Constitutional Theory and the Constitutional History of Colonial America

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Constitutional economics provides a framework for evaluating constitutional rules, and many fundamental principles of constitutional economics relate to the properties of the collective decision rule of unanimity. Unanimity may not be the optimal decision rule for every type of decision when decision-making costs are included in the analysis, as James M. Buchanan and Gordon Tullock (1962) have shown, but unanimity has this desirable characteristic: if everybody agrees to a decision, there is clear evidence that the decision improves the welfare of the group. The properties of unanimity coupled with the costs of making collective decisions provide criteria for evaluating actual constitutions. In this article, I extend Buchanan and Tullock's model of constitutional decision-making rules and apply some basic constitutional theory to the constitutional history of colonial America.

I make two main theoretical points. First, the optimal scope of collective activities declines as the level of consensus required by the collective decision rule increases. This inverse relation exists because when a higher level of consensus is required, as in a move from simple majority rule to two-thirds majority, collective decision-making costs rise. Higher decision-making costs mean that some collective activities that would have produced net benefits in the absence of decision-making costs, and would have been undertaken with a less inclusive decision rule, will not be undertaken because they are too costly. The second main theoretical point is that a requirement of more complete agreement in collective decision-making entails institutional changes designed to facilitate the reaching of that much agreement. Political institutions that efficiently produce majority-rule decisions will differ from political institutions that efficiently

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produce collective decisions under a more inclusive decision rule.

These theoretical concepts can be illustrated by reference to the constitutional history of colonial America. During colonial times the Iroquois exemplified a government that required a high degree of consensus and had very limited scope. The American colonies devised a constitution similar in structure, the Albany Plan of Union, in 1754. Although the Albany Plan was never implemented, there is an interesting progression from the Iroquois constitution through the Albany Plan, the Articles of Confederation, and the Constitution of the United States. A comparison of these constitutions illustrates the trade-off between consensus in collective decision-making and the scope of government, affording insight into how institutions might be designed to facilitate a higher degree of consensus in collective decision-making.

Let us begin by laying a theoretical foundation that provides a context for better understanding the evolution of constitutional rules in colonial America.

Some Constitutional Principles

Buchanan and Tullock (1962) discuss the desirable properties of unanimity in collective decision-making, making a distinction between constitutional and post-constitutional decisions. In their framework, optimal constitutional rules are those that garner unanimous agreement. In the real world, examples of actual unanimous agreement in political settings are hard to come by,[1] but modern contractarians such as John Rawls (1971) and James M. Buchanan (1975) present theoretical frameworks in which some type of conceptual unanimous agreement provides a foundation for evaluating constitutional rules.[2]

In Buchanan and Tullock's (1962) framework, unanimous agreement is desirable because it eliminates the external costs of collective decision-making. This notion of external cost is similar to the idea of externalities associated with market activities.[3] For Buchanan and Tullock, external costs "relate, for the single individual with respect to a single activity, the costs that he expects to endure as a result of the actions of others to the number of individuals who are required to agree before a final political decision is taken for the group" (64). The greater the degree of consensus required by a decision-making rule, the lower the external costs imposed on individuals who are party to the decision-making process.

1. Harold Berman (1983) describes meetings of early medieval towns where all residents would gather in the center of the town to verbally affirm their allegiance to the town's rules. This practice, he argues, may be the historical antecedent to the theory of the social contract developed by Thomas Hobbes (1651) and later writers. Unanimous agreement in a contractual setting is more common, even when many parties are involved. The agreement to restrictive covenants when a home is purchased provides an example of unanimous agreement among all homeowners in a subdivision. See Boudreaux and Holcombe 1989.

2. Theories based on some type of conceptual agreement, rather than actual agreement, are criticized by Yeager (1985).

3. Buchanan (1962) uses this same notion of political externalities.

Buchanan and Tullock model external costs from an individual's standpoint and do not consider the total external costs to the group. I extend their analysis in two ways: first, by disaggregating external costs into two components; and second, by considering aggregate external costs to the group. Note from the quotation in the preceding paragraph that Buchanan and Tullock confine their analysis to collective decision-making for a single activity. I retain that crucial component of their framework.

