Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power

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INTRODUCTION

The United States criminal justice system operates almost reflexively as a system of racial control. Beginning in the 1980s, "crime management" and "crime control" became the two-pronged rally cry of criminal justice policy makers bent on convincing a crime-weary public that tough on crime policies would increase their safety and security.¹ The retributive "culture of control" that ultimately emerged relied on a few favored tools for control: quick arrest, determinate sentencing, and massive incarceration.² What made these tools so effective was their focused application. These tools were utilized in, and directed toward particular offenders and particular communities. As a direct result of these targeted practices, individuals and communities of color have suffered considerable consequences—both intended and unintended.

These criminal justice tools continue to be used almost without question. For the past three decades, criminal justice policy—both in substance and in application—has singled out individuals and communities of color and has left significant devastation in its path.³ Policy makers have been quick to defend their actions and to assert that the policies they have promoted and launched have been colorblind. They have claimed that, even if such policies could be shown to have had a disproportionate impact on individuals and communities of color, this impact was felt only because individuals of color in those communities were engaging in much of the criminal conduct.⁴ However, a closer examination of these and other such denials of racialized motivations are self-deluding at best and deceitful at worst.⁵ Criminal

². Id. at x-xi, 113-27 (describing how the cultural and political climate in the 1980s affected crime control policies and practices).
⁵. The sentencing disparities between crack and cocaine offer one example of how race drove policy. Penalties for crack, typically used and sold in communities of color, were more than five times greater than the penalties exacted for an identical amount of powder cocaine, typically used and sold in white communities. According to the 1986 legislation passed by Con-
justice authorities have similarly sought to justify this targeting by asserting that limited resources have dictated that they look for the most symbolic, most visible, and most potent ways to enforce the law. Still, whatever the purported justification, years of such targeting have devastated communities of color, disabled families, and disrupted most prospects of healthy economic activity.

All of this has been well documented. But perhaps what has received less attention as a consequence of mass incarceration is the political cost that communities of color have suffered as a result of being the preferred site for law enforcement activity. One aspect of the political effect that has received at least some attention is felon disenfranchisement. An estimated 5,300,000 Americans, or about one in every forty-one adults, cannot vote because they have previously been convicted of a felony. Nearly four million (74%) of the 5,300,000 disqualified voters are not currently in prison. Rather, they are living in communities on probation or on parole or are ex-offenders. Approximately two million of those who have been stripped of the right to vote are individuals who have completed their entire sentence, including probation and parole, yet remain disenfranchised. Nationwide, 13% of African-American men have lost the right to vote—a rate that
is seven times the national average—and 8% of African-Americans generally have been disenfranchised.\textsuperscript{11} One of the fundamental battles for the Civil Rights Movement involved the fight for the right to vote, yet that right is eliminated or rendered irrelevant when countless numbers of people within communities of color have effectively lost the franchise. Even as states somewhat belatedly begin to loosen some of the more restrictive provisions of their disenfranchisement laws, communities of color will continue to feel the devastating effects of the diminution of their political voices and power.

Another tool that is rapidly emerging as an unseen but potent means of political disempowerment for communities of color that remains largely ignored—the “usual residence” rule of the U.S. Census Bureau.\textsuperscript{12} If one were to ask the average citizen whether he or she could define the usual residence rule, the citizen most likely would indicate that he or she had never heard the term. But the lack of familiarity with both the phrase and its operation makes the practice all the more troubling. The usual residence rule instructs states to count individuals where they “live[] and sleep[] most of the time.”\textsuperscript{13} While this sounds innocuous enough on the surface, this provision has literally facilitated an unfair redistribution of political power away from urban communities of color to rural communities.\textsuperscript{14} Prison populations have the ability to artificially inflate the population figures of otherwise sparsely populated rural areas through the inclusion of non-voting prison inmates in their sums. This method of counting simultaneously decreases the population numbers within the communities from which these inmates have come and to which they will return for services and support.\textsuperscript{15} While the full impact of this practice is yet to be determined, the political redistribution facilitated by this rule will likely have an enduring impact on apportionment decisions and the resulting political resources that communities of color will have at their disposal.

\textsuperscript{11} Id.
\textsuperscript{12} Id. 
\textsuperscript{13} Id. 
\textsuperscript{14} See generally Anthony Thompson, Democracy Behind Bars, N.Y. Times, Aug. 6, 2009, at A29, \textit{available at} http://www.nytimes.com/2009/08/06/opinion/06thompson.html (describing how state funds are diverted from urban to rural areas because most state prisons are located in rural jurisdictions). 
\textsuperscript{15} Id.
When we combine the impact of state felon disenfranchisement laws with the impact of the usual residence rule, communities of color can expect to experience a devastating one-two punch that threatens to gut the political power of African-American communities. The redistribution of population numbers under the usual residence rule amplifies the political power of rural communities. It also reduces the power of communities of color in order to accumulate resources at a local level and exercise political power at the national level. The unobserved but unmistakable relationship between felon disenfranchisement and the usual residence rule is that both serve to disenfranchise large portions of African-American communities and together drain and dilute the political power that those communities could wield.

This Article examines the comprehensive and devastating blow of felon disenfranchisement and the usual residence rule to the political power of communities of color. Part I examines felon disenfranchisement and its contemporary expansions, revealing the effectiveness of this tool in controlling and limiting black political power at the state level. Part I also examines voter redistricting based on the Census and the method by which prison-based gerrymandering moves electoral power away from the communities from which inmates come—and to which they will be released—to rural prison jurisdictions in which they are housed. It then explores the interaction of these actions and their cumulative impact on black political power. Part II surveys the policies and choices that precipitated the political disempowerment of communities of color. It then examines the historical and contemporary reasons why this political disempowerment has occurred. Part III suggests ways to redress the harms caused by political disenfranchisement and to reallocate political power and resources at both the local and national level.

I. WEAKENING THE POLITICAL EXPRESSION OF INDIVIDUALS AND COMMUNITIES OF COLOR

Political disenfranchisement of African-American communities has deep roots in the history of the United States. From the Reconstruction era to current times, African-American communities have suffered the consequences of efforts to quash and to exercise control

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16. Id.
over growing political power in their communities. Some of these
efforts have been overt in their objectives to respond to and limit
black political power. Other efforts have muted the black political
voice in ways that perhaps were not intended but have had that effect.
Felon disenfranchisement has perhaps more clearly fallen into the for-
mer category over time, and the usual residence rule seems to belong
to the latter category. But whether explicit or implicit, the impact of
both on the political power of communities of color has been—and
will likely continue to be—quite potent.

A. Felon Disenfranchisement: The First Punch

The loss of voting rights following conviction of a crime is not a
new phenomenon. The Ancient Greeks and Romans prevented the
"infamous" from voting. These principles were carried through Eu-
rope, Colonial America, and ultimately to the United States. Prior
to 1840, four states (Connecticut, Delaware, Ohio, and Virginia) had
broad felon disenfranchisement laws. More states followed after
1840 when many states eliminated property restrictions on the right to
vote. The history of felon disenfranchisement reveals that denying
suffrage to felons has had a direct impact on black voter participation
in the political process since the period immediately following the
Civil War when state laws were enacted in order to disenfranchise
blacks. Contemporary uses of state felon disenfranchisement laws
may, at first blush, seem neutral with regard to race. However, the
racialized consequences of the War on Crime, War on Drugs, and

17. See LYNNING, RACIAL VIOLENCE, AND LAW vii-viii (Paul Finkelman ed., 1992) (intro-
ducing an anthology of historical accounts of racial violence with the following: "In the years
after Reconstruction southern whites continued to use violence to destroy black political power
... "); see also ERIC Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 198

18. Jason Schall, The Consistency of Felon Disenfranchisement with Citizenship Theory, 22

19. Id. at 55-57.

20. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT

21. The following Northern states enacted broad felon disenfranchisement laws in the nine-
teenth century: Connecticut (1818); Delaware (1831); Rhode Island (1841); New Jersey (1844);
New York (1847); Wisconsin (1848); Maryland (1851); Minnesota (1857); and Pennsylvania
(1860). MANZA & UGGEN, supra note 20, at 50. The more "progressive" Western states of
California (1849) and Oregon (1859) also enacted such laws. New Hampshire (1967) and Massa-
chusetts (2000) were the last Northern states to enact legislation denying felons the right to vote.
Id. at 55-58 (discussing the types of crimes added).

22. Paul Finkelman, Not Only the Judges' Robes Were Black: African-American Lawyers as
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mass incarceration—which has become a signature of the culture of control and has dominated criminal justice policy-making for the past three decades—illustrate that these laws are far from race-neutral in effect.

The United States has the highest incarceration rate in the world. From the 1920s to the early 1970s, U.S. incarceration rates remained relatively static, hovering around 110 prisoners per one hundred thousand people.23 Today, those numbers have exploded. There are approximately 714 persons per one hundred thousand residents imprisoned.24 Significantly, men of color constitute a disproportionate percentage of inmates in U.S. prisons. If current incarceration rates remain stable, close to one-third of the next generation of African-American men will lose their right to vote at some point in their lives.25 Today, 13% of black men (or 1.4 million), are disenfranchised under state laws, and 440,000 of these men have completed their sentences and ostensibly have paid their full debt to society.26 While other countries such as the United Kingdom and Russia deny prison inmates the right to vote, the United States stands alone in restricting the rights of non-incarcerated felons, who comprise approximately three-quarters of the population of disenfranchised persons.27

An ex-offenders residence determines whether he or she will lose the right to vote. A survey of states reveals wide disparities in the terms and application of laws that states have enacted to disenfranchise individuals who are convicted felons. Two states, Kentucky and Virginia, maintain the most restrictive disenfranchisement provisions—they permanently disenfranchise individuals for all felonies.28 Eight states permanently disenfranchise individuals for some felony convictions. Thirty-five states prohibit convicted offenders from voting while on parole.29 Thirty states apply this rule further to prohibit

27. Id.; Uggen & Manza, supra note 23, at 778.
28. See Uggen & Manza, supra note 23, at 782 n.5.
29. Id.
individuals on probation from voting.\textsuperscript{30} Delaware is the only northern state to disenfranchise individuals with felony convictions who have completed their parole or probation.\textsuperscript{31} Forty-eight states do not allow inmates to vote while they are in custody.\textsuperscript{32} The result of this voting rubric is that inmate presence in the prison community can be used to increase the political power and Congressional representation there as opposed to the community where the inmate will return home.\textsuperscript{33}

Recognizing the gravity of the decision to deprive an individual of the franchise, some states have opted in recent years to restore the right to vote under certain circumstances. Twenty states restore voting rights upon completion of the inmate's sentence, which includes probation or parole.\textsuperscript{34} Five states restore voting rights automatically after release from prison and discharge from parole and allow probationers to vote.\textsuperscript{35} Thirteen states and the District of Columbia restore the right to vote automatically after release from prison.\textsuperscript{36} Two states, Maine and Vermont, have no disenfranchisement statutes on the books and permit inmates to vote.\textsuperscript{37} Many felons, depending on their offense, who wish to regain their voting rights must submit to a psychological examination.\textsuperscript{38}

