



# AS THE PEOPLE WANT IT

## Blueprint for a new confederation

John F. Knutsen



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# AS THE PEOPLE WANT IT

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Sigmund became interested in my views after reading one of my earlier articles on direct democracy. He continued asking me questions, and out of these questions grew the proposed constitution and a more coherent understanding of government.

Sigmund and I also developed a draft for a new law on local government. This draft formed the initial intellectual basis for the proposed constitution. Sigmund was also instrumental in pointing out to me some of the factual material included in the report, e.g. material related to educational results, degree of centralization in various countries. etc.

I would also like to thank Mr Jan Arild Snoen the director of the Progress Party Research Institute for having this publication appear under the FUI label.

# I GENERAL PRINCIPLES

# **1 Introduction**

## **1.1 Purpose of text**

The purpose of this book is to present a new governmental model based on the interests of ordinary people in their individual, group and collective capacities. While most governments rely on virtue in civic life, my model only assumes that each individual acts in his own rational self-interest. If he or she is virtuous, so much the better. But the proposal doesn't rely on individual virtue to cause good government.

Throughout the text I shall point out some shortcomings of current constitutional arrangements and their adverse effects on the daily lives of ordinary people. Also I shall attempt to highlight the differences between present constitutions and my proposal. But the format of this book does not allow it to be a comprehensive comparative study, and it was never intended as such.

It is especially fitting to present these ideas now. Not only are constitutional arrangements the subject of debate in large parts of the world, but simultaneously socialism has crumbled as an economic model. These events represent the triumph of the rational self-interest model in economic thinking. They also represent a rare opportunity for large-scale constitutional reform.

## **1.2 How the book is organized**

Readers who wish to get a quick understanding of the proposed governmental mechanisms should concentrate on tables, figures and the immediately accompanying text. For a list of tables and figures see page 170. Chapters 1 through 9 present the general principles of

## 4 General Principles

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the proposed governmental structure. Chapter 2 provides a summary of the essential points. Supplemental material is set in small type.

Part II SECTION BY SECTION COMMENTARY is a reference section for those who want to study the constitutional proposal in detail. Part III contains the actual text of the proposed constitution. Part IV contains marginal notes, references to other literature and an index.

### **1.3 Summary**

The purpose of this report is to present a new model for governmental structures based on the interests of the citizens in their individual, group and collective capacities.

## **2 The structure of the proposed constitution**

### **2.1 Three foundations**

The proposed constitution has three fundamental ideas:

- **Devolved popular sovereignty**
- **Inter- and intra-governmental competition**
- **Just processes for arriving at and enforcing decisions**

The first foundation is compound. *Devolved popular sovereignty* requires an analysis both of devolution, sovereignty and the term "popular". The second foundation is at least partially dependent on the first, as competition can take place only if there are multiple independent decision makers, which is easiest made possible by devolving some power away from the center. Thirdly decisions based on devolved popular sovereignty and competitive procedures are also just processes for arriving at decisions and they ensure that governmental actions conform to the interests of ordinary people.

Of course, in the actual text of the proposed constitution several of these fundamental ideas may influence the phrasing of any one particular section.

### **2.2 Confederate structure**

The Constitution is built on a confederate structure where state law is superior law, and the individual states retain their sovereignty and <sup>in</sup>dependence, including the right to secede. (See below for definitions of federations and confederations.)

## 6 General Principles

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This structure encourages competition between governmental units and ensures that government continues to obey the wishes of the citizens.

The central government's task is to take care of the common good as defined by the citizens in their collective capacities, ease co-operation, provide the states and the citizens with alternate solutions to their concerns, and provide cohesion and guidance. But if the people of a member state reject confederate legislative proposals, it has no power to compel enforcement. Its coercive powers are limited to only those powers needed to ensure that individuals in their collective, group or individual capacities, have an opportunity to choose.

### **Confederations**

The traditional definition of a confederation is *a body whose laws are binding only on sovereigns*. This means that confederate legislation has to be transformed into internal legislation in each member state to be binding on that state's citizens and court system.

As Figure 1 shows, the paths of control in a confederation are top-down, but if a state fails to carry out confederate instructions, the confederation may take action only against state authorities. As happened during the Gulf war of 1991, it is common for state authorities in these circumstances to protect themselves behind a wall of ordinary people<sup>1</sup>. This makes the people rather than the responsible state leader suffer the consequences of illegitimate state action. As central decisions do not extend directly to individuals, traditional confederations are inherently unstable. Either they fall apart, with confederate instructions becoming no more than polite advice, or they evolve into federations.

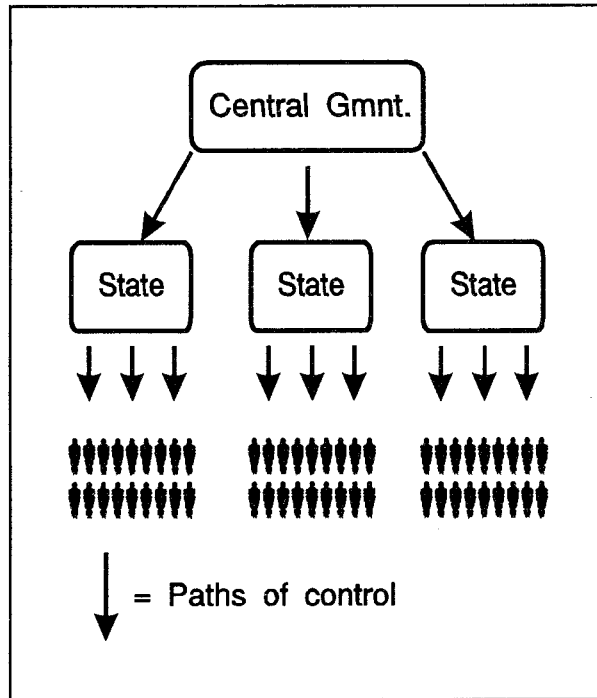
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<sup>1</sup>The United Nations is in fact a confederation, and the Iraqi authorities were probably legally bound to obey U.N. resolutions. However, legal technicalities turned out to be of minor importance as the Iraqi leaders hid and continues to hide behind a shield of innocent civilians and army personell.

### Federations

Contrary to traditional confederate legislation, federal legislation may extend rights and obligations directly on individuals in each member state. (See Figure 2.) Obviously it is much easier to coerce individuals than it is to coerce state authorities that have the full powers of the state at their disposal for protection. Thus the central powers tend to be much more important within a federation than within a confederation.

If state and federal laws conflict, as they invariably do eventually, it is the central body's laws and legal system that prevails. Central law is superior law, and the paths of control are top-down.



**Figure 1** Traditional confederation

Since federal law prevails with respect to each individual, there is no need for the central government to instruct state governments, and normally it doesn't have this authority.

### Contemporary federations and confederations

The traditional definition of a federation includes the United States of America, Canada, Australia, Germany and Switzerland. Perhaps surprisingly, the European Community ends up being a federation as well.

There are three forms of Community law: A) *Regulations*; which automatically become law for everyone living in Community countries, B) *Decisions*; which automatically become law for particular bodies or persons, and C) *Directives*; which order member states to make laws of their own to give effect to community policies (Letwin, page 14). It follows that the European Community can only be classified as

a confederation if it relies exclusively on Directives. Whenever the Community issues *Regulations* or *Decisions*, it acts as a federation. The essential federal nature of the Community is independent of the fact that the scope of the Community's powers as they exist today, is limited. The Community has the power to legislate only on certain economic issues, trade, agriculture etc.. But within the Community's limited domain, within that range where it can issue *Regulations* or *Decisions*, it acts as a federation.

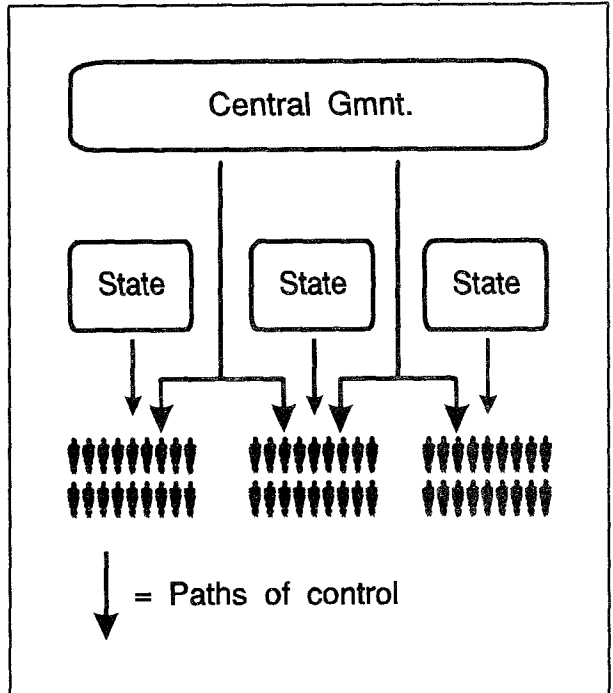


Figure 2 Traditional federation

### Toward a new confederation

This book's definition of a confederation differs somewhat from the traditional definition. *A federation is a multi-governmental entity where central law is superior law, while a confederation is a multi-governmental entity where local law (state law) is superior law.* This new definition allows confederations to act directly on individual citizens, and thus provide the level of cohesion now offered only by federations, and it gives the term *confederation* a more meaningful content.

### Important features of new confederate definition

The new definition preserves the fuzzy popular notion that confederations are "looser" structures than federations; more based on cooperation than coercion.

From the local-law-is-superior principle it follows that interaction within a confederation has to rely on voluntary cooperation between the member states, while a federation ultimately relies on coercion.

As seen by individual citizens, the traditional and the new definition of a confederation are related. If confederate law can act only on sovereigns and has to be transformed into local law to act on individuals, - then from each citizen's point of view, state law is superior law.

The proposed definition is also consistent with the prior classification of the United States of America, Canada, Australia, Germany, Switzerland and the European Community as federations.

It is the force to coerce and compel, rather than propose and persuade that distinguishes the new federations from the new confederations. A confederation relies on bottom-up paths of control while a federation relies on top-down paths of control.

**Table I** Summary comparison of traditional and reformed confederations

<b>Traditional confederation/federation</b>	<b>Reformed confederation</b>
Citizens may not instruct either state or confederate/federate authorities	State citizens (as a group) may instruct state authorities  Confederate citizens (as a group) may instruct central authority
Confederate/Federate law is superior law	State law is superior law
State borders are fixed or determined by central authority	State borders are determined by those directly affected
Structure is based on centralized command politics	Structure is based on voluntary cooperation and popular sovereignty
Cohesion is provided by central authority's power to coerce and compel.	Cohesion is provided by the central authority's power to propose and persuade.

### **2.3 Two parts**

The Constitution itself is divided into two parts: Chapters 1 through 4 specify the powers of the three contracting parties; the states, the citizens and the Confederation in relation to each other, and Chapters 5 through 10 specify how the confederate government is to be organized, and put limitations on the powers of the different institutions within the confederate government.

The purpose of this division is to allow the confederate government to organize itself as it pleases and in a way that proves convenient, but prevent these institutional changes within the central government from encroaching on the sovereignty of the states. For similar reasons there are no references in the first part to institutions in the second part, neither are there references the other way, except that certain actions by the confederate government naturally presuppose a legal basis in Chapter 3.

Chapters 1 through 4 of the Constitution are also superior to Chapters 5 through 10.

### **Summary**

The proposed constitutional model is built on three fundamental ideas:

- **Devolved popular sovereignty**
- **Inter- and infra-governmental competition**
- **Just processes for arriving at and enforcing decisions**

The new Confederation has extensive powers to persuade and propose, but limited powers to coerce. Contrary to present federations and confederations the structure is voluntary.

## 3 Popular sovereignty

### 3.1 Introduction

#### **Historical background**

The modern meaning of sovereignty was introduced by Jean Bodin in 1576. According to the New Columbia Encyclopedia, *sovereignty is* the supreme authority in a political community " .

The origin of popular sovereignty, on the other hand, goes most directly back to what is called the social contract school of the mid 1600s to the mid 1700s. Popular sovereignty is the notion that no law or rule is legitimate unless it rests directly or indirectly on the consent of the individuals concerned.

Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778) were the most important members of the *social contract school* . They all postulated that the nature of society, whatever its origins, was a contractual arrangement between its members. The reason men entered society was to protect themselves against the dangers of the "state of nature". But, their theories differed markedly in other respects.

Hobbes claimed that the first and only task of political society was to name an individual or a group of individuals as sovereign. This sovereign would then have absolute power, and each citizen would owe him absolute obedience. Hobbes concept meant that popular sovereignty only existed momentarily. In modern terms we might say that it consisted of "one man, one vote, once".

Locke as well, claimed that the social contract was permanent and irrevocable, but the legislative was only empowered to legislate for the public good. If this trust was violated, the people retained the power to replace the legislative with a new legislative. It is unclear whether Locke deposited sovereignty in the people or in the legislative. Though he was less absolute than Hobbes, he clearly didn't intend popular intervention to be commonplace. If anything, Locke's vision is probably closer to the British view of Parliamentary sovereignty.

Rousseau claimed that laws enacted by the legislature could only address the common good of the society's members and they could only extend the same rights or obligations to all citizens. Rousseau, however, didn't elaborate on what would happen

if these conditions were violated, but he did propose mechanisms to find out what the "general will" was and he did see the legislative powers as vested in the people itself.

Thus there was a development in political theory from the very limited role played by the people in Hobbes' theories, to the more significant popular sovereignty of Rousseau.

#### ***Rule by consent in other fields of thought***

Ideas and thoughts legitimizing the rule of consent also may be found in many religious tracts. The Bible sums it up quite nicely and again not coincidentally : "Love your neighbor as yourself." (Mark 12, 31), and "And as you would like that men would do to you, do exactly so to them." (Luke 6,31). In other words; since you like to control your life, let others control theirs. The implied promise is that the individual and society will be happy and prosperous to the extent that this advice is followed and the people is given the maximum amount of individual and group liberty and sovereignty.

Contemporary psychologists as well, in their search for the sources of happiness and depression, have found the same result. Happiness, confidence and success are closely related to a belief in one's ability to influence one's own fate. Depression and failure are related to a feeling of inability to control one's own life; to a feeling of being controlled.

To most people these truths seem so evident that they need not be argued. But in practical politics there is an enormous resistance to giving ordinary people the final say.

### **3.2 A contemporary definition of popular sovereignty**

According to the New Columbia Encyclopedia, sovereignty is "the supreme authority in a political community". The sovereign is that individual or group that has absolute power to make law. The absolute power to make law is also the power to make the rules by which the other authorities operate. The chief characteristic of a sovereign body is thus that it makes the decision making rules for

government'.

The term *popular sovereignty* is supposed to mean that this ultimate power belongs to the people, but what is the most common contemporary interpretation? Most Western democracies claim to base their government on popular sovereignty, but in reality the people have little ultimate authority short of revolution. Most decisions, even fundamental decisions, are left to the legislatures. It is usually the legislature that controls the constitution, the most basic instrument of government, and the extent of popular authority is usually at this body's discretion. Even where popular consent is required, the legislature usually has the sole authority to propose amendments. In reality this means that sovereignty is most commonly placed in the legislature. It is this body, rather than the people, that has the ultimate power to make law.

On the other hand, in order for a government to be truly *popular* it would have to provide the people with at least as much authority as any other body, and in addition a right to overrule that body. In practical terms this means that an updated definition of popular sovereignty has to rest on the people's ability to:

**® Adopt its own basic law or constitution**

*Propose and adopt amendments to the basic law or*

**constitution**

If the people have these powers, they may institute any other changes they desire. If they don't have these powers, however, it is unclear how it can be legitimately said that the government rests on the supreme authority of the people.

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'This set of decision making rules, whether collected in one or several documents, is that state's basic law or constitution.

### **3.3 Popular sovereignty and direct democracy**

Direct democracy means that the people directly decide all issues, instead of delegating decisions to representative bodies like national legislatures; while popular sovereignty means that the ultimate political authority is deposited in the people. It follows that popular sovereignty and direct democracy are closely related, but they are not exactly the same. Crudely simplified we may say that popular sovereignty is political theory at a more basic level, while direct or semi-direct democracy is its practical and pragmatic manifestation. Much of the discussion in the following chapters will therefor focus on (semi)direct democracy, its implementation and effects.

As an aside I might add that it is possible to have direct or semi-direct democracy without popular sovereignty. Ordinary people may be allowed to make ordinary laws, but barred from changing the constitution. Such a combination was proposed in the United Kingdom around the turn of the century.

Similarly, it is possible to have popular sovereignty without direct democracy in its purest form. This is the usual form of popular sovereignty; a combination of representative bodies and ultimate popular authority. But it is not possible to envision popular sovereignty without such a form of semi-direct democracy.

Semi-direct democracy is a combination of direct democracy and representative (also called indirect) democracy. A semi-direct system is characterized by the people having delegated legislative powers to a parliament or other representative body, but having made this delegation revocable and limited. Besides the legislature there must also be a mechanism allowing for the people to express its will directly.

For reasons of simplicity the rest of the book also employs the term *direct democracy* to describe the direct parts of a semi-direct governmental system.

The proposed governmental system is a semi-direct democracy.

### **History of direct democracy in Europe**

The history of popular sovereignty and direct legislation goes back a long time. It can be found in some **greek** city states of antiquity, and among the **germanic** tribes of northern Europe. At the time of the Greeks and the Romans, the northern Europeans lived in small groups in sparsely populated areas. In such societies, there are definite limits to oppression. If people are dissatisfied, they simply gather in a little group to move on to greener pastures elsewhere. This way of life naturally leads to an essential equality in fundamental political decisions. After all, these groups or tribes can only be kept together by voluntary compact. Thus the nature of frontier society gave every young able-bodied individual a stake in fundamental decisions.

Later, voting with your feet largely ceased being an option as the more fertile parts of Europe became more densely populated and land became scarce. The emergence of agriculture as the dominant food source, reinforced the vulnerability of ordinary people. In an open landscape, with a sedentary lifestyle it became harder to escape tyrants and their professional fighting men. Over time this lack of effective countermeasures led to the emergence and growth of feudal institutions.

In the less accessible parts of Scandinavia and Switzerland, however, repression was more difficult to enforce, and the local **landsgemeinde** or things survived for a considerable period. The original **landsgemeinde** were general assemblies of all adult free-men that met once or twice a year to resolve important issues. In Norway during the time of the vikings (around 1000 a.d. and even later) kings were still elected or approved at the local direct assemblies, and usually there was more than one contender. This multiplicity of choice acted as a brake on royal ambition. For a long time there was no real central government, and even after its creation, the geographical conditions were such that only occasional supervision of local communities could be accomplished. Even if you did have a fall-out with the monarch, you could usually escape to other viking communities in Iceland, Normandy, Ireland, England, the Orkneys or the Baltics with impunity.

The regional representative assemblies assumed many powers of the earlier Norwegian direct assemblies beginning about 1000 a.d. However, these representative assemblies had almost **un-fettered** legislative powers at least until 1152 when the first serious attempts at national legal harmonization were made. The things or representative assemblies did survive until 1662, but their powers steadily eroded with the increasing influence of the church, the dwindling number and **professionalization** of members, and the appointment by the king of an ever larger fraction of the total.

Even after the time of the Vikings, during the more powerful Danish-Norwegian kings, central government enforcement was still difficult, and several tax collectors failed to return to the capital. On the continent or in the flat eastern part of Norway,

the king or the feudal lord could employ heavily armed professional soldiers on the sedentary population. But heavy arms were of little help in Switzerland, Iceland or in the Norwegian mountains with their ample opportunities for ambush and guerrilla warfare. Neither were there many fields to burn as the population to a large extent relied on husbandry, fishing and hunting for subsistence.

Thus by the Middle Ages the democratic traditions of citizens' assemblies survived only in Iceland, in parts of Norway, possibly in parts of Sweden, and in the original Swiss cantons. Scandinavia eventually succumbed to absolutism, and direct democracy survived only in Swiss towns and cantons.

In Switzerland, 1291 marked the establishment of a defensive league between the original cantons of Uri, Schwyz and **Unterwalden** directed toward the feudal Habsburgs. Swiss history as well is filled with much strife even after this time. But the Swiss, contrary to the Scandinavians were never conquered and never ruled by monarchs (excepting Napoleon).

It was the democratic traditions of Switzerland that later inspired Jean-Jacques Rousseau. Rousseau's writings led to the adoption of the referendum in the French Constitution of 1793, i.e. during the French Revolution. Though this Constitution never came into operation, Napoleon used the referendum occasionally. It also led to a revitalization in Switzerland itself.

In 1848, the new Swiss federal constitution gave the Swiss people the power to demand the complete revision of the Constitution through the election of what was in effect a constitutional convention. In 1874 the Swiss used this power to force the adoption of the legislative referendum (the right to approve or reject ordinary federal legislation). Later, the threat of another confrontation with the people led the Parliament to propose and pass itself the constitutional initiative (approved 1891).

### **Direct democracy in the United States**

The basis of the democratic traditions of the British colonies in North America is similar to that in Europe. The North American colonies were far removed from the hub of power. They were protected from royal interference by difficult communications and sheer physical distance. In this environment of free-men evolved the New England town meeting.

The town meeting is an assembly of all adults (originally all male adults) called every year to decide important local issues.

As in Switzerland several centuries earlier, the Americans resented central taxation and interference with what they perceived to be internal American affairs. As in

## 18 General Principles

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Switzerland, geography hampered the military response of the central power, and eventually secured the freedom of the American people and the preservation of its democratic traditions. Thus as early as 1778, the Massachusetts constitution was adopted by referendum. But this was hardly an expression of popular sovereignty as I have defined it. Rather it was the people vesting its ultimate authority in a new legislature according to the Lockean vision. This becomes quite clear in the American Declaration of Independence of July 4, 1776:

...."whenever any form of government becomes destructive of these ends [life, liberty etc.], it is the right of the people to alter or to abolish it, and to institute a new government, ... "

Also, it should be noted that though the American Constitution starts off with " We the people of the United States ".....etc. There is no way for the people to amend the constitution. Popular sovereignty in its more radical form was introduced later. Today, Delaware is the only state that does not require popular approval for constitutional amendments, but the federal constitution has still not been updated.

The initiative, legislative referendums and other democratic reforms were also postponed for another century. When these issues emerged or reemerged, it was because of a maturing United States and a maturing political structure. The drive westward was being completed and the opportunities for voting with your feet internally in the United States were reduced. Simultaneously the political structures of the older states were setting, while the ordinary man's entrepreneurial spirit especially in the West, was still not completely subdued.

It is to this entrepreneurial spirit we probably have to attribute the reform movement born in the American Midwest at the turn of the century. Many of these people had moved thousands of miles to get to a place that offered *individual* opportunity and individual choice. They didn't need or want a corrupt or party ruled legislature to tell them what to do. In 1898 the reform movement managed to get the initiative adopted in South Dakota as the first state.

Direct legislation in the United States is still largely a western phenomenon. Mostly it has been introduced within a few decades of the state's erection, and before its political structure has become too entrenched. Though several efforts have been made at the federal level, the entrenched interests of pressure groups and party machines have so far successfully repulsed every effort. The initiative also has been fiercely resisted in most of the eastern states.

