



**UNIVERSITY  
AT ALBANY**  
State University of New York

# President Kermit L. Hall

## *League of Women Voters*

# *Twenty-Two Keys to Constitutions and Rights in American History*





# Constitutions & Rights



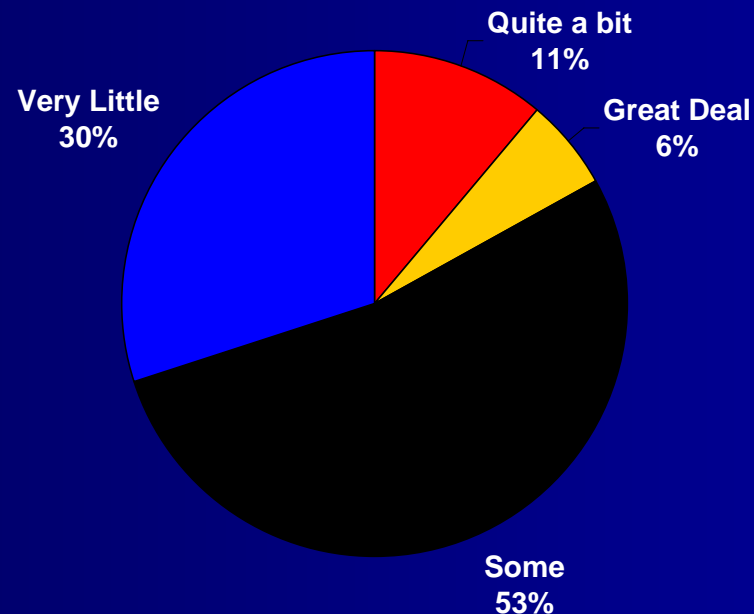
***“The way I see it, the Constitutions cuts both ways. The First Amendment gives you the right to say what you want, but the Second Amendment gives me the right to shoot you for it.”***

# National Constitution Center

## *National Poll Results*

- To the majority of Americans, the Constitution is more than just a two-century old document lying under glass in the National Archives:

How Much Do You Feel You Know About the Constitution?





# National Constitution Center

## *National Poll Results*

- What Does The U.S. Constitution Mean To You?
  - Freedom -- 34%
  - Basis of our rights -- 20%
  - Our system of laws -- 11%
  - Established this country -- 7%
  - Established our government
  - Determines our quality of life -- 3%
  - Everything -- 3%



# National Constitution Center

## *National Poll Results*

- **How Uniformed is the American Public?**
  - **Only 6% can name *all four rights guaranteed by the First Amendment.***
  - **62% cannot name *all three branches of the Federal government.***
  - **35% believe that the *Constitution mandates English as the official language.***
  - **Only 7% can *correctly identify the Constitutional Convention as the authors.***
  - **4 in 5 do not know *how many amendments there are to the Constitution.***
  - **1 in 5 do not know that the *President is Commander-in-Chief of the U.S. Armed Forces.***
  - **32% believe that *John Hancock had a hand in drafting the Constitution.***
  - **84% believe that the *U.S. Constitution is the document that states that "all men are created equal", thus confusing it with the Declaration of Independence.***

# National Constitution Center

## *National Poll Results*

- Americans cherish the U.S. Constitution but do not know much about it.
  - **91% of Americans believe that the *U.S. Constitution is important to them;***
  - **84% believe that to work as intended, our system of government depends on *active and informed citizens;***



