

I

Introduction

American government is defined – some might say constrained – by its institutions. If we wish to know how the government might accomplish specific policy ends, why it often fails to accomplish them, how its application of coercive force on the people can be restrained, we look to these institutions. If we wish to know how public opinion is channeled in affecting public policy, we look to these institutions. Some of the most important ones – mass parties, a large administrative bureaucracy – were not anticipated at America’s founding. But equally clearly, some of our major institutional structures – such as federalism, separation of powers, and “checks and balances” – were.

Throughout their lifespan in America, these institutions have changed the world’s standard for orderly, popularly responsive government on a mass scale. They offer one paradigm of how to ensure liberty and protect citizens from arbitrary public action. And they underwrote America’s growth into an economic and military superpower. We can accept this and still acknowledge the defects of these institutions for democracy and internal stability. The United States often fails to distribute prosperity and security justly among its residents, sometimes grotesquely so. We can do better, but a country could certainly do worse and many have. So it is useful to know how we got here.

What is the wellspring of these institutions? The US Constitution is an obvious candidate. The Constitution and related literature, such as the debates from the constitutional convention and the Federalist Papers, present unusual examples (especially for the time) of conscious, forward-looking design of political institutions. To answer why the United States has the institutions it does, these documents are good places to start. But

they are not good places to stop. The United States in 1787 was not an institutional blank slate. Much of what the framers of the Constitution achieved was to borrow, reconfigure, and retheorize their institutional inheritance from the British empire (Wood 1969; Kernell 2003; Robertson 2013). Given that so few of the institutional structures in the Constitution were invented for the occasion, it is natural to ask why they were first deployed, and how they evolved, under British administration of the territory that became the United States.

These are the questions I address in this book. My argument is that America's foundational institutions emerged from problems of British governance in the New World – more specifically, the crown's strategic response to them. These problems arose because the British¹ imperial state² was not unitary. Governing an empire requires delegation, and the British empire was no exception. This delegation included authority to claim territory in the monarch's name, organize a colonial economy, export people and supplies out of England, import goods and resources into England, and govern the monarch's subjects.

All of this authority radiated ultimately from the crown (Keith 1930). How it was exercised affected what, if anything, the crown and the state would gain from colonization. Therefore, the actors exercising this authority were, at least formally, the crown's *agents*.

It did not escape the crown's notice that the agents to which it delegated might not always act in its best interest (Roper and Van Ruymbeke 2007, 10). They might wish to encroach on territory that would embroil the crown in international disputes (MacMillan 2011). They might prefer free trade with other nations where the crown preferred all produce to go to England (Barrow 1967). They might use their political authority within colonies to dominate other colonists economically and capture the rents for themselves, even at the risk of the stability and security

¹ The state of Great Britain came into being in 1707 with the Acts of Union between England and Scotland. Before that date, colonies were established under the crown of England; thus the empire was “English.” After 1707, the empire under the crown's authority could be designated “British.” I will often switch between the two labels without much risk of confusion.

² I use the phrase “imperial state” to connote the institutional system for managing an empire, and a state's “empire” to connote a system of extraction outside of that state's own physical boundaries that is at least theoretically under the command of the state. While historians have long debated exactly when England obtained a self-consciousness as an imperial power (e.g., Pagden 1995; Armitage 2000), or when (if ever) it attained sufficient real control to justify the term (e.g., Andrews 1934; Bliss 1990), these debates are not immediately relevant to my usage, as will become clearer below.

of a colony (Morgan 1975). Moreover, the crown's information about both the economic potential and internal politics of colonies was severely limited, especially at the outset of the colonial era (Games 2008).