In Canada, direct legislation can be found in the province of Alberta and at the local level.

### 3.4 Summary

This chapter defines popular sovereignty as the people's power to:

- **Adopt its own basic law (constitution)**
- **Propose and adopt amendments to the basic law (constitution)**

A basic law or constitution is a set of decision making rules fixing the authority of each branch of government.

The practical manifestation of *popular sovereignty* is *direct democracy*.

A semi-direct democracy employs both a representative legislature and direct legislation. Throughout the rest of the text *direct democracy* will be employed to describe the direct components of a semi-direct legislative system.

## 4 Direct democracy

### 4.1 Proposed constitution's use of direct democracy

The proposed constitution employs all the traditional instruments of direct democracy; the referendum, the initiative and the recall. The initiative and the referendum is employed to secure popular sovereignty and to foster competition between governmental units. Equally important is a novel method for self-imposed taxation more fully described in Chapter 8, page 53. The recall plays a more subordinate role. For a description of the referendum, the initiative and the recall see below.

#### **Traditional instruments of direct democracy**

Traditional direct legislation comes in three different varieties: the initiative, the referendum and the recall. In modern times, the oldest of these is the referendum, which *often* lead almost directly to the later introduction of the initiative and the recall.

#### **The referendum**

The referendum is the peoples's power to approve or reject acts of the legislature. It comes in several forms depending on the nature of the legislation to which it applies etc..

The referendum may be characterized along the following four dimensions:

**e Form of legislation:**

A) constitutions or constitutional amendments, B) ordinary statutes, and C) fiscal issues

**• Initiator**

A) the citizens, B) the legislature itself or parts of it, C) the president or D) the states.

**e Advisory or binding**

**® Voluntary or compulsory**

This gives many possible combinations. However, some of these combinations are

more common and more important than Others.

The term referendum when employed alone, usually means a binding compulsory referendum on ordinary statutes. In the United States or Switzerland this term is also used in the more specific sense of a citizen initiated referendum. A citizen initiated referendum is also called a petition referendum since it starts as a petition signed by a group of citizens. However, as the number of signatures surpasses a certain number, the petition ceases to be a petition in the ordinary sense and becomes instead obligatory or compulsory on governmental authorities. If 50,000 Swiss voters petition the government for a referendum on a federal statute, the government may not refuse them. It is obligated by the Constitution to carry out the referendum.

Another common category in the United States and in the Swiss cantons, is the binding compulsory fiscal referendum. In its typical form, the state (or canton) is obligated by the state constitution to let the voters approve governmental debt increases.

Lastly, many countries require popular approval for constitutional amendments (normally as a binding compulsory referendum).

### **The initiative**

The initiative is the people's power to approve or reject legislation initiated or proposed by someone other than the legislature.

The initiative may be characterized along the following dimensions:

- **Form of legislation:**
  - A) constitutions or constitutional amendments, B) ordinary statutes, and C) fiscal issues
- **Initiator**
  - The citizens or the states.
- **Advisory or binding**
- **Voluntary or compulsory**
- **Direct or indirect**

The usual form of the initiative is as a citizens' initiative or as a voters' initiative. (The two terms have the same meaning). This is legislation (whether ordinary statutes or fiscal issues) proposed by a group of citizens through a petition. As with the petition referendum, once the petition itself has gathered enough voter support in the form of signatures, it becomes both compulsory and binding.

If the initiative is direct, it is placed on the ballot at the next election. If the initiative

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is indirect, the legislature gets a chance to enact the proposal. Only if it fails in the legislature is it placed on the ballot.

At the federal level in Switzerland can be found only the constitutional initiative. Many American states on the other hand, allow both the constitutional and the legislative initiative.

### **The recall**

The recall is the people's power to force a public official out of office. It can be found at the state (and local) level in the U.S. and at the cantonal (and local) level in Switzerland.

As for the other instruments of direct democracy it comes in several forms:

- **Application**

- A) all public officials whether elected or not, B) all public officials except judges, C) all elected public officials including judges, and D) all elected public officials except judges

- **Direct or indirect**

The term "direct recall petition" means a petition that leads directly to a new election. Indirect petitions only lead to a new election if they are successful, i.e., if the official in question is actually recalled at the polls.

Besides these distinctions, there are many other variations. Sometimes, the recall may only be employed once during an official's term, in other cases the official gains 6 months' or 1 year's immunity against new recall attempts, and sometimes the defeat of the recall implies reelection for a new term.

### **4.2 Principal features of direct democracy**

The principal features of direct democracy is its ability: A) to limit the influence of pressure groups, B) to unbundle spending and legislative decisions and C) to secure competition between governmental units through proper arbitration.

### **Limiting the influence of pressure groups**

A principal feature of direct democracy is that it limits the influence of numerically small but politically powerful pressure groups.

The direct vote of the citizens reduces the influence of special interest groups by automatically weighing the interest of the smaller group against that of the majority. In order for a proposal to gain a majority in a referendum it has to offer advantages to a much larger cross-section of the population than ordinary legislative decisions. In all likelihood it has to be a positive sum proposal, while legislation influenced by smaller pressure groups in all likelihood will be negative sum proposals where the cost to the majority are larger than the benefits accruing to the smaller pressure group due to costs associated with administering and implementing the proposal itself.

Referendums and initiatives work by dramatically reducing the cost (to the majority) of influencing government decisions. Political influence in most representative systems comes through extensive long-term lobbying. Such lobbying is expensive in terms of time and effort, and it only pays to engage in it if the potential pay-off is substantial. Usually it will not be rationally cost effective for individuals to oppose actively governmental programs as the cost of opposition (in terms of time and effort) exceeds the benefits of lower taxation. Direct democracy reduces the cost of opposition to the time and effort required to put a ballot in the ballot-box; an enormous improvement over having to lobby legislators directly.

### **Direct democracy and direct decision making costs**

One objection to widespread use of direct democracy concerns its alleged high direct costs. According to Kendall and Louw (Kendall, 1989, page 135), the Swiss Federal chancellery estimates the costs of a national initiative combined with a federal counterproposal to about 1 Swiss franc per voter. Even when special ballots have to be held to decide single issues, the costs are modest. In California such a special ballot was held in 1973. It cost the state about USD 20 million, or about 80 cents (USD 0.80) per capita. (Walker, page 93).

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Besides the direct costs incurred by government, comes the costs associated with launching an initiative. In Switzerland this cost is estimated to at least one franc per petition signature (Junker, page 122). In California initiative campaigns cost several million dollars. In per capita terms however, these costs are still marginal, which is why this method of making decisions is so effective. Even if we assume that the Swiss spend a few million francs (everything included) on national issues every year, this has to be compared with a Swiss federal budget of about 23 billion francs (1985) (Junker, page 40).

The mismatch between the resources allocated by the government, and the input on allocation allowed by each citizen may also be illustrated in another manner. While one third to two thirds of the total resources of most developed countries are allocated through the public sector, ordinary people are allowed decision making powers only once or twice every four or five years. (I am here disregarding direct lobbying by individual citizens as a practical alternative due to its high indirect costs.)

At the personal level, on the other hand, we are constantly incurring decision making costs as we try to weigh the relative advantages of everything we buy from tooth paste to motor vehicles and homes. Since the cost of each individual decision is much lower in the private market sector, decision making costs including inconvenience and allocated time is much higher for each dollar, franc or ecu each citizen spends as a private individual than for dollars, francs or ecus spent via the public sector. Lower private sector unit costs for decision making give many decisions and higher total decision making costs. These higher total decision making costs are, however, more than counterbalanced by the fact that funds are allocated according to each individual's preferences. Thus there is ample room for governments to increase total *direct* decision making costs, i.e. direct costs associated with ballots etc., and thus reduce the unit cost of influencing individual governmental decision.

### **Anecdotal evidence; taxes**

The most potent form of direct democracy, voters' initiatives, is today practiced primarily in Switzerland and at the state level in the United States.

It is well known that Switzerland has one of the lowest tax rates in Europe. Among the European members of the Organization for Economic Cooperation and Development (OECD), for instance, only Portugal and Turkey have lower total taxation as a percentage of GNP. Other European OECD members at a comparable level of income and development with Switzerland have much higher levels of taxation. In fact, comparable in this respect is not so easy to define as the Swiss also have the highest incomes. The Swiss position can pretty much be summed up by saying that the Swiss enjoy the highest income and the lowest taxes of Europe.

Table II Swiss and European taxes

Country	Total tax receipts as % of GDP	Highest rate central gmnt. income tax
Switzerland	32.5	13.2
United Kingdom	37.3	40.0
European Community average	40.8	53.1
OECD average	38.4	49.0

Source: OECD in Figures **June/July** 1991

In America, the most famous of all initiatives was Proposition 13 in California in 1978. In spite of opposition from both political parties and most public officials, the voters decided to cut property taxes by 57%, from USD 12 billion to USD 5 billion and restrict increases in the future. Similar proposals were later enacted in other American states. (Kendall, Frances: *Let the People Govern* page 139)

The following table of state tax rates gives further evidence of the correlation between democracy and taxes.

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**Table III** Direct democracy and tax rates

Y = yes, state has provisions for legislative citizens' initiative

N = no, state does not have provisions for legislative citizens' initiative

Highest individual income tax rates		Highest sales tax rates	
Minnesota	N	Connecticut	N
New York	N	Washington	Y
Connecticut	N	Minnesota	N
Iowa	N	Mississippi	N
West Virginia	N	New Jersey	N
		Pennsylvania	N
		Rhode Island	N
No individual income tax		No sales tax	
Alaska	Y	Alaska	Y
Florida	Y	Delaware	N
Nevada	Y	Montana	N
South Dakota	Y	New Hampshire	N
Texas	N	Oregon	Y
Washington	Y		
Wyoming	Y		

Sources: tax rate information from Wilson, James Q., page 644

information about state initiatives from Butler, David, pages 71-72

Only one high tax state (Washington) has a provision for voters' initiative. Similarly, six of seven states without an individual income tax are "initiative" states, while only one (Texas) is not. The results for states without sales tax (5) are indecisive; with 2 "initiative" states and 3 non-initiative states. (24 U.S. states or territories have implemented the initiative.)

Though more comprehensive statistics are less clear-cut, the above evidence taken with the history of the American tax revolt in the late 1970s and early 1980s and the Swiss experience, substantiates that popular initiatives lead to lower relative taxes and less governmental interference.

### **Unbundling spending and legislative coalitions**

By its very nature direct democracy and especially the initiative, tends to unbundle decisions since it enables individual citizens to vote separately on each issue.

Representative political systems on the other hand tend to bundle political decisions. As an individual you may approve a particular candidate's views on taxes, but be opposed to the same candidate's views on abortion. In a representative system you have to take the whole bundle. As an individual voter you are not able to separate the two issues.

Bundling reduces the general welfare. Any system that enables unbundling is thus a superior system. Direct democracy allows unbundling and is thus superior to a purely representative system.

### **Parliamentia and Democratia, an example**

Let's suppose we have two identical states: Parliamentia and Democratia representing respectively a parliamentary (representative) system and a semi-direct system. In both countries a proposal to spend 100 million currency units (CU) on a national tiddlywinks team (proposal A) and another proposal (proposal B) to spend 100 million

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Semi-direct democracy: democracy encompassing both a representative system (an elected legislature) and direct legislation by the citizens. Semi-direct democracy can be found in Switzerland, both at the federal and the local level, and in many American states.

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currency units on bubble gum for school children is introduced.

### **Parliamentia**

In **Parliamentia** the leader of the **Leftright** party (the sponsor of bill A) confers with the leader of the **Rightleft** party (the sponsor of bill B). The **Leftright**s hold 25 parliamentary seats, while the **Rightleft**s hold 26 seats. Together they hold 51 of the total 100 seats. They quickly agree on a quid pro quo, if the **Leftright**s vote in favor of **B**, the **Rightleft**s in turn will vote in favor of **A**. This is done, and both measures pass though each counted separately is opposed by about 3/4 of the MPs.

Peter Individual, a parliamentarian of the **Rightleft** party briefly considers voting according to his convictions, but realizing the risk of being censored by or expelled from the party (by that eliminating his chances of reelection to Parliament), he decides to toe the party line.

Though the leader of the **Leftright**s could theoretically renege on his promises after the approval of **A**, he doesn't do so as he realizes that he needs a similar gentlemen's agreement with the **Rightleft**s for the approval of proposal **F**, to be decided in Parliament the following week. (Here he is prepared to offer his support for **G**).

In other words as the order will be reversed the following week he has to keep to his part of the current agreement. (Besides he is a man of honor, at least as far as his fellow MPs are concerned.)

### **Democratia**

In **Democratia**, on the other hand, the proposals are to be decided directly by the people. The leaders of the **Leftright**s and the **Rightleft**s announce that they have made a deal. They urge their supporters to back both measures. However, since voting is secret, neither leader can identify party members or citizens that don't heed their admonitions, and they certainly cannot expel anyone from the country. Thus the citizens are free to vote according to their individual convictions. The citizens are also a little bit piqued about the way the politicians have taken it upon themselves to tell the people what to do. Thus both measures are heavily defeated.

The following year, however, the leaders of the **Leftright**s and the **Rightleft**s decide to submit a single proposal (**A&B**), incorporating both measures, to the public. By simple calculation they figure such a joint proposal will be favored by 51% of the voters.

Unfortunately, **Truespeak**, an independent citizens' action group sponsors a petition drive for a proposal to withhold funds from the tiddlywinks team (**A-negative**). Another group, **Peoplepower**, sponsors a drive to withhold funds from the bubble gum

project (B-negative).

At the polls, **A&B** receives 51 % of the votes, A-negative receives 75%, while B-negative receives 74% of the vote. Since conflicting measures are decided according to the number of votes; the 100 million currency units support for the tiddlywinks team (A) is neutralized by A -negative (51 % of the vote versus 75%), while the bubble gum project is neutralized by B-negative (51% versus. 74%).

### **Conclusions**

As the example shows, in representative assemblies, proposals may pass though they do not represent majority opinions. This happens when the 25 representatives favoring proposal A combine with the group of 26 representatives favoring proposal B to form a majority of 51. This tendency is most obvious when it comes to appropriations, but it also takes place when it comes to legislation. The net result is a steady increase in the size of government despite the opposition of most voters and politicians.

Such alliances to push up spending or enact legislation are not possible however, when decisions are returned to individual citizens. Since votes are secret, the leaders of each faction have no means of enforcing agreements. There is no stick that prevents individuals from voting according to their own convictions.

### **Popular votes as the arbiter between governmental units**

As the proposed constitution creates a multi-governmental entity, it has to provide a mechanism for resolving conflicts between subunits. I am proposing that this power to arbitrate between governmental units is devolved directly on the people. This method of ultimate arbitration is the only one that ensures competition between governmental units in fulfilling the needs of ordinary citizens.

## **4.3 Summary**

There are 3 forms of direct legislation:

- **The referendum,**  
often referred to as the people's veto power,
- **The initiative,**  
which gives the people the power to propose and enact legislation, and
- **The recall,**  
which gives the people the right to call a new election

The referendum and the initiative limit the influence of pressure groups by dramatically reducing the cost of opposing narrow pressure groups. The referendum and initiative also improve the allocation of resources by unbundling spending and legislative decisions.

Popular votes also may be used as the ultimate arbiter in cases of conflict between representative bodies or branches of government. Evidence from both the United States and Switzerland suggests that a greater say for the people may lead to lower taxes and a smaller public sector.

## 5 The benefits of local control

### **5.1 Better results/Better resource utilization**

Many of us intuitively feel that local control often produces better results than central control. But, intuition is usually not considered a valid argument in the political or scientific marketplace. In some fields, studies support our intuition.

#### **Education**

In the United States, Americans have studied the effects of local funding on graduation levels and SAT (Standard Aptitude Test) scores. Test scores and graduation rates generally improve when schools are locally funded instead of being funded by state or federal authorities.

Many states with a greater local control also have more funding of the school system. When people know where their taxes are going, they may be willing to spend more. This could be part of the explanation accounting for the difference in test scores and graduation rates. On the other hand, the study also shows that more money reaches the individual school in locally funded systems. Proportionally less money is wasted in bureaucracy.

Table IV Local funding and educational results

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	% local funding	Relative SAT score•	Graduation rate
10 most locally funded states:	60.1	109.4	75.4
10 least locally funded states	21.2	95.3	66.4
• SAT (and ACT (Achievement Test)) score in % of national average			

(Source: Warren Brookes: Public Education & the Global Failure of Socialism", IMPRIMIS, April 1990, Vol. 19, no. 4, pages 4 and 5.)

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When comparing New Hampshire and Vermont for instance, we find that teacher salaries and teacher-to-student ratios are virtually the same in the two states. While Vermont spends 14% more per student and 39% more per capita, New Hampshire students' performance on standardized tests (SAT) are consistently better than their Vermont counterparts. Thus Vermont spends more, with poorer results. Funding in New Hampshire is over 90 % local, while spending in Vermont is only 60 % local.

### Number of public employees

The following table lists the average size (in population terms) of the lowest governmental level, *gemeinde* in Switzerland and *kommune* in Scandinavia, compared with the total number of public sector employees as a percentage of total employment.

**Table V** Governmental devolution and effectiveness

Country	Avg. population of local authority	Public employees as % of total
Sweden	28, 350	32.4
Denmark	18, 000	29.8
Norway	8, 900	23.7
Switzerland	2,100	11.2

Sources: Population figures: national statistics  
Public employees: OECD in figures, 1990

This table shows that larger more centralized local authorities go with many public employees, and that smaller less centralized societies also have fewer governmental employees.

These numbers by themselves, don't say anything about cause and effect. But if it is true that there are large untapped economies of scale in government, how come the Swedish government needs almost three times as many employees as the Swiss?

The opposite tenet seems much more likely. Though, from a

theoretical point of view, large scale economies of scale may seem to exist, they are not realizable in the real world. In other words, the diseconomies of organization quickly overcome the economies of scale of service provision.

### **Size and economic growth**

The two previous examples are from the realm of local government, but the same tendencies appear at the national level. According to a new study by University of Pennsylvania economist Robert Summer, ("Actually, small-fry nations can do just fine," International Business Week, October 1, 1990, page 12) the average economic growth among large nations is no higher than the average among small nations. Countries with small areas and high population densities, even grew a little bit faster than physically large countries. Incomes in countries with either large populations or large areas tend to be lower than per capita incomes in smaller countries.

Though small countries suffer disadvantages in market access and access to raw materials, this is counterbalanced by the more important conflicts between interest groups in the larger countries and the resulting inefficiency of government.

### **5.2 Devolution and citizen satisfaction, an example**

What is meant by more satisfaction? In this context it means that more people (i.e., a higher fraction of the total) get what they want. Let us suppose for instance, that we have two countries Centralia and Devolutia with the same number of people. In both countries a decision about whether to abolish blue laws (i.e. allow open grocery stores on Sundays) are to be decided by popular vote (referendum). In Centralia the 400 voters are divided into 4 polling districts, while in Devolutia the 400 voters are divided into 4 districts that are also, in this respect, self-governing states. The votes in each district are as follows:

**Table VI** Voting district example

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Area I		Area H	
For	20	For	19
Against	80	Against	81

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Area III		Area IV	
For	80	For	80
Against	20	Against	20

Total votes cast: 400

Votes in favour: 199

Votes against: 201

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The results for Devolutia and Centralia are shown on the next page.

**Table VII** Devolutia

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State I No Sunday grocery stores 80 happy voters	State II No Sunday grocery stores 81 happy voters
State III Sunday grocery stores 80 happy voters	State IV Sunday grocery stores 80 happy voters
321 <b>Happy voters</b>	

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**Table VIII** Centralia

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No Sunday grocery stores  
201 happy voters

In Centralia 201 voters are happy as the blue laws are not abolished. In Devolutia, however, 321 people got their way. In state 1 and 2, blue laws were retained, while in state 3 and 4 they were not.

This simplistic example shows the fundamental power of devolution, it makes more people happy by allowing greater diversity. (Adapted from Kendall, Frances and Louw, Leon: Let the People Govern, pages 148-150).

### **5.3 Summary**

This chapter has given examples of the benefits of local control in education and in local government. There are two principal benefits associated with devolution and local control:

- Better resource utilization (operational efficiency)
- Increased allocational efficiency (better fit between people's wants and what they get)

## 6 Devolved popular sovereignty

### 6.1 Introduction

The purpose of this chapter is to define *devolved popular sovereignty* and show how *devolved popular sovereignty* can reconcile democracy (majority rule) and individual liberty.

#### **Historical background**

##### **Individual liberty and Hobbes's social contract**

The ultimate basis for political power is often thought to have been a real or implied social contract. This social contract is an agreement that every individual entered with every other individual to protect himself against the dangers of the state of nature.

In Hobbes's version the first and only task of political society is to name the sovereign (whether individual or group). The contract itself is permanent and irrevocable and commits the individual to absolute obedience.

The main problem with this position is its lack of legitimacy with respect to the descendants of the original contractors. Even if we assume that individuals can sign away their liberty, is it legitimate to commit your descendants to slavery? Are we really bound by our ancestors and have to accept meekly any government we happen to inherit?

Most people would supply a resounding negative to the above question raised.

##### **Individual liberty and Locke's limited legislative authority**

The next stage in political theory is characterized by Lockean ideas. Locke maintained that the legislative was limited to acts for the public good.

If the legislative exceeded these limits, the people were authorized to resist and if necessary, overthrow the government and institute a new legislative. In a sense this view solved the problem of self-inflicted slavery. The social contract was still thought to be permanent and irrevocable, but the powers of government were limited, and slavery certainly wouldn't qualify as an act for the public good.

However, two issues remain:

- Although the contract is limited, is it acceptable and legitimate for one generation to act for its descendants?
- By whom or how is it to be determined whether the limited social contract has been breached?

### **Individual liberty and Rousseauian majority rule**

Rousseau tried to get around the problems of the Lockean contract in several ways:

- He postulated that individual members of society were formally to consent to the existing institutions upon coming of age.
- He required the inclusion of all citizens in the deliberations and votes that led to expressions of the general will (i.e. enactment of new laws).

Thus Rousseau answered the second question above by instituting majority rule.

Rousseau's contract is neither permanent nor irrevocable: The general will may only enact laws that are addressed to the common good of the society's members, and that extends the same rights or obligations to all citizens. If a law does not fulfill these conditions, the social contract is violated and its obligation lapses.

However, Rousseau does not specify the practical consequences of a lapse of the social contract, and the interpretation of what forms acceptable law is effectively left to the majority. As there is no limitation on this majority rule, except those limitations that the majority may elect to impose on itself and the vague guidelines mentioned above, it is not hard to see how this system of government can lead to oppression of minorities and individuals and suppression of individual liberty.

## **6.2 Devolved popular sovereignty and individual liberty**

While traditional popular sovereignty gives the popular majority ultimate power, traditional individual liberty claims inalienable rights. By definition; rights cannot be inalienable if they are at the mercy of some ultimate power, and no power can be ultimate if it has to respect inalienable rights. These principles can only be reconciled if there is unanimity, - or if the decision can be made to apply only to a unanimous group.

