PU59-UFYC] (providing tables of state and local funding).

122. Bilzin, *supra* note 98, at 270.

123. Complaint, *supra* note 3, at 13.

However, in looking to the four goals of Representational Equality discussed above, this conclusion may not be supported. First, prisoners do not receive much increased access to their representatives—such access goes to those constituents who are not incarcerated and are able to visit the representative's office, speak to him or her directly, and attend events where the representative will be. At most, prisoners can write letters to their representatives, but it is unlikely that they would spend the money to do so; because few prisoners spend more than a few years imprisoned in a single prison, the incentive to attempt to communicate with the representative of that location is reduced.[124] Indeed, the letters prisoners do write may not even be heard: New York state senator Dale Volker, who represents the district where Attica Prison is located, admitted to receiving letters from inmates but indicated that "his real attention is directed toward corrections workers, with whom he has forged strong relationships."[125]

Second, prisoners do benefit from being counted when it comes to benefits and resources apportioned to their jurisdiction—to a point. Prisoners, like students and military personnel, "draw upon the services of the communities in which their . . . institutions are located. The communities in which these persons are residing must plan and develop their public resources to provide for all residents."[126] In that way, prisoners do receive some benefit from being counted in that location. However, because many prisoners spend only a few years or less in these prisons,[127] it may actually be more beneficial that those resources are allocated to the prisoners' pre-incarceration addresses, because the resources will benefit the communities where prisoners will spend a larger part of their life.[128]

Third, counting prisoners in the location of the prison likely does not increase the responsiveness of representatives to their constituents. If anything, many lawmakers do not view prisoners housed within their districts as "constituents" at all.[129] In a survey of Indiana state legislators, all forty respondents felt that an

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124. *See* TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS, PEW CENTER ON THE STATES 13 (June 2012), http://www.pewtrusts.org/-/media/assets/2012/06/06/time_served_report. pdf (noting various states' averages for time served); *cf.* Hamsher, *supra* note 15, at 316.

125. Peter Wagner, *Locked Up, Then Counted Out: Prisoners and the Census*, PRISON POL'Y INITATIVE (Jan. 17, 2003), https://www.prisonpolicy.org/blog/2003/01/17/locked/ [https://perma.cc/ 6W5R-P656].

126. District of Columbia v. U.S. Dep't of Commerce, 789 F. Supp. 1179, 1187 (D.D.C. 1992) (quoting Borough of Bethel Park v. Stans, 319 F. Supp. 971, 979 (W.D. Pa. 1970)); *see also* C. Zawadi Morris, *GOP State Senators File Law Suit Against Jeffries's Prisoner Counting Law*, BED-STUY PATCH (Apr. 7, 2011, 7:28 AM), https://patch.com/new-york/bed-stuy/gop-state-senators-file-law-suit-against-jeffriess-prcd97f17d65 [https://perma.cc/N5EK-PGP2] (noting that a suit claimed that "communities in question would lose political clout, yet still be required to provide basic services—fire, police and infrastructure—to the facilities that house the prisoners, even though they are no longer considered residents").

127. *See, e.g.*, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS, *supra* note 124 (finding that the national average term of imprisonment in 2009 was 2.9 years); Hamsher, *supra* note 15, at 313 (noting that in the Illinois correctional system in 2003, the average prison stay was 1.4 years, and half of the prisoners were imprisoned for less than eight months).

128. *See* Hamsher, *supra* note 15, at 316 (discussing Illinois's prisoners' tendency to return to their prior-to-incarceration location).

129. Ho, *supra* note 2, at 370.

inmate who is "currently incarcerated in prison in another district, but who lived in [their] district before being convicted and/or whose family still lives in [their] district," was more "truly a part of [their] constituency" compared to an inmate "currently incarcerated in a prison located in [their] district, but [with] no other ties to [their] district."[130] Because it is unlikely that many prisoners view themselves as the constituents of these representatives, there is no incentive for representatives to respond to their needs.

