YALE
LAW JOURNAL

VOL. V JUNE, 1896 NO. 6

THE ORIGINALITY OF THE UNITED STATES CONSTITUTION.

The striking and now famous remark of Mr. Gladstone—"As the British Constitution is the most subtle organism which has ever proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man,"—has given good cause for much discussion. Our most recent constitutional commentator has expressed himself on this point thus: "It was well said by Gladstone that 'the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.' Sciolists and bookworms have sneered at the phrase as overlooking the indebtedness of the Federal Convention to the teachings of history But the great statesman of our own time well appreciated the value and the character of the work of the statesmen of the eighteenth century. Their product was new, if anything can be new, unless we destroy the word and adopt the hyperbole of Solomon. The result was as much an invention as were the first cotton-gin and telephone."[1] A reviewer of the work of this commentator has also written with special dogmatic energy, "As a whole the Constitution is just what Gladstone called it—'the most wonderful work ever struck off at a given time by the brain and purpose of man.'"[2] We think, however, the prevailing view of Gladstone's remark among our jurists and scholars has been to the effect that it was quite wide of the mark, a hasty or superficial generalization, which the fame of its author has alone floated into the accept-

[1] Foster, Com. on Const. 1, Sec. 6.

[2] Prof. Henry Pratt Judson in Am. Hist. Rev., April, 1896.

ance of the uncritical or uninformed. The very emphatic opinions of the two authorities now mentioned make it possibly worth while to examine the point again.

Much depends in this case as in most cases on the meaning attached to words. If an agreed or true meaning can be found for the words used here by Mr. Gladstone, and if the same can be done for the language used by Messrs. Foster and Judson, as above quoted, much will have been done towards fair argument and correct conclusions.

Here, as is so often true, the language used is open to more than one interpretation. What does Mr. Gladstone mean by (1) "struck off"; (2) "at a given time"; (3) "by the brain and purpose of man?" The whole remark is rhetorically an antithesis; two contrasted ideas are set over against each other —the growth or method of the British Constitution, and the growth or method of the United States Constitution. The measure of one member of an antithesis may often be found in the other. The idea of the British Constitution, intended by the writer here, is an organism resulting from successive historical facts and influences. The contrast to this is the idea of the United States Constitution as a work done and completed at a single point, or within a narrow limit of time. The antithesis is clear—it is between a slow growth on the one hand and a quick manufacture on the other. The one Constitution is represented as resulting from a long train of events and forces, the other as created, "struck off," brought into being, at once, by the effort of a few men working to that end.

Mr. Foster's idea, if his language is faithful to his idea, is, or seems to be, that Mr. Gladstone had reference, in his description of the Constitution of the United States, to the mere combining of elements—principles, practices and methods—already known and developed, and as in a mechanical invention like the cotton-gin or the telephone, producing a general result properly called new, or in the phrase of the law, "novel." Manifestly Mr. Gladstone had no such notion in mind. His language will not suffer such a meaning. He meant, not that the so-called authors of our Constitution put together political principles and practices already tried and known or familiar, but that they originated political principles and practices or methods not before known or discovered. He meant this by his antithesis—the British Constitution the product not of individual men acting consciously to such end at a given time, but the product of impersonal forces moving forward in the manner of history to an observed result.

Under such a view his antithesis is as a mere piece of rhetoric quite faultless; but if he meant to contrast the processes and results of the impersonal forces of history with the processes and products of mechanical combinations and contrivances, resulting in what is known in patent law as "novelty," his antithesis loses its point and propriety.

What Mr. Gladstone says may, therefore, be correctly stated thus: The British Constitution is the slow result of historical forces and influences; the Constitution of the United States is the sudden result of the creative genius of our men of 1787. Perhaps Professor Judson had such a contrast in mind, but manifestly Mr. Foster had not. The latter's reference to the cotton-gin and the telephone shows quite another thought. Mr. Gladstone's thought is, not that those who drew the Constitution of 1789, were *rédacteurs*, but creators, discoverers, originators, whereas the British Constitution was not only unwritten, but, as it were, uncreated and unoriginated, save as a result of influences which no one man, or assembly or generation of men, had controlled or guided.

This statement or vindication of Mr. Gladstone's rhetorical attitude and real meaning has been necessary in order that we may see whether his view be accurate or superficial, illuminating or misleading. What we maintain, in opposition to Mr. Gladstone's notion, is that the Constitution of the United States is as truly the result of progressive history, as truly an organism proceeding from antecedent historical ideas and principles, as is the British Constitution; that the work of the authors of the Constitution of 1789, was not, by contrast, creative and original, but very strictly of a selecting, arranging, and combining nature—a really synthetical, and not an originating, work.

