

## PREFACE.

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THE book to which the following pages relate has been for several years before the public. It has been reviewed in some of the principal periodicals of the country, and recommended in the strongest terms to public favor. I have no disposition to detract from its merits as a valuable compendium of historical facts, or as presenting just views of the Constitution in many respects. My attention has been directed to its political principles alone, and my sole purpose has been to enquire into the correctness of those principles, so far as they relate to the true nature and character of our federal government.

It may well excite surprise that so elaborate a work as this of Judge Story, and one so well calculated to influence public opinion, should have remained so long unnoticed by those who do not concur in the author's views. No one can regret this circumstance more than I do; for I would willingly have devolved upon abler hands the task which I have now undertaken. I offer no apology for the manner in which that task has been performed. It is enough for me to say, that the reader, howsoever unfavorable his opinion of this essay may be, will not be more sensible of its imperfections than I am. I know that the actual practice of the federal government for many years past, and the strong tendencies of public opinion in favor of federal power, forbid me to hope for a favorable reception, except from the very few who still cherish the principles which I have endeavored to re-establish.

The following essay was prepared about three years ago, with a view to its publication in one of our periodical reviews. Circumstances, which it is unnecessary to mention, prevented this from being

done, and the work was laid aside and forgotten. My attention has been again called to it within a few weeks past, and I am now induced to give it to the public, under the hope that it may not be without its influence in directing the attention of those who have not yet lost all interest in the subject, to the true principles of our constitution of government.

I do not claim the merit of originality. My conclusions are drawn from the authentic information of history, and from a train of reasoning, which will occur to every mind, on the facts which history discloses. My object will be answered, if even the few by whom these pages will probably be read shall be induced to re-examine, with a sincere desire after truth, the great principles upon which political parties in our country were once divided, but which there is much reason to fear are no longer respected, even if they be not wholly forgotten.

I do not offer this essay as a commentary on the Federal Constitution. Having proposed to myself but a single object, I have endeavored to compress my matter within as small a compass as possible, consistent with a due degree of clearness, and a proper reference to authorities, where authorities are relied on.

THE  
TRUE NATURE AND CHARACTER  
OF OUR  
FEDERAL GOVERNMENT:  
A REVIEW

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*Commentaries on the Constitution of the United States, with a preliminary review of the constitutional history of the colonies and states before the adoption of the Constitution.* By JOSEPH STORY, LL. D., Dana Professor of Law in Harvard University.

It came within the range of Judge Story's duties, as Dana Professor of Law in Harvard University, to expound and illustrate the Constitution of the United States. His lectures upon that subject have been abridged by himself, and published in a separate volume, under the above title. Although the work is given to the public as an abridgment, it is nevertheless, as it professes to be, "a full analysis and exposition of the constitution of government of the United States;" and presents, in the opinion of the author himself, the "leading doctrines" of the original, "so far as they are necessary to a just understanding of the actual provisions of the Constitution." The author professes to have compiled it "for the use of colleges and high schools;" but as it contains all the important historical facts, and all the leading reasons upon which his own opinions have been based, and as it has been prepared with elaborate care in other respects, we may reasonably suppose, without impeaching his modesty, that he expected it to be received as a complete work. It is, indeed, quite as full as any such work needs to be, for any purpose, except, perhaps, the very first

lessons to the student of constitutional law. The politician and the jurist may consult it, with a certainty of finding all the prominent topics of the subject fully discussed.

A work presenting a proper analysis and correct views of the Constitution of the United States has long been a desideratum with the public. It is true that the last fifteen years have not been unfruitful in commentaries upon that instrument; *such* commentaries, however, as have, for the most part, met a deserved fate, in immediate and total oblivion. Most of them have served only to throw ridicule upon the subject which they professed to illustrate. A few have appeared, however, of a much higher order, and bearing the stamp of talent, learning and research. Among these, the work before us and the Commentaries of Chief Justice Kent hold the first rank. Both these works are, as it is natural they should be, strongly tinged with the political opinions of their respective authors; and as there is a perfect concurrence between them in this respect, their joint authority can scarcely fail to exert a strong influence upon public opinion. It is much to be regretted that some one, among the many who differ from them in their views of the Constitution, and who possess all the requisite qualifications for the task, should not have thought it necessary to vindicate his own peculiar tenets, in a work equally elaborate, and presenting just claims to public attention. The authority of great names is of such imposing weight, that mere reason and argument can rarely counterpoise it in the public mind; and its preponderance is not easily overcome, except by adding like authority to the weight of reason and argument, in the opposing scale. I hope it is not yet too late for this suggestion to have its effect upon those to whom it is addressed.

