American Federal Government

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4. Participation and Representation

Chapter Roadmap

In this chapter you will learn about different theoretical models of representation, historical battles for representation in the United States that expanded suffrage (the right to vote), and what contemporary battles about representation are on-going today. Representation battles are not simply America's past, but its present and its future as well.

4.1 Representation in Liberal Democracy

Liberal democracy is based on the concept of popular sovereignty, the belief that the people of the polity are the true sovereign, the real source of all legitimate political power. This idea is at the heart of America's founding, expressed in the Declaration of Independence.

> Governments are instituted among Men, deriving their just powers from the consent of the governed.

This consent is particularly important if we think of our definitions of politics. Do we consent to the superordination of our governors, to their authoritative allocation of values? One key to that consent is that we have representation in that government (liberal democracy is, in practice, always structured as a representative democracy). It is critical that we feel that our interests are considered, and our voices heard, even if we do not get what we want. The reality of politics is that sometimes you win, sometimes you compromise (politics has been called the art of compromise), and sometimes you lose, but we can accept the legitimacy of losing if we belief the process was fair: and a fair process is one in which voices representing our interests are not excluded.

But who counts as "the people"? Who is the "we" whose interests get representation? The simple theoretical answer is "everyone who is part of

our polity," but in practice it has never been that simple. The more your voice is heard, with interests opposed to mine, the less powerful my voice is. And while theoretically our voices should be equal, ensuring this equality has been, and continues to be, a hard political struggle. The great irony of American politics is that we have simultaneously proclaimed liberty and equality and internally fought over liberty and equality. What people have demanded for themselves, they have often denied to others.

In this chapter we will look at some ideas about representation, and how they have been reflected in demands for political participation, in an-going series of political struggles that stretch seamlessly from the colonial era to the present day.

4.2 Virtual Representation, Actual Representation, and Revolution

England was the world's first modern liberal democracy, but it was still developing its democratic institutions during the colonial era. While the House of Commons represented the common people (in contrast to the House of Lords, which represented the nobility), not every community in England got to elect someone to the Parliament. Nor did the colonies. In England this was justified by the theory of "virtual" representation, which said that despite not having an "actual" representative (someone elected by the people of their district), all the common people of England were still represented in the House of Commons because the Members of Parliament (MPs) represented the whole interest of the country, and the particular interests of those without actual representatives were spoken for by MPs who came from districts with similar interests.

The idea is today most famously associated with Edmund Burke, an Anglo-Irish member of Parliament during America's colonial era. Burke argued that MPs were not simply ambassadors, or delegates, from their own district, narrowly following the wishes of their constituents, but trustees, entrusted with responsibility for using their best judgement as developed during considered debate in Parliament, which he considered "an essential element in the discovery of right answers to political questions."[1] An MP's constituents, however intelligent and wise they might have been, did not have the benefit of engaging in this constructive debate, so the MP could not be bound to their constituent's wishes. His most well-known expression of this perspective comes from a campaign speech to his constituents.

> [Constituents'] wishes ought to have great weight with [their representatives]; their opinion high respect, their business unremitted attention. . . . But, his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any set of men living. . . . Your representative owes you, not his industry only, but his judgement; and he betrays you, instead of serving you, if he sacrifices it to your opinion. [2]

The concept of virtual representation is grounded in this trustee model of representation. As MPs, in Burke's view, are not bound directly to their constituents' wishes but engaged in considered debate to find the right answers to political questions, the House of Commons as a whole was not merely a collection of ambassadors from separate and opposing interests, but the legislature of the nation as a whole.

> [E]very Member of Parliament sits in the House [of Commons] not as representative of his own constituents, but as one of that august assembly by which all the commons of [the country] are represented.[3]

Because the whole country is represented in the Parliament, it wasn't strictly necessary that each district have its own actual representative. If two cities, for example, have similar interests, but only one has an actual representative, that representative will be the voice of the interest of his city, and in so doing will also be voicing the interests of the other city, representing them virtually.

The key to this theory is in their being some actual representative who shares a particular districts interests. If a district is distinct enough that it has particular interests of concerns that others don't have, then it cannot be virtually represented. It must have its own "actual" (elected) representative. Burke not only understood that, but in two important cases he insisted, in opposition to his fellow MPs, that a certain group of British subjects were neither actually nor virtually represented. The first group was Irish Catholics. Although Burke was an Irish Protestant (his father had converted), his mother was Catholic, as was his wife, so he was more attuned to their concerns than most members of Parliament, were Catholics could not (at that time) serve. The absence of Irish Catholics mean they had no actual representation, so they could have no virtual representation. He did not argue that all Irish Catholics should get an

actual representative – not even all English Protestants had that – but he thought there should be *some* representatives from some Catholic parts of Ireland, so that the rest would be virtually represented.[4]

The second case concerned the colonies in North America, where complaints about a lack of a voice in Parliament were increasing. While many Members of Parliament dismissed these complaints on the grounds that as British citizens the colonies were virtually represented by Parliament's concern with the whole national interest, Burke agreed with the colonists, arguing that the colonies were too distinct and too far away for anyone in Parliament to be an actual representative from any area that shared colonial interests. On this basis he was favorable towards the American cause during the Revolutionary War.

