



Abel Parker Upshur

**OUR FEDERAL
GOVERNMENT**
Its True Nature and Character

Being a Review of Judge Story's
Commentaries on the Constitution
of the United States

by
Abel Parker Upshur

With an Introduction and Copious Critical
and Explanatory Notes by C. Chauncey Burr

**THE CONFEDERATE
REPRINT COMPANY**



WWW.CONFEDERATEREPRINT.COM

Our Federal Government:
Its True Nature and Character
by Abel Parker Upshur

Originally Published in 1868
by Van Evrie, Horton and Company
New York

Reprint Edition © 2015
The Confederate Reprint Company
Post Office Box 2027
Toccoa, Georgia 30577
www.confederatereprint.com

Cover and Interior by
Magnolia Graphic Design
www.magnoliagraphicdesign.com

ISBN-13: 978-0692387481
ISBN-10: 069238748X

CONTENTS



Introduction	7
Preface by the Author	13
Chapter One	15
The Character of Judge Story’s Commentaries	
Chapter Two	23
The Non-Relation of the Colonies to Each Other: They Were Not One People	
Chapter Three	35
The Relation of the Colonies to Each Other	
Chapter Four	53
The Nature and Extent of the Powers Exercised by the Revolutionary Government Did Not Make the Colonies One People	
Chapter Five	65
The Declaration of Independence Did Not Consolidate the Colonies Into One People	
Chapter Six	77
The Articles of Confederation Did Not Impair the Sovereignty of the States, Nor Consolidate Them Into One People	
Chapter Seven	81
The Constitution Did Not Change the Sovereign Attitude of the States, Nor Consolidate Them Into a National Government	
Chapter Eight	115
The Union a Confederation and Not a National Government	
Chapter Nine	129
The Extent and Limit of the Jurisdiction of the Supreme Court of the United States	
Chapter Ten	167
The Structure and Functions of the House of Representatives	

INTRODUCTION



The author of this volume was considered one of the ablest legal minds in the United States. He studied law under William Wirt, the eminent author of the *Life of Patrick Henry*, and his practiced profession with great success from 1810 to 1824. After an interval of retirement, he held a high judicial position as Judge of the General Court of Virginia, from 1826 to 1841; at which time he entered Mr. Tyler's Cabinet as Secretary of the Navy. On Mr. Webster's retirement, in the spring of 1843, Judge Upshur succeeded him as Secretary of State. On the 28th of February 1844, the explosion of the great gun ("Peacemaker") on board the steamer *Princeton* killed this eminent jurist and statesman. His reputation in private life was as spotless as his public fame was exalted and unrivaled.

This review of Judge Story's *Commentaries on the Constitution of the United States* is perhaps the ablest analysis of the nature and character of the Federal Government that has ever been published. It has remained unanswered. Indeed, we are not aware that any attempt has been made to invalidate the soundness of its reasoning. As a law writer, Judge Story has been regarded as one of the ablest of his school, which was that of the straightest type of "Federalists" of the elder Adams's party. His commentaries are a good deal marred with the peculiar partisan doctrines of that school of politicians; indeed, they may be looked upon as a plea for the severe political principles which ruled the administration of President John Adams. The

