

Supreme Court Justice Joseph Story

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BOOK REVIEW

SUPREME COURT JUSTICE JOSEPH STORY. *R. Kent Newmyer*. Chapel Hill: University of North Carolina Press. 1985. Pp. xvii, 490. \$33.00. (Studies in Legal History).

Joseph Story is one of those historical figures who stand astride a nation or a period, whose energy exhausts and amazes but who ultimately cannot be said to be as significant as their lives initially suggest. Cotton Mather, Richard Hooker, the English theologian, and Roscoe Pound are similar figures. Nevertheless, the life of a figure, like Joseph Story, fascinates because it provides a vantage point on the history of his particular epoch. Because of this, it is surprising that we have had to wait until now for the first major biography of Joseph Story.¹

Kent Newmyer has crafted a tightly organized² biography of sensible length that examines Story's life and epoch very well. He integrates well the complexities of the early republican period with Story's life. Legal cases and materials are dealt with carefully and accurately; the discussion of *Swift v. Tyson*³ is the best available.⁴

¹ R.K. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY (1985) [hereinafter cited as NEWMYER]. There is another full-length modern biography. G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970). It does a good job of drawing together most of the materials on Story's life but does not investigate in depth Story's intellectual contributions. James McClellan attempted an intellectual study in JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT WITH SELECTED WRITINGS (1971). On McClellan see Dowd, Book Review, 72 COLUM. L. REV. 954 (1972).

² The indices to this volume are excellent. The topical index is thorough and well laid out, particularly in its functional subheadings under the entry for Story himself. The case index is very helpful. The gathering of the footnotes at the end did not bother me because few of them were textual and because I moved a book mark along to consult them as I read.

³ 41 U.S. (16 Pet.) 1 (1842).

⁴ See NEWMYER, *supra* note 1, at 334-43. I am aware of three other major attempts to describe this seminal case. First, Morton Horwitz places it in the context of his transformation thesis, and to the extent one thinks that there was a transformation in American law, then *Swift* was part of it. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977). Second, Randall Bridwell, at first in his book, written with Ralph U. Whitten, and later in a long and sharply worded review of the Horwitz book, has offered a neo-Hayekian interpretation of the case and much else. R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINE OF SEPARATION OF POWERS AND FEDERALISM (1977); Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horowitz, The Transformation of American Law, 1780-1860, and on the Common Law in America*, 53 IND. L.J. 449 (1978). For a thoughtful review of the Bridwell and Whitten book, see Ely, Book Review, 53 IND. L.J. 277 (1977). Third, Mark Tushnet, in a note written while a law student, placed *Swift* in the context of efforts by lawyers, including Story, to resist the popular aspects of the codification movement and

Newmyer's discussion (pp. 370-75) of Story's opinion in *Prigg v. Pennsylvania*⁵ effectively refutes Robert Cover's argument that the opinion reflected the peculiar strain on antislavery jurisprudence and judges in 1841⁶ and suggests instead that *Prigg* is consistent with Story's view of the inescapable aspects of the Constitution's slavery compromise. Every United States constitutional law professor, legal historian, and general historian should read this solid work carefully.

Unlike much recent United States legal history, this is a gentle book. Newmyer is deferential to other scholars even when he disagrees with them, for instance, with Robert Cover and Morton Horowitz.⁷ Conclusions are not overstated; the book does not go farther than the carefully marshalled evidence. Perhaps this gentleness will give rise to criticism from others, but this reviewer finds it a particular attraction of the book, one that will make the book more durable than other more argumentative historical works. The rest of this review is, therefore, not offered as criticism but rather as thoughts or speculations engendered by reading Kent Newmyer's fine book.

I

THE STATUS OF STORY'S FAMILY

Kent Newmyer describes Story and his family as part of the "Marblehead aristocracy" (p. 7). He points out, however, that Story's physician father, Elisha, begat at least eighteen children by his two wives and that Story's mother, the second wife, took care of the household chores without any servants until after the Revolution (p. 10). Although Elisha Story was a physician, this by no means implies the high economic or social status that characterizes twentieth century medical practice.⁸ Elisha Story's brother, Isaac, was the

also in the context of Perry Miller's view that the first part of the nineteenth century was a conflict between Mind and Heart. Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1969).