External costs can be divided into two components, which can be regarded as efficiency and distributive components. One benefit of a unanimous decision rule, emphasized by Knut Wicksell ([1896] 1967) and by Erik Lindahl ([1919] 1967), is that all collective decisions will be Pareto improvements, making everyone in the group better off, and thus will move in the direction of economic efficiency. If a collective action provides net benefits for everyone in a group, then the benefits must exceed the costs for the group as a whole. As one moves away from the unanimity rule, the probability of a collective decision in favor of an inefficient proposal, one whose aggregate costs exceed its aggregate benefits, increases. The expected loss arising from the increased likelihood of collectively agreeing to inefficient proposals is the efficiency component of external costs.

Even for an efficient group activity, however, an individual might suffer an external cost—the distributive component of external costs—by being required to bear a disproportionate share of the costs, so that his own cost exceeds his benefit. For example, if a road were to be built on land seized by the government without compensation, the landowners would suffer external costs even if the road were economically efficient. In this case, a more inclusive decision rule might force the group to search for a distribution of the costs that more closely corresponds to the distribution of individual benefits. Adjusting cost shares to more closely approximate a "Lindahl equilibrium," in which costs are shared in proportion to marginal benefits, would help get the approval of the landowners by reducing their external cost (but with an increase in decision-making costs).

Distributive External Costs

To focus on these distributive external costs, let us consider a collective decision rule for a single activity, as Buchanan and Tullock do, and assume that the collective activity always produces aggregate benefits in excess of aggregate costs, so there are no inefficiency-related external costs. In that case external costs can result only from imposing such a large share of the costs on some individuals that their own cost exceeds their own benefit. If sufficient decision-making costs were incurred, an allocation of the costs could be found that would make everyone better off. With positive decision-making costs, however, some collective actions that would be efficient without decision-making costs will not be undertaken because the decision-making costs outweigh the benefits of collective action, just as transactions costs in private markets prevent exchanges that would occur if they could be undertaken costlessly.[4]

For concreteness, imagine that every collective decision for a single activity will produce an average expected benefit to every citizen of $10 and an average expected cost of $9. Half of the people will get benefits of $5 each, the other half $15; and half the individuals will pay $18 each, the other half nothing. If cost and benefit shares are randomly assigned, the biggest net beneficiaries will get $15 in net benefits and the biggest net losers will bear $13 in net costs, with the others falling between these extremes. If hundreds of these decisions are made, the costs and benefits being assigned each time to individuals at random, the individual can expect to benefit by $1 on average for each collective decision made. The expected value of the external costs will be positive only for certain especially risk-averse individuals, and hence the external costs will be relatively unimportant.[5] The optimal decision rule would require relatively little consensus in order to minimize decision-making costs.

Now consider the same example, but this time assume that only a few people will pay $1 million, the rest zero. Benefits still average $10 per capita, and the expected cost remains $9 per capita. In this case, being one of those required to pay might lead to severe financial hardship. Although ex ante the expected net gain is $1 per person, the high potential external costs to be borne by only a few might lead risk-averse voters to favor a very inclusive decision rule as people try to avoid even a small probability of being required to bear such high costs. The external costs are purely distributive, because each proposal is assumed to be economically efficient; external costs exist only because some people must pay a disproportionate share of the total costs.

The expected dollar value of distributive external costs is always zero, but risk-averse individuals will assign a positive expected value to these costs. Individuals will want to avoid distributive external costs, and can do so with a more inclusive decision-making rule. However, a more inclusive decision-making rule imposes higher decision-making costs. The Buchanan and Tullock trade-off remains even when external costs are purely distributive.

