Chapter 18: The United States, an Exception or Further Illustration?

A. Introduction: American Exceptions and Similarities

The last case to be analyzed is the American transition to constitutional democracy. This case involves a somewhat different catalyst for constitutional exchange than the previous ones, although the results are consistent with the models of constitutional exchange developed in part I. This case also involves another continent's culture, the absence of an obvious "king," a war of independence, and most important, a difference in the timing of the transition. Although the relevant British colonies won independence as a nation-state in 1783, their transition to democracy in what was to become the United States began much earlier.

The first more or less democratic constitution in America was the third charter for the Virginia colony, which was drafted between 1619 and 1622. It called for a bicameral legislature, with one appointed chamber (the chamber of state), composed largely of English nobles, and another chamber (the chamber of burgesses), which was elected by freemen in the colony. Freemen were simply men who were neither indentured servants nor slaves and owned a bit of property. This was very broad suffrage by European standards well into the nineteenth century, because so many colonists owned property. This early start suggests that the path to democracy in the United States may have been quite different than in Europe, but this is less true than might have been expected.

In the United States and most of Europe, the path was largely peaceful and gradual. In the United States and most of Europe, the liberal ideas and economic interests of political elites (i.e., those with the authority to adopt constitutional changes) were important determinants of constitutional developments. In the United States and most of Europe, the power of the purse played an important role in the emergence of party governance and parliamentary authority. In the course of a century and a half, a series of constitutional reforms cumulatively led to new forms of state and national governance. The United States adopted women's suffrage in 1920, about the same time as in Europe's parliamentary democracies. The main difference between the American and European transitions is the catalyst for constitutional development, rather than about the fundamental path to democracy.

The War of Independence, which has played a powerful role in America's mythology and which played a significant role in the emergence of national government, had a smaller effect on the institutions of governance than often told to grammar school students. Relatively few Americans appreciate how democratic the English colonies were before the War of Independence was fought,

nor of the parallels between its later developments and those of Europe in the late nineteenth century. Both its prerevolutionary and post-revolutionary reforms are consistent with the model of constitutional exchange developed in part one of this book.

B. Constitutional Competition in the Colonial Period

Colonization of North America began nearly a century later than in South America, in large part because land, rather than gold, was the direct economic return for most investors in the North American colonies. Land does not automatically produce income or wealth. Land, unlike gold, is not portable and not valuable, unless it is "improved" in some way. Farming requires clearing and tilling. Mining requires exploration, digging, and smelting. Timber requires lumberjacks, saws, and sawmills. To profit from land holdings requires labor and capital in addition to land. Consequently, those who received large land grants or subsequently purchased large tracts in North America had a strong demand for labor and capital, because without those additional inputs, their large land holdings were essentially without economic value.

> The King [James I], who was always restive under the restraint placed upon him by the English Parliament had no desire to see the liberal institutions of the mother country transplanted … **He wished, beyond doubt, to build a colonial empire which should be dependent upon himself for its government and which should add to the royal revenues.** In this way he would augment the power of the Sovereign and render it less subject to the restraint of parliament. (Wertenbacker 1914: 32).

Property in the early commercial colonies, such as Virginia, was much like that within modern corporations, in which the firm's property is communal and those making use of the properties are simply employees or partners with various use rights. Ownership was initially vested in the company and its shareholders, rather than the persons using corporate resources. As it became clear that selling land was more profitable than managing or leasing it, surveys and laws regarding ownership were developed.

Although many land-grant recipients and subsequent purchasers of large tracts of land were nobles or members of noble families who had enough wealth to provide much of their own capital, they could not supply their own labor. Both skilled and unskilled labor had to be attracted to their colonies, towns, plantations, and farms if profits were to be realized from their investments in the North America. This demand for labor played a central role in the early constitutional developments of the English colonies of North America.

Credible Commitments and Other Contracting Problems

The most common method of attracting skilled and unskilled labor to the colony were with loans made to workers to pay for their journey across the Atlantic combined with promises of support after arrival. Shipping agents and other entrepreneurs provided transportation to the colonies in exchange for promises of several years of labor, and those promises (contracts) were sold by shipping companies to landowners needing labor. These indentured servant contracts normally promised workers a substantial piece of farmland after their transport loan had been worked off, which gave them an interest in adhering to the contract and allowed the servants to become freemen after five to 10 years of hard work for their colonial masters. About half of the European emigrants to the colonies in the seventeenth and eighteenth centuries had their trips financed through indentured servant contracts (Galenson 1986).

In some cases, however, promises were made and then new obligations mandated after the "servants" arrived in America, especially in the early days.

> The Divine, Moral and Martial Laws, as they were called, undoubtedly brought about good order in the colony, and aided in the establishment of prosperity, but they were ill suited for the government of free-born Englishmen. **They were in open violation of the rights guaranteed to the settlers in their charters, and caused bitter discontent and resentment**. ("Regarding Governance in Virginia in 1610," Wertenbaker 1914: 23).

Many such problems can be thought of as commitment problems, although not all of them involved contracts per se. The rulemakers in the colonies had significant autonomy in the early days and could rewrite rules and contracts and enact new regulations at their pleasure, as owners of firms are often able to do within their own organizations.

Even without problems of governance, indentured labor "contracts" were risky both for the indentured servant and the contract holder. Once in America, indentured servants could not afford to purchase a ticket back to Europe to sue for damages, if their master overstepped the bounds of the contract, reneged on his promise of land at the end of the contract period, or added new conditions to the terms of contract. Exit costs to other colonies were low, but not trivial in the early days, and in most places natural exit costs were reinforced by local laws. Conversely, masters might have difficulty with "runaways" whether they overstepped the bounds of the contract or not, as transportation networks among the colonies emerged. In the early days, many servants and other immigrants also died from various diseases before paying off their debts. In the first two decades of the Virginia colony, there were many years in which new immigrants simply replaced previous

arrivals who had died from disease and conflicts with Indians. Between 1619 and 1624, some 5,000 persons emigrated to Virginia, but the net gain in populations was only 200 (Wertenbacker 1914: 12–6, 46–7).

Similar problems faced communities that attempted to attract tradesmen and the tradesmen who brought their skills or capital to the new colonies in exchange for promises of land or other support. People would be more willing to emigrate if contract terms were reasonable and enforced, and if subsequent promises and accumulated wealth were not broken or expropriated. And, of course, more people would provide labor-backed loans, if they were likely to be repaid.

To attract labor and capital to their colonies, landowners needed to assure labor, small businessmen, and other investors that they would be better off in their particular colony than at home. This would require establishing a reliable, credible method of enforcing land titles and contracts in a predictable (lawful) manner.

In principle, such contracting problems can be solved through self-enforcing contracts, a well-functioning court system, or a combination of the two. However, in the early days, court systems did not always exist, and those that did exist tended to be biased in favor of major shareholders and/or associates of the proprietors receiving major land grants. Designing self-enforcing contracts in circumstances in which time is an important element and courts are nonexistent or unreliable is clearly problematic. Indeed, the worst indentured contracts were such that they probably would not have been enforced in England, and the worst indentured contract owners (masters) might well have been punished for violating criminal law.

Large landholders had a significant economic interest in developing methods for securing property rights and enforcing contracts in the colonies. If economic and political risks could be reduced for skilled and unskilled labor and for large and small capital investors, their land would become much more valuable. Institutional innovations that increased the effectiveness and perceived fairness of colonial political and legal institutions would increase the flow of labor and capital to particular colonies and thereby the wealth of large landholders. As in the case of the medieval tax constitution, a government and court system that protected the landed gentry, capital owners, and labor from arbitrary treatment would advance the long-run interests of all.

The Virginia Experiments: Representative Political Institutions as a Means of Protecting Property Rights and Increasing Cooperation

The Virginia colony's first governing body was characterized by the First Charter of Virginia that was granted by James I in 1606. The first charter provided a land grant in North America.

Access to that land was to be determined by a council consisting of major investors in the Virginia Company, many of whom were nobles who naturally remained in England.

> And do therefore, for Us [James I], our Heirs, and Successors, GRANT and agree, that the said **Sir Thomas Gates, Sir George Somers, Richard Hackluit, and Edward-Maria Wingfield**, Adventurers of and for our City of London, and all such others, as are, or shall be, joined unto them of that Colony, shall be called **the first Colony**; And they shall and may begin their said first Plantation and Habitation, at any Place upon the said-Coast of Virginia or America, where they shall think fit and convenient, ... And that **no other of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the Backside of them, towards the main Land, without the Express License or Consent of the Council of that Colony**, thereunto in Writing; first had and obtained.

A second charter of the Virginia company was granted in 1609, two years after the colony was founded. The second charter granted very extensive legislative authority to the company by the king for a period of 20 years, in exchange for promised payments to the sovereign. The company's ruling council, in turn, delegated much of its authority to an appointed governor who arrived in Virginia in 1610.

A third charter was obtained in 1611, which gave the company additional legislative ability:

> [The company] shall likewise have **full Power and Authority, to ordain and make such Laws and Ordinances, for the Good and Welfare of the said Plantation**, as to them from Time to Time, shall be thought requisite and meet: So always, as the same be not contrary to the Laws and Statutes of this our Realm of England; And shall, in like Manner, **have Power and Authority, to expel, disfranchise, and put out of and from their said Company and Society for ever**, all and every such Person and Persons.

Because the efforts of the company's appointed governor were not entirely successful, the company decided to revise its method of governing the colonies.[383] At this point, the Virginia company replaced its authoritarian system of governance with a more representative one by adopting a system of governance based loosely on the English procedures in 1619–21. The new system of governance included a governor, an appointed chamber, and an elected chamber (the General Assembly).[384]

> THE one of which Councils, to be called THE COUNCIL OF STATE (and whose Office shall chiefly be assisting, with their Care, Advice, and Circumspection, to the

[383] See Salmon and Cambell (1994: ch. 1; Wertenbaker 1914: ch. 2) for an overview of Virginia's original authoritarian government.

[384] Copies of Virginia's three charters and the company's 1621 Ordinances for Virginia are available from Yale's Avalon Project (http://avalon.law.yale.edu/subject_menus/statech.asp).

> said Governor) shall be chosen, nominated, placed and displaced, from time to time, by Us.
>
> [The other shall consist] of two Burgesses out of every Town, Hundred, or other particular Plantation, to be respectively chosen by the Inhabitants: Which Council shall be called THE GENERAL ASSEMBLY, wherein (as also in the said Council of State) all Matters shall be decided, determined, and ordered, by the greater Part of the Voices then present; reserving to the Governor always a Negative Voice. And this General Assembly shall have free Power to treat, consult, and conclude, as well of all emergent Occasions concerning the Public Weal of the said Colony and every Part thereof, as also to make, ordain, and enact such general Laws and Orders, for the Behoof of the said Colony, and the good Government thereof. (*Ordinances for Virginia*, July 24, 1621).

This template for governance solved many of the existing contracting and governance problems.

The Virginia model provided the sovereign company with considerable control over the office of governor and the membership of the first chamber, which consequently represented the interest of well-connected major landholders and merchants. The second chamber was elected by town and country property holders and therefore represented the interests of the middle class. Together, the veto power of the two chambers protected the middle class and economic elites from each other and provided similar protections for the proprietors. Changes in basic contract law, property rights, and other civil liberties could be adopted only if they advanced the interests (of majorities) of all three groups. The council and subsequently the assembly served as Virginia's highest court of appeal (Wertenbaker 1914: 2, 8–10, 34–7, 40, 54–5).

