

The Distributive Model of Government: Evidence from the Confederate Constitution*

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I. Introduction

One of the well-established models of public choice is the distributive model of politics, which explains how narrow special interests are able to use the democratic political process to produce legislation for their own private benefit. Economic analysis of the problems of special interest politics is relatively recent,¹ suggesting that the problem may not have been recognized until recently.² Higgs [8] notes that big government in the United States is a 20th century phenomenon, and carefully documents a shift in the dominant ideology in the progressive era prior to World War I that, he argues, set the stage for rampant government growth. Similarly, Anderson and Hill [1] trace the birth of the transfer society back to the 1877 *Munn v. Illinois* case that allowed the Illinois legislature to regulate grain elevator rates. Hughes [11], on the other hand, argues that Americans have always had the governmental habit, and that special interest programs have always been produced by the federal government. These two theses are not necessarily inconsistent: a trickle of special interest legislation in the 19th century might have set the stage for rampant government growth in the 20th century.³

The existence of pork-barrel politics in the late 20th century is beyond question, but there is a legitimate question about when it began, and about whether it is a direct result of the design of government specified in the U.S. Constitution. If problems of special interest politics began with *Munn v. Illinois*, as Anderson and Hill [1] suggest, or during the progressive era, as argued by Higgs [8], then the question arises regarding why the same fundamental political structure did not produce pork-barrel programs until then. However, this paper finds evidence in the Constitution of the Confederate States of America that special interest problem was well-recognized before the Civil War. The design of the Confederate Constitution makes it apparent that one of the fun-

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1. For examples, see Weingast, Shepsle, and Johnsen [15] and Holcombe [9]. Wittman [16] presents an opposing view. The foundations for this literature can be traced to Downs [5], who noted the incentives for voters to be rationally ignorant of legislative activity.

2. Surely the standard public finance literature before the 1960s did not recognize it [2].

3. Large federal government in the United States is a twentieth century phenomenon. As late as 1913 federal spending was only 2.5 percent of GNP, and had grown to 21.9 percent by 1980 when Ronald Reagan was elected in what some observers perceived as a mandate to reduce federal spending. Statistics on both federal and total government spending through 1970 appear in *Historical Statistics of the United States*, Part 1, pp. 1119–1123. The 1980 figure is from the *Statistical Abstract*, 1986 edition, p. 262.

damental flaws that its authors found in the pre-Civil War government of the United States was special interest spending programs.

The Confederate Constitution can legitimately be viewed as an amended Constitution of the United States. Viewing the Confederate Constitution this way is doubly reasonable. First, the two documents are for the most part identical. Second, the Confederate Constitution was written by individuals who had lived under the U.S. Constitution, who were therefore in a good position to evaluate its strengths and weaknesses. It is a tribute to the Constitution of the United States that even as the Confederate States were seceding from the Union, they wanted to take with them the Union Constitution, mostly unmodified.

The fact that few changes were made makes it a reasonable conjecture that the changes that were made were intended to correct perceived problems with the U.S. Constitution. Whether these changes were improvements could be debated, but at least one Northern source, the *New York Herald*, argued on March 19, 1861, that the Confederate Constitution was an improvement over the U.S. Constitution [13, 297–99].

II. Distributive Politics

The foundation of the distributive model of politics is the hypothesis that voters in general are rationally ignorant of most of what occurs in the legislature, but special interests are informed about those programs that can provide them with concentrated benefits. This biases the political process to produce an excessive amount of special interest legislation rather than legislation in the general public interest, which in the aggregate produces greater costs than benefits. The inefficient programs persist, however, because legislators are in a prisoners' dilemma setting.⁴

Since this model of distributive government has been developed in the literature, there is no reason to review it further here. However, it is worthwhile to note that the literature attributes the problem to political incentives that exist in legislative institutions. These institutions have remained relatively unchanged since the adoption of the U.S. Constitution, suggesting that problems created by the incentive structure should also have existed since the U.S. Constitution was adopted. The Confederate Constitution confirms that these problems were apparent to observers of the American political system before the Civil War, and that they were deemed important enough to warrant constitutional changes. The Confederate Constitution was a slightly modified version of the U.S. Constitution, with the most significant modifications intended to rectify the problems outlined in the contemporary model of distributive politics.

III. The Confederate Constitution

The Confederate Constitutional Convention began in February, 1861, and from the beginning those attending the Convention intended to base the Confederate Constitution on the Constitution of the United States.⁵ Robert Barnwell Rhett from South Carolina, who was called the father of

4. The model of rational ignorance underlying the distributive model of politics was developed by Downs [5], but Downs himself argued that the result would be too little government spending [6]. The prisoners' dilemma nature of legislative voting is discussed by Holcombe [10].

