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STATESMAN OF THE OLD REPUBLIC†

Craig Joyce*

SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC. By R. Kent Newmyer. Chapel Hill: University of North Carolina Press. 1985. Pp. xvii, 490. Cloth, \$33; paper, \$14.95.

I

"I am the last of the old race of Judges," grieved a beleaguered Joseph Story in the dark days of early 1837. "I stand their solitary representative, with a pained heart, and a subdued confidence. Do you remember the story of the last dinner of a club, who dined once a year? I am in the predicament of the last survivor."¹

The sources of Story's gloom were not far to seek. John Marshall, his colleague and steadfast friend during nearly a quarter century of service on the Supreme Court, was dead.² Only Marshall's unique authority, coupled with the enormous personal esteem in which the great Chief Justice was held by other members of the Court, had theretofore stemmed the surging tide of Jacksonian Democracy that Story so greatly feared. Now that bulwark was gone, leaving only Story himself to defend the edifice of constitutional and economic nationalism that he and Marshall had labored so long to erect. In the Term just ended, a new majority of the Court, led by Jackson's most recent appointee, Chief Justice Roger Taney, had asserted itself unmistakably. In *Mayor of New York v. Miln*,³ Story had been forced to enter a rare, solitary dissent, claiming only the comfort of the posthumous concurrence "of that great constitutional jurist, the late Mr. Chief Justice Marshall."⁴ In *Briscoe v. Bank of the Commonwealth of Ken-*

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1. Joseph Story to Harriet Martineau (Apr. 7, 1837), reprinted in 2 J. STORY, LIFE AND LETTERS OF JOSEPH STORY 277 (W. Story ed. 1851) [hereinafter cited as LIFE AND LETTERS].

2. Marshall died on July 6, 1835. Anticipating his passing two weeks before the event, Story had written to Richard Peters, Jr., the Court's Reporter: "Great, good, and excellent man! . . . I shall never see his like again! His gentleness, his affectionateness, his glorious virtues, his unblemished life, his exalted talents, leave him without a rival or a peer." Joseph Story to Richard Peters, Jr. (June 19, 1835), reprinted in 2 LIFE AND LETTERS, supra note 1, at 199-200.

3. 36 U.S. (11 Pet.) 102 (1837) (upholding state exercise of police power in face of commerce clause challenge).

4. 36 U.S. (11 Pet.) at 161. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall had at least suggested that congressional power over interstate commerce was exclusive of the states.

tucky,⁵ Story had again dissented alone, prompted, he said, by “profound reverence and affection” for the wisdom of Taney’s predecessor.⁶ Finally, in *Charles River Bridge v. Warren Bridge*,⁷ the Court had seemingly consigned to its dustbin of forgotten doctrines the generous construction of public and private corporate rights lovingly adumbrated in Story’s landmark *Dartmouth College* concurrence.⁸ No wonder then that, as Story surveyed the scene from his lonely eminence, all seemed lost.

Like the gaunt visage memorialized in Mathew Brady’s famous daguerreotype (ca. 1844), the old Judge portrayed in Story’s later opinions and letters seems often to be a worn and despairing reactionary, anachronistic even in his own day, irrelevant to ours, unworthy of attention or emulation.⁹ It is a sad picture indeed. It is also shockingly incomplete and fundamentally inaccurate, as readers of Kent Newmyer’s splendid new biography will quickly discover.¹⁰ The Story who emerges from Newmyer’s pages is a fuller and vastly more appealing figure: capable of melancholy over professional reverses and personal tragedies, yes, but withal a figure of Olympian accomplishments and energies, a warm patriot, a generous husband, father and friend, a man whose vision, idealism and elemental decency were so marked that, upon his death in 1845, even his sometime adversary, Chief Justice Taney, was moved to mourn the nation’s loss as “irrepa-

5. 36 U.S. (11 Pet.) 257 (1837) (approving issuance of paper money by bank chartered and owned by state).

6. 36 U.S. (11 Pet.) at 350. In *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830), interpreting art. I, § 10, cl. 1 of the Constitution, Marshall’s opinion for the Court had broadly prohibited state issuance of “bills of credit.”

7. 36 U.S. (11 Pet.) 420 (1837) (narrowly construing private bridge company’s legislative charter so as to allow construction of competing bridge by second company).

8. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Marshall’s somewhat narrowly premised opinion, while sufficient for the plaintiff’s purpose, had prompted Story to a more general inquiry “into the nature, rights, and duties of aggregate corporations at common law.” 17 U.S. (4 Wheat.) at 667 (Story, J., concurring).

9. Judicial and academic critiques of Story’s contributions to the law — not to say his person — are abundant and well known. See, e.g., Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Feb. 17, 1928), reprinted in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 214-15 (M. Howe 2d ed. 1961) [hereinafter cited as HOLMES-POLLOCK LETTERS] (deriding Story’s belief in the possibility of a “general law” as the quest for a “brooding omnipresence in the sky”); J. GRAY, THE NATURE AND SOURCES OF THE LAW 253 (2d ed. 1921) (accusing Story of “dogmat[is]m,” “restless vanity” and a “reputation for learning greater even than the learning itself”). The particular object of Holmes’ and Gray’s disparagements was Story’s much maligned opinion in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (sanctioning the application of federal common law, rather than state law, in diversity cases concerning “commercial jurisprudence”). Story’s low reputation among modern law students has been well summarized by Grant Gilmore, who phrased the issue as a question of “whether [Story] was more stupid than he was wicked, or, alternatively, more wicked than he was stupid.” Gilmore, Book Review, 39 U. CHI. L. REV. 244, 244 (1971) (reviewing an earlier biography of Story).

