Defects of the Articles of Confederation

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Synopsis: This essay describes the main defects of the Articles of Confederation under which the American states organized themselves during the Revolutionary War until the adoption of the Constitution in 1788. It was previously published as a series of 16 essays between 30 Jun 2011 and 21 Nov 2011.

Contents

1 Historical Background

It must be recalled that the Revolution of the American colonies against the British was not the result of some grand conspiracy. The main source of irritation between the colonies and the mother country was a series of Acts of Parliament that constituted undue interference in the colonies' traditional rights of self-government. Among the offenses were alteration of the colonial charters, in which land grants were withdrawn and sold again; the imposition of taxes without consulting the colonies; the gradual usurpation of the rights of the colonists to elect their own government; and the intensification of economic burdens designed to benefit England at the expense of the colonies. All of these were more or less the consequence of King George III's desire to rule both England and the colonies as a personal autocracy. But even in the early 1770's, many people in the colonies preferred to remain Englishmen, hoping that they could somehow reach a compromise with Great Britain. Only when the British crown sought to make Massachusetts an example by imposing severe constraints on her in 1775 did the colonies awake to the fact that Parliament would not retract any of their excesses.

The colonies were not closely aligned politically during the immediate pre-war period. There had never been any desire on the part of any of the colonies to form associations or leagues; all were content to operate as independently of each other as possible as direct subordinates to the crown. But when the British Parliament began to impose repressive measures, some of the colonists saw a need to act together to seek remedies. They appointed a Congress of delegates from the several colonies to meet in May 1774; its purpose was to defend the rights of the colonies. It was not entirely clear how to get Parliament's attention; and Congress as such had no real authority to do much anyway. The main result of this first Congress was a debate on the legitimate powers held by Parliament, in view of the colonial charters and the traditional rights as Englishmen. A break with England was not seriously considered yet. It published a petition calling on Parliament to repeal all the offensive laws passed since 1763. Suffice to say, it as summarily ignored by Parliament.

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By the fall of 1774, the abuses by Parliament against Massachusetts led to the people beginning to reject the powers of the crown outright; this tension promoted by some in America who saw that the Americans were ripe for independence, and by the British, who desired to bring each of the colonies under direct rule by the king. Eventually the British attempted to end the dispute by arresting leaders of the independence movement; this led to the battles at Lexington and Concord in April 1775. There was now no going back; the issue of Parliament's powers, and if they were to have any over the colonies, would be decided by force.

The Second Continental Congress convened in May 1775. Its charter was to do what was necessary and proper to convince Parliament to undo its abuses. But with the battle of Bunker and Breed's Hill in June, the assembly of a large number of militiamen around Boston to threaten the British army there, the establishment of new governments in Massachusetts and New Hampshire, and the expansion of fighting throughout the northeast, Congress became a de facto revolutionary government. Having gained the confidence of the people, it simply assumed command of the shooting war, appointing Washington as commander, issuing currency on its own credit, and generally organizing the war effort. The Americans launched an invasion of Canada in August 1775, and the British responded militarily in earnest in October of 1775. A formal break with Great Britain was now inevitable, and was announced by the Declaration of Independence on 4 Jul 1776.

Congress assumed the powers of a government without any particular authorization outside of the military emergency. Because the delegates could not agree on the relative weighting by population or wealth, or any other method of apportioning votes, it adopted by default a purely federal system in which each former colony, referring to themselves now as states, had one vote. Congress appointed a committee on 10 Jun 1776 to devise a permanent government for the thirteen states; it reported out a draft of the Articles of Confederation on 12 Jul 1776. The Articles were debated from 12 Jul 1776 to 20 Aug 1776 and again from 8 Apr 1777 until their form was agreed to on 15 Nov 1777, which is to say, it was suitable to send to the states for ratification. On 9 Jul 1778, delegates from eight states ratified the Articles (Connecticut, New Hampshire, Rhode Island, Massachusetts, New York, Pennsylvania, Virginia, and South Carolina). North Carolina followed suit on 21 Jul 1778, Georgia on 24 Jul 1778; New Jersey on 26 Nov 1778, Delaware on 5 May 1779, and Maryland on 1 Mar 1781. The Articles required that all thirteen states ratify it before it could go into effect; hence Congress did not convene under the powers granted by the Articles until 2 Mar 1781.

The main features of the Articles, which will be examined more closely in the next sections, were:

a. Congress was the only instrument of the federation. It was to convene on the first Monday in November and continue for a period not longer than six months. When it adjourned, the government was maintained by an executive committee consisting of one delegate from each state. Congress elected a President, who was only the nominal leader of Congress, and had the same powers as any other delegate. Congress published a monthly journal of its proceedings.

b. Each state was allowed to send between two and seven delegates, but since it was a confederation of states, each state had a single vote. The delegates were paid by their respective states, not out of a federal treasury. Instead of administrative departments, the various functions were allocated to committees. This proved to be inefficient, and later on some functions were allocated to individuals in the interest of expediency.

c. Congress was granted the following powers: a) to borrow money; b) to appropriate requisitions of money, men, and equipment from each of the states, but could not raise revenue on its own; c) to resolve issues between the states; d) to enact treaties with foreign powers; e) to establish an army and navy; and f) to issue a currency as an obligation to repay loans. Congress had the power to establish requisitions from the states based on the proportional value of real estate in each state. The states were then free to raise the requisition by taxing their own citizens.

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d. Concurrence of two-thirds of the states was required for any of the following actions: a) to engage in war; b) to make treaties; c) to coin money; d) to borrow or appropriate money; e) to assign quotas of revenue to the states; and f) to appoint commanders of the army.
e. The states were required to grant every freeman the same rights and privileges. Every state was compelled to recognize the records and acts of every other state, and obligated to extradite persons found in their state who were wanted on criminal charges in another state. Otherwise, all the other powers were left to the states with the following prohibitions: a) a state could not maintain an army or a navy, except for the militia; b) a state could not enter into treaties with foreign nations; c) a state could not form alliances with any of the other states without the consent of Congress; and d) each state was prohibited from entering into any other wars except against the Indians.
f. The Articles could be amended only by concurrence of all member states.

The remaining sections discuss how these provisions worked in practice at the return of peace.

2 The Power to Raise an Army and Navy

No matter how a government is constituted, its first duty is to protect the people from other governments and other factions which intend to invade its territory, attack the people, or infringe upon their legitimate interests. Any government unwilling or unable to perform this task will soon lose all legitimacy; first, it will excite the ambition of other governments of factions; secondly, it will earn the contempt of the domestic population. No sensible people can prosper or seek happiness if subject to coercion or invasion by armies in the service of other governments or by armed factions; the uncertainty and fear among the people is certain to restrain the promotion of progress. What population will support a government that allows invasions and attacks upon them without a commensurate response? They may as well avoid the expense of the government and take measures into their own hands. To remain viable then, every government must enjoy the confidence of the people that it can and will deter or respond to outside threats. Once that confidence is lost, such a government is ripe for replacement either by a domestic revolt of conquest.

It is instructive first to review the difficulties encountered before the Articles formally went into effect on 2 Mar 1781. By the time Congress issued the Declaration of Independence on 4 Jul 1776, the states were already involved in a shooting war. The war had been fought entirely by militia at Lexington and Concord (18, 19 Apr 1775) and Bunker Hill and Breed's Hill (17 Jun 1775). When George Washington took over as commander of the Continental army at Cambridge on 3 Jul 1775, it consisted of 3,000 regular troops authorized by Congress and 16,000 militiamen from the northern states. The militia continued to be the dominant force throughout the battles of Hampton Roads, VA (26-28 Oct 1775); Montreal (12 Nov 1775); Great Bridge, VA (9 Dec 1775); Quebec (31 Dec 1775); Moore's Creek, NC (27 Feb 1776); Boston (4-17 Mar 1776); and the remaining defeats in Canada up to June of 1776. Washington recognized early on the great risk associated with fighting a protracted war using militiamen with short terms of service. In his letter to Congress 2 Sep 1776, he wrote in part, concerning the lack of discipline among the militia, and their enlistments [1]:

> "All these circumstances fully confirm the opinion I ever entertained, and which I more than once in my letters took the liberty of mentioning to Congress, that no dependence could be in a militia or other troops than those enlisted end embodied for a longer period than our regulations heretofore have prescribed. I am persuaded and as fully convinced, as I am of any one fact that has happened, that our liberties must of necessity be greatly hazarded, if not entirely lost, if their defense is left to any but a permanent standing army, I mean one to exist during the war."

By his last qualification, "during the war", he is no doubt referring to the suspicion held by many in the states at that time, that a standing army leads invariably to domestic tyranny engineered by whoever controlled the army. He did not have enough troops of sufficiently durable enlistments to defend New York; losing at Long Island (27-29 Aug 1776); Manhattan (15, 16 Sep 1776); White Plains (28 Oct 1776); Ft.

Washington (16 Nov 1776); the evacuation of Ft. Lee (20 Nov 1776); and the retreat through New Jersey (28 Nov - 12 Dec 1776).

On 16 Sep 1776, Congress responded to his letter of 2 Sep, authorizing 88 battalions to be raised by the states according to quota and pay schedule established by Congress. They were to be paid and outfitted by the states, and each state was to appoint all officers of rank colonel and below. Although these troops were authorized as part of a regular army, their existence was still too dependent on the states. First, promotion below colonel could not be done based on merit in the field; it could be done by whatever system the states adopted back home. Secondly, the pay set by Congress was too low; men found they could do better by waiting for an appointment to a state militia.

The Continental army, or what was left of it, was in an exceedingly precarious situation at the close of 1776. It still consisted mostly of militia, and those enlistments were about to run out. Having been faced with continuous defeats the past six months, this army, barring some miracle, was at risk of simply melting away at the first of the year. Washington revisited this same topic again in a letter of 16 Dec 1776 [2] to the President of Congress, writing in part:

> "Sir: In a late letter which I had the honor of addressing you, I took the liberty to recommend that more battalions should be raised for the new army, than what had been voted. Having fully considered the matter I am more and more convinced not only of the propriety, but of the necessity of the measure. That the enemy will leave nothing unessayed in the course of the next campaign, to reduce these states to the rule of a most lawless and insufferable tyranny must be obvious to everyone, and that the militia is not to be depended on, or aid expected from them, but in cases of the most pressing emergency, is not to be doubted. The first of these propositions is unquestionable, and fatal experience has given her sanction to the truth of the latter; indeed their lethargy of late and backwardness to turn out at this alarming crisis, seem to justify an apprehension, than nothing can bring them from their homes. ... In a word, the next will be a trying campaign and as all that is dear and valuable may depend on the issue of it, I think no measure would advise that nothing should be omitted to ensure that shall seem necessary to our success. Let us have a respectable army, and such as will be competent to every exigency. I will also add that the critical situation of our affairs and the dissolution of our present force, (now at hand) require that every nerve and exertion be employed for recruiting the new battalions."

It was Washington's brilliant attack on Trenton, NJ (26-29 Dec 1776) by crossing the Delaware River in the dead of winter, followed by victories at Princeton, NJ (3 Jan 1777) and Elizabethtown, NJ (7 Jan 1777) that induced many to remain in the army.

Afterwards, as Congress' authorization of 16 Sep 1776 took effect, there was greater balance in the makeup of the army. It should be noted however, that the militia played an important role in two areas: a) the defeat of several Hessian and British detachments at Hubbardtown, NY (4-7 Jul 1777), Oriskany, NY (6 Aug 1777), and Bennington, NY (16 Aug 1777); all of these contributed to Burgoyne's surrender after the second battle of Freeman's Farm (7 Oct 1777). Also, the militia was instrumental in keeping the war in the south alive after General Horatio Gates was defeated by Lord Cornwallis at Camden, SC (16 Aug 1780). It was not until March of 1781, after Nathaniel Greene replaced Gates, when the regular American army resumed fighting the British in the south; Greene and Lafayette were able to deprive Cornwallis of his interior lines and forced him to retreat to Yorktown, VA. The French fleet blocked Cornwallis' attempt to evacuate by sea, Washington led a forced march from New York, and Cornwallis was defeated at Yorktown 19 Oct 1781.