5. A complete history of the Confederate Convention appears in Lee [12]. A provisional Constitution was adopted until the "permanent" Constitution was approved. Also, Lee [12] reprints both the Confederate and U.S. Constitutions

secession, initiated both South Carolina's secession from the union and encouraged other states to secede. Once the states had decided to move cooperatively to form the Confederacy,⁶ Rhett was instrumental in calling the Constitutional Convention, and Rhett promoted the idea that the Confederate Constitution be based on the Constitution of the United States.

The Convention consisted of 50 delegates elected from the seven seceding states. Rhett nominated Howell Cobb, a Georgia attorney and former Speaker of the U.S. House of Representatives, to preside over the convention, and the motion was approved by acclamation. Alexander Stevens, an influential delegate from Georgia, called Cobb the most active member of the Convention. Cobb's notes on the Convention credit Rhett and Robert Toombs, also of Georgia, as being the originators of most of the changes made to the document during the Convention.⁷

As a whole, the Georgia delegation was undoubtedly the most influential of the Convention, but the general structure of the document had already been determined because the delegates agreed with Rhett's suggestion of using the U.S. Constitution as the model. Because the basic structure of the document was already determined by using the U.S. Constitution as a template, the Confederate Constitution was quickly completed, and adopted by the Convention on March 11, 1861.⁸

In outline and in language, the Confederate Constitution follows the Constitution of the United States almost perfectly. It uses the exact same language unless it appeared that an obvious improvement could be made. Furthermore, the Confederate Constitution uses the exact same outline as the Constitution of the United States except when there is an obvious reason to deviate. Thus, for example, Article I, Section 8 of both Constitutions describe the powers of Congress, and both use the same exact wording except when the Confederate Constitution intends to deliberately change the meaning or interpretation.

The similarities between the two documents make the differences stand out as perceived problem areas with the U.S. Constitution that became evident after more than seven decades of experience with the document. The following sections consider the differences between the two documents, and the comparison makes clear that the primary problem that alterations were trying to address was the use of the legislature to engage in distributive politics as depicted in the contemporary public choice literature.

It is worth noting that the preamble to the Confederate Constitution states that the states are acting "in order to form a permanent federal government," which differs from the U.S. Constitution, and that in Article VI, Section 3, "This Constitution, and the laws . . . made in pursuance thereof . . . shall be the supreme law of the land . . ." which is identical to the language of the U.S. Constitution. In other words, while the Confederate states were seceding from the Union, they intended to create a permanent federal government superior to the state governments.⁹

side by side so that it is easy to see the parallel construction, and to identify the places in which the two constitutions differ.

6. Rhett favored separate action by South Carolina if other states would not secede together. Initial inquiries produced unfavorable responses from Virginia, Georgia, and Louisiana, but favorable replies from Mississippi, Alabama, and Florida. While those states were willing to secede, they did not want to be the first, which helped to establish Rhett's leadership position on the issue.

7. Harwell [7] gives a brief overview of the Convention. A complete listing and brief biography of all members of the Convention is given in Lee [12], ch. 2. Of the 50 delegates to the Convention, 23 had served in either the U.S. House or Senate, and 42 were lawyers or "lawyer-planters" by occupation. One was a college professor. By political party affiliation, there were 31 Democrats and 17 Whigs.

8. By the end of 1861 thirteen states had ratified the Constitution and become a part of the Confederacy.

9. This point is important in addressing the argument that states' rights were a major issue. Undoubtedly the Con-

IV. Slavery

The differences between the two Constitutions on the issue of slavery are not large. Perhaps the largest difference is a more restrictive clause in the Confederate Constitution. The U.S. Constitution allowed the importation of slaves to continue through 1808, and does not specify what would happen beyond that date, but the Confederate Constitution explicitly prohibits the importation of slaves. While the Confederate provision might be seen as a special interest provision protecting the market value of slaves already in the country, the larger point is that both Constitutions permitted slavery, although the Confederate Constitution clearly intended to perpetuate it. The Confederate Constitution explicitly says, "No bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed." But the explicit provisions in the Confederate Constitution simply preserved the status quo that had existed under the Constitution of the United States. The treatment of slavery in the two constitutions cannot be considered to be very different; the Confederate Constitution simply went the extra step toward more explicitly preserving the institution as it had existed under the U.S. Constitution.

