

**CONSTITUTIONS AS CONSTRAINTS:
A Case Study of Three American Constitutions***

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The Original Constitution of the United States, the Articles of Confederation, was approved in 1781, but within a few years the Articles were replaced by the Constitution of the United States. Approximately seven decades later, the Confederate States of America wrote a constitution using the U.S. Constitution as a model. The three documents are used as a case study on constitutional rules as constraints on government. When compared to the Articles, the effect of adopting the Constitution was to relax constraints on the federal government. The Confederate Constitution added constraints to the U.S. Constitution, while retaining the same basic framework.

Introduction

The challenge of constitutional design is to construct a constitution that allows those in the government enough flexibility and discretion to engage in efficiency-enhancing activities while at the same time constraining them from engaging in activities that are inefficient, or that serve no other purpose than to transfer resources from those outside government to those within. A constitution can constrain the government's activities in two ways. First, it can enumerate the activities that the government can engage in or prohibit certain types of activities. Second, it can design a system of accountability whereby those in government can be controlled by citizens, or by other parts of the government. The Constitution of the United States uses both types of constraints.¹

The United States was formed in order to escape the oppression of the British government, and its founders were keenly aware of the

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¹ For constitutional constraints to be effective, there must be some type of enforcement mechanism. Enforcement mechanisms are beyond the scope of this analysis, which concentrates on the constraints themselves and assumes they will be enforced. Enforcement has not been a problem with the U.S. Constitution; the bigger issue is how the interpretation of the constraints has changed over the centuries. See Anderson and Hill (1980) and Higgs (1987) for an analysis of changes in the interpretation of the U.S. Constitution.

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desirability of constitutional constraints to ensure that government activity was channelled in productive ways. The desirability of constitutional constraints is echoed in the theory of constitutional economics. Buchanan (1990) has described constitutional economics as the examination of the choice among constraints. The debate on rules versus discretion in government activity is concerned with designing constraints that limit the range of government action (cf. Klein 1990). The extensive literature spawned by Buchanan and Tullock (1962) on representation and optimal voting rules is concerned with how legislative activity can be made accountable to voters, but at the same time not so constraining as to be inefficient.²

The design of the United States government illustrates the challenge of designing optimal constraints into a constitution. The original constitution of the United States, the Articles of Confederation, was approved in 1781, and contained the general types of constraints that would be advocated by the theory of constitutional economics. It required unanimous approval of the states (but not of every individual) to be adopted, and required the same unanimous approval to be amended. It enumerated the allowable activities of government and prohibited any activities not specifically enumerated. It limited the federal government's ability to raise revenue and was designed so that the federal government's activities were accountable to the states.

Within a few years many influential individuals felt that the Articles of Confederation were too constraining on the new government, and they were replaced by the Constitution of the United States. When viewed in isolation, the Constitution of the United States is rightly seen as a document that constrains government. But when compared with the Articles of Confederation that preceded it, the Constitution is clearly less constraining than the Articles. The net effect of replacing the Articles with the Constitution was to reduce the constraints on the United States government. The majority of this paper compares the Articles and the Constitution to show what types of constraints were built into the Articles, and why the Articles were more constraining than the Constitution.

² Rawls (1971) and Buchanan (1975) extend this line of reasoning to examine processes for determining the types of rules and constraints to which individuals could be expected to agree.

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Approximately seven decades after the Constitution was adopted, the Confederate States of America was formed out of a subset of the existing United States. The Confederate Constitution closely paralleled the United States Constitution, both in language and in outline. The U.S. Constitution was retained, word for word, by the authors of the Confederate Constitution, except when they explicitly determined that changes were warranted. Most of the changes in the Confederate Constitution imposed additional constraints that were designed to prevent the government from engaging in special interest programs.³

The American constitutional history is interesting when viewed within the context of the theory of constitutions. The initial constitution that was designed to be very constraining was replaced in less than a decade with a constitution that constrained the government much less. After seven decades of experience, that constitution was used as a template to construct a new constitution that differed from the old mainly in the additional constraints it placed on the government. The governments envisioned by all three constitutions were similar in scope, organization, and degree of representation. While differences in these areas did exist—especially between the Articles of Confederation and the U.S. Constitution—the most significant differences had to do with the degree to which the government was constrained by constitutional rules. The history of these three constitutions illustrates the challenge involved in designing optimal constitutional constraints.

I. Government Under The Articles of Confederation

The Articles of Confederation were submitted to the States for their approval in 1777, and were finally ratified by all 13 States in 1781. Since each State already had its own government, the Articles essentially provided for the common defense of the United States, for the citizens of each State to be accorded free movement of themselves and their goods among the States, and for the States to provide the same rights to citizens of any State. Furthermore, the Articles tried to establish a framework for a peaceful interrelationship among the States, and gave

³ Weingast, Shepsle, and Johnsen (1981) and Holcombe (1985) model the special interest nature of the legislative process. Within a constitutional framework, Buchanan and Wagner (1977) discuss budget deficits as a problem of relaxed constraints, and in the same vein Brennan and Buchanan (1980) examine taxation.

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most powers for military operations and international affairs to the government of the United States.

