

## I. Thinking about Constitutions

### A. Understanding how **lawful politics** operates in general:

- i. **Constitutions as "Rules of the Game"**
    - a. Like rules of a game of football or a card game, a constitution does not determine the outcome, but rather the course of "lawful" play.
    - b. Some procedures (kicking the ball) are permitted and others (using hands, shooting other players) are forbidden.
    - c. Similarly, the standing procedures and constraints of policy making affect how "voters" and "politicians" play the game of politics.
  - ii. Constitutions may be studied because there are practical design issues:
    - a. How do political institutions work?
    - b. How can they be improved?
- ### B. Constitutions and other political institutions can also be studied for their personal and scientific value.
- i. Understanding political institutions allows you to extend your own personal view of the world.
    - You become more aware of advantages and disadvantages of your own political system relative to other systems.
    - You can make up your own mind about what "good" or "ideal" political institutions look like?
    - You may just find political institutions interesting or amazing because of your own curiosity about how the political world works.
  - ii. Scientific understanding of political institutions, to the extent this is possible, allows you to determine what, if anything, is general about political procedures and basic institution.
    - a. To put on your "scientist hat," one has to try to escape from one's own personal myths and the myths promoted by one's society.
      - One's private "nationalism" is often grounded in such historical mythologies, and thus to recognize one's own myths often requires a scientific understanding.
      - On the other hand, understanding the nationalism of other persons in other countries require understanding a bit about their myths.
  - iii. My purpose today is more aimed at understanding "American" institutions than at "American" myths, although a bit of light will be cast on American myths as well.
    - a. Much of the American mythology has to do with its colonial roots and constitutionalism.

- b. (Many of the perceived differences between America and Europe are themselves myths rather than realities, but it takes a bit of attention (and detachment) to see through the myths to their underlying common natures.
- c. American's history and institutions, however, are different and worth knowing a bit if you want to understand the commonalities and differences between "Europe" and "America."

## II. Architecture of the American Constitution

### A. Selecting the U. S. National Government

- i. House of Representatives: elected by direct election (plurality) in single member districts drawn within state boundaries.
  - a. Representatives stand for election every two years.
  - b. The number of districts in each state is based on population, which is measured every 10 years in a national census.
  - c. The geography of each state district is determined by state legislatures. (Many are very strange shaped, to advance political interests.)
- ii. The Senate is directly elected by state voters.
  - a. Every state, regardless of size, has two senators.
  - b. Senators stand for reelection every six years.
    - A third of the senate stands for reelection every three years.
    - National elections take place every two, so this means that a state's has one senator standing for election two out of three national election cycles.
  - c. (For about the first hundred and thirty years, the Senators were largely appointed by state legislatures.)
- iii. The President is elected in a more or less direct manner, but the final decision is based on the "electoral college" rather than by votes cast.
  - a. The president stands for election every 4 years, but can only be reelected only 1 time.
  - b. As a first approximation, you can think of the president as being elected by direct votes.
  - c. However, formally he (or she) is elected by the "electoral college."
    - Officially, voter cast votes for "electors" who then vote their conscience for President, but electors essentially always vote for the candidate with the most votes.
    - Generally, the winner of a state's vote tally, gets that state's "electoral votes" which is the sum of its Senate seats and House seats.
    - With very rare exceptions, the results of the electoral college are the same as that of the popular vote count.

- iv. A fourth chamber of government, the Supreme Court, also has limited veto power over legislation, insofar as it may be deemed constitutional or not.
  - a. Members of the Supreme Court are appointed for life (during good behavior).
  - b. New justices are nominated by the President and have to be approved by the Senate.
  - c. Normally, the Supreme Court does not participate in policy making decisions, until well after a law is passed, and only in cases in which laws suits are brought against such laws, and the Court thinks that the problem is serious enough (as a matter of law) to warrant its attention.

#### B. Policy Making by the National Government

- i. The president, senate, and house are all co-equal participants in policy making.
  - a. They all can propose policies.
    - Although, for budgetary matters, the normal course is for the President to recommend a budget, and the Congress to modify and approve it, and send their modifications back for his approval or not.
  - b. Often the Congress radically modifies a President's proposal.
    - Here it bears noting that the President has much less power than a "equivalent" Prime Minister.
    - He does not control his party or his party's members in the Senate or House, but has to persuade them of the merits of his policy proposals.
  - c. Normally, majorities in the House and Senate, plus the President approve a policy for it to become national law.
    - In Tsbelius' terms, the president and majorities in the Senate and House are veto players.)
    - Because of the composition of the House and Senate, normally new laws require modest "super majorities" of popular support for a proposed policy (budget or law) to be passed by both chambers.
  - d. In cases in which the President vetoes a law passed by the Senate and House, the Congress can "**override**" the presidential veto with a 2/3 majority in each chamber.
- ii. In cases in which a law is thought (by almost anyone) to violate the constitution, a lawsuit can be brought in the National court system, which has the authority to determine whether a law is or is not constitutional.
  - These court decisions can be appealed all the way to the Supreme Court.

#### C. Federalism: Very Decentralized Policy Making

- i. Although policy making authority is more "centralized" today than it was a hundred years ago, it is far more decentralized than in most countries in Europe.

- Only Switzerland has a comparable level of decentralization within Europe.
- ii. There are fifty states, each with an elected government all but one has approximately the same architecture as the federal governments.
  - a. The states have a directly elected governor (president), and bicameral legislature: a directly elected House and Senate.
  - b. Below state governments are County and City governments, which often have quite different organizational structures, but also have considerable policy making authority.
  - c. Below county governments are township and town governments.
- iii. All levels of government have the power to tax and to regulate.
- iv. All levels of government have the authority to produce government services.
- v. Many, but not all policy decisions, are constrained by those of "higher levels" of government.

#### D. For Danish students, it bears keeping in mind that the US is a very large country and has a very wide range of opinions and circumstances.

- i. Many states and cities have populations greater than that of Denmark.
- ii. It also bears keeping in mind that you can find pretty much the full range of American opinions in Denmark and other European countries.
  - That is to say, America is different, but it not so different from Europe, because the two continents have been culturally ,economically and politically connected for more than four centuries.
  - The **distribution of American opinion about good public policy** differs from that of Denmark, as does that of Denmark from Germany, Ireland ... etc., although the range of policy is similar.

#### E. Of course, a good deal of the American Institutional structure looks a bit strange from a modern democratic theory perspective, which is partly because the current architecture emerged gradually over the course of more than two hundred years.

- (Of course, this tends to be true of most European governments as well.)
- a. For the most of the rest of the lecture, I will talk a bit about that history.
- b. Toward the end, I will talk a bit about your readings on America.