The portions of the Articles of Confederation attendant to our subject are found in Article VI, paragraphs 4 and 5; and Articles VII and VIII, as follows:

> [**Article VI**, paragraphs 4 and 5] No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as, in the judgment of the United States, Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition and camp equipage.
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> No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be invested by pirates, in which case vessels of war be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.
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> **Article VII.** When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, all vacancies shall be filled up by the State which first made the appointment.
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> **Article VIII.** All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

It is easily seen from these provisions that the main sources of complaint by Washington continued. Although Congress had the authority to establish a regular army, it was to be largely commanded, except at the flag-rank, by men chosen by the state legislatures. The states were properly restrained from declaring war on their own. But the most serious defect that affected the military was Article VIII, in which the army was to be paid by Congress, but the money was to come from requisitions upon the states. Congress appropriated requisitions, but the states simply refused to pay, or paid only a fraction of their requisition. Congress issued its first requisition under the Confederation on 30 Oct 1781 for $8,000,000 in Spanish milled dollars (1 SM$ = 386.7 grains of silver). By the end of 1785, only $1,600,000 would be paid. Congress made other requisitions, none of which were ever paid. The net result was that Congress was unable to pay the army; this led to several revolts throughout 1783. Congress was forced to adopt a half-pay-for-life provision as a way to keep men in the field; it was later changed to a "commutation" of five years pay immediately. The truth was that Congress could not pay either one; it simply issued notes that matured some years later at 6% interest, or provided land in the western territories. The situation became so bad in 1786 that Congress was unable to raise a force to put down Shays' rebellion in Massachusetts (19 Sep 1786 - 1 Mar 1787), which was a popular tax revolt against the foreclosure of farms.

The U. S. Constitution remedies these defects by giving power to the federal government to lay taxes necessary to raise an army and navy, and to make rules for their discipline. It retained the militia system

for two reasons: a) to aid the regular army if called upon; and b) as a means for an armed population to repel any attempt at domestic tyranny. The provisions of interest are contained in Article 1, Section 8, reading in part:

> **[Article 1, Section 8.]** The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
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> To provide and maintain a Navy;
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> To make Rules for the Government and Regulation of the land and naval Forces;
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> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
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> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Congress under the Constitution now has the ability to organize and equip a regular army and navy, establish rules for their deployment, and levy taxes directly for their support without depending on the states. The only limitation, deferring to the continuing (and legitimate) suspicions against standing armies, was that appropriations for the military had to be renewed at least every two years. Alexander Hamilton explained the underlying reasoning behind these provisions, as compared to the corresponding ones in the Articles in the *Federalist Papers* #23:

> The principal purposes to be answered by union are these -- the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.
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> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.
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> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.
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> Whether there ought to be a federal government intrusted with the care of the common defense, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy -- that is, in any matter essential to the formation, direction, or support of the national forces.

> Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.
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> The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

The militia, which is the entire armed population, is intended partly to aid the regular army when called and partly to restrain the forces of ambition within the federal government. I mention this only because there are those who maintain a fiction that the National Guard is now the militia mentioned in the Constitution. But the concept that a perpetually armed population is necessary to deter domestic tyranny is confirmed by Madison's comments in the *Federalist Papers* #46:

> The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibil-

> ity of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it.

Thus the Constitution remedied the defects of the Articles of Confederation with respect to the maintenance of regular military institutions. The federal government has always been able to suitably field necessary armies, navies, and other forces as necessary. All Americans should be grateful that the U. S. military has been exceptional throughout its history in maintaining fidelity to the Constitution - very different from the experiences of most nations. That said however, no free people will ever allow themselves to be disarmed, no matter how well the military behaves.

3 The Power to Make Treaties

A treaty is nothing more than an agreement between nations. But unlike the numerous pacts, communiqués, diplomatic memorandums and the like that occur commonly in foreign relations, a treaty normally imposes solemn obligations on both sides. Therefore, they are not to be entered into lightly, because they represent promises made by a nation in return for promises to be kept by the other party. A treaty must be established by knowledgeable persons, since violations of a treaty could be a just cause for war, loss of national prestige, loss of confidence by other nations, or many types of economic retaliation. It is of utmost importance then, that a treaty be entered into for sound reasons, that is, for reasons that promote the national interest; but once entered into, be adhered to in good faith. All of this explains why treaties must be negotiated by experienced people, capable of understanding a nation's long-term interests and the threats to them. Otherwise, a detrimental treaty may result, in which case there is no choice but to ask for renegotiation, adhere to it as best as can be done, or take the risk of violating it.

We can observe from history in general some requirements for a successful treaty: a) each party enters into obligations in return for obligations to be observed by the other; b) the provisions are consistent with the long-term goals and interests of the entire nation, not just a portion thereof or one faction; c) it should be made either for a term of years, or to be operable so long as a certain set of conditions prevails; d) should take the long-term view, unless made for a term of years; not focusing only on immediate problems that may be solved with the passage of time, or risking long-term interests for short-term gain; and e) contain a means of termination should both parties find it advisable, or as a means to address violations.

Likewise, conditions conducive to successful negotiations include: a) that both parties have confidence of good faith by the other; in many cases this is known not to be true, in which case, no treaty should be signed without numerous caveats and conditions; b) ability to maintain secrecy if necessary and prudent; and c) that both side believe they will achieve a net gain for their interests.

Congress had full powers to enact treaties under the Articles of Confederation, and the States were likewise constrained, by the first three paragraphs of Article VI and by the first and next-to-last paragraphs of Article IX, as follows:

> **Article VI.** No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.
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> No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.
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> No State shall lay any impost or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.
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> **Article IX.** The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of said courts.
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> The United States, in Congress assembled, shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

Congress' power of commercial treaties was limited by two exemptions which the states reserved to themselves: a) no commercial treaty negotiated by Congress could prevent the states from imposing duties on foreigners so long as they were equivalent to those imposed on Americans; and b) the states had powers to determine prohibitions on imports and exports. However, the states were prohibited from interfering with treaties under negotiation with France and Spain. The ratification of treaties required the concurrence of nine states (i.e., two-thirds of thirteen), same as most other major topics of government.

After the return of peace in 1781, there arose three major problems with the treaty provisions of the Articles. The first was the inability of Congress to conclude any type of commercial treaty with uniform regulations. A major factor was Great Britain's return to the Navigation Acts on 2 Jul 1783, when King George III issued an order in council regarding trade with the Americans. Britain's main fear was that the Ameri-

cans would replace the British in the carrying trade in the western Mediterranean; in order to prevent it, Britain sought to weaken American commerce in general. Therefore, Britain imposed regulations designed to weaken the New England states: a) trade between America and the British West Indies could only be conducted in ships built, manned and navigated by British subjects; and b) American ships landing in British ports were permitted to bring in only items produced in states of which the ships' owners were citizens. The first of these nearly ruined the shipbuilding trade in the New England states, and greatly reduced the demand for its fisheries. The second greatly reduced the ability of the southern states to export their products, as none of them had a shipping industry. In fact, the weakness of the southern states with regard to shipping resulted in the British controlling nearly all trade in the southern states, even along the inland waterways. As a result, the states ended up attempting to raise revenues by imposing duties on imports from Europe. This led to a feud between New Jersey and New York, since nearly everything imported into New Jersey had to pass through the port of New York. Meanwhile, although there were demands for Congress to respond to the Navigation Acts, Congress could not get nine states to agree to give Congress suitable power to regulate commerce.

The second major problem was the issue of navigation rights on the Mississippi River. With British trade restricted, the New England states were very interested in obtaining a trade agreement with Spain. But, Spain was adamant in its rejection of American demands that any trade treaty allow American navigation on the river. The southern states wisely recognized that this was an essential point, and important for the future of the nation, since Spanish control of the Mississippi might tempt the western territories to align with Spain, thus causing all of the states to be surrounded by hostile powers. This dispute led to a north-south split among the states, which was not resolved until after the adoption of the Constitution.

The third major problem was that Great Britain refused to enter into any negotiations at all, on the grounds that since the thirteen states each retained powers over trade, there was little point in attempting to negotiate with Congress. It made little sense, from the British view, to conclude a treaty with Congress that could be violated by the states individually. Britain accordingly sought to deal with each state individually, albeit indirectly, by altering regulations that affected one or a few states; i.e., playing the states against one another and weakening all of them. This tempted some of the states to think about entering into commercial leagues among a few states, which were clearly prohibited by the Articles; but the general crisis of the Articles led to the adoption of the Constitution before any of these could materialize. It should be noted, however, that Congress did successfully ratify treaties with Holland (23 Jan 1783), Sweden (29 Jul 1783), and Prussia (17 May 1786).

The U. S. Constitution remedied these problems under several provisions. Two of these are found in Article I, Section 10, which imposes restrictions on State powers:

> "No State shall enter into any treaty, alliance, or confederation..."
> "No State shall, without the consent of Congress, enter into any agreement or compact with another State, or with a foreign power..."

The provisions under Article 1 make it clear that the federal government has a monopoly on the power to make treaties, and in fact, these two provisions were simply carried over from Article VI of the Articles of Confederation. The immediate consequence was to terminate any activities by the respective states to engage in independent agreements with foreign nations to the detriment of other states. In the long run, these provisions ensure that treaties are made by and with the United States as a uniform whole, preventing foreign nations from pitting one state or group of states against another, thus weakening all. It ensures that treaties are of a purely national character; a provision of this sort is necessary especially in compound-republic American system. It corrects one of the more notorious problems with the Articles of Confederation, as Hamilton notes in the *Federalist Papers* #22:

> "The treaties of the United States, under the present Constitution [i.e., the Articles of Confederation], are liable to the infractions of thirteen different legislatures, and as many courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the preju-

> dices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?"

Another is in Article II, Section 2, which grants certain powers to the Executive:

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur..."

The provisions of Article II are designed to enhance the dignity of the power of making treaties but tempering it with a review and confirmation by the Senate. The President is the only officer in the American system that is elected, albeit indirectly, by the whole voting population; hence he has the dignity of representing the entire people. It serves as a signal to foreigners that the President and his delegates, in his treaty-making capacity, is empowered to negotiate on behalf of the entire nation. But, it would be unwise to place the entire power in the hands of one person, so this same provision requires that two-thirds of the Senators present confirm, or ratify, and treaty presented to them. The Senate was chosen for this task instead of the House because the Senators, being elected to terms of six rather than two years, are more likely to have the maturity and experience from continuity in office to the implications of proposed treaties, especially prior to the 17th Amendment, when members of the Senate were appointed by state legislatures instead of being popularly elected. Note that the number of votes necessary to ratify a treaty is not fixed in the Constitution: it requires only that two-thirds of the Senators present ratify it, as opposed to the provision in the Articles, which required two-thirds of all the states. No doubt this was intended as a compromise between the high threshold of two-thirds of the states, which became a problem under the Articles, and the necessary reduction of risk to the interests of the states. In summary, it was unlikely in the founders' view that both the President and the Senate could make a serious mistake compromising the nation's health.

The next important power regarding treaties occurs in Article III, section 2, describing the powers of the Supreme Court:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made..."

Last, Article VI states the legal status of treaties made under the Constitution as compared to domestic laws:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ..."

The provisions of Articles III and VI provide confidence to foreign nations that the U. S. takes foreign relations seriously, since treaties are to have the force of law equally with the Constitution itself. But the Supreme Court still has a review authority, since clearly, in the American system, no treaty obtained by fraud, or one that contradicts the Constitution or one which reduces the liberties of the people can be valid, even if it was ratified. A treaty with any of these defects is voided the same as any law passed by Congress in violation of the constitution.

