

which necessarily flourish or wither together." Bronowski proposes that we discover the identity of man by examining both the fruits of his knowledge and the activity of knowing.

It is tempting to be pedantic and fault Bronowski on specific technical points. For example, he does not always make it clear whether he is discussing the activity of knowing or the results of that activity. In addition, his argument generally attempts to persuade by repetition rather than by elaboration. But pedantry is out of place in this case. There is much to learn here, and what these essays lose in the way of technical excellence they gain from their scope and vision which result in the enrichment of the reader's own perspective. These essays are interesting and provocative reading and are worth the respectful attention of professional philosophers and laymen alike.

Reviewed by HUGH MERCER CURTLER

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### *The Story Tradition*

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

THE STUDY of constitutional law is one of the great traditions of political science research in both Europe and America. Such investigations were for a long time central in any inquiry into public philosophy or the system of values dominating a community. In graduate work a generation or more ago the Ph.D. in political science had to be grounded in constitutional history, both English and American, and in American constitutional law. A superficial history

of political philosophy and political thought as represented by Alexis de Tocqueville and *The Federalist* were also part of the training of the young Ph.D. If Professor McClellan is correct in his judgments—and I believe that he is—Joseph Story is the great originator of such study, and of the legal erudition which later became a foundation of graduate study. As a consequence there emerged at the end of the last century the new discipline of political science and public law. A few years ago when Professor Edward S. Corwin was at his scholarly height, he was a notable genius in the succession of scholars who have contributed to the tradition of research founded by Justice Story. And when we consider the exhaustive and indefatigable research of Professor McClellan, we must recognize in him a worthy successor of Professor Corwin, and a late creative mind in the Story tradition. All of these scholars would agree that there are profound meanings in the Constitution which are part of our consciousness of being Americans.

In every sense McClellan's book is an achievement of contemporary scholarship. It would seem that every scrap of evidence in documentary collections and every item of printed material has been carefully studied. This alone would distinguish the work, but in addition there is extraordinary care in using a vast mass of quotations. There are new interpretations of Story's ideas and of his influence on his contemporaries, such as John Marshall and Daniel Webster. Because of the range of the research, almost every important issue in the development of the American tradition is reexamined with impressive results.

Following a chapter outlining the education and career of Story, Chapter II deals with the issue of natural law in Story's mind, and his conceptions of the relation of natural law to the Constitution, Christianity, and to the Common Law. However, it is apparent that Story was not well-versed in the medieval uses of natural law. His treatment seems to spring from the rationalist tradition of the eighteenth century and

from classical writings, rather than from any contributions of medieval philosophy. In Chapter III it is argued that Christianity forms an integral part of the Common Law, and with qualifications as to the Common Law both Christianity and the Law form a basic substratum of the American legal and political order. Chapter IV affirms in principle that the Common Law was adopted with due applicability into the American legal system. The defense of property in various forms is one of the central themes in all of Story's work. Property and contract are explored in Chapter V, which is a chapter that should be read by anyone who today wishes to reaffirm the right to all forms of property, the right of inheritance, and the right to be protected in one's property against the incursions of legislators and bureaucrats. The theory of the nature of the Union (Chapter VI) is to many one of the most important of all the elements in Story's legacy. Some have argued that Story more than any other writer of the Union laid the foundations of the Civil War. This arises from his theory of a kind of historically organic union, which in its time was highly important. His steady rejection of the rights of the states and his stream of judicial arguments for national constitutional and judicial supremacy over the states tended to convince the northern intellectuals of the iniquity of the South.

Professor McClellan concludes his study with an evaluation of "The Story Legacy." Story touched and shaped all of the great issues in the growth and formation of the American tradition. The manuscript sources show repeatedly that it was Story who was influencing the northern leaders of his time and not they him. These men wrote to Story for information and argument. He assembled the history and precedent of the law for use by John Marshall and his brethren of the Supreme Court, and Daniel Webster copied his argument from the *Commentaries* in his reply to Hayne. But in a larger and truer sense Story used the best of European social philosophy and transmitted it to alert American minds. He

was the bridge by which European social philosophy of the late eighteenth and early nineteenth centuries came to America. This philosophical thought was in the end the great weapon by which the earlier bed-rock conservatism of *The Federalist* and the interpretation of the Constitution held back divagations of the Jeffersonians and the Jacksonian democracy. As McClellan has observed:

Behind Story's penchant for eighteenth-century ideas and ideals, epitomized by Burke, William Paley, the Augustan poets, Jane Austen, and Scott, all of whom he read and admired, was an insistence upon order and restraint, the essence of the classical spirit.

