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ARTICLE

ASSESSING THE CONSTITUTIONALITY OF ADJUSTING PRISONER CENSUS DATA IN CONGRESSIONAL REDISTRICTING: MARYLAND'S TEST CASE

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The issue of prisoner populations in redistricting presented itself for the first time on a national scale this redistricting cycle. Columbia University School of Law professor Nathaniel Persily was one of the first to predict a critical mass in a movement that had long subsisted in the backwater of voter advocacy circles, taking a backseat to more cognizable campaigns for voter access and non-discrimination. He observed in a recent *Cardozo Law Review* article, "[h]ow and where the census counts prisoners is likely to be the subject of much debate surrounding the 2010 Census."[1]

In most states prisoners cannot vote.[2] Maryland is one of the majority of states that denies the franchise to inmates.[3] The movement to count prisoners at their previous residences however, does not center on prisoner rights, instead it focuses on the representation rights of the communities that those prisoners come from. The crux of the argument in favor of the practice is that most inmates are displaced residents from urban communities incarcerated in institutions mostly located in rural areas.[4] Most states, with no way of knowing exactly how many prisoners the U.S. Census counted or their previous addresses, would count an entire prison inmate population toward the total population of a U.S. Congressional or legislative district.[5] For example, the Commissioner Districts in Somerset County, Maryland, includes one African-American

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[1] Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 786 (2011).

[2] The Sentencing Project, *The Impact of Felony Disenfranchisement Laws in the United States* (Oct. 1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

[3] MD. GEN. ASSEMB.,WAYS AND MEANS COMM., DEPT. OF LEGIS. SERV., Fiscal and Policy Note, H.B. 603,(2006).

[4] Persily, *supra* note 1, at 787.

[5] *Id.* Before the 2010 census, this data was known as the "Advanced Group Quarters Table." *Id.* at 788, n. 123. Such data was released after the redistricting data and thus was not available for use by states. *Id.* 787-88.

majority district; however, less than 34% of its population is eligible to vote; the rest are inmates of the Eastern Correctional Institution.[6]

Election districts all over the country are replete with examples of what has come to be known as the "prison gerrymandering" effect.[7] In general, political districts with prisons located within them significantly reduce the number of eligible voters in that district compared to districts without these large prison institutions. This disparity in eligible voter populations produces several distortions that affect voting rights. First, the most basic claim of prison gerrymandering opponents is that it distorts relative voting power, that is, votes in prison districts weigh more than votes from non-prison districts.[8] For instance, a vote in Somerset County's Commissioner District 1 prior to Maryland's prisoner reallocation law was worth 2.7 times that of votes in neighboring districts.[9] A similar rationale informed the U.S. Supreme Court's reasoning as it formulated its now famous "one person, one vote line" of cases:

> How then can one person be given twice or ten times the voting power of another person in a state-wide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote [...]. This is required by the Equal Protection Clause of the Fourteenth Amendment.[10]

Second, the distortion does not affect individual voters alone, prison gerrymandering gives more representation in the legislature to certain regions within a state.[11] Typically, rural regions with less overall population and a large prisoner population are over-represented versus their more urban counterparts. That is, many cities lose much of their

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[6] *See generally No Representation Without Population Act: Hearing on S.B. 400 Before the S. Educ., Health, & Envtl. Affairs Comm.*, 111th Cong. (2010) (written statement of the Maryland American Civil Liberties Union discussing Somerset County's 1985 consent decree under the federal Voting Rights Act of 1965 creating commissioner district 1 as a remedial African-Americ*an* majority-minority district).

[7] PRISON POLICY INITIATIVE, *The Census Count and Prisons: the Problem, the Solutions and What the Census Can Do* (Oct. 4, 2010), http://www.demos.org/sites/default/files/publications/FACTSHEET_PBG_WhatCensusCanDo_Demos.pdf (*hereinafter* "*The Census Count and Prisons*"). One of the more extreme examples offered by the Prison Policy Initiative is the city of Anamosa, Iowa. A candidate for city council won a seat after a total of two (write-in) votes were cast. In Anamosa, 96% of the district was comprised of prisoners incarcerated in a nearby prison. *Id.*

[8] *Id.*

[9] *See generally No Representation Without Population Act: Hearing on S.B. 400 Before the S. Educ., Health, & Envtl. Affairs Comm.*, 111th Cong. (2010) (statement of Peter Wagner, Exec. Dir. Prison Policy Inst.).

[10] Gray v. Sanders, 372 U.S. 368, 379 (1963).

[11] *The Census Count and Prisons*, *supra* note 7.

census population to prisons in rural districts and thus suffer less representation in the state legislature as a result. Persily described it this way:

> The counting of prisoners in prison can create dramatic disparities between districts in their numbers of eligible voters. In some state legislative districts, for example, over ten percent of the population resides in prison. The disparities can be even greater at the local level. In twenty-one counties in the country, over twenty percent of the population is in prison, leading to huge variations in eligible voter populations between districts.[12]

Third, and even more intriguing, is the question of whether the distortion caused by counting prisoners as residents of the institutions they are incarcerated in implicates the Voting Rights Act. As Persily notes, the counting of prisoners can also have a racially disparate impact: "[i]n several states, such as New York and Illinois, the prison population is heavily minority and from urban centers, while prisons are located in rural, largely white counties."[13]

Maryland has large prison institutions in Western Maryland and on the Eastern Shore. Hagerstown Correctional Institution's prison population comprises nearly 14% of the population of State Legislative District 2C.[14] The prison population of the Eastern Correctional Institution in Somerset County makes up 7% of Legislative Sub-District 38A.[15] Much of the population gains of Western Maryland and the Eastern Shore from these prison populations have been at the expense of Baltimore City, which has been losing representation in the State Legislature since the 1980's.[16]

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[12] Persily, *supra* note 1, at 787.

[13] *Id.*

[14] *See* Decl. of Karl Aro, Ex. 4 at 7, Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (ECF No. 33-5) (*hereinafter* "Decl. of Karl Aro, Ex. 4"); *see also* STATE OF MD. DEP'T OF PLANNING, REPORT OF MD. PRECINCT POPULATION DATA: 2010 CENSUS, ADJUSTED MD. REDISTRICTING DATA & UNADJUSTED CENSUS POPULATION COUNT, App. B-1 (2010) (*hereinafter* "MD. DEP'T OF PLANNING"). Census 2010 data showed 6,127 prisoners in the Hagerstown facility and a total (unadjusted) population of 43,292 in the state's 2002 Legislative Sub-District 2C, where the Hagerstown facility is located. *See* Karl Aro Decl. Ex. 4 at 7.

[15] *See* MD. DEP'T OF PLANNING, *supra* note 14, at App. B-1. Census 2010 data showed 3,254 prisoners in the Eastern Correctional facility and a total (unadjusted) population of 45,791 in the state's 2002 Legislative Sub-District 2C where the facility is located. *See* Karl Aro Decl., *supra* note 14, at 7; *see also* MD. DEP'T OF PLANNING, *supra* note 14, at App. B-1.

[16] *See generally* Legislative Election Districts, MD. GEN. ASSEMB. (2012), *available at* http://www.msa.md.gov/msa/mdmanual/07leg/map/html/map.html. Baltimore City's representation in the legislature has steadily declined over the past few decades. In 1992, Baltimore City comprised all or part of eight legislative districts. *See* STATE OF MD. DEP'T OF PLANNING, MD. 1992 LEGISLATIVE DISTRICTS (2012), *available at* http://www.mdp.state.md.us/MSDC/Redist/Legd92/92ldmdid.htm. In 2002, it was only included in 6 districts, and only 5.2 districts in 2012. *See* STATE OF MD. DEP'T OF PLANNING, MD. 2002 LEGISLATIVE DISTRICTS (2012), *available at*

Dale Ho, Assistant Counsel at the NAACP Legal Defense & Educational Fund, suggested in a 2011 *Stanford Law & Policy Review* article that prison gerrymandering could be characterized as a minority vote dilution claim under Section Two of the 1964 Voting Rights Act.[17] Heretofore, Section Two claims have followed a fairly structured legal test under *Thornburg v. Gingles,* which requires the existence of specific factors that pin a plaintiff's success on whether a remedy is available.[18] Historically, that remedy has been the creation of a majority-minority district to protect minority representation rights.[19] In the context of prisoner gerrymandering however, the remedy would encompass reallocating prisoners back to their previous residences and potentially equalizing the relative voting power between communities with and without prisoner populations.[20] Despite a general recognition of prisoner populations as an issue for redistricting in 2010, and a few scholarly musings about the legal theories a court might apply to the effects of prison gerrymandering, there were several key events leading up to Maryland's 2010 passage of its prisoner reallocation law.

