Election Integrity and Voting Rights: A Two-Day Conversation on Representation, the General Will and Popular Sovereignty

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Introduction

THE MANY CONTRADICTIONS OF VOTING RIGHTS: PUERTO RICO, THE DISTRICT OF COLUMBIA, AMERICANS LIVING ABROAD, AND FIRST AMERICANS

Steven Spielberg's 2021 remake of West Side Story brings into focus the continued ambiguous status of Puerto Rico. When the audience hears "I Like to Be in America," the reality that Puerto Ricans are American citizens who enjoy no voting representation in Congress and who cannot cast a ballot in presidential elections should challenge our common notion of an ever-expanding franchise. About 3.3 million Puerto Ricans (about 1 percent of the total U.S. population, according to the 2020 Census) reside outside constitutional voting rights protections: Puerto Rico is not a state and its residents pay a commonwealth tax rather than a federal income tax.

In Washington, D.C., where such fine distinctions are debated in the highest court in the land, suffrage, citizenship, and statehood are equally complicated. The nearly 700,000 residents of the District enjoy an exclusive privilege afforded to this non-state and to no other by the Twenty-Third Amendment: the District casts three electoral votes every four years. Its electoral power is limited to that of the least populous state, Wyoming, which has a population half of its size. African American men have been able to vote in the District since 1967, but this majority African American jurisdiction, which has been consigned to Congressional oversight in perpetuity, has failed to achieve statehood.

Consider also the liminality of Americans living abroad. According to the State Department, nearly nine million Americans live abroad and about a third are eligible to vote. Those who vote are considered residents of the state where they last lived according to their most

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recent residential address. Only about a tenth of Americans abroad file taxes on an annual basis (primarily because of concerns about double taxation).

Finally, let us consider the voting rights of Native Americans, the first Americans. Only in 1924, with the passage of the Indian Citizenship Act (known as the Snyder Act), were Native Americans afforded the constitutional rights of citizenship that were promised by the Reconstruction Amendments. Nevertheless, Native Americans only earned full suffrage in Arizona in 1948 and in Maine in 1964. The 1965 Voting Rights Act freed them from literacy tests, poll taxes, fraud, and intimidation, according to the Library of Congress (first link in this paragraph). The Native American Voting Rights Coalition has documented continued roadblocks to full franchise and has advocated for the passage of the John R. Lewis Voting Rights Advancement Act of 2021 (H.R. 4), which now includes the Native American Voting rights Act. The most pressing concerns are geographic isolation (often with lack of reliable transportation and poor access to distant polling and registration locations) and nontraditional mailing addresses for voter registration and early/absentee ballots.

These concerns highlight the lack of uniformity in voting rights from jurisdiction to jurisdiction. While there may be a general consensus that the franchise may be denied because of a felony conviction, a determination of mental incompetence, insufficient length of residency within a state, or the failure to reach the age of majority, voting rights have historically varied from state to state. The ballot is not available to all.

There is also a consensus that the decennial census allows the interests of those denied the franchise to be served through congressional apportionment based on total population ("one person, one vote"). Citizenship, suffrage, and statehood remain contested in the contexts that we have briefly surveyed, but the Madisonian balancing act outlined in Federalist 54 continues to trade this incomplete manifestation of the general will in favor of an artificial accounting of the general welfare.

Overview

Perhaps no dictum encapsulates American expectations about representative government more than the phrase "no taxation without representation." The signers of the Declaration of Independence rejected the British Parliament's false promise of virtual representation and insisted on their natural right to self-government. Such grievances were fueled by Enlightenment era debates about the tension between civil liberties and national sovereignty, property rights, and the duties of citizenship.

