

A Short History of Constitutional Liberalism in America

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We, whose names are hereunder written, being desirous to inhabit in the town of Providence, do promise to submit ourselves, in active or passive obedience, to all such orders or agreements as shall be made for public good by the body in an orderly way, by the major consent of the inhabitants, masters of families, incorporated together into a township, and such others as they shall admit into the same, only in civil things. (Town Charter Oath for the settlement that became the city of Providence, Rhode Island, 1636.)

Thus, in the beginning all the world was America, and more so than that is now. (Locke, J. 1689, *Two Treatises on Government*, p. 119)

Abstract: American liberalism emerged before the most famous European liberal intellectuals put their pens to paper. It was grounded partly on liberal ideas that were in the air before those works were written, but mostly on the attractive communities generated by liberal institutions and policies. American liberalism is empirically, rather than theoretically, grounded. This paper uses excerpts from colonial and constitutional documents to demonstrate the long history of liberal institutions in the territories that became the United States. American liberalism is an evolutionary rather than an intellectual phenomenon.

I. Introduction

The history of liberalism is usually told as a European story. There is the enlightenment, with its series of philosophers that emphasize reason and natural law—Grotius, Hobbes, and Locke—followed by the political and economic theorists of classical liberalism—Montesquieu, Rousseau, and Smith. Refinements continued in the nineteenth and twentieth centuries with contributions by such European scholars as Bastiat, De Touqueville, Von Humboldt, Mill, Spencer, Wicksell, Weber, Mises, and Hayek. It was a

doctrine that opposed all privileges that might be granted by governments and stood in opposition to the medieval order with its family-based hierarchies and monopolies.

During the nineteenth century, what might be called applied liberalism emerged as thoughtful men and women adopted various subsets of the ideas of the pioneering intellectuals and pressed for the reforms implied by their analysis. Liberal coalitions and parties were organized; persuasive campaigns were undertaken. The persuasive campaigns gradually produced major reforms of political and legal institutions in Europe during the nineteenth and twentieth centuries—reforms that gradually produced the constitutional regimes and commercial societies in Europe that many of us in the West now take for granted (Congleton 2011a). By the late nineteenth century, the political culture of Western Europe was constitutionally liberal in that most voters favored written constitutions, electorally grounded governance, broad adult suffrage, relatively open markets, and equal protection of the law

This is not to say that the liberal movement spoke with one voice. There were always disagreements, but in the main they supported the same general direction of constitutional reform. As liberalism achieved its main constitutional ends, long-standing constitutional disagreements with conservatives about the proper balance between royals, nobles, and commoners largely disappeared and disagreements among liberals over day-to-day policies began to dominate political campaigns and debates.

The story of North American liberalism differs from that of Europe in many respects. Constitutional liberalism emerged relatively early in the British colonies. It did so prior to the great tide of liberal thought and reforms developed by European intellectuals and politically active groups. Moreover, there was little or no sustained intellectual tradition of liberalism in North America and few Americans in the nineteenth century regarded themselves to be “liberals,” although many—perhaps most—supported liberal constitutional and economic norms and policies during that period. Apart from the *Federalist Papers*, there were no major American contributions to the grounding ideas and explications of liberalism. It was only after World War II that American intellectuals—Friedman, Buchanan, and Rawls—might be added to the list of influential liberal intellectuals.

Nonetheless, there is a strong liberal political culture in America. Appleby (2000) argues that liberalism emerged in the United States after its war of secession with the United Kingdom was won, but there is a good deal of evidence that it existed long before the Revolutionary War was fought and won. Liberalism in the United States was not theoretical but practical and pragmatic. It emerged as “natural” solutions to the problems confronted by persons living in a hostile environment, where labor was scarce, land plentiful, and people were mobile relative to most persons in Europe.¹ It was and continues to be a concrete form of liberalism rather than an abstract one.

The purpose of this paper is to demonstrate this point. It does so by exploring institutional developments in the colonies and in the state and national governments that emerged after independence.

Overview of the Origins of American Liberalism

In the early seventeenth century, large land grants were made to private companies and individuals who needed labor to realize profits from those land grants. Without labor, large land grants in North America were about as valuable as large land grants on the moon would be today. To prosper, it was necessary to attract labor and capital to colonies, towns, and the countryside to harvest the natural bounty of the lands and provide markets for the land, produce, and products that could not be profitably shipped back to Europe.

The English companies and persons granted territory in North America were given significant political authority over their lands. Their formal authority was reinforced by the difficulty and disinterest in closely monitoring developments in the colonies that would become the United States of America. Together, this made it relatively easy to engage in institutional experiments in the colonies. European methods of management and governance failed to work as well as expected, and this induced a good deal of institutional experimentation.

¹ This point is not developed at length in this paper, because of space considerations. See Congleton (2011, ch. 18), Nikolova (2017), and Nikolova and Nikolova (2017) for more detailed analyses. These labor-supply-based explanations do not conflict with other ethnic or geographical explanations, as in Sowell (1981) or Berkowitz and Clay (2012), but suggest that competition for labor was the main cause of the emergence of liberal political institutions in the territories that became the United States, and that the other factors were secondary. Other places with similar ethnicity or geographical characteristics were not nearly as liberal in their institutions as in the new English colonies.

The circumstances of the Atlantic colonies of Great Britain favored liberal institutions for reasons later worked out by intellectuals—which is to say because polities with relatively open political and economic systems and relatively equal protection of the law attract and sustain more residents than relatively closed communities with laws that favor “elites” and disfavor others. That this was so was not a surprise to the proto-liberals and liberals of that period, but was to European conservatives, whose views and pragmatic interests supported Europe’s family-based governance and privileges during America’s colonial period. American liberalism emerged as a patchwork of practical, institutional solutions to the problems of settling a wilderness in which life was hard, sustenance could not be taken for granted, and labor was both scarce and mobile. Institutional experiments turned out to support liberal laws and institutions—not because the proprietors or immigrants were all liberals, but because liberal policies and institutions produced relatively attractive, viable, communities.

The institutions that survived contributed to the subsequent history of liberalism by providing evidence that liberal ideas could work in the real world. They provided “data” for the theories of subsequent generations of European liberals, as illustrated by the Locke quote at the beginning of this paper. The same experience directly informed the institutional and political views of subsequent generations of Americans.

Overview of the Methodology

To support these hypothesis, a short history of American liberalism is developed in this paper. A single paper cannot provide a complete history of American liberalism but it can demonstrate that both constitutional liberalism and economic liberalism were evident in North America from its earliest days. It does so for the most part by focusing on governmental charters and amendments. To establish its early pedigree, relatively more attention is given to documents from the early colonial period than from later periods, although several later documents and amendments are also reviewed. The documents focused on are in most cases a bit special, but many others could have been used to provide evidence of liberalism, although not quite as clearly.

The “liberal” ideas included in the formal documents quoted from were adopted well before the major intellectual works were written by liberal scholars in Europe—although the

term “liberal” would not be widely used in the United States until the twentieth century and then in a manner that differed from European usage.

The use of formal documents as evidence of liberalism has advantages over other more sociological or political approaches. First, far less interpretation is required. Although the words used in the documents may have slightly changed meanings during the past three centuries, their meaning is still clear and often appears to be essentially timeless. The use of prose rather than quantitative representations, such as a liberalism index, further reduces the need for interpretation and also eliminates the judgement calls and approximations required to form such indices. Second, the claim is not that colonial governance was fully liberal at any place or point in history. Formal laws are adopted, because they reflect the sentiments and beliefs of legislators and/or the interests of the persons who selected them for high office. Those interests normally included both normative and practical ones. That the language adopted include liberal ideas is evidence of the presence and importance of those ideas for those drafting the laws, although it did not necessarily reflect the main interest(s) of the persons adopting the laws. How they were subsequently implemented often involved other people with other interests, ones that were not always consistent with those of the persons drafting and adopting the documents focused on.

Because of the space constraints, little or no attention is given to the men and women, groups, societies, or politics that caused those laws to be adopted, nor in how they were implemented. The paper provides a slice through American history, rather than a fully developed historical narrative.²

All this is not to say that liberalism in the United States was entirely independent of European developments. The emigrants that adopted the first relatively liberal forms of government and laws in the territories that became the United States were from Europe. Books from Europe were widely read. And after 1800, many of the issues addressed by liberals in Europe also attracted the interest of liberals in the United States and vice versa. However, it is to say that the American form was largely home grown, empirical, concrete,

² For more on the politics of early American life, see Rothbard (1999) for a narrative told from a highly critical liberal perspective. For more on the social context in which governing institutions and reforms were adopted see Appleby (2000, 2005). These too could be supplemented by narrower histories of particular places and events. For overviews of day-to-day electoral politics in the colonies, see Brown (1955) or Brown and Brown (1964).

and less self-consciously undertaken than that in Europe. Liberalism emerged in the United States because it worked, rather than because of abstract ideological or theological theories.

