

‘To the Common Sense of the People’: Joseph Story’s Dual Foundation for American Constitutionalism

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Public belief in the foundations of the regime is indispensable in a republic. For many, the foundation of the United States has its roots in liberalism: American society was formed to protect certain inalienable rights through a popular government created to better secure these rights. But questions emerge regarding how one should understand these fundamental rights and where one should look for guidance.¹ The early US republic witnessed a debate on this question. At its core, the disagreement concerned the nature of republicanism. Against arguments that claimed that the principles of the American regime were rooted solely in absolute natural rights philosophy, Justice Joseph Story sought to advance an interpretation of the founding that grounded American republicanism in a historical account of consent. In centralizing consent, he endeavored to provide a firmer foundation for American politics by combining Lockean republicanism with common law principles. Given the popularity of figures like Thomas Jefferson and Andrew Jackson, however, Story had to convince the American people that a theory of American government with roots in the common law

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advanced their republican interests and provided a sure path for the sovereignty of the people.

This article presents Justice Story in a new light by suggesting that his *Commentaries on the Constitution of the United States* is a project of civic education. In this project, Justice Story attempts to construct a richer foundation for American politics by synthesizing the common law with natural rights philosophy. Story suggests two beneficial consequences of his efforts. First, he believes that a stronger attachment and veneration for the US Constitution can be cultivated because the people will recognize their central role in the American experiment. Cultivation of this attachment requires that he root Lockean principles in a common law republicanism that finds its basis in the people themselves. Second, after their education, the people will better protect American self-government by recognizing the formal processes necessary for substantial change—convention and ratification.

Joseph Story is often viewed as a conservative jurist devoted to defending the old republic against a new generation of Americans. Two scholars best articulate this account, R. Kent Newmyer and James McClellan. In their biographical studies of Story, they consider how the justice sought to enshrine Federalist constitutional interpretation in the US Supreme Court as a defense against Jacksonian politics.² This approach is often used to consider Story's influence on later developments in conservative legal thought. One result of this reading is to view Story as a judicial supremacist who believed that the nation could be saved only through judicial statesmanship. For example, Newmyer suggests that Story's interpretive method opened "a broad constructivist highway" dedicated to bringing the Constitution more in line with the promises of the founding.³ These readings direct attention to how Story, a Democratic Republican, came to align himself with the Federalist nationalism of John Marshall.⁴ However, this approach often suggests that while Story is committed to the founding principles, his thought exemplifies a tension present in the founding itself: the unsteady relationship between the republican notion of popular sovereignty and the rule of law.⁵ For McClellan, Story's opposition

to Jacksonian democracy reveals a jurist fundamentally opposed to democracy.⁶

Some scholars have pushed against this interpretation, arguing that it construes Story's republicanism too narrowly. Peter Schotten, for example, asserts that Story's opposition to Jacksonian democracy does not indicate antidemocratic sympathies. Instead, he argues, Story sought to preserve the first principles of the American constitutional order against political movements that threatened to undermine them.⁷ Similarly, H. Jefferson Powell argues that careful attention to the context for the *Commentaries on the Constitution of the United States* reveals Story's constitutional theory as fundamentally majoritarian.⁸ Seeking to clarify Story's relationship to the founding, Powell and Schotten read the jurist exclusively as a liberal thinker.⁹ Therefore, recognizing that standard accounts of the founding have followed Hartz's liberal consensus theory, these scholars have sought to legitimize Story by making him fit within this broader interpretation.¹⁰

Yet other scholars have argued that American constitutionalism is incoherent when divorced from its common law origins. Often this approach is directed by the goal of contextualizing judicial review.¹¹ James Stoner provides the most comprehensive account of the influence of the common law on the American system. Similarly, Gary McDowell seeks to evaluate the judiciary by investigating the Constitution's grant of the equity power to the same judicial body. For McDowell, this is clear evidence of a common law understanding of the nature of law compared with the Hobbesian argument that sought to separate a reconceptualized idea of equity from common law courts.¹² McDowell's study complicates those readings of Story that view him solely as a liberal thinker, since he links Story to the "old way" of equity jurisprudence and provides evidence of Story's tendency to eschew partisan views.¹³

I contend that it is difficult to view Justice Joseph Story solely through the lens of liberalism. Indeed, his two methods—expounding the Constitution in judicial opinions and educating the American public in his *Commentaries on the Constitution of the United*

States—point to his project of synthesizing natural rights philosophy with the common law to provide a stable foundation for American society. Evaluating how Story synthesizes these traditions provides a fuller account of his constitutional thought, which, in turn, allows us to understand his insistence on the higher aims of the American constitutional order—an insistence that put him at odds with some leaders of the founding generation, especially Thomas Jefferson.

