

Chapter 3: The Emergence of Constitutional Governance

1. Two meanings of Governance

There are two meaning of government that are often used interchangeably in English. On the one hand, governance means the decision making or policy making part of an organization. Every large, long-standing organization has a government. On the other, the term also refers to a particular organization with the power to tax and use coercive force to enforce its rules. The previous chapter makes the connection between these two ideas fairly clear. Governments are ordinary organizations with extraordinary powers to make decisions affecting those both inside and outside of the organization.

Organizational Rules and Enforcement

Most organizations have rules for that their members are expected to follow, as part of the process of joint production, to solve coordination problems, or avoid internal tragedies of the commons. In the examples above “following the rules” was called “work” and disobeying the rules was called “shirk,” which are plausible interpretations of choices to follow or disobey rules that address team production problems. “Lets meet at dawn by the old Oak tree, and go hunting for food west of the camp.” The organizational problem can, thus, be thought of in more general terms as choosing the rules that solve the organizations internal problems and methods for solving associated coordination problems. As evident in the “rule following” dilemma characterized in Table 3 below, disobeying the rules (shirking one’s duties) often is a sensible strategy for an organization’s members because the rules are not self-enforcing.

Table 3

The Rule Following Dilemma Game for a Community			Organizational Solution to the Rule-Following Dilemma		
Member A	Member B		Member A	Member B	
	Follow Rules	Disobey Rules		Follow Rules	Disobey Rules
Follow rules	3, 3	1, 4	Follow rules	3+R, 3+R	1+R, 4-P
Disobey rules	4, 1	2, 2	Disobey rules	4-P, 1+R	2-P, 2-P
Exit	1.5	1.5	Exit	1.5 - E	1.5 - E

The cell entries are utilities, the rank order of subjective payoffs for the team members (A, B). The dilemma in the “natural case” is that both team members shirk rather than work.

Again a suitable set of rewards and punishments can change member incentives to perform their organizational duties (or follow orders) and these can be a mixture of pecuniary (larger shares of the organization’s output) and nonpecuniary rewards (status and self-respect). Members are normally selected rather than unrestricted, as noted, because they are easy to motivate or especially skilled at the organization’s enterprise.

Punishments are again limited by a member’s exit options, even when it is very cost effective. For example, if an individual can join one of two organizations, they will tend to favor those with greater rewards and fewer punishments, other things being equal. This, of course, limits the use of sanctions in more or less voluntary groups, and, thereby, also encourages the development of groups that rely upon wages rather than whips, because such groups will have an easier time attracting members to engage in joint enterprises.

On the other hand, in some cases an organization may operate in an environment in which exit costs (E) are relatively high. For example, the selection process of other organizations (only family members, only members of a particular religion, only those who can speak language Z, only the educated and so forth) any limit the exit options of many in a given organization because they may not be allow entry into others. (Exit costs include the cost of joining other organizations in such cases.) In other cases, for example, no similar organizations exist. In still other cases, an organization may be able to affect exit costs as well as the usual internal rules and incentives.

Here it bears noting that exit costs tend to be quite high from relation-based groups such as families, because economies from team production (food, social insurance, fellowship) are extremely useful, and other similar groups are nearly impossible to join. Such groups often, consequently, are able to use punishments (spanking, etc.) more than others. Attempted departures from such organization might also be punished as a particularly nasty dereliction of familial duties.

Exit costs also tend to be high whenever an organization has local monopoly power. The next best hunting party may not be very effective or may meet at a place far away from home. In such cases, significant penalty errors would be accepted by group members, because it is better to be a member of a productive organization than not. Indeed, a bit of arbitrary punishment or “taxation” by formeteurs or team leaders would also be acceptable in such cases.

Organizational Scope and Community Governance

The coercive power of government within a given territory, thus, may originate in its monopoly power for services rather than economies of scale in coercion, per se. An organization that has the ability to provide an especially important service in a territory of sufficient size that exit is costly, will have coercive power. Without that monopoly power, members of the community would simply leave whenever punishments diminish net benefits to those available elsewhere. Such monopoly power may arise, for example, when there are economies of scale in the production of important services such as village defense, dispute settlement, or social insurance.

Here it bears noting that the decision and incentive problems addressed within every organization do not apply to disputes between organizations or between their members. Although disputes within an organization are resolved by its own institutions, disputes between organizations cannot. The value of such services may encourage a formateur is able to organize the provisions of such "inter-organization" services. Such a community will make more effective use of its resources, and thus there are profits available to formateurs that provide such services. These rewards may be further increased if inter-organizational services exhibit significant economies of scale.

These organizations will, as all others, reflect the interests of the formateurs who create them and also their knowledge of organization solutions. Thus, inter-organizational organizations will also tend to apply "tried and true" solutions to their decision and incentive problems. Thus, organizations formed to solve community wide public goods and coordination problems is likely to resemble the forms adopted by smaller organizations within the community, even in cases in which an entirely new organization is founded for those purposes.

On the other hand, community governments do not have to be created, but may also emerge as an organization established for other purposes gradually assumes broader responsibilities for important community services through time. Increases in size and scope eventually produce significant monopoly power within a small community, which allows it to use coercion to solve team production, coordination, and commons problems. Insofar as punishment is a cost effective solutions to the organizational problems at hand, and exit costs are increased by monopoly power, concentration tends to further increase. Coercion in this case allows the monopolist to

be a relatively more efficient producer of community services than smaller organizations that lack the ability to punish their members.

