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Joseph Story's Republics in a Minor Key: Dark Times and the Astonishing Relevance of Kent Newmyer

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Essay

Joseph Story's Republics in a Minor Key: Dark Times and the Astonishing Relevance of Kent Newmyer

STEVEN R. WILF

Kent Newmyer's biography of Justice Joseph Story set the standard of later judicial biographies. Yet it focused on the public aspects of republicanism in Story's court decisions rather than the ways a republican ethos might lead to the construction of alternative realms. Such realms became increasingly important as the common republicanism of the founding generation waned. In response to Jeffersonian and, especially, Jacksonian partisan politics, Story began to carve out space to invent domains apart from the politicized spheres of Supreme Court decision-making. It was Story's adaptation to what he considered dark times. This Article examines three of these parallel worlds—his construction of a saltwater jurisprudence through admiralty law that proved a separate realm from the Court's common law cases, his lengthy poetic imagining of a solitary place apart from politics, and his encouragement of mechanic republicanism through patent law and his involvement with mechanical institutes. Dark times elicit the making of new, uncharted parallel worlds.

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STEVEN R. WILF *

*In den finsternen Zeiten
Wird da auch gesungen werden?
Da wird auch gesungen werden.
Von den finsternen Zeiten.*

*In the dark times
Will there also be singing?
Yes, there will also be singing.
About the dark times.*

Bertolt Brecht
Svendborg Poems, 1939¹

[E]ven in the darkest of times we have the right to expect some illumination, and that such illumination may well come less from theories and concepts than from the uncertain, flickering, and often weak light that some men and women, in their lives and their works, will kindle under almost all circumstances and shed over the time span that was given them on earth

Hannah Arendt
*Men in Dark Times*²

There is a crack, a crack in everything. That's how the light gets in.

Leonard Cohen
"Anthem"³

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¹ Bertolt Brecht, *Svendborg Poems* (1939), reprinted in David Constantine, *The Usefulness of Poetry*, in BRECHT'S POETRY OF POLITICAL EXILE 29, 39 (Ronald Speirs ed., 2000).

² HANNAH ARENDT, *MEN IN DARK TIMES*, at ix (1955).

³ LEONARD COHEN, *Anthem*, on *THE FUTURE* (Columbia Records 1992).

INTRODUCTION

Kent probably never expected to be relevant. He is a scholar's scholar—careful in his research and following paths directed by the historical documents themselves. His paragraphs are filled with footnotes arrayed in neat formation to make a point—much like a Roman legion's phalanx. But many of us have come to believe that we are living in a neo-Jacksonian age—the appeal to mass democracy at a rather base level; the exuberant embrace of markets; the cultural construction of citizenship privileging the white, male, and able; the raw plasticity of truth; and the crossing of established civil society norms. For those of us committed to the rule of law (and who isn't in a law faculty?), we find ourselves in a situation akin to Justice Joseph Story who, in the early nineteenth century, defended legal norms against the Jeffersonians and—to an even larger extent—against the Jacksonians.

This is the trajectory of much of Kent's life work—to interrogate the tension between law and popular politics from Jefferson to Jackson, from Marshall to Taney. What does rule of law mean in an age of disruption?

I recall suggesting a different title for this symposium in honor of Kent that referred to “law in dark times.” Wiser counsel, perhaps, prevailed to soften this to “our times.” But I am going to take the risk of slipping into potentially political brackish waters (much to my discomfort) and think about Kent's Story from the vantage point of our own dark times.⁴ I am following French historian Pierre Nora's dictum: We must prevent history from being merely history.⁵

What I will not do is resurface Story's Jeremiad. We all know that the Supreme Court's decision in *Charles River Bridge* (1837)⁶ marked a turning point. A corporate charter granted by Massachusetts was abrogated, and a new, competing bridge was built nearby. For Jacksonians like Justice Roger Taney, the opinion's author, it freed a dynamic market economy from the fetters of legal norms favoring old elites. This market revolution, as Charles Sellers has called it,⁷ was a comeuppance for those who favored traditional notions of rule of law. The legalist republicanism of the founders was upset by the mass democracy of the Jacksonians.

⁴ See R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC*, at xvi (1985) [hereinafter NEWMYER, *SUPREME COURT JUSTICE*] (setting forth Story's nationalist vision, which took place “squarely on the fault line of historical change”).

⁵ Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7, 18 (1989).

⁶ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

⁷ CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846*, at 21 (1991) (“The American economy's takeoff was fueled by the unusually feverish enterprise of its market sector. Colonial Americans pursued wealth more freely than Europeans because they were not overshadowed and hemmed in by aristocrats and postfeudal institutions.”).

