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Political Power and Passive Citizenship: The Implications of Considering African American Prisoners as Residents of Rural New York State Districts

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Between the early 1970s and the late 1990s, the number of prisoners in the State of New York soared. The majority of these prisoners were African Americans who used to live in New York City, but served their sentences in upstate rural prisons. This transfer of urban African Americans to rural prisons has had profound political implications. Although state law dictates that these prisoners have no political rights, their numbers have been crucial for the existence of upstate senate districts dominated by conservative legislators who have generally been hostile to African Americans and their interests. If not for the counting of these urban populations as residents of upstate New York, a number of state senate districts would have to be redrawn because of a lack of adequate numbers of residents, meaning that the Republican Party would be unable to dominate the New York state senate, and that downstate New York would be more powerful politically.[2]

The counting of disenfranchised African Americans as residents for political apportionment has a long history in the United States and the practice is akin to a condition that I refer to as passive citizenship. Passive citizens are residents

of the United States who have no political rights but are counted by the U.S. Census and used for political districting purposes. Depending on the historical period and locality, these groups have included non-citizens, women, minors, Asians, Latinos, Native Americans, and people of African descent. Historically, the counting of disenfranchised populations for political purposes, has provided their oppressors the ability to maintain political power in state and national representative bodies. African Americans constitute the group with the longest and most extreme degree of passive citizenship in the United States. This has been the case with the South, which for more than a century derived immense political power from the numbers of African Americans living in its territory while excluding them from the polls. This has also been the case in the State of New York since the 1970s where upstate rural districts have benefited from the longer sentencing of downstate urban people, since prisons have provided jobs to upstate areas and also political power.

This paper examines how African Americans have been marginalized as citizens in the State of New York since the early 1970s. The incarcerations of a large number of African Americans in New York and the long duration of their terms in prison are the byproduct of political decisions that were used to consolidate the power of conservative political entrepreneurs. Though based on statutes that have been in place for centuries, the political disenfranchisement of prisoners in New York is at odds with the Voting Rights Act of 1965 (VRA) and its subsequent amendments. Federal courts have refused to fully address this question, claiming that the U.S. Congress did not specifically include prisoners and parolees in the VRA and that it should be up to the U.S. Supreme Court to invalidate state laws that disenfranchise felons. Moreover, federal and state courts, the New York

State Constitution, and New York Election Law have submitted that prisoners cannot become residents of the area where their prison is located and that they retain the residency of the area where they used to reside before their incarceration. However, the courts have refused to directly remedy the situation of counting these same prisoners as residents of the rural districts where their prisons are located, claiming that it is customary for states to use the figures of the U.S. Census to draw districts. In almost every legal challenge regarding the disenfranchisement of African American citizens in New York, the courts have sided with the states' rights doctrine, which has historically functioned as a mechanism that prolongs racial discrimination.[3]

AFRICAN AMERICANS AND PASSIVE CITIZENSHIP

Efforts to make African Americans passive citizens in the United States can be divided into four historical periods. The first period began in the colonial era and ended in the early 1870s; during this period African Americans were denied political rights in most of the states of the Union. The second period is between the early 1870s and the mid-1890s; African Americans were given the right to vote and to be elected because of federal election laws and because of the Fourteenth and Fifteenth Amendments, though in the South redistricting aimed at diluting their vote and white violence during elections sought to keep Blacks away from the polls. The third period is between the 1890s and the 1960s; known as the Jim Crow era, this period is defined by the almost complete exclusion of African American political rights in the South through constitutional amendments and other disenfranchising devices. The fourth period is between the late 1960s and the present; efforts to disenfranchise African Americans reverted to creative redistricting though the

problem of disenfranchised felons has also become very salient.