Note that this argument does not require economies of scale in production in the sense that average production costs diminish with scale, but rather is a consequence of increased exit costs and the cost-effectiveness of punishment relative to rewards. In this manner, a single organization may gradually become responsible for a broad array of important services within a community, and may also use coercive methods (punishments) to produce its services within "its" community, because exit costs are relatively high.

A digression on rule by "strong men"

This evolutionary theory of the emergence of government based on advantages of organized over disorganized production of significant goods and services differs from the "strong man" dominance stories that are often used to account for the existence of early governments. Such stories usually begin with the "pecking orders" common in many animal groups, in which the biggest strongest animal has the highest status and gains privileged access to food and woman. By analogy, it is often argued that a strong man simply uses his brute strength to dominate a group and profit by taxing other group members who fear his attacks.

In terms of the model used above, the strongest man may be a better formateur than others, because he can solve many internal enforcement problems simply by threatening to do harm to shirking team members. Moreover, as Mancur Olson (1965) pointed out, the organization problem is itself a public goods problem, and it may well be the case that organizations are normally formed by single individuals. The first human organization, the family, is often dominated by the father, who is often the strongest member of the group. Modern firms are often created by single "strong men" such as Henry Ford, Kiichiro Toyota, Thomas Edison, Friedrich Krup and the like.

On the other hand, among their many unusual strengths, humans tend to be far better "organizers" than are other animals. Normally, it would be possible for the second and third strongest members of a group to organize a team of two, and defeat the strongest man using relatively simple weapons. Even a very strong man needs to sleep. Thus, if the second strongest man is a better organized than the first, he would emerge as the community's "strong man," as might the third or fourth strongest. In the end, it is organizational skill rather than brute strength that matters for human society.

Once standing organizations emerge, the “strong man” is simply the pivotal decision maker within the *strongest organization’s* government.

Moreover, although the ability to organize and apply physical force is one path to governance, it is not the only path, or necessarily the most common one. Governance can emerge without the use of physical force or conquest in settings in which exit costs are high or are increased by an organization’s efficiency. In a setting of low exit costs, the use of coercion by a physically strong man or group will cause a community to rapidly disintegrate as the members quietly depart for other groups or locations where punishments are less common or less harsh. It is high exit costs rather than physical strength that allows coercion to be routinely applied to solve an organization’s incentive problems.

2. Emergence of Constitutional Governance

Most small groups, even families, tend to have many organizations, because there are many tasks for which economies of scale or scope exist. Not all tasks are improved by having twenty rather than ten, or ten rather than two, and thus groups tend to form with a sized sufficient to realize known economies of scale, but not larger than this insofar as coordination and incentive problems increase with membership. Many organizations formed are very short-lived, because the tasks addressed are also short lived, or there are no advantages for standing organizations over freshly formed ones. Such organizations will require few internal rules or rely on preexisting norms, as in lunch parties, amateur sports, and academic conferences. Team production in such cases can rely upon the shared knowledge of the rules of their respective games to solve the problems of team production, and so such temporary organizations require little management or design to function well enough for the purposes at hand.

Long-Standing Organizations and Ruleful Behavior

However, there are also many cases in which established routines and specialization improve an organization’s productivity. For example, the effectiveness of each separate task in a production process often increases with the effectiveness with which the other team members perform their assigned tasks, and that effectiveness is partly based on team-specific knowledge (human capital). For such activities, there will be advantages associated with a stable membership, because both specialization within the team and coordination among team members improve with practice. Modern

sports teams provide a clear example of this, but this also tends to be true of hunters, carpenters, ship builders, and pirates. In other cases, a long-standing organization may establish a reputation for treating its members well, for producing services of high quality, or for exacting retribution on shirkers which provides recruiting advantages over new entrants. Such organizations will be able to attract and motivate skilled team members than possible for new entrants or other groups without such reputations, because the net rewards of being on such teams are higher than elsewhere.

Nearly all organizations have decision making procedures. Standing organizations, naturally, have standing decisionmaking procedures. In their early stages, when dominated by formateurs, governance may make decisions to advance the erratic whims of the formateurs. However, such formateurs will have a difficult time attracting and keeping members unless his or her whims help solve team production problems, or are minor relative to such solutions. Most processes of team production require predictability to be effective.

For example, A performs task X, B performs task Y, and C performs task Z. If performance is acceptable then rewards are R_A , R_B , and R_C . If performance is not acceptable, penalties are P_A , P_B , and P_C for whoever 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 and the possibility of exit limits the arbitrariness of formateurs and also increases the value of stable organizational routines and rules, both in the short run and long run.

This implies that formateurs would be wise to establish stable-predictable routines for providing rewards and imposing penalties—that is to say for enforcing the organization’s rules. These rules and routines, of course, may not be uniform for all members of the organization—as for example, family members may be subject to lower (or higher) standards—but the more predictable the procedures are, the easier it will be for an organization to assemble an effective team.

In hierarchical organizations, in which some or all management responsibilities are delegated by the formateurs, these routines would also bind others within the organization who make significant internal policy decisions. These rules for “governing” may be regarded as an organization’s constitution. An organization’s constitution determines the rules for making new rules and for enforcing the old.

