

**Constitutional Exchange in Japan:
From Shogunate to Parliamentary Democracy¹**

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I. Introduction: Constitutional Exchange and Japanese Political History

This paper uses recent work from constitutional political economy to analyze the constitutional politics of Japan as it shifted from a medieval empire or federation to a modern parliamentary state in the late nineteenth century. Peaceful constitutional reforms normally take place within an existing political and legal order, and, as such, require the support of those who have the authority to change the rules of governance. To acquire this support, constitutional reforms must advance the interests of those who already hold much of the authority to make public policy, and this as in ordinary markets often requires mutual gains from exchange. Recent research in constitutional political economy suggests that economic development, international political shocks, and ideological shifts can all create opportunities for constitutional exchange. Such factors clearly played a role in the development of the Meiji constitution—as, of course, did the preexisting economic and political interests of those with the power to adopt new rules for governance.

The analysis suggests that the Tokugawa period, the Meiji restoration, and its transition to constitutional monarchy can be understood as settings in which a good deal of constitutional exchange took place. This is not to say that all constitutional developments in Japanese history are lawful reforms or motivated by narrow self-interest, but rather to say that the interests of those with the authority to reform the rules of governance had important effects on the course of Japanese constitutional development. Even in cases in which military threats are important considerations, resistance to new procedures can be reduced by choosing reforms that advance

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mutual interests and minimize unproductive conflict. Consequently, analysis of potential gains to trade sheds very useful light on the final constitutional outcomes, whether accomplished entirely through peaceful means or partly through force.

This paper uses a federal version of the king and council model as its main engine of analysis. It looks for gains to trade that may exist between the king and his council and between the central government and regional governments. To justify this approach, the first half of the paper explains why the king and council template for governance is so common. Part II provides a brief “natural selection” explanation for the widespread use of the “king and council” template. It argues that the king and council “template” is commonplace, not because of historical accident, but because experience demonstrates that it is a relatively efficient and robust institution for governance, e.g. for making policy decisions. Part III develops an efficiency explanation for the use of the king and council template in national and regional governance. It analyzes short-run informational advantages of the king and council and notes that long-run problems associated with succession can also be addressed through king and council governance. Part IV develops a model of the emergence of divided government as a method of avoiding wasteful conflict. It notes that federal forms of the king and council template allow policymaking authority to be divided among those involved in conflict in a manner that replicates the distributional results of conflict, but avoids “rent-seeking” losses associated with civil war.

The second half of the paper remainder analyzes constitutional developments in Japanese in the late Tokugawa and Meiji periods and develops evidence of constitutional exchange. The latter required a significant amount of historical research, because historians tend to focus their attention on particular people and places rather than on the evolution of political institutions. (Evidently, many institutions are sufficiently stable that they may be taken as “given” for purposes of historical analysis.) Part V analyzes how changes in the interests and ideas of senior government officials affected constitutional developments before and after the Meiji restoration.

Importance of Rational Choice–Based Historical Research

The analysis of constitutional reform is important for several reasons. First, if social science has made significant progress at understanding how contemporary economic and political processes operate, it should also be able to account for the predictable elements of

national and world history. History provides a rich source of data that is too important to leave to historians. Second, the study of constitutional history may allow new theories of constitutional dynamics to be developed. It is possible that the process of governmental decisionmaking changes through time in more or less predictable ways, if so constitutional history may stimulate the development of hypotheses concerning such causal links. Third, history potentially allows theories of constitutional design and reform to be tested. For example, there is a large literature from political science and sociology that stresses the importance of revolution in shifts from authoritarian to parliamentary regimes. In many cases, however, the path to democracy is gradual and peaceful, rather than marked by civil war and violence. The model of constitutional reform developed below demonstrates that constitutional change requires neither violence nor altruism. Fourth, we know that most existing democratic constitutions have been amended many times, both through formal and informal means. Rather than consider all such changes illegitimate, as some conservatives would insist, science demands that we bring such changes into our analysis so that we can better understand such processes and perhaps learn something useful about the institutions of constitutional reform.

Methodological Differences between Social Science and History

A public choice analysis of past events is not “history” in the sense used by historians, but rather social science. Social science does not attempt to explain everything that happens, because much that happens is the result of chance events and unusual personalities. Thus, for the purposes of social science, it is necessary to ignore many of the factors that actually “determined” historical events. The rational choice approach to social science does this explicitly by using mathematical models to identify general tendencies present whenever a “typical” person faces “common” circumstances. By doing so, it attempts to isolate general features of the choice environment—interests, ideas and institutions—that tend to generate particular choices—policies, institutions, or institutional reforms. In the case of political analysis, the typical person is a policy maker and the circumstances are jointly determined by existing institutions, external opportunities, and constraints. The present analysis of Japanese constitutional history, thus, begins with models rather than with observed events.

In contrast, historians are interested in all the details that jointly “determined” the events of interest. Historians, consequently, focus a good deal of attention on the interests of particular decision makers and unusual circumstances that contributed to the particular events

of interest, because random factors plays a significant role in nearly all events. Idiosyncratic factors are, thus, necessary to provide a complete account of most important past events. It is only in cases in which chance factors are of little significance that the accounts of historians and social scientists should be essentially identical.

Differences between the Present Analysis and Previous Public Choice Work

Most public choice analyses of governance have used unitary models of government. As a consequence, Public choice research has developed very good models of direct and representative democracy and also good models of autocracy and dictatorship. Unfortunately, unitary models of governance have a difficult time accounting for the effects of institutions on policy outcomes, because these effects arise, in large part, from dividing policymaking authority within the central government or between the central and regional governments in particular ways.

Most real world democratic and autocratic governments are not unitary states, but rather divide policymaking authority among several branches or levels of government. For example, most governments include both a “king” and a “council,” that is to say, a branch of government headed by a single chief executive and another composed of a “committee of equals” that makes decisions by consensus or counting votes. In parliamentary democracies, the council (parliament) selects and monitors the chief executive (chancellor or prime minister). In a presidential democracy, the president and parliament are independently elected and legislative powers are divided between the president and the parliament. In autocratic regimes, the king often selects a council of advisors, who often represent regional and/or economic interests. In constitutional monarchies, a hereditary king is combined with an elected parliament, and legislative authority is divided between the king and parliament. Moreover, most central governments possess less than complete authority over public policy. Most political systems distribute the authority to make public policy among central, regional, and local governments (which also use the king and council template).

Policymaking authority is multidimensional. This implies that a given assignment of authority is not necessarily Pareto efficient for those persons who possess the authority at a given moment. That is to say, “constitutional gains to trade” may emerge through time as political and economic circumstances change. Together the multidimensionality and divisibility of policymaking authority allow political power to be transferred peacefully and lawfully as

results of constitutional bargaining (Congleton 2003, 2004). For example, a king may accept diminished policymaking authority in exchange for additional tax revenue or security. This was, for example, an important part of the explanation for both the origin of European parliaments with veto power over taxation and also the origin of the “free towns” of medieval Europe, which generally paid the king additional taxes in exchange for additional local autonomy (Pirenne 1925). In other cases, the reassignment of policymaking authority may reflect changes in the common political interests of the government (Buchanan 1975). This is, for example, a partial explanation of the Meiji reforms introduced in the decades after Admiral Perry’s arrival in 1854 and revealed weaknesses in long-standing Japanese institutions.

Historically, we observe many cases in which the authority to make public policy shifts back and forth between king and council or between the central and local governments in response to changing political and economic conditions. As legislative authority shifts from the king to the council in feudal societies, oligarchic or parliamentary rule emerges. As power is shifted from the king to the council in constitutional monarchies, a parliamentary system may emerge. As power returns to the king, an authoritarian system reemerges. There is a good deal of evidence that variation in the policymaking authority has significant effects on public policy choices (Congleton and Swedenborg, 2006).

In cases in which a shift of authority is peaceful, it is very likely that the result advances the interests of those with the authority to reform the rules of governance. That is to say, it is very likely that such changes are instances of constitutional exchange rather than accident, coercion, or a formal constitutional convention.

II. Organizational Selection and Convergence

To understand the process of constitutional reform, it is useful to recall that governments rarely emerge as the consequence of a single universal contract or conquest, but rather emerge gradually as one of many types of organizations in the distant past. As such, governments, like other organizations, are based on a long series of experiments that attempt to solve a wide variety of internal incentive and decision problems, including significant ones associated with governance and institutional stability.