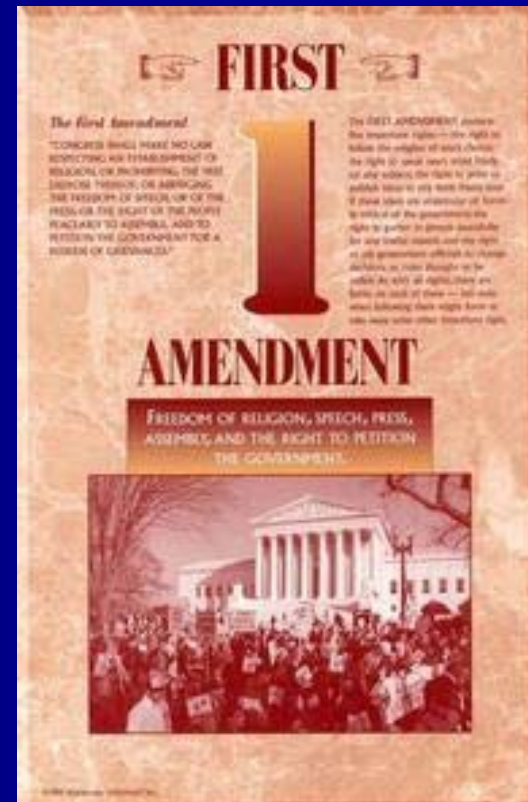


# Constitutions & Rights

## Twenty-Two Keys

1. The federal Constitution is a **short, incomplete document** – the Bill of Rights is even shorter and less complete.

- **4,609 Before 1789**
- **7,606 Today**



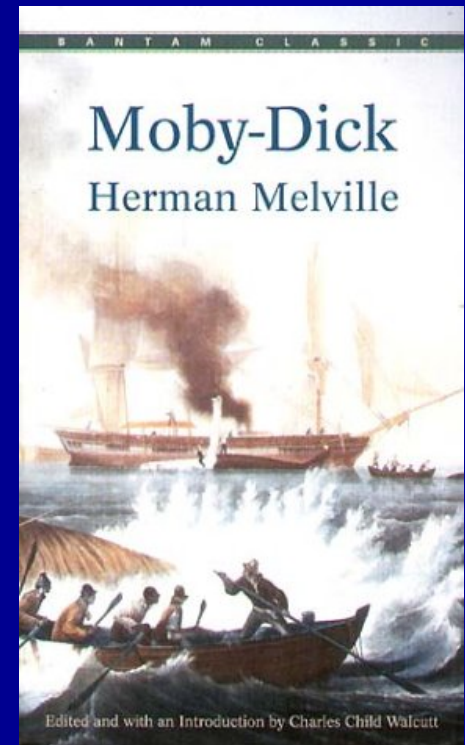


# Constitutions & Rights

## *Twenty-Two Keys*

2. State constitutions are *long, comprehensive, and code-like documents*, with their own bills of right and/or declaration of rights, which tend to be more inclusive – education, human dignity.

- **24,000 Words – Average Length**
- **51,350 Words – New York Constitution**



# Constitutions & Rights

## *Twenty-Two Keys*

**3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!**

**a. No ex post facto laws, bill of attainder, habeas corpus, e.g.**

**U.S. Constitution: Article I, Section 9, Clause 3**

*No Bill of Attainder or ex post facto Law shall be passed.*



The 'words and the intent' of the Ex Post Facto Clause encompass “every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”

**Samuel Chase**

Calder v. Bull, 1798



# Constitutions & Rights

## *Twenty-Two Keys*

**3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!**

**b. State constitutions as laboratories of experimentation –**

- Constitutional design
- The police powers (health, safety, morals, and welfare)
- The protection of rights
- “Forever Wild”
- Referendum, initiative, and recall
- Balanced budgets
- Human dignity

***The center of constitutional gravity has been local, not national.***

# Constitutions & Rights

## *Twenty-Two Keys*

### 3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!

#### Montana Constitution, Article II, Section 4.

- Individual Dignity. *The dignity of the human being is inviolable.* No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.





# Constitutions & Rights

## *Twenty-Two Keys*

**3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!**

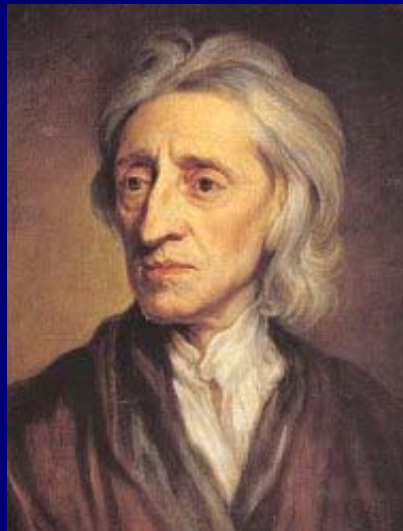
**c. Private law – torts, contracts, property**



# Constitutions & Rights

## *Twenty-Two Keys*

3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!
  - d. Natural law and higher law principles. Is there a right of revolution?