Organizations adopt constitutions not because they are operating behind the veil or necessarily believe in the “rule of law,” but simple for the practical reason that such rules tend to improve the performance of organizations. Without such predictable rules and a predictable rewards and penalties from following those rules, organizations will lose members to other organizations where such patterned behavior is customary. A belief in the “rule of law” might well emerge among an organization’s members in a manner which the rules adopted also advance the interests of the membership.

Arbitrariness Decreases with Complexity

In complex organizations and environments, arbitrariness is also limited by the formateur’s time and attention, perhaps even more than the advantages of predicable rules and sanctions.

The formateur and his or senior managers have to allocate their scarce time and attention among the problems that need to be decided. A common solution based largely on informational advantages is to issue a series of standing decisions, each of which is to remain in force for a significant period of time. This allows problems to be carefully dealt with one at time, and insofar as independent solutions exists, allows effective policies to be adopted. In this manner a formateur creates a more or less stable set of rules for his or her organization. In so far as those laws are subject to only gradual revision, as problems reemerge or the issues are revisited, these decisions or “rulings” are often quite durable and predictable. Within community governments, such standing decisions would clearly create the “law of the land” that is enforced by its standing procedures for reward and punishment.

The stability of these procedures and constraints are increased by the same considerations that support institutional conservatism. To the extent that past rules are supported by a preexisting culture or one that was partly produced by those rules, changes in procedures may undermine an organization’s productive routines. Again a formateurs’ own interest produces the reason for orderly routines, given the constraints that he, she, or they face.

Orderly Secession and Organization Durability

Eventually, a truly long-standing organization will move beyond the period in which formateurs dominate decision making for the organization. In some cases, the formateur may design the organization to be free-standing so that their time and attention can be turned to other interests. In others, the formateur(s) become incapacitated because of illness, age, or death. Formateurs do not live forever, although their organizations may.

Many standing organizations, however, constructed around the particular talents and interests of a formateur or team of formateurs disappear with their founders because the organizational structure took full advantage of the formateurs abilities and they were irreplaceable. It bears noting that the maintenance and control of an organization often difficult for formateurs, because of the rewards (rents) associated with governance. An effective formateur often becomes wealthy or widely respected as a consequence of their organization’s success. And others both inside and outside the organization will attempt to obtain those rewards for themselves by taking over the firm’s governance. Conflict over who should rule both during and after the formateur period can be intense and can consume a substantial among of the surplus generated by the organization. A common method for reducing conflict in such cases is to prevent “natural” successors from emerging within the organization. With this in mind, opportunities for potential formateur rivals to secure the necessary experience or broad support may be blocked in various ways in order to reduce problems for the formateurs. Such persons may, for example, be evicted from the organization or sent to distant posts. The absence of “natural” successors often makes finding the “right man” difficult. Such solutions, however, tend to increase prospects for the organization to end with the formateur’s departure. Both family businesses and empires often disintegrate shortly after their founder’s death. However, a few organizations survive their founder’s absence.

In the long run, it is clear that truly durable organizations are ones that solve the problem of ongoing control and secession in a manner that does not unnecessarily increase the cost of selecting new members for it's government. Organizations that solve the secession problem effectively will have more surplus available for maintaining the organization’s membership and for its productive activities, and thus are more likely

to survive temporary shocks and decision errors affecting membership and other resources.

A good solution minimizes unproductive conflict while identifying “good policy makers” that replaces governance by *formeteurs*. The new members of the organization’s government need not have the organizational talents of the *formeteurs* themselves, although this is often useful, but they should have the ability to adjust the organizations priorities and internal design to meet changing circumstances. The process of training and selecting such persons is nontrivial task in complex organizations because so many margins of adjustment must be taken account of. Thus, in many cases, it “takes one to know one.” 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.

Consequently, 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. Both tend to increase the effectiveness of future governments, and such arrangements have been 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 might select a king and the king select electors. A board of directors might hire a new president and a president may appoint or suggest new board members.

In cases in which an organization’s council cannot agree upon a new king, conflict among council members can consume substantial resources (including in some cases assassination of rivals) and in extreme cases or at times of crisis may reduce the organization's prospects for survival. In such case, some more or less mechanical method of selecting kings may be adopted to eliminate conflict, even if the average result is a somewhat less competent king than would have been selected by a consensus oriented council. A very common mechanistic solution to the transition problem is to make the *formateur*’s oldest son his successor.

By avoiding organization threatening conflict at times of transition, such dynastic organizations have more resources available to weather the storms that confront every

long-standing organization. Insofar as family members value the futures prospects of their first born sons and daughters, may also lead them to a more careful analysis of the long term consequences of their decisions. And, by retaining their advisory councils, the decisions reached are well-informed if not always well-judged. In medieval Europe, there are several cases in which a council representing noble interests voted to make the office of King hereditary—as for example in Sweden, in 1544.

