

reviewed by RICHARD BISHIRJIAN

Justice Story's Influence on American Law

Joseph Story and the American Constitution: A Study in Political and Legal Thought, by James McClellan. Norman, Okla.: University of Oklahoma Press, 1971. Pp. 413. \$12.50.

JOSEPH Story, Associate Justice of the Supreme Court of the United States from 1811-1844, is in the forefront, alongside Chief Justice John Marshall, of those early 19th century national supremacy jurists who contributed to the consolidation of national power, and the authority of the Supreme Court, in a time when there was good reason to believe that such consolidation was necessary. From the perspective of contemporary Constitutional development, however, Professor McClellan argues that Joseph Story laid the legal foundations for the complete decline of the power and authority of the States in our own day, and the subsequent change in form of the American Constitution from a federal republic, in which the field of action of the States over their own citizens was virtually unlimited, to a democratic republic, in which state citizenship is virtually meaningless, and the authority of the States is rigidly checked by the Supreme Court. Ironically, Story's jurisprudence is of special interest because the principles of order he articulated are principles fundamentally opposed to those which we commonly associate with the secularized and democratic republic which,

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with Story's unwitting help, America has become.

Story's view that the Constitution adopted the English common law was, in essence, a rejection of the Enlightenment doctrines of "natural rights" and the social contract, as useful explanatory concepts of the origin of American political order. Story knew that political communities did not erupt out of a state of nature. The origin of political community, he wrote, is in "the primitive establishment of families." The American political community, therefore, was not founded in a vacuum, but by colonists who brought with them the ordered society, customs, and more importantly, Christianity. It followed in his mind that the English common law also, founded as he believed it was upon the Christian religion, was the law of the land, except where inapplicable to American conditions, or preceded by acts of the new governments. Though it was generally held by his contemporaries that state jurisprudence rested on a common law basis, Professor McClellan shows how Mr. Justice Story argued successfully the further points that the Supreme Court had a voice in determining what the common law rule of a State should be, that the common law was a source of jurisdiction in cases dealing with common law crimes against the United States, and, that the Constitution itself is grounded in the common law. What he sought to avoid by this "judicial activism" was not only the tyranny of a formless body of law in a yet to be formed American nation, but also the excesses that have been the result of reading the Bill of Rights as statements of inalienable natural rights when in truth they are political, and thus limited, rights rooted in the English common law.

In a brilliant chapter, "Christianity and the Common Law," Professor McClellan traces the development of the principle of "Incorporation," which is the means by which the Court has, since as early as 1925, reversed the Constitutional principle that the Bill of Rights limits only Congress. Because this reversal is still being applied in current cases, few scholars have analyzed it with sufficient objectivity that their conclusions can be appreciated as precise analytical judgments, and not campaign slogans. Professor McClellan marshalls historical, theoretical, and legal materials in his assessment of the true relationship between the first eight amendments and the Fourteenth Amendment in the American political system. At the core of his analysis is the theoretical distinction between political rights and natural rights. Because Mr. Justice Story understood that the Constitution absorbed the Christian natural law tradition, he believed that the rights protected by the Bill of Rights were principles of justice grounded in an experience of God who is the origin of justice. Such a view of these principles does not lend them to use in ideological warfare against the basic institutions of the American political community.



Joseph Story

Thus Story fought Jefferson's attack on the Virginia Episcopal Church because he did not believe that the freedom of religion lent itself to an attack on religious institutions. Story's view of freedom contained an appreciation of the obligations which limit man's freedom.

This emphasis on moral obligation is visible also in Story's defense of property. Story thought that contracts, a form of property, morally obligated men to deal fairly and truthfully with one another. He believed that property was a keystone of society because the action of making a contract with the intention of meeting its obligations was "conformable to the will of God, which requires all men to deal with good faith, and truth, and sincerity in their intercourse." It is important to give this aspect of Story's thought its rightful place. The theological formulations which underpin his political thought are representative of the religious culture of the America he sought to serve. Later jurists, particularly in the so-called "laissez-faire" era of the Supreme Court, would equally defend the inviolability of contracts. Story, however, was not one to read an economic theory into the Constitution; he sought only to articulate the implications for commerce of the religious culture of the American people. That religious culture, he thought, was opposed to the theocratic views of the early Puritan colonists. The totalitarian intolerance which the Puritans established in New England was rejected by Americans, who, like Story, saw social order and tranquility to be found in the separation of church and state. He believed, however, that though the State should not prefer one religion over another, it ought to encourage the growth of Christianity.

It is in the nature of things political, of course, that the legal and moral authority which Story consistently sought for the Supreme Court of the United States, when no longer transparent to the community of belief and practice which his decisions symbolized, would become the instrument of jurists inspired by other beliefs, and other constitutional theories. Professor McClellan,


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James McClellan

lan, argues, however, that the reversions of the constitutional balance intended by the Founders, particularly those accomplished by the application of the restrictions of the Bill of Rights upon the States, if we pay

attention to the Story legacy, may be seen to be more revolutionary than any acts that occurred in 1776. This is a formidable insight, because it indicates the degree of swiftness with which a revolution of legal attitudes can be accomplished. In reading the chapters of Professor McClellan's book which deal with Story and his times (Chapter One); Story's *Commentaries* on the Constitution (Chapter Two); and Story's concept of the nature of the Union (Chapter Six), this political scientist had an opportunity to see how far the American legal profession has declined. The difference between Mr. Justice Story and Mr. Justice Douglas, is the difference which separates Attorneys Webster, and even Darrow, from their contemporary professional colleagues such as Kunstler. My only reaction then is amazement that the 19th century, particularly bleak in philosophy and political theory, in the profession of law, at least, maintained standards worthy of serious study today. By this book Professor McClellan has made a first attempt at recovering the concepts of political order which contemporary America so badly needs.

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