HANNIS TAYLOR

[1851—]

CORRY MONTAGUE STADDEN

"BY their fruits ye shall know them" is a test infallible and ancient, and the editor of the *North American Review,* applying it to Dr. Hannis Taylor, lawyer, diplomatist, and author, epitomized the achievements of his energetic and illustrious career in the following language:

"Hannis Taylor, who is recognized throughout the world as one of the most eminent living authorities on constitutional history and constitutional law, was born in New Berne, North Carolina, in 1851. Having graduated at the university of his native State, he was admitted to the Bar and achieved great distinction in the practice of his profession. He was appointed Minister to Spain by President Cleveland in 1893. The wide literary fame gained for Mr. Taylor by his great work on 'The Origin and Growth of the English Constitution' was materially enhanced by his treatise on 'International Public Law,' which has been declared by a high authority to be the most exhaustive work of its kind issued in this country since Dana's 'Wheaton.' In recognition of the service which he had rendered to literature and learning by the publication of these works, the Universities of Dublin and Edinburgh simultaneously conferred upon Dr. Taylor the honorary degree of LL.D. He recently published a third treatise, of a like scholarly and comprehensive character, on the 'Jurisdiction and Procedure of the United States Supreme Court,' upon which the Justices of that court put the imprimatur of their high approval and commendation. Mr. Taylor represented the United States before the Alaskan Boundary Commission."

Dr. Taylor's parents were Richard Nixon and Susan Stevenson Taylor, who descended from two colonial families that settled in North Carolina prior to the Revolution. From his mother, a woman of strong intellect and rare culture in English history and literature, he inherited those literary traits which have given him enduring fame, while from his father, who was brother to William H. Taylor, the inventor of submarine armor, he acquired habits of industry and perseverance, more to be desired than fortune. Taylor, as a boy, was a diligent student, whose soul was fired with the ambition to go through college and achieve big things in the world's affairs. He

entered the University of North Carolina, but before he had completed his course, financial misfortunes overtaking his family, made it necessary for him to return home. There, at the age of seventeen, he took up the study of law, which was completed at Mobile, Alabama, to which place his father removed; and soon after his eighteenth birthday he was admitted to practice in the lower courts, receiving with his license from the circuit judge a temporary appointment as prosecuting attorney for the adjoining county of Baldwin. From that day law and literature took possession of his ample and capacious mind; and, as he matured, philosophy directed his industry, attaining for him most remarkable success in his chosen field.

'The Origin and Growth of the English Constitution,' which was Dr. Taylor's first important work, was begun shortly after he had attained his majority, and to its composition he devoted about twenty years. His was the first attempt ever made by an American to write the history of the Constitution of the mother country, from which our system of constitutional law has been derived. The appearance of the first volume in 1889 challenged the admiration of Professor Rufus King of the Cincinnati Law School, who wrote: "I cannot help congratulating our country upon the singular coincidence that in return for Mr. Bryce's tribute to the 'American Commonwealth,' you have so quickly responded with your profound analysis of 'The Origin and Growth of the English Constitution.' I remember nothing like it in the history of letters."

On both sides of the Atlantic the work was instantly declared to be a success. Professor Montagu Burrows, of the University of Oxford, in commendation of it, wrote: "No other book exhibits so clear a view of the English Constitution, broadening down from precedent to precedent." The University of Dublin, by a formal vote of its Senate, adopted it as a text-book, in preference to the English works, after conferring upon its author the degree of Doctor of Laws. Its popularity continues undiminished, and it is now in the eighth edition. *The Review of Reviews* said of it in 1898: "The completion of the second volume rounds out one of the most important recent achievements of American scholarship."

The greatest compliment, however, that came to Dr. Taylor because of this work, was from President Cleveland, who in 1893 tendered to him the mission to Spain, which in other days had been offered to those illustrious authors, Washington Irving and James Russell Lowell. For four years and a half Dr. Taylor remained at his post in Madrid, without leave of absence, performing the most delicate and exacting duties imposed upon him by the insurrection in Cuba and the strained relations between Spain and the United

States, due to American sympathy for the insurgents' cause, which at length precipitated the Spanish War. During a period of two years his residence in Madrid was surrounded night and day by a guard of soldiers. At the conclusion of his arduous service he returned to the United States, proud of the unqualified thanks which had been bestowed by Presidents Cleveland and McKinley, and of the fact that his every act had had the warm support of the Department of State.

