1993

Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation

Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University

WHY CONSTITUTIONAL LAWYERS AND HISTORIANS SHOULD TAKE A FRESH LOOK AT THE EMERGENCE OF THE CONSTITUTION FROM THE CONFEDERATION PERIOD: THE CASE OF THE DRAFTING OF THE ARTICLES OF CONFEDERATION

ERIC M. FREEDMAN*

Table of Contents

---

* Assistant Professor of Law, Hofstra University School of Law. B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University. I am grateful to Richard K. Neumann, Wendy M. Rogovin, Andrew Schepard, and Norman I. Silber for their comments on an earlier draft; to Nancy A. Grasser for her dedicated secretarial assistance; to Samuel J. Ferrara, Caroline K. Hall, and Victoria J. Saunders for their diligent research assistance; to John W. Karrel and Susan Lloyd for their generous logistical support; to Calvin Jillson and Rick K. Wilson for sharing with me in manuscript their book on the Continental Congress, *infra* note 55; and to Yale Law School for its supportive professional courtesy.

INTRODUCTION

Political events in the years between the start of the American Revolution and the calling of the Constitutional Convention traditionally have been partially understood by historians and wholly ignored by legal scholars. Both groups could benefit by taking a second look. The period contains a rich vein of useful historical and legal source material that, because of outmoded scholarship, has remained largely unmined.

This Article seeks to support that position with an argument in three parts. Part I describes the conventional historical picture of the period and the major weaknesses of that picture. The received account—which sees a "critical period" of chaos brought to an abrupt end by the Constitution—is not just a selective rendering of the facts, but also constricting to both historical and legal insights in a variety of areas.

By obscuring institutional continuities and interpreting political debates primarily as ideological contests, the conventional view has (1) limited the ability of historians to draw useful connections between related events (like the compromises in the Continental Congress and the ones at the Philadelphia Convention), and (2) wholly blinded constitutional lawyers to the extent of important data that the Confederation period offers for the interpretation of the Constitution.

Some of the most familiar parts of the Constitution, including the Supremacy Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause, were drawn directly from the Articles of Confederation, while many of the additional textual powers granted to the new government were ones that the old government had been exercising in practice. Yet the resulting interpretive possibilities have been largely ignored, because the conventional account has been unable to accommodate these facts.

Part II of the Article illustrates some of the weaknesses of the existing paradigm through a new consideration of the drafting of the Articles of Confederation. Subpart II.A sets forth a brief chronology of the proceedings as the Articles passed through the Continental Congress. Subpart II.B describes the interpretations that prior authors have given to these events and critiques them as inadequate to account for the known facts.

Subpart II.C puts forward a new interpretation, supported by a detailed examination of the congressional debates and roll calls on the Articles. This account challenges both those previous writers who have seen the drafting process as the collision of coherent, opposed factional blocs, defined by either ideology or region, and those who have seen it as wholly incoherent. If one examines the debates on an issue-by-issue basis, a repeated pattern appears: the delegates divide initially on the basis of the interests of their states, and then unite, on the basis of shared ideological premises and the practical need for consensus, to reach pragmatically acceptable compromises.

The modest conclusion, set forth in Part III, is that the more accurately we recapture the full texture of the circumstances under which the Constitution was written, the better we will be able to understand it.

I. THE PROBLEM: THE CRITICAL WEAKNESSES OF "THE CRITICAL PERIOD"

The conventional view of the period between the Declaration of Independence and the Constitution, a view that has remained unchanged except in detail for nearly one hundred years,[1] is that the country came to the very brink of dying in infancy. Deep ideological splits over the amount of power that should be vested in the national government accompanied the drafting of the Articles of Confederation.[2] Those favoring a weak national government prevailed, but when put to the test of practice, their creation simply did not work.[3] The national government lacked coercive power over individuals[4] and a reliable revenue source,[5] and depended on the voluntary (and often

---

1. The picture painted in this paragraph of the text is substantially consistent with that presented in JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789 (Boston, Houghton Mifflin Co. 1888). It is a composite—from which various historians might well dissent to a greater or lesser degree—but a fair composite. *See* JOHN M. BLUM ET AL., THE NATIONAL EXPERIENCE 116-24 (4th ed. 1977) (standard college text adopting the critical period view); MAJOR PROBLEMS IN THE ERA OF THE AMERICAN REVOLUTION 1760-1791, at 389 (Richard D. Brown ed., 1992) [hereinafter MAJOR PROBLEMS] ("The history of this Confederation era, once called the critical period, has been dominated by the Federalist belief that the Articles of Confederation were a failure and that the Constitution of 1787 rescued the nation."); GORDON S. WOOD, THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES at vii-xv (1973) (summarizing historiography and noting substantial areas of agreement among debaters). It also represents the long-received account among the judiciary. *See, e.g.*, Virginia v. West Virginia, 246 U.S. 565, 598-99 (1918); Thompson v. Auditor General, 247 N.W. 360, 365 (Mich. 1933).

2. This thesis has been most fully articulated by Merrill Jensen, whose work is summarized and critiqued in section II.B.1 and subsection II.B.3.a of this Article.

3. *See, e.g.*, BROADUS MITCHELL & LOUISE P. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 3-19 (2d ed. 1975). Despite the challenge posed to this portion of the conventional picture by MERRILL JENSEN, THE NEW NATION (1950) [hereinafter JENSEN, NEW NATION], its limitations are only sporadically acknowledged. *See, e.g.*, H. James Henderson, *The Structure of Politics in the Continental Congress*, *in* ESSAYS ON THE AMERICAN REVOLUTION 157, 158-59 (Steven G. Kurtz & James H. Hutson eds., 1973).

4. *See* National League of Cities v. Usery, 426 U.S. 833, 844 (1976) (citing Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868)) (stating that the Constitution substituted a government that acted directly on individuals for one that did not do so). In its most recent formulation, the Court has said that the Confederation Congress "lacked the authority in most respects to govern the people directly." New York v. United States, 112 S. Ct. 2408, 2421 (1992); *cf. infra* note 21.

5. *See* EEOC v. Wyoming, 460 U.S. 226, 268 n.4 (1983) (Powell, J., dissenting) (stating that the key weakness of the Confederation was its inability to tax directly).

unobtainable) cooperation of the states.[6] Because the national government could not function,[7] the country was wracked by the alarming domestic insurgency known as Shays's Rebellion,[8] and was unable to negotiate effectively abroad[9] or stem protectionism at home.[10] Eventually, the baleful

---

6. *See* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 527 (1925) ("[I]n brief, it was not a government at all, but rather the central agency of an alliance.").

7. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 112-14 (Phillips Bradley ed., 1945).

8. *See* MARION L. STARKEY, A LITTLE REBELLION 242 (1955) (arguing that but for Shays's Rebellion, a federal constitution might not have come to pass); ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 168 (1954) (describing events of rebellion and linking them to the adoption of the Constitution: "[T]he upheaval in Massachusetts and the fear that disorder would spread intensified the demand for a stronger central government."). *But cf.* Richard D. Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 113-27 (Richard Beeman et al. eds., 1987) [hereinafter BEYOND CONFEDERATION] (arguing that rebellion assisted in the creation of the Constitution and its ratification in some states, but also provoked strong and almost successful Antifederalist backlash in Massachusetts); Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388 (1969). Feer argues:

> [I]n all likelihood, the Constitutional Convention would have met when it did, the same document would have been drawn up, and it would have been ratified even if Shays's Rebellion had not taken place. If by a "cause" we mean something necessary to the occurrence of a particular event, Shays's Rebellion was not a cause of the Constitution of the United States.

Id. at 410.

9. *See* Oldfield v. Marriott, 51 U.S. (10 How.) 146, 164 (1850) (stating that under the Articles of Confederation, the states were unwilling to adopt, and Congress was unable to impose, a uniform commerical policy towards Great Britain; "On that account more than any other, those conventions were held which happily terminated in the present Constitution of the United States."); BLUM ET AL., *supra* note 1, at 119-20; FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION at x (2d ed. 1986) ("Taken as a whole, problems relating to the conduct of foreign affairs far outweighed any other combination of issues facing the Confederation. A more advantageous position vis-a-vis the world was the overriding concern of the Federalists, the *sine qua non* of political change. It is what gave rise to the Constitution, just as it provided the winning issue in state campaigns for ratification."); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902 (1983) (stating that "a major impetus for the Philadelphia Convention" was the need to enforce state compliance with the peace treaty that ended the Revolution; such state adherence to the treaty would remove Britain's excuse for noncompliance).

10. *See* EEOC v. Wyoming, 460 U.S. at 244-47 (Stevens, J., concurring) (arguing that restraints on interstate commerce were "the central problem that gave rise to the Constitution"); Michelin Tire Corp. v. Wages, 423 U.S. 276, 283-86 (1976); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224-26 (1824) (Johnson, J., concurring); Smith v. Farr, 104 P. 401, 403 (Colo. 1909); MITCHELL & MITCHELL, *supra* note 3, at 14-16.

effects of governmental impotence fed a centralizing reaction that enabled those favoring a stronger national government to triumph over their opponents by securing ratification of a radically different charter, the Constitution.[11]

Because historians have seen the Articles of Confederation within this framework, their debates have centered on such matters as how revolutionary the Revolution was, whether the Revolutionary and early national periods were characterized more by dissension or consensus, and whether the Constitution was foisted on the country by an elite.[12] In light of this focus, even those legal scholars who may have been following the literature have not understood that they have anything to learn from the period.[13]

But the conventional view of the transition from Articles to Constitution is misleading at best. The particular purpose of this Article is to illustate that thesis by demonstrating that the provisions of the Articles did not emerge from an ideological conflict over the strength of the national government, but from a confluence of entirely different forces.

In isolation, that demonstration might be considered as only the readjustment of a subsidiary portion of the received account. But the conventional view's mishandling of the drafting of the Articles is not an aberrational lapse on a point of detail. Rather, it is typical of the weaknesses of that view—and of the extent to which the accepted wisdom has for too long let elements that should share the center of the picture be downplayed or ignored altogether. The conventional view is not so much false as it is incomplete. The needed new paradigm will, without causing us to forget what we already know, be able to accommodate at least six realities we have forgotten or never learned:[14]

---

11. See Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838), where the Supreme Court stated:

> [O]wing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject matters, on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary.

Id. at 729; *see also* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 244-45 (1970) [hereinafter JENSEN, ARTICLES].

12. *See* MARKS, *supra* note 9, at ix n.1, xv-xxii (summarizing historiography); WOOD, *supra* note 1; Richard B. Morris, *Confederation and Constitution: Fulfillment or Counter-Revolution*, *in* THE AMERICAN REVOLUTION RECONSIDERED 127 (1967) (summarizing historiography).

13. Thus, the confederation era has not figured into the main lines of the debates in legal scholarship over the formation of the Constitution. *See generally* George S. Grossman, *Scholars and the Constitution: Bibliographic Notes on Two Centuries of Scholarship on the Constitution of the United States*, 5 CONST. COMMENT. 393 (1988).

14. The argument summarized in the following paragraphs of the text was made more fully in Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142 (1978). This argument was subsequently adopted by Arthur R. Landever, *Those Indispensable*

1. The text of the Articles granted significant powers to the national government,[15] implementing them through a judicially enforceable supremacy clause, and created a common national citizenship through privileges-and-immunities and full-faith-and-credit clauses. Like numerous other important parts of the Articles, these passed virtually unchanged into the Constitution.[16]

2. The Articles government construed its charter broadly, which enabled it to perform many functions (like governing the western territories and incorporating a Bank of North America) for which no explicit textual authority existed.[17]

3. The states not only acquiesced in these assertions of national power,[18] but through their courts, assisted them.[19]

Articles of Confederation—Stage in Constitutionalism, Passage for the Framers, and Clue to the Nature of the Constitution, 31 ARIZ. L. REV. 79 (1989).

15. Indeed, when Madison argued in favor of the Constitution he stated that it conferred few new powers on the national government:

> The present Congress can make requisitions to any amount they please; and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow both abroad and at home as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. . . . The existing Congress, without any . . . control, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land.

THE FEDERALIST No. 38, at 238 (James Madison) (Clinton Rossiter ed., 1961); *see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 359 (1969) ("What is truly remarkable about the Confederation is the degree of union that was achieved.").

16. These matters are discussed in detail in Freedman, *supra* note 14, at 147-49, 160-62. *See also* United States v. Butenko, 494 F.2d 593, 632-33 (3d Cir.) (Gibbons, J., dissenting) (chart comparing the texts of war and foreign affairs powers under the Articles and the Constitution), *cert. denied*, 419 U.S. 881 (1974); *infra* note 35.

17. *See* Corwin, *supra* note 6, at 529 (arguing that if the theory used to support the creation of the Bank of North America had continued in application, the Articles "might easily have come to support an even greater structure of derived powers than the Constitution of the United States does at this moment"); Freedman, *supra* note 14, at 155, 162-65. Congressional authority to legislate for the territories of the United States was eventually granted explicitly by the Constitution, while congressional authority to charter a bank was not. *See* U.S. CONST. art. IV, § 3, cl. 2; *infra* note 38.

18. On the basis of such acquiescence, the Supreme Court later validated numerous exercises of sovereignty by the Continental Congress before the Articles had even gone into effect. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 231-33 (1796); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 80-82 (1795); *see also* Freedman, *supra* note 14, at 163 n.141 (listing exercises of sovereignty that occurred prior to the adoption of the Articles). Congressional control over Indian affairs is another such example. *See* United States v. Douglas, 190 F. 482, 485 (8th Cir. 1911).

19. *See* Freedman, *supra* note 14, at 149-60 (discussing state decisions that displaced state law and followed congressional mandates concerning military matters, treaties,

4. The result of these developments was

> that the overall structure of the government chartered by the Constitution was similar in many respects to the one that already existed under the Articles. A national legislature already engaged actively in the creation of national laws, treaties and policies; a national court of appeals, the institutional predecessor of the Supreme Court, rendered judgments superior within its jurisdiction to state court decisions; and federal administrative departments carried the national will into execution.[20]

5. Many of the alleged deficiencies in the Articles were not deficiencies in the national government at all,[21] but rather were weaknesses of the state governments, which the Constitution did nothing to cure.[22]

---

admiralty, and interstate comity); *see also* Jones v. Freeman, 146 P.2d 564, 580 (Okla.) (Riley, J., dissenting) (describing the practice of judicial review prior to the adoption of the Constitution), *appeal dismissed and cert. denied per curiam*, 322 U.S. 717 (1944).

20. Freedman, *supra* note 14, at 164 (footnotes omitted). Isolated commentators have begun to see the merits of this viewpoint. For example, Richard Brown has recently stated that the national government as chartered by the Articles

> shared much in common with the [government chartered by the] Constitution and was by no means its opposite . . . . In reality, strong continuities ran between the two governments. Consideration of the text of the Articles of Confederation, and of the politics surrounding government land policy, reveals the political principles and the practical realities of national government in the new republic of the 1780s.

MAJOR PROBLEMS, *supra* note 1, at 389-90. But few relevant primary studies—and virtually no recent ones—have been done. Thus, for example, on the issue of how the federal bureaucratic structure created under the Articles provided the foundation for that employed under the Constitution, the key work remains JENSEN, NEW NATION, *supra* note 3, at 360-74.

21. For example, the assertion that the Confederation government wholly lacked coercive power over individuals is simply false. *See* THE FEDERALIST No. 40, at 250 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote:

> In cases of capture, of piracy, of the post-office; of coins, weights and measures; of trade with the Indians; of claims under grants of land by different States; and above all, in the case of trials by courts-martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil Magistrate; in all these cases the powers of the Confederation operate immediately on the persons and interests of individual citizens.

Id.; *see also* Freedman, *supra* note 14, at 151-53 (describing Confederation's expansive use of the court-martial power and its direct enforcement of commercial regulations and treaty provisions); *cf.* THE FEDERALIST No. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing for more national legislative power over individuals but conceding that the principle that the Confederation legislates for states, not individuals, "does not run through all the powers delegated to the Union").

22. Robert McColley, *Jefferson's Rivals: The Shifting Character of the Federalists*, MIDCONTINENT AM. STUD. J., Spring 1968, at 23, 24 ("Under the supposedly more perfect government of the Constitution of 1787 we had whiskey rebellions, western conspiracies, financial confusion and secessionist plots quite as alarming as the troubles of the 1780's."); *cf.* Joseph P. Warren, *The Confederation and the Shays'[s] Rebellion*, 11 AM. HIST. REV. 42,

6. Although a series of problems that needed solutions had emerged by 1786-87, there was broad public agreement on the existence of the problems and the need for solutions.[23] Thus, for example, on two occasions twelve of the thirteen states agreed to proposals that would have provided a dependable and independent source of revenue to Congress.[24] Moreover, the Antifederalist argument was not that the Confederation should be left alone, but rather that the particular reforms proposed were undesirable.[25]

50-51, 61, 63, 65 (1905) (describing contemporary arguments over whether Shays's rebellion was a state or federal matter).

