

# Founding Myths and Democracy in America

June 28, 2011

Roger D. Congleton  
BB&T Chair  
Department of Economics  
West Virginia University

# Introduction

There is a fairly common historical narrative for the emergence of constitutional democracy in the United States.

It often begins with discussion of tax increases, followed by a tax revolt (as with the Boston Tea Party), a declaration of independence and the writing of a new constitution.

The constitution itself is often characterized as “revolutionary,” as an entirely new document that characterized an entirely new form of government. The new form for governance was largely the product of the vision of a handful of men—the Founding Fathers—who wrote the document and sold it to the nation at large during 1787-9.

The narrative that I want to present this evening is one that begins a good deal earlier than 1787 or 1776 or 1773.

# Introduction

- The narrative that I want to develop tonight goes back at to 1619, when the colony of Virginia received its third charter.
- That charter provided for a bicameral legislature: one chamber appointed by the governor consisted mainly of the colonies elite, the other was broadly elected by all freemen (essentially all property owners).
- The governor, the upper chamber and the lower chamber (the elected House of Burgess) all had veto power over new laws and new legislation.
- What is interesting and important to note is that this constitutional architecture was very similar to that of the US constitution some 170 years later.

# Introduction

- The third charter, in somewhat modified form, survived in Virginia until independence was declared, and then was transformed into a state constitution, with minor revisions.
  - Madison—who is often regarded as the most important architect of the US, of course, lived in the state of Virginia and served in its government.
  - It also bears noting that by 1700, most of the other colonial charters (constitutions) had come to resemble that in Virginia.
  - And, that after the Declaration of Independence most of the states slightly revised their colonial charters so that they would serve as their new state constitutions.
- All this suggests that the new constitution of 1787 was really not as new and not as revolutionary as argued in grammar school textbooks and many historical best sellers!

# Introduction

- This is not to say that there was nothing new in the US Constitution or that several key men did not play important roles. But, it is to say that to understand the US constitution, one needs to start a good deal earlier than the Boston Tea Party.
- **Another important more academic myth** about “the founding” is that both the US Declaration of independence and its Constitution were products of the European Enlightenment, that they were, for example, heavily influenced by the political philosophy of John Locke and the constitutional theories of Montesquieu.
  - There is evidence in support of this theory.
  - Both of these important theoretical treatises were written well before these famous American documents were written.
  - Locke completed his widely read treatise on governance in 1689.
  - And that Montesquieu wrote his influential book on the origins of law in 1724.

# Introduction

- However, it is important to note that both Locke and Montesquieu were influenced by developments in the American colonies. And that an interest in social contracts, federalism, separation of powers, rights, and liberty was in evidence in many of the Colonial Charters that were written before Locke or Montesquieu wrote their famous books.
- What I will do tonight is to develop a somewhat different story of the foundations of American democracy than is usually told, one that combines idealism with pragmatism, as most histories do, but one that begins far earlier.
- To begin the story it is useful to begin with a bit of European constitutional history and then discuss the political and legal problems that European settlers in North America had to solve to be viable enterprises.

# Just a Bit on the Historical Context

- In 1600, the standard architecture for governance in Europe included a King and a Parliament.
  - Although, parliaments were commonplace throughout medieval Europe, they had little control over public policy and their members were for the most part members of elite families and were often appointed, rather than elected, or served as a birthright.
  - The locus of policymaking authority was centered in a single royal man—the King—or woman—the Queen—and his or her appointed councilors.
  -
- Prior to 1776, there were no national governments whose policymakers were elected on the basis of broad suffrage, and only a few city-sized governments with relatively broad suffrage are found in historical records.
  - Only citizens, narrowly defined, could vote in Athens. Only the wealthiest voted in medieval cities such as Sienna and Florence during their “republican” periods.
  - Only a small fraction of citizens could vote for the English House of Commons until well into the nineteenth century.