All organizations share the property that they are formed to advance goals that can best be achieved by coordinating the efforts of more than one person. This is true of simple organizations in which fellowship is the organization’s only objective and being organized is an

end in itself. It is also true of large and complex organizations, such as governments and international corporations whose aims concern people, places, and activities beyond their membership. All formal organizations, consequently, confront similar incentive and decision problems.

Economists have spent a good deal of time analyzing how incentive problems associated with team production and coordination can be addressed with various sophisticated methods of contract and screening methods. All organizations attempt to induce their members to function as a more or less productive teams, rather than as an unproductive assembly of individual shirkers and rent seekers. Thus, it is not surprising to observe that organizations, both nongovernmental and governmental, adopt more or less similar systems of conditional rewards to solve internal incentive problems.²

Economists, however, have paid little attention to the problem of governance, the process by which an organization makes decisions that allocate their resources. Instead, they often simply assume that every private organization is well governed. That is to say, they assume that an entrepreneur or “formeteur” creates an organization and designs it to maximize his or her net benefits. The relevant net benefit is often represented as money profits for the case of organizations whose primary activity is commerce.

The task of establishing an organization is not trivial. It takes enormous time, talent, and energy to create a new organization. As a consequence, “formeteur” time and attention is one of every organization's most valuable and scarce resources, and the scarcity of formeteur time has obvious effects on the institutions created. First, all organizations tend to advance formeteur interests. Second, rather than trying to imagine every internal and external incentive problem that needs to be addressed in every conceivable circumstance, formeteurs often economize by selecting from a menu of preexisting organizational templates that have stood the test of time and thus proven to be robust solutions to a broad range of organizational problems. The common “decision” and “management” problems faced by every person or group that attempts to form an organization or to modify an old one, allows new formeteurs to learn a good deal from past formeteurs.

² The variations observed often reflect differences in an organization's ability to screen individuals and to rely on nonpecuniary reward systems. Religious and governmental organizations, for example, generally make more extensive use of nonpecuniary rewards than firms, but firms also try to encourage loyalty and an internal work ethic.

Other economic advantages of “institutional conservatism” tend to limit organizational experimentation. For example, it is generally less costly to staff organizations that are based on familiar principles than ones that are entirely novel. Experimentation also tends to be somewhat risky in cases where it is acknowledged that their organization functions in ways not fully understood by the formateur and his advisors. Thus, economics in staffing and risk aversion tend to reduce the menu of existing organizational templates available for formateurs.

Together the culling of failed institutional experiments and institutional conservatism imply that the theory of formal organizations can be far simpler than the organizations studied, the problems addressed by them, or the environments in which they function. Only a handful of general designs tend to be widely used in the private and public sector, because only a handful have attracted the interests of formateurs by solving a sufficiently wide variety of incentive and decision problems.³

The long-term search for “best practices” tends to generate a relatively small menu of institutional designs—both within the society in which the formateur operates, and among societies.

III. The king and council as a solution to problems of governance

Of particular interest for the purposes of this paper is a template for organizational governance that has stood the test of time. A template is not a unique organization, but rather a pattern from which a particular organizations can be created. The king and council template is widely used for both public and private sector governance, but in many different particular forms. Japan’s late medieval regime included both a shogun and *roju* (senior council). It was succeeded by similar imperial arrangements that also included the Emperor and his council of advisors. Contemporary Japan includes a prime minister and an elected parliament. Medieval and modern European kingdoms have kings and parliaments. Corporations often have a chief executives (king) and a board of directors (council). Universities often have a president and a board of governors.

Large organizations also use the king and council template for their internal governance. Provincial governments often have a governor and a local assembly. Local governments often have a mayor and town council. During the Tokugawa period, each regional ruler (*daimyo*) had

³ Elinor Ostrom (2005), for example, suggests that there are a large number of organizational choice settings, but these can be classified using a reasonably small number of characteristics.

his own council and towns were often ruled jointly by an appointed head man and council of elders (Mason and Caiger 1997: 210–11).

The rationality of formeteurs implies that widely used templates for governance are not adopted for religious or customary reasons, but rather because experience reveals them to be relatively efficient and robust methods for solving significant problems of governance faced by organizations. Several examples of decisionmaking problems solved by the king and council template are developed below.

Informational Dilemmas for Formeteurs

Wintrobe (1997) argues that every autocrat faces severe information problems. First, an autocrat faces the same fundamental information problems as an ordinary person. An autocrat has to make decisions, and their decisions are more likely to advance their interests if they are well-informed. Because time and energy are scarce, the autocrat must decide how much and what kinds of information to gather, which information sources should be believed, and how much of the information gathered should be shared with others. Second, an autocrat confronts a series of information problems that are associated with the power of the position held. Much of the information available to him will be intentionally biased insofar as individuals, especially those within the government, can benefit from manipulating the autocrat in some manner. For example, personal careers may often be advanced by exaggerating their loyalty and performance relative to other rivals within the government. Wintrobe (1997: ch. 2) refers to this filtering aspect of a ruler's informational problem as the "dictator's dilemma."

Third, the problem of getting useful information is compounded by a greater need for accurate policy information than that of individuals with less control over their organization's resources. The scope of an autocrat's policymaking authority is normally far wider than that of other members of his government and, consequently, so are the range of alternatives that must be accurately assessed if he or she is to make policy decisions that advance his or her own interests. Together, these imply that, in most cases, it will be difficult for any single individual to directly gather enough information to make accurate assessments of the relative merits of alternative policies. Moreover, the larger the organization is, and more complex its goals and operating environment are, the more difficult it is to collect sufficient information to make good decisions.

One widely used organizational technology for reducing an autocrat's information costs is the advisory council.

Advisory Councils for Well-Informed Formeteurs

Consider first the case of a fairly well-informed formeteur with unbiased expectations about the consequences of alternative policies and thereby of the relative merits of policy alternatives. Such a formeteur will not make systematic policy errors and, so, on average, will choose policies that maximize his expected utility. Yet a formeteur, like any other person, will economize on data and collect it only to the point where his expected marginal benefits equal his marginal cost. Ordinary statistical theory implies that the smaller the data set, the greater the estimation errors tend to be, other things being equal. Estimation errors reduce the quality of public policy for the autocrat, which implies that other methods of collecting information and making day-to-day policy decisions may be worthwhile.

For example, a formeteur may assemble a group of advisors and pay them for their advice (either directly in cash or indirectly through favors and privileges). If the benefits of improved policy decisions exceed the cost of maintaining the council, a king with a council will be better off than a king without a council, other things being equal.

Even the advice of a council of nonexperts chosen at random from the organization (or from the citizenry in the case of a governmental organization) can improve the quality of an autocrat's policy decisions. Although each person may be individually less informed than the autocrat, because such persons lack an encompassing interest in the organization, Condorcet's jury theorem implies that advice from such a council tends to be informative, insofar as the council as a group has more independent information than the formeteur. In this case, the council's median predictions about future events will tend to be more accurate than formeteur's own independent estimate.⁴ Together, these aggregation and estimation effects imply that a council of advisors can be a cost-effective method of aggregation, in cases in which more precise estimates significantly improve policy decisions for the autocrat.

In many cases, the proprietor can improve his council's accuracy by selecting a panel of especially well-informed independent individuals. Such expert panels will have a more thorough understanding of policy that makes their median forecasts even more accurate (lower variance)

⁴ Note that this provides an informational reason for using majority rule to make decisions rather than "consensus," which may or may not be consciously appreciated by formeteurs or council members.

than that of randomly assembled advisory committees. The more independent information in the minds of council members, the better is their median forecast, other things being equal. The independence of expert information sets can be increased by choosing experts from different regions of the country, from a variety of specializations, and by the creation of competitive contests for council positions.⁵

Advisory Councils in Settings of Ignorance

In cases in which ignorance exists, unbiased estimates are not possible for the autocrat, and the benefits of better information and policy decisions tends to be larger than in the previous case where a bit was known about all possibilities. In this case, better information reduces bias as well as the variance of the error term. An honest or well-motivated council of rationally ignorant advisors can obviously improve royal decisions by reducing rational and natural ignorance at a relatively low cost.⁶

Unfortunately, in order to profit from council advice in areas in which the autocrat is essentially ignorant, the organization of the council must overcome the “dilemma of experts,” the difficulty of taking advice from knowledgeable persons whose information cannot be readily appraised *ex ante*. Relatively short-term forecasts and advice can often be directly checked by the

⁵ Such "expert" councilors have a comparative advantage at gathering and processing information, because their opportunity cost for assembling and processing information is substantially below that of the formateur or because their talent as information processors is greater.

