

The Administrative Foundations of Self-enforcing Constitutions

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Abstract

Current theories of the rule of law argue that public officials respect rights if the citizens are coordinated on an equilibrium in which they collectively resist abuse. Constitutional rules are means to coordinate on this equilibrium. In past and present states, however, constitutional rules often have no effect on the rule of law. This paper suggests an alternative view of the origin and development of the rule of law. Instead of considering constitutional rules as coordination devices for citizens at large, history suggests considering them as manifestations of equilibria with rulers constrained by “administrators” required to implement policy. Analysis of the administrative foundations of self-enforcing constitutions may be the key to a theory and policy that would foster the rule of law in developing countries and those in transition. In particular, constitutional reforms might benefit from focusing on altering the equilibrium distribution of administrative capacity and power, providing incentives to the administratively powerful to check predation by each other and the central authorities, and to align administrators’ interests with social welfare.

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Evidence indicates that prosperity increases with the rule of law that limits abuse by public officials. Less is known, however, about how to foster such rule of law in developing countries. Constitutional theory views the problem as one of coordinating the citizenry. “Liberty can only be sustained when citizens have the ability to act in a coordinated manner against governmental transgressions” (Weingast 2005, p.106). Constitutions “create a focal solution ... so that citizens gain the ability to act in concert and police their government,” (ibid, p. 105). Citizens’ expected response to abuses make the constitution self-enforcing. The challenge for reform, however, is that we have no theory articulating the conditions under which constitutional rules successfully coordinate behavior (Greif 2006).

The process that led to the emergence of the rule of law in the West suggests the merit of another theory of self-enforcing constitutions to guide reforms (Greif 2007b). Instead of considering constitutional rules to be coordination devices for citizens at large, history suggests considering them to be manifestations of equilibria with rulers constrained by those “administrators” that implement policy.

The focus on administrators reflects the common situation where public officials (or ‘rulers’) have limited *physical* capacity to implement policy choices, including abuses. Rulers therefore have to rely on “administrators:” individuals and organizations that implement policy (e.g. armies, tax farmers, feudal lords, bureaucracies, self-governed provinces and cities, and clans). Administrators have an advantage over regular citizens in sanctioning rulers: they can refuse to cooperate with the ruler while facing a state apparatus that has been weakened by this refusal. When administrators have the power to ‘sanction’ a ruler in this way, they may also be able to forestall choices that weaken their relative power. Power can perpetuate.

The rule of law can therefore be a manifestation of equilibria with administrators sufficiently powerful to constrain rulers. In such cases, constitutional rules that explicitly articulate a common comprehension of equilibrium rights can reduce conflict between rulers and administrators, while political representation fosters cooperation in changing this common comprehension of rights. The equilibrium distribution of administrative power determines the set of self-enforcing constitutional rules. Thus, constitutional rules are enforced by the credible

threat of sanctions by powerful administrators, of which a coordinated citizenry (that provides administrative service) is only one example.

This paper demonstrates the relevance of this administrative-power view of constitutionalism by examining the experiences of the City-State of Venice and England, the two Western polities in which constitutionalism lasted the longest. Political rights and representation were functions of the distribution of administrative power. More generally, the administrative-power view of self-enforcing constitutions better explains these states' constitutional histories than the coordination view. Reforms might therefore benefit from focusing on altering the equilibrium distribution of administrative capacity and power, providing incentives to the administratively powerful to check predation by each other and the central authorities, and to align administrators' interests with social welfare.

I. The Administrative Roots of Venice's Political Development

The City-State of Venice evolved from an elected monarchy into a republic and eventually into an oligarchy. This evolution reflects endogenous changes in the distribution of administrative powers: the increasing coherence of administrators gradually reduced the power and rights of other groups. This emergent oligarchy then implemented economic policies that reinforced its administrative power and wealth.

When Venice became an independent political unit in the 9th century, it was governed by doges elected for life by the city's free men (the *popolo*). Their Grand Assembly also had the right to approve laws. This wide distribution of political rights is consistent with the assertion that political rights reflect administrative power. The Venetian lagoons were populated after the fall of the Roman Empire by many families with relatively similar administrative capacities.

Probably due to the difficulty of coordinating the numerous *popolo*, there were no formal constitutional rules limiting the doge's power. Once elected, the doge had absolute power with unlimited authority over all constitutional, administrative, political and military matters. The factor that prevented doges from *de facto* assuming dictatorial powers was not the expectation of popular retaliation, as the coordination view might suggest. Rather, doges were constrained by a number of rival clans with relatively high administrative capacities. The role of these clans in limiting dictatorial tendencies is revealed in doges' repeated attempts to seize dictatorial powers

by neutralizing the threat posed by these clans, rather than subjugating the people at large. Ultimately, all these attempts failed. This is consistent with our assertion that administrative capacity and power limit rulers' ability to abuse rights.

The process through which Venice was transformed into a republican magistracy is also consistent with the conjecture that political representation is provided to those with administrative powers and that its aim is to reduce conflicts among the powerful. Doges began relying on members of important clans and families (known as the Great) in juridical and political decision-making processes. By 1143 this arrangement was formalized through constitutional reform that created the Council of the Wise Men. Members of the Council, drawn from families of the Great, acted as guardians of the interests of the commune and took an active role in its administration.