Any decision can be made to apply to a unanimous group if the

minority is allowed to withdraw or exempt itself from the decision. This power to exempt oneself from decisions in effect makes the minority's power more ultimate than the ultimate sovereign power of the people (group) as a whole.

I have used the term *devolved popular sovereignty* to describe such a system where popular sovereignty is ordered according to group size, and where the smaller group's sovereign power is superior to that of the larger group of which it is part.

### **Sovereignty and statehood**

In its practical implementation, the concept of individual or group sovereignty at the state level does not apply to each individual decision. It works at the level of adherence to a particular set of decision making rules, a particular state or a particular set of governmental institutions. (These terms are synonymous.)

As long as an individual is a citizen of a particular state, he is bound to follow the laws of that state as determined by the majority of its citizens or its legitimate government. However, at any time a group of any size may declare itself a new state. Since the group itself is a subset of the total, its sovereignty is superior to that of the state. As the group declares itself a new state, each group member ceases to be a citizen of his or her former state, and the relations between the group and their former state or states take on the character of relations between states. Within this framework, a state can be defined as any entity, whether consisting of a group or an individual, that interacts with its neighbors or its surroundings through a state of nature.

### **Statehood and territory**

Strictly speaking, it may be sufficient to define a state as any entity that interacts with its neighbor through a state of nature. After all, this definition is closely related to the ancient definition of a nation

as a group of people rather than as a territory. From a practical point of view however, it is convenient that a state has a territory. The fact is, today no state is recognized without territory. Territory and statehood go together. This insistence on a one to one relationship between territory and statehood is the major factor slowing or preventing the erection of new states since the whole surface of the Earth is claimed by one state or another.

This problem is resolved by allowing not only the withdrawal of minds and bodies from individual states but also any property belonging to those citizens wanting to erect a new state. As real property cannot be physically moved, withdrawal of real property has to take place through a reclassification process. If a group of people want to erect a new state, any real property owned by group members is reclassified as the new state's territory.

This view also corrects the present anomaly where real property is different from other property in that it somehow "belongs to" a particular state. Real property like any other property, belongs to individuals, and if they decide to relocate themselves to another state, they may take with them their real property just like other property.

It follows that most new states are likely to be very small states at the outset. However, the important issue isn't whether the territory is large or small, but whether the new state possesses an initial territory at all. Many smaller states, including such diverse countries as Iceland, Luxembourg, Singapore and Monaco, seem to be thriving. Such small states are obviously quite dependent on their neighbors, but there seems to be no practical limit or cut-off point in terms of state size, population or territory, as long as they are able to interact peacefully with other states.

If the new state is successful in providing the freedoms, liberties and services that people seek, its territory is likely to expand rapidly as more people in its immediate geographical vicinity switch allegiance.

***Devolved popular sovereignty at the confederate level***

At the confederate level *devolved popular sovereignty* means that ultimate power, the power to propose and adopt constitutional amendments, rests with the states, and that each state has the right to secede.

As a matter of practicality I have also made state law superior to confederate law. This broadens the scope of devolved powers to also apply to "ordinary" decisions.

**Conclusions**

In contrast with Rousseau and the other social contract theorists, the proposed model makes democracy (and majority rule) immediately compatible with individual liberty. The protection of individual liberty becomes an integral part of the model itself, rather than something that has to be added at the end. *Devolved popular sovereignty* transforms minority and individual rights (individual liberty) from a static set of criteria into a dynamic process for making decisions.

In addition, the consistency of the principle from the large units of nations to the level of the individual makes application relatively easy:

Each individual comes to life unbound by the previous promises of his ancestors, and with all liberties still intact. As soon as his individual or group sovereignty is exercised, it overrules that of state government. Until such time, it lies dormant and he has to obey the laws of the state of which we are part.

Within each state, the general will is determined by majority rule based on popular sovereignty,

### **6.3 Practical issues related to the application of devolved popular sovereignty**

#### **Free speech, an example of application**

What is said about protecting individual liberty and minorities, however made up, applies to human rights in general. For instance, if an individual is denied the right of free speech within a particular state, he may declare himself a new state and speak freely as much as he wants. He has just exercised his superior sovereignty. From a practical point of view it is not very likely that a single individual will erect a new state. The overhead simply becomes too great as his entire interaction with the outside world has to take place across state borders. If free speech or any other right is infringed in any serious way it is far more likely that a large group or even a major part of the country secedes. On the other hand, the certainty that this is a legitimate alternative may restrain the majority sufficiently in its exercise of power to make secession unnecessary.

#### **The individual *as a state***

It may seem ridiculous to allow a single individual the right to erect his own state. It is very unlikely that such an action will take place, but as a matter of principle it is important that it *might* take place. A comparison with free speech as practiced in the Western World may be helpful. In most Western countries any individual may start his own newspaper. The power of this principle is not related to the fact that most newspapers are launched by individuals or that each individual is likely to launch his own paper. Most papers these days are launched by major corporations, and there are thousands of people to every paper. But the fact that free speech is individualistic prevents the government from artificially restricting entry into that market. This in turn, makes the market behave, almost, as if every individual was already part of it. Individuals refrain from starting papers because their points of view are already represented by one paper or another. The market is (almost) as diverse as it would have been if every individual published his own paper.

Let's employ the viability argument on newspapers and see what happens. Let's assume that free speech is not a right that pertains to the individual. Governments may plausibly argue that newspapers started by individual citizens are not viable and should not be allowed. Any particular individual citizen's point of view, it might be argued, is not important as only organizations representing larger groups of people make a difference anyhow. To make sure that these larger groups of people are legitimate, there probably should be some kind of licensing system. - Mind by the way, since everybody, or at least those that represent important organizations and institutions, have access to all papers, there is really "no need for" more than one or two papers in every major city. This will avoid "unnecessary" duplication and "save" resources.

The system I have just outlined is a system and line of reasoning employed by the

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former regimes in Eastern Europe, most authoritarian regimes and by most Western governments with respect to the newer media of radio and television. It is a paradox that the Eastern European regimes that disallowed newsmedia started by individual citizens probably spawned more small newspapers, as underground carbon copied newsletters, than any Western country where the news business is unrestricted. Individual free speech is not important because every individual will take advantage of it, but because, if it is recognized, it transforms society in such a way as to make individual use less urgent.

In today's world many groups try to build their own states or separate from empires or federations. What can possibly happen if we let them build their own states? What if we allowed every individual the right to build his own state? Would we get very many new states? At the beginning some, later, - a few. The act of allowing peaceful state erection by individuals would transform politics and society so that it would no longer be necessary for most minority groups to build a state of their own.

### **War and forcible annexation**

As long as the principle of devolved sovereignty applies, human rights and individual liberties are protected. However, with all the wars going on around the world, what would prevent an existing state from simply annexing its newly erected neighbor by force? There is no easy answer to this question. We can note as a matter of fact that few if any democratic states forcibly annex their neighbors. There are at least 3 reasons why force should not be used: A) The attacking state always runs the risk that the attacked state will defend itself by armed resistance, B) Condemnation may damage or strain the attacker's relations with other states hurt its own people both in the short term and in the long term, and C) The "policeman" whether in the form of the United States, the United Nations or the proposed Confederation may arrive to sort things out.

The power of political theories lies in their general acceptance and legitimacy. In my case they provide the necessary rules for determining when the confederate government should intervene, and what the goal of intervention should be. No contemporary organization have such clearly defined and in my view, honest and legitimate goals. This lack of intellectual coherence shows up in indecisiveness and timidity, with large-scale human suffering as a result; just ask the kurds and the peoples of the former Yugoslav and Soviet republics. A government that does not follow the proposed norms also will be illegitimate and therefore more susceptible to overthrow. If it is a member of a European Confederation it will be forced to comply, at gunpoint if necessary. If adopted, the proposed system would also provide a guiding rod for UN intervention.

## **6.4 Summary**

This chapter defines *devolved popular sovereignty as* the principle by which group sovereignty, as far as the group is concerned, overrules the sovereignty of the collective whole.

At the most basic level, *devolved popular sovereignty* allows each individual to erect his own state. In order to make a state viable, it has to have its own territory. Since all land on Earth is already claimed, it is no use saying that people may withdraw from society by going somewhere else.

This withdrawal from any particular state is made possible by recognizing that property belongs to individuals and not states. The new state's territory is made up of the real estate owned by its citizens.

## **7 Inter-governmental competition**

### **7.1 Introduction**

In relation to government, each citizen may be viewed both as a shareholder and as a customer. As shareholders we elect a Board of Directors (Representatives) to run the enterprise on our behalf, while reserving important decisions for a direct vote by the citizens.

As the previous chapters have examined our role as governmental shareholders, the purpose of this chapter is to examine constitutional mechanisms in view of our role as governmental customers. We shall be looking at constitutional mechanisms for introducing and preserving competition between governmental units and governmental decision making models. Competition is not a goal in itself. Competitive markets optimize the use of resources so as to make everybody better off.

#### **Vertical and horizontal competition, definitions**

The proposed constitutional model supports two kinds of inter-governmental markets: a vertical competitive market between governmental units at different levels, and a horizontal market between units at the same level. Individual states would all be at the same level, while the Confederation would be at a higher level. While federal constitutions like the Treaty of Rome or the U.S. Constitution inadvertently provide some competitive horizontal mechanisms, no current constitution provides for vertical competition.

#### **The importance of vertical competition**

There are two fundamental reasons for emphasizing vertical competition:

- Since central government by definition is unique, the only means of subjecting it to competition is by subjecting it to *vertical* competition.
- Unlike horizontal competition, vertical competition provides freedom of choice without forcing the citizens to move physically, and it provides competition between *existing* organizations within a given geographical area.

Vertical competition is a powerful complement to horizontal competition. It is not a substitute.

## 7.2 Vertical competition and independent action

### **Independence of action and state powers**

*Independence of action*, or lack thereof, is the greatest obstacle to vertical competition.

There are two traditional ways of defining state powers; either by enumerating the powers of the states, and leaving the residual to the federal government, or by enumerating the powers of the federal government and leaving the residual to the states. Usually each level, either the state level or the federal level, is left with a monopoly regarding each subject matter. The degree of centralization is then determined by how extensive the monopoly powers of the central government are compared with the monopoly powers of each state government.

In order to create competitive pressures, however, authorities have to overlap. Instead of fixing tasks at a certain level (statism), the proposed constitution creates a dynamic equilibrium where the efficacy and prowess of each governmental unit decides the extent of its activities. It is the citizens at the lower governmental level that eventually decides whether any particular task should be carried out either at the confederate level, the regional level or at the state level.

Each state may take over any confederate task, but the confederate government has the option of appealing the decision directly to the state citizens. The Confederation also may ask the citizens for permission to assume responsibility for any task neglected by the states. This process ensures the principle of *subsidiarity*, i.e. the carrying out of tasks out at the lowest possible level. The easier it is to move tasks between levels, the more competitive the market.

(For the particular mechanisms for moving tasks between levels see section 1.4, page 127 and section 3.2, page 132 and the corresponding commentaries pages 69 and 83. The payment mechanisms for tasks requiring financial outlays is described in section 1.5, page 127 and commentaries page 70).

The proposed system also allows governmental units at the same level to act independently of each other. One state may decide to take over a particular confederate task within its jurisdiction, while other states continues to rely on confederate services.

### **Independent institutions**

Since state law is superior to confederate law, what prevents the states from nullifying confederate powers altogether? The independence of action of the Confederation and each state is insured by sections 1.1 and 3.1. respectively and by the other sections of the Constitution granting each of them certain prerogatives. These prerogatives supersede ordinary laws.

The Constitution grants the Confederation co-sovereignty with the states. This means that state authorities are not allowed to interfere with confederate decision making or with the carrying out of legitimate confederate tasks. Neither may the states direct or influence the actions of individuals when they are carrying out legitimate confederate business.

### **Recursion and intermediate layers of government**

To lower barriers of entry, section 1.7 (Regional bodies) provides for the erection of intermediate bodies between the state layer and the confederate layer. The powers to erect regional bodies are themselves recursive, so that each intermediate layer may be empowered to build new intermediate layers etc.. (Provided each intermediate layer's constitution is modeled on the proposed confederate constitution.) There is no limit to the number of intermediate layers. No other

constitution contains a similar recursive mechanism.

### **Empowering regional bodies**

As part of the same section 1.7 the relationship between the Confederation and a regional body may be governed by the same rules as that between the Confederation and the states. The Region may be empowered to take over confederate tasks on the same terms as the states. On the other hand, the Confederation will have the same power of making proposals in regional matters as in state matters. Since states control their own constitutions (section 2.2) and treaties are limited to a fixed period or terminable upon notice, the states will always retain their status as the ultimate sovereigns.

If the proposed Constitution is used as a model for setting up a regional body, the states will also retain the right to assume a task either directly from the Confederation or from the Region. (The Confederation retains the right of making proposals all the way down to the states.)

### **Closing the size gap**

Easing the erection of intermediate governmental layers also enhances competition by closing the size gap between the confederate and state layers.

As anyone appreciates, private individuals will have a hard time competing with General Motors in the making of cars. Auto manufacturing have real economies of scale and effective competition can only be provided by giant companies like Ford, Toyota and Daimler Benz. At the same time it is quite clear that you can be a lot smaller than GM and still be competitive. Thus it is not size alone that counts.

Similarly it is important to keep the difference in relative size between governmental units in different competing layers within a certain range to make the whole structure competitive. But regional bodies

like GM 's smaller competitors, can still provide competitive services even if they are much smaller than the Confederation.

### **7.3 Horizontal competition**

Horizontal competition rests on many of the same assumptions as vertical competition.

#### **Independence of action**

Independence of action is secured for each state by that state's sovereignty, independence and freedoms. Within its own borders, and broadly speaking, as long as it doesn't interfere with the proper interests of other states or their citizens, each state is free to take any action it pleases. Independence from above is again secured by state sovereignty and by state law being superior law.

#### **"Left" and "right" mechanisms**

Horizontal competition is increased by allowing the free movement of people, goods and real estate. "Movement" of real estate is accomplished by reclassification (movement of borders) or by the erection of new states. In most cases it is probably easier to move borders than real physical resources. It is thus likely that horizontal competition will increase significantly. State governments that are unable to compete will see their citizens disappear as their borders close in on them. Ultimately the state itself will be wiped off the map and pave the way for new states that are more responsive to the needs of the citizens. This is not a new process, but until now the erection of new states or the movement of borders have had terrible costs in blood and human suffering.

### **Barriers of entry**

If there is a mechanism for wiping out entities that don't perform, (and such a mechanism is necessary in competitive markets), there has to be a corresponding mechanism for the creation of new entities (states). Without such a mechanism, competition would gradually decrease as the number of states dwindled.

The barriers of entry should be as low as possible to ensure as much diversity and competition among the states as possible. The lower the barriers of entry, the more likely that government will respond to the needs and wants of the people.

The proposed constitution 's section 2.5 on self-determination provides for the peaceful erection of a new state. Ease of erection is ensured by: A) The decision is left to the population within the proposed new state boundaries. and B) There is no limitation on the size either in terms of population or in terms of area of the new state.

These rights are enforceable by confederate authorities.

### **Removal of artificial restraints**

It is also important that competition between states is not reduced through artificial restraints. Section 2.3 ensures the mobility of people, with their goods and capital. Section 2.4 prevents the discrimination of out-of-state citizens.

## **7.4 Summary**

### **Vertical competition**

The main element of the proposed system of vertical competition is to create two or more parallel governmental layers (the Confederation, the regional bodies and the states). Each layer acts independently, its authorities overlap those of the other layers and the decision about which tasks each layer is to perform is left to the people as consumers

of governmental services. A payment mechanism is introduced to encourage competitive behavior.

Vertical competition is complementary to horizontal competition. It is not a substitute.

Resource mobility into and out of the central government sector is covered in a separate chapter on confederate taxation.

### **Horizontal competition**

Horizontal competition is increased by allowing for the movement of lines on pieces of paper (borders) rather than physical resources (people, buildings, machinery etc.), and by the ease of erection of new states.

As for most federal constitutions, regulations easing the physical mobility of resources (people, goods etc.) are retained.

## 8 Confederate taxation

### **8.1 Proposed solution; Competitive and restraining components**

Due to the unitary (monopolistic) nature of central government, special care has to be taken in constructing a confederate fiscal system. While the states will be restrained from excessive taxation by inter-state competition, the unitary nature of the Confederation prevents this mechanism at the central level. Accordingly, the proposed solution has a competitive component and a restraining component and the issue of the level of taxation is separated from the mode of taxation. The competitive component applies only to what is taxed and how it is taxed, given a particular level of taxation. The restraining component only deals with the level of taxation, irrespective of collection.

To achieve competitive behavior in collection, funds are requisitioned from each state. This leaves each state free to decide what is to be taxed, and how to tax it with the minimum economic dislocation. (In case of non-compliance/non-cooperation by state authorities, the Confederation is empowered to make up the shortfall by direct taxes on the citizens.)

The level of taxation on the other hand, is decided directly by all confederate citizens by Dutch auction. By reducing the level of taxation to one figure and separating the level of taxation from collection, the level of taxation can be determined directly by the ultimate payees, i.e., ordinary people. This method together with measures designed to balance the budget, is intended to force the politicians to live within their budgetary means. The proposed method is able to raise any amount of money for the confederate budget, provided the charge is approved by the people. Unlike present procedures related to taxation, it is unable to raise funds contrary to

the wishes of the population.

### **8.2 Disadvantages of traditional measures for raising public revenue**

There are four possible alternative methods of Confederate fundraising:

- Specific revenue sources
- Concurrent revenue sources
- State appropriations
- Traditional requisitioning

#### **Specific revenue sources**

*Specific revenue sources* has 3 distinct disabling features: A) It doesn't provide for the raising of enough money in times of extraordinary requirements; B) It doesn't provide a mechanism for the deflation of the confederate budget after the formerly limited powers have been breached; and; C) It provides no incentive for collecting taxes with the least amount of distortion to the economy.

The first two objections really go together. Since the only way the central government can garner more funds is by expanding its taxing authority, there will be continuing pressures to breach the revenue straitjacket. Over long periods there will always be occasions where this makes sense from a short term point of view; typically during a war or other crisis when central government needs funds to arm. Once the barrier is breached, central government grows until the new revenue sources are exhausted, and at the next moment of crisis, it is the same story all over. The author does not know of a single instance where revenue sources once ceded to central government have been returned to local authorities.

The third objection is a little bit different. Since specific revenue sources leave the central government without any choice as to what to tax, by definition it cannot design its taxes to minimize economic dislocation.

The mildest consequences of specific revenue taxation probably will be encountered with import duties or tariffs. This source is also the most common. Import duties or tariffs will essentially act as protective tariffs, but this is less important if domestic competition is sufficiently fierce. If the Confederation is very large with varied living standards, ample domestic supplies of raw materials and a diversified industrial structure, the negative consequences will be limited. Imports will be substituted by domestically manufactured goods at a moderate cost differential. On the other hand, this also puts a limit on how much revenue can be collected by the Confederation, and

whets the appetite for other more substantial revenue sources.

### **Concurrent revenue sources**

Concurrent powers of taxation exist when the central government and the states may lay and collect taxes independently of each other. Concurrent taxation is often combined with specific revenue sources so that some taxes are concurrent and some specific to the central body. The typical mix, is a combination of central import duties combined with concurrent vat or sales tax(es) or income tax(es). Indirect taxes, like value added taxes are simply added up. If the central government lays a tax of 5% and the state lays a tax of 10%, the total tax is 15%.

Concurrence has the great advantage that it avoids unnecessary conflict. The issue of taxation becomes one of convenience. How can revenue be gathered with the least effort by the government and inciting the least opposition from taxpayers? There is little or no haggling between governments to get access to the most attractive sources of revenue. If there is a need at a particular level, it can be fulfilled as the citizens and the government at that level sees fit. Contrary to specific revenue sources, concurrent powers are flexible. They can fit increasing central needs in times of crisis (war), and increasing local needs in times of peace. Thus at least from a revenue point of view, governmental tasks may be carried out at the most effective level. Indeed, flexibility and independence when it comes to revenue may often be seen as a prerequisite for independence of action.

Concurrence is however, inconsistent with inter-governmental competition, as it will be impossible to escape monopolized central taxation.

The major problem with concurrent taxation is how to restrain the confederate government. Since the money doesn't come out of their pockets, the states will have little incentive for acting as catalysts in restraining the confederate government. The state government's interests may in fact be the exact opposite. Due to competitive pressures there will be definite limits to how much each state can raise its own taxes, but if it can persuade the central government, with its monopoly powers, to raise enough money and then transfer money back to the state, this "problem" will not arise. In effect the federal or central government is coopted into an arrangement whose sole purpose is to defeat the interests of ordinary people. Concurrent taxation is a recipe for disaster in the field of fiscal restraint.

### **State appropriations**

State appropriations has the advantage that it restrains the centralizing powers of the Confederation. It has the disadvantage that by itself it doesn't insure the Confederation sufficient funds to carry out its tasks.

## 56 General Principles

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If voluntary contributions are to work, there has to be a fixed method of finding each state's share, and there has to be a mechanism for compelling payment. In effect, this would be a requisitioning system where the charge was determined not by the institutions of the Confederation, but by the states collectively.

Such a system has the disadvantage of being susceptible to state collusion. See also *decoupling* and *unbundling* page 57.

### **Traditional requisitioning**

In a system of traditional requisitioning the Confederation chooses an amount that is payable by each state. This alternative has the advantage of being clearer, shorter and simpler to express than the concurrent taxation alternative. It also makes the flow of funds more visible, by that making it easier for the people to decide whether the flow of funds into confederate coffers corresponds to their wishes. And it does provide the states with an incentive to monitor confederate spending and present alternatives.

But since it allows the traditional bundling of spending decisions, and the traditional coupling of revenue and spending measures, it is likely to lead to **traditional** runaway governmental budgets. Its most immediate disadvantage is risk of non-compliance by individual states and instability due to the low legitimacy of central institutions. Decisions taken directly by the people are likely to have a much greater authority than requisitions enacted by a central legislature.

See also *decoupling* and *unbundling* page 57.

### **8.3 Additional comments on fiscal restraint**

The proposed mechanisms for confederate spending and taxation has 3 important characteristics: A) taxation is decided freely and directly by the citizens through Dutch auction, B) taxation is decoupled from spending decisions, and C) spending decisions are unbundled. These 3 elements act together to restrain the confederate share of the total economy, and they tend to produce spending decisions beneficial to the general welfare of the inhabitants.

The chief advantage of a Dutch auction system is that it allows citizens to decide the level of taxation without artificial restraints. A simple popular approval does not suffice since it presupposes someone

making a prior judgement as to what to put on the ballot; a process that is also likely to be confrontational. Dutch auction decisions on the other hand, are non-confrontational and non-prejudicial.

The proposed system also ensures that each vote is equally important.