23. *See* The Mercedes de Larrinaga, 293 F. 251, 256 (D. Mass. 1923) ("There was no difference of opinion at any time over the necessity of giving Congress power over commerce, and the wide power granted by the Constitution was adopted without dissent."); HERBERT APTHEKER, EARLY YEARS OF THE REPUBLIC 37 (1976) (stating that despite the progress made under Articles government, "clear evidences of inadequacies were present and were recognized by all elements of the revolutionary coalition"); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 47 (1913) (stating that the weaknesses of the national government with regard to revenue, regulation of domestic and foreign trade, and treaties "were self-evident and there seems to have been a general unanimity of sentiment in favor of the reforms proposed"); E. JAMES FERGUSON, THE POWER OF THE PURSE 337 (1961) ("That the crisis of the Union inspired the calling of the Federal Convention indicates such a level of agreement as to suggest that there was no crisis at all."); Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION, *supra* note 8, at 72 ("By 1787 almost every political leader in the country, including most of the later Antifederalists, wanted something done to strengthen the Articles of Confederation," particularly to enhance the national government's ability to raise revenue and regulate commerce). *See generally* John P. Roche, *The Triumph of Reform Politics: Overthrowing the Articles of Confederation*, 1987 UTAH L. REV. 809, 816-17 (arguing that the weaknesses besetting the country were of primary concern to the elite and not to the common people).

24. *See* FARRAND, *supra* note 23, at 4-5; JENSEN, NEW NATION, *supra* note 3, at 407-21; Freedman, *supra* note 14, at 154 ("These plans probably would have made the Confederation government fiscally viable . . . ."). In addition, even the conventional account takes note of the importance of the agreement reached between Virginia and Maryland to cease their commercial warfare over shipping on the Potomac River and in the Chesapeake Bay. *See* MITCHELL & MITCHELL, *supra* note 3, at 15. A detailed description of this compact and the surrounding history is found in Barnes v. State, 47 A.2d 50, 52-62 (Md. 1945), *cert denied*, 329 U.S. 754 (1946); *see also* Wharton v. Wise, 153 U.S. 155 (1894) (holding the Virginia-Maryland agreement enforceable and applying it). Though less often noted, similar agreements were also reached between Pennsylvania and New Jersey, *see id.* at 170, and South Carolina and Georgia, *see* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 733-34 (1925).

25. *See, e.g.*, A PLEBEIAN [MELANCTON SMITH], AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK: SHEWING THE NECESSITY OF MAKING AMENDMENTS TO THE CONSTITUTION, PROPOSED FOR THE UNITED STATES, PREVIOUS TO ITS ADOPTION 11 (1788), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 99 (Paul L. Ford ed., B. Franklin 1971)

From this evolutionary perspective, the change from Confederation to Constitution contained only two aspects marking a sharp break with the past. One was procedural: the replacement of the Articles's requirement of unanimity for amendments. The Constitution would enter into force with the assent of nine states, and be easier to amend in the future than the Articles.[26] The other change was political. The presentation of the Constitution to the people sparked a widespread public debate on the appropriate functions and powers of a national government,[27] a debate that had not taken place while the Confederation was accumulating powers through accretion.

Viewing events in this fuller context may bring new insight to both historians and constitutional lawyers. For historians, adopting a broader perspective may point the way towards a more fruitful debate over the early national period than just the endlessly recurring arguments between those emphasizing internal divisions and those "denying conflict and emphasizing the consensus and continuity of the period."[28] The following account of the drafting of the Articles of Confederation shows clearly that both sides have grasped but a portion of the elephant: Sharp conflicts based on self-interest indeed arose, but they were followed by compromises designed to appeal to a preexisting political consensus. The paradigm might be called one of constrained consensus; the drafters did have individual interests to represent, but they also faced external pressures (notably the British army) requiring

---

(1888). This address stated in pertinent part:

> The importance of preserving an union, and of establishing a government equal to the purpose of maintaining that union, is a sentiment deeply impressed on the mind of every citizen of America. It is now no longer doubted, that the confederation, in its present form, is inadequate to that end: Some reform in our government must take place: In this, all parties agree . . . .

Id.; *see also* THE FEDERALIST No. 15, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[O]pponents as well as . . . friends of the new Constitution . . . in general appear to harmonize in this sentiment, at least: that there are material imperfections in our national system, and that something is necessary to be done to rescue us from impending anarchy.").

26. *Compare* ARTICLES OF CONFEDERATION art. XIII, *reprinted in* 9 JOURNALS OF THE CONTINENTAL CONGRESS 925 (Worthington C. Ford ed., 1907) [hereinafter JOURNALS] *with* U.S. CONST. arts. V, VII. *See generally* Christian Feigenspan, Inc. v. Bodine, 264 F. 186, 195 (D.N.J.), *aff'd sub nom.*, Rhode Island v. Palmer, 253 U.S. 350, 352 (1920); Benjamin F. Wright, *Consensus and Continuity—1776-1787*, 38 B.U. L. REV. 1, 19 (1958) (suggesting that had the Articles been amendable by less than unanimous vote, they "might have been adapted to the needs of the country . . . [and] be the constitution of the United States in the twentieth century"); *infra* note 32.

27. *See* MITCHELL & MITCHELL, *supra* note 3, at 129-92.

28. WOOD, *supra* note 1, at xii-xiii (noting that in the process of resolving their disagreements these two groups have left "some difficult problems unresolved"); *see* James E. Viator, *Give Me That Old-Time Historiography: Charles Beard and the Study of the Constitution*, 36 LOY. L. REV. 981 (1991) (summarizing historiography).

them to craft solutions with broad enough appeal to get their work through the state legislatures.[29]

The Framers of the Constitution (many of whom were the same people who drafted the Articles)[30] faced similar problems[31] when they met in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."[32] A consideration of the Framers' prior responses to these problems might prove illuminating indeed,[33] especially because the docu-

---

29. These long-neglected factors have received special attention in the work of Jack N. Rakove. *See* discussion *infra* text accompanying note 74.

30. *See* FARRAND, *supra* note 23, at 39 (reporting that approximately three-fourths of the Convention delegates had been members of Congress).

31. *See* Roche, *supra* note 23, at 820. Roche states:

> What the constitutionalists, the reform caucus, wanted was a qualitative as well as a quantitative consensus, a political imperative, in order to obtain ratification. The plan had to go back and be approved, first by the Continental Congress and then by individual conventions called by the state legislatures. The plan could not simply be imposed as an act of genius.

Id.

32. 32 JOURNALS, *supra* note 26, at 74. This congressional resolution of February 21, 1787 continued by directing the Convention to report "to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union." *Id.* As to whether the Convention was faithful to this charge, compare Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989) (no) with THE FEDERALIST No. 40 (James Madison) (Clinton Rossiter ed. 1961) (yes). *See also* Lindsay v. State, 139 So. 2d 353, 354 n.2 (Ala. Ct. App. 1961), *cert. denied*, 139 So. 2d 355 (Ala. 1962); Wheeler v. Board of Trustees, 37 S.E.2d 322, 328 (Ga. 1946); Smith v. Cenarrusa, 475 P.2d 11, 14-15 (Idaho 1970); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41, 328 n.4 (1991).

33. Like John P. Roche, most writers have seen that the "Constitution was a patchwork sewn together under the pressure of time and events by a group of extremely talented democratic politicians." Roche, *supra* note 23, at 828; *see* John R. Brown, *The Miracle of 1787: Could It? Would It? Happen Again?*, 33 LOY. L. REV. 903, 913-16 (1988). But very few have incorporated the insight of Max Farrand, that the constitutional "bundle of compromises" was constructed from constitutional structures, practices, and ideas of the Confederation period. *See* FARRAND, *supra* note 23, at 201-03; *infra* note 36.

For example, Richard P. McCormick, *The Miracle at Philadelphia*, 1987 UTAH L. REV. 829, 835-40, discusses the Convention debates as a process in which clashing interests were resolved by pragmatic compromises, a process facilitated by "the remarkable . . . consensus that prevailed on a wide range of important issues." *Id.* at 839. But McCormick wholly ignores the similar dynamic at work in the drafting of the Articles and that many of the points of agreement in Philadelphia (for example, the inclusion of a supremacy clause) represented the fruits of the delegates' prior work as members of Congress.

Similarly, Benjamin Fletcher Wright, who seeks to highlight the continuities of the period, could only have strengthened his argument if, in describing the dispute in Philadelphia that was ultimately compromised by apportioning the House and the Senate on different bases, he had described the lengthy discussions of this same problem as the Articles

mentary sources for the drafting of the Articles are much more complete than for the Philadelphia Convention.[34]

For constitutional lawyers, an understanding of the continuities between the Articles and the Constitution should lead to an acceptance of using the former as a guide to elucidating the latter—resulting in at least six areas of potentially profitable exploration:

1. The most obvious of these areas is a consideration of textual similarities between the documents.[35]

---

were being written. *See* Wright, *supra* note 26, at 22-24; *infra* subsection II.C.2.b; *see also* JENSEN, ARTICLES, *supra* note 11, at 141 (The arguments that occurred during the drafting of the Articles over whether votes in Congress should be allocated by population or by states "have more than an academic interest, for they were to be used in the Convention of 1787 by James Wilson, Alexander Hamilton, and other conservatives in their efforts to evade the fact of state sovereignty.").

34. As the notes to the succeeding parts of this Article indicate, the delegates to the Continental Congress left extensive records of the drafting of the Articles in correspondence, diaries, and private papers. In contrast, the worthwhile records of the debates in Philadelphia are exiguous. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION at xv (1990); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 32-35 (1986) (Madison's notes, the only reliable account of the Philadelphia Convention, report approximately 10% of each hour's proceedings); *see also* Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 259-66 (1989) (summarizing the difficulties of using Convention records to show original intent). This scarcity of material arises from the strict and seemingly well-enforced rule of secrecy under which the delegates worked. *See* FARRAND, *supra* note 23, at 58-59, 65; Hutson, *supra*, at 2 n.5 (writing that the secrecy rule was "observed with fidelity throughout the proceedings"); *see also* Brown, *supra* note 33, at 904-09, 919-20 (arguing that the secrecy rule was indispensable to success).

35. *See generally* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 314-15 (1990) (Brennan, J., concurring, for four members of the Court) (interpreting Interstate Compact Clause, U.S. CONST. art. I, § 10, cl. 3, in light of its origin in the Articles); Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (unanimous decision) (describing "the mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism"); Biddinger v. Commissioner of Police, 245 U.S. 128, 132 (1917) (The Extradition Clause, U.S. CONST. art. IV, § 2, "with the change of only two words, first appears in the Articles of Confederation."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1873) (Because the purpose of the Privileges and Immunities Clause in the Articles and in Article IV of the Constitution "is the same, and [because] the privileges and immunities intended are the same in each," the fact that some examples are specifically mentioned in the Articles should provide some "general idea of the class of civil rights meant by the phrase."); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861) (Because the substance of the Extradition Clause of the Constitution is "a literal copy of the article of the Confederation, and it is plain that the mode . . . under the Confederation[] must have been in the minds of the members of the Convention when this article was introduced, . . . in adopting the same words[] they manifestly intended to sanction the mode of proceeding practiced under the Confederation."); United States v.

2. At the same time, as much may be learned from the important phrases that were changed as from those that were not.[36]

Mackenzie, 30 F. Cas. 1160, 1163 (S.D.N.Y. 1843) (No. 18,313) (When the Convention "transferred to the new constitution the language of the confederation in relation to the government of the land and naval forces, and the spirit of the provision in respect to piracies and felonies, it is natural to suppose that these provisions were understood in the same sense, and were designed to convey the same power, as that affixed to them in the usages and practices under the preceding government."); *supra* note 16.

36. For example, in Philadelphia, the Three-Fifths Clause, U.S. CONST. art. I, § 2, cl. 3, was taken from a compromise already made in the Confederation Congress, *see* 24 JOURNALS, *supra* note 26, at 260-61, when it adopted its second fundraising plan in April of 1783, *see* FARRAND, *supra* note 23, at 107-08; Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, *in* BEYOND CONFEDERATION, *supra* note 8, at 188, 194-208. But the wording of the clause in the Constitution (state's population to "be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons") differs from that in the proposed amendment to the Articles (census of persons to be used in calculating tax should report "the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing descriptions, except Indians not paying taxes, in each state"). *Id.* at 198.

It has been argued that this distinction is of importance, not with respect to the matter of apportionment—since no one doubts that the two clauses mean, and were intended to mean, the same thing—but rather because it undermines the historical premises of the *Dred Scott* case, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Because the phrase "'white and other free citizens and inhabitants'" used by the Confederation Congress "plainly embraced free Negroes" and there was "no intimation that they suffered any disability," the proponents of the argument reason that the Supreme Court erred in finding "that the Constitutional fathers did not regard Negroes, though free, as citizens." MITCHELL & MITCHELL, *supra* note 3, at 12; *see* United States v. Rhodes, 27 F. Cas. 785, 789-90 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, Circuit Justice) (making same argument, while noting from the *Dred Scott* dissent that South Carolina unsuccessfully moved to amend the Articles to limit clause to "free white" inhabitants); 11 JOURNALS, *supra* note 26, at 647; *cf. Scott*, 60 U.S. at 418-19 (noting that the privileges and immunities clause of the Articles speaks of "free inhabitants" of states, "which might be construed to include an emancipated slave," not "citizens" as in the Constitution, and arguing that change supports the Court's holding).

Whatever may be the merits of either argument, the methodology that they share is sound and has an appropriate place in constitutional debate. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819) (reasoning that the Articles reserved to states all powers not expressly delegated to the national government; the 10th Amendment omits that word; therefore, the change was probably intentional and greater implied powers are supported under the Constitution); Green v. Sarmiento, 10 F. Cas. 1117, 1118-19 (C.C.D. Pa. 1810) (No. 5,760) (Washington, Circuit Justice) ("[T]he change of the language of [the Full Faith and Credit Clause] of the constitution, from the parallel section of the articles of confederation, affords a strong reason for the opinion, that the former was intended to give to the judgments of each state within the other states, a more extensive force and effect . . . ."); *see also* Miller v. McQuerry, 17 F. Cas. 335, 337-39 (C.C.D. Ohio 1853) (No. 9,583) (McLean,

3. Once constitutional lawyers recognize that clauses in the Articles that were later carried forward unchanged into the Constitution became the subject of litigation during the Confederation period, previously ignored case law will take on new relevance.[37]

4. Similarly, new authority can be found regarding the weight that the courts should give to original intent.[38]

5. Moreover, key provisions of the Constitution have their roots in congressional enactments of the Confederation period.[39]

Circuit Justice) (stating that the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3, was added because of the dissatisfaction with the hortatory nature of the extradition clause of the Articles).

37. *See* Freedman, *supra* note 14, at 159-60 (discussing cases decided under full-faith-and-credit clause of the Articles); *see, e.g.*, Millar v. Hall, 1 U.S. (1 Dall.) 229 (1788) (debtor, sued in Pennsylvania, successfully defends on the basis of an insolvency discharge in Maryland). *But cf.* Rice v. Jones, 8 Va. (4 Call) 89 (1786) (refusing credit to a prior North Carolina judgment while making no reference to the Articles).

In addition, some 114 admiralty cases were decided under the Articles by a national appeals court, which both Congress and the judicial branch have recognized as the institutional predecessor of the Supreme Court. *See* Act of May 8, 1792, ch. 36, § 12, 1 Stat. 275 (1792) (appellate court's acts are entitled to "like faith and credit" as are those of the Supreme Court); Jennings v. Carson, 8 U.S. (4 Cranch) 2, 4-8, 21, 25 (1807) (Marshall, C.J.); HENRY BOURGUIGNON, THE FIRST FEDERAL COURT 208, 217 (1977); James F. Jameson, *The Predecessor of the Supreme Court, in* ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1, 44 (James F. Jameson ed., 1889). Some of the Court's admiralty opinions are printed at 2 U.S. (2 Dall.) 1-42 (1781-87). One sidelight of considerable historical and legal interest—and arguably Seventh Amendment significance—is that on the trial level many of these cases, although in admiralty, were decided by juries. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 n.51 (1973).

38. For example, state courts regularly applied the Articles's full-faith-and-credit clause at the behest of judgment creditors, *see supra* note 37, notwithstanding that during the drafting of the Articles the Congress had defeated a proposal to add to the clause an explicit statement that "an action of debt may lie in a court of law of any State for the recovery of a debt due on a judgment of any court in any other State." 9 JOURNALS, *supra* note 26, at 895; *see* Appendix *infra* p. 837 (Vote XIV).

The situation is thus very similar to that presented by McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court, relying in part on similar action taken by the Confederation Congress under a theory of implied powers, upheld the creation of the Bank of North America under the Constitution. *See id.* at 401, 406-07; Freedman, *supra* note 14, at 163-64. The Court did so even though the Convention had voted down a proposal that the United States be allowed "to grant charters of incorporation where the interest of the U.S. might require [and] the legislative provisions of individual states may be incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615-16 (Max Farrand ed., 1937) (Madison's notes of Sept. 14, 1787).