For one whose primary interest is not constitutional law, McClellan's volume is a deft and encyclopaedic treatment of the emergence of the issues in American tradition. It is clear that the utopianism of democratic liberalism has not been realized in American history, just as the fear of popular democratic degeneration into anarchism was not a sound prophecy. But it is equally clear that the law, judicial interpretations, the principle of a moral order which binds men regardless of their votes, Christianity, and the Anglo-American legal tradition have insisted on sanity when social madness seemed irresistible. Still, in the revolutionary era in which we live there are fears of political excess as the old restraints are dissolved in an age of disrespect for history, or, indeed, an age in which the blows showered on progress have withered moderation and justice.

In our time natural law has been reduced to physical force, but through most of Western history it has been a rational and divine statement of permanent moral principles. As Story said in his unsigned article for Francis Lieber's encyclopaedia:

Natural law, or, as it is commonly called, the law of nature, is that system of principles, which human reason has discovered to regulate the conduct of

man in all his various relations. Doctor Paley defines it to be the science, which teaches men their duty and the reasons for it. In its largest sense, it comprehends natural theology, moral philosophy, and political philosophy; in other words, it comprehends man's duties to God, to himself, to other men, and as a member of political society.

McClellan emphasizes that Story lifts intact much of his theory of natural law, rights and duties from Paley's *Moral and Political Philosophy*. And it becomes particularly clear that his theory is in conflict with John Locke. Some of the impressive sections of the book deal with the interpretation of Locke and the demonstration of the number of people who rejected Locke either in the contract theory (as in Story's writings) or in his conception of rights.

However, in Story's legal philosophy one of the most significant contributions was the overriding centrality of the law of nature. The moral law of Christianity, the principles of the Constitution and the Common Law, and all the traditions of justice from earlier systems of law, including, of course, the Roman Law, formed together the great corpus of justice associated with the law of nature in human history. Again, there

. . . is the underlying assumption that the natural law requires a representative form of democratic government, a vigorous and independent judiciary, separation of church and state, and the enforcement of the obligation of contracts according to the common law principles of interpretation.

As Story saw it, the American national system as interpreted by the Supreme Court should be an embodiment of natural law, and in fact a kind of *Code de la Nature*. Summarizing, McClellan observes:

Stripped of their legal covering, Story's opinions on the subject of separation of powers and states' rights reveal the mind of a man with a "mystical

sense of nationalism," who is consumed by the menace of an unrestrained democracy. Like Marshall he considered democracy as something of a euphemism for mob rule and looked upon most elected politicians as unprincipled opportunists, catering to the base emotions of a rowdy populace.

Apparently both Marshall and Story believed in property qualifications for voters. Neither would accept the "natural rights" theory against the "natural law" tradition of our government. For them the Constitution would not in any case express a past continuity with John Locke. McClellan cautions, however:

All this is not to argue [he says in following the judgment of Willmoore Kendall], that the Constitution is anti-democratic or undemocratic, but to suggest that, on the whole, there is scant evidence to support the claim that the Constitution fits comfortably within the modern natural rights tradition or that it is the finished product of Locke's teaching.

In our time it would appear that the passion of American nationalism is fading. Ours is no time for the mystical nationalism of Joseph Story. The supremacy of the nation over the states as advanced by Joseph Story came to be largely accepted in the North, though it might seem there was far less historical evidence for it than for the Southern analysis of the documents of ratification that brought the nation together. In a series of decisions that still stand as the modern basis of judicial supremacy, Story weakened the federal principle and retracted the powers of the states. The consequences of the Civil War joined unbreakably with the nationalism preached in legal opinions and in the *Commentaries* of Joseph Story.

As the revolutionary ignores the law, as the law fades from the revolution, the conservative must inevitably be driven back

to the classical spirit exemplified in Story, and to those upon whom he leaned for the philosophical and religious meaning of American institutions. Conservatives like McClellan—and this reviewer—must inevitably seek to restore the Constitution to its golden age in legal creativeness, as we may discover it in the mind of Joseph Story. But much of this readoption of Story's legal philosophy must be accompanied by a critical evaluation, such as Story himself applied to British legal institutions when he studied their applicability to American conditions.

Reviewed by FRANCIS C. WILSON