Decision Rules and the Scope of Collective Action

Consider further the example from the previous section, in which a collective action has expected per capita benefits of $10 and expected per capita costs of $9. If members of the collective decision-making group place no value on the expected distributive external costs, then they will choose a collective decision rule to minimize decision-

4. This parallel between transactions costs in markets and decision-making costs in collective decisions is suggested by Williamson (1990), who considers public choice to be a part of the new institutional economics.

5. A similar point is made by Friedman (1980).

making costs and produce the good with net social benefits. Now assume that they place a high value on the expected distributive external costs and therefore require a more inclusive decision rule, which raises decision-making costs. If the decision-making costs rise to more than $1 per capita, the collective action will cost more than the benefits it returns, so it will no longer be efficient. As the required degree of consensus increases, decision-making costs increase, and as decision-making costs increase, some projects that would have been worthwhile in the absence of decision costs no longer will be. Thus, the more inclusive the decision rule, the more limited the optimal scope of collective action.

People can accomplish more through collective action by placing less weight on external costs, which allows lower decision-making costs. An increased demand for collective action causes people to weigh external costs less highly. Examples include wars and depressions, when citizens believe that nations can deal with their problems more effectively though collective action. In the twentieth-century United States, both world wars and the Great Depression engendered an increased demand for collective action and an increased willingness to bear distributive external costs in exchange for lower decision-making costs to promote government action. The willingness to bear increased external costs in such situations comes from the perception of increased benefits from a broader scope of collective action.

Robert Higgs (1987) documents the external costs resulting from increased government power during the world wars and the Great Depression. The government imposed more costs on its citizens, which they were willing to accept in exchange for a larger scope of collective action to further some collectively held goals. During the world wars, industries were nationalized, prices and wages were controlled, and government bureaucrats gained more power to act at their discretion without subjection of their actions to some type of consensus approval. Furthermore, many people voluntarily bore a disproportionate part of the distributive external costs by actions such as purchasing war bonds and volunteering for military service.

The acceptance of greater external costs does reduce decision-making costs, but the real reason for this acceptance is the desire to increase the scope of collective action. The primary trade-off, then, is between the degree of consensus in collective decision-making and the scope of collective action.

Nations may differ in their perceptions of the net benefits from accepting higher external costs to expand the scope of their governments, and the same nation may hold different perceptions at different times, as the wartime example suggests. The more consensus a group demands in its collective decision-making procedures, the more limited will be its ability to engage in collective action. Conversely, the more the citizens of a state want to further national goals through collective action, the less consensus will they demand in their collective decision-making process.

The Meaning of Consensus

In Buchanan and Tullock's (1962) discussion, consensus is modeled narrowly as the number of people required to agree when making a specific type of collective decision. This conception describes only the end of what may be a lengthy political bargaining process. Buchanan and Tullock also discuss the bargaining process under the heading of logrolling, where they analyze how agreement can be forged by trading various aspects of a collective decision in order to reach agreement. A bargaining process, operating through the adjustment of tax shares, also plays an important role in the process described by Wicksell and by Lindahl for making collective decisions. Under a simple majority rule, logrolling is prevalent, but there is no reason for supporters of particular measures to continue logrolling for additional support once they have the support of a majority.

The requirement that only a majority agree may lead to an inefficient allocation of resources even if everybody does agree, because, as I have explained elsewhere (Holcombe 1986), being in the majority coalition constitutes an advantage. If it is clear that one side on an issue has a majority, people in the minority will benefit from joining the majority coalition even if they prefer the position espoused by the minority. Clearly, unanimous agreement under a majority rule differs from unanimous agreement under a unanimity rule, but a less inclusive decision rule lowers decision-making costs and enables the group to undertake more collective action.