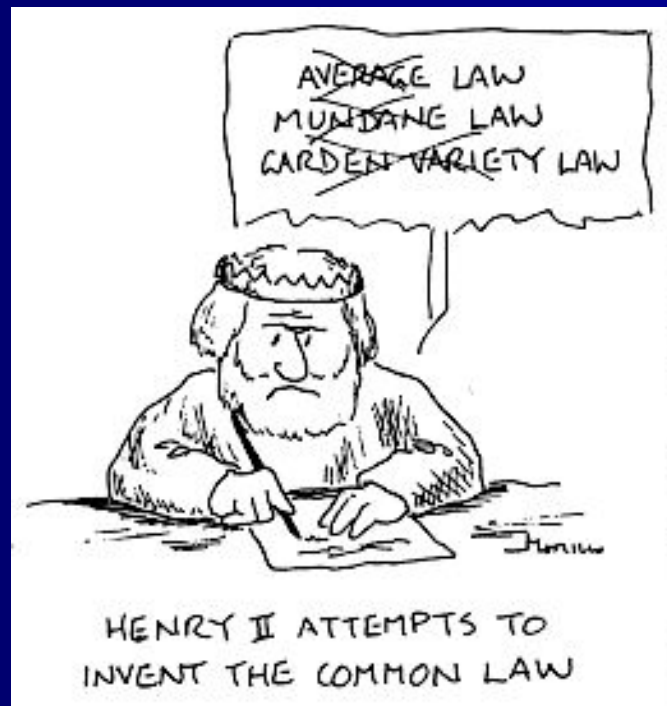
John Locke



# Constitutions & Rights

## *Twenty-Two Keys*

3. American Constitutional History involves more than the federal Constitution and the federal Bill of Rights!
  - e. **Common law principles**





# Constitutions & Rights

## *Twenty-Two Keys*

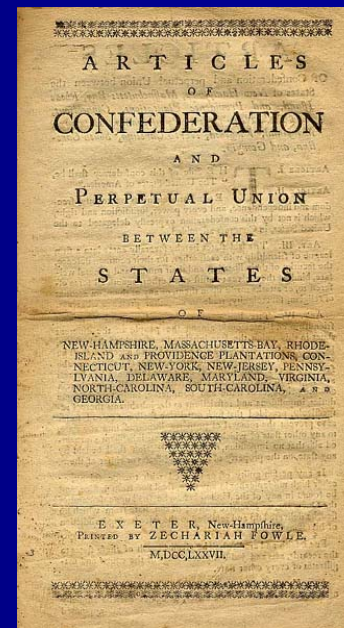
4. Not all rights are enumerated – they have to be ***revealed through interpretation*** (privacy, e.g., gender, sexual orientation, race). The problem of original intent and judicial interpretation – activism and restraint, are they meaningful categories?
- **Does the past have a dead hand?**
  - **Should it?**



# Constitutions & Rights

## Twenty-Two Keys

5. Eras of Constitutional Development tend to be parallel.
  - a. **1607 – 1787**: The era of constitutional development *before the federal Constitution* – charters, compacts, state constitutions, and the Articles of Confederation.





# Constitutions & Rights

## *Twenty-Two Keys*

5. Eras of Constitutional Development tend to be parallel.
  - b. **1787 – 1877**: The struggle over *state vs. federal authority* – the 13<sup>th</sup>, 15<sup>th</sup>, and especially the 14<sup>th</sup> amendments.



# Constitutions & Rights

## *Twenty-Two Keys*

5. Eras of Constitutional Development tend to be parallel.  
c. 1877 – 1937: The impact of *immigration and industrialization*