This informational comparative advantage is, of course, partly endogenous. It can be increased by constructing competitive games for council membership that reward policy-relevant information acquisition with high status or high salaries. In some cases, contests can be extremely effective, inducing greater investments by the players than the sum of the rewards given out, as is true of even simple lotteries (Tullock 1980). Moreover, payment in *positional goods* can be quite inexpensive for the proprietor, yet encourage substantial efforts by prospective councilors (Hirsch 1995; Frank 1985; Congleton 1989). Being councilor to the king (shogun, chief, or prime minister) may also produce other consulting opportunities as well as status.

⁶ The more extensive information set of such extended or representative councils partly reflects differences in backgrounds (military, business, church, agriculture), partly chance events which bring before them different bits and pieces of knowledge, and partly talents that lead councilors to more efficiently collect and process information. These natural differences can be magnified when specialization among councilors is encouraged. Although every councilor may be ignorant about some policy consequences that the king is well versed in, their areas of ignorance would not entirely overlap. (In the context of the model developed in the appendix, some may specialize in information about ΔY and other about ΔT .)

proprietor as events unfold, but long-term advice remains problematic to assess. (Of course, even bad short-run advice can be disastrous for the autocrat.)

Beyond gauging the quality of advice based on past performance, a formeteur can attempt to organize his council to minimize strategic information problems. There are several ways he can attempt to address the problem of information manipulation. The simplest method is to assemble a council that includes persons with well-understood, but conflicting interests, who possess overlapping knowledge or expertise. Such a council can be assembled by having regional interests or economic interests (guilds, land owners, the clergy, etc.) represented on the proprietor's council. A more or less "balanced" council implies that the proprietor will hear a wide range of policy assessments and that the *median* or average of the opinions heard is fairly well informed and more or less unbiased, insofar as the council as a whole lacks a policy interest that differs *systematically* from that of the formeteur.⁷

Within Japanese political history, such advisory councils are nearly always important factors in government policymaking, and they often included representatives with different interests. For example, during the Tokugawa period, the government of the shogun relied upon a senior council (*the roju*) consisting of three to six important regional leaders (*daimyo*). The governments of the Emperor also relied heavily on advisory councils of *daimyo*.

The first three of the Tokugawa leaders were cautious hardworking men who, although they surrounded themselves with capable advisors, nevertheless reserved the right to make final decisions (Mason and Caiger 1997: 193).

Governance in the Long Run: Advantages of Rules

Some organizations last longer than others, because they are designed to do so, others do so because their designs prove more successful than imagined. In either case, durable organizations necessarily address long-term organizational problems in addition to the immediate problems of team production and decisionmaking. For the present purposes, it does not matter whether institutional experiments succeed because they are carefully thought out or whether they succeed because of good fortune, as long as their long term relative effectiveness can be observed.

⁷ Both the size and representativeness of *advisory* councils can be varied to maximize the autocrat's informational advantage. At the autocrat's ideal, the marginal cost of a larger more complex council equals approximately the expected marginal informational advantage of improved public policies (e.g., those that advance the autocrat's interest in the present context).

In most cases, long-term problems are addressed by adopting standing procedures that guide decisions throughout the organization. Such durable rules or policies are not adopted because formeteurs operate behind a veil of ignorance or because they believe in “constitutionalism” or even the “rule of law.” Rather, they are adopted because such rule-based decisionmaking tends to improve the performance of their organizations. Without such predictable decisionmaking procedures, internal rules, and predictable rewards and penalties, organizations will lose members and territory to other more efficient organizations where predictable rule-based rewards are used.⁸

In addition to the economic advantages of stable routines for making decisions and implementing policy, arbitrariness is also limited by the autocrat’s own time and attention. The autocrat and his senior managers have to allocate their scarce time and attention among the problems confronted. A common practice is to issue a series of standing decisions, each of which to remain in force unless revised. By carefully analyzing one group of related problems at a time, general solutions can be developed. In this manner, the cycle of rule making and review tends to create a series of “rulings” or “policy principles” that are durable and, hence, predictable, insofar as they are sanctioned by the organization. In the long run, standing rules become the “law of the land.”

⁸ There are many cases in which established routines and specialization improve an organization’s ability to engage in team production. For example, suppose that Mr. A performs task X, Mr. B performs task Y, and Ms. C performs task Z. If performance is acceptable, rewards are R_A , R_B , and R_C . If performance is not acceptable, penalties are P_A , P_B , and P_C for whomever has not performed up to standard.

If standards of performance are arbitrary, the rewards associated with a given effort by A, B, or C will be random variables, and normal risk aversion implies that they will prefer to be members of organizations where rewards are more certain (have lower variance) other things being equal. Similarly, if the criteria for assessing penalties are volatile, the risk associated with being a member of even a productive organization is increased, which tends to lower the average penalty that can be applied, other things being equal. In this manner, the existence of other similar organizations—as tends to be true of regional and local governments—and the possibility of exit limits the arbitrariness of formeteurs and also increases the value of stable organizational routines and rules, both in the short run and long run.

The advantage of predictable reward systems for solving internal incentive problems implies that formeteurs and their successors would be wise to establish stable, predictable procedures for enforcing the organization’s rules. These procedures may not be uniform for all members of the organization—as for example, the formeteur’s family members may be subject to lower (or higher) standards—but the more predictable the procedures are, the easier it will be to assemble and maintain an effective organization.

Detailed regulations for important groups or classes underpinned the Tokugawa administration system. Such regulations took the form of basic codes, which were reaffirmed and sometimes revised at the accession of each new Shogun (Mason and Caiger 1997: 195).

The stability of these procedures and constraints is increased by various economic, cultural, and informational considerations that support rational institutional conservatism. To the extent that past rules are known to work tolerably well, and are supported by a preexisting culture or an intra-organizational culture that was partly produced by those rules, any change in procedures can potentially undermine an organization's productive routines.

Durable organizations, thus, tend to have their own quasi-constitutional environments composed of standing rules and decisionmaking procedures that advance formateur interests, given their external and internal constraints. Note that belief in the "rule of law" may emerge in such cases, but tends to be evidence of support for existing routines, rather than deep philosophical or legal convictions.⁹

Governance in the Long Run: Orderly Secession and Organizational Durability

In the long run, ongoing governance also requires an effective method of renewing both their king and council through time, as well as effective information collecting and processing institutions. A good solution minimizes unproductive conflict, while identifying "good policymakers" to replace governance by the original formateurs. It is also clear that organizations that effectively solve the secession problem are more likely to be durable, because they avoid unnecessary conflict and make better decisions through time. Such organizations tend to have more surplus available for maintaining its membership and for its productive activities, which makes them more likely to survive temporary external shocks and decision errors.

⁹ A belief in "constitutionalism" and the "rule of law" as principles of governance might, however, emerge within a successful government. That is to say, the success of an existing regime—which may be acknowledged to emerge for complex reasons not fully understood—will lead those who benefit from the existing regime to defend it against change. Such arguments may take both institutional and theoretical form.

In hierarchical organizations, formal rules often limit the discretion of subordinates. Within autocratic governments, these rules tend to bind formally all but the autocrat (or formateur), including council members, for example, who make significant internal policy decisions. However, the advantage of predictable rules implies that those rules also tend to constrain the formateur, even if in principle he or she can revise them at will.

A relatively skilled leader or manager from inside the organization can usually more readily judge the skills necessary for effective organizational governance than an outsider can. In organizations using the king and council template, the council often selects the new king. And, conversely, the king often selects new council members. In this way government is gradually renewed by those with the largest stakes in the continuation of the organization and the most intimate knowledge of its operation, which tends to increase the effectiveness of future governments. Such arrangements are common historically within a broad cross-section of organizations: churches, commercial enterprises, and governments. A Council of Cardinals selects the new Pope, and the Pope selects new cardinals. A parliament or council of electors often selects a king, and the king often selects new electors or members of parliament. A board of directors hires a new CEO, and the CEO may appoint or suggest new board members.

In cases in which an organization's council cannot agree on a new king, conflict among council members can consume substantial resources (including in some cases assassination of rivals), which in extreme cases or at times of crisis may reduce the organization's prospects for survival. If such succession crises are commonplace, a more or less mechanical method of selecting kings may improve performance by reducing conflict, even if the average result is a somewhat less competent king or council than would have been selected by a consensus-oriented council.

A very common mechanistic solution to the transition problem is to make the current ruler's oldest son his successor. In addition to reducing unproductive conflict, the creation of hereditary posts also tend to induce a more careful consideration of the long-term consequences of policy decisions, because fathers and mothers tend to value the future prospects of their sons and daughters (Tullock 1987; Olson 2000). In cases in which no clear heir exists, the council or childless king can make new appointments.

