The State Constitutions at the Adoption of the Federal Constitution in 1789.

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The evolution of the State constitution in America from the primitive Charter was accomplished in a comparatively short period when similar great changes in government are taken into consideration. Although its growth may seem somewhat premature, the State constitution itself contains but little in advance of what the preceding Charter “ordained, constituted, and declared as the rights and privileges of the colony. These were merely the adaptation of the rights that all British subjects enjoyed, to the new conditions of the colonists, with the addition of a more fully developed form of government than was in vogue even in the
mother country itself. Indeed the progress towards liberty and religious tolerance acknowledged by the American Constitutions, would seem very trivial when compared with the number of years consumed in their final preparation, if the conservative nature of the people concerned were not considered. From their first arrival in the country, the colonists, fresh from persecution yet consistent Englishmen, forgot their troubles seemingly and established governments very much resembling, with the exception of the aristocratic sentiment, the one from whose tyrannical administration they had fled. Of course their forms of government were contained in the Charters granting them rights of colonization; but the influences diffused and the ordinances promulgated by their Councils and Assemblies in the midst of their severe trials for existence, prove the attachment of the colonists to those forms of government which although made unpopular by mal-administration still were the exponents of that individual freedom which makes itself so prominent
in all the forms and institutions of the then new American Commonwealths.

The idea of individual freedom is nothing new, and was merely hereditary with them. Indeed it had been interwoven with their existence as far back into the ages as history can convey us: oftentimes preeminent in the administration of government to be regarded by the people, in times of affliction as those good old days’ when justice and concord dwayed with mighty hand; oftentimes overshadowed by the intrigues of sovereigns and the machinations of landed proprietors; but at all times, even when Christendom was in its darkest gloom, pervading the hearts of the down-trodden, that sovereignty with all its antagonistic powers could not restrain it. Still conservatism prevented rapid progress and sovereigns infringed to such an extent that the liberties already granted, had to be reestablished at frequent intervals in new Charters and Declarations of Rights. But “Social necessities and social opinion,” says Sir Henry Maine, “are always more or
less in advance of law," and individual liberty is no exception. Thus it fell to the colonists not only to incorporate but to exercise more fully in their institution, the State, the long disputed right, and very well did they do it as our Nation the direct result of their labors proves.

The governments existing in the Colonies at the Declaration of Independence were of three forms: first, Republican including Rhode Island and Connecticut; secondly, Proprietary including Maryland, Pennsylvania and Delaware; thirdly, Provincial including Georgia, North and South Carolina, Virginia, New Jersey, New York, Massachusetts and New Hampshire. The Crown had supervision over all acts passed by the Colonial Assemblies, save in the case of Maryland where neither supervision nor control was expressly or impliedly provided for. In the Republican form of government all the officials were elected by people directly or indirectly in the Proprietary form the proprietor appointed the Governor.
and in Maryland the upper house of the Legislature also, otherwise the people elected the Legislature; in the Provincial form the Governor and Council which acted as an upper house in the Legislature were directly appointed by the Crown; the lower house alone being chosen by the colonists. Massachusetts however was an exception to this general rule in that Royal interference had caused a change from the Republican form of government granted by her Charter, to a modified Provincial form. Before the reign of Charles II all the colonies except Georgia had chosen a model government under one of these three heads, and naturally many diversities of organization due to the character, desires, and conditions of the different colonists appeared. On the other hand points of agreement were plentiful as the following circumstances will show. Right of Appeal to the Crown was prevalent except in the Proprietary Colonies, otherwise there was much similarity in their judicial system, as it was required in the Charters and besides it was but a matter of course
for the colonists to make the Colonial Law as near as possible agreeable the British law. But in this itself, a wide diversity of legal opinions arose due to the extensive range given the exposition and interpretations of the common law by the judiciary of each colony. The colonists early became distinguished for their love of freedom which Burke refers to six capital sources: "of descent; of form of government; of religion in the Northern provinces; of manners in the Southern; of education; of remoteness of situation from the first mover of government." From all these causes a fierce spirit of liberty has grown up." So these might be added another, the country with its wild surroundings devoid of protection except as the subject provided it for himself, certainly would propagate in the heart of an Englishman that independence and love of freedom to soon to be made manifest.