Robert LaFollette

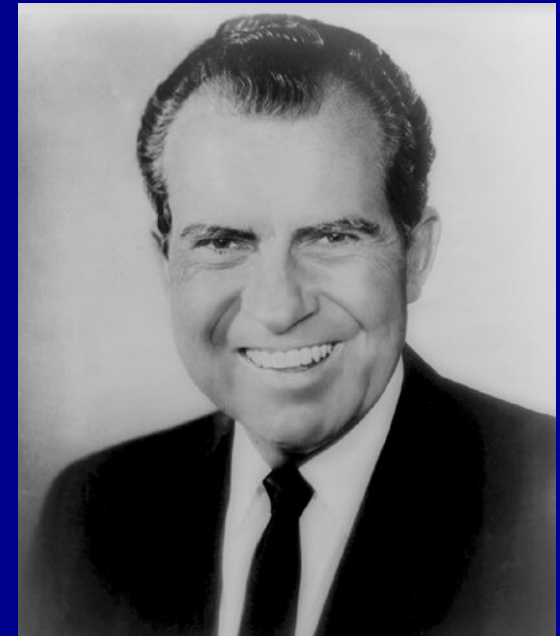




# Constitutions & Rights

## *Twenty-Two Keys*

5. Eras of Constitutional Development tend to be parallel.
  - d. 1937 – Present: *Equality, human rights, and the welfare state*

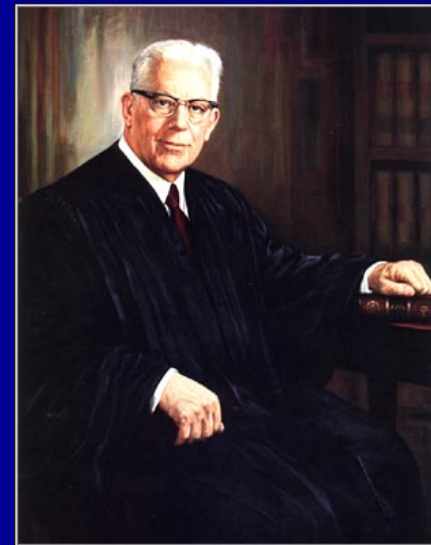
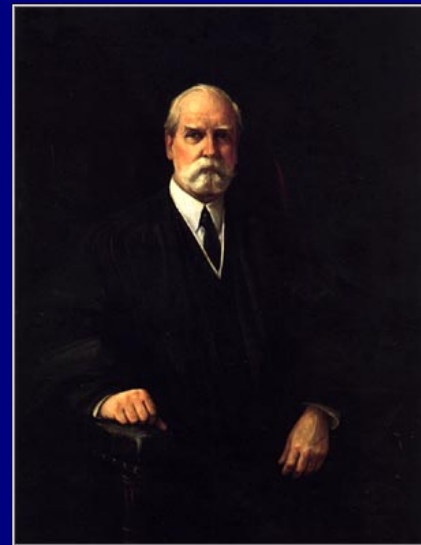
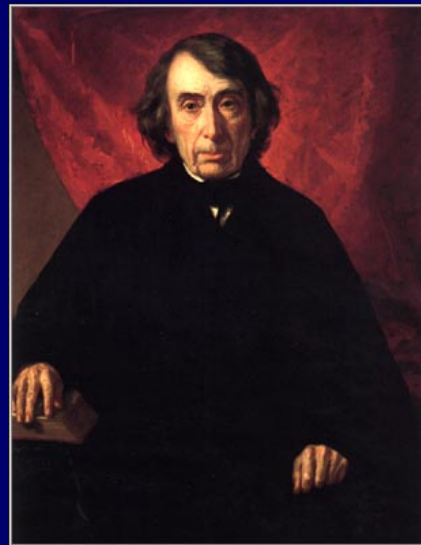
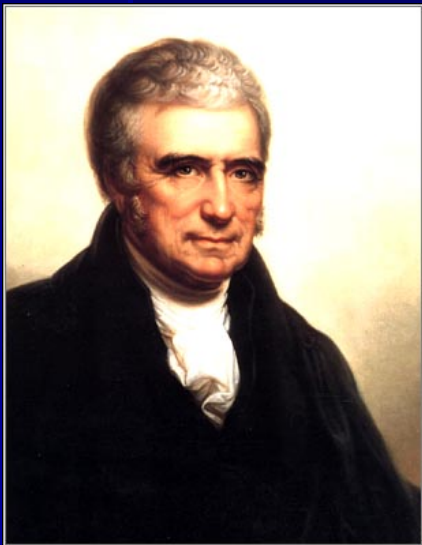




# Constitutions & Rights

## *Twenty-Two Keys*

6. The Supreme Court Reality – judicial independence, judicial review, and judicial sovereignty, the “least dangerous branch,” and the impact of Marshall, Taney, Hughes, and Warren Courts.