# Just a Bit on the Historical Context

- In the North American colonies, suffrage was 5-20 times greater than in Europe. And many colonial parliaments had significant authority over both taxes and new laws.
  - In chapter 18 of my book, *Perfecting Parliament*, I argue The transition to parliamentary rule in the American colonies in the seventeenth and eighteenth centuries was surprisingly similar to that of Europe in the nineteenth century.
  - Constitutional bargaining and the power of the purse were important factors in each case.
  - However, mobility and scarcity of labor, rather than industrialization, induced constitutional development in what subsequently became the United States.
- In today's talk, I will simply try to make the case that colonial constitutions and constitutional theory were far more advanced than most US histories acknowledge.



# Why was the 3<sup>rd</sup> charter so liberal?

- In this context, it should be clear that the third charter of Virginia that I mentioned at the beginning of the talk represented a significant innovation in constitutional history, both because the elected chamber had so much veto authority and because it was so broadly elected.
- The main part of today's lecture attempts to answer the following three questions:
  - Why was the charter adopted?
  - Why was it so widely copied?
  - How did the balance of authority within it change through time?
- Hint: the answer is NOT because Virginia was in 1619 was populated by radical liberals or brilliant men.

# Why was the 3<sup>rd</sup> charter so liberal?

- First, it is important to recognize that the first North American colonial governments were more or less authoritarian and aristocratic systems, with the possible exception of those in the Puritan colonies of New England.
- Second, it is important to remember that Land rather than Gold was the direct economic return for most investors in the North American colonies.
  - Land, unlike gold, is not portable and is not valuable unless it is “improved” in some sense.
  - Land does not automatically produce income or wealth.
  - Farming requires clearing and tilling. Mining requires exploration, digging, and development, as well as smelting.
  - Timber requires lumberjacks, saws, and sawmills. To profit from land holdings requires labor and capital in addition to land.

# Why was the 3<sup>rd</sup> charter so liberal?

- The point of departure in the North American colonies is one where the elites (in many cases nobles) had enormous holdings of land and enormous political authority within their colonies.
- However, without additional inputs, their large land holdings were essentially without value.
  - Land, unlike gold or spices, could not be moved to locations where labor and capital were plentiful.
- To prosper, the various crown companies and aristocratic proprietors had to attract labor and capital to the colonies, which indirectly gave them an incentive to adopt far more liberal political-legal systems than their brethren in Europe.

## Why was the 3<sup>rd</sup> charter so liberal?

- Although, the authority of aristocrats in their colonies was initially far greater than that they held at home, they could not simply use coercion to force capital and labor to move to their colonies.
- - That is to say, labor from Europe came voluntarily, in contrast to most of that from Africa.
  - Consequently, emigration from Europe was encouraged through a variety of methods, conditional land grants, and loans.
  - Transport was often provided to persons who could not afford to pay for it themselves, in exchange for promises of labor or other services, through what is known as “indentured servant” contracts.

# Why was the 3<sup>rd</sup> charter so liberal?

- However, there was no guarantee that the contracts would be carried out when the servants arrived in North America.
  - Indeed, the worst indentured contracts and contract owners were such that they probably would not have been enforced in England.
  - And, the worst contract owners (masters) might well have been punished for violating criminal law.
- Institutional innovations that increased the effectiveness, perceived fairness of colonial political and legal institutions, and reduce their risks would increase the flow of labor and capital to particular colonies and thereby the wealth of large landholders.
  - This gave colonial elites an incentive to engage in constitutional bargaining and experimentation that was lacking in Europe and most of the rest of the world at that time.

# Why was the 3<sup>rd</sup> charter so liberal?

- In 1619–21, the Virginia company replaced its more or less authoritarian system of governance characterized in its first and second charters with a more representative one, which included a governor, an elected chamber, and an appointed chamber.
- This bicameral solution was a very effective system for protecting property rights.
  - The upper appointed chamber protected elite interests, because it was made up of relatively large landowners, merchants, and company directors.
  - The lower chamber was directly elected with relatively broad “freeman” suffrage and protected the interest of middle-class colonists.
- Designing self-enforcing contracts in circumstances in which time is an important element and courts are nonexistent or biased is clearly problematic, but the Virginia template for governance reduced both the credibility, enforcement, and renegotiation problems.