In stable circumstances, the ability to change policies to adjust to new circumstances may not be as important as avoiding losses from conflict about senior positions. As long as other crises are not confronted, hereditary solutions may be viable for a broad cross-section of government positions. Hereditary positions at all levels of government were, for example, commonplace during much of the stable Tokugawa period (Maison and Caiger 1997: 198—99). By retaining their advisory councils and deferring to past precedents, the decisions reached by successive rulers will tend to well informed, if not always well judged.

After the first three shoguns, “Their successors . . . came to office when the system was already in being. They had to rule as part of the established bureaucracy, abiding by existing laws and conventions and depending on the advice of serving ministers” (Mason and Caiger 1997: 217).

IV. The Emergence of Divided Governance

The previous section provided informational and succession explanations for the widespread use of the king and council template for governance, and for the widespread use of quasi-constitutional rules for both day-to-day and long-term decisionmaking. Thus, we rarely see a king without a council or a council without a king. Nor do we often see durable systems of governance without stable rules and internal procedures. The informational analysis, however, does not provide a rationale for moving beyond nearly polar forms of the “king and council” template to ones in which both the king and council share the authority to determine public policies. We now explore how problems facing a nearly all powerful autocrat may lead him to adopt divided government as a solution to costly games of conflict.

Divided Governance as a Solution to Games with Wasteful Conflict

Consider a setting in which the autocrat is dominant, but not in complete control of the entire country. If the “king” is the most powerful person in the territory of interest, yet lacks the power to impose his will costlessly on all within the entire territory, conflict can be extensive and consume a good deal of the kingdom’s resources. Clearly, a government that avoids such conflict would be economically and often militarily stronger, because fewer resources would be wasted in civil warfare.

Table 1 illustrates some essential features of an asymmetric game of political conflict in a setting in which two parties clash over the control of some territory, resource, policy, or theology. Suppose that the weaker of the two parties is able to resist the stronger, so that complete domination is either impossible or at least very costly for the stronger party. (In the case in which the stronger party can simply conquer the weaker and dictate terms, a “kingdom” or autocracy may be said to be the result, as in the upper right-hand cell.) The stronger party benefits from investing resources in conflict insofar as it is able to expand its dominion and/or tax base or generally achieve more control over policy. The weaker party benefits from resisting the stronger, insofar as it retains more power or property or generally achieves a better policy

result. The Nash equilibrium of this game involves a balance of power in which both parties make intense efforts, that is, engage in a power struggle.

		Stronger Party		
		Little Aggression n	Moderate Aggression	Intense Aggression n
Weaker Party	Little Resistance	6, 14	3, 16	0, 18
	Moderate Resistance	7, 10	4, 12	1, 13
	Intense Resistance	8, 8	5, 10	2, 11

Such investments in conflict are independently profitable in the sense that each party's own payoff increases as it invests more resources in the conflict (aggression for the stronger party/resistance for the weaker), other things being equal. However, the balance of military power equilibrium that emerges is clearly wasteful, because the welfare of both groups shrinks as additional resources are devoted to conflict. In the illustration, seven units of resources can be said to be wasted at the Nash equilibrium [$7 = (6+14) - (2+11)$]. As in a conventional rent-seeking game, both parties would be better off if they could achieve the same balance of power while reducing the extent to which each invests resources in the conflict that generates that balance.

A less resource-intensive form of conflict within a well-designed "collective choice" mechanism is one way of reducing the losses associated with such conflict (Hobbes 1651; North 1987). Moreover, if the parties agree on magnitude of the losses associated with conflict and the final result, as assumed above, they each have an interest in adopting a collective choice mechanism that achieves a similar final apportionment of resources at lower cost (Congleton 1980).

Note that both the "king and council" and federal systems of governance allow such outcomes to be replicated by dividing the authority to make public policies between king and council or among central and regional governments. Such divisions of authority can replicate

the payoff ratios of nearly any violent equilibrium, while reducing the extent of the resources consumed by conflict, making all parties better off. In contrast, unitary forms of political organization do not, by definition, allow the possibility of such power sharing—and so cannot be easily adjusted to avoid wasteful conflict.¹⁰

This method of avoiding wasteful conflict provides one explanation of power sharing within the Tokugawa Shogunate, which ended a long period of civil warfare. It is clear that policymaking authority was not simply vested in the shogun, but, rather carefully divided between the central government (shogunate) and the regional governments (*daimyo*). Policies were fine-tuned at regular meetings of the shogun and *daimyo* in Edo (Tokyo). Each party gave up some autonomy in order to secure something that it valued more. Replacing a more expensive form of conflict with a less expensive form, clearly made all parties better off.¹¹

Throughout their history as national rulers, the shoguns retained direct control over no more than a quarter of the territory and people of Japan . . . the remaining three quarters was parceled out among the *daimyo* to rule as their own domains (han) . . . a *daimyo* was generally lord of all that he surveyed from the top of his castle keep, and ordinarily a good deal more (Mason and Caiger 1997: 197–98).

Unfortunately, the payoff structure of the conflict game also implies that successful constitutional settlements of this sort require an enforcement device of some sort, which for major matters nearly always require institutional adjustments as well as formal agreements. Such

¹⁰ An effective collective choice mechanism does not generally eliminate all losses from conflict, but reduces the cost of conflict by encouraging the use of more “civil” forms of social choice (Congleton 1980). Persuasion and coalition building may replace warfare on the battlefield, assassination and counter assassination, or tax avoidance may be replaced by tax compliance when less confiscatory tax instruments are used to raise revenue (Hobbes 1959; Bush 1972; Buchanan 1975).

¹¹ It bears noting that this setting departs from the initial position imagined by many contractarian theories of the state, because the parties to the new instrument of governance are not necessarily equal nor are all affected parties necessarily consulted.

In nondemocratic regimes, the agreement (pact) reached normally involves only a relatively small subset of the most powerful members of the polity are necessarily consulted regarding the new allocation of policymaking powers—essentially the parties to the original conflict. Consequently, the resulting division of power may lack the normative appeal of the social contracts analyzed by Buchanan and Tullock (1962), Rawls (1971), or Buchanan (1975). However, such contracts among elites (pacts) can nonetheless reduce the deadweight loss of governance and also tend to make the political process more representative than would have been the case had the stronger party “simply” conquered the weaker.

problems tend to be social dilemma, rather than coordination games, and thus incentives to cheat on agreements always exist.

In the case of the shogunate constitution, it is clear that considerable decentralization and limitations on central government taxation were obtained by the principle *daimyo*, in exchange for an oath of fealty to the shogun. It was clear to all, however, that such promises are not self-enforcing. Compliance was assured by requiring *daimyo* family members to reside in Edo (Tokyo) as “hostages.” This system also reduced the likelihood of regional revolt, because it required the *daimyo* to spend one year in two in Edo (Mason and Caiger 1997: 197). In exchange, the *daimyo* and their own councils retained the ability to rule their own territories and were for the most part exempt from central government taxes. The result was a long period of relatively peaceful and lawful governance.

Constitutional Exchange and Divided Governance

The power-struggle game outlined above, also implies that changes in the nature of the underlying equilibrium—whether because of military innovation, changes in economic circumstances, or external shocks—will tend to cause the assignment of power between king and council to be revised if circumstances change. New circumstances will change the bargaining power of the participants. And new bargaining may take place that replicates the new balance of military power within the central government and/or between the central and regional governments. These military-based adjustments are not, however, the only source of opportunities for constitutional exchange. New opportunities also arise because of changes in the distribution of wealth or changes in the ideology. In either case, such shifts of authority are *not imposed* unilaterally by the stronger party, but rather emerge from bargaining in the political and constitutional context of interest.

The shogunate period exhibits a number peaceful shifts of authority between king and council and between the central and regional authorities, that are consistent with the constitutional exchange model. The shogun gradually transferred authority to his council and the bureaucracy for day to day rule, and regional governments gradually secured increased autonomy (Mason and Caiger 1997: 215–16). The shift in policymaking authority between king and council and between central and regional governance fluctuated somewhat, but tended to be in the direction of council rule and regional autonomy. The existence of a fiscal constitution like that of the shogunate period, allows both council members and regional governments to

offer tax revenue in exchange for authority to make public policies, and the shogunate governments were always hungry for new revenues (Congleton 2001; Congleton, Bacarria, and Kyriacu 2003).