Finally, Representational Equality should serve to equalize the political power of each constituent to advocate for their own interests. When counting prisoners at the location of the prison, the prisoners do not actually gain any political power—especially when they cannot vote. Instead, the practice serves to increase the political power of the surrounding community[131] and dilute the political power of the communities where large numbers of incarcerated persons lived previously.[132] Indeed, proponents of counting prisoners at the prison facility acknowledge that a change would dilute their political power from its current state.[133] According to a recent complaint challenging a New York law counting prisoners at their last-known location, incarcerated persons in New York are currently counted as inhabitants of Republican-represented Senate districts, and the "reallocation of 58,000 incarcerated persons primarily to Democratic represented Senatorial Districts is partisan gerrymandering."[134] However, the question is not whether political groups have enough political power,[135] but whether each person is given equal political power in relation to others.[136]

In sum, counting prisoners in the location of the prison ignores reality: they are not considered to be constituents by the representatives of those locations, few of them came from the district of the prison, and few of them will stay in that district

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130. *Id.* at 371 (citing Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 VA. J. SOC. POL'Y & L. 229, 302 (2004)).

131. Morris, *supra* note 126.

132. *See* Hamsher, *supra* note 15, at 302; *cf.* Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292, 1312 (N.D. Fla. 2016) ("People who lack a meaningful or substantial representational nexus with a given legislative body, or whose representational nexus with that body is substantially attenuated relative to others in the body's jurisdiction, don't 'count' for purposes of representational equality—that is, their cognizable representational rights vis-à-vis that body are not affected by the size of that body's districts, nor does their presence affect the representational rights of others. Nonvoters, of course, don't 'count' for purposes of electoral equality. Nonvoters who also lack a meaningful representational nexus don't count *at all*, and including a relatively large, geographically compact group of such people in a district impermissibly dilutes the voting *and* representational strength of people in *other* districts.").

133. Complaint, *supra* note 3, at 27.

134. *Id.*

135. And, indeed, prison-based gerrymandering doesn't seem to have a strong effect on political party power. Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J.L. REFORM 179, 204 (2015) ("[E]liminating prison-based gerrymandering did not significantly impact the size of state legislative districts or shift the political control of either state. After all, legislators in both states have many tools available to design districts to their own liking; it turns out that reallocating the prison population, a relatively small portion of the overall population of the state, is not a particularly effective method to impact the design of state and congressional districts.").

136. *See* Calderon v. City of Los Angeles, 481 P.2d 489, 494 (Cal. 1971).

after they are released. All of these considerations indicate that counting the prisoners at the prison's location increases the representational power of that community without any corresponding requirement that the representative acknowledge or care about the inmates. This does not equalize the representation of each person and instead dilutes the power of the inmates and their home communities. Although it may seem to make sense to count prisoners where they are physically located at the time of the Census, the goals of Representational Equality are furthered most by counting prisoners at their pre-incarceration address.

2. Location Pre-Incarceration

Counting prisoners at their pre-incarceration address initially seems counter-intuitive because they do not currently reside there, they cannot vote there,[137] and there is a possibility that they will never return to that location, even after release.[138] Opponents of counting prisoners at their pre-incarceration address note that "reallocations have the perverse effect of placing people into addresses where they have not lived for years and may never live again (if they are sentenced for life)."[139] This outcome seems to suggest that counting prisoners in their home location cannot make sense. Although counting prisoners at their pre-incarceration addresses may not seem to further the goals of Representational Equality, there are many reasons why it does.

First, because prisoners tend to enjoy little access to the representatives of the location of their prison,[140] counting them in their pre-incarceration location increases their chances of gaining more equal access to their representatives once they are released. Because prisoners rarely spend a long time in the prison in which they are housed, and most return to their home communities, those prisoners receive more equal access to the representatives of their home communities.[141] Indeed, the representatives of their pre-incarceration locations are more likely to view the prisoners as constituents than the representatives of the prison district.[142] Prisoners' family members, who are often tasked with advocating for them while they are incarcerated, are encouraged to write to their own representatives when seeking help for their incarcerated family members, rather than

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137. With the exception of Maine and Vermont. *Felony Disenfranchisement Laws in the United States*, *supra* note 104; Ho, *supra* note 2, at 375 ("Indeed, unlike aliens, if incarcerated persons could vote, they would, in almost all cases, have to vote by absentee ballot in entirely separate districts from where they are physically present.").

138. *See* Complaint, *supra* note 3, at 24.

139. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 789 (2011).