In the Constitutional Convention of 1787, the question of whether southern slaves were persons or property arose. Southerners wanted to count slaves as persons so that they could bolster their representation in the U.S. Congress though southern state laws would still prohibit these persons from voting for these representatives. Northerners argued that if slaves were persons, then they should have been citizens and allowed to vote; if they were property, then they should have been included in taxation computations. Although this question was not resolved in a satisfactory manner, the compromise was that three-fifths of the number of slaves would be used for both the apportionment of representatives and for the purpose of property taxes. The Constitutional Convention did not even resolve the citizenship status of free African Americans. Although many Northerners thought that free Blacks had the rights of citizens, this view was not always accepted.[4]

Between 1762 and 1863, most states (or colonies) restricted the franchise to white males. These states included southern, northern, and western ones. The only states to never disenfranchise African Americans were Massachusetts, Vermont, Maine, and New Hampshire. New York in its 1821 constitution placed higher property holding and longer residency periods for Blacks in relation to whites for the purposes of voting and managed to exclude most African Americans from the political process. Though some states such as Rhode Island lifted these restrictions during the antebellum period, in most states African Americans did not have political rights until the ratification of the Fifteenth Amendment in 1870.[5]

In the former confederate states, African Americans gained suffrage during the Reconstruction era but lost it in the decades that followed. During Reconstruction, African Americans were enfranchised because of the Fourteenth and the Fifteenth Amendments, which were ratified in 1868 and 1870, because of federal election laws (and their enforcement) passed between 1870 and 1872, and because Radical Republicans were able to force the defeated southern states to allow racially impartial suffrage. Almost immediately, African American office-holding in the south surged. Southern whites responded with violence and with measures aiming to dilute African American votes without officially disenfranchising voters because of their race. This changed after the 1870s with efforts to exclude African Americans from the polls becoming more direct and racially exclusive. White southerners took advantage of a declining interest of northerners toward southern affairs and used the end of Reconstruction in order to almost completely deny southern Blacks the right to vote and to be elected. By 1895, Georgia, Florida, Tennessee, and Arkansas had established poll tax qualifications that excluded African Americans. The Democratic Party of Mississippi had passed a constitutional amendment disenfranchising African Americans and some poor whites without even holding any popular referenda. The same happened in South Carolina. By the beginning of the twentieth-century, North Carolina and Louisiana had amended their state constitutions so that the great majority of African Americans would be unable to vote. Virginia and Alabama were ready to follow with similar disenfranchising constitutional conventions.[6]

The relegation of African Americans into passive citizens in southern states lasted until the 1960s and began to be reversed with the Voting Rights Act of 1965. The VRA

outlawed all the major mechanisms that southern states and localities had employed in order to deny the voting rights of African Americans and it explicitly prohibited any device that would abridge or deny the right to vote because of race or color. It also established guidelines under which the U.S. Justice Department would have to monitor election law policies in formerly disenfranchising jurisdictions and reject election law changes that sought to racially discriminate. If these jurisdictions wanted to challenge the Justice Department in the courts, they would only be able to bring such a suit in the federal court of the District of Columbia so that southern courts, that had a tendency of discriminating against African Americans, would not be involved.[7]

The legacy of the VRA is complicated though its provisions — original or as amended — have largely prevailed. This is so because the legislative and the judicial branches have been sympathetic to minority voting rights but also because Congress has attempted to maintain electoral fairness. For example, before 1982, section 2 of the VRA was seldom used in litigation because plaintiffs used the Fifteenth Amendment, which included language that was very similar; section 2 stated that political subdivisions and states may not devise a voting rule in order to "deny or abridge the right of any citizen of the United States to vote on account of race or color." In 1980, the U.S. Supreme Court decided that the Fifteenth Amendment prohibited only intentional racial discrimination in voting. The court also argued that section 2 of the Voting Rights Act simply restated provisions of the Fifteenth Amendment. This decision meant that complainants would have to prove that a voting practice was enacted and used for discriminatory purposes in order to win cases. U.S. Congress responded by amending section 2 so that plaintiffs would not be required to show purposeful discrimination in

order to obtain relief. After 1982, section 2 of the Voting Rights Act became the principle tool in vote dilution litigation.[8]

J. Morgan Kousser argues that the legislative and judicial consensus created after the passage of the VRA began to be undermined in the 1990s mostly because of U.S. Supreme Court decisions. The court embraced the arguments of opponents of affirmative action, contending that lawmakers did not have a constitutional obligation to create districts that would enhance the election of minority candidates, just as they could not use race in a way that marginalized minority candidates. In other court cases, at least three members of the U.S. Supreme Court were ready to declare provisions of the VRA unconstitutional, but through a slim majority such decisions were avoided.[9]

In recent years, most litigation over the VRA has involved redistricting. In New York many of the challenges have come from minority prisoners who believe that they have been reduced to passive citizens because of their race. These challenges have failed, not necessarily because they lack merit, but because judges have been reluctant to address voting and redistricting practices.