⁵ 41 U.S. (16 Pet.) 539 (1842).

⁶ R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

⁷ For instance, he cites Robert Cover's comments when he finds himself in agreement with Cover, e.g., NEWMYER, *supra* note 1, at 349-50, but when he disagrees, as in his exegesis of *Prigg*, he does not set out and confront the disagreement. In the *Prigg* discussion the main reference to Cover that I have found is in footnote 102, supporting page 373 of the text. In the text Newmyer states, "Possibly *Prigg* was like *Amistad* or the *Creole* mutiny affair, in which the law permitted judges to discover what they wanted to find (in Story's case a loophole for freedom) . . ." *Id.* at 373. This is fundamentally at variance with Cover's version of that case, and yet in footnote 102 Newmyer states, "This is the theme of Cover, *Justice Accused*, which treats Story's decisions on slavery with insight." *Id.* at 447 n.102.

⁸ See Osgood, *John Clark, Esq., Justice of the Peace, 1667-1728*, in 62 LAW IN COLONIAL MASSACHUSETTS, 1630-1800, at 107-11 (Pub. Colonial Soc'y Mass. 1984); MEDICINE IN COLONIAL MASSACHUSETTS, 1620-1820 *passim* (Pub. Colonial Soc'y Mass. 1980).

Calvinist minister of the Second Church in Marblehead, and both of his fathers-in-law were substantial figures in Marblehead.

Kent Newmyer's data is accurate, but I think it misses a crucial point. Story saw himself, largely because of his origins, as a nonaristocrat in Massachusetts society. His isolation at Harvard College (p. 23) and his life-long unctuousness and toadying to people of higher social status make no sense unless one understands that Joseph Story felt very deeply that he was not of high social status. Even granting that nineteenth century discourse was fawning in tone, Story's pronouncements were more than normally self-abasing.

I think Story viewed himself as coming from a solid family that was modest in social attainments, dwelling in a small, provincial town, Marblehead.⁹ His striving for wealth and respectability during the rest of his life becomes inexplicable if one accepts without some further elaboration Kent Newmyer's explanation of his social origins. Undoubtedly, Story's sense of his social status affected his political and intellectual views, as discussed below.

II

STORY'S PERSONALITY

Kent Newmyer adds little to our understanding of Story's personality, a subject of interest to many who have dealt with aspects of his life. I am not suggesting that Newmyer should have engaged in psychohistory, but I had hoped that he would shed new light on Story's persona.

For instance, Newmyer points out that Story tended to push ideas to extremes (p. 350). This contrasts with John Marshall who, as Newmyer suggests, could recognize "brick-walls" and knew how to avoid them. Similarly, Story's fingers were in many pies; he taught law, he was the president of a bank (p. 326), he rode circuit, he did more than his share of the Supreme Court's work, he advised Daniel Webster on cases (pp. 175-77) and conservative Massachusetts politicians on tactics (pp. 162-63).

Story also switched his political affiliation from Republican to proto-Whig. Newmyer ties this evolution to Story's enduring affiliation to the ideas of the "old republic,"¹⁰ the conservative, Burkean ideals of the revolutionary epoch. Although this rationale seems

⁹ See *I LIFE AND LETTERS OF JOSEPH STORY* 30-34 (W.W. Story ed. 1851).

¹⁰ I am aware that this is a well-developed theme in general American historiography, e.g., that there was a group of ideas called "republicanism" which were in conflict with the democratic thrusts represented for the most part by Andrew Jackson. See M. HOLT, *THE POLITICAL CRISIS OF THE 1850s* (1978); L. KERBER, *FEDERALISTS IN DISSENT* (1970). I remain unsure that this label is very helpful in understanding anything more than a generational and sectional tendency against Jacksonianism.

certain and is particularly well demonstrated by Story's willingness to abide by the constitutional settlement of the slavery issue, it is hard to square with Story's ability to adapt in other areas, such as his evolving sense of what the commercial classes needed.

