

4-15-2023

What's Past Is Prologue

Marc Racicot
Governor

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the Law Commons

Let us know how access to this document benefits you.

Recommended Citation

Marc Racicot, *What's Past Is Prologue*, 84 Mont. L. Rev. 19 (2023).

This Transcript is brought to you for free and open access by the Alexander Blewett III School of Law at ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

WHAT'S PAST IS PROLOGUE

Marc Racicot*

It has not been an easy journey to get where we are. Throughout all human history, people around the world have tried and experimented with just about every conceivable form of government imaginable in various attempts to discover how to live together, for the long run, in freedom and peace.

It all began with the law of the jungle, in the beginning, where the strongest prospered and the weak did not. Such was followed thereafter, over a period of 2,500 years, by experience with monarchies, aristocracies, tyrannies, oligarchies, theocracies, colonialism, socialism, communism and, of course, democracy.

Then in 1786, the American colonies, having endured the vagaries of an oppressive and distant monarch for almost two centuries, along with their own impotent and failed governmental structures, set about to draft, in Philadelphia, what was advertised to be amendments to the Articles of Confederation.¹

I. CONTEXT IS EVERYTHING

Parenthetically, it is important to note the historical context within which the summer meeting in Philadelphia occurred.² Truly, the past was the prologue to the future yet to be written.

The first permanent British colony was established on the North American continent in 1607.³ One-hundred-and-sixty years later, with growing unrest and tension in the colonies, there were 2,000 British soldiers occupying Boston to enforce the tax laws along with 16,000 colonists.⁴

* The Author, Marc Racicot, is a 1973 graduate of the University of Montana School of Law and the 20th Governor of Montana. After Governor Racicot graduated from law school, he went straight into the U.S. Army Judge Advocate General's Corps (JAGC) in what was then West Germany where he served first as an Army prosecutor and then as the chief prosecutor for the largest geographic U.S. military jurisdiction in Europe. Upon Governor Racicot's return to Montana in 1976, he worked as a deputy county attorney for Missoula County and in 1977 Governor Racicot became an Assistant Attorney General and Montana's first state Special Prosecutor. By 1988 Governor Racicot was elected as Attorney General. By 1993, Governor Racicot was sworn in as Montana's 20th governor. In 1996, he was reelected for a second term. This is the transcript of Governor Racicot's speech from the 2022 Browning Symposium.

1. *Congress Tries to Revise the Articles of Confederation*, LIBRARY OF CONGRESS, <https://perma.cc/3592-U2SS> (Last visited Nov. 8, 2022).

2. *Id.*

3. *Captain John Smith*, NATIONAL PARK SERVICE, (Sept. 4, 2022), <https://perma.cc/N9DE-ER39>.

4. *Boston Massacre*, HISTORY, <https://perma.cc/K7PB-HES6> (last updated Sep. 20, 2022).

Following the Boston Massacre in 1770, rebellion in the colonies continued, the Boston Tea Party occurred, and the First Continental Congress was formed in 1774 in reaction to the British monarch's Coercive Acts.⁵ The Continental Congress would serve as the government of the 13 American colonies for 15 years until 1789.⁶

In 1776, the Declaration of Independence was signed and in 1781 the British were forced to surrender at Yorktown, Virginia.⁷ The fighting, however, would not formally end until 1783 when the peace treaty with the British, the Treaty of Paris, was signed.⁸

Since the establishment of the first American colony, seven generations of Americans had waited for 176 years for the independence of the United States to be recognized around the world.

Then the question became, how will the future of this new country be preserved? How will it be governed, if at all?

It is important to remember that it had taken five years to draft the Articles of Confederation, debate them, amend them, and persuade the last State to ratify them.⁹

And what did the States agree to by enacting the Articles of Confederation? Article III provided the answer: "The said States hereby severally enter in a firm league of friendship with each other."¹⁰ Not a solemn bond, not an unbroken or eternal commitment, one to another and to the whole of the union, but to "a firm league of friendship."¹¹

There were no provisions to collect taxes, defend the country, pay the public debt or regulate trade and commerce.¹² The troops during the Revolutionary War lacked boots, food, weapons, ammunition, clothing, and medical care.¹³ Public debts continued to go unpaid and States found their credit unworthy.¹⁴ Seven States chose to rely solely on paper money;¹⁵ and

5. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789*, LIBRARY OF CONGRESS, <https://perma.cc/6Q8S-98Y9> (last visited Nov. 11, 2022).

6. *Continental Congress*, HISTORY, <https://perma.cc/6UXX-42KN> (last updated Aug. 4, 2022).

7. *The British Surrender at Yorktown October 19, 1781*, THE LIBRARY OF CONGRESS, <https://perma.cc/QYN3-KF6D> (last visited Nov. 8, 2022).