Four years and a half of exciting diplomatic experience centered Dr. Taylor's mind upon the subject of international law; and the outcome was the publication, in 1901, of his 'International Public Law,' a work now recognized as a standard authority throughout the world. The *Harvard Law Review* has characterized it as "the best American work since Wheaton," and the *Law Quarterly Review* of London has said: "This book is, probably, on the whole, the fullest treatise in the language on its subject." In special recognition of this work the University of Edinburgh conferred upon Mr. Taylor its LL.D. and at his laureation Sir Ludovic Grant, professor of international law in that institution, said: "I do not hesitate to say that Dr. Hannis Taylor's 'International Public Law,' replete with historical learning, characterized by philosophical breadth of view, and distinguished for the classical stateliness of its diction, entitles its author to a conspicuous place in a galaxy which includes the names of Wheaton and Kent and Halleck, of Woolsey and Dudley Field."

Shortly after the publication of this work, the Government of the United States retained Dr. Taylor as an expert in international law, to represent it as its Special Counsel in all cases before the Spanish Treaty Claims Commission; and subsequently retained him as one of the three counsel who presented and argued its case in London before the Alaskan Boundary Commission. His employment as special counsel before the Spanish Treaty Claims Commission has made it possible for him to live in Washington and to build up an important practice before the Supreme Court of the United States. The outcome of that experience is his work on the 'Jurisdiction and Procedure of the Supreme Court of the United States,' which appeared in 1905. Unusual tributes to the merits of that work have been paid by Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Peckham, and Mr. Justice Day. Mr. Justice Harlan has said: "Your book on the 'Jurisdiction and Procedure of the United States Supreme Court' is most admirable in every way, and will become a necessity to every lawyer who practices in our Court, or who prepares a case which may come here for final determination."

Dr. Taylor's most original and ambitious work is entitled 'The

Science of Jurisprudence,' a treatise in which the growth of positive law is unfolded by the historical method, its elements being classified and defined by the analytical, published by the Macmillan Company in 1908. In that work he has announced a discovery in the history of Roman and English law of world-wide importance. This discovery, set forth in a single sentence, is that "out of the blending of Roman and English law there is rapidly arising a typical state-law system whose outer shell is English public law, including jury trials in criminal cases, and whose interior code is Roman private law." The Honorable James Bryce and Thomas Erskine Holland, the great jurist of Oxford, were "struck with the truth and originality" of this conclusion. This new thought as to the world-wide fusion now going on between Roman and English law, when submitted to the great Romanists of Germany—Dr. Rudolph Sohm and Dr. Von L. Mitteis of the University of Leipsic—elicited from them most significant personal compliments and congratulations and sincere professional commendation of his "scholarly and valuable work." To Señor Nabuco, now Brazilian Ambassador at Washington, this new conception seemed "eminently suggestive and full of potentialities for new scholars"; and to Dr. Westlake, the great authority on international law at the University of Cambridge, "a sane and fruitful generalization."

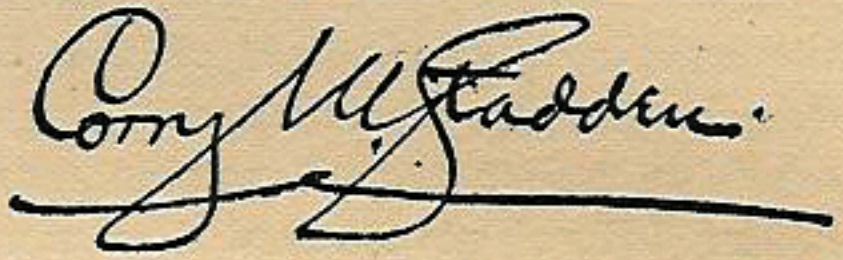
Judge Shackelford Miller, Dean of the Jefferson School of Law, and a specialist in comparative law, said in a review: "Indeed, it must be said that 'The Science of Jurisprudence' is the most important contribution to the scientific side of law that has appeared on this side of the ocean since Maine's 'Ancient Law' was published in 1861. The generalization of the fusion of Roman and English law now first worked out by Dr. Taylor is an entirely new contribution to legal and political science. Like the accurate and profound generalization of Maine, that summed up the agencies of legal progress in Fiction, Equity, and Legislation, this new and equally accurate and profound generalization of Dr. Taylor must be readily accepted by students of jurisprudence everywhere."