# Why was the 3<sup>rd</sup> charter so liberal?

- Granting veto power over new taxes and new laws to both chambers tended to guarantee that neither group (elites or the middle class) would be exploited by the other, nor by the governor.
- In this way, the 3<sup>rd</sup> Virginia Charter provided an unusually powerful solution to the problems of self-enforcing contracts, and reduced the ability of colony governors or colonial elites to rewrite “the rules” after colonists had arrived in North America.
- If labor had not been so scarce or contracts could easily been enforced back in England, it seems clear that few proprietors would have had an interest in constitutional liberalization.
- The Virginia template gradually became the standard one for governance in the colonies.

## Why was the Virginia Template Copied?

- This did not happen immediately, but during the course of the seventeenth century.
- As in Virginia, the other colonies usually began with nondemocratic forms of government: a governor and unelected council.
  - The Plymouth (1620), the New Amsterdam Colony (1624), and the Maryland colony (1632) all began with unelected government and subsequently added elected chambers.
  - This was also the case in West New Jersey, which was founded in 1664 and in North and South Carolina (initially a single colony founded by royal charter in 1663).



## Constitutional Reform in the Colonies

- See Salmon and Cambell (1994, ch. 1) for an overview of Virginia's original authoritarian government and Edgar (1998) for an overview of Carolina's early government.
- See Lutz (1998) for a collection of early colonial charters and codes.
- Many other colonial charters and ordinances are also available at Yale Law School's Avalon Project:  
<http://www.yale.edu/lawweb/avalon/avalon.htm>.
- However, charters could be reformed both informally within the colonies and through formal procedures in England.
  - Charters reforms were normally formally ratified in England in legal procedures initiated by colonial governors.
  - They were naturally reformed when there were advantages to doing so (e.g. constitutional gains from trade among those with authority to adopt reforms).

## Constitutional Reform in the Colonies

- In 1636 the Plymouth colony adopted a cabinet form of government with a governor and seven-person council of assistants elected by freemen, followed by provisions for equal protection of the law in 1641 and a bicameral legislature in 1644 (Massachusetts).
  - Maryland adopted an elected assembly in 1638, equality before the law in 1638, and religious tolerance in 1649.
  - West New Jersey adopted a democratic bicameral government in 1681.
  - Its elected chamber was called the General Free Assembly.
  - William Penn in his 1682 *Charter of Liberty*, also adopted a bicameral legislature (provincial council and general assembly).
  - New Amsterdam was taken by England and renamed New York, but religious liberties were continued and a new, relatively weak, representative assembly was adopted in 1683.
  - Carolina held elections for its new Commons House in 1692.
  - Connecticut secured a charter that provided for an elected governor and bicameral legislature in 1698.
  -
- By 1700, a good deal of the architecture for democratic governance had already been worked out and broadly adopted in the colonies.

# Colonization and Constitutional Competition

- The mobility of labor reinforced the incentive for local, county, and colonial governments to adopt liberal political reforms.
  - Rivers and coastal shipping networks had emerged by the late seventeenth century.
  - Person in colonies where governments were poorly constructed or corrupt could thus easily emigrate to other better governed places.
- The “sharing” of power with commoners, equality before the law, and religious tolerance—advanced their economic ends by protecting what economists call “property rights” and by attracting productive settlers to their territories.

# Ideas and Authority in the Colonies

- There was also “ideological” support for political liberalization that reinforced the economic case for liberalization.
- Both colonists and proprietors often had ideological reasons to prefer liberal reforms of the existing institutions.
- These fairly common interests in reform arose in spite of cultural, economic, and religious differences.
  - For example, Plymouth was a religious colony founded by Puritans.
  - New York was a commercial trading post founded by Dutch merchants,
  - Pennsylvania and Maryland were proprietorships (a colony initially purchased by a single person.
  - Carolina was founded by royal charter granted to 8 noble partners.
- A good example of a policy that combined ideological and economic interests is religious tolerance.

# Ideas and Authority in the Colonies

- One might think that formal support for religious tolerance emerged rather late in the colonies.
  - Jefferson is said to be most proud of his Virginia statute for religious tolerance adopted in 1785.
- However, the same incentives that induced elites to accept more liberal constitutions also led many of them to promote religious tolerance.
  - In 1649, the proprietor and colonial legislature of Maryland adopted its Toleration Act in order to attract religious (Christian) dissidents from Europe and from other colonies.
  - Even broader protections were adopted by the charter of West New Jersey in 1676.
  - In 1702 William Penn formally granted religious tolerance to all non-Atheists (although only Christians could serve in government.)