The first commentary upon the Constitution, the *Federalist*, is decidedly the best which has yet appeared. The writers of that book were actors in all the interesting scenes of the period, and two of them were members of the convention which formed the Constitution. Added to this, their extensive information, their commanding talents, and their experience in great public affairs, qualified them, in a peculiar degree, for the task which they undertook. Nevertheless, their great object was to *recommend* the Constitution to the people, at a time when it was very uncertain whether they would adopt it or not; and hence their work, although it contains a very full and philosophical analysis of the subject, comes to us as a mere argument in support of a favorite measure, and, for that reason, does not always command our entire confidence. Besides, the Constitution was then

untried, and its true character, which is to be learned only from its practical operation, could only be conjectured. Much has been developed, in the actual practice of the government, which no politician of that day could either have foreseen or imagined. New questions have arisen, not then anticipated, and difficulties and embarrassments, wholly unforeseen, have sprung from new events in the relation of the states to one another, and to the general government. Hence the Federalist cannot be relied on, as full and safe authority in all cases. It is, indeed, matter of just surprise, and affording the strongest proof of the profound wisdom and far-seeing sagacity of the authors of that work, that their views of the Constitution have been so often justified in the course of its practical operation. Still, however, it must be admitted that the Federalist is defective in some important particulars, and deficient in many more. The Constitution is much better understood at this day than it was at the time of its adoption. This is not true of the great principles of civil and political liberty, which lie at the foundation of that instrument; but it is emphatically true of some of its provisions, which were considered at the time as comparatively unimportant, or so plain as not to be misunderstood, but which have been shown, by subsequent events, to be pregnant with the greatest difficulties, and to exert the most important influence upon the whole character of the government. Contemporary expositions of the Constitution, therefore, although they should be received as authority in *some* cases, and may enlighten our judgments in most others, cannot be regarded as safe guides, by the expounder of that instrument at this day. The subject demands our attention now as strongly as it did before the Federalist was written.

It is not surprising, therefore, that the work now under consideration should have been hailed with pleasure, and received with every favorable disposition. Judge Story fills a high station in the judiciary of the United States, and has acquired a character, for talents and learning, which ensures respect to whatever he may publish under his own name. His duty, as a judge of the supreme court, has demanded of him frequent investigations of the nicest questions of constitutional law; and his long service in that capacity has probably brought under his review every provision of that instrument, in regard to which any difference of opinion has prevailed. Assisted as he has been by the arguments of the ablest counsel, and by the joint deliberations of the other judges of the court, it would be indeed wonderful, if he should hazard his well-earned reputation as a jurist, upon any hasty or unweighed opinion, upon subjects so grave and

important. He has also been an attentive observer of political events, and although by no means obtrusive in politics, has yet a political character, scarcely less distinguished than his character as a jurist. To all these claims to public attention and respect, may be added a reputation for laborious research, and for calm and temperate thinking. A work on the Constitution of the United States, emanating from such a source, cannot fail to exert a strong influence upon public opinion, and it is, therefore, peculiarly important that its real character should be understood. Whatever may be the caste of its political opinions, it can scarcely fail to contain many valuable truths, and much information which will be found useful to all classes of readers. And, so far as its political opinions are concerned, it is of the highest importance to guard the public mind against the influence which its errors, if errors there be, may borrow from the mere authority of the distinguished name under which they are advanced.

