

America's Constitutions,

Analysis and Evidence

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Course Texts and Readings:

Keyssar, A. (2000) *The Right to Vote, the Contested History of Democracy in the United States*. New York: Basic Books.

Taylor, A. (2001) *American Colonies, the Settling of North America*. New York: Penguin Books.

Rehnquist, W. H. (2001) *The Supreme Court*. New York: Alfred A. Knopf.

[Class Web Notes and Links](#) (see class web site)

Course Overview: Constitutionalism and the "New Republic"

One important difference between the United States and Europe is its "constitutionalism." That is to say, a good deal of the American identity, both domestically and internationally, is a consequence of its constitutional history. The United States was the first truly constitutional government in modern times. The proposed course attempts to develop an analytical and historical understanding of America's constitutions and constitutionalism, its development over the course of four centuries, its international significance, and its mythology. It notes the many parallels with and differences from the European constitutional and political developments during the same period. American image in the world is based partly on real historical events and partly on myths associated with those events.

I. Overview of the course and Methodology

A. Organization and Purpose of this Course (6-9-06)

B. Methodological Notes (6-9-06)

For the most part, this course uses a rational choice approach to analyze and explain constitutional developments. From a rational choice perspective, the rules of a game have important consequences for the way that a game is played, and this tends to be true of political constitutions as well. What the usual game theoretic perspective lacks is the ability to explain where "the rules" come from.

The contractarian theories of Hobbes, Locke, Montesquieu, Rawls, and Buchanan provide one possible explanation, but true social compacts are very rare in history. What seems to be a better explanation is that the rules of political games include "rules for changing rules" which are part of the larger game of politics.

From this perspective, constitutions emerge gradually as preexisting rules are modified to take advantage of new circumstances (exogenous changes in payoffs for players). In most cases, constitutions emerge when a sufficient number of individuals with the preexisting authority to change rules find it in their common interest to do so. In many cases, this occurs as opportunities for constitutional exchange occur. In other cases, it occurs because most come to see the advantages of particular constitutional changes.

It bears noting that elite political interests are not simply determined by rank, wealth, and military power, but also by ideas. Ideas about "the good society" have played very important roles in both the history of the United States and Europe.

[Readings: Keyssar Ch. 1, *Perfecting Parliament* Ch. 1 (web)]

II. Historic Foundations: The Constitutional Governance of the English Colonies

A. Colonization for Profit: the Demand for Labor and Capital (13-9-06)

Democratic governance in the English colonies emerged as a method of attracting scarce capital and labor to the colonies. Colonists could select among a dozen colonial governments and to a significant extent choose to live in the colonies that provided the most protection for their lives and property. The colonial governments tended to gravitate toward surprisingly democratic forms in which property owners had veto power over new taxes and regulations. This evidently was largely a consequence of "Tiebout-like" competition among the colonies. (Footnote on Scandinavian immigrants: New Sweden and the "American" log cabin.)

[Readings: Taylor Ch. 2, 6, 8]

B. Constitutional Convergence in the Colonies (20-9-06)

An early example of colonial government was established in 1619-21 when the Virginia colonists established a bicameral legislature with veto power over its appointed governor. One chamber was appointed by the governor. The other was a representative government elected under very broad suffrage--freeholder suffrage--a breadth of suffrage that was not common in Europe for more than two hundred years. Within the next century all the other North American colonies followed suit.

Not all emigration to the English colonies in North America were motivated by economic considerations. New England was first settled by a group of Puritans that arrived with the intention of establishing a new purified settlement for worship, away from the temptations of modern life. However, in other colonies religious tolerance was introduced, as was democracy, to attract residents and capital, as for example was the case for New Amsterdam, Maryland, Rhode Island, and Pennsylvania.

[Readings: Taylor Ch. 7,11, 12, 14; see also web links to Colonial Charters.]

C. A Digression: Constitutional Theory and Public Policy, A Primer (27-9-06)

Why do constitutions matter? Constitutions matter because they largely determine the procedures through which public policies are chosen. To the extent that procedures affect policy choices, and policy outcomes affect economic and social opportunities, the quality of life is indirectly affected by constitutions. Illustrations: the median voter theory under narrow and broad electorates, veto players, public goods problems.