### III. The "Europeanization" of North America began with Columbus who "sailed the ocean blue in 1492"

- A. Columbus had accepted a theory of the size of the earth that implied China was only about 3000 miles to the West of Europe, rather than the 10,000 miles believed by many sophisticated theorists. (Taylor. p. 34)
- i. He persuaded the new King Ferdinand and Queen Isabella of Spain to finance the trip to China and off he went.
    - a. Ferdinand and Isabella are somewhat famous within Europe for driving the Moors out of Southern Spain, unifying the country, and for being the parents of Charles V's mother Joanna.
    - b. It is mostly the success of the Spanish army, but partly the success of Columbus, that induced Charles V to move from Belgium to Spain to become King of Spain in 1517 and soon after also the Holy Roman Emperor in 1519.
  - ii. Ferdinand and Isabella are very **famous in American history** and mythology, but mainly for sponsoring Columbus's trips (after rejecting his lobbying efforts three times).
    - a. In US history, Columbus is considered to be the discoverer of "American," although he was convinced for at least a decade that he had found a new route to the East Indies and China.
    - b. The two "new" continents were not named after Columbus, however, but rather after Amerigo Vespucci who wrote letters that were published and widely circulated in Europe **announcing the discovery of a "new world"** in approximately 1505, after a voyage on which he represented Medici bank interests.
    - c. A prominent map maker, Martin Waldseemuller, named the new continent America on his maps of the New World in 1507, and his names were adopted by other map makers.
  - iii. South America was rapidly claimed by Spain and Portugal.
    - a. The natives of South America (Incans and Aztecs) were more sophisticated and much wealthier than those of North America, although the residents of both continents were evidently decimated by European diseases such as small pox.
    - b. Many Spanish explorers and, of course the Spanish Crown, **became rich simply by taking the gold and silver from the Incas and Aztecs**, which ruled relatively large sophisticated nation states in South America and Mexico, respectively.
    - c. The great influx of **South American gold and silver into Spain had important effects on the balance of power within Europe**, as it allowed Spain to purchase both military ships and favors from other kingdoms.
- d. Neither the Spanish nor the Portuguese devoted much effort to the lands north of Florida and Mexico, probably because there was no gold to be found among North America's natives.
- B. Word of new world riches reached the ears of the rulers and merchants in England, France, and the Netherlands--and they sent ships to explore the unclaimed north in hopes of finding wealth where Spain had not.
- i. They commissioned explorers who mapped North America fairly carefully with an eye for gold, other marketable resources, and for potential settlement.
  - ii. However, no gold was found, and so **land sales and trade were the only source of profits for North European commoner investments in North America**.
- C. In the early sixteen hundreds, successful English, Dutch, and French colonies existed along the east coast of what is now the United States, and along several of the larger rivers--especially the St Lawrence Seaway in what is now Canada.
- a. The French established colonies in what is now Canada (and also on a few Islands in the Caribbean).
  - b. The English established colonies along the coast of what is now the United States from about South Carolina to Maine.
  - c. The Dutch established colonies in what became New York, New Jersey, and Delaware.
  - d. (And a small colony of New Sweden was established by Dutch and Scandinavian settlers near what became Wilmington, Delaware. The "American" **log cabin** originated in this short-lived colony. Its design was imported from **Finland**.)
- D. Note that in all of these cases, **the motivation for exploration, conquest, and settlement was largely economic**.
- a. Kings wanted additional gold, in part to escape from the veto power of their parliaments.
  - b. And, of course, Merchants engage in trade and investment for financial reasons.
  - c. (There were also religious motivations, that also drove some colonial efforts, but these would not have been sustained very long without associated economic profits.)
- E. It also bears noting that **many of the New World's major effects on Europe** were unanticipated and, thus, largely **accidental**.
- i. For example, completely unanticipated food stuffs were found and introduced to Europe from the New World.
    - a. The potato, corn and cassava grew in places that the major European crops--wheat, barley, and oats--could not and also provided about 50% more calories per acre.

- b. This allowed more of Europe to be farmed, and also allowed more people to be supported per acre of farm land than with the older crops, both of which contributed to European population growth in the next two centuries (Taylor, p. 45).
- ii. Discovery of the "new world," also **demonstrated that the state of knowledge during the late medieval Europe was incomplete in major ways, and could be made more complete through exploration.**
- a. This doubtless made the arguments of Protestant reformers such as Luther and Calvin in the first decades of the sixteenth century more persuasive by **undermining** the reputation of "received wisdom."
- b. If North and South America was completely new to European map makers, perhaps other parts of received wisdom were also incomplete or wrong.
- c. For roughly the same reason, it helped catalyze the scientific revolution that continues through to the present, by demonstrating that the received scientific wisdom of the Greeks was open to question, research and new experiments.
- d. A lot was being learned from direct observation and exploration that was completely unknown to the Greek and Christian scholars of the past.
  - (Ironically, the Greek estimates of distances to China were eventually proven to be more accurate than those used by Columbus!)
- iii. **Columbus and his successors demonstrated that direct observation and experiment could add to the "wisdom of the ages."**
- F. **Although the search for profits was most important, religious** men and women also were interested in the new world as a source of converts: "souls that could be saved," and as places in which religious beliefs could be perfected.
- i. A few of the English colonies in "New England" were also interested in the new world as a place where they would be free to purify their religion, away from the corrupting influence of Europe.
- a. The New England religious immigrants--as with the "Pilgrims"--turned out to be quite influential in the long run, particularly with respect to US myths and holidays (Thanksgiving), but also with respect to many of its "Puritan" religious traditions.
- b. Some colonies used promises of **religious liberty** to attract new immigrants as with Maryland's *Religious Toleration Act* of 1649.
- ii. However, even in these cases, it is clear that economic incentives were important.
- a. The shipping center that emerged in New England (Boston) provided the resources "puritans" need for successful development (and moderation) in the seventeenth century.

- b. (This is not to say that the New England religious communities were nonbelievers or hypocrites, because of their interest in economic success. Rather it is to point out that even devote settlers knew that one could not "eat" a prayer.)
- G. It also bears noting that the North American colonies were "done on the cheap."
- i. The lack of gold meant that returns from European investments were likely to be lower than in South America, and thus few resources were invested by the governments of France, England, and the Netherlands.
- ii. Indeed, most of the development by the English and Dutch colonies were done through crown companies--that is to say as private firms chartered by the English king or Dutch States General.
- iii. Government services were not freely provided by the crown, but rather had to be created essentially "whole cloth" by the crown companies and colonists.
- IV. The Demand for Labor and Capital and the Origins of Democracy in the United States**
- A. Land rather than gold was the direct economic return for most investors in the North American colonies, but land is not very valuable unless it is "improved" in some sense.
- B. This had profound differences in the development of North and South America.
- i. Farming requires clearing and tilling.
- ii. Mining requires exploration and development, as well as smelting.
- iii. Timber requires lumberjacks, saws, and sawmills.
- iv. All these require transportation of some kind (normally by boat in this period).
- v. (Taking gold and silver from natives requires armies and organization rather than settlers.)
- C. **To profit from North American colonies required what economists call "labor" and "capital" as well as land to produce a stream of income.**
- i. Consequently, those who received large land grants (often nobles or members of noble families in England or wealthy families from the Netherlands), or subsequently purchased large blocks of land, **had a strong demand for labor and capital**, without which their land was essentially without value.
- ii. Some investors and land-grant recipients were sufficiently wealthy to provide their own capital, but they could not supply enough labor.
- iii. **Both skilled and unskilled labor had to be attracted to** colonies, plantations, farms, or cities, if these wealth individual were to profit from their investments in the North America.

## D. How could this be done?

- i. In order to attract labor and capital to their colonies, the landowners needed to assure these people that they would be better off there than at home in England (and elsewhere in Europe, where immigrants were widely sought).
- ii. Landowners and ship owners engaged in extravagant "promises" of land or riches to fool people into going and then exploit them after they arrive.
  - a. This method only works for a few years, as people and stories returned to Europe about what life (and death) were like in the colonies.
- iii. A more important method was to attempt to recruit very poor people, who felt they had little to lose by crossing the Atlantic. Landowners and shipping companies could pay the way for those who were interested in the New World, but who could not afford the trip.
  - a. This was the origin of most of the early "indentured servants" in the first decades of North American development
  - b. These "servants" normally borrowed the transatlantic fare from a company or land owner. In exchange, they worked for five to ten years for very low wages, after which they would be free men--in some cases with a piece of their own land.
- iv. Obviously, such contracts are risky for the indentured servant, because once in America, they could not buy a ticket home.
  - a. (Indeed, in the early days, many died from various diseases before paying off their debt.)
  - b. Clearly, people would be more willing to sign such contracts if the contract terms were reasonable and would be enforced once they reached the colonies.

## E. Economists often call such enforcement problems "contracting problems."

- i. In principle, many such problems can be solved through well constructed "self-enforcing" contracts.
- ii. However, self-enforcing contracts do not exist for all economic or social or economic problems.
- iii. And, unfortunately, European courts were not really available to colonists.
  - a. Indeed, the worst indentured contracts and contract owners were such they probably would not have been enforced in England or the Netherlands.
  - b. Indeed, the worst contract owners (masters) might have been punished for violating criminal law.
- iv. In principle, there would be legal recourse in European courts, but only relatively wealthy people could afford the trip back to Europe to try the case, and even for them it was an expensive remedy for contract breach.

F. Consequently, **attracting labor to the new world, required some reliable method of enforcing the contracts signed in Europe, where judicial systems had a long history of enforcing contracts.**

- i. **Some "American" method of securing property rights and enforcing contracts in the colonies had to be worked out that would reduce the risks** faced by both skilled and unskilled labor, and also risks faced by those making both small and large capital investments in the colonies.
- ii. That is to say, **settlement in North America depended on the creation of new legal and political institutions**, because these would determine the flow of labor and capital to particular colonies, and thus the wealth of the large landholders.