And we may say here, as well as later, that the work of the men of 1787 called for and showed wisdom, sagacity and prescience of an order as high as if they had set themselves to contrive and create new methods and principles of government. In truth, it showed far greater wisdom. On another occasion the present writer thus expressed his view of this point:

"The wisdom of the authors of the Constitution of 1789 lay, be it ever remembered, in following no fascinating theories of natural right and justice, nor brilliant philosophical speculations upon the nature of society and government, but in a profound knowledge and application of the familiar, home-bred, hard-won, slowly maturing results of the political life and experience of the American people as colonies and as States under the Confederation. The authors of our political and judicial systems wrought with materials furnished by that long, symmetrical, Providential training which, through a century and

a half of feeble and futile confederation had schooled them for their sublime task of preserving and perpetuating their local governments through familiar local agencies, and yet binding them all, by indivisible bonds, into one harmonious Plural Unit. Honored be their memories! Their abounding and unselfish patriotism; their grave and serene trust in their cause; their lofty and invincible faith in human nature; their brave and unshaken confidence in our capacity for self-government; but more than all, except their antique and severe public virtues, their simple reliance on what history and experience had taught them!"[3]

What, now, are the evidences which go to determine the issue we have above stated? Generally, they are the facts which support the general conclusion that all the methods and principles, with but one important exception, which were combined and wrought together into the Constitution of 1789, were well known and, we may fairly say, familiar, in theory and practice before 1787. The exception is the method provided in our Constitution for the election of President and Vice-President. It is even stated on good authority that "that was borrowed from the Constitution of Maryland, which provided a similar method for the election of its Senators."[4] And it is a most significant and impressive fact that this exception is really the only feature of our Constitution which has become essentially a dead letter, the central idea of this provision having long ago been superseded in practice by a method directly opposite in its effects to the intended effects of the provision of the Constitution. The scheme of the Constitution, in this respect only, may have been an invention "as much as were the cotton-gin and the telephone," but for want of any roots in the past, as well as for want of harmony with democratic tendencies, it fell and passed into innocuous desuetude, while the other chief features of the Constitution, having "proceeded from progressive history," have lived and grown strong and stronger.

Perhaps before going farther it may be well to ask what is meant by the idea which is expressed by the phrase, "proceeded from progressive history." It is rather a misty and grandiose phrase, and in that respect quite characteristic of its author—resounding rather than accurate, rhetorical rather than carefully descriptive. Reduced to common speech, it seems to be intended and understood to exclude to some great degree and in some strict sense the idea of conscious aimor plan or agency of individual men or generations of individual men. It appears to

[3] Const. Hist. as seen in Am. Law, 283 (Putnams, 1889).

[4] Henry Wade Rogers, LL.D., in Const. Hist. as seen in Am. Law 9, citing 2 Pitkin's "Political and Civil History of the United States," 302.

be used to connote an order or evolution of results which is directed by higher powers than man's. We do not quarrel here with this abstract notion, but it does not appear how it can be truly applied to the British Constitution in any special sense. It would at times seem that those who use Gladstone's phrases, if not their author himself, conceive of history as some great irresistible force or current, like a pre-historic glacier, carrying in its mass huge boulders which it deposits here and there, which remain as landmarks and guides to succeeding generations of men. Some such vague conception seems to be in the minds of many when the discourse is of the British Constitution. It is far from the fact. The British Constitution has been the work of individual men, of separate human hands, of distinct generations of men—statesmen, rulers, philosophers, jurists—all real men whose personalities and names are known and registered. In no other sense is it an historical deposit like a glacial rock or collection of rocks, than that many of the men who wrought it out and fashioned it lived in far-back tracts of history and were representatives of long successive periods of time. The British Constitution is not written in one document; its text is nowhere accessible as a whole; its muniments and titles and documents, most of them, cannot be inspected in their original forms like enrolled Constitutions or legislative acts of the day, but this is the most superficial of differences. Progressive history, if it means more than the successive efforts and results of human agents largely self-directed to self-determined ends is a misleading and deceptive phrase, even when applied to the British Constitution.

Our thesis now is—that the separate features of the Constitution of the United States were well-known before 1787, and were in truth products of history, "proceeded," if one pleases so to call it, from "progressive history." The proper limits of this article will not permit much detail in confirmation of this view, but a little may well be said to that point.

Our federal Union is a union of individual States, each State a civil organism complete within itself, once sovereign and independent, and still an organism distinct from the Union or nation. The States existed before the Union and might and doubtless would exist as States after the Union should have passed away.[5] From the States came the Union under the Constitution. The original, historic unit was the State—Massachu-

[5] Chief-Justice Chase in Lane Co. *v.* Oregon, 7 Wall. 76, 78, and in Texas *v.* White, 7 Wall. 700, 725.

setts, Virginia, Connecticut, for example. Any adequate study of the origin of our Union and nation must begin with the States. The American State, Connecticut for instance, is as free and true a growth of history as England herself. She certainly was not "struck off, at a given time, by the brain or purpose of man." She was born and grew, and was not hand-made, or man-made, in any other sense than England was.