The Virginia model provided fiscal and regulatory stability that was somewhat stronger than that noted by North and Weingast (1989) regarding England's parliament 70 years later (1689).[385] And, it was this institutional template together with the mobility of labor and the interests of large landowners that induced the emergence of relatively liberal forms of representative government throughout the North American colonies during the next century and a half. King James had granted the Virginia company the authority to create institutions of governance in their colony in the company's second and third charters, partly in exchange for a promise of additional revenues from the colony, although he evidently disapproved of the form finally chosen in 1619.[386]

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[385] The ordinances for Virginia adopted in 1921 describe the new bicameral representative government for the colony itself. See Wertenbacker (1914: chs. 2–4) for a detailed overview of how lawful governance gradually emerged under that new colonial constitution.

[386] It is interesting to note that Virginia's 1621 constitution was written well before Hobbes, Locke, or Montesquieu put their pens to paper, and before the Levellers contract. It is often attributed

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Gradual Liberalization of Colonial Governments

Although the Virginia template gradually became the standard one for governance in the colonies, the other colonies also began with nondemocratic forms of government: often a governor and unelected council of advisers. Initial variation in colonial governance was partly caused by 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, and Maryland was a proprietorship (a colony initially purchased by a single person) that encouraged Catholic immigration. The Plymouth (1620), New Amsterdam (1624), and Maryland (1632) colonies all began with unelected governments. 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 in 1664. Charter reforms were normally formally ratified in England in legal procedures initiated by colonial governors.[387]

Within a few decades of their colonies' foundings, the various colonial formeteurs found it useful to add elected chambers with veto power over taxes and laws in response to labor mobility and yardstick competition among the colonies. For example, in 1636 the Plymouth colony adopted a cabinet form of government with a governor and seven-person council of assistants elected by freemen. This was modified by adding 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 for all Christians in 1649. West New Jersey adopted a democratic bicameral government in 1681. Its elected chamber was called the General Free Assembly. New Amsterdam was taken from the Dutch by England and renamed New York, but its religious liberties were continued and a new, relatively weak, representative assembly was adopted in 1683. (Similar assemblies had been proposed during the Dutch period, but not adopted.) 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.

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to Sir Edwin Sandys, who had served as a member of parliament for many years and had become the treasurer of the Virginia Company of London shortly before Virginia's ordinances for the new government were issued. Sandys had previously been involved in contesting royal grants of monopoly (mentioned in chapter 12) and debates on religious tolerance. He also had relations with the Leiden Puritans, many of whom migrated to Plymouth from the Netherlands in 1620 via the Mayflower. See Raab (1998) for a biography of Sir Edwin and his various roles in the Virginia company and English parliament.

387 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.

The influence of early liberal political theories is evident in most of the charters. Consider, for example, these excerpts from the West New Jersey Charter of 1681 adopted a decade before Locke finished his influential treatise on government and several years before England's Glorious Revolution. The excerpts are from Lutz (1998):

> **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.
>
> (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.
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> (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.
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> (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**.
>
> (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).

Although the North American colonies were often founded for profit and often run by chartered companies, they turned out to be great experimental laboratories of governance. Indeed, the freedom to conduct constitutional experiments could be counted as one of the great unexpected consequences of the discovery of the New World, perhaps the greatest in the long run.

Independence of the English Colonies

That the North American colonies remained independently organized and governed, rather than centrally administered under the tight control of England's kings was partly a matter of luck. Seventeenth-century England was a place of political turmoil, involving a major civil war, Cromwell's dictatorship, a restoration, and a Glorious Revolution.

It was not until shortly before the Glorious Revolution that an English monarch, James II, began to centralize governance in the colonies. James II initiated a series of lawsuits to revoke colonial charters for violations of English law. His success in court allowed him to create the Dominion of New England in 1685, which eventually placed all of New England, New York, and New Jersey under a single central, more or less authoritarian, administration. James II appointed Governor Andros to rule the dominion.

Andros, as evidently ordered, restricted local assemblies and reduced judicial independence by appointing new judges and suspending the Massachusetts General Court. New taxes were imposed, and existing land claims were challenged. Enforcement of the Navigation Acts was stepped up. Writs against the charters of Maryland, the Carolinas, Pennsylvania, and the Bahamas were pending in English courts. If successful, those suits together with the dominion would have greatly reduced political autonomy throughout the English colonies in North America (Taylor 2001: 276–77; Haffenden 1958; Osgood 1902).

This policy of centralization ended for several decades in 1689, when William III and the Dutch army induced James II to flee to France. William III reinstated the colonial charters (in some cases with minor revisions) and thereby restored decentralized governance in the colonies. George III was the next English monarch to make a serious attempt to centralize control over the colonies, which more or less directly led to the American War of Independence.

The Power of the Purse, Labor Mobility, and Constitutional Liberalization in the Colonial Period

Colonial governors and their governments were not as powerful in the North American colonies as in medieval Europe or as centralized as in the South American colonies. This was partly because the North American colonies were less profitable than colonies elsewhere and so were less directly supported by well-organized European armies, courts, and police. With little or no standing tax revenues and with little support from English taxpayers or sovereign companies, the royal colonial governors depended on taxes and fees approved by their legislatures for revenues and often

for their salaries. Governors needed reliable majorities in the colonial parliaments to secure the resources for governing, which made the governors dependent on their colonial legislatures (and also provided them with good reason to look for additional revenue from the British parliament). It also made the colonial parliaments among the most powerful representative assemblies in the world at that time, in terms of their control of legislation and taxation.[388]

The power of colonial government was also constrained by the desire to attract new residents (i.e., the demand for labor) and to avoid out-migration by those in the colony.

Migration to and among the colonies was catalyzed by the efforts of entrepreneurs in Europe and in the colonies. In the North, religious leaders organized groups to found new settlements to promote narrow religious practices, although these leaders also recognized the need for additional colonists to increase the viability of their communities and "spread the word." In the rest of the colonies, colonial governments often represented investor interests and so attempted to attract the labor and capital necessary for their colony's viability and their company's or proprietor's profits. Within the colonies, land speculators aggressively sought labor and capital to increase the value of their land holdings.

Without relatively liberal political institutions, a colony's landed gentry might have a bit more political power and "their" people might exhibit greater cultural uniformity, but they would have been less wealthy and more at risk, because there would be fewer persons to farm, timber, mine, manage, purchase, and protect their land holdings. Exit from poor or overly repressive colonies and communities became increasingly easy in the seventeenth century. Colonial transport networks developed, and the natives were gradually pushed out of territory near the Atlantic seacoast. In combination with decentralized governance, it became relatively easy to move to more prosperous towns and colonies with somewhat different rules and rulers. Many of the colonies were physically close together, because they were relatively small—as in the North with Massachusetts, Rhode Island, and Connecticut—and/or were linked together by common waterways—as with Maryland, Virginia, and Pennsylvania or New Jersey, Connecticut, and New York. Ships ran up and down the coast of North America, and the same rivers that allowed commerce to develop inland also allowed

[388] The governor of the Connecticut and Rhode Island colonies were (indirectly) elected by the colonists. Other governors held office through royal appointment, appointment by colonial companies, or proprietors.

pioneers to move from town to town. Less liberalization was evident in the Southern colonies, evidently because they depended less on free labor. Wealth requirements for suffrage and office, for example, remained somewhat higher.[389]

This is not to say that colonial governance was always routine and lawful, but that the institutions adopted tended to make it so—apart from disagreements about what the laws for making public policies (interpretations of colonial charters accepted by legal authorities in England) actually meant. Elections were routinely organized, and elected representatives routinely decided the merits of new taxes and laws. Colonial suffrage was very broad by world standards in the seventeenth century, although various restrictions on suffrage were introduced in most colonies during the early eighteenth century, as ideology shifted, population increased, and use of slavery expanded in the south (McKinley 1905; Brown 1955; Steinfeld 1989).

By assuring stable property rights and allowing provision of needed public services, colonial governments demonstrated that representative governance was a feasible arrangement for territorial governance. Indeed, representative political institutions tended to increase prosperity, a prosperity that tended to be reinforced by subsequent inflows of labor and capital.[390]

The success of these relatively democratic institutions was evident in the emigration rates, land sales, use of new labor contracts, and economic growth. Population and economic development increased rapidly during the seventeenth century, and by century's end the larger colonies were comparable in size to the smaller European states and duchies in 1700. Major commercial centers emerged along the Eastern seaboard at Boston, New York, Philadelphia, and Charleston. A good deal of the population growth in colonial America was simply the effect of learning to farm in the New World, which increased rates of survival and family size. But much of the commercial prosperity can be attributed to the relatively rapid improvement in governance and government

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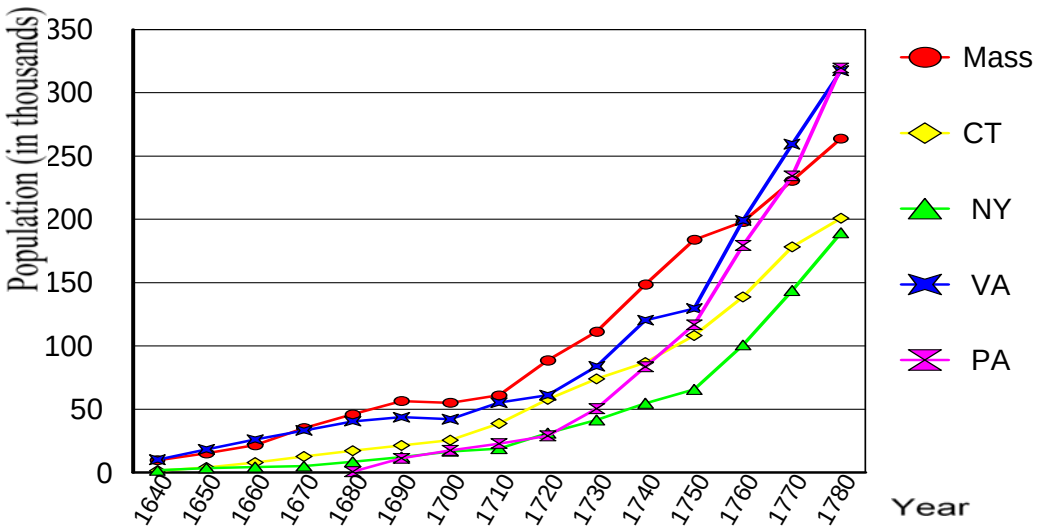
[389] European political institutions also evolved to increase the value of land, but in a situation in which labor was not often scarce, because of Malthusian labor supplies. There are several cases in which individual European monarchs encouraged immigration of relatively highly skilled groups that could produce services unavailable locally. Immigration was often encouraged with subsidies and by granting special civil and political liberties within specific communities or "free towns." In general, however, competition for unskilled labor was less intense in Europe, because the supply of labor was relatively large and its marginal productivity was relatively low.

[390] The possibility of exit must also have moderated the behavior of other colonial governments around the world with respect to their immigrants as well. But many were more profitable than the North American colonies and, thus, they were better policed and exit costs could be driven higher by local governments. European diseases had also greatly reduced the native "Indian" population, which simultaneously increased the demand for colonists and provided many more opportunities for resettlement (more open land) than in many other parts of the world.

services. The latter was often simply the rule of law and absence of impediments to trade (low exit costs), which contemporary research shows tends to increase economic growth. It is interesting to note that many of the contemporary indexes of "institutional quality" are simply indexes of the "liberalness" of a polity's political and economic institutions (Gwartney, Lawson, and Holcombe 2006; Keefer and Knack 1995; Congleton 2007b).

The association between democratic bicameral forms of the "king and council" template and prosperity led essentially all of the North American colonies to adopt them during the late seventeenth and early eighteenth centuries.