The colonists had been left alone for more than a century and a half and had become largely self-governing. Representation in Parliament was not a concern to them so long as it played little role in their affairs. But when, after the French and Indian War, Parliament became more actively involved in regulating the colonies, through restrictions on moving into Indian territory to get free farmland, limitations on American shipping through the granting of monopolies to the East India Company (the cause of the Boston Tea Party), and a series of taxes, having a voice in the body that was making those regulations become important. The most famous slogan of the era was "no taxation without representation." Actual representation might not have worked well, but a return to self-governance, if Parliament had done so early enough, would have staved off a war that killed tens of thousands of people. Burke argued for this in Parliament in 1775, the year fighting started, and the year before the colonies gave up hope of reconciliation and declared independence.

A final note on virtual representation before we move on: as much as the concept of virtual representation seems disfavorable to most Americans today, the idea is not inherently false, and in fact virtual representation is absolutely indispensable in some contexts. For example, we do not let small children vote (in fact we assume they do not really know their own interests), but we assume that when their parents vote they have the interests of their children in mind, and they expect their representative to attend to those interests as well. We also do not always allow mentally retarded people to vote, seeing them (accurately or not) as akin to children in not being intellectually sophisticated enough to know their interests. Additionally, there are American citizens who not have

actual representation, just as in Burke's day there were Englishmen who did not have representatives from their districts. The residents of Washington, D.C. Puerto Rico, the U.S. Virgin Islands, and the Northern Marianas Islands, although they are U.S. citizens living in U.S. territories, do not get to send representatives to Congress. Perhaps there are representatives who share their interests well enough to virtually represent them – D.C. may have similar interests as Baltimore or other large cities that have similar demographics – but in at least some cases, such as our various island territories, it seems doubtful.

4.3 Representation Battles at the Constitutional Convention

When the colonies declared independence they declared themselves each independent states, with the last sentence of the declaration of independence saying "these United Colonies are, and of right ought to be, free and independent states." Remember our definition of a state from chapter 2; this meant free and independent countries, not a single country. And with the Articles of Confederation, drafted during the Revolutionary War, these 13 states joined into a confederation of independent states, as specified in Article II of the Articles of Confederation.

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

The Continental Congress – which was not a legislature, but a meeting of representatives from the colonies for purposes of organizing a collective response to the grievances they had against England – was transformed into the Congress of the Confederation, which was still not truly a legislature, but now a meeting of representatives from newly independent states for matters of discussing and trying to organize collective resolutions to matters of common concern. The states as independent countries were represented, not the people (just as with the United Nations today), and so each state had an equal voice, one vote each (also just as with the United Nations today).

Agreeing on Representation in a Bicameral Legislature

When representatives of those states met in Philadelphia in 1787 at the Federal (later to be called the Constitutional) Convention and decided to scrap the Articles and create a whole new plan of government, suddenly the question of representation was brought to the agenda and became the most bitterly fought over issue of the whole process. James Madison's Virginia Plan proposed to replace the unicameral Congress where the states had equal representation with a bicameral Congress where the states would be represented in each chamber either by population or by financial contributions. His argument was that the new government would represent not the states as separate political bodies, but the people of the United States, so it was the people who should have equal representation. The proposal was angrily rejected by the smaller population states, as it proposed to destroy their equality of representation as states. That Virginia was the largest state by population whether or not you counted only free people or included the enslaved (see Table 4.1) did not escape their attention. Even if they only counted free people, it was ten times as populous as the smallest state. And the four most populous states had over half the population, so they would have potentially had more representatives than the other nine put together. No wonder that New Jersey's William Paterson saw the idea "as striking at the existence of the lesser States."[5]

Population of States in 1790		
	Free	Free + Enslaved
Virginia	516,230	821,287
Massachusetts	475,327	475,327
Pennsylvania	430,636	434373
New York	318,796	340,120
North Carolina	293,179	393,751
Connecticut	235,182	237,946
Maryland	216,692	319,728
New Jersey	172,716	184,139
South Carolina	141,979	249,073
New Hampshire	141,727	141,885
Rhode Island	67,877	68,825
Georgia	53,284	82,548
Delaware	50,209	59,094
	3,113,832	3,808,096

Note: By 1790 Kentucky had been created out of Virginia's territory and Maine out of Massachusetts's territory. Their 1790 populations are here included in the population totals of the states of which they were parts during the Constitutional Convention of 1787.

Table 4.1

The small states absolutely refused to sacrifice their equality, and the large states refused to agree that their larger populations should not have more representation than those states' smaller populations. The

Convention stalemated, and nearly collapsed over this issue, repeatedly returning to it over five weeks until they were exhausted enough to give in. Just two days into the debate, Connecticut's Roger Sherman suggested a reasonable compromise: as they had already agreed to a bicameral Congress, why not agree to equal representation in one of the chambers and representation by population in the other? But as is so common early in the conflict, neither side had yet realized that the other would not give in, and the proposal got little attention. New Jersey offered their own plan as a counter to the Virginia Plan: it kept the existing unicameral Congress with its equal representation of states. Neither plan could gain a majority to pass. After four weeks of intermittent debate Sherman's compromise plan was proposed again by his fellow Connecticut delegate Roger Sherman. It lost again, leading Sherman to describe the Convention as at "a full stop,"[6] Unable to move forward, the Convention delegated a committee to discuss the matter and return with a proposal. It came back with the support for the Connecticut compromise, the obviousness of which must by now have been clear to many delegates. After two more days of debate, the Convention finally agreed to representation by population in the House of Representatives and equal state representation in the Senate. The vote was 6-3, with two states abstaining because their delegates could not come to agreement among themselves, hardly a resounding stamp of approval, but one that allowed the convention to lay the issue to rest and move on. Importantly, the Senators from each state were to be selected by their state legislatures, not by the people, so the people of each state were represented only indirectly in the Senate: it was the states as equal political bodies that were represented (until passage of the 17th amendment, discussed below).