# Constitutions & Rights

## *Twenty-Two Keys*

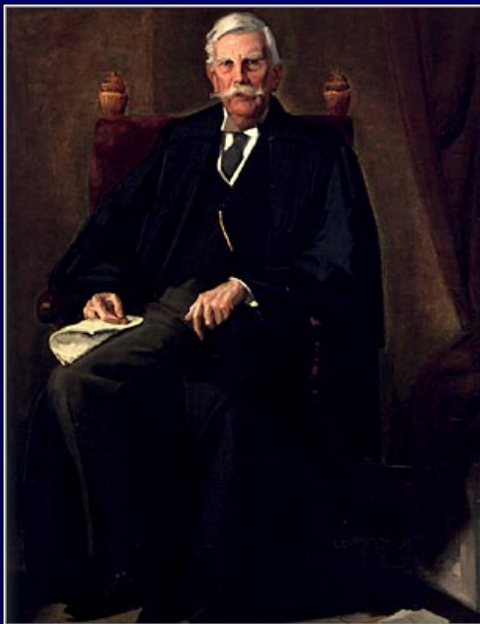
7. The High Court Bias – the role of lower federal courts and state appellate and trial courts and constitutional parochialism.



# Constitutions & Rights

## *Twenty-Two Keys*

8. The general emphasis on classical rights – *property, speech, press, social rights, civil rights, e.g.* – has not been constant and it has been responsive to historical necessity and context.



"The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic."

**Oliver Wendell Holmes, Jr.**  
Schenck v. United States

# Constitutions & Rights

## Twenty-Two Keys

9. There is little attention to **substantive social rights guarantees** in the federal Constitution and state constitutions – income, housing, a job, e.g. Negative vs. positive liberty, and the distance between the United States and the rest of the world.

### *Constitution of the Republic of South Africa – 1996*

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

26. (1) Everyone has the right to have access to adequate housing.  
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

29. (1) Everyone has the right

- to a basic education, including adult basic education; and
- to further education, which the state, through reasonable measures, must make progressively available and accessible.

### *Iraqi Constitution*

#### *Chapter Two: Rights, duties, and public and private freedom*

##### RIGHTS

- Iraqis are all equal before the law without regard to gender, opinion, belief, nationality, religion, sect, or origin. Discrimination on the bases of gender, nationality, religion, sect, origin, or social position is forbidden. They [Iraqis] have the right to personal security, life, and liberty. Nobody may be deprived of his life or liberty except in accordance with law.
  - Equality of opportunity is guaranteed to all citizens in accordance with law.



# Constitutions & Rights

## *Twenty-Two Keys*

- 11.** No rights are absolute – Life, Liberty, Property.  
“Congress shall make no law...”

*The Constitution is not a suicide pact.*



**Robert H. Jackson**

“There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

Terminiello v. Chicago, 1949



# Constitutions & Rights

## Twenty-Two Keys

- 12.** Constitutional processes and rights, therefore, are best understood in the context of politics – distributive justice – costs, benefits, and rewards.



Susette Kelo





# Constitutions & Rights

## Twenty-Two Keys

13. A critical and continuing issue is **who defines the constitutional system** and the **rights and responsibilities** associated with it – national and state constitutional conventions, courts, the legislature, the executive, the people, the states?





# Constitutions & Rights

## *Twenty-Two Keys*

**14.** The problem of sovereignty –  
*“We the people” or something else?*  
The Philadelphia Convention and the re-invention of politics and constitutionalism. Republic in a large area, a kinetic form of government, whom to protect:



- *The minority from abuse of the majority?*
- *The majority from abuse of the government?*
- *What is a minority?*



# Constitutions & Rights

## *Twenty-Two Keys*

**15. Constitutionalism – federal and state – has been shaped in two ways:**

- i. **Arguments about popular consent and control *versus***
- ii. **Fundamental or higher law**

**The ability to hold contradictory ideas simultaneously.**



***Do not be tyrannized by dichotomies!***



# Constitutions & Rights

## *Twenty-Two Keys*

- 16.** The history of the development and protection of rights rests as much in the structure of government as in the bill of rights or declaration of rights guarantees – separation of powers, federalism, checks and balances, especially.



