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OCCASIONAL PAPER

The Federal Census at the Constitutional Convention: Representation, Taxation, and Objectivity

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From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it.²

Under Article I, Section 2, Clause 3 of the Constitution, Congress is directed to make an "actual Enumeration" of the population. The question of an adjustment to the 1990 federal census gives rise to several questions regarding this Constitutional mandate.

For example, does this terminology limit the means with which the population count can be made? Or, stated another way, did the Founding Fathers, by their choice of language, intend to provide for a complete, yet objective, catalogue of the entire population to form the basis of both representation and taxation? Would they have approved of any adjustment of the census results in search of the elusive goal of accuracy, or did their concerns lie elsewhere?

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² Ferrand, Max; THE RECORDS OF THE FEDERAL CONVENTION OF 1787, Yale University Press, New Haven and London, 1966 edition; Vol I, p. 578.

I. The art of taking a census.

While today's common understanding of both terms, census and enumeration, would seem to preclude any misinterpretation, this was not always the case. Today the meaning of census is "a count of the population; a usually complete enumeration." Enumerate is defined as "to ascertain the number of; count; to specify one after another; list". (Webster's New Collegiate Dictionary)

Historically, census taking had been undertaken by one of two basic means. First was an effort to catalogue every actual person, or at least persons meeting certain criteria, e.g., males over a certain age. This was the means which form the background scene for the story of Bethlehem. "And all went to be enrolled [entered into the register], each to his own city." (Luke 2:3). The second general means of determining the size of the population was to count a small subset of the total population in order to estimate the size of the overall population. This method had been used by the Emperor Napoleon I.

The notion of institutionalizing a complete nominal enumeration, or a head count, was not unknown at the time of the Constitutional Convention. However, it was not standard practice for many governments. For example, noted historian and English politician Thomas Macaulay, in his *History of England*, qualified a remark on a census with the following language, "In 1740, the population of Nottingham was found, by enumeration, to be just 10,000". After the American experience, several large nations did follow the example and started their own censuses on a periodic basis.

The choice of means by which a census would be taken also depended upon the purpose for which the numbers were needed. If the purpose was for a general purpose where there was no direct fiscal impact (i.e., revenue for the sovereign), a sampling method would be the cost-effective means. However, if the goal was tax assessment, the preferred choice would be to make a list of persons, or at least of taxpayers, so that the crown could reap every *sou* which could be rendered. For example, William the Conqueror ordered a census of England in 1085 which produced the famous Domesday Book. The U.S. Constitution still requires that "No Capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." (Art.I, Sec.9, Cl.4)

The method used by the American states in these pre-Convention days to take their own censuses is unclear, though they were apparently undertaken without sufficient procedural safeguards. Part of the debate at the Convention involved the disparate numbers submitted by the states, and their link to revenue generation under the Articles of Confederation.

II. One-state/one-vote, or one-dollar/one-vote

Under the Articles of Confederation, each state had one vote "in Congress assembled". However, revenue generation, which had always been one of the chief weaknesses of the Articles, was based upon an estimate of property. (See Article VIII.) The two schools of representation theory for the U.S. House were, therefore, either one vote



per state, or a basis relative to either property or population. While there was some sentiment for the current "one-man/one-vote" doctrine of representation evident, the predominant concern at the Convention was for a basis on property. In general, the focus of debate was more on the equality of large state vs. small (see the Great Compromise relative to the Senate) than on whether the ratio of representation should be based upon property or the rights of man.

Note should be made here that the notion that the rights of blacks, or any non-free inhabitants, were given short shrift by the Constitution is often at odds with the focus of the Convention debate. The comments of the father of the Gerrymander, Elbridge Gerry, elucidate the parameters within which this debate occurred. Gerry, and others, wondered why, if blacks were property and were used in the South as horses and cattle were in the North, should this property be entitled to ANY representation at all. Thus the choice before the Framers was whether blacks should be given any weight in representation, not full weight. Gerry was later quoted as stating that 3/5 was the "full proportion that could be admitted" for blacks.

As stated by delegate John Rutledge of South Carolina, "money was power; and the States ought to have weight in the Govt. - in proportion to their wealth." (Ferrand I:196) The most politically expedient option for this focus became the contribution for revenue which by an Act of Congress under the Articles was free inhabitants plus three-fifths of all others. (Ferrand I:201)

III. The linkage of representation and taxation and the concern for objectivity.

It is clear that the potential for manipulation of the process by the individual states was on the minds of several delegates. George Mason, of Virginia, raised several concerns about the role of the respective numbers and their link to the political benefit of representation rather than the economic liability of taxation alone.