Figure 1: European Derived Population of the Five Largest Colonies (1640-1780)



Mid-Eighteenth Century Colonial Governments

Eighteenth-century colonial governments typically included bicameral legislatures with one elected and one appointed chamber, each with veto power over new taxes and new laws.[391] The upper chamber was often an elite chamber composed of senior government officials and major landholders, which was analogous to the noble chambers of European parliaments in that era, although membership was not entirely based on family bloodlines. Members of the second chamber were normally elected on the basis of much broader suffrage than in European parliaments. The

[391] By the time of the Revolutionary War, only Pennsylvania had a unicameral legislature, although it too had briefly experimented with the Virginia model.

number of voters eligible to participate in elections for the lower chamber tended to increase as the number of freemen increased through time, although suffrage laws were occasionally tightened. Rather than 5 or 10 percent male suffrage, as was common in Europe until the nineteenth century, colonial suffrage was often greater than 50 percent and occasionally close to 100 percent of adult males, because so many families owned land and so met minimum property requirements (Brown 1955, Brown and Brown 1964).

This was a breadth of suffrage not reached in Europe until late in the nineteenth century, a century and a half later. Electoral politics, consequently, became mass marketing affairs in the North Atlantic colonies well before it did in Europe (as evidenced by local and regional newspapers and pamphlets). The combination of parliamentary authority and broad suffrage imply that colonial governments were well on their way to becoming parliamentary democracies well before independence was declared in 1776.

This is not to say that the colonies were modern liberal states. Although more or less equal civil liberties were broadly in place, religious freedom in the northern colonies, for example, was often as limited as in Europe. In Massachusetts, Catholic priests were subject to lifetime imprisonment. In the southern colonies, slavery was commonplace, and in many places it was becoming more rather than less difficult for slaves to earn their freedom. (In the northern colonies, there were already politically active groups lobbying for the abolition of slavery.) Even in relatively tolerant states, suffrage and the right to hold elective office were often limited by religion and race in addition to wealth (Fiske 1888: 76).

By the standards of world history, however, the power of the purse had allowed colonial parliaments to become relatively powerful, while liberal political ideology, mobility, and plentiful land had made suffrage relatively broadly based.[392] Wage rates in the colonies remained higher than those in Europe.[393]

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[392] As evidence of the breadth of suffrage, consider this analysis of the effects of typical wealth rules for suffrage in Pennsylvania by Thomas Paine: "By a former law of Pennsylvania, prior to forming the Constitution, it was enjoined, that a man is required, should swear or affirm himself worth fifty pounds currency before he should be entitled to vote. The only end this answered was, that of tempting men to forswear themselves. *Every man* with a chest of tools, a few implements of husbandry, a few spare clothes, a bed and a few household utensils, a few articles for sale in a window, or almost any thing else he could call or even think his own, supposed himself within the pale of an oath, and made no hesitation of taking it; and to serve the

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C. 1776 and the "New" Constitutions of the Former Colonies

King George III's efforts to centralized policymaking authority in the English colonies and the subsequent Declaration of Independence and war to secede from the British Empire all provided new opportunities for constitutional bargaining, experimentation, and exchange. There were new problems to address, and after independence was declared, important veto players disappeared from those negotiations. These changes created new opportunities for constitutional exchange among those with the authority to amend existing arrangements. The resulting constitutional bargains created the first sizable polities in human history grounded entirely on broad suffrage.

The new state constitutions were not invented whole cloth, as the story is sometimes told. Instead, they reflected a century and a half of experimentation, bargaining, and competition with the Virginia political template.[394] The same can be said of the constitution for national governance adopted in 1789.

Independence and the Adoption of "New" State Constitutions

The Declaration of Independence had immediate and direct effects on the organization of the executive branch at the state level. The royal and proprietary governors who had run the executive branch of government lost their offices. The colonial parliaments could have dispensed with the executive office, but organizational conservatism and the advantages of executive administration prevailed, and governors were replaced, rather than eliminated.

Two alternative procedures for selecting governors attracted attention, and both were adopted by subsets of the new sovereign state governments. Governors could be selected by elected state legislatures, or governors could be directly elected by state electorates. The choice was between what would later be termed "prime ministerial" and "presidential" systems.

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particular purposes of an election day the money has been lent" (cited by Brown 1963: 269).

393 Smith (1776: I.8.22) notes that "The wages of labor, however, are much higher in North America than in any part of England. In the province of New York, common laborers earn 23 three shillings and sixpence currency, equal to two shillings sterling, a day; ship carpenters, ten shillings and sixpence currency, with a pint of rum worth sixpence sterling, equal in all to six shillings and sixpence sterling; house carpenters and bricklayers, eight shillings currency, equal to four shillings and sixpence sterling; journeymen tailors, five shillings currency, equal to about two shillings and ten pence sterling. These prices are all above the London price; and wages are said to be as high in the other colonies as in New York."

394 Two colonies, Connecticut (1662) and Rhode Island (1663), already had charters that provided for elected governors; so their constitutions required only minor reforms to be serviceable. Connecticut continued to be governed under its colonial charter until 1818. Rhode Island continued to use its colonial charter as its state constitution until 1843.

Parliamentary appointment is consistent with an institutionally-induced interest theory of constitutional reform, because this procedure maximizes the parliament's control of the executive, and thereby, public policy. However, institutional interests were not the only ones pursued by members of the colonial parliaments. For example, the direct election of governors could advance partisan interests and ideological interests. Colonial leaders who expected to win elections for governor had reason to favor directly elected governors, because it would provide them with a more powerful office than that of prime minister. Direct election of governors was also consistent with the democratic theories of governance that were widely accepted within the colonies. It also reduced problems associated with unified governance, what Thomas Paine termed the "vices of government."

In the next few years, finely grained constitutional bargains were negotiated and accepted by the preexisting colonial legislatures. In the first round of constitutional reform, most of the new states chose a prime ministerial system of governance.[395] In only three cases did a majority of the legislature initially favor direct election of governors. This is not to say that ideological considerations had no influence on the new state constitutions. Most state constitutions, for example, were explicitly grounded on popular sovereignty. Most of the new state constitutions also included lists of rights. Most also included provisions for broad male suffrage, subject to wealth or tax constraints, although in some cases, suffrage was also limited by race and religion. Only two states initially forbade voting by free blacks (Georgia and South Carolina). Complete freedom of religious conscience was assured by the state constitutions of Georgia, Massachusetts, New Jersey, New York, Pennsylvania, Virginia, and Vermont. Delaware's constitution explicitly rules out the establishment of a state church. A few constitutions protected open worship by only Protestants (North and South Carolina) and others by all Christians (Maryland). A few state constitutions also explicitly forbade clergy from holding state offices. No new state constitution mentions a state-supported church.

[395] In subsequent rounds of constitutional reform, several state constitutions were modified to include independently elected governors. New Hampshire did so in 1783, Pennsylvania in 1790, and Delaware in 1792 (Fiske 1888: 67–68).

Table 1: Characteristics of State Constitutions Adopted Immediately after the Declaration of Independence

	Date	Election of Governor	Legislative Form	Suffrage Qualifications[10]	List of Rights	Supreme court	State church
Delaware	1776	Legislature	Bicameral	Retained	yes	yes	no
Georgia	1777	Legislature	Unicameral[3]	10 pounds[4]	yes	yes	no
Maryland	1776	Legislature	Bicameral	50 acres	yes	yes	no[1]
Massachusetts	1780	Freemen	Bicameral	60 pounds	yes	no	no
New Hampshire	1776	Legislature	Unicameral[3]	Retained	no	no	no
New Jersey	1776	Legislature	Bicameral	50 pounds[2]	yes	yes	no
New York	1777	Freemen	Bicameral	100 pounds[8]	yes	yes	no
North Carolina	1776	Legislature	Bicameral	50 acres[5]	yes	yes	no
Pennsylvania	1776	Legislature	Unicameral[3]	Paid taxes	yes	yes	no
South Carolina	1778	Legislature	Bicameral	50 acres[6]	yes	no	no[9]
Vermont[7]	1777	Freemen	Bicameral	All men	yes	yes	no
Virginia	1776	Legislature	Bicameral	Retained	yes	yes	no

[1] Article 33 allows the possibility of supporting Christian churches using tax revenue.
[2] Article 4 says that "**all inhabitants** of this Colony, of full age, who are worth fifty pounds proclamation money" may vote. This gave independent **women** the right to vote until the wording was changed two decades later (Keyssar 2000: 54).
[3] An unelected second chamber (an executive council or cabinet) is chosen by the first (the assembly).
[4] Article 9 states that "All **male, white inhabitants** … of the age of twenty-one years and possessed in his own right of ten pounds value … shall have a right to vote at all elections."
[5] Articles 7 and 8 characterize different rules for House and Senate electors; one can vote for the House if one has paid public taxes.
[6] In addition, the right to vote is limited by race and religion: "free white man, and …who acknowledges the being of a God, and believes in a future state of rewards and punishments."
[7] Vermont was created as a new state from land originally part of New York in 1786, a few years after its constitution was written. It was, however, not admitted to the union until 1791.
[8] Rules differ for the Senate and Assembly. Article 7 allows freeholders with more than 20 pounds of assets and renters to vote for members of the Assembly if they have "rented a tenement therein of the yearly value of forty shillings." Article 10 restricts votes for Senate to freeholders with wealth greater than 100 pounds.
[9] Article 38 of the South Carolina constitution includes a characterization of acceptable Protestant religious beliefs.
[10] When different suffrage rules apply to the chambers of government, rules for the most stringent is listed.

Source: *State Constitutional Documents*, Thorpe (1909). Also available on the web from Yale University's Avalon Project.

National Governance and State Sovereignty

Before independence, an alliance of the colony-states was formed to coordinate and share the cost of lobbying the British sovereign and parliament. After independence was declared, the military

threat from England and some of the other European powers created new gains from constitutional exchange. And, there were public service areas in which economies of scale could be realized through national governance, and other policy areas in which a central authority could reduce wasteful conflict among the states.[396]

Constitutional negotiation took place, and the existing lobbying alliance was formalized as a treaty organization of sovereign states, analogous to the old Dutch republic and contemporary European Union. The new national government had to be acceptable to all member states and consequently the result was, as in those cases, a relatively weak central government. The central government had no authority to collect taxes and little ability to impose rules on its members. The states, nonetheless, delegated significant policymaking authority to the central government and allowed a variety of decisions to be made with less than unanimous agreement.

Articles two and three of the Articles of Confederation clearly indicate that the new confederation preserved state sovereignty, while pursuing common ends:

> (II) **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.
>
> (III) The said States hereby severally enter into a **firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare,** binding themselves to assist each other, against all force offered to, or attacks made on them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

However, article 13 suggests that the formeteurs intended to create a national organization that was more powerful and durable than the usual treaty organization:

> (XIII) **Every State shall abide by the determination of the United States in Congress assembled**, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and **the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.**

The remainder of the articles defines policy areas in which the national government would have jurisdiction and its procedures for adopting public policy and settling interstate disputes. Its main provisions were significant extensions of existing theories and practices of confederal governance.

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[396] See Congleton (2004b) and Congleton, Kyriacou, and Bacaria (2003) for rational choice–based theories of voluntary association among state governments.

Article 5 specified that each state delegation would consist of two or more delegates and that "each state shall have one vote." It also specifies three-year term limits for the delegates and assures freedom of speech in the Congress and immunity of delegates from arrest during sessions of Congress. Article 6 delegated all international relations to the confederal government. Article 8 specifies that state tax obligations for the "common defense" and "general welfare" are determined by the relative value of land holdings in the various states and are to be levied by the state legislatures. Article 9 gave the central government exclusive power over war and peace and to regulate the minting of coins, regulate international trade, and serve as the highest court of appeal in disputes among states. Supermajorities (9 of 13 votes) were required for most such policy decisions. Article 9 also provided for establishing national courts to hear disputes among states and for establishing a standing committee with a president (limited to one-year terms) to govern while Congress is not in session. The Congress was to meet at least once every six months. Article 4 established free mobility among the states and assured persons migrating of the same rights as other citizens of the states in which they entered. It also provided for the extradition of criminals fleeing from state to state.

This design for a national government, completed in 1777, was used for the next two decades, although it was not ratified by all the member states until 1781. The tension between articles 2 and 13 would play a role in many of the constitutional controversies that took place in the next two centuries.