While this may be a new way to study Story, this method of analysis, evaluating a theorist's or political commentator's attempt to replace or reform political foundations, is an established approach. In *Designing a Polity: America's Constitution in Theory and Practice*, James W. Ceaser evaluates how Alexis de Tocqueville offers customary history as a surer foundation than natural rights philosophy.¹⁴ Given Tocqueville's use of Story's *Commentaries*, this present study may benefit Tocqueville scholars.¹⁵ Both thinkers present some version of customary history—for Tocqueville, mores, and for Story, the common law—to undergird the public philosophy of the founding. Scholars of Tocqueville have recognized and grappled with his understanding of the necessary structures for legitimate government.¹⁶ Indeed, some scholars argue that Tocqueville presented a foundation for American society that overcame or moderated the excesses of liberalism.¹⁷ These studies point to, but do not address, a key overlap between Tocqueville's and Story's educational projects. For example, Wilson Carey McWilliams discusses the tension in Tocqueville's account between majoritarian forces and the rule of law in American life.¹⁸ Perhaps a similar tension within Story's thought has led scholars to view him as antidemocratic. By evaluating Story's argument for a dual foundation for America, this paper reconsiders his republicanism.

Joseph Story's Methodology

Joseph Story's use of the common law in his judicial opinions is well known. Indeed, one way that scholars have distinguished Story from Chief Justice John Marshall is through his deep knowledge of the common law. A comparison between the jurists' opinions in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), provides

evidence. But a question remains: Is there a place for the common law outside of legal opinions? This question considers Joseph Story as a political thinker and suggests that Story employed the common law differently based on the kind of scholarship he produced. Other scholars have considered the different audiences for Story's works. For example, H. Jefferson Powell and R. Kent Newmyer argue that Story's *Commentaries* should be understood as a supplement to his legal opinions. In this way, the *Commentaries* are primarily meant for lawyers and judges to further their legal education.¹⁹ This understanding suggests that Story's *Commentaries on the Constitution of the United States* should be read like his specialized commentaries on specific areas of the law.²⁰ Indeed, Powell argues that the complexity of the *Commentaries on the Constitution of the United States*, especially Story's systematic exposition of the Constitution with "the most precise terminology and the most discriminating logic," exemplifies his sharp break from Jefferson, who prioritized presenting constitutional thought in a language that the average American could understand.²¹ Powell's description of Story's analytic approach fits the justice's opinions, but it seems to conflict with the stated goal of the *Commentaries on the Constitution of the United States*.²²

In the preface to his three-volume analysis of the national Constitution, Justice Story identifies his intended audience, "the public," or "general reader" (C, v).²³ His audience is telling. Before beginning his study of the origins, logic, and developments of the Constitution, he states his intention for the work: to make accessible to the general American the theory of the national constitution for the purpose of reflecting on its "nature and value." To do this, Story promises that he will avoid any new theories or "novel constructions" of constitutional law (C, vi–vii). Instead, he will turn to common sources, like the *Federalist* and other writings of the founders, and present constitutional principles to "the common sense of the people" (C, vi). Story's intention is the general education of the citizenry; he seeks to step away from the judicial bench and present an understanding of the United States in language accessible to the average American.

Story's presentation of American history and constitutional development, however, does not simplify constitutional theory. At points, he admits that the clearest articulation of constitutional principles is found in a specific court case and therefore inserts significant portions of court opinions.²⁴ But rather than making his style inaccessible to the public, the structure and presentation of the *Commentaries* provide the reader with the necessary preparation to advance to more complicated areas. What may at first appear as an overly systematic account of the origins of American constitutionalism becomes an invitation to the public to advance their understanding of their role in the political community. This invitation points to a secondary goal of the *Commentaries*: by providing a constitutional education to the public, whereby everyday Americans can reflect on the "nature and value" of the Constitution, Story hopes to build an attachment to—a "veneration" of—the document and an allegiance to the union.

This goal for his constitutional commentaries is especially fitting for a jurist devoted to articulating a deeper foundation for the American political order. For Story, the Constitution is the fundamental agreement between the people, an agreement originating from the people and aiming at a perpetual union, the protection of individual rights, and republican self-government. Therefore, by offering his *Commentaries* in 1833, Story seeks to continue for a new generation the public conversations about the American regime that were prevalent in the founding and confederation periods.

Story's Developmental Foundations

Joseph Story recognizes that fusing the common law with Lockean republicanism is a tall order, at least as a work of political philosophy. The primary challenge for Story appears to be the contradiction between a theory of inherited rights and the natural rights basis of Lockean republicanism. Indeed, the idea of a pre-political individual is often considered at odds with many arguments in favor of communities based on custom and tradition.²⁵ Yet Story seeks to overcome this theoretical split by offering a historical

account of the development of the several colonies, paying special attention to the place for the common law within this system. This account focuses on the emergence of an American people—before the Declaration of Independence—who continue through the ratification debates to his present day. Therefore, his historical analysis presents the American people as the driving force behind American sovereignty and highlights their adoption of common law concepts and Lockean republicanism to articulate this sovereignty.