*Tension*





# Constitutions & Rights

## *Twenty-Two Keys*

17. Rights and powers should not be confused – the **power to declare war** is not the **right to declare war**. The **right to speak** is not necessarily the **power to speak**. The debate over slavery in territories in the mid-nineteenth century. State sovereignty vs. state rights.

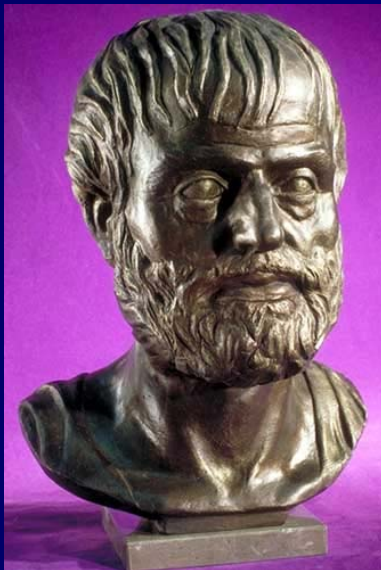




# Constitutions & Rights

## *Twenty-Two Keys*

- 18.** Constitutions are a form of law, and all law is a system of social choice, and that means that constitutions – federal and state – mirror those social choices.



Make the constitution fit the people.

**Aristotle**



# Constitutions & Rights

## Twenty-Two Keys

19. Constitutions and law discriminate – to have one right you may lose or diminish another right. **Rights, therefore, are not “free”; they must be earned.** One generation’s “losers” may be a subsequent generation’s “winners.”





# Constitutions & Rights

## Twenty-Two Keys

20. Constitutions and Civic Religion – *the symbolic role of the Constitution in American history* – Nullification, Civil War, World Wars, Great Depression, and Watergate.





# Constitutions & Rights

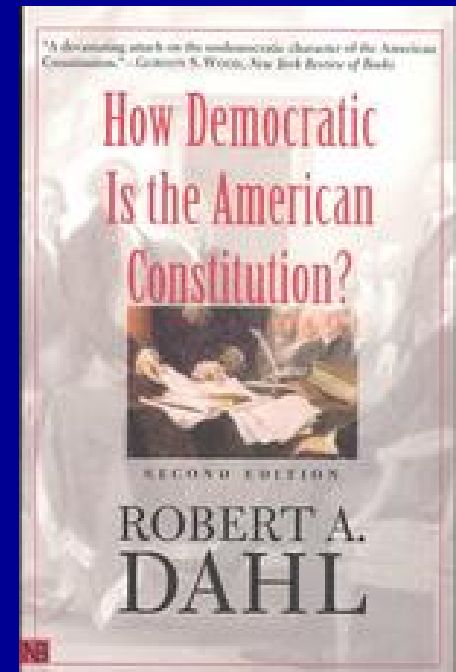
## Twenty-Two Keys

- 21. How Democratic is the American constitutional system – federal vs. state?**
- The problem of representation – large vs. small states and the House vs. Senate.**
  - The electoral college.**
  - Initiative, referendum, and recall.**
  - Election vs. appointment of judges.**
  - Winner take all.**