If a State may be compared to a watch, its outer shell or case represents the State's political constitution or public law, while its inner mechanism represents the State's interior code of private law. With that illustration clearly in view it is easy to comprehend at a glance the nature of the union of two distinct systems of law, in a new combination, as that union now appears in the state-law systems of Continental Europe and Latin America. Everywhere the outer shell of the State, the public or constitutional law, is English by conscious adoption since the French Revolution, while the inner mechanism or private law is everywhere Roman. If Napoleon were

now alive he could say—"this union of the strongest parts of the two great law systems of the world has all taken place under my eyes." That fact should help us to realize the suddenness with which the two survivals—Roman private law and English public law—after ripening for ages in isolation, have united in a new combination. Mr. Taylor's discovery and portrayal of this notable phenomenon in the history of legal development have been justly characterized by Judge Shackelford Miller as "an entirely new contribution to legal and political science." Beyond question a sense of its importance will grow with time.

Scarcely less notable is the work done by Dr. Taylor in settling the paternity of our Federal Constitution. As all the world knows, the existing Constitution of the United States, drafted at Philadelphia in 1787, embodies, as Tocqueville says, "a wholly novel theory," so unique that it can no more be confounded with any preceding federal government than a modern mogul engine can be confounded with an ancient stage-coach. No system of government devised by man was ever so distinctly an invention. Suddenly a new kind of federalism came into existence, resting upon entirely new principles. These new principles are set forth in the epoch-making document of thirty octavo pages published by Pelatiah Webster, February 16, 1783, at Philadelphia—a document just as authentic as the Declaration of Independence or the Constitution itself. In it every material element of the great invention is worked out in minute detail. For years before they began their work, the draftsmen of the three "plans" held in their hands the text of the great invention, which passed through such "plans," as conduits, into the existing Constitution of the United States. Those who shall hereafter strive to take away from Pelatiah Webster the honor of having made this free and priceless gift to the country that has for so long a time neglected and forgotten him, must be prepared to meet the concrete issue of historical fact involved; they must be prepared to name some particular man who announced some one of the four basic principles in question, *prior to February 16, 1783.* As that can not be done, the cavilers must forever hold their peace. Strange, indeed, it is that the most important document connected with our constitutional history should, at this late day, be presented to the jurists and statesmen of the United States as if it were a papyrus from Egypt or Herculaneum. It has been the good fortune of Mr. Taylor to unearth the epoch-making document, and to place it in its proper light. At his request it was reprinted in May, 1908, after an interval of 116 years, as Senate Document, No. 461 (Sixtieth Congress, first session), which contains Mr. Taylor's commentary upon Pelatiah Webster's work. The eminent French critic and historian, Ch. V.

Langlais, has said: "History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. There is no substitute for documents: no documents, no history." The great document in question, so long neglected and forgotten, tells its own story and settles the paternity of the Federal Constitution of the United States. It dispels the nebulous and impossible assumption that the greatest of all political inventions had no inventor. One of the most eminent English historians now living, after a careful examination of Senate Document, No. 461, recently wrote to Mr. Taylor: "You have, I think, definitely established the claim of Webster to the paternity of the American Federal Constitution." That statement will pass without challenge.



THE BLENDING OF ROMAN AND ENGLISH LAW

Preface to 'The Science of Jurisprudence.'