Governance under the Articles of Confederation proved adequate for a time of war, and the national Congress was able to pass significant legislation, such as the Northwest Ordinance governing the admission of new states. However, it was widely regarded, perhaps surprisingly so, as being 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. Secession from the confederation was being discussed in several states. A prominent group of state and national politicians believed that a stronger central government would be necessary if the United States was to defend itself in the long run (Fiske 1888: ch. 4).

Negotiations for a stronger central government took place in assemblies of appointed state representatives in Annapolis and Philadelphia, many of whom had recently participated in drafting their state constitutions. The architecture for a new central government was worked out in

Philadelphia, accepted by the assembled representatives and submitted to the national Congress for consideration.[397] The national Congress accepted their proposed reforms of the Articles of Confederation without comment, and the proposal was sent to state legislatures for ratification or rejection in 1787, as required under article 13. After much public debate and some further constitutional negotiation regarding a bill of rights, the proposed constitution was approved by all of the member states in 1790. In this manner, the first central government of the United States was peacefully and formally transformed into a far stronger one.

The new constitution substantially modified the architecture of the existing Congress by adding a directly elected chamber and a supreme court and greatly strengthening the office of the president. The new architecture, however, was very similar to that already used by most of the member states. One chamber of the new parliament, the Senate, preserved the original Congress of state representatives, which helped obtain the approval of the smaller states. The Senate consisted of two representatives appointed by each member-state government. A completely new directly elected chamber was added to the central government, the House of Representatives. Its members were directly elected by voters in single-member districts (based on population) and had essentially the same policy authority as the Senate. The rotating presidency of the old Congress (essentially a prime minister) was replaced by a new, more powerful, indirectly elected president. The president would execute the laws approved by both assemblies, serve as commander-in-chief in times of war, and could veto legislation from the Congress (although Congress could override that veto). Senators, representatives, and the president would receive a salary.

Bills for raising revenues originated in the House of Representatives. Congress was to meet once a year and term limits were dropped. Majority rule was used for most decisions, including those that previously required supermajorities. Direct taxes were to be based on population, rather than land holdings (slaves were counted as two-thirds of a person). Senators and representatives were guaranteed free speech in Congress.

Those drafting the constitution sought a practical structure for governance and so naturally looked to the governments with which they were familiar. Bargaining within preexisting institutional frameworks is evident at every step in the drafting and ratification process. Institutional

[397] At the close of the Philadelphia assembly on September 17, 1787, it was agreed that everyone would destroy their notes or turn them over to the president of the assembly (George Washington). Fortunately for historians, a few of the delegates violated this rule. Madison's notes are by far the most complete, and reveal both sophisticated bargaining and analysis of constitutional consequences throughout the meetings of the assembly.

conservatism is, consequently, evident in most provisions of the "new" constitution. For example, the list of areas of central government authority included in article 1, sections 8–10, of the new constitution consists largely of the same ones listed in the Articles of Confederation.[398] The general architecture of the revised national constitution also followed closely the pattern of state constitutions, particularly those with elected governors, which, in turn, closely followed the architecture of the colonial governments that had evolved in the century before independence was declared.

Liberal political theory, however, was significantly advanced and implemented by the state constitutional debates and reforms and by the new national government.[399] Many of the liberal provisions of the state constitutions and national constitution preceded similar developments in Europe by about a century. For example, the states (colonies) had very broad male suffrage because of relatively low wealth-based thresholds and broad ownership of land and other real estate. As a consequence, suffrage in the United States approached universal male suffrage in most states in 1790, a level that did not emerge in England until early in the twentieth century. Moreover, the directly elected chambers of the state and national governments had very broad authority over taxes and legislation, in contrast to much of Europe for several more decades. Control over national law and revenues by the elected chamber of the federal government was essentially absolute after the new constitution was ratified in 1788, although the constitution constrained the apportioning of taxes among the states.

Those drafting the national constitution sought an encompassing legitimizing authority, but as had been done at the state level, drew that authority from the "self-evident" rights of man, rather than biblical citations, as might have been expected from the representatives of a deeply religious society.[400] The constitution of the United States begins with the words "We the people in order to form a more perfect Union." That such a conception of the state preceded the French Revolution by a few years is unsurprising; Franklin, Adams, Jefferson, and Madison had all spent time in France

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398 It is easy to exaggerate how centralized the new government really was. For the next century and a half, the main source of government services remained local (town and counties) rather than federal. It was not until about 1935, after the progressive amendments (see below) that federal expenditures exceeded state and local expenditures. See *Historical Statistics of the United States* Volume 5, 2006: Table Ea-A, pp. 5–6.

399 To see this, compare Montesquieu's chapters on federalism and divided powers in his *Spirit of the Laws* with the discussions included in Madison, Hamilton, and Jay's *Federalist Papers*. Part of this difference, of course, may be the result of Europe's censorship and treason laws.

400 See Miller (1991) for a discussion of the shift from traditionalist and religious theories of democracy and community to liberal ones in eighteenth-century America.

before the new constitution was drafted, and they were all familiar with contractarian theories of the state that were common among liberals in Europe at that time. That similar language had *already been in use in colonial charters for more than century* is, however, often overlooked by modern constitutional scholars and in contemporary tales about the founding of the United States. This foundation for governance has not yet been incorporated into the constitutions of all Europe's constitutional monarchies.

Relevance for Constitutional Developments Elsewhere

Although it was not a radical experiment, the new national constitution was a significant event in the history of liberal democracy. It created the first government of a large territory that was completely grounded in elections with broad suffrage. It included a bill of rights that would be supported by an independent Supreme Court.[401] Its federal structure was scalable and was subsequently extended to govern a far larger territory simply by creating and adding new states. In the next few decades, the representative democratic government of the United States demonstrated that rule of law could be implemented by popular government and that more or less moderate policies could be adopted by governments based on relatively broad suffrage. Wealth was not taken from the rich, huge deficits were not run, and law and order was not completely undermined by officials directly or indirectly selected by common persons.

The success of this relatively democratic national government supported nineteenth-century arguments in Europe about the feasibility of popular government. Such governments had previously been intangible speculations of political philosophers or quite unusual forms of city government studied by political historians. If the liberal political institutions of the United States functioned reasonably well, perhaps the political ideas of the English Levellers, Locke, Montesquieu, and

[401] Several of the state assemblies and state constitutional conventions approved the constitution, subject to the addition of a "bill of rights" that more clearly characterized the bounds of central government authority, as already found in most state constitutions. Twelve amendments were adopted in rapid succession by the Congress to satisfy this demand. Ten amendments (the Bill of Rights) were approved by Congress, the president, and the requisite number of state legislatures on December 15, 1791. (Two of the original 12 amendments passed by Congress did not receive sufficient state support to be adopted.) The first 10 amendments are essentially part of the original constitution.

Rousseau were not impossible pipe dreams of idealists and scholars. Perhaps, such ideas could provide the intellectual foundations for practical alternatives to existing arrangements in Europe.[402]

Constitutional bargaining in the United States, however, did not end in 1789. It gradually transformed a relatively liberal representative system into a more completely democratic one during the same period in which parliamentary democracy emerged in western Europe. For example, the paper ballot was gradually introduced and reformed during much of the nineteenth century.[403]

D. Constitutional Reform in the New Republic, before and after the Civil War, 1792–1870

Bargaining over formal constitutional reforms as well as quasi-constitutional ones was nearly continuous throughout the nineteenth century, as was also true in Europe. Although the constitution was sufficiently stable to serve as "rules for making rules," neither the process of adopting new laws nor the constraints on laws that could be adopted were chiseled in stone. Consistent with the models of constitutional reform previously developed, the bargains struck reflected changing economic interests, ideological refinements, and preexisting institutions.

The constitution was formally amended more than a dozen times and informally amended many more times. The balance of policymaking authority within the central government and between the central government and the states was continually debated and adjusted at the margin. State governments were reorganized, as governors became independently elected offices with broader powers and elected second chambers were added (Benjamin 1985, Fiske 1888). Suffrage laws were liberalized for both state and national elections. New territories were acquired, organized, and

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[402] The point here is not that the new government inspired the rise of European democracy in the nineteenth century, but rather that the U.S. constitution played a significant role in subsequent political debate and reform in Europe by providing evidence that relatively peaceful transitions to representative governance could be undertaken, in contrast with the evidence generated by the French Revolution.

See, for example, McLean (2004) for a discussion of effects of American political theory on the French Revolution. Thomas Paine, quoted below, also provided intellectual support for the French Revolution in France where he was charged with treason (as he had previously been by England). Numerous constitutional documents and laws were translated and discussed throughout Europe.

[403] Ballot design, perhaps surprisingly, continues to be controversial in the United States today. After the 2000 election for President, many significant changes in ballot design and counting were suggested, and a few were implemented. See, for example, Agresti and Presnell (2002) for a careful analysis of the effects on ballot design on the distribution of votes in Palm Beach County Florida. The "Help America Vote Act" was passed by Congress and accepted by the president in 2002.

admitted as states to the Union. The veto authority of the Supreme Court was extended to include constitutional review of national legislation and executive actions early in the nineteenth century, albeit largely through its own decisions (Rehnquist 2001: ch. 1).

Suffrage law during the colonial period had been based on property holdings with further restrictions based on civic status (free or slave), residency, race, and literacy. Who was or was not sufficiently independent (a freeholder) to cast a meaningful vote differed among the colonies (and states) through time, both before and after independence. Suffrage was broader than in Europe, even with these limits and with slavery taken into account, and many northern states approached universal male suffrage. After independence, suffrage remained a state matter and was gradually expanded in the early nineteenth century as the definition of "freeholder" was liberalized and wealth requirements reduced one state at a time. This was partly a result of interstate competition for labor, as the new states generally had more liberal rules than the original colonies. It was also partly a consequence of changing norms, expanding public education, and political competition, as in late nineteenth-century Europe. More and more persons were deemed to be sufficiently independent and knowledgeable to participate in elections, although black suffrage was reduced, rather than expanded in many states.[404]

Unfortunately, in addition to the political effects of early liberal ideology, industrialization, and the inclusion of new states, a problem postponed during the constitutional deliberations of 1787 led to a constitutional crisis and another war of succession in the middle of the nineteenth century. In this case, however, those attempting to secede lost the war, although at great cost to both sides.

Slavery, State Sovereignty, and the Perpetual Union

Under the constitution, slavery was a state regulatory issue, and support for or against this ancient institution varied by region, because of the balance of ideological and economic interests. In the northern states, where slavery was economically unimportant, abolitionists pressed for its elimination, and slavery was gradually abolished beginning with Delaware in 1776, Vermont in 1777, Pennsylvania in 1780, and Massachusetts in 1780. In the South, where slavery was economically important for tobacco, rice, indigo, and subsequently cotton production; slavery was retained despite the efforts of southern abolitionists. Abolition of slavery throughout the United States became an increasingly important ideological issue in northern elections and consequently within the House of Representatives where representation was determined by state population.

[404] Black suffrage was reduced or eliminated in several states as in Deleware (1792), Maryland (1809), Connecticut (1818), New Jersey (1820), and Pennsylvania (1838) (Grimes 1987: 32).

