

### 3. Early American Governments and the Confederation



Photo courtesy George S. Flohn.

**T**HE next task in understanding the American way of government is to discover how the American government has achieved its particular structure of the moment. Granted its inheritance of the universal sentiments and shape of government, what accounts for its numerous special traits? Much of the governmental system of the United States stems from the early colonial times of the seventeenth century. The traditions and beliefs underlying the system date from many centuries before then. The present federal Constitution, which is the oldest document of its sort in the world that is still in effect, was adopted in 1788. It was based to a considerable degree upon the revolutionary State constitutions and the Articles of Confederation. The first State constitutions, in turn, were quite similar to the charters of colonial government which they supplanted. The colonial governments themselves rested upon those political doctrines with which the colonial ruling groups were best acquainted and to which they were most accustomed—the doctrines of seventeenth-century English parliamentarism. The English government itself had evolved its peculiar character from long years of domestic struggle, which had reached a peak in that century, and from

numerous influences and sources in Anglo-Saxon, Norman, and church culture and law.

British parliamentarism was then in a critical stage. Hundreds of years of English governing experience had laid a road toward parliamentarism, but it was an unpaved road. The Great Charter (Magna Carta) of 1215 had only partially defined the relationship of political authority to individual freedom in England. During the 1600's alone three revolutions in England contributed to a further clarification of this relationship.

Thus, a full analysis of the ancient sources of American government merits not merely a chapter but a volume or series of volumes on western civilization. At the moment, a cursory presentation of early American governments and the Confederation will suffice to offer at least some notion of the original character of government in the United States and simultaneously to indicate the remarkable stability of some fundamental American political institutions and issues of today.

## COLONIAL GOVERNMENTS

### *Types*

There were three general types of government in the British colonies in North America. They were the charter colony, the proprietary colony, and the royal colony. Their typical forms are drawn in Figure 6. These types could be distinguished from one another chiefly by the relationship that each had with the British king. Whatever the relationship, it is well to note that all three types reacted strongly against the king, and, later on, pursuing the logic of that hatred, against all executive power.

*Charter:* The charter or corporate colony was farthest removed from the king's control. Initially a charter colony was a joint-stock company—a type of business organization akin to a modern corporation—whose intended function was to make profits for the company owners. After the owners had secured their charter from the king, they determined what sort of government their colony should have. In general the inhabitants of charter colonies showed the greatest resistance toward British rule, in part because the structure of their government gave them liberty to do so. Consequently one after another of these colonies lost their charters, so that at the time of the American Revolution there remained only two—Connecticut and Rhode Island.

*Proprietary:* The proprietary colony was somewhat more easily disciplined by the king. It comprised a tract of land which the king had awarded to an individual, or to a group of individuals whose interrelationships more nearly resembled those of a partnership than those of a corporation. Along with the tract of land the proprietor or proprietors acquired the power of establishing a government for the colony. Since the settlers of some proprietary colonies also became rebellious, their lands were taken away from the original owners; by 1775 there were but three—Pennsylvania, Delaware, and Maryland.

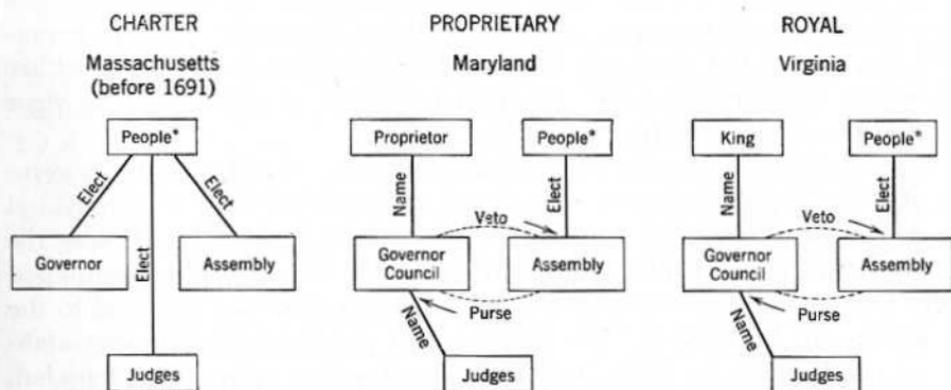
**Replica of the Capitol of Virginia as it Stood in Colonial Times, at Williamsburg.**

**Royal:** The royal colony was the type immediately under the governance of the king; he and his ministers, especially the Board of Trade and Plantations, directly supervised their rule. Charter and proprietary colonies, such as, respectively, Virginia and the Carolinas, were converted into royal colonies when they became unmanageable. At the outbreak of the Revolution there were eight of them—all but the two charter and three proprietary colonies noted above.