4 Division of Government Powers

James Madison mentions in the *Federalist Papers* #38 that putting all government powers in the hands of a few is inherently risky. He is referring to the fact that Congress was the only institution under the Articles of Confederation, a purely federal union organized under emergency conditions at the beginning of the Revolutionary War. He writes:

> Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depositary of all the federal powers.

The issues that arose specifically from this feature are due partly to the nature of deliberative legislative bodies, and partly to the concentration of such a wide variety of powers in a few hands. (The lack of adequate powers will be the subject of later sections.) When an issue of importance came up, there was no mechanism within the Congress to address it, other than to debate or send to a committee for consideration, whereupon some resolution would be passed or defeated. It ended up being tasked with every type of problem, but was not ideally suited for those that required immediate attention or a definite determination. It had a nominal judicial function to render certain types of findings in disputes between the states, but no regular judicial function. It was also charged with managing the war effort and foreign relations, which sometimes require quick action.

But the larger risk was that all of these powers were lodged in one place. It was common knowledge among the leaders in the founding generation, from their knowledge of history and the observations of the great political theorists, that the best structure for both efficiency and protection of liberties was an inherent division of power within the government. Certain structures are inherently more efficient for certain objectives; but efficiency in government, carried too far, leads to a grasping for more powers to do more things efficiently; which in turn leads to a reduction in liberty as the government wields greater power. The best solution was to divide the government into branches with narrowly-defined powers, and let the mutual ambitions of each cancel each other out. While each branch has its legitimate sphere of power, the jealousy of the other branches keeps it within its proper limits.

One of the political theorists familiar to the founding generation was Charles de Montesquieu, who laid out his observations on divided government in his book *The Spirit of Laws* (1748). In Book IX, he points out the one nation on earth in which political liberty was the main objective of its constitution, that is to say, England. He proceeds to dissect the characteristics of the English system and how it promoted liberty in a general sense, writing in part:

> "6. Of the Constitution of England. In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to things that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.
>
> The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.
>
> As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole people. But since this is

> impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves."

The desirability of a system of functional branches was so evident to the delegates to the federal convention, that the first set of resolutions on a new plan, offered by Edmund Randolph on 29 May 1787, called for separate legislative, executive, and judicial departments. On the same day (the fourth of the convention), Charles Pinckney put forward a draft of a constitution; it also called for the same three separate branches. The next day, Nathaniel Gorham proposed, and his motion was carried, to postpone the discussion of Randolph's first proposition about the general enlargement of the Articles of Confederation, and consider directly a general revision of the government, in these words [3]:

> 1. That a union of the states merely federal will not accomplish the objects proposed by the Articles of Confederation – namely, common defense, security of liberty, and general welfare.
> 2. That no treaty of treaties among the whole or part of the states, as individual sovereignties, would be sufficient.
> 3. That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary.

The story of the Convention is how the delegates conducted the debate about the exact character of the government; whether it should be entirely national or entirely federal, or a mix; how the members thereof should be chosen, and what the duration of their offices would be; but from this point forward, there was little debate about the necessity and utility of a government with the three familiar branches, instead of Congress alone.

5 Regulation of Foreign Commerce

Every successful nation that intends to remain independent requires the ability to regulate commercial activities with foreign nations. Historically, national governments have used the management of foreign trade for several purposes, including: a) generation of domestic revenue through imposition of duties and tariffs; b) restrictions or prohibitions on the exportation of certain items which would give competing nations an equal or superior military advantage (such as the U. S. Munitions List); c) regulation on the quality of articles that can be imported (such as consumer safety); d) as a means of promoting trade and closer relations with certain "favored nations"; e) outright prohibition on the importation of articles deemed dangerous (such as "illegal drugs"); f) restrictions on imports to protect domestic industry or stimulate domestic investment and production; g) management of boycotts of certain enemy nations; and h) indirect means to influence domestic policies in a foreign nation (such as restrictions on goods imported from nations that allow child labor). Nearly all of these have been tried in different times and to different degrees by every nation. While the first four are eminently practical and wise, the last two are useful only for making symbolic political statements. The remaining two are generally well-meaning but ineffective, and may sometimes be dangerous. Regardless of their wisdom or lack thereof, the main point is that every nation has a legitimate power to pass laws regulating foreign commerce as a means to advance or protect its interests. The consequences of an inability to do so can be illustrated by a review of the events in this area while the Articles of Confederation were in effect.

The states were prohibited by Article VI of the Articles of Confederation from contradicting any provision in any subsequent treaty then in negotiations with France and Spain. Also, they retained powers over the most important aspects of commercial treaties.

> **Article VI.** No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present,

> emolument, office, or title of any kind whatever, from any king, prince or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.
>
> No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.
>
> No State shall lay any impost or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.
>
> **Article IX.** The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of said courts.

By the ninth Article, the states had the power to regulate commerce by imposts and duties, so long as foreigners were treated equally with Americans, and also retained the power to prohibit exports or imports as they saw fit. During the war, the ability to make meaningful trade regulations in the states was limited. After the war, the states naturally proceeded to enact laws that they believed best advanced their interests. One of the main issues, as detailed in section 3, was how to respond to Great Britain's Navigation Acts. Recall that these were designed to limit America's ability to conduct trade with British territories; in fact was designed to prevent the Americans from gaining a significant share of the carrying trade in the western Mediterranean. Britain was able to capitalize on the weakness of each state, and the inability of Congress to form a united front in its alleged capacity to negotiate treaties for all thirteen states.

On 26 Apr 1784, Congress passed a resolution stipulating that all treaties were to be represented as an agreement with all thirteen states. But since the Articles of Confederation allowed the states to determine import and export rules as well as the setting of duties, which constituted important provisions in commercial treaties, Congress in effect was not able to force the states to abide by any treaties that were negotiated by the ambassadors. There was therefore little incentive for foreign nations to enter into treaties with the United States. Great Britain chose to adopt a policy of negotiating with each of the states separately; but any state that did so would be in violation of the Articles prohibiting separate treaties by states.

By the end of 1783, Britain's Navigation Acts had ruined much of the commercial activity in the states. The Virginia State legislature had passed a resolution in which they urged all the other states to grant Congress a power to respond to them. On 30 Apr 1784, Congress passed a resolution recommending to the states that it be given power for 15 years to develop and enforce regulations in response to the Navigation Acts. But the states never did agree to grant Congress this power, as there was considerable suspicion among the states that Congress would be unable or unwilling to develop rules that were equally fair to all the states. By Mar 1786, several states had granted some powers to Congress to either regulate trade or impose a revenue duty, but they were inconsistent and could not be used to justify a modification to the Articles. All Congress could do was to issue another request for consideration of the initial resolution.

Meanwhile, a general authority lacking in Congress, the states did as they believed best for themselves. In Jan 1785, New York imposed a two-fold duty on goods arriving in British ships, as retaliation for the Navigation Acts. These were passed onto the residents of New Jersey, since they imported their goods from New York. The residents of New Jersey were thus forced to pay a duty to New York, without any corresponding advantage to their treasury. By the spring of 1785, merchants in Massachusetts organized a boycott of all British-owned businesses in the state. In Jul 1785, Massachusetts prohibited exports carried on British ships, levied a tonnage duty, and imposed high duties on certain foreign goods in order to protect domestic manufacturers. New Hampshire and Rhode Island passed nearly identical laws a week or two later. Connecticut then opened its ports to British ships, and imposed a tax on imports from Massachusetts. In Sep 1785, Pennsylvania passed a law imposing duties on 70 items, especially iron manufactures, and imposed a tonnage duty on the ships of any nation that did not have a commercial treaty with Congress. Pennsylvania also passed laws against trade with Delaware and New Jersey. As states levied duties on imports, the trade was simply carried to ports in other states, negating the alleged benefits of a revenue duty. New York imposed heavy duties on imports from Connecticut and New Jersey, including a requirement that every shipment, no matter how small, be obliged to clear customs upon entering any port in New York. Connecticut responded with a boycott on commerce with New York. New Jersey retaliated by imposing a large tax on a lighthouse owned by New York, but sitting on an island off the coast of New Jersey. Most of the states violated the most-favored-nation provisions of the treaties with Holland and France. In other words, America was in the midst of a trade war among the states, and in violation of agreements with other nations. Fortunately, the Convention of 1787 occurred before any shooting wars between the states, and the Constitution that resulted resolved the commercial trade issues.

The lack of requisite powers over trade in the Articles of Confederation was so obvious to the delegates at the Convention, that there was little argument over giving them generally to the federal government. Ultimately, the U. S. Constitution as devised at the Convention addressed all these difficulties by four methods. First, in regard to treaties in general, the Executive was given power to negotiate them, but they require ratification by the Senate, as detailed in section 3 (Article 1, Section 10; Article 2). Second, Congress was given general legislative power over foreign trade not covered by treaty (Article 1, Section 8). Third, Congress was given legislative power to regulate trade between the states and the Indian tribes (Article 1, Section 8) with the caveats per Article 1, Section 9. Fourth, the states are prohibited from imposing import and export levies except for the costs of inspection, and any excess revenue is to be devoted to the United States (Article 1, Section 10). The relevant texts are:

> **Article 1, Section 8, First and Third Clauses:**
>
> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> **Article 1, Section 9, Fifth and Sixth Clauses:**
>
> No Tax or Duty shall be laid on Articles exported from any State.
>
> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.
>
> **Article 1, Section 10:**
>
> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection

> Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
>
> No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

6 Disputes between States

Before reviewing how the Articles of Confederation operated with respect to territorial issues, it is first necessary to recall that the states retained land claims under the ancient colonial English charters. The charters of Massachusetts and Connecticut extended ostensibly all the way to the western end of the continent. The colony of New York had been established during the reign of Charles II; as a result, Massachusetts and Connecticut exempted that area, but continued to claim all the lands to the west at their respective latitudes. Massachusetts also held the territory of what is now the state of Maine. During the period from its establishment to the Revolution, the colony of New York gradually gained influence over the Iroquois Indians and the other tribes that had accepted the nominal sovereignty of the Iroquois. Consequently, New York claimed all the land occupied by these tribes, which extended westward nearly to what is now Michigan. After the Spanish gained control of the southwest it was recognized that these claims now extended only to the Mississippi River.

The original charters of Virginia, North Carolina, and Georgia also extended to the western sea, although by the time of the Revolution was valid only to the Mississippi River given the Spanish occupation of the southwest. South Carolina likewise had some claims to territory in the west, but was not clearly specified.

The claims of Virginia were further enhanced by the fact that two earlier expeditions had led to the conquest of some western territory. In 1774, after Parliament had passed the Quebec Act, Lord Dunmore, governor of Virginia, called out a large number of settlers in western part of the colony to suppress an Indian uprising against some of the settlers along the Ohio River. In November of that year, this force defeated the Shawnees at Point Pleasant and established peace with the Shawnees and their allies. Virginia then exerted indirect control over the Ohio Valley even before the Revolution; this action, known in history as Lord Dunmore's War, effectively nullified the British Quebec Act since the colonial settlers controlled it before the British could organize it directly under a government set up by Parliament. A second action during the Revolution furthered Virginia's claims. An expedition led by George Rodgers Clarke began a campaign in Jun 1778 to defeat the British and their Indian allies along the Mississippi and Ohio Rivers. By the end of July, they had taken Cahokia and Kaskaskia. By Feb 1779, Clarke had taken Vincennes; this gave Virginia physical control of all the territory along the Ohio River as far as present-day Detroit and westward to present day St. Louis.

The powers given to Congress under the Articles of Confederation to determine territorial questions between the states was contained in the second and third paragraphs of Article IX:

> The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning,

> until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall, nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.
>
> All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between the different States.