## G. Moreover, potential colonists could choose among colonies, and would tend to choose the colony or town offering the best protection and therefore the best economic opportunities--other things being equal.

- i. Thus, Improvements in legal and political institutions tended to increase the flow of labor and capital to the New World in general and to particular colonies, which in turn would make political elites wealthier.
- ii. (This degree of competition for labor was far less common in Europe, where labor was almost freely available, and it was not always easy for peasants and working class folk to move from one place to another, because they were often "bound" to the land.)

H. Note, that in North America, "elites" faced a **very different tradeoff** between protecting their political power and increasing their economic wealth than they faced in Europe.

- i. This, together with competition for labor, caused a very different history of institutions.
  - In North America, elites recognized very early on that to become wealthy, they would have to develop relatively liberal political and economic institutions.
- ii. It also bears noting that, governments were not as powerful in the North American colonies as in Europe or South America .
  - This was largely because the new colonies were less profitable, and so they were less directly supported by well organized European armies and police.
- iii. It was also because it was relatively easy for colonists to escape from oppressive laws by joining Indian settlements or moving to other colonies.
  - a. The latter was especially important, because it increased competition among the colonies for manpower and capital.
  - b. Ships ran up and down the coast of North America, and the same rivers that allowed commerce to develop inland from the coast, also allowed pioneers to move from town to town.

- iv. 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 water ways--as with Maryland and Virginia in the South.
- Indeed, migration was often done by organized groups who seceded from existing towns, particularly in the intolerant religious communities in the North, and founded their own independent settlements with their own largely independent local governments.

## V. Colonial Competition and the Spread of Democratic Institutions

A. All this lead to a good deal of experimentation with governmental forms.

- i. Experiments were made at both the local government level and at the colonial level.
  - a. Success was evident in population increase, and failures with population decrease.
  - b. Moreover, as noted above, because population increases tended to increase the wealth of the colonial elites, they had strong economic reasons to adopt successful patterns.
    - (This was quite different in Europe at this time, where liberalization would often reduce rather than increase elite wealth.)
  - c. In the American colonies, there was **relatively intense political and economic competition**, but, **for the most part, of a peaceful variety**.
- ii. Mobility must also tend to moderate the behavior of other colonial governments around the world with respect to their immigrants as well.
  - a. However, many were more profitable than the North American colonies, and thus they were better policed.
  - b. They also tended to be less dependent on immigration for to increase the value of their land investments.
  - c. European diseases had greatly reduced the native "Indian" population, which provided many more opportunities for resettlement (more open land) than in many other parts of the world.

B. Consequently, although the North American colonies were **founded for profit and often run by chartered companies, they turned out to be great experimental laboratories of governance**.

- i. The scarcity of labor among the colonies induced elites to copy successful political and economic institutions among the colonies.
  - Otherwise, less labor would be attracted, and land (and capital) would be less valuable to their owners.

- ii. **Relatively broad suffrage was in the economic interest of political elites** (who were normally major landowner-investors in the crown companies, insofar as it might attract new hardworking settlers.
  - a. Without relatively liberal political institutions, a colony's elites might have a bit more political power, but they would have been far less wealthy, because there would be no one to farm, timber, mine, and mind their land holdings!
  - b. (Farming techniques in the South shifted to tobacco and then cotton plantation run by slaves, which reduced this liberalizing tendency, but did not eliminate it.)

C. **New models of government, based loosely on European models**, rapidly emerged throughout the English colonies.

- i. These typically included bicameral legislatures with veto power over new taxes and new laws, with one elected chamber and one appointed chamber.
  - a. The appointed chamber was often, in effect, an Aristocratic or Noble chamber because such persons were normally important "shareholders."
  - b. These "upper" chambers, thus, were very similar to the first chambers of European parliaments.
  - c. However, **the second chamber was often elected on the basis of much broader suffrage than in Europe, and so had a quite different character**.
    - (Indeed, it would be nearly three hundred years before Europe had similarly liberal election laws.)
- ii. In these new more or less representative bicameral systems, the governor protected company and crown interests, the upper chamber protected those of the economic and political elites, and the lower chamber those of the middle class.
  - a. This organization, thus, solved the problem of arbitrary changes in law that would take property or other rights from one class at the request of others.
  - b. It thus solved the "contract enforcement" problem.
  - c. It also generated extraordinarily liberal governments by the standards of the seventeenth and eighteenth centuries!
- iii. Rather than 5 or 10% male suffrage as was fairly common in Europe in the Seventeenth century, English colonial suffrage was generally greater than 50% of adult males and often close to 100%.
  - a. **This was a degree of suffrage not reached in Europe until the nineteenth century, nearly three hundred years later**.
  - b. Indeed, this could be counted as **another of the great unexpected consequences of the discovery of the New World**, perhaps the greatest in the long run: the demonstration that relatively democratic governments could actually work.

- (Political philosophers of the late seventeenth and eighteenth centuries were fascinated by this experience. See, for example, Locke and Rousseau.)
- iv. Without standing tax bases and little support from English taxpayers, the colonial governments were very dependent on their legislatures for revenues, and often for their salaries.
    - a. This made the colonial parliaments among the most powerful in the world insofar as their impact on legislation and governance was concerned.
    - b. Governors needed reliable majorities in the colonial parliaments to secure the resources for governing, which in many cases included their own salaries.
- D. The English colonies were, of course, relatively small places compared to nation states.
- i. However, their populations rapidly increased in the seventeenth century, and by century's end (in 1700) they were not so much smaller than the smaller European states.
    - a. A good deal of the population growth was simply the effect of learning to farm in the new world.
    - b. But, a good deal must also be attributed to the fairly rapid improvement in governance and government services.
  - ii. The latter was often simply the absence of arbitrary laws and confiscatory taxation--which contemporary work in economics shows tends to increase economic growth.
  - iii. (Of course, the consequent increase in political, religious, and economic freedom also encouraged immigration to the New World, but **increased prosperity was clearly the most important factor** for most immigrants, as true of today's.)

## VI. Some Examples of Early Democratic Institutions from Colonial Constitutions

- A. My "America's Constitutions" class website includes links to "From Revolution to Reconstruction," which includes many colonial documents, including colonial charters and constitutions, and several precursors to the American developments.
  - i. For example, the website includes the Dutch Act of Abduration, (Plakkaat van Verlatinghe, 1581) which is the Dutch declaration of independence. It includes a very "modern" description of the right of a people to revolt against tyrants.
  - ii. It was written about a hundred years before Locke's famous, but similar, statement of the same principle in his Treatises on Government, published anonymously in 1689.
  - iii. These documents help to frame the formal development of constitutional law in the colonies.
- B. However, many quite new political developments also occurred in the North American colonies.
  - i. The Mayflower Compact of 1620 is perhaps the first **true social contract**, and was written about **thirty years before Hobbes** developed his contract theory of the state in the Leviathan. This social compact was negotiated on a ship (the Mayflower) rented by English and Dutch puritans on their way to founding a religious colony near Plymouth Rock in Massachusetts and signed by all (men) on board.
    - a. "We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honor of our King and Country, a Voyage to plant the first colony in the northern Parts of Virginia;
    - b. Do by these Presents, solemnly and mutually in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid;
    - c. And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience."
  - ii. "An Ordinance and Constitution of the Virginia Company in England" written in 1621 is the first (more or less) democratic parliamentary constitution of the West.
    - a. "We therefore, the said treasurer, council, and company, by authority directed to us from his majesty under the great seal, upon mature deliberation, do hereby order and declare, that, from hence forward, there shall be two supreme councils in Virginia, for the better government of the said colony aforesaid."