Is there some explanation for Story's intellectual compulsiveness, his desire to work constantly, and his political change? Newmyer is surely correct that Story was a man of the old republic; by the end of his tenure on the Supreme Court Story felt that he was the beleaguered defender of the Constitution. But beyond this, one has to believe that other things were at work in Story's life. Was the mid-life career change of his son, William, from lawyer to sculptor an indication that Story's activities as a jurist never satisfied his poetic or romantic side (p. 197), which he pushed aside after an initial critical rejection? Deep questions about the personality of a famous person can rarely be answered satisfactorily, but a major biography should confront them. The questions become at least a framework from which to look at the professional aspects of the person's life.

Perhaps the explanation for why so little of what Story did has born further professional fruit is that his work reflected a deep personality ambivalence or schism. Newmyer tantalizes with some hints. "Shades of Cotton Mather!" he notes of Story at one point (p. 186). The personality resemblances are indeed strong. On the other hand, Story's humane side, unlike Mather's, comes through in his family life which, even though it was not an everyday aspect of his existence because of his frequent travels and his wife's invalidism, was happy (p. 221). If Story was a pedant, Mather was a pedant's pedant. Story's second wife, Sarah Wetmore, found Mather "incorrigibly dull & credulous" (p. 178).

In contrast to Kent Newmyer's cautiousness, I want to advance the thesis that Story's personality quirks, political views, and combination of scholarly productivity and lack of coherence, discussed below, resulted from his sense of social inferiority. It is hard to make sense of his revulsion at Jacksonianism, his flirtation with and later rejection of Republicanism, and his lifelong dedication to the facilitation of commerce by the law without understanding him and his ambitions in the context of the Massachusetts social order.

III

STORY THE THEORIST

It is difficult to embark on a major inquiry into Story's theory of law because he did not view himself as a theorist. Story was interested in practical, *scientific* law. But he did write a fair amount of what we might call jurisprudence. He believed in natural law (p. 170). He thought law could and should be scientific (pp. 277, 285,

& 303). He believed in the wisdom and relevance of the common law residuum, at least as a starting point, for developing American law. Although he thought very highly of John Marshall, Lord Mansfield, the great common law judge, was his hero (p. 246). He thought that the law was and should be moral (p. 211). He cited, not as authority, but as sources of wisdom and insight, the works available to him by the civilians (p. 287).

What did Story mean by natural law? What made law scientific? Was the use of such terms merely a ruse, designed to emphasize that society needed lawyers at its very center to guide it and Joseph Story at the center of the center to train and guide the lawyers? What of the relationship of religion to law, which Story occasionally stressed (pp. 183, 184, & 244)?

Kent Newmyer deftly reveals that the foregoing are issues. He also makes an effort to place Story in the intellectual milieu of his age. Story was an active Unitarian (p. 180), and intellectually he resembled his Harvard classmate, William Ellery Channing,¹¹ the great pre-transcendentalist, Unitarian divine. For Story and for Channing, if the latter ever used the concept, natural law was a set of possible legal choices that was consistent with their views as to the perfectability of mankind. The world was an imperfect creation, but it lacked the active, evil force that the New Lights¹² and their predecessors, the Puritans, saw. So defined, Story's natural law provided few specific answers to particular questions but was rather an affirmation of a framework of rationality for answering those questions.

Story was not above using the words "natural law" to suggest their ancient meaning, i.e., a set of derivable and unchangeable moral truths revealed to man but perhaps not rationally deducible. Story vigorously affirmed the proposition that slavery was a moral wrong.¹³ That it was not consistent with natural law is another proposition he probably accepted. But Story, like most modern legal theorists, did not feel that law which failed to intersect with morality ceased to be law. Slavery could be maintained as a matter of municipal law.

¹¹ For work on this important figure in American religious history, see D.P. EDGELL, *WILLIAM ELLERY CHANNING: AN INTELLECTUAL PORTRAIT* (1955); A. DELBANCO, *WILLIAM ELLERY CHANNING: AN ESSAY ON THE LIBERAL SPIRIT IN AMERICA* (1981).

¹² For a discussion of the conflict between the New Lights, evangelicals of the late eighteenth century, and the Old Lights, see C.C. GOEN, *REVIVALISM AND SEPARATISM IN NEW ENGLAND, 1740-1800: STRICT CONGREGATIONALISTS AND SEPARATE BAPTISTS IN THE GREAT AWAKENING* (1962); A. HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* (1966).