It was in 1172, however, that Venice's transition to a republican magistracy was completed. In the previous year, Venetians in Byzantium were attacked and thousands were imprisoned. The doge failed to resolve the crisis and was assassinated in Venice. The Venetians probably recognized the need to provide better incentives for serving the state to those with administrative capacity. The Grand Assembly authorized transforming the Council of the Wise Men into a Great Council, which subsequently included all the adult males of the Great families. Its sub-committees elected Doges and assumed an increased administrative responsibility.

The relative power of the doges declined because the council and its committees fostered cooperation among the Great, increasing both their investment and control over administrative capacity in Venice. Consistent with our conjecture, the doges gradually lost their political rights. A 14th century observer noted that the doges had become not lords, not even leaders, but honored servants of the State. In 1355 after a last attempt by a doge to assume dictatorial powers, sword-bearing executioners followed them in official processions to symbolize that doges too were under the law. The Great, however, still had to rely on the administrative services of the *popolo* to man the navy and army. Hence, they organized Venetian trade in a way that benefited all Venetians (González de Lara 2007).

The Great's control over the administration was also used to peacefully dissolve the powerful clans. Specifically, assignments to administrative and political positions were made without consideration of clan strength. Campaigning for office was outlawed, officers (including the doge) were appointed by randomly selected committees and only one family member was

allowed on any such committee or office. The administrative capacity of one's clan was therefore no longer important in determining his political and economic rights, influence, and benefits. Clans gradually declined.

The rule of law was self-enforcing because each member of the Great Council had much to gain from protecting the system and much to lose from its failure. Furthermore, the administrative system generated information about abuses and coordinated on the belief that anyone who abused power would be punished. Various councils and magistracies were given overlapping jurisdictions, so that each was monitored by others. Office holders were legally required to notify the State Attorneys of any observed wrongdoings. The Attorneys had investigative powers and examined the conduct of every official during and at the end of his term.

This system transformed the Great into a cohesive group where each member had a personal interest in its perpetuation. By the 14th century, members of the Great Council were better able to cooperate, administer and impose their will on the *popolo*. Membership in the Council of the Great became hereditary and the Council used its administrative control over the lucrative overseas trade to enrich its members and perpetuate its control. Venice became an oligarchy.

II. The Administrative Roots of English Constitutionalism

The coordination view of the rule of law has been inspired by a particular interpretation of English history. It asserts that during the 17th century, property owners sought to protect their property from abuse by the Crown. Upon victory, these property owners specified constitutional rules to coordinate actions against the Crown that secured their rights. This increased security of rights fostered markets and hence prosperity.

Administrative power, however, constrained English monarchs long before the 17th century and political rights changed as the distribution of administrative power evolved (Greif 2007b). As early as the Norman Conquest (1066), nobles who provided the Crown with military, financial and judicial services, had considerable administrative power. These nobles were represented in the Great Council which, after 1215, had the right to authorize new taxes. Conflicts among nobles and the Crown, among other factors, led to an increase in the

administrative power of towns. Consistent with our conjecture, the towns then gained political representation and rights. In 1295, Edward I summoned the so-called 'model' Parliament that was the first to include the towns. Edward recognized the Parliament's right to approve taxes. Administrative power implied rights.

Over subsequent centuries, Parliament's grants of taxation were often accompanied by a list of grievances that sought either to influence policy or gain additional rights. Influence and rights were not gained by coordinating the citizens against the Crown, however. They were requested by the Crown's administrators in return for administrative services and were conceded arguably because the administrative power of Parliamentarians was increasing. By the 17th century, the Crown was unable to either systematically abuse rights or raise taxes and to gain unauthorized revenues, monarchs had to resort to such desperate measures as selling Crown land and noble titles.

Administrative power was central to the political conflict in 17th century England. Despite significant limits on the Crown's ability to abuse domestic rights, the expansion of Atlantic trade increased the value of the Crown's rights to collect customs and to set foreign policy. With limited administrative capacity to raise capital and administer overseas ventures, the Crown pursued trade expansion through self-governed, joint stock corporations. The additional income, particularly from customs, increasingly enabled monarchs to govern without relying on Parliamentary taxes.

A coalition of members of Parliament emerged to push for constitutional reforms, arguably because they expected the Crown to become more powerful in the future. In the subsequent conflict, the English monarchs indeed lost their traditional rights over customs and overseas policy. Ironically, the creation of this coalition appears to have been facilitated by the introduction of the new joint stock corporations that allowed a broad group of non-merchants to profit from opportunities overseas (Jha, 2007).

The interpretation of the 17th century conflict as one of aligning rights with administrative power is more consistent with the evidence than the interpretation implied by the coordination view. The latter considers the conflict as fought over protecting domestic property rights and argues that this protection was necessary for growth. Yet property owners were no more likely than other administrators to oppose the Crown during the 17th century and growth had accelerated a century earlier. Furthermore, domestic expropriation risk, as indicated by interest

rates and land prices, were relatively small prior, during, and after the 17th century. Finally, it was in later centuries that England witnessed some of the greatest property rights abuses in its history (see Greif 2007b for references.)