140. *See* Davidson v. City of Cranston, 837 F.3d 135, 140 (1st Cir. 2016) ("The district court found that the inmates have no interest in Cranston's public schools, receive few services from the City, and have no contact with Cranston's elected officials . . . . ACI inmates have no stake in the local political process.").

141. Hamsher, *supra* note 15, at 316 (noting that in Illinois, "[t]he vast majority of released inmates return to their home county after incarceration . . . [and of] the prisoners who were released to Cook County," eighty-one percent had served two or fewer years in prison).

142. Ho, *supra* note 2, at 371 (citing Stinebrickner-Kauffman, *supra* note 130, at 302).

contact the representative who serves the prison location.[143]

Second, counting prisoners in their pre-incarceration addresses helps to equalize the benefits received by each constituent. Counting people in their pre-incarceration addresses creates "a more accurate picture of the size, demographics, and needs of our nation's communities, and will lead to more informed policies and a *more just distribution of public funds*."[144] It also prevents communities with prisons from benefiting financially: one mayor in Illinois was quoted as saying, "It really figures out this way . . . this little town of 450 people is getting the tax money of a town of 2,700 . . . and those people in that prison can't vote me out of office."[145] Although local governments do spend money on infrastructure that affects prisoners, the expenditures are minimal.[146] Prisoners "receive few services" from local governments,[147] and the expenditures that do exist are the "sorts of financial considerations [that] are accounted for in the cost of operating a prison."[148] Although prisons receive some funding from local governments, they are not receiving nearly enough to justify the influx of tax money and resources to local governments created by the inflated population numbers from counting prisoners there. Instead, monetary benefits allocated to prisoners' home locations will ultimately improve their communities for their return and provide long-lasting benefits as these prisoners reintegrate into society.[149]

Third, counting prisoners at their pre-incarceration addresses serves to increase responsiveness of representatives more so than counting them in the location of the prison. Although prisoners cannot usually vote during their incarceration, counting them in their home location rather than the location of the prison facility removes the "perverse incentive" for representatives of districts with prisons to oppose criminal justice reforms that would likely decrease the prison population

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143. *How to Help Your Loved One in Federal Prison*, FAMILIES AGAINST MANDATORY MINIMUMS, https://famm.org/wp-content/uploads/FS-Help-a-Federal-Prisoner-2.23.11-NW.pdf.

144. Ho, *supra* note 2, at 370 (quoting Kenneth Prewitt, *Foreword* to PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS (2004)) (emphasis added).

145. Hamsher, *supra* note 15, at 311 (citation omitted).

146. Ho, *supra* note 2, at 374 ("[I]ncarcerated persons have no choice in where they are located . . . . [T]hey are physically prohibited from integrating into their surrounding communities . . . . [A]lthough incarcerated persons undoubtedly have an effect on some local services—for example, utilities like electricity and water—these sorts of financial considerations are accounted for in the cost of operating a prison.").

147. *See* Davidson v. City of Cranston, 837 F.3d 135, 140 (1st Cir. 2016).

148. Ho, *supra* note 2, at 374.

149. Hamsher, *supra* note 15, at 316 ("It is in Cook County where they will use the services that population-based funding provides and where they will use their political representatives, yet it is the downstate communities which draw additional representation and funding from the prisoners' presence on Census Day."); *see also* Susan K. Urahn, *The Power of Incentives for Performance*, GOVERNING THE STATES AND LOCALITIES (Aug. 22, 2012), http://www.governing.com/columns/mgmt-insights/col-performance-incentive-funding-corrections-probationers.html [https://perma.cc/C8V3-573Z] (noting that "states pay for imprisonment," while it is the "counties or cities . . . [that] supervise (and usually bear the costs for) offenders on probation," who have usually returned to their home communities).

as a whole.[150] Because many of these representatives benefit, both electorally and financially, by keeping bustling prisons in their districts, they have a vested interest in an overflowing prison system.[151] Therefore, they naturally oppose reforms to the criminal justice system, continuing the cycle of mass incarceration.[152]

