

Federal Constitutions and Cultural Evolution

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Prepared for the conference
“Evolutionary Theory, Failed States, and Nation-Building”
Stanford University
December 2011

October 29, 2011

Abstract

Constitutions are more than their text; a constitution is also a set of conventions, or expectations that constituents have about one another’s behavior. That is, constitutions have a *culture*. The coherence between the constitutional law and constitutional culture determine a constitution’s success. Constitutional culture and constitutional law co-evolve; by understanding the influence of multiple institutions, one may make predictions about the likelihood of the emergence of a prosocial constitutional culture. There are reasons to believe that federalism might encourage the development of a prosocial constitutional culture, but the effect is far from certain. This essay concludes with questions to consider in while assessing Afghanistan’s prospects for constitutional success.

1 Constitutions: Big “C” and Small “c”

Written constitutions are aspirational: they almost always contain words that describe the society’s vision of its potential. Preambles record hope:

“in order to form a more perfect union, establish justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty”,¹ “an ever-closer union to ensure the economic and social progress of their countries by common action . . . [and] to preserve and strengthen peace and liberty,”² “we the multinational people . . . proceeding from the commonly recognized principles of equality and self-determination . . . striving to secure the wellbeing and prosperity of [our country]”,³ “united in our diversity . . . to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights”,⁴ “looking with confidence to the future through a republican, federal, democratic, pluralistic system . . . to establish justice and equality, to cast aside the politics of aggression, to spread the culture of diversity and to defuse terrorism.”⁵ Written constitutions reify the reasons for constructing a state from a society.

Written constitutions are also motivational; they create an incentive environment. The institutions prescribed by a constitution’s design influence the behavior of its subjects. The constitution shapes the relationship between the government and the public; it guides policy-making, establishing both process and constraints, and therefore the laws that may emerge under its domain; and so by molding public policy, it shapes the way the people within its jurisdiction interact with one another. Viewed this way, the constitution literally *constitutes* the society; it is the foundation upon which all social relationships are based.

However, the formal—written, or big “C”—constitution is not the whole of the constitution. A constitution is also importantly a set of conventions; this public understanding is constitution with a small “c”.⁶ As the Canadian Supreme Court declared in its celebrated *Patriation Reference* decision, conventions ensure that the “legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period” ([1981] 1 R.C.S 753:880) and that “constitutional conventions plus constitutional law equal the total Constitution of the country” ([1981] 1 R.C.S. 753:883–84). Constitutional law is the text itself plus the juridically-

¹United States of America, Constitution, September 1787.

²European Economic Community (European Union), Treaty of Rome, March 1957.

³Russian Federation, Constitution, December 1993.

⁴Republic of South Africa, Constitution, December 1996.

⁵Iraq, Constitution, October 2005.

⁶Richard Primus first taught me to think about constitutions in this fuller sense.

created doctrine, but that is not the whole of the constitution; the constitutional conventions—the constitutional culture—is an inseparable part of the constitution.

Words written on paper must be interpreted before a constitution’s institutional structure can affect behavior. That interpretation leans on symbolic representation or shared meanings that cue common expectations of behavior. The constitutional culture, the small “c” constitution, is a product of the patterns of behavior within a community. These patterns result from repeated interactions between the members of society, who over time come to base predictions of future behavior on past experiences. These predictions are beliefs, or expectations. With sufficient circulation within the community, these expectations are commonly held. Sometimes called constitutional culture, these conventions are informal institutions, and deviations from common expectations are sanctioned socially. The constitution is best viewed as a system, it contains both formal and informal components that interact to determine the constitution’s performance.

Constitutional success is measured by its ability to cause the society to reach the goals as set out in the constitutional aspirations. The excerpts from constitutional preambles that opened this essay are not unusual. Most aspirations combine peace, individual and collective satisfaction and autonomy, and growth and prosperity. If the constitution, both as written and as understood by convention, is able to organize relations within a society so that the society might realize its aspirational potential, then the constitution is deemed successful.

Given the inseparability of the written and understood constitutions, a written constitution’s prospects for success depends on the development of a compatible constitutional culture. Informal institutions can work with a formal institution, accommodating it and even boosting its effectiveness (Helmke and Levitsky 2005, Bednar 2009). But the underlying informal institutions can also work against the formal institutions, resisting intended effects, either through intentional resistance (Helmke and Levitsky 2005:729–30) or by having insufficient complementary sanctioning powers (Bednar 2009:154–63). Informal institutions may even prevent the adoption of particular formal institutions (Grzymala-Busse 2010). The success of the big “C” Constitution depends upon its complementarity with the small “c” constitutional culture.