If a two-thirds majority were required rather than a simple majority, logrolling would have to be extended until two-thirds supported the proposal in question. The two-thirds rule would eliminate some inefficient proposals that would impose substantial external costs on the minority, but also some proposals that would produce net benefits for the group in the absence of decision-making costs, because the decision-making costs involved in putting together a coalition composed of two-thirds of the group would be too high. If unanimity were required, logrolling would have to extend even further until everyone agreed. By eliminating external costs, the unanimity rule would guarantee the efficiency of all proposals passed, but because of its higher decision-making costs, it would reduce the scope of collective action even further.

In the collective decision-making setting, consensus might be viewed as a unanimous decision-making rule, but to capture all of the institutional detail, the analysis must also take into account the negotiating process—the logrolling and bargaining—that generates a proposal acceptable to everyone. Majority rule encourages the formation of coalitions in which the majority creates benefits for itself, perhaps at the expense of the minority.[6] Unanimity encourages more inclusive institutions in which everyone must feel, first, that the group's goal really is in the collective interest and, second, that no one is exploited to achieve the collective goal. As the degree of required agreement

6. Riker (1962) talks of the advantages of a minimum winning coalition. See Holcombe 1985 for a discussion of the inefficiency of coalition decisions even when everyone is in the coalition.

changes, the types of institutions that will minimize collective decision-making costs will also change. If less consensus is required, political institutions designed to build consensus are less necessary.

In sum, the foregoing analysis extends Buchanan and Tullock's framework in two ways. First, it shows that as more consensus is required to undertake collective action, the optimal scope of collective action falls. Second, it shows that changes in the degree of consensus required for collective decisions will be accompanied by other institutional changes, because the institutions that are optimal for producing agreement under one rule differ from those optimal under a different rule.

In the remainder of this article, I show how the historical evolution of constitutional rules in colonial America reveals the operation of these principles of constitutional theory.

Wicksellian Unanimity: The Iroquois Example

With modern governments as our frame of reference, a unanimity rule for making collective decisions might seem to be an unrealistic abstraction. As suggested in the previous section, however, unanimity must be considered not merely as a voting rule but as a political bargaining process designed to build a consensus. The collective decision-making procedures of the Iroquois nation in the 1700s illustrate how unanimity was actually used to arrive at collective decisions.

The Iroquois composed a confederation of five Native American nations[7] established between 1000 and 1400 A.D.[8] During colonial times, they were the dominant power east of the Mississippi, significantly outnumbering the colonial population. The Iroquois were united by a constitution with many of the same features as contemporary American government, including a federal system with substantial sovereignty and independence for the five nations, a common military defense, and a collective decision-making process that allowed all of the nations to work together to produce unified policies in foreign affairs, which were conducted by the central government. The collective decision-making process of the Iroquois has particular interest in the context of contemporary constitutional economics.

The Great Council of the Iroquois Confederacy, consisting of fifty tribal chiefs, was the Iroquois legislature.[9] The chiefs acted not so much as present-day legislators do, but rather as spokesmen for their tribes. Though the legislature made some decisions on its own, important decisions were always taken back to the tribal councils to be decided.

7. The five Iroquois nations were the Mohawk, Oneida, Onondaga, Cyuga, and Seneca. The Tuscarora joined in the 1700s, but for most of its history the Iroquois confederacy consisted of five nations. Parker (in Fenton 1968, book 3, p. 1) says that the sixth nation joined in 1724; Grinde (1977) says 1735.

8. Johansen (1982) reports these dates but notes that many Euro-American historians place the founding around 1450. Thus, the Iroquois constitution was older in 1776 than the U.S. Constitution is now.

9. Fenton (1968) relates a description of the Iroquois constitution by Arthur Parker, a well-known student of Iroquois institutions.

Thus, the collective decision-making process began with individual tribal councils and their chiefs. Considering certain individuals to be chiefs, however, involves a projection of the European hierarchical form of government onto the Iroquois. Iroquois chiefs were not rulers in the same sense as European kings; instead, they were more like chairmen who facilitated the creation of consensus and acted as spokesmen for their councils. As Daniel K. Richter (1992) notes, "despite differences in status and ceremonial roles among their members, councils functioned as bodies of equals" (43–44).