Finally, counting prisoners in their home location furthers the theory of Representational Equality because it equalizes the political power of each constituent to advocate for their interests. As a threshold matter, counting prisoners at their pre-incarceration addresses remedies the loss of political power from more urban communities to rural communities,[153] especially given that a vast majority of prisoners serve for a relatively short time, return to their previous home, and are then able to vote.[154] One example of this shift in political power is in New York State. New York City produces sixty-six percent of the state's prisoners, but more than ninety-one percent of prisoners are incarcerated outside of New York City, thereby increasing the political power and representation of the more rural districts upstate.[155] Urban, suburban, and rural communities all have different interests and needs, and diluting the representation of the urban communities in favor of the rural ones violates Representational Equality. Thinking of "residence" as where a person has an "allegiance or enduring tie"[156] highlights that a prisoner's "residence" is not the prison's district, where the prisoner probably does not plan on staying long-term, but likely instead is his or her previous community.[157]

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150. *See* Ho, *supra* note 2, at 364; *see also* April M. Short, *6 Shocking Revelations About How Private Prisons Make Money*, SALON (Sept. 23, 2013, 8:22 AM), https://www.salon.com/2013/09/23/6_shocking_revelations_about_how_private_prisons_make_money_partner/ [https://perma.cc/8NLY-3AX5] (noting that a majority of private prison contracts include "occupancy guarantees in the form of quotas or required payments for empty prison cells (a 'low-crime tax')," which incentivizes lawmakers to keep crime rates high enough to fill those cells).

151. *See* Ho, *supra* note 2, at 364.

152. *Id*. at 358, 364.

153. Hamsher, *supra* note 15, at 302.

154. *Id*. at 316; *cf*. Daly v. Hunt, 93 F.3d 1212, 1228 (4th Cir. 1996) ("Furthermore, using voting-age population as the apportionment base would ignore the voting strength of those persons who are between the ages of 8 and 17 at the time of the apportionment, but who would become eligible to vote before the next apportionment.").

155. Hamsher, *supra* note 15, at 302–03; *see also* Complaint, *supra* note 3, at 13 (using different statistics but still finding that forty-nine percent of DOCS prisoners are from New York City and the five boroughs, and twelve percent are from the suburban counties of New York State).

156. This phrase comes from *Franklin v. Massachusetts*, in which the Court indicated that the term "usual residence" used by the Census could mean "more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." 505 U.S. 788, 804 (1992). This definition allowed overseas federal employees to be counted under the Census's usual residence rule. *Id*. at 806.

157. Ho, *supra* note 2, at 370 ("Recognition of the fact that incarcerated individuals almost always return to their home communities is reflected in the fact that nearly every state has adopted a policy of releasing parolees back to the counties in which they were sentenced."). Additionally, few stay long at the prison where they are counted. *See* Wagner, *supra* note 21, at 1251 (noting that the median stay for people at their current prison in New York State was only 7.1 months); *see also* Davidson v. City of Cranston, 837 F.3d 135, 138 (1st Cir. 2016) (noting that approximately 155 prisoners, out of 3,433 inmates, came from Cranston at the time of the Census—and only "eighteen of those had pre-

Additionally, counting prisoners in their home communities remedies the loss of political power within rural communities themselves. One famous example in Anamosa, Iowa serves to illustrate this point. The town was divided into four City Council wards, each containing 1,370 people—but one ward held a state prison.[158] Thus, that ward actually contained about sixty non-incarcerated persons, only two of whom were needed to elect a man to City Council in 2002 based on their write-in votes.[159] The voting strength of the residents of the other three wards was diluted significantly because the prison was included in the population count, and therefore the residents of that ward wielded "about 25 times more political clout."[160] After that election, Anamosa abandoned the ward system for an at-large voting system to remedy the voting disparities, earning them "praise from good government advocates."[161]

Beyond the question of diluted political power of urban versus rural persons, or rural versus other rural persons, there is the question of whether counting prisoners in their home location serves to equalize the power of black versus white persons. Currently, prisons tend to sit in primarily white jurisdictions, but African-Americans are incarcerated at a much higher percentage than their percentage of the total population, especially for drug-related offenses.[162] Because many prisons are located "in predominantly white rural districts[, this] often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation."[163] Short of showing invidious discrimination,[164] a plaintiff's constitutional racial vote dilution challenge would be unlikely to survive based on minor deviations from the Census data; however, if such an apportionment scheme would "operate to minimize or cancel out the voting strength of racial or political elements of the voting population," there may be a potential challenge.[165]

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incarceration addresses located" in the ward where they were counted; the median length of stay for prisoners at the local prison was ninety-nine days).