THE SIGNIFICANCE OF RACE IN THE NEW YORK PRISON SYSTEM

In the three decades that followed the 1960s, the prison population of the State of New York increased substantially. There were 12,444 prisoners in state prisons in 1973. That number increased to 25,921 in 1981, to 35,141 in 1985, and to 54,895 in 1990. The number of prisoners continued to increase in the 1990s reaching the figure of 71,472 in 1999. The number of inmates in New York, slowly but steadily decreased after that year, reaching the figure of

62,732 in 2005. The number of new commitments to state prisons was 7,959 in 1980, but steadily increased in the following years reaching the figure of 25,000 in 1992. After that year, the number of new commitments decreased going slightly under 20,000 in 1998 and stabilizing to the figure around 17,000 annually in the 2000s.[10]

Blacks and Latinos have constituted the overwhelming number of inmates in state prisons usually surpassing the 80% figure. For example in 1992, Blacks made up 50% of the state prison population and Latinos 35.2%. However, Blacks only constituted 12.4% of the overall state population and Latinos 10.8%. In 2005, Blacks comprised 50.4% of the state prison population and 15.9% of the state population. Latinos comprised 28.4% of the state prison population and 15.1% of the state population. No matter how these statistics are represented, since the 1970s, most of the state prisoners in the State of New York have been African Americans with Latinos constituting the second largest group.[11]

The overwhelming majority of these Black and Latino state prisoners were New York City residents. Of this, the largest group has come from Central Brooklyn, which includes Bedford Stuyvesant, the largest African American neighborhood in the city, and Crown Heights, the largest Afro-Caribbean neighborhood in the city. Other neighborhoods in Central Brooklyn include East New York, Bushwick, Bronwsville, and Flatbush, all of which have a sizable number of African Americans, Afro-Caribbeans, and Latinos. Other city neighborhoods where large numbers of state prisoners have originated from include the Lower East Side, Harlem, East Harlem, Washington Heights, and Inwood in Manhattan, the neighborhoods of the South Bronx, minority areas in Brooklyn that are not in Central Brooklyn,

and a few minority communities in Queens and Staten Island. Since the 1960s, almost all of these neighborhoods have been predominantly African American or Latino.[12]

Once sentenced, most of these people from minority New York City neighborhoods were transferred to rural upstate correctional facilities. In 2000, of the 85% Blacks and Latinos comprising the state prison population, 75% were from New York City. This figure does not even include prisoners from the urban areas of Buffalo, Albany, and Syracuse, who also found themselves incarcerated in rural areas. Although there were about 14,000 inmates in New York City prisons in 2005 (down from 22,600 in 1991), 72% were pre–trial detainees. These detainees were released if found innocent or transferred to upstate prisons if found guilty. Moreover, New York City prisoners were usually from the city so their counting as downstate residents was more justified than their counting as upstate residents.[13]

The construction and maintenance of prisons in upstate New York has been viewed as the only growth industry providing jobs and other benefits. In the 1980s and the 1990s, the number of prisons in New York more than doubled going from 30 to 65, with a few rural northern counties getting a disproportionate share of these new prisons. Since 1982, all prisons built in the State of New York have been built upstate. Given that the prison population grew substantially after 1982, it is safe to say that most prisons and prisoners in New York are located upstate and that there has been a concerted effort to locate carceral institutions there. The number of these prisons began to rise in the 1980s when in response to prison overcrowding, Governor Mario Cuomo used the Urban Development Corporation (UDC) in order to finance new prison construction. Cuomo used the UDC because in 1981, voters had rejected a $500 million prison

construction bond; the UDC could issue bonds for the construction of prisons without having to consult taxpayers. In the 1980s, Republican state senator Ronald Stafford became a cheerleader of prison construction in his rural district adjoining the Canadian border, promoting it as the road to economic growth. Influenced by Stafford and advised by their elected representatives, other upstate districts also lobbied for the construction of prisons within their boundaries, given that industrial and other types of employment were steadily declining. Some campaigns for prisons included extreme measures such as the enclosure of land where the new prison could potentially be built. By 2000, 40% of New York state prisons were located within the upstate districts of three Republican state senators. By that year, the state's prison population constituted more than 10% of the population of one New York county, more than 5% of the population of five New York counties, and more than 1% of the population of eighteen counties.[14]