There may have been few on either side who were wholly satisfied, but they had reached a point where most on each side knew they could not get their first choice outcome, so what was left to them was a choice between the compromise or ending the Convention and staying with the Articles of Confederation, unchanged. Politics sometimes called the art of the possible, or the art of compromise: there are times when you have to decide whether to take half of what you want or get nothing at all.

The 3/5th Compromise

Agreement on representation by population in the House led to a second-stage question: who to count as the population of each state, only the free people, or enslaved people as well? This was a crucial question, and also led to angry debate, because some states had very few slaves while others had a great number (Table 4.2). When counting only free people, the southern states had only 39% of the population, but when counting the total number of people, they had nearly half (Figure 4.1). The southern states naturally wanted to maximize how the population based was counted to maximize their representation in the House of Representatives. In part this was because they knew there was growing disapproval of slavery in the northern states, and they were afraid that a northern-dominated Congress might vote to end slavery. The northern states wanted to count only free people so they would have greater representation, but they also argued on the basis of principle. New Jersey's William Paterson pointedly noted that slaves weren't even represented, or allowed to vote, in the states which now wanted to count them,[7] but the most powerful critique was made by Pennsylvania's Gouverneur Morris.

> Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens and let them vote. Are they property? Why then is no other property included? The Houses in this city [Philada.] are worth more than all the wretched slaves which cover the rice swamps of South Carolina. The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.[8]

The southern states had no good answer, and could never give a justification other than self-interest,[9] but they refused to agree to counting only free people to determine representation. The northern states were forced to compromise or risk southern states

refusing to ratify the Constitution, so they grudgingly agreed to let each state's representation be "determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons" (Article 1, §2). "Three fifths of all other Persons," was a cautious circumlocution that allowed them to not openly admit they were talking about enslaved humans.

Percent Population Increase for Representational Purposes with Inclusion of 3/5 of Slaves (using 1790 census data)

State	*Free Population*	*Enslaved Population*	*% Population Increase Counting all Enslaved People*	*% Population Increase Counting 3/5th of Enslaved People*
Massachusetts	475,327	0	0%	0%
New Hampshire	141,727	158	.1%	.1%
Pennsylvania	430,636	3,737	.9%	.5%
Connecticut	235,182	2764	1.2%	.7%
Rhode Island	67,877	948	1.4%	.8%
New Jersey	172,716	11,423	6.2%	3.8%
New York	318,796	21,324	6.3%	3.9%
Delaware	50,209	8,887	15%	9.6%
North Carolina	293,179	100,572	25.5%	17.1%
Maryland	216,692	103,036	32.2%	22.2%
Georgia	53,284	29,264	35.5%	24.8%
Virginia	516,230	305,057	37.1%	26.2%
South Carolina	141,979	107,094	43%	31.2%

Table 4.2

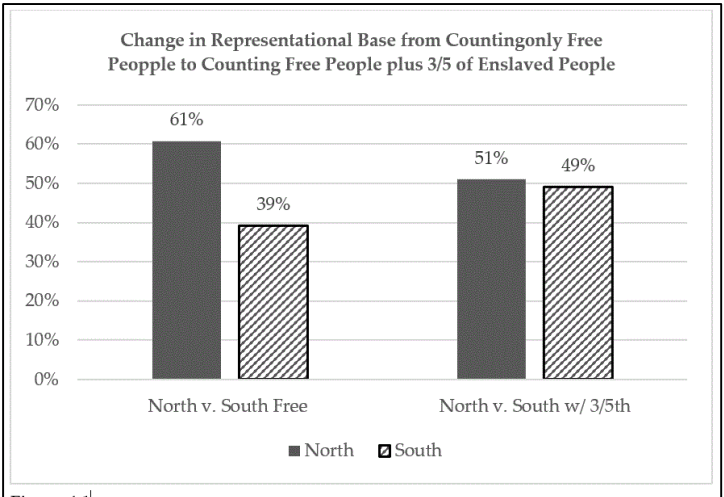

Figure 4.1

Descriptive Representation

The debates at the convention hint at another concept of representation has been significant in American history: descriptive representation. Numerous historical figures, including American founders John Adams and James Wilson, described proper representation of a country as a picture of the country, "an exact portrait in miniature, or the people at large" (Adams), while others compared it to a map, saying that just as a map describes the physical area of a country, the legislatures should be a map of the people.[10] Taking that top-down and approaching it from the bottom, the level of the voters, descriptive representation means being represented by someone who seems like "one of us," in whatever way we define that; someone who shares characteristics with us that we identify as important. Rightly or wrongly we "assume that people's characteristics are a guide to the actions they will take,"[11] so someone who shares our characteristics is likely to take the actions we would.

The Framers' concern for sufficient representation for their region reflected their concern to have someone like them in Congress, but for the northern states and the southern states, the "someone like them" was in conflict. Northerners wanted representatives who understood money, banking, and commercial interests, and disapproved of slavery. Southerners wanted representatives who understood the interests of the southern plantation owners, including their desire to maintain a system of chattel slavery rather than have to hire free labor. Northerners wanted representatives who shared their beliefs in the value of tariffs on imported goods as a means of supporting the growth of domestic industry and protecting American shipping companies from foreign competition, while the southerners wanted representatives who shared their beliefs that tariffs would make goods more expensive for them and could hurt the export of their raw cotton. It's clear that neither side shared Edmund Burke's belief that a legislature was a deliberative body concerned with the needs of the nation, a collaborative approach to politics. Instead they saw it more as a battleground for competing interests, a more conflictual approach to politics (and ultimately those conflicts would lead to the Civil War, which killed more Americans than all of America's other wars combined).