The mixture of conflicting interests and information asymmetries in the non-unitary state³ generated, in the language of political economy, a principal–agent problem. In the pages below I adapt a principal–agent perspective⁴ to analyze the strategic dilemmas of English imperial governance in the New World. I cast the English crown as the principal.⁵ This may seem surprising; there is a common belief that English law (and institutions) migrated with the colonists, and there was nothing the crown or anyone else could do about it (cf. Keith 1930, 9–10; McNeil 1989, 135; Hulsebosch 2003, 470; MacMillan 2006, 32). In fact, the crown held extensive formal power over colonial and imperial institutions: Only the crown could issue the letters patent and governors' commissions that specified these institutions. At the outset of colonization, the monarch's unilateral prerogative was particularly expansive. In principle, the monarch could govern entirely through prerogative institutions, “without local consent and with or without the metropolitan Parliament” (Hulsebosch 2005, 26). In short, the monarch had capacious power over the first colonial institutions; the question was how to use it.⁶

Royal authority over institutional structure does not mean that the crown exercised day-to-day control itself. It does mean that, if the crown

³ My focus on the role of the non-unitary state ascribes an independent, causal role to state structure in the ongoing evolution of state institutions. In this way, it shares a theoretical focus with other state-centric work on political development, including the generative work of Skowronek (1982), Evans et al. (1985), and Carpenter (2001), despite a different methodological focus.

⁴ See Laffont and Martimort (2002) for an extended treatment of principal–agent theory; Bolton and Dewatripont (2005) for a wide range of applications including organizational economics; and Gailmard (2014) for an informal overview with applications to internal government accountability.

⁵ I generally take the crown as a unitary actor. In fact, the crown consisted of the monarch – an actual, individual person – and its advisors, ministers, and bureaucrats. The crown's most senior advisors comprised the Privy Council. So even within the institution of the crown, the monarch faced agency problems. I consider these issues only tangentially, but in principle, it could be interesting to give them a sustained treatment.

⁶ Despite its assumption of formal power for the principal, a principal–agent perspective does not presume that the principal can find a way to achieve its most preferred arrangement. On the contrary, the perspective is interesting precisely because it explains how principals may fall far short of achieving their most preferred arrangement, or even a satisfactory one. That is a fair summary of the crown's position in the New World empire. My view is that a compelling account is one that explains this position strategically, rather than assuming it.

delegated extensive control, we should seek to understand why – and how. This dovetails with one of the central theoretical points from principal–agent models of institutions: The institutional structure in which agents operate affects their incentives to promote their principal’s interests. Therefore, we should expect principals to use their authority over institutional structure to provide beneficial incentives to agents (e.g., Jensen and Meckling 1976; McCubbins et al. 1987). The institutions of the British empire structured the nature, extent, and oversight of authority delegated from the crown to colonizing agents. *Colonial* institutions (internal to each colony) and *imperial* institutions (between colonies and the crown) affected that control and channeled that oversight. If the crown wished to maximize its own gain from the empire, it follows that it should have implemented institutions to manage these principal–agent problems.⁷

In the early colonies, the crown used its formal power to implement a consistent – if highly decentralized – institutional structure across a group of mutually independent colonies.⁸ There were two major attributes of this structure. First was *internal colonial autonomy* with respect to the crown. Colonizers were guaranteed long-term and near-complete control over their internal operations and obliged to share only a small amount of economic output with the crown. Second was *independence of legislatures* from governors within colonies. Either an appointed colonial council or elected assembly was to share the power to legislate and tax within the colony; colonizers were not to be autocrats. The crown provided for these structures in royal letters patent, which were binding on the crown in English courts.

The principal–agent perspective explains what these structures did for the crown. Internal autonomy provided strong incentives for colonizers to incur great costs to figure out how to make money in the New World. Legislative independence provided a check on extractive colonial executives

⁷ This theoretical perspective builds on Levi (1988), who argued that all rulers are interested in revenue extraction, so variation in state structures comes from variation in their constraints, not their motives. I extend this argument to the case of early modern colonization. On this model, in all colonies, the crown was interested in whatever extraction was possible. The key constraints in my analysis are *incentive constraints* the crown faced with its colonizers. These constraints both structured the first English institutions and generated social and political structures that further constrained the crown’s freedom of institutional choice.

⁸ Importantly for comparison to prevailing arguments about English colonial institutions (e.g., Acemoglu et al. 2001), this institutional structure did not vary much as a function of colonial factor endowments or settler mortality.

that the crown – armed with a weak bureaucracy at the time – could not provide itself.