A key to educating the public and drawing attention to the prisoner problem in representation has been the Prison Policy Initiative.[21] This ten-year old non-profit organization seeks to document "how mass incarceration skews democracy."[22] The issue arose when prison population growth in the United States contributed to increased distortion in state and local legislatures.[23] The group cites Anamosa, Iowa, where a prison makes up nearly 100% of a local city council district, as its most compelling example of the unfairness of counting prison populations within one district.[24] Thus, only a handful of voters control the representation of an entire city council seat.[25] While the effects of the practice are not this dramatic in most jurisdictions, it impacts varying degrees of representational rights in nearly every state.

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http://www.mdp.state.md.us/PDF/OurProducts/Redistrict/2002ld_courtappeals_62102_MD_map_web.pdf; *see* STATE OF MD. DEP'T OF PLANNING, MD. 2012 LEGISLATIVE DISTRICTS (2012), *available at* http://planning.maryland.gov/PDF/Redistricting/2010maps/Leg/Statewide.pdf.

[17] Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 388 (2011).

[18] Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986).

[19] *Id.* at 76.

[20] Ho, *supra* note 17, at 387-88.

[21] *See generally* PRISON POLICY INITIATIVE, http://www.prisonpolicy.org (last visited Sept. 29, 2012).

[22] *Id.*

[23] *Id.*

[24] *The Census Count and Prisons*, *supra* note 7.

[25] *Id.*

Although the sudden popularity of prisoner reallocation this redistricting cycle was greatly influenced by a groundswell of support from good government advocacy groups, the key to its success was a more practical one. The United States Census Bureau's operational decision to make the requisite data available to rectify the prison problem made prison reallocation possible.[26] This was undoubtedly a response to advocates hoping to end prisoner gerrymandering.[27] In April of 2011, the Census Bureau announced that it would, for the first time, make detailed prison population data from its 2010 census count available in time for decennial redistricting activity in the states.[28] This "group-quarters" data would allow states and localities to identify prisons according to their locations within census geography, and obtain detailed demographic information about the prisoner population.[29]

This policy change by the Census Bureau was made in spite of many pleas by the advocacy community and other stakeholders to end its policy of counting prisoners as residents of the prisons.[30] However, the Census Bureau insists that after much research and deliberation, changing its practice would be too cumbersome and expensive to implement.[31] In its view, ascertaining the previous addresses of prisoners was beyond the scope of Census Bureau operations.[32]

Where the Census Bureau created "opportunity," the Second Circuit created legal legitimacy when it mentioned prison gerrymandering in the 2006 decision *Hayden v. Pataki*.[33] *Hayden* involved an unsuccessful

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[26] *2010 Census Advance Group Quarters Summary File, Census of Population and Housing*, U.S. CENSUS BUREAU 1-1 (Apr. 2011), http://www.census.gov/prod/cen2010/doc/gqsf.pdf; *see* Peter Wagner, *Census Bureau Releases Group Quarters Data*, PRISONERS OF THE CENSUS BLOG (Apr. 22, 2011), http://www.prisonersofthecensus.org/news/2012/10/26/nacreop-testimony.

[27] *See* Wagner, *supra* note 26.

[28] *2010 Census Advance Group Quarters Summary File*, *supra* note 26, at 1-1. In the past, this data file would be distributed long after most states completed redistricting. *See* Wagner, *supra* note 26.

[29] *See generally 2010 Census Advance Group Quarters Summary File*, *supra* note 26, at G-2 (stating that the residence rule is used to determine where people should be counted during the census, and that people who do not have a usual residence (or cannot be determined), a usual residence should be counted based on their current location).

[30] *See, e.g.*, *The Problem*, PRISONERS OF THE CENSUS, http://www.prisonersofthecensus.org/impact.html (last visited Nov. 26, 2012).

[31] *See* U.S. CENSUS BUREAU, TABULATING PRISONERS AT THEIR "PERMANENT HOME OF RECORD" ADDRESS, 1-2 (Feb. 21, 2006), *available at* http:// http://www.census.gov/newsroom/releases/pdf/2006-02-21_tabulating_prisoners.pdf ("Counting prisoners at a 'permanent home of record' address, rather than at their place of incarceration, would result in increased cost both to the decennial census program and to the federal, state, and local correctional facilities that would be required to participate in data collection efforts. Our study raises concerns that this change would result in decreased accuracy for a possibly large proportion of millions of individuals confined on Census day.").

[32] *The Census Count and Prisons*, *supra* note 7, at G-2.

[33] Hayden v. Pataki, 449 F.3d 305, 341-42 (2d Cir. 2006) (*en banc*).

challenge to New York's felon disenfranchisement law.[34] In this case, the plaintiffs represented a class of Black and Latino incarcerated felons and parolees in New York state prisons who claimed that the state statutes disenfranchising them are covered by the Voting Rights Act, and those statutes violated Section Two of the Act by diluting minority voting power.[35] The Second Circuit, sitting *en banc*, affirmed the lower court's holding that the Voting Rights Act did not cover New York's disenfranchisement law, but the court pondered an issue not explicitly raised by the plaintiffs:

> It is unclear whether plaintiffs' vote dilution claim also encompasses a claim on behalf of plaintiffs who are neither incarcerated nor on parole, that their votes are "diluted" because of New York's apportionment process, [...], which counts incarcerated prisoners as residents of the communities in which they are incarcerated, and has the alleged effect of increasing upstate New York regions' populations at the expense of New York City's. Plaintiffs' complaint does not raise this claim explicitly, though it is briefly alluded to in their submissions before this Court.[36]

Without briefs or any consideration of this issue by the District Court, the majority opinion ordered the case be remanded to consider this issue.[37] A trial never resumed on remand after plaintiffs declined to go any further with the claim, but the few lines written by the Second Circuit Court appeared to garner national attention.[38] In May 2006, a *New York Times* editorial lauded the court for recognizing the issue.[39] For advocacy groups, the court's musings became a clarion call for reform.[40]

The Supreme Court interpreted the United States Census Act to require use of the 100% decennial census count for purposes of apportioning the United States House of Representatives, rather than implementing statistical sampling and other survey data products provided by the Census Bureau.[41] This bright-line rule does not apply to

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[34] *Id.*

[35] *Id.* at 311.

[36] *Id.* at 328-29 (citing N.Y. CONST. art. III, § 4).

[37] *Hayden*, 449 F.3d at 329.

[38] *Hayden v. Pataki*, No. 00 Civ. 8586(LMM), 2006 WL 2242760 (S.D.N.Y. Aug. 4, 2006).

[39] Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES (May 20, 2006), *available at* http://www.nytimes.com/2006/05/20/opinion/20sat3.html?_r=1.

[40] *New York to End Prisoner Gerrymandering*, PRO SE (Prisoners' Legal Services of New York), Summer 2010, at 3, *available at* http://www.plsny.org/Pro_Se_-_8-25.pdf.

