

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES;

WITH A PRELIMINARY REVIEW
THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES,
BEFORE THE ADOPTION OF THE CONSTITUTION.

BY JOSEPH STORY, LL. D.,
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IN THREE VOLUMES.

"GOVERNMENT IS A CONTRIVANCE
OF
HUMAN WISDOM
TO
PROVIDE FOR HUMAN WANTS."
BURKE.

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VOLUME I.

BOSTON: HILLIARD, GRAY AND COMPANY.
CAMBRIDGE: BROWN, SHATTUCK, AND CO.

1833.

INTRODUCTION

This reprint of Joseph Story's 1833 Commentaries on the Constitution of the United States provides a welcome revival for a significant work in the literature of American constitutionalism. Today, a century and a third after Story's book first appeared, the fundamental law of the American republic is under more intense scrutiny than at any time since 1789, when the Constitution first became effective. Most of the urgent questions of present day domestic policy turn on the division of power to govern between the states and the national government. Allocation of national effort by means of heavier national taxation and selective federal expenditure; increasingly comprehensive control of the nation's economy under national legislation effectuated by federal administrators; more and more strict supervision of the administration of justice by federal courts which often irk state prosecutors and judges; readjustment of race relations, of labor relations, of land use in urban complexes--all relate in one way or another to a shift in governmental power from the local to the national.

Every change in government restricts some men for the benefit of others, and men so restricted are apt, under our system, to cry out that the change is unconstitutional. Story's Constitution is immensely useful for evaluating the arguments of those who contend that diminished local authority and the shift toward national

control are counter to our historic constitutional ways. Story wrote, of course, before the Civil War, and before the Thirteenth, Fourteenth, and Fifteenth Amendments had institutionalized that war's results and had emphasized the diminution of state sovereignty which the Union victory had

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demonstrated. He wrote before the dramatic efflorescence of technology, of transportation and communication, which followed the peace of 1865, and which made inevitably necessary an increasing federal control of all the ensuing aggregate of mechanical and human apparatus--railroad trains, electric power lines, radio broadcasts do not stop at state lines. And he wrote before the Income Tax Amendment of 1913 had increased federal power to canalize public revenue and expenditure, thereby still further centralizing the total government of the nation. But the perceptive reader of Story's 1833 book sees that the author, a justice of the United States Supreme Court and Dane Professor of Law at Harvard, was a fully committed believer in Chief Justice John Marshall's broad concept of national power. The details of federal concern have changed, but Story was ready, a century and a third ago, to find the government of the United States adequate to the tasks of its time and to find in the Supreme Court ample powers to carry out its share of expanded national duties. His Constitution treatise has a lesson for our own time.

Story was born in Marblehead, Massachusetts, in 1779, graduated from Harvard in 1798, read law in Samuel Sewall's office in Marblehead, was admitted to the Massachusetts Bar in 1801, and began practice in Salem. Essex County was a strong center of the John Adams Federalists. Young Story turned instead toward Jefferson's Republican Party, ancestor of the present Democrats, a move undoubtedly fortunate for his later career. He was elected to the state legislature in 1805 and to the House of Representatives in 1808. In the time not allotted to his law practice and political activity, he began his career as a writer on legal subjects. He started with an annotated Selection of Pleadings in Civil Actions (1805), and then went on to produce American editions of standard English treatises on commercial paper, on the law of shipping,

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and on legal procedure--areas in which American lawyers still followed English precedent. In 1810 Story appeared in the Supreme Court as successful counsel for one John Peck in the first case in which that Court held invalid a state statute on the ground that it violated the United States Constitution.¹ In 1811, when Story was only thirtytwo years old, President Madison appointed him an Associate Justice of the Supreme Court of the United States.