### **Decoupling and unbundling**

Decoupling and unbundling is essentially the same mechanism applied to two different decision. With *unbundling*, two or more spending or legislative decisions are separated. *Decoupling* separates taxation decisions from individual spending decisions. With the proposed system it is not possible for instance, to link several spending decisions to create a majority for higher taxation. Each proposal to spend more money has to pass two hurdles. First, funds must be available (as confederate requisitioning), secondly given availability, each project will be ranked according to its support in the entire population. Thus even if a particular group, e.g. farmers, vote in favour of higher taxes, they cannot be assured that the increased funds will be spent according to their particular preferences, e.g. farm subsidies. As each spending project is unbundled, it must meet with the approval of at least 51% of the voters, but since it also competes with other projects for a fixed sum of money, the actual required approval rating may be considerably higher. This assures us that central government projects increase the general welfare instead of narrow pressure group welfare. Since pressure groups cannot be assured of a payoff (e.g. higher farm subsidies), it also puts a damper on their support for higher taxes.

Prerequisites for both decoupling and unbundling are: A) secret balloting making it impossible to enforce agreements that seek to exploit the minority, and B) many participants to make it difficult to form coalitions and even more difficult to enforce them.

### **8.4 Summary**

There are two sets of difficulties in designing a system to raise confederate revenues: A) The system has to be compatible with inter-governmental competition, and B) the system has to reflect the people's opinions about the wanted level of taxation at any point in time.

The two traditional central revenue measures in a federal system: specific revenue sources and concurrent taxation are neither compatible with intergovernmental competition nor do they ensure a level of taxation consistent with the wishes of the people.

The proposed solution ensures inter-governmental competition by separating the issue of how much tax from the issue of how to collect the tax. Collection is left to the states according to their own preferences. Tax level responsiveness is ensured by giving the people the right to decide the appropriate level of taxation by Dutch auction.

All procedures are eased by standardizing confederate taxation decisions to per capita figures.

## **9 Confederate institutions**

### **9.1 Introduction**

The Constitution is built on a standard presidential system with a bicameral legislature (a House of Representatives and a Senate) and a supreme court. The President, however, has more extensive veto powers than usual. The blending of the executive and legislative functions caused by extensive veto powers is justified by the President often being more representative of the will of the people as a whole than the legislature, viz Table IX (see next page).

**Table IX** Legislative decisions as representative of the will of the people

Legislative decision	Minimum % popular support required for legislative decision
Congress, majority	25
Congress, 2/3 majority	33 1/3
Congress, 5/6 majority	41 2/3
President, veto	50
The People, direct legislation	50
The People, amendment to part two of the Constitution	55
The People, amendment to part one of the Constitution	60

The table is based on the following assumptions: Representatives, Senators and the President is assumed to be elected by majority voting. The composition in the two houses of Congress is assumed to be similar, so that a measure which passes in the House also passes in the Senate. (In effect, Congress, for reasons of simplicity is assumed to act like a unicameral legislature.) The percentages apply to participating electors, i.e. excluding abstentions.

The calculation is as follows: A congressional majority is assumed to require the assent of 50 % of the legislators (+ 1 representative and +1 senator). The election of this half of the legislature is assumed to require the assent of 50 % of the electors in their respective districts (+ 1 elector for each district). The minimum % popular support behind each majority decision then equals one half of one half, which is one quarter, or 25 %.

The table also shows the range of legislative mechanisms employed by the proposed Constitution. A nearly continuous range of different mechanisms lessens the opportunities for legislative arbitrage (attempts to put legislative decisions into different categories in order to justify usurped powers, e.g. making a constitutional decision appear as a legislative decision).

The higher percentages required for constitutional amendments are justified by the desire to distinguish between rules for decision-making and particular applications of those rules, i.e. ordinary legislative decisions. Rules for decision making are collected in the Constitution, while particular legislation is decided by ordinary non-constitutional statutes.

The confederate institutions together hold the sovereign powers of the Confederation as defined in Chapter 3, but they do not hold any more powers than that chapter gives them. Textual and logical separation improves clarity and allows for easier, clearer and better defined clauses and future amendments.

With the proposed system it would, for instance, be possible to introduce a parliamentary system by making changes to part two of the Constitution, but without changing the powers of the Confederation as defined in part one. This is not a recommended change.

The advantages of a presidential system are twofold: A) Governmental powers pose less of a threat to individual liberty when they are divided between several independent branches, and B) the President may act as a proxy for the whole people in the legislative process.

## **9.2 Bill of Rights and General provisions of Part two**

The Bill of Rights, chapter 9, contains *a bill of rights* modeled on the U.S. constitution. The rights have been modernized due to social

and technological changes. The section on Freedom of speech, for instance, has been amended to take into account broadcasting and cable networks. Likewise the section on privacy has been expanded to expressly include wiretapping (interception of communications).

The Bill of Rights is binding on all confederate institutions, including the courts. The provisions are likewise binding on state institutions and courts, unless of course, a particular state enacts specific legislation to the contrary. The principle of devolved sovereignty allows confederate rights to be more extensive and confederate authorities to be more restrained than state authorities. This result is precisely what we want: We do not, for instance, want a European Confederation to adopt an official religion. On the other hand, if the British want to preserve the Queen's title as "Defender of the Faith" there is no reason why they should not be allowed to do so.

If a state wants to modify the rights provided by chapter 9 according to local circumstances, it is free to do so, but since conflicts with out-of-state citizens are handled by the confederate system, it is not able to enforce such modifications on anyone but its own citizens.

The last chapter of the proposed Constitution, Chapter 10. General provisions of part two, may be subdivided into 2 parts: A) sections defining procedures for the operations of confederate institutions, e.g., the requirement that at least one day every year shall be designated confederate election day, and B) temporary clauses relating to the saving of existing legislation. These latter sections may be adopted according to the circumstances.

### **9.3 Summary**

The confederate institutions consist of a presidential system with a standard bicameral legislature. The President has been given extensive powers in order to counteract the legislature's natural

inclination to overspend and overlegislate. Separation of powers have been enhanced compared with other constitutions.

The limited coercive powers of the Confederation means that it will have to rely on a more aggressive style in promoting its policies in competition with those of the states. The executive and legislative branches have been significantly streamlined in order to support a more active style of government.

The Constitution contains an enhanced and modernized Bill of Rights modeled on that of the American Constitution. The Bill of Rights is binding on confederate institutions, and will extend to the individual states, unless superseded by state legislation. The introduction of the Bill of Rights in part two of the Constitution, allows it to contain provisions that would be inappropriate or unnecessary at the state level.

II SECTION BY SECTION  
COMMENTARY

# 1 State Powers

## 1.1 Sovereignty

Section 1.1, page 127 serves two purposes: A) It confirms the independence and sovereignty of each state, and B) it limits the powers of the Confederation to those expressly delegated. Section 1.1 is best understood together with the rest of chapter 1, which expands on particular aspects of each state's sovereignty and the preservation of that sovereignty.

The preservation of state powers must also be seen in the context of the Constitution's general design as a voluntary compact between the states.

The U.S. Constitution and most other federal constitutions lack a similar guarantee of state rights. According to the Preamble of the U.S. Constitution the powers vested in the federal institutions are granted by the people in their collective capacity. In practice this leaves the State authorities of the U.S.A. in a precarious and subservient position in relation to the federal government.

Other federal constitutions are no better than the American Constitution in this respect.

The Tenth Amendment of the U.S. Constitution leaves the implied powers of the federal institutions intact (Smith, E.C., page 19) and does not appreciably change the situation.

Section 1.1, page 127 follows closely the U.S. Articles of Confederation Art. II, and is equivalent to the Swiss Constitution's Article 3.

## **1.2 Defense**

Section 1.2, page 127 serves two purposes: A) It reaffirms each state's sovereignty by expressly allowing for state defense and state defense forces; and B) it disallows the use of force in inter-state conflicts. (Actually it disallows the forced entry of one state's armed forces into another state.)

The second subsection of 1.2 legitimizes peace-keeping operations by the Confederation through the Confederation's right to defend and enforce the Constitution (Section 3.5).

The emphasis of section 1.2 is strictly on defense. No state may engage in aggressive extra-territorial behavior without the consent of the Confederation (see subsection 3.5.2).

Section 1.2 corresponds to the U.S. Constitution's I.10.3 and the Second Amendment. But it gives each state much wider powers than the Swiss or U.S. Constitutions since it doesn't contain the same constraints as those articles. Article I, Section 10.3 of the U.S. Constitution for instance, obligates the states to seek permission from the Congress (i.e. federal authorities) to keep troops or ships of war, cfr. the Second Amendment ("the right to bear arms").

## **1.3 Secession**

Section 1.3 confirms the independence and sovereignty of each individual state by expressly granting each state the right to secede from the Confederation. The right to secede also emphasizes the fundamental nature of the Constitution as a voluntary compact between states. No government is legitimate unless it rests on the consent of those governed. If the citizens of any one state wants to secede, the confederate government is no longer legitimate with respect to that state, and it should resign its authority. In order for a state to secede it has to submit the question of secession directly to the citizens for decision.

Section 1.3 has no equivalent in the U.S., where the states are not allowed to secede (viz the American Civil War, 1861-64).

### **1.4 Superior law**

Section 1.4 defines the proposed governmental organization as a confederation. In a confederation state law is superior law, while in a federation central government law is superior law.'

By making state law superior, the states are given the means by which they can defend their independence and sovereignty from confederate encroachment.

This section also provides the "down" mechanism necessary for vertical competition (competition between governmental entities at different levels). (See section 3.2 for the corresponding "up" mechanism.)

Both the Treaty of Rome and the Swiss and U.S. Constitutions define federal law as superior law.

### **1.5 State assumption of a confederate service**

Section 1.5 serves the twin purposes of: A) Expressly granting each state the right to take over a confederate task or service within its own jurisdiction; and B) Granting the state a financial compensation corresponding to the savings incurred by the Confederation. The financial compensation is essential in preserving real state autonomy and real choice. Without such a clause, state citizens would be

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'According to the definitions employed in this document.

obliged to pay for the same service twice; both through state taxation and confederate requisition.

Each state may also discontinue confederate services on similar terms.

Section 1.5 applies to all welfare legislation and transfer payments of any kind. But this power does not extend to those essential confederate judicial or other powers expressly granted in the Constitution itself (see chapter 3). The Confederation obviously has *the right* to provide the chapter 3 services independent of whether a state wants to assume them. Any disagreement concerning the extent of confederate privileges, would have to be referred to the people (state citizens) or , ultimately, to the Constitutional Tribunal for decision.

Section 1.5 provides the down mechanism for vertical inter-governmental competition. Through the financial compensation mechanism it provides state authorities with the necessary financial incentives needed to foster competition and innovation. With the exception of tasks expressly delegated to confederate authorities, the people decide whether any given task should be performed by confederate or state authorities ,cfr. section 3.2.

This section has no equivalent in other federal or confederate constitutions.

### **1.6 Treaty powers**

This section serves the purpose of expressly preserving each state's right to make treaties. It is necessary to preserve this right to prevent the Confederation from achieving by treaty what cannot be achieved by statute. Term limits on treaties prevent one generation of voters from binding its posterity, cfr. also Section 10.4 Sunset clause.

Section 1.6 allows two or more states to solve internal problems without involving the Confederation. Similarly, states may make treaties for solving local issues involving foreign neighbors. It ensures the ability to solve problems at the lowest possible level (subsidiarity).

Issues of legitimate confederate concern are covered by the limitations on secrecy and the constitution's sections 1.2 (deals with internal conflict), 1.4 (treaties are subject to the constitution), 3.5.2 (limitations on movements of military forces) and 3.5.1 (the Confederation's right to enforce and defend the constitution and the states).

This section has no direct equivalent in other federal constitutions. The U.S. Constitution (Subsection I.10.1) expressly forbids the states to enter any treaties, while the Swiss constitution (Art. 7, 9 and 10) grants the cantons limited treaty powers. The Treaty of Rome grants the European Community exclusive treaty powers with respect to matters of trade and many other important economic issues.

### **1.7 Regional bodies**

The purpose of section 1.7 is to enable the erection of regional bodies. This section enhances vertical competition by providing the people intermediate layers of government and with additional suppliers of governmental services. It also closes the size gap between a large confederation and smaller individual states and ensures a gradual increase in the territorial reach of governmental units.

Section 1.7 enhances the treaty powers of the states by obligating the Confederation to recognize the existence of regional bodies established by treaty, and by giving the states the option of conferring some of their confederate privileges on regional bodies. Two or

more states may for instance, agree to cooperate on the assumption of a confederate service and delegate to a regional body the privilege of receiving financial compensation from the Confederation. Small states may also elect to have their populations counted together to ensure representation or a better representation in the confederate congress.

Section 1.7 has no equivalence in other constitutions.

### **1.8 The constitutional tribunal**

The twin purposes of section 1.8 are: A) To establish a Constitutional Tribunal for resolution of constitutional conflicts between state authorities and confederate authorities; and B) To ensure that the Constitutional tribunal stays independent of the Confederation.

This section has no direct equivalent in other federal constitutions.

Traditionally, federal supreme courts have themselves been part of the federal government and thus biased in favor of the federal government. The history of the United States provides a typical example of how selective interpretation of the constitution has gradually, but steadily, eroded state rights. By interpreting federal rights widely, and state rights narrowly, the federal Supreme Court reduces the states to de facto sub-units of the federal government. Similar tendencies are showing up in the judicial branches of other federations including that of the European Community.

The proposal attempts to alleviate these problems through several mechanisms:

A) The Confederation has been given no power to influence the selection of judges. (Usually it is the states that have no influence or very little influence in the selection of judges.)

B) No proceedings are to take place in the capital, nor is the tribunal allowed to maintain any offices there. This is to prevent the justices from identifying with confederate institutions; and

C) The justices are called into service only at random and hopefully, infrequent intervals. Their primary function and interest will be in their respective state supreme courts.

Section 1.8 contains additional regulations regarding dismissals and pay intended to safeguard the independence of the judges.

### **1.9 Amendments to part one the corn s act**

The purpose of section 1.9 is: A) To safeguard state sovereignty by granting the states exclusive rights to propose amendments to Part One of the Constitution, B) To safeguard the rights of state citizens by requiring their consent and C) To safeguard the rights of individual states by requiring each state's consent to bind that state. (Cfr. also section 8.6, the proposed Constitution's second amendment clause).

Changes affecting each state's sovereignty are adopted by a 60% double majority, but they are binding on each state only to the extent approved by that state.

Changes concerning the inner workings of confederate institutions (see sections 8.6 and 8.7), on the other hand, are binding if approved by a double majority of 55%.

Section 1.9 has no direct equivalent in other confederate or federate constitutions. Most constitutions do not distinguish between constitutional amendments that merely reorganize central institutions and amendments that transfer power from one level of government to another. Many constitutions leave both decisions in the hands the central legislature. Very few of them bother to seek popular approval.

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The U.S. Constitution in reality leaves the initiative with the federal Congress.

The Treaty of Rome does leave the initiative with the states, and it does require unanimity. But European citizens have no direct say.

Sections 8.6 and 8.7 correspond closely to Art. 121 of the Swiss Constitution, which however, only requires a simple double majority (50%).

## 2 Rights of the state citizens

### 2.1 Citizenship

Section 2.1 grants state citizens confederate citizenship.

This section is the equivalent of the Swiss constitution's Art. 43, first subsection.

The U.S. fourteenth amendment grants state citizenship to U.S. citizens, but strictly speaking, not vice versa. In the U.S. naturalization is also strictly federal (1.8.4), while in Switzerland it is partially federal and partially cantonal (Art. 44).

With the adoption of the Maastricht agreement similar Europe-wide rules will apply to the European Community.

### 2.2 Democratic government

The purpose of this section is to ensure that state government rest on the consent of those governed.

This section is the equivalent of the Swiss' Art. 6, which also guarantees that cantonal constitutions are adopted by the people, and may be amended by the people.

The Treaty of Rome does not ensure popular sovereignty in member countries, and most member countries leave ultimate power in their legislatures.

The U.S. Constitution guarantees only *republican*, as opposed to monarchical, state governments. *Republican* in this context, also means representative as opposed to direct democracy:

" ....in a democracy, the people meet and exercise the government in person: in a republic, they assemble

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and administer it by their representatives and agents."

James Madison, (The Federalist Papers, "Representative Republics and Direct Democracies" page 150)

### **2.3 Freedom of movement**

This section protects the free exit of citizens and property of any kind from any state and thus also from the Confederation as a whole. It protects both peaceful trade and the rights of minorities by allaying fears of confiscation of property upon emigration or other obstacles to emigration.

It does not restrain the individual state's powers to tax or disallow imports on the grounds of health, safety or any other consideration.

Unlike the U.S. interstate commerce clause (1.8.3) or the European Community treaties, it protects the interests of the citizens both in their individual capacity, as when they want to emigrate, and in their group capacity, as when a state wants to keep higher health and safety standards than the usual norm. (My proposal gives individual states the right to restrain imports.)

Issues of safety and inconvenience related to transit will primarily be determined by confederate authorities in their capacity as impartial umpires.

Subsection 2.3.3 provides a procedure that allows individuals the right to take with them real estate.

The proposed mechanism allows peaceful resolution of minor border adjustments and enhances competition among the states. If a state consistently fails to give its citizens what they want, it will start losing population and territory along the perimeter as people decide to become part of neighboring states. Competition will be most intense where language and cultural barriers are few, i.e. where current state borders do not coincide with ethnic borders.

## **2.4 Privileges and immunities.**

This section expands the previous section by prohibiting the discrimination against citizens from other states within the Confederation. The first subsection is equal to the U.S. subsection IV.2.1.

If one state has more lenient immigration policies than other states, the rights of naturalized citizens to settle in all parts of the Confederation may be restricted.

## **2.5 Self-determination**

This section gives the people itself the right to decide which state they want to be part of, or whether they want to erect a new state. It serves the dual purpose of protecting minorities by enabling them to erect their own states, and enhances competition among state governments by allowing for the peaceful establishment of new competitors (lowering barriers of entry).

A delimitation initiative has three important characteristics:

- **Border adjustments are initiated and decided by the people**
- **Voting region is defined by the delimitation initiative**
- **Voting is supervised and enforced by the Confederation**

Each of these characteristics is the opposite of current international practice. In current federations border adjustments are usually either initiated and decided by the central legislature or the borders are fixed. The only means of input the local population may have, is through the process of revolution. Secondly, the voting region, if there is a vote, is normally defined by existing borders or by the central authority. Thirdly, even if the local minority's position is known, there is often a lack of an enforcing mechanism. The failures

of present mechanisms are especially obvious in the present conflicts in Yugoslavia and the former Soviet Union.

The proposed model rests on the principle of devolved popular sovereignty. The local population, rather than a central authority, has the right to initiate the erection of a new state. No authority, whether state or confederate legally may prevent a vote from taking place. The Confederation even has an express duty to make sure that the Constitutional right to self-determination is upheld. The voting region is also defined by the initiative itself. This prevents gerrymandering (manipulation of borders) to achieve a specific result. Also since the initiative is self-defining it is likely to result in borders that coincide with the geographical distribution of minorities or ethnic groups.

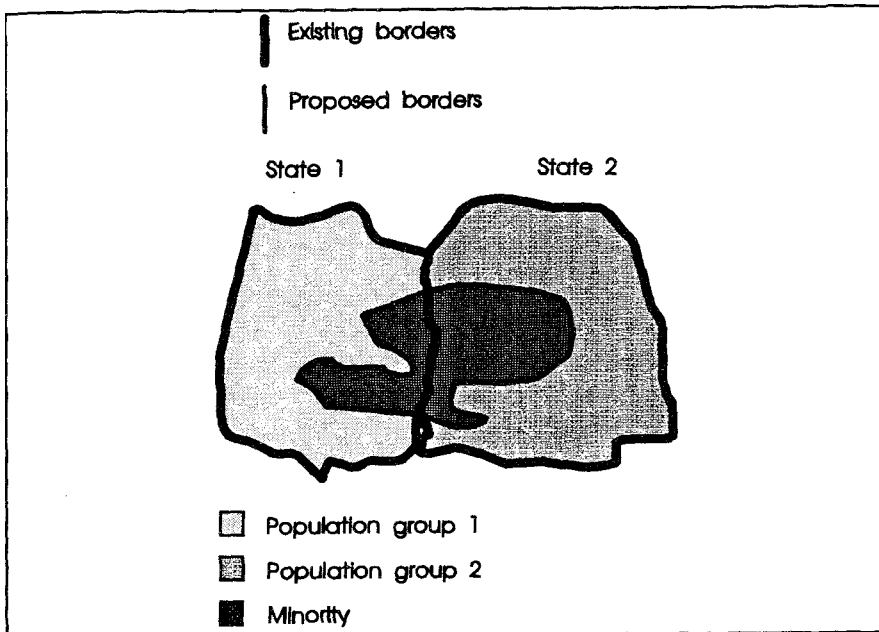
The proposed model ensures that all borders and governments have genuine popular mandates.

#### **Establishing new borders**

Subsection 2.5.2 specifies that the borders of the proposed new state are to be set directly by the initiative itself. This provides a limited self-adjusting mechanism. If the sponsors are too ambitious and include a very large area and significant minority populations, they will not be able to get enough votes to have the new state established. On the other hand if the territory of the proposed new state is too small, significant populations that want to be part of the new state may not be included.

Subsection 2.5.7 complements the previous subsection by providing a mechanism for more accurate delineation. Citizens/Owners that have been included in the new state against their will, may retain their previous affiliations. Those citizens that have not been incorporated into the new state, but would like to become part of the new state may employ 2.3.3 to reclassify themselves.

Subsection 2.5.7 also prevents the use of state erection as a mechanism for confiscating property. Lacking the individual right to retain previous citizen and territorial affiliations, any two neighbors could team up to erect a new state that included a third neighbor, and then upon erection, confiscate his property and divide the loot between them.



**Figure 3** Delimitation initiatives

In the special case of residential property where the residents are not owners, the constitution would allow the expropriation of property by the new state. However, here the owner's compensation would be determined by a confederate court, as the owner would be an out of state citizen.

The clause on self-determination and the freedom of movement clause, does, however, allow for the erection of enclaves and non-contiguous states. This inconvenience is a price one has to pay for a just mechanism.

However, the problems with cost shouldn't be exaggerated. It falls primarily on the beneficiaries, and it is a consequence of their own free choice. If a proposal for erecting a new state contains a non-contiguous arrangement, the voters may take these possible added costs and inconveniences into account in their decision. Similarly, the clause on "freedom of movement" gives the "receiving" state the right to refuse a particular territory.

#### **Self-determination and expropriation**

Clearly sometimes, self-determination, may also be seen as a means of avoiding <sup>ex</sup>propriation. Again there is a dynamic equilibrium at work. The property owner

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must weigh the relative merits of each state 's compensation laws, the risk of having his property expropriated and the inconveniences and costs related to living in an enclave or having his property become part of a neighboring state. When the state has already decided to expropriate, it is too late. The real estate owner must accept whatever the (state) law gives him, unless he is an out of state citizen, and the compensation is determined by confederate law or by state treaty. (See also Confederate powers, the right to enforce and defend the constitution)

### **Secession and representative bodies**

Even democracies treat secession with suspicion and hostility. When the borough of Staten Island, by an 82% vote of its citizens, wanted to secede from New York City, the Mayor's first comment is that he "firmly opposes the secession and doesn't intend to sit by and watch the process passively." (Source: "New York 's Staten Island Studies Seceding From City", Wall Street Journal (Europe), November 9. 1990)

The Mayor's reactions are precisely the same as, and in principle equally foreign to the well-being of the people as those encountered by the Turkish and Russian speaking minorities in Moldova, by the **Moldovans** themselves with respect to the prior central government in Moscow, by the peoples of Estonia, Latvia and Lithuania, by the people of Slovenia, Croatia, and the Kosovo region of Serbia etc.