While expansions of felon disenfranchisement laws historically have served as implements of reversing black political gains,\textsuperscript{39} the origins of felon disenfranchisement do not reveal a decision to enact laws

\textsuperscript{30} Id.
\textsuperscript{31} In 2000, Delaware amended its constitution to allow ex-felons to vote five years after serving their sentences. However, individuals convicted of homicide, manslaughter, a sexual offense, bribery or improper influence of a public official, and abuse of office may not have their voting rights restored. \textit{See Del. Const. art. 5, § 2; Felony Disenfranchisement Laws, supra note 26.}
\textsuperscript{32} \textit{Felony Disenfranchisement Laws, supra note 26, at 3.}
\textsuperscript{33} \textit{See generally Peter Wagner, Importing Constituents: Prisoners and Political Clout in New York, Prison Policy Initiative (Apr. 22, 2002), http://www.prisonpolicy.org/importing/importing_body.pdf (discussing the “impact of mass incarceration on individuals, communities, and the national welfare” and encouraging the public to participate in creating better criminal justice policy); see also Felony Disenfranchisement Laws, supra note 26.}
\textsuperscript{34} These states include: Arkansas, Arizona, Georgia, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin. \textit{See Felony Disenfranchisement Laws, supra note 26, at 3.}
\textsuperscript{35} These five states include: California, Colorado, Connecticut, New York, and South Dakota. \textit{Id.}
\textsuperscript{36} These states include: Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Manza & Uogen, supra note 20, at 86.}
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in order to produce a racial impact. In fact, prior to the Civil War, state felon disenfranchisement laws did not have an extensive effect, in part, because states did not incarcerate many people during that period.\textsuperscript{40} Additionally, prior to the Civil War, blacks could only vote in six states, and property restrictions prohibited many African-Americans from voting at all.\textsuperscript{41} But today, many African-Americans who would otherwise be eligible to vote are prohibited from exercising this right due to the impact of criminal justice policy choices.

Litigants have challenged felony disenfranchisement laws alleging that they violate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{42} The United States Supreme Court considered the question in \textit{Richardson v. Ramirez}\textsuperscript{43} and explicitly upheld felon disenfranchisement. In that case, three individuals who had previously been convicted of felonies attempted to register to vote, but the State of California denied their application.\textsuperscript{44} The Court noted that Section 2 of the Fourteenth Amendment to the United States Constitution allows for the disenfranchisement of ex-felons.\textsuperscript{45} Specifically, Section 2 permits the denial of voting rights "for 'participation in rebellion, or other crime.' "\textsuperscript{46} The Court further found that "those who framed and adopted the Fourteenth Amendment could not have intended to pro\-hibit outright in Section 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by Section 2 of the Amendment."\textsuperscript{47} Notwithstanding other decisions in which the Court rejected some types of state limitations on voting rights under the Equal Protection Clause, in \textit{Richardson}, the Court determined that "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [Section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons" was controlling.\textsuperscript{48} The Court distinguished disenfranchisement from other state restrictions on the franchise "which have been held invalid under the Equal Protection

\textsuperscript{40} \textsc{Manza} \& \textsc{Uggen}, \textit{supra} note 20, at 54.
\textsuperscript{41} \textit{Id.} at 42, 54.
\textsuperscript{43} \textit{Richardson}, 418 U.S. at 24.
\textsuperscript{44} \textit{Id.} at 26.
\textsuperscript{45} \textit{Id.} at 54.
\textsuperscript{46} \textit{Id.} at 25.
\textsuperscript{47} \textit{Id.} at 43.
\textsuperscript{48} \textit{Id.} at 54.
Clause by this Court." The Court did not address the racial nature of both the origins of many disenfranchisement laws nor their continuing racialized impact.

Critics have attacked the Richardson decision, arguing that Section 2 should not be given such interpretive weight. In his dissent, Justice Marshall made a spirited attack, arguing that Section 2 "was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment." Justice Marshall rejected the majority's reasoning that Section 2 provides a limitation on Section 1, asserting that Section 2 merely "provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes" and the fact that "Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by [Section] 2 does not necessarily imply congressional approval of this disenfranchisement." Marshall's dissent argued that to hold otherwise would, in essence, "freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment." Another state limitation on voting explicitly authorized at the time of the adoption of the Amendment—one-year durational residence requirements—had already been declared unconstitutional by the Court in Dunn v. Blumstein.

Scholars present a related but broader attack on the meaning of Section 2. Many consider Section 2 an obsolete provision that was neither exercised nor enforced. They contend that it is a relic of the Reconstruction era without lasting significance or practical impact. Some have taken the argument even further, asserting that the Fifteenth Amendment effectively repealed Section 2 of the Fourteenth

51. See Wagner, Importing Constituents, supra note 33.
52. Richardson, 418 U.S. at 74.
53. Id. at 74-75.
54. Id. at 76.
57. Id.
Amendment. Scholars, such as Professor Gabriel Chin, posit that “Section 2 was a dead letter before it became law.” Before the Fourteenth Amendment was passed, work on the Fifteenth Amendment had already begun. Chin further argues that a fundamental inconsistency exists between the two: “Section 2 recognized state power to disenfranchise African-Americans, while the Fifteenth Amendment removed that power,” and the “Fifteenth Amendment simply eliminated the power that Section 2 attempted to regulate.”

If, as Chin suggests, Section 2 was effectively repealed by the Fifteenth Amendment, then the justification for Chief Justice Rehnquist’s reliance on Section 2 in the majority opinion of Richardson is substantially weakened. If Section 2 is no longer an active provision, then relying on it is no longer a text-based argument; rather, it simply provides evidence of types of voting limitations that were in existence at the time and that were considered appropriate by the framers of the Fourteenth Amendment. However, other types of limitations that were also accepted at the time of the writing of the Fourteenth Amendment, such as residency requirements, have been subjected to scrutiny under the Equal Protection Clause.

There is yet another ground for a more limited reading of Section 2. For example, Professor David Shapiro suggests that a close reading of the text suggests a distinction between those for whom the right to vote may be denied—those who are not male citizens over twenty-one years of age—and those for whom the right to vote may be abridged—those who have engaged in rebellion or other crime. This reading would suggest that Section 2 did not contemplate or explicitly allow a permanent denial of the right to vote to an ex-felon who has completed his sentence and, thereby, paid his debt to society.

There is also some basis to limit today’s expansive definition of felony. Using the same sources Justice Rehnquist uses in Richardson,
there already exists a limited reading of the concept of crime present. In *Richardson*, he argues that at the time the Fourteenth Amendment was ratified, twenty-nine states had provisions that withheld the franchise from "persons convicted of felonies or infamous crimes."66 At the time, the concept of "felony" was limited to crimes at common law, which when compared to modern criminal codes, is a much more limited list of offenses. Similarly, the Military Reconstruction Act, also cited by Rehnquist, required the franchise to all males over the age of twenty-one "except such as may be disfranchised for participation in the rebellion or for felony at common law."67 Finally, the enabling legislation that admitted states to representation in Congress also specified that disenfranchisement was permitted "as a punishment for such crimes as are now felonies at common law."68 Justice Rehnquist indicates that the understanding of "other crime[s]" was limited to those crimes that were felonies at common law—a sharply restricted list compared to a modern understanding of what constitutes a felony.

There is ample support for this interpretation. Between 1776 and 1821, "eleven state constitutions disqualified criminals from voting," and "by 1868 eighteen more states excluded serious offenders from the franchise."69 Although these laws differed, the most common offenses that led to disenfranchisement were infamous crimes and penitentiary offenses.70 A review of the historical evidence suggests that "early U.S. disenfranchisement law[s]... target[ed] those crimes manifesting a particularly immoral character."71 While theoretically the moral turpitude label could have been interpreted more broadly, its use as a basis for limiting the franchise is tied to common law felonies.

There is some evidence to suggest that the term "other crimes" was intended to refer to crimes that were felonies at common law.72 This interpretation would require a relatively sweeping change to the nation's disenfranchisement laws. States that disenfranchise for all felonies, as well as those that use crimes such as drug sales and drug

67. Id. at 49 (emphasis added).
68. Id. at 52.
71. Id.
72. See, e.g., Harvey v. Brewer, 605 F.3d 1067, 1070-71 (9th Cir. 2010); see also Chin, *supra* note 58, at 315.
possession, would be required to reevaluate and greatly restrict the
number of current felons who could be subjected to
disenfranchisement.

This argument was presented to the U.S. Court of Appeals for
the Ninth Circuit in Harvey v. Brewer. In Harvey, the plaintiffs ar-
gued that the Equal Protection Clause only allows for felon disen-
franchisement for crimes designated as felonies at common law. The
Ninth Circuit justices rejected this as a prerequisite for felon disen-
franchisement. First, Justice O'Connor, who wrote for the panel,
noted that in Richardson v. Ramirez, one of the plaintiffs had been
convicted of a crime that was clearly not a felony at common law. The
panel held that the Fourteenth Amendment's term "other crime"
was not restricted only to common law felonies. It stated that not only
did historical dictionaries not define crime as common law crime but
also that the best way to determine the seriousness of a crime is to see
how modern legislatures designate the offense. The panel also re-
ferred to the Supreme Court's decision in Blanton v. City of North Las
Vegas, in which the Court held that the Sixth Amendment's guarantee
to a jury trial could not be based solely on common law offenses. In
Blanton, the Supreme Court recognized that "[o]ur adherence to a
common-law approach has been undermined by the substantial num-
ber of statutory offenses lacking common-law antecedents."

Despite the Supreme Court's rejection of equal protection chal-
lenges to state felon disenfranchisement laws, the Equal Protection
Clause may still offer a glimmer of hope to litigants. In Hunter v.
Underwood, the Court made clear that it did not read Section 2 as
being "designed to permit the purposeful racial discrimination attend-
ing the enactment and operation of [the disenfranchisement law in
question] which otherwise violates [Section] 1 of the Fourteenth
Amendment. Nothing in our opinion in Richardson v. Ramirez . . .
suggests the contrary." In this case, the Court held that provisions
of a state felon disenfranchisement law that denied the right to vote to
persons convicted of crimes involving moral turpitude violated the

73. Harvey, 605 F.3d at 1067.
74. Id. at 1072.
76. Harvey, 605 F.3d at 1074 (noting that the crime was heroin possession).
77. Id. at 1074-75.
78. Id. at 1075; see also Blanton v. City of N. Las Vegas, 489 U.S. 538, 541-43 (1989).
79. Blanton, 489 U.S. at 541 n.5.
Equal Protection Clause, noting that the provision was originally motivated by racial discrimination against blacks. Thus, if litigants can establish intentional discrimination or demonstrate a pattern of unequal or selective enforcement, they may prevail. But such challenges would likely prove difficult. Ultimately, communities of color will need to advocate for legislative change in order to reverse the impact of felony disenfranchisement.