The plan of the work before us is very judicious. In order to a correct understanding of the Constitution, it is absolutely necessary to understand the situation of the states before it was adopted. The author, acting upon this idea, distributes his work into three great divisions. "The first will embrace a sketch of the charters, constitutional history, and anti-revolutionary jurisprudence of the colonies. The second will embrace the constitutional history of the states, during the revolution, and the rise, progress, decline and fall of the confederation. The third will embrace the history of the rise and adoption of the Constitution, and a full exposition of all its provisions, with the reasons on which they were respectively founded, the objections by which they were respectively assailed, and such illustrations drawn from contemporaneous documents, and the subsequent operations of the government, as may best enable the reader to estimate for himself, the true value of each." This plan is at once comprehensive and analytic. It embraces every topic necessary to a full understanding of the subject, while, at the same time, it presents them in the natural order of investigation. It displays a perfect acquaintance with the true nature of the subject, and promises every result which the reader can desire. The first part relates to a subject of the greatest interest to every American, and well worthy the study of philosophical enquirers, all over the world. There is not, within the whole range of history, an event more important, with reference to its effects upon the world at large, than the settlement of the American colonies. It did not fall within the plan of our author to enquire very extensively, or very minutely, into the mere history of the events which

distinguished that extraordinary enterprise. So far as the first settlers may be regarded as actuated by avarice, by ambition, or by any other of the usual motives of the adventurer, their deeds belong to the province of the historian alone. We, however, must contemplate them in another and a higher character. A deep and solemn feeling of religion, and an attachment to, and an understanding of, the principles of civil liberty, far in advance of the age in which they lived, suggested to most of them the idea of seeking a new home, and founding new institutions, in the western world. To this spirit we are indebted for all that is free and liberal in our present political systems. It would be a work of very great interest, and altogether worthy of the political historian, to trace the great principles of our institutions back to their sources. Their origin would probably be discovered at a period much more remote than is generally supposed. We should derive from such a review much light in the interpretation of those parts of our systems, as to which we have no precise rules in the language of our constitutions of government. It is to be regretted that Judge Story did not take this view of the subject. Although not strictly required by the plan of his work, it was, nevertheless, altogether consistent with it, and would have added much to its interest with the general reader. His sources of historical information were ample, and his habits and the character of his mind fitted him well for such an investigation, and for presenting the result in an analytic and philosophical form. He has chosen, however, to confine himself within much narrower limits. Yet, even within those limits, he has brought together a variety of historical facts of great interest, and has presented them in a condensed form, well calculated to make a lasting impression upon the memory. The brief sketch which he has given of the settlement of the several colonies, and of the charters from which they derived their rights and powers as separate governments, contains much to enable us to understand fully the relation which they bore to one another and to the mother country. This is the true starting point in the investigation of those vexed questions of constitutional law which have so long divided political parties in the United States. It would seem almost impossible that any two opinions could exist upon the subject; and yet the historical facts, upon which alone all parties must rely, although well authenticated and comparatively recent, have not been understood by all men alike. Our author was well aware of the importance of settling this question at the threshold of his work. Many of the powers which have been claimed for the federal government, by the political party to which he

belongs, depend upon, a denial of that separate existence, and separate sovereignty and independence, which the opposing party has uniformly claimed for the states. It is, therefore, highly important to the correct settlement of this controversy, that we should ascertain the precise political condition of the several colonies prior to the revolution. This will enable us to determine how far our author has done justice to his subject, in the execution of the first part of his plan; and by tracing the colonies from their first establishment as such, through the various stages of their progress up to the adoption of the Federal Constitution, we shall be greatly aided in forming a correct opinion as to the true character of that instrument.

It appears to be a favorite object with the author to impress upon the mind of the reader, at the very commencement of his work, the idea that the people of the several colonies were, as to some objects, which he has not explained, and to some extent, which he has not defined, "one people." This is not only plainly inferable from the general scope of the book, but is expressly asserted in the following passage: "But although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony, and as a British subject he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies too was regulated by the general laws of the British empire, and could not be restrained or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay are equally just and striking: 'All the people of this country were then subjects of the king of Great Britain, and owed allegiance to him, and all the civil authority then existing or exercised here flowed from the head of the British empire. They were in a strict sense *fellow subjects*, and in a variety of respects *one people*. When the revolution commenced, the patriots did not assert that only the same affinity and social connexion subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain and Spain, while Roman provinces, to wit, only that affinity and social connexion which results from the mere circumstance of being governed by the same prince.'"