10. Newmyer is Professor of History at the University of Connecticut. *Supreme Court Justice Joseph Story* is the twenty-fourth volume of the American Society for Legal History’s distinguished Studies in Legal History.

rable, utterly irreparable in this generation, for there is nobody equal to him."¹¹

Taney was right. No figure of Story's era even roughly compares with him in terms of impact on the American legal system. Plausible cases can be made that one or another of Story's contemporaries or near-contemporaries, including Marshall, were greater judges.¹² But Story was a man of many talents and many roles. Lawyer, politician, judge, scholar, teacher, publicist, legislative draftsman, codifier: it is almost impossible to name a law-related role that Story did not at one time in his long career perform, and perform superbly. Miraculously, Newmyer manages to present his subject informatively, and even entertainingly, in each of these varied guises, and to discern in each the common talents and traits that combined in the person of Joseph Story to produce a great life in the law. The result is not the emaciated image of the Brady portrait, still less the forlorn figure of popular memory. Instead, Newmyer reveals a remarkable human being of rare accomplishments, whose life and work are aptly summarized in his biographer's becoming sobriquet: "Statesman of the Old Republic."¹³

II

Story was born on September 18, 1779 in Marblehead, Massachusetts, then British North America's sixth-ranking metropolis in population and, in fishing, its first. His father, Elisha, had helped dump tea into Boston Harbor at the very outset of the Revolution and had

11. Roger Taney to Richard Peters, Jr. (Nov. 14, 1845), Richard Peters Papers, Historical Society of Pennsylvania, Philadelphia.

12. In addition to his undoubted abilities, of course, Marshall had the great advantage of being Chief Justice. As such, he spoke for the Court in many of its greatest pronouncements. Story proved equal to the challenge, however, on those occasions when the opportunity to announce the Court's decisions fell to him. *See, e.g.,* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in which Marshall disqualified himself owing to a personal interest in the litigation. Also, Story's opinions on circuit displayed both consummate scholarship and an unrivaled familiarity with the practical affairs that he was called to decide and shape. *See, e.g.,* *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), a leading admiralty decision; and *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), a pre-*Prigg* attempt to curtail slavery, this time by limiting the rights of vessels engaged in the slave trade. In addition, Story's *Commentaries on the Constitution*, published in 1833, quickly became the most influential statement of constitutional nationalism since the *Federalist Papers*, and remained so for at least the rest of the century.

Story would have liked to be Chief Justice himself. But the post was already filled by Marshall upon Story's arrival on the Court in 1811; and, although he performed the responsibilities of senior judge effectively in the Term following Marshall's death, no doubt he knew full well that Jackson would never appoint the "most dangerous man in America" to fill the nation's highest judicial office. Joseph Story to Sarah Waldo Story (his wife) (Jan. 27, 1833), *reprinted in* 2 LIFE AND LETTERS, *supra* note 1, at 119.

13. Newmyer's beginning chapters provide essentially chronological accounts of Story's early life, his brief dalliance with politics, and his ascension to the bench. An epilogue narrates Story's final years and examines his legacy. In between, Newmyer organizes his chapters thematically around such topics as nationalism, economic growth, sectionalism and slavery — the problems, as he says, "with which Story as a judicial statesman grappled." P. xv.

served with Washington at Long Island, White Plains and Trenton. Joseph's mother, Mehitable Pedrick Story (Elisha's second wife), in her one recorded utterance, is reported to have admonished her first-born: "Now, Joe, I've sat up and tended you many a night when you were a child, and don't you dare not be a great man."¹⁴

By 1798, at the tender age of eighteen, Story had acquired a Harvard degree and a lifelong love of scholarship.¹⁵ By 1801, he had completed his apprenticeship with two of Massachusetts' most successful lawyers¹⁶ and been admitted to the Essex County bar, at which he quickly prospered. By 1805, he had been elected to the Massachusetts legislature and, by 1808, to the United States House of Representatives.¹⁷ By 1811, disillusioned by the vicissitudes and untidiness of politics, he had published four significant pieces of legal scholarship¹⁸—and, by year's end, he had been freed by an unexpected appointment to the Supreme Court "to pursue, what of all things I admire, juridical studies."¹⁹

None of this is remarkable or new as history, except that from it several factors crucial to Story's character and career can be identified: his roots deep in the soil of New England; the patriotism and ambition inherited from his family; his own precociousness and industry; the power of his intellect; his conscious decision to pursue a career in law and scholarship, rather than in politics; and his general good fortune in being who he was, when and where he was.

The latter point, in particular, requires elaboration. Newmyer ar-

14. 1 LIFE AND LETTERS, *supra* note 1, at 22 (purportedly recounting a reminiscence by Story's mother to his son, William Wetmore Story).

15. Story's first love, although clearly not his principal aptitude, had been poetry. Delicacy precludes any reproduction of those efforts here.