II. Setting the Stage: Late Medieval Europe and the Colonization of the Americas

Europe's Privilege-Based Medieval Order

In the time before the great liberal reforms of the nineteenth century, both privileges and anti-privileges in Europe were largely matters of family inheritance, rather than personal achievement. The first-born sons of noble families in Europe inherited the noble titles of their father and large tracts of land over which they had significant local regulatory, judicial, and tax authority. A single religion was normally privileged by law. Religion was decided by the top noble in the territory of interest: the kings in England, France, Spain, and Scandinavia, and the barons (Grafen) and dukes of the territories of the Holy Roman Empire (Germany). Other religious beliefs and rituals were often illegal, and when not illegal were discouraged both socially and through discriminatory laws and taxation. Literacy was not very common outside aristocratic families, but those that could read and write were constrained by various censorship laws and broadly interpreted laws against blasphemy and sedition.

Economic privileges were also commonplace. Many career choices were constrained by birthrights. With minor exceptions, only nobles could become officers in the military, occupy senior posts in the bureaucracy, or serve in the most important chambers of national parliaments. Among more commonplace occupations, there were often formal and informal rules that limited occupational choices. There were, for example, a variety of monopolies “owned” by families, companies, and guilds. Only a subset of towns had “market privileges” and they could impose charges on goods sold in their markets (in effect local tariffs). International tariffs, monopolies, and the rent from royal properties were the main sources of government revenues.

The colleges and universities created during this period were mainly places where senior clergy, bureaucrats, and lawyers were trained, rather than places that focused on secular philosophical or scientific enterprises. Faculty lived like monks with religious as well as educational duties and, if married, could not live with their spouses on campus. The

towns of Cambridge and Oxford shared a duopoly on higher education for more than five centuries. If one wanted to found a new college in England, it had to be either in either Oxford or Cambridge.

Criticism of the monopoly church or the elite family-based (royal) system of government was discouraged through censorship and laws on blasphemy and treason. Books critical of local theological or political practices were difficult and dangerous to publish. Consequently, works that could be regarded as critical were normally published anonymously—as were the most influential books of Locke and Montesquieu—posthumously, or at presses in other countries.

Liberalism in Europe emerged in the seventeenth, eighteenth, and nineteenth centuries as a long series of critiques of the medieval system, with its family-based hierarchies, censorship, monopoly religion, and mercantilism. In contrast to the American experience, liberalism in Europe was substantially a theoretical phenomenon, rather than an experiential one. Europeans had little direct experience with open political or market systems.³

The Founding of the British North Atlantic Colonies

The European conquest and settlement of the New World began in the sixteenth century shortly after Columbus stumbled on two continents while attempting to find a Western route to what Europeans referred to as the Far East. In South America, advanced civilizations had already emerged with written languages, astronomy, and relatively advanced engineering methods, including the mining and refining of gold into ornaments, but without mastery of iron or gun powder. Even the most powerful governments of South and Central America were unable to defend their territories from European diseases and guns. Relatively small Spanish and Portuguese armies were able to conquer all of South and Central America in the sixteenth century.

³ I take these to be uncontroversial historical facts and so provide no references. For those interested in more support for these claims and numerous references see Congleton (2011). Nearly any reasonably thorough history of medieval Europe will also support these claims. Few general European histories do so because of space constraints, although most will develop a narrative consistent with the above. After 1600, an exception to this general characterization of Europe's political and economic culture was the United Provinces of the Netherlands, a republic that was the most liberal place in Europe for the next century.

Gold and silver were extremely valuable in Europe, and the military expeditions were organized and financed with such precious metals in mind. After the conquest, a good deal of gold and silver was shipped back to Spain and Portugal, whose governments and elite families were much enriched by them. Profits from rare metals were later topped up with agricultural exports that could be grown economically in the tropic areas of South America and the Caribbean Islands using slave labor, as with sugar, indigo, and tobacco. These easy pickings made the conquest and colonialization of South America very profitable for Spain and Portugal.

A century later, North America was subsequently claimed by England, the Netherlands, and France. This was not because the governments of Spain and Portugal were too ignorant or lazy to do so, but because profitable opportunities in North America did not appear to be nearly as commonplace as those in South America, the Caribbean islands, or Asia. There was little evidence of gold or silver in the north, nor did it have the right climate for the most profitable agricultural exports. This assessment turned out to be completely accurate.⁴

The governments of England, the Netherlands, and France undertook the colonization of North America using methods similar to those previously used in the Far East. The English king created two land-development companies, which were empowered to sell off development rights to smaller companies that would undertake exploration and settlement of the “new” territories. Among those companies were the London Company (which settled present-day Virginia) and the Massachusetts Bay Company (which settled Boston and its adjacent areas). The French king created the New France Company. The Netherlands as a republic, rather than a kingdom, did not create a crown company, but did create a new monopoly trade company for the West, the West Indies Company.⁵ All these

⁴ Both France and Spain had founded a few small settlements in North America in the sixteenth century as in St. Augustine and Quebec, but these are not important parts of the historical narrative for North America. French efforts failed in South Carolina and Florida, in part because of Spanish efforts to repel them. Settling the area north of Florida was evidently very difficult. Very high death rates in the early years were commonplace.

⁵ Henry Hudson, explored the area that subsequently became New Amsterdam and then New York, He was in the employ of the East India Company, rather than the West India Company, at the time that he discovered the fine natural harbors at the end of the river that would later bear his name.

companies were funded largely by private investors (referred to as “adventurers” in this period).

Three of the four first colonies in the territory that became the United States were founded by private companies: Massachusetts, New York (New Amsterdam), and Virginia. Their investors (adventurers) included nobles, members of noble families, and successful commoners. The fourth, Maryland, was a proprietorship granted to Lord Baltimore.⁶ None of these colonies were initially democratic, although the governing boards and leaders of the three companies were elected by their investor-partners. Monopolies on exports from and imports to their lands were normally included in the major land grants. In exchange for the land grants, the royal companies promised income for the king that would be free from parliamentary vetoes. However, as predicted by the Spanish and Portuguese, relatively little royal income materialized from the North American enterprises.⁷

These private foundings were not obviously destined to produce liberal polities with relatively open markets and politics during the next century. Aristocracy and monopoly were far more likely to beget further aristocracy and monopoly, as it tended to in Europe and had in South America. Yet, it did so.⁸

III. The Origin of North America’s Constitutional Liberalism

Most of the British colonies began with a charter that described the territory granted, the company or person obtaining it, and the authorities granted. The companies were entitled to

⁶ The Plymouth colony is neglected here because it was absorbed by the Massachusetts colony in 1691. (This was partly because the Pilgrims had founded a colony in lands well to the north of those specified in their charter.)

⁷ In addition to companies, English kings also “gave” undeveloped land to persons to whom they were indebted to for extraordinary service or for money, as with Lord Baltimore, and several decades later with William Penn (paying off debts owed his father).

⁸ Monopoly, for example, was defended in the Dutch West Indies Company’s charter: “And we find by experience, that **without the common help, assistance, and interposition of a General Company**, the people designed from hence for those parts cannot be profitably protected and maintained in their great risk from pirates, extortion and otherwise, which will happen in so very long a voyage. We have, therefore, and for several other important reasons and considerations as thereunto moving, with mature deliberation of counsel, and for highly necessary causes, **found it good, that the navigation, trade, and commerce, in the parts of the West-Indies, and Africa, and other places hereafter described, should not henceforth be carried on any otherwise than by the common united strength of the merchants** and inhabitants of these countries; and **for that end there shall be erected one General Company**, which we out of special regard to their common well-being...” (http://avalon.law.yale.edu/17th_century/westind.asp).

make binding rules for their territories, collect tariffs and other taxes, and sell off parts of their territory, subject to the constraint that their colonial rules were consistent with British law.

As true of today's companies, the owners normally delegated rule-making authority to managers who worked for them. The first colonial "governors" thus should be regarded as corporate executives with relatively broad authority. They were able to make rules for their staff, employees, and those settling on company lands. The colonial governments were thus initially "authoritarian" regimes, much as the governance of ordinary firms can be regarded as authoritarian. Rules were adopted by senior executives and committees for their employees and company properties without significant input from those subject to the rules. In the new world, senior managers had greater scope for adopting rules than a contemporary CEO would have, but the rules adopted were also intended to generate company profits.⁹

The rules and regulations adopted for the Virginia colony were thus, in principle, all adopted with the economic viability and profitability of the colony in mind. However, the first managers and their rules produced little or no marketable output and arguably contributed to the deprivation and starvation during the first years of the Virginia colony. Evidently, the London company and its governor had drawn the wrong lessons from their European experience.

Within a few years the Virginia company found it useful to distribute some land to settlers and allow them to do what they pleased with it. This produced a good deal more food and product than centralized management had. Shareholders and emigrants became independent property owners—freemen—rather than employees, leaseholders, or sharecroppers in company property. Land was also promised to persons traveling to the colonies as indentured servants.¹⁰ The London (Virginia) company also found it useful to

⁹ The charters were not "national" constitutions in the sense that they were the supreme law of the land. English law was supposed to be supreme. Nonetheless, they created colonial governments (rule-making and enforcing bodies) that had significant autonomy and there were several long periods in which they were little monitored by English rulers or courts.

¹⁰ In the first days of the Virginia and Plymouth colonies, company ownership and management of their land grants generated significant problems—indeed starvation in their colonies. Starvation was ended by shifting to owner- rather than employee-based production methods and by the development of a strain of tobacco that could be grown in the colony and exported to England. The second charter for the Virginia colony

add a representative assembly to its colonial rule-making system. This assembly was created through formal documents and granted significant control over policy and taxation. The new representative assembly had a full veto over both new laws and taxes.