¹³ *United States v. La Jeune Eugenie*, 26 F. Cas. 823, 845-46 (C.C.D. Mass. 1822) (No. 15,551).

For Story the most important concept was his belief that law had to be scientific. This statement, no doubt, meant a number of things, even to Story. It conveyed his belief that law was a precise science and provided specific answers to questions. Law was exact and exacting. It also meant that scientists, experts, were needed. A sick patient required a physician; an unpaid creditor required an intelligent attorney who, in turn, required the authority and procedures of the law. Finally, law was scientific in that it was rational, it made logical sense, at least it did to Joseph Story once he had figured it out.

It would, however, be a mistake to portray Joseph Story as a pure rationalist, a cold Aristotelian without a cosmology. He was a man of the late eighteenth and early nineteenth centuries, and in those eras the language of the past obfuscated changed and changing perceptions. His unflagging zeal for the entire common law system, including its sister branch, equity, demonstrates that he carried with him a tremendous amount of historical baggage. But, as Newmyer lucidly shows, even Story was willing to contemplate limited codification and other changes and evolution in the common law (p. 279).

IV

STORY THE LEGAL FIGURE

Story loved the action associated with the law. He loved sitting as a circuit judge. Kent Newmyer makes the reader feel how excited Story was to breeze into Providence or Wiscasset, as *the* circuit judge, impatiently imparting knowledge to the far corners of the New England legal community. Newmyer also conveys, as no one else has done before, the extent of Story's devotion to teaching and to Harvard. Teaching was no minor corner of his career. It was a source of immense satisfaction to him to teach, even if he was gassy, as some jealous colleagues and a few students asserted.

But what to make of Story's intellectual contribution to the law? He wrote a large, but not immense, corpus of federal decisions. His treatises covered a good shelf in a library and dealt competently with most of commercial law, plus constitutional law, conflicts, pleading, and equity. Kent Newmyer succinctly evaluates these treatises (pp. 281-89). *Conflict of Laws* was the most original. *Equity Jurisprudence* probably has had the greatest impact. His *Commentaries on the Constitution*, although it continues to draw attention,¹⁴ is perhaps the

¹⁴ The author of the most recent discussion of the constitutional law treatise does not disagree in any substantial way with what Newmyer has to say, although neither seems to have read the other's manuscript. See Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985).

most argumentative. But it is hard to find a theme that runs through these treatises.

Story's opinions also present a series of pictures that do not seem to reflect any single motif. There is the securing and protection of the Marshallian legacy in *Martin v. Hunter's Lessee*.¹⁵ One finds a continuing advancement of general, knowable commercial rules; *Swift v. Tyson*¹⁶ is the most famous opinion. Conversely, he conceived of property rights in fairly static terms, as shown in his dissent in *Charles River Bridge v. Warren Bridge*.¹⁷

Lest anyone think that Story was the spokesman merely of his region and time, a number of his decisions cut against both. At great risk he opposed sectional sentiment on the War of 1812 and the embargo of 1807 (pp. 58-60, 83-90). He resisted abolitionist demands (pp. 307, 365-78). He favored balancing the interests of seamen, masters and shipowners in admiralty (pp. 151-53). But even these contrarities have no theme. For in most matters Story reflected the aspirations and interests of the dominant culture of New England.

Perhaps the answer to the questions implicitly posed here, what motivated and explains Joseph Story, is that there are for many humans, with their complexities, no simple ideologies that they hold on to or that unlock the mystery of their lives. Rather, they meld the passions and interests of their ideals, their society, their social situation and ambitions, and the peculiar twists and turns of their own lives' paths. It is also possible that such intellectual diffuseness is desirable. How could an adherent of a more rigid and authoritarian legal system, like the civil law, ever have elaborated, as Story did in his treatise, the notion of dual sovereignty in which the states and federal government not only end up with less power than a unitary state but as contenders for the favor of the people?

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¹⁵ 14 U.S. (1 Wheat.) 304 (1816).

¹⁶ 41 U.S. (16 Pet.) 1 (1842).

¹⁷ 36 U.S. (11 Pet.) 420 (1837).

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