The Defects of the Articles of Confederation, Part 12

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10 Sep 2011

Synopsis: This twelfth essay on the defects of the Articles of Confederation discusses the difficulty of amending it; and recounts the one critical case in which a failure to amend led to the 1787 Constitutional Convention.

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. Part 9 of this series 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

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> 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 purpose 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 #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 #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

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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 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.

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