The prison overcrowding of the early 1980s, was to a great extent created because of law and order legislation proposed by Governor Rockefeller that included mandatory sentencing. Nelson Rockefeller was a liberal Republican who was elected governor of the State New York for four consecutive terms (he served as governor between 1959 and 1973). Having presidential ambitions, Rockefeller sought to shore up his popularity in the national Republican Party, which was becoming increasingly conservative, with law and order initiatives. The most important and enduring law and order initiative was the Rockefeller Drug Laws passed by the state legislature in 1973, which established a system of mandatory sentencing for people possessing illegal narcotics in New York. The passage of this law opened the doors for subsequent law and order legislation such as the Second

Felony Offender Law of 1973, under which a second time offender would face mandatory sentencing and could only plea and be tried for a felony; the Violent Felony Offender Law of 1978, which stipulated long mandatory prison terms for people involved in violent felonies; and the 1980 handgun possession law, which also punished weapon possession with a minimum of one year in prison. In the years that followed the legislature toughened some existing criminal statutes even more and also added some new ones.[15]

Eventually, the Rockefeller Drug Laws became one of the most important vehicles for incarcerating African Americans and Latinos in the state of New York. These laws punished people for possessing illegal drugs, not for their role in the drug transaction. The vast majority of people arrested under these laws, were first-time, non-violent offenders. People convicted and sent to prison under the Rockefeller Drug Laws constituted 11% of new prisoners in 1980; their numbers increased to 17% in 1985 and to 45% in 1989. Throughout the 1990s, this figure remained around 45%. From 2001 onward these percentages decreased; in 2006, 36% of new prison commitments were because of drug crimes. Although the majority of people selling and using illegal drugs during this period were white, the overwhelming majority of people serving time in New York penitentiaries were Black and Latino. In the beginning of 2008, 58.5% of drug offenders in New York state prisons were Black, 31.5% Latinos, and 8.9% whites. The main reason for this disparity is that law enforcement agencies have targeted minority neighborhoods and their residents. Other reasons for this racial disparity have to do with the attitudes of judges who have a tendency of handing heavier sentences to Blacks and Latinos when compared to whites, and the more public nature

of the distribution and consumption of drugs in low income neighborhoods.[16]

GERRYMANDERING AND PRISONERS IN NEW YORK

In the state of New York, regionalism has been one of the main dividing features among the major political parties. Since at least the late nineteenth century, upstate voters have viewed themselves as different from people living in New York City because of the large influx of immigrants there. Racial, cultural, political, and religious differences have continued to politically divide New York urban and rural residents throughout the twentieth century. The dominance of city politics by Democrats has convinced upstate voters that they are better off supporting the Republican Party. Suburban areas that grew around New York City in the twentieth century have shown a similar tendency of supporting Republican candidates, mainly because of issues of race and class.[17]

Since the mid-1970s, Democrats have managed to become more competitive in certain upstate and suburban areas reducing the power of Republicans who have been able to cling onto the state senate. The Democrats have controlled the state assembly since 1975. With minor disruptions, the Republicans have dominated the state senate for most of the twentieth century. Indeed, besides a brief interlude in the mid-1960s, the Republican Party held a majority in the state senate from 1939 to 2008. This is an exceptional record given that many more voters in New York have been registering as Democrats than as Republicans since the late 1950s; in 2002 registered Democrats outnumbered registered Republicans by 2.12 million.[18]

Since the crystallization of party power in each one of the state's legislative bodies, political power has worked in the State of New York as follows. The annual budget and other important issues would be negotiated by the governor, the speaker of the state assembly, and the senate majority leader. The members of the majority party of the state senate and the assembly would rubber-stamp the decisions of these three men by voting for them. If the governor, the senate majority leader, and the speaker of the assembly could not compromise on an issue, then legislation related to it would not pass; in fact, such legislation has usually not been introduced. This means that the dominance of at least one of the state's legislative bodies is crucial for each political party, since the leaders of the party can then veto unacceptable legislative proposals from the opposition.[19]