[41] Persily, *supra* note 1, at 758-60. In *Dept. of Commerce v. U.S. House of Representatives*, the court found that 13 U.S.C. §195 prohibits the use of statistical sampling for purposes of reapportioning the U.S. House of Representatives under Article I, Section 2 of the U.S. Constitution. Dep't of Commerce v. U.S. H.R., 11 F.Supp.2d 76, 79 (D.D.C. 1999); *see*

the data distributed to states for redistricting purposes.[42] When it comes to redistricting, which is performed at the state level, the overwhelming convention by states is to use the same unadjusted census data produced by the Census Bureau for Congressional apportionment.[43] Thus, by default, most jurisdictions use total population as the base from which it redraws electoral lines.[44] However, unlike Congressional apportionment, there is no legal precedent providing a bright-line rule that defines a "constitutionally acceptable" population base for redistricting purposes.[45] Indeed, there are many potential population bases: voting age population, citizen population, registered voters, residents, nonfelons and more, some of which involving tweaking census data.[46] Since 1988, Kansas has routinely modified census total population data by extracting college students and military non-residents for legislative redistricting.[47]

Hayden seemed to open the door to the idea that prison populations could substantially affect representational rights, but Federal courts remained silent on the question of excluding or moving prisoners in the redistricting process until the Fourth Circuit Court's decision in *Fletcher v. Lamone*.[48] The U.S. Supreme Court and various federal circuits over the years have sparingly meandered into the political thicket to consider the use of undercount estimates, voter registration rolls, and citizen voting age population data.[49] The two recurring themes in each of these scenarios seem to be the availability and reliability of the data used; and the resulting difference between the adjusted and the traditional data set.[50]

Generally, courts have given the states wide discretion when engaging in political line-drawing.[51] Until 1964, the question of courts adjudicating a state's congressional or legislative district map was

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generally U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: DESIGN AND METHODOLOGY (Apr. 2009), *available at* http://www.census.gov/acs/www/Downloads/survey_methodology/acs_design_methodology.pdf. There is some debate on what constitutes sampling. *See generally* Persily, *supra* note 1, at 758 (discussing the debate on "sampling").

[42] Persily, *supra* note 1, at 759.

[43] NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 , 11 (2009).

[44] *See id.*

[45] Persily, *supra* note 1, at 763.

[46] *Id.*

[47] KAN. STAT. ANN. § 11-301-2 (2001).

[48] *See generally Hayden*, 449 F.3d at 341-42; *see generally* Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011). However, Federal courts have heard cases centering on other types of adjusted Census data and alternate datasets. *See generally* Hunter v. Underwood, 471 U.S. 222 (1985).

[49] *See* Colgrove v. Green, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket.").

[50] *See* REDISTRICTING LAW 2010, *supra* note 43 at THE CENSUS, 10 (2009) ("Federal courts have upheld the use of alternative population bases for redistricting if the alternative database is used uniformly and if the results are comparable to those produced by a census population-based plan.").

[51] Reynolds v. Sims, 377 U.S. 533 (1964); *see Colgrove*, 328 U.S. at 552.

considered to be one of a "peculiarly political nature" outside of the court's jurisdiction.[52] After the court's turnaround in *Baker v. Carr,* it embraced jurisdiction for violations of the constitution.[53] However, the Court did not preempt the entire redistricting process:

> "From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites [...]." [54]

Since *Baker*, the Supreme Court has delved deeper into redistricting controversies, and it has recognized census data as the "best population data available" for purposes of redistricting.[55] But, the Court has emphasized that it is the accuracy and reliability of the data that is dispositive in those cases, not its status as official census data.[56] In *Karcher*, the Supreme Court rejected deviations in New Jersey's Congressional district populations meant to correct for the census undercount.[57] While the court recognized a confirmed historical undercount in censuses throughout the years, and acknowledged New Jersey's right to correct for that when redistricting, the process by which it accomplishes that must produce reliable, accurate results.[58] Adjusting census data reliably and accurately requires execution of a coherent, well-documented and even-handed policy. In *Karcher*, New Jersey line-drawers had attempted to compensate for a 1% census undercount by allowing for deviations between districts of 1%.[59] Of course, this did nothing to reduce the overall undercount of individuals in the state or between districts.[60] The court underscored the need for states to carefully tailor adjustments to census data to so that it actually improves the accuracy of population totals:

> Unless some systematic effort is made to correct the distortions inherent in census counts of total population, deviations from the norm of population equality are far more likely to exacerbate the

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[52] *Colgrove*, 328 U.S. at 552.
[53] White v. Weiser, 412 U.S. 783, 794 (1973); Baker v. Carr, 369 U.S. 186 (1962).
[54] *White*, 412 U.S. at 794.
[55] Karcher v. Daggett, 462 U.S. 725, 738 (1983) (quoting Kirkpatrick v. Preisler, 394 U.S. 526 (1969)).
[56] *Karcher*, 462 U.S. at 738.
[57] *Id.* at 731.
[58] *Id.* at 741.
[59] *See id.* at 740 (stating that the plan did not come "as nearly as practicable to population equality").
[60] *Id.* at 736.

> differences between districts. If a State does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.[61]

As early as 1966, the Supreme Court grudgingly upheld a Hawaiian legislative apportionment plan based on the state's registered voters instead of the Census Bureau's total population counts.[62] The reasoning behind the use of this alternate population group was Hawaii's unique concentration of non-resident military personnel.[63] While the Court upheld the plan, it did so with the clear caveat that the voter database "substantially" resembled Hawaii's total citizen population.[64] The Court noted that the registered voter database was not, by definition, a permissible dataset since it "depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote."[65] *Burns* clearly warned against future use of such alternative population bases, given the strong correlation needed between a registered voter database and more acceptable population datasets.[66] "We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."[67] Indeed, in 1982, a federal district court found that registered voters in Hawaii no longer approximated the citizen population total and overturned a legislative plan based on that data.[68]

Three years after the United States Supreme Court upheld Hawaii's state senate districts, the Court affirmed the District Court for the Western District of Missouri ruling, which struck down Missouri's 1967 Redistricting Act.[69] The redistricting map featured population variances above 3% between Congressional districts.[70] Missouri's main justification had been that the deviations accounted for large military populations in some areas of the state, just as had been the case in Hawaii.[71] However, the Court found the Missouri Legislature's methods lacking, calling its redistricting process "haphazard."[72] Missouri had not

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[61] *See id.* at 744 (quoting *Kirkpatrick*, 394 U.S. at 534-35 (1969)).
[62] Burns v. Richardson, 384 U.S. 73, 97-98 (1966).
[63] *Id.* at 94.
[64] *Id.* at 93.
[65] *Id.* at 92.
[66] *Id.* at 92-93.
[67] *Id.* at 96.
[68] Travis v. King, 552 F. Supp 554, 572 (D. Haw. 1982).
[69] *See Kirkpatrick*, 394 U.S. at 533.
[70] *Id.*
[71] *Id.* at 534.
[72] *Id.* at 535.

used voter registration records as was done in Hawaii, but simply made "adjustments" to the total population data, something the court found to be too unreliable.[73]

More recently, the Fifth Circuit Court of Appeals considered the question of using citizen voting age population as the basis for redistricting.[74] In *Chen v. City of Houston*, the Plaintiffs sued the City of Houston's apportionment of its City Council districts.[75] *Chen* included a claim that the City violated the Fourteenth Amendment's Equal Protection Clause by using total population as the basis for attaining proportional representation between districts.[76] While the plaintiffs acknowledged that the use of total population was not a *per se* violation of the Fourteenth Amendment, they argued that significantly large concentrations of non-citizens in some districts created electoral inequities between eligible voters in districts.[77] Thus, when total population does not approximate the distribution of the voting eligible population, officials are obligated to use a more exacting measurement.[78] The Fifth Circuit distinguished *Chen* from prior United States Supreme Court's "one-person, one-vote" cases, and instead required jurisdictions use a particular population base for redistricting.[79] *Chen* criticized the Supreme Court as being "evasive in regard to which population base must be equalized," and acknowledged the thorny tension between representational equality (equal numbers of individuals per representative) and electoral equality (equal numbers of voters per representative).[80]

Advocates seeking to end prison-based gerrymandering contend that counting prisoners where they physically reside for redistricting purposes violates both representational and electoral equality.[81] It violates representational equality because prisoners are not recognized as residents of the prison's location in most jurisdictions.[82] Electoral equality is violated by the fact that these prisoners cannot vote.[83] Additionally, large concentrated populations of non-voters generally distort a district's relative voting strength.[84]

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[73] *Id.*
[74] Chen v. City of Houston, 206 F.3d. 502 (5th Cir. 2000).
[75] *Id.*
[76] *Id.* at 523.
[77] *Id.* at 522.
[78] *Id.*at 524.
[79] *Id.* at 524-525; *see* Reynolds v. Sims, 377 U.S. 533 (1964); *see generally Burns*, 384 U.S. 73.
[80] *Chen*, 206 F.3d at 524.
[81] Ho, *supra* note 17, at 383.
[82] *Id.* at 384.
[83] *Id.*
[84] *Id.* at 394.