By giving most military and diplomatic powers to the government of the United States, the Articles created a single unified government with which other nations would deal. But they severely limited the power of the new government. The United States government had no direct power over its citizens; it interacted with them indirectly through their States. Rather than directly raising an army, Congress directed the States to do so. Congress also had no direct power to levy taxes. Article VIII of the Articles of Confederation gave Congress the ability to requisition funds from the States in proportion to the value of property in the State, but Congress was required to get its funding from the States and could not levy taxes directly.

A major motivation for forming the government originally was to fight the war of independence, so after the war, the United States government was not as important to its citizens as it had been. The United States government had amassed debt to fight the war, but was having trouble raising revenues to pay those debts. Approval of nine States was required to requisition funds from the States. But getting approval was often difficult, and even if requisitions were approved, States were often delinquent in making payment.⁴

The conventional wisdom about the Articles of Confederation is that they were flawed by several weaknesses. They gave the federal government too little power to raise revenues, to maintain military forces, and to oversee international commerce. Furthermore, the Articles were difficult to amend since amendment required the approval of all States. Essentially, the concern was that the Articles constrained the federal government too much. However, another way to look at the Articles is that they were drafted to provide a common face in international affairs, to provide for collective defense during time of war, and to serve as a treaty to provide peaceful coexistence among the States as they already existed. In this context, severe limits make sense, much as they do with groups such as the EC and NATO.

Regardless of how government under the Articles is viewed, surely experience can expose defects in the original agreement. In this context,

⁴ Some problems with the new government under the Articles are recounted by Beck (1924). Beck's analysis parallels the conventional wisdom on the weaknesses of the Articles.

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a convention was called to try to amend the Articles in such a way that would secure the unanimous agreement that amendment required.

II. The Constitutional Convention

The Constitutional Convention can only be called that with the benefit of hindsight, because at the time it was called, its expressed purpose was not to write a new constitution, but to amend the Articles of Confederation.⁵ For this reason, some delegates to the Convention felt that the group was overstepping its authority by drafting an entirely new document. The Convention, furthermore, was shrouded in secrecy, so that nobody but the delegates themselves knew what was taking place, beyond the fact that a Convention was meeting to propose revisions to the Articles.

The idea to replace the Articles with a new constitution was brought to the Convention by Governor Edmund Randolph of Virginia, and was known as the Virginia plan. As an alternative, William Paterson of New Jersey proposed a plan to revise the Articles substantially without completely abandoning them, which became known as the New Jersey plan. Some proponents of the New Jersey plan favored it because they felt that the Virginia plan went beyond the authority of the Convention, but others opposed the Virginia plan directly because they were afraid that it would reduce—or even abolish altogether—the independent authority of the States.⁶ While this concern is evident from the tenth amendment to the Constitution, note that Article II of the Articles of Confederation closely parallels the tenth amendment by affirming that powers not expressly given to the United States government remain with the States.

The New Jersey plan would have given Congress the power to levy taxes on imports directly, to regulate trade and commerce, to establish a United States judiciary, to which State decisions could be appealed,

⁵ The Act of Congress calling for the Convention states, “it is expedient that . . . a Convention of delegates . . . be held . . . for the sole and express purpose of revising the Articles of Confederation. . . .” The text of the complete Act appears in Hamilton et al. (1937: 577). The Articles of Confederation appear in that volume as Appendix II.

⁶ Cf. Warren (1937: particularly 222). A standard reference of the proceedings of the Constitutional Convention is Farrand (1937), who chronicles the debate through a thorough reconstruction of original notes taken at the convention.

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to modify the 9/13ths rule for requisitioning the States (the replacement rule was not specified), to establish an executive branch of government, as well as other provisions.⁷ However, the New Jersey plan's underlying philosophy was to retain a confederation of states, whereas the underlying philosophy of the Virginia plan was to establish a national government.

The New Jersey plan would have retained the unicameral legislature in the Articles, whereas the Virginia plan specified a bicameral legislature. The Virginia plan specified proportional representation in both houses, but would have selected one by popular vote while the other would be chosen by State legislatures. The latter provision was retained in the final Constitution, but a compromise was worked out between small and large States on the matter of representation. Under the Articles, each State had the same power; as a compromise, the Senate under the Constitution retained this representation by giving each State the same number of Senators, whereas the House of Representatives was apportioned in proportion to population.⁸

The history of the drafting of the Constitution is well-enough documented that there is no need to go into more detail here. This section establishes the points that (1) the Constitutional Convention was not called for the purpose of drafting a new constitution, and (2) there was a clear alternative to the new constitution in the form of the New Jersey plan to revise the Articles. Thus, there was no reason for the Constitutional Convention to produce a new constitution except that those in attendance preferred the new Constitution to an amended Articles of Confederation. As a matter of underlying philosophy, retaining the Articles would have retained a federal government as a federation of states, whereas adopting the Constitution meant establishing a national government with powers greater than the States.⁹ Those who

⁷ A complete listing is given in Prescott (1941: 52-55). Prescott compares the Virginia and New Jersey plans on pages 55-60.

⁸ Both the Virginia and New Jersey plans are reproduced in appendixes to Beck (1924).

⁹ Perhaps the most vocal critic of the Constitution on the grounds that it gave too much power to the federal government was George Mason, a delegate to the Convention from Virginia, and one of those who did not sign the Constitution. Mason is perhaps best known for championing the addition of a Bill of Rights to the Constitution, but his proposals for modifying the Constitution had more to do with limiting the powers of officeholders in the federal government, and for limiting their terms. Some of Mason's proposals are given in his own words in Pole (1987: 126-132). For a sympathetic discussion of Mason's political views, see Rutland (1981).