Once the secession problem is solved, it is clear that *formeteur* interests no longer directly guide their organizations. Their lasting effects arise only insofar as their successors have similar goals. Although every person has their own personal constellation of interests, their “derived interests” are clearly affected by the durable rules that govern the organizations in which they makes polices and receive rewards. The new governors have been selected by established procedures for succession and receive rewards based more or less on the structure of pecuniary and nonpecuniary rewards established and refined by the *formeteurs*. Insofar as those rules continue to empower and constrain the new leadership, a *formateur*’s most lasting contribution to an organization may be said to be their constitution.

In this sense at least, an organization—or at least its government—may be said to have “its own” interests, chief among them being the organization’s survival insofar as this is necessary to assure continuation of the rewards of governance.

3. Durability and Stability of Governance

If an organization’s constitution can be characterized as its *rules for making rules*, it is clear that the procedures and constraints of a constitution have to be more durable and stable than the laws developed under them. That is to say, the procedures defined by constitutional laws have to be *taken as given* by policy makers on most occasions. It is in this sense that ordinary day-to-day policies can be said to be developed through constitutional means. Durability is a defining characteristic of constitutions of long-standing organizations. A constitution is durable only if it remains in force. It may be said to be stable only if the procedures initially defined by the constitution can be substantially changed only by amendment. Constitutional procedures can only be said to constrain ordinary day-to-day politics if they are not themselves a decision variable in every policy decision.

Constitutional stability and durability normally go hand in hand. A written constitution that does not provide a stable set of procedures is unlikely to be durable. A

written constitution that provides stable procedures with a well-functioning political equilibrium tends to be durable. However, a written constitution can be durable in the sense that it remains in force, but not stable in the sense that policymaking procedures may change radically through time without formally amending the constitution. That is to say it may be more of a “template” for governance than decision making process.

For example, the Swedish instruments of governance prior to 1809 and the present Norwegian instrument of 1814 have been durable, but not stable. The basic king and parliament template specified by those instruments was durable in the sense that both branches of governance continued to exist more or less as described by constitutional documents. However, the division of policymaking power between king and parliament was only broadly characterized by those written documents. In both cases, the assignment of policymaking power shifted dramatically from the king to the parliament in the course of a century without significant changes in their respective instruments of governance.⁸ The stability and durability of procedures for making new laws are related, but are not identical properties of constitutions.

Both the stability and durability of a constitution are largely consequences of the formal and informal processes of amendment. The laws and internal norms and routines that specify the procedures by which an organization’s basic laws can be changed determine the difficulty and cost of lawful constitutional reform. In most constitutional democracies, churches, clubs, and corporations, revising procedures and constraints in their organizational charters is more difficult than making even important day to day decisions that affects an organization’s prospects for survival. For example, Article 15 of the Swedish constitution requires amendments to be approved by two successive parliaments separated by an election. Ordinary laws require approval by only a single parliament. Article 5 of the U. S. constitution requires amendments to be

approved by a two-thirds majority of both chambers of the legislature and by three-fourths of the state legislatures. Ordinary legislation requires only majority approval in both chambers of the legislature and acceptance by the president. Such relatively more complex procedures help assure that an organization’s constitution will be more durable than the laws developed under them.⁹

Because every constitution can be amended or abandoned, stability requires some minimal continuing consensus among those with the power to reform (or ignore) the existing constitution. In a modern private organizations, their governments are often constrained by civil law to abide by the procedures specified in its charter. In contemporary democratic polities, the constitutional consensus must be broadly shared by those eligible to vote, which is one sense in which a democratic constitution can be regarded as a social compact. In king dominated governments, it may be only the king’s interest that binds him to the kingdom’s grounding laws and amendment procedures. In divided governments, leadership of pivotal groups or political parties may be sufficient to assure stable government procedures and constraints, as in nineteenth century Sweden and England. Most formal amendment procedures require a broader consensus than required to make day-to-day decisions. However, even ordinary decisionmaking procedures often include significant decision costs, evidently for the express purpose of increasing the stability of policies that depend on stability for their intended effects.

It bears noting that the cost of changing an existing organizational charter can be so high that amendments never take place. In extreme cases, formal and informal restrictions on stability may provide so much stability that even an overwhelming consensus cannot revise decisionmaking procedures or reward systems. Such cumbersome procedures of amendment may imply that dissolution of the organization

⁸ Most new laws in constitutional monarchies are formally issued in the name of the king or queen. However, in the cases noted and several others, the sovereign has not attempted to overrule parliamentary “recommendations” regarding new laws for many decades. The Swedish constitution of 1974 formally ended this practice for Sweden, although the King had not exerted significant influence over policy in the twentieth century.

⁹ The constitution law of the United Kingdom is nearly unique in not specifying an amendment process that is more complex than that of ordinary legislation. Generally speaking, majority approval in the House of Commons is sufficient for both new constitutional provisions and new legislation. The latter makes it difficult to discern clearly the difference between constitutional and ordinary legislation. Yet, as argued below in section C, the latter is not uniquely a problem for the United Kingdom. All political constitutions essentially include durable procedures and constraints that are enacted as ordinary legislation.

A modern curiosity for constitutional theorists is the current Swiss constitution. It includes many checks and balances on both ordinary legislation and constitutional revision, but actually specifies a *less restrictive* petition to force *ordinary legislation* to be passed by referendum (50,000 signatures, see Article 89) than to force a proposed constitutional revision to be subjected to direct referendum (100,000 signatures, see Article 120).

or civil warfare are less costly methods of reform than is lawful reform. In such circumstances, organizational revolutions may be said to occur out of necessity.