The primary reason for "the establishment's" opposition to self-determination is presumably that it threatens the very basis of that established authority 's *raison d'être* and power. Even in a representative democracy like New York City, secession undermines the powers of the Mayor 's office and of the city legislature. The right to secede involves a very significant transfer of authority from the establishment back to ordinary people. It reduces local authorities to competitive units instead of local monopolies. This is also why secession should never be a decision of a representative body. It should be decided directly by the people that want to secede.

## **2.6 General comments on the constitution's chapter 2**

All the rights of the citizens as enumerated in chapter 2 are procedural rights. Procedural rights are rights that say something about by whom or how an issue is to be decided. Ideally they don't say anything about the decisions themselves.

The reasons for concentrating on these rights are twofold. On the one hand, by limiting the number of, and simplifying the rights, we

also limit the opportunities for the Confederation to muscle into state affairs by using these rights as a pretext. Secondly, even if there is a general agreement on many human rights, particular interpretations may differ, and this may cause instead of reduce conflicts between states.

The U.S. Constitution, for instance, has a clause prohibiting cruel and unusual punishment. But what is the definition of cruel and unusual punishment? Does it or doesn't it include capital punishment? This is a typical issue where cultural factors can make it hard for even sensible people to agree. The citizens of some countries may believe that capital punishment should be completely abolished, while others may feel there is a place for capital punishment when the country is at war, or as a punishment for particularly hideous crimes.

The issue of abortion may be another typical example of a legal field where centralized decisions may cause rather than alleviate conflicts. In *Roe V. Wade* (Smith, E.C., page 141) the United States Supreme Court voided state laws that made abortions criminal offenses. The interpretation rested on the "due process clause" of the American Constitution (14th Amendment) which is assumed to protect the right to privacy which again is assumed to include the right to abortion. There is still considerable disagreement whether the protection of privacy and the fourteenth amendment which dates from 1866 properly has anything to do with permitting abortion. These arguments carry even more weight in the context of the specific requirements that the Court has laid down for abortion legislation.

These issues are important also in a European context, - surely, abortion views differ greatly between let's say secular Sweden and catholic Poland. If the European family is to expand to include islamic Turkey or islamic parts of the former Soviet Union, further potential for conflict exists. Within such an expanded Europe, fundamental islamic or other national or religious groups cannot be

ruled out. A sensible model has to rule them in and find a method of accommodation. The lesson to be learned is that extending the scope of the exclusive central judicial powers increases the number and severity of conflicts and encourages creative judicial interpretation at the center. Perhaps the U.S. Supreme Court would have done the country a service by leaving these issues to the political authorities of the individual states, so that they could have been resolved according to local preferences.

By delegating these decisions to the individual states, conflicts may not disappear, but at least they will be relieved by differing interpretations related to local norms.

## 3 Confederate powers

### **3.1 Sovereignty**

The Confederation is co-sovereign with the several states. This means that within the limits of the Constitution it can act independently of the states. It can appoint its own officers, pass its own legislation and so forth. As long as the Confederation keeps its activities within the limits of the Constitution, the states have no right to interfere.

### **3.2 The right of making proposals**

Section 3.2 grants the Confederation the right of proposing changes in each state's internal legislation to that state's legislature or directly to its citizens. This section has two purposes: A) It enables the Confederation to force a decision in the state legislatures, thereby strengthening the powers of reform and protecting minority rights. B) It provides the up mechanism for vertical competition. The legislature of each state has the power to pull down any confederate task, confer section 1.5. This section provides the countering up mechanism.

By giving the people the power of arbitrating between the central government and the state government, the Constitution ensures that these two governmental layers have the best interests of the people in mind when competing for power with each other.

### **3.3 Judicial powers**

This section serves the dual purpose of: A) Putting the Confederation in the traditional role of arbiter in inter-state conflicts; and B) Giving the Confederation primary responsibility for preserving the procedural rights of state citizens.

The arbitration of inter-state conflicts would extend to such issues as for instance cross-border pollution. Groups of citizens being polluted on by out-of-state parties could seek damages in confederate courts. Confederate authorities would also be able to impose fees on polluters to compensate those being polluted on. (But the Confederation would not be able to impose fees as part of confederate revenue raising.)

If the states are able to agree on other arbitration methods, they are free to do so by treaty. This puts a competitive element into the legal system. If confederate courts are efficient and impartial, they will get most of the business, if not, they'll soon find the states opting for alternatives.

To prevent the Confederation from using the judicial powers to encroach on state sovereignty, each state has the right to appeal decisions to the constitutional tribunal.

This section is the equivalent of the U.S. subsection 111.2.1.

### **3.4 Legislative powers**

Section 3.4 grants the Confederation general legislative and treaty powers and authority to requisition funds from the states. Requisitions must be apportioned according to population.

Since confederate laws and treaties are inferior to state laws and

treaties, the lack of limitations in confederate legislative subject matter does not endanger the sovereignty of the states. On the contrary, the concurrence of confederate and state legislative powers ensures competitive pressures.

The Confederation's power to tax is limited to requisition funds from each state apportioned according to population, with the added proviso that it may enforce any requisition through the imposition of direct taxes on citizens of non-complying states.

This approach maintains horizontal competition in taxation, and makes confederate taxation impregnable to manipulation.

Direct popular determination of the level of confederate taxation through a combined requisition/Dutch auction system (see section 8.1) fulfills the three requirements of a system of taxation:

- **Ability to raise any amount of money approved by the people**
- **Inability to raise funds contrary to the wishes of the people**
- **Compatibility with competition between governmental units**

Several possible apportion methods exist. Apportionment according to population has the following advantages:

- A) Does not discriminate against successful states, i.e. in this context, states with policies successful in enhancing economic growth.
- B) Does not vary the tax burden depending on cultural factors, e.g. whether both parents work for monetary wages or whether one of them stays at home to look after the children.
- C) Does not discriminate against states with efficient bureaus of statistics and a small informal sector. Neither does it create the need for an elaborate

confederate bureaucracy to estimate macro-economic variables for the various states.

D) Is not open manipulation. Countries have been known for instance, to change the definition of price indices by law to "achieve" objectives like low inflation. Any method of apportionment other than a simple head-count is open to the same kind of manipulation.

E) Makes it easier for the people to monitor and adjust the level of confederate taxation. The per capita charge plays the same role in deciding confederate taxation as standard weights and measures play in commercial transactions. Standards ease information gathering and understanding.

The taxing power is not limited in monetary terms, but it is limited in form. The total requisition may be any amount what-so-ever, but as long as the individual states pay up, the Confederation may not impose its own direct or indirect taxes on the citizens.

### **3.5 The right of enforcing and defending the constitution**

Section 3.5 gives the Confederation the authority to use any means necessary and proper to enforce and defend the constitution and the several states (See also U.S. I.8.18 for comparison). The Confederation is thus given the power of defending the constitution both from within and without, and by doing so, protecting its own interests and existence. The power to enforce the Constitution is especially important in the context of the democratic and procedural rights enumerated in chapter 2. Rights of the state citizens. This authority allows the Confederation to use force against state authorities that do not respect popular rights.

Since the power to defend itself is so fundamental to the very existence of a governmental organization, the power of defense would probably have been implied if not given expressly. The express provision of section 3.5 removes any doubt that may have existed.

This power of defense or enforcement is not exclusive to the Confederation. Each state

has the same right to defend itself and its institutions, and conflicts between the states and the Confederation are still to be resolved by the constitutional tribunal. Decisions by the tribunal will be as binding on the Confederation as the Constitution itself. In the end, it is the Constitutional Tribunal, biased in favor of the states, that will decide what is *necessary and proper*.

The difference between this *necessary and proper* clause and the **corresponding** clause in the U.S. constitution or the current arrangement in the European Community treaties and other federal constitutions, is not so much in what it says, but in who interprets what it says. In the end it is up to the Constitutional Tribunal to provide a body of case law that defines in detail what is meant by democratic **government**, what makes up "a reasonable number of citizens", whether, or in what circumstances the confederation can force the building of highways, railroads or airports to ensure freedom of movement etc., etc.. Each of these decisions is important, but they are not "constitutional". They are not fundamental or constitutional principles, but the application of fundamental principles to changing circumstances and concrete issues.

The last subsection prevents the individual states from getting the Confederation as a whole embroiled in external conflict. It doesn't prevent each state from defending itself, but it does place limits on aggressive behavior.

## 4 Definitions and general provisions

### **4.1 Majority of votes cast**

Section 4.1 ensures that popular and other votes are determined by the majority of the votes cast.

### **4.2 Double majorities**

Section 4.2 defines the term *double majority*. A double majority consists of a majority of the confederate citizen's votes as well as a majority in a majority of the states.

The use of double majorities safeguards the interests both of the most populous and the least populous states.

### **4.3 Conflicting double majorities**

Section 4.3 regulates the order of precedence in case the people approve conflicting measures.

### **4.4 Non-contested real estate**

Section 4.4 defines *Non-contested real estate*. Section 2.3 requires the weighing of conflicting interests in real property. If the property is nonresidential *freedom of movement* poses no conflicts, and the right to have it withdrawn is reserved to the owner. If the property is residential on the other hand, the owner's right of withdrawing the property (and thus his freedom of movement) may conflict with the residents' right not to move. (Freedom to move also implies the

opposite freedom of not moving.) This conflict is resolved in favor of the residents because our bodies are more essential than physical assets.

The actual source of the problem is the linking of statehood and territory.

### **4.5 Precedence**

Section 4.5 expressly states that Part one of the Constitution takes precedence over Part two. The confederate institutions as a group, hold all the powers granted the Confederation in Part One, but they cannot exceed these powers.

Most traditional federal or confederate constitutions do not make this distinction between the sum of the powers granted to a particular governmental unit (level) and the distribution of those powers between the various branches within that unit (level).

## 5 The President

### 5.1 Executive power

The executive power of the Confederation is vested in the President. This section provides a general definition of the President's role within the confederate institutions. This general definition is clarified in the remainder of the chapter, especially in section 5.2.

Section 5.1 corresponds to the first part of U.S. 11.1 .1 . The remaining issues regulated by the U.S. equivalent (the presidential term and elections) are dealt with separately in the proposal's section 5.3.

### 5.2 Prerogatives

This section defines the executive power of the President. It grants the President the position of commander-in-chief, empowers him to appoint department heads, grant pardons, make treaties, make proposals to state legislatures or state citizens, make proposals to Congress, veto legislation and reduce or eliminate appropriations to balance the confederate budget.

The proposed constitution outlines a very powerful presidency compared with the legislature's (Congress') powers. But as the confederate powers themselves are relatively weak, the sum of presidential powers are less than those of most contemporary federations.

Because the President commonly represents the people better than Congress, his functions as the third house of the legislature has been extended. The veto power applies to all congressional decisions, i.e. even to decisions that normally require a two thirds majority like proposing amendments to part two of the Constitution, approving

deficits etc.. The veto can be overridden by Congress by a majority that is 1/6 larger than that required for a decision that meets with the approval of the President. A majority has to be increased to a two thirds majority, and a two thirds majority has to be increased to a five sixths majority.

The line item veto and the power to reduce appropriations provide the President with powers similar to those of the Referendum. It provides for the unbundling and uncoupling of spending and legislative decisions in Congress.

**Line by line comparison with the U.S. Constitution's Article II . sections 2 and 3**

Subsection 5.2.2, appointment of officers, corresponds to U.S. 11.2.2 , but limits the Senate's and the President 's deliberations to avoid dead-lock in case of disagreement.

Subsection 5.2.3, reprieves and pardons, corresponds to U.S. 11.2.1, but limits the President's power to grant reprieves and pardons in the case of impeachment. This limitation is found in the U.S. II.4 .

Subsection 5.2.4 provides for the making of treaties with the consent of Congress instead of (U.S. 11.2.2) a two thirds majority in the Senate.

Subsection 5.2.5, the right to make formal proposals to the authorities of individual states, is a new power not granted the U.S. President.

Subsection 5.2.6, the right to make formal proposals directly to the citizens of individual states, is a new power not granted the U.S. President.

Subsection 5.2.8, presidential veto powers, corresponds to the U.S. 1.7.3 with the following modifications:

- A) Line item veto granted,
- 13) Veto period extended to 30 days, and
- C) Any bill or vote not approved is automatically vetoed at the end of 30 days.

An automatic veto prevents the Congress from taking measures to prevent the timely return of vetoed bills.

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Subsection 5.2.9, the power to reduce appropriations, is new in comparison with the powers granted the U.S. President. It gives added flexibility in combating excessive spending and budgetary deficits.

It also confirms the President's role as the people's instrument in checking the ambitions of Congress and in reconciling the interests of geographical or other pressure groups with those of the people as a whole. It provides a mechanism for enforcing the balanced budget requirement.

### **5.3 Term and election**

Section 5.3 provides for direct presidential elections and fixes the ordinary term at 5 years. If no candidate has a majority of votes cast in the first ballot, there is a run-off between the two candidates with the highest number of votes.

By loosening the requirements for recall (see below), there is no reason why the presidential term may not be further extended (see also appendix 1.2 for a discussion of continuous elections).

The section proposes no limit on the number of terms. To the extent that this becomes a problem it may be alleviated through a recall.

### **5.4 Candidates**

This section has no equivalent in either the U.S. or the Swiss constitutions. It proposes the direct nomination of candidates by popular petitions. This makes the nomination process independent of party politics and procedures.

The vice presidential candidate is chosen by the presidential candidate. This corresponds to U.S. practice, but not constitutional wording (see U.S. II.1.3).

## **5.5 Removal**

Section 5.5 is modeled on the U.S. Constitution. The first subsection states that the President is removable on impeachment. This corresponds to a similar if not identically worded provision in U.S. II.4.

The rest of the section corresponds to the original removal provisions in the U.S. constitution (U.S. II.1.6). It enables the Congress to provide for the swift resolution of the President's possible inability through its powers to regulate the courts, but prevents Congress from usurping executive or judicial powers. (The Congress may for instance, designate the Supreme Court as having original jurisdiction, specify time limits and special procedures for times of war and crisis and so on.) Swiftness, flexibility and impartiality is also better served by a small judicial body like the Supreme Court, than by a larger body that may be prevented from assembling by the very crisis that demands a swift resolution.

The corresponding section 11.1.6 of the U.S. constitution has since been replaced by the twenty-fifth amendment which:

A) Unnecessarily complicates matters by variously trying to cover all possibilities and simultaneously repeating in more complex language, what most people would assume the original section to mean anyhow. By making the issues more complex, the amendment may be counterproductive and dangerous rather than helpful in a real crisis. It muddles the essentials.

B) Confers on the Congress the ultimate power of deciding whether the President is able to discharge his powers. This encroachment of the Congress on the powers of the judiciary is especially dangerous since it may place the President at the mercy of Congress at that very moment, for instance during a war or other crisis, when the executive nature of the executive powers is most needed, and indeed for the occasion from which much of the rationale for creating an independent executive arose. Just in times of crisis, it is even more essential than at other times to leave these issues to the professional levelheadedness and detachment of the judiciary; and

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C) Provides a means by which Congress may usurp power even if there is no crisis. The Norwegian Parliament for instance, used the inability of the **Swedish/Norwegian** king to discharge his executive powers to justify the annulment of the union with Sweden in 1905.

Thus, safety is better served by simple rules that are flexible enough to take account of crisis circumstances, and without encouragement for congressional usurpation of executive power.

## 6 The Congress

### **6.1 Legislative powers**

This section, outlining the legislative powers of the People and the Congress, corresponds to the U.S. I.1. It differs from the U.S. Constitution on the following significant issues:

- A) Legislative powers are vested in the People, i.e. in the citizens of the Confederation, and in Congress only by limited delegation.
- B) Legislative powers are confined by Part One.

### **6.2 The powers of Congress**

The powers of Congress follow the U.S. constitution with the following major exceptions (see also "Legislative powers" and "The people") :

- A) Congress may only requisition emergency funds from the states, and then only by a two thirds' majority. Ordinary annual requisitions are decided by the people. Congress may lay taxes only on the citizens of those states not complying with the requisitions.
- B) Congress may appropriate funds as it pleases, but if the total exceeds confederate revenues or approved budgetary deficits, the President may reduce or eliminate appropriations. (The reasoning behind this should be obvious to anyone following the budget debates around the world.)

- C) Congress may borrow money only by a two thirds majority.
- D) Congress may approve budgetary deficits only by a two thirds majority.
- E) Proposals for constitutional amendments is subject to the veto power of the President.
- F) Overriding the President's veto may sometimes require a 5/6th majority of each house.
- G) The power of trying impeachments is moved to the Supreme Court. The Senate is given the power of impeachment concurrent with the House.
- H) Congress is given the powers of overriding suspensions caused by the Referendum.

### **6.3 The Senate**

#### **Number of senators**

Until there are 25 states the determination of the number of senators (2 from each state) corresponds to U.S. 1.3.1 and the general sense of Switzerland Art. 80.

The rest of the section accommodates situations where there are more than 25 states.

#### **Election**

This section corresponds to U.S. 1.4.1, but instead of giving the ultimate power of regulating elections to the Congress, it grants this power to the states.

The co-sovereignty of the Confederation implies that the Confederation ought to decide its own election procedures. This principle is counterbalanced by a need to provide room for innovation and flexibility. The proposed section enables the states to adopt modes of election according to local traditions.

### **6.4 The House of Representatives**

The purpose of section 6.4 is to: A) Fix the number of Representatives in the House of Representatives; B) Provide for **reapportionment** according to changing state populations; and C) Fix the maximum term for representatives.

#### **Apportioning representatives among the states**

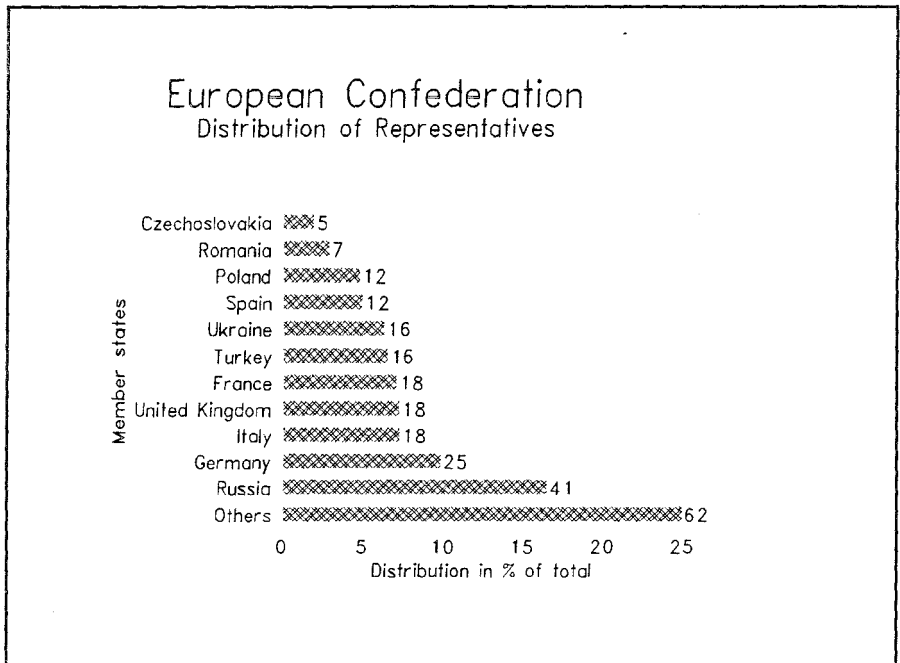
Subsection 6.4.1 fixes the number of Representatives at 250. Representatives are apportioned according to population. The proposed number of representatives makes the House small enough to be a forum of real debate and vigor, and yet large enough to ensure diversity.

Apportionment according to population also ensures that each citizen vote has equal value. Subsection 6.4.1 corresponds to U.S. 1.2.3. It is similar in principle to the Australian constitution's section 24. The subsection is not influenced by population variations (typically increases due to population growth or the admission of new states)

The proposed apportioning of representatives among the states allows a dispersed representation in a European Congress while retaining small House of Representatives. As Figure 4 shows the Russia-group makes up only 41 of 250 representatives.

#### **Redistricting and gerrymandering**

The proposed constitution does not touch on the subject of redistricting within the



**Figure 4** Distribution of representatives, pan-European Confederation

states.

In principle redistricting can be viewed as reapportioning extended downward to each individual congressional district. In the U.S., the courts have decided that congressional districts within each state must have very nearly equal population. Similarly the introduction of "one vote one value", was recommended by the Australian Constitutional Commission 1988.

The Constitution does provide for "one vote one value" at the state level, but it leaves the states free to select their own methods for internal apportioning. This flexibility may be particularly appropriate for states deciding to pool their populations for obtaining representation in Congress. Any deviations from one vote one value may

<sup>2</sup> The Australian way of saying that districts must have the same population.

also be alleviated through a state constitutional initiative, or by the erection of a new state. State freedom in regulating elections also implies freedom to choose between proportional, first past the post or other election methods.

## 7 The Supreme Court

### 7.1 Judicial powers

Confederate judicial powers are vested in one Supreme Court and in inferior courts established by law. Judicial powers are limited by section 3.3 and the regulations related to the Constitutional Tribunal. The text of section 7.1 is modeled on the U.S. Constitution Article III section 1 and partially on Article III section 2.

This chapter 7 follows the U.S. Constitution with the following exceptions:

A) The courts are expressly granted the powers of judicial review,(see section 7.2), i.e. the power to decide whether acts of Congress are constitutional.

B) Regulations of the court system may not come into effect until a new President has taken office (see section 7.3). This is to prevent the blatant manipulation of the court system attempted by Franklin D. Roosevelt in the U.S. in the 1930s.

The Supreme Court declared parts of Roosevelt's New Deal legislation for unconstitutional. This resulted in Roosevelt threatening to expand the court and appoint enough new justices to overrule those not bending to his will.

C) The Supreme Court is given the powers to recommend (propose) changes in legislation regulating the courts. (See section 7.3)

## **7.2 Judicial review**

The power of judicial review is the power to declare ordinary laws unconstitutional and thereby making them unenforceable. The courts have this power in most countries relying on the Anglo-American legal system including the U.S.A., Canada, Australia etc.. In several European states, e.g. France and Germany, judicial review takes place only in specialized courts or institutions. While, in still other, like Switzerland, there is no mechanism for judicial review at the federal level.

Countries like Switzerland instead rely on democratic processes to produce laws that agree with the constitution.

The advantages of a process of judicial review by ordinary courts are:

A) It is continuously available. Though a law at first sight appears constitutional, later experience may reveal flaws in the original assessment. Any system relying on assessing constitutionality only once at the outset, lacks the ability of considering these later developments.