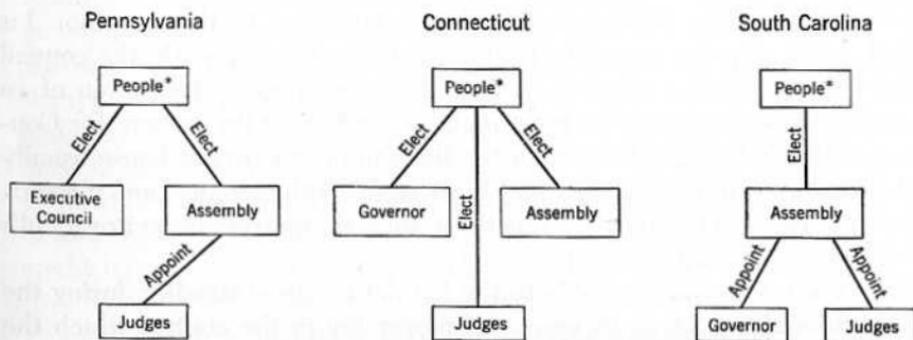
### Structure

The governments of the different colonies, whether charter, proprietary, or royal, bore great structural similarity to one another; all, too, came to resemble the British government. This similarity is quite understandable; for the British colonists, like most colonists in history, established the type of governmental structure most familiar to them. All colonial governments thus possessed three somewhat distinct branches, the executive, legislative, and judicial, a division that later Americans made permanent in both philos-

### Typical Colonial Governments



### Typical Early State Governments



**Figure 6. Organization of Early American Governments.** \*The term "people" here refers particularly to those men, often a small number, who had the right to vote.

ophy and practice. There was considerable overlapping of function among the branches, however.

*The Executive Branch:* The chief of the executive branch in each colony was the governor. He was appointed by the king in the royal colonies, named by the proprietor in the proprietary colonies, and chosen by the voters in the charter colonies. (Note the origins of later practice here.) Associated with the governor was a council, usually appointed by the agent that chose the governor. Together the governor and his council administered the affairs of the colony. Moreover, during the eighteenth century the executive was under increasing pressure to emphasize the colonial policy of the British crown. The fact that governors named by the voters or the proprietor might be unreliable in carrying out this latter task, especially if they were native colonists, justified, in the eyes of the crown, the transformation of some settlements into royal colonies, in which the governor would be more obedient to the king and to British direction.

As executive chiefs of the colonies, the governors of the royal and proprietary colonies enjoyed, at least on paper, large powers. For example, they were authorized to exercise a suspensive (that is, temporary) veto, or a full veto, upon acts of the colonial legislatures. Thus was the now familiar veto originated in America. Moreover, governors could woo and win supporters through their appointive power (a device termed *patronage*, still an important function). But ultimately how much of their power they could utilize depended upon many factors, the most important of which was the vigor of the colonial legislature.

*The Legislative Branch:* The legislative branch of the colonial government, after it had undergone a process of development, finally consisted of a two-chambered, or bicameral, body whose principal task was the enactment of laws. Colonial governments at the outset were not equipped with legislatures; legislation as well as administration was confided to the governor and his council. The first colonial popular assembly was established in Virginia in 1619, twelve years after the colony was founded. Popular assemblies emerged partly because of the demands of the colonists, and partly because of the wish of some of the charter companies to win the support of the people in their occasional contests with the British government. At first the legislature consisted of the governor, his council, and a popular assembly seated together. Subsequently the council tended to join with the elective body as its upper house. The union of an erstwhile executive council with a popular assembly set the pattern for Congress and the State legislatures after the Revolution; the upper house usually had longer terms, more exacting qualifications for both members and electors, and certain vestiges of executive functions, such as confirming the President's and the Governors' appointments.

The degree of power available to the legislature grew steadily during the eighteenth century. A main source of power lay in the control which the legislatures secured over the voting of taxes and appropriations; once this power of the purse was won, a colonial legislature could defy the governor. Eventually, in some colonies the governor was obliged to petition the legis-

lature for payment of his salary. Generally it was the popular assembly, or lower house, which acquired this monetary ascendancy; here it only adopted the means exploited centuries before by the British House of Commons in its struggle with the king. At the same time it founded an American tradition which the Founding Fathers accepted when they gave the House of Representatives exclusive power to initiate bills levying taxes.