A supportive constitutional culture may be characterized as “prosocial”. Whatever the society’s aspirations are, they require self-restraint with re-

gard to the interests of others. So prosocial behavior can be active, but it can also be passive. It can appear to be altruistic, and it can have underlying expectations of reciprocity, in some cases, it can be self-interested with interdependence. And it can be evidenced by refraining from acting on one's impulses or interests because doing so is harmful to the community.

2 The Evolution of Prosociality

A prosocial constitutional culture is necessary for constitutional success. If the prosocial constitutional culture is not preexisting, how might it develop? Before we can answer that question we need to take a step back, to consider what is needed for prosociality to be present. As informal institutions, the prosocial constitutional culture is upheld through social sanctions for deviance. In other words, prosociality requires a common willingness to punish those who behave antisocially. The willingness is beyond an acceptance that some arm of the law will punish social deviants, for that is a formal mechanism. Instead, should the formal mechanism fail, there must be a public will to sanction, even at personal cost (Bendor and Swistak 2001).

Axelrod 1986 constructs an evolutionary game of norm development, where successful strategies are more likely to be kept and unsuccessful ones dropped from an individual agent's behavioral repertoire. In the evolutionary context, sanctioning tendencies themselves are not sufficient to maintain prosocial behavior, because in the evolutionary model, the tendency to punish—"vengefulness"—can decline in the population as deviance declines. As vengefulness falls to zero, deviance can return with no social resistance. The model demonstrates the importance of mechanisms that sustain the tendency to punish, such as "metanorms"—the willingness to punish those who fail to sanction deviators. With metanorms, the evolutionary model has a strikingly different dynamic; vengefulness is maintained even as deviance declines. Other mechanisms that sustain the tendency to punish include internalization. Prosociality appears to require the willingness to define those who fail to uphold social norms as social deviants deserving of punishment, including one's self. Bowles and Gintis 2004 show that the existence of strong reciprocators in a community can also sustain prosocial community behavior.

Community size affects the tendency to cooperate: in smaller communities, monitoring may be easier and it is easier to establish a strong sense of group identity and the commitment of each agent to the common goal

(Ostrom 1990). If the community is kin-based, cooperation is more readily facilitated, and norms of reciprocity are more easily maintained in small scale populations.⁷ Reputation, another important sanction-maintenance mechanism, is more readily established and spread in small communities. Formal institutions can encourage cooperation by segmenting or parochializing interactions (Bowles and Gintis 1998); in the reduced community size prosocial forces can emerge. A key question from these results is how to scale up the institutions that sustain prosocial behavior, beyond the reach of personal interactions, and to the scope of constitutional culture.

Community characteristics such as size and familial connections aren't the only influences on an agent's response to an institution's incentives. An institution's influence is sensitive to the fuller institutional context. Identical institutions can induce different behaviors when situated among different institutions. For example, Bowles and Gintis (1976) noticed the correspondence in the institutional structure of the U.S. educational system and the economy, with schools in low income areas containing coercive authority structures and little inventiveness or student autonomy while schools in more affluent areas provide more opportunities for student participation, offer more electives, and have less direct supervision of students. This stratification mirrors the structure of low and high-paying jobs, and resulted in distinct student responses to the learning environments: limited inventiveness and capacity to self-restraint in the low-income schools, and free expression and internalization of norms in the higher income schools.

The correlation in institutional effects is connected through behavior. Behaviors developed in one institution may be applied as heuristics in other games (Bednar and Page 2007). Rather than starting with a random strategy and evolutionarily creeping toward more efficient strategies, agents draw on their experience, borrowing behaviors from related games. This heuristic-borrowing has been offered as an explanation for culture-specific variance in response to public good provision games (Henrich et al 2001, 2004), and has been observed in controlled behavioral experiments (Bednar et al, 2011).

The form and direction of behavioral spillovers may be predicted. Different institutional forms require different degrees of cognitive processing to solve, a characteristic that can be measured by the entropy of agent response to the games when played in isolation (Bednar et al, 2011). Games of low

⁷Riolo, Cohen, and Axelrod 2001 demonstrate that arbitrary similarity tags also facilitate cooperation.

entropy—those that are relatively easy to solve, generally because they have a dominant strategy—are least vulnerable to behavioral influence, and behaviors applied in these easy games are most likely to be applied as initial heuristics in other games. Dominant strategies require no consideration of the payoffs or likely behavior of others; while not necessarily destructive to society, it is antisocial in the strict sense. Antisocial behavior—indifference to others—is cognitively easy and becomes likely to affect play in other games. In games that reward cooperation, such as the repeated prisoner’s dilemma, agents are less likely to cooperate when they simultaneously play a game that rewards indifference to others.

