

## The Defects of the Articles of Confederation, Part 13

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**Synopsis:** This essay is the 13th in a series on the weaknesses of the Articles of Confederation. In this edition, the means of ratifying the Articles is compared to that of ratifying the Constitution. The Articles were ratified either by state legislatures or by delegates to Congress; the Constitution was ratified by conventions in each state called for that purpose, thus indirectly representing the people.

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 parts 9 and 12 of this series.

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 #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 No. 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.