Richard A. Marino October 2014  
AMS321, US Constitutional History

# The United States Constitution, an Evolving Document, Has Remained Surprisingly Stagnant

While the Constitution of the United States is considered to be an evolving document, it has remained largely constant throughout history, except for the expansions of certain people's rights. When the constitution was drafted in 1790, the only people who had complete rights were white males, which was already an expansion over Thomas Jefferson's "white, male, landowners." The "spirit" of the constitution encourages amendments when an appropriate time arises. In this course, we discussed cases of people campaigning for rights to which they believed they were entitled. Not all of these cases resulted in formation of a constitutional amendment, but all did, eventually, allow for creation of a law that accomplished the purpose, and clarified the particular rights of various groups. **This can clearly be demonstrated by looking at the expansion of rights of women over time, particularly the right to vote, the right to work/occupational choice, and the right to birth control.**

## Right to Work/Occupational Choice

Myra Bradwell campaigned for the right to be an attorney; she did not effectively succeed. While she was authorized in her deathbed, during the course of her life, she was unable to practice, despite apparently possessing the skills and competencies required to do so. Bradwell studied her husband's law books, and went on to found the Chicago Legal News, which was well regarded and extremely popular among attorneys in the state of Illinois. Clearly, Bradwell was competent to practice law, as she edited a digest periodical that documented recent cases in courts within the State of Illinois. Later, upon attempting to join the Bar, and become an attorney, she was not approved. In *Bradwell v. Illinois* the court ruled that the Privileges and Immunities did not apply to right to practice a profession. (Bradwell v. Illinois). While Bradwell was admitted to the Bar on her deathbed by her husband, this was not due to any legal reason, and was effectively a one-off act of kindness.

Around the same time as Bradwell's struggle, Bevel A. Lockwood engaged in a campaign to practice law exemplifies a similar level of significance. Lockwood was one of the first women to complete her studies at the National University Law School in Washington, DC. Upon completion of her studies, she was not granted a degree, and petitioned President Ulysses S. Grant, for the degree (Grant was also the ex officio president of the law school). Upon receipt of her degree, she was admitted to the District of Columbia Bar, but was refused the privilege of practicing before the Supreme Court (eventually allowed after an 1894 appeal), and subsequently the privilege of practicing law in Virginia. The Virginia state's bar declared that a "person" who was allowed to practice in front of the Supreme Court, or in another state, would be allowed to practice in Virginia. In a decision that would be referenced many times from 1894 until 1971, the court upheld that the word "person" could be intended to refer to males only, thus excluding her from practicing. This decision was based on a comparison drawn to the Dread Scott case, in which it was established that there could be a second class of citizens to which some rights that would normally be granted by the Constitution are not applicable.

## Right to Vote/Susan B Anthony

During Susan B Anthony's trial, the defense declared that "for any state to make sex a qualification that must ever result in the disenfranchisement of an entire half of the people [is] a violation of the supreme law of the land." (Life of Susan B. Anthony). Were this considered to be the case at the time, there should have been no problem the day Miss Anthony visited her polling place and cast her ballot. Instead, in order to vote, she needed to intimidate the poll workers into allowing her to cast her ballot by bringing a large number of women with her. After voting, she returned home and waited for a U.S. Marshall to arrest her. While women were neither expressly forbidden, nor authorized to vote, it simply wasn't considered within the *status quo* for a woman to vote.

A distinction of sex was never mentioned in the constitution until 1868, in the Fourteenth Amendment. A mention of rights for "males" was included in an attempt to prevent Confederates from interfering with the newly authorized rights of the freedmen. This was not tested until Minor v. Happersett (in 1875), in which the Supreme Court ruled that the Privileges and Immunities Clause (Article 1) of the Fourteenth Amendment to the Constitution did not protect the right to vote.

Two years later, in Minor vs. Happersett, the supreme court declared that while Minor was a citizen of the United States, the constitutionally protected privileges of citizenship did not include the right to vote, rendering the privileges and immunities clause of the Fourteenth Amendment irrelevant.

As discussed in the context of Lockwood above, there was some question in relevant case law as to the definition of a "person", or "citizen". There was some question as to the relevance of the Thirteenth, Fourteenth, and Fifteenth amendments toward women at this time. In response to a case known as the "Slaughter House Case" in Louisiana, the Supreme Court declared that, in regards to those amendments, "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their full and just weight in any question of construction. Undoubtedly while negro slavery alone was in the minds of the Congress which proposed the thirteenth article, it forbids any kind of slavery, now, or hereafter." This provided a further and more concrete standing for the guarantee of the privileges and immunities, although it was still considered not to apply to women.