16. Samuel Sewall of Marblehead and Samuel Putnam of Salem.

17. Story secured both posts flying the colors of the Republican party, a circumstance that caused him no little embarrassment among his conservative friends in later years. As he explained to his son, however, two decades after the conclusion of his brief foray into partisan politics: "A Virginia Republican of that day, was very different from a Massachusetts Republican, and the anti-federal doctrines of the former state then had . . . very little support or influence in the latter State, notwithstanding a concurrence in political action upon general subjects." Joseph Story to William W. Story (Jan. 23, 1831), *reprinted in* J. STORY, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 27 (W. Story ed. 1852).

18. A SELECTION OF PLEADINGS IN CIVIL ACTIONS (1805), and new editions of Chitty's A PRACTICAL TREATISE ON BILLS OF EXCHANGE (1809), Abbott's A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN (1810), and Lawe's A PRACTICAL TREATISE ON PLEADING IN ASSUMPSIT (1811). In each of these early publications, Story selected leading English cases and demonstrated, by extensive annotation and reference to relevant American decisions (most of which remained unreported), how they applied to the United States.

19. Joseph Story to Nathaniel Williams (Nov. 30, 1811), *reprinted in* 1 LIFE AND LETTERS, *supra* note 1, at 201.

Justice William Cushing's death in 1810 opened up the Court's New England seat. Story, although eminently qualified for the post, had been an indifferent Republican by strict Jeffersonian standards and was no better than fourth on President Madison's list of possible appointees. Levi Lincoln and John Quincy Adams both said no to Madison; and Alexander Wolcott, who accepted the nomination, was told no by the Senate.

gues persuasively that Story's life and work must be seen as a "singular commingling of history and biography" (p. 387). He and his generation were located in time and place precisely at the confluence of Enlightenment idealism and Revolutionary pragmatism. His immediate forebears had defied all odds to impose their will upon history. Their children's challenge, amidst the seemingly endless possibilities of the early nineteenth century, was to secure the promise of the Revolution in a way that would endure for those who came after. In these extraordinary circumstances, Story's natural genius blossomed. To quote Newmyer: "Story was great because he captured the unique lawmaking, system-building potential of the early republic" (p. xvi).

To help us in understanding a world so far removed from our own, Newmyer analyzes two concepts central to the thinking of Story and his contemporaries. One was "republicanism." Wisely, Newmyer eschews any attempt to define the term as a narrow creed or monolithic ideology. Rather, he presents it as a "cultural matrix" generated by the Revolution itself, "within which Americans debated questions of government, law, economics, and all else" (p. xvi). There was agreement among participants to the debate that America had been set apart by Providence for a special destiny, but there was furious debate about the nature of that destiny. Popular sovereignty too, at least as distinguished from monarchical rule, was a given, but the nature of popular sovereignty was in no way settled. What were the roles, respectively, of the people and their representatives? Among the people's representatives, what level of government, and within each level which branch or branches, was best suited to govern? In a nation in the process of creating itself, the list of issues to be resolved seemed beyond number. Far from decreeing a solution, the Constitution bequeathed to the post-revolutionary generation by the founders merely marked out the parameters of the debate. And each of the participants' visions, not surprisingly, tended to be framed by his own peculiar "window on America" (p. 117): Virginia for Jefferson, for example; New England for Story.

On one matter, however, all of the protagonists in the drama that was early nineteenth-century America passionately agreed: each assumed the preemptive importance of advancing the national destiny, however it might be defined, by every means at the actor's command. For lawyers, as Newmyer carefully explains, the principal means at hand was a second cultural given of Story's age: "legal science." Like republicanism, legal science was vaguely defined. The term had yet to acquire the strongly normative connotation that it has to modern ears. Instead, in the young Republic, legal science "[m]ost often . . . meant simply systematic law — the mirror opposite, that is to say, of the haphazard, pluralistic, localized nature of early national jurisprudence" (p. xiv). In this sense, the term might mean little more than clarifying, rationalizing and disseminating the principles of the com-

mon law as it had evolved, and was evolving, in the United States — all constrained by the application of neutral, scientific principles of interpretation and development. In short, the aim was well-controlled legal reform. This seems to be the principal sense in which Story, as a republican lawyer, understood legal science. No doubt, this “juristic” dimension of Story’s thought was subject, as a purely intellectual exercise, to the dangers of rigidity and dogmatism. But — *pace* Jefferson! — Story’s preferred approach to the conundrums of legal science was pragmatic and thus attentive to the needs of the society around him. The only difficulty, from the viewpoint of Southern agrarians, was the nature of the society with which Story, by birth, education and professional experience, was familiar. If, as Newmyer demonstrates, Story’s law “took its character and spirit from the practical needs of real people,” inevitably the foundations of his legal science became “the needs of the business community and the imperatives of the market as he saw them operate in New England” (p. 116). Thus, by improving law through the application of legal science, Story hoped to create a “national commercial Utopia” (p. 378).