Over time, the crown wished to exert greater control over colonial political economies but encountered significant complications. First, early colonial institutions generated entrenched interests that resisted reform, such as a large merchant-planter class across colonies. Second, ostensibly separate institutions within colonies interacted with each other to create what I call *self-reinforcing bundles* of institutions. Self-reinforcement arose because the crown's attempts to layer a new imperial hierarchy on old colonial institutions generated additional agency problems with royal agents. It made bundles of colonial institutions more durable than any of their individual components, and stymied control by the crown.⁹ For these reasons, the crown's *political* (real) power was less than its *legal* (formal) power in the established empire.¹⁰ This mismatch resulted in persistent colonial autonomy and powerful, independent legislatures that lasted through the colonial period. These institutions in turn directly affected the US Constitution: The separation of powers between executive and legislature, and the assumption of states as independent units of political life, flowed immediately from colonial dynamics.

The substantive payoff of the principal–agent perspective is to understand (*i*) why English colonies were governed in this way and (*ii*) how their early structures interacted with agency problems in the imperial hierarchy to inhibit control later on. To explain more, it is useful to start with an overview of the first British empire and its institutions. Then I give a more detailed overview of my argument.

1.1 HISTORICAL OVERVIEW: THE ENGLISH EMPIRE, ENGLISH COLONIES, AND THEIR INSTITUTIONS

Examining a more or less consolidated British empire in the New World after the French and Indian War, one finds a chain of relatively populous political societies in eastern North America and several Caribbean islands with well-articulated governmental institutions and economic structures

⁹ Thus self-reinforcing bundles of institutions are one route to institutional path dependence (North 1981, 1990; Pierson 2000). Related concepts are deployed by Greif (2006) on economic institutions; Acemoglu and Robinson (2008) on institutional persistence; Besley and Persson (2011) on development clusters; and Filippov et al. (2004), Defigueiredo and Weingast (2005), Bednar (2008), and Broschek (2013) on federalism.

¹⁰ See Aghion and Tirole (1997) on the distinction between formal and real authority in organizations.

based on agricultural production and trade. There were also established modes of oversight and regulation of the colonial political economies by the central state, bureaucracies (and very occasionally Parliament itself) in Britain to devise these regulations, and agents of the metropole on the ground in the colonial periphery to implement them. All colonies had elective assemblies answerable to property-owning colonists. Almost all had governors chosen and instructed by the crown. Colonial assemblies could initiate legislation, but in most it had to be approved by royal governors and also by the imperial ministry in England. Colonists had considerable autonomy over their production and trade, though the navigation system required external trade to be carried on British ships and, for the most valuable products, funneled first through England to pay customs duties. British writers and officials thought of their empire as one of seaborne trade, not of extractive domination, and thus fully compatible with the liberty of its white, free subjects – in contrast to the corrupting empires of their continental rivals and of antiquity (Armitage 2000). At least this might be called the “official” view of the empire’s governance, and it had been in place since the 1690s (Webb 1979).

Despite this coherence, any attempt to find an *ex ante* plan by the English state to create such an imperial structure would be in vain. It is universally recognized among historians that there was no singular act of state will behind this empire (Beer 1908; Andrews 1984; Bliss 1990; Roper 2017). Instead, the English empire emerged out of decentralized commercial ventures by private English merchants inflected with a more or less martial character (Webb 1979; Andrews 1984). Without stretching the concept too much, we could recognize these commercial overseas ventures as public–private partnerships. Private merchants exercised power delegated by the state, such as the right to claim territory in the name of the crown, subdivide land and grant it as property, govern the monarch’s subjects, and move people and goods in and out of England.

The Crown’s Legal Authority

None of these rights could be legally obtained except by explicit grant of the crown (Bliss 1990, 23; MacMillan 2006). Therefore, private actors and merchants lobbied the crown and its ministers, often bringing them on as leading figures in overseas ventures, essentially offering political support and financial returns in exchange for delegations of state power. The crown also stood to benefit from customs revenue on overseas produce vended in England and imports of strategically important

resources, so its financial and security interests supported the delegation of state power to help the ventures succeed. Moreover, a rich pamphlet literature praised the myriad public benefits from overseas ventures, especially colonization: It would provide outlets for England's surplus population; a check on the dominance of foreign rivals, especially Spain; sources of wealth through minerals and resources; and markets for English products. The literate minority consumed this literature and took the point that colonization could benefit the whole commonwealth.