158. Ho, *supra* note 2, at 362–63 (citing Peter Wagner, *New York Times Profiles Anamosa Iowa, Where a District Is Almost Entirely People in Prison*, PRISON POL'Y INITIATIVE (Oct. 24, 2008), http://www.prisonersofthecensus.org/news/2008/); *see also* Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES (Oct. 23, 2008), https://nyti.ms/2xQoAti.

159. Ho, *supra* note 2, at 362–63.

160. Roberts, *supra* note 158.

161. *Prisons and City Elections*, PRISON POLICY INITIATIVE (Nov. 3, 2009), https://www.prisonpolicy.org/news/ipr11032009.html [https://perma.cc/8UMV-6MF2].

162. Ho, *supra* note 2, at 361–62.

163. *Id.* at 360 (quoting LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY 189–90 (2002)).

164. *See* Burns v. Richardson, 384 U.S. 73, 88 (1966).

165. *Id.* ("Where the requirements of *Reynolds v. Sims* are met, apportionment schemes . . . will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965))); *see also* Gaffney v. Cummings, 412 U.S. 735, 754 (1973) ("As we have indicated, for example, multimember districts may be vulnerable [to constitutional challenge], if racial or political groups have been fenced out of the political

   In sum, counting prisoners in their pre-incarceration location is likely to remedy some of the issues under the Representational Equality theory. The communities from which inmates come are likely the communities to which they will return, and thus the locations where they will vote if they are able to do so after incarceration.[166] Counting prisoners at their pre-incarceration addresses presents a more honest picture of the population, racial demographics, and needs of various communities, and does not artificially inflate the population or needs of the communities in which the prisons sit.[167] Because representatives admittedly do not consider inmates of the prisons in their districts as their constituents, counting prisoners in those districts for apportionment purposes does not further the goals of Representational Equality. Instead, prisoners should be counted at their last known address, or potentially another address that represents where they plan to go after release.[168]

<div align="center">CONCLUSION</div>

   Counting prisoners is not a simple task. There may be administrative reasons to count prisoners at the prison facility,[169] but the question should not be which location is most simple to administer. Rather, we should ask which location best furthers the goals of equal representation in a democracy. Regardless of whether a person ascribes to a theory of Voter Equality or a theory of Representational Equality, the question of where to count prisoners implicates critical issues. If prisoners cannot vote, should they be counted at all? If the goal is equality of representation, then where are prisoners best represented? If there is a *right* to equal representation, where does that right vest? And is that right violated if prisoners are counted, but not in the right place? All these questions and more will continue to arise as all the states grapple with how best to count prisoners.[170]

   After the 2020 Census, states will be faced with the challenge of redistricting to reflect the new data, which includes answering the question of where to count prisoners. Under the Voter Equality theory, disenfranchised prisoners should not be counted at all—although, if one acknowledges their post-incarceration ability to vote, there may be an argument for counting them in their pre-incarceration address. Under the Representational Equality theory, prisoners should be counted

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process and their voting strength invidiously minimized."); Davidson v. City of Cranston, 837 F.3d 135, 143 (1st Cir. 2016) (finding no invidious discrimination where there was "no showing, nor even a claim, that either racial or political groups have been fenced out of the process in Cranston").

   166. Hamsher, *supra* note 15, at 316.

   167. *See* Kenneth Prewitt, *Foreword* to PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS (2004).

   168. Groves, *supra* note 14. The scope of the question of which option would be best between their last known address, or where they plan to go after release, is beyond the capacity of this Note. After more states adopt new methods of counting prisoners, we may be able to see evidence of which option, or options, work best.

   169. *See* Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. at 42,578.

   170. Evenwel v. Abbott, 136 S. Ct. 1120, 1141 (2016) (Thomas, J., concurring) ("States are free to serve as 'laboratories' of democracy . . . . That 'laboratory' extends to experimenting about the nature of democracy itself.").

in their pre-incarceration address, because that method does a better job of furthering the theory's goals. What remains clear is that, under both of the theories, the current method of counting prisoners at the location of the prison does not further the goals of a representative democracy.