THE group of scholars who founded something more than a century ago the science now known as Comparative Philology revolutionized the thought of the world not so much through the marvelous revelations of that science as by the discovery of the new method of investigation that made such revelations possible. Out of the application of the new method to fresh subject-matters have since arisen Comparative Mythology, Comparative Politics, and Comparative Law. By the aid of the two sciences last named a flood of light has been shed upon the processes through which the aggregate, generally known as government and law, emerged from progressive history in the nations that have made the deepest impress upon civilization.

The most important single outcome of Comparative Politics—which may be called the science of state building, the science of constitutions—is embodied in the discovery that the only two conceptions of the state known to the ancient and modern world have been and are represented by aggregations or federations in which the starting point was the village community. The unit of state organization, from Ireland to Hindostan, was the naturally organized association of kindred; the family swelled into the clan which, in a settled state, assumed the form of the village community represented, in a general way, by the γένος of Athens, the *gens* of Rome, the *mir* of Russia, the clan of Ireland, the *mark* or *gemeinde* of the Teutonic nations which appeared in Britain as the *tun* or township. When we turn to the Mediterranean world in which the Science of Politics was born we there find that the ancient conception of the state as the city-commonwealth was the product of aggregations in which the village community was the unit or starting point. In Greece the first stage in the aggregation is represented by the gathering of a group of village communities or clans into a brotherhood (φρατρία); the second by the gathering of φρατρίαε into a tribe; the last by the gathering of the tribes into a city-state. In Italy the village com-

munity appears as the *gens*. Out of the union of *gentes* arose the *curia;* out of the union of *curiæ* arose the tribe; out of the union of tribes arose the city-state. It was upon the soil of Italy that a group of village communities grew into a single independent city-state that centralized within its walls the political power of the world. Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries—the state, as known to modern international law. The homogeneous race called Teutonic was broken up into an endless number of political communities or tribes which stood to each other in a state of complete political isolation, except when united in temporary confederacies. The typical Teutonic tribe—the *civitas* of Cæsar and Tacitus—represented an aggregation of hundreds; while the hundreds represented an aggregation of village communities. The parallel between the Teutonic, the Greek, and the Latin tribe seems to be complete. The γένος, the *gens,* the *mark,* represent the same thing, the village community; while the φρατρία, the *curia,* the hundred, seem to represent the same thing, a group or union of village communities. Out of the aggregation of such indeterminate groups or hundreds arose the tribe itself. But here the parallel ceases. In the Mediterranean peninsulas the resultant of a union of tribes was the city-state; in Teutonic lands the resultant of a union of tribes was not a city at all, but a nation. When we turn to the existing European state system, built up in the main out of the fragments of the empire of Charles the Great, we there find that the modern conception of the state as a nation is the product of aggregations in which the village community is the unit or starting point. The typical modern state in Britain, known as England, represents an aggregation of shires; each shire an aggregation of hundreds; each hundred an aggregation of village communities or townships. The power to subdue and settle a new country, and then to build up a state by this process of aggregation constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. As Tocqueville has

expressed it: "In America . . . it may be said that the township was organized before the county, the county before the State, the State before the Union." After thus unfolding the origin and growth of the political constitutions of states, ancient and modern, Comparative Politics has undertaken to classify and label such constitutions as buildings and animals are classified and labeled by those to whom buildings and animals are objects of study. Students of Comparative Politics and students of Comparative Anatomy, beginning with the incomplete data embodied in traces and survivals, supply the deficiencies and work out results through substantially the same process of reasoning.

Not until the history of the outer shells or constitutions of states had been thus subjected to critical examination at the hands of Comparative Politics, did Comparative Law undertake to unfold the history of such bodies of interior or private law as have existed as distinct codes. The outcome is the discovery that the world has so far produced only five distinct systems of law: (1) the Roman; (2) the English; (3) the Muhammadan; (4) the Hindoo; (5) the Chinese. An attempt has been made to indicate the limits of the several geographical areas to which each is confined. By that survey the fact is established that about nine-tenths of the civilized world is now dominated by Roman and English law, in not very unequal proportions. It thus appears that the student of the Science of Jurisprudence, as defined herein, is directly concerned only with Roman and English law, from whose histories are to be drawn practically the entire data with which he has to deal. For that reason, in the central chapters of this work, entitled respectively "The External History of Roman Law" and "The External History of English Law," an effort has been made to outline, as progressive and unbroken developments, first, the growth of the code that grew out of the primitive customs of the great Italian city; second, the growth of the code that grew out of the primitive customs of that group of Teutonic tribes which founded in Britain the English commonwealth. When the external histories of these two world codes are thus unfolded, side by side, the coincidences, the likenesses are striking indeed. Each consisted at the outset of a body of customary law which became rigid and unelastic the