The only thing federal courts have made clear regarding acceptable apportionment population bases for redistricting is that the matter is simply not settled. Interestingly, the Supreme Court hinted that it is agnostic when it comes to picking and choosing what qualifies as acceptable and what does not, since such decisions are so deeply entwined with more political notions of representation.[85] For now, it seems the federal bar is more willing to judge the procedural aspects of a jurisdiction's choice of population base when it comes to assessing constitutionality under the Fourteenth Amendment, and not the choice itself.

Maryland's "No Representation without Population" Act requires that population counts used for creating legislative districts exclude current inmates who were not state residents prior to their incarceration.[86] Inmates who are state residents must be counted as residents at their last known address.[87] The Act, enacted in 2010, was broadly supported by the civil rights community in the state, with several prominent civil rights organizations testifying on its behalf.[88]

In Maryland, as in so many other states, the issue of whether to include prison populations was a practical one. Heavily African-American jurisdictions in the state, namely Baltimore City and Prince George's County, had been on a population slide since the 2000 Census.[89] When the Act was adopted, it was very likely that those regions would

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[85] *Burns*, 384 U.S. at 92 ("Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.").

[86] No Representation Without Population Act, ch. 67, 2010 Md. Laws 737, 739. These districts include both Congressional and General Assembly legislative districts; along with districts used for county and municipal governing bodies. *Id.*

[87] *Id.*

[88] Such organizations included the A.C.L.U., the Somerset County N.A.A.C.P., and the Maryland Legislative Black Caucus. *See* Press Release, Somerset County NAACP, SB 400 – No Representation Without Population Act (March 4, 2010), *available at* http://www.prisonersofthecensus.org/testimony/Somerset_NAACP_MD_SB400_March_4_2010.pdf; *see* Press Release, Somerset County ACLU, SB 400 – No Representation Without Population Act (March 4, 2010), *available at* http://www.prisonersofthecensus.org/testimony/ACLU_MD_SB400_March_4_2010.pdf; Letter from Del. Veronica Turner, Chair, Legis. Black Caucus of Md., Inc., to the Hon. Joan Carter Conway, Chair, Md. Sen. Educ., Health and Envtl. Matters Comm. (March 4, 2010), *available at* http://www.prisonersofthecensus.org/testimony/Legislative_Black_Caucus_MD_SB400_March_4_2010.pdf.

[89] MD. DEP'T OF PLANNING, *supra* note 14, at 52, 79; *see* MD. DEP'T OF PLANNING, REPORT OF MD. PRECINCT POPULATION DATA: 2000 CENSUS, MD. CENSUS POPULATION COUNT at 8-16, 81-86.

lose representation in the legislature because of population decline.[90] Counting prisoners at their previous home addresses would mitigate some of this loss, although at the time, no one could be sure how much.[91]

However, African-American residents of Maryland's Somerset County had a more specific and weighty concern.[92] During hearings on the Act, Somerset County residents testified that the county's five-member commission had never elected an African-American preferred candidate, despite the county's 42% African-American population and a 70% African-American commissioner district.[93] The culprit is the Eastern Correctional Institution ("ECI"), established in 1987, which houses approximately 3,000 prisoners and accounts for 70% of the district's population.[94] As witnesses pointed out during testimony, their majority-minority district was only majority black "on paper."[95] Somerset, being a perfect example of the so-called prison gerrymandered district, was key in ushering in corrective prisoner reallocation legislation in Maryland.[96]

While the No Representation without Population Act was a major victory for various constituencies, its language did not address the gargantuan task of actually implementing prisoner reallocation procedures.[97] Approximately one hundred local jurisdictions around the country have engaged in prisoner reallocation, but Maryland became the first to implement these procedures statewide.[98] State officials will have to review and verify address records from thirty-three state and federal facilities in the state; geocode these addresses for inclusion in a database; and then subsequently "adjust" the 2010 U.S. Census data record-by-record.[99]

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[90] Annie Linskey, *Baltimore Loses Clout in Redistricting,* BALT. SUN, Dec. 16, 2011, http://articles.baltimoresun.com/2011-12-16/news/bs-md-legis-redistrict-20111214_1_map-majority-african-american-districts-legislative-session.

[91] *See Ending Prison-Based Gerrymandering would Aid the African American Vote in Maryland,* PRISONERS OF THE CENSUS (Jan. 22, 2010), http://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf.

[92] Somerset County NAACP, *supra* note 88.

[93] *Id.*

[94] *Id.*

[95] *Id.* "Majority-minority district" a is term of art usually understood to mean "districts where a racial minority comprises a voting majority in an electoral district." REDISTRICTING LAW 2010, supra note 43 at 227.

[96] *See Maryland Law Brings Long-Awaited Racial Justice to Somerset County,* PRISONERS OF THE CENSUS (Aug. 15, 2012), http://www.prisonersofthecensus.org/news/2012/08/16/somerset-herald/.

[97] Defendant's Memorandum and Motion to Dismiss at 1-4, Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (Case 8:11-cv-03220-RWT).

[98] *Inside Maryland Politics: Counting Maryland's Prisoners,* WYPR, http://www.wypr.org/news/inside-maryland-politics-counting-maryland-prisoners (last visited Jan. 20, 2013). *See also Local Govt's That Avoid Prison Based Gerrymandering,* PRISONERS OF THE CENSUS, http://www.prisonersofthecensus.org/local/ (last visited Oct. 8, 2012).

[99] *See generally* No Representation Without Population Act, ch. 67, sec. 1, §8-701, sec. 2-2A-01, art. 24 §1-111 2010 Md. Laws (local jails were exempted from the Act).

Address records of prisoners were reviewed as they existed on the date the Census was taken, April 1, 2010, to mirror the census data.[100] As one might expect, many of these records were far from complete or accurate.[101] Address collection is not the top priority of prison intake officers. Accordingly, state officials began with a database of over twenty-thousand inmate names and addresses, many of which needed to be corrected, formatted, or supplemented before they were usable under the Act.[102] Verification and formatting of proper Maryland addresses was crucial for the geocoding process, which involves pinpointing the precise geographic location of an address via longitude and latitude; a necessity for the actual census data adjustment process.[103]

The address verification process brought about a series of policy and practice questions critical to the integrity of the process, most important of which was how to treat prisoners with no obtainable address. For various reasons, addresses were not obtainable for some prisoners: such as rural routes, post office boxes, missing house numbers, homelessness, or no address listed.[104] The state adopted regulations to ensure uniformity in dealing with each of these situations; and those regulations established clear procedures for correcting address information, along with deadlines for completing the geocoding.[105] Generally, after "reasonable efforts" are made to obtain address information, prisoners with unobtainable addresses were given the address of the institution where they were currently incarcerated.[106]

Perhaps the most unexpected challenge that faced state officials during the reallocation process was the Federal Bureau of Prisons' refusal to submit inmate address information for federal prisons located in Maryland.[107] Citing privacy concerns, the Department of Justice refused the Maryland Attorney General's repeated attempts to obtain the needed Federal inmate address data.[108] The result was a stalemate that effectively excluded federal prisoners from the entire reallocation process.[109]

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[100] Decl. of James Cannistra, Ex. 2 at 1, Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (Case: 8:11-cv-03220-RWT).

[101] *Id.* at 2.

[102] Decl. of Karl Aro, Ex. 4, *supra* note 14, at 2.

[103] Act of Aug. 13, 2010, ch. 472, § 1, 2011 Del. Acts (to be codified at DEL. CODE ANN. Tit. 29 § 804A (2011)). Delaware passed a similar law to Maryland but found the process to be too cumbersome and expensive for the 2010 redistricting cycle. *Id.* Delaware amended their law in May of 2011 to take effect for the 2020 cycle. *Id.*

[104] Decl. of Karl Aro, Ex. 4, *supra* note 14, at 3.

[105] MD. CODE REGS. 34.05.01.04 (2010).

[106] *Id.*

[107] Decl. of James Cannistra, *supra* note 100, at 3.

[108] *Id.* at 4.

[109] *See* Decl. of Karl Aro, Ex. 4, *supra* note 14, at 3.