It is also clear that such rigid organizations cannot be easily adjusted to account for new circumstances, and, thus tend to be at a disadvantage relative to more flexible organizations during times when reforms can increase an organization's productivity or reduce errors. Revolution is usually an extraordinarily costly method of reform.

Written and Unwritten Constitutions

An organization's constitution consists of all of its durable procedures and constraints for allocating its resources and for renewing itself. Although the core procedures and constraints are often easy to describe, providing a complete written description is a nearly impossible task. Many informal procedures, norms, and programs are sufficiently durable that they are taken as given for day-to-day policymaking decisions. For example, much of the internal organization of a polity, especially in areas of federalism and civil law, predate by many centuries their most recent constitutional reforms.¹⁰ The current outlines of many broad public policies, such as those regarding public pensions, unemployment insurance, and taxation, are similarly taken for granted in the course of ordinary legislation.

It is clear that both the formal and informal parts of a nation's constitution are largely evolutionary products of trial and error in much the same manner that the charters of other large organizations are. A good deal of what is written in new constitutional documents consists of procedures and constraints already contained in previous written documents, and most changes in formal procedures assume the continuation of most of the informal practices and constraints associated with the previous unwritten constitution.

This is, of course, what is meant by a constitutional amendment. Such piecemeal changes allow the gradual accumulation of constitutional knowledge and practice over the centuries. And, in this sense, a long-standing parliamentary democracy may be said to have a constitution that is substantially older than the government defined by its current constitution. Many parts of a nation's constitution are influenced by customs, procedures, and norms that have evolved over the centuries.¹¹

None the less, every change in a nation's written constitution explicitly creates a new combination of procedures and constraints for the development of new law and every newly written constitution legally supersedes both the written and unwritten parts of the previous constitution. Moreover, changes in the formal written procedures and constraints tend to induce changes in both the unwritten practices and procedures of governance, especially in areas directly affected by the new formal procedures. In this sense, at least, institutions can be thought of as products of design as well as evolution.

For example, the early social choice literature (Black, 1948, Arrow 1962, McKelvey 1976) demonstrated that democratic governance per se tends to be inherently unstable in the sense that nearly every majority coalition can be replaced by another. Consequently, it might appear unlikely that ordinary legislation within democracy could ever be durable or stable enough to be regarded as constitutional in the sense used here. However, stability in democratic legislation may be generated by other durable institutions, many of which were adopted for other purposes--such as political parties, procedural constraints, legislative norms, or ideologies--that reduce the number of feasible majority coalitions and the domain of policy making (Shepsle and Weingast 1981, Buchanan and Congleton 1998, Congleton, 2003).¹² In this manner, both formal

¹⁰ The present governments of the Netherlands and Germany date from 1815 and 1949 respectively but their regional governments were founded in the middle ages. Most of the original thirteen states of the United States began as colonies more than a century before independence. In many cases, they were initially commercial enterprises that gradually assumed responsibility for governance. The English common law, similarly, is grounded in the judicial rulings that go back to the middle ages, which may in turn owe much to Roman law. The civil code of modern Sweden is based on the Code of 1734, which is formally still in force today. Its formulation was influenced by many factors outside Sweden, but may be said to have evolved gradually from the 1350 common law established for Sweden during Magnus Eriksson's reign (Cronhult 1994, p. 37)

¹¹ See Sterzel (1994) for a concise history of administrative law and procedures within Sweden.

¹² Public choice theory indicates that, in the absence of procedural and other constraints, majority coalitions will be unstable, especially with respect to distribution issues. Shepsle and Weingast (1981) use the term structure-induced equilibrium to describe the stabilizing effects of institutions on majoritarian politics. For example, the division (2, 2, 2) can be defeated by (3, 3, 0), which can be defeated by (5, 0, 1) and so forth. Congleton (1997) and Buchanan and Congleton (1998) suggest that policies such as equal protection of the law and the generality principle are critical for the stability and durability of democracies.

A constitution may also fail because it fails to specify procedures and constraints sufficient to assure reasonably stable public policies.

and informal political institutions can affect the cost of “amending” the informal portions of a nation’s constitution.¹³

4. The Emergence of Territorial Governments: Monopoly Power, Exit Costs, and Coercion

Nearly all long-standing organizations have formateurs and interests. Nearly all have grounding charters that characterize how routine “high level” decisions are to be made. Nearly all address and solve the problem of secession. Nearly all reflect a long series of minor adjustments to those constitutional documents that take account of changes in circumstances that either change the interests of those who occupy seats of policy making authority or change the techniques that can be used to advance organizational objectives. Insofar as universal principles of organization exist or only a small number of well functioning architectures for governance have yet been discovered, governance will tend through time to converge to similar decision rules, rewards, and divisions of decisionmaking authority.

Political governments tend to be organizations that have gained monopoly power of various important services for which there are few substitutes. This implies that exit costs from such organizations are very high, which in turn allows coercion to be used to solve coordination and team production problems, and to generate rents for formateurs and their successors. Service monopolies often include: regional defense, the provision of dispute resolution services, enforcement of basic property and personal law, and the production of public works such as roads and water supplies. Dominance in even a subset of these fields allows organizations to make greater use of penalties (coercion) than possible in other organizations in which exit costs are far smaller.