moment it was reduced to written formulas. Long after that stage was reached each state grew into a world power with vast territorial dependencies. Thus each state was forced so to expand its meager and unelastic code of archaic law as to meet the manifold and ever changing conditions of the after-growth. That result was worked out in each by identically the same agencies—legal fictions, equity, and legislation. Each state as it advanced manifested its conservatism by promoting law reform mainly through the agency of judge-made law—the Roman *responsa* and the English case-law system presenting parallel processes of innovation in existing rules, made only after exhaustive discussion as to particular deficiencies revealed by the facts of individual cases. As old institutions became obsolete they were, as a general rule, permitted simply to die out, without formal abrogation. Thus at Rome as in England out of the old was slowly evolved, bit by bit, the new. There is, however, an utter lack of similarity between the two world systems of positive law when antiquity, fullness, and philosophical completeness are taken into account. So far as antiquity is concerned Roman law, after a thousand years of historic growth, had passed into the second stage of codification before the Teutonic conquest and settlement of Britain was fairly begun. Ethelbert had ruled the men of Kent only some five years in 565, when Justinian died. And yet in thinking of any possible influence of Roman forms and institutions in England prior to the Norman Conquest, there can be no question of Justinian's Corpus Juris, which was as such still a new thing in the Eastern Empire itself at the time of Augustine's mission to Kent. How the Teutonic state that arose in Britain, known as England, was affected in later times by successive infusions of Roman law will be indicated hereafter.

The lost text of Gaius, which has shed great light on portions of the history of Roman law previously most obscure, was discovered at Verona in 1816 by the historian Niebuhr, just at the moment when the founders of the historical school of jurisprudence were beginning to assert their influence. Niebuhr communicated the fact to Savigny, who pointed to Gaius as the real author. He, as well as his immediate followers, dealt only with Roman materials. The founder, or rather, consolidator of the historical school, applied that method

only in a very limited way to the general theory of politics. When in 1803 Savigny published his *Das Recht des Besitzes,* or the right of possession, jurists perceived that the old uncritical study of Roman law was at an end. Instead of considering law as the creation of the will of individuals, Savigny maintained it to be the natural outcome of the consciousness of the people, like their social history or their language. In his *Geschicte des Römischen Rechts,* the first volume of which appeared in 1815, is embodied an emphatic protest against the habit of viewing the law of a nation as an arbitrary creation, not connected with its history and condition. In his famous pamphlet (*Beruf unserer Zeit*), published the year before, he expressed the then new idea that law is a part and parcel of national life. Down to that time comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale. The almost unbroken soil of that rich and inviting field was to be turned over by the plow of one who revealed wonders. Sir Henry Sumner Maine, whose *Ancient Law* appeared in 1861, said in his preface that—"the chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." In the masterly demonstration that followed he showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures; that they cannot be treated as mere incidents in the general history of the societies where they occur. The works of these epoch-making men, the one German, the other English, have resulted in the creation of what may be called the natural history of law. But long before the advent of Maine the torch lighted in Germany by the historical school of jurisprudence had passed into England by the hand of John Mitchell Kemble. He was the real path breaker into the jungle of early English institutional history. To him belongs the imperishable honor of being the first to bring to light the most valuable of the early records, and to apply to their interpretation the rich results of German research into the childhood of the whole Teutonic race. After studying under the brothers Grimm at Göttingen, Kemble was the first to reject every suggestion of Roman influence at the outset, and to perceive