Alien and Sedition Laws, which have long since passed into a by-word of reproach, will still find abundant support in Judge Story's *Commentaries*. He perpetually insisted on construing the Constitution from the standpoint of that small and defeated party in the Federal Convention which wanted to form a government on the model of the English monarchy in everything but the name. This party was powerful in respectability and talents, but weak or few in numbers – and after it was so signally defeated in the Constitutional Convention, it still held on to its monarchical principles, and sought to invest the new government with kingly powers, notwithstanding the Constitution had been constructed upon principles entirely opposite to its doctrine. In a letter of U. S. Senator John Langdon, of New Hampshire to Samuel Ringgold, of the date of October 10th, 1800, he says: "Mr. Adams certainly expressed himself that he hoped, or expected to see the day when Mr. Taylor, and his friend, Mr. Giles, would be convinced that the people of America would never be happy without a hereditary Chief Magistrate and Senate or at least for life." Mr. Rose, a Senator from Pennsylvania, and a friend of the Adams party, left the table of Mr. Hollines, of Philadelphia, when "the Constitution of the United States" was given as a toast. John Wood, the historian of the time, speaking of the principles of the Federalists, says: "They bestowed unbounded panegyrics upon Alexander Hamilton, because this gentleman acted the part of Prime Minister to the President. They thought the administration and the government ought to be confounded and identified; that the administration was the government, and the government the administration; and that the people ought to bow in tame submission to its whim and caprice." Writing of Mr. Adams, Jefferson says: "Mr. Adams had originally been a Republican. The glare of royalty and nobility, during his mission in England, had made him believe their fascination to be a necessary ingredient in government. His book on the American Constitution had made known his political bias. He was taken up by the monarchical Federalists in his absence, and was by them made to believe

that the general disposition of our citizens was favorable to monarchy.”

At a dinner given by Mr. Jefferson, when he was a member of Washington’s Cabinet, he declares that, “after dinner, Mr. Adams said: ‘Purge the British Constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect Constitution ever devised by the wit of man.’ Hamilton replied: ‘Purge it of its corruption, and give to its popular branch equality of representation, and it would become then an impracticable government. As it stands at present, with all its supposed defects, it is the most perfect government that ever existed.’” Mr. Jefferson adds: “Hamilton was not only a monarchist, but for a monarchy bottomed on corruption.” The Federalists having a majority in Congress, passed an act to continue in force during the administration of Mr. Adams, declaring that “if any person should write or publish, or cause to be published, any libel against the Government of the United States, or either House of Congress, or against the President, he shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.” A great many editors, and other gentlemen, were imprisoned under this act. Even to ridicule the President was pronounced by the corrupt partisan judges a violation of the law. Men were beaten almost to death for neglecting to pull off their hats when the President was passing, and every man who did not instantly prostrate himself before the ensigns of Federal royalty, was denounced as the enemy of his country. The following letter, addressed to President John Adams by the merchants of Boston, shows to what lengths that party had dragged the public mind in the direction of monarchy:

We, the subscribers, inhabitants and citizens of Boston, in the State of Massachusetts, deeply impressed with the alarming situation of our country, and convinced of the necessity of uniting with firmness at this interesting crisis, beg leave to express to you, the Chief Magistrate and su-

preme ruler over the United States, our fullest approbation of all the measures, external and internal, you have pleased to adopt, under direction of divine authority. We beg leave also to express the high and elevated opinion we entertain of your talents, your virtue, your wisdom and your prudence; and our fixed resolution to support, at the risk of our lives and fortunes, such measures as you may determine upon to be necessary for promoting and securing the honor and happiness of America.

Any one can see that men who could address the President after this fashion, had a great deal less respect for the restraints and limitations of a written Constitution, than for the will and force of individual power. That was the drift of a certain portion of public opinion in America at that time. But the tyrannical excesses of that party soon brought it into such odium, that it was driven from power by the election of Mr. Jefferson to the Presidency. Though defeated, its partisans never ceased to labor to drag the Constitution away from its Democratic foundations, by giving the Constitution a construction utterly antagonistic to the intentions of the Convention which framed and of the States which adopted it. The great vice of the Federalists consisted in desiring to clothe the Federal Government with almost monarchical powers; whereas the States had carefully and resolutely reserved the great mass of political power to themselves. The powers which they delegated to the Federal Government were few, and were general in their character. Those which they reserved embraced their original and inalienable sovereignty, which no State imagined it was surrendering when it adopted the Constitution. Mr. Madison dwelt with great force upon the fact that “a delegated is not a surrendered power.” The States surrendered no powers to the Federal Government. They only delegated them. The powers of the States are original. Those of the Federal Government are only derived and secondary; and they were delegated, not for the purpose of aggrandizing the Federal Government, but for the sole purpose of protecting the rights and sovereignty of “the