There are a variety of evolutionary paths through which dominance in one crucial field may lead it to broaden its scope in a manner that increases its importance for a community. For example, a water monopoly may become involved in dispute resolution, social insurance, and regional defense. Many of these evolutionary paths to government do not require superior military organization, but all require superior organization and perhaps a bit of luck on the part of formateurs and their

organizations. For example, the North American colonies originated as business enterprises or religious sanctuaries, and rapidly became governments because the regional proprietors and religious authorities were effective organizers that had monopoly power over many crucial services. Exit was not impossible, but the natives were not always friendly and return voyages were expensive and often dangerous.

Once coercive power is established within a given region, it is clear that the task of establishing long-standing organizations *is greatly simplified*. The confiscatory powers and credible threats associated with the power to punish clearly makes it easier for such dominant organizations to acquire the resources required to sustain the organization's membership and to weather the storms of chance. The emergence of organizational norms and loyalty (patriotism and nationalism) also reduces the costs of solving team production and coordination problems. Together, these also imply that it is relatively easier for a regional government to become a durable institution than for otherwise similar organization that are not able to dominate crucial services within their territories. “Loyalty” to an existing regional government's does not usually have to be produced from scratch, nor do all of its resources have to be produced directly by its members or acquired through more or less voluntary exchange with non members.

History and experience affirms the relative advantage of governments and public agencies insofar as most governments are older than most firms, and it is generally easier to establish a new public agency than it is to dispose of an old one. (The opposite tends to be true of private organizations.) Only a few religious organizations are older than the organizations that rule over regional and national territories. Of course, the persons inhabiting those organizations change far more frequently than their core procedures of governance. For example, dictators may change while the dictatorship remains in place, or as the English saying goes “the king is dead, long live the King.”

The monopoly power of governments within in their own territories also implies that there is relatively little evolutionary pressure on governmental institutions at the territorial level except when military threats are relatively large or exit costs diminish. Even substantial mistakes in institutional designs by democracies or dictatorships will, thus, not necessarily produce institutional reforms because there is no competitive

¹³ Congleton and Tollison (1999) demonstrate that the cost of organizing new majority coalitions can itself be substantial. The existence of such costs tends to promote the development of institutions and norms that make legislative outcomes more stable and, therefore, more durable than majoritarian voting rules imply; indeed, democracy may not be a feasible form of government without such institutional solutions to cycling problems.

mechanism that eliminates inefficient designs. New constitutions are written very infrequently, and major amendments are adopted only slightly more often.

On the other hand, over the very long run, there are evolutionary pressures on national defense agencies, economic policies, and resource management. In the long run, mistakes in civil law, military investment, and public finance can cause the end of poorly organized nation states. A government that fails to solve its community's commons problems, fails to defend its borders, and over taxes its members will eventually find itself with little food and territory to sustain the persons ruled. Consequently, the structure of civil law, national defense, and taxation tend to reflect thousands of years of experience across many different times and places.

At the sub-national level where territories tend to be small and exit costs also relatively low, there is often substantial competition between towns and counties for residents and other sources of tax revenues, insofar as exit costs are low. This is also true, although to a lesser extent, of national, state, and local public agencies insofar as agency performance—providing education, bus service, or bicycle paths—compete for budgetary resources. Poorly organized agencies may receive smaller budgets and more effective ones larger budgets. The relative effectiveness of alternative organizational structures may be assessed, and reorganization of small agencies to enhance their effectiveness may be politically feasible—indeed politically rewarded. Thus, there are modest competitive pressures on local governments and sub-national agencies that tend to induce improvements in institutional design “in the small” through time.

The interests advanced by organizations remain those which have been institutionalized by their formateurs, but significant adjustments to procedures may be made by their successors who find their interests advanced by such reforms. No general claim about welfare are made here, beyond the claim that exit possibilities limit the range of reward systems that an organization may use to advance its ends. The higher exit costs for “members” of a territorial monopoly does imply, however, that

rewards net of punishments can be lower for governments than for other organizations whose members have lower exit costs, other things being equal.

Political and economic crises tend to reduce the viability of some organizations while increasing the viability of others. For example, the failure of some organizations (say local or private charities) tends to increase the demand for services from others (national welfare systems). Alternatively, the success of some organizations (the EU) may increase the demand for other organizations (pan EU political parties and interest groups). In this manner external shocks tend to eliminate organizations that are barely self sustaining. Among governments, however, these shocks have to be relatively large to induce innovation. Many such failures may be believed to be consequences of policy mistakes rather than poor institutional designs, and thus the next generation of political formateurs may simply adopt the old decision making institutions of governance with new policy constraints.

The lack of competition and consequent high exit costs together with access to tax revenues and appeals to patriotism shield governments and governmental agencies from many, if not all, evolutionary pressures during reasonably stable times. Its scale and complexity tend to increase the risks associated with major experiments. The stability of a government's constitution is thus partly a consequence of the absence of competition, which is also fundamentally the source of a government's power to take, but also by rational institutional conservatism.¹⁴

Except perhaps at times of crisis, only very minor revisions of constitutions tend to occur because of the constellation of interests generated by the organization's decision making procedures is relatively stable in durable organizations. The reforms that are adopted tend to reflect changes in those interests, rather because external competitive pressures or threats except, perhaps, in times of severe economic or military crisis.