Within the individual tribes, collective decision-making involved a slow process of arriving at a consensus. A meeting would be held and an issue discussed until individuals agreed that the group had reached a consensus.[10] The consensus would then be taken to the legislature by the chief, who acted as a spokesman for the tribe's views, rather than as a legislator with his own views. The chiefs, always men, were chosen by the women of the tribe. They served for indefinite terms but could be replaced if a consensus emerged that they were not representing the group.[11]

The general principle at work in Iroquois collective decision-making required arriving at a collective decision that was unopposed by anyone in the group. The discussions held to arrive at a consensus both fostered logrolling to help shape an optimal decision and provided the chief with a deeper understanding of the issues. Thus, the chief would be prepared to effectively represent his tribe at the legislature. In this collective decision-making process, the chief had the power only to convey to the other members of the Great Council the decisions of the council he represented and to agree to actions in accordance with the decisions of his tribe. If an issue or alternative came up that the chief's tribe had not discussed, the chief could not do what he thought best; he had to go back to the tribe to find out their opinion before taking action.

In this respect, tribal chiefs were more like United Nations ambassadors than U.S. congressmen. U.N. ambassadors are supposed to represent the opinions of their nations' administrations rather than do what they think is best, and they are subject to recall if they do not. Congressmen, on the other hand, serve fixed terms and have more discretion to act as they see fit.

The colonists saw the Iroquois government as a slow and cumbersome process for making decisions, and indeed it was by comparison with taking a vote and proceeding according to the majority opinion. As noted earlier, when the degree of consensus in collective decision-making changes, other institutions must also change to enable

10. Stites (1905, 98) discusses the idea of consensus in Iroquois decision-making, noting that formal votes were not taken, but rather through discussion the sentiment of the group would evolve into a consensus.

11. This arrangement is very similar to representation in the Continental Congress under the Articles of Confederation. Representatives to the Continental Congress were chosen by state legislatures and could be replaced at any time. Thus, representatives had to act as spokesmen for their states rather than as independent agents, or they would be replaced. Under the Constitution, legislators are elected for fixed terms, which gives them more discretion. See Holcombe 1991 for a more detailed discussion of government under the Articles of Confederation.

the creation of consensus. In dealing with the Iroquois, the colonists complained that the Iroquois chiefs could never come to a decision but always had to go back to consult their people. By requiring a consensus, the Iroquois minimized the external costs of their collective decisions but, because of high decision-making costs, made collective action more difficult and therefore less likely. The Iroquois willingly expended great effort to reach a consensus in order to avoid making a decision that went against the interests of a part of the group.

One effect of this type of decision-making process, in comparison to a simple majority-rule system, is a tendency to preserve the status quo. Another effect is that decisions are made slowly. By protecting the interests of minorities, however, it provides powerful protection against political exploitation. As a result, the Iroquois society was one of relative freedom and equality, especially in comparison to the hierarchical European societies of the time.[12] Cadwallader Colden, a firsthand observer of the Iroquois, wrote in 1727 that "the Five Nations have such absolute Notions of Liberty that they allow no kind of Superiority of one over another, and banish all Servitude from their Territories."[13] Obviously, political equality will mark any political system that requires consensus and thus permits individuals to veto collective action. Giving everyone a right to vote may mean little in a majoritarian democracy, where a majority can exploit a minority, but it will mean much in a political system that demands consensus.

The Iroquois example illustrates several points with regard to constitutional theory. First, more inclusive voting rules entail not only a change in the percentage of a group required to agree but also a change in collective decision-making institutions to facilitate consensus. Second, more inclusive voting rules imply a smaller optimal scope of government. Finally, the Iroquois example shows that government by consensus is not just a theoretical possibility but actually has been practiced. Of course, the Iroquois government was so limited in its activities that it hardly compares to modern governments with their much greater scope, but that difference is significant. Whereas it was possible to run the very limited Iroquois government by consensus, the demand for an increased scope of government has brought with it a reduction in the degree of consensus required, so as to reduce collective decision-making costs.