39. For example, in implementing its implied powers to govern the western territories, *see supra* text accompanying note 17, the Confederation Congress passed the Northwest Ordinance. Ordinance of 1787: The Northwest Territorial Government, Confederation Cong.

6. Under the Articles, matters of constitutional practice still in current dispute arose and were resolved.[40]

These observations are not meant to suggest that history alone can solve the legal problems of today. The most ardent originalist would not claim that it is possible to dispense with human judgment, and the most amateur historian is aware of the vices of presentism. The purpose of creating a more accurate picture of the past should not be to resolve any immediate controversy, but rather to generate information of long-term value to the growth of both law and history.[41] Specifically, the aim of offering the following new account of the drafting of the Articles of Confederation and demonstrating how much more consistent it is with the evidence than existing accounts is to suggest to constitutional lawyers and historians that both fields would benefit by returning the Confederation period to the mainstream of American history and political development.

(July 13, 1787), *reprinted in* 1 U.S.C. xli (1976) (governing the United States territory northwest of the river Ohio). Many of the provisions in the Ordinance are closely tied to ones in the Constitution, both in substance (e.g., in guaranteeing freedom of religion, the availability of habeas corpus, due process of law before the deprivation of liberty or property, and the security of private contracts against later legislation), and in wording (e.g., in outlawing "cruel or unusual punishments," and decreeing that "[t]here shall be neither slavery nor involuntary servitude . . . otherwise than in the punishment of crimes, whereof the party shall have been duly convicted"). *See* U.S. CONST. arts. II, VI; *see also supra* note 36 (discussing the Three-Fifths Clause). *See generally* MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 84-85 (1988).

40. In one such episode, the Virginia Legislature approved an amendment to the Articles to increase the national government's fundraising powers, but then voted to reverse its approval. The other states accepted that the recision was effective, killing the amendment. *See* H. JAMES HENDERSON, PARTY POLITICS IN THE CONTINENTAL CONGRESS 327-28 (1974). This would seem to be a precedent directly applicable to the current unresolved debate over the legitimacy of similar actions in modern times, yet it has been ignored by both courts and legal scholars. *See* Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom.* National Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387, 421-24 (1983) ("[W]e have no definitive answer to a question as crucial as whether a state legislature that has voted to ratify can subsequently rescind its action," but such actions should be invalid, in part because of lack of historical support for them.); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 434 n.6 (1983) (disagreeing with Dellinger's answer and approach).

41. In this regard, I share the view of Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. (3d ser.) 340 (1989), that because "the old story line is itself problematic and needs to be recast," and because of the need to build bridges between the two professions, scholarship in constitutional law and American history would benefit at present from works that focus on narrative rather than overarching ideological theories. *Id.* at 344-46.

II. TESTING A SOLUTION: A RECONSIDERATION OF THE DRAFTING OF THE ARTICLES OF CONFEDERATION

A. Outline of Congressional Proceedings

On July 21, 1775, Benjamin Franklin presented to the second Continental Congress a draft set of the "Articles of Confederation and Perpetual Union [Between] the several Colonies."[42] The plan provided: "[E]ach colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, Privileges, and peculiar Jurisdictions within its own limits . . . ."[43] And it set up a General Congress, whose "Power and Duty" would extend to:

> Determining on War and Peace, to sending and receiving ambassadors, and entring into Alliances, . . . the Settling all Disputes and Differences between Colony and Colony about Limits or any other cause if such should arise . . . .
>
> The Congress shall also make such general Ordinances as tho' necessary to the General Welfare, particular Assemblies cannot be competent to; viz. those that may relate to our general Commerce; or general Currency; to the Establishment of Posts; and the Regulation of our common Forces. The Congress shall also have the Appointment of all General Officers, civil and military, appertaining to the general Confederacy . . . .[44]

Consideration of this plan was postponed for nearly six months,[45] but on January 16, 1776, the Congress heard "[c]onsiderable Arguments on the Point Whether a Day shall be fixed for considering the Instrument of Confederation formerly brought in . . . . It was carried in the Negative. Dr. Franklin exerted himself in Favor of the Confederation as did Hooper, Dickinson and others agt. it."[46]

---

42. The Franklin plan is printed in 2 JOURNALS, *supra* note 26, at 194-99. On the plan and its significance, see EDMUND C. BURNETT, THE CONTINENTAL CONGRESS 213-19 (1941), and discussion *infra* note 49.

For plans of confederation before those treated in this brief sketch, see JAMES B. SCOTT, THE UNITED STATES OF AMERICA: A STUDY IN INTERNATIONAL ORGANIZATION 471 (1920), the excellent set of documents in 2 HISTORY OF THE CELEBRATION OF THE ONE HUNDREDTH ANNIVERSARY OF THE CONSTITUTION OF THE UNITED STATES 439 (Hampton L. Carson ed., 1889), and Edmund Pendleton's Proposed Resolution (May 24-26?, 1775), *in* 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 402 (Paul H. Smith ed., 1976) [hereinafter LETTERS].

A documentary summary of congressional action on confederation can be found in 1 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 283-464 (U.S. Dep't of State ed. 1821) [hereinafter SECRET JOURNALS].

43. *See* 2 JOURNALS, *supra* note 26, at 196.

44. *Id.*

45. *See id.* at 454, 456.

46. Richard Smith's Diary (Jan. 16, 1776), *in* 3 LETTERS, *supra* note 42, at 102-03; *see also* Letter from Samuel Adams to John Adams (Jan. 15, 1776), *in* 3 LETTERS, *supra* note 42, at 93-94; Letter from the Connecticut Delegates to Jonathan Trumbull, Sr. (Dec. 5,

On June 7, 1776, as the second part of his motion "[t]hat these United Colonies are, and of right ought to be, free and independent States," Richard Henry Lee moved "[t]hat a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."[47] Five days later, a committee consisting of one member from each colony was formed "to prepare and digest the form of a confederation."[48] This committee presented its draft on July 12.[49] Congress ordered the draft to be printed, enjoining the delegates and printers not to disclose its contents.[50]

1775), *in* 2 LETTERS, *supra* note 42, at 440; Letter from Benjamin Harrison to Unknown (Nov. 24, 1775), *in* 2 LETTERS, *supra* note 42, at 381, 381-82. The standard and seemingly correct explanation for this result is that the delegates believed that the creation of a confederation would be tantamount to a declaration of independence. *See generally* Merrill Jensen, *The Articles of Confederation*, *in* FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION 62 (1973); Letter from Samuel Adams to James Warren (Jan. 7, 1776), *in* 3 LETTERS, *supra* note 42, at 51, 52; Letter from John Adams to James Warren (July 24, 1775), *in* 1 LETTERS, *supra* note 42, at 658. Several other plans of confederation had been circulated among the members. *See* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 136-38 (1979); Silas Deane's Proposals to Congress (Nov. ?, 1775), *in* 2 Letters, *supra* note 42, at 418. Even so, the Congress itself was not yet ready to take this step. *See* Letter from John Adams to James Warren (May 15, 1776), *in* 3 LETTERS, *supra* note 42 at 676, 678; Letter from John Adams to James Warren (Apr. 16, 1776), *in* 3 LETTERS, *supra* note 42, at 535, 536; Letter from Thomas Nelson to John Page (Feb. 13, 1776), *in* 3 LETTERS, *supra* note 42, at 248, 249.

47. 5 JOURNALS, *supra* note 26, at 425; *see* Letter from Edward Rutledge to John Jay (June 8, 1776), *in* 4 LETTERS, *supra* note 42, at 174, 174-75; Thomas Jefferson's Notes of Proceedings in Congress (June 7-28, 1776), *in* 4 LETTERS, *supra* note 42, at 158, 158-65.

48. 5 JOURNALS, *supra* note 26, at 433; *see* Letter from Josiah Bartlett to John Langdon (June 17, 1776), *in* 4 LETTERS, *supra* note 42, at 255, 256. The members were: Josiah Bartlett, New Hampshire; Samuel Adams, Massachusetts; Stephen Hopkins, Rhode Island; Roger Sherman, Connecticut; Robert Livingston, New York; John Dickinson, Pennsylvania; Thomas McKean, Delaware; Thomas Stone, Maryland; Thomas Nelson, Virginia; Joseph Hewes, North Carolina; Edward Rutledge, South Carolina; and Button Gwinnett, Georgia. 5 JOURNALS, *supra* note 26, at 433. Francis Hopkinson of New Jersey was added to the committee on June 28, 1776. *See id.* at 489.

49. 5 JOURNALS, *supra* note 26, at 546, 674-89. This document appears under the heading "First Printed Form." *Id.* at 674. Because it is in the handwriting of John Dickinson and was largely drafted by him, it has long been known as the "Dickinson draft" of the Articles of Confederation and is so referred to herein. (This draft and those following it are discussed in more detail *infra* text accompanying notes 99-108). More recently, it has become apparent that the committee was marking up a first draft that had been prepared by Dickinson individually. *See* RAKOVE, *supra* note 46, at 139, 151-58; 4 LETTERS, *supra* note 42, at 251 n.1; Josiah Bartlett's and John Dickinson's Draft Articles of Confederation (June 17-July 1?, 1776), *in* 4 LETTERS, *supra* note 42, at 233-50. Paul H. Smith, the editor of this set of letters, adds, "[T]here can be no doubt that the members of the committee began their work with a copy of Benjamin Franklin's proposed Articles of Confederation before them . . . ." 4 LETTERS, *supra* note 42, at 252.

50. 5 JOURNALS, *supra* note 26, at 555.

Congress worked steadily on the Articles throughout July,[51] concentrating on "the minutiae of the Confederation . . . [with] the great points of representation, boundaries, taxation &c. being left open."[52] These matters were taken up again during August and resolved in some measure, at least temporarily.[53] On August 20, 1776, a revised version of the Articles was ordered to be printed under the same conditions of secrecy as the last one.[54] Because of the absence of many delegates[55] and the time demands that the

---

51. *See id.* at 600, 603-04, 608-09, 612, 615, 621-22, 624; John Adams's Notes of Debates (July 30, 1776), *in* 4 LETTERS, *supra* note 42, at 568, 568-69; Letter from Joseph Hewes to Samuel Johnston (July 28, 1776), *in* 4 LETTERS, *supra* note 42, at 555; *see also* Letter from Josiah Bartlett to John Langdon (July 22, 1776), *in* 4 LETTERS, *supra* note 42, at 513, 514; Letter from Samuel Chase to Philip Schuyler (July 19, 1776), *in* 4 LETTERS, *supra* note 42, at 486; Letter from the New Hampshire Delegates to Meshech Weare, (July 9, 1776), *in* 4 LETTERS, *supra* note 42, at 419, 420.

52. Letter from Thomas Jefferson to Richard Henry Lee (July 29, 1776), *in* 4 LETTERS, *supra* note 42, at 561.

53. Letter from Edward Rutledge to Robert R. Livingston (Aug. 19?, 1776), *in* 5 LETTERS, *supra* note 42, at 25, 27; Letter from William Williams to Oliver Wolcott (Aug. 12, 1776), *in* 4 LETTERS, *supra* note 42, at 666, 667; Letter from Samuel Chase to Philip Schuyler (Aug. 9, 1776), *in* 4 LETTERS, *supra* note 42, at 644. Entries in the *Journals of the Continental Congress* for this period merely show that confederation was taken under consideration. *See* 5 JOURNALS, *supra* note 26, at 624-25, 628, 635-36, 639-40, 674; John Adams's Notes of Debates (Aug. 2, 1776), *in* 4 LETTERS, *supra* note 42, at 603, 603-04; John Adams's Notes of Debates (Aug. 1, 1776), *in* 4 LETTERS, *supra* note 42, at 592, 593.

54. 5 JOURNALS, *supra* note 26, at 689; *see* Letter from Josiah Bartlett to William Whipple (Aug. 27, 1776), *in* 5 LETTERS, *supra* note 42, at 70.

55. *See* Letter from Henry Marchant to Nicholas Cooke (Oct. 24, 1777), *in* 8 LETTERS, *supra* note 42, at 176, 177, *reprinted from* 6 COLLECTIONS OF THE RHODE ISLAND HISTORICAL SOCIETY 202 (1867); Letter from Roger Sherman to Oliver Wolcott (May 13, 1777), *in* 7 LETTERS, *supra* note 42, at 80; Letter from James Sykes to George Read (Apr. 10, 1777), *in* 6 LETTERS, *supra* note 42, at 569, 569-70; Letter from John Adams to Abigail Adams (July 30, 1776), *in* 4 LETTERS, *supra* note 42, at 569, 570; *see also* 5 JOURNALS, *supra* note 26, at 837 (resolution of October 1 that the President write to the states requesting full representation in Congress.); Letter from Edward Rutledge to Robert R. Livingston (Oct. 2, 1776), *in* 5 LETTERS, *supra* note 42, at 294, 295.

Apparently the individual delegates found attendance at Congress to be a considerable strain. *See* 5 JOURNALS, *supra* note 26, at 611 n.1. But because some states required that a certain number of their delegates be present to commit the state, the absence of a relatively few members could have a large effect in leaving states effectively unrepresented. *See* CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE COORDINATION AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774-1789 (forthcoming from Stanford University Press) (manuscript at 243-45, on file with author); *infra* note 186.

The sparse attendance thus posed constant problems. *See* Letter from Samuel Adams to Richard Henry Lee (July 22, 1777), *in* 7 LETTERS, *supra* note 42, at 359; Letter from John Hancock to the Delaware and Virginia Assemblies (July 18, 1777), *in* 7 LETTERS, *supra* note 42, at 352; Letter from John Hancock to the New York Delegates (Mar. 11, 1777), *in* 6 LETTERS, *supra* note 42, at 433; Letter from John Hancock to Robert Morris (Jan. 14, 1777),

war made on those present, the subject was then dropped.[56]

Congress decided on April 8, 1777 to resume deliberations on the Articles,[57] and it actually did so on April 21.[58] In May, John Adams reported that "the great Work of Confederation, drags heavily on,"[59] and it tottered forward with little progress during June, July, August, and September.[60]

In the early morning hours of September 19, Congress fled from Philadelphia to Lancaster, and then to York, Pennsylvania, before the advancing British army.[61] This distressing event greatly increased the urgency with which the members viewed confederation. They responded with a great burst of activity during October,[62] and they continued working

---

in 6 LETTERS, *supra* note 42, at 98, 100; Letter from John Hancock to Certain States (Oct. 2, 1776), *in* 5 LETTERS, *supra* note 42, at 290; Letter from William Ellery to Nicholas Cooke (Sept. 7, 1776), *in* 5 LETTERS, *supra* note 42, at 117, 117-18.

56. Letter from Josiah Bartlett to William Whipple (Sept. 10, 1776), *in* 5 LETTERS, *supra* note 42, at 128.

57. *See* 7 JOURNALS, *supra* note 26, at 240; Letter from James Sykes to George Read (Apr. 10, 1777), *supra* note 55, at 569.

58. 7 JOURNALS, *supra* note 26, at 287; *see* Letter from Thomas Burke to Richard Caswell (Apr. 29, 1777), *in* 6 LETTERS, *supra* note 42, at 671, 672-73.

59. Letter from John Adams to Thomas Jefferson (May 26, 1777), *in* 7 LETTERS, *supra* note 42, at 120; *see* 7 JOURNALS, *supra* note 26, at 328-29, 351; Letter from Thomas Burke to Richard Caswell (May 23, 1777), *in* 7 LETTERS, *supra* note 42, at 108, 109; Letter from Roger Sherman to Oliver Wolcott (May 13, 1777), *supra* note 55, at 80; Letter from Thomas Burke to Richard Caswell (May 11, 1777), *in* 7 LETTERS, *supra* note 42, at 69.

60. 8 JOURNALS, *supra* note 26, at 492, 501; *see* Letter from Eliphalet Dyer to Joseph Trumbull (Sept. 7, 1777), *in* 7 LETTERS, *supra* note 42, at 623; Letter from Richard Henry Lee to Thomas Jefferson (Aug. 25, 1777), *in* 7 LETTERS, *supra* note 42, at 550, 551; Letter from Charles Carroll of Carrollton to Benjamin Franklin (Aug. 12, 1777), *in* 7 LETTERS, *supra* note 42, at 461, 463; Letter from Samuel Adams to Richard Henry Lee (July 22, 1777), *supra* note 55, at 359; Letter from William Williams to Jonathan Trumbull, Sr. (July 5, 1777), *in* 7 LETTERS, *supra* note 42, at 301, 302; Letter from Samuel Adams to James Warren (June 30, 1777), *in* 7 LETTERS, *supra* note 42, at 271, 271-72.

61. *See* Letter from John Adams to Abigail Adams (Sept. 30, 1777), *in* 8 LETTERS, *supra* note 42, at 27; Letter from Charles Carroll of Carrollton to Charles Carroll, Sr. (Sept. 28, 1777), *in* 8 LETTERS, *supra* note 42, at 26; Letter from Eliphalet Dyer to Joseph Trumbull (Sept. 28, 1777), *in* 8 LETTERS, *supra* note 42, at 24, 25.