The key lesson from the multiple games studies is that the institutional context affects agent response in many games, particularly the more complicated ones which often includes those that would encourage cooperation. Antisocial behavior spreads, and the presence of institutions that reward antisocial behavior makes it more unlikely that prosocial behavior will emerge in institutions that might otherwise foster it. On the other hand, in simulations and initial results from current behavioral experiments, prosocial behavior can be encouraged through small modification to the institutional environment, perhaps by making the antisocial games less salient or by introducing a simpler institution that rewards prosocial behavior. And under some conditions, path revision is possible (Bednar, Page, and Toole forthcoming). Nevertheless, given the institutional path dependence that results from behavioral spillovers, it is not possible to achieve all outcomes from every set of preexisting institutions and behavioral patterns.

In sum, preliminary research indicates that prosociality is affected by institutional design and the institutional context. Scaling is problematic; prosociality is easier to develop in small communities. The full institutional environment must be considered when trying to gauge the effectiveness of any single institution. Behavioral patterns span institutions, and adapt in response to changes in the institutional environment. The institutional environment, with multiple institutions, influences patterns of behavior and shared expectations of one another’s behavior. It creates and sustains the community’s culture.

3 Federalism's Potential

Given the importance of prosocial behaviors for constitutional success, and the conditional responsiveness of culture to institutional design, it is worth asking whether a constitution might be written in a way that fosters the development of prosociality—whether prosociality might be bootstrapped by careful constitutional design. Given that in small groups conditions are more ripe for the emergence of prosocial behaviors, one naturally is prone to think of federalism, with its ability to decentralize key policy-making to smaller community subsets, as a constitutional form that might be most likely to promote cooperative behavior.

Federalism is touted for many reasons, ranging from economic innovation and growth, to improved representation, to minority autonomy, at least if minority populations are clustered. But the evidence of federalism's ability to encourage prosocial behaviors is slim to disconcerting. On the whole, federal systems provide fewer public goods, spend less on public education, have higher poverty rates, and greater income inequality (Hicks and Swank 1984, 1992, Huber et al 1993, Birchfield and Crepaz 1998, Castles 1989, 1998, Crepaz 2002, Busemeyer 2007). The apparent underdevelopment of prosocial policies is related to the effective number of veto players (Tsebelis 2002); federal systems create competitive power-sharing arrangements and it simply becomes more difficult to secure approval of redistribution plans. While states may engage in policies that pick up the slack, any policy with positive externalities will tend to be underprovided, as will redistributive policies such as welfare or health care, given the fear of becoming a “welfare magnet”, attracting the needy into the state, whether or not such movement actually happens (Peterson 1995).

Despite the offputting evidence, there are four ways that federalism might be useful. First, if distributional issues and externalities can be limited, at least initially, the smaller and perhaps more homogeneous community does promote community responsibility. Second, and relatedly, policy-making in federal systems is quite adaptive; while formal change is made difficult by the numerous veto players, unofficially or informally, policy authority can be shifted between levels of government, at least on an experimental basis, with some ease, particularly when policy authority is already shared between levels of government (Bednar 2009). With thoughtful design of the institutional safeguards, pushing against the boundaries of federalism need not upset the union. With experience, the public may come to recognize the efficiency of

centralizing policies even if at first such centralization was politically unthinkable (or the contrary).

Third, the federal system may help a public new to democratic institutions to learn how to trust the institutions of governance, boosting the likelihood that the formal institutions work as designed. Consider two examples, the first relating to the electoral system and the second to judicial legitimacy and power. If people have little or no experience with voting, many aspects of electoral choice may confound them, from the mechanical practice of submitting a ballot to the higher level problem of correctly mapping candidates to one's own policy preferences. Ordeshook and Shvetsova (1997), building on Tocqueville, argue that the multiplicity of political offices created by the fragmentation of federations gives the public a chance to practice casting ballots as well as to encourage the development of an integrated party system. Especially in local elections, where the stakes may be small and personal information more readily available, federalism "trains" new voters, enabling them to learn the skills that they need in order to make informed choices in national level elections. It also may create a national government attentive to local concerns.