As mentioned above, the colonies were under three different forms of government, all however attaining essentially the same
ideas concerning its administration. The manner in which these ideas came to be set forth in constitutions will of necessity require our attention next. The First Continental Congress had considered, but on account of severe opposition had never conceded the advisability of forming local governments in the several colonies, since the idea of reconciliation with Great Britain was still regarded as possible and at the most desirable thing. The influence of the younger and more eloquent men together with the utter contempt with which the King and Parliament regarded their petitions do around the spirit of the Second Congress that not only was it in May, 1776, “recommended the Assemblies of the Colonies, ++ + +, where no government sufficient to the exigencies of their affairs had been hitherto established, to adopt such government as shall, ++ + +, best conduce to the happiness and safety of their constituents in particular and America in general,” but in July it evolved that priceless instrument of American
freedom and organic law, the Declaration of Independence. The result of this resolution was if anything a surprise to its framers, John Adams, as in all the Colonies the provincial assemblies made immediate provision for temporary popular governments with full power to prepare a permanent form.

Massachusetts and Rhode Island retained their charters though considering them somewhat amplified in their application, Georgia and South Carolina adopted completed constitutions in 1777, while the remaining nine had all adopted a suitable form of government before the end of 1776. Massachusetts, New Hampshire, South Carolina and Georgia had however before the Adoption of the Federal Constitution, adopted new Constitutions. It is quite interesting to note that but one of these constitutions, that of Massachusetts, was ever submitted to popular ratification. The remainder were merely promulgated by the Convention or Assembly.
and silently accepted by the people. This irregularity was due probably to the disturbed condition of the country caused by the war, and shows the unwonted confidence on the part of the people in the fidelity and trustworthiness of their representatives to themselves and to the cause of liberty.

It now devolves upon us to study the constitutions of the thirteen States as they were operating at the Adoption of the Federal Constitution in 1789. The first point thus arising would be the idea of state relations existing at that time. This can be best explained by Article II of the Articles of Confederation, which sets forth that “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation delegated to United States by Congress.” The powers here spoken of are delegated to the general Congress were most irregular and summary prerogatives of peace and war without any previous compact and sanctioned
only by the silent consent of the people. The Confederation was not formed by deliberate choice for permanent union, but was developed for mutual cooperation against a common foe. Thus it was that each State retained in itself all sovereign powers except those more closely connected with their common existence. It was this same idea of sovereignty expressed as follows: "The people of any State by withdrawing from the Federal Government its grant of powers, by this fact itself dissolves the bond unifying it," and "there can be no sovereignty by the people of all the States," that almost disrupted a government destined as a landmark in the onward march of liberty.

"By a constitution of a commonwealth," says Jameson, "is meant primarily its make-up as a political organization; that special adjustment of instrumentalities, powers, and functions by which its forms and operations are determined." These several necessities of government are grouped in the normal constitution under three heads, namely: (1)
Bill of Rights containing statements of the origin, ground, and purposes of government with practical injunctions and prohibitions; (2) Form of Government describing the structure and functions of the government; and (3) The Schedule containing provisions for the adoption of the instrument. A distinct Bill of Rights appears in seven States. New York, Delaware, South Carolina, and Georgia did not distinguish it from the Form of Government, and Rhode Island still retained its Charter. The Schedule did not appear in the early instruments of government till 1790 when South Carolina and Pennsylvania adopted new Constitutions. Nothing further need be said concerning the Bills of Rights since no vital difference can be noted in them in the several Constitutions, and their content is well stated in the above definition. As will be inferred, the colonists made the Form of Government the principal portion of their constitutions, yet in its composition they recognized the division of government into its three departments, Executive, Legislative, and Judicial in but three cases, those of New
Hampshire, Massachusetts, and Georgia where newer Constitutions were in force. The remaining States threw the provisions for these departments together promiscuously.

The Executive Department will naturally require our attention previous to the others. Nothing can better state the relations existing between the Executive and Legislative Departments than the words of Madison in the Convention of 1787. He said: "Experience proves a tendency in our governments to throw all powers into the Legislative vortex. The Executives of the States are little more than ciphers; the Legislatures are omnipotent. If no effectual check be devised on the encroachments of the latter, a revolution will be inevitable." Everywhere there were restrictions on the power of the Executive making his dependence on the Legislature assured. In New England only was the Governor elected by the people; in the remainder the Legislatures
had elective power. The term of office of the Governor in Delaware, Maryland, New York, and Virginia was three years; in Georgia and South Carolina two years; and in the remainder one year. With various requirements for eligibility to a second term, every State had its Privy Council usually appointed from the Legislature and often consisting of its members, to guard against Executive encroachment. In Massachusetts alone was the Governor permitted the ordinary qualified veto, although New York granted the right with the advice of the Supreme Court. The pardoning power in Georgia and New York alone was unrestricted by the Council or Assembly; South Carolina did not seem to provide for this prerogative. The Governor was usually required, if any specifications were made at all, to be at least thirty years of age and must own a stipulated amount of property within the State. He was always the Commander-in-Chief of the militia of the State but with varying conditions as to duties and control of
the same. The appointing power should be exclusively an Executive prerogative, yet in not one of the States did the Executive possess it. The Governor and Assembly exercised the right in five States; The Governor and Executive Council in three; the Legislature solely in the remaining nine. But seven States assigned explicitly the mere issuing of commissions either civil or military to the Executive. The Governor could prorogue or dissolve the Legislature in New York alone. In New Hampshire with the advice of the Council he could exercise this prerogative; in the remaining States the Legislature was omnipotent, although the Governor was generally conceded the right to summon it in extra session. These many defects in the Executive power were soon remedied in several States after the Adoption of the Federal Constitution.