Story begins to fuse these systems in volume 1 of his *Commentaries*, where he offers a “General Review” that follows detailed accounts of the origins of each of the colonies. In this review, Story addresses the leading authorities of the two systems he seeks to synthesize, William Blackstone and Thomas Jefferson, both of whom suggest the inapplicability of the common law to the American context. Justice Story corrects these thinkers’ judgment of an American common law in turn. For Story, the fusion of the common law with features of the natural rights tradition occurs in the colonial recognition and adoption of popular sovereignty. Thus, to understand the American experiment of self-government, one must recognize the emergence of an American common law that bridges these seeming contradictions. Story first breaks from Blackstone to place the American conception of the common law within a theory of constituent power. He then uses this new American common law—created through the choice of the people—to assess the Jeffersonian account of the founding.

Despite his disagreement with Blackstone regarding the applicability of the common law to America, Story uses the English jurist’s theory to explain its adoption in the colonies.²⁶ According to Story, Blackstone puts forward two methods of imperial expansion: conquest and colonization. These two methods are distinguished by the organization of the land prior to expansion and the method of expansion. While conquest forcefully acquires already organized land, it does not extend English common law. Colonization, to the contrary, allows for the extension of the English common law because British subjects carry the tradition with them through emigration, “for the law is the birthright of every subject. So that

wherever they go, they carry their laws with them; and the newfound country is governed by them.” However, there are necessary restrictions on the adoption of the common law, as Story outlines, “Such colonists do not carry with them the whole body of English laws, as they then exist; for many of them must . . . be wholly inapplicable to their situation, and inconsistent with their comfort and prosperity” (*C*, 132–33). Therefore, the process of emigration offers a wide avenue for the application of the common law, which is left to the colonists themselves. For Story, this is accomplished either through the usage of legal concepts by the colonists themselves or by judicial determination. Yet, despite this distinction, which allows for the expansion of the common law and a conception of English political rights, Blackstone believed that the common law was inapplicable to America because the several colonies were founded through conquest, not colonization. To overcome Blackstone’s objections while staying within his own common law argument, Story must prove that Blackstone committed a category error.

Therefore, Story turns to colonial history to prove that Blackstone mischaracterizes the origin of the American colonies because he evaluates them externally. From the American context, and guided by colonial grants and charters, the American colonies were settled via emigration based on the right of discovery (*C*, 135). For Story, this understanding is so generally recognized that “the universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance” (*C*, 140). This general principle is reflected in the revolutionary mindset that informed the American fight for independence. For many, the American Revolution was a mixture of natural rights philosophy and a defense of English rights and privileges.²⁷ This is the foundation that Story seeks to recover and further articulate. Moreover, a century of colonial jurisprudence, which undergirds many state laws, stands on the application of the common law to local situations (*C*, 140).

Jefferson rejects viewing the common law as an inherited right. In a letter to John Tyler Sr., which Story quotes at length, Jefferson

calls this view of the American Revolution, “a *favourite* in the first moment of rallying to our rights against Great Britain. But it was that of men, who felt their rights, before they had thought of their explanation. The truth is, that we brought with us the rights of men, of expatriated men” (C, 140). For Jefferson, the American view of inherited rights—and the attached concept of common law—represented a people who were halfway through a revolution of mind. Yet, for Story, Jefferson’s argument is insufficient, since this view of inherited rights stood as the groundwork for the emergence of an American union at the Congress of 1774. In fact, Story argues that the promises of the Declaration ought to be traced back to this Congress, where the people first came together to assert their sovereignty.

Corresponding with his correction of Blackstone, Story details the emergence of the American people to combat Jefferson’s view that the American understanding of rights underwent a transformation from inherited rights to absolute natural rights. In this account, he details three stages that reflect the American people’s improvement in the experiment of self-government: the “revolutionary government,” the “confederated government,” and the “federal government.” On Story’s reading, these governments were formed to protect rights and legal processes articulated in both natural rights philosophy and the common law. These three governments follow the emergence of the American people as a result of their opposition to the Crown. Other scholars have recognized that Story’s account of governmental development presents a “remarkably practical and straightforward adaptation of Locke’s political philosophy.”²⁸ This adaptation is unique in that it uses Lockean theory to defend rights guaranteed by nature and convention. Therefore, a key disagreement emerges between Jefferson and Story in their interpretations of Locke. Against a view that focuses on absolute rights, Story’s account centers on the American people, showing how their choice—both to overthrow a government that is abusing their rights and to maintain legal principles and traditions that protect their rights—stands as the ultimate act of sovereignty.