After the elections of 1860, the southern "slave" states feared that the national government would adopt new liberal laws on slavery and other laws (chiefly tariffs) that would substantially reduce their wealth. Neither were very likely in the short run, given the balance in the Senate. Nonetheless, the southern states attempted to secede from the union to avoid these economic calamities in the long run and to preserve their political autonomy.[405]

The constitutionality of secession had been much debated in the period leading up to the war (Farber 2003: chs. 4–5). Articles 2 and 3 of the Articles of Confederation had explicitly guaranteed state sovereignty on all matters not transferred to the Congress, although article 13 had committed signatory states to a "perpetual union." The legal and philosophical tension between perpetual union and state sovereignty, however, could no longer be peacefully resolved through constitutional bargaining and compromise. Rather, the perpetual union agreed to under article 13 was preserved by force of arms in a bloody civil war (1861–65). According to President Lincoln's interpretation of the constitution, sovereign states did not have the right to secede from a perpetual union.[406]

Suffrage and Citizenship after the Civil War

Amendments of the U. S. Constitution require two-thirds majorities in both chambers of the legislature and approval by the legislatures of two-thirds of the states. The secession of the southern states changed the balance of interests represented in Congress and, thus, provided new opportunities for constitutional bargaining. A supermajority of the seats in the Civil War Congress were occupied by northern liberals and abolitionists. The secession of the southern states had also reduced the number of states opposed to amendments with respect to slavery and race. (The post-war governments in the South were often Republican governments.) As a consequence, three liberal reforms of the constitution were adopted by the northern Republicans after the war was won. The thirteenth amendment (1865) made slavery illegal; the fourteenth amendment (1868) defined

[405] The seceding states listed their reasons in secession documents adopted by the state governments. For example, South Carolina's states that: "On the 4th day of March next, this party [President Lincoln and northern abolitionists] will take possession of the Government. It has announced that … a war must be waged against slavery until it shall cease throughout the United States. The guaranties of the Constitution will then no longer exist; the equal rights of the States will be lost. The slave-holding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy." It bears noting that the "war" against slavery refers to the long political campaign undertaken by the northern liberals against slavery, rather than a military effort.

[406] The army of the north was (and is) therefore called the union army. The army of the south was (and is) known as the confederate army, in honor of the new confederal constitution devised by the seceding states in 1861. The Civil War took place from 1861–1865, and ended with a victory for the North. It was by far the deadliest war in U. S. history.

citizenship in inclusive terms (all persons born or naturalized in the United States) and guaranteed equal protection of the law to all citizens; and the fifteenth amendment (1870) forbade state laws that used race or color as a condition of suffrage, which changed suffrage laws in the North and West, as well as in the South.

These civil liberty reforms were largely motivated by liberal ideological interests (the civic equality of all citizens), although they also advanced the short-term political interests of the Republican Party, for whom the newly enfranchised were expected to vote.[407]

After the war was won, the southern states were administered by the U. S. government and the northern army for a few years. Provisional state governors were initially appointed for each of the southern states. Elections for state constitutional conventions were held in 1866 to revamp Southern state governments. These and other state elections initially used existing state suffrage rules, although senior members of the southern army and government, and wealthy plantation owners were not permitted to vote. The new state governments extended many civil liberties to former slaves (and blacks who had not been slaves), but in no case were blacks given the right to vote in elections, to serve as witnesses in criminal cases, or to serve on juries. Violence against freedman (former slaves in this case) increased, state parliaments refused to cooperate with their provisional governors, and new discriminatory "black codes" were promulgated.

In 1867 the U. S. Congress replaced the provisional civilian governments with military governments, and new elections were held for another round of constitutional conventions, in which blacks and previously unenfranchised whites were allowed to vote. This time the result was 11 more liberal state constitutions, with broad suffrage and substantial equality before the law. In some cases, remaining wealth qualifications for high state office were also eliminated. New state elections were held, which elected a number of blacks to high state offices. To regain complete self-governance, each southern state had to ratify the Civil War amendments to the U. S. Constitution. This was easily accomplished by the governments elected under the new suffrage laws. Georgia was the last of the "reconstructed" governments to ratify the Civil War amendments (in July

[407] Slavery had been eliminated in most of Europe several decades earlier, as it had been in the northern states. However, southern slave owners were not compensated for their capital losses as they were in many European countries, nor were losses reduced by phasing out slavery as it had been done in some of the Northern states. (Slaves accounted for about half of southern wealth in 1860.)

15, 1870). In this somewhat irregular manner, slavery was ended in the South and freed slaves became eligible to vote in federal elections (Morison 1965: 711-17).[408]

After control of public policy was returned to southern state governments, however, suffrage laws gradually became more restrictive, as various literacy tests and fees (poll taxes) for voters were introduced to exclude former slaves and many other poor persons from voting (Keyssar 2000). Race per se could no longer be used as a criteria for suffrage, but many other criteria were allowed that had similar effects, and many of these criteria (informally) were unequally applied among the races. There was clearly no slippery slope to universal male suffrage in the southeastern United States.[409]

E. Economic and Ideological Developments in the Nineteenth Century

There was no equivalent to the Civil War in Europe, but many other features of the evolution of constitutional democracy in the United States parallel developments in Europe. Many of the political trends of nineteenth-century America were consequences of improved farming, industrialization, urbanization, and shifts in political ideology. Ideological change, however, was somewhat less evident in the United States than in Europe, because there were very few "true" conservatives in the European sense. The center of gravity of American politics had been liberal for more than a century in the sense used here, well before the term was first applied to politics. Consequently, most policy debates took place between left- and right-of-center liberals, who accepted the principles of open political and economic systems. Nonetheless, support for the

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408 Several southern states were among the ratifiers of the thirteenth amendment in 1865, including South Carolina, Alabama, North Carolina, and Georgia. The politics of the thirteenth amendment is discussed in Grimes (1987: 31-39).

409 Poll taxes were used in eight states. Literacy tests were also used to reduce the electorate among both black and working class communities, in some cases with much tougher questions for blacks than whites. The Ku Klux Klan's illegal (but tolerated) campaign of terrorism against politically active blacks and southern liberals clearly reduced open support among southern liberals for the elimination of such policies.

(As a consequence of the interests represented in government and war damage, the south industrialized far more slowly than the north and had slower income growth. After suffrage was expanded in the late 1960s, per capita income in the southern states began catching up with the rest of the country.)

expansion of public education, modest economic regulation, and social insurance increased during the century, as did support for women's suffrage.[410]

Economic Development: Industrialization and Urbanization

As in Europe, economic life in North America was undergoing a major transformation. The use of increasingly costly, powerful, and productive steam engines in manufacturing, mining, and transport, together with organizational improvements, created new economies of scale in manufacturing and commerce. Specialization increased, and with it, life and livelihood changed for a majority of families. Technological change also produced rapid improvements in transportation, which reduced transaction costs and allowed inputs and outputs to reach farms and factories further inland. The new transportation networks allowed manufacturing to take place farther from the banks of rivers than possible in the past. Specialization and commerce increased as trading networks expanded. Further economic development was stimulated by late nineteenth-century innovations in electricity and chemistry (Taylor 1951, Nye 1990, Gordon 1999, Wallis 2000).[411]

As in Europe, the rural landscape was transformed through a combination of legal reform and subsequent economic development. The territory of the United States had expanded in the nineteenth century through the purchase of Louisiana (1803) and Alaska (1867).[412] Other territories in the Southwest were won from Mexico during 1846–48. Most of this land was initially held by the central government. To promote development, methods for transferring ownership of large blocks

[410] See Miller (1991) for a discussion of the gradual spread of liberal political theory in eighteenth- and nineteenth-century America. Miller argues that liberalism gradually replaced earlier traditional (communitarian) and Puritan (Calvinist) political theories. The American version of liberalism, however, was influenced by these early theories and local traditions of direct democracy, as was true in some parts of Europe (Lutz 1983).

Consider, for example, this quote from the beginning of *Common Sense* (1776), a widely read political tract by Thomas Paine: "This necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessing of which, would supersede, and render the obligations of law and government unnecessary while they remained perfectly just to each other; but as nothing but heaven is impregnable to vice, it will unavoidably happen, that in proportion as they surmount the first difficulties of emigration, which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness, will point out the necessity, of establishing some form of government to supply the defect of moral virtue."

[411] Some economic historians debate the extent to which improved transport networks contributed to economic growth (Fogel 1962; Fremdling 1977). However, it seems clear that reduced transport costs, improved information, and increased specialization tend to increase economic output (Gordon 1999; Buchanan and Yoon 1994).

[412] Several of the original 13 states had previously "privatized" land that had been in the control of the royal governors and proprietors after independence was declared (Fiske 1888: 71).

of government land to individual families were devised and implemented, as with various "homestead" acts. Many of the changes were similar to those involved in the European enclosure acts, as new deeds were devised, roads and fences were built, and lands converted from commons to private pasture and cropland.[413]

Population growth continued in the second half of the nineteenth century, reflecting increases in arable land and improved farming technologies. Family sizes continued to be large, and there was substantial (net) immigration from Europe and Asia. Immigration was completely open during this period, and new immigrants could often vote before they were citizens, in that the former was a matter of local and the latter national regulations (passports did not yet exist). For the most part, these were economic emigrants, who sought the opportunities that relatively open markets and abundant undeveloped land produced, although broader civil liberties also played a role at the margin during much of the nineteenth century. Emigrant neighborhoods emerged in larger cities, and entire regions of states were often dominated by particular immigrant groups. Newspapers were published in dozens of languages. New cities and towns emerged in the west, and older ones expanded in the east.

Agricultural technologies improved substantially during the nineteenth century with the introduction of better seeds and plows, mechanization of planting and harvesting, and chemical fertilizers. These techniques together with rising demand from nonfarmers allowed larger, less fertile areas to be profitably cultivated, and farmland increased throughout the century. As in Europe, however, an increasing fraction of economic output (value added) was nonagricultural. Farm employment in the United States fell from 74.4 percent of total employment in 1800 to 55.8 percent of total employment in 1860, to about 30.7 percent of total employment in 1910.[414]

Urban populations thus expanded more rapidly than did rural populations. People would not, of course, choose towns over farms unless real incomes and/or other conditions were preferable to those in the countryside. Urban life was systematically improving, as new technologies were applied

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[413] The various homestead acts, with their very favorable terms for land sales demonstrate that urbanization was voluntary in the United States, rather than the result of a shortage of farmland. In Europe, urbanization in the early nineteenth century is sometimes argued to be a consequence of privatization that evicted the landless, which induced them to move to cities as a last resort. (Involuntary urbanization can occur as medieval rights to commons disappear.) However, as noted above, research suggests that European enclosures often increased demand for rural labor to create new pasture from wastelands, drain swamps, and build new roads and fences.

[414] See *Historical Statistics of the United States* (2006: vol. 2, tables Ba-A, pp. 2–18). During the same period, clerical and manufacturing employment rose from negligible levels to about 34.9 percent of employment.

and wages rose. Urban sanitation and transportation improved. Central heating was introduced, followed by electricity, and telephones.

The urbanization associated with the expansion of commerce and manufacturing also generated new demands for public services and regulation. Demand for public services in cities tends to increase with income, because government services are normal goods. Demand also increased as some services became relatively more valuable or less expensive (public water and sanitation) and partly because new services became available (mass transit). Mass transit and public water systems expanded as towns grew into cities and as existing urban centers grew larger. Public education expanded (mostly by local and state governments) as new public school and state university systems were created and enlarged. Infrastructure and education were subsidized by all three levels of government, although state and local governments remained relatively more important sources of services in the nineteenth century. Expenditures on local public services per capita increased sevenfold (Wallis 2000). At the federal level, the Morrill Acts of 1862 and 1890 transferred lands from the central government to the states as a method of funding new public universities to be focused on science, engineering, agriculture, and military science. National and state government grants of rights of way and other subsidies helped private turnpike, canal, and railroad companies create a more complete, rapid, and efficient transport network.