All of this explains a good deal. It provides essential background, for example, to an informed understanding of Story’s vast output of opinions, both on circuit and in the Supreme Court, during his thirty-four years on the bench.²⁰ Typical of Story’s early efforts is *De Lovio v. Boit*,²¹ an 1815 circuit court opinion described by Justice Frankfurter as the “classic” American admiralty decision.²² *De Lovio* concerned an insurance policy written by Boston businessmen on a Spanish vessel sailing out of Havana to ply the foreign slave trade. The insurers had refused to pay for loss owing to the ship’s capture, and had denied federal court jurisdiction over such maritime contracts. Anticipating the arrival of the case from the District Court, which sided with the insurers on the jurisdictional question, Story advised Supreme Court Reporter Henry Wheaton that he would deliver in *De Lovio* “a very elaborate opinion upon the whole Admiralty jurisdiction as well as over torts and contracts, and [would] review all the common law decisions on this subject.”²³ He did. Story’s conclusion, buttressed by an exhaustive survey of reported decisions (both at common law and under Continental systems), was that the admiralty jurisdiction of the federal courts, founded on article III, section 2 of the Constitution, rightfully extended to “all maritime contracts . . . and to all torts, injuries, and offences, on the high seas, and in ports . . . as far

20. Appointed to the Court at age thirty-two (the youngest Justice ever), Story served until his death in 1845. Only five Justices (John Marshall, Stephen Field, the first John Marshall Harlan, Hugo Black, and William O. Douglas) have served longer.

21. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

22. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 691 (1950).

23. Joseph Story to Henry Wheaton (Sept. 5, 1815), reprinted in 1 LIFE AND LETTERS, *supra* note 1, at 267.

as the ebb and flow of the tide."²⁴

Detailed though Story's scholarship in *De Lovio* may be, his decision rested not just on history, the Constitution and "juridical logic," but also, as he confessed in the conclusion of his opinion, on "national policy" and the "advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions . . ."²⁵ *De Lovio* itself did not fully achieve such uniformity. While conferring broad jurisdiction on the federal courts, it did not oust state court jurisdiction over maritime contracts in general or marine insurance questions in particular; nor did the decision become law beyond the First Circuit, thanks to the parties' failure to appeal Story's ruling to the Supreme Court. Nonetheless, *De Lovio* was a considerable victory for Story's expansive views; and, in company with similar decisions rendered by Circuit Justice Story during his early years on the bench, it illustrates vividly his determination "to facilitate commercial development" by applying legal science to the facts of life in the marketplace, and the "fusion of scholarship, practicality, and long-range economic calculation in [his] judging" (p. 123).

Swift v. Tyson,²⁶ decided nearly three decades later but this time in Story's role as Supreme Court Justice, teaches the same lessons; and a careful reading of the case, as Newmyer demonstrates, does much to redeem the modern-day reputations of both the decision and its author. The issue to be resolved in *Swift* was relatively narrow: did the Rules of Decision Act,²⁷ which governed diversity actions, require the federal courts to apply local common law in determining the validity of a negotiable instrument? In a brief opinion by Story, the Court held that the transfer of a bill of exchange in order to discharge the transferor's preexistent debt rendered the transferee a holder in due course despite defects that might have destroyed the value of the bill as between the original parties thereto — and this, notwithstanding the pos-

24. *De Lovio*, 7 F. Cas. at 441. Story's aggressive attitude toward extending federal jurisdiction is well conveyed by the observation that, "if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it." Note, *Extension of Federal Jurisdiction Over State Canals*, 37 AM. L. REV. 911, 916 (1903). But see Story's doubtless painful act of judicial self-abnegation in *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), denying a libel for wages because the service upon which wages were due was not "substantially performed, or to be performed, upon the sea or upon waters within the ebb and flow of the tide." The line of demarcation in *DeLovio* and *Jefferson*, obviously, was consistent. As Newmyer points out: "In *DeLovio* legal science worked to achieve the broad policy goals that Story wanted. In *Jefferson* he demonstrated a willingness to stick by 'science' when it pinched as well as when it comforted." P. 208.

25. 7 F. Cas. at 443.

26. 41 U.S. (16 Pet.) 1 (1842).

27. Originally enacted as section 34 of the Judiciary Act of 1789, the Rules of Decision Act provided:

That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

1 Stat. 92 (1789). The statute, slightly amended, is now found at 28 U.S.C. § 1652 (1982).

sibility that New York law, as established by the courts of that state, was otherwise. Story's opinion rested on his distinction between "state laws strictly local" and "general commercial law." The former, he said, consisted of "rights and titles to things having a permanent locality" (mainly real estate) and was evinced by state statutes and judicial constructions thereof. In these local matters, federal diversity courts were bound by state law. Not so, however, with respect to "contracts and other instruments of a commercial nature," which Story considered "not at all dependent upon local statutes or local usages of a fixed and permanent operation." As to *those* matters, the federal courts could and should make up their own minds, based on "the general principles and doctrines of commercial jurisprudence."²⁸

In its time, *Swift* was hardly a controversial decision: on the issue actually decided, Story spoke for a unanimous Court,²⁹ and his opinion was barely noticed by contemporary newspapers and periodicals.³⁰ After the Civil War, of course, the Court expanded the category of general commercial law created in *Swift* to encompass a variety of other matters, including municipal bonds and torts.³¹ Story himself can hardly be charged with those follies.³² Still less should he be pilloried for having rendered, in his dotage, an "unconstitutional" decision.³³ The central issue in *Swift* was not federal-state relations, but whether there should be uniformity and certainty in commercial transactions throughout the United States.³⁴ On that question, even Story's

28. 41 U.S. (16 Pet.) at 18-19.