B) Judicial review by the courts ensures a more thorough, reliable and certain review than the democratic process alone. In essence, the people delegate to the courts the duty of acting as a watchdog in relation to possible encroachments on the Constitution by the executive and the legislative. This does not of course, mean that the courts and the voters always be in agreement. The courts ought to interpret the Constitution as it is, while the people may want a different constitution. An independent judiciary process ensures any deficiencies in the Constitution are forced out into open, where they can be examined and amended directly by

the voters.

### **7.3 Original jurisdiction and right of appeal**

See section 7.1 above.

## 8 The People

### **8.1 Requisitioning**

Section 8.1 provides for the people itself to decide directly what level of taxation it wants to incur. This can be done by Dutch auction due to the simplified nature of confederate financing as an annual per capita charge on the states.

Experience from Switzerland and the United States suggests that constitutional amendments restraining the raising of revenues enjoy widespread support, and can be expected to enter the Constitution if the people have the power of the constitutional initiative. Given that such restraints are to enter the Constitution anyhow, the real question is what form they ought to have.

The proposed section has the advantage of simplicity, from the point of view both of the electorate and of their representatives. It is also highly flexible, allowing the raising and lowering of taxes depending on popular opinion.

In addition the proposed section uncouples aggregate taxation from spending on particular projects. This provides an additional hurdle for spending and reduces overall taxation.

The Congress is empowered to raise emergency funds in case of war or crisis.

The annual charge may be reset any time, but has to be reset at least every 5 years.

### **8.2 The Initiative**

Section 8.2 regulates the people's power to propose and enact legislation of any kind except constitutional amendments which separately regulated in section 8.6, confer also section 1 .9,

Most of this section follows the standard pattern for initiatives, with the following exceptions:

For reasons of practicality, Initiatives may be lumped with elections so that the voters don't have to go to the polling places several times a year. Subsection 8.1.3 taken with section 9.3, provides that Initiatives has to be decided within 465 days (100 days + 1 year).

Decisions require a double majority (a majority of the popular votes and a majority of the states). This ensures that confederate legislation enjoys broad support.

Legislation enacted directly by the voters may be amended after 5 years.

Experience in the U.S. suggests that legislatures has to be prevented from nullifying the decisions of the people by repealing or amending statutes enacted by the initiative. On the other hand, if initiative legislation is absolutely protected, it is unable to adopt to changing circumstances.

In California direct legislation may only be changed by new direct legislation. This has partly led to obsolete legislation remaining on the books, and partly to the voters being overwhelmed by proposals for minor amendments.

The 5 year limit is a compromise between these two opposing considerations. After 5 years, at least there will have been a renewal of the House of Representatives and in the presidency, possibly also in the Senate. This limits, but does not eliminate, the first consideration.

### **8.3 The Referendum**

Section 8.3 regulates the people's power to approve or reject any bill or act of Congress. This section follows the usual pattern for petition referendums with the following exception (see also comments on the Initiative):

The referendum, as defined in this document, does not imply a vote on whether to veto an act of Congress; Instead, it implies a vote on the proposed legislation itself. This means that legislation not expressly approved is rejected.

### **8.4 The Recall**

Section 8.4 regulates the people's power to end the term of any elected public official. The recall of elected officials, cannot be found either in the U.S. or Swiss constitutions, but can be found in state constitutions in the U.S.. It provides a safety valve short of removal by impeachment. Additionally, it puts this power in the hands of the people instead of elected officials.

Recall is the most recent invention in the field of direct democracy, following the introduction of the referendum and the initiative. Although it is rarely used, this may not reflect its real importance. After all, the instrument of impeachment is even less used, but its existence and the implication that it might be used played a crucial role in forcing the resignation of former U.S. President Richard Nixon.

The lesser use of the recall may also be related to the fact that the qualification requirements for recalls are usually much stricter than for the initiative or the referendum.

By loosening the qualification requirements for recall, longer terms for elected officials might become increasingly attractive and possible as the recall takes on the character of being an ordinary and acceptable way of making a change of officials.

How or whether to use the recall is, however, a decision best left to the people itself through popular resetting of the qualification requirements.

The proposed recall provision forces a new election. Some state provisions in the U.S. use a two-step procedure; First the recall itself, and then if successful, a new election. This procedure is more cumbersome and therefore less desirable.

To ensure multiple candidates, candidates at the prior election qualify immediately. Qualification requirements for other candidates will depend on legislation.

### **8.5 Qualifying Initiatives, Referendums and Recalls**

Section 8.5 regulates the procedure for setting the number of signatures (voters) required to qualify Initiatives, Referendums and recalls. It has no equivalent in other constitutions.

One method employed by legislatures to get rid of the perceived impertinent intrusion of the voters has been to raise signature requirements to unrealistically high numbers. Instead of specifying a number or percentage that may later be challenged and changed, the proposed model relies on a self-adjusting process so this issue may be decided by the voters themselves from time to time.

If the people feel that the number of Initiatives, Referendums or Recalls is inadequate, they get the chance of reducing the qualifying number of petitioners. If on the other hand, the number of Initiatives, Referendums or Recalls is excessive, qualifying requirements may be adjusted upwards.

One objection to direct legislation has been that the people quickly become swamped by irrelevant proposals. On the other hand, if the hurdle is too high, important issues may not get voted on. The proposed procedure alleviates these concerns by leaving the decision directly with the people itself.

### **8.6 The Constitutional Initiative**

Section 8.6 regulates the people's power to propose and enact amendments to Part Two of the Constitution. This section corresponds to the Swiss Art. 121, and to many equivalent amending sections in American state constitutions.

The Constitutional Initiative has more stringent requirements than the statutory initiative. These requirements encourage ordinary statutory issues to be decided by statute and discourage the Swiss practice of putting everything into the Constitution. The disadvantage of a large and complex constitution is among other things, lesser accessibility. Complex constitutions also make legislation less amenable to changing circumstances and obscures the difference between rules related to decision making and the outcome of individual decisions.

Constitutional amendments to part two of the Constitution are decided by a 55% majority of the popular votes and a majority of state votes. This gives the constitutional amendment a broader basis than the statute, but is less stringent than amendments to Part One of the Constitution.

### **8.7 Confederate and state initiated direct legislation**

Section 8.7 gives confederate institutions or state legislatures the right to initiate direct legislation. Such initiatives may be in direct response to popular initiatives.

Both in Switzerland and in the U.S.A. it is common for legislatures to present their own competing and often moderated, versions of voter initiatives. Quite often these "official" alternatives win out either because they are better drafted or because they are less extreme.

## **9 Bill of Rights**

### **9.1 Applicability**

The purpose of section 9.1 is to make the Bill of Rights expressly binding on all confederate institutions, and to provide a safety net for state legislation. If state law is silent, confederate law and the confederate bill of rights will extend also to state institutions and within state jurisdictions.

On the other hand, states that want to modify the Bill of Rights to local circumstances are free to do so, confer section 1.4 Superior law.

### **9.2 Non-discrimination**

Section 9.2 prevents discrimination due to nationality or ethnic origin, political or religious beliefs, race, color or sex.

### **9.3 Voting age**

Section 9.3 extends the right to vote to all citizens older than eighteen years.

### **9.4 Ex post facto law**

Section 9.4 prohibits the use of ex post facto laws.

### **9.5 Religious freedom**

Section 9.5 ensures the peaceful enjoyment of religious activities.

### **9.6 Freedom of speech**

Section 9.6 follows the U.S. Constitution, 1st amendment, but it has been expanded to provide for the freedom of other media than the printed press.

Also, it has been expanded to provide for the protection of media ownership, production and distribution. This is to prevent factual censorship by for instance, the well-tried methods of limiting newsprint supplies or refusing distribution; both methods popular with authoritarian regimes.

Similar protection has been provided for the newer media.

#### **Transfer of access rights**

Section 9.6 also provides for the unrestricted ownership of and transferal of access rights such as for instance, electromagnetic frequency rights.

Distribution in the newer media is qualitatively different from the older media like the press. There is no physical limit on the number of printing presses, and the fact that The Observer owns a printing press, does not prevent The Financial Times from owning a press too. However, radio and television broadcasting is different. If BBC uses a particular frequency, that prevents Sky Channel from using the same frequency without garbling up the messages of both channels.

There is a limited number of broadcasting bands available. The number may change over time due to technical refinements in broadcasting technology, but it can never become infinite. In fact, as technology advances it looks as if the relative availability of frequency bands decreases. Not only is the demand rapidly increasing from <sup>ind</sup>ependent broadcasters, but also from modern two-way communication technology

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(radio, mobile telephones, pagers, satellites, etc.) that is expanding rapidly into the same limited frequency range.

Thus frequency rights have to be allocated among several contenders. Government has traditionally used this allocation as an excuse for regulating the contents of what is transmitted and for censoring the media themselves.

The constitution proposes two remedies:

A) Access rights are separated from freedom of speech, or the right to start new media. (Thus anyone may start a television channel, just like anyone may start a newspaper.)

B) Access rights are made freely transferable. Once the access right has been created, it may be bought and sold freely. Access rights may be created either by government involvement as for electromagnetic frequency rights, or by private enterprise, as for distribution rights in a cable network. In effect, instead of being dependent on governmental privilege, access rights have become property like any other property.

This section does not by itself compel the government to sell off access rights. Provided the Confederation possesses all rights initially it could take over all broadcasting itself and create a confederate monopoly. However, such a monopoly would be unlawful according to the Bill of Rights. Thus in effect, the Confederation may not conspire to restrict the freedom of the media. (Though each state would, in a limited fashion, be able to do so within its borders.)

### **9.7 Right of assembly and association**

Section 9.7 protects the right of assembly and association.

### **9.8 Habeas corpus**

Section 9.8 corresponds to U.S. 1.9.2. However, while the U.S. clause provides for the suspension of Habeas Corpus in times of rebellion or invasion, the proposed clause does not. In those rare cases where a suspension is justified, i.e. in the actual theater of war

or during a complete break-down of civil authority, the suspension will come about automatically, as the courts will be unable to sit, and therefore will be unable to issue the writ. Thus there is no reason for a constitutional loop-hole and it may be potentially dangerous to provide a mechanism by which other authorities than the courts themselves decide either whether detention is justified or whether the danger to public safety requires the general suspension of Habeas Corpus.

During the Second World War tens of thousands of U.S. citizens of Japanese origin were detained without conviction or indeed without even being accused of a crime. Only recently has the U.S. government taken steps to remedy this gross injustice through monetary compensation to the estimated remaining approximately 67,000 victims. The legal basis for this suspension of basic rights was the risk to public safety cited in U.S. 1.9.2.

### **9.9 Privacy, searches, seizures, and interceptions**

Section 9.9 protects the people's right to privacy. This section is based on the U.S. Constitution 4th amendment, with the following exceptions and modifications:

- A) It starts by a positive declaration of what is to be protected, the privacy of the individual. This positive declaration supports a broader interpretation of the rest of the section (for instance to take account of advances in technology).
- B) The term searches and seizures is expanded to include interception (for instance wire tapping).
- C) The section also includes information and communications.

D) The proposed section also protects against private parties to take account of increasingly sophisticated electronic and other gadgetry available to private parties and organizations. Typical private parties are neighbors, news organizations and employers.

E) Restrictions apply independently of where the seizure takes place. The actual interception of phone calls, for instance, will normally take place outside your home.

It is impossible for the public to evaluate whether there is probable cause in each instance. Through the publication of statistics and the admission of compensation the proposed section introduces a process that discourages non-legitimate searches.

### **9.10 Due process**

This section is based on the U.S. Constitution 5th amendment, but also provides for compensation for those wrongfully detained or convicted.

### **9.11 Criminal prosecutions**

Section 9.11 protects individuals in criminal prosecutions. It is a combination of parts from U.S. Bill of Rights safeguards and Supreme Court decisions (Miranda warnings).

Section 9.11 clarifies the expression *due process of law* in criminal cases.

### **9.12 Jury**

Section 9.12 protects the people's right to trial by jury.

### **9.13 Excessive bail**

Section 9.13 protects the people against excessive bail, excessive damages and cruel and unusual punishments.

### **9.14 Taking of property**

Section 9.14 protects individuals against arbitrary confiscation. Compared with the U.S. and most other taking clauses the proposed section also gives *full* instead of *just* compensation and includes regulations.

#### **Full or just compensation**

The difference between full and just compensation is that full compensation will always be just, while just compensation may not always be full. Full compensation is always the larger figure of several possible combinations either of which could conceivably be termed just compensation. Possible basis for full or just compensations are: original cost, inflation adjusted cost, book-value (in case of business entities), net present value (based on income stream from property), market value, replacement value and sentimental value.

Additional questions that are not answered by this clause: If the value of the property is higher to the government than to the original owner, should this higher value be used as a basis? Should effects caused by the expropriation itself be considered? A constitutional clause does not answer all questions, legislation or common law is still required to fill the blanks.

#### **Regulations**

Regulations are probably more important economically than the actual taking of property in the narrow sense. In most countries, the

author does not know of any exceptions, government may impose restrictions without paying compensation. Since this mode is "free" (at least to government), zoning and other regulations proliferate. The proposed remedy has two objectives:

A) Provide compensation to property owners according to the losses suffered by regulations, and

B) Providing governments with cost figures, so that there is a basis for trade-offs between costs and benefits. Potential savings due to an intelligent trade-off between the costs and benefits of governmental regulation may easily run into tens of billions of ECU for the European Community, and possibly into hundreds of billions of ECU. These are savings larger than those envisioned by the single market reforms.

Instead of declaring **un-necessary** regulations unlawful; the proposal relies on a flexible mechanism by which government may regulate without limit; as long as it pays the actual costs.

The issue is also depoliticized. Instead of haggling over whether a regulation is necessary or not, we can leave it to the accountants, economists and legal system to figure out the cost, and then decide whether we believe the costs outweigh the benefits or vice versa. Compensation can be paid out either through the court system, or through automatic compensation plans relying on legislation. The depoliticized approach also allows continual refinement as more information becomes available.

#### **Safety regulations**

Forcing government and politicians to include all costs has important positive consequences for safety regulations.

Let us take the licensing of medicines as an example. Regulations requiring extensive testing of medicines before marketing have three essential cost components: a) the cost of the testing itself, b) the cost to the manufacturer related to the fact that potential

revenues from selling the medication are delayed, and c) the cost to patients in terms of money and suffering, perhaps even death, while they await the release of the medication. C) is related to b) since the revenue to be expected by the manufacturer relates directly to the alleviated suffering. Manufacturers of medicine can expect to recoup their costs and earn a profit only if they sell expensive medicines to patients suffering from very serious diseases (AIDS for instance), or if they sell inexpensive medicines relieving many patients of minor suffering (e.g. cough medicine). Thus the suffering of the patients while they await release corresponds to a revenue loss for the manufacturer. On the other side of the ledger, we find that extensive testing also has benefits as seen by the manufacturer; It protects him against the economic consequences, in terms of compensation to victims, of releasing a medicine with serious defects. From the patients' point of view it reduces the likelihood of injuries and suffering from the un-anticipated medical effects. This latter cost is again included in the manufacturer's cost, as he must compensate victims of unanticipated effects.

It is important to note that the pharmaceutical company will only be able to claim compensation if the net costs associated with complying with regulations exceed the company's net benefits. Often this will not be the case, and regulations can be retained as they are. Compensation related to safety regulations will only be possible when requirements go beyond what is sensible. For instance, many countries do not distinguish between medication for fatal and non-fatal diseases. Medication for AIDS has to go through the same lengthy test procedure as cough medicine. This does not make sense. If you are already dead, it is of no use that the medication you could have taken to stay alive is "safe". In this case the pharmaceutical company's potential liability for unanticipated effects is very small as its potential customers would have died anyway. The potential revenues on the other hand, may be significant as people are willing to pay quite a lot for staying alive. The net loss to the pharmaceutical company due to regulation is large. Through the courts the pharmaceutical company will be able to claim a significant compensation. This will show up as a significant expense in the confederate budget, and will encourage greater regulatory differentiation. Thus instead of encouraging a colder and less humane society, inclusion of regulatory costs will encourage politicians and governmental organizations to act more humanely.

### **Breaking up or regulating cartels and monopolistic organizations**

There is considerable disagreement among knowledgeable people whether it is possible for a country to regulate itself free from the negative economic effects of cartels and monopolies. Experience from several countries suggests that the effect of regulations often turns out to be the opposite of those intended: Instead of increased competition we may get additional regulatory barriers of entry, and instead of competitive behavior, we may get government sponsored collusion. A typical example of the latter

kind can be found in the American regulations related to "fair" (whatever that means) foreign competition. In the name of fair competition American authorities have sponsored "voluntary" restraining agreements among Japanese manufacturers of automobiles and semiconductors. In effect the American government is condoning a cartel of Japanese manufacturers so as to reduce competition in the American market and raise prices.

Nevertheless, given that we are to have anti-trust regulation (which in theory is different from trade regulations), it can only be justified to the extent that it returns monopolistic profits to customers. This puts the injured party (the customer) in the position he would have been in if the monopoly or cartel didn't exist. The result of monopolistic coercion is counteracted by governmental coercion and this is its justification. The monopolist is forced to repay a gain he has come by not necessarily through a fault of himself, but through an unfair process. It is like finding a suitcase of money on the subway. Though you didn't come by this money illegally, you are obliged to return them to their rightful owner. Neither the government nor the customer can demand anything more from a monopolist that has reached his position honestly by out-competing his rivals. As far as economic efficiency is concerned, it is sufficient for monopolistic profits to be returned to customers. Any regulation that goes beyond this without providing compensation is neither justifiable on grounds of equity nor on economic efficiency grounds. The second subsection encourages the courts to monitor anti-trust and anti-cartel legislation to make sure that it does no more than intended and is justifiable on the grounds of economic efficiency and equity.

It is not always possible to find practical ways of counteracting the effects of monopolies and near-monopolies, and often the costs involved may not be worth the effort. The government may compel you to try to find the owner of a suitcase full of money or at least deposit the money at the nearest police station. It hardly seems worthwhile to compel citizens to spend the same amount of effort on a dime (10 cent piece) found on the streets of New York or a lo p piece found on the streets of London. Thus it is sufficient for the Constitution to give the Confederation the option of regulating these issues. It should not compel regulation.

### **9.15 Speedy decisions**

The purpose of section 9.15 is to prevent the government from achieving through stalling what could not be achieved otherwise, and to provide an incentive for government to act by putting the burden of delay on government instead of on each citizen.

### **The cost to individuals of government stalling**

The everyday life of ordinary people has become increasingly dependent on government permits and decisions. These permits are not usually a matter of life and death, but they may make the difference between prosperity and bankruptcy. Sometimes the executive branch may achieve an objective beyond its stated powers simply by delaying the necessary paper-work. Delaying action may be just as effective as outright refusal and much harder to alleviate through the court system which itself is overburdened. However, usually it is not a question of malice, but simply a lack of governmental resources. Governments and politicians rarely weigh the supposed advantages to society of a thorough investigation against the interests of the individual seeking a permit, and they have no incentive to do so.

The need for rules to prevent government stalling also has to do with the government's monopoly position. Any business refusing to serve its customers within reasonable time, would simply go out of business, as people would go elsewhere. This option is not available in the case of the confederate government.

## **9.16 Equal protection**

The purpose of this section is to ensure that all citizens, including confederate officials, are equal before the law and enjoy the equal protection of the laws.

As some governmental functions by nature, require immunity, the real purpose of this section is to transfer the evaluation of what makes up *necessary* privileges and immunities from the officials themselves to the judicial system. The advantages associated with this approach has to do with the relative dangers to equality and individual liberty associated with the various branches of government. Because courts are reactive rather than active (they only decide issues brought before them) they pose less of a threat to the public than either the executive or the legislative.

### **Examples of privileges gone wrong**

#### **Members of the legislature as the new privileged class**

The original function of Parliamentary privileges was to protect the Parliamentarians against a powerful non-elected executive. Typically, MPs had complete freedom of speech, i.e. not even subject to libel, freedom from arrest during sessions etc.. However, as the need for such privileges has diminished, they have nevertheless at least sometimes, been strengthened.

In Sweden, Parliament has recently enacted an insider trading statute, but simultaneously the Swedish Parliament also exempted itself from the same statute. (Source: "Innsidelov ikke for Riksdagen", Dagens Næringsliv, Oslo, September 22, 1990). It is hard to see how this exemption can be justified by the need for protecting the democratic process.

In Norway, Parliament enacted an anti-smoking statute, only to try to have itself exempted. Similarly it is quite common for MPs to have special tax privileges. Though Norwegian MPs rarely pay their own way when travelling, their tax-free travel allowances are double everybody else's allowances. These legal exceptions are not individually important, but taken together they show many politicians' disrespect for democratic processes and for the people that elected them.

#### **Sovereign immunity**

More directly important may be the idea of sovereign immunity found in varying degrees in many countries. In the United Kingdom for instance, the executive government (the Crown) may not be sued. On the continent there is an extensive body of administrative law that similarly protects the government and government officials.

#### **The U.S. Atomic Energy Commission**

In the United States the Atomic Energy Commission in the 1950s operated uranium mines in Colorado and other western states of the U.S.. In spite of warnings from the U.S. Public Health Service advocating better ventilation, the AEC failed to act because it was afraid of alerting the miners to the dangers associated with uranium mining. Eventually many miners developed lung cancer, but when they sued, the court ruled that the government was protected by sovereign immunity. (Source: "These people were used as guinea pigs", International Business Week, October 22, 1990, page 64 B-E and 64 C-E).

It is instructive to compare the AEC case with the asbestos cases in the U.S.. Manville Co., the world's largest manufacturer of asbestos, was eventually forced to pay compensation to asbestos victims though it didn't know and could not have known at the time of the sale that asbestos posed a health risk. The AEC got off without any

liability although it deliberately avoided taking protective measures.

### **9.17 Monopolies**

The objective of this section is to ensure that the confederate government does not achieve through a monopolistic arrangement what it cannot achieve through legislation. Governmental monopolies may for instance be an alternate method for raising revenues. In this respect it may act as a substitute for taxes. Similarly, monopolies may be used to introduce or maintain regulations that would otherwise have been illegal. This section makes it harder for the Confederation to exempt itself from competitive pressures.

The second subsection protects patents, copyrights etc..

### **9.18 Rights retained by the people**

The purpose of this section is to provide the courts with a means of enforcing rights that are generally accepted, but have been omitted from the Constitution either by accident or by design. The U.S. constitution for instance, has clauses relating to slavery and involuntary servitude. The idea of slavery, however, is so foreign to current thinking that putting it in would be to give it more attention than it deserves.

## **10 General Provisions of part two**

### **10.1 Election day**

The establishment of an election day has two purposes:

A) To prevent the government from depriving the citizens of their right of democratic government by postponing elections.

There are unfortunately, many instances where even democratically elected governments have used this and similar tactics. In the United States there are many cases of state legislatures designating ordinary legislation as emergency legislation to prevent it from being subject to a referendum. Similarly, in Switzerland during and after the Second World War the Swiss government enacted several highly unpopular measures and prevented the people from exercising their right of referendum. The Swiss eventually amended their Constitution to preclude similar occurrences in the future.