The first representative assembly met in 1619 in Virginia (although the formal charter providing for the assembly appears to have arrived in Virginia in 1621). The new government for the Virginia colony was created by its third charter. It was one of the most important of a decade-long series of experiments in governance.¹¹

From the London Companies Ordinances for Virginia (1621)

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.

III. THE one of which Councils, to be called THE COUNCIL OF STATE.

IV. 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 [representatives] out of every Town, Hundred, or other particular Plantation, to be respectively chosen by the inhabitants**: Which Council shall be called THE GENERAL ASSEMBLY ... **to make, ordain, and enact such general Laws and Orders, for the Behoof of the said**

(1609) granted all settlers older than 10 years old a share of stock and a grant of 100 acres of land on which they could farm. Starvation fell because of the stronger incentives to work for oneself and one's family than under the former output-sharing rules. This success clearly demonstrated the relative merits of private ownership relative to centralized management in the colonies.

See Bethell (1998, ch. 3) for a discussion of both early starvation and of the role of private property in solving this problem. For a short overview of reforms of property and law undertaken in the early days of the Virginia colony, see Rothbard (1999, ch. 3). Bethel notes that Edwin Sandys, treasurer of the London Company and former member of Parliament, evidently misunderstood the importance of the property reform, although Sandys was one of the most thoughtful and influential protoliberals of the early seventeenth century. For a biography of Sandys, see Rabb (1998).

¹¹ There is some disagreement about the date at which the general assembly was first formed. Several authors use *earlier* dates, which would imply a colonial origin, rather than advice from the company's office in London. The first meeting of the general assembly took place in 1619 and was evidently authorized by a document similar to the one quoted from. The date used here is from Yale University's Avalon website. The treasurer of the London Company at the time was a former member of parliament named Edwin Sandys, who by the standards of early seventeenth-century England could be regarded as a liberal or protoliberal. He either accepted recommendations from Jamestown or suggested the reforms himself. It bears noting that it is likely that at least some parts of the 1621 ordinance were suggested by the colonists themselves, partly as an antidote to the first decade of more or less authoritarian rule by the company's governors.

Colony, and the good Government thereof, as shall, from time to time, appear necessary or requisite. [Bolding added by the author.]

The system of rule making allowed the company's interests to be protected by the veto power of governor, that of the colonial elite by the veto of the council of state, and that of the middle class by the veto of the elected assembly. Any changes in law that disadvantaged a majority of the freemen represented in the assembly could be vetoed. Suffrage was initially very broad, because so many of the colonists met the property qualification (because of the second charter). It was a level of suffrage not sustained in Europe for two centuries, but one that would be typical in the subsequent English colonies in North America as well.

Note that there is no appeal to liberal principles nor even a clear declaration of new procedures for making policy decisions; instead the new rule-making system is simply described in formal legalistic terms. Nonetheless, the Virginia template for government, with its bicameral legislature (parliament) and a chief executive was subsequently adopted by all the other colonies during the next century. It also bears noting that this system of government preceded by more than a decade the various proposals for an "agreement of the people" by the Levelers, the first influential protoliberal interest group in England, and preceded Montesquieu's (1748) famous defense of divided government by more than a century.

These relatively democratic political institutions were adopted for completely practical reasons. To incentivize labor in the colonial context required both a private stake in the success of the colonial enterprise and the assurance that contracts and civil liberties would not be subsequently revised by the company or proprietor(s) to their disadvantage. The veto power of the representative chamber helped attract middle-class immigrants by providing them with more secure property rights and contracts than they would otherwise have had.

Similar institutional reforms were gradually adopted by all the colonies that followed, although most also began with authoritarian regimes. For example, the government of Massachusetts began in 1629 as a corporation with governing officers elected by a small number of shareholders. In 1634 town representatives were added to its shareholder assembly (the General Court), which was granted veto power over new taxes at the same

time.¹² Lord Baltimore's initial charter for Maryland (1632) included a duty to consult with its freemen when adopting new laws. With this in mind, a formal assembly was organized in 1637 and a bicameral structure was adopted in 1650.¹³ Subsequent colonies, also added elected representative assemblies to their colonial governments, as Rhode Island did in 1663, New Jersey in 1664, Carolina and Connecticut in 1665, Pennsylvania in 1682, and New York in 1683.¹⁴

The language of the colonial charters and their reforms tended to be legalistic with religious undertones, but without the terminology of social contracts or liberalism. An exception is the frame of government for West Jersey adopted in 1681, which stresses the words "free" and "free people." Article I of which begins with:

... there shall be a **General Free Assembly for the Province aforesaid, yearly and every year, at a day certain, chosen by the free people** of the said Province, where on all the representatives for the said Province, shall be summoned to appear, to consider of the affairs of the said Province, and to **make and ordain such acts, and laws, as shall be requisite and necessary for the good government and prosperity of the free people of the said Province...**¹⁵

Thus, well before John Locke had finished his famous work on political theory in 1689, the colonies had already worked out much of the architecture for election-based governance and in one case used liberal language to describe it. In two colonies, Rhode Island and

¹² The addition of town representatives in Massachusetts was partly in response to "yardstick" competition. Other colonies, for example, Virginia and Bermuda, had already done so (Congleton 2011b).

¹³ See Riley (1906, ch. 1) for a short history of the first assemblies. See the Senate of Maryland website for a short history of its origin. (<http://msa.maryland.gov/msa/mdmanual/05sen/html/senf.htm>).

¹⁴ Pennsylvania eliminated its upper chamber in 1701. This was done at the same time that a *Charter of Privileges* was adopted by William Penn after he was encouraged to do so by "his" colonists. The charter protects freedom of religion, due process, and created the new unicameral assembly. It also allowed Delaware, then part of the Penn territories, to have its own assembly.

¹⁵ The Yale Law School maintains a very good collection of colonial charters and related documents on its <http://www.Avalon.law.yale.edu> website. See also Lutz (1998).

The West Jersey Charter was never fully implemented, because of various lawsuits among the colonies. See Rothbard (1999, ch. 54) for a discussion of the authorship and problems associated with implementing it. The point of the quote is not that the charter was implemented as written, but that it was written in explicitly liberal language, before Locke's famous treatises were published. It was clearly an attempt to attract new residents to the colony. There was Tiebout (1956) "constitutional competition" among colonies and towns for residents.

Connecticut, all government officials were already directly or indirectly elected by colonial freemen, including their governors.¹⁶

The persons living in the colonies were not all political liberals, nor were the colonies liberal utopias. Life was difficult for many, so difficult that it paid to band together in communities that could provide mutual defense, law and order, churches, and modest social insurance. Within those communities, slavery often existed, women had very limited rights to own and control property, and freedom of religion was rarely universal. Nonetheless, by the standards of world history, relatively liberal political institutions were commonplace in England's North American colonies within a few decades of their founding.

The charters describing the governments of both colonies and towns were, for the most part, drafted or modified in the colonies and put into practice well before the famous enlightenment scholars published their work or rose to prominence. Copies of the North American colonial charters and stories about them were widely circulated in Europe, which helped both stimulate emigration to North America and European political theorists to deeper empirically grounded political theories. (About 10 percent of emigrants returned to Europe within a few years of arrival.)

The influence of enlightenment scholars on American institutions and thought is often overstated by political historians, particularly those whose narratives begin in the eighteenth century.¹⁷

¹⁶ At about this same time, Locke, working for his patron Lord Ashley (who had invested in the Carolina colony) helped draft the most medieval of the colonial frames of government. The Carolina charter provided for an established church (the Church of England) and a colonial hereditary nobility (with ranks of Palatine, Lords Proprietor, Landgrave, Cazique, and Baron). Lord Ashley's influence in Carolina remains evident today in a wide variety of place names. A copy of the 1669 constitution for Carolina can be found at http://avalon.law.yale.edu/17th_century/nc05.asp.

¹⁷ Again, this is not to say that European ideas had no effect in the colonies in this period. Most of the residents in the colonies during seventeenth century were from Europe. However, it is to say that mainstream European ideas about governance did not work very well in the colonies, whereas liberal theories of government, property, and trade did. This was arguably more true of the northern colonies than the southern ones, possibly because of differences in rules for founding new towns (Congleton 2011b), but similar political and legal institutions were also present in southern colonies. Most were considerably more liberal than those in England and other parts of Europe. Indeed, Ashley's attempt to create a new feudalism in the Carolina colony was a notable failure of mainstream European ideas about governance in the North American setting.

Economic Liberalism and Mobility in Colonial America

In Canada, Massachusetts and New Amsterdam (New York), commerce with native Americans proved modestly profitable, and furs were shipped back to Europe to be made into warm clothing of various kinds. In Virginia and Maryland, new strands of tobacco and rice were developed for export back to Europe. However, it turned out that neither mineral extraction nor agriculture were particularly profitable for the English crown companies. Land development turned out to be by far the most profitable enterprise.

Land development required attracting persons to the new communities and then retaining them. Company profits would come from land sales, monopoly privileges, and tariffs on goods imported and exported. It turned out that relatively liberal colonies were more successful at attracting free labor than less liberal colonies. This was partly because middle-class persons that emigrated from England, the Netherlands, and Germany had political and economic intuitions that were among the most liberal in the world at that time.