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avored the new Constitution did so because they felt that the Articles of Confederation were too constraining on the federal government.

III. The Interests of the Founding Fathers

The modern theory of public choice suggests that the Founding Fathers had an incentive to produce a Constitution that furthered their own special interests rather than one that was in the general public interest. This would have to be tempered by the fact that the document would have to be approved by the State legislatures in order to be ratified.¹⁰ The document could not favor some States over others; such favoritism could not receive approval in the convention, since there was wide representation among the States. However, among citizens of the United States, those in State legislatures and those at the Convention were not a cross-section of the population. Rather, they were selected by the State legislatures, and most States had requirements of property ownership, wealth, and income, to be a legislator.¹¹ Clearly, the Convention was manned by individuals from among the wealthier citizens who had business and commercial interests and land holdings. Simple attendance at the Convention meant leaving work. Individuals who could afford to make this sacrifice had an incentive to see that the document they produced would protect their interests.¹²

Charles Beard (1913) proposed a theory along these lines early in the 20th century. The Constitution, he argued, was crafted to further the economic interests of those in commerce and banking, of landowners, and of creditors, including those who owned debt issued by the United States government. Recent empirical tests by McGuire and Ohsfeldt (1989) support Beard's analysis.¹³ McGuire and Ohsfeldt, like Beard,

¹⁰ Under the Articles, unanimous approval of the States would be required for amendment. One might raise a legitimate question, then, about the provision in the new Constitution that made it effective after being ratified by nine States. This is discussed further below.

¹¹ Only Pennsylvania and Connecticut had no property or wealth requirements for State office. Eidelberg (1968), Appendix 1, Table 2, lists the property qualifications for State office.

¹² The Convention lasted from May 14 to September 17, 1787. It is difficult to imagine farmers who worked their own land giving up an entire growing season to attend; property owners who had others working their land could more easily afford the time away.

¹³ McGuire and Ohsfeldt (1989) reference several of their earlier studies that support Beard's thesis.

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recognize that the effect of the Constitution can only be analyzed by comparing it to the Articles of Confederation that it replaced. Beard's thesis was controversial when it appeared, and remains so. But it fits comfortably within the public choice framework for analyzing public sector activity.¹⁴

Beard (1913: 73) does not accuse the Founding Fathers of creating a Constitution that furthers their interests at the expense of others, but rather of representing those interests that they knew best, from first-hand experience. Property owners were afraid of losing their property to those who had ideas of a more egalitarian redistribution of property. Commercial interests were concerned about the possibility of trade barriers. Banking interests were worried about the stability of the monetary system, about the ability of the government to raise revenue, and about the ability of the government to pay the debts it already had outstanding. They believed that the public interest would be served by a stronger central government with greater regulatory powers, with the power to independently raise revenue, with greater power to create legislation, with a more fully developed executive branch, and perhaps most significant, with more power to act independently without the approval of the States. These changes were embodied in the Constitution of the United States.

James Madison viewed the Constitution as a set of rules that were intended to regulate the economic interests of those governed by it, and there is no doubt that others at the Convention saw that the Constitution could be a vehicle to protect their economic interests. In *The Federalist*: 10 Madison argued,

The most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, and many lesser interests, grow up of necessity in civilized nations and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms

¹⁴ McConnell (1966) documents the surprise and outrage that was expressed early in the 20th century when the existence of paid lobbyists became public knowledge. This suggests an intellectual environment in which Beard's thesis would have been much more controversial than today when, whether they like it or not, people accept the fact that interests pay professionals to try to alter legislation for their benefit.

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the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

This passage is significant in light of the political climate in which there were a significant number of individuals who wanted to redistribute property, who wanted to tax exports, who wanted to abolish the slave trade, who would be content to renege on the U.S. government's debts, and who favored the easy creation of money in order to make it easier for debtors in general to pay their debts. Against such threats, all of these economic interests came to be protected in the Constitution.

In short, the Founding Fathers wrote a Constitution that would create a stronger central government with the power to protect their interests. The role of the economic interests of the Founding Fathers is controversial, and has been debated extensively, but the fact that the Constitution enhanced the power of the central government is not in dispute. When viewed as a replacement for the Articles, then, the Constitution cannot be seen as a document that limits the power of government, but rather as a vehicle for relaxing constraints on the federal government, for creating greater government power, and greater government growth. The following sections examine this issue more carefully by comparing the Articles and the Constitution from the perspective of modern constitutional economics.

IV. The Articles and the Constitution: A Comparison

The Constitution of the United States is a document that was created out of an attempt to modify the Articles of Confederation. Therefore, the effects of ratifying the Constitution were the changes that the Constitution made over the status quo that was embodied in the Articles. The next several sections consider those changes from a public choice perspective.

Five major areas of change will be considered: (1) the role of unanimity as a decision rule; (2) the role of state legislatures in the federal decision-making process; (3) taxation; (4) commerce; and (5) the organization and institutional structure of the federal government. A more extensive analysis might also include changes in military organization and the disposition of western lands.¹⁵ The Constitution did transfer

¹⁵ Beard (1913: 176) mentions these but does not include (1), (2), and (5) from the present list.