- b. "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 said governor) shall be chosen, nominated, placed, and displaced, from time to time, by us the said treasurer, council and company, and our successors"
- c. "The other council, more generally to be called by the governor, once yearly, and no oftener, but for very extraordinary and important occasions, shall consist for the present, of the said council of state, and 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"
- d. "And this general assembly shall have free power, to treat, consult, and conclude, as well of all emergent occasions concerning the publick 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, as shall, from time to time, appear necessary"
- iii. The "Charter of Freedoms and Exemptions to Patroons" written in 1629 assures **Dutch** Investors and other settlers of New Amsterdam (present day New York city and New York State) that they will have the rights of Dutchman in the new world, may engage in trade, and claim as much land as they improve. (Note similarity with Lockes' 1689 theory of property.)
- a. "The Company promises the colonists of the Patroons that they shall be **free from customs, taxes, excise, imposts or any other contributions for the space of ten years**; and after the expiration of the said ten years, at the highest, such customs as the goods pay here for the present."
- b. "All the Patroons of Colonies in New Netherlands, and of Colonies on the Island of Manhattan, shall be **at liberty to sail and traffic all along the coast**, from Florida to Terra Neuf, provided that they do again return with all such goods as they shall get in trade to the Island of Manhattan, and **pay five per cent duty** to the Company, in order, if possible, that, after the necessary inventory of the goods shipped be taken, the same may be sent hither"
- c. "In regard to such private persons as on their own account. . . shall be inclined to go thither and settle, they shall, with the approbation of the Director and Council there, **be at liberty to take up and take possession of as much land as they shall be able properly to improve. . .**"
- d. "The Patroons and colonists shall in particular, and in the speediest manner, **endeavor to find out ways and means whereby they may support a Minister and Schoolmaster**, that thus the service of God and zeal for religion may not grow cool and be neglected among them, and they shall, for the first, procure a **Comforter of the sick** there. . ."
- e. "The Colonists shall **not be permitted to make any woollen, linen or cotton cloth**, nor weave any other stuffs there, on pain of being banished, and as perjurers, to be arbitrarily punished."
- f. "The Company will use their endeavors to **supply the colonists with as many Blacks as they conveniently can**, on the conditions hereafter to be made, in such manner, however, that **they shall not be bound** to do it for a longer time than they shall think proper."
- g. (Although not free by today's standards, the Dutch colony was the freest in North America for much of the first half of the sixteenth century, and one of the most prosperous. Recall that the Netherlands, was the most liberal place on earth at that time, and Dutch rights included the right of conscience, for Christians. However, governance in New Amsterdam was not particularly liberal.)
- iv. "The fundamental orders of **Connecticut**" written in 1639 develops an even more democratic government than in Virginia that includes freeman suffrage an elected governor (which was relatively rare in the colonies).
- a. "It is Ordered, sentenced, and decreed, that there shall be **yearly two General Assemblies or Courts**, the one the second Thursday in April, the other the second Thursday in September following; the first shall be called the Court of Election, wherein shall be yearly chosen from time to time, so many Magistrates and other public Officers as shall be found requisite: Whereof **one to be chosen Governor for the year ensuing and until another be chosen**, and no other Magistrate to be chosen for more than one year: provided always there be six chosen besides the **Governor**, which being chosen and sworn according to an Oath recorded for that purpose, **shall have the power to administer justice according to the Laws here established, and for want thereof, according to the Rule of the Word of God**;
- b. [The vote or] **choice shall be made by all that are admitted freemen** and have taken the Oath of Fidelity, and do cohabit within this Jurisdiction having been **admitted Inhabitants by the major part of the Town** wherein they live or the major part of such as shall be then present.
- c. It is Ordered, sentenced, and decreed, that the election of the aforesaid Magistrates shall be in this manner: **every person present and qualified for choice shall bring in** (to the person deputed to receive them) **one single paper with the name of him written in it whom he desires to have**



**Governor, and that he that hath the greatest number of papers shall be Governor for that year.**

- d. And the rest of the Magistrates or public officers to be chosen in this manner: the Secretary for the time being shall first read the names of all that are to be put to choice and then shall severally nominate them distinctly, and every one that would have the person nominated to be chosen shall bring in one single paper written upon, and he that would not have him chosen shall bring in a blank; and **every one that hath more written papers than blanks shall be a Magistrate for that year**; which papers shall be received and told by one or more that shall be then chosen by the court and sworn to be faithful therein; but in case there should not be six chosen as aforesaid, besides the Governor, out of those which are nominated, than he or they which have the most written papers shall be a Magistrate or Magistrates for the ensuing year, to make up the aforesaid number."
- e. (Note that the governor becomes, effectively, the **Prime Minister of Connecticut**, as an executive selected by the public assembly of freemen.)

**VII. The First American Constitution: the Articles of Confederation**

- A. The colonial governments organized themselves into a loose **alliance** to lobby for legal reforms in England and subsequently to fight the revolutionary war.
- i. As true of the European Union and other treaty organizations, the states were more or less co-equal members of this new "confederal" organization.
    - a. Many decisions were made by unanimous agreement and others were made by supermajority rule.
    - b. There was a weak president with a term of just one year.
    - c. It had no powers of taxation or regulation, but could request funds from the state governments and suggest regulations.
  - ii. For the most part, the confederation's government was supposed to intermediate disputes between the states and to provide for the national defense.
  - iii. The **Articles of Confederation** were sufficient for the United States to fight a war with England, albeit with considerable help from the French treasury, navy, and army.
- B. It continued to govern after the "Revolutionary War" was fought and won. For example:
- i. In 1784, it agreed to form 14 new states from the lands more or less west of the Appalachian mountains
  - ii. In 1785, it surveyed and began selling the new land

- iii. In 1787, it determined a process through which new organized territories could become states. See Johnson, 1997: 187-8.
- C. On the other hand, the Articles were not sufficient to solve other problems that many felt were important for the central government, especially those involving national debt and defense.
- D. The "Articles" were not a self-enforcing agreement.
- "For the current expenses of the government in that same year \$9,000,000 were needed. It was calculated that \$4,000,000 might be raised by a loan, and the other \$5,000,000 were demanded of the states. At the end of the year \$422,000 had been collected, not a cent of which came from Georgia, the Carolinas, or Delaware. Rhode Island, which paid \$38,000, did the best of all according to its resources. Of the Continental taxes assessed in 1783, only one fifth part had been paid by the middle of 1785." (Fisk, 1896: 58)
  - "the delinquency of each state simply set an example of disobedience for all the others to follow; and the amendment, had it been carried, would merely have armed Congress with a threat which everybody would have laughed at.
- i. So manifestly hopeless was the current government for Pelatiah Webster that as early as May, 1781, he published **a pamphlet, urging the necessity for a federal convention** for "overhauling the whole scheme of government from beginning to end." (Fisk, 1896:57)
    - [A very interesting pro federalist overview of the history between 1783 and 1789 is developed in a short book by John Fisk "The Critical Period of American History 1783-1789," published in Boston by Houghton Mifflin and Co in 1896. It is available on the web at: <http://www.ecn.bris.ac.uk/het/fiske/The%20Critical%20Period%20of%20American%20History%201783.rtf> ]
  - ii. Other amendments were proposed by Morris, Hamilton, and Madison among many others (Johnson, 1997: 184-6).
- E. Although many amendments were proposed, none could achieve the unanimous agreement of the states required under the Articles of Confederation.
- i. In the end, the Philadelphia convention of state commissioners agreed to use **the 9/13 rule** that had been specified for important decisions (but not constitutional ones) under the Articles as their procedure for adopting the new constitution.

- ii. Thus, one of the most important decisions reached in Philadelphia was to amend the amendment procedure!
    - (Had this rule been adopted earlier, the more decentralized structure of the Articles of Confederation might have lasted far longer, and been modified gradually, rather than whole cloth.)
  - iii. Although the state governments were doing relatively well, there was concern that the union would disintegrate, that boundary disputes would escalate to civil war, or that the confederation would be conquered by an outside force and so many pressed for a new constitutional convention.
- F. The implicit solution was a “meeting of commissioners” appointed by the states at Annapolis (Maryland) in 1786, to discuss “trade and commerce of the United States” and other important matters...
- The commissioners recommended may be said to have somewhat exceeded their charge by recommending that another meeting be held in Philadelphia to “render the constitution of the Federal Government adequate to the exigencies of the Union...”

### VIII. The Constitutional Convention in Philadelphia

The meeting in Philadelphia was clearly regarded to be an important meeting, and each state sent many of their most experienced men (largely lawyers) to the convention. 55 men participated in the deliberations (Keyssar, 2000). Most had served in the Continental Congress (42), many were college graduates (26) many had participated in the drafting of their new state constitutions. They were experienced serious men. (Johnson, 1997: 186-8).