Descriptive representation is a contested issue today because it is most often associated with racial representation. Notably, most black legislators are elected from districts with a large share of black voters[12]),

and candidates who are Latino or at least speak Spanish use those characteristics to try to attract Latino voters. Gender can also play a role: men are slightly more likely to vote for men (although that tendency is diminishing over time), whereas women are more neutral. But race, ethnicity, and gender are not the only relevant characteristics that people look for when choosing representatives who are like them. Conservative Christians tend to prefer candidates who are very open about their faith. In presidential elections many members of the public – often enough to tip the balance – like a candidate who talks at their level, rather than someone who sounds like he or she is talking down to them (this is often described as "which candidate would you rather have a beer with"). And college professors, of course, want someone who sounds like he or she talks at their level. Although the racial/ethnic aspect of descriptive representation makes it controversial today, we should not fool ourselves into thinking it is something new: the Framers of the Constitution sought it as well, in terms of regional interests, but also – if we look at history clearly – very few of them would ever have considered voting for a black political candidate, or, for many, a Jewish or Catholic one.

Changes to the House and Senate

The Framers structure of representation looks much the same today – the House represents states by population, and each state has an equal number of Senators – but it has changed in two important ways. For the House, the 3/5 compromise was eliminated by the 14th Amendment, which requires that apportionment of Representatives among the states be based on "the whole number of persons in each state." Not only did this mean the freed former slaves and their descendants would count, it means that every person living in the United States is counted for purposes of representation, even non-citizens who don't have voting right (a point we will return to at the end of this chapter).

In the Senate, the 17th Amendment, ratified in 1913, shifted the selection of Senators from their state legislatures to the people of the state through popular election. The effect of this was to make Senators representatives of the people of their states, rather than representing their states as distinct political units as embodied in their state governments. This has led to them being less responsive to state governments, but more responsive to the people of their state,[13] which at times results in supporting policies that

are popular but that state governments may oppose because it imposes costs on them or limits their freedom to make their own policies. But in addition to that it created a conceptual problem for representation: it is easy to understand the equality of each state as a political unit (this is how it is in the U.N. after all, where the tiniest of countries have an equal vote in the General Assembly with the largest ones), but it is much harder to accept that the half a million people of Wyoming are equal to the 40 million people of California. For Californians to have equal representation to Wyomingites, they should have 80 Senators for each one of Wyoming's! This conceptual perversity had led to a growing movement for either eliminating the Senate or changing it to have representation by population. No change appears to be imminent, but the voices do seem to be growing in number, and such a change – for good or ill – is not inconceivable at some time in the future.

District-based Elections and the Path Not Taken

The Constitution only says that each state shall get a number of Representatives in proportion to their population, but it does not say what the electoral base for those Representatives shall be; they thought that choice was best left to the states. So it should not surprise you that at the beginning different states chose different electoral bases. Some states chose to use single-member districts, others used multi-member districts, some elected them at-large (no districts; each Representative representing the whole state), and some tried a mixture of these.[14] In 1842, however, Congress passed a statute requiring single-member districts, but granted some exceptions, and in 1967 passed a statute eliminating the last of those exceptions. So today, single-member districts are required by federal law, but still not by the Constitution.

The use of single-member districts has important effects on the structure of the American political system. They are so significant that they can be considered part of the United States' "unwritten constitution," or as political scientists often call it, our "small c" constitution, in contrast to the official "capital C" Constitution. One of these is the dominance of a two-party system. Duverger's law suggests single-member districts tend to produce two-party systems, so the American two-party system is not a direct product of our Constitutional structure (we will discuss this in more

detail in the chapter on parties). The other effect is the persistence of gerrymandering. Dividing a state into single-member districts make it possible to favor one party by drawing district lines between and around their groups of supporters in a way to favor one party over the other. This can result in one party getting more votes for their candidates across the state, but only winning a minority of the districts. The same technique can be used to limit the political effectiveness of racial/ethnic groups. We will discuss this later in this chapter.

An alternative approach that is used by many of the world's democratic countries is proportional representation (PR), in which there are no electoral districts and people vote for a party, rather than an individual candidate, with parties getting a number of seats in the legislature in proportion to their share of the vote. PR has two important advantages over single-member district systems. First, in accordance with Duverger's law, they tend to produce multi-party systems, which means voters can choose parties that more closely share their political perspectives. Second, without districts there is no gerrymandering.

Most democracies that formed after the United States have chosen PR and America might have also had it come into being later. But the Framers of the Constitution did not have this model to consider as it had not yet been invented. Instead they followed the model with which they were familiar, that of the British House of Commons, based on single-member districts (also used in their state legislatures). The U.S. Constitution does not tell states how to structure their electoral systems for their state governments (beyond mandating that all people be equally represented), nor does Congress have the authority to do so. So an American state could experiment with a PR system if its people chose to. In a sufficiently large and diverse state – particularly California – we would expect to find a multi-party system developing at the state level. From a political scientist's perspective, it would be fascinating to see a state try this, but at present there do not seem to be any that are considering it.