B) To simplify voting by enabling the voters to decide several issues with only one visit to the polling place.

Experience seems to show that if too many visits to the polling place is required throughout the year, a certain amount of voter fatigue sets in. (This may of course, be alleviated by the introduction of technology or methods that allows the people to vote without having to show up at a certain place at a certain time.)

### **10.2 Limit on other office of profit**

The purpose of this clause is to protect the separation of powers, and prevent the corruption of legislators. Without this clause, the President for instance, may bribe legislators by offering them important or profitable positions within the administration.

### **10.3 Compensation**

This section corresponds to U.S. II.1.7 which employs the same mechanism to enjoin the U.S. President from being party to the determination of his own compensation. Each President's compensation is in effect determined by his predecessor and by Congress.

The clause is expanded to include senators, representatives and other elected public officials.

### **10.4 Sunset clause**

Section 10.4 serves three purposes: A) It ensures that obsolete statutes are taken off the books, B) It restores separation of powers, and C) It reduces long-term effects of special circumstances.

#### **Removes obsolete statutes**

Statutes accumulate continuously. This section ensures that obsolete statutes are taken off the books, and that other statutes are examined from time to time to bring them up to date with changes in society. The 35 year period represents about one generation which seems a reasonable interval.

#### **Restores separation of powers**

In a federal or confederate system of government or in a system of government relying on multiple independent branches there is a further advantage in a sunset clause. It undoes any shifts in powers caused by legislation.

Without a sunset clause, there is for instance, a strong tendency for the executive's powers to be compromised over time in relation to those of the Congress.

### **Reduces long-term effects of special circumstances**

Similarly there is a tendency for central governmental powers to increase at the expense of individual states and citizens. A sunset clause will, to a certain extent, alleviate this problem by eliminating those encroachments tolerated by the courts due to special circumstances. For instance, during times of war or crisis, the people and the courts will tolerate statutes and the interpretation of statutes that in times of peace would have been inconceivable. The sunset clause increases the likelihood that these measures will eventually get off the books again when circumstances change.

### **10.5 Sunrise clause**

The purpose of this section is to minimize legislative interference with the referendum.

### **10.6 Confederate budget**

The purpose of this clause is to make it more difficult for the President and the Congress to embark on creative budgeting.

The inclusion of provisions for contingent liabilities, eliminates or reduces the budgetary "gains" of off-budget financing. The inclusion of provisions for obligations payable in the future, is intended to make sure that each Congress pays its own way. (It minimizes the budgetary consequences of Louis XV like attitudes: "After me, the deluge.")

The carry-forward of accumulated deficits reduces the effects of eternally optimistic program cost estimates. (Similar fudging of the confederate revenues is not possible, as they are determined directly by the people on a per capita basis.)

### **10.7 Constitutional convention**

The purpose of the constitutional convention is not to propose an entirely new constitution, but to provide a forum for the periodic more systematic evaluation of the text of the constitution. The purpose is to provide the same critical assessment of constitutional clauses as the sunset clause provides for ordinary legislation.

### **III THE CONSTITUTION**

## **Part One (The Compact)**

### **1 State powers and privileges**

#### **1.1 Sovereignty**

Each state is independent and sovereign. It retains all such freedoms, powers, jurisdictions, rights and privileges not expressly delegated to the Confederation.

#### **1.2 Defense**

Each state has the right to maintain its own defense forces and the right to defend itself against actual invasion. No state's military forces may enter another state without that state's consent.

#### **1.3 Secession**

Each state has the right to secede from the Confederation on the direct vote of its citizens.

#### **1.4 Superior law**

Subject to part one (the compact) of this constitution and each state's jurisdiction, state laws and treaties are superior to confederate laws and treaties.

#### **1.5 State assumption of a confederate service**

Each state has the right to take over or discontinue the provision of a confederate task or service within its jurisdiction. The state shall receive a financial compensation from the Confederation equal to the Confederation's realizable savings.

#### **1.6 Treaty powers**

Each state retains the right to make treaties with any other state or foreign state, provided that such treaties either shall be made for a

fixed term shorter than 35 years or with a notice of termination shorter than 3 years. Treaties may not contain secret clauses.

### **1.7 Regional bodies**

- 1.7.1 Two or more states may, by treaty, establish a regional body and grant it part of their powers and privileges according to this constitution.
- 1.7.2 The founding treaty shall enumerate those regional powers and privileges to be enjoyed concurrently with the member states and those powers and privileges exclusive to the regional body.
- 1.7.3 Each state may be a member of any number of regional bodies as long as their powers or privileges do not conflict, or can be made not to conflict, with each other, or with those of each state.
- 1.7.4 Regional bodies may be non-contiguous.
- 1.7.5 Regional bodies enjoy constitutional protection.
- 1.7.6 Regional bodies are bound by this constitution, concurrent with, and on the same terms as each state.

### **1.8 The constitutional tribunal**

- 1.8.1 Conflicts between one or more states and the Confederation shall be referred to the constitutional tribunal for final decision.
- 1.8.2 The tribunal shall, in each instance, consist of 9 judges drawn by lot from the candidates of the tribunal.
  - 1.8.2.1 The candidates of the tribunal shall consist of 5 judges selected from the supreme court of each state by that state.
  - 1.8.2.2 When selected they shall remain as candidates during good behavior.
  - 1.8.2.3 They shall receive for their services a compensation, which shall not be diminished during their continuance as a candidate.

- 1.8.3** The tribunal shall maintain no offices in the capital of the Confederation, neither must its proceedings take place in the capital.

### **1.9 Amendments to Part One (The Compact)**

- 1.9.1** The power to propose amendments to this constitution affecting the freedoms, powers, privileges, independence or sovereignty of the individual states, including amendments to any section of part one (the compact), shall be the exclusive privilege of each state.
- 1.9.2** To qualify for the ballot, such proposed amendment must be supported by at least one third of the states or by states that together have at least one third of the total population of the Confederation.
- 1.9.3** Proposals must be submitted to the citizens for decision within 465 days.
- 1.9.4** The proposed amendment shall be approved by a double majority of 60%, with each state's vote being equal.
- 1.9.5** Notwithstanding the previous subsection, no amendment to part one (the compact) becomes binding on or in relation to a state whose citizens have not approved the amendment.

## **2 Rights of the state citizens**

### **2.1 Citizenship**

Each state citizen is also a citizen of the Confederation.

### **2.2 Democratic government**

Each state citizen has the right to:

- 2.2.1 vote on the state constitution and amendments thereto
- 2.2.2 propose constitutional amendments
- 2.2.3 qualify a proposed constitutional amendment by having it supported by a reasonable number of fellow state citizens

- 2.2.4 submit a qualified proposed constitutional amendment to the state citizens for decision

### **2.3 Freedom of movement**

Each citizen has the right to:

- 2.3.1 leave any state and bring with him property of any kind
- 2.3.2 transit through any state and bring with him property of any kind
- 2.3.3 withdraw from any state's territory any of his non-contested real estate that has been accepted by another state

### **2.4 Privileges and immunities**

- 2.4.1 The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.
- 2.4.2 Notwithstanding the previous subsection, the right of a naturalized citizen to settle in a state other than the one of which he is a citizen may be regulated by the states or by the Confederation.

### **2.5 Self-determination**

- 2.5.1 The right of self-determination is the citizens' right to erect a new state either within the boundaries of an existing state or by the amalgamation of two or more states or parts of states.
- 2.5.2 Any citizen qualified to vote may sponsor a draft proposal for the erection of a new state. The draft shall describe the boundaries of the proposed new state.
- 2.5.3 To qualify for the ballot, the draft proposal shall fulfill the requirements of a state constitutional initiative. The requirements shall be adjusted for consistency with their application to the proposed new state. Signature requirements shall be apportioned according to the number of resident confederate citizens.

- 2.5.4 The erection of a new state is decided by the confederate citizens resident within the boundaries of the proposed new state.
- 2.5.5 If erected the new state comes into existence as a member state of the Confederation.
- 2.5.6 A resident confederate citizen automatically becomes a state citizen unless he elects to retain his existing state citizenship.
- 2.5.7 All real estate within the proposed boundaries becomes part of the territory of the newly erected state, except that the owner of non-contested real estate may elect to retain his existing territorial affiliation.
- 2.5.8 Decisions relating to the amalgamation of two or more states follow the rules for constitutional amendments within each state.

### **3 Confederate powers and privileges**

#### **3.1 Sovereignty**

The Confederation is co-sovereign with the several states.

#### **3.2 The right of making proposals**

The Confederation has the right of proposing new state laws or state treaties of any kind or changes to each state's existing laws, treaties and constitution. If not approved by the state within 200 days, the Confederation may put the proposal to the direct vote of the citizens of the state for determination.

#### **3.3 Judicial powers**

- 3.3.1 Subject to the states' treaty powers and the constitutional tribunal, the Confederation has the right to resolve by legislation, treaty or by trial, all disputes between states, between a state and citizens of another state, between

citizens of different states and disputes involving foreign citizens or foreign states.

- 3.3.2 Subject to the constitutional tribunal, the Confederation has the right to try all disputes related to chapter 2 Rights of the state citizens.

### **3.4 Legislative powers**

- 3.4.1 Within the limits of this constitution, the Confederation has general legislative powers and treaty powers.
- 3.4.2 The Confederation may requisition funds from the states apportioned according to population. Such levy may be enforced by direct taxes on the citizens of non-complying states. The Confederation has no other rights of taxation.

### **3.5 The right to enforce and defend the constitution**

- 3.5.1 The Confederation may use any means necessary and proper to enforce and defend this constitution and the several states.
- 3.5.2 No state's military forces may leave the territory of the several states without the consent of the Confederation.

## **4 Definitions and general provisions**

### **4.1 Majority of votes cast**

All votes shall be determined by the majority of the votes cast unless expressly stated otherwise.

### **4.2 Double majorities**

A double majority or a qualified double majority has to fulfill two requirements: A) It must constitute a majority (qualified majority) of the votes cast by the citizens of the Confederation and B) it must constitute an equal majority (majority or qualified majority) of the state votes, where each state's vote equals the majority outcome of the direct vote among that state's citizens.

#### **4.3 Conflicting double majorities**

Conflicts between decisions that have been made at the same ballot by double majority, shall first be resolved according to the number of affirmative state votes. Conflicts between decisions receiving the same number of state votes shall be resolved according to the number of affirmative votes cast by the citizens of the Confederation.

#### **4.4 Non-contested real estate**

Non-contested real estate is either non-residential real estate or residential real estate where a majority of the residents concur with the owner's decision.

#### **4.5 Precedence**

**4.5.1** Part one (the compact) of this constitution takes precedence over part two (confederate institutions).

**4.5.2** The confederate institutions collectively hold, no more and no less, than the confederate powers and privileges granted in Part one (the compact).

#### **4.6 Ratification**

This constitution comes into effect between the ratifying states, when ratified by 5 states.

## Part Two (Confederate Institutions)

### 5 The President

#### 5.1 Executive power

The executive power of the Confederation shall be vested in the President.

#### 5.2 Prerogatives

The President has the power to:

- 5.2.1 direct the joint defense forces of the Confederation as commander in chief
- 5.2.2 appoint all officers, department heads, ambassadors, public ministers and judges with the consent of the Senate, unless delegated or otherwise provided for by law or herein.
  - 5.2.2.1 If the Senate fails to confirm the President's nominee within 15 days, he shall be deemed to have been rejected.
 

If the Senate successively rejects 3 presidential nominees, the nominee with the highest number of affirmative votes shall be appointed, provided that the President may decide if the votes are equal.
  - 5.2.2,3 During the recess of the Senate, the President may make temporary appointments to expire no later than 60 days after the start of the Senate's next session
- 5.2.3 grant reprieves and pardons for offenses against the Confederation excepting removal from office in case of impeachment
- 5.2.4 make treaties with the consent of Congress
- 5.2.5 make proposals to the legislatures or appropriate authorities of the individual states with the consent of either the Senate or the House of Representatives.

- 5.2.6** make proposals directly to the citizens of the individual states with the consent of Congress.
- 5.2.7** make proposals to the Congress of any kind.
- 5.2.8** veto, in part or in whole, any bill, order, resolution or vote of Congress within 30 days of its passage. No law enacted by Congress may come into effect without the express approval of the President or a majority in each house sufficient to override his veto.
- 5.2.9** reduce or eliminate appropriations at any time prior to or during the fiscal year if necessary to balance the confederate budget or keep the deficit within approved limits.

### **5.3 Term and election**

The President shall be elected directly by the citizens of the Confederation for a term of five years. If no person has a majority, the President shall be elected by a second ballot among the two candidates with the highest number of votes in the first ballot.

### **5.4 Candidates**

- 5.4.1** Presidential candidates are nominated by the citizens of the Confederation by a petition signed by 5 percent of the number of citizens required for the initiative, or by such lower number determined by law. No more than half the number of petitioners for each candidate may be citizens of the same state.
- 5.4.2** Each presidential candidate chooses a candidate for Vice President to be elected together with the presidential candidate for the same term. The presidential candidate and his chosen vice presidential candidate may not be citizens of the same state.

### **5.5 Removal**

- 5.5.1** The President is removable by impeachment

- 5.5.2** In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the Vice President shall become President or acting President, and the Congress or the People may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President until the disability be removed, or a President shall be elected.

## **6 The Congress**

### **6.1 Legislative powers**

The legislative powers of the Confederation shall be vested in the People. The People have granted Congress, consisting of a Senate and a House of Representatives, limited concurrent powers as enumerated.

### **6.2 The powers of Congress**

**6.2.1** Each house of Congress has the power to:

- 6.2.1.1** elect its own officers.
- 6.2.1.2** regulate its own proceedings unless established by law or herein, including the dates of assembly and adjournment. If there is disagreement regarding assembly and adjournment between the two houses, the issue is settled by the President.
- 6.2.1.3** impeach. Impeachments shall be tried by the Supreme Court unless a judge of the Supreme Court shall be tried, in which case he shall be tried by a tribunal selected at random from among the justices of the supreme courts of the states.
- 6.2.2** Congress has the power to:
  - 6.2.2.1** lay direct taxes on the citizens of states not complying with ordinary or emergency requisitions.
  - 6.2.2.2** appropriate funds.

- 6.2.2.3 enact statutes of any kind except as otherwise provided for herein.
- 6.2.2.4 constitute tribunals inferior to the Supreme Court and regulate the Supreme Court and the inferior courts
- 6.2.2.5 declare war
- 6.2.2.6 admit new states into the Confederation
- 6.2.3 Congress, by a two thirds majority of each house, has the power to:
  - 6.2.3.1 requisition emergency funds from the states apportioned according to population.
  - 6.2.3.2 borrow money on the credit of the Confederation.
  - 6.2.3.3 approve budget deficits.
  - 6.2.3.4 override suspension caused by a proposed Referendum.
  - 6.2.3.5 propose amendments to part two of this constitution.
- 6.2.4 Congress has the power to override the President's veto by a supermajority of each house. Such supermajority shall consist of a two thirds majority for issues ordinarily requiring a majority, and a five sixths majority for issues ordinarily requiring a two thirds majority of each house.

### 6.3 The Senate

- 6.3.1 The Senate shall consist of 2 senators from each state.
  - 6.3.1.1 If there are more than 25 states but less than 50 states, the Senate shall consist of 2 senators from each of the more populous states and 1 senator from each of the less populous states, for a total number of 50 senators.
  - 6.3.1.2 If there are more than 50 states, the Senate shall consist of 1 senator from each of the 50 most populous states.
- 6.3.2 Senators shall be elected by the citizens for a term not exceeding 6 years in a manner regulated by Congress until each state passes appropriate legislation.

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### 6.4 The House of Representatives

- 6.4.1 Each state's number of representatives shall be that state's fraction of the total population of the Confederation multiplied by 250 and rounded to the nearest integer.
- 6.4.2 Representatives shall be elected by the citizens for a term not exceeding 4 years in a manner regulated by Congress until each state passes appropriate legislation.

## 7 The Supreme Court

### 7.1 Judicial powers

The judicial power of the Confederation shall be vested in one Supreme Court and in inferior courts established by law. The judicial power shall extend to all cases, in law and in equity, arising under the judicial powers of the Confederation. The judges of both the supreme and inferior courts, shall hold their offices during good behavior. They shall receive for their services a compensation, which shall not be diminished during their continuance in office.

### 7.2 Judicial review

The Supreme Court and the inferior courts shall each have the power of judicial review.

### 7.3 Original jurisdiction and right of appeal

- 7.3.1 Congress or the People may, by law, decide in which cases the Supreme Court shall have original jurisdiction, regulate the right of appeal and the number of Supreme Court justices, provided that such regulations must be consistent with this Constitution and may not come into effect until a new President shall have taken office.
- 7.3.2 The Supreme Court has the right to propose alterations to laws regulating the Supreme Court or the inferior courts.

## **8 The People**

### **8.1 Requisitioning**

The annual per capita charge on the states is to be set at least every 5 years directly by the citizens by Dutch auction. A valid charge shall have received approval by a double majority.

### **8.2 The Initiative**

**8.2.1** The Initiative is the people's power to propose and enact legislation of any kind except constitutional amendments.

**8.2.2** Any citizen qualified to vote may sponsor a draft initiative. Such draft shall contain the entire text of the initiative.

**8.2.3** If the draft initiative is supported by the requisite number of voters, it becomes qualified to be put on the ballot at the next confederate election day, provided that the Confederation always has 100 days to make practical arrangements and verify the number of supporting voters. Statistical methods may be used for verification.

**8.2.4** Until the citizens decide otherwise, no time limit may be put on the qualification of draft initiatives.

**8.2.5** A qualified initiative is enacted by a double majority.

**8.2.6** Legislation enacted by the initiative may not be vetoed by the President, nor may it be amended by Congress within 5 years of its enactment.

### **8.3 The Referendum**

**8.3.1** The Referendum is the people's power to approve or reject, in part or in whole, any act, bill, order, resolution or vote of Congress or either house of Congress.

**8.3.2** Any citizen qualified to vote may sponsor a draft referendum. Such draft shall specify the act or part thereof proposed to be referred to the people. It shall contain the entire text to be voted upon.

- 8.3.3** If the draft referendum is supported by the requisite number of voters, it becomes qualified to be put on the ballot at the next confederate election day, provided that the Confederation always has 100 days to make practical arrangements and verify the number of supporting voters. Statistical methods may be used for verification.
- 8.3.4** A draft referendum must qualify within 6 months of the referred legislation's enactment in Congress.
- 8.3.5** Until decided by the citizens, legislation, or parts thereof, covered by a qualified referendum is suspended, unless Congress by a two thirds' majority of each house overrides the suspension.
- 8.3.6** Legislation covered by a qualified referendum is approved by a double majority. Legislation not approved is rejected.
- 8.3.7** Rejected legislation may not be reenacted by Congress within 5 years of its rejection.

#### **8.4 The Recall**

- 8.4.1** The Recall is the people's power to end the term of any elected public official and thereby force a new election.
- 8.4.2** Any citizen qualified to vote may sponsor a draft recall. Such draft shall name the official to be recalled.
- 8.4.3** If the draft recall is supported by the requisite number of voters, a new election shall take place within 100 days. Statistical methods may be used for verification of the number of supporting voters.
- 8.4.4** A draft recall petition must qualify within 6 months of the end of term of the named official.
- 8.4.5** Any candidate of the previous election automatically becomes a candidate if he or she so desires.

#### **8.5 Qualifying initiatives, referendums and recalls**

- 8.5.1** The number of voters required to qualify a draft initiative, referendum or recall shall be set directly by the citizens at least every 10 years by Dutch auction.

- 8.5.2 The number shall be determined separately for the initiative, the referendum and the recall. The number for the recall shall apply to the President, and unless superseded by the states, 150 % of such qualification apportioned according to the population of the electoral district shall also apply to senators, representatives and other elected officials.
- 8.5.3 The initial qualification shall be set by law.

### **8.6 The Constitutional Initiative**

- 8.6.1 The Constitutional Initiative is the people's power to propose and enact amendments to this constitution's part two. Constitutional initiatives follow the regulations for initiatives as far as applicable and with the following exceptions:
- 8.6.2 The number of voters required to qualify a draft constitutional initiative shall equal 120 % of the qualifying number for an initiative.
- 8.6.3 A constitutional initiative is enacted by a double majority of 55%.

### **8.7 Confederate and state initiated direct legislation**

- 8.7.1 Direct legislation including amendments to this constitution's part two (confederate institutions), may also be proposed either by A) confederate statute, or B) by one fifth of the states, or C) by states that together have one fifth of the total number of senators, or D) by states that together have one fifth of the total population of the Confederation.
- 8.7.2 As far as applicable, confederate and state initiated direct legislation follows the regulations for the corresponding direct legislation initiated directly by the citizens.

## **9 Bill of Rights**

### **9.1 Applicability**

Chapter 9 Bill of Rights and Chapter 10 General provisions of part two are binding on all confederate institutions at all times, and are otherwise binding within the powers of the Confederation as defined in Chapter 3 of this Constitution.

### **9.2 Non-discrimination**

The rights of the citizens cannot be denied or abridged on account of nationality or ethnic origin, political or religious beliefs, race, color or sex.

### **9.3 Voting age**

The right of a citizen, being eighteen years of age, to vote or be elected to an office cannot be denied or abridged.

### **9.4 Ex post facto law**

No bill of attainder or ex post facto law shall be passed.

### **9.5 Religious freedom**

No official religion may be established, nor may peaceful religious activities be restricted.

### **9.6 Freedom of speech**

**9.6.1** The freedom of A) speech and expression, and B) the press and other media may not be restricted.

**9.6.2** Nor may the ownership of media or the transfer of electromagnetic frequency rights or other access rights or technical means of media production and distribution be restricted.

### **9.7 Right of assembly and association**

The right of the people to peaceably assemble or associate or not to assemble or associate cannot be denied or abridged.

## **9.8 Habeas corpus**

The writ of habeas corpus shall not be suspended.

## **9.9 Privacy, searches, seizures and interceptions**

- 9.9.1** Everyone has the right of peaceful privacy, which includes the freedom from unreasonable searches, seizures and interceptions of his person, papers, information stored or given in confidence, home, property, communications and effects of any kind, whether by government or by private parties, and independent of where the search, interception or seizure takes place.
- 9.9.2** No warrants shall issue, but according to law, upon probable cause and particularly describing the place to be searched or items to be intercepted or seized and the mode of interception and seizure.
- 9.9.3** Each year statistics on the number of warrants issued, and the number of searches resulting in the interception or seizure of item or items described by the warrant shall be published.
- 9.9.4** Compensation is payable to those affected by unsuccessful or unlawful searches, seizures and interceptions according to the inconveniences endured.

## **9.10 Due process**

- 9.10.1** No person shall twice be put in jeopardy of life or limb for the same offense, nor be deprived of life, liberty, or property without due process of law.
- 9.10.2** Anyone deprived of life, liberty or property without later conviction or convicted, but later found innocent, shall have just compensation.