Increases in specialization, capital accumulation, and technological advance caused per capita (average) income to rise throughout the late nineteenth and early twentieth centuries. From 1870 through 1920, real per capita income more than doubled, as population tripled.[415]

American Liberalism in the Nineteenth Century

Liberalism and liberal political and economic institutions were largely taken for granted in the United States, except perhaps in the Southeast. Male suffrage was essentially universal. Internal barriers to trade were minimal. Equal protection of the law was broadly in place, at least in the sense that there were few if any class-based differences in the law itself. Political speech was protected and

[415] Rising per capita income tends to be somewhat biased upward in this period. First, it bears noting that income has to be estimated, as the GDP surveys were not undertaken until the 1930s, which implies that the historical data series are less accurate than contemporary ones. Second, the substitution of trade for household production implies that both tax and flow of goods estimates tend to exaggerate national income, because these approaches neglect reductions in home production. The decision to use "store-bought" cloth and clothing implies that a net improvement in living standards occurred, but not that homespun cloth and homemade clothing was without value.

slavery outlawed. The fact that a large number of liberal reforms had already been adopted in the United States gave its national politics a different cast than that in Europe.[416]

In Europe, increased male suffrage and equality before the law remained prominent constitutional issues that liberals could broadly support. Tariff reduction remained a central policy issue for economic liberals and many industrialists. In the United States, male suffrage was already essentially universal (except for retrenchment in the south), and international trade was less important for the United States, because free trade across state boundaries was guaranteed by the constitution and its internal market was very large.[417] Nonetheless, many of the issues that economic and political liberals focused on in Europe were also issues in the United States. For example, the proper extent of economic regulation, monopoly privileges, tariffs, and tax reform were all issues in the United States in the late nineteenth century. Women's suffrage and the unelected basis of the first chamber (the Senate) remained as constitutional issues.

> If the victims of protection were all rich and its beneficiaries all poor, I should oppose it just as bitterly. But as it is, all of its beneficiaries are rich and its victims include rich and poor. All the poor and most of the rich are its victims. There is nothing communistic or agrarian about the free trade movement. Every man who has earned a dollar has earned the right to spend it where he can get the most for it (Philpott 1881: 15).

In Europe, the liberal constitutional reform agenda often induced left- and right-of-center liberals to cooperate in their persuasive campaigns and electoral strategies. This sort of cooperation was less common in the United States than in Europe, because liberals already dominated the major political parties, and was for the most part "constitutional liberalism" was taken for granted. Moreover, there was a sense in which the United States could be said to be populated by liberals, although not in the sense that most Americans were idealists or self-consciously liberal.[418] There were few of Europe's mid-nineteenth century conservatives in the United States, except perhaps in

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[416] For example, in the American context, most "conservatives" who defended the status quo could be regarded as liberals, except perhaps n the South, insofar as they defended preexisting liberal institutions.

[417] Nonetheless, tariffs fell during the first half of the century in the United States, in spite of the fact that it was a major source of the national government's revenues. Tariffs rose in the second half of the nineteenth century, in part to pay off bonds issued to finance the civil war, but also because free-trade groups around the world were losing ground in this period.

[418] The term "liberal" was not widely used in the United States during the nineteenth century to describe political positions, although it was occasionally used. The terms civil liberty, political liberty, and economic liberty were used more widely in political debates. Ross (1919) provides an account of American politicians who explicitly regarded themselves to be "liberals," most of whom were Republicans.

the south. There was no legally sanctioned family-based aristocracy, established church, or ancient political institutions to defend. Wealthy, well-connected families did exist, but their influence over public policies was not based on formal birthrights, but rather on inherited wealth and informal family networks that included high officials.

Disagreements among liberals, rather than agreements, tended to dominate American politics and political campaigns. Many of the public policy debates were similar to those in Europe; others were more uniquely American, because the international and domestic context differed. For example, "states rights" before and after the Civil War were often matters debated by right-of-center and left-of-center liberals. New states were being added which altered the political balance in the Congress in a manner that tended to favor rural and Western interests. Although nineteenth-century wars with native Americans (Indians), Mexico, and Spain were politically important, they did not have significant constitutional effects. America was generally less affected by external events than most states in Europe.

Disagreements among left-, center, and right-of-center American liberals were sufficiently systematic that political parties representing right-of-center, moderate, and left-of-center liberals emerged in the United States during this period. For much of the nineteenth century, the Republican Party represented left-of-center liberals and the Democratic Party right-of-center liberals, although this changed in the early twentieth century. Moderates floated between the two major parties as issues, interests, party personalities, and scandals varied at the margins of local, state, and national politics.

In the late nineteenth and early twentieth century, a "progressive" movement emerged. Their short-lived political party of the same name can be thought of as the American equivalent of the Social Democratic Party in Europe. Progressives were not generally opposed to private property or markets, but were largely interested in improving market outcomes through institutional and regulatory reforms and by equalizing bargaining power. In the terminology used here, most Progressives were "left-of-center" or "radical" liberals, rather than "socialists," as was also true of moderate Social Democrats in Europe.[419]

[419] Prasch (1995, 1999) notes that: "What distinguished the economists associated with the Progressive movement from their forebears in the liberal tradition was not their concern for rules per se, rather it was their belief that a free market could be the locus of systematic economic power. They thought that the proximate cause of this power was unequal bargaining power between employers and individual laborers. It was their observation that labor was

Continued on next page...

It is interesting to note that the "left-of-center" liberals (the Progressives) retained the name "liberal" in the United States in the twentieth century, whereas in Europe the "right-of-center" liberals kept that political label.

Politically Active Interest Groups of the Nineteenth Century

As in Europe, many new politically active interest groups in the United States were organized in the late nineteenth century. These groups often had fairly narrow policy agendas, although many of the groups had overlapping memberships. Newly organized economic interest groups included regional and national business associations, trusts, labor unions, and farmer cooperatives. Such groups mainly sought policy reforms that improved the economic well-being of their members (profits, wage rates, and working conditions). Other interest groups had explicitly ideological and political agendas, such as the temperance and women's suffrage movements. Other groups had both economic and ideological agendas, as with many free-trade and labor movements.

The Progressives and other liberal groups were more important for their persuasive campaigns than for the creation of new political parties. The number of national political interest groups increased during the nineteenth century, reflecting modest ideological shifts in the United States and industrialization. As noted above, the efforts of organized ideological and economic interest groups tend to increase as member wealth increases, as their numbers increase, and as their effectiveness increases (Congleton 1991). In the late nineteenth century, per capita income rose, economic interests often increased, and techniques for organizing large groups improved as specialization increased and the technology of communication improved. Consequently, economic and ideological interest group activity increased throughout the nineteenth century in the United States, as in Europe.

Labor and progressive groups often joined forces in the United States, as did industrialists and laissez-faire liberals. In late nineteenth century Europe such coalitions often led to the formation of new labor-Social Democratic political parties and to new conservative parties, but this did not happen in the United States. The Progressive Party did poorly in U. S. national elections, in large part because political competition induced the two major parties (Democrats and Republicans) to adopt more progressive positions on many issues. In a polity with competitive elections based on

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typically constrained by a lack of wealth. This simple fact, operating in conjunction with the need to feed oneself and one' s family, placed a distinct limit on the length of time that labor could 'hold out' for a better wage bargain." Nonetheless, Progressives did include persons favoring broad public ownership of major industries, such as the railroads.

broad suffrage in single-member districts, interest group activities tend to affect the platforms of existing major political parties, rather than to lead to the formation of new parties.[420]

F. Changes in the Economic Constitution of the United States

Although the Civil War, like the Revolutionary War, attracts considerable attention among historians and plays an important role in American political mythology, it was by no means the only significant period of constitutional reform in the nineteenth and early twentieth centuries. Indeed, the war itself and its three associated amendments can be said to have had a smaller effect on peacetime national governance and public policy than the reforms and constitutional amendments adopted between 1875 and 1915, in what is often called the progressive era. The Civil War amendments were civil-equality amendments, rather than procedural ones.[421]

During the late nineteenth century, there were several changes in what might be called the "economic constitution" of the United States, which paralleled those of the industrializing countries of Europe. For example, a variety of adjustments were made in the rules that determined what is owned and how what is owned may be used without legal (or political) interference. Many of these adjustments were made shortly after independence was declared (Fiske 1888: 71), but many more were made in the second half of the nineteenth century. Property rights concerning physical goods

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[420] A national Progressive Party was founded in 1912 by former Republican president Theodore Roosevelt, partly because he had failed to secure the Republican party's nomination as their candidate for president (on a more or less progressive platform).

Many of its proposed policies were similar to those of the early Social Democratic Parties in Scandinavia, and the party did best in states where Scandinavian emigrants were large constituencies. In Minnesota, for example, the party received more votes than either of the mainstream parties. It ran second to the Democrats in the nation as a whole on a platform calling for a six-day work week, and eight-hour day in manufacturing, prohibition of child labor at ages below 16 years, and women's suffrage. It bears noting that men's suffrage was not an issue in the U. S. at the time the Progressive movement emerged in the U. S., except perhaps in a few southern states. See Youngman (1913) for the 1912 Roosevelt platform and Davis (1964) for an analysis of the Progressive party's base of support.

A People's Independent Party had previously been founded in 1892, which represented somewhat similar groups and interests and also drew much of its support from radical Republicans. See, for example, Webb (1993) for a discussion of relationships among populists, progressives, and progressive Republicans. The progressive movement's base of support consisted largely of progressive Republicans and independents.

[421] The Civil War Amendments did, however, slightly reduce the scope of state authority over public policies and overturned parts of some southern state constitutions. Race and parental status could no longer be used as a basis for determining eligibility for suffrage or the scope of other laws, at least until the "separate but equal" doctrines emerged in the late nineteenth century. (Private organizations were, of course, free to discriminate on such matters.)

and services often became "individualized" and alienable, at the same time that "use rights" were also narrowed to take account of externalities and reduce monopoly power.[422]

Federalism, Ideology, and Economic Regulation

The increase in population densities and the size of firms, together with persuasive campaigns led by progressives produced significant electoral demand for increased regulation of economic organizations. Many states and cities adopted new laws to regulate firms and labor contracts, including antitrust laws and child-labor laws. By 1900 most northern states had rules governing work days and work weeks for children and women, and similar laws were being adopted in the South in the period immediately after 1900 (Hindman 2002: 58-64).

Economic theory, however, suggests that interstate mobility and externalities limit the ability of state governments to address effectively some of the problems that state electorates wanted addressed. Partly because of such problems and organized persuasive campaigns, there was a significant increase in interest group and electoral support for shifting some regulatory responsibilities to the central government. The persuasive campaigns undertaken by progressives, together with support from economically aligned interest groups, gradually produced a series of new national laws that attempted to regulate large interstate firms and transactions.[423] Examples include the Interstate Commerce Act, which regulated railroads (1887); the Sherman Antitrust laws, which regulated monopolies and other conspiracies to restrict open markets (1890); the Pure Food and Drug Act (1906), which created the Food and Drug Administration and provided for federal inspections of meat products and forbade poisonous patent medicines; the Federal Trade Commission Act (1914), which regulated "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices . . ."; and the Clayton Antitrust Act (1914), which strengthened the Sherman Act and exempted nonprofit institutions and organized labor from antitrust proceedings.

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[422] Changes in property law were more obvious in Europe and Japan where medieval family-based privileges for particular occupations, products, and services finally disappeared as matters of law during the nineteenth century. Debts often became individual, rather than family based, and land became freely bought and sold. However, it is clear that property and tort law changed in the United States as well. See, for example, Posner 2007.

[423] Many voters became skeptical of the ethics of the new industrialists in general, or at least a significant subset of them, who were called "robber barons," although the new millionaires rarely resorted to obviously illegal behavior. (Many of the new industrial millionaires—Carnegie, Rockefeller, Morgan, Edison, and Ford—established large charitable foundations with large endowments partly to undermine such labels. See, for example, Johnson 1997: 536–60.)