clearly the all-important fact, now generally admitted, that the national life of the English people, both natural and political, began with the coming of the Teutonic invaders who, during the fifth and sixth centuries, transferred from the continent into Britain their entire scheme of barbaric life. The historians who have enlarged and refined upon his work have put it beyond all question that the German element is the paternal element in the English system, natural and political. The Roman elements which have been since absorbed, whether by conscious adaptation or otherwise, *ab extra,* are not of the essence of the system, however largely they may have entered into the private law side of it. Specialists who have followed Kemble have devoted themselves rather to English institutional history than to that of private law for the obvious reason that of the two it is by far the most distinctive and far-reaching in its influence. An exception must, however, be made in favor of Pollock and Maitland's *History of English Law,* whose excellence is universally recognized.

Emphasis has been given at the proper place to the fact that the public law of Rome, constitutional and administrative, was rejected because inapplicable to the new conditions that arose when the state system of modern Europe, in which the state as the nation is the unit, swept away and superseded the ancient state system in which the city-commonwealth had been the unit. What did survive was the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. It is that system of Roman private law which became the basis of the codes of the Continental nations, whence it passed into Mexico, Central and South America, to certain states in South Africa, as well as to Scotland and Louisiana. On the other hand, it is the public law of England that has had the widest extension, and is exercising by far the most potent influence by reason of the fact that the English constitutional system stands out as the accepted political model after which have been fashioned the many systems of popular government now existing throughout the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English

Parliament in a spirit of conscious imitation. Not, however, until the typical English national assembly, embodying what is generally known as the bicameral system, had been popularized by the founders of the federal republic of the United States, was it copied into the Continental European constitutions. Nothing is more interesting in the institutional history of the world than the approaches now being made to the constitutional system of the United States by Mexico and the states of Central and South America. In some instances in Latin America single states approach very closely, so far as their constitutional law is concerned, to the English original as modified by American innovations; in others, federal states are organized on the American plan, with certain reservations. But no matter to what extent a Mexican, Central, or South American state may adopt English constitutional law in the structure of its outer shell, its interior code of private law is invariably Roman—a fact equally true of every Continental European state whose constitution has been founded on the English model. Jurists who view the existing state system of the world as a connected whole cannot fail to perceive, when their attention is specially directed to the subject, that, within a century, in the blending of Roman and English law there has occurred a phenomenon that marks a turning point in the history of legal development. After centuries of growth Roman public law, constituted and administrative, perished, leaving behind it the inner part, the private law, largely judge-made, which lives on as an immortality and universality—as the fittest it survives. In the same way and for the same reason English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government. The phenomenon in question is presented by the blending now going on between the strongest elements of Roman and English law in the state systems of Continental Europe, in those of Latin America, and in that of the state of Louisiana. If the existing state system of France is taken as a typical illustration, we there find the outer shell of the state, the system of parliamentary government, to be purely English through deliberate and recent imitation, while the interior code of private law is essentially Roman. The same thing may be said of every other Continental European

state having a parliamentary government. In the state system of Louisiana we find the outer shell of the state to be English as modified by American innovations, while the interior private law is based on the Code Napoleon. The same thing is true of the seventeen Latin-American republics which have adopted English constitutions in the North American form, while retaining the private law drawn from Roman sources. Is it not therefore manifest that out of this blending of Roman and English law there is rapidly arising a typical state-law system whose outer shell is English public law, including jury trials in criminal cases, and whose interior code is Roman private law? This far-reaching generalization, now submitted to the consideration of students of the Science of Jurisprudence for the first time, so far as the author knows, has been subjected in advance to the searching and approving criticism of a few of the most eminent jurists of the English speaking world.