Story considered resigning from the Court after *Charles River Bridge*. He believed (as he recorded in his notes) that this decision was simply the exercise of “sheer power.”⁸ Writing to Joseph Story, Chancellor Kent complained that the Supreme Court “has fallen from its high station and commanding dignity, and has lost its energy and spirit, and independence and accuracy, and surrendered up to the tempter of the day the true principles of the constitution.”⁹ In the wake of *Charles River Bridge*, a despondent Story famously wrote: “I am the last of the old race of judges. I stand their solitary representative, with a pained heart and a subdued confidence.”¹⁰ By the 1830s, the American Justinians, Kent and Story, (to use Sellers’s phrase) became the American Jeremiahs.

Story is today mostly known for his Jeremiad. Jeremiads have a long history in American letters—as Sacvan Bercovitch famously has shown—from Jonathan Edwards onwards. They reflect the chasm between the ideal and the actual.¹¹ It is not surprising that Story’s dissent in *Charles River Bridge* embraced this particularly New England Old Testament tradition when he wrote: “I stand upon the old law.”¹²

But I want to tell a different Story: how he created over his lifetime—and not just in response to the Jacksonian assault on contract—a number of independent worlds that embodied his ideal of legalism. They form a kind of archipelago of republicanism, an assemblage of islands sharing a common cultural ecosystem with similar political ideas. Derived from the Latin *res publica*, republicanism was an ideological posture as much as a firm set of ascribed political positions. It presumed a public-directed governance grounded in citizens with shared values. Yet what happens when the values are no longer shared? When citizens establish political parties at odds with each other—even barely speaking the same language? And when the public good becomes a point of contestation as much as agreement? Story remained a republican for his entire lifetime. Yet he had to reinvent what republicanism meant by creating space beyond the reality of contemporary politics. For lack of a better term, I will call these worlds an example of *republics in a minor key*. And, I will argue, it is precisely that kind of republicanism we need as we grope our way through our own dark times.

⁸ Kent Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232, 234 (1973).

⁹ JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM 1763-1847*, at 293–94 (1939).

¹⁰ JOHN M. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES* 400 (1879).

¹¹ See SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD*, at xv (1978) (introducing the epilogue’s focus on American literary texts’ “pervasive impact upon [the] culture of the American jeremiad”).

¹² *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 598 (1837) (Story, J., dissenting).

German poet Bertholt Brecht, who certainly lived in dark times, penned a few lines that encompass the kind of creativity that can emerge at moments when fundamental principles seem to be in eclipse:

*In the dark times
Will there also be singing?
Yes, there will be singing
About the dark times.*¹³

This talk will be about how Story took the ideal of republicanism and embodied it in a variety of different independent normative worlds (*republicanism in a minor key*). These were Story's songs for a dark time. I prefer this approach as opposed to the politics of resentment, the commonplace of Story in dissent penning a Jeremiad, and the predictions (from Henry Adams to David Brooks) of American decay. These are simply rhetorical responses. Making space apart from hegemonic common law legalism is a fundamentally pragmatic lawyerly approach.

My point of departure is Kent's trenchant discussion of republicanism in the Story biography. Kent situates Story in republican culture. Republicanism is (and I quote Kent) "a set of collectively held and often vaguely defined general assumptions about American government and society: what it was as well as what it ought to be."¹⁴ But there was a shift in this culture. In the 1780s, Americans were acutely aware of the problem of how difficult it is to sustain a republic when the historical deck is stacked against you. The past is replete with classical republics and renaissance republics that failed. Historians have long recognized that this sense of frailty was grounded in an eighteenth-century trope about virtue eroded through corruption.

By the beginning of the nineteenth century, however, Americans celebrated a republic that had survived for decades. But the essence of the republic—a small political unit sharing common cultural values—seems to have eroded even as the American polity was enlarged. Frontiersmen and sophisticated merchants in seaport cities, agrarian yeomen and urban mechanics with leather aprons, slave owners and Northern manufacturers—what did they have in common? Agrarian republicanism tussled with commercial republicanism. And by the 1830s, Taney's Supreme Court had become a tribunal divided against itself.

Yet Story, I will argue, developed three different independent worlds—his archipelago of republicanism in a minor key—where he established norms of his own: the first is the saltwater expanse of Admiralty law, the second his own personal retreat in a poetic incarnation

¹³ Brecht, *supra* note 1, at 39.

¹⁴ NEWMYER, SUPREME COURT JUSTICE, *supra* note 4, at xv.

of solitude, and the third is the making of a modern patent law situated in a milieu of artisans and mechanics.

Let me begin with the sea.

I. FIRST SONG: SALTWATER JURISDICTION

Admiralty law articulated a particular vision of an expansive republic. Instead of the expansion—really the colonial enterprise of the United States—stretching westward across the continent as Jacksonians endorsed, Story promoted a seaward projecting of American power through its merchant fleets under the flag of federal jurisdiction.