8. *Milestone Documents: Treaty of Paris*, NATIONAL ARCHIVES, <https://perma.cc/K64K-PN4G> (last visited Nov. 8, 2022).

9. *Milestone Documents: Articles of Confederation*, NATIONAL ARCHIVES, <https://perma.cc/8X9J-QPPF> (last visited Nov. 8, 2022).

10. ARTICLES OF CONFEDERATION of 1781 art. III. (repealed 1787).

11. *Id.*

12. *Id.*; *Milestone Documents: Articles of Confederation*, *supra* note 9.

13. *Valley Forge*, HISTORY, <https://perma.cc/ZQ5T-SMTQ> (last updated Jul. 29, 2022).

14. *Articles of Confederation*, HISTORY, <https://perma.cc/US97-FA7K> (last updated Sep. 27, 2019).

15. CATHERINE DRINKER BOWEN, *Miracle at Philadelphia; The Story of the Constitutional Convention May to September 1787*, at 9 (1966).

2023

WHAT'S PAST IS PROLOGUE

21

one, namely Pennsylvania, required that money printed in Pennsylvania be kept within its borders.¹⁶

During this period, the States also found themselves engaged in more and more boundary disputes.¹⁷ They passed tariff laws and imposed them upon one another.¹⁸ New Jersey had its own customs service,¹⁹ and nine States had their own navy.²⁰

Throughout the years after the Revolutionary War ended, there were continual discussions and proposals offered to amend the Articles of Confederation.²¹ But the calls for reform of the Articles went unheeded and were largely ignored.²²

As it happened, however, in 1785 Maryland and Virginia became entangled in a very serious dispute over navigation on the Potomac River.²³ Both States sent commissioners to Mount Vernon to discuss the disagreement. Seeing the chance to enlist the cooperation of neighboring States, the commission was enlarged and set to meet in Annapolis in September 1786.²⁴

Prior to the Annapolis meeting, however, on August 29, 1786, desperate farmers in western Massachusetts, having concluded that they were “being ruinously taxed by Boston” and suffering the seizure of their property by officials, rose in revolt.²⁵ Armed with pitchforks and posts the participants in Shays’ Rebellion marched on county courthouses threatening and wreaking havoc.²⁶ Although ultimately pardoned, 14 rioting leaders were condemned to death for their insurrection.²⁷

Against this backdrop, the Annapolis commission met in September 1786.²⁸ Out of that meeting came a recommendation that all 13 States appoint delegates to meet in May 1787 to consider the regulation of trade and commerce in the United States.²⁹

16. *Id.*

17. *Articles of Confederation*, HISTORY, <https://perma.cc/US97-FA7K> (last updated Sep. 27, 2019).

18. *Economic and the Articles of Confederation*, HISTORY CENTRAL, <https://perma.cc/F6UG-SDJY> (last visited Nov. 8, 2022).

19. BOWEN, *supra* note 15, at 9.

20. *Id.*

21. *Attempts to Revise The Articles of Confederation*, CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION, <https://perma.cc/HWR7-B477> (last visited Nov. 8, 2022).

22. *Id.*

23. *The Mt. Vernon Compact & the Annapolis Convention*, the Maryland State House, <https://perma.cc/QQM8-K62A> (last visited Nov. 8, 2022).

24. *Id.*

25. BOWEN, *supra* note 15, at 10.

26. *Shays’ Rebellion*, HISTORY, <https://perma.cc/DHS6-B2GT> (last updated Oct. 31, 2019).

27. *Shays’ Rebellion-The Last Battle of the American Revolution*, AMERICAN HISTORY CENTRAL, <https://perma.cc/9G66-DW8Z> (last updated Sep. 28, 2022).

28. *The Mt. Vernon Compact*, *supra* note 23.

29. *Id.*

The Continental Congress, proceeding cautiously, resolved that the convention was to be confined “. . . for the sole and express purpose of revising the Articles of Confederation.”³⁰

It is fair to say that all the delegates came to the convention at Philadelphia with a determination to restructure the Articles of Confederation.³¹ But what happened at the convention was something quite different and extraordinary. By the end of 116 days its delegates had agreed to go far beyond amending the Articles of Confederation and instead had crafted the Constitution for the United States of America which was ratified by the required majority of nine States barely ten months later.³²

How was it possible for the founders to do what they did? To begin with there were no political parties, as they exist today, identified and operative at this time.³³ The delegates were all present in the same room for 89 days of discussion and argument at Independence Hall.³⁴ There were procedural rules of conduct agreed upon and observed.³⁵ There were curtains over the windows and the imposition of a rule of confidentiality to prevent rumors and misinformation from circulating in the colonies.³⁶ Most importantly, there was no internet or social media allowing for instant worldwide communication and misinformation.