As seen by this provision, the method of resolution was to be a determination by a special court appointed under the supervision of Congress. These judges, or commissioners, would then be tasked with formulating a decision on any territorial disputes between states. This presented three problems. First, it was not particularly efficient, as each case was to be handled in isolation from every other. It was probably not a feasible system for resolving large-scale competing territorial claims. Secondly, there was no provision for conflicts within a state in which one part wished to separate from the other. Third, there was no provision by which additional states could be added to the Confederation out of any western lands.

The legislature and delegates to Congress from the state of Maryland performed a very useful service to the eventual union by helping to resolve the first of these defects. The Articles were agreed to and recommended to the states on 15 Nov 1777, and were ratified by eight states on 9 Jul 1778. But, unlike our Constitution, which could be activated through ratification by any nine of the thirteen states, the Articles required all the states to ratify it before it could go into effect. The legislature in Maryland, recognizing the difficulties that would ensue over the colonial charters, passed a resolution on 15 Dec 1778 stating their refusal to consider ratification of the Articles until all the states had conveyed their land claims to Congress. Maryland thus wisely made the activation of the Confederation dependent upon cession of all the competing claims to the western lands.

The states responded to Maryland's challenge in a most commendable way. On 19 Apr 1779, New York conceded that Congress should have power to determine its western boundary. In Oct 1780, Connecticut ceded its western claims except for a small slice of territory just east of what is now Cleveland. Virginia, who had not only strong claims to western lands, but was actually in control of a great deal of it, magnanimously ceded its claims to Congress on 2 Jan 1781. Since the claim of Massachusetts was weak, and the territories claimed by North Carolina and Georgia were mostly still wilderness, Maryland authorized its delegation to ratify the Articles on 30 Jan 1781. Maryland, the final state to ratify, did so on 1 Mar 1781, and Congress officially assumed authority under the Articles on 2 Mar 1781.

The provision contained in the Articles was used once, in the long-standing feud between Pennsylvania and Connecticut regarding the Wyoming Valley, situated in Pennsylvania just north of what is now Scranton. Although contained entirely within Pennsylvania, the area had been settled by settlers from Connecticut, and was claimed by that state. A special court convened under the Articles settled this dispute in a ruling on 30 Dec 1782, which was accepted by both sides.

But the power conveyed under the Articles proved insufficient to deal with disputes within the states. The Maine district of Massachusetts desired to break away and form an independent state. There had been a long-running feud between New Hampshire and New York regarding the territory now known as Vermont. This district, although belonging in strictness to New York, desired independence before the Revolution. It declared itself independent on 15 Jan 1777, calling itself "New Connecticut", and petitioned for entry into Congress as a fourteenth state. The name was changed on 8 Jul 1777 to "Vermont". The delegation from New York successfully prevented this request from coming before Congress, and it remained unresolved until Vermont formally seceded from New York on 4 Jul 1786.

The case of North Carolina is unique. In Jun 1784, North Carolina ceded its western claims to Congress on the condition that Congress would have two years to decide how to allocate it. But the settlers in that area, beset by problems with Indians, were refused help from both Congress and North Carolina, and accordingly set up their own state, named Franklin in 1786. This led to a low-level civil war in this region, now the state of Tennessee, until 1788, when it was rejoined to North Carolina. The important point here is that Congress was too weak to resolve the conflict either way.

Last, we must take notice of the Northwest Ordinance of 13 Jul 1787, passed by Congress to determine the conditions of settlement and eventual statehood for all the lands in the west that had been ceded to Congress. It was an admirable law, providing an excellent method of settlement, governance as a territory, a prohibition of slavery, and guarantees of certain civil rights. It superseded an earlier one of 28 Jun 1786, which contained the great defect of permitting slavery in the west. While the Northwest Ordinance proved to be an excellent expedient, it was done without outside any specific authority in the Articles. As a result, Congress simply treated this vast territory as a traditional English folk land, in which it is divided and administered ad-hoc as the population increases. Congress passed it of necessity, as the population was growing. But the fact that it had no authority to exercise any sovereign authority of this nature only proved the general deficiency of the Articles, for the powers granted would have to be violated as circumstances arose; that could only lead to quarrels and instability among the states.

The requisite power over territory, lacking in the Articles, was granted to Congress under the federal Constitution in Article IV, Section 3:

> **[Article IV]**
> **Section 3.** New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

7 Division of Legislative Power among the States

A republican political system is one in which a large fraction of the general population exerts power indirectly through representatives of their choice. The great attraction of a republic is that those representatives will, over the long run, reflect the views of a majority of the people, but at the same time, will tend to attenuate excessive demands by the public in times of difficulty or uncertainty. A republic is therefore somewhere in the center of the styles of political organization. At one end are the forms in which power is concentrated in a few people. Among these are: a) a dictatorship or absolute monarchy, in which one

person has nearly all the power; b) a monarchy and hereditary nobility composed of a small but stable number of people; and c) ruling oligarchies, in which power is assumed by a small number of people who are not members of a permanent class. At the other extreme is pure democracy, in which every eligible person has a direct voice in public affairs.

There are two main classes of systems that can be correctly called republics. In the first type, a purely federative style, the members of the federation are actually subordinate political divisions. Each political subdivision chooses delegates to represent it at an upper political level. In the second type, the general public chooses delegates to the top political level in their capacity as individuals. A mixture of these prevailed under the Articles of Confederation: the eligible voting public, in their capacity as individuals, chose delegates to their state legislatures; those state legislators in turn chose delegates to Congress. In Congress, each state had an equal vote. At the state level then, it was of the second type of republic, but at the national level, was purely federative. The provision in the Articles of Confederation is found in the first portion of Article V:

> **Article V.** For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.
>
> No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.
>
> Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.
>
> In determining questions in the United States, in Congress assembled, each State shall have one vote.

It is clear that such a system is republican in the sense that the public chose representatives at the state level who in turn represented the state in Congress. The people thus had an indirect choice in who represented them in Congress. This is a satisfactory system, because ultimately the people are able to determine the makeup of Congress, although the process is one step removed from direct election. But, if we recall the basic premise of a republic, that the views of a majority of the people will usually prevail, it is equally clear that a purely federative system such s the Articles can maintain this premise only if each state has approximately the same population. Such was not the case with the original thirteen states. As Hamilton pointed out in the *Federalist Papers* #22, seven states (Delaware, Georgia, Maryland, New Hampshire, New Jersey, Rhode Island, and South Carolina) could constitute a majority of votes in Congress, yet their combined population was not more than a third of the entire population. On the face of it, there was no remedy for this problem other than the hope that these states would have such diverse interests that they would not combine together, thus requiring that some other combination of states vote one way or the other, and that by this means, opinions shared by of a majority of the population could be expressed. It is true that these seven states rarely agreed, so little harm was done, but it was accidental, not by virtue of the system.

The Articles did contain one other provision that tended to mitigate this problem somewhat, at least at first glance. It is found in the second-to-last paragraph of Article IX:

> The United States, in Congress assembled, shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forc-

> es to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

As seen here, concurrence of nine of the thirteen states was required to enact legislation on the important issues, such as treaties, coining money and issuing currency, and military expenditures. In this way, the defect mentioned earlier was avoided: any nine states, including the seven whose population totaled only one-third, would likely constitute a majority of the people. Secondly, history shows that requiring a supermajority on important issues having a great impact on the whole is an excellent idea. But the wide diversity of state populations, the provincial outlook of many states, and the nine-of-thirteen rule sometimes led to a pernicious defect in the operation of the Articles when taken together. For, if nine states were required to pass significant legislation, a combination of five states, whose combined population may total only 20% of the entire American population, could prevent necessary legislation from being passed – rule by the minority, contrary to the basic goal of a republic. It was similar to, but not quite as bad as the Polish system, which required unanimity on every issue.

Two examples illustrate the problem. In 1784, Congress was deprived of a quorum to do business from 11 Aug to 30 Nov because three New England states decided not to attend. An even worse example was a vote taken on 23 Apr 1784 regarding the administration of western lands. The issue was whether slavery would be allowed in those territories. Because not all the states were present this vote required 7 of 10 states to retain a previous resolution that prohibited slavery. New Jersey's lone delegate refused to vote, and the delegation from North Carolina was divided. So, the previous resolution was repealed by the votes of three states: Virginia, South Carolina, and Maryland; thus three states, with a combined population very much in the minority compared to the whole, was able to re-institute slavery in all the western territories. Fortunately, this act of 1784 was superseded by the Northwest Ordinance of 13 Jul 1787.

The U. S. Constitution as proposed in 1787 preserved the excellent feature of a two-thirds requirement to confirm treaties in the Senate, which represented the states in their sovereign capacity. But to avoid the main representative defect discussed here, most other legislation was to be decided by a simple majority in both branches of Congress: the House, which represents the people through their directly-elected representatives, and the Senate representing the states. In this way, the sentiments of a majority of the people, through representation in the House, are always guaranteed a voice in every vote. These provisions lay out a workable framework by cannot address the case wherein the interests of the members of Congress diverge from the interests of the people; there is no cure for that except elections.

8 Mutual Guarantee between States and Federal Government

One of the problems of the Articles of Confederation is that it contained no implicit or explicit guarantee that the states would remain qualified to be in the Confederacy. It was conceivable that a state could end up with a form of state government unsuitable for participation in a federal system. While Article VI addressed instances where Congress could respond if a state was invaded by Indians or other nations, and Article IX addressed how disputes between states were to be handled, neither of them addressed the problem of an internal rebellion that affected the state constitution. In short, every state was left at risk to handle any internal violence, and could expect no assistance from other states or from Congress.

Hamilton addressed this problem, namely the inability of Congress under the Articles to take action to preserve a state government, in the *Federalist Papers* #21:

> The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan. There is nothing of this kind declared in the articles that compose it; and to imply a tacit guaranty from considerations of utility, would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion from the like considerations. The want of a guaranty, though it might in its conse-

> quences endanger the Union, does not so immediately attack its existence as the want of a constitutional sanction to its laws.
>
> Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government. The tempestuous situation from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions, if the malcontents had been headed by a Caesar or by a Cromwell? Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York?

Hamilton is alluding here to Shays' rebellion, a tax revolt in Massachusetts that had just concluded in Feb 1787. It was not necessary for Hamilton to mention those names and battles directly, as they were fresh in the mind of the readers of the *Federalist* essays. But if we are to understand Hamilton's argument, it is helpful for us to review Shay's Rebellion, and how it influenced the movement toward a replacement of the Articles with the U. S. Constitution. As mentioned in section 3, an economic depression occurred after the war owing to Britain's enforcement of its Navigation Acts coupled with Congress' inability to respond accordingly. Meanwhile, the states passed their own laws, some of which negatively affected neighboring states. But the shortage of ready money and the seizure of farms in lieu of unpaid taxes continued in Massachusetts, which led to the following events.

The people of Massachusetts, desperate for money and unable to obtain any satisfaction from the state legislature, began to call conventions in prominent towns to discuss what should be done about economic conditions. One of the most influential of these was convened at Hatfield (Hampshire County, MA) on 22 Aug 1786; and others occurred about same time in Worcester, Middlesex, Bristol, Lenox, and Berkshire. Mainly these were attended by people who had seen their farms seized for payment of taxes or debt; or who had prosperous farms but were unable to sell their produce because of the lack of circulating medium. Hard money was in short supply, due partly to Britain's policies but also to the foolishness of the people, who continued to buy luxuries they could not afford. The convention at Hatfield formulated a petition of 25 articles summarizing their complaints: a) the state Senate was derelict in its duty, and ought to be abolished; b) the Court of Common Pleas should be abolished; c) there were too many lawyers in the state prospering from the numerous debt-related lawsuits; d) import duties and excise taxes devoted to paying Massachusetts' portion of the requisitions by Congress and payments to the army was denounced; e) the method of apportioning taxes declared to be unfair; and f) an urgent need for paper money. The Court of Common Pleas was an object of hatred, because distress sales and seizures for nonpayment of debt were adjudicated there. The resolutions adopted at Hatfield were imitated in other conventions, and large groups of men decided to take action by forming mobs and disrupting court proceedings in the various counties in Massachusetts.