29. In his concurring opinion, Justice Catron took issue with Story's view, expressed in dicta, that bills taken by way of security for an antecedent debt, no less than those taken in payment, were free of prior defenses. 41 U.S. (16 Pet.) at 23.

30. T. FREYER, HARMONY & DISSONANCE: THE *SWIFT & ERIE* CASES IN AMERICAN FEDERALISM 17-18 (1981).

31. See, e.g., *Baltimore & O. R.R. Co. v. Baugh*, 149 U.S. 368 (1893).

32. As Newmyer himself admits, Story's opinion in *Swift*, as developed by the Court in later decisions, "produced legal confusion, pitted state judiciaries against federal courts, and put the Supreme Court itself on the political firing line." P. 335. Even so strong a critic as Justice Holmes, however, conceded that, had "Bradley, Harlan, et al." stuck to the matter "dealt with" by Story, "no great harm" would have resulted. Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Feb. 17, 1928), reprinted in 2 HOLMES-POLLOCK LETTERS, *supra* note 9, at 215.

33. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (Brandeis, J., quoting Holmes, J.).

34. See also *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). In his majority opinion, Chief Justice Taney had insisted that an ambiguous, monopoly-granting corporate charter be construed strictly "against the adventurers, and in favor of the public," thereby in effect destroying the property of the grantees. 36 U.S. (11 Pet.) at 544-53. The decision provided a spur to creative (not to say rapacious) capitalism during the remainder of the nineteenth century. Certainly, Story was no less enthusiastic an advocate of commerce than Taney. His dissent can be explained in part by revulsion at what Newmyer calls the "disjunction between law and morality that Taney's instrumentalism produced." P. 232. But Story also feared the damage done by the majority to the promotion of a uniform, predictable, nation-building law of commerce. "For my own part," he wrote in his dissent, "I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security, and as to productiveness." 36 U.S. (11 Pet.) at 608.

Jacksonian brethren agreed with him³⁵ — as would proponents of the Uniform Commercial Code almost a century later, ironically just as *Swift* itself was being interred in *Erie Railroad Co. v. Tompkins*.³⁶ Viewed in this light, there is nothing radical or usurpatory about Story's opinion in *Swift v. Tyson*: as in his circuit court opinions, he applied the tools of legal science for the profoundly practical purpose of forging the national commercial marketplace that he believed would strengthen and preserve the Republic. In this, Newmyer says, Story merely did "what he had been doing all along, what he did incomparably well, and what the age accepted as legitimate" (p. 342).

Scientific judging was not the only role that Story, in the view of contemporaries, performed incomparably well. In his scholarly and academic endeavors, he was clearly without peer in his age; and here, as well, the imprint of what Newmyer calls his republicanism and legal science is much in evidence.

Story's scholarship prior to his appointment to the Court has already been noted.³⁷ During the next eighteen years, he continued to publish widely on a variety of legal topics, both in his own name³⁸ and anonymously on behalf of others.³⁹ His most famous contributions to the literature of the law, however, date from his incumbency in the Dane Professorship at Harvard Law School between 1829 and 1845. The terms of the professorship required publication of the lectures delivered under its auspices. In all, Story produced eleven ample volumes on nine major areas of American law. Except for three volumes on the Constitution,⁴⁰ all of the works concerned private law and, more specifically, commercial law or matters clearly ancillary to

35. See generally T. FREYER, *supra* note 30, at 35-43.

36. 304 U.S. 64 (1938).

37. See note 18 *supra*. Newmyer says that, by 1811, Story "was the most promising and prolific legal scholar in New England." P. 70.

38. Among the works to which Story signed his name were a statutory compilation entitled LAWS OF THE UNITED STATES (1827) and the fourth American edition of Abbott's SHIPPING (1829).

39. Story contributed generously, but without attribution, to the extensive scholarly annotations published by Supreme Court Reporter Henry Wheaton in the Court's official Reports between 1816 and 1821, and to the Digest of the Court's decisions published by Wheaton in 1821. See 1 LIFE AND LETTERS, *supra* note 1, at 280-93, 303-04; Joyce, *supra* note *, at 1331-37. He also produced a series of unsigned articles on legal subjects (including *Courts of the U. States, Law, Legislation and Codes, and Natural Law*) for Francis Lieber's *Encyclopaedia Americana*, published in multiple volumes beginning in 1829. P. 450.

40. 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 (3 vols. 1833) [hereinafter cited as J. STORY, COMMENTARIES ON THE CONSTITUTION]. The work achieved enormous success at all levels. It appeared in several abridgments: one for college and high school students (1833); one for students younger still (1834); and one, entitled *A Familiar Exposition of the Constitution of the United States*, suitable for the general reader (1840). The full work, updated and annotated by Thomas M. Cooley and others, went through five American editions and remained in print through the turn of the century. In addition, the *Commentaries* were enthusiastically received by scholars and

it.⁴¹ As Newmyer's thorough analysis demonstrates, the commentaries were more than a tour de force of learning and technique.⁴² They were also interrelated and integral parts of Story's "grand effort to create an American commercial common law suitable both to the needs of the new capitalism and to the values of old republicanism" (p. 282). As applied law, they were eminently successful. Newmyer admiringly calls them "working law for working lawyers" (p. 303). The practicing bar obviously agreed: altogether, Story's eight volumes on private law went through seventy-one editions, many of them remaining in circulation for a half-century after their first publication.