Boarding a boat for America was a great break with the past, although not an irreversible one. Emigrating demonstrated confidence in one's ability to make a better life for themselves in a new land. Once on the boat, most were free to choose among alternative places and forms of government. Others would become so after their indentured contracts were fulfilled. A few of the emigrants could be regarded as protoliberals with well-formed ideas about the good life and good society, but most were simply individuals and families looking for new opportunities and willing to take risks and make commitments to pursue them. Together, their mobility, willingness to work, and their political and economic intuitions tended to induce a liberal impulse in institutional developments, because towns and colonies with elected governments, protections for property, and relatively few economic restrictions tended to produce more and better opportunities.¹⁸

Nonetheless, relatively liberal institutions could be sustained only if they produced relatively attractive viable communities. Had liberal experiments produced dismal results,

¹⁸ The sentiments expressed in seventeenth-century colonial documents were liberal in part because many of the persons most interested in American investments and emigration were from what would later be called the Whiggish or liberal part of the English political spectrum. The German Quakers of New York, New Jersey, and Pennsylvania also had liberal intuitions on a variety of issues, as did many of the settlers from the Netherlands. However, as noted above, liberal innovations could be sustained only if they produced attractive communities for those without strong ideological interests.

they would have been replaced by the traditional hierarchical forms commonplace in Europe and South America. Liberal institutions emerged incrementally and piecewise as successes encouraged further experiments at the many margins of public policy and governance.

Except for New York, the Atlantic colonies formally had property and contract law based on English common law. Most of the colonial charters explicitly mention the common law rights of all immigrants. However, local ordinances were often adopted to implement, clarify, or supplement those rights. One of the most interesting of the colonial legal codes was the *Massachusetts Body of Liberties* adopted by the Massachusetts Bay Colony in 1641. The *Body of Liberties* provides clear evidence of support for economic and civil liberties in New England. Among its provisions were:

Equal Protection of the Law: (2) Every person within this jurisdiction, whether inhabitant or foreigner, shall enjoy the same justice and law, that is general for the Plantation, which we constitute and execute one towards another, without partiality or delay.

A Takings Principle: (8) No man's cattle or goods of what kind so ever shall be pressed or taken for any public use or service, unless it be by warrant grounded upon some act of the General Court, nor without such reasonable prices and hire as the ordinary rates of the country do afford. And if his cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompensed.

Restrictions on State Monopolies: (9) No monopolies shall be granted or allowed amongst us, but of such new inventions that are profitable to the Country [colony], and that for a short time.

No Cruel or Unusual Punishments: (46) For bodily punishments we allow amongst us none that are inhumane, barbarous, or cruel.

Definition of Legal Adulthood: (53) The age of discretion for passing away of lands or such kind of hereditments, or for giving votes, verdicts or sentence in any civil Courts or causes, shall be one and twenty years.

Woman's Rights. (79) If any man at his death shall not leave his wife a competent portion of his estate, upon just complaint made to the General Court she shall be relieved. (80) Every married woman shall be free from bodily correction or stripes [whipping] by her husband, unless it be in his own defense upon her assault.

Animal Rights: (92) No man shall exercise any tyranny or cruelty towards any brute creature which are usually kept for man's use.

(Bolded titles were added by the author. The numbers and nonbolded text are from the original legal code.)

It is interesting to note that many of these regulations are entirely uncontroversial in the twenty first century, although many were controversial at the time of their adoption. Other provisions of the Massachusetts code would be regarded to be illiberal by today's standards, as with rules on acceptable church doctrine and death penalties for adultery and homosexuality. Many of those opposing the Massachusetts code of 1641, simply preferred using the Bible as law. The Massachusetts Bay Colony was, after all, a relatively conservative religious colony.

For the purposes of this paper, the first three provisions of the *Massachusetts Body of Liberties* are of greatest interest, because they implement ideas that were important to future political and economic liberals such as Adam Smith a century and a half later. Recall that Adam Smith spends much of the *Wealth of Nations* (1776) criticizing privileges associated with state monopolies, guilds, and conspiracies among businessmen to reduce competition. The word "monopoly" is mentioned more than a hundred times in the *Wealth of Nations* and never kindly. The term corporation, which is used mostly as a synonym for the word cartel, is used more than 50 times. Equality before the law, restrictions on state powers to monopolize, and a takings clause were all in place in Massachusetts before Hobbes had completed *Leviathan* (1651), with its contractarian case for essentially unrestrained governmental authority. The latter was clearly not the sort of constitutional contract that North American colonists were interested in.¹⁹

Early Liberal Theories of Taxation

Control over taxation had long been important to opponents of royal power in Europe. Most European parliaments had veto power over new taxes but not over

¹⁹ See Calabresi and Price (2012) for an excellent overview of the history of laws creating and/or constraining monopolies during the colonial period through modern times. Monopoly grants were for the most part limited to salt works, which were relatively capital-intensive enterprises, although there were also instances in which importers, exporters, and those constructing bridges were granted monopoly privileges.

preexisting taxes. That authority had long been a source of contention between parliaments and kings in Europe, partly because the distinction between existing and new taxes was never entirely clear. In contrast, all taxes—not simply new taxes—were subject to the veto of elected assemblies in the British colonies of North America. Moreover, there were cases in which annual taxes were not only subject to a veto by the elected assembly but were constitutionally constrained to strengthen that veto and to limit loopholes and other tax privileges. The West Jersey frame of government, for example, addresses such issues:

By act as aforesaid, *to lay equal taxes and assessments*, equally to raise moneys or goods upon all lands (excepting the lands of us the Lords Proprietors before settling) or persons within the several precincts, hundreds, parishes, manors, or whatsoever other divisions shall hereafter be made and established in the said Province, as oft as necessity shall require, and **in such manner as to them shall seem *most equal and easy* for the said inhabitants**; in order to the better supporting of the public charge of the said Government, and *for the mutual safety, defense and security* of the said Province.

FOR THE BETTER SECURITY OF THE PROPRIETIES OF ALL THE INHABITANTS: First. They are **not to impose** nor suffer to be imposed, **any tax, custom, subsidy, tallage, assessment, or any other duty** whatsoever upon any color or presence, upon the said Province and inhabitants thereof, **other than what shall be imposed by the authority and consent of the General Assembly**, and then **only in manner as aforesaid**. (Excerpted from *The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and With All and Every the Adventurers and All Such as Shall Settle or Plant There*, 1664, [Capitalizations are from the original, bolding added by the author; some spellings have been modernized.]

Formal control over taxation was augmented by mobility, which was considerable among middle-class emigrants. Unless higher taxes came with better services, persons would choose a low-tax town or colony over a high-tax town or colony. Together, mobility and constitutional constraints implied that essentially all taxes were controlled by middle-class voters, a very rare event in world history and not true in England or France at this time. Only relatively wealthy persons could vote for representatives in most elections for the House of Commons until well into the nineteenth century and there were no national assemblies elected in France at this time.

IV. Constitutional Liberalism at the Founding of the United States

Had liberal institutions not generated results that were at least as good as the alternatives, liberal reforms would have been repealed, and liberalism in the colonies—had it ever emerged—might well have taken a more northern European trajectory, with long periods of persuasion and lobbying followed by incremental liberal reforms by national governments. Instead, the rapid population growth of free labor in the colonies and towns with relatively liberal political institutions demonstrated that the results of liberal governance were attractive rather than repulsive. This practical experience affirmed liberalism in the North American colonies (although not by that name) and reduced support for the conservative theories of most seventeenth- and eighteenth-century royalists and religious zealots.

That colonial institutions helped shape American attitudes concerning the best forms of governance is most obvious in the late eighteenth century when a war of secession from the British Empire was fought and won (with the assistance of the French government). Independence clearly made great breaks from the past possible, but American political and economic institutions remained more or less as they had been in colonial times, when they were formally constrained by both British laws and governmental decisions.

In the mid-seventeenth century, interest in secession from the British Empire increased because of interventions in the colonies following accession of George III to the throne in 1760. George III attempted to rein in what he regarded to be liberal excesses in the colonies and to increase tax collections from the colonies to increase his net revenues from them.²⁰ As far as many of the leading colonists were concerned, the British interventions were unilateral revisions of the unwritten constitution that had long characterized the balance of authority between the British government and the North American colonies.

The colonists did not suddenly decide that they preferred representative governance, equality before the law, and relatively open markets in 1776, as is sometime suggested by popular historians and introductory American history textbooks. Most colonists had grown up under such institutions, and had done so for more than a century. Rather, it was the fear

²⁰ By the mid-eighteenth century, most of the colonies had been taken over by the British Government. These governmental takeovers, however, for the most part respected the existing colonial charters. The charters themselves were being revised or re-interpreted by George III and his appointees.

of losing their independence and their already relatively liberal institutions that generated support for secession.

Many of the “founding fathers” came from families who had been active in colonial politics and had direct knowledge of politics and institutions from personal experience and family stories. John Adam’s father had been a member of his town’s elected town council. Adams, himself, was active in town and state politics from the age of 30. He was elected to the Massachusetts assembly (General Court) at the age of 35. (His cousin, Sam, had been elected to office at an even earlier age.) Roger Sherman was elected to the Connecticut assembly (House of Representatives) at the age of 35. John Dickinson, whose name appears often in the constitutional debates in Philadelphia, was elected to the Delaware Assembly at the age of 28. Thomas Jefferson was elected to the colonial Virginia’s assembly (House of Burgesses) at the age of 26. Gouverneur Morris, whose name also appears prominently in the constitutional debates, was elected to the New York assembly (Provincial Congress) at the age of 23.