62. 9 JOURNALS, *supra* note 26, at 778-82, 788-89, 793, 797-98, 800, 801-08, 826-28, 833-45, 848-50; *see* Letter from Samuel Adams to James Warren (Oct. 29, 1777), *in* 8 LETTERS, *supra* note 42, at 209, 209-10; Letter from Henry Marchant to Nicholas Cooke (Oct. 24, 1777), *supra* note 55, at 176, 177; Letter from John Adams to James Warren (Oct. 24, 1777), *in* 8 LETTERS, *supra* note 42, at 170, 171; Letter from William Williams to Jonathan Trumbull, Sr. (Oct. 23, 1777), *in* 8 LETTERS, *supra* note 42, at 162; Letter from William Williams to Jabez Huntington (Oct. 22, 1777), *in* 8 LETTERS, *supra* note 42, at 162; Letter from James Lovell to Horatio Gates (Oct. 5, 1777), *in* 8 LETTERS, *supra* note 42, at 57, 58; *see also* BURNETT, *supra* note 42, at 248.

steadily in November. After settling their remaining differences in the middle of that month, they put the Articles of Confederation into final form, and sent them to the states with a strong appeal for swift ratification.[63]

B. Prior Interpretations

1. The Jensen Thesis

The fullest attempt to interpret rather than merely recount these events remains that of Merrill Jensen in *The Articles of Confederation*.[64] He offers the following explanation.[65]

---

63. 9 JOURNALS, *supra* note 26, at 879-80, 886-90, 893-96, 899-900, 907-28, 932-35, 981; *see* Letter from William Williams to Jonathan Trumbull, Sr. (Nov. 28, 1777), *in* 8 LETTERS, *supra* note 42, at 340, 340-41; Letter from Richard Henry Lee to Samuel Adams (Nov. 23, 1777), *in* 8 LETTERS, *supra* note 42, at 310, 311; Letter from Cornelius Harnett to Thomas Burke (Nov. 20, 1777), *in* 8 LETTERS, *supra* note 42, at 289, 290; Letter from Daniel Roberdeau to Thomas Wharton (Nov. 19, 1777), *in* 8 LETTERS, *supra* note 42, at 286, 287; Letter from Richard Henry Lee to Samuel Adams (Nov. 15, 1777), *in* 8 LETTERS, *supra* note 42, at 273; Letter from the Pennsylvania Delegates to Thomas Wharton (Nov. 13, 1777), *in* 8 LETTERS, *supra* note 42, at 262; Letter from Cornelius Harnett to Thomas Burke (Nov. 13, 1777), *in* 8 LETTERS, *supra* note 42, at 254; Letter from William Duer to George Clinton (Nov. 9, 1777), *in* 8 LETTERS, *supra* note 42, at 248; Letter from James Lovell to William Whipple (Nov. 3, 1777), *in* 8 LETTERS, *supra* note 42, at 225.

For the later history of confederation, see CHRONICLES OF THE AMERICAN REVOLUTION 323 (Alden T. Vaughan ed., 1965); 11 JOURNALS, *supra* note 26, at 647-56; RAKOVE, *supra* note 46, at 186-91; 1 SECRET JOURNALS, *supra* note 42, at 283-464; George D. Harmon, *The Proposed Amendments to the Articles of Confederation* (pts. 1-2), 24 S. ATLANTIC Q. 298, 411 (1925).

64. JENSEN, ARTICLES, *supra* note 11. Jensen's book was reprinted with new prefaces in 1948, 1959, and 1970, and the author's views apparently changed somewhat over the years. In Jensen's 1970 foreword he wrote:

> [T]he basic conclusions remain the same. Those are that the social, political, and economic discontent that existed in America before 1776 did not disappear with independence, that that discontent continued to have an impact on American politics, and that the debate over the nature and purpose of the central government of the United States was one of the central issues of the age of the American Revolution.

Id. at x. But as will be seen in the following paragraph, his text (which was never revised since first written) did not put forth quite this thesis. Because the text contains the documentation, this Article addresses only the thesis presented in the text. The latest preface dealing specifically with the drafting of the Articles was printed in the 1959 edition. Discussing what he would do if writing the book over again, Jensen stated, "The main problem, as I see it, is not with the sections on the writing and ratification of the Articles of Confederation . . . ." *Id.* at xxi (preface to the 1959 printing).

65. For Jensen's own summary of his views on this period, see MERRILL JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 23-28 (1964).

Before the Revolution, the individual colonies were largely controlled by conservative elements in the population. These "conservatives" retained control during the beginning of the revolutionary period, but gradually lost power to "radicals,"[66] who desired internal democracy as much as independence. "[Conservatives] appeared in strength in the first Continental Congress. In it their ideas and desires were expressed. They were still powerful at the beginning of the second Continental Congress, but gradually their hold was weakened by the growing revolutionary movement in the various states."[67] The conservatives felt that the only way to protect their position would be to create a strong central government for the protection of vested interests.[68] The Dickinson draft of the Articles embodied their desires.

The radicals, however, discovered the attempt and altered the document to conform to their own desire for a weak central government,[69] which would leave them free to enjoy the victories that they had previously won in the individual colonies.

> The American Revolution thus marks the ascendancy of the radicals of the colonies . . . . True, this radical ascendancy was of brief duration, but while it lasted an attempt was made to write democratic ideals and theories of government into the laws and constitutions of the American states . . . . The

---

66. Jensen describes the two groups this way:

> Those called conservatives . . . were members of that group who wished to retain the British connection, but, failing that and choosing to become revolutionists, wished to retain the political and economic structure of the colonial period unchanged in the new states. The revolutionary group, or party (the "radicals"), wanted independence from the beginning . . . . [T]hey disagreed with the "conservatives" on the issue of the nature of the central government to be adopted for the American states. Most of the conservatives saw in a powerful central government the means of maintaining the status quo, and they saw this from the start.

Merrill Jensen, *The Idea of a National Government During the American Revolution*, 58 POL. SCI. Q. 356, 360 (1943); *see* JENSEN, ARTICLES, *supra* note 11, at xvii (preface to the 1948 printing). For an earlier similar view, see JENNINGS B. SANDERS, THE PRESIDENCY OF THE CONTINENTAL CONGRESS 71 (1930).

67. JENSEN, ARTICLES, *supra* note 11, at 13-14.

68. *Id.* at xiv (preface to the 1948 printing). "[T]he eighteenth-century counterparts of nineteenth-century vested interests . . . rejected the doctrine of state sovereignty. For them the only escape from a democracy which found expression in unchecked state governments was the creation of a national government which would limit if not destroy the sovereignty of the states." *Id.*

69. *Id.* at 10-11. In Jensen's words:

> The Dickinson draft . . . made the constitution of the central government the standard by which the rights, powers, and duties of the states were to be measured. Congress was theoretically, if not practically, the supreme authority. In contrast, the final draft of the Articles of Confederation was a pact between thirteen sovereign states which agreed to delegate certain powers for specific purposes, while they retained all powers not expressly delegated by them to the central government.

Id. at 130.

> participation of the radicals in the creation of a common government is all-important, for they as well as the conservatives believed that a centralized government was essential to the maintenance of conservative rule. Naturally the radicals who exercised so much power in 1776 refused to set up in the Articles of Confederation a government which would guarantee the position of the conservative interests they sought to remove from power.[70]

But the radicals

> failed to see . . . that they must continue their union if they were to maintain their local independence under the Articles of Confederation. . . .
>
> Thus when the radicals had won their war, most of them were well content to go home and continue with the program of action they had started long before the war began.[71]

2. Newer Interpretations

Subsequently, H. James Henderson offered a somewhat different interpretation, albeit one that also saw the divisions in congressional opinion as being ones over ideology.[72] In his view, coherent voting blocs, originating in sectional conflict, persisted throughout the Congress.[73]

This entire line of thinking came under attack from Jack N. Rakove in *The Beginnings of National Politics*, which argued that "major decisions of Congress owed much less to partisan conflict than other historians have concluded. Other considerations usually proved more important: the extent to which external events limited available alternatives, the delegates' shared assumptions about the requirements of resistance, and their sensitivity to the preservation of Congress's authority."[74]

Most recently, two political scientists, Calvin Jillson and Rick K. Wilson, in a provocative forthcoming work, have exhaustively surveyed the voting in the Congress within the context of its structural features, in order to quantify the extent to which "regional patterns of political cooperation and opposition were influenced and often undercut by other forces, influences and inter-

---

70. *Id.* at 11-12.

71. *Id.* at 244.

72. *See* HENDERSON, *supra* note 40.

73. *See id.* The role of sectionalism was given even greater prominence a few years later by JOSEPH L. DAVIS, SECTIONALISM IN AMERICAN POLITICS 1774-1787 (1977).

74. RAKOVE, *supra* note 46, at xv-xvi. For a critical review of Rakove's work, which seeks to support Jensen's account of the drafting of the Articles, see E. James Ferguson, Book Review, 38 WM. & MARY Q. (3d ser.) 125, 126-27 (1981). For a more recent discussion, see JERRILYN G. MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776, at 183-84 (1987). In a book review of the work, Rakove criticizes its account of the drafting of the Articles of Confederation. *See* Jack N. Rakove, *Jerrilyn Greene Marston's King and Congress: The Transfer of Political Legitimacy, 1774-1776*, 9 L. & HIST. REV. 185, 188-89 (1991).

ests."[75] In particular, they point out that the delegates deliberately chose structures designed to maximize the values of openness and consensus, rather than efficiency, with the result that coherent voting blocs developed slowly if at all.[76]

3. An Assessment

a. The Jensen Thesis

In my view, the Jensen thesis, which views the drafting of the Articles as an episode in an ongoing struggle between centralizing conservatives and states' rights radicals, will not bear the weight of the evidence, including much of Jensen's own.[77] For example, in discussing the internal politics of the colonies, Jensen describes four colonies that support his claim, three that contradict it, two that are dubious, and four that are left out entirely.[78] While

---

75. JILLSON & WILSON, *supra* note 55, at 304.

76. *Id.* at 321-25. The cited pages contain the authors' description of the "deliciously ambiguous" voting patterns of 1777, the year of principal interest for this Article. *Id.*

77. Jensen's book overall is a curiously mixed performance. Although it shows a considerable knowledge of the sources, it cannot satisfactorily account for the data (as it often very candidly admits) and is marred by a number of blunders. For example, Jensen says that the first Continental Congress was an expression of the will of the conservatives, who gradually lost control in the second Continental Congress to the radicals. *See* JENSEN, ARTICLES, *supra* note 11, at 13-14; *supra* text accompanying note 67. Yet twenty pages later we read that the New York conservatives "had no idea that the radicals would dominate the first Continental Congress." JENSEN, ARTICLES, *supra* note 11, at 34; *see also id.* at 55, 73 (radicals in control of the body). In addition, a number of factual inaccuracies exist in Jensen's discussion of the various drafts of the Articles. *See* discussion *infra* text accompanying notes 94-108.

A fair assessment of the work remains the review by Homer C. Hockett, *Merrill Jensen's The Articles of Confederation*, 28 MISS. VALLEY HIST. REV. 89, 90 (1941-42). Hockett writes:

> Jensen's interpretation is ably and convincingly presented, . . . [b]ut it does not quite escape the suspicion of overstatement. For example, the reviewer is not ready to agree that the Conservatives monopolized the desire for what we would now call a government of distributed powers; nor to accept as great a degree of Radical control in the states as the writer assumes; nor to admit as high a degree of continuity in party composition as he.

Id.

78. By Jensen's account, the four colonies that support his thesis are Pennsylvania, Connecticut, Rhode Island, and Massachusetts. *But cf.* Oscar & Mary F. Handlin, *Radicals and Conservatives in Massachusetts After Independence*, 17 NEW ENG. Q. 343, 346 (Sept. 1944) (Jensen thesis "misleading and inaccurate" as applied to developments in Massachusetts). Jensen's presentation shows that Maryland, South Carolina, and New York contradict his thesis, and the status of Virginia and North Carolina is dubious. Jensen omits Delaware, New Jersey, Georgia, and New Hampshire. *Cf.* Richard B. Morris, *The Confederation Period*

this Article is not concerned with events in the states,[79] nor with those before or after the time the Articles were considered and passed by Congress, the Jensen thesis provides a similarly inadequate explanation for the events of the drafting.

The root of the problem is the hypothesized dichotomy between radicals and conservatives.[80] Jensen simply fails to show a reliable connection between one's views on independence and one's views on national power or to prove the existence of cohesive factions based on issues of sovereignty.

To begin with, because of state legislative control of congressional delegations,[81] "votes in Congress were often inconsistent with a given delegate's political and economic views."[82] Moreover, "conservatives . . . use[d] radical theories to support their demands."[83] But by far the biggest problem for any sort of rational analysis is the qualification that "the radicals did not always agree with one another, nor did the conservatives."[84] Considering that "many conservatives"[85] (particularly Southern ones[86]) sided with the radicals on the fundamental question of state sovereignty, one is hard put to see the distinction between these two parties.

Jensen says, "There were some, of course, who shifted from one side to the other, but to assert that because men shifted sides, the sides themselves did not exist is to argue speciously."[87] The point is a good one. But causes should not be multiplied beyond necessity, and when a scholar finds virtually

---

and the American Historian, 13 WM. & MARY Q. (3d ser.) 139, 150-54 (1956) (criticizing Jensen's account of the internal developments in the states).

79. For an overview of conditions in the states during the Confederation period, see JACKSON T. MAIN, THE SOVEREIGN STATES 1775-1783 (1973).

80. *Cf.* STANLEY ELKINS & ERIC MCKITRICK, THE FOUNDING FATHERS: YOUNG MEN OF THE REVOLUTION 21 (1962) ("But if Professor Jensen seems to have called everything by the wrong name, it is well to remember that nomenclature is not everything.") The authors seem inclined to be sympathetic because they find that the struggle for ratification of the Constitution "raises some nice points as to who were the 'conservatives' and who were the 'radicals.'" *Id.* at 26; *see also* MARSTON, *supra* note 73, at 310-11; Cecelia M. Kenyon, *Republicanism and Radicalism in the American Revolution: An Old-Fashioned Interpretation*, 19 WM. & MARY Q. (3d ser.) 153, 157-58 (1962); Richard B. Morris, *Alexander Hamilton After Two Centuries*, *in* THE BASIC IDEAS OF ALEXANDER HAMILTON at xvii (Richard B. Morris ed., 1957).

81. On factional feuding within state legislatures over the composition of congressional delegations, see CHRISTOPHER COLLIER, ROGER SHERMAN'S CONNECTICUT 130 (1971); 2 THE PAPERS OF THOMAS JEFFERSON 16 (Julian P. Boyd ed., 1950); 2 THE WRITINGS OF THOMAS JEFFERSON 128 n.1 (Paul L. Ford ed., 1893).

82. JENSEN, ARTICLES, *supra* note 11, at 243.

83. *Id.* at 168.

84. *Id.* at 57.

85. *Id.* at xix (preface to the 1948 printing); *id.* at 118.

86. *Id.* at 30, 161.

87. *Id.* at xviii (preface to the 1948 printing); *see id.* at xxvi (preface to the 1959 printing).

as many exceptions as cases conforming to a rule, perhaps it is time for a new rule.

This counsel has particular force here because the actors showed a uniform reluctance to consider as most important those issues that the historian does. Surely, the case for the existence of two groups formed around the issue of the distribution of political power must be undermined by the fact that all of the available evidence shows little dispute on the subject. Jensen frankly admits that what he considers "the most vital problem of all—the distribution of power between the states on the one hand and Congress on the other," was only briefly discussed by the delegates.[88] As far as he is concerned, "none of the radicals . . . sensed the significance of the Dickinson draft when it was first presented to Congress."[89]

From Jensen's point of view, the most important event of the entire drafting process occurred when Thomas Burke of North Carolina "proposed an amendment to the Confederation which completely altered its whole character and deprived it of the last vestiges of the legal supremacy which Dickinson had given it. . . . Burke thus placed before Congress the basic constitutional issue of the Revolution."[90] Burke's account reads:

> [The article to be amended] stood originally the third article; and expressed only a reservation of the power of regulating internal police, and consequently resigned every other power. It appeared to me that this . . . left it in the power of the future Congress . . . to make their own power as unlimited as they please. I proposed, therefore, an amendment, which held up the principle, that all sovereign Power was in the States separately, and that particular acts of it, which should be expressly enumerated, would be exercised in conjunction, [i.e., with Congress,] and not otherwise . . . . *This was at first so little understood that it was some time before it was seconded* . . . . The opposition was made by Mr. Wilson of Pennsylvania, and Mr. R.H. Lee of Virginia: in the End however *the question was carried for my proposition, Eleven ayes, one no, and one divided.* . . . I was much pleased to find the opinion of accumulating powers to Congress so little supported, and I promise myself, *in the whole business I shall find my ideas relative thereto nearly similar to those of most of the States.*[91]

Particularly when one considers that, according to Jensen, James Wilson was a leading conservative and Richard Henry Lee a leading radical,[92] it

---

88. *Id.* at 139.