Each State had one vote and a majority of a State’s delegates had to be present and agree before that State’s vote counted.³⁷ Each delegate could speak only once on each issue until all the delegates received the opportunity to speak, and then only with the special permission of the convention delegates.³⁸

The rules explicitly required the delegates to pay close attention to the presentations by other delegates and forbade the reading of books, documents, or papers while one of the delegates was speaking.³⁹ Finally, all the comments were required to be addressed to the president to avoid, as much

30. THE FEDERALIST NO. 40 (James Madison).

31. *The Mt. Vernon Compact*, *supra* note 23.

32. *Constitution*, HISTORY, <https://perma.cc/FK8E-GJF9> (last updated Sep. 17, 2021); *Observing Constitution Day*, NATIONAL ARCHIVES (Aug. 21, 2016), <https://perma.cc/H973-6675>.

33. *Formation of Political Parties: Creating the United States*, LIBRARY OF CONGRESS, <https://perma.cc/CS7Z-TL9S> (last visited Nov. 8, 2022).

34. Martin Kelly, *Constitutional Convention: The History and Delegates Who Attended*, THOUGHTCo (Jan. 02, 2021), <https://perma.cc/N22U-NECB>.

35. Gordon Lloyd, *The Rules of the Convention*, TEACHING AMERICAN HISTORY, <https://perma.cc/ACM3-FM57> (last visited Nov. 8, 2022).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

2023

WHAT'S PAST IS PROLOGUE

23

as possible, elevated rhetoric between delegates involved in the same exchange.⁴⁰

II. “A REPUBLIC. . .IF YOU CAN KEEP IT”

This year we celebrate the 50th anniversary of our 1972 Montana Constitution.⁴¹ On July 4th, we celebrated the 246th anniversary of the Declaration of Independence,⁴² and on June 21, 2022, we marked the creation of our constitutional democracy when the United States Constitution was ratified 234 years ago.⁴³

A recent Washington Post and University of Maryland poll in December, revealed that the percentage of Americans who believe that violent action against the government is justified stood at 34 %, considerably higher than in past polls dating back more than two decades.⁴⁴

That survey was followed closely thereafter by another, a National Public Radio and Ipsos poll in January 2022. The results of that poll revealed that 70% of Americans believe that America is in crisis and at risk of failing.⁴⁵

Benjamin Franklin predicted and warned of such moments upon the adjournment of the Constitutional Convention in 1787.⁴⁶ When asked: “What have we got, a republic or a monarchy?” His response was prophetic: “A republic if you can keep it.”⁴⁷

That remains, as it did in the beginning, the existential question of our time: can we keep our republic? And can we keep it if the values and virtues of the Rule of Law,⁴⁸ purposely infused into our Constitution, are not faithfully and consensually observed?

40. *Id.*

41. MONT. CONST. (1972).

42. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

43. U.S. CONST. (1787).

44. Dan Balz, Scott Clement, & Emily Guskin, *Republicans and Democrats Divided Over Jan. 6 Insurrection and Trump's Culpability, Post-UMD Poll Finds*, THE WASHINGTON POST (Jan. 1, 2022), <https://perma.cc/4Y7N-789R>.

45. *Seven in Ten Americans Say the Country is in Crisis, at Risk of Failing*, IPSOS (Jan. 3, 2022), <https://perma.cc/APT3-YEVU>.

46. Judge Edward W. Najam, Jr., *The Constitution, Factions, and the Rule of Law*, 64 RES GESTAE 10, 11 (Apr. 2021).

47. *Id.*

48. Rule of Law: “The supremacy of regular as opposed to arbitrary power; the absence of any arbitrary power on the part of the government <citizens must respect the rule of law>. — Also termed *supremacy of law*. 2. The doctrine that every person is subject to the ordinary law within the jurisdiction; the equal subordination of all citizens and classes to the ordinary law of the land <all persons within the United States are within the American rule of law>.” *Rule of Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

It appears undeniable that there are ominous and unmistakable warning signs all around us that our constitutional government and republic is confronting moments of uncertainty and peril.

A people who cannot talk to or listen to each other, who do not respect each another, who will not sincerely and fairly consider the thoughts of each other, who do not trust each other and who cannot reason with each other, cannot long live in freedom.

The most probable way for our republic to vanish is through a lack of fidelity to the Constitution and the Rule of Law. Not surprisingly, a pledge of fidelity is precisely the promise we make to each other as Americans. It is also the indispensable pledge required by our Constitutional oath of office: “I do solemnly swear or affirm that I will support, protect, and defend the Constitution. . . and that I will discharge the duties of my office with fidelity, so help me God.”⁴⁹

What did the framers of our Constitution intend when they chose fidelity to be the virtue that commands the attention and conformity of every citizen and every officeholder?