The commonplace understanding of Admiralty courts is as the tribunal for adjudicating private maritime disputes. During the period of the Early Republic, however, admiralty law was more akin to public law. The Constitution's Admiralty Clause¹⁵ was intended to assert federal jurisdiction over prize cases, which had a diplomatic dimension; addressed crimes taking place on the high seas, often by pirates who were (like today's terrorists) the non-state actors of the period; and enabled the policing of tariffs, which implicated a major source of revenue for the federal government.¹⁶

Citizens of the Early Republic had every reason to detest admiralty law. It was deployed by the British to evade colonial juries. In 1764, the English Revenue Act established a Vice-Admiralty Court in Halifax that tried Americans who resisted imposed tariffs. Colonial Americans, who celebrated their jury system as an emblem of liberty, found themselves hauled before a court without a jury trial, the burden of proof rested upon those whose ships were seized—often on thin evidence—by customs officers, and the tribunal itself benefitted from the selling of a condemned vessel. Locating the proceedings in Halifax meant merchants had to contend in proceedings thousands of miles from their homes. Even after 1768, when the Vice-Admiralty Court was moved to Boston, Charleston, and Philadelphia, these legal actions served imperial interests and violated basic common law norms.¹⁷

Yet, more than anyone else in the Early Republic, Story championed Admiralty jurisdiction. In the 1815 landmark case *DeLovio v. Boit*, Story determined that a contract of maritime insurance, no matter where executed, was subject to admiralty jurisdiction.¹⁸ After meticulously listing

¹⁵ U.S. CONST., art. III, § 2, cl. 1.

¹⁶ William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 118 (1993).

¹⁷ Richard Ross & Steven Wilf, *Revolutionary Mobilization and 18th Century Legal Orders—Learned, Vernacular, and Comparative*, in THE CAMBRIDGE HISTORY OF THE AMERICAN REVOLUTION (Marjoleine Kars, Michael A. McDonnell, & Andrew M. Schocket eds., forthcoming 2022).

¹⁸ *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815).

much narrower English precedent, Story—gesturing to the time immemorial nature of admiralty law—decided that the United States has a different, vastly expanded maritime jurisdiction grounded in the Constitution’s Admiralty Clause.¹⁹ In fact, the Constitution does nothing more than state “the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.”²⁰ The devil, of course, is in the details defining the deep blue sea.

It is only after reading Story’s lengthy historical chronicle in *DeLovio* that it becomes clear that this decision was truly radical.²¹ Sir Edward Coke in the seventeenth century vindicated broad common law jurisdiction by shrinking courts founded on royal prerogatives—including Admiralty.²² A good case could be made that the use of a Savings Clause—saving those seeking redress from common law remedies in court—embodied Coke’s principle of limiting other forms of adjudication. Coke is the villain in what G. Edward White has called Story’s “historical morality play.”²³ Story rejected the common law bounds of admiralty and campaigned for his claim that the American Revolution turned upside down English law because “[t]he advantages . . . to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the [C]onstitution to be so [expansively] construed”²⁴

Plank by plank, Story built admiralty jurisdiction as a different world. After a good deal of controversy, the Supreme Court in 1813 determined in *United States v. Hudson and Goodwin* that there was no common law of federal crimes.²⁵ Yet the very same year in *United States v. Coolidge*, Story found that felonies committed on the high seas, even in the absence of any statutory basis whatsoever, might be punishable by United States courts.²⁶ Historians generally point to Story’s childhood in Marblehead and local connections to explain his remarkable commitment to admiralty law.

Story’s maritime turn might be better understood in the shadow of the War of 1812—a historical moment that has received insufficient attention from legal historians. In the course of the war, Story’s circuit caseload was inundated with prize cases. Indeed, quite apart from Story’s own

¹⁹ *Id.* at 441; U.S. CONST., art. III, § 2, cl. 1.

²⁰ U.S. CONST., art. III, § 2, cl. 1.

²¹ *DeLovio*, 7 F. Cas. at 419–26.

²² *Id.* at 421.

²³ G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in III–IV THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 438 (Paul A. Freund & Stanley N. Katz eds., 1988).

²⁴ *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815).

²⁵ *United States v. Hudson*, 11 U.S. 32, 32 (1812).

²⁶ *United States v. Coolidge*, 25 F. Cas. 619, 621 (D. Mass. 1813).

maneuvers to expand admiralty jurisdiction, simply through the naval conflict a remarkable one-third of the Supreme Court docket involved admiralty law.²⁷ In the war's wake, the Federalist party collapses, regional divides are sharpened as the North becomes more industrial, the South increasingly relies upon monoculture grounded in unfree labor. Finally, the transportation revolution—railroads and canals—turn out to be a locus of contention even while intended to bind an increasingly fractured nation together.

