



A forgotten clause of the Constitution could change the Census outcome

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The Census Bureau recently announced the results of the 2020 Census, which determines the apportionment of U.S. House seats among the states for the next 10 years. The most startling outcome was the shockingly small margin between New York and Minnesota in the race for the 435th and final House seat. Minnesota won the seat, but a difference of just 26 fewer Minnesotans or 89 more New Yorkers would have flipped it to New York.

It's unprecedented for a congressional seat to swing on such a narrow margin, and New York is no doubt considering its options in litigation. Should New York mount a legal bid, the court battle that ensues could bring attention to a nearly forgotten and never enforced provision of the Constitution: the Fourteenth Amendment's "Penalty Clause" for disenfranchised citizens.

The "Penalty Clause" was a product of creative political compromise in the aftermath of the Civil War. In 1866, the drafters of the Fourteenth Amendment searched for a way to prevent the soon-to-be-readmitted southern states from continuing to disenfranchise Black citizens. But it was not at all clear that a constitutional amendment flatly banning disenfranchisement on the basis of race could be ratified in three-quarters of the states. The drafters feared that the inclusion of such a clause could imperil the enactment of the amendment's other crucial provisions.

The drafters thus settled on a more politically palatable but also more convoluted solution, which became Section 2 of the Fourteenth Amendment. Rather than prohibiting the southern states from disenfranchising Black citizens, Section 2 would *punish* them for doing so.

Specifically, Section 2's Penalty Clause mandates that if a state disenfranchises adult male citizens for any reason other than "participation in rebellion, or other crime," the state's census count must be decreased by a ratio equal to the percentage of adult male citizens who have been thus disenfranchised. So if a state takes away the vote from 10 percent of its adult male citizens for some reason other than as punishment for a crime, that state's census count must be treated as if it were 10 percent lower, thus likely decreasing its number of seats in Congress.

But a combination of historical events led to the Penalty Clause becoming “lost to the ages.” Its purpose was effectively superseded by the enactment of the Fifteenth Amendment in 1870, which finally prohibited disenfranchisement on the basis of “race, color, or previous condition of servitude.”

In addition, efforts to calculate the penalty for each state in the 1870 Census were thwarted when uncooperative states delivered implausibly low totals of disenfranchised adult males. The Interior secretary at the time admitted that he put “little credit” in the numbers found, and no state was penalized by the loss of even a single seat. The Census Bureau has not attempted to calculate each state’s Section 2 penalty in any census since.

But even though the original purpose for the Penalty Clause has been largely forgotten, it remains in the Constitution. And even though it was drafted with a focus on racial disenfranchisement, its language is broad. One of the Fourteenth Amendment’s drafters and leading advocates, Sen. Jacob Howard, explained that (except for criminal punishment) the penalty applies “no matter what may be the ground of exclusion” from the franchise.

And there is at least one way in which adult citizens continue to be disenfranchised despite not having committed a crime: disenfranchisement on grounds of mental incapacity. Both New York and Minnesota are among the 40 states that disenfranchise adults found to lack the mental capacity to vote.

Unfortunately, complete and accurate statistics on the total number of people disenfranchised on grounds of mental incapacity by each state are hard to come by. In a recent survey, New York reported that it had removed 95 people from the registered voter rolls for reason of mental incapacity over the previous two years. Minnesota declined to respond to the survey on the semantic grounds that those found to lack capacity in Minnesota have their voter status changed to “challenged” but are not technically removed.

It’s thus hard to know how much New York or Minnesota would be penalized if the data necessary to enforce the Penalty Clause were calculated. In nearly every previous census, the tipping point margin has likely been too large for the Penalty Clause to have made a difference, even if it were enforced.

But this census is different. A tipping point margin of less than a hundred people means that if Minnesota in fact disenfranchises a greater share of its adult male citizens than does New York (for mental incapacity or other non-criminal reasons), the 435th seat almost surely belongs rightfully to New York. If New York pursues such a claim, this forgotten clause could finally have new life, 150 years after it was abandoned.

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