And what is this fidelity, which we hear recited at every swearing-in ceremony, but, in all probability, have rarely stopped to consider thoughtfully and thoroughly? It is, in a word, faithfulness. Faithfulness to the preservation of our union, faithfulness to our fellow citizens, faithfulness to the cause of freedom, and faithfulness to a shared set of values. That faithfulness is demonstrated by unequivocal loyalty and support of the Rule of Law, above all else and without exception.

The fidelity referred to in our oath presumes not just faithfulness to the actual words of our Constitution, but faithfulness to the spirit that permeates those Constitutions as well. A spirit recognized and requited by humility, respect of others and the rights of others, decency, integrity, honor, and self-discipline.

This fidelity of which we speak is synonymous with the Rule of Law and is the exact opposite of seeking power for its own sake, which history has revealed time and time again to be a fool’s errand.

Many of us in this room grew up in an America as it used to be, one of the world’s most stubbornly civil societies and cultures, where being a neighbor meant more than merely living next door to another family.

Throughout our growing-up years, and into adulthood and a new millennium, we shared a positive attitude about life, about neighbors, about families, and about values.

49. *Oath of Office*, UNITED STATES SENATE, <https://perma.cc/3M8J-34X7> (last visited Nov. 11, 2022).

We suspected the best of each other until proven wrong, a sort of presumption of innocence and good faith that was accorded from the beginning and instinctively one to another.

Contrast that with the poisonous and frequently inaccurate public communications of today, where 360,000 tweets a minute are instantaneously dispatched and received every minute of every hour of every day.⁵⁰

That's how much of the country, and much of the world, talks to each other these days. It's dizzying, vacuous, and perilous.

Chances for people with diverse views sitting across a table from one another and talking to each other about how to solve difficult and important problems have been substantially diminished. And now, most of the time, eliminated, in favor of the new mindless electronic rituals that produce infinitely more confusion and anger than understanding.

It seems almost impossible to manage the noise, to control the flood of unverified and frequently inaccurate communications, oftentimes conceived in rage and competition, and then once dispatched, regretted because all of that hateful piffle is now etched and preserved, apparently forever, in a network of accessible internet files.

The internet is a marvelous creation, in so many ways. But it has also strained and stunted our social existence, especially our political affairs, with false and irresponsible insinuations that have absolutely no basis in fact. Social media has left us in an almost constant state of shared incomprehension and confusion.

We have to return to the deliberative processes and the Rule of Law embedded in our Constitution. If we don't, more and more important policy decisions will be made on the basis of destructive rumors rather than on facts and context. The result is the production of exponentially growing friction, exhaustion, and bitterness. And in the end, the unraveling of our democracy and our way of life. It really is that urgent.

We have to bring more self-discipline, integrity, and sensitivity to our communications and comments, individually and collectively, to fulfill the requirements of fidelity to one another, fidelity to the cause of freedom, fidelity to the defense of our democracy and fidelity to our shared belief in the future of our country and State.

It's not really a big ask. I'm not suggesting, hopelessly, a return to simpler times.

I'm calling, hopefully, for a return to the Rule of Law, to simple, timeless, and enduring values: presuming the best of each other, listening in good faith before acting or responding, exuding generosity and grace, self-

50. Hannah Laird, *World Social Media Day Facts*, TEXAS STATE UNIVERSITY: DIVISION OF INFORMATION TECHNOLOGY (Jun. 30, 2018), <https://perma.cc/NW63-2KYQ>.

correcting our own mistakes, and being ambitious to accomplish something, not to be somebody.

I'm suggesting that much more can be accomplished practically—and politically—by shunning the tired and perverted rhetorical games of modern political discourse, now magnified exponentially, and given eternal life by the internet.

I'm suggesting that we focus on carefully listening to each other, gathering the facts before we make up our minds, and then actually fixing our society's problems instead of being distracted by the flashing lights; engaging in the to and from of never-ending, instantaneous, bitter, and, all too often, coarse and careless electronic communications that are dispatched each day all over the world.

Democracy is a voluntary association of individuals. It's a dynamic institution, always changing. It can dynamically deteriorate and rot just as quickly as it can dynamically improve.

Sadly, we hear so much about our divisions. We are conditioned by the modern media to think that we have little in common—as a nation and as a people. But I believe the majority of the American people, the great middle of America, are tired of the intramural wars where all sides emphasize only their divisions with the hope of having them magnified and instantaneously scattered across the landscape courtesy of the internet and the propaganda incessantly purveyed by political hucksters for both political parties.

As one precocious Montanan told me at her eighth-grade graduation, we are not different groups of people in America. We are, she said, one group of different Americans. One group of different Americans. It would serve us well to remember that.

We've got problems in this country and in our individual States. So, let us rediscover and restore the Rule of Law that metaphysically binds us together in freedom, independence, and stability. Let us quickly and completely abandon the solitary and destructive search for power and control and get on with fixing our problems and taking care of one another—with fidelity, so help us God.