

# The Unanimity Trap

BY GEORGE ANDERSON

**A**RGININA HAS A FEDERAL FISCAL regime that few will defend but no one sees how to change. It has no underlying principle regarding fiscal capacity, or need, or derivation, but is essentially the opaque product of past deals. Its main defenders are some provinces that are “winners.” Unfortunately, in 1994 this fiscal “co-participation” agreement was entrenched in the constitution so that all twenty-seven provinces as well as the federal Congress and President would need to agree to any change.

Unanimity is the most rigid of all decision-making rules. In fact, the founding of the first modern federation in 1789 emerged from the unhappy experience of the American states with confederal arrangements that required unanimity for any collective action.

Federalism was meant to break away from this by creating two orders of government, each normally able to make decisions in its own area of jurisdiction.

Joint decision-making between the orders of government is very much the exception in federal constitutions. The biggest exception is constitutional-amending formulas, where there are often rules requiring some measure of consent from both orders of government for certain amendments. But even here, unanimity is rare. Since 1981, the Canadian constitution requires unanimity for changes to the monarchy, the Supreme Court or the amending formula itself. However, one day such a formula could lead to a real crisis of legitimacy should one small province exercise a veto.

Federations can slip into a requirement for unanimity in ways that constitutional drafters never envisaged. In Argentina, it arose initially as the price the federal government paid for taking over various provincial taxing authorities. Something analogous has arisen in Brazil, where efforts at fiscal reform must come to terms with a unanimity rule regarding changes to the states' value added tax regime.

In both cases, the unanimity rule was rooted in an agreement by the two orders of government to cooperate in using their respective authorities. Could it have been avoided? There are various alternatives.

One alternative is weighted voting. The European Community (EC) long used unanimity for its decision-making. At its worst, this led to paralysis during former French President Charles de Gaulle's “policy of the empty chair.” As the EC added members and deepened its functions, it eventually moved to weighted majority voting, except in exceptional circumstances. It has served them well, though some would like to see further evolution in a “federal” direction.


Within federal constitutions, weighted majority voting is uniquely found in Germany, where the *Länder* governments form the *Bundesrat*, Germany's upper chamber, and vote on laws affecting them. Even this frequently led to blockage, known as the “joint decision trap.” The recent constitutional reforms have thus reduced the number of laws requiring *Länder* approval. Australia's two orders of government have delegated powers to a competition commission whose members are elected by the states (one vote each) and commonwealth government (three votes). But even Australia has fallen into the “unanimity trap” with its goods and services tax.

Under Canada's social union accord the federal government will not introduce new social transfer programs in areas of provincial competence without a majority of provinces agreeing. However, provinces that disagree are given a right to equivalent transfers so long as they introduce new programs that achieve the same objectives.

The reality is that in modern federations the two orders of government



frequently bump up against one another so that they try to work out integrated arrangements. In practice many federal governments address this by effectively imposing their will on subnational governments – legally or through fiscal levers. Such unilateral federalism is probably more functional than excessive dependence on unanimity,

but many federations would do well to explore alternatives to these extremes. 

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