The main reason why Republicans have been able to hold a majority in the state senate is the practice of gerrymandering. Every ten years, the State of New York is required to reapportion its electoral districts in accordance to the population enumeration of the U.S. Census. In recent decades, the state assembly dominated by Democrats has been drawing assembly districts and the state senate dominated by Republicans has been drawing senate districts. Given their tenuous majority in the state senate, Republicans have been especially creative in drawing senate districts so that they can maintain their majority. The Republican majority of the state senate has been facing numerous challenges; the population of many of their upstate strongholds has been declining, many of the New York City suburbs that used to always side with Republicans have increasingly been voting for the Democrats, and the population of New York City has been increasing. Republicans have traditionally not performed well in New York City, though they have been able to elect a few state

senators there in carefully drawn districts located in the outer boroughs.[20]

Every ten years the state senate uses the numbers of the U.S. Census provided by each county in order to redraw its districts. Since the first U.S. decennial census of 1790, the census authority has used the concept of "usual residence" as a guiding principle of where people should be counted. Usual residence is defined as "the place where the person lives and sleeps most of the time." The problem with the concept of usual residence as defined and used by the U.S. Census Bureau is that it is not necessarily the same as a person's voting residence or legal residence. In every census taken since 1790, census takers have been instructed that the usual residence of prisoners is their institution and they should be counted there. This means that the rules of the U.S. Census Bureau have been different from those of most states including New York in determining someone's residence. More than this, each New York county is allowed by state law to choose its population base that is used for redistricting. There are sixteen New York counties that have been including their prisoners in their population base and thirteen counties that have not.[21]

In 2002, the Republican senate majority had to redraw state districts according to the results of the 2000 U.S. Census, which showed that the New York City population had increased and that the upstate population had decreased. Having no interest in losing any upstate seats, the senate leadership increased the total number of senate seats by one and created a new senate district in a conservative area of Brooklyn. This addition of a senate district allowed the Republican leadership to roughly maintain existing districts elsewhere in the state. In adding a seat, the Republicans took advantage of unclear language in the state constitution in

order to avoid the virtually impossible task of maintaining a majority by substantially redrawing districts in the entire state.[22]

A questionable practice of the 2002 New York state senate gerrymandering concerned the population of each district. The maximum population deviation between senate districts was found to be 9.78% with many Democratic districts in New York City having a higher population than many Republican districts in upstate. This percentage was considered to be acceptable; although the U.S. Supreme Court has ruled that congressional districts require absolute population equality, it has also declared that state legislative seats require only "substantial" population equality. In 1983, the U.S. Supreme Court clarified that redistricting plans with a maximum population deviation of below 10% are minor enough and do not violate the Equal Protection Clause. Ever since, state legislative bodies have used the 10% rule to draw districts.[23]

Without counting the upstate prison population of certain counties, the population deviation of some New York state districts would be higher than 10% meaning that they would have to be redrawn. The redrawing of even a couple senate districts would create a ripple effect throughout the state. Populations would have to be reallocated southward. Given that the margins for favorable redistricting for Republicans have already become very narrow, the Republican majority of the state senate would be in jeopardy.

According to the 2002 state senate redistricting in response to the enumeration of the 2000 U.S. Census, senate districts 10, 11, 12, 13, 14, 15, and 16 in Queens had a higher population than the average New York state senate district. This population deviation was +4.05% for four of the districts and +4.06% for three of the districts. All of these districts

were located in urban sections of Queens. Only one of these districts had a prison housing 604 prisoners.[24]

Senate districts 45, 47, 48, 49, 51, 54, and 59 of upstate New York had a lower population than the average New York state senate district. The population deviation of these districts varied between -2.11% in district 45 and -4.95% in district 48. All of these districts had large prisons and they counted their prisoners as part of their population for state districting purposes. District 45 had 12,989 prisoners, district 59 had 8,951 prisoners, and district 48 had 5,291. The rest of the districts had lower numbers of prisoners though the lowest was 2,881 in district 49. Almost all of these prisoners were not from the counties where their prison was located. Without including these prisoners as residents, the population deviation of these senate districts would be between -5.77% and -6.79%; this means that five of these seven districts would be above the 10% population deviation figure. Any district redrawing would pose problems to neighboring districts all of which had a negative population deviation.[25]

If these prisoners ceased to be counted as upstate residents and began to be counted as New York City residents, existing districts would be found to be unconstitutional. Since tens of thousands of people would cease to be counted in upstate New York and would be counted in New York City, the maximum deviation between districts would increase even more. Districts in Brooklyn, Manhattan, the Bronx, and Queens would suddenly have more residents and districts in upstate New York would have less. Such population redistribution would make it impossible for present districts to exist, regardless of who draws these districts.