Their personal experiences in relatively democratic colonial governments would clearly have a greater effect on their constitutional intuitions than their readings of the books of Montesquieu or Locke, although both scholars were widely read by educated men in that period.²¹ This is not to say that colonial beliefs were unaffected by what they read, but unlike their European counterparts, Americans had direct experience with representative institutions of government as voters, politicians, and lawmakers. Experience with relatively liberal institutions would naturally continue to inform their ideas about constitutional design, economics, and the rule of law. This was clearly demonstrated by the state constitutions adopted in the period immediately after independence was declared in 1776.²²

After 1776, the colonies regarded themselves to be independent sovereign states bound into a confederation to resist British interference.²³ Most of the former colonial

²¹ Samuel Adams graduated from Harvard in 1740, John Adams from Harvard in 1758, Thomas Jefferson from William and Mary in 1762, and Gouverneur Morris from Kings College (now Columbia University) in 1768 receiving a master’s degree in 1773. Roger Sherman did not attend college but was admitted to the bar at the age of 33 and served in a variety of political and judicial position in Connecticut.

²² See Bailyn (1967) for evidence that they were also affected by European liberal or Whiggish scholarship.

²³ The alliance/confederation was formally constituted under the first constitution of the United States called the *Articles of Confederation*, which was negotiated in 1776 and 1777 but not ratified until 1781.

legislatures drafted “new” state constitutions in the next few years. It turned out that these “new” documents were in most cases minor revisions of their most recent colonial charters. They kept most of the language of their colonial charters but added provisions for selecting governors. Subsequent governors would be selected either by direct elections or legislative appointment. Connecticut and Rhode Island did not bother to rewrite their charters, because they already had procedures in place for selecting governors.²⁴

A decade later, after the war of secession was won, a new national constitution was developed in 1789 to replace the *Articles of Confederation*. It was based on the widely used bicameral colonial template with roots extending back to the Virginia charter of 1621. The “new” constitution also had a directly elected assembly (House of Representatives), appointed council (the Senate), and governor (the President). The Senate was appointed by state legislatures until the 17th amendment was ratified in 1913. The President was indirectly elected, as were the governors in most states at the time the constitution was ratified.²⁵

With respect to equality before the law, there was a consensus at constitutional convention in Philadelphia concerned privileges, but not antiprivileges, possibly reflecting their experience with appointed governors. The state representatives to the constitutional convention generally opposed the concepts of both royalty and nobility. Section 9 of Article 1, rules out such hereditary privileges in the United States and restricts the acceptance of such titles from other countries: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” Concerns about antiprivileges (slavery) are evident in notes from the constitutional deliberations, but a consensus did not emerge for eliminating them.²⁶

²⁴ See Congleton (2011, ch. 18) for more details and references. In some cases, the colonial legislators did add significant new language on civil liberties.

²⁵ Most governors were elected by the State legislatures at that time, although a few were directly elected. The process for electing the President can be regarded as a compromise between states preferring a “prime ministerial” system and those preferring direct elections.

²⁶ All quotes are taken from the words of the original unamended constitution, which is available at: http://www.archives.gov/exhibits/charters/constitution_transcript.html.

Intellectual innovations in political theory emerged in debates associated with adopting the 1789 constitution. The *Federalist Papers* were written to garner support for the New York deliberations on ratification. These editorials were not simply warmed-over Locke and Montesquieu but jointly constituted a major step forward in constitutional analysis. Many of the counter-arguments made by the anti-Federalists also included significant innovations in liberal political theory as applied to centralization. Prerevolutionary pamphlets also sharpened argumentation and addressed new issues, even in cases in which they used arguments grounded in Locke or Montesquieu.²⁷ The debates in newspapers and state ratification assemblies suggest that protecting civil liberties and property rights were very much on the minds of those engaged in the constitutional deliberations of that period.

Economic liberalism is thus evident in the 1789 constitution. Popular control over taxation was assured procedurally. All tax bills were to originate in the directly elected House of Representatives. Section 7 of Article 1 states that “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” Several provisions designed to assure equal taxations were adopted. For example, to minimize tax discrimination among the states, Section 9 states that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”

Other innovations reflected experience during the period after independence was declared. For example, unregulated trade among the states was mandated by the constitution to eliminate trade restrictions that had emerged among the states after independence. This created the largest free trade zone in the world during that period. To minimize the use of national export duties to favor one region over another, section 9 states that “No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor

²⁷ Censorship was commonplace in late-eighteenth-century Europe for both political and religious texts. Penalties for treason were often severe. Thus, arguments for major reforms of the existing government were risky to make. In the previous century, the risk was sufficient that Locke initially published his *Treatise on Government* anonymously. A long list of books was banned in Catholic countries at this time. Indeed, Thomas Paine’s *Common Sense* was first published anonymously.

shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” Interstate tariffs are ruled out by Section 10, which forbids states from taxing or imposing duties on the products of other states that differ from their own taxes: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.”

Free mobility of persons among the states was assured by provisions guarantees that immigrants from other states would be treated fairly. Section 2 states that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” These restrictions imply that each state must (largely) accept each other’s rules and regulations, which increased mobility among the states. A married couple does not have to be remarried or obtain new college degrees when crossing state boundaries.²⁸

The creation of a large intranational free trade zone and restrictions on discriminatory taxes were among the most important of the liberal economic principles incorporated into the new constitution. They allowed a very large integrated market to emerge in which economies of scale and specialization could be fully realized. These constitutional provisions would also increase the speed of industrialization and growth of income in the next century.

A bill of rights was added to the new frame of government through 10 amendments in 1791. These assured freedom of religious conscience, a free press, and formalized long-standing norms for trials and punishments. The *Declaration of Independence* of 1776 had provided some general liberal principles for law and governance: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The new constitution provided a concrete framework for advancing those aim.

After the new Constitution and its Bill of Rights were ratified by the member states in 1791, most of the institutional reforms that would occupy European liberals in the

²⁸ The Supreme Court, however, subsequently allowed licenses and other certifications to vary state by state.

nineteenth century were already in place in the United States: a written constitution, representative governance based on broad suffrage, equality before the law, elimination of noble and/or royal privileges, taxes controlled by elected representatives, “takings” by the central government only for public purposes and with compensation to owners, and a very large domestic free trade zone.²⁹

That very liberal system of governance and rights was largely taken for granted in the United States from 1791 on. As noted above, a surprising number of its provisions had long been elements of colonial governance. To most persons in the United States, its institutions were thus simply considered to be “American” rather than “liberal” as such institutions would be referred to in Europe and elsewhere during the next two centuries.

It also bears noting that both suffrage and equality before the law applied mostly to males of European descent. These civil liberties were broad by the standards of world history, but clearly fell short of twentieth century norms for liberal democracies. They would be gradually extended to most others during the nineteenth and twentieth centuries, as developed below.

V. Slavery, the Civil War Amendments, and Equality before the Law

Although American institutional developments were distinct from those in Europe prior to 1800; after 1800, the United States and Europe reforms had common trajectories, but followed quite different similar paths. For example, policy debates regarding slavery, free trade, and women’s suffrage emerged in the United States at roughly the same time that they did in Europe. In 1790 the Pennsylvania Society for the Abolition of Slavery with the support of Benjamin Franklin argued that the new national constitution should be “color blind.”

These blessings [of liberty] ought rightfully to be administered, **without distinction of color to all descriptions of people** ... that **equal liberty** was originally the position, and **is still the birthright of all men** influenced by the strong ties of humanity. (Excerpt from the February 2, 1790, Pennsylvania

²⁹ Eleven states had ratified it by early 1789, which was two more than required for implementation. North Carolina ratified the constitution later that year and Rhode Island in 1790. (The degree of support varied widely.) The new constitution substantially revised the original *Articles of Confederation*, which had been used during the Revolutionary War and for the first few years after the war was formally ended by the Paris peace treaty of 1783.

Society for the Abolition of Slavery petition, United States Senate, Center for Legislative Archives. Bolding added by the author.)

Franklin failed in that enterprise, which meant that the obvious meaning of the phrase “all men” in the *Declaration of Independence* was left for future constitutional negotiations that would become the most contentious of the nineteenth century. Of secondary importance, but not unimportant, were controversies on various issues concerning international trade, monopoly, taxation, public lands, and the proper extent of public services such as education.³⁰

Expanding Equality before the Law: The Abolition Movement

Slavery was not an American or European invention but a feature of human society that stretches back to the dawn of history. The Code of Hammurabi, chiseled into stone in 1772 BCE, includes several laws regarding slaves and slavery. Ancient Egyptian and Chinese societies are well known to have used slave labor. Opposition to slavery is nearly as ancient as slavery itself. Evidence of such opposition is, for example, found in Aristotle’s discussion of slavery in the *Politics*. However, in previous centuries, opposition had not been sufficient to induce legal reforms to eliminate that long-standing “antiprivilege.”