[Readings: see web links to pieces on the Median Voter, Veto Players, and Constitutional Exchange]

D. The *Continental Congress and Articles of Confederation* as a Treaty Organization (04-10-06)

The English colonies were independent entities that joined forces when the English government took steps to reduce the powers of the colonial governments, especially their elected chambers. This threatened life as it was known within the colonies and induced them to form a new level of government to coordinate lobbying in England and eventually to create a common "defense" within the colonies. The first government was analogous to the Dutch republic and the modern EU with its many provisions for unanimous consent and its inability to raise taxes. Presidents served for a one year term of office.

[Footnote: the first person to serve a full term as president of the Continental Congress after the Articles of Confederation were ratified and the battle of Yorktown was won was a man of Scandinavian decent named John Hanson (November, 1781-82).]

Organizing a revolutionary war was made possible by the broad autonomy of the colonial governments and their preexisting power to raise revenues through taxation and to print money. The colonial parliaments had become essentially sovereign entities. Not all colonists, of course, were opposed to continued association with England, but a sufficient number "saw the writing on the wall" that England would greatly reduce colonial independence in the near future and was prepared to resist that attempt at centralization peacefully through lobbying parliament and the king and, as turned out to be necessary, by organizing a military campaign (army, navy, alliance with France, etc) to resist centralization and eventually to secede.

Among the many American myths are: (i) that "freedom" did not exist in the colonies, (ii) that essentially all Americans were actively involved in the war, (iii) that the war was essentially fought on by American alone against the strongest military state in Europe (e.g. with only minor French help), (iv) that Thomas Jefferson wrote the declaration of independence on his own, (v) that the United States emerged more or less instantly and smoothly after the war, and (vi) that separation of church and state in the new world began (and was complete) with the bill of rights.

[Readings: see web links to Common Sense, Declaration of Independence, and Articles of Confederation, several passages are cited in the web notes]

E. The Second Constitution of the United States: Constitutional Debates: Federalists vs. Antifederalists (11-10-06)

After the revolutionary war was won, the Congressional Congress' inability to raise taxes or to address interstate conflicts, caused many within the new republic to favor a more effective central government. However, concern over the powers of central government caused colonial leaders to design a new form of government making extensive use of divided powers (as recommended by Montesquieu's widely read *Spirit of the Laws*) to protect individual and state authority.

It is easy to exaggerate how revolutionary the new government was: in many respects it simply applied existing governmental forms at the state level to the new national government. For example, the famous compromise on bicameralism was already widely in use in many state governments. The new president was "simply" an elected "king" or "governor" constrained by parliamentary vetoes over budgets and new legislation, as had existed within many European polities in the previous century. Extensive federalism existed in the Dutch republic and Swiss confederation. These last two governments also were cases in which powers were delegated to a central government by "sovereign" regional governments.

However, there was much that was new both in the large and in the small. The new government was by far the most democratic national government observed to that point. It was the first national government to be grounded in a single formal document, a constitution. It was the first to self-consciously use the division of powers to constrain the autonomy of the central government. It was one of the very few new national governments selected through a formal amendment process--all the state legislatures had to approve the new constitution. These were by the standards of histories major innovations in national government. And, with the exception of the appointed Senate, the basic architecture of government established in the new constitution, remains in place today more than two hundred years later.

[Readings: Keyssar Ch. 1; see also web links to Federalist Papers and the 1787 Constitution--excerpts included in the web notes]

F. Fall Holiday ("Potato Week," the 42nd Week of 2006)

III. The Evolution of "the Constitution" of the United States

A. Evolution and Innovation: the Bill of Rights and the Emergence of a Supreme Court (25-10-06)

Of course the constitution, extensive as it was, was not entirely complete. Partly to assuage doubts about the ability of the division of powers to curtail central authority, several amendments were quickly adopted after the new constitution was ratified, the "Bill of Rights." This bill of rights was an innovation in several respects. They specified areas in which laws could not be created, thereby protecting political speech, gun ownership, freedom from unlawful search, due process of the law, and freedom of worship.

