**THE ARTICLES OF CONFEDERATION AND THE CONSTITUTION**

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Just as it took time and painful political experimentation for the colonists to break with Great Britain and embrace independence, so, too, it took time for Americans to think of themselves as (in Alexander Hamilton's words in The Federalist No. 85) "a nation without a national government" -- something he decried as "an awful spectacle" -- and take steps to remedy that defect. Again, as with independence, there were no guarantees undergirding this process of national development; the outcomes were neither assured nor foreordained. Rather, the Americans had to do some heavy political lifting to prepare the political ground for reform of their government, and some heavy intellectual and theoretical lifting as well to devise the mechanisms and institutions that they felt ought to be put into place as a new national constitution.

I. THE ARTICLES OF CONFEDERATION

In the 1770s, as the Americans moved toward independence and began to lay the groundwork for state constitution-making, they tried, but more hesitantly and nervously, to do the same at the national level. Few were ready for a unified national government. Most distrusted centralized government, both because they associated it with the failure of the British colonial empire and because of a theoretical and ideological context that we have to address: that of republicanism.

What does republicanism mean? Americans wanted republican government, which in its simplest terms meant no kings, no hereditary nobility. Under republican forms of government, the people would be the ultimate source of power and legitimacy in the polity, the ultimate source of political authority -- whether exercising that power directly (highly unlikely) or through representatives they elected directly (or, in some cases, indirectly). But all the accumulated wisdom of human history in the Atlantic Civilization taught that a republic could work only with a small population in a small territory. Each of the American states was at the outside limit of territorial and population size for a republic to have a chance of surviving external and internal threats to its existence. This is the intellectual context in which the Second Continental Congress tried constitution-making for an American nation.

In the summer of 1776, at the same time that the Second Continental Congress adopted the resolution authorizing American independence and the framing of the Declaration of Independence, they adopted two other resolutions offered by Richard Henry Lee at the same time that he proposed the famous one for independence: the first authorized the opening of negotiations for military and commercial alliances with European powers such as France and Spain, and the second authorized the framing of "articles of confederation and perpetual union." The first draft of what became the Articles of Confederation was prepared by the noted constitutional thinker and lawyer John Dickinson of Pennsylvania. Because other delegates objected that his draft vested too much power in Congress, they subjected it to more than a year of redrafting and watering down. On 15 November 1777, the Continental Congress sent the finished draft to the states. It took nearly four years for the Articles to win the support of all thirteen states; during that time, the Continental Congress did business under the Articles, hoping that the document would be ratified. On 1 March 1781, Maryland ratified the Articles; as the last of the thirteen states to act, it put the Articles into effect.

The Articles created a one-house Confederation Congress; each state delegation had one vote. On most matters, a majority vote was needed; on certain key matters, such as treaties, a two-thirds vote was needed; Article 13 required consent (ratification) by all thirteen states to any proposed amendment of the Articles. At the core of the Articles was the enduring conflict between a perpetual union and state sovereignty, never clearly resolved. The Confederation had no independent executive or judiciary, no federal power of taxation or raising revenue, no federal power to operate directly on individual citizens. The Confederation had to depend on the willingness of the states to comply with congressional requisitions, and the willingness of the state governments to enforce measures to secure American interests.

As time went on and the delegates realized that they needed to flesh out the administrative structure of the Confederation, Congress created independent executive departments (War, Finance, Foreign Affairs) and a court (the Court of Appeals in Cases of Capture). Were these ad hoc institutions unconstitutional? Probably -- but, fortunately, nobody challenged them. And if they had? The obvious course would have been to amend the Articles to authorize such institutions -- but Article 13 would have made it impossible, for none of the four or five attempts to amend the Articles between 1781 and 1787 got the consent of all thirteen states. One state -- Rhode Island -- blocked every attempt (in 1783 Rhode Island's dissent then encouraged localists in Virginia to reverse the state's position).