The heart of the prisoner reallocation process is the actual modification of the database containing the official 2010 U.S. Census data's hard count of the population.[110] This involves modifying the total population counts of individual census blocks by extracting prisoners from the location of the prison, and adding them to the census blocks where their home address is located.[111] In the end, state officials reviewed over twenty-two thousand prisoner address records, and modified over ten-thousand census block totals.[112] The final adjustment of Census data resulted in a population deduction of one thousand, three hundred and twenty one nonresident prisoners from the official U.S. Census count for Maryland.[113] Western Maryland's population count was reduced by a total of seven thousand, three hundred and sixty five individuals who were reallocated or moved to their previous home address.[114] Most of these previous home addresses were located in Baltimore and the Washington, D.C. suburbs.[115]

Despite the arduous process of reallocation, the end result did not significantly change the state's demographics.[116] The nearly seventeen thousand reallocated prisoners represented only 0.3% of the state's population.[117] Under the U.S. Supreme Court's "one-person, one-vote" cases, it appears that Maryland's Census data adjustment process "approximates" the standard census data totals for the state. This fact likely influenced the court's view when considering the legal challenge against the congressional map drawn using its numbers.[118]

Maryland, like most other states, redraws its Congressional districts every ten years.[119] But, unlike other states, Maryland's governor is given the first crack at redrawing the map.[120] The highly unusual step is not a legal requirement, but a tradition.[121] Maryland's Constitution only requires the governor to submit a legislative redistricting map to the General Assembly on a pre-determined date.[122] The governor's proposed

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[110] *See Id.* at 15.
[111] *Id.*
[112] *Id.* at 14.
[113] *Id.* at 3-4.
[114] *2010 Adjusted Census Population*, MD DEPT. OF PLANNING, *available at* http://www.planning.maryland.gov/PDF/Redistricting/2010docs/Adj_2010_Tot_Pop_by_MDCntyReg.pdf, (last visited Oct. 11, 2012).
[115] *Id.*
[116] Decl, of Karl Aro, Ex. 4, *supra* note 14 at 3-4.
[117] *Id.* During the process 16,988 prisoners were relocated, bringing the adjusted total population for Maryland to 5,772, 231. *Id.*
[118] *Fletcher*, 831 F. Supp. 2d at 893-94.
[119] MD. CONST. art. III, § 5.
[120] *Id.*
[121] *Redistricting Process in Maryland,* MARYLAND GENERAL ASSEMBLY REAPPORTIONMENT AND REDISTRICTING, http://mgaleg.maryland.gov/Other/Redistricting/Redistricting.htm (last visited Jan. 20, 2013).
[122] MD. CONST. art. III, § 5.

map then automatically becomes law, unless a supermajority comprised of both chambers of the General Assembly enact an alternative legislative redistricting map within forty-five days.[123]

The Maryland state constitution does not refer to drawing U.S. Congressional districts, thus the U.S. Constitution leaves the General Assembly with jurisdiction over this matter.[124] Despite the General Assembly's authority to establish Congressional districts for the state, the governor has traditionally introduced a Congressional redistricting map in companion to the state legislative map.[125] However, the General Assembly has greater latitude to accept or reject the governor's proposed Congressional map.[126] The General Assembly may, at any time, pass an alternative plan or accept the governor's proposal by a majority vote.[127]

Part of the reason for the gubernatorial tradition of presenting the legislature with the Congressional and state legislative redistricting maps is due to the Maryland Constitution's public hearing requirement.[128] Article III, Section 5 of the Maryland Constitution requires the governor to prepare the state legislative plan only after "public hearings."[129] In 1974, the Court of Appeals of Maryland clarified this constitutional language when it invalidated a state legislative map proposed by the governor after one public hearing was held two days prior to its General Assembly introduction.[130] The court found that a single public hearing was not adequate, and the governor has since appointed an advisory committee to hold pre-map and post-map hearings in order to comply with the court's holding.[131] The General Assembly appears to be content with the governor's process for legislative redistricting, and has acquiesced to following the same process for Congressional redistricting.[132]

In July 2011, Maryland Governor Martin O'Malley appointed a five member advisory committee to submit a map of proposed Congressional

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[123] *Id.*

[124] *See* U.S. CONST., art. I, § 4.

[125] *Overview of the 2012 Census Redistricting Data Program*, MD. DEPT. OF PLANNING, *available at* http://planning.maryland.gov/PDF/Redistricting/2010docs/2010CensRedistdata ProgOvrvw.pdf.

[126] MD. CONST. art. III, § 5.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *In re* Legislative Redistricting of the State, 271 Md. 320, 317 A.2d 477 (1974). *See* Memorandum from William H. Adkins, II, Assistant Dir. of Dep't. of Legislative Reference, Maryland Gen. Assembly to All Members of the General Assembly (Aug. 1, 1973) (on file with author).

[131] Press Release, Takirra Winfield, Governor O'Malley Announces Members of the Governor's Redistricting Advisory Comm. (Jul. 4, 2011), *available at* http://planning.maryland.gov/PDF/Press/pressRelease-RedistrictingCommittee070411.pdf.

[132] *Redistricting Process in Maryland, supra* note 121.

districts.[133] This map was submitted after the committee held twelve public hearings across the state, and in time for an October special session of the General Assembly.[134] The General Assembly held this special session in order to complete the Congressional redistricting process in time for the Spring 2012 presidential primaries.[135] The Governor's map featured a reconfigured Sixth Congressional District that challenged the re-election prospects of the district's long-time Republican incumbent Congressman.[136] It also made major changes to districts in central Maryland and the Washington suburbs.[137] Legislators passed the Governor's proposed map in a three-day session, which prompted the filing of several lawsuits by discontented constituents.[138]

The Maryland Constitution lists various standards and requirements for drawing state legislative districts, including mandates to construct compact districts or to maintain the integrity of political subdivisions.[139] However, it is silent in regards to Congressional redistricting, and thus any and all legal constriction on Congressional redistricting exists in Federal law.[140] Practically speaking, this means that there are no state constitutional mandates for drawing Congressional district maps in Maryland.[141] The only specific federal statutory requirement for Congressional districts is that they be single-member.[142] Thus, the only significant legal limitations on the drawing of Congressional districts in Maryland are the Voting Rights Act of 1965, and federal case law interpreting the U.S. Constitution, specifically, the Fourteenth and Fifteenth Amendments.[143]

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[133] Takirra Winfield, *supra* note 131.

[134] *Fletcher*, 831 F. Supp. 2d at 891.

[135] *Redistricting and Reapportionment*, MD. DEPT. OF LEGIS. SERVS., *available at* http://mlis.state.md.us/Other/Redistricting/Redistricting.htm.

[136] Abby Livingston, *Maryland Legislature Passes Map Endangering Bartlett*, ROLL CALL, Oct. 19, 2011.

[137] *Fletcher*, 831 F. Supp. 2d at 903.

[138] *Id.* at 891.

[139] MD. CONST. art. III, § 5.

[140] *Redistricting and Reapportionment, supra* note 135.

[141] *Id.*

[142] *See* 2 U.S.C. § 2(c) (1967) (stating that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative."). Before passage of the single-member district requirement, states were free to elect some of its congressional representatives at-large under the Reapportionment Act of 1929. *See generally* Wood v. Broom, 287 U.S. 1 (1932).

[143] 42 U.S.C. § 1973a (2006); Baker v. Carr, 369 U.S. 186 (1962) (Fourteenth Amendment requires that political districts be equal in population so that a single person's vote would be weighed equally in any district); Dept. of Commerce v. U.S. H.R., 525 U.S. 316 (1999) (Supreme Court held that reapportionment must be carried out using the Census Bureau's actual enumeration and not statistically adjusted data provided by the Census); Mahan v. Howell, 410 U.S. 315, 322 (1973) (Supreme Court held that strict population equality is required among congressional districts in each state); Reynolds v. Simms, 377 U.S. 533, 578

The vast majority of legal challenges to redistricting plans fall into the following categories: 1) equal population; 2) racial gerrymandering; 3) political gerrymandering; and 4) violations of the Voting Rights Act of 1965.[144] The equal population requirement, which is the focus of this article, stems from both Article I, Section 2 of the U.S. Constitution (in regards to Congressional districts), and the Fourteenth Amendment (for legislative and other redistricting maps).[145] Both racial and political gerrymandering claims arise from the Fourteenth Amendment's Equal Protection Clause.[146] Section two of the Voting Rights Act covers minority vote dilution claims, as well as redistricting plans deemed to be "retrogressive" to minority populations.[147] The Voting Rights Act bans redistricting plans that purposely discriminate and have a discriminatory effect on minorities.[148]

The grievances claimed in lawsuits against Maryland's 2012 Congressional redistricting map included all of the above challenges.[149] Several plaintiffs, mostly minority residents from various regions of Maryland, filed suit in Federal District Court and alleged the 2012 Congressional map discriminated against Maryland minority voters; was an illegal partisan gerrymander; and violated the "One Person, One Vote" equal population requirement.[150] Plaintiffs alleged that there were various impermissible infractions against minority voters.[151] Chief among these complaints was the manner that the map used to split minority communities in the Baltimore and Prince George's County areas.[152] The plaintiffs claimed that some minority communities were split in order to create predominantly white districts, which the plaintiffs argued was illegal racial gerrymandering in violation of the Fourteenth Amendment.[153] Additionally, the plaintiffs alleged that other minority communities were submerged into majority white districts in order to dilute the minority vote, and thus violated Section Two of the Voting Rights Act.[154]

(1964) (Supreme Court held that the Equal Protection Clause requires States to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.").