- A. The work was completed in four months.
  - i. There were 560 roll call votes.
  - ii. (The records of the convention were supposed to be destroyed, but a few participants disobeyed that agreement and saved their notes, the most complete of which are those of James Madison.)
- B. Washington presided over what was clearly a new constitutional convention.
 

Madison’s notes suggests that the business of the convention began on the third day when Mr. Randolph then opened the main business.
- A. He expressed his regret, that it should fall to him, rather than those, who were of longer standing in life and political experience, to open the great subject of their mission.

- B. But, as the **convention had originated from Virginia**, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.
- C. He then commented on the difficulty of the crisis, and the necessity of preventing the fulfillment of the prophecies of the American downfall.

Randolph observed that in revising the federal system we ought to inquire

- i. (1) into the properties, which such a government ought to possess,
- ii. (2) the defects of the confederation,
- iii. (3) the danger of our situation
- iv. and (4) the remedy.

A. The Character of such a government ought to secure:

- i. (1) against foreign invasion:
- ii. (2) against dissentions between member of the Union, or seditious in particular states:
- iii. (3) to procure to the several States, various blessings, of which an isolated situation was incapable:
- iv. (4) to be able to defend itself against encroachment,
- v. and (5). to be paramount to the state constitutions.

B. He then proceeded to enumerate **the defects of the Articles of Confederation:**

- i. (1) that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority-
- ii. Of this he cited many examples; most of which tended to show, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without control; and that neither militia nor draughts being fit for defense on such occasions, enlistments only could be successful, and these could
- iii. (2) that the federal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency:
- iv. (3) that there were many advantages, which the U. S. might acquire, which were not attainable under the confederation-such as a productive impost- counteraction of the commercial regulations of other nations-pushing of commerce ad libitum-etc etc.
- v. (4) that the federal government could not defend itself against the incroachments from the states.
- vi. (5) that it was not even paramount to the state constitutions, ratified, as it was in may of the states.

C. Randolph next reviewed the danger of our situation,

- i. [He appealed to the sense of the best friends of the U. S.-the prospect of anarchy from the laxity of government every where; and to other considerations. ]
- D. He proposed as conformable to his ideas the following resolutions, which he explained one by one.

**Randolph went on to propose what is often called the Virginia Plan** (which is often attributed to James Madison). Again, from Madison's notes: Randolph proposed as conformable to his ideas the following resolutions, which he explained one by one:

- i. 1. Resolved that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, "common defense, security of liberty and general welfare.
- ii. 2. Resolved therefore that the rights of suffrage in the National legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.
- iii. 3. Resolved that the National legislature ought to consist of two branches.
- iv. 4. Resolved that the members of the first branch of the National legislature ought to be elected by the people of the several States every for the term of to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of reelection for the space of after the expiration of their term of service, and to be subject to recall.
- v. 5. Resolved that the members of the second branch of the National legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures, to be of the age of years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.
- vi. 6. Resolved that each branch ought to possess the right of originating Acts; that the National legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening in the opinion of the National legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

- vii. 7. Resolved that a National Executive be instituted; to be chosen by the National legislature for the term of years to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.
- viii. 8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National legislature before it shall operate, and every act of a particular legislature before a Negative thereof shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National legislature be again passed, or that of a particular legislature be again negatived (vetoed) by of the members of each branch.
- ix. 9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the [last] resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachment of any National officers, and questions which may involve the national peace and harmony.
- x. 10. Resolved that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.
- xi. 11. Resolved that a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State.
- xii. 12. Resolved that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.
- xiii. 13. Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National legislature ought not to be required thereto.
- xiv. 14. Resolved that the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union.
- xv. 15. Resolved that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be

submitted to an assembly or assemblies of Representatives, recommended by the several legislatures to be expressly chosen by the people, to consider and decide thereon.

Randolph concluded with an exhortation, not to suffer the present opportunity of establishing general peace harmony, happiness and liberty in the U. S. to pass away unimproved.

It is interesting to note how much of this first proposal survived the negotiation process, and also the wide range of subtle revisions that were adopted on its way to completion by the Philadelphia convention.

- i. It is also interesting to note how similar the proposed constitution was to many existing state constitutions!
- ii. The convention did not adopt the new constitution, nor even recommend that states should accept it recommendation.
- iii. Instead, they recommended that every state elect its own convention to consider the document (essentially as an all or nothing offer) as a whole.
- iv. If approved by 9/13 of the states, it would become the law of the land.
- v. [Fairly detailed discussion of the federal convention debates from the various undestroyed notes can be found at: <http://odur.let.rug.nl/%7Eusa/D/1776-1800/federalist/antifx.htm>]

After four months of debate and compromise, all except three of the members present (Randolph (!), Mason, and Gerry) then proceeded to sign the instrument.

Whilst the last members were signing it Dr. FRANKLIN looking towards the Presidents Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: **But now at length I have the happiness to know that it is a rising and not a setting Sun.**

## IX. The Ratification Debates: The Federalist and Anti-Federalist papers as Political Dialogue and Political Theory: Toward a Modern Constitution

- A. Ratification debates took place over the next two years, often in specially elected constitutional conventions formed for this purpose.
  - Eventually 9 states ratified the proposed constitution, although several did so with the caveat that a **bill of rights** be passed.
  - A bill of rights was subsequently proposed as a series of amendments to the constitution and ten were rapidly passed by the new Congress and the requisite 3/4 of the states.
- B. Another important event for Political Theory occurred during the ratification process.
  - A series of very good political theory essays, known to day as the "federalist papers" were published in New York newspapers (to influence the New York convention which was initially opposed to the new constitution).
  - Here in one place is the first sophisticated defense of constitutional democracy. It represents a major advance over the contributions of Hobbes, Locke, Montesquieu, and Rousseau, in many respects.
- C. The basic architecture of that proposed and ratified Constitution continues in force today.
  - The only really substantial reforms (amendments) took place after the civil war and at the time just before WWI, what some call the "Progressive Era."
- D. (I have neglected the ratification debates and the Civil War for the purposes of this lecture. However Students can take a look at the lectures on ratification and the Civil War in my America's Constitutions course, which explains the bill of rights and the civil war amendments and the political issues at stake in the War.)

## X. Economic and Political Developments in the late 19th Century

- A. The second half of the 19th century was a period of rapid economic growth, which as in much of Europe, was combined with industrialization, urbanization, and a shift in political ideology.

**Table 11.1** : Population and Per Capita Income

year	population	urban	rural	Rgnp/pop
1,860	31,443,321	6,216,518	25,226,803	n/a
1,870	38,558,371	9,902,361	28,656,010	531
1,880	50,189,209	14,129,735	36,059,474	774
1,890	62,979,766	22,106,265	40,873,501	836
1,900	76,212,168	30,214,832	45,997,336	1,011
1,910	92,228,496	42,064,001	50,164,495	1,299
1,920	106,021,537	54,253,282	51,768,255	1,315

Sources: <http://www.census.gov/population/censusdata/table-4.pdf>  
<http://www2.census.gov/prod2/statcomp/documents/CT1970p1-07.pdf>

- B. Population growth and economic development continued throughout the second half of the nineteenth century.

- i. Population growth reflected large family size and (net) immigration.
  - ◆ Immigration was completely open during this time period, and new immigrants could often vote before they were citizens.
  - ◆ Passports did not yet exist.
- ii. Population growth was possible because of a general increase in farm production.
  - ◆ The general increase in agricultural production reflected technological improvements (better seeds and plows, and subsequent mechanization of planting and harvesting)
  - ◆ Larger areas were also being farmed as settlement gradually increased throughout the U. S. as settlement pressed West and railroad networks expanded.