EFFORTS OF AFRICAN AMERICAN PRISONERS TO CHALLENGE THEIR PASSIVE CITIZENSHIP STATUS IN NEW YORK

Since 1971, Jalil Abdul Muntaqim, an African American, has been serving sentences in New York or California prisons. Originally known as Anthony Bottom, Muntaqim converted to Islam while in prison and changed his name. In New York he was convicted for the murder of two New York City police officers and sentenced to "two concurrent indeterminate terms of twenty-five years to life." In 1994, while serving his sentence at the Shawangunk Correctional Facility in Wallkill, Muntaqim filed a complaint against state officials alleging that a provision in state law that denies the right to vote to incarcerated or paroled felons, violates section 2 of the VRA because it "results in a denial or abridgement of the right . . . to vote on account of race." Muntaqim in his complaint argued that in the State of New York, Blacks and Hispanics constitute over 80% of inmates, even though they constitute less than 30% of voting age adults. He added that racial discrimination in sentencing contributed to the racial disparity of the prison population and that 80% of the incarcerated Blacks and Hispanics come from New York City. Given the figures, Muntaqim claimed that the state law violated the VRA because it denied him the right to vote and because it diluted the Black and Hispanic vote in New York City. After numerous appeals, in 2004 the U.S. Court of Appeals decided that the question on whether the VRA applied to New York Election Law § 5-106, which disenfranchised incarcerated felons and parolees, was a difficult one, but that the court could not invalidate the New York provision governing imprisoned or paroled felons because it would then be altering the constitutional balance of power between the states and the federal government. The

court added that the VRA did not include prisoners and parolees in its provisions, and that since the U.S. Congress made no clear statement regarding the voting rights of these groups the court could not side with the complainant. Upon appeals, the U.S. Supreme Court refused to consider the case but the U.S. Court of Appeals decided to hear the case all over again.[26]

In rehearing the case in 2006, the U. S. Court of Appeals cited several New York and federal court decisions, New York Election Law, and the New York Constitution in order to conclude that prisoners incarcerated in New York may not become residents of the area where their prison is located but retain the residency of the place where they used to live before imprisonment. During the court proceedings, Muntaqim admitted that he was a resident of California prior to his incarceration there in 1971 for an offense that was unrelated to the New York one, and that since that time he was incarcerated either in New York or in California. In its decision, the court concluded that Muntaqim was not a resident of New York and that according to New York Election Law only people who have been residents of the state for a minimum of thirty days are allowed to register to vote and to vote. Moreover, according to the New York State Constitution residence cannot be gained or lost because of incarceration: "no person shall be deemed to have gained or lost a residence, [for purposes of registering and/or voting] by reason of his or her presence or absence, while . . . confined in any public prison." Because of this provision the court established that Muntaqim was a California resident and that he never became a New York resident because of his incarceration in New York. The court also cited decisions of New York courts, which decided that prisoners could not become residents of places where they were incarcerated or

institutionalized because their presence is involuntary: "an inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution." Ultimately, the court dismissed the case because Muntaqim as a non-resident lacked standing in his lawsuit and consequently the court lacked jurisdiction.[27]

Many other court decisions have made similar statements regarding the residency of prisoners. Since 1894, New York state courts have repeatedly argued that people do not involuntarily lose their place of residence because of imprisonment. In many of the same cases, the decision has been that prisoners may not become residents of the area where the prison is located. This decision is based on the principle that *bona fide* residents can come and go as they wish and that prisoners are not *bona fide* residents because they are confined and are unable to come and go whenever they like.[28]

Though dismissed, the Muntaqim case illustrated the issues of passive citizenship that structure the existence of African Americans incarcerated in the State of New York and the legal avenues that some of these prisoners have been pursuing in the courts. The issues of being counted for political reasons without having political rights appear to be inextricably linked, not only though the complaints that African American prisoners make, but also through the conclusions at which judges arrive. However, all of the decisions are against Black prisoners because the courts try to separate the issue of voting rights from the issue of counting disenfranchised African Americans and then argue that other courts should consider these cases in order to avoid definitive decisions that are certain to be controversial. Other courts (lower or higher) are under no obligation to reconsider these

cases, which means that the condition of African American passive citizenship is not resolved.