B. The Usual Residence Rule and Voter Redistricting: The Second Punch

In similar fashion, the usual residence rule threatens to gut the political power of African-American communities. Counting inmates as residents, an act permitted under the Census Bureau’s usual residence rule, skews political power, clout, and resources. The usual residence rule is an important dimension of the national Census that instructs states to count individuals where they “live[] and sleep[] most of the time.” It is this practice that permits states and counties to count prison inmates as residents of the jurisdiction in which the prison is located. While most prisoners typically come from low-income urban communities and ultimately return to those same communities upon release, they are not counted as part of the population in those communities for the purpose of the Census. Instead, sparsely populated rural areas can legally inflate their population numbers by including prison inmates who do not have the power to vote in those rural areas in their count.

The dramatic impact on political power and resources that occurs because of the implementation of the usual residence rule was most likely unintended when the rule was first created. The Census emerged as the principal centralized mechanism employed by the federal government to count the entire population in order to apportion

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81. Id. at 232-33.
84. Id.
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congressional representation to each state rationally and fairly. Because the federal government’s principal concern in taking the Census is to capture the total number of residents within a state for apportionment purposes, the question of where in the state prisoners should be counted—either in their home district or in the district in which the prison is located—makes no difference to Census officials. Consequently, since the government instituted the Census in 1790, prisoners generally have been counted as residents of the correctional facility in which they are being held and, therefore, as part of that jurisdiction’s local population. This redistribution of numbers simultaneously amplifies the political power of rural communities and dilutes the potential political power of the communities of color from which these inmates come and to which they will return upon release from prison for services and support.

Several states have imposed laws asserting that incarceration does not modify one’s residence. Accordingly, the practice employed by many states of counting prisoners as residents of the prison in which they are incarcerated runs counter to state residency law. Legal residence tends to be “defined as the place that people choose to be and do not intend to leave.” In most instances, prisoners cannot choose where they are incarcerated, and they fully intend to leave as soon as possible. Under this view, a prison appears to be the antithesis of a residence, and the inclusion of prisoners in the population of the district in which the prison is located appears to be in direct conflict with state law.

The Supreme Court has decided many cases related to voting practices that unfairly dilute the vote or interfere with fundamental democratic principles. The Court has addressed issues such as stuffing ballot boxes and racially based gerrymandering, declaring such prac-


88. See e.g., CAL. ELEC. CODE § 2025 (West 2010) (“A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place . . . while kept in an almshouse, asylum or prison.”); CONN. GEN. STAT. ANN. § 9-40(a) (West 2010) (“No person shall be deemed to have lost such residence in any municipality by reason of his absence therefrom because of imprisonment on conviction of crime.”).

89. Kajstura & Wagner, supra note 86 (emphasis added).

Prison-based gerrymandering may be paralleled to the Three-Fifths Clause, which was originally contained in the U.S. Constitution and under which slaves counted as three-fifths of a person for purposes of apportionment despite their inability to vote.

Today, prisoners are being counted for purposes of representation as full residents of an area where they did not choose to reside, in which they generally cannot vote, and where they typically do not intend to stay once released from incarceration. The operation of the usual residence appears to undercut the principle of one man, one vote.

When one adds the racial component—where people of color are inflating the population numbers of largely rural areas and shifting resources to those areas and away from the urban areas where those people of color are likely to return—the analogy to the Three Fifths clause is all the more compelling. The districts in which prisons are located are generally rural and have an overwhelmingly white population. Those being held in the prisons, however, are disproportionately African-American. In Georgia, for instance, African-Americans make up roughly 30% of the general population but over 60% of the prison population. Additionally, most prisoners are incarcerated in areas other than where they previously resided. An extreme example of this is Illinois where 60% of the state’s prisoners are from Cook County, but 99% of these prisoners are counted as residents of other counties. These patterns can be found to a lesser degree in many other states. Removing African-Americans from urban districts and counting them in rural or suburban areas tend to decrease voting power in their home districts. Representatives, who would likely not receive the votes of those who are incarcerated were the prisoners

91. See generally Ex parte Siebold, 100 U.S. 371 (1879) (discussing Congress’ constitutional right to punish election crimes such as placing extra ballots in a ballot box).
94. See Peter Wagner, Prisoner of the Census Analysis: Counting Urban Prisoners as Rural Residents Counts Out Democracy in New York Senate, REAL REFORM NY (Dec. 1 2003), http://www.realreformny.org/wagner120203.html (“Officially, the district is overwhelmingly white (94.2% White, 2.13% Black), but even that little diversity is from the prisoners. The 8,951 prisoners are 77% Black or Latino. Without the prisoners, the district would be 96.5% White and 0.64% Black.”).
96. See McGhee & Wagner, supra note 92.
97. Id.
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allowed to participate in elections, are nevertheless put in office specifically because of the presence of the prisoners in their district.

Anamosa, Iowa, offers a stark example of the power-shifting effect of counting prisoners as residents of their prisons. The local government in Anamosa has divided the city into four wards, each with roughly identical populations.98 Despite appearing equal on paper, each vote cast in Ward 2 of Anamosa carries almost twenty-five times more weight than votes cast in the other Wards.99 This imbalance is due to the fact that all but fifty-eight of the people in Ward 2 are prisoners.100 The situation in Anamosa is so disproportionate that a city councilman of Ward 2 was elected with just two write-in votes, one from his wife and the other from his neighbor.101 While certainly the most extreme example, Anamosa is not the only place where prisoners make up a large percentage of a district’s population.

There are a range of examples of prisoners accounting for significant portions of the population. Indeed, where the usual residence rule presents perhaps the most significant problem on the national level is where its operation creates political districts that would not otherwise exist.

For example, the district of State Senator Elizabeth O’C. Little, a Republican in upstate New York, has [thirteen] prisons, adding approximately 13,500 incarcerated “residents.” Without the inmate population, Ms. Little would face an uncertain future. Her district would probably have to be redrawn because it wouldn’t have enough residents to justify a Senate seat.102

Other examples include Lake County, TN, where prisoners account for 88% of a county commissioner district103 and La Villa, TX, where the prison population accounts for up to 69% of the city’s population.104 More typically, prisoners will account for anywhere from

99. Id.
100. Id.
101. Id.
102. Thompson, supra note 14.
103. See Roberts, supra note 98.
5% to 15% of the population in the area in which they reside.\textsuperscript{105} While these and other similarly situated districts benefit from a system that includes prisoners in the population count, those areas most adversely affected by this system are the communities from which the prisoners have come—often the areas with the highest crime rates.\textsuperscript{106}

The usual residence rule, therefore, raises two fundamental issues. First, inmates in nearly all states are not allowed to vote, yet their presence affects electoral representation in places where they do not live permanently. Second, resources shift unfairly from inner city urban areas to rural jurisdictions. When this occurs, the effects are plain to see for anyone who cares to take note. Cities lose out on funds that could be used to enhance those communities and to assist returning inmates in reentering those communities, and rural areas unfairly enjoy the benefits of inflated numbers without having to do anything other than bear the burden of maintaining a prison.

Perhaps as the impact of the usual residence rule begins to come to light, litigation on the subject will increase. Thus far, challenges have been largely unsuccessful. For example, in \textit{Borough of Bethel Park v. Stans}, plaintiffs brought suit against the National Census Bureau and the Commonwealth of Pennsylvania for applying the usual residence rule to count college students, members of the Armed Forces stationed in the U.S., and inmates of institutions in the places where they were located at the time of the Census as opposed to the places of their legal residences for all other purposes.\textsuperscript{107} Plaintiffs argued that the method of enumeration permitted by the usual residence rule resulted in an underestimation of these groups’ respective political subdivisions.\textsuperscript{108} They also alleged that such enumeration would lead to an improper allocation of federal and state funds and a dilution of the vote for these groups.\textsuperscript{109} But the Third Circuit rejected their claim that the rule violated the Fifth and Fourteenth Amendments and held that there was a rational basis for the usual residence rule.\textsuperscript{110}


\textsuperscript{106} See McGhee & Wagner, \textit{supra} note 92.

\textsuperscript{107} Borough of Bethel Park v. Stans, 449 F.2d 575, 577 (3d Cir. 1971).

\textsuperscript{108} Id. at 577.

\textsuperscript{109} Id. at 580-83.

\textsuperscript{110} Id. at 582-83.
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To the extent that litigants can tie their claims to state constitutions, they may have a better chance of success. For example, litigants in Massachusetts might raise a challenge based on the Massachusetts Constitution. The State Supreme Court has raised a question as to whether the application of the usual residence rule violates the Commonwealth of Massachusetts' interpretation of "inhabitant."\textsuperscript{111} While the usual residence rule counts an individual on the basis of where he or she lives and sleeps most of the time, the Commonwealth's constitution defines a person as an inhabitant of his or her domicile.\textsuperscript{112} It remains to be seen whether challenges under the Voting Rights Act may also prove helpful to raise issues about the dilution of the vote for communities of color.

C. The Cumulative Impact of Felon Disenfranchisement and the Usual Residence Rule on Black Political Power: The One-Two Punch

At a time when national political attention is drawn to pressing issues around the national and global economy, we have failed to appreciate the full extent of political disenfranchisement. Political disenfranchisement has occurred and continues to occur in communities of color across the country because of the staying power of state felon disenfranchisement laws and the Census' usual residence rule.

Felon disenfranchisement carries with it a range of consequences for the individuals and the communities that the rule disproportionately affects. When large numbers of African-American voters face exclusion from the polls, many critical perspectives are left out of the electorate and out of the mainstream of political debate. Indeed, the exclusion of felons poses a threat to fundamental notions of democracy.\textsuperscript{113} The impact can be felt on both an individual level and on a community level.

For the individual, the practice of barring an ex-offender from the political process reinforces his or her separation from the community and society as a whole.\textsuperscript{114} When one focuses on the large numbers of African-Americans that endure permanent disenfranchisement, one

\textsuperscript{112} See id. at 209; Eric Lotke & Peter Wagner, Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From, 24 PACE L. REV. 587, 600 (2004).
\textsuperscript{113} See Uggen & Manza, supra note 23, at 777-78.
\textsuperscript{114} Thompson, supra note 3, at 124-28.
sees parallels to other institutions that have too often sought to bar African-American perspectives. If we examine juries in the United States, for example, and efforts in some states to move away from unanimous voting, we see another method of diluting the voices of people of color. Typically, jurors of color make up a minority percentage of juries, but their views and voices often represent a critical voice of difference that would otherwise be lost if not for a requirement of unanimity. Kim Taylor-Thompson in her important work on race, gender and juries, suggests that people of color on juries serve to “decode” situations that may be in question in the context of a criminal trial. Their ability to bring insights and experiences to the deliberation enhances the jurors’ fact-finding role. Similarly, Professor Peggy Davis has also focused on the role of individuals of color “going meta” in their ability to step outside of a situation and analyze its nuances in ways that others who are not subordinated may be unable. In the context of a jury, going meta “may permit the juror of color to observe the degree to which race affects and infects the jury deliberation process, and then to re-engage and contribute insights.” Voters of color would likely bring the same outsider perspective to questions that mainstream voters might otherwise miss.