Story spends considerable time presenting the “revolutionary government” to solidify his account of sovereignty. This first stage of government began in 1774 when Congress

adopted a declaration of rights, not differing in substance from that of the congress of 1765, and affirming that the respective colonies are entitled to the common law of England and the benefit of such English statutes, as existed at the time of their colonization, and which they have by experience found to be applicable to their . . . circumstances. (*C*, 187)

In this way, Story ties revolutionary principles to those inherited rights carried to the American colonies in the common law by British emigrants. The Americans demanded those rights guaranteed by birthright, especially those principles and processes of the common law adopted by the people themselves. The Congress of 1774 was followed by the Americans’ fullest articulation of rights, the Declaration of Independence, which Story calls an act “of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and independence” (*C*, 198). By presenting the origin of American independence in this way, Story does not separate the revolution from Lockean natural rights theory—indeed, he justifies action through the right to revolution. Instead, he seeks to contextualize these rights so that they are more recognizable to the people and engrained in their way of life. According to Story, the revolutionary government had the power to issue its statement because it was the representative body of an aggrieved people reclaiming authority for itself. Following his reading of the colonists’ adoption of those elements of the common law that best support their self-government, the right of revolution is thus the final route for colonists who are no longer protected by the governing structure that they carried to a new place.

This contextualization cannot occur without a reference to the common law. For Story, a rejection of America’s common law

origins makes the rights and grievances articulated in the Declaration of Independence incoherent. Indeed, separation from Great Britain can be justified only if the Americans were emigrants from England who brought with them certain political rights. Story argues that the Declaration admits this logical conclusion (*C*, 198). The grievances that justify the Americans' actions rely on the common law, its principles of justice and those universal tenets recognized in the "law of nations," which were placed within the colonial charters and adopted by the several colonies through their use of legal customs and traditions. Without the Crown's disregard for the established rights and legal precedents under the common law, the American people would have no basis for their use of the Lockean right of revolution. Speaking of the common law, Story writes, "Thus limited and defined, it has become the guardian of our political and civil rights; it has protected our infant liberties; it has watched over our mature growth; it has expanded with our wants; it has nurtured that spirit of independence, which checked the first approaches of arbitrary power" (*C*, 141). The common law, then, is the tradition by which the American colonists understand their rights and thus is the basis for determining whether those rights have been infringed.

Story's developmental approach reveals the necessary connection between popular sovereignty in the colonial adoption of common law principles and eventual opposition to the Crown. In each, the people chose for themselves the laws and governmental structure that best supported and protected their rights. This provides solid evidence for the recognized Lockean principle of a government based on consent. Yet, Story's reading of consent elevates republicanism over other Lockean features like those found in Jefferson's account of abstract natural rights. Powell and Schotten recognize Story's efforts to emphasize the republican features of Locke's theory over and against abstract natural rights. Powell suggests that Story feared the Jeffersonian "interpretive methodology" because it suggested "a rejection of the fundamental republican principle that all power was derived from the people."²⁹ Peter Schotten, too, argues that one reason for Story's efforts to

construct a different view of the Declaration is rooted in his concern that Jeffersonian philosophy had a “tendency to resort too rashly to first political principles.”³⁰ This tendency could produce an American people untethered from the duties of republican government. For Story, Jefferson’s interpretation individualized rights too far and divorced them from the sovereign body of the people. In this way, Story could appear as a new kind of liberal.³¹ Returning to Story’s reliance on the common law context that undergirded the founding conception of rights allows us to better see the emergence of a more moderate understanding of popular sovereignty that could withstand changes in leadership.

Therefore, Story’s insistence that the common law constitutes a necessary piece of America’s foundation should be understood as an attempt to provide stability against Jacksonian-era trends to hyper-democratize the constitutional order. In each of the developmental periods that Story presents, the people articulate a government that best secures their established rights and liberties. The thread that unites the three periods together is the established order inherited from the colonial period. For Story, popular sovereignty did not mean a simple majoritarianism that allowed for continual change but rather a rearticulation of the sovereign people who can make lasting change through clearly defined moments of sovereign expression.

Story’s project to construct a dual foundation in Lockean republicanism and the common law offers a different account of constituent power. This project gets at the tension in the American adoption of Locke—the gap between popular sovereignty and the rule of law.³² Story seeks to merge this gap by showing how the British colonists chose for themselves which features of the common law would support their political situation. Thus, rather than being controlled by a foreign or irrational law, the common law itself became the steward of a growing sense of republicanism within the colonies. Story’s reading shows that from their earliest acts of political participation, the people are the central figures in the emergence of America as an independent nation. However, it is a people who, as sovereign, articulate their choice through a specific mode of political

decision-making. Story reminds the American people that Lockean republicanism is centered on the sovereign people acting within constitutional convention.

Story's Majoritarian Argument and the "Convention Moment"

A republican system requires an official method by which the people articulate their sovereign will. For Joseph Story, the regular lawmaking process, while necessary for the continued functioning of the republic, is insufficient as the true articulation of the will of the people. A representative legislature may work to advance the public good, but it cannot articulate the public good itself or establish the fundamental tenets of a political community. That is, representatives can act on behalf of the people, but they cannot take the place of the people. Therefore, Story considers his second and third stages of government to suggest the proper way for this fundamental expression of sovereignty: the "ratification moment" or "convention moment."