The constitution also specified a Court system in which claims between states and federal laws could be settled and appealed. The top appeals court in the Federal system was the Supreme court. In a landmark court decision in 1803, *Marbury vs. Madison*, the court claimed the right to review legislation to determine whether it was consistent with the constitution of the United States. This decision, thereby, transformed the most senior court of appeal into the world's first constitutional court--if not the first court that made significant constitutional decisions.

[Readings: Keyssar Ch. 2; Rhenquist Ch. 1; see also web-links to the Bill of Rights and to *Marbury vs. Madison*, excerpts included in web notes.]

B. America's Men's Suffrage Movement: Democratic National Governance (01-11-06)

At the beginning of the new constitutional government of the United States of America, there was broad suffrage among male voters, but not universal suffrage. State constitutions generally limited suffrage to property owners. A man normally required a 25-50 acre holding of land to qualify as a voter if he lived in the countryside (a small farm) and required a 1/4 acre (a town building lot) if he lived in town. This was essentially middle class rather than universal suffrage. The path to universal suffrage is one of the great "quasi constitutional" debates of the 19th and 20th century. It began in the late eighteenth and early nineteenth century as a true suffrage movement that petitioned state legislatures for "liberalized" suffrage laws.

On the other hand, lobbying is not generally sufficient by itself to generate new suffrage law, because expanding suffrage tends to make pivotal voters worse off. Other constitutional refinements: the XI and XII constitutional amendments.

[Readings: Keyssar Ch. 2; web link to Congleton *HoEc* paper on Suffrage Reform, excerpted in class web notes]

C. [Prof. Congleton is off to China / the class will be made up later](#) (8/11/06)

IV. The Third Constitution: American Liberalism, Centralization, and Citizenship

A. Who is Equal before the Law? The Slavery Conundrum (15-11-06)

Among the great unanswered constitutional questions, was the question of citizenship. Namely, who is a political person under the law. The declaration of independence echoes many of the conclusions of enlightenment political philosophers (especially Locke, Montesquieu, and Rousseau), including claims about natural equality. However, there was substantial disagreement about just "who" was entitled to participate in political life--what Aristotle terms a nation's citizenry. The most widely held notion was evidently limited to male freeholders of European descent--although many Americans took the universal claims of the enlightenment more seriously and included other men and women as well. However, this serious question was left unresolved at the federal level, although as in Europe the definition of "citizen" in Aristotle's sense expanded gradually throughout the nineteenth century in most states,

because the "legal leveler" arguments of the Enlightenment was increasingly accepted by all classes.

(In Europe, the spread of liberal ideas and constitutional reform are more clearly associated--as slavery was eliminated early in the nineteenth century and as suffrage gradually broadened. Even most European men with property were not full citizens in Aristotle's sense at the beginning of the century, but were so by the century's end. In the U. S., the suffrage controversy was centered on blacks and women. The slavery debates were far more contentious at the federal level, because slaves were a far larger part of wealth within the Southern states than in the North or in Europe.)

[Readings: Keyssar Ch. 3; Rehnquist, Ch. 2; web links to excerpts from popular debates, excerpted in class web notes.]

B. The Civil War: Secession and Equal Protection of the Law (22-11-06)

In 1860, the Southern slave holding states decided to secede from the "irrevocable union" formed to fight for independence, rather than face the liberal tide that threatened to revolutionize life in the South by reorganizing economic and cultural life from slave-based production to freeman production. The union that remained, presided over by President Lincoln declared that secession was impossible under the constitution (the original Articles of Confederation ruled out secession) and launched a war to bring the South back into the United States. It was by far the bloodiest war in which the United States has ever been involved in, and profoundly affected the culture of the South, but also changed the balance of power between the states and the Central government.

In 1865, slavery in the United States was eliminated by the 13th amendment and equal protection of the law was extended to blacks in 1868-70 by the 14th and 15th amendments. Moreover, the civil war made it clear that "exit" was not an option for individual states. The United States was no longer a voluntary (perpetual) association of independent states, but a single nation.

[Readings: Keyssar Ch. 4; Rehnquist Ch. 3, 4; web links to constitutional amendments and to popular debates, excerpted in class web notes.]