Alan Taylor has described the War of 1812 as a North American civil war that pitted American citizens against Canadian subjects.²⁸ Yet it also was a pivotal point for the fracturing of shared American values as distinct regional identities emerged from the war with different agendas. New England, in particular, saw itself increasingly politically isolated as it sought to protect its seafaring industries. The British acts of impressment and flogging of American sailors were not simply a *casus belli*. By presenting the amplification of maritime law as a national project, Story was seeking a touchstone for commonality in an increasingly splintered America. His cases were nothing short of a saltwater manifesto for American sovereignty.²⁹ The War of 1812, however, was more than a second war of independence from the British. It was also a formative step towards the sectional conflict that would culminate in the Civil War.

Federal admiralty law was intended to supplant state court power. Story sought to fashion a maritime science of law—deeply founded on doctrinal principles and controlled by judges rather than compromised by legislative interference and fickle juries. Through using the particularly enhanced authority of common law judges, he hoped to import the discipline of civil law norms. As he stated in an 1829 address to members of the bar, “our jurisprudence is young and flexible,” and maritime law was the perfect place to lodge legal transplants.³⁰ Admiralty jurisdiction extended far and wide, claiming *in personam* and *in rem* jurisdiction over maritime contracts, insurance, and liens even when these were executed on land. Until he reversed course in *The Thomas Jefferson* (1825),³¹ it looked as if Story would extend admiralty jurisdiction well beyond the ebb and flow of the tides—and through the vast array of inland waterways no

²⁷ Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1315 (1985).

²⁸ ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, AND INDIAN ALLIES* 6–12 (2010).

²⁹ R. Kent Newmyer, *Joseph Story and the War of 1812: A Judicial Nationalist*, 26 HISTORIAN 486, 487 (1964).

³⁰ Joseph Story, Supreme Court Justice, An Address Delivered Before the Members of the Suffolk Bar, at their Anniversary, on the Fourth of September, 1821, at Boston (Sept. 4, 1821), in 1 AM. JURIST & L. MAG. 1, 29 (1829).

³¹ *The Thomas Jefferson*, 23 U.S. 428 (1825).

matter how insignificant. His Fabian retreat in *The Thomas Jefferson* (how ironic that the vessel was named after his nemesis) was an attempt to keep his salt water world intact even as others questioned the right of a New England built admiralty law to assert its claims over steamboats making their way down broad rivers such as the Missouri.

Even when Story yielded ground in his campaign for vast admiralty jurisdiction, such an abandoning of the field was simply tactical. In the very same year as *The Thomas Jefferson*, Story, in partnership with Daniel Webster, drafted what would become the Crimes Act of 1825. It included a brash imagining of topography. A federal crime on the high seas includes “any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States.”³² Any creek? And in 1845, the year of his death, Story drafted the Admiralty Jurisdiction Act, which extended federal admiralty jurisdiction to the Great Lakes and its connecting waterways.³³ This piece of legislation was a gesture of penance for his decision in *The Thomas Jefferson*.

“It was said of . . . Story, 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.”³⁴ The saltwater republic had expanded (yet again) into freshwater domains.

II. SECOND SONG: SOLITUDE AS REFUGE

No one has a good word to say about Story as a poet. His poem, *The Power of Solitude*, Kent writes, “fell into well-deserved obscurity, except the single copy that for some mysterious reason remained chained to a table at Harvard Law School.”³⁵ Legal historian Sandra VanBurkleo calls him a “second-rate poet.”³⁶ Story himself knew that he was better off penning his nine treatises covering such diverse subjects as bailments and civil pleadings. These constituted what Story envisioned as legal science. Treatises summoned up the illusion of a coherent and unified Anglo-American common law. They stood between the bric-a-brac of Anglo-American case law and the overly determined codes of Continental Europe. Treatises were part of a nation building enterprise—an attempt to

³² An Act More Effectually to Provide for the Punishment of Certain Crimes Against the United States, and for Other Purposes, ch. 65, 4 Stat. 115, 115–117, 122 (1825).

³³ An Act Extending the Jurisdiction of the District Courts to Certain Cases, Upon the Lakes and Navigable Waters Connecting the Same, ch. 20, 5 Stat. 726, 726 (1845).

³⁴ Note, *Extension of Federal Jurisdiction Over State Canals*, 37 AM. L. REV. 911, 916 (1903).

³⁵ NEWMYER, SUPREME COURT JUSTICE, *supra* note 4, at 52.