- iii. The increase in agricultural productivity (the green revolution) is further evidenced by the increase in the fraction of the total population living in towns and cities.
    - a. People would not choose towns over farms unless real incomes and/or other conditions were preferable to those in the country side.
      - ◆ Opportunities for life must have been systematically improving in the cities: that is to say income in commerce and manufacturing must have been rising relative to farm income.
    - b. Thus the relative increase in the urban centers implies that an increasing fraction of total production (value added) in the US economy as a whole was non agricultural.
    - c. Note that per capita (average) income was rising throughout this sixty year period.
      - ◆ From 1870 through 1920, per capita income more than doubled., even as population tripled.
      - ◆ Total economic output, thus, increased more than six-fold during this period.
      - ◆ (Per capita income in previous periods of history was far more stable. As population increased or decreased to keep per capita income fairly constant--as noted by Malthus, 1798, and other classical economists.)
- C. Society was undergoing a major transformation of life and livelihood for the first time in 10-12,000 years, when settled agriculture was being worked out
- i. The use of increasingly expensive, powerful, and productive steam engine in manufacturing and in transport, together with organizational improvements, created **new economies of scale in manufacturing and commerce**.
    - ◆ These engines allowed manufacturing to stray further from the banks of rivers than possible in the past,
  - ii. Although rivers were still important sources of transport, water, and sanitation, clearly improvements in rail transportation allowed both inputs and outputs to more cheaply reach farms and factories further inland.
  - iii. Realizing the benefits (profits) from technological improvements and increases in the most efficient scale of production often required new laws to remove internal and external barriers to trade.
    - a. Entrepreneurs had to have access to relatively large markets to make investments in the new equipment and organizations worthwhile.
    - b. In Europe changes in rules that opened up internal and external markets were one of the main policy agendas of manufacturers and importers.
    - c. This also tended to be true in the U. S., but market reform, per se, was mainly required within states and municipalities and with respect to international trade.

- ♦ The constitution guaranteed a large integrated national markets, although tariffs remained a national policy concern for economic liberals.
- ♦ The latter, allowed industrialization to take place rapidly within the United States.
- d. Similar legal changes were taking place throughout the “West” and industrialization (application of new technologies to farming, commerce, and manufacturing) occurred in all countries that adopted the required legal reforms and accepted the changes in social organization.
  - ♦ [Farming and commerce were also modernizing and increasing in scale at the same time in many European countries that were not rapidly industrializing ( as in NL and DK).]
- iv. Note that **in the parts of the world where legal reforms were not forthcoming, and application of new technologies were discouraged, industrialization did not take place.**
  - a. [Because relatively more democratic governments were more open to reform than other governmental types, there is a very interesting correlation between democratic reform and industrialization in the late 19th century.]
  - b. Economies of scale, in a many cases, lead to very large and profitable enterprises being created “from scratch, as “self-made” men became millionaires.
    - ♦ In many, perhaps most cases, economies of scale allowed them to profit by selling new and old products at lower prices than other manufacturers could match.
  - c. Many persons were skeptical of the ethics of these men in general, or at least a significant subset of them called “robber barons,” although relatively few of the new millionaires resorted to obviously illegal behavior.
    - ♦ (Indeed, many of the new industrial millionaires--Carnegie, Rockefeller, Morgan, Edison, Ford--established large charitable foundations with huge endowments. See, for example, Johnson 1997: 536-560.)
- v. It also bears noting that the urbanization associated with the expansion of commerce and manufacturing also generated new demands for public services and regulation.
  - Demands for public services (especially education, transport, and sanitary systems) increased with urbanization and industrialization.
  - Greater density also increased the level of what economists call “externalities” which voters wanted regulated.
  - Thus, at the same time that old trade barriers were eliminated, **new regulations were adopted at state and national levels**, and many government services increased.
- D. Overall it could be said that there was a **change in what might be called the “economic constitution”** of industrializing countries--systematic changes in the rules

- that determined what is owned and how it may be used without legal (political) interference.
- i. Property rights over physical goods and services became “individualized” and alienable.
    - a. This was more obvious in Europe and Japan where:
      - ♦ Family--birth right--privileges for particular occupations, products, and services largely disappeared, at least as matters of law.
      - ♦ Debts often became individual rather than family based, and land became freely bought and sold.
      - ♦ Industrialization required trade to become more open and property of all kinds to be more marketable and portable.
    - b. In the U. S. mechanisms for **transferring large public properties** to individual families had to be devised and implemented, as with the various **homestead acts**.
      - ♦ Recall that the territory of the US also expanded in the 19th century through the Louisiana and Alaskan purchases, and in the territories in the Southwest won from Mexico during 1846-8. Most of this land was initially held by the central government.
      - ♦ (The various homestead acts, with their very favorable terms for land sales also implies that urbanization was voluntary in the US rather than the result of a shortage of farm land. In Europe urbanization initially was associated with various enclosure movements which may have generated involuntary urbanization as medieval rights to commons disappeared.)
      - There were also new public services and new regulations on how private property could lawfully be used.
  - ii. **Public education** was expanded (mostly by the states, as state university systems were developed) and infrastructure was subsidized in many ways.
    - See for example the Morrill Acts of 1862 and 1890, through which the central government transferred lands to states to fund new public universities focused on engineering, agriculture, and military science.
    - Much of the regulatory reform (and suffrage reform) also tended to be at the state and local level.
    - a. However, some reforms were restrained by local fears of interstate competition (as with work week and minimum wage laws)
    - b. Others were constrained by both state courts and the U. S. Supreme Court. (See Rehnquist, 2001, ch. 5.)
      - ♦ Rehnquist, P. 113-14 provides a short summary of “anti-progressive” Supreme Court decisions.

- iii. Partly because of problems with regulating national firms at local and state levels within an open national economy, there **was a significant increase in the regulatory responsibilities of the central government**. Examples include:
- The Interstate Commerce Act regulated railroads (1887)
  - The Sherman Antitrust laws regulated monopolies and other conspiracies to restrict open markets (1890).
  - The Pure Food and Drug Act (1906) created the FDA and provided for federal inspections of meat products and forbid poisonous patent medicines.
  - The Federal Trade Commission Act (1914) was created to regulate “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices...”
  - Clayton Antitrust Act (1914) strengthened the Sherman act and exempted nonprofit institutions and organized labor from anti trust proceedings.
- iv. Overall, there were trends toward more liberal and open market-based production and consumption--with relatively free entry and trade possible throughout towns, states, the nation, and internationally--at the same time that other new regulations restricted anti-competitive and fraudulent business practices.
- (It bears noting that many of these “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.)

## XI. Political debates associated with industrialization in the U. S.

- A. New economic regulations and political reform, of course, rarely “spring forth” by themselves.
- B. Normally new regulations are a consequence of organized efforts to persuade (and occasionally bribe) voters or the government to adopt regulatory and other reforms.
- i. Many of the new politically active groups attempted to advance narrow economic interests.
- **A wide variety of new economic interest groups were organized such as business associations and trusts, labor unions, and farmer cooperatives.**
  - Such groups mainly sought policy reforms that improved the economic well-being (profits, wage rates, working conditions) of their members.
- ii. However, even relatively narrow interest groups often took an interest in broad policy and political debates.
- They might for example lobby for political, trade, and constitutional reforms as a “matter of principle” rather than of narrow interest.
  - Other interest groups, such as the “progressives” and “liberals,” had explicitly ideological agendas.
- iii. Just before the civil war a **women’s suffrage movement** appeared, which gained support throughout the rest of the century (Keyssar, 2000, ch.6.)

- a. This movement is, of course, a large part of the reason that the word “sex” was almost added to the Civil war amendments discussed in the last lecture (see Keyssar, 2000, p.178-9)
- ♦ The civil war amendments (the 14th guaranteeing equal protection of the law) were, none the less, used in legal challenges of suffrage laws that discriminated against woman, but these challenges were unsuccessful.
- b. It became a broadly supported and well organized mass movement after the turn of the century, which allowed it to secure the support of the male median voter, which allowed reforms at the state level to be passed (Keyssar, 2000, p. 203-6).
- During approximately the same time period, a “temperance” movement emerged that opposed alcohol consumption (demon rum) and lobbied for new laws restricting alcohol access and consumption.
- c. Although the **temperance movement** was quite old in the United States, it gained membership and political support throughout the 19th century.
- ♦ The American Temperance Society was founded in 1826.
  - ♦ (Of course, the temperance problem was partly a symptom of the new urban lifestyle based on wages rather than household production.)
- d. Both the temperance and woman’s suffrage movements had counter parts in Europe.
- ♦ A temperance society was founded in Ireland in 1829, in Sweden in 1837, in Denmark in 1840, Norway in 1845. Energetic temperance movements also emerged in Germany and England.
  - ♦ Some of these organizations were international in scope, as with the “Independent Order of Good Templars.”
  - And, it was often the case that the temperance and woman’s suffrage movements had had overlapping memberships.
  - ♦ (See Johnson, 1997, and the *Catholic Encyclopedia*, “Temperance Movements.”)
- C. The progressive movement (party) can be thought of as the American equivalent of the “social democratic” movement (party) in Europe.
- In my terms, it was a “left of center” liberal movement rather than a “socialist movement.”
  - They were not opposed to private property or markets, but for the most part were interested in “improving” market outcomes through institutional and regulator reforms and by equalizing bargaining power.