C. The American Liberal Movement(s) of the 19th Century (29-11-06)

In much of Europe, including Denmark, the second half of the nineteenth century was marked by a variety of liberal movements. For the most part these were "leveler movements" and suffrage was extended to successively poorer (less independent and educated) male cohorts and finally in the early 19th century to woman. These movements could be said to be income or class based because existing suffrage laws were tax and wealth based.

In this respect the suffrage history of the United States is quite different. The male portion of suffrage *law* extension had, for the most part taken place during the colonial period of the United States, where freeholder suffrage was common place during the 18th century. However, suffrage movements for women, blacks, and native Americans, and subsequently for the end to legal

restrictions that limited suffrage. In many U. S. states, both the end result and process of reform paralleled similar developments in Europe.

(Initially, especially during the period of northern occupation after Civil War ended, blacks were elected to Congress and held significant political positions within their states and communities--however, this was relatively short lived as Southern states gradually adopted laws which greatly reduced the ability of blacks and poor whites to participate in state politics, through poll taxes, literacy requirements, and the like. Many of these barriers continued well into the 20th century in southern states.)

On the other hand, the late nineteenth century was a period of rapid industrialization in the US as well as in much of Northern Europe, which techniques of mass production (factories) replaced smaller scale production and markets became larger in scope. In many respects this was a period of market globalization, at least within the West, partly because free trade movements within the West were having great success during this period, partly because of technological innovations that greatly reduced transport costs (railroads and steam ships), and also created new economies of scale in production.

Two consequences of this increase in specialization for individuals and scale of operation for economic organizations included (1) an increase in economic risks, as boom and bust business cycles had enormous effects on individual businesses and individuals, and (2) and increased concentration in industrial power within large organizations: both industrial trusts and labor unions. Both these business cycles and monopoly power tended to increase economic risks for the majority of voters outside those organizations. These voters called for new policies to address those risks. In the United States, social insurance at State levels were more widely provided and public education increased throughout the country. New national anti trust laws were passed.

Such laws indirectly revised the constitution by increasing the power of higher levels of governments relative to local governments. Throughout the 19th century state and local governments were far more important sources of public services than the national government. It took another half century for the national government to become a larger and more important enterprise than state governments.

[Readings: Keyssar Ch. 5, Rhenquist Ch. 6, web links on the progressive movements, excerpted in class web notes.]

V. The Fourth Constitution: Twentieth Century: Democracy and the Welfare State

A. The Pre W.W.I Amendments: A New Senate, a New Tax Base, Prohibition, and Woman's Suffrage. (6-12-06)

In Europe, the liberal and social democratic movements of late 18th century continued to press for reforms that democratized politics and expanded social insurance during the early 20th century. In the U. S. a similar pressure was provided by the progressive movement (much of which was centered in the upper midwest where Scandinavian emigrants tended to be influential).

These lead to substantial changes in the U. S. constitution via formal amendments: a national income tax (direct taxation) was allowed by the 16th amendment in 1913. Another progressive amendment, the Senate became an elective rather than an appointed body through the 17th amendment in 1913 and the sale of alcoholic beverages was banned by the 18th amendment in 1917. In 1920, woman's suffrage became nation wide with the adoption of the 19th amendment.

(The "temperance movements" in Europe, often secured centralized control of alcohol sales or higher taxes rather than outright bans. The American ban lead, as might be expected, to a large and dangerous black market in those beverages.)

[Readings: Keyssar Ch. 6, Rehnquist Ch. 5, links to constitutional debates on taxation, prohibition and woman's suffrage amendments, excerpted in class web notes]

B. The Great Depression: Amending the Economic Constitution and Expanding the Scope of Governance (13-12-06)

After W.W.I, a great economic depression spread throughout the industrialized world of that time. It was generated by a variety of causes including reduced international trade, the collapse of the gold standard, mistakes in government policies partly caused by errors in economic theory. There had been many other deep recessions in the previous hundred years, but none had lasted so long.

This together with new radical political theories (communism and fascism) had enormous effects on political systems and public policies. Some new democracies failed, as in Germany and Italy. Others greatly expanded social insurance programs and public works. In the United States, the latter was clearly evident in national policies, many of which required constitutional revision to implement. These were generally adopted through contentious judicial reinterpretation of existing constitutional law rather than through formal amendment.