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military power from the States to the U.S. government, and did open the way for new states to be added to the United States. Furthermore, this list leaves out some of the economic issues that were considered above. For example, Article I, Section 10 of the Constitution prevents States from issuing money, which was in the interest of creditors rather than debtors. Individuals at the time understood that the issuance of paper money by the States would lower the value of debt. While it is clear that the scope of inquiry could be widened from the five issues discussed below, these issues were selected because of their more direct relevance to the principles of contemporary constitutional economics.

1. Unanimity

One of the most distinguishing features of modern constitutional economics is the prominent role assigned the rule of unanimity in evaluating constitutional rules. In a normative framework, the criterion for evaluating the desirability of a constitutional rule is whether it would command unanimous agreement, at least in some conceptual sense. The prominence of the rule of unanimity in constitutional economics is due to the influence of Buchanan and Tullock (1962). They note (96):

The individualistic theory of the constitution that we have been able to develop assigns a central role to a single decision-making rule—that of general consensus or unanimity. . . . In political discussion . . . many scholars seem to have overlooked the central place that the unanimity rule must occupy in any normative theory of democratic government.

Buchanan and Tullock (1962: ch. 6) illustrate how less than unanimous decision rules might unanimously be chosen, but stress the significance of unanimous approval of rules at the constitutional stage. The significance of unanimous approval for constitutional rules was further developed by Buchanan (1975) and Rawls (1971). One of the main normative conclusions of constitutional economics is the desirability of unanimous approval for constitutional rules.¹⁶

The Articles of Confederation more closely conform to this criterion than the Constitution of the United States. Following the criterion of unanimity, unanimous approval of all State legislatures was required for the Articles to take effect, and amendment of the Articles required

¹⁶ Ostrom (1987: 62-65) discusses the importance of unanimity in the literature on constitutional decision-making, citing writers from Hobbes to Madison to Buchanan and Tullock as sharing this idea.

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unanimous consent of the States as well. Unanimous approval of the State legislatures is considerably less constraining than requiring unanimous agreement of all individuals. This is particularly true since, as noted above, State legislators were hardly representative of the general population of their States. However, the Constitution required approval of only nine States for it to become effective, and amendments require two-thirds approval from Congress and approval of three-fourths of the States.

The elimination of the unanimity requirement when the Articles were replaced by the Constitution was no accident. One of the defects of the Articles, as perceived by its critics, was the difficulty with which the Articles could be amended. One might call upon the theory of constitutions in *The Calculus of Consent* to justify this, saying that a less than unanimous decision rule was agreed upon, but it was not agreed upon unanimously. For one thing, the Articles required unanimous approval of the States for amendment, and since the Constitutional Convention was originally called to amend the Articles, one might presume that unanimous agreement of the States would be required under the existing rules to adopt the new Constitution. However, as just noted, a 9/13ths rule was written into the Constitution, in apparent violation of the existing and unanimously (at least by the States) agreed-upon rule. A unanimously agreed-upon rule of unanimity was overturned by a 9/13ths majority!

Furthermore, there was not unanimous approval of the new Constitution in the Constitutional Convention. One State (Rhode Island) was not in attendance, and several individual members of the Convention declined to sign. Interestingly, the significance of the unanimity rule seems to be a part of the document, even though the just-mentioned exceptions meant that the document did not receive unanimous approval. Since most members of every State present signed, the Constitution reads, “Done in Convention by the Unanimous Consent of the States present. . .” The aura of unanimity is there even though there was not actual unanimous approval, even of those at the Convention.¹⁷

¹⁷ Also note that in *The Federalist* 39, Madison stresses that the decision rule for ratification is not majority rule, but “the *unanimous* assent of the several States that are parties to it. . .” (original emphasis). Article VII of the Constitution states that it will take effect over the States that have ratified it when nine States agree.

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The rule of unanimity is an important normative element in contemporary constitutional economics, and an important way in which changes to constitutional rules can be constrained. The Articles of Confederation more closely conform to this criterion than the Constitution of the United States that replaced the Articles. This is one way in which the constraints the Articles placed on the federal government were relaxed when the Constitution was adopted.

2. The Role of the States

One of the frequently cited virtues of the Constitution is its system of checks and balances. One branch of government always stands ready to check the abuse of power from another. This virtue finds contemporary support in constitutional economics through the recommendation of rules to control the behavior of those in government. Brennan and Buchanan (1985) have written about the reason of rules, and the general idea can be traced back to individuals such as Hayek (1960) and Leoni (1961) who have written about the virtues of the rule of law. By checking one branch of government against another, the checks and balances in the Constitution constrain those in government to follow the constitutional rules rather than act at their discretion.

The constitutional constraints in the Articles were much more effective as checks and balances because rather than have the federal government checked by branches of itself, it was checked by the States.¹⁸ One important check, discussed in the next section, was that States controlled the flow of revenue into the U.S. government. But State legislatures selected their State representatives to Congress, rather than representatives being elected directly, which gave State governments direct control over Congress. Furthermore, the Articles gave States the power to recall and replace their delegates at any time. If a State legislature ever felt that its representatives in Congress were not representing the interests of the State, the State legislature could immediately replace them. The Articles attempted to guarantee that Representatives in Congress could not act in a way that did not directly represent the wishes of the State legislatures.

