

# All People are Equal, but Some People are More Equal Than Others

HOW PRISON GERRYMANDERING CREATES PHANTOM  
CONSTITUENTS AND REMOVES POWER FROM COMMUNITIES  
ANTOINE MARSHALL

## I. Introduction

North Carolina has garnered national attention for its redistricting battle. Since new lines were drawn after the 2010 decennial census, State and Federal Courts have found that General Assembly drawn unconstitutional maps for various school board,<sup>1</sup> city council,<sup>2</sup> General Assembly<sup>3</sup> and Congressional districts.<sup>4</sup>

Redistricting is an invaluable part of our representative democracy, with the purpose of ensuring that there is equal representation and all communities have a voice. While much of the focus is on the Republicans within the General Assembly who due to their majority have had the ability to draw districts favorable to their party this decade, and the inequity it creates, less attention is focused on structural issues that create disparities within our redistricting process. Our Census is used not just in maintaining statistical snapshots of America, but also to influence key policy decisions. When communities are inaccurately counted it can result in fewer allotted resources and reduced representation in governmental bodies. When the Census counts incarcerated people as residents of the prison location this flaw in the data disenfranchises higher crime communities.

There are 66,000 individuals incarcerated in North Carolina through State and Federal prisons and local prisons. There are more people incarcerated within the state than citizens of the City of Chapel Hill. Removing their representation from their respective communities and placing it in the handful of communities with a state of federal prison, gifts those communities an inequitable amount of legislative power.

This paper is one of a series of papers exploring policy changes that can effectively make representation in North Carolina's government more equitable. This paper focuses on prison gerrymandering through the use of incarceration sites rather than prisoners' permanent home of record when determining their residences.

## II. How the Census is used in redistricting

---

<sup>1</sup> *RALEIGH WAKE CITIZENS ASSOCIATION v. WAKE COUNTY BOARD OF ELECTIONS*, No. 16-1270 (4th Cir. July 1, 2016).

<sup>2</sup> *City of Greensboro v. GUILFORD COUNTY BOARD OF ELECTIONS*, No. 1: 15-CV-559 (M.D.N.C. Apr. 3, 2017).

<sup>3</sup> *North Carolina v. Covington*, 137 S. Ct. 2211 (U.S. 2017).

<sup>4</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 581 U.S., 197 L. Ed. 2d 837 (2017).

When the Census Bureau began keeping track of American populations, the only policy determination that resulted from the data was the determination of how many seats in Congress each state had.<sup>5</sup> For that limited purpose, it did not matter where those citizens actually lived provided they were within the state lines. It was not until a series of “One Person, One Vote” court cases in 1962 did a clear federal requirement mandate that governments must use population data to draw legislative boundaries each decade to ensure resident’s had an equal stake in government.<sup>6</sup>

While state and local governments are required by federal law to redistrict each decade and typically use decennial census data to do so, Federal Law does not require them to rely solely on the census.<sup>7</sup> States are required to use the “best population data available” and if the census data is recognized as flawed the states are not required to use said data merely because it is census data.<sup>8</sup> In fact, the Supreme Court rejected an argument from a state that it was required to use Census Bureau assignments of residences of military personnel in its state legislative redistricting and held that a state may not use Census data it knows to be incorrect.<sup>9</sup>

### III. Where is home for inmates?

Due to the “One Person, One Vote” rulings, more detailed information was needed in order to craft legislative districts of roughly equal population. Given a growing transient culture and the ease of travel in which people occasionally spend substantial periods of time away from a single location. It raises the question of where “home” is, particularly among specific demographics such as the homeless, hospitalized, college students, live-in employees, military personnel or those with a seasonal residence.

The Census relies on what is called usual-residence rule, which requires that a person be counted as a resident of the place where he lives and sleeps most of the time.<sup>10</sup> For prisoners’ the “usual residence” is wherever they happen to be locked up on census day. The Census has applied what is called the usual-residence rule

---

<sup>5</sup> Peter Wagner, *A Changing Country Needs a Changing Census*, Prison Pol’y Initiative (Nov. 29, 2004), <http://www.prisonersofthecensus.org/news/2004/11/29/changing/>.

<sup>6</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 168 (1962).

<sup>7</sup> *Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 (3d Cir. 1971).

<sup>8</sup> *City of Detroit v. Franklin*, 4 F.3d 1367, 1373-74

<sup>9</sup> *Mahan v. Howell*, 410 U.S. 315, 330-332 (1973).