The representative systems that sprang up as a part of the constitutional machinery of the several provincial states founded by English settlers upon American soil were in no proper sense the result of imitation. Like the states themselves of which they were a part, they were the predestined product of a national process of reproduction. The constitutional history of these provincial states does not begin with the landing of the English in America in the seventeenth century, but with the landing of the English in Britain in the fifth. When, after the severance of the tie that bound these provincial states to the mother country, the time came for them to confederate, they simply reproduced the ancient type of a federal union as then existing between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of Switzerland, and upon the plains of Germany. The fundamental principle underlying all such fabrics was the requisition system, under which the federal head was simply endowed with the power to make requisitions for men and money upon the states or cities composing the league for federal purposes, while the states alone, in their corporate capacity possessed the power to execute and enforce them. In their first effort American statesmen exhibited no fertility of resource whatever in the making of federal constitutions. The first fabric simply embodied the very old story of a confed-

eration with the entire federal power vested in a single assembly, without an executive head, and without a judiciary. In 1787—eleven years after the drafting of the first federal constitution, which proved to be a failure—the world was startled by the announcement that a second had been drafted, embodying a radical departure from all preceding experiments. As Tocqueville has expressed it: "This constitution, which may at first be confounded with federal constitutions that have preceded it, rests in truth upon a wholly novel theory which may be considered a great discovery in modern political science." As the second constitution has no prototype in history, Gladstone made no mistake when he declared it to be "the most wonderful work ever struck off at a given time by the brain and purpose of man." No other viable constitution was ever so distinctly an invention; its basic principles were discovered suddenly by some man or by some body of men. And yet, despite that fact, there has been no curiosity to discover who was the real inventor of the greatest of inventions. The popular and un-critical idea has been that, in some mysterious way, the invention was made as a composite work by the leaders who sat in the Federal Convention during the 125 days that intervened between May 14th and September 17th, 1787. The impossibility of that nebulous theory is manifest the moment we remember it is admitted, on all hands, that the finished product was the outcome of four kindred "plans"—each embodying the basic principles of the great invention—which were carefully formulated some time beforehand. We know that Madison, the draftsman of the most important of the "plans," was at work upon it at least a year before the Convention met. The question is therefore inevitable—From what common source did the draftsmen of the four "plans" draw the path-breaking invention which was the foundation of all of them? Let it be said to the honor of those draftsmen that no one of them ever claimed to be the author of that invention. Neither Madison, nor Charles Pinckney, nor Sherman, nor Ellsworth, nor Hamilton, nor any of their biographers, ever put forward such a claim in behalf of any one of them. There is now no excuse for doubt upon the subject, as the complete and conclusive evidence is contained in a single document, as authentic as the

Constitution itself, published at Philadelphia, February 16th, 1783, by Pelatiah Webster, who claimed at the time the invention as his own. As early as 1781 he perceived that the first federal constitution was a failure. Then it was, as Madison tells us, that he proposed the calling of a "Continental Convention" for the purpose of making a new one. Webster says in express terms that he was fully of opinion that "it would be ten times easier to form a new constitution than to mend the old one." In that frame of mind the great one set himself to work to create an entirely new and unique federal system which should supersede the first constitution of 1776. In his epoch-making paper, published more than four years before the Federal Convention of 1787 met, he propounded to the world, as "the original thoughts of a private individual, dictated by the nature of the subject only," the four novel and basic principles upon which the great creation now reposes:—

(1) The principle of a federal government operating directly on the individual, instead of upon the states as corporations; (2) the division of a federal government into three departments—legislative, executive, and judicial; (3) the division of a federal legislature into two chambers on the bicameral plan; (4) a federal government with delegated powers, the residuum of power remaining in the states. For some years before they began their work the draftsmen of the four "plans" held in their hands the text of the great invention, which passed through such "plans," as conduits, into the existing Constitution of the United States. Those who shall hereafter strive to take away from Pelatiah Webster the honor of having made this free and priceless gift to the country that has for so long a time neglected and forgotten him must be prepared to meet the concrete issue of historical fact involved —they must be prepared to name some particular man who announced some one of the four basic principles in question, *prior to February 16, 1783*. If that cannot be done, the cavilers must forever hold their peace. The puerile argument that a great many people were thinking about such things about that time fails to meet the issue at all. As it has been the good fortune of the author to unearth this epoch-making document and to place it in its proper light, it is printed as an appendix to this work so that students of the Science of Politics every-

where may see for themselves the tentative form in which appeared an invention that has revolutionized federal government throughout the world.