³⁶ Sandra F. VanBurkleo, *Book Review: Supreme Court Justice Joseph Story: Statesman of the Old Republic* by R. Kent Newmyer, U. MINN. L. SCH. CONST. COMMENT., 244, 245 (1986).

fashion a national law much as Noah Webster identified an American language.³⁷

Yet when Story became Dane Professor at Harvard in 1829, his inaugural lecture urged students to study literature in order to uncover the “graphical displays of the human heart.”³⁸ *The Power of Solitude*³⁹ is perhaps too much of a display. It stretches to 260 pages—let me repeat, 260 pages—and is filled with images from Piranesian ruins to solitary groves to (I quote) “mouldered turret and . . . moonlight.”⁴⁰

What prompted Story to write in 1804 such a lengthy, singularly non-epic poem? Joel Barlow, just three years later in 1807, published a vast national epic, *The Columbiad*, about how America established a republic founded on Godwinian notions of justice.⁴¹ Just as the Aeneid tells tale of a hero’s journey from Troy to the Italian Peninsula, and links this account to Rome’s legendary founding, Barlow hoped to trace the beginnings of “rational liberty” in the New World. By contrast, Story’s poem is personal, not about politics. It is what Montaigne called an *arrière-boutique*—the psychological space to have a back shop behind a very public life. If his treatises are an exercise in Enlightenment thinking, then his poem reflects his youthful infatuation with Rousseau and German romanticism.⁴²

The Power of Solitude is dominated by light, landscape, and love. It was published the same year that Story’s first wife, Mary, died at age twenty-three.⁴³ The light is generally muted and gloomy, the landscape filled with Piranesian ruins—overgrown retreats, groves filled with the “magic arts.”⁴⁴ The landscape is what Story calls “an irregular fabric.”⁴⁵ And love? It was mostly longing. The Poet Petrarch, lovesick, speaks with Laura who seeks refuge in the verdant stream of the Vaucluse: *refrigerio de’ sospir miei lassi* (“comfort for [my] weary sighs”).

³⁷ Steven Wilf, *Legal Treatise*, in OXFORD HANDBOOK OF LAW AND THE HUMANITIES 687–702 (Simon Stern, Maksymillian Del Mar & Bernadette Meyler eds., 2020).

³⁸ JOSEPH STORY, *Value and Importance of Legal Studies: A Discourse Pronounced at the Inauguration of the Author as Dane Professor of Law in Harvard University, August 25, 1829*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 527–29 (William W. Story ed., 1857).

³⁹ JOSEPH STORY, THE POWER OF SOLITUDE (1804).

⁴⁰ *Id.* at 14.

⁴¹ See *A New Work of Taste: The Power of Solitude*, SALEM REG., May 30, 1805, at 2 (announcing publication of *The Power of Solitude*). See also STEVEN WILF, LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA 161–63 (2010) (discussing Joel Barlow’s praise of the Guillotine). On Joel Barlow, more generally, see RICHARD BUEL, JR., JOEL BARLOW: AMERICAN CITIZEN IN A REVOLUTIONARY WORLD (2011).

⁴² See NEWMYER, SUPREME COURT JUSTICE, *supra* note 4, at 40 (noting that at this time Joseph Story was “singing the beauties of Rousseau, Southey, Junius, and the German Romantics”).

⁴³ Gerald T. Dunne, *Joseph Story, The Germinal Years*, 75 HARV. L. REV. 707, 716 (1962); *Married, Died*, SALEM GAZETTE, June 25, 1805, at 2 (announcing the death of Mary Story at age 23).

⁴⁴ STORY, THE POWER OF SOLITUDE, *supra* note 39, at 13.

⁴⁵ *Id.* at 1.

The Power of Solitude was deeply personal—but it was written in the shadow of less than solitary party politics. Story, an ever-so-conservative Republican, was witnessing the ascendancy of Jeffersonian politics of the sort that he found distasteful. After Story opposed the embargo on British shipping, Jefferson suspected he was a Federalist in Republican waistcoat. The poem’s central theme focuses on the pleasures of solitude.⁴⁶ It describes the struggle with association, the tranquility of retired life, and the quiet cultivation of the more refined parts of the soul.⁴⁷ Story urges the reader to reject honors and fame. Following a trope of Renaissance political thought, it commends the love of “classic ruins” and the retreats of departed ius.⁴⁸ Ius, of course, is law—both in its abstract sense and in the meaning of a place where justice is meted out. Nowhere else is Story so personal. Law will be replaced by loneliness, the *vita activa* with the *vita contemplativa* (the active life with the contemplative life).

1805 was Story’s pivotal year.⁴⁹ He fashioned what the French call an interior labyrinth (*labyrinthe intérieur*), an imagined memory palace where one can withdraw in seclusion from personal and political loss. Kent’s biography describes Story as part of a generation “obsessed with the question of ambition, greatness, fame—all rooted in the history and logic of a successful revolution.”⁵⁰ The biography is explicitly, and almost exclusively, concerned with Story’s judicial persona. As Kent wrote in his introduction, “Story largely subsumed his private life” in his public calling.⁵¹ And he worked on this presumption, keeping close to the biographic plotline of Story as a judicial statesman. It is true that Story “needed the company of friends.”⁵² However, he might best be described as a convivial loner. In 1805, solitude was his solace. As Story wrote to a classmate: “My spirits have been so depressed, and my anguish so keen, that for three months I have been solitary and closeted, unknowing and unknown in the world.”⁵³

There is a real question of how Story could have operated in his own dark times of endangered republicanism without the security of his inner sanctuary. As Kevin Butterfield has recently pointed out in a masterful book, the penchant for membership and association was core to America in

⁴⁶ See *id.* at 10 (discussing a “lone enthusiast” enjoying the solitary study of “elder lore”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Dunne, *supra* note 43, at 718. His father, Elisha Story, died the same year.