Many of Story's readers, of course, were his own former students at Harvard Law School, who had also been the first auditors of the commentaries in lecture form. Story's efforts in imagining and bringing into being the first "national" law school are too well known to require repetition here.⁴³ What is important for present purposes is the complete coincidence that existed between Story's Harvard reforms and the purposes that animated him in his other roles. As Story's influence on the Court waned during the last decade and a half of his life, he embraced his duties at the Law School in the fervent hope that, at Harvard, he could employ scientific law to train scientific

judges in England, Scotland, Germany and France — with translations into French, Spanish and Portuguese.

Story's first edition was notable, in particular, for its "Concluding Remarks," in which his republican fire shone with special brilliance:

If these Commentaries shall but inspire in the rising generation a more ardent love of their country, an unquenchable thirst for liberty, and a profound reverence for the constitution and the Union, then they will have accomplished all, that their author ought to desire. Let the American youth never forget, that they possess a noble inheritance, bought by the toils, and sufferings, and blood of their ancestors; and capable, if wisely improved, and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of life, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful, as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, at 759-60.

41. COMMENTARIES ON THE LAW OF BAILMENTS (1832); COMMENTARIES ON THE CONFLICT OF LAWS (1834); COMMENTARIES ON EQUITY JURISPRUDENCE (1836); COMMENTARIES ON EQUITY PLEADINGS (1838); COMMENTARIES ON THE LAW OF AGENCY (1839); COMMENTARIES ON THE LAW OF PARTNERSHIP (1841); COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE (1843); COMMENTARIES ON THE LAW OF PROMISSORY NOTES (1845). Story died before completing his grand survey of American jurisprudence with planned commentaries on admiralty and maritime law. P. 381.

42. Truth to tell, the commentaries have not escaped criticism as verbose, tedious, diffuse, eclectic — or worse. But even Holmes, who at times had harsh words for Story's scholarship, acknowledged that, on the whole, he had "done more than any other English-speaking man [of the nineteenth century] to make the law luminous and easy to understand." O.W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 41 (1920).

43. See, e.g., 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 266-77, 413-543 (1908); 2 *id.* at 1-69; see also A. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967, at 92-139 (1967).

lawyers, whose sound learning and solid common sense might save the Republic from the dangers of democratic excess. How well he succeeded is a matter subject to debate, but the impact of his vision is not. By the final year of Story's life, Harvard had truly become, in the words of Massachusetts Chief Justice Lemuel Shaw's April 1845¹ report to the Harvard Corporation, "[a]n American law school."⁴⁴ Like his friend Story, to whom he gave the lion's share of the credit, Shaw saw the revitalized law school as

a union of educated young men . . . who afterwards distribute over all the United States, may be expected to have conspicuous and influential places in Society, and may be looked to as a means of Union and harmony tending to the advancement of the common and general interests of the whole people.⁴⁵

If the old Judge himself smiled on reading Shaw's vision of the new Harvard, no doubt he had earned the pleasure.

Story's accomplishments in his many other legal roles — as publicist,⁴⁶ legislative draftsman⁴⁷ and codifier,⁴⁸ for example — defy retelling in brief compass. In all of his roles, however, Story's purpose

44. Quoted in 2 C. WARREN, *supra* note 43, at 37 n.1 (emphasis added).

45. *Id.*

46. In addition to his more formal scholarship, Story contributed articles to a variety of contemporary publications, including *North American Review*, *American Law Review*, and *American Jurist and Law Magazine*. The character and purpose of many of these efforts is suggested by the title of one that appeared in *New England Magazine* in August 1834: *Statesmen—Their Rareness and Importance: Daniel Webster*. 7 NEW ENG. MAG. 89 (1834).

47. As early as 1812, Story had drawn up and forwarded to Attorney General William Pinkney a "sketch" for an improved federal criminal code. P. 103. In his middle years, his projects included a national bankruptcy act, which he drafted and which his ally, Daniel Webster, promoted in Congress. P. 172. And shortly before his death, at the request of the Senate Judiciary Committee and with the approval of the Court, Story prepared an act, subsequently codified at 5 Stat. 726 (1845), extending federal jurisdiction over inland waters to federally licensed vehicles employed in interstate commerce. P. 208.

48. Story believed in what might be called "moderate codification." He was no Benthamite; nor did he oppose codification altogether. His theory of codification was perhaps best exemplified in his 1825 exchange of letters with Henry Wheaton concerning the latter's responsibilities as a revisor of New York's statute laws. Wheaton had described the project to Story as "fill[ing] up the lacunae" left by the legislature in certain areas and "simplifying the practice" in others, rather than as a wholesale revision of existing law. Henry Wheaton to Joseph Story (Sept. 19, 1825), Henry Wheaton Papers, The Pierpont Morgan Library, New York City. In his response, Story urged that the New York revisors codify the common law itself, or "at least the part which is most reduced to principles & is of daily extensive application." Story's theory was not that the legislature should create principles of law, but that it might clarify and refine those that had been developed over time by the common law courts. "I am in favour of a Code," he informed Wheaton, "because I think it may reduce to certainty, method, & exactness much of the law, already passed by judicial tribunals & thus give to the public the means, with[in] a reasonable compass, of ascertaining their own rights & duties in many of the most interesting concerns of . . . life." In addition, a code might greatly abridge "the labours & exhausting researches of the profession." Joseph Story to Henry Wheaton (Oct. 1, 1825), Henry Wheaton Papers. In an 1837 report to the Governor of Massachusetts, written in his capacity as chair of that state's special code commission, Story identified the following three areas as particularly susceptible of codification: criminal law; procedure and the law of evidence; and commercial law. The codification movement in Massachusetts eventually died, due not to Story's efforts but to lack of enthusiasm on the part of figures more conservative than he. Pp. 279-80.

was constant: to bring consistent, carefully conceived legal principles to bear in resolving the great political and economic problems of his own generation, and so to safeguard the precious inheritance bequeathed to it by those who made the Revolution.