The work of the Supreme Court itself was much lighter in 1811 than it is now, but the individual justices were then required to go on circuit in various parts of the United States, where, as circuit justices, they presided over trials in the circuit courts and heard appeals from the federal district courts. Thus Story not only sat on the Supreme Court in Washington several months each year, but he also held circuit courts in New Hampshire, Massachusetts (part of which became Maine in 1820), and Rhode Island. With all of these judicial duties, he nevertheless continued his writing. In 1829 Harvard appointed him Dane Professor of Law on the understanding that, like Blackstone at Oxford before him, he would not only lecture on various legal topics, but would publish those lectures as treatises. Harvard also contemplated that Story would remain on the Supreme Court, and he thus continued both as associate justice and as professor of law until he died in September, 1845.²

In January, 1832, Story published the first offshoot of his Dane professorship, a book on the Law of

Bailments. This was a practical treatise, not novel, useful in its day,

1. *Fletcher v. Peck*, 6 Cranch 138 (1810). Peck had deeded lands in the State of Georgia to Fletcher. The Georgia legislature had passed a law holding Peck's title invalid. Fletcher sued Peck for selling lands he did not own. The Supreme Court held the Georgia statute invalid because it attempted to "impair the obligation of a contract," in violation of Article I, §10 of the U. S. Constitution.

2. A useful biography is *Life and Letters of Joseph Story*, written by his son, William Wetmore Story.

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now read only by legal antiquarians. A year later he published the second treatise of his Dane chair, the three volume *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*. Of the nine books which Story wrote during his Dane professorship, his *Constitution* has been the most read, the most reprinted.

Story's *Constitution* was not the first American book on the subject. Hamilton, Madison, and Jay had written the *Federalist Papers*, which appeared serially in newspapers in 1787-1788 and which ever since, as published in book form and republished in numerous editions, has remained an invaluable commentary. The first volume of St. George Tucker's 1803 edition of *Blackstone* contained, as a 237-page appendix, a "View of the Constitution of the United States." Thomas Sergeant published his *Constitutional Law* in Philadelphia in 1822; a second edition appeared in 1830. William Rawle published his *View of the Constitution* in Philadelphia in 1825. Rawle's book is now principally remembered because he expressed in it the view that any state of the Union could constitutionally secede if the unequivocal voices of the state's people so determined. Rawle's text was used for instruction at West Point when the men who came to lead the Confederate armies in 1861-1865 were cadets. Kent's *Commentaries* of 1826 and Dane's *Abridgment* of 1823-1829 contained much constitutional commentary. Story was familiar with all these works.

But none of these earlier books had a sweep even approaching that of Story's *Constitution*; no one of their authors had Story's equipment. He had been a young lawyer when the Jefferson-Marshall antagonism came to a head in 1803 in the Supreme Court's *Marbury v. Madison*,³ which established that Court's power to declare an

3. 1 Cranch 137.

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act of Congress unconstitutional--a power which Story vigorously supported thirty years later in his *Constitution*.⁴ He had been counsel in the first case to hold a state statute unconstitutional.⁵ He had sat on the Supreme Court from 1811 while Marshall's doctrines of strong national power were becoming entrenched, in a series of notable opinions, as the very foundations of American constitutionalism. And by 1833 he had mastered the art of authorship. His *Constitution* deserved its immediate popularity.

New American editions appeared in 1851, 1858, 1873, and 1891; the last--the fifth edition--was reprinted in 1905. A French translation appeared in 1843, somewhat abridged, with cross references to Tocqueville and other writers. Latin America during the mid-nineteenth century was trying to develop federal systems on the model of the United States, and Spanish editions of Story's *Constitution* appeared in Buenos Aires in 1860, 1881, and 1888, and in Mexico in 1879. A Brazilian edition, in Portuguese, was published between 1894 and 1896. Story himself, in 1834, brought out an abridged version entitled *The Constitutional Class Book*, intended, as he wrote, for "the higher classes in common schools." His abridgment ran through a series of editions in the middle and later years of the nineteenth century under the amended title, *A Familiar Exposition of the Constitution*.

But by 1905, when the reprint of the fifth American edition of the complete work appeared, the book had already become outdated as a currently useful text on American constitutional law. The increasing use of the Fourteenth Amendment's due process and equal protection clauses as limitations on state economic regulation called for fundamentally revised constitutional texts.

4. §1570 ff. Story explicitly endorses the *Marbury* doctrine, citing the case.

5. *Fletcher v. Peck*, 6 Cranch 87 (1810) .