Withholding the franchise from ex-felons, who disproportionately tend to be of color, serves to exclude and reduce the impact of the voice of difference that ex-felons would likely bring to the political debate. African-Americans interact with and experience society in ways that are not shared by non-African-Americans. This is not to suggest that African-American community views are monolithic; rather, notwithstanding class differences, there are still issues where which race makes a difference in perception. And that perception informs political views and attitudes. When we add the component of experience with the justice system and imprisonment, there are a host of experiences that may affect political judgment and decision-making which should be a part of the debate and discussion. But these perspectives are simply lost due to the operation of disenfranchisement laws.

116. Id. at 1287.
118. Taylor-Thompson, supra note 115, at 1288.
119. THOMPSON, supra note 3, at 135.
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Another impact of disenfranchisement is the ostracism of the person from the community into which he or she will return. The process of political participation can serve as a critical means of reconnecting individuals to their respective communities. The creation of peer associations and genuine community connections through participation in political forums and political activity can build social capital for the individual and for the community. These activities can build community support for the individual returning to the community from a period of incarceration. The support of others and a socially active lifestyle may have some of the same benefits as mentoring and similar programs that help reconnect individuals who have spent time in custody. Returning offenders involved in democratic activity who work on issues that affect others in their situation may garner the support of community members and groups and therefore increase their likelihood of successful reintegration.

Communities of color suffer from the effects of felon disenfranchisement. Some argue that the impact of felon disenfranchisement may not be severe given that black communities tend to have low voter participation generally. But evidence suggests a link of low voter participation to felon disenfranchisement. In states with more restrictive criminal disenfranchisement laws, the overall voter turnout is lower than in states with less restrictive criminal disenfranchisement laws. Moreover, in states with restrictive criminal disenfranchisement laws, the probability of voting declines for African-Americans, even if they do not possess a criminal record. The fact that so many are barred from voting in particular communities makes exercising the franchise less a part of the fabric of the community, precipitating a negative ripple effect.

Concentrating large numbers of non-voting citizens in communities results in neighborhoods that have little or no political voice.

120. Id.
123. Id. at 80.
124. See Anthony C. Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. Rev. 235, 282-83 (2004) ("The loss of voting power has ramifications not only for the individual ex-offender, but also for the communities to which ex-offenders return, which will then include growing numbers of residents without a recognized political voice.")
Individual disempowerment and the loss of a single perspective in our democracy should raise alarm, particularly when that disempowerment is occasioned by the state. But when individual impact is multiplied and the cumulative impact of silencing large segments of neighborhoods and communities is examined, the integrity of our democratic system is brought into question. Moreover, since African-Americans overwhelmingly vote Democratic, felon disenfranchisement reduces the Democratic voting base by decreasing the number of eligible voters. Absent the voice of such a large number of African-American voters, the political process in the United States disproportionately favors the center and the right of the political spectrum.

Unlocking democracy and engaging voices that have been left out of the political discourse would alter the political playing field. Racial identification remains “highly correlated with political affiliation.” This fact raises some profound questions about the political leadership and discourse in this country. Although many states allow for the re-acquisition of voting rights, the means and methods are often expensive, labor-intensive, and unrealistic for unrepresented, indigent defendants.

When we add the usual residence rule to this mix, the results are all the more disturbing. The U.S. Census count is used to apportion voting representation and to create political boundaries. With a disproportionate number of people of color imprisoned in the United States, many of the communities losing their political power are communities of color. The usual residence rule not only serves to dilute political power, but also to divest urban communities of much-needed federal funding for social services and reentry. While prison communities are given jobs in the correctional field, communities where

125. See Uggen & Manza, supra note 23, at 780.
129. Brisman, supra note 83, at 356.
130. Id. at 301-02 (citing RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA 1
individuals return are often devoid of genuine occupational opportunities.\footnote{131}{See id.}

The usual residence rule permits the manufacture of legislative districts that would not exist but for the prison.\footnote{132}{See Taren Stinebrickner-Kauffman, Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote," 11 VA. J. SOC. POL’Y & L. 229, 230 (2004) ("Legislative districts with prisons gain constituents by virtue of the presence of the prisons, so the residents of these districts are over-represented as compared to those who live in districts without prisons.").}

Without the presence of inmates, there would be an insufficient number of citizens to create a political district organically in many instances. Some suggest that this situation can be changed by election, but this argument fails to acknowledge that individuals who are being used to enhance the political power of rural communities and being counted for redistricting purposes cannot vote.\footnote{133}{See supra notes 14-15 and accompanying text.} Moreover, too often the artificially bolstered rural districts maintain a strong political hold on state legislatures.\footnote{134}{See MANZA & UGGEN, supra note 20, at 202.}


The choice to build a prison means additional correctional jobs in communities that might otherwise have no real industry to sustain them.\footnote{136}{HULING, supra note 135.}

Countless communities have become the equivalent of company towns in which generations of families plan for careers as correctional officers. The economic viability of the community and the residents depends upon the prison’s sustained existence. So it is perhaps not surprising that maintaining those prisons becomes a priority for legislators from those jurisdictions. And when we see state legislatures opposing reductions in mandatory minimum drug sentences, the rhetoric may be crime control, but the often unspoken agenda is to avoid (at all costs) anything that might threaten the economic viability of these prison communities. Felon disenfranchisement and the usual residence rule should not be used as tools to sustain the economic...
viability of rural communities when the resultant effect is the disempowerment African-American communities.

II. THE PATH TO POLITICAL DISEMPOWERMENT: HOW DID WE ARRIVE AT THIS POINT?

The combination of post-Reconstruction legislation and the War on Drugs from the 1960s to the present has led to an explosion of collateral consequences for criminal convictions. No set of collateral consequences has been as devastating for the political life of African-American communities as the one-two punch of felon disenfranchisement and the usual residence rule. The disproportional racial impact of these strategies raises questions as to whether they were intended to operate together as a method of disempowerment or whether the combined effect was unintended. This Part will examine the history of these actions, exploring the policy choices and political context in which they occurred as well as the historic and contemporary reasons why this political disempowerment exists and persists.

A. Is This Disempowerment a Legacy of Slavery?

Felon disenfranchisement is not a new phenomenon; however, it has enjoyed periods of expansion that have coincided with gains in black political power. In one of the most significant works on disenfranchisement, Professors Jeff Manza and Christopher Uggen assert that there were two initial waves of felon disenfranchisement.137 The first wave occurred between 1840 and 1865 during which time all sixteen states that passed laws disenfranchising felons “did so after establishing full white male suffrage by eliminating property tests.”138 These measures were not specifically related to race. Of course, they did not need to be, “most states did not permit African Americans to vote at all.”139

The second major wave of felon disenfranchisement occurred between 1865 and 1900. During this time, nineteen states “adopted or amended laws restricting the voting rights of criminal offenders.”140 Before 1880, disenfranchisement laws applied to individuals convicted of common law offenses, such as murder, rape, assault, and bur-
Indeed very few states had developed or enacted a legal distinction between those offenses considered crimes at common law and any other felonies. Indeed, the enabling acts and the Reconstruction Act support the view that the term “other crimes” was intended to be limited to those crimes that were then felonies at common law. Comments by representatives indicate that they were concerned that the “other crimes” exception could be used to discriminate against black men, so they limited the provision to crimes that were then “felonies under the common law.” But between 1865 and 1900, when states expanded the coverage of disenfranchisement laws to include a broader list of felonies, they seemed focused on diluting the voting power of African-Americans as a group.

1. The Impact of Jim Crow

Felon disenfranchisement became a potent weapon in, as well as a legacy from, the Jim Crow era. Jim Crow laws were state and local statutes enacted and enforced beginning around 1876 and ending in the mid-1960s that mandated racial segregation in all public facilities. During the Reconstruction period after the Civil War, the federal government expanded and enacted into law civil rights protections for blacks who had been freed as a result of the Civil War. Blacks were elected to office, owned property, started businesses, and attended school in record numbers. This dramatic change in the political landscape was intended by Republicans (the party of Abraham Lincoln) to demonstrate that they had won the Civil War. But as a consequence, southern Democrats rededicated their efforts to finding new methods to regain control over the black population that had been freed.

141. Id. at 55, 307 n.40.
142. Id. at 55.
143. John R. Cosgrove, Four New Arguments Against the Constitutionality of Felony Disenfranchisement, 26 T. JEFFERSON L. REV. 157, 175-81 (2004) (analyzing whether the other crime exception was limited to offenses that were felonious at common law).
144. Id. at 177. Cosgrove makes three other arguments in support of a limited reading of Section 2. Two of the arguments are based on the language limiting the provision to male citizens (suggesting either that it does not apply to female felons or that it is in conflict with the Nineteenth Amendment). Id. at 188-92. The other argument focuses on disenfranchisement that is inflicted on individuals for out of state convictions (violating either the Due Process Clause or the Full Faith and Credit Clause). Id. at 181-87; see Sumi Cho, Post-Racialism, 94 IOWA L. REV. 1589, 1606 (2009).
The election of large numbers of blacks to state and federal offices was perhaps one of the most visible blows to Southern Democratic power. Indeed, these political accomplishments were met with significant backlash from whites, especially poor southern whites, who viewed the gains being made by blacks as a direct threat to white social and economic power and position.\textsuperscript{148} The change in status of blacks from slaves to elected officials did not sit well with Southern whites, and, as resentment fomented, southern whites looked for new ways to fight "the egalitarian policies adopted by" the newly established governments.\textsuperscript{149}

Blacks were aware that this moment in history presented an opportunity. So they made use of the franchise to elect unprecedented numbers of freedmen to office. Between 1869 and 1901, twenty-two blacks were elected to Congress.\textsuperscript{150} The social and political impact was immediate. Whites felt threatened by the presence of black office-holders. One commentator reflected the feelings of whites, writing in 1881 that the enfranchisement of the black population caused the "debasement of the elective franchise."\textsuperscript{151} He added that the impending "negro domination" ultimately would result in "incompetence, profligacy, and pillage, the like of which has never disgraced the annals of any English-speaking people."\textsuperscript{152}

With fears of a new racial hierarchy, white Southerners banded together in an effort to subvert federal voting laws. Democrats, "guardians of white suffrage," easily made "the Negro [voter] a whipping boy, a scapegoat" for all of the problems facing the post-war South.\textsuperscript{153} The conflict between Republican and Democratic platforms debating the power of federal rather than state sovereignty emerged as a contentious issue that spurred both legislative and judicial attempts at black disenfranchisement. Once the Union regained control of the Confederacy, a number of bills were enacted as federal law, including the Enforcement Act of 1870 and the "Ku Klux Klan" Act

\textsuperscript{152} Id. at 242.
\textsuperscript{153} Id.
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of 1871. The federal government soon became the national "arbiter of citizen's rights." While a national debate raged about states versus federal rights, the Supreme Court was reluctant to limit state powers.  