89. *Id.* at 169.

90. *Id.* at 174-75.

91. Letter from Thomas Burke to Richard Caswell (Apr. 29, 1777), *supra* note 58, at 671, 672 (emphasis added).

92. JENSEN, ARTICLES, *supra* note 11, at 92, 198. Jensen comments, "There seems to be no evidence to explain why Richard Henry Lee took a stand so at variance with his prevailing political philosophy." *Id.* at 175 n.31.

hardly sounds as though the participants considered this event the culminating battle of a war between factions.

Nor was there any reason they should have. As Burke had written earlier:

> The advocates do not always keep the same side of the contest. The same persons, who, on one day, endeavor to carry through some resolutions, whose tendency is to increase the power of Congress, are often on another day very strenuous advocates to restrain it. From this I infer that no one has entertained a concerted design to increase the power . . . .[93]

Jensen's insistence on a contrary view underlies his several serious misinterpretations of the Articles of Confederation.

To begin with, Jensen's treatment is often factually misleading. He says, for example: "Eighteenth-century radicals looked upon the desire for office as a disease which fed upon office-holding. Hence they were careful to provide that . . . [n]o one could be a member of Congress for more than three out of any six years."[94] Virtually all political theorists agreed on this point: the provision in question was written originally by the "conservative" Dickinson, and remained unchanged throughout the various versions.[95] To take another instance, it is true in the strict sense that "[t]he two articles which erased state lines with respect to legal and commercial privileges and rights were . . . omitted" from the second draft.[96] It would certainly give a more complete picture, however, to note that those articles were restored, in considerably strengthened form, to the third version.[97]

But beyond such flaws, the central factual difficulty with Jensen's thesis is that the successive drafts of the Articles simply do not show a steady progression from a strong to a weak central government. While it would be unprofitable to attempt to discuss all of the numerous changes that were made between the various versions,[98] a few examples should illustrate the point.

The first version of the Articles provided: "Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation."[99] The second version strengthened the national government by removing the tolerance accorded to existing laws inconsistent with the Articles: "Each State reserves to itself the sole and exclusive regulation and

---

93. Letter from Thomas Burke to Richard Caswell (Mar. 11, 1777), *in* 6 LETTERS, *supra* note 42, at 425, 427.

94. JENSEN, ARTICLES, *supra* note 11, at 242.

95. 9 JOURNALS, *supra* note 26, at 909-10 (printing both first and second versions).

96. JENSEN, ARTICLES, *supra* note 11, at 139.

97. 9 JOURNALS, *supra* note 26, at 908-09; *see infra* text accompanying note 105 (detailing this change).

98. For a complete analysis of the changes, see Freedman, *supra* note 14, at 165-66.

99. 5 JOURNALS, *supra* note 26, at 675.

government of its internal police, in all matters that shall not interfere with the articles of this Confederation."[100]

On the crucial matter of authority over the general budget, the first draft read: "The United States assembled shall have Authority for the Defence and Welfare of the United Colonies and every of them, to agree upon and fix the necessary Sums and Expenses."[101] The second version removed the limiting language and simply provided the authority without imposing the burdensome requirement that each expenditure be ascertainably for the benefit of each state.[102]

Both the first and second versions allowed Congress to appoint certain officers in the continental army, but the second increased the number while also strengthening congressional control over the navy.[103] Again, the first version allowed Congress to set up a post office, but the second permitted the imposition of postage charges to defray its expenses.[104]

Between the second and third versions of the Articles, there were several similar changes in a centralizing direction. The third version added to the second a very strong provision granting "the free inhabitants of each of these states . . . all privileges and immunities of . . . the several states."[105] The same new article also provided for interstate extradition, and required that "[f]ull faith and credit . . . be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."[106]

The third version also made the central government stronger than it had been in the second by adding an article granting congressional immunity, and by letting Congress fix the value of state, as well as national, currency.[107] Moreover, the budget authority was still further strengthened by giving Congress power not only "to ascertain" what sums were necessary to be raised, but also "to appropriate and apply the same."[108]

Not all the changes between drafts were this important, and many tended in a decentralizing direction. The key point, however, is that the theory of one-directional movement towards a weaker central government is simply untenable. This fact in turn suggests that any change in the nature of the

---

100. *Id.* (printing both first and second versions).

101. *Id.* at 683.

102. *Id.* (printing both first and second versions).

103. *Id.* at 677, 682-84.

104. *Id.* at 682 (printing both first and second versions).

105. 9 JOURNALS, *supra* note 26, at 908. A weaker version appeared in the first draft, but was dropped in the second. 5 *id.* at 676. The earlier form required comity in matters of "Trade, Navigation, and Commerce," but in all other cases restricted aliens to the rights they currently enjoyed. *Id.*

106. 9 *id.* at 909.

107. *Id.* at 910, 919. The previous currency provision is at 5 *id.* at 682.

108. 9 *id.* at 920.

general government that came about during the drafting process was the incidental effect of disputes between groups whose real focus lay elsewhere.

b. Newer Interpretations

Assessing the theses of the more recent writers is simpler. The prominence given to sectionalism by Henderson and Davis is, at least for the period during which the Articles were being drafted, inconsistent with the careful empirical demonstration of Jillson and Wilson that "[a]lthough geographically contiguous groups of states often did vote together . . . this [did not result from] . . . long-term coalitional activity by cohesive state delegations."[109]

On the other hand, Rakove describes the composition of the Articles episode by episode, without any sense that the same pattern tends to repeat itself several times over. His detailed and valuable chronological account rightly discounts the roles of political factions and ideological theories of government, as well as stressing the pressure towards solutions imposed by the exigencies of fighting the Revolution,[110] but does not offer a framework within which to understand the individual events of the drafting process.

Similarly, Jillson and Wilson report how the votes fall on a preference map, and note the inadequacies of the existing secondary literature to explain those results. But they are largely uninterested in why the delegates took the positions they did. Instead, Jillson and Wilson rightly point out, as previous authors have neglected, that Congress deliberately adopted institutional procedures requiring high levels of consensus. But the authors do not connect the two sets of observations, that is, to consider whether the delegates' substantive and procedural preferences may have issued from common sources.

My suggestion, quite simply, is that there were such common sources. The data suggests more order than Rakove presents. But that order is not the one that previous writers have sought to impose.

---

109. JILLSON & WILSON, *supra* note 55, at 266; *see* JENSEN, ARTICLES, *supra* note 11, at 56. Jensen writes:

> Broadly speaking, the New England colonies had interests in common which differentiated them from the others. The same was true of the Middle colonies . . . . The Southern colonies, too, were characterized by certain common features . . . . Yet such groupings do not satisfactorily explain the major issues that arose in the Congress. The large colonies were pitted against the small ones; colonies with many slaves were in opposition to those with fewer; colonies that had no western lands contended with those that did. On all these issues sectional lines were so broken as to become meaningless.

Id.

110. RAKOVE, *supra* note 46, at 157-58, 171-72, 177-78. For a more recent summary of his views, see Jack N. Rakove, *The Legacy of the Articles of Confederation*, 12 PUBLIUS 45, 47-53 (Fall 1982).

C. A New Look at the Data

1. Self-Interested Disagreement and Pragmatic Compromise

Certainly parties were present in the second Continental Congress. Henry Laurens of South Carolina wrote:

> I have discovered parties within parties, divisions & subdivisions to as great a possible extent as the number 35 (for we have never more together) will admit of. As it is wholly contrary to my genius & practice to hold with any of them *as party*, so I incur the censure of not being *long* with any.[111]

But the basis on which these shifting groups were differentiated was not political ideology. An abundance of evidence shows that a definite consensus existed about centralized political power: It was to be avoided.

The delegates of Virginia, North Carolina, Rhode Island, New Jersey, and Connecticut all came to Congress with specific instructions not to accept any confederation that interfered with the internal concerns of their states.[112] "Northern as well as Southern statesmen, then and long afterward were wont to cling to the doctrine of state sovereignty and independence as tenaciously as grim death in the fable clung to the deceased African."[113]

This doctrine was basically a means of keeping political power—which politicians and citizens of every shade of opinion considered a corrupting force that had to be checked by ceaseless vigilance[114]—as close to hand as

---

111. Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS, *supra* note 42, at 606, 615.

112. 6 AMERICAN ARCHIVES No. 4, at 1524 (Peter Force ed., 1846); *see* CHRISTOPHER COLLIER, CONNECTICUT IN THE CONTINENTAL CONGRESS 46 (1973); 10 THE COLONIAL RECORDS OF NORTH CAROLINA 512 (William L. Saunders ed., 1890); 4 JOURNALS, *supra* note 26, at 353; 5 *id.* 490, 504. For similar sentiment in Pennsylvania, see CHRONICLES OF THE AMERICAN REVOLUTION, *supra* note 63, at 240-41.

113. Edmund C. Burnett, *Southern Statesmen and the Confederation*, 14 N.C. HIST. REV. 343, 349 (1937).

114. *See, e.g.*, DEMOPHILUS [pseud.], THE GENUINE PRINCIPLES OF THE ANCIENT SAXON, OR ENGLISH CONSTITUTION 6, 9 (1776); JENSEN, ARTICLES, *supra* note 11, at xxvii-xxix (preface to the 1959 printing); Letter from Thomas Burke to Richard Caswell (Mar. 11, 1777), *supra* note 93, at 425, 427; Letter from John Adams to Joseph Hawley (Aug. 25, 1776), *in* 9 CHARLES F. ADAMS, THE WORKS OF JOHN ADAMS 433, 435 (1854); Letter from Charles Lee to Patrick Henry (July 29, 1776), *in* ADAMS, *supra*, at 178; Letter from Alexander White to Charles Lee (June 27, 1776), *in* COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR THE YEAR 1872, at 83, 86, 87 (1872) [hereinafter NEW YORK COLLECTIONS]; Letter from Samuel Adams to James Warren (Dec. 27, 1775), *in* 2 LETTERS, *supra* note 42, at 524, 525; *see also* THE ANTIFEDERALISTS at xxix (C. Kenyon ed., 1966) ("Self-interest, and . . . a lust for power, were anticipated."); WOOD, *supra* note 15, at 21-22; Jack P. Greene, *Ideas and the American Revolution*, 17 AM. Q. 592, 594 (1965) (reviewing PAMPHLETS OF THE AMERICAN REVOLUTION (B. Bailyn ed., 1965)). Greene writes:

possible.[115] Hence, there was general agreement[116] that the central government "should by no means have authority to interfere with the internal police or domestic concerns of any Colony, but [be] confined strictly to such general regulations, as tho' necessary for the good of the whole, cannot be established by any other power."[117]

Conflicts in Congress, and the unstable liaisons by which they were resolved,[118] originated elsewhere—in the perceived interests, sometimes conceived in geographical terms, of the individual states. More than twenty years before the Revolution, Franklin had noted: "[P]articular colonies have *selfish views*, as New York, with regard to Indian trade and land; or are less

---

> [A] dominant and comprehensive theory of politics had emerged in the colonies by the middle of the eighteenth century. At the heart of this theory were the convictions that man in general could not withstand the temptations of power, that power was by its very nature a corrupting and aggressive force, and that liberty was its natural victim.

Id.

This view of power has very early origins in American history. *See* T.H. Breen, *Looking Out for Number One: Conflicting Cultural Values in Early Seventeenth-Century Virginia*, 78 S. ATLANTIC Q. 342, 349 (1979). Breen argues that Virginia settlers of the early 1600s "assumed that persons in authority would use their office for personal gain." *Id.* This view remained the dominant one as the Constitution was being debated. *See* Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 40 n.93 (1992) (collecting primary sources).

This view's merits lie at the heart of the recent debate in the literature of constitutional law and history, *see id.* at 39 n.91 (summarizing literature), over the role of civic republicanism in the founders' thought and the relevance of the answer to constitutional interpretation. *See, e.g.*, Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 897-98 (1993) (arguing that civic republicans are inadequately distrustful of those in power); Johnathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1673-74 (1988) (criticizing Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988), for lacking the Framers' "appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends," and adopting "a faith in human virtue that the framers did not themselves embrace, and which does not correspond to reality").

115. *See* JENSEN, ARTICLES, *supra* note 11, at 244.

116. *Id.* at 125.

117. Carter Braxton, *An Address to The Convention of . . . Virginia . . . On The Subject of Government* 24 (1776); *cf. supra* text accompanying note 44 (quoting Article V of the Franklin plan).

118. *See* Kenyon, *supra* note 80, at 155. Kenyon argues:

> Their ideal of politics appears to have involved not the division of the body of citizens into more or less permanent groupings held together by similar views on a composite cluster of principles and/or interests, but rather *ex tempore* majorities and minorities formed by the issue of the moment and undistorted by pre-existing organization not related to the instant issue.

Id.

exposed, being covered by others, as New Jersey, Rhode Island, Connecticut, Maryland; have particular whims and prejudices against warlike measure in general, as Pennsylvania, where Quakers predominate . . . ."[119]

Once the colonies had declared independence, it remained "loyalty to one's country that moved men, whether radical or conservative, and one's country was the state in which one lived, not the thirteen more or less united states along the Atlantic Coast."[120] Provincial attitudes were as common among the delegates[121] as in the army they sought to direct.[122]

---

119. 3 THE WRITINGS OF BENJAMIN FRANKLIN 206 (Albert H. Smyth ed., 1905) (Franklin's comments on his proposed Albany Plan of Union).

120. JENSEN, ARTICLES, *supra* note 11, at 163; *see also* COLLIER, *supra* note 111, at 46; 1 PAGE SMITH, JOHN ADAMS 281 (1962); Letter from Thomas Burke to Richard Caswell (May 23, 1777), *in* 7 LETTERS, *supra* note 42, at 108.

121. *See, e.g.*, Letter from Richard Henry Lee to Samuel Adams (Nov. 23, 1777), *supra* note 63, at 310, 311 ("the insatiable avarice of Pennsylvania"); Letter from James Lovell to Richard Henry Lee (July 22, 1777), *in* 7 LETTERS, *supra* note 42, at 363 ("[T]he obstinate Vanity of N[or]th C[arolina] and the persevering Design of N.Y. have been reinforced by the ill timed Bodings and Frosty Caution of C[onnecticu]t."); Letter from Richard Henry Lee to Patrick Henry (May 26, 1777), *in* 7 LETTERS, *supra* note 42, at 121, 124 ("One thing is certain, that among the Middle and Southern states Virginia had many enemies, arising from jealousy and envy of her wisdom, vigor, and extent of Territory."); Letter from William Kennon to Charles Lee (Dec. 7, 1776), *in* NEW YORK COLLECTIONS, *supra* note 114, at 333; Letter from Edward Rutledge to John Jay (June 29, 1776), *in* 4 LETTERS, *supra* note 42, at 337, 338 (urging that the Dickinson draft was unacceptable, as it would subject other colonies to the "Government of the Eastern Provinces. . . . I dread their low Cunning, and those levelling Principles which Men without Character and without Fortune in general Possess"); Letter from John Adams to Cotton Tufts (June 23, 1776), *in* 4 LETTERS, *supra* note 42, at 297, 298 ("New York still acts in Character, like a People without Courage or sense, or Spirit, or in short any one Virtue or Ability."); *see also* 1 JOHN Q. ADAMS & CHARLES F. ADAMS, THE LIFE OF JOHN ADAMS 342-43, 379-81 (rev. ed. 1874); 3 EDWARD CHANNING, A HISTORY OF THE UNITED STATES 453 (1912); EVARTS B. GREENE, THE REVOLUTIONARY GENERATION 1763-1790, at 185-87, 299, 300 (1943); MARSTON, *supra* note 74, at 184-86; SCOTT, *supra* note 42, at 41; Letter from Charles Lee to John Rutledge (July 23, 1776), *in* NEW YORK COLLECTIONS, *supra* note 114, at 157-60; Letter from John Adams to Horatio Gates (Mar. 23, 1776), *in* 3 LETTERS, *supra* note 42, at 429, 431.

Indeed, Congress called its roll in geographical order, beginning with New Hampshire as the northernmost state and continuing through to Georgia in the south. *See* JILLSON & WILSON, *supra* note 55, at 214. The states were listed in this order for all formal purposes (such as committee assignments) and at the head of the Articles.