Royal authority was formally delegated to colonizing agents through the legal instrument of letters patent, a device akin to a contract between the legal sovereign and an agent. By this arrangement, the merchant-mariners that initiated New World colonization were literally government contractors, and this colonization was, in a sense, an early modern forerunner of government contracting out for services.¹¹

By exercising state powers in pursuit of private gain, the contractors simultaneously drew the English state into the governance of overseas ventures. State power, if misused by private contractors, would waste opportunities for gain, create colonial unrest the monarch had to address, or worst of all, entangle the state in conflict with other European colonizers. No state protective of its wealth and security, which England certainly was, could leave private traders entirely to their own devices. Managing colonizers' use of state power required the crown to spell out institutions of colonial and imperial government. This, rather than any centralized design to achieve benefits to the state or people of England through colonization, was how the English crown got involved in colonial governance. The state in 1600 did not have any policy of establishing large political societies or territorial holdings overseas (Andrews 1984, 356–357).

The crown had not only the incentive but also the legal authority to structure colonial contracting in its interest. Justice Matthew Hale summarized several decades of English jurisprudence on this point in *Prerogatives of the King*. Of overseas dominions, Hale held:

¹¹ Strictly speaking, colonial charters and patents were different from contracts. Contracts involved (then as now) a process of offer–acceptance–consideration between legal equals. Charters and patents were grants of royal largesse to subjects, not agreements among equals. Nevertheless, colonial charters and patents included crucial contractual elements of mutual acceptance, duration specified *ex ante*, stipulated terms enforceable by a third-party court, and potential revocation of the patent holder's rights if terms were violated. These are the crucial elements required to invoke the conceptual apparatus of principal–agent theory. Therefore, I refer to colonial charters and patents in this sense as colonial “contracts” and apologize in advance for any offense this causes to legal historians.

[F]or the course and manner of their acquisition ... the king issued a commission to seize such and such continents ... in the name of the king ... [T]hese are acquired to the king in right of the crown of England and are parcel of the *dominions* though not the *realm* of England ... [U]pon the acquist English laws are not settled there ... [T]he English planters carry along with them those English liberties that are incident to their persons. (quoted in MacMillan 2006)

Hale made a subtle but key distinction between the *realm* and the *dominion* of England. The “realm of England” was the nation-state of England proper. Here the monarch was bound to observe common law and the “ancient constitution” – a legal corpus including the right of Parliamentary consultation on taxation and major state decisions. By contrast, the “dominion of England” included lands in the monarch’s personal possession outside of physical boundaries of England itself. Here, England’s “ancient constitution” did not bind the monarch. However, English colonists from the realm did have specific rights even in the king’s dominion: Those “incident to their persons,” such as the right of colonists not to be arbitrarily deprived of life, liberty, or property – rights held by the subjects of any lawful monarch, not specific to the English constitution. Importantly for the crown’s power in colonization, these were substantive rights with no specific institutions prescribed to underwrite them or remedies in case of their violation (MacMillan 2006, 33).¹²

English law also clarified the powers of the English Parliament in directing early New World settlement: There were none, except what the monarch chose to share with it. Conquered colonies were claimed and held under the monarch’s prerogative, a zone of discretion that lay outside the authority of the Lords and Commons. The monarch could exercise its prerogative in consultation with Parliament or not, and Parliament did sometimes legislate for overseas dominions with the monarch’s approval. But the Commons and Lords could not force the monarch to accept any provision for their settlement that it did not wish to accept. This is obvious not least because the monarch was, in the early seventeenth century,

¹² The key English court case on colonization was *Calvin’s Case* (1608), particularly the *obiter dicta* by Justice Edward Coke. Coke and subsequent English jurists recognized certain *substantive* rights of English colonists, but not rights to any specific *institutions* that the crown had to construct to safeguard those rights. Moreover, Coke held that in “conquered colonies” (which, in the cases’s schema, included all of the New World), the crown had complete control over the colonial constitution. See Black (1976), Hulsebosch (2005), and MacMillan (2006) for extensive discussions of *Calvin’s Case* and its implications for colonization.

part of Parliament; Parliament could not legislate without the monarch's assent (Black 1976, 1202, 1210).¹³