Some observers viewed black empowerment as "further punishment of white southerners by radical Republicans." These feelings spurred increasingly violent acts, such as lynchings and rapes, against blacks individually. At the same time that these more obvious forms of racial intimidation and hatred were becoming the norm, more institutionalized forms of legal discrimination began to emerge on the American landscape. In 1877, a "national compromise" secured southern votes in the national presidential election and sold out newly freed blacks in the enforcement of civil rights. This compromise resulted in the withdrawal of federal troops from the south and virtually guaranteed the unencumbered enforcement of Jim Crow laws without federal interference.  

The United States Supreme Court became a willing collaborator. In Plessy v Ferguson, the Court facilitated the institutionalization of Jim Crow in 1896 by officially sanctioning legalized segregation. The Court found that separate but equal facilities were constitutional and that any sense of inferiority that separate but equal facilities produced was solely a product of Black perception. The Court also stated that prejudice could not be undone by forcing the commingling of races. While the enforcement of Jim Crow was already well underway, the language of "separate but equal" from Plessy gave Southern lawmakers the rhetorical underpinning and legal justification for brutal systems of segregation.  

The Jim Crow era went further. It forbade blacks to sit on juries and prevented them from holding positions of authority in the justice system, such as sheriffs, police officers, prosecutors, and judges. Moreover, a general social atmosphere of violence and repression resulted in what was effectively a dual criminal justice system: one for

156. See Barnes & Connolly, supra note 154, at 335.
158. 163 U.S. 537 (1896).
159. See Tyson, supra note 24, at 350-51.
blacks and one for whites. Under Jim Crow, whites could expect to escape prosecution or, if prosecuted, to escape conviction for even the most violent crimes against blacks.

The late 1800s represented the beginning of a massive retrenchment of rights for newly freed blacks. Disenfranchisement grew from a limited vehicle focused on common law felonies into a more powerful device that was used to limit the political power of blacks primarily but not solely in the South. In addition, the prison as an institution played an important role in the retrenchment of newly found black rights. Prison leasing became a method of reinforcing the white landholder's grip on economic power in the South. There have been numerous histories of the convict lease, some taking the perspective of the culture that fostered the lease,\textsuperscript{160} some focusing on the economic foundations of the lease,\textsuperscript{161} while others focus on elaborating the precise forms it took.\textsuperscript{162} In all of these instances the lease is treated as something peculiar to the South—as an anomaly in a history of American punishment focused on the creation and development of systems of imprisonment.

Robert Perkinson argues, however, that rather than viewing Southern punishment as anomalous, we can only truly understand contemporary forms of American punishment by understanding Southern punishment.\textsuperscript{163} He argues that there are two strains of punishment in the United States. One originated in the North and embraced the rehabilitative ideology, assuming that people can change and reintegrate into society. The other, coming largely out of the South, focused on "the development of labor control, racial division, and corporal debasement."\textsuperscript{164} Both strands are present in the U.S. criminal justice system, but only by focusing on Southern punishment and the latter strand can we better understand the retributive forms that punishment has taken in the late twentieth century.

\textsuperscript{160} See generally \textsc{Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South} (1984) (exploring the major elements of southern crime and punishment at a time that saw the formation of the fundamental patterns of class and race).

\textsuperscript{161} See \textsc{Alex Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South} xiv-xv (1996).

\textsuperscript{162} \textsc{Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black People in America from the Civil War to World War II} 90 (2008); see also \textsc{David M. Oshinsky, Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice} (1996).

\textsuperscript{163} \textsc{Robert Perkinson, Texas Tough: The Rise of America's Prison Empire} 8 (2010).

\textsuperscript{164} Id.
Rather than focusing solely on the convict lease as a distinct component of a larger history of punishment, the South’s increasing reliance on the convict lease until the end of the nineteenth century may be viewed as one part of a move toward the complete disenfranchisement of blacks in the South. It was one of many techniques that was used to deny the recently freed slaves political participation. As Douglas Blackmon argues:

By 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites. It was not coincidental that 1901 also marked the final full disenfranchisement of nearly all blacks throughout the South.165

Alex Lichtenstein makes a similar argument while emphasizing the unique function of convict lease within the development of the Southern economy: “Convict labor accommodated the labor needs of industrial and extractive enterprises while keeping in check the threatening social transformations associated with modernization. What anti-enticement laws, crop-liens, and vagrancy statutes were to the planters, the convict lease was to an emerging class of industrial entrepreneurs, in Georgia and elsewhere.”166

Although prior to the Civil War numerous states in the South had begun to construct penitentiaries on the Northern model, these were reserved almost exclusively for white convicts. In all Southern states where penitentiaries were constructed, however, construction was preceded by extensive debates about the role of penitentiaries in republican society. According to Ayers, the positions of the debate could be described as follows:

Some . . . Southerners believed freedom could grow best under the protection of an enlightened state government that made laws more effective by making them less brutal and offered the possibility of restoring the ex-criminal to society. Others believed, just as strongly, that such an innovation threatened the liberty of citizens and even of convicted criminals. Both sides used the same rhetoric, but with visions of a different republic in mind.167

Ayers alleges that to understand this debate it is important to understand the centrality of the concept of honor to Southerners because:

165. BLACKMON, supra note 162, at 7.
166. LICHENSTEIN, supra note 161, at 72.
167. AYERS, supra note 160, at 42.
[T]he same attitudes that perpetuated honor—distrust of the state in any of its forms and a conviction that directly aggrieved parties could best deal with their own problems—also undermined the penitentiary. The penitentiary seemed an undeniable agent of progress if one trusted an impersonal state to mete out truly blind justice, and powerful men did trust such a state, for they or men like themselves would control it. Other Southerners, common men with no power other than their own votes, sought to keep as much control as possible in their own hands and in the hands of people whom they knew and could watch.168

In this way, a class divide between those who supported the penitentiary (and had the most invested in property as a means of social order) and those who were suspicious of it (and were more likely to be inmates in the new institution) emerged.169

Although couched in terms of the meaning of Republicanism, the debate over the penitentiary was also focused on what it meant to be modern.170 The supporters of the penitentiary tended to be representative of the most cosmopolitan elements of their society. They shared many of the values and concerns of the outside world, and they were aware that the rest of the Anglo-American world increasingly looked upon their slave South as a throwback to a part of a common past best forgotten. This may help account for the frequency with which the dualism of “barbarism” and “civilization” recurs in Southern pleas for the penitentiary.171

The foundations of the penitentiaries in the South were very shallow. Ayers argues that, in the North, “an emerging capitalist ideology fused with republicanism to make the institution seem less obtrusive than it did to many people in the South. Republicanism and capitalism reinforced each other’s emphasis on internalized values, the transforming power of labor, and the necessity of order and regularity.”172 These ideologies did not permeate the South, where the penitentiary appeared to be a centralized source of power unconnected to other values.

Once they were created, the penitentiaries in the South were composed largely of “[p]oor and alien white men.”173 Blacks were emphatically not inmates during the antebellum period because “peni-

168. Id. at 57-58.
169. Id.
170. Id.
171. Id. at 55.
172. Id. at 71.
173. Id. at 61.
tentiaries in a republican society simply were not for slaves. Slaves had no rights to respect, no civic virtue or character to restore, no freedom to abridge."174 Although they always constituted a minority, the existence of free blacks posed significant problems to Southern penitentiaries. According to prison officials, the presence of blacks would destroy any reformatory effect the prisons might exert because "it destroyed white men's feelings of pride while dangerously inflating that of the blacks."175 The solution was to "lease free blacks to work outside the prison walls on canals, roads, and bridges."176

The one exception to the overwhelmingly white prison populations in the South was found in Texas where although there were no black prisoners, it did have among its imprisoned population "a disproportionate number with Mexican roots."177 Instead of subjecting slaves to the penitentiary, slaves were largely subjected to the discipline of their owners and as such were largely outside the reach of the criminal justice system. This version of subjugation although different from slavery, has its roots in fundamental disempowerment of certain communities. Political disempowerment in this way served to subordinate communities of color.

B. Is This Disempowerment a Political Conspiracy?

As one examines the policy choices that have led to the political disenfranchisement of African-Americans, it is perhaps worth exploring whether there is reason to suspect a political conspiracy. Authors have attempted to link the War on Drugs and other criminal justice efforts to anti-civil rights efforts in the early 1970s. This analysis necessarily starts with an exploration of Jim Crow and post-Jim Crow politics and policies.

After the Jim Crow laws took hold in the South and began to creep into the North, the Civil Rights Movement in the 1960s began to attack the racism inherent in "separate but equal" practices and laws.178 The 1960s represented a time of heightened political unrest

174. Id.
175. Id. at 62.
176. Id.
177. Perkinson, supra note 163, at 76.
and activism, marked by the anti-Vietnam War Movement. But coinciding with Americans' attacks on the war came increasingly potent expressions of black political power. Black political activism found two principal avenues for expression: the Black Power Movement and the Civil Rights Movement. While employing often vastly divergent tactics, the objectives of both movements were to empower blacks, attack racist practices and laws, and demonstrate that black people would not allow racist practices to go unnoticed or unanswered.

Largely due to the choice to employ non-violence as a signature for the movement, the Civil Rights Movement gained tremendous attention and popular momentum. What is perhaps remembered most clearly is that the Civil Rights Movement mobilized a nation to change. What is remembered less clearly is that in an effort to discredit the movement, Southern governors and law enforcement officials mobilized white opposition by changing the discourse from equality and civil rights to a demand for "law and order." Southern officials attempted to redefine civil rights protest activities as criminal rather than political in nature in order to gain traction and support for their efforts to thwart black political activism. These political leaders, tapping into Southern white anger at losing their political control over blacks, successfully tied the emergence of the Civil Rights Movement to what they would proclaim was a "breakdown of law and order" necessary to protect the social fabric of the country.