- ♦ **(It bears noting that it was the “left of center” liberals, the progressives, who retained the name “liberals” in the United States, in contrast to Europe, where the “right of center” liberals kept that political label.)**
- ♦ (It also bears noting that within academia there was far less specialization in the 19th century than today. Thus, “economists” often wrote about politics and history, and political scientists and sociologists wrote about law and economics.)
- i. “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.
  - a. They thought that the proximate cause of this power was unequal bargaining power between employers and individual laborers.
  - b. It was their observation that labor was 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.” (Prasch, 1995, 1999).
  - c. It bears noting, however, that the progressives, as true of mid-century liberals, were not always in favor of universal suffrage in the United States or in Europe (Keyssar, 2000, p. 159).
- ii. Initially, the Republican party the United States can be thought of as the equivalent of the right of center liberal movement in nineteenth century Europe.
  - These political and social liberals and the early progressives were the abolitionists and free traders of the first half of the 19th century
  - (There was no perfect equivalent of Europe’s 19th century conservatives in the United States, because there was no birth based aristocracy to defend, nor established church, or ancient political institutions. However, on other issues, such as trade, suffrage reform, and regulation, 19th century democrats often took “conservative” positions, especially in the South.)
- iii. As the right of center liberal agenda had for the most part been achieved by 1880 in the US--trade liberalization, open markets, slavery abolished, equal protection of the law, and essentially universal male suffrage--policy debate in the late 19th century often tended to be between pro-reform progressives and “laisse faire” liberals, who opposed further reform.
  - a. In this respect, pre WWI politics in America somewhat resembled discourse among the center parties of post WWI Europe (minus communists and fascists).
    - ♦ In most parts of Europe in the 19th century, the liberal agenda had not generally been so far advanced, and the left of center and right of center liberals often cooperated in their persuasive efforts regarding trade and suffrage reform.
  - b. On the other hand, tension between left and right of center liberals was clearly evident in Europe, as in the US, on other issues.
    - ♦ (This is, of course, why such terms as liberals, radicals, and social democrats are used to describe policy positions in Europe.)
    - ♦ In the late 19th century, republicans were the “radical liberals” and “progressives” rather than the democrats (although this changed in the early 20th century, partly in response to political pressures).
- c. As always, on given issues ideological and economic interest groups often joined forces to lobby for or against new policies and reforms.
- iv. A digression on Keyssar and “declining” support for universal suffrage in the US.
  - a. Keyssar, 2000, p. 168-9 , argues that support for universal suffrage had waned somewhat towards the end of the century.
    - ♦ For example, his preceding chapter shows that residency requirements had reduced suffrage somewhat.
  - b. However, it remains the case that male suffrage was essentially universal in the sense that we use today: male residents could vote, as he shows in the earlier chapters.
    - ♦ There were no serious efforts to reintroduce property requirements.
  - c. Although it remained the case that most voters thought that those “qualified to vote” should be able to vote. (There was not really every a very deep support for truly universal suffrage.)
    - ♦ There were cases, as noted by Keyssars, problems in the South where poll taxes (used in 8 states), rigged literacy tests, and terrorism by the KKK reduced suffrage significantly both within working class and black communities.
    - ♦ But such barriers were less restrictive in the North.
    - ♦ (It bears noting that, perhaps as a consequence, the South industrialized far more slowly than the North, and had slower income growth.)
  - d. Thus, the men’s suffrage debate continued., but on a smaller scale.
    - ♦ This was evidently not a sign of disinterest, but of the general success of previous efforts and disagreement about the final margins of suffrage: non-residents, Indians, and criminals.
    - ♦ That is the debate remained centered on “who is qualified to vote?” or “who is a proper citizen?” as it had been since voting was allowed to all “freeholders” in colonial times.
    - ♦ (See the quote from the New Republic in Keyssar, 2000, p. 225.)
- v. Continued **debate over men’s suffrage at the margin was overshadowed by the woman’s suffrage movement**, whose success demonstrates that broad support for (almost) universal suffrage was actually alive and well.



- ♦ (Johnson, 1997, pg. 657, notes that the early suffragettes had also favored enfranchisement of only qualified women.)
- D. The Lockner decision and dissent provide evidence that a **split between “liberals” and “progressives” over economic and policy issues existed** within **elite policy circles**, as well as among politically active interest groups, political theorists, and editorial writers.
- i. The famous Lockner decision 1905 concerned the permissible scope of central government regulations under the constitution
  - ii. The majority opinion favoring Lockner develops a “liberal” argument:
    - ♦ “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..”
  - iii. The dissent by Oliver Wendall Holmes develops the progressive argument:
    - ♦ “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 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 Postoffice, 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.”
- a. The complete case, majority opinion, and dissenting opinions can be found at: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=198&invol=45>
    - See Rehnquist, 2001, p. 107, who believes Lockner was wrongly decided.)

## XII. "Progressive" Changes in the Political Constitution of the United States

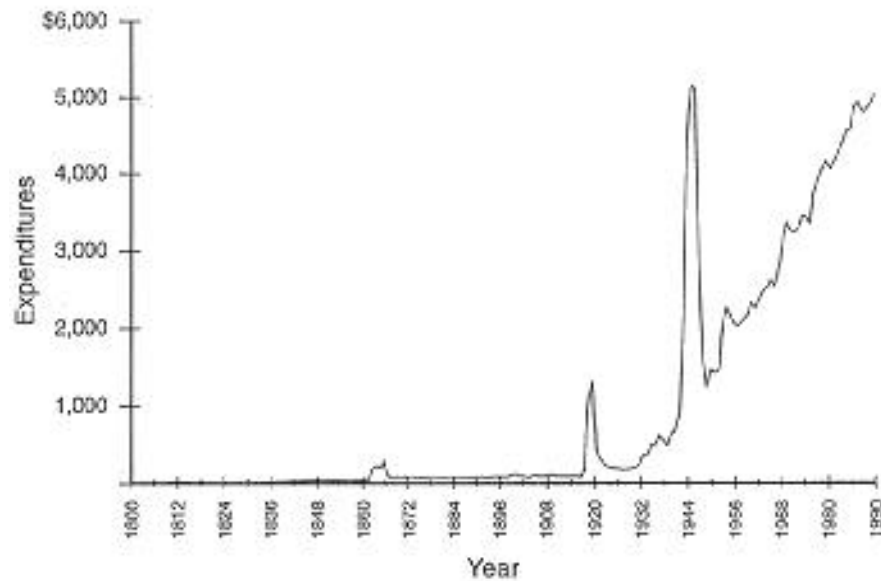
- A. A number of significant procedural changes in the fundamental procedures and structure of American governance occurred during the “Progressive Period.”
- B. These “progressive” reforms occurred at all levels of government, and demonstrate that there was continuing majority support (among those who could vote) for such reforms.
  - i. For example, 19 states constitutions added (or included) direct referenda and recall provisions, which allows voters to decide specific issues, avoiding agency problems associated with representative systems of government.
    - a. These were mostly adopted by new states in the West that entered after the civil war, but several other states amended their state constitutions to allow such referenda.
    - b. Direct democracy continued to be used in some New England towns throughout this period, although it had not formerly played a significant role in state governance.
      - ♦ (There is still no provision for direct referenda at the national level of government.)
  - ii. The secret ballot was adopted, which allowed votes to be cast without fear of rebuke by their neighbors, landlords, and employers.
    - a. Recall that many states and towns continued to used voice voting, from colonial days.
    - b. Secret ballots were used in presidential election after 1884.
    - c. (Secret ballots are also known as the “Australian ballot,” because the rules and ballots were heavily influenced by Australian reforms in the previous decade. The new ballots included a list of **all candidates** rather than favored candidates. Paper ballots had been used in many states--New York and Vermont--since the revolution.)