The administrative-power view is consistent with these observations. Growth in the 16th century was possible because administrators' property had been secured by the existing distribution of power. The English Civil War did not impact land prices or interest rates because a royal victory was not expected to undermine the administrative power of property owners. Finally, property rights were abused in England after the Revolution because Parliament represented those with administrative power. Others' rights were not protected. Ironically, the rise of Parliament relative to the Crown enabled greater coordination and mobilization of resources to abuse those rights (Greif 2007b).

III. Concluding Comments

The experiences of Venice and England suggest that the equilibrium distribution of administrative power was historically important in constraining rulers. Administrative power determined which rights were an equilibrium outcome and hence which constitutional rules were self-enforcing. Administrative power played a similar role in the emergence of constitutionalism in other pre-modern states (Greif 2007a, 2007b).

An important question yet to be explored is whether administrative power also influences constitutionalism in contemporary states. While important work has examined the role of civil society – of administrative capacity outside the state apparatus – in supporting the rule of law, surprisingly little attention has been given to the possible influence of state administrators. Casual observation suggests, however, that control over administrative capacity still influences the rule of law.

In the US, for example, the wide distribution of administrative capacity restricts abuse. Military, financial and other administrative services are provided by many independent bodies such as states, school districts, local law enforcement agencies, business associations, and business corporations (that provide tax collection services). This administrative structure reduces the expected gain for any one unit from implementing illegal choices because other units can be mobilized against transgressors.

Moreover, the federal government's capacity to abuse rights is limited by its dependence on the cooperation of many administratively powerful units. If an American president refused to vacate his office or a general attempted to seize power, they would face high costs of implementing their choices. As in pre-modern Venice, it would be extremely difficult for such a usurper to convince a sufficient number of administrators that they would be better off cooperating with him given the common belief that others would not cooperate.

Spain's democratic transition in 1975 exemplifies how administrative incapacity by aspiring dictators safeguards democracy. At the end of Spain's dictatorship, the reformers recognized that a conscripted army would be more likely to protect democratic institutions because it would be dominated by men who had not benefited from the dictatorship. Indeed, during the last Fascist attempt of a coup in 1981, soldiers refused to support their rebellious officers.

More generally, changes in the distribution of administrative capacity are still a hallmark of self-enforcing constitutional changes. Contemporary aspiring autocratic regimes regularly attempt to weaken administrative power through such means as creating alternative administrative structures and gaining control over the distribution of mineral wealth. Similarly, those attempting transitions away from authoritarian regimes often seek administrative reforms aimed at reducing central control over administrative capacity.

The capacity to foster the rule of law through administrative reform requires further analytical developments. We do not have models of the conditions under which administrative power is an equilibrium outcome. Arguably, power increases in the rulers' costs of replacing administrators. The ultimate factors determining this cost, however, seem to be both exogenous such as technology but also endogenous, such as self-enforcing legitimacy and the loyalty of administrators' agents (Greif 2007b).

Hence, while the coordination view emphasizes that constitutional rules, through their focal impact, influence beliefs and norms, the administrative-power view highlights complementary relations between institutional rules and culture. The beliefs and norms underpinning legitimacy and loyalty determine constitutional rules through their impact on administrative power.

Similarly, we lack models of when administrative power that supports the rule of law also promotes economic prosperity and reduce poverty. Historically, the impact of the rule of law on

welfare has not been uniform. In Venice and England, the gains from the commercial expansion pursued by the administratively powerful were widely shared for a long period of time. This was not the case, for example, in the constitutional monarchy of Poland-Lithuania (1569-1975). There the aristocracy, whose power and wealth were based on agricultural exports, legislated serfdom and limited urban growth (Greif 2007a, 2007b). These distinct outcomes may reflect differences in economic structure and in the impact of prosperity on administrative power (Kivanc 2006).

We also lack a theory specifying the conditions under which the administratively powerful will implement policies that lead to the rise of new groups with administrative capacity or expand constitutional rights to others. In England, new groups emerged and rights were expanded but this did not transpire in oligarchic Venice. Surprisingly, Poland-Lithuania adopted a constitution similar to that of the US in 1791.

In any case, history indicates that the origin of the rule of law does not lie in the ability of citizens at large to coordinate resistance to an abusive ruler. Rather, it appears to lie in the capacity and incentives of the administratively powerful to sanction rulers. The equilibrium distribution of administrative power has determined the distribution of rights and influenced economic policies and outcomes. If constitutionalism can enhance prosperity by enabling commitment to particular policies (Engerman and Sokoloff, 2000; Acemoglu, et. al., 2001), it is crucial to know the mechanism that renders it self-enforcing and its inter-relations with policy choices.

Reforms that aim to foster constitutionalism may profit from redistributing administrative capacity and responsibilities so that administrators are both powerful relative to the central authorities and are aligned in their interests with weaker citizens. Admittedly, this is easier said than done, but history indicates it is both feasible and rewarding. Administrative reforms aimed at fostering constitutionalism are a neglected but important channel for advancing economic prosperity.

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