In this passage the author takes his ground distinctly and boldly. The first idea suggested by the perusal of it is, that he discerned very clearly the necessity of establishing his position, but did not discern quite so clearly by what process of reasoning he was to accomplish it. If the passage stood alone, it would be fair to suppose that he did not

design to extend the idea of a unity among the people of the colonies beyond the several particulars which he has enumerated. Justice to him requires that we should suppose this; for, if it had been otherwise, he would scarcely have failed to support his opinion by pointing out some one of the "many purposes," for which the colonies were, in his view of them, "one people." The same may be said of Mr. Chief Justice Jay. He also has specified several particulars in which he supposed this unity to exist, and arrives at the conclusion, that the people of the several colonies were, "in a variety of respects, one people." In what respect they were "one," except those which he has enumerated, he does not say, and of course it is fair to presume that he meant to rest the justness of his conclusion upon them alone. The historical facts stated by both of these gentlemen are truly stated; but it is surprising that it did not occur to such cool reasoners, that every one of them is *the result of the relation between the colonies and the mother country, and not the result of the relation between the colonies themselves.* Every British subject, whether born in England proper or in a colony, has a right to reside any where within the British realm; and this *by the force of British laws.* Such is the right of every Englishman, wherever he may be found. As to the right of the colonist to inherit lands by descent in any other colony than his own, our author himself informs us that it belonged to him "as a British subject." That right, indeed, is a consequence of his allegiance. By the policy of the British constitution and laws, it is not permitted that the soil of her territory should belong to any from whom she cannot demand all the duties of allegiance. This allegiance is the same in all the colonies as it is in England proper; and, wherever it exists, the correspondent right to own and inherit the soil attaches. The right to regulate commercial intercourse among her colonies belongs, of course, to the parent country, unless she relinquishes it by some act of her own; and no such act is shown in the present case. On the contrary, although that right was resisted for a time by some of the American colonies, it was finally yielded, as our author himself informs us, by all those of New England, and I am not informed that it was denied by any other. Indeed, the supremacy of parliament, in most matters of legislation which concerned the colonies, was generally—nay, *universally*—admitted, up to the very eve of the revolution. It is true, the right to *tax* the colonies was denied, but this was upon a wholly different principle. It was the right of every British subject to be exempt from taxation, except by his own consent; and as the colonies were not, and from their local situation could not be,

represented in parliament, the right of that body to tax them was denied, upon a fundamental principle of English liberty. But the right of the mother country to regulate commerce among her colonies is of a different character, and it never was denied to England by her American colonies, so long as a hope of reconciliation remained to them. In like manner, the facts relied on by Mr. Jay, that "all the people of this country were then subjects of the king of Great Britain, and owed allegiance to him," and that "all the civil authority then existing or exercised here flowed from the head of the British empire," are but the usual incidents of colonial dependence, and are by no means peculiar to the case he was considering. They do, indeed, prove a unity between all the colonies and *the mother country*, and show that these, taken altogether, are, in the strictest sense of the terms, "one people;" but I am at a loss to perceive how they prove, that two or more parts or subdivisions of the same empire necessarily constitute "one people." If this be true of the colonies, it is equally true of any two or more geographical sections of England proper; for every one of the reasons assigned applies as strictly to this case as to that of the colonies. Any two countries may be "one people," or "a nation de facto," if they can be made so by the facts that their people are "subjects of the king of Great Britain, and owe allegiance to him," and that "all the civil authority exercised therein flows from the head of the British empire."

It is to be regretted that the author has not given us his own views of the sources from which these several rights and powers were derived. If they authorize his conclusion, that there was any sort of unity among the people of the several colonies, distinct from their common connexion with the mother country, as parts of the same empire, it must be because they flowed from something in the relation betwixt the colonies themselves, and not from their common relation to the parent country. Nor is it enough that these rights and powers should, *in point of fact*, flow from the relation of the colonies to one another; they must be the *necessary result of their political condition*. Even admitting, then, that they would, under any state of circumstances, warrant the conclusion which the author has drawn from them, it does not follow that the conclusion is correctly drawn in the present instance. For aught that he has said to the contrary, the right of every colonist to inhabit and inherit lands in every colony, whether his own or not, may have been derived from positive compact and agreement among the colonies themselves; and this presupposes that they were distinct and separate, and not "one people."