several States.” The Federal Government was formed by the States for their own benefit. The Federal Government is simply an agency, commissioned by the “several States” for their own convenience and safety. In the Convention of Virginia, Patrick Henry said: “Liberty, sir, is the primary object. Liberty, the greatest of all earthly blessings – give us that precious jewel, and you may take away everything else.” And, with an eloquence more powerful than that which shook the throne of Macedon, he demonstrated that the battles of the Revolution were fought, not to make “a great and mighty empire,” but “for liberty.” It was for liberty – for the liberty of the people of the “several States” that the Federal Government was established. Not for the kingly grandeur and power of government, but for the happiness, safety and liberty of “the people of the several States.” Nothing could possibly be stronger than the determination pervading the mind of the Federal Convention to sacrifice no iota of the essential sovereignty of the States in the formation of the general Union. This feeling was most happily expressed by Chief Justice Ellsworth, of Connecticut, in, the Convention that framed our Constitution, in the following words:

I want domestic happiness as well as general security. A General Government will never grant me this, as it cannot know my wants, nor relieve my distress. My State is only as one out of thirteen. Can they, the General Government, gratify my wishes? My happiness depends as much on the existence of my State Government as a new-born infant depends upon its mother for nourishment.

In the Convention of Massachusetts, Fisher Ames said:

A consolidation of the States would subvert the new Constitution, and against which this article is our best security. Too much provision cannot be made against consolidation. The State Governments represent the wishes and feelings, and local interests of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers

of our violated rights.

Such were the views and sentiments of the men who framed and who adopted the Federal Constitution. But Judge Story belonged to another school of politicians, and his *Commentaries upon the Constitution* were written in the interests of the Consolidationists, who have ever insisted on giving that instrument an interpretation in harmony with their wishes and ideas. This review of Judge Upshur, however, does not leave a single point of the Federalistic heresy unanswered. It will ever stand as a text-book of the true theory of our government. We are confident that no book has ever appeared in this country which so thoroughly meets the demands of the present hour. With this book in his hand, the Democratic statesman or orator is armed at every point against the sophistries of the foes of State sovereignty and self-government. There is no vital point which it does not discuss and settle upon the basis of invulnerable truth.

The Notes which we have added, we hope, will be found useful to the unprofessional reader. They will show that the author's reasoning is confirmed by our Constitutional history and by the early decisions of the Supreme Court.

In every instance, our own Notes are distinguished from those of the author by our initials – "C. C. B."

PREFACE BY THE AUTHOR



The book to which the following pages relate has been for several years before the public. It has been reviewed by 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 inquire 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 now have 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 favorable 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 reestablish.

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 regard to clearness, and a proper reference to authorities, where authorities are relied on.

CHAPTER ONE

The Character of Judge Story's Commentaries on the Constitution



It came within the range of Judge Story's duties, as Dane 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. 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 of 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 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 mis-understood, 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.¹

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

1. General Hamilton one of the principal writers of the *Federalist*, was undoubtedly at heart a monarchist. On more than one occasion he plainly avowed himself such. In the convention which framed the Constitution, he exerted his commanding influence to impart centralized, consolidated, or monarchical powers to the Federal Union. But, signally failing in this, in his subsequent interpretations of the Constitution he did what he could to bend the instrument to suit his views. Judge Story and Chief Justice Kent, and, earlier, Chief Justice Jay, belonged to the same political party as General Hamilton. They were Federalists, and so odious did this party become to the American people, that it was driven out of power at the expiration of old John Adams's single presidential term in 1800. — [C. C. B.]

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 cast 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 they 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 ante-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 analytical. 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 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 analytical 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 on 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 Judge Story 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.