The Albany Plan of Union

The Constitution of the United States was not produced ex nihilo by the Constitutional Convention in 1787; it evolved from earlier constitutional agreements. After declaring its independence, the nation was governed by the Articles of Confederation.

12. Benson (1991) suggests that the organization of some Native American societies became more hierarchical following the immigration of Europeans into America.

13. Quoted from Johansen (1982, 33). Weatherford (1988) notes that the European colonists did not bring with them a tradition of equality, but rather lived in very hierarchical societies. The egalitarian democracy that exists in the United States is much closer in principle to the Native American society that predated the American colonists.

Earlier, in 1754, the Albany Plan of Union, a document intended to unite the colonies, had been drawn up. Approved by the Albany Congress but not ratified by the colonial legislatures, it never took effect. It was, nevertheless, an important precursor to the subsequent constitutions that did take effect.

The Albany Plan of Union was affected in at least two important ways by the Iroquois. First, the Iroquois believed that they would benefit by encouraging the colonies to unite. One complaint the Iroquois had voiced strongly in making a 1744 treaty was that they had to deal with many separate colonial governments. The Iroquois believed that the colonies could form a confederation, just as the Iroquois had, to facilitate negotiation between the two groups. Because he published the treaty, Benjamin Franklin was well aware of the Iroquois desire for a union among the colonies similar to the Iroquois confederacy, and in 1751 Franklin asserted,

> It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a Scheme for such an Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble, and yet a like Union should be impracticable for ten or a dozen English colonies.[14]

Franklin further argued that the English colonies should find it in their interest to form an alliance with the Iroquois, partly in the interest of mutual peace, partly because of the threat from French colonists. In disputes between French and British colonists, both sides considered it a major advantage to have the Iroquois on their side.[15]

Besides encouraging the union, the Iroquois influenced the Albany Plan of Union by providing a model for a union among independent states. Benjamin Franklin was undoubtedly the most influential of the delegates to the Albany Congress. Having published documents related to the Iroquois, Franklin was familiar with Iroquois government, and he advocated the creation of a confederation among the colonies similar to that of the Iroquois. But Iroquois influence went beyond Franklin's presence at the Albany Congress. For one thing, several Iroquois attended the Congress. While there, James de Lancy, acting governor of New York, expressed to them his hope that out of the congress would come an agreement to create a union of states as powerful and prominent as the Iroquois union (Johansen 1982, 69–70). The colonists were well aware of the nature of the Iroquois government, and it is apparent that the Iroquois had at least some influence at the Albany congress.

The resulting Albany Plan of Union resembled the Iroquois constitution in many ways.[16] The individual colonies would retain their own constitutions and their own individual sovereignty under the plan. Because they were colonial governments, the

14. Quoted in Johansen 1982, 56.

15. See Johansen 1982, 67. More than just politics may have been involved in the forging of alliances. Graymont (1972, 27) suggests that the Iroquois preferred dealing with the English over the French because English goods were cheaper.

plan would be administered by a President General appointed by the British crown, but the union would be governed by a Grand Council. The members of the council would choose their own speaker. Colonies would be represented in the Grand Council roughly in proportion to their populations, but each colony (rather than each representative) would have one vote. The Grand Council would amount to a unicameral legislature, but a rule of unanimity would apply, allowing any colony to veto any action. Thus, all colonies would have to agree before the Union could take action.

In the Albany Plan, the Grand Council would oversee all of the government's activities. The power of the Union government would be checked by the power of the states to select their delegates, and by the Grand Council's unanimity decision rule. The Albany Plan of Union gave the Grand Council the power to raise an army and navy and to build forts, and it gave the President General, with the advice of the Grand Council, the exclusive right to make treaties with the native population and to declare peace and war with them.