¹⁸ *The Federalist* 51 mentions the role of the States as additional checks on the power of the federal government, but does not consider the fact that the Constitution greatly limits the ability of the States to control the federal government when compared to the Articles.

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When Congress was not in session, the Articles provided for a Committee of the States to oversee the administrative functions of the federal government. The Committee was composed of one representative from each State, and engaging in war, borrowing, coining money, appropriating money, and certain other decisions required the approval of nine members of the Committee. The method of representation and the supermajority voting rule provided additional constraints on the federal government.

In general, the Articles created a federal government that reported to and was run by the State legislatures, whereas the Constitution replaced that government with a national government that had more power to act on its own.¹⁹ Contemporary constitutional economics sees virtue in constraining government to act within a well-defined body of rules. The Articles were more constraining than the Constitution that replaced them; indeed, a common argument for the benefits of the new Constitution was that it allowed the national government to be more independent of constraints. Thus, the Articles more effectively constrain government to act through adherence to rules—in particular, rules of accountability—while the Constitution of the United States provides greater opportunity for government officials to act at their discretion.

3. Taxation

One of the big factors pushing the Founding Fathers to want to amend the Articles was the fact that the U.S. government had no power to raise revenue directly, but rather had to get it from the States. Since members of Congress were selected by and represented States rather than representing individuals directly, State legislatures indirectly determined the amount that the federal government would spend and the amount of revenue it would ask States to contribute, and State legislatures directly approved the payment to the federal government. The Articles specifically provided that States pay in proportion to the value of property in the State.

¹⁹ Prescott (1941: 57) notes when comparing the New Jersey plan to modify the Articles with the Virginia plan to draft a new constitution, “Stating the results of this comparison in general terms, the New Jersey resolutions enumerate definite powers which Congress may exercise; the revised Virginia resolution, on the other hand, announces principles which are to determine future delegations of power.”

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One notable feature of this method of public finance is that it forces State governments to take account directly of the opportunity cost of federal government spending. Any money going into the federal treasury is money that is taken directly from State treasuries, and therefore directly reduces the money that State legislatures have to spend themselves.

The modern theory of special interest spending by government relies on the notion of rational ignorance. Each taxpayer pays relatively little for each special interest project, so has little incentive to actively oppose it. Rationally ignorant taxpayers will not even be aware of most special interest projects or how much they cost. Special interests who receive the concentrated benefits are well aware of them, however, so the projects receive much support from those who benefit but little opposition from those who pay.²⁰

This model of government suggests the possibility that government will overspend on special interest projects because the full opportunity cost of government spending is not considered in the decision to undertake the project. However, when State legislatures must give up funds that they otherwise could use for their own spending projects, States have an incentive to consider the opportunity cost of foregone State spending to finance federal programs.

Individuals have little chance of overturning spending legislation, and would have little to gain individually even if they did. States, however, contributed large amounts of money under the Articles, making an obvious and direct trade-off between State spending programs and federal programs. The method of federal revenue collection provided a much better method of weighing the opportunity cost of federal spending. One problem noted with the Articles was that under that method of federal revenue generation, the federal government was chronically short of funds and had difficulty collecting from the States. One possible explanation is that State legislatures evaluated the benefits of federal spending and decided that their money would be better spent in their home State rather than on federal activities. Recall that the immediate motivation for forming the United States was to fight a war of independence, and once that war was over, the importance of the federal government to the States declined. It is reasonable that States would

²⁰ Models representative of this special interest theory of government are described in Weingast, Shepsle, and Johnsen (1981) and Holcombe (1985).

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want to contribute less to an institution that now provided less in collective benefits.

One alternative at that point would have been to modify the Articles in the other direction: to make them more of a treaty among States and dissolve the federal government, or at least greatly weaken it. However, as noted earlier, many politically powerful individuals had an economic interest in retaining and strengthening the federal government. One of the most significant ways in which the powers of the federal government were enhanced by the adoption of the Constitution was that the federal government was directly given the power to tax, rather than having to go to the States for revenue.²¹

Riker (1964: 11) discusses federalism “as a bargain between prospective national leaders and officials of constituent governments for the purpose of aggregating territory, the better to lay taxes and raise armies.” The raising of armies was obviously important to the formation of the nation for the purpose of fighting the Revolutionary War, but once the war was over, the raising of taxes became a more significant issue. Allowing the federal government to levy taxes directly lessens revenue constraints on the government, making it easier to raise revenue, as Riker observes.

From the perspective of modern constitutional economics, constraining the government’s power to tax is an important function of constitutional rules.²² Government should have the power to raise revenue only insofar as those who are taxed agree. In this area, the Articles were much more constraining than the U.S. Constitution. The Constitution gives government much more power to unilaterally raise revenue without the direct approval of those who pay. Surely the activities of the U.S. government would be very different today if the current Constitution was as it is in every respect except that it contained the federal revenue-raising provisions in the Articles.

4. Commerce

Beard’s economic interpretation of the Constitution clearly shows that commercial interests were heavily represented in replacing the

²¹ Beard (1913) points out that many of the Founding Fathers had loaned the U.S. government money to finance the Revolutionary War, and were bondholders who were concerned that their bonds would never be repaid because of the difficulty that the U.S. government had in raising revenue.

²² Along these lines, see Brennan and Buchanan (1980) and Buchanan and Wagner (1977).