Colonial legislatures also won the right to be sole judges of their membership, thus forbidding governors to arbitrarily unseat a duly elected representative. Furthermore, they wrested the choice of the presiding officer, the Speaker, from the governor; and this official soon became the leading spokesman for the colonial cause. Indeed, the legislatures of some colonies effected deep invasions of the executive power; for instance, they secured the right to appoint several administrative officials, beginning with the colonial treasurer. In most respects, the practices described here have descended to the legislatures of the present.

*The Judicial Branch:* The judicial branch of the colonial government, which was the last to emerge, included finally courts of first instance (that is, where cases might be first brought to trial) and courts of appeal. Initially the governor and his council dealt with all cases. As the population increased and the judiciary assumed greater burdens, lower courts were instituted; the governor and his council remained essentially the supreme court of the colony. Many cases, especially those involving British officials, could be further appealed to the king in England. Colonial judges were named by the king or governor, or even elected by the people, according to the type of colony. (Both the gubernatorial and the popular means for selecting judges are used widely in America today.) In their courts the colonists were eventually guaranteed those judicial rights that protected Englishmen at home.

### *Competing colonial interest groupings*

From the founding of the Jamestown settlement, colonial society and politics displayed the competing interest groupings that can be discerned in every large-scale human organization. Sometimes the poor were ranged against the rich, the coastal dwellers against the frontiersmen, and the newcomers against the established settlers. As shall be shown in later pages of this book, the American government is colored throughout by the activities of myriad such groupings. Moreover, to the quarrels among these colonial groupings were added disputes between the partisans of the colonies and those of the mother country. These external groupings sometimes coincided with, and sometimes cut across, the several internal groupings. That is, Americans who were opposed to the crown could be either rich or poor, or might be old settlers or immigrants.

## EARLY STATE GOVERNMENTS

One of the first results of the American Revolution was the conversion of the colonies into thirteen independent States. Indeed, each of the States

had an organized legal government before they were united under the Articles of Confederation into the first American national state. The new State governments were quite similar to the previous colonial governments; in fact, the constitutions which the State leaders eventually framed often did little more than establish a new legal basis for the regimes which developed after the British officials had fled. A new authority and sovereignty were claimed. Hence, just as the former colonial governments had resembled one another, so did the new State governments. However, certain major changes were instituted, partly in reaction to the governing principles of King George III.

### ***The State constitutions***

Each of the new State governments quickly adopted a written constitution. One of the most important aims of American leaders was the securing of written constitutions. These men were imbued with the compact theory of government, which held that governments arise through contracts between rulers and ruled, stating mutual rights and duties; they believed that a constitution was such a compact. Hence they argued that these documents would offer greater protection from an arbitrary ruler, since the ruler or government would feel bound by their provisions; if the ruler or government did not abide by these documents, the people could withdraw their part of the bargain. The colonists had experienced such documents, in the form of charters. Now, as citizens of independent States, they demanded constitutions that would establish representative, republican governments controlled by contracts with the people.

This doctrine was stated explicitly in some constitutions; thus Article I of the North Carolina constitution of 1776 asserted, "That all political power is vested in and derived from the people only." Additional guarantees that the sphere of government action was limited were afforded by clauses assuring the exercise of rights and liberties traditional in British political theory, such as freedom of speech and of assembly. In some instances, beginning with Virginia, these rights were embraced in a single section and placed at the first of the constitution as a Bill or Declaration of Rights. The Virginia Bill of Rights probably influenced all other State constitutions, the Federal Bill of Rights, and even the French Declaration of the Rights of Man and the Citizen. Like the Declaration of Independence, it bespoke the prevalent theory that men are by nature politically equal and possessed of natural rights which the state was created to safeguard.