Arguments about the proper extent of governmental regulation of market activities and the constitutionality of such "ideal" regulations among right- and left-of-center liberals was evident in newspapers, political campaigns, scholarly books, and in the courts. Such debates occurred at every level of society. The arguments are nicely summarized in the Supreme Court's Lockner decision and dissent of 1905. The arguments advanced in the majority opinion of the famous Lockner case uses the "right-of-center" liberal argument favoring complete freedom of contract, although this was not directly at issue in the case:

> The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.
>
> Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified a a health law to safeguard the public health, or the health of the individuals following that occupation.
>
> It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature.

The minority dissent by Oliver Wendall Holmes develops the "progressive" argument, which supported government regulation of some contracts and gradually became the dominant opinion on the Supreme Court.[424]

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many

[424] See, for example, Rehnquist (2001: 107), who argues that Lockner was wrongly decided. The point of the quotes, however, is to demonstrate that liberal ideas and arguments were present at the highest levels of government, rather than to analyze the Lockner decision per se.

> ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.
>
> Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the post office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

Although the final Lockner decision was a relatively narrow one, the arguments used in the opinions demonstrate that the split between right- and left-of-center liberals occurred in the highest policy circles, as well as among politically active interest groups, political theorists, and editorial writers.[425]

Overall, the nineteenth century trend toward more liberal and open market–based production and consumption continued into the twentieth century—with freer (but not entirely free) entry and trade possible throughout the nation and internationally. This expansion of free trade, nonetheless, occurred in conjunction with the expansion of government services and new national regulations that attempted to restrict anti-competitive and fraudulent business practices.[426]

In this manner, the policy debates between liberals and progressives became significant factors in American policy and legal debates over regulation at about the same time that similar debates between liberals and Social Democrats emerged in Europe, although the debate on adult male suffrage in the United State was essentially over (outside the south) by this point.

The Constitutional Agenda of America's Left-of-Center Liberals

In addition to their reform program on economic policy, progressives also pursued constitutional objectives at the state and national levels. As a consequence, a number of significant procedural changes in the fundamental procedures and structure of American governance occurred during the "progressive period," many of which also parallel those of Europe during this time. The themes of these reforms were broadly liberal insofar as progressives continued to press for civic equality and more open markets and politics. Such reforms occurred at all levels of government,

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425 Rehnquist (2001: 113–14) provides a short summary of "anti-progressive" Supreme Court decisions.

426 Preexisting civil law had also included provisions discouraging fraud and monopoly that failed to address the concerns of progressives. Many of the new "progressive" policies were subsequently used by large firms as new methods of reducing competition, although this was clearly not what the reformers themselves had in mind.

which demonstrates that support for the progressive reform agenda extended well beyond those who cast votes for the Progressive party's candidates.

For example, various forms of the secret ballot were adopted by individual states. beginning with Massachusetts in 1888. Ballots were placed in official envelopes before being placed in ballot boxes, which allowed votes to be cast votes without fear of rebuke by their neighbors, landlords, and employers.[427] Nineteen states added (or included) direct referenda and recall provisions to their constitutions, which allowed voters to decide specific issues, avoiding agency problems associated with representative systems of government.[428]

Bureaucracy was reformed to reduce political influence over career bureaucrats. For example, the Pendleton Act (1883) established the U. S. Civil Service Commission, which placed most federal employees on a "merit system," greatly reducing the extent to which political parties could determine jobs within the bureaucracy. After the Pendleton Act, only holders of the senior-most jobs in the U. S. bureaucracy were appointed by the president. Such "civil service" reform improves efficiency by increasing institutional memory. To the extent that job-related skills are not highly correlated with partisan loyalty, merit-based hiring also tends to increase competence and productivity. They also reduce the incumbent's ability to use the bureaucracy in political campaigns for reelection, which tends to increase political competition (by reducing incumbent advantage) and reduce corruption.

The Suffrage and Temperance Movements

Prior to the Civil War there were broad suffrage movements that attempted to expand suffrage for men and women. As in Europe, the American suffrage debates focused on qualifications for casting independent, meaningful votes. As in Europe, the suffrage movement attempted to reduce remaining property and residency qualifications for suffrage and subsequently to eliminate religion, race, and sex as qualifications for suffrage.

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[427] Secret ballots were also known as the "Australian ballot," because the rules and ballots were heavily influenced by Australian electoral reforms of the previous decade. The new ballots included a list of all candidates, rather than favored candidates. Standard ballots were printed by government and distributed at voting places, although several exceptions existed (Ludington 1909). Heckelman (1995) notes that voter turnout fell as the secret ballot was adopted, which suggests that vote buying was diminished by the new voting rules.

Paper ballots had previously been used in several states. New York and Vermont had used paper ballots since independence.

[428] Provisions for referenda were mostly adopted by new states in the West that received statehood after the Civil War, but several other states amended their state constitutions to allow such referenda. Direct democracy continued to be used in some New England towns throughout this period, although it had not previously played a significant role in state governance.

Suffrage law in the U.S. was a matter of state rather than national policy in the United States, and there was significant variation in the qualifications for suffrage among states in 1800 and in the scope of their suffrage movements. Some states had universal male suffrage, others retained colonial property, tax, and/or literacy qualifications. Property qualifications for men's suffrage were largely eliminated in the early nineteenth century, although other qualifications were sometimes added. Although the men's suffrage campaigns did not end with the end of most property and religious restrictions, it tended to focus on suffrage for smaller groups such as southern blacks and native Americans, which attracted relatively little attention by state suffrage groups in the late nineteenth and early twentieth centuries.[429]

A women's suffrage movement had predictably emerged in the early nineteenth century, as property restrictions for men's suffrage disappeared in large parts of the U.S.. The early women's suffrage movement had almost been able to add the word "sex" to the Fifteenth Amendment, which ruled out legal discrimination on the basis of race (see Keyssar 2000: 178–79). The Fourteenth Amendment (which guaranteed "due process of law" and "equal protection of the laws" to *all* citizens) was subsequently used in legal challenges of state suffrage laws that discriminated against women. These challenges were unsuccessful, however, in part because the legislative history of the fifteenth amendment was well known and in part because the fourteenth amendment itself included provisions based on the sex of voters.[430]

After the civil war, by far the most active part of the suffrage movement was that in support of women's suffrage and women's equality before the law. The women's suffrage movement became a better organized and more broadly supported mass movement in the late nineteenth century and it began to have significant effects on public policy. After decades of persuasive campaigns by "suffragettes," several states adopted women's suffrage laws in the early twentieth century (Keyssar 2000: 203–12).[431]

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[429] Keyssar (2000: 168–69), argues that support for universal suffrage had waned somewhat toward the end of the century, although it seems clear that support for women's suffrage increased.

[430] The fourteenth amendment distinguishes between equality before the law in general and political equality. Seats in the House of Representatives after 1868 were allocated to among states in proportion to the number of men qualified to vote, rather than state population. This provided states with a strong incentive to eliminate their remaining restrictions on male suffrage. The fifteenth amendment prevents the use of race as a qualification for suffrage.

[431] Qualified women had been granted suffrage in some colonies and in the state of New Jersey from 1776 through 1807. Idaho adopted women's suffrage in 1896, Washington in 1910, California in 1911, and Kansas in 1912 (Keyssar 2000). A useful timeline of the U. S. women's suffrage movement and women's suffrage is available at http://dpsinfo.com/women/history/timeline.html.

During the roughly the same period, another long-standing movement also influenced the course of constitutional reforms in the United States. The anti-alcohol movement originated in the late eighteenth century. The American Temperance Society was organized in 1826. The "temperance" movement opposed alcohol abuse and lobbied for new laws restricting alcohol access, production, and consumption. Temperance movements in the United States and in many parts of northern Europe gained membership and political support throughout the nineteenth century. Some of these organizations were explicitly international in scope, as with the "Independent Order of Good Templars"; others simply paid attention to the efforts of other similar groups in other places, copying their best practices.[432] Support for temperance laws increased toward the end of the twentieth century partly a consequence of the new urban lifestyles based on wages, where many men were reputed to "drink up" a significant fraction of their week's wages on the way home to their families after pay days. Temperance had also long appealed to the strong Puritan strand of American thought, which had long opposed "demon rum." As a consequence of lobbying campaigns by a broad cross section of anti-acohol groups, many towns, counties, and a few states tightened their regulations for alcohol sales and consumption. Pressures to do so intensified in the early twentieth century.[433]

It was often the case that the temperance and women's suffrage organizations had overlapping memberships. The state temperance and suffrage reforms and the subsequent adoption of the eighteenth and nineteenth amendment are largely consistent with the suffrage law equilibrium model of chapter 7 and 8. A majority of male voters had gradually been persuaded that women were qualified to cast their own independent votes and that alcohol was undermining the quality of life and the productivity of a broad cross section of the American labor force. In no case was the women's or temperance movement a serious revolutionary threat.

G. The "Progressive" Reforms of the National Constitution

A number of progressive amendments were proposed in the late nineteenth and early twentieth centuries, but only four garnered sufficient support to pass in the Congress and be ratified by

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[432] Temperance societies were founded in Ireland in 1829, in Sweden in 1837, in Denmark in 1840, and in Norway in 1845. Energetic temperance movements also emerged in Germany and England. The temperance and women's suffrage movements in Europe are less studied, because they operated in the political shadow of various men's suffrage movements. See Johnson (1997) and the *Catholic Encyclopedia* for overviews of European temperance movements.

[433] For a contemporary overview of the pro- and anti- "prohibition" campaigns in the U.S., see the *New York Times*, July 16, 1911, "Prohibition the Issue of 1911." (Some states and counties had long been "dry" states, as for example Maine had been so since the mid-nineteenth century.)

three-quarters of the states. The negotiations were analogous in many ways to those undertaken in Europe at this time insofar as two of the amendments further democratized American governance. Negotiations on these constitutional reforms also combined idealistic and pragmatic interests. Two other amendments addressed tax reform issues and public health issues using amendment procedures, whereas in Europe similar reforms were often adopted through ordinary legislation.

In the United States, the executive branch does not have veto power over amendments, so negotiations take place within and among the chambers of the national and state legislatures. The details of constitutional amendments in the United States are normally worked out within Congress and sent to the state legislature for ratification. Amendments thus normally require minority as well as majority support, because of the two-thirds vote requirement for amendments to clear the Congress before being sent to the states for ratification. Three major reforms and one minor reform of the U. S. constitution were negotiated and adopted between 1909 and 1920. The progressive amendments had significant effects on governance, tax revenues, and the demand for government services.

Changing the U. S. Tax Constitution: the Income Tax and Prohibition

The federal government had relied entirely on excise taxes and tariffs for its revenues before 1913 (with a short exception during the Civil War), because the constitution forbade direct federal taxes—taxes borne directly by individuals. In effect, the federal government had a standing tax constitution that proscribed a tax base analogous to that of the medieval kings of Europe. The use of tariffs and excise taxes limited the range of services that could be centrally provided, which helped to assure that governance in the United States would remain a decentralized federal system.[434]

Interests in reform of the federal tax base paralleled developments at the state level, where property taxes were the principal source of revenue. As demands for central government services increased and confidence in the central government's ability to provide those services increased, it became clear that old tax rates would have to be increased or new tax rates lowered. Those most affected by existing tariffs and excise taxes, of course, generally preferred that a new tax be introduced that would shift the burden of taxation to others. There were also ideological arguments in support of income taxation. For example, proponents such as Edwin Seligman argued that the

[434] Neither the colonial governments nor the state governments were similarly restricted. Colonies had used taxes similar to income taxes as early as the seventeenth century. States had used income taxes throughout the nineteenth century, beginning with Virginia in 1843 (Comstock 1921). The federal government's occasional use of an income tax had been ruled unconstitutional by the Supreme Court in 1895.

income tax was a fairer tax, because the burden of excise taxes and tariffs tended to be disproportionately borne by middle-class and poor persons.[435]

The Democratic Party proposed a national income tax in their 1896 platform, and a series of income tax proposals were introduced in Congress, but voted down during the next decade. However, economic growth, electoral pressures, and expenditure pressures, including those associated with national security, increasingly favored the income taxation in the early twentieth century (Brownlee 2004: ch. 1).