In the course of two centuries, the result of bargaining over the distribution of policymaking authority was a complex decentralized unwritten constitution, in which hereditary councils in the central and regional governments and their respective bureaucracies controlled most day-to-day policy decisions and the shogun and the major daimyo lived comfortable lives of high politics and leisure in Edo.

By 1800, Tokugawa administration at its topmost level had evolved into an elaborate coalition of different interests. The interests maintained their separate identities and important ties between them were often familial and tacit, rather than formal and institutional (Mason and Caiger 1997: 201).

Success and Failures of the Shogunate Constitution

Constitutional negotiation is most clear in cases in which the results generate obvious benefits those directly involved in the negotiations. When a contract is well negotiated, all parties not only expect to benefit, they actually do benefit. In the case of the Tokugawa period, the shogunate constitution ended a long period of armed conflict and created a fairly stable system of property rights and law, which promoted economic development throughout Japan. Decentralized policymaking in the Han, allowed local variations in public policies to encourage development, while yardstick competition encouraged “best practices” to be gradually disseminated throughout Japan.

Economic growth tends to take place through expansion of labor and capital and also through specialization. Increased specialization implies that commerce becomes more central to ordinary life and a more important source of national output. Increased specialization and capital accumulation also tend to change the extent and distribution of wealth in countries that are initially based on agriculture. The income produced by commerce and manufacturing in shogunate Japan grew relative to that of agriculture, at the same time that agriculture production increased as new methods of farming were employed and more land was brought under cultivation. As a consequence, the samurai became courtiers and businessmen, rather than full-time soldiers, and many *daimyo* diversified into manufacturing and commerce. Barriers to trade, however, among the Han (*daimyo* territories) and a policy of international isolation

significantly impeded the development of national and international markets, although these policies were undermined to some extent by Japan's extensive sea coast.¹²

In the long run, however, it became clear that Japan did not grow as rapidly as Europe or North America. A new "yardstick" was introduced in 1853, when Admiral Perry and a small fleet from the United States Navy arrived. After a long period of relatively stable governance, the best practices of the past were obviously no longer the "best" of available practices.

V. Constitutional Exchange, and the Emergence of Parliamentary Rule in the Meiji Era

In Buchanan's terms, new circumstances may create "constitutional moments," and this was clearly evident in the two decades following Perry's arrival. On the other hand, opportunities to develop new institutions peacefully are constrained by interests that are generated and advanced by preexisting institutions. These interests often change as industrialization takes place and as liberal ideas spread and gain support, among those already in government (Congleton 2001, 2004). In the second half of the nineteenth century, these factors also created numerous opportunities for institutional reforms and constitutional exchange, which had profound effects on the course of constitutional development in Japan.

Japan was not entirely closed to foreign intercourse before Admiral Perry's arrival, although contacts were very limited. Contacts between the Satsumu and the Chinese continued via Okinawa (Mason and Caiger 1997: 205). Contact with Europe was maintained through the small trading post maintained by the Dutch on the island of Deshima near Nagasaki. Nonreligious books and newspapers from the Netherlands were translated by scholars (albeit slowly and for limited distribution, because printing was done via wooden block, rather than with movable type). In this manner, some Western scientific ideas and philosophical ideas were available to interested scholars, particularly in the south. Indeed, the Dutch had provided the shogun with advance notice that the United States would send ships to Japan a few years before Admiral Perry arrived in 1853 [Britannica 1911: 239]. Additional international commerce also took place illicitly along the coast and also with the Russians to the north.

¹² "The system of feudal government exercised a crippling influence, for each feudal chief endeavored to check the exit of any kind of property from his fief, and free interchange of commodities was thus prevented so effectually that cases are recorded of one feudatory's subjects dying of starvation, while those of an adjoining fief enjoyed abundance. International commerce, on the other hand, lay under the veto of the central government, which punished with death anyone attempting to hold intercourse with foreigners" (Britannica 1911: 33).

Tokugawa Reforms after Perry

Nonetheless, the arrival of Perry's four ships of war in 1853, his return in 1854, and subsequent treaties of access (1854) and trade (1858) had significant effects on daimyo and samurai assessments of the quality of existing Japanese institutions. Subsequent treaties with European states only reinforced their assessments of institutional weakness. It bears noting that this conclusion was not a superficial one that focused on military equipment alone, but was often far more sophisticated. Many senior government officials clearly understood that Western technology reflected organizational as well as technological advantages. To "catch up," many believed that a broad range of new organizational techniques had to be analyzed and adapted to Japanese circumstances.

New policies were rapidly adopted. First, a variety of long-standing quasi-constitutional domestic policies changed. The Shogun ended the prohibitions on construction and purchase of seagoing ships. The government ordered a battleship from the Dutch, who were also enlisted to "procure from Europe all the best works on modern military science." New fortresses were built, cannons cast, and samurai troops trained in their use. The translation of European scientific, legal, and political texts was both broadened and accelerated as interest intensified and as moveable type was introduced. Second, the shogun convened a special council of the major *daimyo* to determine the proper response to the new "yardstick" and the West's insistence on more open international markets. Third, the Emperor directed that "at the seven principal shrines, special prayers should be offered for the safety of the land and the destruction of aliens" [Britannica 1911: 239]. A crisis was clearly at hand.

The renewal of foreign trade after two centuries of closure clearly affected many Japanese family firms that now had to compete with distant foreign producers. It also clearly affected those in the South, who previously had exclusive arrangements with the Dutch and Chinese. Southern daimyo were among the strongest opponents to foreign trade at the imperial court. The Shogun was in the forefront of negotiations and, by the standards of the time, could be regarded as a "liberal" in the sense that he and his advisors acknowledged the need for institutional reform and modernization. However, neither the shogunate nor the Edo court was sufficiently powerful or influential to accomplish such changes on its own. It takes more authority to change the status quo than to maintain it, and much of the central government's authority had been traded away during the past century or so.

Trade increased the presence of foreign persons, who did not always follow the well established etiquette of the Tokugawa era, which increased resistance to the intrusions of uncouth foreigners. On the other hand, a small liberal movement began to take shape that pressed for open foreign relations and a more participatory political process. The first newspapers were printed, and many were critical of existing government policies and results. These liberalizing pressures were countered by conservatives who pressed for a return to “closure.”

Negotiations between the imperial court and shogunate took place regarding foreign treaties, domestic policies, and institutional reforms, but without obvious results beyond disagreement about the proper response. Many daimyo and samurai argued for renewed closure; others argued for the end of closure—largely out of necessity.

The Meiji Restoration

During the Tokugawa era, sovereignty formally rested with the Emperor and his court, and authority for “ordinary” policies was delegated to the Shogun and his administration. The Shogun, however, exercised considerable control over the coming and goings of the Emperor and his court through his Nijo-jo fortress near the Emperor's palace in Kyoto. With the failure of the shogunate to protect the homeland and enforce its own policies, support for the old “two government” system diminished, even among those who had previously benefited from it. The future would clearly differ from the past.

Consultations continued among representatives of the Shogun, imperial court and *daimyo*. A shogun died and was succeeded by Yoshinubo (Keiki) in 1866, who continued to press for modest reforms. Further consultations were undertaken.

In 1867, a major constitutional reform emerged out of this long series of negotiations, albeit reinforced by the military efforts on behalf of the Emperor by the southern *daimyo*. The Tokugawa regime accepted a shift of day-to-day policymaking authority from the new relatively weak Shogun to the relatively new and weak (15-year-old) Emperor Meiji. The new Shogun called a council of *daimyo* and high officials in Kyoto to announce his resignation, which was tendered the following day to the Emperor (Britannica 1911: 308)

“Now that foreign intercourse becomes daily more extensive, unless government is directed from one central authority, the foundations of the state will fall to pieces. . . . If national deliberations be conducted on an extensive scale and the Imperio decision be secured, and if the empire be supported by the whole people,

then the empire will be able to maintain its rank and dignity among the nations on earth—it is, I believe, my highest duty to realize this ideal by giving entirely my rule over this land” (Tokugawa Yoshinobu, reprinted from Mason and Caiger 1997: 259).

The Meiji “restoration” is considered by some scholars to be a unilateral act of generosity on the part of the Shogun to strengthen national governance and avoid civil war, and by others it is considered to be an act of surrender accepted out of necessity in the face of a superior military force.¹³ However, there is much that suggests that it can be regarded as part of the terms worked out for a major constitutional exchange.