### The New York Times

BUSH PREVAILS; BY SINGLE VOTE,  
JUSTICES END RECOUNT, BLOCKING  
GORE AFTER 5-WEEK STRUGGLE

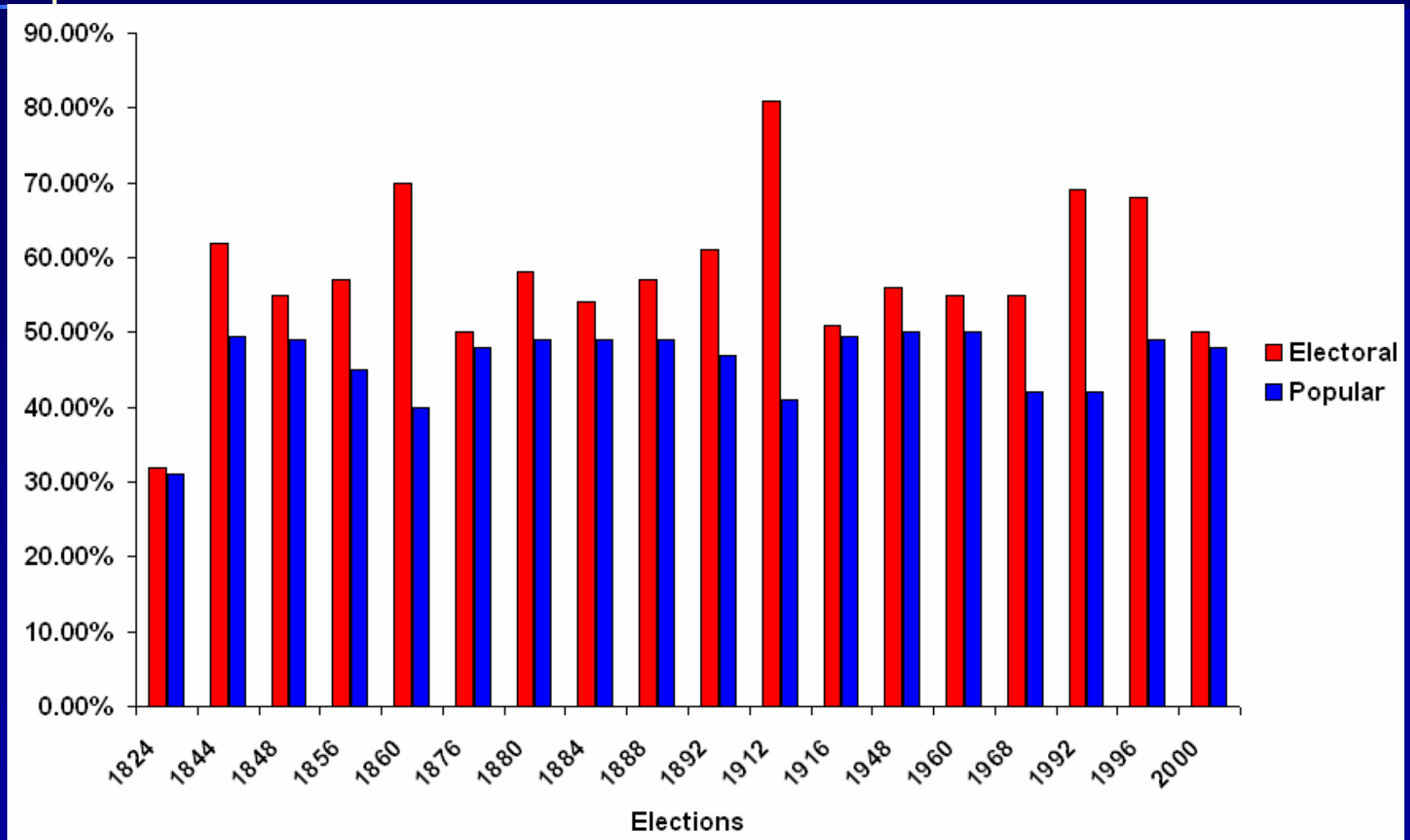
December 13, 2000





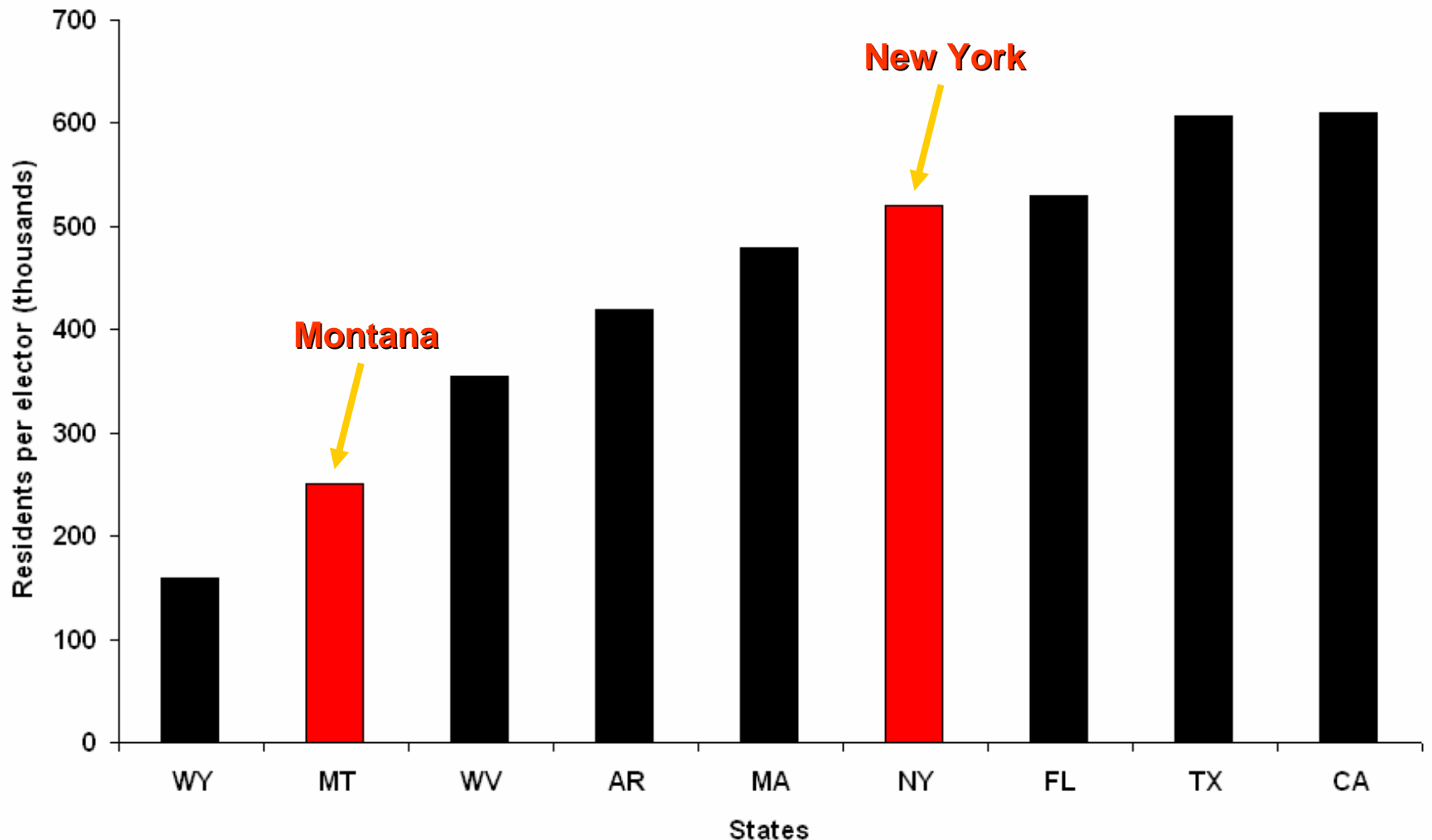
# Presidential Election Results

## *Elections Won With Less than 50% of the Popular Vote*



# Unequal Representation in the Electoral College

## *A Sample of States*



# Constitutions & Rights

## *Twenty-Two Keys*

**22.** An underperforming democracy? The United States vs. the world's twenty-one other "enduring" democracies and the United States vs. South Africa.

<i>Variable</i>	<i>U.S. Rank</i>	<i># of Countries</i>	<i>Percentage of Countries Performing Better than U.S.</i>
<i>Budget Deficits, 1970-1995</i>	<i>10<sup>th</sup> most of</i>	<i>22</i>	<i>43</i>
<i>Unemployment, 1971-1995</i>	<i>8<sup>th</sup> highest of</i>	<i>16</i>	<i>47</i>
<i>Rich-Poor Ratio, 1981-1993</i>	<i>4<sup>th</sup> greatest of</i>	<i>18</i>	<i>82</i>
<i>Welfare state index, 1980</i>	<i>17<sup>th</sup> lowest of</i>	<i>18</i>	<i>94</i>
<i>Foreign aid, 1992-1995</i>	<i>19<sup>th</sup> lowest of</i>	<i>19</i>	<i>100</i>



# Constitutions & Rights



Source: [www.cartoonbook.com](http://www.cartoonbook.com)