# Ideas and Authority in the Colonies

- It bears noting that, with the exception of New York (New Amsterdam), the first colonies were not initially very tolerant places.
- It also bears noting that tolerance in the colonies emerged somewhat before Locke wrote his famous letter on religious tolerance in 1689.
- That ideas of representative and constrained governance, equality before the law, and protection for property had been formalized before Locke finished his great treatise on government, consider these West New Jersey Charter of 1681 adopted eight years before Locke finished his influential treatise on government, eight years before England's Glorious Revolution, and a hundred years before the American Declaration of Independence.
- The excerpts are from Lutz (1998) and are also available from the Avalon Project at the Yale Law School.

# Ideas and Authority in the Colonies

- **(West New Jersey Charter 1676)**
- We the Governor and Proprietors, freeholders and inhabitants of West New Jersey, by mutual consent and agreement, for the prevention of invasion and oppression, either upon us or our posterity, and for the preservation of the peace and tranquility of the same; and that all may be encourage to go on cheerfully in their several places.
- We do make and constitute these our agreements to be as fundamentals to us and our posterity, to be held inviolable, and that no person or persons whatsoever, shall or may make void or disanul the same upon any presence whatsoever.

# Ideas and Authority in the Colonies

- (i.) There shall be a free assembly of the people for the Province aforesaid, yearly and every year at a day certain chosen by the said free people of said province, whereupon all of the representatives of the free people of the said Province shall be summoned to appear
- ... to make and ordain such acts as shall be requisite for good government and prosperity of the free people of said province.



# Ideas and Authority in the Colonies

- (ii.) The Governor of said province shall not suspend or delay the signing, sealing and confirming of such laws as the General Assembly shall make.
- (iii.) That it shall not be lawful for the Governor to make or enact any law or laws for said Province without the consent, act, and concurrence of the General Free Assembly.
- (iv.) That it shall not be lawful for the Governor and council, or any of them, to levy taxes without the consent, act, and concurrence of the General Free Assembly.
-

# Ideas and Authority in the Colonies

- (v.) That no General Free Assembly shall give to the Governor, his heirs, or successors any tax or custom for any time longer than one whole year.
- The West New Jersey charter of 1676 had previously provided for freedom of religion (chapter 16), for due process and jury trials (chs. 17-20), and public trials (ch. 23).
  - “That no men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters, therefore it is consented, agreed and ordained, that no person or persons ... shall be any ways upon any presence whatsoever, called in question, or in the least punished or hurt, for the sake of his opinion, judgment, faith or worship towards God in matters of religion

# Ideas and Authority in the Colonies

- Of course, not every charter included such strong language, but that what I call “political liberalism” was already present in the colonies, well before Locke, Montesquieu, or Blackstone finished their important books.
- It is also noteworthy that the language of the West New Jersey Charter were not simply philosophical ideas in the colonies, but already matters of law.

# Ideas and Authority in the Colonies

- It is also noteworthy that the balance of authority in the colonial governments that emerged during the seventeenth and eighteenth centuries often had dominant or nearly dominant parliaments.
  - A balance of authority that did not emerge in Europe for another century.
- Again, this is partly a matter of economics and partly of ideas.
  - Deference to the executive branch of government had never been a central tenant of political theory or practice in the North American colonies.
  - Colonial assemblies (parliaments) were not simply rubber stamps for their governors.
  - However, economics also played a role.

## Ideas and Authority in the Colonies

- The North American colonies were to be self-financing, indeed profitable, enterprises.
- This indirectly allowed the colonial parliaments to rapidly become among the most powerful representative assemblies in the world at the time, in terms of their control over legislation and taxation.
- Without standing personal tax revenues and with little support from English taxpayers or crown companies, the royal colonial governors were very dependent on their legislatures for revenues and often for their salaries.
  - This made the governors very dependent on their colonial legislatures and also provided them with good reason to look for additional revenue from the British parliament.
  - (The governor of the Connecticut and Rhode Island colonies were (indirectly) elected by the colonists. The other governors were by royal appointment or selected by colonial companies and proprietors.)
- Governors needed reliable majorities in the colonial parliaments to secure the resources for governing, which in many cases included their own salaries.