¹⁴ The task of establishing *effective* public agencies as opposed to durable ones is more difficult than establishing effective private organizations, partly for the same reasons. Electoral pressures and agency culture are not generally sufficient to accomplish this even in democracies, because the majority's interest is not always the same as the “public interest,” nor are agency norms necessarily well aligned with the goals of the broader society. Monitoring agency performance is also difficult both for experts and voters. Elections tend to take place on many issues at once which diminishes the ability of voters to punish politicians or parties for poor performance on “minor” issues. The ease with which new governmental institutions become permanent institutions also suggests that there is less evolutionary pressure on them than on other organizational forms. Reduced competition implies that relatively less effective organizational structures will survive.

Thus, off-the-shelf governmental agency structures tend to be, on average, somewhat less efficient at advancing the organization's purposes than those of similar private organizations.

Experimentation and Institutional Evolution

In the past twenty years, a very interesting literature in microeconomics has emerged that explores how “incentive compatible contracts” can be designed to solve a variety of principal-agent problems, that is to say which elicit the right people to join organizations and work hard. This very theoretical literature explores how a well-informed formateur might design a new organization from scratch to properly motivate its members, and to find the members that are easiest to motivate. In the simplest rational choice representation of this process, a relatively wise and farseeing entrepreneur establishes a conditional contract which induces the “right” people to join the organization and motivates those persons who join to be productive team members. A parallel literature exists in political theory in which governments are presumed to emerge whole cloth from a single grand social compact, as suggested by Hobbes (1651), Rousseau (1962) and Rawls (1971).

In practice however, only the simplest organizations can be designed completely or implemented with an off the shelf template. It is for this reason that institutional design remains an experimental science or art at the margin. A new group of people are assembled, within a slightly new payoff structure, to advance slightly different goals. Organizational designs are always a bit incomplete, and the success of an organization depends in part on adaptation. This experimental process tends to be a bit error prone, because organizational forms that advance one set of purposes do not always successfully advance others. Thus, the adaptation of existing organizational structures for new purposes often requires minor adjustments and is necessarily an *experimental process* as well as a bit of luck at the margin.

Changes in opportunities or interests among those with the power to create new rules of policies, however, can produce internal reasons for institutional innovation. New interests may arise during times of economic transformation, during times of ideological change, or following successful institutional innovations elsewhere. At such times, existing procedures and constraints may no longer best serve the interests of an organization's governing decision makers, and reforms will be voluntarily adopted using preexisting methods for amendment and policy revision, whether formal or informal. By creating new more efficient or effective templates, such innovations reduces the viability of somewhat less efficient or less robust organizational forms.

Existing political constitutions reflect both past institutional experimentation and institutional conservatism in a relatively uncompetitive environment.. “Yardstick” competition allows senior governing decision makers to observe successful experiments in other organizations, and they will copy those that seem likely to advance their particular interests. However, major reforms are unlikely to be adopted, because they are risky. Large reforms are difficult to implement because existing personnel would have to be retrained and new reward structures may have to be established. Such reforms would tend to be resisted by many organization members and might undermine existing informal reward systems that support existing procedures and constraints. All these reduce the effectiveness of reforms while increasing uncertainty about their likely consequences.

Whether a particular experiment succeeds in the long run, that is whether a new organization becomes an institution, depends in part on external conditions beyond the control of an organization's government as well as internal effects that are unanticipated and thus not fully considered in their reform. Many experiments will fail to gain the expected productivity increases or disadvantage the members of the organization's government. Some external changes in opportunities or risks may prove to be short-lived. Thus, many reforms will be undone as evidence about their merits emerges or as circumstances change. The existence of long-standing solutions to an organization's decision and incentive problems is both evidence of their robustness--their ability to advance a variety of formateur interests in a variety of environments--and of institutional conservatism.

As in the case for other organizations, political experiments tend to be piecemeal and marginal in nature, as preexisting institutions are modified to advance new interests or reduce new risks. Government experimentation, however, tend to be more limited than those undertaken in by non-governmental organizations, because they tend to be larger and more complex organizations, which implies greater uncertainty about the consequences of reform, and because they face far less competition for resources.

Institutional conservatism and governance

This long process of trial and error, however, also explains why preexisting organizational templates tend to be reused by well-informed designers of new governments. Existing templates are known to have “proven themselves” over time to be productive, flexible, and robust organizational forms. They are tried and true.¹⁵

Rational institutional conservatism is further increased by the processes through which individuals learn to participate effectively within a new organization. As noted above, most employees (members) of a new organization will have experience in with other organizations. It will clearly be easier for them to “learn the ropes” in a new organization if the new organization has routines that are similar to those in other organizations. Thus the speed with which a new organization can become operational can be reduced by drawing on the knowledge and habits that potential employees (members) have accumulated from experience in other organizations. If an organization succeeds, the new organizations informal routines and norms will subsequently be transmitted to new employees by others already in the organization. This learning process establishes common routines, norms, and informal relationships within and among organizations. It is reinforced by an organization’s extrinsic reward structures, insofar as salary, responsibilities, and perks are conditioned on past productivity within the organization, but are not fully determined by them.¹⁶

Organizations, thus, have incentives to experiment at a relatively small scale. Small reforms are less likely to undermine informal reward structures than are major reforms. Small reforms allow personnel from other organizations and from the preexisting organization to be used in new organizations with little new training. And small reforms allow organizational entrepreneurs to make effective use of knowledge produced by past experience when creating new organizations and modifying existing ones. It is for this reason that modern business and law schools spend so much time reviewing case histories with their advanced students. . However, to say that designers do not control or consider all relevant matters is not to say that institutions are not designed, but rather to say that *institutions are rarely if ever designed whole cloth*.