The Court of Common Pleas at Northampton, MA was disrupted on 29 Aug 1786 by a mob of 1,500 armed men, who had occupied the court before the judges arrived. This encouraged other groups to do the same in other towns. On 5 Sep, the Court of Common Pleas at Worcester, MA was also disrupted by an armed mob. The local militia sided with the mob, and the court was adjourned. Likewise, the Courts of Common Pleas at Concord and Great Barrington, MA were disrupted by armed mobs on 12 Sep 1786. At Great Barrington, the mob broke into the jail and set the prisoners free, and intimidated three of the four judges to sign papers stating they would not exercise their duties until the complaints of the people had been addressed by the legislature. The Supreme Court of Massachusetts was scheduled to open on 19 Sep 1786 at Springfield. In light of the disruptions of the past few weeks, Governor Bowdoin ordered General Shepard and his militia to occupy the courthouse beforehand in order to ensure that it could do business. But the militia was met by a group of rebels, who called themselves The Regulators, led by

Daniel Shays, who had served as a captain during the war. There was a tense standoff between the Regulators and the militia, and the court adjourned 21 Sep 1786 when it could not do business owing to a lack of jurors.

At the end of September, Shays heard a rumor that the Massachusetts Supreme Court was not going to convene at Great Barrington as scheduled. But he believed this to be a ruse, and marched his "Regulators" there and occupied the town. But when they got there, they found the court was in fact to sit at Boston. Disappointed, the rebels started a riot, searched some houses, and ran a few government officials out of town. The Court convened without incident at Boston on 27 Sep 1786.

Three more conventions were held in Worcester, Boston, and Middlesex, MA in early Oct 1786 by people angry about the state of the economy and the lawsuits over debt. Each of them filed petitions with the state legislature. The main complaints were about the various courts (General Sessions of the Peace, Common Pleas, Probate, and General), the lack of money, and the manner in which revenues from the import duties and excise taxes were appropriated. The state legislature in Massachusetts passed legislation on 18 Nov 1786 which they believed addressed the concerns expressed by the petitions presented by the three conventions in Middlesex, Boston, and Worcester in October. But the remedies suggested by the legislature proved to be the spark that set off Shays' Rebellion.

The Court of General Sessions was prevented from sitting at Worcester, MA on 21 Nov 1786 due to the court being occupied by a band of armed men. On 23 Nov 1786, a convention assembled at Worcester read the resolutions adopted by the legislature of Massachusetts in response to the petitions of Oct 1786. These were condemned as the work of people out of touch with the common people. The members of the legislature were accused of being men of affluence, of never having experienced being sued for non-payment of debts or having their property seized for inability to pay the high property taxes (all of which was true). The convention likewise condemned the interference with the courts, but to no avail. In the next few weeks, a large group of rebels from Bristol, Worcester, Hampshire, and Middlesex met at Middlesex, despite a previous pledge to prominent people of Middlesex that they would not assemble.

On 2 Dec 1786, a large band of rebels under Shays assembled at Worcester, despite freezing cold and deep snow. He imposed on residents of the town to house his men, which provoked many people in the state against him when the news got out. The militia was called out on 4 Dec 1786 in Boston to defend the city against an attack by Shays' Regulators, to be commanded by General Lincoln. Shays decided to retreat from Worcester rather than attack Boston. By mid-December, Governor Bowdoin decided to raise a militia to deal with Shays, but was careful to select militiamen who did not reside in the same areas as Shays' men. This was done to prevent a situation in which friends and neighbors would fight each other in the fields. A force of 4,400 was called up: 500 from Essex, 700 from Suffolk, 800 from Middlesex, 1,200 from Hampshire, and 1,200 from Worcester. The contingents from Suffolk and Essex were to be stationed in Boston; those from Hampshire to be stationed in Springfield, and the men from Worcester to be stationed at the eastern part of the county. They were enlisted for 30 days starting from 18 Jan 1787. General Lincoln was in overall command, assisted by Generals Tupper, Shepard, and Patterson. But it was soon discovered that there was no money in the treasury to pay them, and the legislature was out of session. Even if it were called in, any tax levied would be too late to make timely payment to the soldiers. A group of wealthy Boston businessmen volunteered to fund the militia.

Shays marched his men to Springfield at the end of January 1787, planning to capture the supplies at the arsenal there by defeating Shepard before Lincoln could arrive from Worcester. His men were split into three groups commanded by Luke Day, Eli Parsons, and Shays himself. Shepard had already arranged his troops on the heights surrounding the town. On the 24th, Shays ordered Day to attack on the 25th, but Day, determined to gain all the glory for himself, sent a message back to Shays informing him that he would not attack until the 26th. But Day's message to Shays was intercepted and sent to Lincoln. Shays attacked Shepard on the 26th, but his inexperienced men panicked after a few casualties, and most of his men retreated to Ludlow. On the 26th, Shays' men met with Parsons at Chicopee, and found that 200 had deserted. Parsons escaped over the border to New Hampshire and then to New York while Shays remained in Springfield with a small force. On the 27th, Lincoln arrived in Springfield, defeated Shays in

a skirmish, and Shays' army retreated to and pillaged S. Hadley, then continued to Amherst. Lincoln pursued Shays as far as Amherst on the 28th, but Shays had by that time moved to Pelham and took up a strong position in the hills.

Meanwhile, a group of rebels under Hubbard had assembled at W. Stockbridge; their plan was to aid Shays by diverting the army to several places at once. However, Hubbard was defeated by General Patterson and was captured. Hubbard's men retreated, but were pursued and defeated by Patterson at Adams and Williamstown. Lincoln pursued Shays' army for several days in early February, and Shays was captured on 5 Feb 1787. With Shays' men now scattered, Lincoln was confident that the revolt was over; he marched to Pittsfield via Amherst, Hadley, Chesterfield, Partridgefield, and Worthington, and ordered Shepard to meet him there. But Shays' ally, Eli Parsons, having escaped capture in Massachusetts, traveled from town to town in Vermont and New York, successfully raising another army to oppose Lincoln. On 26 Feb 1787 Parson's rebel force from New York, commanded by Hamlin, invaded Stockbridge, plundered it, and took some prominent men as hostages. The militia at Sheffield and Great Barrington were called out, and they marched around trying to find Hamlin. They stumbled across him by accident at Springfield. They defeated Hamlin and captured him, and this ended Shays' Rebellion. Hamlin had missed a golden opportunity; if he had attacked a few days earlier, he would have been unopposed, since the militia's enlistments had run out on the 21st, and for a few days, Lincoln only had 30 men in the field.

It is easy to see that a victory by Shays would have produced a very serious situation: at minimum, a state would have been held hostage to the demands of the leaders of an armed revolt. Suppose Shays had decided to set up a monarchy or a dictatorship? Clearly Massachusetts would no longer be eligible for membership in the Confederation, and the entire system could have collapsed over that issue. It is important to recall that all during this period, Congress was aware of these events, but took no action. It was unwilling or unable to act in the interest of preserving the confederation upon which its existence was founded. Shay's revolt was in fact one of the two primary factors that led to the states' assent to the Constitutional Convention in 1787 (the other was inability to raise revenue).

There was also a currency revolt in Rhode Island in 1786 which caused considerable political distress, symptomatic of the instability that could occur in the states due to poor policies. The details will be covered in section 10; for our purposes here, it is important to note that the government of Rhode Island actually passed a requirement that the people pledge an oath to accept the state paper currency at par or else they would lose the right to vote (among other penalties). This was a most un-republican development; one which Congress under the Articles could not address.

The general problem of ensuring state stability was resolved by the adoption of a provision in the U. S. Constitution granting power to the federal government to suppress revolts directly. It is in effect a guarantee by all the states that none of them could be overthrown by a domestic insurrection. It is found in the fourth section of Article IV:

> **[Article IV] Section 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

This provision does not prevent the people of a state from changing their constitution by peaceful means, but only gives power to the federal government to act when violent means are attempted. However, in order to maintain the consistency of the union, every state is also required to maintain a republican form of government. Section 4 above discussed the general requirement for republican governments.

9 Necessary Revenues

Every viable government must possess the means to fulfill its duties and to keep its promises. A national or federal government, whether it is a republic, aristocracy, or some other, naturally has the duty to manage the nation's defenses, engage in diplomacy, manage trade relations, and maintain a judicial system;

all these must be paid for in some way or another. In the American system, the states likewise exercise many powers for which considerable revenue is required, and so on down to the local level. Our early history instructs us on one thing in particular with regard to finances: a government must have the financial means to execute its respective powers and duties. It cannot, in the long run, depend on another level of government for money; it will become captive to the interests and prejudices of the politicians and bureaucrats within the other government entity. A prime example of this principle is contained in the most serious defect of the Articles of Confederation: Congress, as the only federal power, was dependent entirely on the states for revenue. This disconnect caused a radical divergence between need and ability: Congress' needs were great, even after the war, but the states, attending to their own problems, soon found ready excuses not to meet their financial obligations to Congress. By the mid-1780's, Congress had neither credit nor credibility, and the thinkers of that time realized that Congress' lack of a revenue stream caused many other problems. If the states were to stay together, a more consistent federal government would be required, and that government must have its own independent revenue source.

At the beginning of the Revolutionary War, Congress assumed emergency powers to manage the war effort. Although the Articles of Confederation were proposed and debated from 1776 to 1778, they did not actually go into operation until the spring of 1781. Congress attempted to fund the war effort prior to the implementation of the Articles by three means: borrowing, issuing its own currency, and asking requisitions from the states. The first two will form the subject of section 10, but the last will be considered here since it emulates so closely the provision in Article VIII of the Confederation:

> **Article VIII.** All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

Under this system, Congress allocated to each state a requisition, based on an estimate of the total value of land and buildings. The state was obligated to raise this sum by internal taxation, which was then to be forwarded to Congress. The system never worked as envisioned, and the proof of it lies in these facts. In the following, all amounts have been converted to Spanish milled dollars, a coin in common use at the time, which was reckoned at 386.7 grains of pure silver.

First, consider requisitions issued by Congress prior to the ratification of the Articles of Confederation:

> 22 Nov 1777: Congress issued a recommendation that the states raise $5,000,000, apportioned according to population, to be paid in quarterly installments starting 1 Jan 1778 to pay the expenses for 1778.
>
> 5 Jan 1779: Congress issued a requisition to the states for SM$15,000,000 for 1779. Congress passed additional resolutions urging the states to pay it on 7 Oct 1779 and 18 Mar 1780.
>
> 19 May 1779: Congress requisitioned $45,000,000 from the states.

None of the above requisitions were ever paid. In fairness to the states, Congress was not acting under any constitutional authority, only as an emergency institution.

But the requisition system under the Articles, in which the states were obligated by the compact, did not fare much better:

30 Oct 1781: Congress issued its first requisition to the states under the Articles of Confederation for SM$8,000,000.

4 Sep 1782: Congress requisitioned SM$1,200,000 from the states, but did not require it be paid directly to Congress. The states were to use the revenue to pay down interest in their own states.

16 Oct 1782: Congress requisitioned another SM$2,000,000 from the states.

18 Apr 1783: A standing annual requisition of SM$1,500,000 was requested as part of resolution to give Congress the power to levy import duties.

27 Apr 1784: Of the $SM8,000,000 requisitioned on 30 Oct 1781, SM$1,436,511 had been received from the states. The states were credited with having paid the SM$1,200,000 requisitioned on 4 Sep 1782 as it was for local interest payments. Of the requisition of 16 Oct 1782 for SM$2,000,000, none had been paid. The request for the standing requisition of 18 Apr 1783 had been ignored. Congress decided to lower its expectations down to half of the original requisition of SM$8,000,000, subtracted the amount paid, and accordingly requisitioned SM$2,670,988 for 1784. This amount would meet the immediate minimal needs of the government.