How was the Confederation to be financed? Because the Confederation Congress had no independent taxing power, it therefore depended on contributions made by the several states -- and on loans negotiated by American diplomats abroad. The states were to levy and collect taxes for the benefit of the Confederation and to remit the moneys collected to the Confederation; each state's share of the burden of raising money for the Confederation was based on the value of its land. Why did they do it this way, when we would expect that it might not work well, if at all? First, we must remember that the Americans of the 1770s were nervous about a powerful central government, especially nervous about a government with a real taxing power; they had just launched a revolution against one such government and were leery of trusting another, even one of their own devising. Second, we must remember that the Americans who framed the Articles were caught up in the fervor of the Revolution and believed that the people's and politicians' general faith in the glorious cause would be enough to prompt the states to do what they were asked to do.

**II. PROBLEMS WITH THE CONFEDERATION**

NATIONAL

(i) States rarely paid their requisitions fully and almost never did so on time. Some states -- for example, Georgia -- never paid at all. The Confederation was powerless to satisfy the war debt the United States had run up during the Revolution, or to compel the states to pay what they had pledged to pay to the Confederation.

(ii) States repeatedly violated treaties with Indian nations, and the Confederation was powerless to prevent or punish those violations.

(iii) States regularly failed to send delegates to Congress; thus, there were times when the Congress lacked even a quorum.

(iv) the Confederation could not even secure an amendment to the Articles to permit the Confederation Congress to levy a simple five percent tax on imports.

STATES:

(i) States sought to solve their economic difficulties by disputing boundaries, arguing over fishing rights, waging trade wars against one another, and imposing tariffs on goods imported across state boundaries. As James Madison observed, New Jersey, between New York and Pennsylvania, was like a cask tapped at both ends; North Carolina, between Virginia and South Carolina, was like a patient bleeding at both arms.

(ii) Secessionist movements: In each of four states -- New York, Virginia, Massachusetts, and North Carolina, settlers in distant regions sought to break free and set up their own independent states. Virginia had little trouble reining in the settlers of Kentucky, and Massachusetts managed to preserve its authority over the district of Maine. In North Carolina, however, the state government strove to subdue the would-be state of Franklin, and New York struggled for fourteen years (until 1791) to bring back under its control the "independent republic of Vermont." Even though New York, in particular, demanded action by the Confederation Congress to vindicate its authority over the rebellious Vermonters, nervous delegates from other states declined, not wanting to set inconvenient precedents cutting one way or the other.

(iii) Many states were convulsed by political turmoil over the respective rights and responsibilities of debtors and creditors. The economic downturn of the mid-1780s and the always difficult lives of farmers, who could be ruined by just one bad harvest, made relations between debtors and creditors a fertile source of controversy. In such states as Rhode Island, debtor and creditor parties struggled to control the state government in annual elections; these battles often resulted in rapidly-changing state laws that hobbled interstate commerce and seemed to nervous creditors to assail the rights of private property. For example, debtors in many states demanded -- and in some states achieved -- the enactment of paper-money laws, that would spur inflation so as to help debtors more easily satisfy their creditors. The resulting inflation, however, injured not only creditors but the value of the states' paper money and the stability of interstate economic transactions. Some creditors refused to accept inflated paper money; in response, states such as Rhode Island enacted "tender laws" under which a citizen-debtor could require his creditor, whether a fellow citizen of the state or a citizen of another state or foreign nation, to accept the paper money as the sole means of paying the debt.

(iv) In those states where debtors could not secure relief for their plight through the ordinary processes of politics, they sometimes took arms to defend their homes and families against what they deemed to be cruel and heartless creditors and an indifferent judicial system. The most famous of these debtor's rebellions was Shays's Rebellion, which focused on western Massachusetts. It was not just limited to western Massachusetts, however, nor was it just a simple riot of people who sought to avoid paying just debts. Outbreaks of debtor violence associated with Shays's Rebellion ranged from Vermont to Virginia; by some estimates, one-fourth of the armed men of New England took part in Shays's Rebellion. Shays himself had been a valiant captain in the Continental Army, but he also was a debt-ridden farmer who struggled to keep a roof over his family's head. He was more a symbol of revolt than an actual leader. Ultimately, in the winter of 1787, Massachusetts authorities put down Shays's Rebellion by force, but its lessons and its warnings lingered.

**FEDERALIST PAPER 51**

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| **The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments From the New York Packet. Friday, February 8, 1788.** |

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| **HAMILTON OR MADISON** |

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.