Contractual Imperialism

English overseas activity in the sixteenth century focused primarily on Asia, which everyone knew was the real money-maker (Andrews 1984, 356). Searching for a northwest passage, English mariners such as Sir Francis Drake and Sir Humphrey Gilbert hit North America and found it a useful staging point for privateering raids against the Spanish fleet. Pamphleteers imagined numerous sources of wealth and argued that England could organize a North American empire to rival that of Catholic Spain in South America. Inspired by his half-brother Gilbert, Sir Walter Raleigh secured an English patent for a massive segment of North America, imagining himself as a feudal lord over eastern seaboard. The embryonic colony of Roanoke in contemporary North Carolina, which Raleigh organized and financed but never saw in person, was the closest he got to success. Roanoke hobbled on for a few years, but disappeared in mysterious circumstances. Nevertheless, based on Raleigh's example, English interest in North America gradually shifted to forming bases for privateering, mineral prospecting, and territorial settlement (Roper 2017).

Picking up where these excursions left off, in 1606, King James I authorized two companies in "Virginia," which at the time meant the huge swath of the eastern seaboard from present-day Georgia to Maine that Raleigh had named for Queen Elizabeth I. Two separate companies, the "London Company" and the "Plymouth Company," were each granted half. The London Company landed in the Chesapeake Bay region in 1607 and named their first settlement Jamestown.¹⁴ No one knew how to actually make money there, let alone build a stable polity.

¹³ The authority of Parliament, or more specifically the authority of the House of Commons, over the colonies is a knotty problem that covered the key legal dispute in the American Revolution, a dispute that has continued in historiography to the present day (e.g., Nelson 2014). Part of that dispute is how one reckons the changing authority of Parliament after the Revolution of 1688, which made Parliamentary supremacy a reality and royal assent a formality. Most of this dispute is tangential to the question of the monarch's authority over the earliest colonial institutions. See Black (1976), McIlwain (1923), and Schuyler (1929).

¹⁴ This left the Plymouth Company with the northern colony, but it never established a successful settlement itself. It did authorize the Popham or Sagadahoc Colony in New

The Jamestown settlement is momentous because it turned out to be the first English New World settlement to last. In 1607, it was just another overseas company, neither the most prominent nor best financed. It was different from prior trading companies in that it was not entering an established trading economy or a cosmopolitan political society; previous New World ventures especially by Raleigh, Gilbert, and others had revealed this (Games 2008; Horn 2008). Still, Virginia was designed to make a profit for its employee-colonists and its shareholders to enjoy in England. Its government was rudimentary and repressive, and its economy, such as it was, initially aimed at mineral extraction. Through a series of diplomatic missteps and conflicts with local Powhatans, the colony found itself almost annihilated several times over the next fifteen years. It experimented with several widely divergent schemes of internal government and economic regulation through the 1610s before figuring out how to grow a strain of tobacco palatable to the English consumer. This generated a tobacco boom that rapidly turned Virginia into a tobacco monoculture (Horn 1998).

After trial and error in Virginia, colonial patents tended to follow a common pattern with similar terms across multiple colonies. I refer to the policy of shaping colonies through ex ante patents as *contractual imperialism*, and it had several major components. First, patents granted long-term control to the colony's organizers in exchange for symbolic rents.¹⁵ They specified no direction or review of economic operations and granted extensive authority over internal colonial policy. Second, most incorporated a form of output sharing with crown, specifying shares to the crown from various mineral deposits and shares of agricultural output vended in England in terms of customs revenue. Third, almost all patents required some kind of independent council or assembly to consult on policy decisions of the patent holders – a balance of governmental powers within each colony. Fourth, on external affairs, patents recognized colonists' right of self-protection, but enjoined them not to start any conflicts with other Europeans. These patents were secure commitments but not absolute; when and if patent recipients violated the terms, the crown could sue for patent revocation in English court.

England, which failed after fourteen months. But the Plymouth Company and its successor, the Council of New England, rented land to the Pilgrims for the Plymouth Colony in 1620, and the much larger group of Puritans for the Massachusetts Bay Colony in 1629.

¹⁵ For instance, the Barbados patent specified that the proprietor had to furnish the monarch a white horse to ride whenever they should visit the island, though they never did in this era.