"Crime rhetoric thus reemerged in political discourse as southern officials called for a crackdown on the 'hoodlums,' 'agitators,' 'street mobs,' and 'lawbreakers' who challenged segregation and black disenfranchisement." However, this rhetoric was not limited to the South. It also entered the national discourse on the Civil Rights


183. Id. at 30.

184. Id.

185. Id.
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Movement as evidenced by former Vice President Richard Nixon’s argument that “the deterioration [of respect for the rule of law] can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them.” Katherine Beckett argues that “racial subtext” of the arguments for the need for increased law and order:

was not lost on the public: those most opposed to social and racial reform were also most receptive to calls for law and order. Ironically, it was the success of the civil rights movement in discrediting more explicit expressions of racist sentiment that led politicians to attempt to appeal to the public with such “subliminally” racist messages.

When the Republican candidate for President, Barry Goldwater, based his 1964 campaign on a law and order platform, the public’s fear of crime was quite low. Despite the lack of public concern, Goldwater raised the specter of lawlessness and loss of social control as central issues in his campaign. Couching opposition to expanding civil rights legislation in calls for law and order had found a national stage at the same time this approach was gaining traction on a state and local level among the most ardent opponents of civil rights and desegregation.

But it was not until the election of 1968 that this call for increased law and order resulted in Richard Nixon’s call for increased convictions. Richard Nixon’s presidential platform was built largely on “Tough on Crime” rhetoric that focused a great deal on the gains made by the black community. Nixon’s Chief of Staff, H.R. Haldeman, described in detail the strategy imposed by the President in addressing his strategy: “[President Nixon] emphasized that you have to face the fact that the whole problem is really the Blacks. The key is to devise a system that recognizes this while not appearing to.” Despite the centrality of crime in Nixon’s campaign, once in office he had to confront the fact that crime was largely a local issue. As a result,

186. Id. at 31 (internal quotation marks omitted).
187. Id. at 32.
188. Id. at 25.
190. Id. at 431.
191. Tyson, supra note 24, at 368.
192. Id.
193. Id. at 368-69.
"[i]nsiders concluded that 'the only thing we could do was to exercise vigorous symbolic leadership' and therefore waged war on crime by adopting 'tough sounding rhetoric' and pressing for largely ineffectual but highly symbolic legislation. Still, the Tough on Crime policies that were devised and implemented by the Nixon Administration were continued in subsequent Republican administrations under the label of the 'War on Drugs.' The War on Drugs was fought on the streets of African-American communities and targeted young African-American men—perhaps, the largest contributor to the high number of disenfranchised blacks.

It seems clear that support for increasingly punitive crime control policies was linked to views on race. For instance,

Beginning in the early 1970s, researchers found that those expressing the highest degree of concern about crime also tended to oppose racial reform. . . . Others also found that racial attitudes were an important predictor of support for law and order rhetoric: "those who support a hard line on law and order issues tend to be more racist and sexist, tend not to support equal rights for unpopular minorities . . . and they have a more negative view of welfare recipients." At the same time, views with regard to race became the determinate of party affiliation: "As the traditional working-class coalition that buttressed the Democratic party was ruptured along racial lines, race eclipsed class as the organizing principle of American politics. By 1972, attitudes on racial issues rather than socioeconomic status were the primary determinant of voters' political self-identification." Katherine Beckett argues that this is why crime control rhetoric was so useful to the Republican party, maintaining that "[t]he rise of racial attitudes as the primary determinant of partisan loyalty and the association between racial attitudes and beliefs about crime and punishment help to explain the utility of crime-related issues to the Republican party." This was viewed by political strategists as one type of "coded antiblack campaign rhetoric." This campaign strategy also explains Reagan's creation of the War on Drugs.

195. Thompson, supra note 3, at 49.
196. Beckett, supra note 182, at 84.
197. Id. at 42.
198. Id. at 86.
199. Id. at 41.
The conventional wisdom among the Republicans was that the way to attract working-class men and their families was on the basis of what Reagan called the social issues—especially law and order. Consistent with this analysis, the Republican party platform of 1980 advocated “firm and speedy application of criminal penalties,” increased use of the death penalty, and the “firm punishment of drug pushers and drug smugglers with mandatory sentences.”

While considering the use of crime control rhetoric by political elites, it is important to evaluate the impact of this rhetoric on public attitudes. One argument is that the political initiative with regard to increasingly punitive crime control policies was a response to public concern about increasing crime rates. Public opinion regarding crime was not shaped in response to experience with increasing crime or drug use, rather “levels of public concern are largely unrelated to the reported incidence of crime and drug use but are strongly associated with the extent to which elites highlight these issues in political discourse.” Her findings show that

from 1964 to 1974, levels of political initiative on and media coverage of crime were significantly associated with subsequent levels of public concern, but the reported incidence of crime was not. From 1985 to 1992, political initiative on the drug issue—but not the reported incidence of drug use or abuse—was strongly associated with subsequent public concern about drugs.

Moreover, “while the reported rates of crime and drug use shifted slowly and gradually, public concern about these problems fluctuated quickly and dramatically.” This further suggests that the shift was related to political initiative rather than to actual reported rates of crime or drug use.

1. War on Drugs: Jim Crow Updated

With any reference to a historical phenomenon such as the Holocaust, Slavery, or Jim Crow comes certain metaphorical challenges. Some believe that a contemporary comparison in some way diminishes the significance and impact of the historical event. In analogizing the War on Drugs to Jim Crow, I am fully aware of the limitations of the analogy; however, in light of the War on Drugs’ and Jim Crow’s focus on race, it seems appropriate.

200. Id. at 48.
201. Id. at 15.
202. Id. at 23.
203. Id. at 16.
The War on Drugs grew out of the Tough on Crime politics. The strong Tough on Crime rhetoric served as a basic staple of conservative electoral politics. Indeed, during the height of the crack epidemic in black communities, the Senate finalized a version of the 1986 Anti-Drug Abuse Act that contained a trigger quantity—the issuance of crack cocaine at fifty grams triggered a ten year mandatory minimum sentence. The quantity for cocaine was set at five kilograms. The legislation also imposed twenty-nine new mandatory minimum sentences, resulting in a one hundred to one ratio between the triggering quantities necessary for powder cocaine and crack cocaine sentencing. “In 2002, 81% of the offenders sentenced for crack trafficking were Black.” Statistics reveal that “[t]he average sentence was 119 months for crack defendants and [seventy-eight] months for powder cocaine defendants.”

The collateral consequences of mass incarceration are codified in a range of laws. “Some of these controversial government measures include denying public assistance to persons convicted of drug crimes . . . [and] evicting entire families from public housing if one member is convicted of a drug charge . . . .” The crack cocaine epidemic of the 1980s and 1990s provided the media and social impetus to increase penalties associated with drugs. Images of young men of color on the nightly news with automatic weapons and gold necklaces blanketed the airwaves. In the legal arena, potential legal challenges to the new crack cocaine laws were summarily defeated. Racial challenges seeking to prove a racial animus or discriminatory intent on the part of Congress were found to be lacking.

One exception to the legal rulings on crack was the decision by Judge Cahill in United States v. Clary. Judge Cahill concluded that the crack/powder sentencing disparities are a racist holdover from a Jim Crow Era criminal justice system. Cahill reviewed factors that the

204. Tyson, supra note 24, at 378.
205. Id.
207. Tyson, supra note 24, at 379.
208. Id.
209. Id. at 381.
210. Id.
211. Id. at 375.
212. Id. at 383.
213. United States v. Clary, 97 F.3d 1457 (8th Cir. 1996); see THOMPSON, supra note 206, at 18.
Supreme Court has recognized for determining whether a law was motivated by racial discrimination, including legislative history, overall historical context, and presence of a racially disparate impact. Judge Cahill acknowledged that legislation will not contain overtly racist referrals and lawmakers will go to considerable lengths to eliminate any allusion to racial factors. He also acknowledged that "unconscious racism" plays a role in power dynamics and in the perception of crime in society, finding it in "Congress's attempt to rationalize the sentencing disparity between crack and powder cocaine." Judge Cahill revealed "not only that little thought was given to the construction of the Anti Drug Abuse Act of 1986, but also that the racialization of crack cocaine abuse through mass media and popular perception greatly influenced Congress' thinking." In addition, "[h]e present[ed] compelling statistics from official and reputable sources about the impact of mandatory minimums on the Black male population . . ." Furthermore, he "quoted a Federal Bureau of Prisons report finding a direct relation between the 90% increase in the prison population . . . and the mandatory minimum drug sentences and the sentencing guidelines." The Eighth Circuit overruled Judge Cahill, acknowledging the presence of a racial consciousness based on the testimony of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice in the House of Representatives, at the time the sentencing disparity was passed. However, while the Eighth Circuit acknowledged the presence of a racial consciousness, they did not find this was indicative of the presence of racial animus. During the Jim Crow Era, blacks were prohibited from voting through the use of poll taxes and grandfather laws and also the fear of violent retaliation, including lynching. Today, racialized mass incarceration is used to disenfranchise black voters.

While the disenfranchisement that occurred following the Civil War was the result of changes in laws that actively sought to disenfranchise particular types of felons, the increasing amount of disen-
franchisement that we see today seems to be a result of an increasing number of both crimes that are classified as felonies and felony convictions than a result of changes in felon disenfranchisement laws. This suggests that while, in the post Civil War period, the racialized nature of both voting laws and criminal laws led to the use of criminal disenfranchisement as a means to disenfranchise blacks, in the contemporary period, the laws are facially neutral with regard to race. However, the war on crime and mass incarceration effect a disproportionate racial impact.

Jeff Manza and Christopher Uggen argue that states have attempted to decrease felon disenfranchisement. They argue that this trend began in the early 1960s, reached its high tide mark in the 1970s, and continues to the present:

During this period, a large number of states ([twenty-three] in all) amended or did away with laws barring some or all of the ex-felon population from access to the ballot box. To be sure, even in the midst of this general period of liberalization, two states (Michigan and New Hampshire) became more restrictive, but the clear direction of change was toward liberalization. Some states reduced the scope of their laws by allowing probationers to vote and by automatically restoring voting rights upon completion of sentence. During the peak of this liberalization phase, voting was increasingly extended not only to ex-felons but also to those nonincarcerated felons on probation and, in some cases, parole. Five states changed their laws to automatically restore voting rights upon completion of sentence and five more to disenfranchise only inmates between 1970 and 1975. Since the mid-1970s, the pattern of change has slowed, but of those states changing their laws far more have liberalized . . . . These liberalizing measures have also affected far more individuals than the restrictive measures.222

This seems to suggest that the continued existence of felon disenfranchisement is more the result of incomplete gains during the Civil Rights Movement rather than a reaction to the gains made.223 It is also arguable that the reason disenfranchisement seems so much greater now than in the 1970s is not because the laws have become harsher with regard to actual disenfranchisement, but simply that more people are being sent to prison and, therefore, are subject to

222. MANZA & UGGEN, supra note 20, at 59.
223. Although the increased number of felony convictions seems to be a reaction to the civil rights movement, see the discussion of Katherine Beckett's work above. See supra notes 145-52, 157-63 and accompanying text.
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disenfranchisement. Even if the laws that were in place in 1960 had stayed the same, there still would have been an increase in the number of people disenfranchised. With the changes that have occurred in the laws, there is still an increase in the number of people disenfranchised, but the rate of increase is less than if the laws had not been changed. These facts may be an indication that, although some states have made their laws harsher, the overall trend is towards greater leniency.