27 Sep 1785: Congress requisitioned SM$3,000,000 from the states.

31 Dec 1785: Of the original SM$8,000,000 requisition of 30 Oct 1781, about SM$1,600,000 had been paid by the states.

15 Feb 1786: The total receipts since 1781 amounted to SM$2,457,987: a) from requisitions made between 1 Nov 1781 and 1 Nov 1784, SM$2,025,089; b) from requisitions made between 1 Nov 1784 and 1 Jan 1786, SM$432,898.

31 Dec 1786: Congress had received only SM$500,000 of the money requisitioned from the states over the past two years.

In summary, ignoring the standing requisition of 18 Apr 1783 and the requisition of 4 Sep 1782, Congress had requisitioned $SM13,000,000 from the states, but had received about $SM2,525,000, which is a little less than 20%. This was clearly not a workable system; Congress could not meet its basic obligations (including paying the men in the army). Congress survived on borrowed money, usually at very high interest rates, because its credit and means were so bad.

During the debate leading up to the 15 Feb 1786 requisition, Congress issued a report by a committee consisting of Pinckney, King, Kean, Monroe, and Pettit, declaring that the Articles of Confederation were inadequate. It laid out several conclusions, two of which were: a) the requisition system of raising revenues had been a failure for its entire eight year duration; and b) the requisition system could not be relied upon in the future.

There were some proposals to alter the Articles to give Congress an independent revenue source by granting it a power to levy duties on imports. Twelve of the states agreed to it, but New York refused on the grounds that a general import duty levied by Congress would serve to weaken New York's position as a trade center. The persistent financial crisis and New York's intransigence, coupled with Shays' Rebellion, led to the calling of the Constitutional Convention in 1787.

James Madison wrote an undated paper near the end of his life in which he recounted this period as Congress and the nation as a whole suffered under this defect [4]:

> "But the radical infirmity of the "Articles of Confederation" was the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interests and convenience, and distrusting the compliance of the others."

This problem was resolved by the adoption of the U. S. Constitution, in which Congress was given power to raise revenue independent of state influence:

> **[Article 1] Section 8.** Congress shall have the power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

10 Coinage and Currency

In order to fully appreciate the situation regarding coinage and debt under the Articles of Confederation, and how it was addressed by the Constitution, it is necessary to review some basic facts. First, Congress became the symbol of the Revolution as the only institution recognized by all the states. Secondly, it came into being under emergency circumstances in order to coordinate the war effort. Recognizing a need for a formal arrangement governing relations among the states, the men of Congress first proposed the Articles of Confederation shortly after the Declaration of Independence, but they were not established in final form until November of 1778, when they were submitted to the state legislatures for consideration. They did not go into effect until all thirteen states had sanctioned them which occurred in March of 1781. The provisions concerning money and credit are as follows:

> **[Paragraph 4 of Article IX]** The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of said land and naval forces, and directing their operations.

> **[Paragraph 7 of Article IX]** The United States, in Congress assembled, shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

> **Article XII.** All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

Under Art. IX, paragraph 4, Congress had the power to regulate the nature of coin, but the states were allowed to coin their own money under that regulation. The states also had the power (already existing) to issue their own paper currency. Under paragraph 7 of Art, IX, Congress had the power to issue "bills of credit", which are notes issued on the credit of the United States; they functioned in the same manner as a paper currency. Last, Article XII states that Congress shall be liable for full payment of all debts and bills of credit issued before the Articles are ratified. That means we must first review the progression of the "Continental money", which was mostly issued as bills of credit, but occasionally as paper currency. These were issued directly by Congress as shown in Figure 1, denominated in dollars, ostensibly to be regarded at the same value as the Spanish milled dollar (SM$) then in common use (reckoned as 386.7 grains of silver). The reckoned value of the Continental bills of credit and currency depreciated rapidly, and those estimates compared to the Spanish dollar are given in the Comment column.

Date of Issue	Amount ($)	Form	Comment
29 Nov 1775	3,000,000	bills of credit	
1 Mar 1776	4,000,000	bills of credit	
9 May 1776	5,000,000	bills of credit	
28 Dec 1776	5,000,000	bills of credit	
26 Feb 1777	5,000,000	bills of credit	Continental commonly valued at SM$ 0.80
20 May 1777	5,000,000	bills of credit	
1 Aug 1777	1,000,000	bills of credit	Continental commonly valued at SM$ 0.40
15 Aug 1777	1,000,000	bills of credit	
7 Nov 1777	1,000,000	bills of credit	
3 Dec 1777	1,000,000	bills of credit	
8 Jan 1778	1,000,000	bills of credit	Continental commonly valued at SM$ 0.25
22 Jan 1778	2,000,000	bills of credit	
16 Feb 1778	2,000,000	bills of credit	
4 Apr 1778	1,000,000	paper currency	
11 Apr 1778	5,000,000	bills of credit	
18 Apr 1778	500,000	paper currency	
22 May 1778	5,000,000	paper currency	
20 Jun 1778	5,000,000	paper currency	Continental commonly valued at SM$ 0.25
30 Jul 1778	5,000,000	paper currency	
5 Sep 1778	5,000,000	paper currency	
26 Sep 1778	10,000,000	bills of credit	
4 Nov 1778	10,000,000	bills of credit	
14 Dec 1778	10,000,000	bills of credit	Continental commonly valued at SM$ 0.14
14 Jan 1779	50,000,400	bills of credit	
3 Feb 1779	5,000,160	bills of credit	
19 Feb 1779	5,000,160	bills of credit	
1 Apr 1779	5,000,160	bills of credit	Continental commonly valued at SM$ 0.05
5 May 1779	10,000,100	bills of credit	
4 Jun 1779	10,000,100	bills of credit	
17 Jul 1779	10,000,100	bills of credit	
17 Jul 1779	5,000,180	paper currency	
17 Sep 1779	10,000,100	bills of credit	
17 Sep 1779	5,000,180	paper currency	
14 Oct 1779	5,000,180	paper currency	
17 Nov 1779	5,000,040	bills of credit	
17 Nov 1779	5,050,500	paper currency	
29 Nov 1779	10,000,140	bills of credit	Continental commonly valued at SM$ 0.025

Figure 1: Issues of "Continental" Bills of Credit and Paper Currency by Congress 1775 - 1779

By the end of 1779, the "Continental" was worth about 2 cents in hard money; by Jun 1780, it was valued at about one cent. It then became the object of ridicule and simply went out of circulation. Finally, on 11 Jul 1780, Congress published a redemption schedule for all the Continental bills and currency: they would be redeemed at 40 to 1 (SM$ 0.025), although their reckoned value by that time was about 65 to 1 (i.e., worth about SM$ 0.015). Thus the $232,000,000 or so Continentals that had been issued ultimately was reduced to SM$5,8000,000 in actual redemption value. Because Congress could not raise any revenue on its own, as mentioned in section 9, this was simply added to the national debt. Keep in mind that all this occurred prior to the formal operation of the Articles of Confederation (2 Mar 1781). What happened to all the people that accepted the Continental at face value? They were robbed in economic terms, but in historical terms it was actually a tax that funded the war.

Why did the Continental depreciate so quickly? For the same two reasons any fiat currency depreciates: a) in the short run, the issuer knows it has no value that he is responsible for, so he issues as much as he can without startling the public or the business community; and b) in the long run, the public loses confidence in it once they realize it has no true value. These explain why every fiat currency requires a "legal tender" law in order to force the public and the business community to pretend that it actually does have value. That continues until the issuer decides to get out of the business (having made his money on interest payments) and simply abolishes the fiat currency, thus robbing those who accepted it. Going back to the case of the Continental, Congress issued it under emergency conditions, that is, to fight the war against Britain. Perhaps it was necessary and justifiable to do so, given the enormous benefits to be derived from independence; but it corrupted the economy.

The states had also issued a great deal of paper money during the war, and their currency had also depreciated somewhat. Although the Articles permitted Congress to issue bills of credit, it no longer did so, having learned its lesson from the history of the Continental currency. But the evil of paper money was not solved thereby, since some of the states continued to issue paper money after the war, which also depreciated. Georgia redeemed its paper money at 1,000 to 1 in Feb 1785; Delaware redeemed its paper in the same month at 75 to 1. Pennsylvania issued paper money in May 1785; by Aug 1786, it had already depreciated 12%. South Carolina issue paper currency in Oct 1785; followed by North Carolina in Nov 1785, New York in Mar 1786; New Jersey and Rhode Island in May 1786; and Georgia in Aug 1786. By Aug 1786, New Jersey's currency had become worthless, and Rhode Island's paper had depreciated to 4:1. The other paper issued by the states suffered similar fates, especially in North and South Carolina. It was the debate over paper currency that started Shays' rebellion in Massachusetts (a case where the people wanted it).

Simply issuing paper at the state level was not the only problem; it was coupled with constant alterations in its official value, which affected contracts between parties in different states. Certainly there is no incentive to extend credit if the currency can be manipulated, or as in South Carolina and Virginia, terms of contracts were altered to allow payments in land or tobacco, or as again in South Carolina, contracts were altered to require different payment schedules.

Such was the situation at the Constitutional Convention in 1787. Providing Congress a power to borrow money and establish coinage was agreed to easily. Likewise, the states were prohibited from coining money or issuing bills of credit; furthermore, only gold and silver could be made legal tender in the states. The corrective provisions in the U. S. Constitution read:

> **[Article I, Section 8]** The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
> To borrow money on the credit of the United States;
>
> **[Article I, Section 10]** No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing

> but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

It is of great interest while on this subject to examine the debate in the Constitutional Convention about whether the federal government shall have a power to emit bills of credit. A draft had been presented on 6 Aug 1787, containing a provision [Art. VII, Section 1] stating "The legislature of the United States shall have the power ... to borrow money, and emit bills, on the credit of the United States." This clause was debated on 16 Aug 1787, as follows [5]:

> Mr. Gouverneur Morris moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.
>
> Mr. Butler seconds the motion.
>
> Mr. Madison. Will it not be sufficient to prohibit the making them a tender? This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best.
>
> Mr. Gouverneur Morris. Striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited.
>
> Mr. Gorham was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure.
>
> Mr. Mason had doubts on the subject. Congress, he thought, would not have the power, unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on, had such a prohibition existed.
>
> Mr. Gorham. The power, as far as it will be necessary or safe, is involved in that of borrowing.
>
> Mr. Mercer was a friend to paper money, though, in the present state and temper of America, he should neither propose or approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.
>
> Mr. Ellsworth thought this a favorable moment to shut and bar the door against paper money. The mischief's of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Give the government credit, and other resources will offer. The power may do harm, never good.
>
> Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.
>
> Mr. Wilson. It will have a most salutary influence on the credit of the United States, to remove the possibility of paper money. This expedient can never succeed whilst its mischief's are remembered; and, as long as it can be resorted to, it will be a bar to other resources.
>
> Mr. Butler remarked, that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power.
>
> Mr. Mason was still averse to tying the hands of the legislature altogether. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head.
>
> Mr. Read thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation.

> Mr. Langdon had rather reject the whole plan, than retain the three words, "and emit bills."
>
> On the motion for striking out, --
>
> New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye, 9; New Jersey, Maryland, no, 2.
>
> The clause for borrowing money was agreed to, *nem. con*.
>
> Adjourned.

Elliot added a footnote regarding Virginia's positive vote to strike out "and emit bills." It reads:

> "This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts."

Madison defended this view more directly in the *Federalist Papers* #44:

> The right of coining money, which is here taken from the States, was left in their hands by the Confederation, as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance, also, the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and weights of the circulating pieces. The latter inconveniency defeats one purpose for which the power was originally submitted to the federal head; and as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained by local mints established under the general authority.
>
> The extension of the prohibition to bills of credit must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed, that the same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischief's is less incident to a power in the States to emit paper money, than to coin gold or silver. The power to make anything but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of issuing a paper currency.