Not until Comparative Politics and Comparative Law had collected the data was it possible to draw from them the set of principles constituting the Science of Jurisprudence, whose function it is to extract from the mass of detail, embodied in the several existing systems of positive law, the comparatively few and simple basic legal conceptions that underlie them all. Or, as Austin has expressed it, "The proper subject of general or universal Jurisprudence is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions." As the science of positive law is a Roman creation, Jurisprudence a Roman invention, we must, according to the Historical Method, begin with an examination of the actual conditions at Rome out of which the science in question arose, in order to illustrate by the facts of history the nature of the processes through which it works out its results. An effort will be made hereafter to demonstrate that Rome's relation to commerce caused an influx of foreigners whose need of law compelled, as early as 242 B.C., the appointment of a *prætor peregrinus,* whose duty it became to administer justice between Roman citizens and foreigners and between citizens of different cities within the Empire. As such prætor could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. Thus we encounter what is perhaps the earliest application of Comparative Law, employed for the purpose of extracting from the codes of all the nations with which the Romans were brought into commercial contact, a body of principles afterwards known as the *jus gentium,* the law common to all nations. With the growth of the dominion of Rome and the consequent necessity for the extension of the code of a single city to many cities, there was a natural craving for the discovery of legal principles capable of universal application. In response to such a demand Comparative Law collected the data, and a certain branch of Greek philosophy supplied the

theory upon which they could be worked into a consistent whole. Such was the origin and such the nature of the first set of principles which can be said to embody a philosophy of law. As such principles were the result of generalizations upon elements common to the laws of all nations, their existence was supposed to indicate a similarity in the needs and legal conceptions of all peoples. The philosophic element was the Stoic conception of a law of nature, a universal code from which all particular systems were supposed to be derived and to which all tended to assimilate.

If it be true that the Science of Jurisprudence is directly and practically concerned only with the data to be drawn from the histories of Roman and English law, investigation need not be extended beyond the areas in which these two systems exist, singly or in combination. The effort has been made herein to outline, by the aid of the Historical Method, the growth of law, public and private, within such areas. Not until the synthesis has ended, not until the growth of all the ingredients that enter into the final composite has been traced, however faintly, should the analysis begin. Not until the history of the law systems of the civilized world, with which we have to deal, has been drawn out by the aid of the Historical Method, should an effort be made to classify and define the elements that enter into them by the aid of the Analytical. Until we have ascertained how law grew, it is impossible to understand what it is. The final outcome so far as this treatise is concerned, is embodied in the following conclusions: (1) as law is a living and growing organism which changes as the relations of society change, the Science of Jurisprudence must look behind the law into those social relations which are generally recognized as having legal consequences, in order to note, as Austin has expressed it, "those resemblances between different systems which are bottomed in the common nature of man"; (2) in the light of knowledge thus obtained this science must extract from the mass of details embodied in the several systems of positive law enforced by the political sovereignties composing the family of nations the comparatively few and simple basic ideas that underlie the endless variety of legal rules; (3) such a science is from its very nature an applied and progressive science whose generalizations

must be made anew whenever the data change through the creation of new systems of positive law; (4) no matter whether we look to the ancient or to the modern world, it appears that Comparative Law has ever been the subsidiary science that collects the data to which the Science of Jurisprudence has been and must ever be applied. Not until after that collecting agency has gathered the materials can Jurisprudence, as an analytical and applied science, formulate an orderly scheme of the purposes, methods, and ideas common to every system of positive law. There is no good reason to doubt that through the application of the incipient Science of Jurisprudence to the data collected by Comparative Law, Roman jurists were able to extract from the various codes of the cities with which Rome came into commercial contact a set of principles embodying the general conceptions of legal right then dominant in the ancient world and known as the law of the nations—*jus gentium*. After the lapse of twenty centuries, a new system of codes, far greater in number and far more voluminous in detail, have come into existence, from which the jurists of to-day should be able to extract, through a reapplication of the Roman method, the comparatively few basic principles that underlie them all. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a modern law of the nations, that is, for a uniform conception of legal right, capable of embodiment in a code of substantive and adjective law, which must emerge if at all, from existing codes, like the single and typical face in a composite photograph to which many features have contributed their influence.