Despite this fact, the overall numbers are staggering and have reached heights never before seen. At the time of the publication of their book, Manza and Uggen estimate that over five million adults are disenfranchised as the result of felony convictions. They argue that the high rate of felon disenfranchisement (and felony convictions) is not the result of higher levels of crime but is directly traceable to policy choices, including the fact that the likelihood of a conviction will follow an arrest has increased as well as the average sentence length.

Alexander Keyssar, on the other hand, seems to suggest that the trend has been otherwise, revealing an increase in felon disenfranchisement laws during the 1980s, but he does so without empirical support. He argues that:

by the early 1970s, the disfranchisement of felons and ex-felons was subject to serious logical and judicial challenge . . . . The challenge to these laws, however, was rebuffed by the Supreme Court in 1974. . . . History had reared its head once again: language drafted during the cauldron of Reconstruction and seemingly aimed at Confederate rebels was invoked to legitimize the disfranchisement of men and women who trafficked in illegal drugs in the 1980s.

The one example to which he cites in support of this is Massachusetts, where felons had never before been barred from the polls but whose electorate voted in 2000 to disenfranchise "men and women serving prison time for felonies. The measure was precipitated by the

224. MANZA & UGGEN, supra note 20, at 223-24.
225. See id.
226. Id. at 7.
227. Id. at 100.
228. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 330-31 (2000). Keyssar also points to the decrease of some disenfranchisement during the 1960s and 1970s but then focuses on the legal challenges to disenfranchisement in the period that follows rather than on legislative changes. Id. at 302-03.
political activism of some inmates and had strong bipartisan support in the state legislature."

III. HOW DO WE REPAIR THIS DAMAGE?

As Part I notes, there are efforts underway to attack felon disenfranchisement laws and the impact of the Census' usual residence rule principally through litigation. While some limited success may be possible through the courts, the real opportunity for addressing each as well as the cumulative impact of each may be in the policy arena. What follows is a look at efforts on both the local and federal level that offer some hope that the political disempowerment of African-American communities may be redressed.

A. Efforts on the Local Level

As New York begins redrawing its legislative districts as a result of the decennial Census, for the first time in history, it will have to count prison inmates in their home districts as opposed to counting them in the district in which they are incarcerated. This reformulation of how prisoners are counted is the first step in realigning the prison political structure, which has for years benefited jurisdictions that house prisons. This new formulation will likely have a profound impact on the New York political structure and is a model for rethinking the process of reentry for those formerly incarcerated individuals returning home.

Opponents of the new law suggest that prisoners use the same services as those citizens in the communities in which the prisons are located. However, a close examination of that argument reveals that Departments of Corrections in most jurisdictions budget for utilities and other services. The primary issue here is whether the political representation and financial resources of the state and federal government should go to jurisdictions where individuals are in custody.

229. Id. at 331.
232. Id.
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(and funds are allocated in the form of Corrections' budgets) or to communities to which these individuals will be returning (and often where they committed the offenses which landed them in custody).

New York, through recent legislation co-sponsored by Assemblyman Hakeem Jeffries of Brooklyn and Senator Eric Schneiderman of Manhattan, opted to count prisoners in their home communities rather than in prison districts. This curtails the practice known as prison-based gerrymandering. This practice has often led to increased representation for rural districts at the expense of the urban centers in which most of the prisoners resided prior to incarceration.

Senator Schneiderman, in articulating a justification for his co-sponsorship of the bill states:

The practice of counting people where they are incarcerated undermines the fundamental principle of “one person, one vote”—it’s undemocratic and reflects a broken system. This legislation is as simple as it is fair: it requires that legislative districts at every level of government contain an equal numbers of residents.

Assembly member Hakeem Jeffries asserted:

This bill is necessary to break the back of the prison industrial complex where certain communities benefit from the criminalization of young people who disproportionally come from low-income neighborhoods across the state. Prison-based gerrymandering is unfair, unethical and unconstitutional, and we will not rest until the process is changed.

Other justifications for the legislation include the assertion that it is necessary legislation at the state level because the U.S. Census continues to count prisoners in the area of their incarceration rather than their home district. This leads to a “distorting effect . . . on the drawing of legislative boundaries.” In addition, this population of individuals is distinct from other groups that are similarly counted away from home, such as college students and military personnel, in that prisoners cannot vote, and they do not interact with the surrounding community. Instead, the entire cost of their presence in these locali-

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235. Id.

236. Id.

237. Id.

238. Id.
ties is paid for by the New York State taxpayers. Finally, it is arguable that the Census’ current practice violates federal and state laws.239

The last justification addressed the direct political consequences of the legislation—that counting people in prison in the prison district “most significant[ly] [impacts] vote dilution . . . in rural communities as most counties, cities, and towns use federal census data to draw their local legislative district and ward boundaries.”240 To support this last point, they point to St. Lawrence County where prison populations are counted in establishing legislative districts. This led to “a long-running and disruptive controversy.”241 In contrast, there were numerous counties that “have corrected the census data to remove people in prison before redistricting. “242 This inequality at the local level was cited in support of change on the state level in order to “address . . . the redistricting inequities that result from relying on the Census Bureau’s counting of people in prison.”243

The recent explosion of the prison population, coupled with states’ use of census data has given rise to two main problems. First, including prisoners in the census block in which the prison is situated conflicts with the laws of many states, which declare that incarceration does not impact residence.244 Second, counting prisoners as residents of the correctional facility allows state politicians to artificially inflate a district’s population, in violation of the “one person, one vote” principle established by Reynolds v. Sims.245

1. State and Local Legislation Addressing Prison-Based Gerrymandering

Some local governments have elected not to include prison populations when drawing district lines. Of the twelve counties studied in California, all but two avoided prison-based gerrymandering despite the sizeable prison populations attributed to them by the Census.246

239. See Ceasar, supra note 231.
243. Id.
246. See Kajstura & Wagner, supra note 86.
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In Connecticut, some jurisdictions have taken it upon themselves to modify the Census data to exclude prisoners when redistricting. States are not required to use federal census data when apportioning their own legislatures.

Although a number of jurisdictions have introduced legislation to ensure that prisoners are not used to bolster a particular population count, New York joins Maryland as the only state to actually pass such legislation. Maryland's law, known as the "No Representation Without Population" Act, requires that all incarcerated persons be counted as residents of their home addresses for redistricting purposes. Maryland must now collect the home addresses of prisoners and update all relevant data accordingly. The congressional bill, introduced by Representative Gene Green (D-TX), would require the Census to count prisoners at their pre-incarceration address starting with the 2020 Census. The federal legislation would make it more difficult for states to use prison addresses for inmates to inflate population data. In addition, ten other states have introduced legislation attempting to eliminate the practice of using prisoners to artificially inflate the population count. These states include Rhode Island, Connecticut, Florida, Illinois, Minnesota, Pennsylvania, Wisconsin, Oregon, Texas, and Michigan. These bills intend to eliminate prison-based gerrymandering by either excluding prisoners from the population count for redistricting purposes or requiring prisoners to be counted at their pre-incarceration addresses.

Perhaps one of the least chronicled trends in the 2010 Census has been the impact of counting detained immigrants and federal apportionment and funding. Although prisoners have always been counted in the Census, regardless of their immigration status, the recent boom in immigrant detainees is likely to have an impact on this year's census. Unlike the controversy over where to count prisoners, which

247. See Wagner & de Ocejo, supra note 105.
249. Id.
251. Id.
252. See id.
253. See id.
only affects districting and representation at the state level, the decision regarding which detainees to count will have a significant impact at the federal level.

The 2010 Census is the first census to occur since the immigration agencies were reorganized. This reorganization led to a 400% increase in the number of immigrants detained compared to fifteen years ago. The inclusion of immigrant detainees in their state population count allows for these detention facilities to benefit enormously from the detention explosion in the form of increased representation in the House and increased federal funding. According to the Brookings Institute, the payout from the Census during the 2008 fiscal year was $1,469 per person, a significant amount of money, especially when the people it is meant to benefit will no longer be present in the country.

Some projections suggest that the government will grant over one hundred million dollars in additional funding to areas in which immigrants are detained. Texas, specifically, stands to gain the most since it is home to roughly one third of the country’s immigrant detainees. A number of Texas Representatives have argued that all detainees should continue to be counted regardless of their immigration status because the additional federal money received helps to fund the detention facilities. These arguments mirror state officials’ argument that prisoners use utilities in the jurisdictions where state prisoners are housed. The argument fails to account for the funding by Department of Corrections in the same way that immigration detention facilities are funded by the Department of Homeland Security, not by the federal grants given on the basis of Census data.

The other argument often cited by supporters of counting immigrant detainees in the Census is that the Constitution mandates that all residents are counted, regardless of citizenship. While the Con-

255. See id.
256. See id.
257. Id.
260. See Trevino, supra note 254.
261. Id.
262. Id.
263. See Sieff, supra note 259.
stitution does not mention citizenship status specifically, it does say that all free persons are to be counted, including prisoners.\(^{264}\)

In addition to the artificial inflation of a state's population created by counting detained immigrants and its subsequent effect on federal apportionment, the practice also violates state law. The state laws regarding incarceration and its effect on residency previously discussed apply to detainees awaiting deportation, as well as regular prisoners.\(^{265}\)

Another interesting aspect of counting immigrant detainees in the Census is that the detainees are often unaware that they are being counted at all.\(^{266}\) Unlike illegal immigrants in the general population who must elect to fill out the Census forms, Census forms for immigrant detainees are usually completed by prison officials.\(^{267}\) This has resulted in some unique alliances between immigration reformers who want illegal immigrants to boycott filling out Census forms until they are granted citizenship.\(^{268}\) Conservative leaders, such as Rep. Vitter of Louisiana, are also against counting illegal immigrants in the Census, albeit for very different reasons.\(^{269}\)

Although many reformers are pushing for a complete overhaul of the Census Bureau's methodology, which would require all prisoners to be counted in the areas in which they were living prior to their incarceration, the new policy implement for the 2010 Census seems to be moving in the right direction. Many reformers are introducing legislation that would allow prisoners to be counted at their pre-incarceration residences.

Perhaps the administrative or operational hurdles of enforcing a policy to count individuals in their home jurisdictions will be the greatest. The addresses of inmates who are currently incarcerated and will continue to be incarcerated at the time of the next census must be collected. The debate over counting detained immigrants presents different policy questions that will most likely need to be addressed on the federal level. As the topic of immigration reform stays in the spotlight, this issue will no doubt become contentious, with millions of dollars, potential citizenship, and federal representation on the line.