122. *See, e.g.*, 5 JOURNALS, *supra* note 26, at 591 (resolving "[t]hat a letter be written to General Schuyler, requesting him to recommend, in the strongest terms, harmony between the officers and troops of the different states; [and] to discountenance and suppress all provincial reflections and ungenerous jealousies of every kind"). The result was a letter from John Hancock to Philip Schuyler (July 24, 1776), *in* 4 LETTERS, *supra* note 42, at 533. A general discussion of sectional conflicts in the continental army is found in DAVIS, *supra* note 73, at 10-11; *see also* Letter from Charles Lee to John Armstrong (Aug. 27, 1776), *in*

Of course, pursuing the interests of one's own state might mean forming alliances with other states, sometimes on a geographic basis. Thus, in the numerous congressional disputes dealing with the appointments of specific generals in the continental army,[123] the partisans of both sides saw the opposed blocs in geographical terms.[124] But the geographic groupings were only means, not ends; the interests of his own state were paramount in each delegate's mind. Thomas Burke seems to have grasped the situation very well when he reported home:

> Of the political principles of the respective States I am not yet able to speak very clearly, for they are kept as much as possible out of view. I conjecture however, that all are under some apprehensions of combination in the Eastern States to derive to themselves every possible advantage from the present war, at the expence of the rest. I am not yet satisfied that there is any combination amongst them. I rather think that they only combine when they have one common interest, which is seldom the case, & I am sure this is not peculiar to them.[125]

Under these circumstances, no confederation would have been formed at all had it not been for the other delegates' salient characteristic, their

---

NEW YORK COLLECTIONS, *supra* note 114, at 246 ("The People here [in Georgia] are if possible more harum skarum than [those of] their sister Colony [South Carolina]. . . . Upon the whole I shou'd not be surpris'd if they were to propose mounting a body of Mermaids on Alligators . . . .").

123. For a full-length study of this issue, see JONATHAN G. ROSSIE, THE POLITICS OF COMMAND IN THE AMERICAN REVOLUTION (1975).

124. For a summary of the sectional controversies, see BURNETT, *supra* note 42, at 231-32. For a typical example of how the delegates viewed these matters, see Letter from William Duer to Robert R. Livingston (May 28, 1777), *in* 7 LETTERS, *supra* note 42, at 140. Duer wrote:

> [M]y attention has been so engross'd in defeating the Designs of a Mischievous Combination, and in cultivating the Friendship of the Members from the Southern States that I have had . . . no Time to write . . . . I have now the Pleasure to inform you that in Spite of all the Arts and Influence made use of by the Eastern Delegates in conjunction with Members from New Jersey—we have got Genl. Schuyler's Conduct fully justified . . . . [G]reat Temper and address . . . have dispelled the Mist of Error which had clouded the Eyes even of those who were Friends to the great Cause, and to the State of New York.

Id.; see also Letter from James Duane to Philip Schuyler (Aug. 23, 1777), *in* 7 LETTERS, *supra* note 42, at 535; Letter from the New Hampshire Delegates to Meshech Weare (Aug. 22, 1777), *in* LETTERS, *supra* note 42, at 528; Letter from Charles Lee to Nicholas Cooke (Dec. 7, 1776), *in* NEW YORK COLLECTIONS, *supra* note 114, at 331, 332. For a comprehensive analysis of geographical tensions during the early national period, see Drew R. McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, *in* BEYOND CONFEDERATION, *supra* note 8, at 226.

125. Letter from Thomas Burke to Richard Caswell (Feb. 16, 1777), *in* 6 LETTERS, *supra* note 42, at 298.

willingness to compromise.[126] Knowing that their work would require the approval of every state to become effective,[127] and aided by their shared beliefs,[128] they endeavored to adopt positions that had the broadest possible base of support.[129] Each state asserted its interests as it could, but each state realized that its ultimate interest—the realization of which could not be long delayed if either the Revolution or the delegates' own necks were to remain safe—lay in the creation of a confederation. Hence, the disputes between the ad hoc alliances, though intense while underway, repeatedly concluded with an effort to seek a widely acceptable solution.[130]

Proof of compromise over specific issues will appear in the following section, but the most important overall characteristic of the roll call votes on the Articles (all of which are analyzed in the Appendix to this Article) was

---

126. *See, e.g.*, Letter from Richard Henry Lee to Roger Sherman (Nov. 24, 1777), *in* 8 LETTERS, *supra* note 42, at 318, 319-20 ("In this great business dear Sir we must yield a little to each other, and not rigidly insist on having every thing correspondent to the partial views of every State. On such terms we can never confederate.").

127. *See* Letter from Josiah Bartlett to Nathaniel Folsom (July 1, 1776), *in* 4 LETTERS, *supra* note 42, at 348, 349 (noting that "without the unanimous Consent of all [colonial legislatures] it cannot be Established").

128. *See* 9 JOURNALS, supra note 26, at 826, 833-34, 848; *supra* text accompanying notes 112-16; *cf.* JENSEN, ARTICLES, *supra* note 11, at 161-62 ("The solution . . . was a matter of practical politics, arrived at by the political maneuvering of two opposing parties having quite different political aims and ideals. No one realized this more clearly than contemporary politicians . . . .").

129. The procedural rules which Jillson and Wilson stress, *see, e.g.*, JILLSON & WILSON, *supra* note 55, at 201, thus emerge not just as deliberate choices (which the authors recognize), but as deliberate choices made for specific substantive reasons, *id.* at 4. *See also* discussion *supra* subsection II.B.3.b. The authors hint at this latter thought in their summary of the voting data:

> The delegates to the First Continental Congress shared two contradictory goals. On the one hand, they sought to achieve unanimity in their collective decisions. On the other hand, they sought to maintain the sovereignty of their individual colonies. The early pursuit of these conflicting goals produced many of the tensions that later plagued the Continental Congresses.

JILLSON & WILSON, *supra* note 55, at 199.

130. A recognition of the pattern described in the text would enrich historical scholarship on political chapters of the early post-Constitution years. For example, this pattern replicated itself clearly in the congressional wrangling of 1790 over the location of the capital and payment of the war debt. Yet historians of the later events have not seen their similarity to the earlier ones. Hence, it is easy to pick up a standard account of the 1790 events, and find the eventual solution described as "the first publicly fought out compromise in American history." CHARLENE B. BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789-1791, at 71 (1989).

The key role of compromise in American political thought from the time of the Constitutional Convention forward is a main subject of PETER B. KNUPFER, THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861 (1991).

their consistent one-sidedness. Over the course of sixteen ballots, the majority position carried by a resounding 125-30.[131] Only in one case was there a statistically significant split between the northern and southern states, and in no case was there a statistically significant split between the states with western land claims and those without.

"The Articles of Confederation were a compromise,"[132] and one which took place because the delegates felt that "[s]alvation . . . depend[ed] upon something being . . . done in this [b]usiness,"[133] especially as the military situation worsened. The passion with which they battled was always tempered by the thought that "[o]ur strength and happiness is Continental, not Provincial."[134] The delegates took positions based on their states' interests; but, having done so, they modified those positions in the interest of consensus. It is in the interplay between these two forces that the story of the drafting of the Articles of Confederation is to be found.

---

131. *See* Appendix *infra* pp. 827-39 (summarizing the votes on the Articles); *infra* note 181 (noting that large sections of the Articles passed without dissent and without the need for a roll call).

132. SCOTT, *supra* note 42, at 41.

133. Letter from Edward Rutledge to Robert R. Livingston (Oct. 2, 1776), *supra* note 55, at 294, 295; *see* Letter from Daniel Roberdeau to Thomas Wharton (Oct. 14, 1777), *in* 8 LETTERS, *supra* note 42, at 121, 122 (completion of the Articles "is necessary to our Salvation"); Letter from Eliphalet Dyer to Joseph Trumbull (Sept. 7, 1777), *supra* note 60, at 623 ("All are agreed in the Object" of confederation and likely to overcome specific differences.); Letter from Charles Carroll of Carrollton to Charles Carroll, Sr. (June 26, 1777), *in* 7 LETTERS, *supra* note 42, at 250, 251 ("I am pleased to find a very considerable, nay a very great majority of Congress . . . anxious for a confederacy . . . ."); John Witherspoon's Speech in Congress (July 30, 1776), *in* 4 LETTERS, *supra* note 42, at 584 ("The absolute necessity of union . . . is felt and confessed by every one of us, without exception . . . ."); Letter from Samuel Chase to Richard Henry Lee (July 30, 1776), *in* 4 LETTERS, *supra* note 42, at 570, 571 ("We shall remain weak . . . [until] We are confederated."); John Adams's Notes of Debates (July 30, 1776), *supra* note 51, at 568 ("Clark. We must apply for Pardons, if We dont confederate."); Letter from Josiah Bartlett to Nathaniel Folsom (July 1, 1776), *supra* note 127, at 348, 349 ("The whole Congress are unanimous for forming a plan of Confederation of the Colonies . . . ."); *see also* BURNETT, *supra* note 42, at 257-58; 9 JOURNALS, *supra* note 26, at 933-34.

134. THOMAS PAINE, COMMON SENSE 56, 61, 71-72 (1776); *see* BROADSIDE [PROCEEDINGS OF A PUBLIC MEETING IN FAVOR OF INDEPENDENCE], MAY 20, 1776 (Philadelphia, 1776) ("[It is a] *happy union* with the other colonies, which we consider both as our *glory* and *protection*."); ENOCH HUNTINGTON, THE HAPPY EFFECTS OF UNION, AND THE FATAL TENDENCY OF DIVISIONS 11-13, 17, 20 (1776); ROBERT ROSS, A SERMON IN WHICH THE UNION OF THE COLONIES IS CONSIDERED AND RECOMMENDED; AND THE BAD CONSEQUENCES OF DIVISION ARE REPRESENTED 5-7 (Nov. 16, 1775).

2. The Drafting Process

a. Indian Affairs

One of the earliest debates on the Articles, the one over the management of Indian affairs, provides a very good illustration of the way these tendencies manifested themselves in practice. The starting point for the discussion, which began on July 26, 1776, was the Dickinson draft provision giving the "United States Assembled . . . the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians."[135]

Although the concept of some national control of Indian affairs was not generally thought to represent any great danger to state sovereignty,[136] it may be that Dickinson was motivated to insert this provision by his belief in a strong central government. Indeed, his Pennsylvania colleague James Wilson argued, "No Power ought to treat, with the Indians, but the united States. . . . None should trade with Indians without a Licence from Congress. A perpetual War would be unavoidable, if every Body was allowed to trade with them."[137] But, because a licensing system would presumably apportion trade quotas according to the status quo, it seems at least equally likely that the primary factor was the one Wilson had mentioned earlier: "The Trade of Pensilvania has been more considerable with the Indians than that of the neighbouring Colonies."[138]

In any event, if Wilson was motivated by a passion for a political theory, he was the only such debater. The record of the first words of the discussion reads: "Rutledge and Linch oppose giving the Power . . . to Congress. The Trade is profitable they say. . . . Braxton is for excepting such Indians as are tributary to any State. Several Nations are tributary to Virginia."[139] The rest of the speeches were in the same vein.

> Most of the colonies wished . . . just enough intervention . . . to secure their particular interest. Georgia, which served as a kind of buffer state against the tribes of the South, was anxious to obtain all possible help. South Carolina, which profited from a handsome trade in deerskins, was fearful that the confederacy might regulate or impede her commerce with the Indians and thus wished to be left alone . . . .[140]

Accordingly, Roger Sherman of Connecticut proposed one of his typical softening compromises: "[T]hat Congress may have a Superintending Power,

---

135. 5 JOURNALS, *supra* note 26, at 681-82.

136. *See* JENSEN, ARTICLES, *supra* note 11, at 125.

137. John Adams's Notes of Debates (July 26, 1776), *in* 4 LETTERS, *supra* note 42, at 545, 546.

138. *Id.* at 545.

139. *Id.* (footnote omitted).

140. SMITH, *supra* note 120, at 281.

to prevent Injustice to the Indians or Colonies."[141] This proposal proved unsatisfactory both to Wilson and to Thomas Stone of Maryland (which had no Indian trade and no prospect of getting any if control of it were left in the hands of the other colonies). Because the objecting states were also hoping to have the federal government fix the western limits of certain of their trade rivals, their opposition was placated by changing the language to give Congress the power of "regulating the trade, and managing all affairs with the Indians, not members of any of the States."[142] As no one yet knew what the outcome of the boundary fight would be, this change left everyone temporarily satisfied.

Fifteen months later, when it seemed clear that Congress was not going to fix the boundaries of the states with claims to large areas of western land, Congress returned to the issue. A motion was made to replace the existing provision with one giving Congress the power of "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction."[143]

Because vast tracts within their asserted bounds were uninhabited, this language was highly provocative to the land-claiming states. So the situation was finally resolved by giving "[t]he united states, in Congress assembled, . . . the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states, provided, that the legislative right of any state within its own limits be not infringed or violated."[144] Because the congressional decision not to set boundaries had left all parties entitled to their own opinions on what the "limits" of any state were, the delegates had succeeded in adopting a wording—based on their common regard for state sovereignty—with which almost everyone could be content.[145]

---

141. John Adams's Notes of Debates (July 26, 1776), *supra* note 137, at 545, 546.

142. 5 JOURNALS, *supra* note 26, at 682.

143. 9 *id.* at 844.

144. *Id.* at 919.

145. While this studied ambiguity doubtless helped secure the passage of the Articles, it had other costs: The states remained at odds among themselves, competing agents from Congress and various states sought to deal with the same tribes, and Indian land rights vanished into an almost impenetrable legal muddle. *See* J. David Lehman, *The End of the Iroquois Mystique: The Oneida Land Cession Treaties of the 1780s*, 47 WM. & MARY Q. (3d ser.) 523, 529-46 (1990). In the case of the Indians of New York, it was not until the 1980s that serious efforts were made to sort matters out, which required the courts to give sustained attention to this history in an effort to reach a satisfactory resolution of the ambiguity. *See* Oneida Indian Nation v. New York, 860 F.2d 1145, 1148-61 (2d Cir. 1988) (noting that proviso was adopted "without explanation but evidently in a spirit of compromise," *id.* at 1156), *aff'g.* 649 F. Supp. 420 (N.D.N.Y. 1986), *cert. denied*, 493 U.S. 871 (1989); Oneida Indian Nation v. New York, 691 F.2d 1070, 1084-95 (2d Cir. 1982); *see also* Six Nations v.

The entire history of the issue demonstrates how the members combined a keen regard to their own interests with solicitous attempts to avoid any unnecessary dissension. A similar pattern emerges from a review of the three most controversial issues in the debate over the Articles: representation, taxation, and the control over western lands.

b. Representation

The question concerning representation was whether each state in Congress should have one vote, regardless of size, or a number proportionate to its population. The small states favored the first plan, the large states the second.[146] The basis for their positions was not obscure: "We shall be governed by our Interests, and ought to be," said Samuel Chase of Maryland.[147] Indeed, John Adams actually turned this realization into an argument for proportional representation. He contended:

> Reason, justice, & equity never had weight enough on the face of the earth to govern the councils of men. It is interest alone which does it, and it is interest alone which can be trusted. That therefore the interests within doors should be the mathematical representatives of the interests without doors.[148]

Adams concluded by arguing, as did several others from large states, that the small states had nothing to fear because considerations of geographical self-interest would tend to lead the large states to form coalitions with small states rather than each other.[149]

United States, 173 Ct. Cl. 899 (1965); *cf.* State v. Elliott, 616 A.2d 210 (Vt. 1992) (making no reference to the Articles in canvassing legal developments concerning title to Indian lands in Vermont), *cert. denied*, 113 S. Ct. 1258 (1993).

In the course of its effort, the Second Circuit correctly concluded that Article III courts have subject matter jurisdiction to hear claims under the Articles of Confederation. *Oneida*, 860 F.2d at 1150-52. However, this conclusion was based on weaker historical evidence than was available. *See* Freedman, *supra* note 14, at 159. The court also correctly concluded that treaties made under the Articles were binding on the states. *Oneida*, 691 F.2d at 1091 (citing Freedman, *supra* note 14, at 152-54); *see also* Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 416 n.2 (2d Cir.) (assuming these two *Oneida* propositions arguendo), *cert. denied*, 113 S. Ct. 603 (1992).

146. Letter from William Williams to Jonathan Trumbull, Sr. (July 5, 1777), *supra* note 60, at 301, 302.

147. John Adams's Notes of Debates (July 30, 1776), *supra* note 51, at 568.

148. Thomas Jefferson's Notes of Proceedings in Congress (July 12-Aug. 1, 1776), *in* 4 Letters, *supra* note 42, at 438, 443. *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 245-54 (1992) (tracing increasing acceptability of this view from 1760s through 1780s). Professor Wood treats the same subject at greater length in Wood, *supra* note 23.

149. *See* Thomas Jefferson's Notes of Proceedings in Congress (July 12-Aug. 1, 1776), *supra* note 148, at 443. Jefferson argued:

The representation debate was passionate. The small states stressed that they were expending proportionately as much of their resources as the larger ones and that it would be unfair for three or four colonies[150] to be able to govern thirteen. The larger states primarily emphasized that justice demanded that a majority of the population have a majority of the votes.[151]

Yet—although the small states held a clear majority and could presumably have imposed their will at any time—numerous attempts were made at compromise, and a spirit of compromise ultimately prevailed. Chase observed:

> [O]ur importance, our interests, our peace required that we should confederate, and that mutual sacrifices should be made to effect a compromise of this difficult question. . . . [T]he smaller states should be secured in all questions concerning life or liberty & the greater ones in all respecting property. He therefore proposed that in votes relating to money, the voice of each colony should be proportioned to the number of it's inhabitants.[152]

Virginia, Pennsylvania, & Massachusetts are the three greater colonies. Consider their distance, their difference of produce, of interests, & of manners, & it is apparent they can never have an interest or inclination to combine for the oppression of the smaller. That the smaller will naturally divide on all questions with the larger. Rhode Isld. from it's relation, similarity & intercourse will generally pursue the same objects with Massachusets; Jersey, Delaware & Maryland with Pennsylvania.