- iii. Bureaucracy was reformed to reduce political influence over career bureaucrats.
- a. For example, the Pendleton Act (1883) established the US Civil Service Commission which placed most federal employees on the “merit system,” greatly reducing the extent to which political parties would determine jobs within the bureaucracy.
    - ◆ (After the Pendleton Act, only the senior-most jobs in the U. S. bureaucracy were appointed by the President.)
  - b. Such “civil service” reform improves efficiency by increasing “institutional memory” and it also reduces the incumbent ability to use the bureaucracy for his or her political campaigns for reelection.
    - After the turn of the century, several states had also adopted woman’s suffrage reforms, after years of persuasive campaigns by “suffragettes” (Keyssar, 2000, p.208-12).
  - iv. The existing median voter had gradually been persuaded that women were qualified to cast their own independent votes.
    - (Clearly there were no credible revolutionary threat from the woman’s suffrage movement.)
    - (Note that these state reforms, and the subsequent adoption of the 19th amendment, are consistent with the electoral law equilibrium model developed a few lectures ago. In the absence of ideological interests, as noted in earlier lectures. Otherwise, the existing median voter tends to be quite happy with the existing electoral institutions.)
- C. In addition to these formal state constitutional reforms and other quasi-constitutional reforms, **three major reforms and one minor reform of the national constitution** were adopted between 1909 and 1920.
- i. The Sixteenth Amendment, allowing **income taxes**
    - ◆ Passed by Congress July 2, 1909. Ratified February 3, 1913.
    - ◆ The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.
  - ii. The Seventeenth Amendment: **Direct Election of Senators**
    - ◆ Passed by Congress May 13, 1912. Ratified April 8, 1913.
    - ◆ The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.
    - ◆ When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided,

That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

- ◆ This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.
- iii. The Eighteenth Amendment (the great mistake) **Prohibits Liquor Sales**
- ◆ Passed by Congress December 18, 1917. Ratified January 16, 1919.
  - ◆ (This amendment was finally repealed by the 21st Amendment in 1933.)
  - ◆ After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
  - ◆ The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
  - ◆ This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.
- iv. The nineteenth Amendment: **Woman’s Suffrage**
- ◆ Passed by Congress June 4, 1919. Ratified August 18, 1920.
  - ◆ The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
  - ◆ Congress shall have power to enforce this article by appropriate legislation.
- D. One of these “progressive” amendments, **prohibition**, is really a policy matter rather than a constitutional matter, although it required a constitutional amendment to address (at least at that time).
- i. Prohibition did reduce alcohol consumption somewhat.
    - ◆ But, it also generated an **enormous illegal market** for alcohol, which allowed organized crime to emerge as a major factor in the U. S.
  - ii. A similar temperance movement was also active in Scandinavia during this same time period, and the result was also often “prohibition.”
    - ◆ Norway, Finland, Iceland, and Russia did go through periods of prohibition at about the same time as in the US.
    - ◆ The Swedes transferred all sales to state stores and regulated consumption through a coupon system.

- ♦ (The temperance movement itself was evidently a European movement, beginning in Sweden in 1819, but impulses from America lead to the first European Temperance societies. See the Catholic Encyclopedia on “temperance movements.”)
- E. The 19th amendment represents an extension of the logic of “qualified voters” to woman.
- i. In this, it is a logical extension of the men’s suffrage debate carried out in the first half of the 19th century in the US.
    - ♦ What is a bit strange in the US case, is that the gap between the last major male suffrage reform, the fifteenth amendment passed in 1869, and woman’s suffrage. This simply reaffirms that there is no slippery slope to universal suffrage
    - ♦ (In Europe, universal male suffrage and woman’s suffrage were often adopted within a decade of each other.)
  - ii. Extending suffrage does not change the fundamental procedures of governance, but does change the median voter.
    - ♦ (In the case of woman’s suffrage there is evidence that the new median voter had a higher demand for social insurance than the previous one. See Lott and Kenny *JPE*, 1999.)
- F. The other two amendments **fundamentally altered the structure and resources of the federal government**.
- i. By changing the electoral basis of the Senate, the central government became a less “federal” system of government.
    - ♦ No longer were state interests in decentralization directly represented in government.
  - ii. On the other hand, state voters were not subject to manipulation in the manner that House voters are because states cannot be “gerrymandered.” Thus state results tend to be a more “honest” representation of voter interests than congressional district elections.
- G. The federal government had relied entirely on excise taxes and tariffs for its revenues prior to 1913 (with a short exception during the civil war), because the constitution forbade federal direct taxes--e.g. taxes borne directly by individuals.
- i. Although the income tax was initially limited to the very wealthiest, it was gradually expanded to include most persons.
    - ♦ Essentially all contemporary central government (federal) tax revenues in the U. S. are income taxes: the personal income tax, the corporate income tax, and the payroll tax (that funds Social Security and Medicare).
  - ii. Income is a much larger tax base than “sin taxes” and tariffs, and thus allows a much larger government to be supported.
- ♦ (Holcombe and Lacombe, 1998, argue that the pattern of support for these amendments reflected state interests. Relatively low income states favored the income tax, and states that had already adopted direct election of senators favored the new method of organizing the senate.)
- H. Together, the 16th, 17th and 19th amendments removed earlier constitutional constraints on the size of the central government and increased the demand for central government services.
- i. Partly as a consequence of these constitutional changes, the relative and absolute size of the central government increased for the next eight decades.
    - (Here it should be noted, that median voter interests must have preferred most of these expansions, but it is clear that it is easier to fund new programs with income taxes than with excise taxes (especially those borne by the relative wealth), and that increased centralization is easier without a Senate to “fight for state rights.”
  - ii. These were fundamental reforms, whose effects could clearly be seen in central government expenditures.
  - iii. Indeed, the “progressive amendments” could be said to be the only truly fundamental reforms of American political procedures and constraints since the Bill of Rights was adopted in the late eighteenth century.
    - These reforms had obvious and nearly immediate effects on public policies adopted by the central government.
    - See the figure below depicting per capita federal expenditures in constant dollars from 1800 - 1990, from Holcombe (*Cato* 16 n 2).



(Real per capita central government expenditures)

- iv. Note that per capita government expenditures were low and very stable in the previous 120 years, and began accelerating after the reforms were adopted.
- v. State governments had been the main source of public services in the years prior to the "progressive amendments," but this changed in the next two decades.
  - a. Of course not all of this growth in per capital government expenditures was generated by new political procedures and constraints.
    - ♦ For example the federal government took a more active role in world affairs and took over significant responsibilities for social security and welfare.
  - b. However, without the income tax and shift of federal decision making away from state governments, such changes would have been very **difficult to fund** and more difficult to adopt.

### XIII. Some Quick Comments on your readings for today's lecture.

- i. The text book readings look very good to me, although there are a couple of minor points at which I would disagree.
- ii. The Tocqueville book is a great classic, and these are very nice excerpts from the book, many of his observations about America would also be true of other modern democracies.
- iii. The Steinmo piece is interesting, for me, for reasons somewhat at odds with what he says normatively about American politics.
  - a. For example, his survey results on Pages 113-4 seem to suggest that the US government works better than Swedens, although the Swedish reforms ignored the wishes of Swedish voters during the 1960-79 period, and US reforms actually adopted those favored by voters.
  - b. (I clearly disagree with his conclusion that differences in **the distribution** of opinion matter little in setting policy in Europe or the U. S.. Clearly, George Bush was far more popular in the US than he was in Europe in 2004, where he would have been lucky to get 10 percent of the vote rather than the 50% that he got in the U. S..)
- iv. Prof. Steinmo also seems to confuse fractionalism with federalism.
  - a. Federalism and representative politics requires all interests, not simply elite interests to be taken account of when making public policies.
  - b. Steinmo, surprisingly, seems to support elitist rather than democratic governance, insofar as he thinks that it is working poorly.
    - I would guess that he is an unhappy social democrat in America.
    - I have the impression that European liberals are happier in the US than in Europe, and vice versa, which is of course not very surprising.