### ***The structure of government***

The structure of the new State governments, like that of the earlier colonial regimes, comprised an executive, a legislative, and a judicial branch. Figure 6 shows three forms that they took. Mindful of the turmoil of colonial politics, the authors of the new constitutions aimed at preventing conflicts among the three branches by making the separation of powers explicit and emphatic, so that no one branch would encroach upon the scope

of any other. For example, Article I of the Georgia Constitution of 1777 provided that "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

However, despite these earnest professions, actual power in the governments was entrusted chiefly to the legislative branch. The creators of these new regimes were reacting to their experiences with colonial governors who had sought to restrain the colonial assemblies. In one sense they were conservatives or even reactionaries; for to them the dangerous revolutionary was King George III, whom they charged with attempting to overthrow the results of the Glorious Revolution of 1688, which supposedly had established the supremacy of Parliament. They believed that a legislature was less capable than an executive of building a tyranny, for they viewed it as a representative body which could be checked by the people who had elected it and whom it represented. They could not foresee the benign despotism which the British Parliament was even then fashioning; nor could they predict the Terror soon to reign under the French National Convention of 1792-1795. Finally, they neglected the fact that the colonial governors just prior to the Revolution had been effectively reined by the power which the assemblies possessed over finances; only intervention from overseas kept the governors strong.

*The Executive Branch:* In every State except Pennsylvania the executive branch consisted of a Governor and a council. Pennsylvania at first experimented with a collegiate executive of thirteen members. Only in the five northern States of New Hampshire, Massachusetts, Rhode Island, Connecticut, and New Jersey was the Governor chosen by the people; elsewhere he was named by the legislature, a method that completely disappeared early in the nineteenth century. Generally his functions were restricted, even where he was popularly elected, by a council appointed by the legislature. His term was one year, save in New York, Delaware, and South Carolina; and all the States south of Pennsylvania limited his reeligibility as fifteen States, most of them southern, do today. The powers of the Governor were confined to such tasks as the execution of the laws, commanding the state militia, and pardoning and reprieving convicted persons. He could make appointments only in conjunction with his council or with the legislature; and his veto power had all but vanished.

*The Legislative Branch:* In each State save Pennsylvania and Georgia the legislature was bicameral; the two exceptions maintained unicameral legislatures for a few years only. The bicameral form imitated the colonial institutions, in which the governor's council formed the upper house and the popular assembly the lower. Now the upper house became likewise an elective body; however, qualifications for its voters and its members were sometimes higher, and in some States its members served longer terms. In the lower houses short terms were common, one year being the usual duration. The belief was that short terms discouraged the rise of despotism. These legislatures exercised vast powers; as noted above, they took part

directly or indirectly even in the appointive function, which is normally viewed as proper to the executive. In keeping with colonial practice, the initiation of money bills was confided to the lower house.

*The Judicial Branch:* The judicial branch in the early State governments was quite similar to that under British rule. In every State there arose the two customary levels of jurisdiction, the courts of first instance and the courts of appeal. Generally the lowest courts were those of the justices of the peace. In some States judges were named by the Governor; in others they were appointed by the legislature. The maintenance of traditional juridical procedure was guaranteed by the statements of rights which appeared in all State constitutions, either in the Bills and Declarations of Rights or in the body of the constitution. At the outset these courts did not possess the power of judicial review, that is, of declaring a State law unconstitutional.<sup>1</sup> Since this power comprises a major check upon the legislative function, its absence partially accounts for the political supremacy of the legislatures in these governments.

## THE CONFEDERATION (1781-1788)

The Confederation, which was the first American national government, sprang directly from the political needs of the Revolution; as institutionalized by the Articles of Confederation, it reflected American distaste for the principles of British rule. The Confederation was the offshoot of the Continental Congress, which itself had been sired by the intercolonial Committees of Correspondence. These Committees, which have been called the first American political party, comprised groups of antagonists of what were deemed the tyrannical aspects of British colonial policy. In 1774 the First Continental Congress, which had been summoned by the Committees, convened at Philadelphia to consult together regarding colonial resistance to the British. After adopting a series of resolutions, the members of the Congress called for a similar gathering in the following year. This Second Continental Congress, meeting at Philadelphia in May, 1775, was confronted by the Revolution, which had erupted the previous month at Lexington and Concord. The Congress secured control of the revolutionary army and henceforth was the government of the united colonies. Soon it urged the colonies to draft constitutions as independent political units; and committees of the Congress wrote the Declaration of Independence and the Articles of Confederation.