11 Slavery

Human civilization is probably about 10000 years old. It is fascinating to consider that chattel slavery has existed for 98.5% of that entire period, having ended only about 150 years ago. While it is nothing new in

the history of mankind, it is more revolting to the modern mind. In America we continue to be preoccupied with it since American slavery was uniquely racial in its implementation. That, combined with the fact that there are Americans still living who knew, as children, people who had been slaves, causes slavery to remain fresh in our debates. But those among us who impute universal racism to white people would do well to remember that far more white people than black have been slaves throughout history. The enslavement of blacks began in Africa, just as the enslavement of whites originated in Greece and Rome. Does racism exist in America? Of course; it always has and it always will so long as people of one racial group desire to feel superior to some other. There are and always will be a few who join the Ku Klux Klan or sympathize with them and their equivalents; there are likewise on the other side always a few who embrace Black Liberation and critical race theologies and their various mutations. I digress -- our subject is the issue of slavery at the forming of the United States.

Slavery was practiced throughout the 13 colonies from the mid-1600's onward, especially in the south. It became apparent soon after the colonies were established that black people were better suited to the hard labor required in an agricultural economy in the sub-tropical conditions of the south. Or at least the white people discovered that claim as a convenient excuse. In any case, many of that era believed that slavery was an efficient economic system. Secondly, slavery was important to the British crown as a source of revenue, and was not only encouraged in the colonies, it was sometimes vigorously promoted since there was a great deal of money to be made buying/capturing slaves and selling them in the colonies once Britain obtained a lock on the slave trade in the early 1700's.

The institution of slavery was not uniformly embraced in all the colonies. In the north, the religious ethic rejected slavery on moral grounds, and it did not take hold there as it did in the southern colonies, where the (false) economic argument was firmly planted. There were many attempts prior to the Revolutionary War to limit slavery in the colonies. A few examples are as follows.

In Virginia, the state Assembly imposed a series of import duties from 1732 on the importation of slaves that nearly amounted to a prohibition (up to 40% of the slaves' value). In 1772 the Virginia Assembly wrote to King George III, asking him, unsuccessfully, to abolish the slave trade [6]:

> "We implore your Majesty's paternal assistance in averting a calamity of a most alarming nature. The importation of slaves into the colonies from the coast of Africa hath long been considered a as a trade of great inhumanity, and under its present encouragement we have too much reason to fear will endanger the very existence of your Majesty's American dominions. We are sensible that some of your Majesty's subjects may reap emoluments from this sort of traffic, but when we consider that it greatly retards the settlement of the colonies with more useful inhabitants and may in time have the most destructive influence, we presume to hope that the interest of the few will be disregarded when placed in competition with the security and happiness of such numbers of your Majesty's dutiful and loyal subjects. We therefore beseech your Majesty to remove all those restraints on your majesty's governors in this colony which inhibit their assenting to such laws as might check so pernicious a consequence."

The Rhode Island legislature passed a law in 1774 whereby all slaves brought into state by citizens of other states were to be free, except those passing through with their master; also, Rhode Island citizens bringing in slaves had to remove or free them in one year [7]. In Connecticut, the Assembly passed a law in 1774 stating [8] "No Indian, mulatto, or negro slave shall at any time hereafter be brought or imported into this state, by sea or land, from any place or places whatsoever, to be disposed of, left, or sold within the State." New Jersey had attempted in 1744 and 1761 to essential prohibit importation by imposing large import duty [9], but it was rejected by the Provincial Council as injurious to crown revenue. In Pennsylvania, the influence of the Quakers led to the voluntary freeing of many slaves from 1725 onward [10]. Massachusetts attempted in 1774 to prohibit the importation of slaves outright [11], but this motion was rejected by Gov. Hutchinson as it would reduce revenue to the crown.

The Articles of Confederation was silent on the entire issue of slavery; each state enacted legislation as it saw fit. In 1775, slavery existed in all 13 states but there was a great deal of activity in the states toward reducing slavery from the start of the Revolution through the period of the Articles. In 1776 Delaware prohibited further importation through a provision in its new Constitution, which read: "No person hereafter imported into this state from Africa ought to be held in slavery under any pretense whatever, and no Negro, Indian or mulatto slave ought to be brought into this state for sale from any part of the world." Unfortunately, free blacks were occasionally kidnapped & sold. In 1776, Rhode Island passed legislation that made all children of slaves born in 1776 and after free; and promoted the gradual liberation of existing slaves by regulation [12]. In 1778, Virginia prohibited further importation of slaves, although probably more out of fear of a large population of slaves starting an uprising than out of widespread disapprobation of the institution itself [13]. Pennsylvania passed a law in 1780 that prohibited further importation, and made all persons born after 1 Mar 1780 servants only until age 28, after which they were then free [14]. It was not abolished outright until 1847.

Massachusetts adopted a new Constitution in 1780, the first article of which read: "All men are born free and equal, and have natural, essential, and unalienable rights; among which may be reckoned the right of enjoying, and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." It was not intended by these words to abolish slavery, but a series of court rulings on the Constitution in 1781 and afterward serve to gradually reduce slavery; the people considered it abolished for practical purposes [15]. In 1788, importation of slaves was prohibited directly [16].

Maryland prohibited further importation in 1783 (but slavery was not abolished until 1864). New Hampshire passed a law in 1783 that was similar to the 1780 Pennsylvania law; in 1784, Connecticut did the same [17]. New York followed suit in 1785, except the children of slaves gained full voting rights. Starting in 1782, New Jersey freed all the slaves that had been owned by Tories [18]. In 1786 the legislature passed provisions for voluntary gradual freeing of slaves of a certain age [19]; in that same year prohibited further importation; and in 1788 also prohibited exportation [20]. Gradual mandatory emancipation did not begin until 1804, and slavery was not abolished entirely in New Jersey until 1846.

In 1786 the state of North Carolina imposed a 5 pound sterling duty on importation to discourage the trade. Only in Georgia and South Carolina was the slave trade entirely unrestricted.

The weakness of the Articles of Confederation in this regard was that there was no limitation on the importation of slaves as a general rule. It was gradually being phased out in the north, while importation continued unabated in the south. As the debates at the Constitutional Convention got underway, it was soon apparent that many in the north would have preferred to abolish slavery entirely, but the Georgia and South Carolina delegations made it clear that they would never join the union if there was any attempt to remove slavery as an institution – it was, they believed, too important for the function of their economy [21, 22]. This condition determined the debate, as Georgia and South Carolina were essential for the preservation of the union. It was necessary to keep those two states in the union, since they would serve to deter a serious military threat from Spain in the south. Secondly, if they did not join the union, it is likely they would have attempted to rejoin Great Britain in order to gain an ally in any controversy with Spain over navigation rights on the Mississippi. These two southern states were however, willing to accept the prohibition on the importation of slaves after 1808. The provision in the U. S. Constitution reads:

> **[Article 1] Section 9.** The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The provision did not affect existing slaves, but it was an improvement over the Articles since it universally limited importation after 1808. In effect, it imposed on all the states, even those where slavery was

most entrenched, the same trend that had occurred in the northern states throughout the previous decade.

12 Amendments

Change is the one unchanging constant of human history. By way of application, it must be admitted that any rules for governance among people must contain a provision by which those rules may be altered in an orderly fashion in order to accommodate changing conditions. The Articles of Confederation contained such a provision as follows:

> **Article XIII.** Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

The concurrence of every state legislature was required to make any change in the Articles. Section 9 discussed the main problem with the revenue provisions of the Articles, namely that Congress was entirely dependent on the states through the requisition system. But the Articles could not be amended, because one state (New York) refused to permit Congress a power to establish an independent revenue source to meet the needs at the national level. The conflict over Congress' revenue started on 3 Feb 1781, when Congress, realizing that the requisition system was not working, recommended that the Articles be amended to allow Congress to impose an import duty. With such a power, Congress could raise revenue necessary to perform its minimum duties, such as paying the army. Rhode Island was the first to reject the concept on 1 Nov 1782, arguing among other things, that the revenue collectors would not be answerable to Rhode Island. Virginia was initially in favor of the import duty, but revoked its agreement on 11 Jun 1783. But in that same month, Delaware and New Jersey agreed to it; South Carolina followed suit on 13 Aug 1783 but with difficult caveats; Massachusetts concurred on 16 Oct 1783; Virginia reversing itself once again in favor on 29 Dec 1783; North Carolina agreed on 2 Jun 1784; and New Hampshire agreed on 23 Jun 1785. All the other states except New York did likewise by May 1786.

But the government of the state of New York, interested only in its own revenues, refused to allow Congress to impose any import duties. On 16 Aug 1786, Governor Clinton of New York notified Congress that he would not call the state legislature into session to consider the proposal; although Congress was desperate for money, he did not consider the situation important enough. On 15 Feb 1787, New York gave its final refusal to consider the matter. This proved fatal to the Confederation, as Congress realized it now had no hope of a stable revenue stream. It caused Congress endorse the idea of a convention of the states to modify the Articles, which became the convention that wrote the Constitution.

The Constitution permits amendments in a manner superior to the Articles of Confederation:

> **[Article V]** The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Under this provision, amendments to the Constitution may be initiated in two ways: a) if two-thirds of both Houses of Congress pass an amendment; or b) if two-thirds of the states call for a convention for the pur-

pose of proposing amendments. In each case, concurrence of three-fourths of the states, either by their legislatures or by ratifying conventions, is required before such proposed amendments take effect.

James Madison defended this provision in the *Federalist Papers #4*3:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.

Alexander Hamilton answered critics of the provision, and gave his opinion on the nature of amendments were they to occur, in the *Federalist Papers #85*:

> In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen States at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

Hamilton was almost right when he wrote that subsequent amendments would mostly change the organization of the government, not its powers. In fact, the first ten Amendments confirmed the existing rights of the people and the states relative to the federal government, thus expressly limiting the federal government's power if there was any room for doubt among rational people. There are only two cases where the federal government expanded its powers by amending the Constitution. The first was the patently moronic Prohibition (Amendment 18, subsequently repealed by Amendment 21), which led to the rise to a permanent criminal class (Irish and Italian mafias) with the means and willingness to corrupt the government. Although alcohol prohibition was repealed, it was replaced with other equally detrimental prohibitions that have kept the criminal elite employed for decades. The second case of an expansion of power is Amendment 16, which gave Congress a power to tax incomes.

In general, this method of amendment has the virtue of making amendments fairly difficult, thus enhancing the stability of the Constitution. At the same time it permits necessary amendments, but only if a great majority of the people, acting through their state legislators or conventions, agree to it. It has proven over time to be a most beneficial system, since very few of the numerous and ridiculous proposed amendments ever come to the states for consideration -- they die in Congress as they deserve.

13 Method of Ratification

It was only a week after the Declaration of Independence that a committee in the Continental Congress reported out an initial plan for organizing a confederation of the states to be united in the effort against Great Britain. Although reported out of this committee on 12 Jul 1776, it could have no practical effect until the members of Congress agreed to all of its terms and proposed it to the states. This was a sensible approach, given that the Articles represented a purely federal system, that is, a compact between states in their sovereign capacity. Congress debated these for nearly 18 months; on 15 Nov 1777, having reached agreement on the terms thereof, a letter dated 17 Nov 1777 was sent to every state, asking those states to ratify the Articles. The legislatures of eight states passed legislation in the next 6 months by which their delegates to Congress were authorized to approve the Articles. The delegates from those states (New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Virginia, and South Carolina) formally ratified the Articles on 9 Jul 1778. The provision is contained in Article XIII:

> **Article XIII.** Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.
>
> And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778, and in the third year of the Independence of America.