The "confederated government" fittingly refers to the new nation's first attempt at governance under the Articles of Confederation. Since his *Commentaries* seek to expound on the US Constitution, Story's evaluation of the Articles focuses on their defects. He outlines eight specific defects but spends significant time addressing the four most damaging.³³ Some of these deficiencies are the result of organizing a government during wartime. First, Story argues, while the Articles of Confederation put forward a perpetual union, the "congress in peace was possessed of but a delusive and shadowy sovereignty, with little more than the empty pageantry of office" (C, 227). The powers given to Congress fit the exigencies of war but left the representative body with little real authority.

The second defect is perhaps the Articles' greatest. Again, as a consequence of the exigencies of war, the Articles were never put directly to the people for ratification but were adopted by representatives of the several states. Therefore, the Articles were ratified via delegated authority, which impeded the people from choosing a government for themselves. For Story, this method of adoption is

antithetical to republican government. Continuing his reliance on Lockean republicanism, Story insists that the formation of government must come from the consent of the people, which requires a direct act by the people themselves. The actions of their representatives, no matter how well intentioned, cannot replace the people's consent in matters of ultimate sovereignty.

Failure to root the Articles in popular consent resulted in destructive opinions regarding the new government. Therefore, the third defect of the Articles is their effect on the hearts of the American people when transitioning from war to peacetime: "the leading cause was a growing jealousy of the general government; and a more devoted attachment to the local interests of the states;—a jealousy, which soon found its way even into the councils of congress, and enervated the little power, which it was yet suffered to exert" (*C*, 244). For Story, governmental structure itself affects public opinion; a republican government that bypasses the people's direct consent fails to secure their attachment. Moreover, the Articles obscured the unity articulated in 1774 and the Declaration of Independence. Consequently, improper interpretations of sovereignty emerged, especially those that sought to emphasize different aspects of Locke's political philosophy.

Thus reappear Thomas Jefferson and the Jeffersonian understanding of the founding. Jefferson, as shown, challenges the common view of rights during the revolutionary period by reinterpreting every right, even those political rights extended to the colonies via the common law, into absolute natural rights. Moreover, Jeffersonians pair their reinterpretation of established political rights with an alternative interpretation of popular government in North America: the "people" at the founding were not a unified whole; each state was the embodiment of one people. For Story, interpretations that prioritize the sovereignty of individual states over the united people should be recognized as an outgrowth of absolute natural rights and thus descendants of Jefferson's view. Because these interpretations failed to recognize the link between the common law and the rights asserted in the Declaration of Independence, they also failed to see the inherent, unbroken union of the people.

As previously considered, Story traces the first sovereign act of the American people to the revolutionary government in 1774. For Story, the difference between the Declaration of Independence and the Articles is the Declaration's unanimous articulation on behalf of one people. Yet the Declaration, too, was written and approved by representatives sent on behalf of the people. So, what is this fundamental difference between the Declaration and the Articles that puts forward a sovereign unity in one while breaking this established unity in the other? Story suggests two features: the words used in the documents and the context of the agreements. The Declaration puts forward a unanimous statement on behalf of "one people," and Story insists that the strength of the Declaration requires the admission of a basic unity within the sovereign American people. He states:

The validity of the United States was never doubted, or denied by the people. On the contrary, they became the foundation, upon which the superstructure of the liberties and independence of the United States has been erected. Whatever, then, may be the theories of ingenious men on the subject, it is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states; that that event did not find them or make them such; but that at the moment of their separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all states. (*C*, 202)

For evidence of this unity, Story turns to the context in which the Declaration was written, once again bringing the common law into his account. While the colonies adapted parts of the common law in different ways to fit their situation, common principles show the shared bonds between the American people: "although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary,

they were fellow subjects, and for many purposes one people.” Indeed, this was so clearly the case legally that “[e]very colonist had a right to inhabit, if he pleased, any other colony; and as a British subject, he was capable of inheriting lands by descent in every colony” (C, 164). The common law, therefore, offered a foundation of legal principles, not strict laws.

Those who sought to advance an interpretation of absolute natural rights in support of independent states rejected both standard common law principles and basic tenets of the Declaration. For Story, state “sovereignty” should not be rejected but ought to be clearly articulated to indicate specific political powers and functions designated to and “exclusively exercised by certain public functionaries” for the benefit of the people—not to imply independent nationhood (C, 192). Story therefore returns to Blackstone for his discussion of two different kinds of sovereignty—primary, absolute sovereignty and limited, functional sovereignty—to identify the error in the reasoning of state sovereignty advocates. Further showing how the legal principles of the common law formed the minds of the American colonists, Story insists that these two types of sovereignty can be observed in the American people’s actions during the revolutionary period. He outlines these two kinds of sovereignty:

The term “sovereign” or “sovereignty” is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions. By “sovereignty” in its largest sense is meant, supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern. A state or nation is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength. By the very act of civil and political association, each citizen subjects himself to the authority of the whole. . . . But “sovereignty” is often used in a far more limited sense . . . to designate such political powers, as in the actual organization of the particular state or nation are

to be exclusively exercised by certain public functionaries, without the control of any superior authority. (C, 191–92)