### *Political structure of the Confederation*

The Articles of Confederation provided a constitutional basis for the government under the Continental Congress. The new edifice was described as a "perpetual Union." The supreme organ was the unicameral Congress. Each State was to elect a delegation of from two to seven members, who served annual terms but no more than three years out of any six. Each

State was to pay the salaries of its delegation. Regardless of its size, every State had but one vote, based upon a majority decision of its delegation; should the latter divide evenly, the State lost its vote. Any legislative proposition required the votes of nine States for passage. No executive or judicial branch was created. As needs developed, the Congress established committees to manage certain executive tasks; later it created executive departments to handle foreign affairs, finance, and military concerns. Under the Articles, the national government relied almost entirely upon State courts; Congress itself was to adjudicate disputes between States, and provisions were made for erecting a system of admiralty courts to hear cases involving sea-borne vessels and commerce.

### ***National powers under the Articles of Confederation***

Under the Articles of Confederation the national government ostensibly had rather broad powers. However, these were largely the powers which the British government had exercised prior to the Revolution, so that in establishing the national government the States yielded little or nothing. Most of these powers were delegated to the Congress; however, they were not so much legislative as they were executive, managerial, or supervisory. They included the conduct of foreign relations; the declaration of war and the negotiation of peace; the exchange of ambassadors; the establishment of standards for weights, measures, and the coinage; the creation of a postal system; the borrowing of money and the contracting of debt; and the regulation of the armed forces. Actually the Continental Congress had enjoyed most of these functions before the Articles were ratified, in 1781.

### ***Weaknesses of the Confederation***

*Structural Weaknesses:* To those accustomed to the arrangements under the present Constitution, the outstanding structural weakness of the Confederation lay in the absence of an independent executive and an independent judiciary; inasmuch as these functions were subordinate to the legislature, there was no separation of powers nor system of checks and balances. However, Great Britain flourished for many decades under a legislature as powerful as that of the United States under the Articles. Possibly the heads of the departments which Congress had already created, along with those which it might establish in the future, might have combined to form a parliamentary-cabinet type of government. Perhaps the true weakness of the Confederation structure lay in its inability to satisfy an influential and determined group of men who wanted a strong executive to check the legislature and provide the government with a unifying and conservative force. It must be remembered that the Articles of Confederation, like some of the early State constitutions, were drafted by a radical group, or coalition of radical groups, which owing to the Revolution had won temporary preeminence in American life. New groups, accepting independence wholeheartedly, yet taking a favorable view of the merits of business and other moneyed interests and an unfriendly view of "instable and reckless populism," came forward with their program for the nation.

*Functional Weaknesses:* In analyzing the functional weaknesses of the Confederation, one must keep in mind the distribution of powers under the Articles. Just as under the present Constitution, the national government had only delegated powers, whereas the states had reserved powers. However, under the Confederation, the States were sovereign; the national government had no real control over the States or over the citizens. In other words, today theoretically both the national and the State governments exercise powers delegated to them by the people; but under the Articles of Confederation, according to the same type of reasoning, the State governments exercised powers derived from the people whereas the national government held only such powers as had been granted by the States. These latter powers were scanty, so much so, in fact, that although the Confederation was termed a perpetual union it is difficult to see what might have been attempted had a State seceded. The needs of the Revolution had brought a temporary and perhaps illusory union which tended to dissolve once the Revolution had ended.

The Articles, then, were more nearly a treaty of alliance than a constitution; and the structure and functioning of the Congress intimates that it was to operate as a convention of ambassadors from the States, not as a lawmaking organ. It will readily be seen that the powers denied the national government were those which the colonies had resisted when the powers had been administered by Great Britain. The Revolution itself was directed against a central authority. Actually, in light of the jealousy in which the States held their hard-won sovereign rights, it is evident that the framers of the Articles had achieved as much unity as was possible under the circumstances.

The chief powers *forbidden* the national government under the Articles were: (1) *The levying of taxes.* Congress could collect no taxes from the people; it could only requisition money from the States. Moreover, it had no means for compelling the States to pay. Hence it was impotent; for without money it had no funds to support armed forces. The problem could have been resolved only if the States abandoned their disinclination to provide the money; and they never viewed the national government as important enough to do so. (2) *The regulation of commerce.* Congress had no power over interstate commerce; and it could regulate foreign commerce only through treaties. Only the States could impose tariffs; and during the Confederation period some States waged persistent trade wars with their neighbors. (3) *The exclusive control over money.* The Articles granted the national government the power to establish standards of coinage; however, they permitted the States to issue paper money. Since during the Revolution the Congress had printed large amounts of currency to finance the war, national paper money was so inflated as to be almost worthless. Hence the States circulated paper money to the extent demanded by the dominant groups. Since the debtor interests controlled the Rhode Island government, that State issued huge sums of paper money to help them pay their debts. In Massachusetts, on the other hand, where the creditor interests were supreme, the refusal of the State government to inflate the currency

led in 1786 to a movement of armed resistance by the debtors known as Shays' Rebellion. The fact that the Massachusetts militia had to quell the uprising, since the Confederation had no troops for the task, contributed greatly to the movement for revising the Articles.