The Restoration as Constitutional Exchange

The negotiations between the Shogun’s senior advisors and those of the Emperor clearly affected the details of the restoration. The shift of governmental authority from the Tokugawa to the Meiji court was initially accomplished without substantial change in the central government bureaucracy or regional governments, although a significant reorganization followed, which included surrender of the Tokugawa lands (*tenryo*) to the new central government (Mason and Caiger 1997: 259–60). The emperor relocated from Kyoto to the seat of Tokugawa power, Edo, after the city was renamed Tokyo. Policymaking authority remained for the most part in the hands of advisory councils.

The new regime was clearly more than a palace coup, however, because the change included clear commitments for constitutional reform. The 1868 reading of the “Imperial Oath,” which was written by senior *daimyo* advisors, rather than the young Emperor, included five major commitments.

We shall determine all matters of state by public discussion, after assemblies have been convoked far and wide... We shall unite the minds of people high and low . . . We are duty bound to ensure that all people . . . may fulfill their aspirations and not give into despair. We shall base our actions on the principles of international law. . . . We shall seek knowledge throughout the world and thus reinvigorate the foundation of this imperial nation. [No source?]

After the oath was read, 411 major and minor *daimyo* (including the 30 members of the new advisory council, the Giro) formally renewed their oath of fealty to the Emperor by signing an official document (Breen 1996).

¹³Emperor Meiji, of course, had at least formally always been the official source of the Shogun’s authority and continued to be the formal source of authority under the Meiji constitution. Today’s constitution formally rests on popular sovereignty rather than royal grants.

The parallels between the Emperor's oath and the resignation letter of Yoshinubo submitted the previous year suggest that much had previously been worked out behind closed doors. It is also noteworthy that the four powerful *daimyo* from the south also surrendered their fiefs to the Emperor, an action similar to that taken by Yoshinubo (Britannica 1911: 311). Bargaining and compromise is evident too, in that the imperial court had originally opposed shogunate efforts to negotiate treaties with the west and to modernize, but now fully embraced it, as implicitly did the 411 signatories. A constitutional exchange has to be acceptable to those who have the power to enact major reforms.

The first Meiji reforms were largely consistent with a constitutional exchange interpretation of the restoration. For the most part, the early reforms assured the continued regional political and economic power of the *daimyo*, a subset of whom had been the chief negotiators. A council of *daimyo* continued to run the government, although it now included a group selected by the Emperor, rather than the Shogun. This is not to say that distribution of policymaking authority did not change, but rather to argue that the reforms were not imposed unilaterally. The restoration clearly took account of existing interests.

Policymaking authority shifted back to the central government. The old federal system of government was reorganized. The ancient feudal territories became prefectures to be governed, rather than ruled as family domains. However, initially, the regional *daimyo* continued to rule as governors of their old territories and retained their territorial treasuries. National and regional tax bases were also reformed, so that they included income from commerce as well as from agriculture. Tax rates were reduced, but governmental receipts evidently increased, because of the expanded tax base. Regional *daimyo* were assured of 10 percent of the new tax revenues rather than 40 percent of that from agriculture alone (Britannica 1911: 312).

A less successful constitutional exchange was attempted to end the samurai's exclusive right to be members of the Japanese military. Cash "buy outs" of lifetime privileges were offered to the samurai with some success.¹⁴ However, when the army was reorganized in 1876 along more European lines, which ended the samurai's inherited right to military service and right to wear two swords in public, it generated significant civil unrest and also a significant

¹⁴ Approximately 400,000 samurai had rights to a lifetime pension, which was a substantial drain on the central government expenses. Many of the pensions were hereditary (Britannica 1911: 313).

regional civil war (the Satsuma Rebellion) in 1877, which was put down at great expense (*Britannica* 1911: 316–17).

The Emperor's oath was less than perfectly clear, probably because it reflected compromises among the negotiations. For example, whether the Emperor's commitment to "determine all matters of state by public discussion, after assemblies have been convoked far and wide" was a commitment to create a parliament or simply a promise to call the *daimyo* to Kyoto for consultations was not clear. The latter was a common procedure during periods of crisis under the shogun and at first appeared to be the only promise made.

The groups responsible for the "assemblies" language in the Emperor's Oath, however, pressed for broad assemblies, and induced several somewhat broader assemblies (*kogisho*) of nobles and samurai to be called (Caiger and Mason 1997: 284). Of course, these assemblies were consultative bodies without legislative authority. A new more influential "senate" of the *daimyo* (the *genro-in*) was finally convened in 1875, which was to discuss and suggest revisions to proposed laws and regulations. An assembly of prefecture governors also met in 1874 and 1878 (*Britannica* 1911: 319–20).

In practice, however, the senior council of the Emperor and the bureaucracy continued to control policy making. In this and other new practices, governance closely resembled that of the shogunate. Institutional conservatism had largely prevailed. And, although many new persons occupied positions of power, the old guard retained most of its authority and wealth.

Ideas and Interests in Constitutional Reform

Those in government tend to be quite content with the procedures under which they come to office, whether they are based on heredity, royal appointment, or particular election rules. Congleton (2004) demonstrates that election and other selection rules tend to be durable, because the high officials selected realize direct economic benefits and often ideological benefits from the existing rules. Since these same officials control the rules, and the rules are optimal from their perspective, they will resist changes in the selection process. Moreover, changes in interests regarding the selection procedures are unlikely to emerge from economic changes alone. Thus, the rapid industrialization that followed the Meiji restoration and its consequent changes in economic interests were unlikely by themselves to induce peaceful constitutional reforms of suffrage law although they may induce other significant changes.

Revolutionary threats as emphasized by Asemoglu and Robinson (2001) may induce changes in selection procedures, but credible revolutionary threats are not easy to organize and were not obviously present in Japan. Congleton (2004) argues that it is changes in ideas about “the good society” or about “qualifications for political participation” are more likely to induce changes in selection procedures than economic change alone or revolutionary threats. Consistent with the latter explanation, there was a significant shift in ideology that favored liberalization of both economic and political policies that took place in the fifty years after the restoration.

There is substantial evidence that long-held theories of governance began shifting rapidly in the period after the Meiji restoration, both among the educated and the politically active public and within elite circles of governance. New academic liberals drew on older Japanese writings on equality, law, and the state, and also drew from the new translations of Western philosophers. Among notable scholarly proponents of liberal reform were Fukuzawa Yukichi, who spent much of his life writing liberal tracts, and Nakamura Masanao, who translated J. S. Mill’s *On Liberty* into Japanese. Leading educators in the 1870s, many of whom had prominent positions in universities and in the education ministry, also promoted liberal ideas and institutional reform (Hane 1969). The first generation of newspapers published in the 1870s could also be regarded as liberal insofar as they advocated a “wider opening of the door to official preferment” (*Britannica* 1911: 47). These newspaper interests were not entirely political, but often promoted their owner’s “preferment,” which required liberalization in the sense of expanded political and economic participation.

New organized groups explored philosophical issues of governance, as for example the *Gakugeikodankai* in Itsukaiki (Devine 1979), while others pressed for liberalization of political and economic life, as did the Liberty and Popular Rights Movement, which lobbied for a written constitution and national assemblies (Mason and Caiger 1997: 284; Devine 1979). Ideas about political privileges began to shift as notions of “equality before the law” began to replace theories of family privilege among educated people, including many members of Parliament. Indeed, there were sufficient number of liberal groups and proponents of modernization that a confederation of liberal groups was organized (the *Aikokushi* or Patriotic League) to lobby for tax, regulatory, and political reform. Such groups attracted support from the growing rural and urban middle class as well as liberal intellectuals and academics.

Within government itself, Itagaki Taisuke from Tosa continued to advocate the creation of a written constitution and founded the first organized political party in 1878 (the *Jiyto*) to more effectively lobby for reform. The Emperor's oath, which mentioned broadly representative assemblies, was often used by liberals to insist on a written constitution with an elected national assembly.

This is not to say that members of the liberal movement of the early Meiji period always advocated liberal reforms for ideological reasons alone. Many did, but many others supported liberalization (more open governance and trade, modernization, and Westernization) for pragmatic political, economic, and military reasons—which was, of course, also true of the liberal movement in Europe during the nineteenth century. Nor did opposition to change or institutional conservatism disappear, although it increasingly had to be justified, rather than deferred to. The experience with Admiral Perry and subsequent European intrusions had clearly revealed that the “best practices” of the past were not always the best of all available practices.

Election Rules as Constitutional Bargains

The first formal major institutional reform was adopted in 1878, when an imperial edict announced that local government would henceforth be based on elective assemblies. A totally new selection process was adopted, although it was evidently designed to minimize its effect on the persons holding office, as was also common in Europe. Those eligible to sit in the new representative assembly had to meet a relatively high property qualification, as did those who voted in the elections. Voting was by signed ballot, and the assembly would meet for just one month each year. The local assemblies controlled local taxes (as ratios of national taxes), but prefecture governors remained unelected (Britannica 1911: 150, 319–20).