These new policies and reforms in the U. S. (and similar ones adopted in Europe) further increased the accepted responsibilities and powers of the central government and may be said to have created the political foundation of the modern welfare state. Two minor constitutional amendments were adopted during this period, the 20th provided rules for the beginning congress, including a requirement for annual meetings, and presidential secession. The 21st repealed the prohibition amendment (the 18th).

[Readings: Keyssar Ch. 7, Rehnquist Ch. 6-7, web-links to material on the great depression and popular debates, excerpted in web notes]

VI. The Fifth Constitution: Post W.W.II, The Supreme Court as a Vehicle for Constitutional Reform (** 13-12-06, the make up lecture)

The end of W.W.II is often considered the beginning of contemporary period in many respects, although for the most part the constitutional, political, and

economic foundations of the modern period emerged well before W. W. II. In Europe the post W.W.II period--especially in the 1970s witnessed an amazing expansion of the welfare state, largely induced by a great intellectual shift rather than new economic uncertainties as in previous periods. This shift also occurred in the US, but to smaller extent, in part because its political institutions make rapid shifts in major policies more difficult. The durability of many of these new national programs--both in Europe and in the U. S.--gives them a quasi-constitutional status, which in some cases has been incorporated into national constitutional documents (although not in the United States).

Within the U. S. formal constitutional reforms continued, the 22nd amendment formally limited the number of terms that a president can serve to two terms (in 1951). This had previously been the custom, following the first President's lead. Only Roosevelt served more longer than customary. Voting rights for the District of Columbia in presidential elections were assured by the 23rd amendment in 1960. Perhaps the most significant amendment was the 24th amendment that eliminated remaining poll and other tax requirements for voting (mostly in the South) in 1964. Presidential succession was revised slightly by the 25 amendment in 1967 and the right to vote was extended to 18 year olds by the 26th amendment in 1971.

Other significant changes in the political constitution occurred via legislation, via reinterpretation, as individual rights of political speech and participation were extended, and as equal protection of the law was extended to some public services--especially education in the South, where "separate but equal" school systems were rejected--for the most part because they were never really equal. Many of these reinterpretations of the 1950s and 1960s remain politically contentious today, especially those with respect to abortion and bussing.

[Readings: Keyssar Ch. 8, Rehnquist Ch. 10, web links to significant court decisions and popular debates and statistics, excerpted in class web notes]

VII. The Constitutional Agenda of the 21st Century

(20-12-06)

- A. The constitution-based identity of the citizenry of the United States remains evident today, as contemporary politicians continually make references to the ideas of the declaration of independence and bill of rights. Freedom, loosely defined by these, remains high upon the moral intuitions of modern Americans. However, that constitutionalism has changes through time in part as a consequence of world view changes, and in part because the social contract has itself changed in a number of ways. The modern constitution includes far more social insurance and far more regulations (at the national level) than the original one did, and also more effectively guarantees equal protection of the law than did that original document.
- B. Today's major constitutional concerns tend to be international ones both in the United States and in Europe. That is to say, to what extent should national autonomy be bound by agreements with other nations. Membership in international organizations have constitutional consequences insofar as they transfer (or delegate) policy making power to new citizenries or bound the policy making autonomy of national governments. The number of international organizations has increased rapidly during the past 50 years. In part this has been sparked by a great increase in supranational interests--globalization.
- C. In addition to these new global issues, there is remains ongoing controversy within the U. S. with respect to many of the supreme court decisions of the 50s and 60s. To what extent can tolerance and equal opportunity be promoted by central governmental regulations that treat individual differently? At what point do a collection of cells become human and at what point do they stop being human? These are important issues at the margins of modern constitutional development. Questions that are debated more strenuously in the U. S. than elsewhere in large part because of its constitutional and legalistic traditions, and perhaps because of the "winner take all" nature of some of its political institutions.
- D. Overview and Review of the US Constitutional History
[Readings: Keyssar Ch. 9, Rehnquist ch 15, web links to current controversies, excerpted in class web notes]

VIII. Take Home Exams in January