The Legislative Department attracts no less. One would expect from the general character of the people, their trials...
in the mother country and in their new homes, somewhat strangely
liberal expositions of power granted to this department of government,
and the expectation does not fail of materialization. Released from
the despotism of a strong executive government as whose hands
they had suffered untold injuries, they naturally resorted to
the opposite extreme of elective despotism—a concentration of
power as pernicious as that which they had fought against
—from whose power only the ingenuity and watchfulness
of the Revolutionary Statesmen saved them. Madison in the
Federalist says of this defect in the first constitutions: “The
Legislative Department is everywhere extending the sphere of its
activity and drawing all power into its insidious vortex.
xxx The founders of our republics seem never to have recollected
the danger of Legislative usurpations, which by assembling all
power in the same hands must lead to the same tyranny as
is threatened by Executive usurpation.” All in all they show
a decided failure to recognize that fundamental principle
of Republican government—the division and balancing of governmental powers one against the other.

The usual form of Legislature provided for, was composed of two houses which should convene annually. Pennsylvania, Connecticut, and Rhode Island were exceptions, all having but one house in their Legislature. Otherwise Pennsylvania was normal, but Connecticut and Rhode Island preserved their Charter governments which provided for a general assembling of the representatives of the people and the Executive twice a year. The two Houses of the Legislature were usually designated as the Senate and House of Representatives, the Senate being regarded the first or higher House, this dignity being attributed to it by conferring upon its members a longer term of office, by limiting them to smaller number, and very often by assigning to them Executive and Judicial functions. The term of office for a Senator varied from one to five years; for a representative one year was the
rule except in South Carolina which allowed two. The usual method of impeachment was adopted by seven States with a modified form employed in Pennsylvania. Money bills could be originated only in the House of Representatives of five States. It was an universal rule that all Assemblymen should be freeholders or have control of a certain amount of capital. No stipulated salary for Assemblymen was mentioned, soon, however, public opinion began to discern from its position of preference for legislative predominance towards an equalization of powers, and as a result the Executive began to assume slowly his rights accompanied by the development of that department of government, the Judicial, which is justly the pride of a free nation and of the world.

In order to get a clear perception of the relations existing between the Judicial and other departments, it will be necessary, owing to the diversity and meagerness of details, to consider only
the highest court of each State. Everywhere the English common law prevailed. Georgia and South Carolina elected their judicial officers by popular vote. Of the remaining States, the Assembly appointed six; in Delaware the Governor and Legislature exercised the power; and six States gave the Governor and Council the prerogative. The term of office was usually during good behavior, but Georgia limited it to three, and Pennsylvania to seven years. Judges could be removed in five States by the Governor on request of the Legislature. All the States granted the right to the lower house of impeaching the judges for misdemeanor, and to the upper house the right of trying the charge. The Judges were usually forbidden to hold any other office and were provided with adequate salaries, for which they relied solely upon a legislative appropriation. The functions of the Judiciary were often stated in a fragmentary and confusing way of which modern constitutions are comparatively clear. The power of removal from office by the
Governor or Legislature very much restricted the judiciary in their duties, especially in considering the constitutionality of legislative acts. The reaction against the ascendency of the Legislative Department however produced in a few years a judiciary which fifty years ago excited the wonder of De Jacqueville and may now be classed without superior in the world.

All the Constitutions provide for the minor officials of government in much of a perfunctory manner. Their scope and application in certain respects, is somewhat surprising, yet all strive at a general completeness. They certainly are not sufficiently comprehensive for a modern State Constitution, but taken them all in all they express the most essential of constitutional necessities, confidence and agreement in their common desire—a government in which the sovereignty and power rest alone with the people.