According to article 1, section 4 of the U.S. Constitution, "the times, places and manner of holding elections for Senators and Representatives" are reserved for state legislatures but may be altered by Congress. As a result, voting rights have diverged greatly. Women were allowed to vote in Wyoming, for example, as early as 1870, but most women in the United States only gained suffrage in 1919, with the passage of the Nineteenth Amendment. In theory, such variability expands our understanding of enfranchisement. In practice, however, many have been denied voting rights for a variety of reasons since the ratification

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of the Constitution. The franchise has evolved over the last 235 years and now extends, by way of the Fourteenth, Fifteenth, Nineteenth, and Twenty-sixth Amendments, to persons that the Founders may not have imagined.

Contemporary conversations about voting are often marred by incendiary political speech about suppression and fraud. This lesson avoids all partisan frames for election integrity and voting rights. By adopting a historical lens, our shared inquiry traces continuity and change in our national conversation about representation from 18th-century debates surrounding the ratification of the Constitution (Federalist 54) to 21st-century court cases about citizenship and the census (Evenwel v. Abbott). As outlined in the Preamble to the Constitution, justice, tranquility, the general welfare, and the blessings of liberty remain the pivotal stakes in these civic debates.

Purpose

The purpose of this two-day lesson is to encourage a thoughtful discussion of the following question: Is the decennial census or the electoral ballot the more just, expedient, and reasonable means of ensuring representation of all persons in the United States? An ancillary aim of the conversation will be to discern whether citizenship status should constrain this political right to representation, given the recent controversy about a citizenship question on the 2020 Census and the decision in December 2021 by the New York City Council to allow nearly a million noncitizens to vote in local elections. On the second day of our discussion, we will seek to contextualize representation in light of popular understandings of election integrity and of voting rights and the philosophical concepts of the general will.

Standards

This two-day lesson is in keeping with the Roadmap proposed by Educating for American Democracy to the extent that it promotes three key concepts:

- Learners explore past and present efforts to adapt and redesign the U.S. Constitution and political institutions over time
- Learners explore the relationships between equality, equity, justice, freedom, and order in American constitutional democracy
- Learners develop an understanding of the purpose, processes, strengths, and weaknesses of U.S. government and politics

PRE-READING GUIDELINES

Learners are expected to underline all unfamiliar words and expressions and keep a running list of key concepts. In the document margins, learners should draw connections

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between the text and the lesson's guiding question ("Is the decennial census or the electoral ballot the more just, expedient, and reasonable means of ensuring representation of all persons in the United States?")

PRE-WRITING GUIDELINES

Learners should provide a screenshot of the first 10 results for their search-engine queries. Definitions should not exceed 50 words for each of the expressions and should not be copied and pasted from any of the sources. Learners should strive to articulate an original, personal, and concrete definition of the key concepts.

DAY 1

- Day 1 Pre-Reading: Learners read and reflect on two articles: NYC Council and GA Election Integrity Act.
- Day 1 Pre-Writing: Learners propose definitions for two controversial phrases: "election integrity" and "voting rights," based on the first 10 results of a search-engine query for each phrase.
- Day 1 Warm-up: Venn Diagram ("Who cannot vote in both New York and Georgia?").
- Day 1 Guiding Question: How has the Fourteenth Amendment's equal protection clause broadened the franchise, redefined who can cast a ballot, and reimagined what representation means?

Day 1 Case Study: The 1870 Census (prior to the Amnesty Act of 1872)

Learners will compare 1870 census numbers to the electoral votes cast in the 1872 and 1876 presidential and congressional elections.

Step 1: Create a graph, figure, or chart to represent the number of eligible African American and former Confederate soldier male voters according to the 1870 census.

Step 2: Create a graph, figure, or chart to represent the number of potential voters who were denied the franchise because of their gender.

Step 3: Compare and contrast the electoral vote totals in 1872 and 1876, given the enlarged franchise that was granted to African American men by the Fifteenth Amendment and restored to men who served in the Confederacy after the passage of the Amnesty Act of 1872.

- Day 1 Homework: Learners watch Cato Institute video on Voting Rights and Election Integrity.