Section summary

To summarize this section, the struggle of each state's Constitutional Convention delegates to ensure satisfactory representation for their own state in the new government they were creating was long and bitter, demonstrating how important feeling sufficiently represented is to one's

willingness to recognize the legitimacy of a democratic government. This struggle resulted in tough compromises, one of which (the Connecticut Compromise) still characterizes our political system and the other (the 3/5 Compromise) that we got rid of. We have also changed the nature of representation in the Senate, which has led to growing discomfort with its equality of states, and have statutorily required single-member districts for the House of Representatives, producing a two-party system and gerrymandering.

4.4 Expanding Representation Throughout U.S. History

The Constitution did not specify who would have voting rights. That power was reserved to the states, so each decided who had voting rights within its own borders. The enslaved, of course, were not given voting rights, but also not all free people were either. Suffrage was generally reserved for free adult males who owned property. The Framers not only believed in no taxation without representation, but weren't too keen on representation without taxation, either, and in those days most taxes were property taxes. John Adams, one of the leaders of the revolutionary movement in 1776, argued against letting men without property vote because it would lead to demands to let women and teenagers vote.

> [I]t is dangerous to open So fruitfull a Source of Controversy and Altercation, as would be opened by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell.[15]

By 1850 property qualification had faded away, and most free adult men had voting rights, except, in some states, Catholics and Jews, but those restrictions also eventually were eliminated. But skin color still mattered: for the most part black people, Indians, Latinos in the Southwest after the territory was taken from Mexico in the Mexican-American war (1846-1848), and Asians on the West Coast after they began emigrating to America in the 1850s were denied voting rights.

Gaining Minority Suffrage

The story of minority suffrage is primarily told as a story of the fight for voting rights for African-Americans, but their ultimate victory 177 years after ratification of the Constitution ensured voting rights for all ethnicities. By 1790, just after ratification of the Constitution, Maryland, Massachusetts, New York, North Carolina, Pennsylvania and Vermont all allowed free black men to vote, but elsewhere they faced restrictions, and in states that kept slavery, no enslaved person could vote. The 15th Amendment was ratified in 1870, five years after the Civil War, and guaranteed that the right to would could "not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Even before that, in 1867, Congress had voted to allow all freed men to vote, and many formerly enslaved men not only voted but were elected to office (all as Republicans, the party of Lincoln, which had won their freedom). But in 1877 this "Reconstruction" era ended as part of a deal to resolve a presidential election in which no candidate won a majority of the electoral college, the Democratic Party returned to power in the South, and black men were denied the right to vote regardless of what the Constitution said.

Here is a political problem of conflict: one group of people wanted the right to vote, and claimed both a moral and a constitutional right to it, but another group despised and feared them, and found a variety of ways to get what they wanted. As a Virginia politician said at the beginning of the 1900s,

> Discrimination! Why, that is precisely what we propose; . . . to discriminate to the very extremity of permissible action under the limitation of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[16]

Their methods included poll taxes, a uniform per-person tax, enforced by denying the right to vote until it was paid, and literacy tests, by which a person had to prove to an official that they could read and write. These were predominantly in southern states, where black people were also denied good schools and economic opportunities, so both literacy and money to pay the tax didn't come easily. The implementation was, of

course, rigged against them. Many southern whites were poor and illiterate, but local officials could waive the tax and the test if they wanted to. Black men attempting to register were often asked to go beyond demonstrating literacy and write lengthy interpretations of parts of the Constitution, which were then evaluated by a hostile official who might even know less than they did. These tactics weren't limited to the South or against Blacks. Literacy tests may have first been introduced in New England states in the 1850s to keep naturalized Irish immigrants from voting,[17] Poll taxes were banned by the 24th Amendment in 1964, and literacy tests were ended by the Voting Rights Act of 1965 and amendments to it in 1970.

In one famous case the state of Alabama redrew the boundaries of the city of Tuskeegee, which had a large population of very well educated black people because it was home to both the Tuskeegee Institute, a historically black college, and a hospital for black veterans, which was staffed by blacks. The boundary changed dramatically reduced the size or the city, changing it "from a square to an uncouth twenty-eight-sided figure"[18] (see figure 4.2), which managed to exclude almost every black person in the city. The redrawn city boundaries were challenged by a professor at the Tuskeegee Institute, and were struck down by the Supreme Court as a violation of the 15th Amendment.

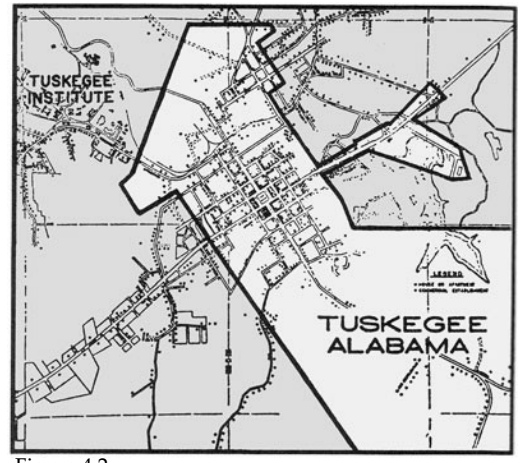

Figure 4.2

It took about four generations – 95 years – from the ratification of the 15th Amendment to gain security for minority suffrage. In 1965 Congress passed the Voting Rights Act over the opposition of southern legislators. As we will see below, some conflicts about minority voting rights still exist, but the basic right has now been well protected for more than half a century.