For Story, this first kind of sovereignty, primary and absolute sovereignty, was never held individually by the several states. He states, “Antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states, in the sense in which the term ‘sovereign’ is applied to states” (C, 191). Therefore, those who advocate for primary sovereignty in the several states misunderstand American sovereignty in two ways. In the first place, they reject the established unity of the American people. Second, and more problematic, is that they fail to recognize the people as the source of sovereignty. Instead, these advocates insist that state legislatures can hold this primary sovereignty. The Articles fell victim to these arguments, failing to extend the principles of popular sovereignty recognized in 1774 and the Declaration of Independence. Instead, the Articles advanced a confederacy of thirteen sovereign states rather than a unanimous statement on behalf of one people.³⁴ This, in turn, hindered the growth of affection for the new government.

A fourth defect, state equality in the Confederation Congress, explains the danger of viewing the several states as independent, sovereign nations. Through this defect Story seeks to articulate an understanding of true majoritarianism that can guide the American people to cherish their sovereignty and act to retain it. State equality under the Articles threatened “that a majority of the states, constituting a third only of the people of America, could control the rights and interest of the other two thirds” (C, 245). In addition, this voting structure led to a misconception that each action of Congress was a fundamental act on the level of first principles, with the result that the states jealously competed to articulate their views of the public good. Two problems emerged from this competition: first, Congress was unable to accomplish the tasks entrusted to it; second, the republican basis of American society was questioned. If a minority of states could block Congress from acting on its entrusted duties, then minority rule became a political reality.

Yet there is a tension within this view, since Story recognizes a legitimate role for state governments and state action. A fuller account of federalism is necessary, especially in relation to the emergence of competing claims of the public good. Moreover, Story seeks to articulate a majoritarian approach to politics that prioritizes the rule of law to prevent the instability of absolute democracy. But this kind of majoritarianism may be difficult to articulate to citizens in Jacksonian America; certainly, it is against the Jeffersonian interpretation of Locke. Perhaps the clearest requirement for Story is that there must be a division between the articulation of first principles and governmental aims and the accomplishment of tasks in pursuit of these aims. In this way, Story relies heavily on the American regime as a written constitution. The project of articulation must be done by the sovereign people themselves through convention and ratification. The second task can be undertaken by the people's representatives who make and execute laws for the public benefit. This division seems to be in keeping with the two different kinds of "sovereignty" that Story introduces in his developmental account (C, 191–95). Arguments put forward by Jeffersonians and Jacksonians seek to collapse these two views of sovereignty so that the government itself can articulate first principles on behalf of the people. Justice Story fears that this change would create a political order that is both unstable and unrepublican.

Story's *Commentaries* as a Work of Civic Education

As we have seen, Story keeps the American people at the center of his account. He highlights that the people themselves engaged in a process of self-government by casting off the reign of a king who no longer offered legitimate protection and instituting a republican government dedicated to preserving their established rights and liberties. Justice Story goes to great lengths to show this self-government at work and attributes the failures of the Articles of Confederation to an inconsistency in extending consent to the people directly. Moreover, the failure to recognize the centrality of consent gave birth to theories of sovereignty that prioritized

governments that acted on behalf of the people. However, as Story argues, these theories relied on a confusion between acts of sovereignty and the functions of government.

One final question remains: Why is Story insistent in presenting this account in his *Commentaries*? While some scholars have argued that the work ought to be considered as supplemental instruction for lawyers, Story's focus on the public reveals the *Commentaries* as a project of civic education. Justice Story seeks to cultivate a deep understanding of the origins of American government to reclaim the concept of popular sovereignty from emerging theories that seek to transform it. Therefore, the first part of his project is intellectual: to educate the American people in a political science that roots the union in the consent of the people. In this way, Story shows that the US Constitution is the fulfillment of the long-standing American way of life. Yet, an education of another kind is required to fulfill his political science. For his education to succeed, Story must cultivate affection for the union. By placing the people at the center of his narrative, Story seeks to foster pride in self-government so that the people themselves defend their regime. This pride may produce a vigilant citizenry who ensures that governmental officials do not extend or change the governing order without the people's direct consent. Thus, Story's project seeks to educate the people in two ways—on the level of the intellect and on the level of affection—to ensure that popular opinion can produce the necessary stability for a republican regime.

In a similar way, this project of civic education seeks to cultivate a love of laws and a recognition that it is the written constitutional order that protects established rights. In doing so, Story seeks to guard against governmental theories that promote the frequent changing of laws. This is best seen in his definitions of the two types of sovereignty: a people who recognize that their ultimate sovereignty is found in the articulation of first principles (in convention) are less likely to be captivated by mandate-based methods of politics. Instead, they will be more likely to view their government officials as stewards and functionaries rather than articulators of new governmental theories. This allows for a

methodical approach to change, recentring constitutional advancement on the ratification moment itself.