Federalism may also help the development of judicial review. While judicial review is often cited as a necessary ingredient in the establishment of the rule of law, it requires a high level of trust from the citizens. An unelected judiciary is by design distinct from public or political influence, enabling it to behave in a countermajoritarian force—needed if it is to strike any law enacted by majority will. For a population unaccustomed to democracy but ready to embrace it, the importance of a countermajoritarian force to democratic success is an irony somewhat too subtle to embrace without experience. In federations, a high court needn't immediately exercise its review powers against the national government, which is likely to lead to much unwanted attention and controversy. Instead, the court can review the legislation generated by subnational governments. When the court strikes subnational law, although it may distress the public within that substate, all other residents of the federation, living in other substates, merely observe the process without a deep interest in the outcome. This disinterested observation gives citizens an opportunity to learn about the judicial process and the importance of review; most likely (unless they are living in a state that sits well outside of the legal norm), the majority of the decisions rendered by the court do not affect them. Friedman and Delaney (2011) describe the evolution of public support for judicial review in the United States in these terms.

The final point in federalism's favor returns us to the main subject of this essay: the growth of a prosocial culture. Prosociality is more than a direct willingness to act in the interests of the community; it is also the support of formal institutions that make the creation of prosocial policy possible. It is respect for the rule of law and for policy that runs against one's own preferences, if determined democratically and upheld juridically. In the federal system, it is an understanding that each level of government has limits and obligations. Many federalism theorists point to the necessity of a federal culture for the success of a federation, positing (in the sense that Weingast 1997 does regarding the rule of law) that when the public has a common sense of what the government is allowed and obligated to do, they are better able to uphold the rules.

Federal systems may have an advantage over other democratic systems in this regard. Multiple competitive veto players each express their own preferred interpretation of the proper role of government, and each safeguard, constructed differently and relying on different evidence, weighs these claims to authority differently. What passes muster through the legislative process, despite party competition, fragmentation, and the incorporation of subnational governments in the decision loop, may be struck by the courts. In the meanwhile, the citizens hear the debates and in a sense engage in a form of deliberation. The public discussion and debate helps citizens to know where others stand. This constructed knowledge, not just about one's own views but about the views of others, is necessary to form expectations about one another's behaviors. As common knowledge of consensus emerges, the public is able to patrol governmental overreach, confident that others share their same outrage at the violation of their expectations for governmental behavior.

4 Constitutional Prospects for Afghanistan

In many ways the prospects for Afghanistan couldn't be more bleak. It has suffered from decades of foreign intervention, sitting on top of ancient tribal rivalries and a minimal indigenous economy. The well-intentioned aid agencies have focused on correcting material shortages: electrification and other infrastructure, essential (but non-indigenous) housing, food. While meeting the substantive needs of the people, it may have exacerbated antisocial tendencies, as direct aid is surely causes the payoffs from self-generated prosocial

behaviors to pale in comparison. For example, it has utterly distorted the labor market. And there is a new urgency to Afghanistan's recovery. If the mineral deposits do prove to be as rich as current exploration indicates, then the Afghan people will need to coordinate, and quickly, in order to avoid expropriation by foreign investors.

Despite this acute need, it is hard to develop prosocial tendencies when a population is fearful. Under these circumstances, it would seem that to introduce institutions such as federalism, or other constitutional structures demanding cooperation, would be unlikely to result in cooperative and socially productive behavior. Even setting aside the usual arguments against federalism in Afghanistan—ancient tribal rivalries—it would seem for these reasons alone that federalism would be ill-advised in Afghanistan.

One often hears this expression of regret: in waging war, we make post-war reconstruction impossible. The reason that reconstruction becomes impossible is that war destroys the prosocial behaviors needed to build a stable society.⁸ One might then ask, has war put Afghanistan on an irreversible path of dependence, or are there interventions that might undo the damage to the social structure, and especially in the case of Afghanistan, create something new? Here, at this point of desperation, it is possible that federalism may hold out promise where the unitary state cannot. With federalism, one might exploit the cultural variation within the country, with anthropologists characterizing some portions as more hierarchical and others more egalitarian. In the egalitarian sections, are there prosocial tendencies? (Egalitarianism does not imply community-mindedness: pure self-interest is egalitarian too.) If so, then any intervention, perhaps by bridging institutions, might be structured to reward individual responsibility and community achievement. Should these pockets flourish, the behaviors may diffuse. Scaling up remains a problem, but federalism, with an ability to develop multilevel coordination, may be one channel.

⁸Stromseth, Wippman, and Brooks 2006 very sensitively build the argument of reconstruction's complexity.

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