But the Articles did not contain a provision by which it would go into effect for those states that ratified it; the intent was that all 13 states were to be united in the war effort. Therefore, the Articles did not formally go into effect until 2 Mar 1781, the day after Maryland's legislature ratified the Articles. This unanimous requirement for both ratification and amendment proved to be a serious defect, as already cited in sections 9 and 12.

The framers of the Constitution were only too familiar with this difficulty, and made provision in the new Constitution by which it would go into effect if a certain number (two-thirds) of the then-existing states were to agree to it:

> **[Article 7]:** The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

This may seem contrary to the Preamble in the Constitution, which states:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

How can it be said that the people established it, if in fact it required ratification by the states? The answer lies in the fact that each state that ratified it did so at a ratifying convention called for that purpose in each state, and each delegate sent to it was tasked with representing the people of the state. The U. S. Constitution is the founding document of a compound democratic republic established by republican means, that is, when the people are represented by those they trust, and accept the results of a vote of the specified majority. In this way, although the representatives cast their votes directly, those votes matter only because the full weight of the people's confidence is behind them.

James Madison, writing in the *Federalist Papers* #40, discussed the objections of some who were opposed to the Constitution on the grounds that agreement of all thirteen states should be required before it should go into effect. Madison simply noted that the critics had avoided the fact that unanimity on ratification would be a form of minority rule:

> It is worthy of remark that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by a *majority* of one sixtieth of the people of America to a measure approved and called for by the voice of twelve States, comprising fifty-nine sixtieths of the people -- an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection, therefore, has been in a manner waived by those who have criticized the powers of the convention, I dismiss it without further observation.

The "example of inflexible opposition" referred to here was the refusal by the state of New York to allow Congress (under the Articles) to impose an import duty in order to obtain a direct revenue source.

Madison addressed the method of ratification as called out in Article 7 directly in the *Federalist Papers* #43:

> This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention which our own experience would have rendered inexcusable.

The provision in the Constitution was an improvement over the Articles in two ways: a) nine states could activate it without being held hostage to a minority of states; and b) it was ratified by conventions that represented the people, not just the state governments.

14 Executive and Judicial Functions

The Articles of Confederation were initially proposed in the wartime emergency of 1775-1776 and were ratified by all the states by 1781; but the structure of the Confederation was not conducive to long-term stability. Congress was granted certain powers under the Articles: a) to determine the amount of requisitions each state was to pay; b) to declare war and make peace; c) to send and receive ambassadors to foreign nations; d) to negotiate and ratify treaties; e) to determine rules for disposition of captures at sea; f) to grant letters of marque (authorizing private piracy on behalf of the U. S.); g) to convene courts for trials of crimes committed at sea; h) to be the appeal of last resort in disputes between the states; i) to regulate coinage issued by Congress or by the states; j) to establish uniform weights and measures

throughout the United States; k) to regulate trade with the Indian tribes; l) to create post offices; m) to exercise overall command and control of the military forces; n) to appoint some officers in the army and all in the navy; and o) to commission all officers in the service of the United States.

One major difficulty was that Congress did not have the ability to regularly enforce any of its laws nor the means to punish violations of them. This essay has presented considerable evidence to that effect, especially concerning Congress' inability to maintain an army, raise revenue, ensure adherence to treaties, manage territories, respond to foreign policies, or regulate commerce. A stable government must, as a minimum, have an executive function to enforce its laws and a judicial system to punish violations of valid laws and to interpret the law itself.

Alexander Hamilton addressed both of these problems in the *Federalist Papers*. First, in the *Federalist Papers* # 21, he cites Congress' inability to enforce any of its laws:

> The next most palpable defect of the subsisting Confederation, is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction, in the face of that part of the second article, by which it is declared, "that each State shall retain every power, jurisdiction, and right, not *expressly* delegated to the United States in Congress assembled." There is, doubtless, a striking absurdity in supposing that a right of this kind does not exist, but we are reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution; and the want of which, in that plan, has been the subject of much plausible animadversion, and severe criticism. If we are unwilling to impair the force of this applauded provision, we shall be obliged to conclude, that the United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws. It will appear, from the specimens which have been cited, that the American Confederacy, in this particular, stands discriminated from every other institution of a similar kind, and exhibits a new and unexampled phenomenon in the political world.

Hamilton then discusses in the *Federalist Papers* #22, the lack of a judicial system:

> A circumstance which crowns the defects of the Confederation remains yet to be mentioned, -- the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the came court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

In reviewing the chronicle of the Constitutional Convention, it is interesting to note that there was no serious debate about whether an executive or judicial branch should exist. The need for them was pretty much accepted by all the attendees; the main debates were about the exact form, how they would be constituted, and what specific powers they would have. There were some who thought an executive council would carry out the executive function better than a single officer; some preferred a system by which the judicial system would be combined with the legislative; some thought all proposed laws by the legislative should be reviewed and modified by the executive and judicial branches. In the end, the framers developed a Constitution that created three main branches of the federal government, each with defined powers and the means to defend itself from encroachment by the other two. The framers employed methods to ensure that the executive (President) and judicial branches were separate from each other and independent of the legislative. There are some areas of overlap between the executive and the legislative (power of making treaties), and considerable influence of both of these upon the judicial branch (nomination of judges by the President and confirmation by the Senate).

The powers granted to the President are: a) to be Commander-in-Chief of the military; b) to be the point of contact for all foreign dignitaries as the nominal head of state; c) to negotiate treaties (but not to ratify them); d) to nominate ambassadors, judges, and certain other offices subject to Senate confirmation; e) to serve as chief administrator over the government departments that enforce the laws made by Congress; and f) to make lower-level appointments in his executive branches charged with those enforcement tasks.

The general power granted to the federal judicial system is to hear all cases in law and equity arising from treaties, federal laws, and the Constitution itself. The powers are divided as follows: a) creation of a Supreme Court which is to have original jurisdiction in cases affecting ambassadors, public officials, and when a state is a party; and b) creation of lower federal courts to hear cases for which the Supreme Court does not have original jurisdiction. In all cases, the Supreme Court has an appellate jurisdiction to hear appeals from lower federal courts.

15 Miscellaneous Necessary Powers

The first fourteen section covered in detail some of the most serious problems encountered under the Articles of Confederation. Most of them arose because Congress did not have sufficient power under that agreement to perform necessary duties. It is important to remember that the U. S. Constitution, as a successor to the Articles, represented in some ways, a transfer of power from the several states to a new federal government. There was not much question that a change was necessary -- the nation was beginning to fall apart owing partly to the weakness of Congress and partly to the jealousies of the states.

A formal transfer of power is not to be taken lightly. The people of that era knew full well that if the states agreed to give up powers to the federal government, those powers would never return to the states. It is a testament to the wisdom of those who wrote the Constitution as well as those that urged its ratification on the state level, that the founding generation got the division of power between states and the federal government about right. The system worked well from 1788 to about the time of World War I, when the federal government began in earnest to assert undue powers. That is of course a very big subject for a later time. For now, the following is a summary of the powers that were not granted to Congress under the Articles of Confederation, but were granted to some portion of the federal government in the U. S. Constitution.

1. The creation of an Executive Department per Article 2, to: a) enforce the laws, b) control foreign policy, c) to be Commander-in-Chief of the military, d) make treaties, subject to ratification by the Senate; e) nominate federal officials, including Supreme Court justices, f) is charged with ensuring that the laws are executed faithfully; and g) has power to commission all officers of the U. S. These were discussed in sections 3, 4, 5, and 14.

2. The creation of a judicial system per Article 3, to: a) hear all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties; b) those affecting ambassadors, other public

ministers and consuls; c) of admiralty and maritime jurisdiction; d) those in which the United States is a party; e) between two or more states; and f) certain types of cases involving citizens and states. The Supreme Court also has appellate power in both law and fact except as Congress may determine. This was discussed in 14.

3. The power to obtain direct revenue for the federal government through the "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." This was discussed in section 9.

4. The power to call out the militia to: a) execute the laws; and b) respond to invasions and revolts. Congress also is granted the power to organize, arm, and determine the actions of the militia when called out to service under the United States. These were discussed in sections 2 and 8.

5. The power to determine regulations for the regular armed forces, transferring the power to provide for the regular army from levies on the states to a central federal power. This was discussed in section 2.

6. The power to guarantee a republican government in every state in order to ensure that the states would be immune from political revolutions. This was discussed in section 8.

7. The power to: a) administrate territories; and b) admit new states. These were necessary in order to regularize the large western area that was rapidly being populated until such time as they qualified for statehood. This was discussed in section 6.

8. The power to regulate: a) foreign commerce; and b) commerce between the states. These powers were necessary to respond to the acts of foreign nations affecting the economy of the U. S and also to control the predatory activities of some states upon the others. These were discussed in sections 3 and 5.

9. The exclusive power to: a) coin money; b) regulate its value; c) regulate the value of foreign money; and d) define and punish counterfeiting of the coin and securities of the U. S. These powers were necessary to end the abuses of paper currency issued by the states and confusion caused by the different values of state issues. This was discussed in section 10.

10. The power to impose taxes and duties in order to affect the slave trade (section 11).

11. The power to punish offenses against the law of nations.

12. The power to establish uniform rules on bankruptcy.

13. The power to create post-roads.

14. The power to grant patents and copyrights.

15. The power to establish a new class of federal property, such as docks, arsenals, forts, etc.

The next section will review the powers that were originally granted to Congress under the Articles of Confederation, but were modified or clarified in the Constitution.

16 Powers of States

The previous section surveyed the alteration of power at the federal level from the Articles of Confederation gave way to the Constitution. But there were also significant alterations to the powers held by the states. These alterations fall into three categories: a) those powers held by the states under the Articles, but were prohibited in the Constitution; b) those that were retained in the Constitution, but in a modified

form; and c) those that were not addressed in the Articles and prohibited by the Constitution. This study closes with a list of powers that were prohibited to the states in the Articles and carried over into the Constitution.

The powers falling under the first category may be summarized as follows:

a. The states were allowed to coin money under the Articles, but are prohibited from doing so under the Constitution. This was to correct the paper-money problem so rampant in the states after the war, as detailed in section 10.

b. The states were allowed to issue bills of credit on their account under the Articles, but are prohibited from doing so under the Constitution. It is worth observing that the federal government likewise falls under the same prohibition. This had been an enormous problem during the war, more so on the part of Congress, as it had issued the Continental bills of credit, which became worthless in a few years. This is also discussed in section 10.

c. Under the Articles, the states could independently issue letters of marque (privateering) with the approval of Congress (which required a declaration of war); under the Constitution, only the federal government can issue them.

The power falling under the second category is the power to levy import duties. Under the Articles, the states retained the power to levy their own import and export duties, unless they conflicted with provisions of treaties that were in negotiation with France and Spain at the time. This power caused several problems after the war. First, the states proceeded to respond to Britain's navigation Acts by imposing tonnage duties and other duties; this was partly a consequence of Congress' inability to negotiate commercial treaties, as detailed in part 5 of this series. The second problem was that the states began to prey on each other in order to gain commercial advantages. The Constitution prohibits the states from these levies, except for any necessary to cover inspection costs. Any revenue collected that is in excess of the inspection costs are to be transferred to the federal treasury.

The powers falling under the third category (not addressed in the Articles, prohibited to the states under the Constitution) include: a) prohibited from passing bills of attainder; b) prohibited from passing ex-post facto laws; c) prohibited from passing laws that inhibit the execution of contracts; d) prohibited from passing a legal tender law, except for gold and silver; and d) prohibited from laying a tonnage duty.

Last, there are powers which were prohibited to the states under the Articles, and were likewise carried over to the Constitution. These prohibitions include: a) creation of titles of nobility; b) establishing treaties with foreign nations; c) forming alliances with foreign nations; d) forming alliances or confederations among any number of states; e) keeping a military navy in peacetime; f) maintaining an army in peacetime except as allowed by Congress; and g) engaging in war without concurrence of Congress, except for emergency situations.

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