Women's Suffrage

Women had sought the vote from the beginning, but for many years had more losses than wins. In 1776, the year of independence, property-owning widows were allowed to vote in some counties, but in 1777 the state prohibited all women from voting. In 1780 Massachusetts did the same, and New Hampshire in 1784. By 1787, only in New Jersey could women vote, if they had enough property or money, but in 1807 they also revoked women's suffrage. Sometimes gains were made. In Kentucky unmarried women and widows who owned property that was taxes for supporting schools were given the right to vote in school elections in 1838. The 1848 Seneca Falls women's rights convention is generally seen as the birth of the organized women's suffrage movement. Activist groups were organized around the country, women circulated petitions calling for the right to vote, and some made efforts to illegally register and vote, facing fines for doing so. Despite the Revolutionaries' rejection of the idea of the colonies being satisfied with virtual representation in the British legislature, many argued that women should be satisfied with virtual representation in the U.S. Congress. Not surprisingly, suffragists rejected virtual representation as firmly as the colonial revolutionaries had.

Many of these women also supported the rights of black people to vote, and the movement was divided over whether to support the 15th Amendment. Some supported it as a matter of principal, but others were angry that it did not also ensure their voting rights (and, some, we can assume, opposed it because they were racist). Whether or not they saw it as a hopeful sign for their own efforts, another half-century would pass before they were successful.

One of the Suffragists tactics was to revive the Revolutionary slogan, "no taxation without representation," and some refused to pay their taxes. But not all women were taxed, and this slogan may have only gained real power after 1913, when the 16th Amendment authorized a federal income tax, which meant all working women were directly taxed.[19]

Because the United States is a federalist country, political battles are frequently fought simultaneously at both the federal and at the state level, and while pursuing an amendment to the U.S. Constitution, suffragists also fought their battles at the state and territorial level. The Wyoming Territory became the first territorial or state level jurisdiction to allow women's suffrage, in 1869. As we should expect in politics, pure principle was not the only motive. According to a local newspaper, part of the

purpose was to attract more women to the territory where there were far more men – mostly young – than women.[20] Other states and territories gradually followed suit, some granting full suffrage rights, others granting only the right to vote in presidential elections. By 1919, 26 states and territories granted at least some voting rights to women, and in 1920 the 19th Amendment was ratified, ensuring women full voting rights across the country.

18 Year Olds

One area where states could still restrict voting rights after the 15th and 19th Amendments was voting by young adults. They were not completely free to do as they pleased, because the 14th Amendment (1868) specified that their representation in Congress would be reduced if they denied the right to any male citizens who were at least 21 years old. But those under age 21 did not have constitutionally protected voting rights. By the time of the Vietnam war in the 1960s, most states still set their voting age at 21. This created an important problem of representation, because men ages 18-20 were being drafted to fight in a war that many opposed, and they could not even vote for the politicians who were making that life and death decision over them. In response, Congress passed the Voting Rights Act of 1970, guaranteeing 18 year olds the right to vote in all federal, state, and local elections. The law was challenged, and the Supreme Court ruled that Congress could require states to allow 18 year olds to vote in federal elections (House of Representatives, Senate, and President), but had no authority to require that for state and local elections.[21] In response to the Supreme Court's ruling Congress proposed the 26th Amendment, guaranteeing the right of 18 year olds to vote in all elections, which was ratified by the states in only four months, faster than any other amendment, becoming effective in 1971.

States still retain the authority to grant suffrage to people under 18 years old, and today there are occasional proposals in various states to reduce the voting age to 17 or even 16. However, none of these proposals has yet succeeded.

4.5 Contemporary Representation Conflicts

While most *voting* rights battles have been won, battles over various voting regulations and issues of representation continue on today. Space limitations preclude in-depth discussion of these conflicts, but we will survey them briefly.

Representation for Washington, D.C.

One of the elements of the Constitution that reminds us of how little the delegates to the 1787 Federal Convention trusted each other is the anomalous status of Washington, D.C. Delegates were not willing to allow the new government to be housed in any state, lest it gain an unfair amount of influence, so they specified that the government would not be in any state, but in " such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States" (Article 1, §8). Maryland and Virginia each ceded some land along the Potomac River. But the residents in that district immediately lost their representational rights, because not being a state, D.C. has neither Representatives in the House nor Senators., nor did residents have the right even to vote in presidential elections, as the real election of the President is done by the electoral college, and the Constitution gave electors only to the states. In part because of this loss of voting right, the Virginia portion of D.C. was later ceded back to the state.

Various efforts were made over the years to address this issue, but with no success until 1961, when the 23rd Amendment was ratified, giving D.C. residents the right to vote in presidential elections and granting them three electors (equal to the minimum of any other state). However, this still did not give D.C. residents representation in Congress. Since 1991 they have been allowed one delegate in the House, (along with delegates from Puerto Rico (since 1901), the U.S. Virgin Islands (since 1972), Guam (since 1972), American Samoa (since 1981), and the Northern Marianas Islands (since 2008)), who can serve on committees, and is allowed a vote on the committee at the discretion of the majority party, but cannot vote on the floor of the House for final passage of legislation.