"From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it." (Ferrand, I:578-9)

This statement gains force by history in general. More specific relevant examples for representation in the United States might be found by the lack of a Congressional reapportionment following the 1920 census or by the grossly malapportioned state legislatures across the nation until the 1960s.

A more specific perspective of political reality came from delegate Edmund Randolph, also of Virginia, "the census must be taken under the direction of the General Legislature [Congress]. The States will be too much interested to take an impartial one for themselves." (Ferrand, I:580)

As stated by another member of the Convention, "by connecting the INTEREST of the States [representation in the House] with their DUTY [payment of direct taxes], the



latter would be sure to be performed" (Ferrand, I:197, emphasis added). There was even debate of limiting the interest of representation to the ACTUAL contributions of the state.

To solve this problem of having the interested party prepare the numbers by which political power would be apportioned, the linkage of representation to direct taxation was made. This coupling formed an important disincentive to the states against manipulation of the numbers. However, since the adoption of the Sixteenth Amendment in 1913, whatever disincentive had existed was lost to the footnotes of history.

In the end, the Framers provided an additional safeguard against temptation, that of having an institutionally neutral entity, the federal government, undertake the census.

IV. Choosing the standard.

Concern for setting a standard by which the reapportionment would be periodically revised was evinced by several delegates. Delegate Mason "considered a Revision from time to time according to some PERMANENT AND PRECISE STANDARD as essential to ye. [sic] fair representation" in the House. (Ferrand, I:578, emphasis added) Delegate Roger Sherman of Connecticut voiced "that the *periods* & the *rule* of revising...ought to be fixt[sic] by the Constitution". (Ferrand I:582, emphasis in the original) Notwithstanding the counter viewpoints that fixing a rule in the Constitution would "shackle" the Congress, the final choice was to have a fixed period and a fixed standard.

While he realized that the number of inhabitants would not always be such a "precise standard of wealth", delegate Mason thought it was "sufficiently so for every substantial purpose". (Ferrand, I:579) These thoughts were shared by the Father of the Constitution, James Madison, also of Virginia, "sufficiently so for the object in contemplation." (Ferrand I:585) On the other side was delegate Gorham of Massachusetts, with the viewpoint that "the most exact proportion prevailed between numbers and property." (Ferrand I:587)

Since the concepts of property and wealth were frequently the focus of arguments, several delegates perceived the economic reality that "estimates" of wealth were all that could be expected from any effort to gather the "respective Numbers".

V. Summary, or short version of the argument.

Given a brief review of the notions surrounding the federal census at the Constitutional Convention of 1787, what would the Founding Fathers think of the concept of an adjustment to the census of 1990? No doubt there would be some who would advocate it as providing the most accurate representation of the population. However, from what documentation we have of the Convention proceedings, and what was left us as the Constitution, it is doubtful that the Fathers would have endorsed the concept of an adjustment.



The Framers were aware of the methods available for taking a census. In the end, they opted for an "actual Enumeration", or a complete listing of the entire population. However, more important to the discussion surrounding census adjustment, the Framers were well aware of the incentive for manipulation of numbers. To counteract this general nature of political man, and the more specific nature of holders of political power, they established two institutional barriers. First, they provided for a direct linkage of a political benefit, representation in the U.S. House, with an economic liability, payment of direct taxation. Second, they provided that the administration of the census would be undertaken by an entity, the federal government, which would have nothing to gain institutionally by the revision and reapportionment of political power within itself.

Several of the dangers which any adjustment to the federal census bring to the discussion are in contradiction with the intent of the Framers. While it is convenient to argue that an adjustment would be the result of professional statisticians as to how to achieve another approximation of accuracy, in the end the degree to which any adjustment is made for any population subgroup, be it racial, economic or geographic, will be reduced to a question of public policy, decided by the Congress. No bureaucratic regulation will shield the operation from Congressional scrutiny. More importantly, once there has been an administrative resolution as to what adjustment is required, there will be nothing to stop the Congress from enacting its own guidelines for a future adjustment. This results in exactly the situation which the Framers tried to avoid, placing their political destiny before them, when they might be tempted to "sacrifice their trust to momentary considerations." (Ferrand, I:580)

Since the ratification of the Sixteenth Amendment, other than the moral imperative of the public trust, there is no economic disincentive for the Congress to manipulate the numbers for the benefit of those in power. In fact, there exist several economic incentives due to the billions of dollars of federal aid which are distributed on the basis of federal census results. In addition, there are political ramifications due to the shift of potential Congressional seats among states and the probable shift of state legislative seats among communities within a state.

Many rational arguments have been offered by advocates of the census adjustment. However, it appears that the political results of an adjustment would be within the scope of what the Founding Fathers feared might occur. They created institutional safeguards to eliminate the temptation from those in power. The question is, will their successors resist the temptation now that the safeguards are not the same?