This view of popular sovereignty recalls an understanding of republicanism that prioritizes the rule of law. Law takes priority as the articulation of the popular will, but lawmakers draft it to be both responsive and long-lasting. This process moderates popular will: legal changes are not introduced to alter basic aspects of society or constitutional principles but written to better provide for the recognized happiness and safety of the people. In this way, and perhaps surprisingly to critics of Story, the purview of the national government is quite limited. A theory of American constitutionalism that prioritizes the rule of law may recognize state governments as the most active functionaries in pursuit of the people's interests. However, national issues and those aims articulated by the national Constitution will be pursued uniformly by the national government. This understanding of the rule of law has clear roots in the adoption of an American common law.

Joseph Story's project of civic education relies on acceptance of his two-part foundation for the American order. His theory of self-government traces the emergence of the American people through their adoption of specific aspects of the common law, to their unity in opposition to Great Britain, and finally to their adoption of a government based on consent. By incorporating an American common law into the basis of American life, Story seeks to stabilize the republican order and provide a richer account of the rights articulated at the founding.

Notes

1. Indeed, the legitimacy of the United States' liberal foundations has been a recurrent debate. Louis Hartz provided the clearest articulation of the influence of liberal theory in American politics: Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*, 2nd Harvest/HBJ ed. (San Diego: Harcourt Brace Jovanovich, 1991). Some scholars have sought to combat Hartz's consensus theory by revealing different, nonliberal bases for the American political order. See, e.g., Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science*

Review 87, no. 3 (September 1993): 549–66. More recent scholars have approached this debate differently, arguing the insufficiency of the liberal account. For this view, see Patrick J. Deneen, *Why Liberalism Failed* (New Haven, CT: Yale University Press, 2018).

2. James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought with Selected Writings*, 1st ed. (Norman: University of Oklahoma Press, 1971); R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, 2nd. print, *Studies in Legal History* (Chapel Hill: University of North Carolina Press, 1986).
3. R. Kent Newmyer, “Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence,” *Journal of American History* 74, no. 3 (1987): 814–35.
4. Gerald T. Dunne also considers the development of Story’s political and constitutional positions. See Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1971). In addition, other scholars have considered Story’s nationalism. By “nationalism” I mean the advocacy of a robust national government that is granted the necessary powers to accomplish its goals. This position is often put at odds with founders who sought to limit the power of the national government through a strict construction of the powers granted to Congress in Article I. One example of scholars who consider Story’s nationalism is Paul Finkelman, “Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story’s Judicial Nationalism,” *Supreme Court Review* 1994 (January): 247–94.
5. Kent Newmyer, “Justice Joseph Story, the Charles River Bridge Case and the Crisis of Republicanism,” *American Journal of Legal History* 17, no. 3 (July 1973): 234.
6. McClellan, *Joseph Story and the American Constitution*, 269–70.
7. Peter Schotten, “The Art of the Judge: Justice Joseph Story and the Founders’ Constitution,” in *History of American Political Thought*, ed. Bryan-Paul Frost and Jeffrey Sikkenga, *Applications of Political Theory* (Lanham, MD: Lexington Books, 2003), 325–41; Peter Schotten, “Joseph Story,” in *American Political Thought: The Philosophic Dimension of American Statesmanship*, ed. Morton J. Frisch and Richard G. Stevens, 3rd ed. (New Brunswick, NJ: Transaction, 2010), 117–41.
8. H. Jefferson Powell, “Joseph Story’s Commentaries on the Constitution: A Belated Review,” *Yale Law Journal* 94, no. 5 (April 1985): 1285–1314.
9. Viewing Story as exclusively liberal is a common approach. Morgan Dowd, e.g., critiques Story for prioritizing the “myth” of the natural right of property at the expense of unbiased judicial rulings. See Morgan D Dowd,