Full representation for D.C. cannot be created statutorily because the Constitution grants Representatives and Senators only to states. The only ways to give full representation are to either amend the Constitution to

allow Representatives and Senators for the District, to grant it statehood (which would require amending the Constitution to allow the capital to be in a state), or to return all the residential portions to the state of Maryland, keeping only the land under the government buildings. The latter proposal has been brought up in Congress several times, but never successfully. Statehood has been sought for many years now, often reviving the "no taxation without representation," slogan. In 2016 the New Columbia Statehood Commission drafted a proposed state constitution as a step towards gaining statehood, but their effort faces two major political obstacles. First, because the District is overwhelmingly Democratic, statehood would almost certainly guarantee two more Senators for the Democrats, which gives Republicans a strong interest in opposing it. Second, around two-thirds of the American Public opposes it.[22]

Racial and partisan gerrymandering

As noted above, gerrymandering of districts can be used to reduce representation of certain groups. Partisan gerrymandering has been common through U.S. history, and the modern combination of extensive data about neighborhoods combined with advanced software are now used to carefully draw boundaries. Constitutionally, states are authorized to draw their own districts, both for the House of Representatives and for their own legislatures, and parties that have the legislative majority in their state (except where the state has chosen to require non-partisan redistricting commissions) use these to draw districts that pack as many of the other party into as few districts as possible, enabling themselves to hold onto a majority in the legislature even if their party does not get a majority of votes in the election. Both parties engage in partisan gerrymandering, as each has the incentive to tilt the rules in their favor.

In recent years some voters have filed lawsuits challenging the constitutionality of gerrymandering, arguing that it denies them fair representation. In the last few decades several cases have reached the Supreme Court, but have not resulted in any clear statement about the constitutionality of gerrymandering. Most recently, in 2019, in a case that involved a Democratic gerrymander in Maryland and a Republican one in North Carolina, the Supreme Court ruled that the issue was a political question that could not be adjudicated by the courts due to "a lack of

judicially discoverable and manageable standards" for determining when a redistricting was so gerrymandered as to deny people political rights.[23] This leaves state legislative majorities freedom to continue to engage in partisan gerrymandering, however public sentiment may be turning against it. In the same year as that ruling, voters in Michigan approved a non-partisan citizen redistricting commission, becoming the ninth state to adopt a non-partisan approach.

Racial gerrymandering is inherently controversial. It has traditionally been used to deny minorities an effective electoral voice, but this "negative" racial gerrymander was prohibited by the 1965 Voting Rights Act. To compensate for years of discrimination and ensure an effective minority voice, "affirmative" racial gerrymandering was sometimes then used, a practice of packing enough minority voters into a district to become the districts majority (so-called majority-minority districts). This was an explicit attempt to ensure descriptive representation, particularly for black Americans. For historically disadvantaged groups, "descriptive representation enhances the substantive representation of interests by improving the quality of deliberation" both in Congress and in respect to communication between the representative and their constituents, as well as increasing those groups' sense of the political system's legitimacy.[24] This is seen in the U.S. Congress, where black representatives often take a more active role in debates concerning bills that promote the interests of black citizens, stepping up, so to speak, when their descriptive similarity is most relevant.[25]

The difficulty with creating majority-minority districts is that sometimes not enough members of the relevant ethnic group live in close enough proximity to each other to draw a geographically compact district. Connecting widely spread clusters of a minority group often produced districts so bizarrely shaped that the Supreme Court referred to one as a "geographical monstrosity."[26] In that 1995 case the Supreme Court ruled that districts could not be based solely on race, even to ensure a minority descriptive representation, because to do so was to return to a segregated system. This does not mean majority-minority districts are necessarily unconstitutional. If they are geographically compact enough they are legitimate. As with partisan gerrymandering, however, the Supreme Court has had difficulty finding standards to determine when a district is racially gerrymandered.

An oddity of the effort to create majority-minority districts is that they may effectively diminish minority representation. By packing a large number of a minority group into a single district we ensure that they can count on electing a representative who looks like them and shares their interests, but that means representatives in the other districts often have so few minority voters that they can safely ignore them. If a minority group was distributed among just enough districts that they were an important voting bloc in each, they might never (or rarely) have a representative who shares their characteristics, but they would have more representatives who had to pay attention to their interests.

Voter ID Battles

In recent years a number of states, predominantly ones with Republican legislative majorities, have moved toward requiring prospective voters to present photo-identification. The announced purpose is to prevent voter fraud. While voter fraud does happen, it is much less common than in the past, and studies have demonstrated that when it occurs it does not happen using methods that enable voter ID requirements to have any effect on reducing it,[27] which suggests that voter ID requirements may be a solution in search of a problem.

Many critics believe the real purpose is to reduce Democratic voting, and this leads to an argument that voter ID laws are racially discriminatory. The argument is that 1) most minorities vote Democratic, and 2) it is easier to target minorities than to target white voters. If this argument is correct, then voter ID laws may be racially discriminatory even if the real goal is to reduce Democratic turnout, rather than out of animosity towards minorities. North Carolina has provided strong evidence for this argument. In enacting their voter ID law and a law restricting early voting, the Republican controlled legislature

> requested data on the use, by race, of a number of voting practices. [then] enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans. . . . target[ing] black voters with almost surgical precision. . .[28]

But there are two caveats to this story. First, requiring voter ID is not inherently unconstitutional; it is only a violation when the purpose or

effect is clearly a violation of equal protection of the laws. Second, it is not at all clear if voter ID requirements actually succeed in reducing turnout. There are studies that say it does,[29] and ones that conclude it does not.[30] If there are suppression effects, they may be modest,[31,32] which perhaps should not surprise us. Humans are not simply objects that get pushed around without being able to respond, and efforts to subordinate them get met with counter-efforts in the politics of who gets what, when, and how. So, for example, if lawmakers choose to require a specific type of photo identification that they've found black voters are least likely to have, black voters are likely to respond by increasing their efforts to get that kind of identification.