Slavery became an explicit constitutional issue only after the Civil War had begun. In his inaugural address of 1861, Lincoln stated, "I have no purpose directly or indirectly to interfere with the institution of slavery in the United States where it exists. . . . I believe I have no lawful right to do so, and I have no inclination to do so" [12, 209]. It is also worth remarking that the census of 1790 counted slaves in every state except Massachusetts, so when the U.S. Constitution was written, slavery was not an exclusively Southern institution. With regard to slavery, there is a difference in the extent to which the institution is explicitly discussed in the two constitutions, but both constitutions recognize and protect the same basic institution.¹⁰

V. Listing of Rights

The Bill of Rights constituting the first ten amendments to the U.S. Constitution were a part of the U.S. Constitution from its adoption. They are built into the body of the Confederate Constitution rather than appended to the end, but use almost the same wording as in the Bill of Rights. With regard to the Bill of Rights, there is a difference of form, but not of substance, between the two constitutions.

VI. The General Welfare

A very significant difference exists between the two constitutions with regard to the omission of a few words. The Confederate Constitution does not refer to the general welfare. The U.S. Consti-

federate states were more strongly supportive of states' rights, but by adopting a constitution almost identical to the U.S. Constitution indicated that the protection of states' rights that they perceived in the existing Constitution was sufficient.

10. Carpenter [4, ch. 6], argues in a historical treatise that slavery was a peripheral issue behind secession, and cites numerous sources from the 1850s and 60s to support his point. Regardless of whether this is true, the issue was undoubtedly a major cause of general tension between the North and South. For the purposes of this paper, however, slavery is only relevant to the extent that it affected the drafting of the Confederate Constitution, and the fact is that the issue is not responsible for major differences among the documents. From an economic standpoint, it is probably most interesting that the Confederate Constitution would have protected the value of slaveholdings by prohibiting further importation.

tution gives Congress the power “To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .” while the parallel passage in the Confederate Constitution give Congress the power “To lay and collect taxes, duties, impost, and excises, for revenue necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States . . .” Quite clearly, reference to the general welfare had already become viewed as a potential open door for any type of governmental activity.¹¹

It would seem that the proper interpretation of the general welfare in the U.S. Constitution would be to prevent governmental financing of activities that benefitted particular groups or individuals rather than the nation in general. The term is in the sentence referring to taxation. Furthermore, if the intent was to have the government in general try to promote the general welfare, there would be no reason for the Constitution to enumerate the allowable activities of the federal government, since those activities would be in addition to anything else that Congress thought would promote the general welfare. And it would be contradictory to restrict the government—as in the Tenth Amendment—to those activities enumerated, if one of the activities was to promote the general welfare in whatever way Congress saw fit.

Immediately following that clause in the Confederate Constitution is a clause that has no parallel in the U.S. Constitution stating, “but no bounties shall be granted from the Treasury; nor shall any duties of taxes on importations from foreign nations be laid to promote or foster any branch of industry . . .” This clause directly addresses the use of tariffs to shelter domestic industries from foreign competition. The use of protective tariffs had been an important issue in national politics since they were first adopted in 1816. Southern states felt that they bore heavy costs from the tariffs since they were used to protect northern manufacturing. Southern economies exported agricultural commodities and imported almost all the goods they consumed, either from abroad or from northern states. Either way, tariffs that protected northern industries raised the cost of goods in the southern states.

There was strong support among members of the Convention for free trade, but this was balanced against the desire to use tariffs as a revenue source.¹² The wording above was the result of compromise on the subject. Protective tariffs are one of the products of special interest politics, and by prohibiting protective tariffs, the Confederate Constitution was designed to prevent a type of special interest benefit that was apparent in the United States well before the Civil War.

The Confederate Constitution prevents Congress from appropriating money “for any internal improvement intended to facilitate commerce . . .” except for improvements to facilitate waterway navigation, but “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 . . .” Once again, the Confederate Constitution explicitly prohibits general revenues to be used for the benefits of special interests.

While reference to the general welfare in the U.S. Constitution might have an ambiguous interpretation, the changes in the Confederate Constitution make clear the interpretation that the Confederate States intended to avoid. The Confederate Constitution’s altered wording plainly says that tax revenues are only to be spent for programs that benefit everyone, not programs that benefit a specific segment of the population, and that in cases where allowed expenditures are targeted at a specific segment, taxes to pay for those expenditures must be targeted at the same specific segment.