The outlawing of slavery in the nineteenth century was one of the great triumphs of liberalism. The assertion that all men should be equal before the law was a relatively new and powerful social norm—one that had rarely if ever been the law of the land. In the eighteenth century, this norm helped induce reforms that gradually reduced formal privileges in Europe and forbid them in the United States.³¹

³⁰ Support for public education has long been an important part of the liberal reform agenda. For example, John Adams suggests that “Laws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant.” (1776, *Thoughts on Government*. Included in *Common Sense, A Summary View of the Rights of British America, Thoughts on Government and Important Early American Political Writing* [2010, Kindle Locations 1455–56]).

³¹ It is sometimes argued that Protestantism was the source of the antislavery movement, and it is true that Protestants were among the leading members of the abolitionist movement. However, it should be kept in mind that Protestants were also among the leading suppliers of slaves to South America and the southern United States. It was the rise of liberalism, which was new, as opposed to Protestantism which was two centuries old that provides the better explanation for the breadth of the support for ending slavery in the places where it did occur. Of course, it also helped that slavery was a relatively unimportant factor in the local economies where the new laws were passed.

The campaign against antiprivileges had impacts on broad swaths of European society; as for example, serfdom was made less onerous or eliminated in most Europe politics by the late eighteenth century. In the eighteenth century, abolitionists and their moderate allies also gradually won the policy debate on slavery and the associated slave trade in Europe and in the northern United States. As a consequence, slavery and slave trade were outlawed in most of Europe and in the northern United States during the late eighteenth and early nineteenth centuries.³²

In the United States, slavery was a state-level issue for most of this period. Slavery was abolished by the Vermont state legislature in 1777 and phased out by laws adopted in Pennsylvania, New Hampshire, Connecticut, Rhode Island, and New Jersey in 1780, 1783, 1784, 1784, and 1804, respectively. It was abolished by the State of Massachusetts in 1783 through a state supreme court decision. In 1787 the Northwest Ordinance prohibited slavery in the northwest territories (those north and west of the Ohio River).

Several northern states phased out slavery rather than simply abolishing it to reduce the economic burden on slave owners. (Slaves were major “capital assets” for their owners.) Consequently, slavery gradually disappeared in the North; as, for example, the children of slaves no longer inherited their parent’s antiprivileges. In the southern United States, where economic and cultural support for slavery dominated liberal opposition to it, the old laws remained in place or were strengthened. In several southern states, new restrictions on manumission, travel, and education were added during the early nineteenth century.

Southern Secession and the Civil War Amendments

Disagreements over tariffs and slavery continued to escalate to the point where the Southern states, who largely supported slavery and opposed protectionist tariffs, decided to secede from the union in 1860. To form a new government for the south, a new constitution was drafted, the *Constitution of the Confederate States of America*. Apart from provisions regarding slavery, it was a liberal document largely based on the 1789 constitution

³²Monopoly privileges could also be addressed at the state level. Calabresi and Price (2012: 96–101) noted that 11 states had adopted antimonopoly provisions and four others provisions against exclusive privileges in their state constitutions by the mid- to late-nineteenth century. See also Calabresi and Agudo (2008).

of the United States, but with additional restrictions on the authority of the central government.³³

Southern secession allowed northern Republicans to amend the constitution of the United States in a manner that increased equality before the law. The Civil War amendments were civil liberty amendments that eliminated a variety of antiprivileges and clarified citizenship. Slavery was eliminated through the 13th amendment, citizenship was more clearly defined by the 14th amendment (as a birthright), and the 15th amendment provided a clearer statement of equality before the law. Without the southern representatives, those favoring the abolition of slavery were a supermajority in the national legislature.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. (Amendment XIV [ratified, 1865])

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amendment XV, Section 1 [ratified, 1868])

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 race, color, or previous condition of servitude. (Amendment XVI [ratified, 1870])

After losing the war, the southern states had to accept the North's civil war amendments as a condition for regaining their state-level governments. In this manner—which combined formal amendment and conquest—antiprivileges were curtailed, civil liberties were clarified,

³³ It may be surprising that liberalism was commonplace in the South in spite of their defense of slavery. The South's constitution included a directly elected House of Representatives, appointed Senate, indirectly elected President, Supreme Court, Bill of Rights, and similar taxing authority (article 1, section 8). There were a few procedural changes. The President, for example, was elected by the states (one vote per slate of state electors, Article II section 3) and limited to a single term of office. Protectionist tariffs were ruled out by the requirement that tariffs and other taxes be uniform (article 1, section 8). Southerners evidently had a narrower concept of citizenship than Northerners. Qualifications for male suffrage, for example, were more restrictive in the south than in the north, although less restrictive than in most of Europe at that time. The constitution of the Confederate States of America (CSA) can be found at http://avalon.law.yale.edu/19th_century/csa_csa.asp.

and discriminatory lawmaking and court proceedings reduced. All these amendments increased equality before the law.

VI. Economic Liberalism in the Nineteenth Century

The American free-trade movement also paralleled those in Europe during this period, although it was arguably less successful in the United States than in northern Europe. As true of groups pressing for the abolition of slavery, groups pressing for free trade were evident throughout the United States. For example, there was a Free Trade Convention in Philadelphia in 1831, where economic liberals discussed the merits of and lobbied for lower tariffs or at least the elimination of protectionist tariffs. This was also true of the Northeast, where protectionist sentiments dominated local politics. For example, the *Friends of Free Trade* in Salem, Massachusetts argued that:

It is a sound political maxim that the **more free trade is, and the more widely it circulates, the more sure will be its prosperity** and that of the union, every restriction which is not indispensable for the purpose of revenue is a shoal which would impede its progress and not infrequently jeopardize its security (quoted in Belko 2012 p. 14).

Such persuasive campaigns, as in Europe, were never entirely successful, because tariffs and other duties were important revenue sources during this period and were supported by domestic firms that profited from the diminished competition associated with import tariffs and other trade barriers.

In contrast to the abolitionist movement, the free trade movement was stronger in the South than in the North, because it was the North that benefited most from protective tariffs. It is partly for this reason that a single liberal party did not emerge in the United States in the late nineteenth century, as was common in Northern Europe. The Republicans of this period were liberal on civil liberties and the Democrats on trade. As in Europe, there were periods of success for the American free-trade movement. For example, tariff rates were reduced in the 1830s, late 1840s, and late 1850s. This pattern was correlated with party success in national elections; Democrats reduced tariffs, and Republicans raised them.

Economic Liberalism: Antimonopoly Policies

Disagreements among economic liberals arose during the nineteenth century. On the one hand, there were arguments based on simple liberty and equality before the law. These implied that all individuals should have essentially complete control over goods and services at their disposal as long as that control does not harm one's neighbors. (One could not use a neighbor's windows for target practice.) On the other hand, some forms of contract arguably harmed one's neighbors without trespassing on their traditional rights.

Governments, for example, should not sell monopoly privileges to willing buyers partly because governments should not create privileged parties and partly because such contracts harmed others in the community. This point is clearly made in an 1856 court decision.

[A]lthough we have **no direct constitutional provision against a monopoly**, yet the whole theory of a free government is opposed to such grants and it does not require even the aid which may be derived from the Bill of rights, the first section of which declares “**that no man or set of men, are entitled to exclusive public emoluments, or privileges from the community,**” to render them void. (1856, Supreme Court of Connecticut decision on Norwich Gaslight Company v. Norwich City Gas Company.

As industrialization occurred, the market power of firms and small groups of firms tended to increase to the point where monopoly power could emerge without government assistance. The courts decided that such contracts were also inappropriate, initially using equal protection of the law and anti-privilege arguments. An 1881 court decision illustrates a typical analysis.

To place the people of the city, with respect to fresh meats and fish, at the mercy of [a cartel], or any other person, would be to allow a most dangerous monopoly, **notwithstanding the prohibition in the bill of rights, which was intended to protect the people against just such monopolies, and to give them the right to have fair competition in the markets** to which they must resort to purchase the necessaries of life. And this is **one of the most important bulwarks thrown around the liberties** of the people. Whatever tends to evade or destroy the effect of it should be denounced as void by the courts of the country. (1881, Texas Supreme Court, City of Brenham v. Becker.

The logic behind the *Brenham v. Becker* decision implied that some private contracts—those forming cartels, trusts, or coordinating pricing decisions—could be interfered with by governments, because they increase public welfare.

Such policies and court decisions were regarded to be exceptions to the general rule of noninterference with the freedom of contract, as demonstrated by the *Lockner* decision. The famous *Lockner* (1905) decision struck down a New York state law establishing a maximum work day and work week for bakers, because it inappropriately intervened in a contractual relationship. The *New York Times* reported on April 17, 1905 that the “New York 10-hour law is unconstitutional. U.S. Supreme Court holds it violates freedom of contract.” The reasoning for the majority opinion was consistent with that headline:

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.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute...has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify...the section as really a health law. **It seems to us that the real object and purpose were simply to regulate the hours of labor** between the master and his employees (all being men, *Sui juris*), **in a private business**, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. **Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.**

Dissents were drafted by Harlan and Holmes, who may be regarded as left liberals insofar as they argued that the constitutionally permitted scope of economic regulation is broader than that argued by the majority, but were otherwise content with the nation’s grounding laws and institutions.

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 Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The point of the quotes from the majority decision is not that the constitution or civil law explicitly protected freedom of contract, as argued by doctrinaire liberals. Rather they demonstrates that doctrinaire liberalism was influential and mainstream in late nineteenth century and early twentieth century America. It was sufficiently so that both laws and legal theories reflected its arguments and conclusions. Yet, as indicated by the minority decision, there was beginning to be a shift in opinion away from the doctrinaire perspective toward the left-liberal perspective, a trend that continued throughout the twentieth century.