Voting Rights for Ex-Felons

Forty-eight states strip convicted felons of their voting rights, only Maine and Vermont allowing them to keep them. Fourteen of those states return felon's voting rights automatically upon release from prison. In twenty-two states felons get their voting rights back at some point after release, usually after completing probation or parole, but in some may have to pay off court fees, fines, and restitution to victims before having their rights restored. In the remaining twelve states their voting rights are suspended indefinitely, and often require special action before a person can have them restored.[33] Since the late 1990s there has been movement toward reducing the severity of these restrictions, with at least eleven states relaxing their laws somewhat.[34]

Those who support restoring ex-felons' voting rights note that they are assumed to have paid their debt to society after completing their sentences, yet denial of voting rights acts as a continuing punishment, which is arguably unconstitutional. They also point to the racial disparities in the American criminal justice system, noting that denying ex-felons' voting rights disproportionately reduces the vote of minority populations, possibly constituting an unconstitutional denial of equal protection under the law. It's not clear what's gained by doing this. Conservative political commentator George Will asks, "What compelling government interest is served by felon disenfranchisement?"[35] In response to Will, two other conservative commentators argued that

> If you're not willing to follow the law, then you should not have a role in making the law for everyone else, which is

> what you do when you vote — either directly (in the case of a referendum or ballot initiative) or indirectly (by choosing lawmakers and law enforcers).[36]

While the logic of that argument is clear, it does not address the issue of these people having paid their debts to society. But the purpose here is not to support one claim or the other, but only to demonstrate that this is a current battle about representation.

Counting Non-citizens for Congressional Apportionment

As this chapter is being written, in 2019, the United States government is preparing for the 2020 census, which will be used to determine how many U.S. Representatives each state gets for the next ten years. This is so important to states that they sometimes sue the U.S. Census Bureau if they think they were not given one too few representatives. The Trump administration tried to add a question to the census asking respondents if they were U.S. citizens, but the effort was blocked by the Supreme Court. Legal scholar Bruce Ackerman claims the effort by the administration was unconstitutional because Article 1 of the Constitution gives Congress, not the President, authority over the census, requiring it to be conducted "in such Manner as they [Congress] shall by Law direct."[37]

The underlying purpose of the administration's effort is to try to change the method of apportionment to be based on the number of citizens in each state. Because some states have far more immigrant (who do not have voting rights, even if they are legal residents) than other states, this would cause high-immigrant states to lose Representatives to low-immigrant states (this is similar to the Constitutional Convention debate over whether to count slaves or not). One estimate is that California, Texas, Florida, New York, and Washington would lose representatives, with Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, Oklahoma, and Pennsylvania.[38] Considering the current partisan leanings of these states, this would almost certainly lead to gains for Republicans in the House of Representatives, which helps explain why the Republican Trump supports it and why Democrats are strongly opposed.

While it may seem strange that non-citizens, who can't vote, are counted for representation, the same is true for children (and some non-citizens will gain their citizenship and become eligible to vote before some

children will turn 18 and gain their right), and ex-felons. But most importantly, the Constitution clearly requires it. The 14th Amendment, which updated the original apportionment rules in Article 1, specifies that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." When drafting the 14th Amendment, Congress knew the difference between using the word citizen and using the word person – "citizen" appears three times in that same section, in reference to the right of citizens 21 years of age or more to vote. Had Congress meant to apportion only on the basis of the citizen population they would have used that word. For that reason, either executive branch or statutory efforts to change the apportionment method to a citizenship-based one, if they happen, would almost certainly be struck down by the federal courts. The only way to make such a change would be to amend the Constitution.

Summary

This chapter has covered several theories of representation and historical and contemporary battles over representation in the United States. While remembering the specific theories and battles is important, the big picture takeaway here is that representation matters tremendously to people, so much so that they are willing to fight hard to take it away from others to increase their own and to fight for generations to gain and keep it. People have been tortured and murdered in pursuit of representation. It is among the most important of on-going political battles, because those without representation are without voice, and therefore without the ability to effectively protect and advance their interests. And these battles are not simply something in America's past that we have long-since resolved, but are our present, and at least for now, continue to be part of our future.

What to Take Away from this Chapter

1. Know the concepts of actual representation, virtual representation, and descriptive representation.
2. Did Edmund Burke think representatives should be ambassadors from their constituents or trustees?

3. Did Edmund Burke think a legislator should be a competitive group of legislators each fighting for their constituents' interests, or a deliberative body discerning the interest of the whole nation?
4. How were the states represented under the Articles of Confederation?
5. What was the compromise made at the Constitutional Convention for representation in the House and Senate?
6. What was the compromise made about how to count states' population for determining how many Representatives they would get in the House?
7. What are the effects of using single-member district representation in the House of Representatives?
8. How did we change representation in the House and in the Senate?
9. What were some of the ways black Americans were denied the right to vote even after they were guaranteed it by the Constitution?
10. What constitutional amendments guaranteed minorities, women, and 18 year olds the right to vote, and when was each added to the Constitution?
11. What are some of the contemporary battles for political participation and representation?

Questions to Discuss and Ponder

1. Would you be satisfied with virtual representation if you thought other people's actual representatives were address the interests that matter to you? Why or why not?
2. Should we ensure descriptive representation for historically oppressed groups? Why, or why not?
3. Is it ever legitimate in a liberal democracy to try to make it harder for some groups to participate and have actual representation? Why or why not? How far could we legitimately go in doing so?
4. Is it legitimate to deny the American citizens of D.C., Puerto Rico, etc., actual representation in Congress?
5. If you were at a new constitutional convention, to rewrite the American Constitution from scratch, would you support or oppose a proposal to shift to proportional representation nation-wide? Why would you take the position you chose?

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