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Articles by the Constitution. The Constitution's commerce clause gives the U.S. government virtually unlimited latitude to regulate commerce. In contrast, the Articles have almost nothing to say about commerce. In addition to the commerce clause, several other aspects of the Constitution relate to the commercial interests of the nation. Two issues of concern to different factions were the importation of slaves and the taxation of exports. The Constitution specifically prohibits taxes on exports and prohibits States from imposing duties on goods shipped from other States. The Constitution allowed the importation of slaves to continue until the year 1808.

Another fear of commercial interests was that States would create paper money, which would cause inflation and transfer wealth from creditors to debtors. The Constitution prevents States from doing so. This was clearly a special interest issue that constrained states by giving power to the federal government. Farmers as a group borrowed money to purchase their farms and favored easy money to facilitate their repayment of loans. Lenders—the commercial interests represented at the Constitutional Convention—were on the other side. As noted, the Constitution favored the commercial over the farming interests.²³

The Articles say little about commerce, but like the Constitution, leave powers not specifically given to the federal government with the States. The commerce clause in the Constitution gives broad powers to the federal government. Thus, in yet another area, the Constitution is clearly less constraining than the Articles.

5. Organization and Institutions

Most of the changes that the Constitution makes over the Articles concern the organization of government. An almost unlimited amount could be written under this heading; indeed, much of the study of public choice involves analyzing how various institutional structures affect the outcomes of collective decision-making. This section will mention a few of the most significant changes.

According to conventional wisdom, one of the great achievements of the Constitution was the creation of a system of checks and balances

²³ One can easily argue the merits of restraining the creation of money by the States. However, Beard would argue that the policy was the result of the self-interests of the commercial interests at the Convention as much as a public interest perspective of the Founding Fathers.

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through the establishment of three branches of government. Under the Articles, there were no federal courts, so legal decisions—except when the dispute was between States—were made by State courts. The Articles did provide for a method of dispute resolution at the federal level for disagreements between States. It must be clear to the contemporary observer that the creation of federal courts enhances the power of the federal government. With regard to the judicial system, the changes brought about by the Constitution enhance rather than limit the power of the federal government.

The Articles did not provide for a separate executive branch of government. All government activities were done under the direction of Congress. When Congress was not in session, a Committee of the States was to oversee government business, but the Committee was essentially an arm of Congress, and had no independent power when Congress was in session. While the Committee might be viewed as a sort of executive branch, it was subservient to the legislative branch.

Because Congress acted as an agent of the States and had limited power to act in a way that States did not approve of, both the legislative and rudimentary executive branches of government under the Articles had little power to act in a way that would be unpopular with the State legislatures. The establishment of an independent executive branch clearly enhanced the power of the federal government, and clearly gave the federal government a greater ability to make decisions that could prove unpopular with the population at large. In short, the establishment of an executive branch of government enhanced the discretionary power of the federal government.

Congress under the Articles was unicameral, and each State was entitled to one vote. The bicameral legislature under the Constitution consists of one house in which States are represented equally and one house in which they are represented in proportion to their populations. The Senate is more comparable to the Congress under the Articles.

There are, however, significant differences between the Congress as specified in the Articles and the Senate as specified in the Constitution. The original Constitution specified that Senators be chosen by the State legislatures, just as were Representatives to Congress under the Articles. However, under the Articles, States could send anywhere from two to seven Representatives, and each State had one vote. The Articles did not specify a decision rule to be used within a State delegation to determine the State vote. Furthermore, State Representatives

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could be recalled and replaced at any time. Under the Constitution, Senators, while they would still be chosen by the State legislatures, served for six year terms, and each Senator got a vote in the Senate. Thus, Senators do not have to agree on a State's position on issues, as they would under the Articles, and Senators who voted in a manner not consistent with the desire of the State legislature could not be replaced until the expiration of the six year term. Thus, Senators under the Constitution would be able to exercise much more discretion and deviate much more from the desires of State legislatures than would have been the case under the Articles.²⁴ Senators under the Constitution were much less accountable to anyone than were Representatives under the Articles. This enhanced their discretionary power and increased the power of the federal government. Once again, the Constitution, when compared to the Articles, is less constraining on the federal government.

Representatives in the House of Representatives under the Constitution were elected in proportion to a State's population. The debate on whether to have the same number of representatives per State, as in the Articles, or to have States represented in proportion to their populations, was really a debate between whether the new government was to be more of a federal government or a national government. A federation of States would imply that each State is represented equally, while a national government would represent each individual equally. The establishment of one house of each type is the result of a compromise, but clearly shows that the movement from the Articles to the Constitution was a movement away from a federal government and toward a national government. The establishment of a national government in place of a federation of state governments is a change that enhances the power of the central government.

The Constitution provides that members of the House of Representatives be elected by popular vote. In the Articles, all Representatives were chosen by State legislatures. Thus, the popular election of legislatures further increases the national character of the U.S. government. According to the original Constitution, Senators and the electors that selected the President were chosen by State legislatures, so over time the popular election of these officials has made the government even

²⁴ Needless to say, after the passage of the 17th ammendment in 1913 that allowed for popular election of Senators, Senators were not accountable at all to their State legislatures.

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more of a national and less of a federal government than it was as originally organized by the Constitution.