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Thomas M. Cooley's 1868 *Constitutional Limitations* and its several revised editions undoubtedly replaced Story's treatise in many libraries as a lawyer's working tool. The rise of casebooks for law-school instruction on the Constitution, led by James Bradley Thayer's massive two volume *Cases on Constitutional Law* of 1895, made Story's book less saleable for student use. Westel Woodbury Willoughby's three-volume *Constitutional Law of the United States*, published in 1910, and its "second edition" of 1928, became the standard reference text of the second and third decades of the twentieth century.

But all these scholarly books, from Cooley on, are products of lamp and library. Story on the other hand had lived in the first great formative era of American constitutionalism, had taken part in most of the great Supreme Court decisions which then made up its substance. To a large extent Story's 1833 book attains the status of a primary source. Copies of the first edition are hard to find and costly. A reprint is welcome alike to professional scholars and to those thoughtful laymen who are interested in the constitutional development of the United States.

Arthur E. Sutherland Cambridge, Massachusetts May, 1968

C O M M E N T A R I E S O N T H E C O N S T I T U T I O N O F T H E U N I T E D S T A T E S ; W I T H A P R E L I M I N A R Y R E V I E W T H E C O N S T I T U T I O N A L H I S T O R Y O F T H E C O L O N I E S A N D S T A T E S , B E F O R E T H E A D O P T I O N O F T H E C O N S T I T U T I O N .

**BY JOSEPH STORY, LL. D.,
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.**

IN THREE VOLUMES.

**"GOVERNMENT IS A CONTRIVANCE
O F
H U M A N W I S D O M
T O
P R O V I D E F O R H U M A N W A N T S ."
B U R K E .**

VOLUME I.

BOSTON: HILLIARD, GRAY AND COMPANY.
CAMBRIDGE: BROWN, SHATTUCK, AND CO.

1833.

Entered according to the act of Congress in the year one thousand eight hundred and thirty three, by Joseph Story, In the Clerk's office of the District Court of the District of Massachusetts.

CAMBRIDGE: E. W. METCALF AND CO.
Printers to the University.

DEDICATION

TO THE HONORABLE JOHN MARSHALL, LL. D.,
CHIEF JUSTICE OF THE UNITED STATES OF AMERICA.

SIR,

I ask the favour of dedicating this work to you. I know not, to whom it could with so much propriety be dedicated, as to one, whose youth was engaged in the arduous enterprises of the Revolution; whose manhood assisted in framing and supporting the national Constitution; and whose maturer years have been devoted to the task of unfolding its powers, and illustrating its principles. When, indeed, I look back upon your judicial labours during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning, and the solid principles, which they every where display. Other Judges have attained an elevated reputation by similar labours in a single department of jurisprudence. But in one department, (it needs scarcely be said, that I allude to that of constitutional law,) the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm by its deliberate award, what the present age has approved, as an act of undisputed justice. Your expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory. They are destined to enlighten, instruct, and convince future generations; and can scarcely perish but with the memory of the constitution itself. They are the victories of a mind accustomed to grapple with difficulties, capable of unfolding the most comprehensive truths with masculine simplicity, and severe logic, and prompt to dissipate the illusions of ingenious doubt, and subtle argument, and impassioned eloquence. They remind us of some mighty river of our

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own country, which, gathering in its course the contributions of many tributary streams, pours at last its own current into the ocean, deep, clear, and irresistible.

But I confess, that I dwell with even more pleasure upon the entirety of a life adorned by consistent principles, and filled up in the discharge of virtuous duty; where there is nothing to regret, and nothing to conceal; no friendships broken; no confidence betrayed; no timid surrenders to popular clamour; no eager reaches for popular favour. Who does not listen with conscious pride to the truth, that the disciple, the friend,

the biographer of Washington, still lives, the uncompromising advocate of his principles?

I am but too sensible, that to some minds the time may not seem yet to have arrived, when language, like this, however true, should meet the eyes or the public. May the period be yet far distant, when praise shall speak out with that fulness of utterance, which belongs to the sanctity of the grave.