Out of States, thus organically produced, came the Union. The tendency and thought which pushed on all the efforts at a union of the colonies from 1735 to 1776, and finally resulted in the Union of 1789, was the same historical force which had, moving more slowly, made England, by successive steps out of the village-community, the hundred, and the shire. The attempts at Union in this country were not satisfactory till by a course of training and education—as truly historical, or "proceeding from progressive history," as any force that can be named—the people of the States, recognizing the necessity of a more perfect Union, rose to the great conception and work of our federal Union. Thus, the Union of 1789 is a strictly historical result. The manner and form of the Union are not less so. The men who sat in convention in 1787 did not contrive the union, nor did they contrive its form. These grew out of antecedent experiences of the people and took form from the same influences. The seed-thought of this Union is a power which can act and be empowered to act on the individual citizens, instead of the States as political corporations. Did Hamilton, or Madison contrive this idea or this Union? No more than Henry VIII. or Elizabeth contrived the consolidation of England. One may search the records of the Convention of 1787, nowhere to find any direct discussion of this idea. The idea was there before the Convention met. It demanded, through the people, simple recognition. It received recognition, and thus the Union became a fact.

The people, on the other hand, enured to local or self-government, by their constant experience as colonists, had come to associate their freedom with their local governments. Here again was the germ of the remarkable feature—the hiding-place of the strength of our system—which gave to the Union only such powers as were needed for certain clearly-defined ends, and retained all else for the original States or the people. Who of the men of 1787 contrived or "struck off" this idea? No man; because the idea was already born, already warm and fixed in the hearts and convictions of the people.

The great general features of the three departments of the government—legislative, executive and judicial—and the division of the legislative into two chambers, were in no sense new or untried or unfamiliar; they were the well-known features of most of the State governments. The national judiciary, especially the Supreme Court, is often remarked as peculiar, and Sir Henry Maine has called it, by overstatement, "a virtually unique creation of the founders of the Constitution,"[6] but even this was only the application to the National government of a feature or method already familiar to the States before 1787. In 1787 eleven of the thirteen States had written constitutions, and courts were empowered to pass upon questions of the conformity of legislative enactments or executive acts, to the fundamental constitutions. Says an able writer recently: "Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when in conflict with their respective constitutions, before ever the Supreme Court of the United States asserted a similar power in 1803, in the great case of Marbury *v.* Madison," [7] and this writer gives abundant historic evidences of the fact thus stated.[8] This practice or principle was not known at that time in Europe, nor is it now. "In short," says the last-quoted authority, "there is not in Europe to this day a Court with authority to pass on the constitutionality of national laws."[9] But in this country, as has been said, the idea and practice were well established in 1787.

The general constitution of the two houses of Congress was plainly after the models of the House of Lords and House of Commons in England, with only such changes as were already familiar in most of the States. The special basis of representation in the lower House—population—was in accordance with State practice, while equal representation in the Senate was but a concession to the smaller States, due to the exigencies of the occasion and in no sense a work of constructive ingenuity or wisdom. The great provision requiring all revenue bills to originate in the lower House is merely a copy of the hard-won right of the Commons of England.

It has been observed by many eminent writers on this sub-

---

[6] Pop. Gov't, p. 217.

[7] Cranch. 137.

[8] Henry Wade Rogers, LL.D., in Const. Hist. as seen in Am. Law, 9, 10.

[9] *Id.*, 11.

ject, that the United States Constitution is marked, as was no other Constitution before it, by a system and series of limitations of all the powers conferred by it. It is true. Our Constitution is unique in this respect among all national constitutions of the past or present, but is this feature an invention or creation of the men of 1787? Plainly not; the idea was already found in the State constitutions. The idea, too, was deeply wrought into the thought and purpose of the people of 1787, by their recent experience. The unlimited powers of Parliament and King in England had forced them into rebellion, and when their representatives sat down in the convention of 1787 to put into express form a constitution of government, no mandate of the people, no thought of the hour, was more imperative and controlling than that of excluding from every nook and corner of the constitution the idea or possibility of absolute power. Hence, the great series of limitations which creates so large a field of our constitutional law—constitutional limitations—is not an invention or thought of any member of the convention of 1787, but is in a special and eminent sense the result of history, of historical facts and influences which moved men in that convention, as it also then moved the whole people of the United States.

In this way we might go over each item of the Constitution, and the result would be in substance the same. The strength, the vitality, the permanence, the wisdom, and the glory of our chart of national government, lie in the fact that, not unlike the British Constitution, but strictly like it, it is in truth the expression of rules, methods, and principles developed by history, made familiar by long experience, and therefore suited to the wants and ways of the people. In our Constitution, as truly as in any human document or memorial, we see the results of history and the control of experience. It cannot be correctly described as "a work struck off at a given time by the brain and purpose of man," nor can it be contrasted with the British Constitution as being less the product of historical forces and influences.