In 2006, in a class action suit filed by African American and Latino inmates of New York state prisons that made almost identical claims as Muntaqim, the U. S. Court of Appeals arrived to similar conclusions though its judges had to decide the case, since unlike Muntaqim the complainants were New York residents. In this case, the majority opinion again stated that the U.S. Congress did not intend to cover state provisions regarding the disenfranchisement of felons with the VRA and that a clear congressional statement would be necessary for the court to side with the complainants. However, on the question of vote dilution because of the counting of prisoners as residents the court found some merit but was reluctant to issue an opinion; instead it referred the case back to the lower courts because they had not adequately considered it. No federal district court has reconsidered this case.[29]

These court decisions have a political dimension; given that in recent decades, the majority of judicial appointees have been made by Republican presidents, the continuous rejection of the claims made by prisoners in federal courts should not come as a surprise. Adam B. Cox and Thomas J. Miles have argued that a judge's judicial ideology and race significantly affects her decisions in cases that involve section 2 of the VRA. In their systematic study of court cases over the last two decades, Cox and Miles found the following: Democratic appointees were more likely to vote for liability under section 2 of the VRA than their Republican counterparts; minority judges were more likely than white judges in siding with the plaintiffs of VRA cases; and that whenever minority judges were included in panels, white judges were more likely to vote for liability.[30]

CONCLUSION

This essay has discussed the condition of passive citizenship in the State of New York between 1973 and 2008. Part of the argument is that conservative political entrepreneurs usually associated with the Republican Party have been able to exploit issues of law and order, pass tough sentencing laws against people committing certain crimes, and use the large numbers of people incarcerated in upstate prisons in order to maintain a majority in the state senate. There is no way of telling what would have happened during this period, had the Democrats been able to dominate both legislative bodies of the state legislature. This essay does not claim that passive citizenship of African American prisoners would not exist, had the Democratic Party been able to dominate the state legislature of New York. It argues that the Republican state senate has used the passive citizenship of African American prisoners for its advantage, that the condition of African American passive citizenship has a long history in the United States, and that the exploitation of African American passive citizenship has had profound implications on matters of political power.

In recent years, there has been a push for the elimination of the Rockefeller Drug Laws by Democratic politicians who have been encouraged by polls revealing that the majority of New Yorkers consider them unnecessarily harsh. The Republican state senate has largely opposed such elimination. In December 2004 and August 2005, the two parties were able to come into a reform agreement, which reduced the mandatory sentences for drug possession for first-time, nonviolent offenders. Under the new rules, these offenders would serve a minimum of 8 years and a maximum

of 20 years in prison as opposed to the previous 15 years to life. These sentences, however, were still harsh.[31]

In 2008, the Democrats were able to win their first majority in the state senate in many decades and in March of 2009, the state legislature repealed portions of the Rockefeller Drug Laws. Most of the mandatory sentences for first-time nonviolent offenders were eliminated. Judges could once again use their discretion in sentencing and could send such offenders to treatment instead of prison. Moreover, first-time nonviolent drug offenders already in prison could apply to have their sentences commuted. Some critics have argued that this legislation did not go far enough. Still, these reforms have the potential of substantially reducing the number of prisoners in the state and such reduction would undermine the effectiveness of counting prisoners from urban areas as residents of rural ones.[32]

With the exception of the Rockefeller Drug Laws, the state legislature has not addressed any other aspects concerning prisoners. The Democratic majority in the state senate has been tenuous and unstable. In 2009, the senate majority leader was unable to unite members of his party in the state senate. In fact, two Democratic state senators briefly defected to the Republican side. Even if the Democrats are able to capture a majority in the state senate in 2010 and redraw state senate districts for the 2012 election, they will probably not directly address the concept of passive citizenship among African American prisoners. Such redistricting would guarantee their domination of the state senate for decades, but not the political rights of prisoners.

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1. Themis Chronopoulos is Assistant Professor of History at the State University of New York, Stony Brook. I would like to thank Jeff Hall for sharing a number of his sources on the State of New York.

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