The two most notable similarities between the Iroquois government and that proposed in the Albany Plan of Union are the federal system of government and the reliance on a rule of unanimity in a unicameral legislature. The unanimity requirement in the Albany Plan of Union was weaker than that of the Iroquois, because although the Grand Council would be chosen by the colonial governments, it would not be accountable to them to the degree that the Iroquois chiefs were accountable to their tribes. If all of the state delegations agreed, then the Grand Council could take action. Thus, the union government would have more autonomy and would not be as hampered by high decision-making costs as were the Iroquois. By reducing decision-making costs in this way, the union government would be able to broaden its scope of action beyond that of the Iroquois government.

One should not claim too much about the influence of the Iroquois on the development of American government. For one thing, it is clear that the colonists did not look up to the Iroquois as role models, but rather viewed them as, in Franklin's words, ignorant savages. The ideological foundations of American government came from Europe, where Locke, Montesquieu, and a host of other thinkers had planted the ideas of creating a government that protected the rights of individuals and designing it to serve the people, rather than requiring the people to serve the government.[17] At the same time one must recognize that these ideas of liberty, as influential as they were, did not contain a blueprint for the design of government. Thus, it is worth noting the similarities between the institutional structure of the Iroquois government and the structure of government designed by the Albany Plan of Union. Because of the similarities, it is worth noting further that the degree of consensus that would have been

16. The Albany Plan of Union is reproduced as an appendix to Grinde 1977. For a description and analysis of the Albany Plan of Union, see Johansen 1982, 71–76).

17. See Bailyn 1992 for a discussion of the ideas (and ideology) surrounding American politics in the eighteenth century.

required by the Albany Plan was less than that required by the Iroquois and therefore would have allowed a larger scope of government action.

Although the colonies were never governed by the Albany Plan, it remains a significant part of America's constitutional history because it was the first attempt to form a union of the colonies and because it provided a model for the Articles of Confederation.

The Articles of Confederation

After declaring independence, the United States adopted its first constitution, the Articles of Confederation, in 1781.[18] There is a clear chain of constitutional evolution from the Albany Plan of Union to the Articles of Confederation to the Constitution of the United States.[19]

Like the Albany Plan of Union, the Articles of Confederation created a unicameral legislature and made no provision for executive or judicial branches of government. Under the Articles, as under the Albany Plan, each state had one vote in the legislature. Many decisions required supermajority approval. Amendment of the Articles required unanimous approval of the states. In overall structure, the United States government under the Articles resembled what it would have been under the Albany Plan. It differed greatly from the European governments of the time.

With regard to constitutional theory, a major difference between the Articles and the Albany Plan was the reduction in the degree of consensus required for collective decision-making. Whereas the Albany Plan always required the consent of all the state delegations, the Articles required unanimous consent only for amendments. As argued earlier, the expectation of higher external costs under a decision rule requiring less complete agreement may be accepted in exchange for a government with more expansive powers. The Articles of Confederation were approved by states intent on gaining independence from their colonial master through military means. This kind of national crisis is the sort of event likely to convince citizens to accept higher external costs in order to give themselves a government capable of undertaking more substantial collective action.[20]

Under the Articles, representatives to the federal legislature were chosen by the state legislatures, which could recall them at any time. This arrangement ensured that representatives would truly represent the views of their constituents. Each state got one vote, even though the state delegation consisted of several legislators. This setup further reinforced the representativeness of the federal legislature by fostering the creation of agreement among each state's representatives and preventing individual

18. The Articles might not have been ratified had France not insisted on ratification as a condition of further aid in the Revolutionary War.

19. Holcombe (1991) discusses the Articles of Confederation in greater detail and compares the Articles with the Constitution of the United States.

20. Rassler and Thompson (1985), extending the Peacock and Wiseman (1961) hypothesis on government growth, note that major wars tend to lead to the expansion of government power.

members of the legislature from acting in an unrepresentative way. The foregoing institutions led federal legislators to represent more closely the views of their constituents regardless of the voting rule used in the congress.