⁵⁰ NEWMYER, SUPREME COURT JUSTICE, *supra* note 4, at 30.

⁵¹ *Id.* at xiv.

⁵² *Id.* at 53.

⁵³ Letter from Joseph Story to Samuel P. Fay (Oct. 8, 1805), in WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 114 (1851); Dunne, *supra* note 43, at 718.

the first decades of the nineteenth century.⁵⁴ The place of solitude was his island within his archipelago of republicanism. He did not need a literary artifact to remind him of this place. On June 22, 1805, Joseph Story gathered all the copies of *The Power of Solitude* he could locate and burned them in a fire.⁵⁵ Did this conflagration destroy his desire for a place apart or did it consecrate solitude as his—solely possessed, unshared, particular, and exclusive?

III. THIRD SONG: A REPUBLIC OF GEARS

In November 1829, Story delivered a laudatory speech to the Boston Mechanics' Society. It is not surprising that he was chosen as the speaker. Supreme Court Justices on circuit in the early nineteenth century, and especially Story, saw themselves as experts in the law of their region—much as legislators represented local constituencies. As with admiralty law, Story staked out his expertise within the Court on patent law. Quite remarkably, Story wrote about forty patent opinions.⁵⁶ Just as there was a republic of letters in early nineteenth-century America, so was there a republic of gears.

The lecture sketched how Hamiltonian aims of establishing a commercial commonwealth might be obtained through levelling means. According to Story, the absence of hierarchy allows technical knowledge to flourish. The American Revolution swept away the class barriers to rewarding genius—hence the importance of the patent system. A republic opposes the “uniform tendency to reduce human beings to mere machines.”⁵⁷ It provides free education and fosters a sense of experimentation. Story, who despite his patrician comportment came from a family of more modest origins, holds out the possibility of erasing class barriers to the advancement of the artisans in the audience. The advancement of new technologies under the “quicken power of science” will prompt a social revolution as striking as the political revolution that led to independence.⁵⁸

Story was trying very hard to lend legitimacy to the Boston Mechanics' Institute. Such associations were a fairly new phenomenon. Founded by John Anderson and George Birkbeck, they emerged during the

⁵⁴ See KEVIN BUTTERFIELD, *THE MAKING OF TOCQUEVILLE'S AMERICA: LAW AND ASSOCIATION IN THE EARLY UNITED STATES* 25 (2015) (concluding that voluntary affiliation in organized groups was “embraced” in the nineteenth century and contributed to a “pervasive culture of constitutional self-government”).

⁵⁵ Dunne, *supra* note 43, at 717.

⁵⁶ NEWMYER, *SUPREME COURT JUSTICE*, *supra* note 4, at 139.

⁵⁷ JOSEPH STORY, *A Discourse Delivered Before the Boston Mechanics' Institute, at the Opening of Their Annual Course of Lectures, November, 1829*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 475, 499 (William W. Story ed., 1852).

⁵⁸ *Id.* at 497.

first decades of the nineteenth century in Glasgow and London out of private lectures. Certainly, there was a similar practice of establishing learned societies for elites. But mechanics' institutes depended upon inventors operating in a collaborative tradition with shared cultural practices. Machinists were deeply networked across such industries as iron foundries, locomotives, steam engines, textile production, and farm implements.⁵⁹ This culture operated at many levels: the shop floor, regional level, and what Anthony F. C. Wallace called the "international fraternity of mechanicians."⁶⁰

Urban crafts were once organized in deeply hierarchical fashion as guilds. Again, mechanics' institutes reordered social relations. These trades societies generally had some sort of foundational document—a constitution⁶¹ or bylaws—and a commitment to "artisan republican"⁶² values. It is particularly important for Story that the Mechanics' Institute is a form of mutual education. The institutes in Philadelphia (the Franklin Institute), Boston, and New York sponsored public lectures, collected and displayed models of machinery, and created reading rooms. Doing so, they evaded a traditional hierarchical dissemination of knowledge. Many of the American mechanic societies, including the Boston Mechanics' Institution (founded in 1827), the Maryland Institute, and the Franklin Institute, had provisions in their by-laws requiring that three-fourths of their directors be practical mechanics.⁶³ The New York Mechanics' Institute made the republican thrust of the association absolutely clear: without this independent education artisans "will be doomed to an intellectual and political slavery by the better educated classes."⁶⁴

Most importantly, mechanics were at the heart of debates over patent in the New Republic. The first Patent Act (1790) designated a triumvirate of the Secretary of War, the Attorney General, and the Secretary of State to determine whether a patent should be granted.⁶⁵ In some ways, this highly discretionary system was modeled on the monarchical privilege of granting patents in early modern England rather than the modern scheme of establishing legal rights when certain rigorous standards of inventiveness were met. An inventor himself, Jefferson, as Secretary of State, dominated

⁵⁹ ANTHONY F. C. WALLACE, *ROCKDALE: THE GROWTH OF AN AMERICAN VILLAGE IN THE EARLY INDUSTRIAL REVOLUTION* 212 (1978).