- “Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge,” *Vanderbilt Law Review* 18, no. 2 (March 1965): 643–62.
10. Christopher Eisgruber takes seriously Story’s natural law leanings. In doing so, he presents a nuanced reading of Story’s opinion in *Prigg v. Pennsylvania* to provide a fuller account of Story’s nationalism. See Christopher L. M. Eisgruber, “Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism,” *University of Chicago Law Review* 55 (1988): 56.
 11. Gary L. McDowell, “Joseph Story’s ‘Science’ of Equity,” *Supreme Court Review* 1979 (January 1979): 153–72; Gary L. McDowell, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy* (Chicago: University of Chicago Press, 1982); James Reist Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992).
 12. McDowell, *Equity and the Constitution*, 28–9.
 13. An example of this tendency in Story is his opinion that, on the level of theory, courts of law and courts of equity should have been kept separate, an opinion also put forward by Anti-Federalists like Federal Farmer and Brutus. See McDowell, *Equity and the Constitution*, 78–80.
 14. James W. Ceaser, *Designing a Polity: America’s Constitution in Theory and Practice* (Lanham, MS: Rowman & Littlefield, 2011).
 15. Harvey Mansfield points to Tocqueville’s reliance on Story’s *Commentaries* and the *Federalist Papers* in his editorial introduction. See Alexis de Tocqueville, *Democracy in America*, ed. Harvey C. Mansfield and Delba Winthrop, paperback ed. (Chicago: University of Chicago Press, 2002).
 16. See, e.g., the debate regarding the lessons for democracy that Tocqueville intended by his work: Stephen Schneck, “New Readings of Tocqueville’s America: Lessons for Democracy,” *Polity* 25, no. 2 (1992): 283–98; Wilson Carey McWilliams, “Comments on Stephen Schneck’s Reading of Tocqueville,” *Polity* 25, no. 2 (1992): 299–306; Delba Winthrop, “Comments on Schneck’s Reading of Tocqueville’s Democracy,” *Polity* 25, no. 2 (1992): 307–13.
 17. B. Allen, “Alexis de Tocqueville on the Covenantal Tradition of American Federal Democracy,” *Publius: The Journal of Federalism* 28, no. 2 (January 1, 1998): 1–23; Aaron L. Herold, “Tocqueville on Religion, the Enlightenment, and the Democratic Soul,” *American Political Science Review* 109, no. 3 (2015): 523–34. This is most often done through a consideration of the relationship between religion and liberty

- in America. See Harvey C. Mansfield, "Tocqueville on Religion and Liberty," *American Political Thought* 5, no. 2 (Spring 2016): 250–76; Sanford Kessler, "Locke and Tocqueville on Religious Foundationalism," *American Political Thought* 9, no. 4 (Fall 2020): 594–622.
18. McWilliams, "Comments on Schneck's Reading of Tocqueville," 301.
 19. Powell, "Joseph Story's Commentaries on the Constitution"; Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence."
 20. For a discussion of Story's other commentary work, see Kurt H Nadelmann, "Joseph Story's Contribution to American Conflicts Law: A Comment," *American Journal of Legal History* 5 (1961): 25; John C. Hogan, "Joseph Story on Juries," *Oregon Law Review* 37, no. 3 (April 1958): 234–55; Gerald T Dunne, "Justice Story and the Modern Corporation—A Closing Circle?," *American Journal of Legal History* 17, no. 3 (July 1973): 10; Charles A. Heckman, "The Relationship of *Swift v. Tyson* to the Status of Commercial Law in the Nineteenth Century and the Federal System," *American Journal of Legal History* 17, no. 3 (July 1973): 246–55.
 21. Powell, "Joseph Story's Commentaries on the Constitution," 1307.
 22. Hereafter the author uses the shortened *Commentaries* to refer to Story's *Commentaries on the Constitution of the United States* and cites the text as C. This paper looks solely at Story's constitutional thought.
 23. Joseph Story, *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*, vol. 1 (Boston: Hilliard, Gray, 1833), v.
 24. E.g., when detailing the origin and title of the several British colonies, Story turns to the Supreme Court's decision in *Johnson v. McIntosh* (8 Wheaton 543) as the clearest articulation of the concept. See Story, *Commentaries on the Constitution of the United States*, 1:8–20.
 25. Winthrop, "Comments on Schneck's Reading of Tocqueville's Democracy," 307–8.
 26. Of note, following Blackstone, Story does not justify, as a matter of justice, these two kinds of imperial expansion. Rather, he withholds that analysis to better understand the relationship between the Crown and the colonies as articulated in the several charters. Story's investigation concerns how the American colonists understood their governing institutions. See Story, *Commentaries*, 1:132–42.
 27. Of note, these views were especially prominent in the decade before the American Revolution and put forward by key thinkers in the American

- cause like James Otis and John Dickinson. See John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies*, 2nd ed. (Philadelphia: David Hall & William Sellers, 1768); for a reading of James Otis that highlights this view, see Matthew Reising, “James Otis and the Glorious Revolution in America,” *American Political Thought* 11, no. 2 (March 1, 2022): 161–84.
28. Schotten, “Joseph Story,” 131.
 29. Powell, “Joseph Story’s Commentaries on the Constitution,” 1306.
 30. Schotten, “Joseph Story,” 134.
 31. Winthrop, “Comments on Schneck’s Reading of Tocqueville’s Democracy,” 313.
 32. Newmyer, “Story, Charles River Bridge,” 234
 33. Story’s analysis of the defects of the Articles of Confederation shares many of the same conclusions as those provided by Publius in *Federalist* No. 22. Story’s emphasis on particular defects, however, differs from Publius’s emphasis.
 34. It could be argued that Story would insist on reading the sovereignty of the states in the Articles as the “functionary” kind of sovereignty he advances elsewhere. However, given the defects in the governing document, the misapplied “absolute” sovereignty is probably the idea advanced by the states in this league of friendship. Therefore, Story is addressing this misapplication to correct later arguments for state sovereignty.