Id.

Wilson stated, "I defy the wit of man to invent a possible case or to suggest any one thing on earth which shall be for the interests of Virginia, Pennsylvania & Massachusets, and which will not also be for the interests of the other states." Id. at 445.

Benjamin Rush of Pennsylvania urged, "If We vote by Numbers Liberty will be always safe. Mass. is contiguous to 2 small Colonies, R.[I.] and N.H. Pen. is near N.J. and D. Virginia is between Maryland and N. Carolina." John Adams's Notes of Debates (Aug. 1, 1776), *supra* note 53, at 592, 593; *see also* Benjamin Rush's Notes for a Speech in Congress (Aug. 1, 1776), *in* 4 LETTERS, *supra* note 42, at 598, 600.

150. Uncertainty, caused by a lack of adequate population data, existed about what the apportionment of votes would be under a population-based plan. Assigning this reason, the delegates to the first Continental Congress, after a debate similar to that in the second, had decided to give each state one vote, at least for the moment. They thus did what the majority of the delegates wanted, while avoiding giving offense to the others. These earlier proceedings are summarized by JENSEN, ARTICLES, *supra* note 11, at 57-59.

151. *See generally* Letter from Samuel Ward to Henry Ward (Dec. 31, 1775), *in* 2 LETTERS, *supra* note 42, at 538, 539-40; John Adams's Diary (Aug. 29-Sept. 5, 1774), *in* 1 LETTERS, *supra* note 42, at 3, 10, *reprinted from* 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 122, 124 (Lyman Butterfield ed., 1961).

152. Thomas Jefferson's Notes of Proceedings in Congress (July 12-Aug. 1, 1776), *supra* note 148, at 438, 441; *cf.* Letter from Samuel Adams to James Warren (June 30, 1777), *supra* note 60, at 271, 272 ("I am apt to think that it will be tomorrow determind that each State shall have one Vote, but that certain great and very interesting Questions shall have the concurrent Votes of nine States for a Decision.").

Sherman said: "Three Colonies would govern the whole, but would not have a Majority of Strength to carry those Votes into Execution. The Vote should be taken two Ways. Call the Colonies and call the Individuals, and have a Majority of both."[153] Jefferson recommended:

> [A]ny proposition might be negatived by the representatives of a majority of the people of America, or of a majority of the colonies of America. The former secures the larger the latter the smaller colonies. . . . The good whigs I think will so far cede their opinions for the sake of the Union . . . .[154]

Eventually, the delegates did what was needed to maximize the chances of gaining support from the states for what all agreed to be the most critical objective: forming a confederation. When the decision was finally taken to retain the plan of all the early drafts[155] and give each state one vote, "several of the states . . . cast their votes for that method because there appeared to be no alternative between that and no confederation."[156] An examination of the Appendix (Votes I, II, III, and IV) will show that in the end the delegates voted with virtual unanimity on the question.[157] The representation debate thus

---

153. John Adams's Notes of Debates (Aug. 1, 1776), *supra* note 53, at 592; *cf.* 9 JOURNALS, *supra* note 26, at 849 (rejecting, nine to one, a proposal to add to the requirement that certain measures of the Confederation Congress have the assent of nine states, the further requirement that those states "assenting shall comprehend a majority of the people of the united states excluding negroes and indians, for which purpose a true account of the number of free people in each State shall be triennially taken"); Appendix *infra* p. 835-36 (Vote XI).

154. Letter from Thomas Jefferson to John Adams (May 16, 1777), *in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 80, at 19.

155. Jensen's thesis is in no way strengthened by the fact that Dickinson—who had the additional motivation of coming from a large state himself—did not write into his plan of confederation the more centralizing proportional representation scheme, which would have implied that the Congressmen were meeting as members of a common political community rather than ambassadors from separate states. A fair conclusion would be that this theoretical issue has been of far more interest to successive generations of historians than it was to contemporaries. *See generally* Jack P. Greene, *The Background of the Articles of Confederation*, 12 PUBLIUS 15, 40-44 (Fall 1982).

156. BURNETT, *supra* note 42, at 249.

157. Summing the results of these four votes, the majority position carried 40-5. On three of them, only one state dissented, Virginia, and on the fourth two dissented. *See* 9 JOURNALS, *supra* note 26, at 779-82; *see also* Letter from Cornelius Harnett to Richard Caswell (Oct. 10, 1777), *in* 8 LETTERS, *supra* note 42, at 97-98; Letter from Charles Carroll of Carrollton to Charles Carroll, Sr. (Oct. 8, 1777), *in* 8 LETTERS, *supra* note 42, at 72, 73.

However, one statistically significant split of theoretical interest is revealed by the voting: Those in favor of proportional representation, possibly the more "nationally minded" delegates, *see supra* note 155, had considerably more congressional experience than those opposed. This result raises the possibility of extending backwards in time the thesis in ELKINS & MCKITRICK, *supra* note 80, at 23, which relies in part on the observation that the Federalists, the "nationally minded" men of their day, had more continental experience than the Antifederalists.

displays a pattern that will become familiar. The states (1) divide on the basis of their self-interests, (2) seek as much harmony as possible, and (3) proceed to a resolution based on some shared idea such as the desirability of union.

c. Taxation

The debate over taxation has left fewer records than the ones on representation or western lands, but we can at least catch a glimpse of the first two of these elements. The issue was whether assessments by the national government against the states (who could raise the money through any levies they chose) should be allocated on the basis of population, as provided in the Dickinson draft, or "by the value of all land within each State . . . [together with any] improvements thereon," as was finally done.[158] The North, which had higher land values than the South, favored the first method. The Southerners objected that this would result in an unfair burden, mainly because the South's population included a large number of slaves who were less productive than the free laborers of the North. The South, therefore, favored the second standard.[159]

This matter touched people in their purses and produced some of the deepest divisions, and the only recorded North-South split, of the confederation debate.[160] Nevertheless, at least two known efforts were made to

---

158. *See* 9 JOURNALS, *supra* note 26, at 801.

159. For an expression of the northern point of view, see Letter from Nathaniel Folsom to Meshech Weare (Nov. 21, 1777), *in* 8 LETTERS, *supra* note 42, at 299. Folsom wrote:

> [T]he Confederation . . . Article . . . which Respects Taxation . . . has given me great uneasiness . . . [O]ne third part of the welth of the Southern States which consists in negroes, is entirely left out . . . in determining their ability to pay taxes, notwithstanding it is by them that they procure their wealth. . . . In the next place the wealth that is in Some States more than there is in others by no means fixes a Proportionable Value on the Lands in Such States, which . . . Seems to Prove that the plan laid down by Congress is not just.

Id.

For an expression of the southern point of view, see Letter from Cornelius Harnett to William Wilkinson (Nov. 30, 1777), *in* 8 LETTERS, *supra* note 42, at 348-49. Harnett wrote:

> The Mode of Settling the Quota of Taxes to be paid . . . is at last fixed by the Value of all Land held under Patent or Deed in each State. The Eastern people were much against this, knowing their Lands to be very Valuable, they were for settling the Quota by the Number of Inhabitants including Slaves, this would have ruined Poor No. Carolina, she has as many Inhabitants as Connecticut (almost) Tho the Land in that State would sell for five times as Much as the Lands in ours.

Id.; *see also* John Adams's Notes of Debates (July 30, 1776), *supra* note 51, at 568, 569; Russell R. Menard, *Slavery, Economic Growth, and Revolutionary Ideology in the South Carolina Lowcountry*, *in* THE ECONOMY OF EARLY AMERICA: THE REVOLUTIONARY PERIOD, 1763-1790, at 244, 271-73 (Ronald Hoffman et al. eds., 1988).

160. *See* 9 JOURNALS, *supra* note 26, at 801; Appendix *infra* p. 831-32 (Vote V) (Oct. 14, 1777). According to Jefferson's notes, more than a year earlier, on August 1, 1776, New

compromise the disagreement. Benjamin Harrison of Virginia "proposed a compromise, that two slaves should be counted as one freeman."[161] Much later, a motion was made to tax on the basis of all property, excluding household goods and wearing apparel, within each state. The motion failed by a vote that is not recorded.[162]

Although these gestures are perhaps relatively small ones when weighed against the sectional split revealed by the other evidence, their existence is important. Once again, an outcome occurs as the result of an interaction between the basically nonideological forces of self-interest and compromise.[163]

d. Western Lands

The greater amount of available evidence makes it easier to see the usual patterns at work in the discussions over the control of western lands. The problem was a very complex one,[164] which plagued Congress repeatedly.[165]

Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania had joined in a vote to defeat a move supported by Delaware, Maryland, Virginia, North Carolina, and South Carolina to amend the Dickinson version of the taxation article by assigning quotas on the basis of white inhabitants only. Thomas Jefferson's Notes of Proceedings in Congress (July 12-Aug. 1, 1776), *supra* note 148, at 438, 441. In the 1776 vote, Georgia split. In Vote V, New York and Pennsylvania did. *See* 9 JOURNALS, *supra* note 26, at 801. In both instances, a vote the other way by either one of two men from these divided states would have changed their delegation's vote and reversed the overall outcome.

161. Thomas Jefferson's Notes of Proceedings in Congress (July 12-Aug. 1, 1776), *supra* note 148, at 438, 440; *cf. supra* note 36 (Three-Fifths Clause of the Constitution originated in Confederation fundraising plan of April 1783).

162. 9 JOURNALS, *supra* note 26, at 800; *see* Letter from Cornelius Harnett to Thomas Burke (Dec. 16, 1777), *in* 8 LETTERS, *supra* note 42, at 424, 425 ("A Valuation of all Property throughout the Continent was allowed to be the most equitable mode for fixing the Quotas, but this was said to be impracticable.").

163. "The controversy . . . between the North and the South had little of the humanitarian about it. It was a matter of simple addition and subtraction. . . . The arguments used by both sides are readily understood if [this fact is] kept in mind." JENSEN, ARTICLES, *supra* note 11, at 146.

164. For summaries of the disputes, see COLLIER, *supra* note 81, at 139-58; JENSEN, ARTICLES, *supra* note 11, at 9; see also IRA ALLEN, SOME MISCELLANEOUS REMARKS AND SHORT ARGUMENTS . . . WHY THE DISTRICT OF THE NEW HAMPSHIRE GRANTS HAD BEST BE A STATE (1777); SAMUEL WHARTON, VIEW OF THE TITLE TO INDIANA, A TRACT OF COUNTRY ON THE RIVER OHIO (1776) (collecting primary sources).

165. *See, e.g.*, 4 JOURNALS, *supra* note 26, at 161-62, 184-85; 8 *id.* at 497, 509-13; Letter from the New York Delegates to the New York Council of Safety (July 2, 1777), *in* 7 LETTERS, *supra* note 42, at 284, 285; Letter from James Duane to Robert R. Livingston (July 1, 1777), *in* 7 LETTERS, *supra* note 42, at 279; Richard Smith's Diary (Mar. 22, 1776), *in* 3 LETTERS, *supra* note 42, at 426, 427; Richard Smith's Diary (Feb. 21, 1776), *in* 3 LETTERS, *supra* note 42, at 294. The issue also caused serious political problems within

Congress would be given the power to draw the western boundaries of those states whose colonial charters gave them large and often overlapping claims to western territories and to take possession for national use of the land placed outside the bounds of any state.

The division on this issue lay between the states with western land claims,[166] who wanted to be able to make use of the territory for their own purposes, and those without such claims, who felt that preserving the status quo would give the land-claiming states an undue share of the wealth that all were fighting to defend (and in which many were speculating).[167] Thomas Burke reported home:

> Pennsylvania, Maryland, Jersey, & some others are exceedingly jealous of the states whose bounds to the westward are yet unascertained, and I am much mistaken if they do not upon all occasions endeavor to fix very extensive powers in a mere majority of Congress in order to get resolutions unfavorable to the claims of such states entered into. To be more explicit, I believe they will endeavor by degrees to make the authority of Congress very extensive, & when it shall be fully established & acknowledged, to make such a party in it as will pass resolves injurious to the rights of those States who claim to the South Seas.[168]

In this debate, as in the others, the issue of whether to have a strong or a weak central government was viewed in relation to how it would serve the provincial interests of the debaters, not as a subject for controversy in itself. Although not finally completed until after the end of the period in issue here,[169] the solution to the problem was based on an adjustment of these interests.

Dickinson, who came from a non-land-claiming state, gave the Congress extensive powers over the West in his draft of the Articles. These powers were of two basic kinds: those enabling the Congress to form a national domain out of land that was either purchased from the Indians or adjudged to lie outside the bounds of any state and those which gave Congress the authority to adjust

---

LETTERS, *supra* note 42, at 294. The issue also caused serious political problems within states, a proposition documented in detail at 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 81, at 64.

166. These were Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia. *See infra* note 190.

167. *See* John Adams's Notes of Debates (Aug. 2, 1776), *supra* note 53, at 603.

168. Letter from Thomas Burke to Richard Caswell (Feb. 16, 1777), *supra* note 125, at 298.

169. For an explanation of the various cessions of territory by which the land problem was finally resolved, see BLUM ET AL., *supra* note 1, at 116-17; RICHARD FROTHINGHAM, THE RISE OF THE REPUBLIC OF THE UNITED STATES 574-75 (8th ed. 1902); CHARLES R. KING, THE LIFE AND CORRESPONDENCE OF RUFUS KING 33-48 (1894); Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 MISS. VALLEY HIST. REV. 323 (1939-40). The political significance of these events to the formation of the new nation is discussed at length in PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787, at 49-145 (1983).

colonial boundaries.[170] Ideally, the land-claiming states would have liked to grant neither power, but compromises were sought on both points.

Jefferson—who repeatedly indicated a willingness to set up independent states in large parts of Virginia's claim[171] and who later drafted the legal instrument which made this possible—suggested that he would accept national land purchases if the properties so acquired were "given freely to those who may be permitted to seat [settle] them," rather than going into the common fund Dickinson proposed.[172] Sherman seconded the motion, and later proposed to make the boundary provision more palatable to the land-claiming states by inserting the limitation: "No Lands to be seperated from any State, which are already settled, or become private Property."[173]

Not surprisingly, Jefferson's wording was more in the interest of Virginia, and Sherman's in that of Connecticut, than the provisions they were intended to replace. What is noteworthy is that both men eschewed the intense rhetoric with which the states had put forth their positions during the debate[174] and sought to find a middle way. In any event, both parts of the western problem were then postponed—as controversial matters during the confederation debate usually were—and Congress took pains to emphasize that it had done nothing to prejudice its ultimate disposition of the matter.[175]

A year passed before the debate was again taken up in earnest. It is very difficult to know what was said at this time, but we do know what was done. Congress was left with the power to settle territorial disputes, but this was to be done by a judicial process, rather than on the floor.[176] Congress was deprived of the power to take control of territory lying beyond adjudicated boundaries, but was given the new power to determine controversies

---

170. *See* 5 JOURNALS, *supra* note 26, at 679-82.

171. *See* Letter from Thomas Jefferson to Edmund Pendleton (Aug. 13, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 81, at 491; *see also* John Adams's Notes of Debates (Aug. 2, 1776), *supra* note 53, at 603; John Adams's Notes of Debates (July 25, 1776), *in* 4 LETTERS, *supra* note 42, at 538, 539.

172. 5 JOURNALS, *supra* note 26, at 680 n.1 (Jefferson amendment); *see also* John Adams's Notes of Debates (July 25, 1776), *supra* note 171, at 538.

173. John Adams's Notes of Debates (Aug. 2, 1776), *supra* note 53, at 603.

174. *See id.* (Harrison: "How came Maryland by its land? but by its Charter: By its Charter Virginia owns to the South Sea. Gentlemen shall not pare away the Colony of Virginia."); John Adams's Notes of Debates (July 25, 1776), *supra* note 171, at 538, 538-39 (Chase: "No colony has a Right to go to the S[outh] Sea. . . . It would not be safe to the rest. It would be destructive to her Sisters, and to herself." Wilson stated, "[Pennsylvania] has a Right to say, that she will not confederate unless those Claims are cut off.")

175. *See* JENSEN, ARTICLES, *supra* note 11, at 158; Letter from Benjamin Rumsey to the Maryland Council of Safety (Nov. 24, 1776), *in* 5 LETTERS, *supra* note 42, at 536.

176. *See* 9 JOURNALS, *supra* note 26, at 807, 843; Appendix *infra* pp. 832-33, 834-35 (Votes VII, X).

concerning "private right of soil" (i.e., disputes between speculators claiming under conflicting state grants).[177]

The land issue, like the others, was one on which it was impossible to satisfy everyone. But clearly a reasonable effort was made to do so; summing up the three votes on the issue, we find the majority solution passing by a convincing twenty-three to five, with no split between the land-claiming and non-land-claiming states.[178] Debate focused on the individual interests of the states, not the nature of the national government, and the provisions in the final Articles—made acceptable at least in part by a shared belief in limiting the power of the central government—reflected an effort to satisfy as many of those interests as possible.