But I know not, that in the course of providence the privilege will be allowed me hereafter, to declare, in any suitable form my deep sense of the obligations, which the jurisprudence of my country owes to your labours, or which I have been for twenty-one years a witness, and in some humble measure a companion. And if any apology should be required for my present freedom, may I not say, that at your age all reserve may well be spared, since all your labours must soon belong exclusively to history?

Allow me to add, that I have a desire (will it be deemed presumptuous?) to record upon these pages the memory of a friendship, which has for so many years been to me a source of inexpressible satisfaction; and which, I indulge the hope, may continue to accompany and cheer me to the close of life.

I am with the highest respect,
affectionately your servant,

/s/ **JOSEPH STORY.**

Cambridge, January, 1833.

PREFACE.

I NOW offer to the public another portion of the labours devolved on me in the execution of the duties of the Dane Professorship of Law in Harvard University. The importance of the subject will hardly be doubled by any persons, who have been accustomed to deep reflection upon the nature and value of the Constitution of the United States. I can only regret, that it has not fallen into abler hands, with more leisure to prepare, and more various knowledge to bring to such a task.

Imperfect, however, as these Commentaries may seem to those, who are accustomed to demand a perfect finish in all elementary works, they have been attended with a degree of uninviting labour, and dry research, of which it is scarcely possible for the general reader to form any adequate estimate. Many of the materials lay loose and scattered; and were to be gathered up among pamphlets and discussions of a temporary character; among obscure private and public documents; and from collections, which required an exhausting diligence to master their contents, or to select from unimportant masses, a few facts, or a solitary argument. Indeed, it required no small labour, even after these sources were explored, to bring together the irregular fragments, and to form them into groups, in which they might illustrate and support each other.

From two great sources, however, I have drawn by far the greatest part of my most valuable materials. These are, *The Federalist*, an incomparable commentary of three of the greatest statesmen of their age; and the extraordinary Judgements of Mr. Chief Justice Marshall upon constitutional law. The former have discussed the structure and organization of the national government, in all its departments, with admirable fulness and force. The latter has expounded the application and

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limits or its powers and functions with unrivalled profoundness and felicity. *The Federalist* could do little more, than state the objects and general bearing of these powers and functions. The masterly reasoning of the

Chief Justice has followed them out to their ultimate results and boundaries, with a precision and clearness, approaching, as near as may be, to mathematical demonstration. The Federalist, being written to meet the most prevalent popular objections at the time of the adoption of the Constitution, has not attempted to pursue any very exact order in its reasonings; but has taken up subjects in such a manner, as was best adapted at the time to overcome prejudices, and win favour. Topics, therefore, having a natural connexion, are sometimes separated; and illustrations appropriate to several important points, are sometimes presented in an incidental discussion. I have transferred into my own pages all, which seemed to be of permanent importance in that great work; and have thereby endeavoured to make its merits more generally known.

The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. My object will be sufficiently attained, if I shall have succeeded in bringing before the reader the true view of its powers maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government. The expositions to be found in the work are less to be regarded, as my own opinions, than as those of the great minds, which framed the Constitution, or which have been from time to time called upon to administer it. Union subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.

The reader will sometimes find the same train of reasoning brought before him in different parts of these Commentaries.

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It was indispensable to do so, unless the discussion was left imperfect, or the reader was referred back to other pages, to gather up and combine disjointed portions of reasoning. In cases, which have undergone judicial investigation, or which concern the judicial department, I have felt myself restricted to more narrow discussions, than in the rest of the work; and have sometimes contented myself with a mere transcript from the judgments of the court. It may readily be understood, that this course has been adopted from a solicitude, not to go incidentally beyond the line pointed out by the authorities.

In dismissing the work, I cannot but solicit the indulgence of the public for its omissions and deficiencies. With more copious materials it might have been made more exact, as well as more satisfactory. With more leisure and more learning it might have been wrought up more in the spirit of political philosophy. Such as it is, it may not be wholly useless, as a means of stimulating abler minds to a more thorough review of the whole subject; and of impressing upon Americans a reverential attachment to the Constitution, as in the highest sense the palladium of American liberty.

January, 1833.

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