[144] *See generally,* REDISTRICTING LAW 2010, *supra* note 43.

[145] *Redistricting and Reapportionment, supra* note 135.

[146] *See* Shaw v. Reno, 509 U.S. 630 (1993); Davis v. Bandemer, 478 U.S. 109 (1986).

[147] *See generally* REDISTRICTING LAW 2010, *supra* note 43; RACIAL AND LANGUAGE MINORITIES 51 (2009).

[148] *Id.*

[149] *Fletcher*, 831 F. Supp. 2d at 891.

[150] *Id.*

[151] *See generally*, Fletcher v. Lamone, 831 F. Supp. 2d 887 (2011).

[152] *Fletcher*, 831 F. Supp. 2d at 891.

[153] *Id.* at 891-92.

[154] *Id.* at 897.

A three-judge panel of the United States District Court of Maryland heard oral arguments on the above claims, and delivered their decision to dispose of all of the plaintiffs' claims in *Fletcher v. Lamone*.[155] In *Fletcher*, the court briefly reviewed and stated its rationale for dismissing each claim.[156] Particularly noteworthy are the court's reasons for rejecting the equal population challenge, which the court based on the state's prisoner reallocation efforts.[157] Plaintiffs appealed the panel's decision on the equal population challenge directly to the United States Supreme Court, who denied the appeal and summarily affirmed the lower court's decision.[158] The Court's denial indicates how the Court views census data adjustment for prison populations in the context of the Equal Protection Clause and the "One Person, One Vote" principle.[159]

Fletcher's racial gerrymandering claim focused on Congressional Districts Three and Five. The plaintiffs described District Three as containing "finger-like district lines [...[that] reach down into Baltimore City snatching minority voters, [and] effectively grafting them into a majority district within the suburbs."[160] District Five, located in Prince George's County, it claimed "bizarrely hooks left to split off minority neighborhoods into three separate districts."[161] This claim of intentional racial discrimination via gerrymandering is based on a distinct group of cases stemming from the U.S. Supreme Court's decision in *Shaw v. Reno*.[162] The *Shaw* line of cases recognized for the first time that voting districts drawn in a way that is so bizarre that the shape itself can be *prima facie* evidence of intentional discrimination, something the Court described as drawing district boundaries using race as the primary and controlling factor.[163]

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[155] *See Id.* at 891. Plaintiffs in the case sued Linda Lamone, the head administrator of Maryland's State Board of Elections. *Id.* Under 42 U.S.C. § 1973c, a three-judge federal district court panels has jurisdiction in all reapportionment and Voting Rights Act cases with direct appeal to the U.S. Supreme Court. 42 U.S.C. § 1973(c) (2006).

[156] *Fletcher*, 831 F. Supp. 2d at 891.

[157] *Id.* at 896-97.

[158] Fletcher v. Lamone, 133 S.Ct. 29, 29 (2012).

[159] Report of the Special Master, 2012 Legislative Redistricting of the State, Misc. Nos. 1, 2, 3, 4, 5, 9. Sept. Term, 2012, 3, n. 3 (Sept. 20, 2012) *available at* https://docs.google.com/viewer?url=http%3A%2F%2Fwww.courts.state.md.us%2Fcoappeals%2Fhighlightedcases%2F2012districting%2Fspecialmastersreport.pdf.

[160] Plaintiffs' Memorandum in Support of its Motion for Preliminary Injunction as to Count Three and Six of the Complaint at 16 Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (No. 11-3220).

[161] *Id.* at 18.

[162] Shaw v. Reno, 509 U.S. 630 (1993).

[163] Miller v. Johnson, 515 U.S. 900, 905 (1995) (citing Arlington Heights v. Metropolitan Housing Devel. Corp., 42 U.S. 252, 266 (1977) ("Redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close scrutiny that we give other state laws that classify citizens by race.")); *Shaw*, 509 U.S. at 644 (citation omitted). Ironically the *Shaw* line of cases comprised of white plaintiffs seeking redress for bizarrely shaped minority-majority districts. In *Fletcher*, the plaintiffs are minorities.

In *Shaw's* dicta, the Court noted that bizarrely shaped districts alone were not necessarily evidence of racial discrimination, but that such districts indicate that traditional districting principles were secondary to racial concerns.[164] The *Fletcher* court reiterated this in its opinion and conceded that several of Maryland's congressional districts were "unusually odd."[165] In particular, Congressional District Three was "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the state."[166] Despite its failed aesthetics, the court found no evidence of discriminatory intent.[167] The opinion noted broad support by the African-American community, the substantial involvement of African-Americans in the development of the map, and the relative proportionality of majority African-American districts to their share of the total population.[168]

The *Fletcher* plaintiffs contended that the "bizarre" boundaries in Maryland's 2012 Congressional District map not only indicated intentional discrimination, but violated Section 2 of the Voting Rights Act by diluting the voting strength of African-Americans in the state as a whole.[169] The Governor's map contained two African-American minority-majority districts, District Four (53.72%) and District Seven (53.75%).[170] District Five was considered a minority "opportunity district" with a 37% African-American population.[171] According to the plaintiffs, three compact majority African-American districts could have

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Fletcher, 831 F. Supp. 2d at 891. The court has found unconstitutional racial gerrymanders under the Fifteenth Amendment as early as 1960. *See* Gomillion v. Lightfoot, 354 U.S. 339 (1960). The *Shaw v. Reno* and *Miller v. Johnson* decisions were based on the Fourteenth Amendment's Equal Protection Clause. *See Miller*, 515 U.S. at 905; *see Shaw*, 509 U.S. at 630.

[164] *Shaw*, 509 U.S. at 642.

[165] *Fletcher*, 831 F. Supp. 2d at 902-03. The *Fletcher* court was especially critical of the Third Congressional District, and described the contours of the District in a footnote: "The Third District is rated at or near the bottom of all congressional districts [nationally] in multiple measures of statistical compactness." *Id.* at 902, n. 5.

[166] *Id.* at 902.

[167] *Id.* at 897.

[168] *Id.* at 902. Two African-American majority districts make up twenty-five percent of the state's eight districts. *Id.* African-Americans makeup twenty-eight percent of the total population in the state. *Id.*

[169] Pl.'s Mem. in Supp. of its Mot. for Prelim. Inj. as to Count Three and Six of the Compl., *supra* note 162, at 23.

[170] *Fletcher*, 831 F. Supp. 2d at 891.

[171] Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction as to Count Three and Six of the Compl., *supra* note 162, at 18. *See also*, *Fletcher*, 831 F. Supp. 2d at 902 ("The State Plan also creates two districts, the Second and the Fifth, with significant and growing minority populations. Assuming population trends remain consistent, both of these districts could conceivably elect minority candidates on the basis of majority/minority coalition voting").

been drawn given the total African-American population of Maryland.[172] Although the U.S. Supreme Court has emphasized that maximizing the number of minority-majority districts in a plan is not required under the Voting Rights Act or any other law, a state could be required to draw an additional minority-majority district where there has been a finding of minority vote dilution.[173]

The U.S. Supreme Court established a three-pronged preliminary test in *Thornburg v. Gingles* to determine when a vote dilution claim is valid.[174] Generally, a vote dilution claim is established when (1) racially polarized voting persists; (2) the minority group in question is politically cohesive; and (3) the group can form a relatively compact district that will allow them to elect candidates of their choosing.[175] The analysis to determine vote dilution under Section Two of the Voting Rights Act can be performed by the officials responsible for redistricting or other stakeholders, but the determination almost always ends up in court for review.[176]

The *Fletcher* plaintiffs offered evidence to satisfy the three *Gingles* factors, which the court found lacking.[177] First, Plaintiffs submitted alternative maps that showed that a third, compact African-American congressional district could have been easily drawn in Maryland.[178] Presumably, this went to prove that the minority population was politically cohesive and could be formed in a compact district, but the court took exception to this evidence and noted that compactness, in the context of Section Two, requires more than analysis of the shape of the proposed third district, but "compactness of the minority population itself."[179] The *Fletcher* majority found that the state actually only had two distinct concentrations of African-Americans, one in the Baltimore

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[172] Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction as to Count Three and Six of the Compl., *supra* note 162, at 16.