This was partly due to new circumstances associated with industrialization and urbanization and partly due to experience which suggested that policies that interfered with freedom of contract often produced desired results at little cost. Although some American voters and statesmen were self-consciously liberal at the time of the *Lockner* decision, most Americans were not political or economic theorists, but practical men and women whose ethical and ideological intuitions were informed by their past experience under American institutions and public policies. When a problem arose, one could usually solve it in a manner consistent with formal and informal constitutional and legal norms, or with minor extensions of them. This pragmatism generated a series of state and national policies that gradually expanded the extent to which public policies could properly interfere with the freedom of contract.

For example, as the market power of the large firms associated with industrialization increased, several states adopted antitrust laws—and in some cases explicitly incorporated

them into their constitutions. These were, as noted above, largely consistent with past history and court decisions but modestly increased the authority of state governments in the area of economic regulation. Similar policies were subsequently adopted by the national government, as with the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1915.

These laws ruled out certain types of contracts, and the laws were to be enforced by the police authority of the government adopting the law. These new laws, in effect, topped up the protections against unfair contracts provided by civil law and associated lawsuits brought by affected private parties. Institutional conservatism, liberalism, and the Supreme Court tended to moderate the reforms adopted.

VII. Liberalism during the Twentieth Century

During the twentieth century, policy debates tended to be won by “left” liberals, which is to say by persons and groups that supported liberal political and legal institutions but favored a relatively broad range of interventions in private lives by elected governments. The doctrinaire perspective on economic liberalism continued to be evident in policy debates, but it was less and less often decisive on policy matters. In effect, the left liberalism of John Stuart Mill and Oliver Wendell Holmes had become mainstream. The antitrust laws discussed above are only one of many instances of the evolution of liberalism and its associated government policies in the United States at the turn of the century. Left liberals had far more confidence in the effectiveness of democratic government than their doctrinaire counterparts.

Consistent with of this leftward evolution of liberal thought, a major wave of constitutional reforms took place in the United States and Europe in the early twentieth century. In Europe, the reforms included universal male suffrage, woman’s suffrage, and placing governance on electoral foundations. Several countries adopted proportional representation systems at the same time as part of the constitutional bargains struck (Congleton 2011a). In the United States, similar constitutional reforms were adopted, although these were less radical than those adopted in Europe, because governance already had electoral foundations and male suffrage was already essentially universal. Both series of

reforms tended to reflect left-liberal ideas about governance and public policy.³⁴

Left liberals generally favored an active state that supported equal opportunity and competitive political and economic systems. The former could be accomplished through public education and support of the efforts of labor unions in their negotiations for better contracts with their employers. They also favored modest social insurance, although national programs were not adopted in the United States until the Great Depression.

Their “progressive” constitutional reform agenda attempted to place the national government on more direct electoral foundations and to provide it with the resources to undertake more such tasks.³⁵

The Progressive Constitutional Amendments

The government of the United States in 1900 was essentially the same as that adopted in 1791, although by then it covered 45 states with territories that ran from the Atlantic Ocean to the Pacific Ocean, rather than 13 relatively small states along Atlantic coast. Members of the House of Representatives were elected in single-member districts via plurality rule. Senators were indirectly elected by state legislatures. The president was indirectly elected by state electors elected for that purpose. Male suffrage was essentially universal, although some low-income men were excluded by property qualifications, literacy tests, and poll taxes in some states. Women in only about half of the states could vote in elections for federal government officeholders.³⁶ Federal taxes were indirect, that is, not

³⁴ In Europe, left liberals often called themselves social democrats, where as doctrinaire liberals called themselves liberals. In the United States, the term liberal became associated with left liberals (moderate progressives) and doctrinaire liberalism became a strand of “conservatism.” Nonetheless, all liberals accepted and defended the grounding liberal institutions of their societies: equal protection of the law, representative governance based on broad (now adult) suffrage, and civil liberties that included private property and broad freedom of contract.

³⁵ Most members of Europe’s new social democratic and labor parties were left liberals in this sense. They came to power after World War I in Europe after the expansion of suffrage, but there was little nationalization or redistribution. Instead, social insurance programs were expanded and labor laws revised. Their disappointed illiberal (socialist) members often broke off and formed new Communist parties. A more complete discussion of this is provided in several of the historical chapters of *Perfecting Parliament* (Congleton 2011).

³⁶ Suffrage law was controlled by the states during this period, subject to constitutional constraints. Women’s suffrage had existed in some colony/states during colonial times but was eliminated in the first years of the United States at roughly the same time that suffrage for foreigners, Indians, and blacks was curtailed. Suffrage movements in the post-civil war period gradually generated voting rights for women in about half of the states. This was most evident in the West—possibly as part of efforts to attract residents to their territories—but also included several states in the East and Midwest. States in the southeast had the most

directly paid by individuals.

All of these provisions were consistent with doctrinaire liberalism, which had long regarded voting to be a task that one should not undertake unless one was reasonably educated, independent, and had a long-term interest in the policies at issue. They also regarded decentralized governance to be the most likely system of governance to perform its core duties (protection of property and civil liberties) and least likely to cause problems, because citizen mobility would tend to align state interests with those of their citizens, as it had done in the past. The United States was far larger, populous, and prosperous than it had been in 1791. Its constitution had proven to be a robust scaleable template for governance and economic development. Why revise what had worked so well for so long?

Left liberals, in contrast, tended to regard suffrage as a birthright and were less concerned about constraints on governance, because they believed that electoral pressures combined with the ethos of those seeking elective office were sufficient to assure good governance. They also believed that there was much that democratic governments could and should do to improve the lives of their citizens, possibilities that went well beyond those associated with the “watchman states” preferred by many doctrinaire liberals.

The constitutional amendments adopted in the United States between 1912 and 1920 all advanced left-liberal (progressive) ends. The 16th amendment extended the tax base for federal expenditures by allowing a subset of direct taxes, namely various forms of income taxes. The 17th amendment formally changed the process for selecting members of the Senate (the federal chamber). Rather than being selected by state legislatures, they would henceforth be directly elected by state voters. This made the Senate a less “federal” chamber, in that its members no longer had an interest in protecting the authorities of state governments, per se. Both the 16th and 17th amendments were ratified in 1913. Women were subsequently enfranchised by the 19th amendment, which was ratified in 1920, after World War I was over.³⁷

The 18th amendment was a policy reform rather than a procedural reform or general constraint on governmental decisions. It made the production, transport, and sale of

stringent standards for male suffrage and generally provided little or no suffrage for women.

³⁷ It is interesting to note that similar constitutional reforms, especially with respect to men’s and women’s suffrage, were being adopted by liberal–social democrat coalitions in Europe at about this same time.

alcoholic beverages (intoxicating liquors) illegal within the United States. This reform (known as prohibition) clearly conflicted with economic liberalism in that it formally outlawed a variety of contracts that had been freely undertaken for centuries, if not millennia. Nonetheless, it was consistent with the *Lockner* decision and its dissent quoted above. Left liberals (progressives) and some conservatives believed that “prohibition” would simultaneously improve the health and morals of society.³⁸ That it interfered with the customary domain of contracts and had greater impact on some persons than others were good reasons for opposing ratification from the perspective of doctrinaire liberalism.

The 18th amendment was ratified in 1919 and went into effect in 1920. However, the 18th amendment failed to significantly improve the health and morals of the community, but did generate a large black market for alcoholic beverages, while reducing tax revenues from excise taxes on those beverages. This illiberal experiment was ended with the support of progressives and doctrinaire liberals in 1933 (via the 21st amendment).

Liberalism, the Great Depression, and World War II

The second quarter of the twentieth century was a difficult time for liberals of all varieties worldwide. It could be said that the middle of the European political spectrum of 1920 departed for the extremes in the late 1920s and 1930s, and liberal parties disappeared from high office in several countries. The Depression and rise of fascist and communist parties in Italy and Germany raised fears of war and revolution. As a world war emerged in the mid-to-late 1930s, democratic governance, rule of law, and equality before the law rapidly disappeared from much of Europe as a two-century liberal tide was reversed and nearly erased in a decade.³⁹

³⁸ Temperance movements swept through Europe at the same time but normally resulted in new regulations on usage and sales of alcohol, rather than constitutional amendments. An amendment was deemed necessary in the United States because the courts had routinely blocked governments from interfering with freedom of contract during the nineteenth and early twentieth centuries, although several states had passed various regulations on alcohol sales.

³⁹ Mises (1927/1985) wrote a book on the state of liberalism in 1927, which can be read as a lament for the decline of European liberalism in the 1920s. In the preference for its English translation of 1962 and reissue in 1985, Mises laments the modern American usage of the term “liberal.” The terms “neoliberal” and “classical liberal” were introduced in the post-war period to describe the post-war strands of doctrinaire and moderate liberalism. In the United States, left liberals and other leftists have recently begun using the term progressive again, which implies that the term liberal may revert to its older and more common usage worldwide.