### **9.11 Criminal prosecutions**

9.11.1 In all criminal prosecutions, the accused shall:

- 9.11.1.1 be presumed innocent until proven guilty
- 9.11.1.2 be entitled to a speedy and public trial by an impartial court
- 9.11.1.3 be informed of the nature and cause of the accusation
- 9.11.1.4 have access to all information presented to the court
- 9.11.1.5 have compulsory process for obtaining witnesses in his favor
- 9.11.1.6 have the assistance of counsel for his defense
- 9.11.1.7 be entitled not to incriminate himself
- 9.11.1.8 have the right of appeal

9.11.2 The accused shall be informed of applicable rights prior to questioning.

9.11.3 Illegally obtained evidence is inadmissible.

9.11.4 On the accused's application, the court may limit media coverage prior to conviction.

### **9.12 Jury**

The trial of all crimes shall be by jury, with such exceptions as may be determined by law for the Supreme Court.

### **9.13 Excessive bail**

Excessive bail shall not be required, nor excessive fines or damages imposed, nor cruel and unusual punishments inflicted.

### **9.14 Taking of property**

9.14.1 Private property, including rights established by contract and intangible property, shall not be taken, regulated or encumbered for public use without full compensation.

9.14.2 The previous subsection does not prevent regulations whose sole purpose is A) the return of monopoly profits to the customers from whom the profits were derived or B) to prevent the accumulation of monopoly profits by enhancing competition.

### **9.15 Speedy decisions**

Whenever an action by a confederate or state institution, court, agency or officer is required for deciding an issue, whether it be a permit of any kind, a case to be tried, a sentence to be served or any other matter, if the action has not been forthcoming within 6 months of the time such action was desired or required or such shorter time as is reasonable or such longer time as is reasonable and established by law, the permit shall be deemed to have been issued, the case shall be deemed to have been lost by the Confederation or state, the sentence shall be deemed to have been served and correspondingly for any other matter.

### **9.16 Equal protection**

- 9.16.1** The Confederation and its officers may sue and be sued and shall enjoy no privileges or immunities not accorded other citizens.
- 9.16.2** All citizens are equal before the law and have the equal protection of the laws.

### **9.17 Monopolies**

- 9.17.1** The Confederation may not erect or protect monopolies or the acquisition of monopoly profits.
- 9.17.2** The previous subsection does not prevent the establishment of intellectual property rights.

### **9.18 Rights retained by the people**

The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

## **10 General provisions of part two**

### **10.1 Election day**

Congress shall designate at least one day every year as confederate election day, and elections and direct votes of the citizens provided for by this constitution shall take place on such day or days.

### **10.2 Limit on other office of profit**

The President, the senators, the representatives or delegates to the constitutional convention may hold no other office of profit under the Confederation.

### **10.3 Compensation of elected officers**

Each elected officer shall receive a compensation for his services, which shall neither be increased nor diminished during his term in office.

### **10.4 Sunset clause**

Legislation of any kind except this Constitution, shall expire no later than 35 years after enactment.

### **10.5 Sunrise clause**

So as not to interfere with the Referendum, legislation may not come into force within 6 months of enactment unless expressly authorized by law.

### **10.6 Confederate budget**

**10.6.1** Each yearly confederate budget shall contain provisions for contingent liabilities and obligations payable in the future.

**10.6.2** Deficits and surpluses shall be carried forward to the next budget.

### **10.7 Constitutional convention**

**10.7.1** At least every 25 years, each state shall appoint 2 delegates for every senator to a constitutional convention charged with

proposing the renumbering (reordering) of the individual clauses of the constitution by putting them in a logical sequence.

10.7.2 Reordering does not extend to changing the wording of the individual clauses beyond their numerical designation, or changing their interpretation.

**10.7.3** After having been approved by a majority of the states, the renumbering shall be submitted to the citizens for approval as one amendment and be approved according to the ordinary rules for amending the constitution.

**10.7.4** The convention may also propose to the states the repeal, amendment, clarification or amalgamation of outdated sections, or the insertion of new sections, but each change according to this subsection shall be proposed as a separate amendment.

## **10.8 Prior law**

Directives and prior legislation by the European Community shall have the force of confederate law.

## **10.9 First election**

The election of the first President and the first Congress shall be organized by the states according to such rules as the states jointly decide.

## IV APPENDICES, REFERENCES AND INDEX

# 1 Appendices

## 1.1 Additional comments on the President's veto powers

### **Preserving executive independence**

#### ***Two functions of veto power.***

The veto power has two functions, A) preserving the executive as a power separate from the legislature, and B) providing the citizens with a defense against pressure groups in the legislature. This second function, effectively sets the President up as the third house of the legislature.

The veto power is indispensable when it comes to preserving the President's independence. Since time immemorial the legislatures of the world have tried to put themselves in the place of the executive. There is not necessarily anything sinister in this. On the contrary, this was how modern democracy came into existence. Even today, these encroachments come about mostly as a natural function of legislators interest in politics and their attempts to guide society in the most advantageous direction. It is a bias built into the system. It cannot be prevented, but only alleviated through other, if possible equally strong, counteracting forces.

The veto power also gives the President the means by which he may defend himself and his office from being reduced to a pawn of the legislature. Since it is in his own self-interest to do so, he can also be relied on to exercise this power.

*The value of flexibility.*

The veto power introduced into the U.S. presidency was limited in comparison to the British monarch's veto which was the reference known to the founders. Instead of having an absolute veto, like the king of Great Britain, the President was given a limited veto that could be overturned by a two thirds' vote in each house of Congress. The framers of the American Constitution believed that a limited veto would be put to more active use than an absolute veto. They also hoped that a more active use would in reality render it more effective. By comparing subsequent political developments in Britain and the U.S., we can see that this belief in a limited veto was justified. The King's veto has in reality disappeared, while the American veto is retained.

**A digression on the value of flexibility in a European context**

The lesson taught us by the history of the veto power is also applicable to the current state of affairs in the European Community, and ought to be a cause for concern.

Today, if a decision of the community is perceived to be contrary to the vital national interests of a member state, that country may veto the decision. In effect, each member government has an absolute veto on Community decisions. However, since this veto is absolute, and since it is binding on all members, its function is very much like that of the traditional veto powers of the British sovereign.

Is it going to go the way of the British royal veto? Yes, this is the most likely outcome. It is fairly obvious that there is an increasing reluctance by member countries to exercise their veto powers. The veto power itself is increasingly perceived only as a bargaining tool. This is the first step. Over time, the bargaining tool loses its efficacy as the implied threat becomes less and less credible. (This is already taking place.) Finally the power itself loses its practical value as the institution rendering the veto is overwhelmed (by Parliament in the case of the British King, by the European Commission in the case of the national member countries of the European Community).

The European community veto power can only be sustained, on two conditions:

- A) It has to be flexible, i.e. line item rather than whole bills, extending only to the member in question and thus not preventing the rest of the community from introducing the legislation, and

B) As far as possible or eventually it has to be wielded by a group that is resistant to bargaining and legislative coalitions, i.e. the people itself.

*Introducing flexibility in presidential vetoes.*

Returning to the confederate President; Experience has shown that even more flexibility is needed. By bundling together ever more issues in one bill, Congress has made it harder and harder for the U.S. President to exercise his veto powers effectively. He cannot distinguish between the parts he likes and the parts that he doesn't like. He has to approve or disapprove the bill in its totality. What makes it even harder, is that Congress has tended to insert especially objectionable parts into bills (continuing resolutions and debt ceiling legislation) that the President cannot veto unless he wants the government to grind to a complete stop. For natural reasons, the President is reluctant to force the issue by shutting down government, and so there has been a steady erosion in executive power, in the same way, but at a slower pace, than in Britain. If a confederate President is to preserve his independence, he has to be given more flexible powers than the U.S. President.

*Line item veto.*

One option already conferred on many American governors, is the line item veto. This is the ability to veto one or more lines or parts of a bill. The line item veto enables the President to defend himself against the bundling of issues, and effectively restores to him the veto power lost through such tactics. In continuing resolution bills, he can veto the objectionable parts without stopping government.

*Constitutional sunset clause.*

The veto power is also strengthened by giving new Presidents the opportunity of correcting the mistakes or compromises of previous Presidents. (See Chapter IX. Section 9.5. Sunset clause.)

Even with a line item veto, no President will veto all items en-

crouching on presidential powers. Most Presidents have their own political program, and will be willing to make sacrifices to ensure the goodwill of the legislature, or even to make an outright compromise with the legislature to ensure the passage of appropriate legislation. During the term of a single President, this is not a problem. But over time, it means that legislation is a one way street. It accumulates and steadily erodes the powers of the executive at the expense of the legislature. If allowed to accumulate indefinitely, the executive is eventually reduced to a pawn.

### **The veto as a defense against pressure groups**

#### *The legislature as a collection of special interests.*

The other reason, and perhaps the most important reason for granting the President veto powers is to provide the citizens with a defense against special interests. Since the President is elected by the whole population, he is much more vulnerable to charges of favoritism than individual representatives and senators. In fact, representatives and senators, are often expected to work in favor of special interests. They are all elected from geographical districts, and they are expected to defend the interests of those districts in the legislature. Theirs is the interests of the special interests.

The President, on the other hand, cannot get elected or reelected if he consistently favors one region or one special interest. By the way he is chosen, he has to be more aware of the interests of the whole rather than the parts. Although imperfect, the President on a day to day basis, is expected to do to the smaller issues, what the people can do to the larger issues through the instruments of Initiative and Referendum. He is the representative of the whole people and not its constituent parts.

*Special interests and appropriations.*

Besides strengthened veto powers, the author also proposes strengthened powers to deal with increasing budgetary deficits. This is a special problem, not separate from those of legislation generally, but sufficiently serious and obvious to warrant special attention. Several sections and subsections deal with this issue.

Most obviously; there has to be a yearly confederate budget, it has to be honest, and it has to be balanced.

The Confederation may only run a deficit if it is approved by a two-thirds majority of both houses of Congress. This last condition gives a way out for those special circumstances when a deficit may be appropriate, but it makes the decision subject to a Presidential veto that can only be overridden by a five sixths majority.

Secondly, the President is given the power to enforce the balanced budget requirement through reducing or eliminating appropriations. This is a less crude method than the line item veto. By the reasoning above, this ought to make it more effective. It has the added advantage that it can be employed as events unfold during the fiscal year. If the budget has underestimated outlays, the President may reduce or eliminate non-essential appropriations.

Congress may reinstate appropriations if they are compensated for by reductions elsewhere, or reinstated by a two thirds majority (subject to the President's five sixths majority veto power).

**Reconciling the case for a unitary independent executive with the Swiss experience**

This book advocates the case of a unitary independent executive, a powerful elected President. How then, it might be asked, explain the success of a plural executive like the one found in Switzerland? The planation is simple enough. The success of the Swiss system

probably does not rest with its plural executive, but with its system of referendums and initiatives. If we look to other countries or organizations, Yugoslavia for instance, or the European Community or the UN Security Council, we see how useless plural executives become in times of crisis.

Switzerland of course, has not had a crisis of similar nature since its introduction of the consensus executive. Also, it was only after the introduction of the referendum and the initiative that the current Swiss **nonconfrontational** system of involving all major parties in the executive evolved.

In fact the development of the plural executive in Switzerland, points to another negative aspect of this system beyond its inability for effective action in times of crisis.

Around the turn of the century, Switzerland, in the eyes of the parliamentary majority, became almost ungovernable. Every time a politically controversial proposal was put to the parliament, the opposition would start a petition drive and have the issue referred to the voters. The solution to this problem turned out to be to include the opposition in the executive. It was hoped, and this has turned out to be true, that by giving the opposition a stake in government, they would "keep quiet".

The problem with this system is that it limits the choices of the voters. In today's Switzerland the opposition's teeth has been pulled so effectively that they no longer, in many circumstances, act as an effective opposition. Thus there is even in this country, a tendency of a division between "them" (the federal politicians) and "us" (the rest of the population). Typically enough, in recent years there have been a surge in initiatives and referendums, but this time not sponsored by the minority parties in government, but by outside groups and single action committees. The real opposition has thus been transferred, as in so many other countries, from groups within

the Parliament, to groups somewhat opposed to and outside the normal political process.

It is a tribute to the strength of the initiative and referendum processes that in spite of these developments, Switzerland still has the most responsive government in Europe. But it ought not be a goal in itself to provide our political agents, the politicians, the means by which they will be able to insulate themselves, if only to a limited extent, from the opinions of the public. A unitary independent executive will be able to preserve the diversity of opinions within the central government. This process expands the political choice of the citizens.

## **1.2 Additional comments on election methods**

### **Contemporary methods of election**

The proposed constitution also encourages innovation in election methods. This appendix describes some alternatives suited to different circumstances. (The listing is adapted from Kendall, Frances: *Let the People Govern* page 150-)

#### *Plurality Voting.*

This system, popularly known as "first past the post" or "winner takes all" is used in the UK, Canada and other countries with a British tradition. Whoever receives the most votes (but not necessarily more than half) in each constituency wins the election and is represented in Parliament or Congress. Plurality voting may be subdivided into two categories depending on whether you have: A) ~~A~~single representative constituency (e.g. U.K. and House of Representatives in the U.S.), in which case, the voting often boils down to selecting a person rather than a party; or B) Multiple representative constituencies, where party voting is more predominant.

Plurality voting in general, and especially plurality voting in multiple representative constituencies is declining in popularity. Two hold-outs of the latter category may be the electoral college for the election of the U.S. President<sup>1</sup> and the election of "senators" in

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<sup>1</sup> The U.S. President is formally elected by an electoral college consisting of representatives from each state. However, as all such representatives in modern times have met with a fixed mandate to vote for a particular presidential candidate, this is more form than substance. By electing the representatives to the electoral college the voters have in reality also decided who is

Switzerland.

*Majority voting*

Majority voting is similar to plurality voting, except that the winning candidate(s) must receive more than 50% of the votes. If none of the candidates receive a majority in the first ballot, there is a second ballot and sometimes a third depending on how many candidates get eliminated in each round. Sometimes another voting method is used in the second and subsequent ballots.

Majority voting is used in the first round in for instance, Australia and France.

*Single Transferable Vote.*

As a candidate receives enough votes for his election, all remaining votes in his favor are transferred to other candidates, listed by the elector in order of preference. This method may be combined with proportional representation.

*Proportional Representation.*

Parties get representation in the legislature depending on their proportion of the total vote. There are several complex methods for calculating the actual proportions and dealing with the inevitable rounding. This is currently the most popular system world-wide.

It has the serious drawback that it leaves in the hands of party organizations much power that ought to rest in the hands of the

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going to be the next president.

<sup>2</sup> Members of the federal "Council of States" in Switzerland are elected according to the plurality method with the exception of Jura that uses proportional voting. (Junker, Beat p. 109)

voters. In many countries the parties alone draw up the list of candidates that may not be amended by the voter. To a very large extent, the parties then actually decide who is going to sit in Parliament. In other cases, the voter has limited choice within each party.

Switzerland and Luxembourg have free lists, which means that though each party lists its candidates in order of preference, each voter may change the order, include candidates from other lists or cast two votes for the same candidate.

### **Alternate methods**

The following election methods have not yet been implemented, but may prove attractive in the future or merit further discussion and testing. The proposed constitution is flexible enough to accommodate small scale testing in individual states if wanted by the people.

### ***Continuous voting.***

Continuous elections may take place with either of the voting methods described above. It is most powerful however, when combined with plurality voting in single representative constituencies. In this case it equals a continuous recall provision.

Continuous elections, or rather a continuous recall provision have been proposed previously by the Danish philosopher Johannes Hohlenberg in "Kampen mot Staten", Copenhagen 1947. What makes this a more realistic alternative today is the coming of adequate technology.

Continuous elections may for instance, be organized through a system of automatic voting machines similar in principle to an automatic teller machine. Instead of depositing or withdrawing money from a bank account, each voter would be depositing or withdrawing his vote from a particular party or candidate. Obviously, checks would have to be built into the system to ensure that each

voter didn't withdraw or deposit more than one vote. But this in principle, is no different from, or more difficult to achieve than the bank making sure that you don't withdraw money you don't have.

The cost would be minimal, on the order of a bank transaction, and the machines themselves may in fact be combined with commercial atm's (automatic teller machines).

Probably a continuous election system ought to be combined with a popular initiative and perhaps some moving averaging for stability. The popular initiative would give the voter a chance to disagree with his representative without turning him out of office. The moving average would give the representative protection against being turned out of office on a short term flare of discontent.

The major benefit of the described system is improved and continuous accountability. It might also lead to less emphasis on campaigning and more emphasis on actual results. It is not clear however, whether candidates on the average would sit longer or shorter in office. On the one hand, the lack of a definite election might make it harder for new candidates to launch themselves and get the requisite attention. On the other hand, the old hands would be vulnerable if somehow they ceased doing a good job.

This idea has ramifications beyond what can be given here. Representative democracy would again become truly representative. If a voter changed his mind as to a particular candidate's fitness, he would withdraw his vote and give it to someone else. If enough voters agreed, the representative would be out of office. Any official

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<sup>3</sup> A moving average is an average that is measured over time. For instance, each candidate's "vote" at any time may be measured as the average of the actual vote over the last three months.

enjoying widespread respect could sit as long as he pleased. On the other hand, candidates with fresh ideas, wouldn't have to sit and wait for the next election.

***Representatives as agents.***

Alternately representatives may be given voting power in Congress according to the number of votes received. Thus a candidate with widespread support would have more voting power than a candidate who barely made it to the legislature. (Adapted from Johannes Hohlenberg: Kampen mot Staten.)

This concept may be used together with plurality or majority voting to put some proportionality into the system without sacrificing the advantages of individual accountability in single representative constituencies.

It might also be combined with continuous elections to provide a representative that is the true (personal) agent of each of his Individual electors.

Since this idea requires changes to how votes are counted in Congress, it cannot be decided at the state level (as different election modes might), but must be decided for the House of Representatives as a whole.

### **1.3 Additional comments on constitutional amendments**

#### **Amending procedures**

There are essentially three ways of amending constitutions:

- **Formal amendment**
- **Judicial interpretation, and**
- **Changing usages and conventions**

Both judicial interpretation and to a lesser extent, changing usages and conventions are most important in those countries where the constitution can be changed only with great difficulty. The typical case of amending the constitution by judicial interpretation can be found in the U.S.

The advantages of using formal amendments consist of:

- **Public debate and deliberation**
- **Accessibility to the public, respect for the law**
- **Popular approval and legitimacy**

#### **Disadvantages of informal processes**

These three points also underscore the drawbacks of the more informal or indirect processes. If the constitution is changed by judicial interpretation, frequently there is little, if any public debate in advance and often not even in retrospect. However, the lack of debate in advance is the more serious aspect. If there is no debate in advance, how can one be reasonably sure that all the relevant<sup>1</sup> implications have been covered. The short answer is: one is not, and they are not. Similarly, and this applies to both changing usages and judicial interpretation, how can one be sure that the people approve of the changes.

**Popular approval and legitimacy**

The weight of this argument admittedly turns on whether one believes popular approval is essential or desirable. But its implication goes further. If the fundamental legal document of a country does not have the support of the people, how can respect for the lesser laws be maintained over time. It is claimed that this respect cannot be maintained, and so the legitimacy of the government itself is undermined.

**Respect for the law and accessibility**

Respect for the law also hinges on whether the law is actually accessible to the public. The easiest method of making law accessible is obviously by writing it down. Conversely, if there is a discrepancy between what the statute says and the way the law is interpreted, this is likely to cause confusion and suspicion among the public. The law loses its legitimacy, becoming the domain of specialists, lawyers and politicians. Perceptions are here very much reality, if the public feels that the constitution cannot be easily understood, but rather is built on sophistry and cleverness, this will over time contaminate their attitudes toward the rest of the legal system as well.

Most of the time, judicial interpretation and changing usages come about because either the issues cannot be referred to the people for decision or the constitution can only be changed with great difficulty. Thus the informal amending procedures become a substitute for formal amendment.

The way out of this dilemma is by simplifying the formal amendment of the constitution, and by broadening the number of parties making propositions.

**Constitutional vigor, legitimacy and the Swiss experience**

According to the assumptions above, the vigor and legitimacy of a constitution can be more or less directly related to the pace of constitutional change. The most effective method of preserving

written constitutions as a living document is then beyond doubt the institution of a constitutional voters' initiative. In the first 50 years of the Swiss constitution of 1848, the Swiss Parliament passed only eleven amendments. The introduction of the initiative in 1891, however, marked the beginning of a new era. In its second half century, the Swiss constitution was amended thirty-seven times. The effects of the initiative are however, mostly indirect. The initiative makes the government more accountable and improves the quality of amendments proposed by the legislature to the point where they are actually accepted by the people.

### **Australian experience**

In Australia, only 8 amendments have been approved since 1900 when the constitution came into existence (30 have been rejected). The mode of approval in Australia and Switzerland is similar. The difference consists in the Australian federal Parliament having the sole power over proposing amendments. Predictably, proposals in Australia have mostly consisted of increasing central government power. Because of lesser accountability the proposals have been self-serving for the federal government, rather than in the legitimate interests of the people itself. One almost gets the impression that the federal government has been attempting to con the people into approving amendments that was not in their interest. The Australian Commission of 1988 extends this tradition of popular mistrust and again shows an attachment to the political elite and a further extension of federal powers.

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# Main features of proposed constitutional model

**Devolved sovereignty:** The model consists of a concrete proposal for a modernized and reformed confederation built on local popular sovereignty and voluntary co-operation. Through the novel concept of devolved sovereignty it alleviates the possible conflict between democracy and majority rule on the one hand, and individual liberty and minority rights on the other hand.

**Checks and balances:** The proposed system of checks and balances facilitates the peaceful resolution of conflicts and deposits ultimate authority in the people in its individual, group and collective capacities.

**Flexibility:** The proposed model can accommodate a confederation of any size and with any number of member states. It provides a level of flexibility which might be especially useful in a European context.

**Sovereignty:** Each member state is sovereign and retains all powers not expressly delegated. Each member state may also withdraw powers previously delegated to confederate authorities.

**Voluntary co-operation:** Member states may opt out of confederate decisions. The constitutional model supports a multi-track Europe.

**Secession:** Member states may secede from the confederation. Member states are free to participate in non-confederate organizations. Non-confederate organizations may be integrated with the confederate structure over time.

**Local power:** The constitution allows any level of political or economic integration, but ensures that the pace of integration is determined, not by central government, but directly by the citizens of each member state.

**Democracy:** The citizens participate through direct democratic elections both at the state level and at the confederate level. The citizens have the right to approve and/or initiate legislation at both levels of government. Amendments to the confederate constitution must be approved by the people.

**Confederate institutions:** A bicameral legislature with a lower house elected by the people and an upper house representing the member states. A president elected directly by the people. An independent supreme court, and a constitutional tribunal to resolve conflicts between the confederation and the states. Limited central taxing powers. Procedural rights intended to safeguard democracy and individual liberty.

**Main objectives:** To create democratic institutions with the limited powers necessary for the resolution of conflicts between member countries and for carrying out any other tasks delegated to them by the people or the states. Prevent the accumulation and centralization of power over time.

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