⁶⁰ *Id.* at 211.

⁶¹ *See, e.g.*, SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS 1788-1850*, at 228–30 (1984) (discussing the organizational structure, provisions, and procedures outlined in the constitution of the General Trades Union).

⁶² *See id.* at 247 (discussing how tradesmen adopted the social tradition of the "artisan republican legacy").

⁶³ BRUCE SINCLAIR, *PHILADELPHIA'S PHILOSOPHER MECHANICS: A HISTORY OF THE FRANKLIN INSTITUTE 1824-1865*, at 12 (1974).

⁶⁴ WILENTZ, *supra* note 61, at 272.

⁶⁵ An Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109 (1790).

the process. There were complaints about favoritism and a sense that the broad discretion was abused.

Less than a year into the operation of the 1790 Patent Act, Jefferson drafted a new statute.⁶⁶ It eliminated the preliminary examination by the Patent Board composed of cabinet members. Instead, it relied upon a mix of public involvement and court intervention to determine whether an invention was worthy of a limited monopoly. The public was informed about the patent by an extensive notification requirement, obligating the publication of a brief description of the invention in newspapers. This description was to be published three times in every district. This proposed statute, which never was enacted, suggests an alternative mechanism to determine patentability: the patent holder would have to defend the validity of the patent in court. As a result, Jefferson hoped that courts would develop a sophisticated doctrine of patentability. In a certain sense, this was a turn towards common law jurisprudence with its reliance upon judicial opinions to set legal rules. Such increased litigation might pose a threat to unsuspecting makers or sellers of a patented object. Jefferson included a remarkably modern provision providing an innocent user defense immunizing a defendant in an infringement suit.⁶⁷

Support for such institutes was directly connected to Story's contribution in patent law. Although during his initial two decades on the Supreme Court Story was not particularly favorable to patents, he increasingly came to see them as critical to the economic development of the country. Story promoted a liberal interpretation of patenting as a particularly United States phenomenon—in contrast to the British patenting system. “[I]t has always been the course of the American courts,” he wrote somewhat disingenuously—considering his earlier record, “to construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements.”⁶⁸

Indeed, in a number of cases, Story developed a theory of property rights in patents that made it difficult to revoke them and, in general, favored validity. Yet Story continued to insist on two fundamental principles. First, republican patents had to be bestowed as (I hesitate to use the phrase) a *quid pro quo*. “[M]onopoly is granted upon the express condition,” Story wrote, “that the party shall make a full and explicit disclosure, so as to enable the public, at the expiration of his patent, to make and use the invention”⁶⁹ The Constitution recognizes the centrality of the public, Story argued, by declaring their object as

⁶⁶ THOMAS JEFFERSON, *Draft of a Bill to Promote the Progress of the Useful Arts*, in 6 THE WORKS OF THOMAS JEFFERSON 189, 189 (Paul Leicester Ford ed., 1904-1905).

⁶⁷ *Id.* at 191.

⁶⁸ *Ames v. Howard*, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833).

⁶⁹ *Whittemore v. Cutter*, 29 F. Cas. 1120, 1122 (C.C.D. Mass. 1813).

“promot[ing] the progress of science and useful arts.”⁷⁰ And, second—as he did with law, in general, and with equity—Story insisted that there was a science behind the patent grant.

In this regard, Story sided with the mechanics against the Jeffersonians. A struggle over the control of inventive knowledge emerged in the early nineteenth century. A Philadelphia lawyer associated with the Franklin Institute, Peter Browne, requested information about patents in order to disseminate this information among mechanics. But William Thornton, the first superintendent of patents, resisted. In 1825, Browne succeeded in finally obtaining patent documents in order to publish descriptions in the *Journal of the Franklin Institute*. What is striking is that the mechanics’ institutes functioned as citizen patent offices. They held tribunals to determine the inventiveness of a new mechanical device, offered incentives—in the form of prizes for new inventions—published descriptions of innovative technology in their journals much like the Patent Office itself, and displayed models as might be found in Washington. Story’s lecture has to be read in this context. If there was a struggle between dilettante inventors like Jefferson, who relied simply on their discretion to determine the worthiness of the patent, and mechanic critics who deployed the laws of science, then Story clearly knew which of these better embodied republican principles.