DAY 2

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- Day 2 Pre-Reading: Learners will read and reflect on Madison's *Federalist* 54 and this Cato resource: 1-Person-1-Vote' Relies on Misreading of Federalist Papers.
- Day 2 Pre-Writing: Learners propose a definition for the phrase "one person one vote," based on a search-engine query of this phrase and its older version (one man one vote).
- Day 2 Warm-up: Class poll ("Who should be able to vote on the following issues?") with three scenarios (a local ordinance to ban firearms on public subways; state capital punishment guidelines in light of the recent lethal injection controversy; and federal immigration enforcement and sanctuary cities) and three possible answers (A = residents; B = citizens; C = elected officials).
- Day 2 Guiding Question: Is the consent of the governed synonymous with the philosophical concepts of the general will and popular sovereignty?
- Day 2 Case Study: The Voting Rights Act of 1965 (prior to *Shelby County v. Holder*).

Learners will compare electoral votes cast in the 1968 and 1972 presidential and congressional elections to the census numbers in the 1970 census.

Step 1: Create a graph, figure, or chart based on the 1970 census to represent the number of eligible voters in 1972, given the enlarged franchise that was granted to voters 18 through 21 years of age by the Twenty-sixth Amendment and the protections afforded to African American voters by the 1965 Voting Rights Act.

Step 2: Compare and contrast the electoral vote totals in 1972 and 1976, given the disenchantment of American voters after the Watergate scandal, the OPEC oil crisis, the disastrous end of the Vietnam War, and the 1975 Church Committee hearings. Did disenchantment dissuade voter turnout?

Step 3: Create a graph, figure, or chart to show the change in electoral votes cast in 1972 and 1976 by Native Americans in light of the American Indian Movement conscientization campaigns of the early 1970s, culminating in the 1973 Wounded Knee Occupation. How many eligible Native American voters did not cast votes in 1972 and 1976?

- Day 2 Homework: Half the class writes a dissenting opinion for *Reynolds v. Sims*. The other half writes a concurring opinion for *Evenwel v Abbott*. Each opinion should refer to either the Day 1 (Reconstruction Era) or Day 2 (Civil Rights Era) case studies.

Dissenting opinion template

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Constitutional warrant	Judicial precedent	Historical context	Practical outcomes
At least two pertinent excerpts from the Constitution	At least two pertinent excerpts from Reynolds v. Sims	At least one example drawn from the Reconstruction Era	To what extent did the (1870 or 1970) census remedy state-level disenfranchisement?
At least one appeal to a pertinent Federalist Paper (for example, Federalist 54)	At least one appeal to the 1965 Civil Rights Act	At least one example drawn from the Civil Rights Era	To what extent did state-level expansion of the franchise address census undercounts?

Lesson Wrap-Up

What elements of the proposed Freedom to Vote Act (2021) are consistent or inconsistent with our shared understanding of representation within the context of American constitutional democracy?

Conclusion

CERTIFICATION OF VOTES—AN EMERGING BATTLEGROUND AND AN OPPORTUNITY FOR BIPARTISAN ACTION

The decision by Florida Governor DeSantis to form an election integrity police unit the very week that President Biden advocated for changes to the Senate filibuster in order to pass the Voting Rights Bill highlights the partisan nature of most reform proposals tied to this contentious set of issues. Both Democrat and Republican battleground states, such as Georgia, Michigan, Pennsylvania, Nevada, and Arizona, earned additional scrutiny of their vote certification processes because of the loopholes created by the Electoral Count Act of 1877. It may be the case that future legal battles over elections will revolve around dueling slates of electors resolved by partisan legislatures against the general will expressed by the state popular vote. Currently, there appears to be bipartisan consensus for a narrow reform to

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close this Pandora's Box of endless mischief, grievance, scandal, and political opportunism. In the language of Federalist 54, such voting rights reform may be the "least objectionable among practicable rules" and may inspire more ambitious future efforts to remedy the contradictions of voting rights in America.

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