In the United States, the collapse of bubbles in the stock and bond markets, together with a large number of bankruptcies reduced the value of financial and real estate assets and generated very high levels of unemployment. Deep recessions had been experienced in the United States before, but the prolonged length of this depression undermined claims about the self-correcting nature of markets. The suffering associated with the Great Depression also undermined assessments of the ability of representative governments to deal with economic crises. Although the foundation of American politics was more deeply rooted in liberalism than in Europe, the depth and breadth of the Depression caused a further shift away from doctrinaire liberalism toward left liberalism in the United States, and in many cases, beyond.

As this occurred, the term “liberal” in America replaced the term progressive as the preferred label for left liberals, whereas in Europe “liberal” had gradually become the label for doctrinaire liberals. Nonetheless, consensus among doctrinaire and left liberals regarding constitutional matters continued as before, and their disagreements over economic policies and regulations continued to dominate public debates in northern Europe.

Left liberals dominated mainstream politics in the United States during this period, although several policies adopted during the Great Depression and World War II arguably went beyond the liberal domain. Higgs (1989), for example, recounts numerous instances of such policies during this period. That nonliberal policies widely adopted during the war did not mean that liberals or liberal ideas had disappeared, rather it demonstrated that liberals may agree to adopt extraordinary policies during extraordinary times. All-out warfare and other large-scale emergencies require enormous resources and benefit from centralized management, which tends to undermine both the rule of law and constitutional governance.

After the war, concerns about the nonliberal policies adopted during the previous 15 years, paradoxically, provided a new impulse for liberal economic theory. Among the most influential post-war liberals were Ludwig von Mises, Ayn Rand, and Frederich Hayek. These European doctrinaire liberals were followed by a series of prominent American intellectuals, including Milton Friedman, James Buchanan, John Rawls and Robert Nozick, although their direct impact on voters was arguably less than that of their European counterparts.

Liberalism and Post-War American Politics

After World War II ended, the West shifted back in a liberal direction, as constitutional governments were restored, centralization reduced, and markets re-established. The leftward drift of liberalism continued, as the modern welfare state emerged in the 1960–80s with its extensive social insurance programs, expanded public education, and increases in economic regulation. The Great Depression and World War II had substantially increased the authority of the national government relative to the state governments, but the constitutional framework remained federal, and private markets remained centers of life and wealth.

American liberalism remained evident and important during the second half of the twentieth century. This was evident in its grounding institutions and in the speeches of leading Republican and Democratic politicians—who would, of course, not appeal to liberal sentiments unless they believed that their audiences were already sympathetic to them. Although, few contemporary politicians think of themselves as doctrinaire liberals or moderate liberals, as was commonplace during the first decades of the twentieth century, their speeches routinely include statements of support for constitutional governance, equality before the law, the expansion of commerce, and tolerance.⁴⁰

Justice requires us to remember that **when any citizen denies his fellow, saying,** “His color is not mine,” or “His beliefs are strange and different,” in that moment **he betrays America,** though his forebears created this Nation. **Liberty was the second article of our covenant.** It was self-government. It was our Bill of Rights. But it was more. **America would be a place where each man could be proud to be himself: stretching his talents, rejoicing in his work,** important in the life of his neighbors and his nation. (*Inaugural Address*, L. B. Johnson, January 1965)

We seek **an open world—open to ideas, open to the exchange of goods and people**—a world in which no people, great or small, will live in angry isolation. (*Inaugural Address*, R. M. Nixon, January 1969)

The orderly transfer of authority as called for in **the Constitution routinely takes place as it has for almost two centuries** and few of us stop to think how unique we really are. In the eyes of many in the world, this every-4-year ceremony we accept as normal is nothing less than a miracle....**We are a**

⁴⁰ Copies of inaugural addresses by the presidents of the United States are available at http://avalon.law.yale.edu/subject_menus/inaug.asp.

nation that has a government—not the other way around. And this makes us special among the nations of the Earth. Our Government has no power except that granted it by the people....It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the **distinction between the powers granted to the Federal Government and those reserved to the States or to the people.** All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government. (*Inaugural Address*, R. Reagan, January 1981.)

When **our founders boldly declared America’s independence** to the world and our purposes to the Almighty, they knew that America, to endure, would have to change. Not change for change’s sake, but **change to preserve America’s ideals, life, liberty, the pursuit of happiness.** Though we march to the music of our time, **our mission is timeless.** (*Inaugural Address*, W. J. Clinton, January 1993.)

We have a place, all of us, in a long story....**It is the story of a new world that became a friend and liberator of the old, a story of a slave-holding society that became a servant of freedom,** the story of a power that went into the world to protect but not possess, to defend but not to conquer. It is the American story. A story of flawed and fallible people, united across the generations **by grand and enduring ideals.** The grandest of these ideals is an unfolding American promise that everyone belongs, that **everyone deserves a chance** (*Inaugural Address*, G. W. Bush, January 2001).

Nor is the question before us whether the **market is a force for good** or ill. **Its power to generate wealth and expand freedom is unmatched,** but this crisis has reminded us that without a watchful eye, the market can spin out of control and that a nation cannot prosper long when it favors only the prosperous. The **success of our economy** has always depended not just on the size of our Gross Domestic Product, **but on the reach of our prosperity; on our ability to extend opportunity to every willing heart—not out of charity, but because it is the surest route to our common good.** (*Inaugural Address*, H. B. Obama, January 2009).

Constitutional liberalism continues to anchor the United States firmly in the liberal portion of the ideological spectrum. Liberalism also remains central to the political culture of the United States, although it is a liberalism well to the left of that of its first centuries.⁴¹

⁴¹ The importance of constitutional governance was often given more emphasis in nineteenth-century speeches. Consider, for example, G. Cleveland’s 1885 inaugural address. “In the discharge of my official duty I shall endeavor to be guided by a just and unstrained construction of the Constitution, a careful observance of the distinction between the powers granted to the Federal Government and those reserved....The Constitution which prescribes his [the president’s] oath, my countrymen, is yours; the Government you have

VIII. Summary and Conclusions

In the United States, liberalism emerged piecemeal through institutional and policy choices made in circumstances that favored liberal institutions and policies. Successive formateurs of colonies, cities, and towns would take account of the most attractive examples of governing laws and governance they knew of and try to improve on them. Why? Because labor and capital were attracted to the most prosperous, comfortable, and safe places. In the American context, these were by and large the places with the most liberal political institutions and public policies. Liberal institutions and policies were adopted and sustained, not because of a clear ideologic vision, but because they worked better than the alternatives.

Because of its evolutionary origin, liberalism in the United States is less self-conscious than it tended to be in Europe and less intellectual. Indeed, after 1800, liberalism in the United States arguably reflected the natural institutional conservatism exhibited by most persons, rather than familiarity with liberal economic and political theories. The institutions and ideas that most Americans grew up with, worked relatively well, and just happened to be liberal.

That the term “liberal” was rarely used in electoral politics during the nineteenth century supports that contention. That most Americans are unaware of their liberal history is also consistent with the main thesis of this paper. In a society in which nearly everyone is a constitutional liberal, the term liberal is not very informative. The term “American” would be sufficient to describe the liberalism that most residents in the United States experienced in the past and continue to experience today.

This is not to deny the presence of philosophical idealists in the English colonies or in the United States, but to suggest that political and legal institutions were for the most part adopted and refined by practical men and women interested in creating sustainable attractive communities, rather than by intellectuals, with only minor exceptions. The political theories

chosen him to administer for a time is yours; the suffrage which executes the will of freemen is yours; the laws and the entire scheme of our civil rule, from the town meeting to the state capitals and the national capital, is yours. Your every voter, as surely as your Chief Magistrate, under the same high sanction, though in a different sphere, exercises a public trust. Nor is this all. Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness. Thus is the people’s will impressed upon the whole framework of our civil polity—municipal, State, and Federal; and this is the price of our liberty and the inspiration of our faith in the Republic.”

of successive generations of politicians and voters were empirically grounded. They supported equality before the law, written constitutions, and open competitive political and economic systems, because these had produced attractive sustainable communities.

That constitutional liberalism in the United States is an outgrowth of necessity and pragmatism rather than idealism or ideology helps to shed light on differences between Europe and the United States and among those living in the United States. Groups that flourished during the first two centuries of experiments would naturally tend to regard that experience as supportive of “American” institutions and intuitions about the good life. Those that did not, would naturally tend to be more skeptical of those traditions, as might be true, for example, of the families of former slaves and the most recent generation or two of immigrants. Identity politics is a fairly old concept in the United States and was used by political parties well before the term was coined. Ethnicity is often associated with both one’s family’s period of immigration and thereby with their political experience and expectations.

However, the main purpose of the paper is not to partially account for such differences, but simply to demonstrate that liberalism was not entirely an invention of European intellectuals. Many of the normative conclusions reached by liberals about political and economic institutions had already been written into law in colonial America before the most famous enlightenment scholars published the insightful books that would make them famous for several centuries. Together, the European and American experiences suggest that a strong liberal intellectual tradition is neither a necessary nor a sufficient condition for liberal institutions to be adopted and flourish.

That institutional experiments can produce a nation of liberals without producing an equally strong liberal intellectual tradition may be surprising to most scholars and intellectuals, but this is evidently true for the United States. In the right circumstances, liberal institutions and support for those institutions and their associated policies can emerge spontaneously, because they produce attractive societies. In the territories that became the U.S., the right circumstances included scarce and mobile labor, freedom to experiment with institutions, and intuitions about life and politics that favored liberal institutions.

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