[173] *See* Shaw v. Hunt, 517 U.S. 899, 909 (1996). States have drawn majority-minority districts of varying shapes and compactness after determining that not drawing them would violate either section 2 or section 5 of the Voting Rights Act. *Id.*

[174] *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986).

[175] *Gingles*, 478 U.S. at 50-51. One of the Supreme Court's more steadfast rules are the so-called *Gingles* factors. To make a prima facie case of minority vote dilution, minority plaintiffs must show "[they are] sufficiently large and geographically compact to constitute a majority in a single-member district . . . [are] politically cohesive, . . . and the white majority votes sufficiently as a bloc to defeat the minority's preferred candidate." *Id.*

[176] REDISTRICTING LAW 2010, *supra* note 43 at 129 ("The trend toward litigation in state and federal courts continued from the 1990s, with a total of 41 states experiencing litigation in either state or federal courts, if not both. Of considerable interest, 28 states experienced some litigation in state court related to legislative redistricting, and an additional 19 had some state litigation related to congressional redistricting.").

[177] *Fletcher*, 831 F. Supp. 2d at 898-99.

[178] *Id.* at 897-98.

[179] *Id.* at 899.

region and the other in suburban Washington, D.C.[180] Any map with a third African-American majority congressional district would have to combine African-Americans from these two distinct areas.[181] While the Plaintiffs attempted to show homogeneity among both regions, the court disagreed, noting that "the differences between the two areas are real."[182] The court pointed out stark differences in the industry, culture and media markets of the Baltimore and Washington areas, and rejected the notion that they together "form a single community of interest."[183]

The *Fletcher* plaintiffs' partisan gerrymandering claim identified the five congressional districts comprising the Western Maryland, Central Maryland and Baltimore regions as unconstitutional gerrymanders.[184] The Plaintiffs offered evidence that showed the district map was drawn to ensure a seven-to-one Democrat Party majority in the state's Congressional delegation.[185] Because there is no specific precedent suggesting that partisan motives violate the U.S. Constitution, and there is no state or federal statute barring political motive when drawing Congressional boundaries, the plaintiffs could only rely on the Supreme Court's fragile majority in *Vieth v. Jubelirer*.[186] That case continued to recognize the justiciability of partisan gerrymandering claims, despite having utterly failed to establish an analytical framework from which it can intelligently identify an unconstitutional partisan gerrymander.[187] Indeed, a plurality of the *Vieth* court lamented that there were "no judicially discernible and manageable standards for adjudicating political gerrymandering claims."[188]

The *Fletcher* court similarly found no reliable standard by which to adjudicate the partisan gerrymandering claim.[189] To persuade the

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[180] *Id.*

[181] *Id.* at 897.

[182] *Fletcher*, 831 F. Supp. 2d at 899. Similarly, the U.S. Supreme Court in *League of United Latin American Citizens v. Perry* (*LULAC*) found that two geographically separated Latino populations within a Texas majority-minority district were also socially distinct. League of United Latin American Citizens v. Perry, 548 U.S. 399, 435 (2006). Thus, section two of the Voting Rights Act would not be satisfied by putting the two very different groups together in one district. *See id.* at 433-34.

[183] *See Fletcher*, 831 F. Supp. 2d at 899-900 (also finding plaintiffs' proof of racially polarized voting lacking). *Id.* The court noted "high levels of white support for minority candidates in several races" and only "moderate" or occasional racial block voting." *Id.*

[184] Plaintiff's Complaint at 15, Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) (No. 11-3220). The analysis to determine vote dilution under Section Two of the Voting Rights Act is commonly performed by the officials responsible for redistricting or other stakeholders to assess their legal liability when formulating redistricting plans and courts have amassed a considerable body of precedent on the analysis required to support a Section Two claim. REDISTRICTING LAW 2010, *supra* note 43 at 64.

[185] *Fletcher*, 831 F. Supp. 2d at 903.

[186] Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

[187] *See* Davis v. Bandemer, 478 U.S. 109 (1986); *see also Fletcher*, 831 F. Supp. 2d at 903.

[188] *Vieth*, 541 U.S. at 281 (Scalia, J., plurality opinion).

[189] *Fletcher*, 831 F. Supp. 2d at 904.

Fletcher panel that the map's overriding goal was to increase partisan strength, plaintiffs relied only on Justice Stevens' dissent in *Vieth*.[190] Despite Justice Stevens' position, it is well established that the Court has never considered political motivation by itself to be a suspect motive in redistricting.[191] The judiciary's acquiescence to the political nature of redistricting is much of the reason why redistricting map controversies were considered non-justiciable until *Baker v. Carr*.[192]

"One Person, One Vote" decisions by courts since *Baker v. Carr* have two parallel tracks by which the population equality standard for congressional redistricting plans are separate and distinct from that of legislative or other local electoral bodies' plans.[193] The Supreme Court first articulated this difference in standards in *Wesberry v. Sanders*.[194] The reason for the difference can be found in the origin of the law that requires it. The Court's equal population requirement for legislative plans emanates from its interpretation of the Fourteenth Amendment's Equal Protection Clause.[195] Additionally, Article I, Section Two of the U.S. Constitution specifically requires that representatives be apportioned among the several states "according to their respective numbers."[196]

This difference, according to the U.S. Supreme Court, results in a substantially equal population standard for state and local legislative bodies; and a strict equality population standard for congressional districts.[197] The stricter congressional standard points back to the direct Constitutional mandate, while the Court created the substantially equal standard.[198] The difference or variance between congressional district population totals must be minimal in order to avoid scrutiny by the courts.[199]

The *Fletcher* plaintiffs' equal population claim relied on the assumption that the state used impermissibly adjusted U.S. Census data.[200] Thus, Maryland's 2012 Congressional Districts were severely

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[190] Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction as to Count Three and Six of the Compl., *supra* note 162, at 22.

[191] *Fletcher*, 831 F. Supp. 2d at 903.

[192] *See Baker*, 369 U.S. at 198; *but see Colgrove*, 328 U.S. at 556.

[193] *See generally* Mahan v. Howell, 410 U.S. 315, 322 (1973).

[194] Wesberry v, Sanders, 376 U.S. 1 (1964).

[195] Reynolds v. Sims, 377 U.S. 533, 577-78 (1973).

[196] U.S. CONST. art. I, § 2.

[197] *Howell*, 410 U.S. at 322 ("Thus whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting [...] The dichotomy between the two lines of cases has consistently been maintained").

[198] *Reynolds*, 377 U.S. at 569 ("[T]he overriding objective must be substantial equality.").

[199] *Howell*, 410 U.S. at 320-22; *see, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 742-51 (1973) (discussing state legislative redistricting plans where the difference or variance between district totals is 7.83%).

[200] *Fletcher*, 831 F. Supp. 2d at 893.

mal-apportioned and in violation of the strict equality standard.[201] According to the plaintiffs, if the total unadjusted population count from the Census was used, District Six is the biggest offender, with six thousand, nine hundred and nineteen persons over the ideal population total.[202] District Seven was the second largest offender, with four thousand, six hundred and sixty-seven persons under the ideal.[203] On the other hand, when the variance of the district is calculated based on adjusted data, the districts are perfectly balanced, to within one person in most districts.[204]

The simple question of the case becomes whether Article I, Section Two requires the State of Maryland to use the traditional, unadjusted data set from the U.S. Census Bureau.[205] The plaintiffs read *Karcher's* "best population data available" standard, discussed above, as requiring use of *unadjusted* census data.[206] The *Fletcher* court, however, chided the plaintiffs for failing to acknowledge the full context of *Karcher*; specifically that *Karcher* acknowledged that Census data could be modified to correct perceived flaws.[207]

The *Fletcher* majority also seemed to extract further meaning from both *Karcher* and *Kirkpatrick v. Preisler*.[208] First, *Fletcher* acknowledged that census data should be used as a starting point, at least in congressional redistricting.[209] Second, *Fletcher* stated that any adjustments must be documented and uniformly implemented.[210] Both

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[201] *Id.* at 893.