\(^{264}\) U.S. Const. art. I, § 2, cl. 3.
\(^{265}\) Id.
\(^{266}\) See Valdes, supra note 258.
\(^{267}\) Id.
\(^{268}\) Id.
B. Efforts on the Federal Level

The Democracy Restoration Act ("DRA") was introduced in the House by John Conyers in July of 2009. Hearings before House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties took place on March 16, 2010.

The DRA would create a uniform rule that the right of citizens to vote in federal elections cannot be denied because of a prior felony conviction, unless the individual is incarcerated in a correctional institution or facility at the time of the election. As previously noted, disenfranchisement laws are governed at the state level and vary widely from state to state. Under the DRA, states would retain the right to control voter eligibility for state elections only and would be free to pass laws that afford the right to vote in federal elections on less restrictive terms than those established by the Act.

1. Notification of the Right to Vote

Under the DRA, the State or the Director of the Bureau of Prisons would be required to notify those individuals in BOP custody and those convicted of criminal offenses of their right to vote. Such notice would be given in writing to those convicted of a felony either on the day the individual is sentenced, when the sentence is probation only, or when the individual is released from custody, provided he or she is not released into the custody of another State or the Federal govern-

273. H.R. 3335 § 2. The term "election" means "a general, special, primary or runoff election"; "a convention or caucus of a political party held to nominate a candidate"; "a primary election held for the selection of delegates to a national nominating convention of a political party"; or "a primary election held for the expression of a preference for the nomination of persons for election to the office of President." Id. § 6(2).
274. Id. § 2. A "correctional institution or facility" includes "any [privately or publicly operated] prison, penitentiary, jail, or other institution or facility for the confinement of individuals convicted of criminal offenses . . . ." Residential community treatment centers, or similar public or private facilities, are not included in this definition. Id. § 6(1).
275. Id. § 3.
276. See Christopher Moraff, Why Are Convicted Felons in Battleground States Being Told They Can't Vote?, ALTERNET (Oct. 9, 2008), http://www.alternet.org/news/102299/why_are_convicted_felons_in_battleground_states_being_told_they_can't_vote/.
277. H.R. 3335 § 7(a).
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For those individuals convicted of misdemeanors, notification will be given at the time of sentencing by a State court. The DRA, as drafted, has both a public and private right of action. Enforcement power under the DRA is vested in the Attorney General. There is also a private right of action. Individuals may receive declaratory or injunctive relief in a civil action against the State if they provide written notification of a violation of the Act to the chief election official of the State involved and if the violation is not cured within the time frame specified. Typically, the State has ninety days after receipt of notice to cure the violation. If the violation occurred within 120 days of an election for Federal office, however, the state only has twenty days to cure the violation. In the event that a violation of the Act occurs within thirty days of a Federal election, no written notice is required before bringing a civil action to obtain declaratory or injunctive relief.

One of the most commonly cited arguments in opposition of the DRA is that the Act infringes on States’ rights and that Congress does not have the authority to enact such legislation. Proponents of the bill cite Article 1, Section 4 of the Constitution, the Election Clause, and Congressional power to protect the right to vote under the 14th, 15th, 19th and 26th Amendments as the basis of authority for the DRA.

The Election Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” Proponents argue that the Court has interpreted this power broadly, with at least five Justices acknowledging that Congress had “ultimate supervisory power” over federal elections. This power included broadening voter qualifications, especially when the practice being challenged

278. Id. § 5(a)(1)-(2).
279. Id. § 5(a)(2)(B).
280. Id. § 4(a).
281. Id. § 4(b)(1).
282. Id. § 4(b)(1)-(3).
284. See, e.g., id. at 44 (statement of Burt Neuborne, Legal Dir., Brennan Center for Justice).
286. See Hearing, supra note 283, at 45 (statement of Burt Neuborne).
“had been used to disenfranchise members of racial minorities.”287 Opponents, on the other hand, argue that Article 1, Section 4 only gives Congress the right to alter the “times, places and manner” of such elections and not the power to regulate who can vote.288

Those supporting the DRA point to the enforcement provisions of the Fourteenth and Fifteenth Amendments as an additional source of authority as both Amendments allow for enforcement “by appropriate legislation.”289 Under the Fourteenth Amendment, Congressional enforcement power is at its peak when passing legislation aimed at correcting previous policies of government discrimination based on a protected characteristic, such as race.290 Additionally, Congressional power to enforce the Fifteenth Amendment, the right to vote, has been compared to the Necessary and Proper Clause.291 Combined, supporters of the DRA see these two Amendments as ample evidence of Congress’ ability to regulate voting laws that were initially intended to differentiate between individuals based on race.

Opponents of the DRA highlight the fact that there is a special provision in the Fourteenth Amendment for those engaged in criminal conduct.292 Additionally, they posit that the discriminatory intent required to render criminal disenfranchisement laws unconstitutional under the Fourteenth and Fifteenth Amendments cannot be sufficiently demonstrated.293 Finally, opponents point to the Qualifications Clause in the Seventeenth Amendment, which states that the qualifications of voters in congressional elections must be the same as the qualifications for voters in elections to the most populous branch of the state legislature.294 Accordingly, passage of the DRA would force states to alter their state voting requirements. This would arguably represent an unauthorized infringement on States’ rights. Those supporting the DRA dismiss this argument by pointing to Court precedent interpreting the scope of the Qualifications Clause, which would allow state voting laws to remain intact.295

287. Id.
288. See id. at 55 (statement of Hans A. von Spakovsky).
290. See Hearing, supra note 283, at 47 (statement of Burt Neuborne).
291. See id.
292. U.S. CONST. amend. XIV, § 2 (noting that the right to vote can be withheld for “participation in rebellion, or other crime”).
293. Id.
295. See id. at 46 (statement of Burt Neuborne) (discussing Tashjian v. Republican Party of Conn., 479 U.S. 208, 227-28 (1986) (stating that the Qualifications Clause of Article I was in-
The DRA addresses the inconsistent patchwork structure of voter eligibility as a result of variations in State laws. It also acknowledges the trend to address disenfranchisement nationally. Over the past ten years, twenty-one states have reformed their criminal disenfranchise ment laws. With wildly inconsistent voting rules across the country, the DRA seeks to harmonize the national access to the franchise. Access to the ballot varies radically from state to state. For example, Kentucky and Virginia permanently disenfranchise those with felony convictions, unless they are granted clemency by the state, and Maine and Vermont allow everyone with a felony conviction to vote, even while those persons are incarcerated. The remaining states fall somewhere in between.

Probation and parole add further confusion to the matter. Citizens of Utah can vote as long as they are not in prison; citizens of Colorado can vote while on probation but not while on parole; and citizens of New Mexico must be off both probation and parole before their right to vote is restored. In addition, some states, such as Alabama, only restrict re-enfranchisement for crimes that fall into specific categories, some of which remain undefined.

In many states, neither parole officers nor voting registration officials are clear on what the voting rules require of those with a felony conviction to become eligible to vote. Not surprisingly, even some local election boards create documentation requirements for convicted felons that are impossible to meet because the documents required do not exist. As a result, lack of uniformity and bright line rules in criminal disenfranchisement laws can often lead to eligible voters being denied the right to vote.

Scholars such as Burt Neuborne point out that under the Supremacy Clause of the United States Constitution, any state law in conflict with the DRA would necessarily be preempted, as was the tended to prevent mischief that would occur if state voters were unable to participate in federal elections and not to limit federal suffrage).
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case for literacy tests. In Kentucky and Alabama, for example, the passage of the DRA would have an immediate impact on their state laws.

Kentucky is one of the states that excludes all persons convicted of a felony or of "such high misdemeanor as the General Assembly may declare" from voting in elections. Individuals can only regain their right to vote by an executive pardon; otherwise, they remain disenfranchised indefinitely. Alabama bans from voting those convicted of felonies involving "moral turpitude." Individuals who are disenfranchised in Alabama cannot vote again until their civil and political rights have been restored. Crimes of "moral turpitude" are broken down into two categories, one of which represents an absolute bar to applying for restoration of civil rights, leaving certain individuals permanently disenfranchised. In 2007, the Supreme Court of Alabama issued an opinion including a list of all of the crimes that Alabama courts had previously categorized as those involving moral turpitude. Although not exhaustive, the list did little to clarify who is barred from the franchise. In contrast to Alabama, Kentucky provides a list of offenses that contains all felonies and those misdemeanors that have been affirmatively specified by the State legislature. Both states demonstrate the merit in the DRA, the development of a "bright-line rule" that would determine when former offenders would be able to exercise the right to vote.

Another lens through which to view felony disenfranchisement is the extent to which it hampers reentry. Most states and the federal government have acknowledged that part of the purpose of incarceration is to prepare individuals for reintegration back into their home communities.

In addition to the systemic issues that criminal disenfranchisement laws present, due to their role in the context of the history of the United States and to the problems they create from an administrative standpoint, criminal disenfranchisement has a real and significant im-

300. See Hearing, supra note 283, at 49 (statement of Burt Neuborne).
301. Ky. CONST. § 145, cl. 1.
302. Id.
303. ALA. CONST. art. VIII, § 177(b).
304. Id.
306. See id. (delineating a list of crimes "of moral turpitude" pursuant to Section 15-22-36.1(g) of the Code of Alabama).
307. THOMPSON, supra note 3, at 6.
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Disenfranchisement has never been proven to aid in crime reduction and has therefore been viewed by many as a continuous punishment. Many law enforcement officials support a re-enfranchisement bill because they do not see disenfranchisement as an effective policy to reduce crime. Disenfranchisement continues to punish those who have been released from prison and have finished serving out their punishment, further setting them apart from the community they are trying to rejoin. It provides a constant reminder of the conduct for which individuals have paid their debt to society and runs afoul of the basic goals of reintegration. The formerly incarcerated face many of the same concerns, responsibilities, and obligations as those without criminal records, but they are consistently denied one of the most basic methods of engagement with their community. This isolation and frustration is often cited as a cause for higher recidivism rates. Permanent disenfranchisement raises the additional issue of “taxation without representation,” as most felons are required to secure employment and therefore pay taxes as a term of their parole or probation.

Opponents point to other deprivations of freedom that criminals must face that would remain unchanged in light of the Act, such as the right to bear arms. They argue that the true motivation behind the DRA lies not in a desire restore a basic civil right, but in a belief held by liberals that former felons will likely vote for Democratic nominees given the makeup of the prison population and that this may help tip the scales in Democrats’ favor in close elections.

CONCLUSION

One of the bedrock principles of democracy is universal suffrage. African-Americans have historically been disproportionately disen-
franchised by default and often by design. The one-two punch of felon disenfranchisement and the usual residence rule have systematically undermined the political viability of black communities nationwide. Undoing felon disenfranchisement and counting individuals in the communities to which they will return after incarceration are vital steps to protecting our democracy.