Congress passed the sixteenth amendment allowing income taxes on July 2, 1909, which was ratified by the required number of state legislatures on February 3, 1913. The first income tax was incorporated into a tariff reduction bill in 1913. The latter suggests that fiscal exchange had played a role in the amendment process. Tariffs were reduced as the income tax was implemented.[436] The income tax was subsequently expanded during World War I, because the war caused tariff revenues to fall at the same time that American participation in the war caused federal expenditures to increase. The importance of income taxes as sources of revenue was further increased when the eighteenth amendment (prohibition of alcohol sales) was adopted in 1919.

The temperance movement, as noted above, had long lobbied for laws that limited alcohol consumption. There were state and national campaigns to reduce and/or eliminate alcohol consumption in most states in most of the nineteenth century. As a consequence, many cities, counties, and states adopt rules prohibiting alcohol consumption, especially in the early twentieth century. By 1913 a majority of persons in the United States lived in places in which alcohol consumption was prohibited, and the temperance movement turned its attention to a national program. Representatives from these congressional districts and states pressed for similar rules for the nation as a whole (Cherrington 1920: 323–30). A constitutional amendment was necessary, because at that time regulations of alcohol was an area of state, rather than national, policy. An anti-alcohol amendment was passed by Congress on December 18, 1917, and ratified by the required number of state legislatures on January 16, 1919. (The eighteenth amendment was subsequently

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435 Seligman was an economist at Columbia university who had written widely on the effects of an income tax. He testified before Congress on May 20 1911 in support of the amendment (*New York Times,* May 21, 1911).

436 Although tariff rates were reduced, tariff revenues initially increased as a consequence of the Underwood Simmons Tariff Act of 1913. The new national income tax was somewhat progressive. It included a one percent tax on personal and corporate income with above $3000 and a six percent rate on incomes above $20,000. About 98 percent of U.S. taxpayers paid no income tax (Brownlee 2004: 56–57).

repealed by the twenty-first amendment in 1933.) This amendment combined ideological and public health aspects, although concerns about the latter were partly ideological in nature. Prohibition, in contrast to the income tax amendment, reduced national, state, and local tax revenues from excise taxes on alcohol products.[437]

Reforming the Selection Process for Members of Congress

Two other Progressive amendments were similar to those adopted in Europe in the early twentieth century. The American first chamber—the Senate—was placed on an electoral basis and suffrage was expanded. In both cases, the amendments reflected long campaigns inside and outside of Congress that supported such amendments, and in both cases the amendments became possible when persuasive campaigns had induced a sufficient numbers of voters to favor the reforms. As in the case of the temperance movement, there were state and national campaigns. As in Europe, support for reform reflected a mixture of pragmatic, partisan, and ideological interests.

The Senate was initially designed to represent the interests of state governments, so its members were appointed by state legislatures. This gave its members somewhat different institutional interests than members of the House of Representatives. Support for reform of the Senate was based partly on a number of scandals in the late nineteenth century, including procedural ones in which state legislatures were unable to select a senator for months at a time, leaving their state unrepresented. There were stories about senators who received their seats through campaign contributions to state parties. Critics began to refer to the Senate as a "millionaire's club."

Progressives and left liberals in the United States, as elsewhere, favored direct elections over indirect ones and pressed for reforms, largely because they thought that representative assemblies produced better public policies than appointed ones. A consensus for reform of the Senate became evident in 1893, when two-thirds of the House of Representatives voted to place the Senate on a directly elected basis. The Senate, however, vetoed the proposed amendment, and similar proposals for the next 18 years.

As a method of getting around the constitutional provision that Senators be appointed by state legislatures without amending the constitution, reformers encouraged states to conduct "non-binding" elections for senators and encouraged state legislators to promise to vote according

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[437] Equally effective temperance movements were also active in Scandinavia during this same time period, and the result was also often "prohibition." For example: Norway, Finland, Iceland, and Russia experienced periods of prohibition at about the same time as the United States. The Swedes transferred all sales to state stores and regulated consumption through a coupon system.

to those electoral outcomes. This and other shifts in state politics gradually changed the institutional interest of the senators in the Senate. Ten senators who voted against reform of the Senate lost their reelection campaigns in 1910 and were replaced with progressives favoring reform. Thirty-one state legislatures formally announced their support for the direct election of senators (Zelizer 2004: 356–62). Negotiations between the Senate and House of Representatives finally produced a compromise amendment early in 1912. The seventeenth amendment providing for the direct election of senators was passed by Congress on May 13, 1912, and ratified by the required number of state legislatures (many of which already used this procedure) on April 8, 1913.

The progressive tide in electoral politics also increased support for women's suffrage during the early nineteenth century. As in Europe women's suffrage was adopted only after male suffrage had been extended and only after a majority of men had been persuaded that women were qualified to cast independent and informed votes. American's left liberals (reform Republicans) and progressives supported suffrage extension, while moderates and conservatives initially opposed it. What is unusual about the U. S. case is the long gap between the major male suffrage reforms (1869) and women's suffrage (1920). Support among male voters increased very gradually in the United States.

The Progressive political party supported a constitutional amendment for women's suffrage in 1912 and the Republicans did so in 1916 (Zelizer 2004: 370–77). Democrats opposed a constitutional amendment and argued that women's suffrage should be adopted one state at a time. A compromise on amendment language was worked out between the House and Senate in 1919 and accepted by the required supermajorities in the two chambers on June 4, 1919. It was ratified by the three quarters of states on August 18, 1920. The nineteenth amendment, as was true of women's suffrage laws in Europe, extended the logic of "qualified voters" to women.

Voting patterns within the Congress for all four of the progressive amendments reflected ideological and economic interests of the states and voters represented. Holcombe and Lacombe (1998) provide statistical evidence that relatively low-income states favored the income tax, and states that had already adopted "direct" election of senators favored the new method of selecting senators. Berman's (1987) empirical work based on voting patterns in western states and McDonagh and Price's (1985) analysis of voting patterns in mid-western states and California support the hypothesis that ideological considerations played a significant role in male support for women's enfranchisement (support for the amendments rose with votes for the Progressive party and fell with votes for Democrats). Support for women's suffrage among male voters was also linked to

other policy agendas—in particular prohibition—which is consistent with an ideological model of suffrage reform.

Consequences of the Progressive Amendments

The individual progressive amendments were modest relative to the constitutional reforms adopted in Europe at this time, but they also significantly altered the procedures and resources of the national government. By changing the electoral basis of the Senate, the central government became a less "federal" system of government. No longer were state government interests in preserving state authority directly represented in the national government. No longer were national revenues limited to excise taxes and tariffs. These were significant reforms. Indeed, some legal scholars argue that the progressive reforms were the first truly fundamental reforms of American political procedures and constraints since the ratification of the Bill of Rights amendments in 1791 (Epstein 2006).

Together, the sixteenth, seventeenth, and nineteenth amendments removed earlier constitutional constraints on the size of the central government and increased the demand for and supply of central government services.[438] The progressive amendments subsequently affected the relative and absolute size of the central government. State and local governments had been the main sources of public services in the years before the progressive amendments, but after 1913, state expenditures grew more slowly than federal ones. The income tax rapidly became the most important revenue source for the federal government. Federal programs for international security and social insurance expanded steadily during the next several decades. Without the income tax and change in the manner in which senators were chosen, the social insurance programs would clearly have been more difficult to adopt and the new programs would have been essentially impossible to fund. Essentially all contemporary central government (federal) tax revenues in the United States are income taxes: the personal income tax, corporate income tax, and payroll tax (which funds Social Security and Medicare).

[438] There is evidence that women's suffrage produced a new median voter with a higher demand for social insurance than the previous one (see Lott and Kenny 1999).

H. Conclusion: Summary and Extensions

With the adoption of women's suffrage, the United States could be said to have completed a 300-year-long transition to constitutional democracy. The foundations of governance had long been entirely electoral, but they were now more direct than in the past.[439] Suffrage was essentially universal among adults, except in the South.[440]

The U. S. transition was marked by revolution and war, but constitutional reforms were rarely motivated by military events. Commercial interests, industrialization, and ideology played a more central role in reform movements and in the reforms adopted. As predicted by the models of part I, the rise of parliament and the broadening of suffrage arose through essentially independent series of reforms. In the American case, the rise of parliaments occurred for the most part in colonial legislatures well before independence and well before universal suffrage. This part of the transition reflected bargaining opportunities between colonial governors and their parliaments (the colonial "king and councils") in circumstances in which colonial legislatures had veto power of new taxes and in which labor was scarce and mobile. As in Europe, the balance of policymaking authority in colonial governments was rarely codified, but reflected the relative bargaining power of colonial parliaments relative to their governors, which largely reflected the interests represented by those with the authority to alter constitutional law, rather than revolutionary threats or severe crisis. External threats catalyzed the formation of a national government in 1776, but the "new" state and national

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[439] Elections for the President are still indirect. Votes are tabulated at the level of states, and state "electors" cast their votes for the president. The number of electors in each state is equal to the sum of their senators and their representatives. With very minor exceptions, the electors have always voted in the manner recommended by the majority of their state's voters.

This indirect election of U. S. Presidents by state electors reflects the confederal and federal history of the United States and was evidently a compromise between the prime ministerial systems and directly elected systems used by the state governments in 1789. The initial proposal of the constitutional committee in Philadelphia was for the president to be elected by the Congress. The executive in such prime ministerial systems is also, of course, indirectly elected. (See Madison's notes for August 6 and September 4, 1787, regarding section 1 of article X of the draft constitution.)

[440] Suffrage among adults in most European countries in most cases excluded minorities in 1925, as noted above. Persons on welfare were also generally ineligible to vote even after "universal" adult suffrage was achieved, as, for example, in Denmark, Japan, Sweden, and the United Kingdom. Citizenship for native-born "foreign workers" was often difficult to obtain until after World War II. Suffrage was not finally extended to poor whites or most blacks in the south until the late 1960s, although both groups had briefly been free to vote in national and state elections after the Civil War.

constitutions reflected a century and a half of constitutional experimentation among colonial governments.

Suffrage in the United States began at relatively high levels during its colonial period, because so many persons satisfied property ownership qualifications. The transition to universal suffrage, however, took nearly 300 years (350 if suffrage restraints in the southeastern United States are taken into account). Male suffrage was extended slowly, as property, religion, educational, and racial qualifications were eliminated. Suffrage was gradually extended to white men, former slaves, and women. Women's suffrage was adopted in the early twentieth century, at about the same time as in Europe. It seems clear that suffrage reform was driven largely by changes in the norms that determined "proper qualifications" for exercising suffrage and partisan advantage.[441] There was clearly no slippery slope to universal suffrage in the United States.

The non-revolutionary basis of the United States of America is evident in its architecture for governance. Its colonial king and council templates had roots in England and in earlier societies. That template was retained, although significant reforms were adopted during the course of a century and a half of constitutional bargaining within the colonies. The architecture of its late eighteenth-century national government reflected the colonial experience with governance, as did the new state constitutions. There were subsequently three major episodes of reform at the national level: the first immediately after ratification of the national constitution, when the Bill of Rights was added, the second after the Civil War, and the third in the 1910s.

Although continuity and constitutional conservatism is evident throughout its history, it is also clear that the effects of constitutional bargaining within the United States was ongoing and multidimensional and had nontrivial effects on state and national governance. Reforms of democratic polities are often more subtle than those between parliaments and kings, and yet even small changes can have significant effects on public policy.

[441] Northern success in the Civil War allowed the enfranchisement of former slaves in the southeastern United States to be imposed by northern liberals. In that case, suffrage expansion was not so much the result of a change in ideology as a change in legislative circumstances. Support for the civil rights reforms of the 1960s, however, reflected ideological shifts after World War II.