3. Conclusions

Focusing an account of the drafting of the Articles of Confederation on the theoretical issue of the nature of national sovereignty is highly misleading. Such an emphasis not only causes us to place at the center of the picture a question that the debaters considered peripheral, but also to overlook instructive recurring patterns.

> The immediate attacks on the Dickinson draft were not the result of its general nature but of certain specific features. Three provisions especially excited dissension. The equal representation of all the states in Congress aroused the antagonism of the larger states. The apportionment of common expenses according to total population aroused the bitter opposition of the states with large slave populations. The grant to Congress of broad powers over Western lands and boundaries was resisted stubbornly by the states whose charters gave them large claims to the West.
>
> . . . Over . . . the distribution of power between the states on the one hand and Congress on the other . . . there was only a short discussion.[179]

Even ignoring the contrary evidence and assuming "[i]t is true that Congress had less power after the drafting of the Articles of Confederation than before,"[180] there seems to be no reason—especially in the face of our

---

177. *See* 9 JOURNALS, *supra* note 26, at 918-19.

178. *See* Appendix *infra* pp. 832-33, 833-34, 834-35 (Votes VII, VIII, X). However, a potentially interesting division surfaces in Vote X; those voting against the boundary-settling provision were significantly older than the majority in favor of it. Whether opposition to the substitute article was because of the cumbersome procedure it provided or (as seems more likely) because of the proviso "that no State shall be deprived of territory for the benefit of the United States," the opponents could arguably be expressing a centralizing and "national" philosophy of government. *See generally* J. FRANKLIN JAMESON, THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT 20, 27 (1926).

179. JENSEN, ARTICLES, *supra* note 11, at 138-39; *see* BERNARD BAILYN ET AL., THE GREAT REPUBLIC 303-04 (1977).

180. ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION

knowledge of what concerned the delegates and what did not—to see this outcome as the result of a behind-the-scenes struggle between a radical ring and a conservative cabal. The delegates considered themselves as representatives whose first loyalty was to the individual good of their own states.

Yet they saw clearly that, faced with a choice between hanging together and hanging separately, confederation was ultimately in the interest of each state. The delegates responded as practical politicians with years of experience in trying to unify a fractious protest movement, years that had imbued all of them with a large measure of suspicion for centralized political authority. Knowing the necessity of confederation—and that to achieve it would require unanimity among the states—they continued the practice they had begun during the independence debates, and sought to shape their measures in such a way as to achieve the greatest possible majorities. The record of their roll call voting, which dates from the latter portion of their deliberations, shows that they largely succeeded in their effort.[181] The existence of a broad base of shared political theory made that effort easier.

As Congress wrote in its appeal to the states for ratification of the Articles: "To form a permanent union, accommodated to the opinions and wishes of the delegates of so many states, differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish."[182]

III. CONCLUSION

An accurate interpretation of the work of the Framers of the Constitution needs to take into account their intimate familiarity with the country's recent history. That history did not include just the elements emphasized in the received account of the "critical period." It also encompassed the extensive powers exercised by the national government before the Articles came into force, the series of political accommodations that led to the Articles, the broad interpretations given to the Articles by the common-law lawyers in Congress to achieve the underlying purposes of national union, and the public acceptance of these actions. Hence, it is simplistic to see the Constitution as simply a rejection of the Articles. Like the Articles, "the Constitution represented a

---

623 (1924).

181. *See supra* note 131 and accompanying text. Roll calls, of course, are usually taken only on questions as to which there is some disagreement. Large portions of the Articles were approved without dissent by voice votes. *See* 9 JOURNALS, *supra* note 26, at 826, 833-34, 848.

182. 9 JOURNALS, *supra* note 26, at 933; *see* Letter from Cornelius Harnett to William Wilkinson (Nov. 30, 1777), *in* 8 LETTERS, *supra* note 42, at 348 ("This has been the most difficult piece of Business that ever was undertaken by any Public Body, it is the best Confederacy that Could be formed, especially when we consider the Number of States, their different Interests, Customs &c &c.").

series of pragmatic compromises that codified and expanded on existing practices and impliedly sanctioned flexible interpretation in . . . implementation"[183] as the political system of the country continued its trial-and-error evolution.

Appendix

STATISTICAL ANALYSIS OF ROLL CALL VOTING IN THE CONTINENTAL CONGRESS ON THE ARTICLES OF CONFEDERATION

Methodology

In analyzing the votes of the Continental Congress on the Articles of Confederation, I have not purported to do the sort of sophisticated roll call analysis that has already been so thoroughly done by Jillson and Wilson.[184] Instead, I have employed two well-known statistical tests for the modest purpose of providing a check on the validity of my thesis.

In testing whether there was any significant difference in the voting behavior of categories of states (e.g., northern and southern), I have made use of the chi-square statistic. In testing the effect on voting behavior of the characteristics of individual delegates (e.g., length of congressional service), I have employed the t-test.

In what follows, I have considered all differences that might have been produced by chance more than 10% of the time (i.e., whose significance level is greater than .10) to be not significant. Roughly speaking, the .10 significance level is attained in the bulk of the votes when the value of chi-square is around .27, or that of t around 1.7.

The following format is used in reporting the results:

Vote Number

1. Date of vote.
2. Page(s) in 9 *Journals of the Continental Congress* where this vote is recorded.
3. Issue being voted on.
4. Number of states in favor.
5. Number of states opposed.
6. Number of states divided.[185]

---

183. Freedman, *supra* note 14, at 165; *see id.* at 149-56, 162-64.

184. JILLSON & WILSON, *supra* note 55.

185. The outcome of a vote in the Continental Congress was determined by deciding which side of an issue had the support of a majority of the states voting. The vote of each state, in turn, was dependent upon the majority view of its delegates. Hence, when a state

7. Number of states represented, but not by a quorum.[186]
8. Number of delegates in favor.
9. Number of delegates opposed.[187]
10. Number of Northern states in favor; opposed.[188]
11. Number of Southern states in favor; opposed.[189]
12. Statistical significance of the difference between the numbers in items 10 and 11.
13. Number of land-claiming states in favor; opposed.[190]
14. Number of non-land-claiming states in favor; opposed.[191]
15. Statistical significance of the difference between the numbers in items 13 and 14.
16. Average age of delegates voting.
17. Average age of delegates in favor.
18. Average age of delegates opposed.
19. Statistical significance of the difference between the numbers in items 17 and 18.
20. Average length of congressional service (in months) of delegates voting.
21. Average length of service of delegates in favor.
22. Average length of service of delegates opposed.
23. Statistical significance of the difference between the numbers in items 21 and 22.

---

with an even number of delegates voting had an equal number on each side of an issue, the state's vote was not counted. *See id.* at 214-15. Item 6 records the number of such situations on the vote in question.

186. Some states required that a certain number of their delegates be present before the state could be committed on one side or the other of an issue; other states had no such requirement. *See id.* at 243-45; *supra* note 55. For example, one delegate was enough to cast a vote on behalf of Pennsylvania, but not on behalf of Connecticut. If only one member was present from the Connecticut delegation, that delegate would vote anyway, but no vote would be recorded for Connecticut. Such situations are recorded in item 7.

187. For completeness, one would like to record the number of abstentions, but the records seem to provide no way of distinguishing them from simple absences.

188. I have defined the northern states as Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island.

189. I have defined the southern states as Georgia, Maryland, North Carolina, South Carolina, and Virginia.

190. Several equally accurate lists of states claiming western lands could be made; however, I have followed ENCYCLOPEDIA OF AMERICAN HISTORY 439 (Richard B. Morris ed., 1970) and defined them as Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia. The same list is given in FROTHINGHAM, *supra* note 169.

191. Similarly, the states without western land claims are defined as Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, and Rhode Island.

Vote I

1. 10/7/77
2. 779-80
3. To establish proportional voting in the national legislature, on the basis of one vote for each fifty thousand inhabitants.
4. 2
5. 9
6. 1
7. 0
8. 6
9. 20
10. 1;6
11. 1;3
12. Not significant. (chi-square = .13)
13. 1;5
14. 1;4
15. Not significant. (chi-square = .40)
16. 42.28
17. 43.00
18. 42.05
19. Not significant. (t = .24)
20. 25.15
21. 31.00
22. 23.40
23. Not significant. (t = 1.18)

Vote II

1. 10/7/77
2. 780
3. To establish proportional representation in the national legislature, on the basis of one vote for each thirty thousand inhabitants.
4. 1
5. 10
6. 1
7. 0
8. 7
9. 19
10. 0;7
11. 1;3
12. Not significant. (chi-square = .25)
13. 1;6
14. 0;4

15. Not significant. (chi-square = .09)
16. 42.28
17. 40.57
18. 42.94
19. Not significant. (t = .64)
20. 25.15
21. 34.71
22. 21.63
23. Significant at the .05 level. (t = 2.29)

Vote III

1. 10/7/77
2. 781
3. To establish proportional representation in the national legislature, on the basis of revenue contributed to the central government.
4. 1
5. 11
6. 0
7. 0
8. 6
9. 21
10. 0;7
11. 1;4
12. Not significant. (chi-square = .03)
13. 1;7
14. 0;4
15. Not significant. (chi-square = .14)
16. 42.30
17. 41.33
18. 42.60
19. Not significant. (t = .33)
20. 25.00
21. 35.00
22. 22.14
23. Significant at the .05 level. (t = 2.16)

Vote IV

1. 10/7/77
2. 782
3. To grant each state one vote in the national legislature.

4. 10
5. 1
6. 1
7. 0
8. 20
9. 7
10. 7;0
11. 3;1
12. Not significant. (chi-square = .09)
13. 6;1
14. 4;0
15. Not significant. (chi-square = .09)
16. 42.30
17. 42.94
18. 40.57
19. Not significant. (t = .66)
20. 25.00
21. 21.60
22. 34.71
23. Significant at the .05 level. (t = 2.36)

Vote V

1. 10/14/77
2. 801
3. To proportion contributions to the national treasure by the value of the land in each state, together with any improvements thereon.
4. 5
5. 4
6. 2
7. 0
8. 16
9. 11
10. 1;4
11. 4;0
12. Significant at the .10 level. (chi-square = 2.98)
13. 3;2
14. 2;2
15. Not significant. (chi-square = .14)
16. 41.29
17. 40.25
18. 42.82
19. Not significant. (t = .79)
20. 25.00

21. 23.25
22. 27.54
23. Not significant. (t = .82)

Vote VI

1. 10/14/77
2. 803-4
3. "That no State shall be represented in Congress by less than two nor more than seven members," under the Confederation.
4. 8
5. 3
6. 0
7. 0
8. 22
9. 5
10. 4;3
11. 4;0
12. Not significant. (chi-square = .70)
13. 6;0
14. 2;3
15. Not significant. (chi-square = 2.40, which is significant at about the .14 level)
16. 41.29
17. 41.00
18. 42.60
19. Not significant. (t = .39)
20. 25.00
21. 24.81
22. 25.80
23. Not significant. (t = .15)

Vote VII

1. 10/15/77
2. 807
3. To recommend to the legislature of each state to lay before the Continental Congress a description of the lands to which the state lays claim, together with a summary of the basis for the claim, so "that the limits of each respective territorial jurisdiction should be ascertained by the articles of confederation."
4. 3

5. 8
6. 0
7. 0
8. 6
9. 20
10. 2;5
11. 1;3
12. Not significant. (chi-square = .33)
13. 1;5
14. 2;3
15. Not significant. (chi-square = .03)
16. 41.15
17. 39.83
18. 41.55
19. Not significant. (t = .46)
20. 25.15
21. 27.00
22. 24.60
23. Not significant. (t = .37)

Vote VIII

1. 10/15/77
2. 808
3. "That . . . [the Confederation] Congress . . . shall have the sole and exclusive right to . . . fix the western boundary of such states as lay claim to the Mississippi or South Sea, and lay out the land beyond the boundary . . . into separate and independent states."
4. 1
5. 9
6. 1
7. 0
8. 4
9. 21
10. 0;6
11. 1;3
12. Not significant. (chi-square = .03)
13. 0;6
14. 1;3
15. Not significant. (chi-square = .05)
16. 41.77
17. 39.00
18. 42.27
19. Not significant. (t = .75)

20. 24.23
21. 24.00
22. 24.27
23. Not significant. (t = .03)

Vote IX

1. 10/23/77
2. 835
3. To add a provision preventing the national government from entering into any "treaty of commerce . . . whereby the . . . respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to."
4. 5
5. 3
6. 2
7. 1
8. 16
9. 6
10. 3;3
11. 2;0
12. Not significant. (chi-square = .18)
13. 4;1
14. 1;2
15. Not significant. (chi-square = .33)
16. 42.27
17. 41.25
18. 45.00
19. Not significant. (t = .93)
20. 24.27
21. 25.50
22. 21.00
23. Not significant. (t = .64)

Vote X

1. 10/27/77
2. 843
3. To enable the Confederation Congress to settle land disputes between states, "provided . . . that no State shall be deprived of territory for the benefit of the United States."
4. 6

5. 1
6. 2
7. 1
8. 15
9. 4
10. 4;1
11. 2;0
12. Not significant. (chi-square = .25)
13. 4;0
14. 2;1
15. Not significant. (chi-square = .25)
16. 41.89
17. 39.60
18. 50.50
19. Significant at the .02 level. (t = 2.62)
20. 24.15
21. 25.80
22. 18.00
23. Not significant. (t = .96)

Vote XI

1. 10/30/77
2. 849
3. To add to the requirement that certain measures of the Confederation Congress have the assent of nine states, the requirement that those states "assenting shall comprehend a majority of the people of the united states excluding negroes and indians, for which purpose a true account of the number of free people in each State shall be triennially taken."
4. 1
5. 9
6. 0
7. 1
8. 6
9. 17
10. 0;7
11. 1;2
12. Not significant. (chi-square = .56)
13. 1;5
14. 0;4
15. Not significant. (chi-square = .05)
16. 42.00
17. 43.50
18. 41.47

19. Not significant. (t = .50)
20. 24.13
21. 29.00
22. 22.41
23. Not significant. (t = .98)

Vote XII

1. 10/30/77
2. 850
3. To make the request of "any state," rather than "any delegate," necessary to force a roll call vote in the Confederation Congress.
4. 7
5. 1
6. 1
7. 2
8. 18
9. 3
10. 5;1
11. 2;0
12. Not significant. (chi-square = .38)
13. 4;0
14. 3;1
15. Not significant. (chi-square = .03)
16. 42.28
17. 42.00
18. 44.00
19. Not significant. (t = .37)
20. 23.28
21. 24.33
22. 17.00
23. Not significant. (t = .83)

Vote XIII

1. 11/7/77
2. 879
3. That no person be allowed to serve as president of the Council of States "more than one year in any term of three years."
4. 7
5. 2
6. 2

7. 0
8. 14
9. 8
10. 5;2
11. 2;0
12. Not significant. (chi-square = .01)
13. 3;2
14. 4;0
15. Not significant. (chi-square = .52)
16. 41.95
17. 42.85
18. 40.50
19. Not significant. (t = .64)
20. 23.09
21. 22.00
22. 25.00
23. Not significant. (t = .48)

Vote XIV

1. 11/12/77
2. 896
3. To allow debts due on the judgment of a court in any state to be sued for in the courts of any other state.
4. 2
5. 5
6. 2
7. 2
8. 5
9. 14
10. 2;2
11. 0;3
12. Not significant. (chi-square = .37)
13. 1;2
14. 1;3
15. Not significant. (chi-square = .37)
16. 42.17
17. 41.40
18. 42.46
19. Not significant. (t = .26)
20. 23.84
21. 21.80
22. 24.57
23. Not significant. (t = .35)

Vote XV

1. 11/17/77
2. 934
3. To recommend to the state legislatures to act by May 1 to empower their delegates to sign the Articles of Confederation.
4. 2
5. 8
6. 0
7. 2
8. 4
9. 18
10. 2;4
11. 0;4
12. Not significant. (chi-square = .23)
13. 1;5
14. 1;3
15. Not significant. (chi-square = .23)
16. 43.00
17. 42.25
18. 43.18
19. Not significant. (t = .19)
20. 22.50
21. 24.75
22. 22.00
23. Not significant. (t = .36)

Vote XVI

1. 11/17/77
2. 935
3. To add the words "if practicable" to a previous resolution setting March 10 as the recommended deadline for state legislatures to empower their delegates to sign the Articles of Confederation.
4. 2
5. 8
6. 0
7. 2
8. 5
9. 18
10. 2;4
11. 0;4
12. Not significant. (chi-square = .23)
13. 1;5

14. 1;3
15. Not significant. (chi-square = .23)
16. 43.00
17. 40.60
18. 43.75
19. Not significant. (t = .69)
20. 22.54
21. 24.40
22. 22.00
23. Not significant. (t = .34)