# Conclusions

- Liberal constitutional democracy had largely emerged in North America well before the Declaration of Independence was drafted, the Revolutionary War Fought, or the new Constitution the United States was Drafted.
- The process of constitutional liberalization was driven jointly by a broad desire to attract new residents (e.g., the demand for labor) and the rise of support for liberal ideas.
  - Migration to and within the colonies was often organized by entrepreneurs in Europe and within the colonies.
  - Land speculators aggressively sought labor and capital to increase the value of their land holdings.
  - Less liberalization was evident in the colonies that were least dependent on free labor.

## Conclusions

- Scarce, voluntary, and mobile labor played an important role in the early emergence of liberal political institutions and civil liberties in the English colonies—not so much because they were occasionally politically active, but because they were economic necessities.
- These economic incentives to adopt liberal reforms, were reinforced by ideas concerning constitutional government, equality before the law, religious tolerance, and private property that had emerged in the colonies a century before the “founding documents” were drafted and well before Locke, Montesquieu, Rousseau, and Blackstone completed their famous theories of social contracts.

## Conclusions

- In the end, the colonies turned out to be great experimental laboratories of representative governance.
- They did not produce chaos or wholesale redistribution as many conservatives at that time feared, in part because of clever institutional designs, but also because many—perhaps most—colonists supported the concept of private property.
- The colonies prospered as labor and capital poured in from Europe and elsewhere.
- Colonial governments, which initially represented investor interests, wound up liberalizing political institutions a century or two before similar pressures led to reforms in Europe, and well before the Declaration of Independence was conceived.



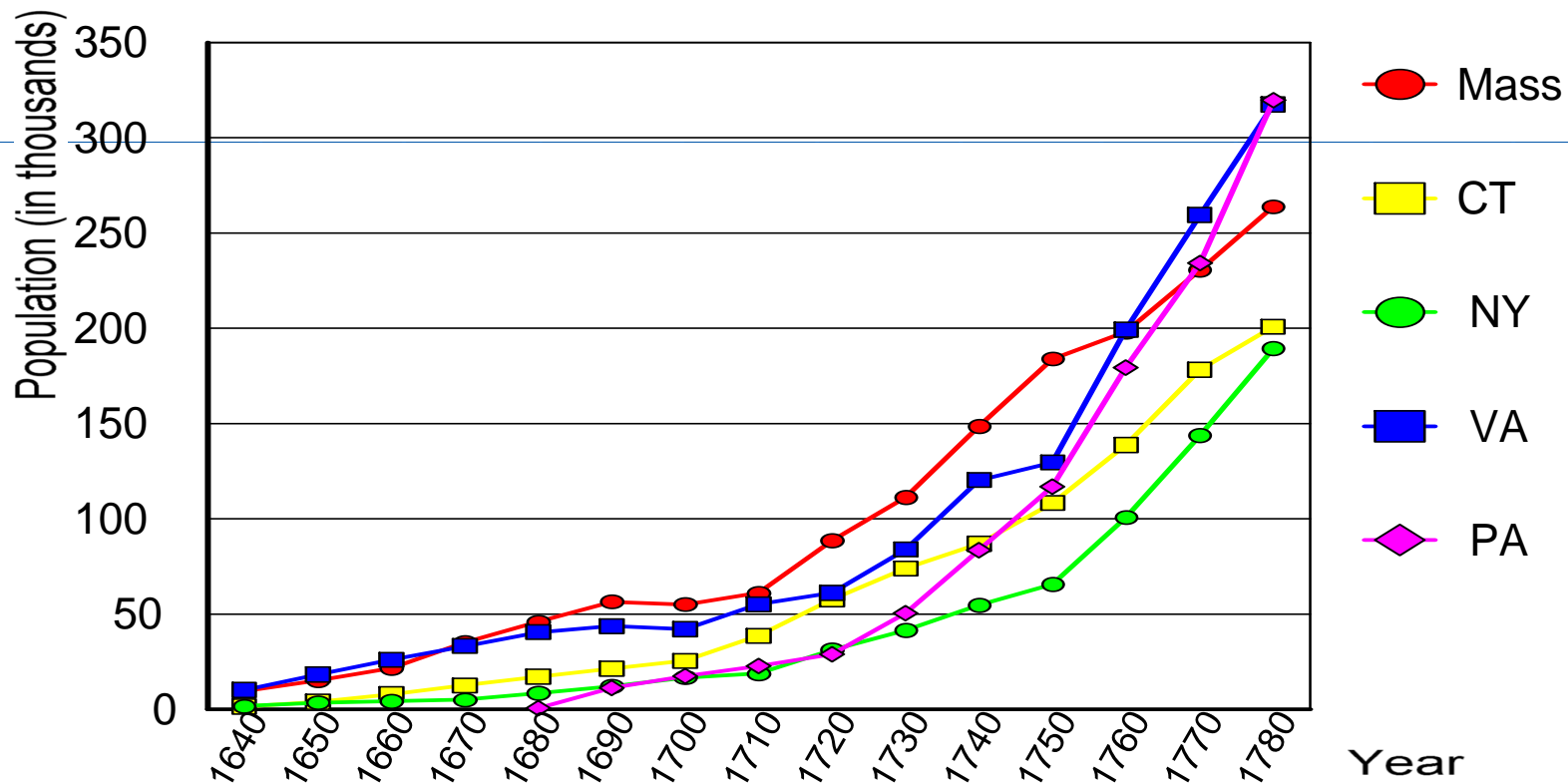
## Colonial Populations (of European decent)