This overview of the organizational and institutional changes that occurred as a result of the replacement of the Articles with the Constitution illustrates that the institutional changes in the U.S. government that resulted from adopting the Constitution produced a U.S. government with increased power and less accountability. While the Constitution is correctly viewed as a document that constrains government, it is much less constraining than the Articles of Confederation it replaced.

V. The Growth of Government

Up to this point, the discussion of the effects of adopting the Constitution has been couched in static terms. The Constitution created a government more powerful and less constrained than the government that existed under the Articles. The Constitution also created an environment within which the United States government had greater ability to grow than would have been the case under the Articles. The underlying argument in this hypothesis is that those in government have an incentive to alter the rules to favor themselves. Therefore, the less they are constrained, the more they will be able to change the political system to enhance their power, which creates government growth.²⁵ The remainder of this section will review some of the earlier discussion to place it in the context of government growth.

(1) The Constitution gives those in the legislative and executive branches of the U.S. government more discretion than did the Articles. Under the Articles, Congress was directly accountable to the State legislatures, whereas once elected, Congress could act without direct accountability under the Constitution.

(2) The Constitution gives the federal government the power to independently raise revenue, which means that it is not accountable to the States for tax increases.

(3) The powers of the federal government were more closely enumerated under the Articles than under the Constitution. The Constitution gives the federal government poorly specified powers, such as to coin

²⁵ Holcombe (1980) develops this argument in more detail within a contractarian theoretical framework. This is similar to the argument in Olson (1982), but Olson puts more weight on the length of time that institutions have been in place.

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money and regulate commerce, and then gives a procedure for deciding how the government should act, rather than clearly stating the bounds of government action as is done in the Articles. Perhaps most significantly, section 8 of the Constitution gives Congress the power to collect taxes to promote the general welfare of the United States, without specifying at all what activities fall under the heading of promoting the general welfare.

A careful reading of the Constitution's reference to the general welfare suggests that the intention was not to allow Congress to do anything that promotes the general welfare, but to restrict Congress to those activities that are in the general public interest rather than to further special interests. First, the phrase is clearly linked to the government's new power to levy taxes directly, rather than indirectly from the states. Second, there would be no reason to enumerate the scope of government in the Constitution if the enumeration was meant to include anything that was in the general welfare. And third, the Tenth Amendment explicitly prohibits the government from exercising any powers not given it in the Constitution. Again, there would be no reason for such a restriction if the government were permitted to do anything it decided would promote the general welfare.

The contemporary interpretation is different, however, and the Congress is given broad latitude to produce legislation because it promotes the general welfare. The vague wording in this clause has been interpreted more loosely over time as an open-ended permission for the government to promote the general welfare in ways it sees fit. This open-endedness in the activities allowed by the government paves the way for increased government activity over time.²⁶

(4) The government created by the Constitution is more of a national government than a federation of states, which gives it more power over the States, and provides a vehicle for federal government growth.

In a dynamic framework, the Constitution provides a platform for government growth much more than did the Articles. The Articles constrained the federal government more than the Constitution by more carefully enumerating what the government could do, by constraining representatives to be more continuously accountable to their constituents, by constraining the government's ability to raise revenue, and

²⁶ See Wagner (1989) for a discussion of the changing concept of the general welfare.

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by making it more explicitly a federation of states rather than a national government that existed above the states.²⁷

VI. Constraints in the Articles and the Constitution

If the Constitution is viewed in isolation, many of its provisions limit the government's activities, but when compared to the Articles of Confederation that it replaced, the Constitution gave the federal government more power and more discretion than the Articles.²⁸ The Constitution transferred power from State governments to the federal government, and while the federal government might have had less power under the Articles, the States were in a position to exert more power.²⁹

One might invoke the Tiebout (1956) model to argue that intergovernmental competition would have limited the power of the States, but there is at least room for debate as to whether individual freedom would have been better preserved under the Articles or under the Constitution. Maybe a strong constitutionally limited federal government is a good way to constrain the power of states, but another alternative would have been to constrain the federal government as in the Articles while

²⁷ Perhaps nowhere is the combination of federal government growth and the expansion of federal powers at the expense of the States more evident than in the area of national defense. When the Constitution was ratified, military forces in the United States consisted primarily of state militias, and the Constitution clearly intended for them to perform a continuing and important role. Today, even those remaining state military forces, the National Guards, are almost completely under federal control. The history of the replacement of state militias with national military forces is discussed by Riker (1987: ch. 8).

²⁸ See, for example, Ostrom (1987), who analyzes the Constitution and *The Federalist* for insights into the operation of a constitution that limits the powers of government, but does not examine the characteristics of the Articles in this regard. At the time the Constitution was adopted, it was a controversial document because of the additional powers it gave to the central government. For a flavor of the controversy, both past and present, see Pole (1987) and Manley and Dolbeare (1987).

²⁹ John Jay makes a similar point in *The Federalist 2*, stating, "It is well worthy of consideration, therefore, whether it would conduce more to the interest of the people of America, that they should, to all general purposes, be one general nation, under one federal Government, than that they should divide themselves into separate confederacies, and give to the head of each, the same kind of powers which they are advised to place in one national Government." See also Jensen (1940) who argues that the primary benefit of the Constitution over the Articles is that the Constitution more closely constrains the States.

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revising the Articles to limit the power of the States also. The clear conclusion is that the adoption of the Constitution of the United States reduced constraints on the federal government, but when considering both state and federal governments, an argument could be made that federal constraints on state governments have resulted in more constrained government overall.