11. See Wagner [14] for a discussion of this open door versus a constitutional view of government.

12. Lee [12, 93–94] discusses the debate on the tariff issue that occurred during the Convention.

The problems of narrow special interests being able to use democratic government for their own private purposes has been a theme of modern public choice analysis [9, 15], but the changes in the Confederate Constitution when compared to the U.S. Constitution show that the problem has existed—and has been recognized—since before the Civil War, and that the Confederate States tried to construct their Constitution in such a way as to reduce the problem.¹³

VII. Taxation

The problems with taxation in the Union, as perceived by the authors of the Confederate Constitution, paralleled the problem of special interest spending. One provision in this regard was just mentioned, and the clear intent is to implement the benefit principle and have taxes paid by those who benefit from the government's expenditures. In other places the Confederate Constitution added to the Constitution of the United States by requiring that taxes not be levied on those who will not benefit from the expenditures, and that expenditures for programs that benefit a narrow constituency be paid for by taxes on that constituency.

VIII. Appropriations

The Confederate Constitution gave the President a line-item veto with regard to appropriations. "The President may approve any appropriation and disapprove any other appropriation in the same bill."

Another important difference is that under many circumstances, the decision rule for appropriations was two-thirds majority rather than simple majority. "Congress shall appropriate no money from the Treasury, except by a vote of two thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments, and submitted to Congress by the President . . ." In other words, without the President's request, a two-thirds majority of both Houses would have been necessary for Congress to spend money. This fits well within the framework of Buchanan and Tullock [3], who note that larger majorities reduce the external costs of collective decision-making.

As Buchanan and Tullock [3, ch. 6] point out, Pareto efficient decisions are guaranteed only when a decision rule of unanimity is used, but less inclusive decisions rules may be optimal when decision-making costs are incorporated into the calculus. However, the greater the consensus, the more likely a decision is to be optimal. The two-thirds rule creates greater consensus, but is also raises decision-making costs. The logic of reverting to simple majority rule when the budgetary request is initiated by the president is that with the president in agreement, there is greater consensus, so a less inclusive decision rule with lower decision-making costs can be used by Congress.

Another provision in the Confederate Constitution read, "All bills appropriating money shall specify, in Federal currency, the exact amount of each appropriation, and the purposes for which

13. Higgs [8] argues that the dominant ideology of the 19th century was opposed to government intervention in economic affairs, and carefully documents the differences between the 19th and 20th centuries in this regard. Hughes [11], on the other hand, argues that special interests have always been ready—and able—to call on the government for favors. While government was undoubtedly more constrained in this regard in the 19th century, these provisions in the Confederate Constitution clearly indicate that the designers of the Constitution perceived what Hughes called the governmental habit.

it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent, or servant, after such contract shall have been made or such service rendered.” The Confederate Constitution tried to make sure that there would be no open-ended commitments and no entitlement programs in the Confederate States. All expenditure bills would specify a fixed amount of money, and another bill would be needed to exceed the initial appropriation.

All of these differences in appropriations are clearly aimed at problems identified by the modern model of distributive politics, and show that the problems recently emphasized by public choice theorists have been understood since before the Civil War.

IX. Other Differences

A number of other differences between the two Constitutions exist which deserve remarks. Related to, but more general than, the subject of appropriations, is the provision that “Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.” This aims at omnibus appropriation bills, but also prevents tying any kinds of unrelated legislation together. The Confederate States wanted to avoid the problem of having legislation viewed as generally undesirable passed because it was tied to some important and desirable legislation.

Another difference was that the President of the Confederate States would be elected to a six year term as President, and would not be eligible to run for another term. In another minor difference, the Post Office was required to be financially self-sufficient. In another difference, while the U.S. Constitution prevents taxes on exports, the Confederate Constitution provided for export taxes if they were approved by a vote of two-thirds of both Houses. Other minor differences exist in the two documents, but the constitutions are similar by design, since it was the intent of the authors of the Confederate Constitution to retain the U.S. Constitution except where they would be able to improve it with the benefit of over seven decades of experience.

X. Conclusion

An analysis of the Constitution of the Confederate States of America provides a great deal of insight into the workings of the Constitution of the United States before the Civil War. The authors of the Confederate Constitution had enough respect for the U.S. Constitution that they were willing to adopt almost all of its general form and language, and modified only those areas in which they believed clear improvement could be made. Thus, an analysis of the differences can pinpoint specific problems that the founders of the Confederacy believed existed in the Constitution’s design.

Seen in this light, it is interesting to note that the problems the authors of the Confederate Constitution actually did address were overwhelmingly those identified in contemporary public choice models of distributive government. They were concerned about the use of legislative powers to impose costs on the general public in order to provide benefits to narrow constituencies. While the large growth of government in the 20th century has made the problem of distributive politics much more visible, the problem was present and clearly recognized by Americans before the Civil War.

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