In the very long run, all long-standing constitutional designs have to be “relatively efficient” in a variety of circumstance to have stand the test of time. The king and council template, evidently has passed this very stringent test of robustness. And,

consequently, it is adopted by new formateurs to advance a broad cross section of purposes.

Evolutionary and contract theories of the state

The evolutionary model developed above is not meant to undermine the existing body of work in CPE. Modern constitutional analysis has focused a good deal of attention on constitutional conventions organized between more or less equal individuals for the purposes of establishing a state or society, de novo. These analyses provide constitutions based on popular sovereignty with a strong normative foundation that can help legitimate modern governments insofar as they demonstrate that existing constitutions potentially could have been adopted unanimously by such conventions. Moreover, these analyses clearly have some basis in fact. Many constitutions are direct consequences of constitutional conventions initiated after successful revolutions that created opportunities to design a new government whole cloth, as in the United States, South America, and to a lesser extent France. The constitutional convention model captures many essential features of revolutionary moments in political history, although they tend to exaggerate the extent to which such institutions are formed whole cloth rather than being based on existing models.¹⁷

However, in most cases, national constitutions and organizational charters reflect bargaining among “political elites” over a long period of negotiations rather than revolutionary moments at which instruments of governments are reinvented. This also tends to be true of the present balance of power within the few countries that have revolutionary origins. Their existing formal and informal rules for making decisions are the results of series of amendments that gradually adjust their decision making rules and constraints. The original constitutions affect the course of those negotiations, but do not fully determine it.

¹⁵ In such cases, it may be said that the organizational templates themselves have become institutions, as might be said of the “king and council” template. It is evidently for this reason that so many new democratic governments have adopted constitutions based on the ancient parliamentary template for their new polities.

¹⁶ Here it bears noting that in large organizations, salaries are only weakly tied to a person’s marginal product. In some cases, the differences reflect unavoidable informational problems in determining marginal product, in others agency problems within managerial structures (corruption), in others production methods in which the sum of marginal products exceed total product—as might be said of the parts in an automobile, and in others informal organizational norms that require greater equality of salaries than evident in productivity. All these, for example, are typically problems in assessing and rewarding academic productivity.

¹⁷ Kuran (1989) demonstrates how public opinion can rapidly switch from one preferred policy or form of political organization to another as a consequence of differences between public and private preferences generated by conformitive pressures. Wintrobe (1998, ch.11) develops a theory of the emergence of dictatorship as a consequence of democratic inaction.

5. The King and Council as a template for democracy?

By the beginning of the nineteenth century, the nation state had emerged as a new form of government in most of Europe. The new nation-state governments ruled over substantially larger territories, but tended to have constitutional architectures that resembled those earlier forms. Most governments in Europe had kings, most kings had parliaments, and most parliaments were multicameral. In most cases, these were largely scaled up versions of governmental systems already present in their territories. In most cases, the new nation states were agglomerations of older smaller states, most of which were ruled by a prince or baron together with a regional council of some kind. In many cases, the European parliaments of the nineteenth century had roots that stretched back to the thirteenth century.¹⁸ Within the United States similar systems date back to the colonial governments of the early seventeenth century.¹⁹

These national parliaments were not democratic in the modern sense, because their members were generally appointed or elected on the basis of very narrow suffrage, rather than selected by a broad electorate. None the less, the various chambers of government were representative bodies that allowed various classes, occupations, and regions to have a direct voice in the formation of policy. This allowed nobles and prominent priests, merchants, farmers, and members of regional governments to have some direct influence over policy according to the formal and informal powers of the parliament in the country in which they lived. By 1800, a few of those national parliamentary systems had already proven themselves to be extremely durable, with histories that spanned many centuries.

¹⁸ “Parliaments, in this sense, sprouted up all over Europe in the thirteenth century...The new assemblies were called cortes in Spain, diets in Germany, estates general in France, parliaments in the British Isles. Usually they are referred to generically as “estates,” the word “parliament” being reserved for Britain, but in origin they were essentially the same.” (Palmer and Coulter, 1950, p. 30-31) An exception to this institutional regularity was the king and parliament of the Netherlands, which had not existed until Napoleon’s intervention at the end of the nineteenth century. Prior to that, the Independent Provinces of the Netherlands were organized as a confederal republic in the late sixteenth century, with a relatively powerful council and weak executive (stathouder) but no king.

¹⁹ In 1619, the Virginia colony established a bicameral legislature with one chamber directly elected by all property holders and the other appointed by the colonial governor, who at that time was appointed by a private firm operating under a formal crown charter. Few parliamentary systems would be as democratic as Virginia’s first House of Burgess for more than two centuries.