[202] *See* Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction as to Count Three and Six of the Complaint, *supra* note 162, at 4.

[203] *See* Defendants' Memorandum in Support of Motion to Dismiss or, in the alternative, for Summary Judgment and Opposition to Motion for Preliminary Injunction at 10, *Fletcher* v. Lamone 831 F. Supp. 2d 887 (D. Md. 2011) (No. 11-3220) (A district's "ideal" population is determined by simply dividing the total population of a jurisdiction and dividing it by the number districts to be drawn); MD. DEP'T OF PLANNING, REPORT OF MD. PRECINCT POPULATION DATA: 2010 CENSUS, ADJUSTED MD. REDISTRICTING DATA & UNADJUSTED CENSUS POPULATION COUNT, App. A-3 (2010), *available at* http://www.mdp.state.md.us/PDF/Redistricting/2010data/precinct/AppA3_Adj.pdf. Before adjusting for prisoners, Maryland's total population was 5,773,552. *Id.* Its ideal congressional district population would have been 721,694. *Id.* After prisoner adjustment, the two numbers respectively were 5,772,231 and 721,529. *Id.* Seven districts in the Congressional map at issue have a population equal to the ideal, and District Eight contained one person less due to the odd state total. *Id.*

[204] *See* MD. DEP'T. OF PLANNING, MD. CONGRESSIONAL DISTRICTS, DEMOGRAPHIC TABLES: CONGRESSIONAL DISTRICTS BY COUNTY: POPULATION BY RACE (2010), *available at* http://www.planning.maryland.gov/PDF/Redistricting/2010data/md2011_congressional_summary_reportOct2011.pdf.

[205] *Fletcher*. 831 F. Supp. 2d at 894-95.

[206] *Id.* at 894; *see supra* note 55 and accompanying text.

[207] *Fletcher*, 831 F. Supp. 2d at 894 (citing *Karcher*, 462 U.S. at 738)

[208] *Fletcher*, 831 F. Supp. 2d at 894-95 (citing *Kirkpatrick*, 394 U.S. at 530-31, 534-35;*Karcher*, 462 U.S. at 732, n. 4, 738).

[209] *Fletcher*, 831 F. Supp. 2d at 894.

[210] *Id.* at 894-95.

requirements show the court's concern for accuracy and reliability of the data being used, and echo the sentiments of past decisions that the best available data usually includes Census data in some form.[211] Indeed, the Supreme Court has long loathed to endorse voter registration as an acceptable population base but noted its close approximation to census data.[212]

Fletcher then stated that the second part of the data question was *Karcher's* requirement that the adjusted data be relevant and systematically applied.[213] The *Fletcher* majority pointed to the state's regulatory framework for reallocation and the well-documented process for obtaining, geocoding and adjusting the data.[214] The plaintiffs did not challenge the states' reallocation process, but did suggest the state's actions were insufficient.[215] Plaintiffs argued that if Maryland could legally adjust its census data to reallocate prisoners, it would have to do the same for other similarly situated, transient populations in the state.[216] Because the state did not address these comparable populations, its actions did not fulfill *Karcher's* requirement that adjustments in systematic manner.[217]

The court confirmed that *Karcher's* endorsement of improved census data should not be read as a requirement for states to improve census data whenever possible. A Federal District Court in San Antonio, Texas, took a similar view in an unreported case regarding the State of Texas's failure to reallocate the state's prisoners before redistricting.[218] Reallocation is consistent with equal population principles, but is not a requirement.[219] Thus, the best data available standard does not mean the best data possible standard.

The *Fletcher* plaintiffs appealed the court's ruling as it pertained to their equal population claim to the U.S. Supreme Court.[220] In June of 2012, the court summarily affirmed the lower court's decision.[221] During the summer of 2012, opponents of the map launched a successful

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[211] *Id.* at 895 (citing City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir.1993)).

[212] Burns v. Richardson, 384 U.S. 73, 95 (1966).

[213] *See Fletcher*, 831 F. Supp. 2d at 896.

[214] *See id.* ("The question remains whether Maryland's adjustments to census data were made in the systematic manner demanded by *Karcher.* It seems clear to us that they were.").

[215] *Id.*

[216] *Id.* ("If Maryland wishes to correct for prisoner-related population distortions, it must also make similar adjustments to account for the distortionary effects of college students and members of the military.").

[217] *Id.*

[218] *Id.* at 895 (quoting Perez v. Texas, No. 11-Ca-360-OLG-JES-XR, slip op. at 24 (W.D. Tex. Sept. 2, 2011) ("[T]he State *could* enact a constitutional amendment or statute that modifies the count of prisoners as residents of whatever county they lived in prior to incarceration ... [but] there is no federal requirement to do so.").

[219] *Fletcher*, 831 F. Supp. 2d at 898-900.

[220] *See generally* Fletcher v. Lamone, No. 11-1178, 2012 WL 1030482 (U.S. June 25, 2012).

[221] *Id.* at *1.

campaign to petition the new congressional map to referendum.[222] In July of 2012, the State Board of Elections certified the required number of signatures needed to place the redistricting question on Maryland's 2012 election ballots.[223] In the 2012 general election, Maryland voters approved of the re-drawn districts.[224]

The *Fletcher* decision cemented the notion espoused by the voting rights cognoscenti that prisoner reallocation corrects distortions in electoral representation rather than magnifying them. What *Fletcher* did not do was endorse it as a requirement.[225] Instead, the *Fletcher* court took the middle-ground, reaffirming the role that state public policy plays in the redistricting process.[226]

Fletcher recognized prisoner reallocation as a rational public policy that states can employ in the redistricting process.[227] Prison populations distort representation, but not to the extent that it burdens equal representation rights protected by Article I, Section Two of the Constitution.[228] Legitimate state policies that properly correct for this distortion in the redistricting process are permitted, but not mandated.[229]

The *Fletcher* decision is a significant progression for a subject that has not seen much groundbreaking judicial interpretation since *Shaw v. Reno*.[230] The decision preserves the historical prominence of Census data in redistricting, while acknowledging the growth and role technology can play in a state's quest for the best data available.[231]

Courts and court watchers have long complained that redistricting is rife with political bedlam, some of which is the result of a healthy democratic system, and some that is rife with rancor and ineffectiveness. Maryland redistricting maps have had their share of judicial scrutiny over the years, and, as is the case with the great majority of redistricting controversies, courts must weigh the delicate balance between the healthy political prerogatives of the line drawer and the rules that keep them in check. Here, the court found no foul with the state's exercise of its

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[222] Earl Kelly & Pamela Wood, *Judge OKs Referendum on Congressional Map*, CAPITAL GAZETTE, (Annapolis, MD), Aug. 11, 2012, at A1.

[223] Letter from Linda H. Lamone, Administrator, Md. State Bd. Of Elections, to Neil Parrott, Delegate (July 20, 2012) (certifying 59,201 signatures) (on file with author).

[224] Holly Nunn, *Redistricting Withstands Ballot Challenge, Maps Upheld*, THE GAZETTE (Gaithersburg, MD), Nov. 6, 2012, http://www.gazette.net/article/20121106/NEWS/711079552/-1/redistricting-withstands-ballot-challenge-maps-upheld&template=gazette.

[225] *See Fletcher*, 831 F. Supp. 2d at 899-901.

[226] *Id.* at 903.

[227] *Id.* at 897.

[228] Nathaniel Persily, *supra* note 1, at 786-89.

[229] *Id.* at 788.

[230] *See generally* Shaw v. Reno, 509 U.S. 630 (1993) (recognizing a cause of action under the Equal Protection Clause for white voters in oddly shaped majority-minority districts).

[231] *See generally Fletcher*, 831 F. Supp. 2d at 887.

prerogatives.[232] More importantly, the *Fletcher* decision solidified Maryland's success as the test case for prisoner reallocation policies nationwide.

[232] *Id.* at 904.