VII. Did the Constitution Go Too Far?

If the Constitution's ultimate adoption is used as an indicator, at the time there was a consensus that the Articles of Confederation were too constraining on the federal government, and that a relaxation of those constraints through the adoption of the U.S. Constitution would improve the ability of the government to act efficiently. Were the constraints on the federal government relaxed too much? Seven decades after the Constitution was adopted, the Confederate States of America wrote their constitution following closely along the lines of the U.S. Constitution, and the evidence from the Confederate Constitution suggests that the authors of the Confederate Constitution in 1861 thought that the U.S. Constitution was not constraining enough on the federal government.³⁰

The Confederate Constitution follows the U.S. Constitution word for word, and section for section, in most places. The adoption of most of the U.S. Constitution shows that, overall, the authors of the Confederate Constitution were satisfied with government under the U.S. Constitution. Because the two constitutions are identical in so many places, the Confederate Constitution can legitimately be viewed as an amended version of the U.S. Constitution. Differences in the two documents identify areas that were clearly viewed as problems with the U.S. Constitution after seventy years of experience.³¹

Almost all of the changes that the Confederate Constitution makes to the U.S. Constitution add constraints to the federal government, and primarily add constraints to prevent the federal government from

³⁰ This section is based on Holcombe (1992), which provides more detail on the adoption of and provisions of the Confederate Constitution.

³¹ Quynn (1959: 297-299) notes that the *New York Herald*, a newspaper sympathetic to the Northern cause, argued in 1861 that the Confederate Constitution was an improvement over the U.S. Constitution.

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engaging in redistributive programs. In the most general instance, the Confederate Constitution does not make reference to the general welfare, as does the U.S. Constitution. Apparently, it was obvious even in 1861 that the phrase was vague and could be loosely interpreted to allow the government to broaden its scope of operations. By eliminating that phrase, the Confederate government would be additionally constrained, because new initiatives could not be justified by arguing that the government had a mandate to promote the general welfare.

Other more specific constraints were added. The Confederate Constitution did not allow its Congress to appropriate money “for any internal improvement intended to facilitate commerce. . .” thus preventing money from being allocated from general revenues to further the interests of specific industries. One exception was made. The government could spend money to improve navigable waterways, but even then the Confederate Constitution required that “in all such cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay for the costs and expenses thereof. . .”

In other places similar constraints appear. In general, the Confederate Constitution prevented the federal government from taxing the general public to benefit a specific segment of the population, and required that any benefits the government produced for a subset of the population be financed by taxes on the beneficiaries of the spending. These provisions are clear constraints on the scope of government activity.

The Confederate Constitution allowed the President to exercise a line-item veto over appropriations bills, and required that all bills deal with one subject only. Furthermore, without a request from the President for funds, appropriations bills were required to pass by a two-thirds majority. A more inclusive majority is more constraining. The Confederate Constitution also required that each bill specify the exact amount of each appropriation. There would be no open-ended financial commitments and no entitlement programs under the Confederate Constitution. While the authors of the Confederate Constitution wanted to adopt most of the U.S. Constitution, the changes they did make in the document clearly added constraints to the federal government. This provides some evidence that after seven decades of experience, some individuals viewed the U.S. Constitution to be an insufficient constraint on the federal government, especially when it came to establishing new government programs and engaging in special interest spending.³²

³² Lee (1963), Quynn (1959), and Holcombe (1992) for additional discussion of the Confederate Constitution.

Conclusion

An ideal constitution would constrain the government to prevent it from engaging in inefficient activities, but would not be so constraining as to prevent it from pursuing efficient activities. The concept is clear in theory, but is one of the practical challenges of constitutional design. This essay has examined three American constitutions to examine the way in which constitutional constraints have been designed in practice.

The Articles of Confederation, ratified in 1781, were the first constitution of the United States, and after a few years of experience, there was significant dissatisfaction with government under the Articles. Most of the dissatisfaction stemmed from the perception that the Articles constrained the federal government too much, preventing it from producing benefits that would be possible with a less constrained government. A convention was held which produced the Constitution of the United States to replace the Articles. A comparison of the two documents shows that they differ in many respects, including the organization of government. When compared point by point, the Constitution is consistently and unambiguously less constraining on the federal government than the Articles.

While there are major differences between the Articles and the Constitution, the U.S. Constitution and the Confederate Constitution are in large part identical, inviting a comparison of the differences. The biggest difference is that the Confederate Constitution is much more constraining on the federal government than the Constitution of the United States. In comparing the three constitutions, then, one finds the first one to be very constraining on the federal government, followed by one that was significantly less constraining, followed by one that added constraints to its predecessor.

Buchanan (1990) has described constitutional economics as the study of choice among constraints. Examining the three American constitutions shows that choosing the degree to which the constitution constrained the government was a major factor in the design of each of them. The three constitutions are similar in the scope of government they envisioned, the way that citizens are represented, and in the way that government is organized. While there are major differences in government under the Articles and government under the U.S. Constitution, the similarities are obvious, and where differences exist, they are related to the degree to which the constitution constrains the government. The

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U.S. Constitution and the Confederate Constitution differ little, and there it is even more clear that the degree to which the constitution constrains the government is the overriding factor in determining the differences.

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