There are manifold ways to establish republics in a minor key—and Story deployed different strategies to fashion his own. Deploying admiralty law as a separate jurisdiction unleashed the possibilities of tempering common law with civil law, grounding norms on the firm principles of legal science, and keeping the seaward expanse of American commerce aloof from quarrelsome state and regional politics. Jurisdiction is topography. But it is a very special sort of topography: a geographic *imaginaire* constructed by courts as surely as mountains are produced by architectonic forces. Similarly, the romantic landscape of Story’s envisioned fortress of solitude was constructed as a refuge from personal trauma and, in his mind, the emergence of deep political party divisions with the Jeffersonian ascendancy. Story built a parallel world. It was populated with secluded groves, neoclassical ruins, gothic turrets, and the unobtainable objects of romantic longing. Built out of poetic couplets rather than legal precedent, it was no less a place—a republic of one’s own. But, since it was deeply personal, Story could consign his poem to the flames and still retain a private emotional refuge in an overwhelmingly public life.

And the Republic of Gears was all that a judge could desire. It ran according to those who believed in a Newtonian world of natural laws,

⁷⁰ *Ames*, 1. F. Cas. at 756.

embodied republican ideals of non-hierarchical association, and—through technological invention—might promote the progress of Story's national vision of an America of artisans. This republic in a minor key required recognition as much as construction. An association of mechanics—tinkerers dressed in leather aprons and with wire eyeglasses perched uneasily atop their heads—might well be said to be a republic in miniature.

IV. THE RELEVANCE OF KENT NEWMYER

I want to conclude with Kent—since this celebration is really *all* about *his* extraordinary life in teaching and scholarship. As I said at the beginning, Kent has become terribly relevant. He teaches the law of slavery at the Law School—a course that is an essential exploration of how law could be used to prop up evil. In the age of Michael Cohen, when lawyers are “an easy tool, [d]eferential, [and] glad to be of use,”⁷¹ this perhaps should be our required course in professional responsibility.

As Mary Bilder pointed out, Kent published his book on the treason trial of Aaron Burr—getting the jump on Lin-Manuel Miranda's *Hamilton*—with a bit less rap. “*Pardon me, are you Aaron Burr, sir? . . . It's a blur, sir . . . If you stand for nothing Burr, what'll you fall for?*”⁷² Confused? Kent makes all these lyrics crystal clear.

He decimated Chief Justice Roger Taney in a slim volume well before his statue was pulled down by protesters who will never forgive him for the *Dred Scott* decision.⁷³ In his biography of Marshall, he reminds us how important it is to combine tactical savvy with principle if one seeks to defend the Court in a hostile political environment.⁷⁴ Someone should mail a copy to our current Supreme Court Justices.

And Story's republicanism in a minor key might well be a way that we can survive our own dark times. Story's songs might not be so different from the kind of snatches of melody that we will need as we grapple with the problem of the rule of law in a neo-Jacksonian age of instrumentalism.

At first glance, Kent's magisterial study of Story seems a contradiction: Nebraska cornfields meets New England Patrician magistrate. But there is an even more surprising side of Kent people in this room probably do not know. Kent has his own romantic object of

⁷¹ T. S. Eliot, *The Love Song of J. Alfred Prufrock*, in *POETRY: A MAGAZINE OF VERSE* 135 (Harriet Monroe ed., 1915).

⁷² LIN-MANUEL MIRANDA, *Aaron Burr, Sir, on HAMILTON: AN AMERICAN MUSICAL (ORIGINAL BROADWAY CAST)* (Atlantic Recording Co. 2015).

⁷³ See Steven Wilf, *Qui sont les Romains dans Dred Scott?*, in *PENSÉE JURIDIQUE OCCIDENTALE ET JURISTES ROMAINS: ARCHÉOLOGIE D'UN HÉRITAGE* (Pierre Bonin, Nader Hakim, Fara Nasti & Aldo Schiavone eds., forthcoming 2021).

⁷⁴ R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 413 (2001).

longing—much like Story in *The Power of Solitude*.⁷⁵ He is in love with the contemporary Polish poetess, Wisława Szymborska.

Kent does not claim to write about our own age. His depiction of Story's Early Republic never resembles a mélange of costume drama and political morality play. Observing the professional norms of historians, he remains circumspect about how history might inform current affairs. But Kent's approach might be too modest for dark times. Story—and Kent—are remarkably germane when we wrestle with rule of law's possible contours. As Szymborska tells us, "*When I pronounce the word Future, the first syllable already belongs to the past.*"⁷⁶

⁷⁵ See STORY, *THE POWER OF SOLITUDE*, *supra* note 39.

⁷⁶ Wisława Szymborska, *The Three Oddest Words*, in *POEMS: NEW AND COLLECTED 1957-1997*, at 261 (Stanislaw Baranczak & Clare Cavanaugh trans., 1998).