For much of Story's career, his purpose and style suited perfectly the needs of the age. America was young and abuilding. "[Story's] cry for national institutions," Newmyer writes, "was commensurate with the dream of national greatness" (p. 114); and his prescriptions for greatness, by and large, worked remarkably well. Toward the end of his life, however, it became painfully and inescapably clear, to Story and to his generation, that republicanism and legal science were incapable of curing one grievous ill of the body politic, an ill that was also, ironically, a legacy of the framers whom Story so much revered. The debilitating disease in question was slavery. Story's deep personal aversion to slavery, evidenced from his earliest days on the bench, is beyond doubt.⁴⁹ But the Constitution itself, that bulwark of republican liberty, unflinchingly acknowledged the existence of human bondage in article I, section 2, clause 3 (the three-fifths clause), and provided in article IV, section 2, clause 3 (the rendition clause) that persons "held to Service or Labour in one State, under the Laws thereof, escaping into another . . . shall be delivered up on Claim of the Party to whom such Service or Labour may be due." Much as he himself abhorred slavery, Story recognized these appalling provisions for what they were: the crucial compromise between slaveholding and free states that had made the Union possible. They were, moreover, the law of the land, which he as a judge was sworn to uphold — and, with them, the measures adopted by Congress for their implementation.

Story's discomfort in deciding *Prigg v. Pennsylvania*⁵⁰ can readily be imagined. His health had already begun to fail by 1842,⁵¹ and he knew that his remaining years on the Court must be few. An opinion sustaining the Fugitive Slave Act of 1793 was bound to be condemned in the North and particularly in New England, a region whose values Story had long embodied and sought to spread throughout the nation. Nonetheless, in a forceful opinion employing by now familiar techniques of reasoning, he concluded that the Act must be upheld — but also that the extradition of fugitive slaves lay *exclusively* within the

49. In his circuit court charges, which were printed and circulated throughout New England, Story attacked slavery directly. See, e.g., the charge to the grand jury quoted in 1 LIFE AND LETTERS, *supra* note 1, at 336-47. In passing on the legality of the international slave trade in *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), he condemned the practice as "incurably unjust and inhuman" and "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."

50. 41 U.S. (16 Pet.) 539 (1842).

51. Story missed the entire 1843 Term due to ill health.

jurisdiction of the federal government. As later explained by his son, Story intended by the latter doctrine "that the State Legislatures [should be] prohibited from interfering even to *assist* in giving effect to the [rendition] clause."⁵² To put the matter more plainly in terms of the Northern states (which after all were the states where rendition would inevitably be sought), not only could the states not pass laws interfering with the constitutional right of masters to recover slaves but, in addition, they were forbidden to legislate in any manner that would *facilitate* rendition! And significantly, in the wake of Story's exclusivist ruling in *Prigg*, a series of acts passed by Northern legislatures (beginning with Massachusetts in 1843) actually prohibited state officials from aiding in the extradition of fugitive slaves.⁵³

Was the result in *Prigg*, then, a "triumph of freedom," as Story is reported by his son to have insisted "repeatedly and earnestly" to family and friends?⁵⁴ Newmyer thinks not, and suggests that Story's opinion, taken as a whole, "was influenced more by his fear of abolition than by his desire to free fugitive slaves" (p. 377). Indeed, Newmyer doubts that Story had any grand strategy in mind in constructing the opinion, conjectures that he agreed reluctantly to write on behalf of the majority, and concludes that, in the end, his overriding objective was simply to preserve the constitutional compromise on slavery that he saw as the last barrier against dissolution of the Union. That assessment, although incapable of conclusive proof, rings true. Story's dark forebodings concerning the future of the Republic, and his sober awareness of the limitations and responsibilities of judicial office, were eloquently manifested in his remarks to the students of Harvard Law School as the year 1843 drew to a close. In discussing the painful necessity, under the Constitution, of returning fugitive slaves to their masters, he observed:

If one part of the country may disregard one part of the Constitution, another section may refuse to obey that part which seems to bear hard upon its interests, and thus the Union will become a "mere rope of sand"; and the Constitution, worse than a dead letter, an apple of discord in our midst, a fruitful source of reproach, bitterness, and hatred, and in the end discord and civil war.⁵⁵

52. 2 LIFE AND LETTERS, *supra* note 1, at 392 (emphasis in original).

53. See T. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (1974).

54. 2 LIFE AND LETTERS, *supra* note 1, at 392; see also R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) (antislavery jurisprudence).