<sup>10</sup> *Residence Rule and Residence Situations for the 2010 Census*, U.S. Census Bureau, [http://www.census.gov/population/www/cen2010/resid\\_rules/resid\\_rules.html](http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html)

to prison inmates since at least 1850 when it first counted prisoners as members of a “prison household” in which the jailor was the head.<sup>11</sup>

#### IV. What are the Harms of Prison Gerrymandering?

Prison Gerrymandering is another collateral consequence of incarceration within the United States. The idea of prison gerrymandering continues a dehumanizing process for prisoners within our political processes. Already barred from casting a ballot while incarcerated,<sup>12</sup> elected officials within the district of the prison have no reason to heed their views or cater to them as constituents. Individuals who are in holding while awaiting trial are unable to capitalize on a presumption of innocence as they have not yet been convicted of a crime, and yet if incarcerated during the Census, will be counted in the community of their holding facility.

But prison gerrymander does not just affect those individuals who are incarcerated. It has a negative impact on the communities that incarcerated individuals hail from; communities that are traditionally poorer, more urban, and predominately minority. Prison gerrymandering is malappropriation of legislative power. This displacement of legislative representation has a very real effect. In 2002, the town of Anamosa, Iowa was divided into four City Council wards of about 1370 individuals each. One ward, Ward 2, had a state penitentiary that housed over 1320 prisoners.<sup>13</sup> This districting set up of the Anamosa City Council gave roughly 60 non-incarcerated individuals the same representation as over 1,300 individuals.

Beyond just representation, prison gerrymandering matters in policy terms. Dale Ho of the NAACP Legal Defense Fund succinctly summed up the argument as follows: “Because their political power depends in some measure on a continuing influx of prisoners, legislators from prison districts have a strong incentive to oppose criminal justice reform that might decrease incarceration rates.”<sup>14</sup> He cited an example of two New York state senators “who led the opposition to efforts to reform the harsh Rockefeller drug sentencing laws.” The two Senators

---

<sup>11</sup> PANEL ON RESIDENCE RULES IN DECENNIAL CENSUS, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., ONCE ONLY ONCE, AND IN THE RIGHT PLACE 84-85 (Daniel L. Cork & Paul R. Voss eds., 2006).

<sup>12</sup> N.C.G.S. §163-55

<sup>13</sup> Peter Wagner, New York Times Profiles Anamosa Iowa, Where a District Is Almost Entirely People in Prison (Oct. 24, 2008), <http://www.prisonersofthecensus.org/news/2008/10/24/anamosa/>

<sup>14</sup> Ho, Dale, Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle (June 1, 2011). Stanford Law & Policy Review, Vol. 22, No. 2, p. 355, 2011.

were representing districts that were home to more than 17% of the state's prisoners.<sup>15</sup>

This highlights an aggressive feedback loop: mass incarceration creates districts where the representatives are incentivized to favor even more mass incarceration. This results in representatives from high prison population districts not only ignoring their incarcerated constituents, but advocating policies against their interests.

## V. Solving Prison Gerrymandering

In 2016 the Census allowed for public comments on the Residency Rule in preparation for the 2020 Census. Of the 262 comments submitted, 162 pertained to prisoners, with 156 recommending that prisoners be counted at their pre-incarceration address.<sup>16</sup> The Census Bureau concluded that they would continue counting prisoners at the correctional facility for the 2020 Census. The Census Bureau did state they plan to offer a product that states can request, in order to assist them in the goal of reallocating their own prisoner population counts.<sup>17</sup>

So far four states, Maryland, New York, Delaware and California have passed legislation to end prison-based gerrymandering and count incarcerated people at their pre-incarceration residences for redistricting purposes. Maryland's law survived a constitutional challenge in the US Supreme Court.<sup>18</sup>

North Carolina needs to become the fifth state and pass a law counting prisoners at their place of residence pre-incarceration by the time of the 2020 Census. The Census Bureau has already stated it would work with states upon demand in order to provide accurate data of those pre-incarcerated addresses. If the Census data is insufficient North Carolina should consider gathering its own data to ensure that the incarcerated are counted accurately.

## VI. Conclusion

Our Democracy is dependent on a 'One Person, One Vote' rule. This rule ensures that everyone's vote counts equally and that there is fair representation. Prison gerrymandering is unfair to the incarcerated individuals, the members of their home communities, and to the fundamental principles of Democracy.

North Carolina's should do everything within its power to ensure that individuals and communities are accurately counted and represented to ensure that our citizens have an equal voice within our democracy.

---

<sup>15</sup> *Id* at 364

<sup>16</sup> 81 FR 42577

<sup>17</sup> *Id.*

<sup>18</sup> *Fletcher v. Lamone*, 133 S. Ct. 29, 567 U.S., 183 L. Ed. 2d 671 (2012).