The Constitution of the United States

The Articles of Confederation did not last long. A convention was called for the purpose of amending them, and the result was the Constitution of the United States, ratified in 1788.[21] Elsewhere I have described the most significant differences between the Articles and the Constitution (Holcombe 1991). In all cases the changes made the United States government more autonomous and less accountable to its citizens. The Constitution was purposely designed to increase the power of the federal government, accepting the trade-off that created more opportunities for the imposition of external costs on its citizens. The basic federal system remained, but even that began eroding early in the nation's history as the federal government enhanced its power over the states.[22] When compared to the Articles of Confederation, the U.S. Constitution gives the federal government more power and subjects it to fewer constraints.[23]

In constitutional theory a fundamental normative principle of collective decision-making is consensus. That principle was carried through the government of the Iroquois, the Albany Plan of Union, and the Articles of Confederation to a substantial degree, albeit weakened at each step. The Constitution of the United States deviates significantly from the principle of consensus, adopting simple majority rule as the primary collective decision rule. As noted earlier, a unanimity voting rule is only a small part of government by consensus. When consensus is required, political institutions will be designed to foster the creation of agreement. Other changes in the Constitution also reflect this move away from consensus.

Under the Articles, representatives to the federal congress had to represent their states because of the possibility of recall and had to arrive at a consensus within the state delegation because each state cast only one vote. Under the Constitution, legislators cannot be recalled, so once elected they can vote as they wish as long as they hold office. Nor is there a requirement of agreement among those in the state

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21. Although the convention was called for the expressed purpose of amending the Articles of Confederation and although the Articles of Confederation required unanimous approval of the states for amendment, the Constitution stipulates that it will become effective when approved by nine states. Thus, the principle of unanimity was abandoned. At the same time, however, the importance of unanimity was recognized by the Constitution's statement, "Done in Convention by the Unanimous Consent of the States present." In fact, no representatives from Rhode Island were present, and many delegates from other states did not approve of the document. Although only a majority of the delegates from almost every state agreed, the principle of unanimity remained sufficiently important to be paid lip service.

22. Holcombe (1992) discusses the erosion of constitutional constraints on the United States government prior to the Civil War.

23. Beard (1913) argues that the authors of the Constitution were serving their own personal interests by enhancing the power of the federal government.

delegation—again the principle of consensus goes by the board. Representatives in the U.S. legislature have a great deal of discretion to act as they see fit.

Under the Articles of Confederation, the legislature chose an individual to preside over the legislature, but that president was more like a committee chairman or an Iroquois chief. There was no executive branch or chief executive officer. The Constitution established an executive branch and a president, creating a more hierarchical government and establishing the presidency of the United States as a position bearing some similarity to that of a European monarch. Although the president is chosen democratically, serves for only a limited time, and has constitutionally limited powers, the Constitution was clearly designed to weaken the requirement for consensus in collective decision-making. Furthermore, the greater external costs of collective decision-making were clearly accepted in order to provide a greater scope of collective action on the part of the federal government.

Is This History Relevant Today?

The Iroquois government provides a real-world example of the use of the unanimity rule for collective decision-making. As American constitutions evolved, they relied less and less on consensus and more and more on majoritarian democracy. Of course this history helps to illustrate the constitutional principles discussed at the outset of this article, but does it have any relevance to current government? Certainly modern governments differ greatly from the colonial American governments of centuries ago; perhaps the constitutional principles of consensus could not be applied effectively to today's governments, which are organizations of vastly wider scope and greater power. To implement these principles today, we would have to be willing to accept a government that is smaller in scope, has less power over its citizens, takes greater account of the views of minorities, distributes political power more equally, and has less capacity to undertake initiatives without a genuine consensus of its citizens. If we are prepared to tolerate those conditions, then the colonial period of American constitutional history can be viewed not as just an interesting historical episode but as a relevant guide to reforming our current political institutions.

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