By 1915, several states had granted women the right to vote, and had set enough house seats to vote in favor of suffragists. It took a considerably longer period to stabilize the senate, due to six-year terms, but this was eventually overcome in 1918. The last state required to ratify the Nineteenth Amendment, Tennessee, had convened a special session of it's own legislature, which eventually ratified the amendment on August 26, 1920. (Industrializing America 1880-1920, 308)

## Comstock Law, Freedom of Speech, and Contraceptives

Margaret Sanger claimed that, as a women, who is a citizen, she has a right to her own body, and that she should be allowed to protect it by preventing herself from getting impregnated. (video) Sanger had noticed that poor women had a large number of kids, (video) and wealthy women had very few, or none at all. She set to work investigating this, and learned of various types of birth control, which were nontrivial to obtain. In addition to this, she learned that many poor people did not understand how sex and reproduction worked, and often attempted abortions in unsanitary and unsafe manners. She set out to educate these people, and protested the unavailability of information, as well as birth control itself, by writing and distributing literature.

The Comstock Law, officially the Act for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use", was enacted on March 3, 1873. The Act made it illegal to send erotica, sex toys, abortifacients, and contraceptives, as well as literature about those articles, using the United States Postal Service. In 1917, Sanger began publishing the Birth Control Review, a monthly periodical targeting primarily poorer women, with information on various birth control methods. Shortly thereafter, Sanger was indicted under the Comstock Law for distributing obscene literature; material describing contraceptives was considered to be obscene. On a later appeal in 1918, she was acquitted of charges, under the guise that contraceptives may legally be discussed as a means of preventing disease.

Sanger had also opened a birth control clinic in Brooklyn, New York on October 16th, 1916 (video). Nine days after the clinic opened, police arrived and arrested Sanger. She posted her bail of $500, and went home. A short time later, police returned, and arrested Sanger, and her sister Ethyl, for breaking a New York state law that prohibited the distribution of contraceptives, as well as for operating a public nuisance. Sanger and Ethyl went to trial in early 1917. A judge found Sanger guilty, after determining that women did not have the right to copulate with contraception. Ethyl was offered a lesser sentence if she promised not to repeat the offense. She accepted the offer and was released. Margaret Sanger was offered the same, but declined, and was sentenced to a work camp, where she later went on hunger strike, and was beaten as a result. (video)

There are a wide variety of legal issues that arose here, the most important being that Sanger was denied her First Amendment rights, as the Comstock Law goes against the rights to freedom of speech and freedom of the press. The Comstock Law makes it illegal to disseminate certain information, and so goes against these rights. Sanger was indicted for disseminating information on a forbidden subject. While her appeal in 1918 was a boon for her personally, it did not help the conditions of the freedoms that were hindered by the Comstock Law in society as a whole. Her appeal did, however, allow physicians to prescribe birth control for the first time.

With the prescription rule in effect, Sanger started another birth control clinic, the "Clinical Research Bureau," in 1923. The Bureau hired a physician, who prescribed birth control to women who came in for consultation. For the first time, birth control could legally be obtained in the United States. The doctors in the physician were all women, and were subsequently ostracized by the general community of physicians. Although her plight for birth control did not result in a constitutional amendment, her efforts weren't unwarranted, and resulted in a significant paradigm shift within the government and society pertaining to contraceptives.

## Conclusion

Of the struggles discussed here, only one resulted in a full amendment to the constitution, the right to vote having resulted in the Nineteenth Amendment. Despite this, all of the cases described have resulted in legal changes, either through legislation or case law, that resulted in an expansion of rights for the relevant parties, namely women. Right to work cases were resolved on various, minute scales at various points, and were eventually cleared up, indirectly, by the time of the Nineteenth amendment. The struggle for contraceptives, mainly driven by Margaret Sanger, resulted in case law in the state of New York that allowed physicians to prescribe contraceptives, as well as a judicial opinion that contraceptives may be discussed, as they may be used to prevent diseases. All of the events discussed happened between 1870, and 1925, a period of only 55 years. Although by the end of the period women were guaranteed significantly more rights, the Constitution did not change significantly in appearance.