### Colony-State Population (of European Decent) 1700-1780

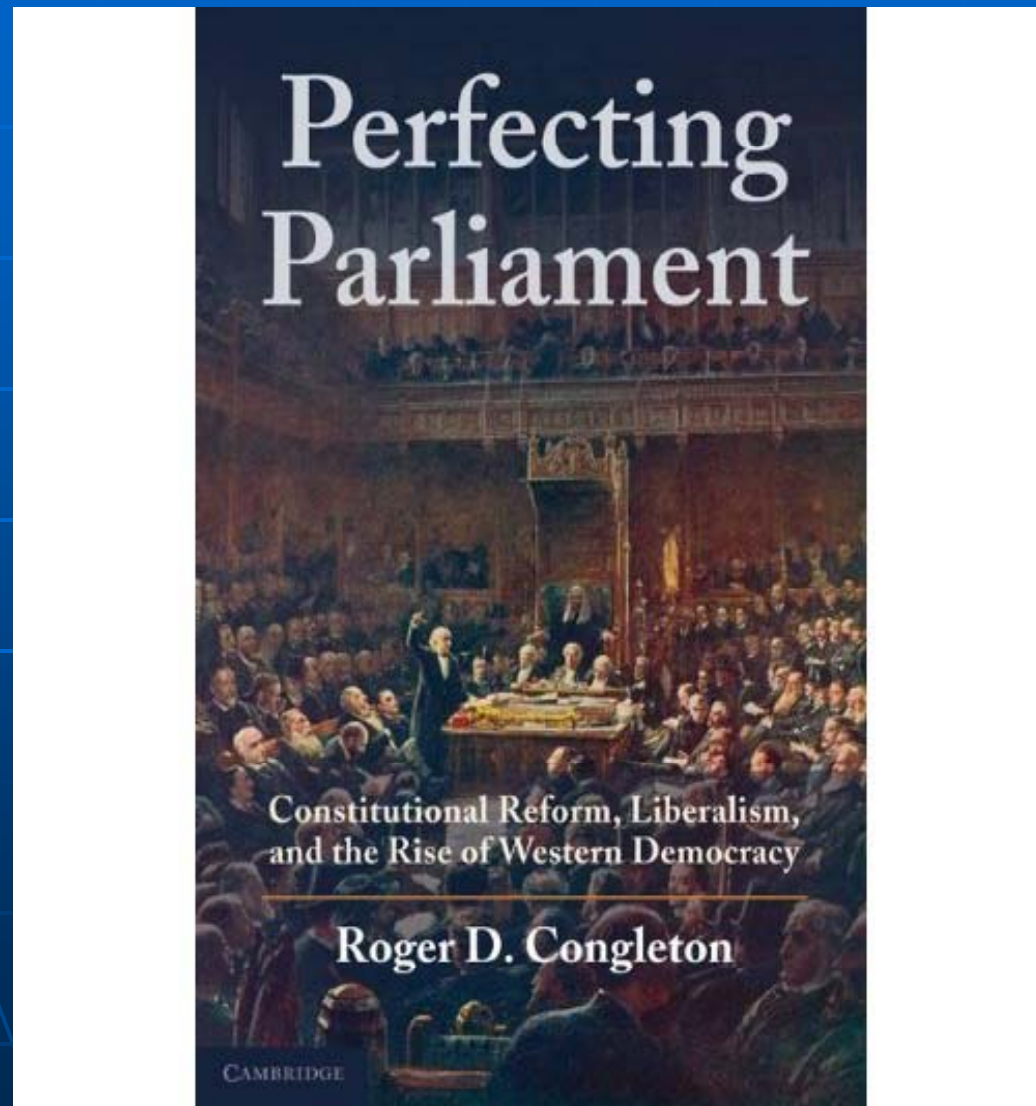
Year	CT	DE	GE	MA	MD	NH	NJ	NY	NC	PA	RI	SC	VA
1700	25.5	2.3		55.1	26.4	4.8	13.2	16.8	10.3	17.5	5.6	3.3	42.2
1710	38.7	3.1		61.1	34.8	5.5	18.5	18.8	14.2	22.9	7.2	4.6	55.2
1720	57.7	4.7		88.6	53.6	9.2	27.4	31.2	18.3	29.0	11.1	6.5	61.2
1730	74.0	8.7		111.3	73.9	10.6	34.5	41.6	24.0	50.5	15.3	10.0	84.0
1740	87.0	18.8	2.0	148.6	92.1	22.8	47.0	54.7	40.8	83.6	22.8	15.0	120.4
1750	108.3	27.2	4.2	183.9	97.6	27.0	66.0	65.7	53.2	116.8	29.9	25.0	129.6
1760	138.7	31.5	6.0	198.0	113.2	38.5	87.2	100.8	76.9	179.3	42.0	36.7	199.2
1770	178.2	33.7	12.7	230.6	138.8	61.7	109.2	143.8	127.6	234.3	54.4	49.1	259.4

# Colonization and Constitutional Competition

## Population of Five Largest Colonies (1640-1780)



For more see Chapter 18 of:



## Independence and Constitutional Negotiations

- The colonial period of the mid-Atlantic colonies ended in 1776, with the Declaration of Independence.
  - This was an important event in many dimensions, but it is of greatest interest here because it produced new opportunities for constitutional exchange.
- The Declaration of Independence and subsequent war to secede from the British Empire induced additional constitutional negotiation and reform.
  - There were new problems to address and many long-standing interests and constraints disappeared.
  - These, naturally, created numerous opportunities for constitutional exchange among those with the authority to amend existing arrangements.
  - The resulting constitutional bargains created the first sizable polities grounded **entirely** in broad suffrage.

## Independence and Constitutional Negotiations

- The most immediate and direct effect occurred on the organization of the executive branch at the state level.
  - The royal and proprietary governors who had run the executive, albeit subject to considerable control by elected colonial parliaments, lost their offices.
- Two methods for selecting governors attracted the most attention within colonial legislatures, and both were used by subsets of the new sovereign state governments.
  - Governors could be indirectly selected by elected state legislatures or governors could be selected directly by electorates.
  - Note that the former, implied that some states adopted essentially parliamentary systems—ones that would not emerge in Europe for a century.