The result was not local democracy, but clearly a significant increase in representative governance. Elections replaced earlier selection procedures—which had for the most part been hereditary and hierarchical. The specific electoral procedures, however, drew office holders from the same relatively wealthy families who normally held office in the past. The effect of signed ballots helped to guarantee this result, because it allowed the most powerful families in a community or prefecture to make sure that their “former vassals” cast their votes for the “right” candidate. Without such assurances, it is clear that opposition from influential families at court would have been far greater, support weaker, and the electoral reform less likely.¹⁵

¹⁵ Similar wealth-based voting and office restrictions had been commonly adopted in most of the first

The Meiji Constitution

In 1881 an Imperial edict announced that a national assembly would be convened in 1891. Efforts to draft a written constitution for such an assembly were begun in earnest, and eight years later, Japan formally became a constitutional monarchy when the new written Meiji constitution was adopted at an Imperial ceremony in 1889.

As true of the local government edict, the Meiji constitution adopted Western forms of government and included new more liberal procedures for selecting office holders. However, it was also clearly designed to protect the interests of those already holding positions of influence. For example, rather than ground the constitution in popular sovereignty, the Meiji constitution was officially a grant by the sovereign, and the Emperor remained sovereign. Although royal policy decisions were to be cosigned by a cabinet minister, the ministers were appointed by the Emperor, and thus the new cabinet was very likely to include members of the present royal council of advisors. The Emperor retained the power to declare war and peace, sign treaties, and appoint and dismiss officials.

The existing political hierarchy outside of the imperial court was protected by using hereditary and wealth-weighted representation in the parliament (diet) and fairly restrictive wealth-based suffrage rights. Following the English design, the parliament was bicameral with a hereditary chamber of nobles and an elected chamber, which had essentially equal powers. Following the Prussian design for the elected chamber, the seats were apportioned by wealth. The top qualified voter-taxpayers, who paid a third of all taxes, received one-third of the seats, the next highest group of voter-taxpayers, who collectively paid one-third of taxes, received a third of the seats, and the rest of the electorate also received a third of the seats. About 1 percent of the total population of Japan—400,000 persons—were eligible to vote under the suffrage laws. Thus, the new electorate reached well into the old samurai class and new upper middle class, but no further. The Parliament had the power to veto new taxes and new laws. Free speech within the new diet would for the first time be protected (Britannica 1911: 142–46; Devine 1979; Mason and Caiger 1997: 296–99).

Given the existing distribution of income, the new election laws provided a small group of wealthy businessmen and landowners (largely drawn from the court nobles, *daimyo*, and

political liberalization in Europe, and were still in place in many countries in, for example, Sweden and England. Secret ballots were becoming common in the United States and Europe at about this time.

senior vassals) with one-third of the seats in the Parliament, and substantial control over public policy in the elected chamber, and complete control in the noble chamber.

Institutionally, the result was historic, nonetheless. Japan was now formally a constitutional monarchy. The government had moved beyond king and council—at least on paper—to king and parliament. Elections were now used to select members of government rather than family ties. Suffrage was far from universal, but governance was formally far more inclusive than the policy making bodies of the Tokugawa and early Meiji period. In these, as in many other respects, the Meiji constitution, as intended, resembled other European constitutional monarchies at this time. In much of Europe, kings rather than parliaments continued to have the right to appoint the “government” (the executive cabinet). And, the right to vote was even more widely regarded to be a privilege determined by wealth or tax payments, rather than a birth right. Once elections and a constitutional monarchy are in place, however, the steps from constitutional monarchy to parliamentary governance and democracy no longer require major changes in the organization of governance, but rather relatively modest reforms of existing procedures. Parliament must gain control over cabinet appointments, and suffrage must be expanded and based on one person–one vote.

Such reforms are by no means guaranteed. Many European systems of governance (e.g., England) had used procedures similar to those adopted in Japan in 1889 for centuries at a time without significant reform.

In industrializing countries of the nineteenth century, existing liberal economic and political interests were reinforced by rising incomes, improved communications technologies, and declining transportation costs. Together liberalization and industrialization tended to promote gradual democratization within parliamentary systems. Consequently, industrialization in Europe was linked with democratization, as policymaking authority gradually shifted to parliament, trade barriers were reduced, suffrage expanded, and appointments to the cabinet became more dependent on electoral majorities. Although Japanese history prior to 1890 was quite different from that of European nations, Japan followed a path of constitutional reform that was surprisingly similar to that of the liberalizing countries of Europe. Very similar constitutional exchanges were negotiated on these two continents during the next few decades.

A Rational Choice Model of Suffrage Reform

The shift to democracy requires an expansion of suffrage as well as an increase in the role of parliament. The former, as demonstrated below, tends to require a shift in the world view of those with political authority, because non-voters cannot vote and, absent a revolutionary organization, they are unlikely to directly influence constitutional or policy development.

Individuals generally have both pragmatic and ideological interests in suffrage law. Election law determines the median voter, the median member of the legislature, and public policy to the extent that the elected chamber has control over public policy. Election laws also determine what might be called the ideological nature of the polity. They determine who is a political citizen and whose interests “should” be taken account of when choosing public policies. Accepting a revised world view does not eliminate a person’s private economic and political interests, but it may induce changes in the means used to advance those interests.

Such dual interests in suffrage can be represented by including suffrage or suffrage norms as an argument in the typical citizen’s indirect utility function. For example, if the citizen *i*’s ideological norm is S_i^* , and the present law is S , the citizen’s utility can be modeled as:

$$U_i = u(G, X_i, |S-S_i^*|) \text{ with } X_i = (1-t) W_i \text{ and } c(G) = t \sum W_j \text{ with } j = 1, 2 \dots N \quad (1)$$

for a given level of personal wealth, W_i , government services, G , and tax rate, t .

Suppose that a typical voter's utility function is strictly concave, that government services and after-tax consumption, X_i , are goods, and that deviations from the citizen’s suffrage norm is a bad. In this case, Citizen *i*’s ideal service level will satisfy:

$$U_G = U_X X_G \text{ or } U_G = U_X (W_i) (C_G / \sum W_j) \quad (2)$$

which the implicit function theorem allows to be represented as:

$$G_i^* = g[W_i, |S-S_i^*|, \sum W_j] \quad (3)$$

In this very lean model of the demand for government services, both the service level and tax rate are indirectly determined by elections laws, because suffrage laws determine identity of the pivotal voter. Given an existing distribution of wealth, the minimum wealth that entitles one to the vote, S^L , implies a particular electorate and thereby a particular median voter for a given distribution of wealth, $W_v = s(S^L)$.¹⁶ The median of a distribution of eligible voters is determined

¹⁶ In weighted voting or weighted representative systems the “pivotal voter” is the voter that supports

by median wealth, W_v , whenever voter preferences for government services are either monotone increasing or decreasing in wealth.

This indirect effect of suffrage law on service levels can be represented by:

$$G_i^* = g[s(S^L), |S^L - S_i^*|, \sum W_j] \quad (4.1)$$

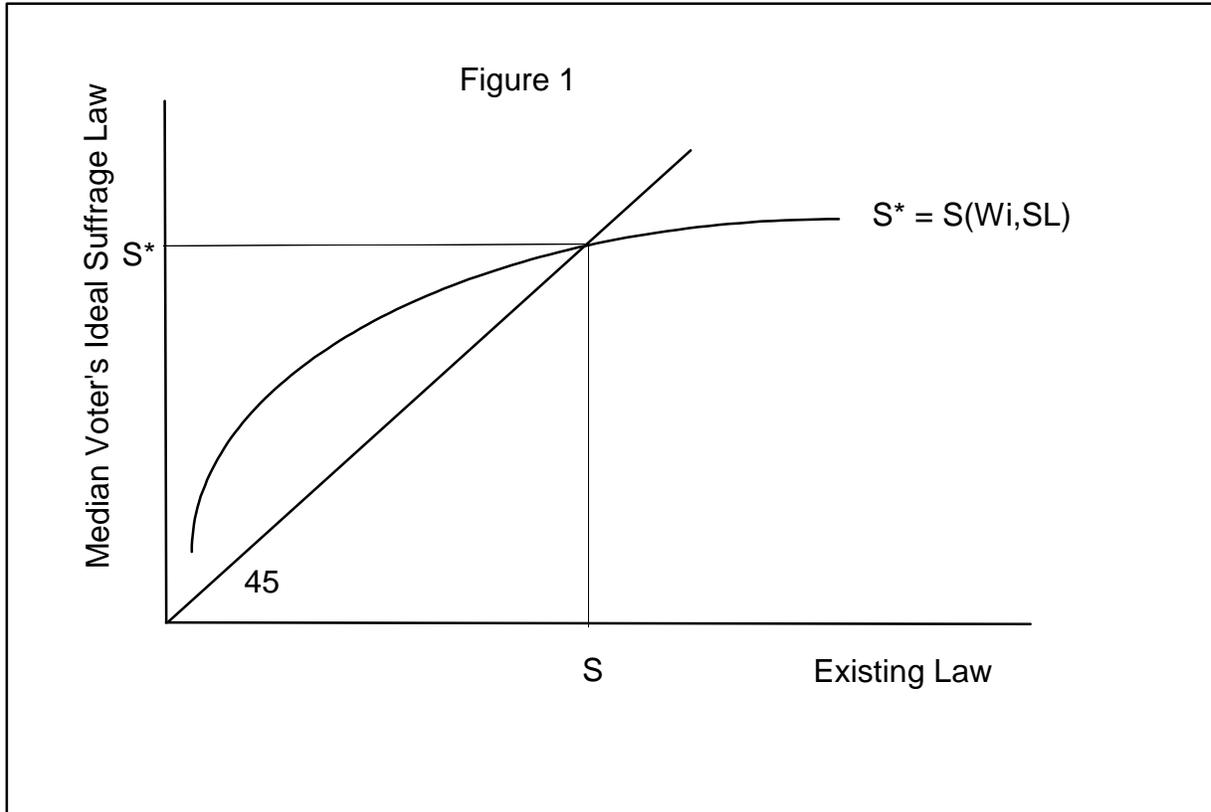
and its effect on the pivotal voter's utility as:

$$U_v^* = u(G^*, X_v, |S - S_i^*|) \quad (4.2)$$

If the median voter is completely satisfied with the existing suffrage law, the derivative of 4.2 with respect to S will be zero. It can easily be shown that the pivotal voter will not have an interest in suffrage reform if he or she has no direct ideological interest in suffrage or regards the present suffrage law to be ideal. In the absence of a significant nonfiscal interest in suffrage, the existing suffrage thresholds are optimal for the median voter, because $U_{S_{WL}} = 0$ and the first-order condition for the pivotal voter's ideal suffrage law are always satisfied at his (or her) ideal service level, G^* . The same result also suggests that changes in pivotal voter tastes with respect to private and public services or changes in the median voter's income will *not* cause the present pivotal voter to change the existing suffrage laws.

All equilibrium suffrage laws are fixed points. The existing suffrage law determines the identity of the median or pivotal voter who, in turn, prefers the current suffrage law. An electoral law equilibrium is illustrated in figure 1. Suffrage law equilibria can be very stable, as, for example, the early fifteenth century electoral laws for the English House of Commons, which remained unchanged for more than four hundred years.

the median member of the elected chamber of parliament. In such cases, the median voter will not be the median of the eligible voters. To simplify the discussion, these effects are neglected, but without significant loss of generality.



This model implies that a change in pivotal voter tastes or in suffrage norms is required to disrupt a suffrage law equilibrium. Even in such cases, however, it bears noting that a change in “ideological” interests may not lead the pivotal voter to favor changes in the election law. If the anticipated new pivotal voter favors a different suffrage law than the present pivotal voter, the current pivotal voter’s preferred suffrage law reform may be expected to generate a series of reforms, which may generate a suffrage law that is worse than the *status quo*. The choice facing the current pivotal voter (and his agent, the median member of parliament) is between the status quo and the new equilibrium that would emerge under different suffrage rules.

This is not to say that new suffrage law will never be adopted, but rather to indicate that the present pivotal voter cannot directly determine the new suffrage law, because any new law that he adopts can be revised by the pivotal voter generated by the new law. Given the continuity assumptions and the fact that suffrage laws are bounded at 0 and 100 percent, there will always be a fixed point, but it may not be an equilibrium that the current median voter prefers the status quo. Small changes in norms, however, tend to generate acceptably small changes in the electoral equilibrium and thus periodic changes in suffrage law.

Suffrage norms may change for various reasons, including philosophical reflection and experience. However, such changes are more likely if interest groups induce a broad cross section of voters to undertake such reflection. During late 19th century and early 20th century Japan, both significant liberal political parties and popular movements attempted to persuade a broad cross section of the Japanese public that more liberal economic and political laws were desirable for a variety of reasons. And although nonconstitutional issues often took center place in policy debates, the liberal arguments favoring more open markets and more open political processes were clearly effective (Hopper 1974).

In the end, there was sufficient support for new suffrage laws among those who could actually draft new laws, that male suffrage was tripled in 1900 as wealth qualifications were lowered (at the same time that wealth restrictions on office were eliminated) and then dropped twenty-five years later to create essentially to universal male suffrage in 1925 (Britannica 1911: 144; Mason and Caiger 1997: 320, 331).

VI. Constitutional Bargaining, Rational Choice, and Constitutional Evolution

Most efforts to develop rational choice explanations of history focus on economic transitions (North, 2005). This paper demonstrates that political transitions can also be analyzed using rational choice models. The aim of the present piece is not to produce new Japanese history, but rather to show that the king and council model in particular and public choice in general can shed new light on that history.¹⁷

Overall, this paper has demonstrated that the tools of public choice and constitutional political economy can shed significant light on an important period of Japanese political history. Consistent with this theory, the political institutions of the Tokugawa and the Meiji periods exhibited considerable durability, although less than complete stability in their underlying decisionmaking procedures. The Tokugawa regime shifted from shogun to council rule and between centralized and decentralized governance. Governance under the Meiji constitution shifted from royal toward parliamentary rule in the first three decades and then back again during the last two decades, largely under the stress of domestic and international crises—many, but not all, of the government's own making. These constitutional reforms were generally lawful and peaceful within the context of existing constitutional institutions.

¹⁷ My knowledge of Japanese history is unfortunately limited to a sample of English texts, which are not as precise on institutional details as would be ideal, but hopefully are sufficient for the purposes of this paper. Comments, corrections, and suggestions are appreciated.

The restoration was clearly what Buchanan terms a “constitutional moment,” although the details clearly reflected ongoing procedures of constitutional negotiation and exchange. Many of the other reforms were individually relatively minor, although cumulatively very important. It was such “minor” reforms that led the Tokugawa regime toward decentralization and the Meiji constitution toward and then away from parliamentary democracy.¹⁸ In well-functioning democracies, the effects of shifts in authority between “king” and “council” are often subtle, because both the legislature and executive are constrained by similar electoral pressures. In authoritarian systems and intermediate systems, however, the effects of such shifts in authority can be profound, as has often been the case in Japanese history.

The alignment of liberal political and economic interests that produced democracies in many European countries was not quite sufficient to do so in Japan. “Party” cabinets were appointed in 1919, 1924, and 1929, but this liberal success was reversed in the 1930s. Fiscal crises, foreign entanglements, and nationalism reversed the liberal tide associated with the first three decades of the Meiji constitution. The constitution remained in force, and elections were held, but policymaking authority shifted back to the Emperor and his advisory councils. After 1932 all the prime ministers were active military men, rather than elected representatives from major political parties (Mason and Caiger 1997: 330–32).

On the other hand, to say that the tide was reversed is different than to say that it was erased. Although conservative arguments evidently won the debate during the 1930s, the “liberalization” of Japan's economy and constitution during the late 19th century and early 20th century evidently made the current political and economic constitutions of Japan far easier to adopt and far more viable than it would have been in 1867, but that is a topic for future research. Interests, ideas, and institutions clearly played a role in defending Japanese constitutional arrangements throughout its recent history, and changes in interests and ideas produced new constitutional reforms that were clearly influenced by preexisting constitutional interests and constraints.

¹⁸ Here, I am assuming that purely democratic regimes use one man–one vote procedures for casting votes, selecting representatives, and determining the members of the cabinet. Internal “divisions” within majoritarian systems can be introduced through the use of bicameralism. However, there is clearly a spectrum of democracy, with one man rule at one extreme and one-man one-vote driven systems at the other. Weighted voting schemes and weighted representation systems occupy the middle ground in this spectrum. The gradual expansion of suffrage under Japan's weighted representation system made the system more democratic by reducing the difference between the implicit weights of voters as did the use of “party” cabinets during the 1920s.

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