The denial of these three powers to the national government probably added to the economic difficulties that the United States was suffering in the 1780's. However, the Articles were not solely responsible for these difficulties, because the country was undergoing the inflation that usually follows a war. Moreover, it was now denied the economic protection it had enjoyed under British rule; and the British were flooding American markets with cheap manufactured goods, possibly in a deliberate effort to crush the infant American industries. At the same time the British were seeking to expel American shipping from the oceans. Actually the financial distress was much more serious in the realm of public funds than it was in the field of private enterprise.

Finally, the Confederation was unable to conduct a strong foreign policy, almost certainly because of its internal weaknesses. The two nations with which the United States had its principal dealings in the Confederation era were Great Britain and Spain, whose colonial properties bounded the United States on the north, west, and south. Each of these great powers aimed at restraining any further territorial expansion by the United States. Great Britain still occupied several outposts in the Great Lakes region; and Spain commanded the mouth of the Mississippi by its possession of New Orleans. Certain leaders among British ruling circles were convinced that a large portion of the United States wished a return to colonial status under the British flag. Both the Spanish and the British were aware of American political and economic impotence. Hence American emissaries could not negotiate treaties with them to relax border tension, or, in the case of Great Britain, restrict British competition with American trade and industry.

*Inflexibility of the Articles:* Many of the shortcomings of the Articles might have been remedied by agreement of the constituent States had it not been for the requirement that an amendment to the Articles must be ratified by all of the States.

This requirement was simply further testimony to the nature of the Confederation; it expressed the unwillingness of any one State to permit interference by the other States in what it considered its sovereign realm. Once Congress proposed an amendment that would have authorized the national government to levy a tariff; but Rhode Island refused to ratify it. When the same amendment was proposed a second time, Rhode Island overcame its reluctance, but New York interposed its veto. This inflexibility almost guaranteed the failure of all attempts to expand the authority of the national government.

### ***Steps toward a new government***

Within a few years of the adoption of the Articles, the first steps were taken toward the creation of a new government. These steps signaled the revival of the groups that favored a strong central authority and an

executive sufficiently weighty to provide an effective balance and check to the legislature. Leadership in the movement was taken primarily by men concerned with the safety of property, the increase of trade, the stability of money, and the prestige of the United States abroad. In 1785 a group of such men, delegates from Maryland and Virginia, convened, upon George Washington's invitation, at Mount Vernon for the purpose of reaching agreements respecting commerce on the Potomac River and in Chesapeake Bay. Although they partially achieved their aims, they urged the summoning of another convention the next year at Annapolis to deal with problems of broader application, which would have delegates from all the States.

However, only Virginia, Pennsylvania, New York, New Jersey, and Delaware were represented at the Annapolis Convention of 1786; hence that body could not speak for the majority of the States. But it did accept the recommendation of Alexander Hamilton that another convention assemble at Philadelphia in the following year; and it applauded his proposal that this convention discuss fundamental changes in the Articles. The Annapolis delegates thereupon urged the legislatures of their States to prepare for such a convention and to counsel the States not represented at Annapolis to do likewise. Shortly afterward Virginia named its deputies for the Philadelphia Convention; and soon New Jersey, Pennsylvania, Delaware, North Carolina, and Georgia also chose representatives. Now Congress formally approved the convention, thereby giving the movement a legal basis. Later every State but Rhode Island sent representatives to the convention, which opened at Philadelphia in May, 1787, with the goal of amending the Articles of Confederation.

## QUESTIONS AND PROBLEMS

1. Describe the actual conditions of the separation of powers in the American colonies.
2. What changes in State government were wrought by the Revolution before 1789?
3. Summarize the conditions favoring an attempt to reorganize the government under the Articles of Confederation.
4. Trace the attitudes of American colonists and revolutionaries toward executive authority, as contrasted to the authority of legislatures.
5. Which, if any, of the several kinds of colonial, State, and confederal governments would you prefer to have lived under? Why?