## Independence and Constitutional Negotiations

- A second direct effect was that reasons to form a national government of some kind emerged in a rather obvious and dramatic form.
  - A war of independence was to be fought with one of the most powerful states on earth, which would be more effective if colonial militias and international lobbying efforts were coordinated .
  - Prior to independence, an alliance of the colony-states was formed to coordinate and share the cost of lobbying the Britain Crown and Parliament.
- After independence was declared, the alliance was formalized as a treaty organization of sovereign states, somewhat analogous to the old Dutch Republic and modern European Union.
  - The new treaty organization had to be acceptable to all member states and consequently established a relatively weak central government; it was essentially a coordinating body with no authority to impose taxes and little ability to impose other rules on its members.
  - This new national government was formalized and extended by the Articles of Confederation, which were completed in 1777 and used for national policy making for the next two decades.
    - See Congleton (2004b) and Congleton, Kyriacou, and Bacaria (2003) for rational choice based theories of voluntary association of state governments and treaty organizations.

## Independence and Constitutional Negotiations

- Of course, the new national government was not perfect, and also produced new potential gains to constitutional exchange.
  - Governance under the Articles of Confederation proved adequate for a time of war, and able to pass significant legislation such as the Northwest Ordinance governing the admission of new states.
  - However, it was, perhaps surprisingly, widely regarded as too weak to advance national interests during the time of peace after the war was won in 1783.
  - States ignored requests for contributions to the central government, trade barriers were being erected among the states.
  - Conflicts about the location of state boundaries were left unresolved.
  - And national defense was poorly financed and orchestrated.

## Independence and Constitutional Negotiations

- Concern about the latter and in paying off creditors created opportunities for constitutional exchange.
  - A prominent group of state and national politicians believed that a stronger central government would be necessary if the United States were to survive.
- Negotiations for a stronger constitution took place in assemblies of appointed state representatives in Annapolis and Philadelphia, and the results of this process were put to state governments for ratification in 1787.
  - After much debate, the proposed constitution was approved by the member states by 1789. In this manner, a weak central government was peacefully and lawfully transformed into a far stronger one.



## Independence and Constitutional Negotiations

- The result was a new federal application of the hundred and seventy year old Virginia template.
  - It combined an indirectly elected executive (president) with a bicameral legislature, and an independent judiciary.
  - One chamber of the legislature (the Senate) was appointed by the states (until 1913) as had been the previous Congress.
    - The Senate was adopted, in part, because it was necessary to secure the approval of the small states.
  - The other chamber was new, and made the national government truly national rather than a treaty organization.
    - The House of Representatives was directly elected by voters, and seats were apportioned by state population (with slaves counting 1/3).
  - Various civil liberties were also guaranteed by the constitution itself and others were extended because state conventions and legislatures demanded a clearer statement of the limits of central authority.
    - The Bill of Rights (first ten amendments of the constitution) were adopted to secure the approval of legislatures and constitutional conventions in large states.

## Independence and Constitutional Negotiations

- The new government could directly levy taxes, and had considerably more control over military forces.
- It is, however, easy to exaggerate how centralized the new government really was.
  - For the next seventy five years, central government expenditures averaged about 4 percent of GDP.
- For the next century and a half, the main source of government services remained state and local (town and counties) government rather than federal.
  - It was not until approximately 1935, during the Great Depression and after the progressive amendments (see paper), that federal expenditures exceeded state and local expenditures.
  - See Historical Statistics of the United States Volume 5 2006: Table Ea-A, pp. 5-6.

# Conclusions

- The remainder of the paper focuses on the 19<sup>th</sup> century, which I do not have time to go through today.
  - Suffice it to say that with the adoption of woman's suffrage in 1920, the United States could be said to have completed a 300-year-long transition to constitutional democracy—outside the Southern states.
- It was a transition marked by revolution and war, but it was rarely motivated by military events.
  - Rather, external threats created new opportunities for constitutional exchange.
- The institutions that emerged were influenced by previous institutions that determined the distribution of political property rights as well as the new opportunities created by economic, military, and ideological shifts.
  - The importance of commercial interests, industrialization, and ideology in this process is clearly evident throughout this history, which is consistent with a theory of constitutional bargaining that stresses changes in the interests of those with the authority to alter constitutional law, rather than revolutionary threats.
- The essentially lawful basis of the constitution that continues to frame the modern United States of America is evident in its basic template for governance, which extends back to early colonial times.