55. As recorded in the journal of the young Rutherford B. Hayes. 1 C. WILLIAMS, THE LIFE OF RUTHERFORD BIRCHARD HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 36-37 (1914). See Story's "Concluding Remarks" in his *Commentaries on the Constitution*:

[T]he slightest attention to the history of the national constitution must satisfy every reflecting mind, how many difficulties attended its formation and adoption, from real or imaginary differences of interests, sectional feelings, and local institutions. It is an attempt to create a national sovereignty, and yet to preserve the state sovereignties; though it is impossible to assign definite boundaries in every case to the powers of each. The influence of the dis-

Barely a year later, Story quietly informed family and close friends of his determination shortly to leave the Court, having concluded sadly "that by remaining on the Bench I could accomplish no good, either for myself or for my country."⁵⁶ He died, still in harness, on September 10, 1845, grateful for his own "prosperity and success . . . in life"⁵⁷ but powerless at last to spare the old Republic from the darkness of the onrushing night.

III

Supreme Court Justice Joseph Story: Statesman of the Old Republic is an unmitigated success. This exemplary biography is the first thoroughgoing study of Story's intellectual life, and as such succeeds brilliantly in conveying both the main influences on Story's thought and the principal themes in his work. Along the way, however, Newmyer manages also to present a fascinating portrait of Story's world. This is Story's biography, yes; but it is the biography of an age as well. Name a leading figure or vital issue of the early nineteenth century and, virtually without exception, he, she or it will appear in these pages. Each is deftly summarized and sketched; all are accorded scrupulously fair treatment by a master historian.⁵⁸ Newmyer should, and one trusts will, receive a variety of honors for this volume. It is the product of painstaking and unprecedented research. It is carefully conceived, illuminating, rich in detail, and entertainingly written.⁵⁹ It is absolutely first-rate.

What elements must concur to produce a biography of this calibre? Opinions will differ. A partial list, however, might include: talent,

turbing causes, which, more than once in the convention, were on the point of breaking up the Union, have since immeasurably increased in concentration and vigour. . . . If, under these circumstances, the Union should once be broken up, it is impossible, that a new constitution should ever be formed, embracing the whole Territory. We shall be divided into several nations or confederacies, rivals in power and interest, too proud to brook injury, and too close to make retaliation distant or ineffectual. Our very animosities will, like those of all other kindred nations, become more deadly, because our lineage, laws, and language are the same. Let the history of the Grecian and Italian republics warn us of our dangers. The national constitution is our last, and our only security.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 758-59.

56. Joseph Story to Ezekial Bacon (Apr. 12, 1845), *reprinted in* 2 LIFE AND LETTERS, *supra* note 1, at 528.

57. As recalled by his son, William Wetmore Story, in 2 LIFE AND LETTERS, *supra* note 1, at 540.

58. Newmyer writes that his years in the trenches, struggling to understand the ambiguities and seeming contradictions of Story and his era, have taught him "the wisdom of the old-fashioned rules of historiography: the need for historians to get out of their own skin, to avoid anachronism, to judge by past, not present, standards." P. xiii.

59. Law professors will envy Newmyer for somehow escaping servitude to the *Texas Style Manual*, an engine of the devil whose purpose is to make bad writing better — and good writing worse. Cf. Wessel, *Computer Software for Writers: Helping the Bad, Hurting the Good?*, Wall St. J., July 7, 1986, at 13, col. 4 ("[F]ollowing rigid rules, the programs spew criticism of the Gettysburg Address and make snide remarks about Mark Twain's 'The Adventures of Tom Sawyer.'").

obviously, on the part of the biographer, and hard work, too; copious and available data; a subject who is significant, interesting, and perhaps underappreciated or even misunderstood in the modern age; and, at least ideally, a good "fit" between biographer and subject. The last-named factor, one suspects, was especially important in the present instance. The very first words of Newmyer's story record the following tale:

Some years ago, as I sat pondering the Crowninshield papers at the Peabody Museum in Salem, Massachusetts, an old man sat down across the table from me. He desperately needed a shave and, in truth, looked totally down, out, and bedraggled. He fixed me with a disconcerting stare for some time before asking if I were the person working on Joseph Story. I confessed my presumption, whereupon he fired several remarkably informed questions at me that led me to conclude that he was an unfrocked history professor—or perhaps a crashed biographer of Judge Story. Having queried me and found me wanting, not to say speechless, he rose abruptly. "Young man," he said with a grim intensity as he turned to leave, "studying Joseph Story could ruin your career!" [p. ix]

Clearly, Newmyer's career has survived his prolonged meditation on the old Judge, and even prospered, deservedly, as a result of it. Newmyer is a generous man. Besides the old fellow at the Peabody, he shares credit in his Acknowledgments with innumerable libraries, archives, historical societies, foundations and publications, and no fewer than thirty-nine named individuals, who have helped him along the way in completing this superb biography. But Newmyer does not stop there, nor could he. In his Introduction, he adds thanks to one final individual who has been his companion, on a daily basis, for almost thirty years: "I confess a strange sense of gratitude," Newmyer writes, "to the old judge for being such a demanding teacher and such good company" (p. xiii). Story, wherever he may be now, should be grateful also. Biographers, no less than their subjects, are revealed by what they have written. In Kent Newmyer, the old Judge has had an apt pupil — and, one suspects, good company, too.