

1985

## Review, Supreme Court Justice Joseph Story: Statesman of the Old Republic

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### Recommended Citation

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*Faculty Articles and Papers*. 497.

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## BOOK REVIEW

**SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC.** By R. Kent Newmyer.\* Chapel Hill & London: The University of North Carolina Press, 1985. Pp. xvii, 490.

Reviewed by Richard S. Kay\*\*

Joseph Story's image among lawyers in the twentieth century has been largely that of a cranky reactionary, attached to a conservative politics and an anachronistic jurisprudence. Modern law students associate him with a handful of landmark cases, notably *Martin v. Hunter's Lessee*,<sup>1</sup> in which he is perceived as Marshall's minion, and *Swift v. Tyson*,<sup>2</sup> in which he enunciated a theory of law that, in light of later criticisms, might most charitably be characterized as laughable. Indeed, in a review of an earlier biography, the late Professor Gilmore noted that the only live issue about Story for his own generation of law students "was whether he was more stupid than he was wicked, or alternatively, more wicked than he was stupid."<sup>3</sup>

As Kent Newmyer's superb new biography makes clear, however, Story deserves at least a more serious, if not a more favorable, consideration from modern legal scholars. The mere tangible products of his

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1. 14 U.S. (1 Wheat.) 304 (1816).

2. 41 U.S. (16 Pet.) 1 (1842).

3. Gilmore, Book Review, 39 U. CHI. L. REV. 244, 244 (1971) (reviewing G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* (1970)). One source of Story's reputation seems to be the frequently cited evaluation of the Justice made by John Chipman Gray in his attack on the holding in *Swift v. Tyson*:

Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character and position of Judge Story. He was then by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the Admiralty; and he was possessed by a restless vanity. All of these things conspired to produce the result.

J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 253 (2d ed. 1921). Although there was far more to Story—and to *Swift v. Tyson*—than this, Gray's characterization of Story is generally consistent with the personal portrait presented in Newmyer's biography.

life were no less than stupendous. Story served for thirty-four years on the Supreme Court and wrote many important decisions both for the full court and as circuit judge.<sup>4</sup> More critical, perhaps, were his contributions to the growth and systemization of American law in what Pound called its "formative era."<sup>5</sup> He wrote nine substantial treatises covering almost every important field of law and, in some cases such as equity and conflicts, practically creating them.<sup>6</sup> At the same time, he was the principal figure establishing the Harvard Law School, and the very idea of a "national" law school was largely his invention.<sup>7</sup> When all of Story's activities—those of judge, scholar and teacher—are taken together, it appears that no other single person in his time was as significant in shaping the American legal system.

Newmyer's biography does justice to the scope, depth, and complexity of these achievements. Its rich and perceptive description of the events and accomplishments of Story's life is backed up by unprecedented research, including what appears to be an exhaustive examination of the letters and papers of Story and many of his contemporaries as well as the relevant published material of the period. It is certainly the most thorough and insightful volume on Story to date, and it is doubtful whether it can be significantly improved.

The biography describes Story as a person, as a public figure, and

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4. Story was appointed in 1811 at the age of 32 (the youngest man ever appointed to the Supreme Court) and he served on the Court until he died in 1845. See R.K. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 64, 381 (1985) [hereinafter cited as NEWMYER]. Among Story's other more important decisions were his opinion for the Court in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (interpreting the Fugitive Slave Act of 1793); his concurring opinion in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (construing the contracts clause of the U.S. Constitution); and his dissent in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (also construing the contracts clause). His opinions for the Court were fewer than might be expected because Chief Justice Marshall wrote almost half of the opinions of the Court during his long tenure. See Johnson, *John Marshall* in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 285, 300-01 (Friedman & Israel eds. 1969). Among Story's better known opinions on circuit were *Delovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), in which he promulgated a very broad definition of federal admiralty jurisdiction; and *United States v. LaJeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), which limited the rights of vessels engaging in the slave trade. One frequently discussed Story opinion that Newmyer does not treat extensively is *Vidal v. Girard's Executor*, 43 U.S. (2 How.) 127 (1844), in which the Court held enforceable that section of the will of Stephen Girard establishing a school administered by municipal authorities in which, by the terms of the will, no minister could enter. That opinion has been called "the cornerstone of the American law of charitable trusts." Clark, *Charitable Trusts, The Fourteenth Amendment and The Will of Stephen Girard*, 66 *YALE L.J.* 979, 986 (1957).

5. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 3 (1938).

6. See NEWMYER, *supra* note 4, at 281, 289-304.

7. See *id.* at 238-43, 264.

as a thinker with detail, precision, and wit. It sets him in the political, social, and intellectual context of the first half of the nineteenth century, allowing us to see how the concerns of the post-Revolutionary War generation influenced and shaped his actions and ideas. The ten chapters are organized not so much by chronology as by the projects and issues that engaged Story's career. Throughout the biography, Newmyer's compelling narrative style makes vivid the people and places of Story's life. Most usefully, Newmyer presents the consistent ideas—or, perhaps more accurately, notions—that dominated Story's conception of law and constitutional order.

Newmyer identifies two overarching themes of Story's view of law — republicanism and legal science. As Newmyer correctly points out, these concepts were not capable of precise definition and were probably only dimly conceived of even by those, like Story, who used them frequently.<sup>8</sup> What sense we can make of them, however, leads to an initial impression that they should not coexist as easily as they seem to have done in the person of Justice Story and in his legal culture.

In embracing the idea of legal science, Story believed that the study and practice of law was a rational endeavor and that "the law" was an object that would respond to such an endeavor. As such, the law could not be the mere creature of human will, but had to have some reason and structure of its own. The spirit of this idea is summed up in Story's much abused dictum in *Swift* that the common law decisions of the judges "are, at most, only evidence of what the laws are; and are not themselves laws."<sup>9</sup> He was even more explicit in his inaugural lecture as Dane Professor in 1829:

Much, indeed, of this unwritten law may now be found in books, in elementary treatises and in judicial decisions. But it does not derive its force from these circumstances. On the contrary, even judicial decisions are deemed but the formal promulgation of rules antecedently existing, and obtain all their value from their supposed conformity to those rules.<sup>10</sup>

Such a view of law as a preexisting entity, to be dealt with rather than manufactured, could lead, in an extreme form, to a concomitant belief in the incapacity of human beings to effect significant change in the

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8. See *id.* at xiv-xvi.

9. 41 U.S. (16 Pet.) at 18.

10. J. STORY, *Value and Importance of Legal Studies* in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 506 (DeCapo Press ed. 1972) (W. Story ed. 1852).

law. Indeed, there are places in Story's writing in which just this attitude appears.<sup>11</sup> For the most part, however, Story acknowledged and applauded flexibility in the application and development of the common law.<sup>12</sup>

In light of this evidence, Newmyer quite rightly questions whether we should take seriously the idea that Story really believed judges discovered rather than made law.<sup>13</sup> But even if Story acknowledged law-making capacity in judges, his concept of legal science entailed aspects of law that should be beyond human control. Legal science dictated, if not the substance of law, then at least the process by which law was properly created. For Story, it therefore imposed *a priori* constraints on what judges could do by specifying a correct technique for judicial law making. Scientific rules could assure the orderly unfolding of the genius of the law that was already present, if inchoate, in the material with which a judge had to work.<sup>14</sup> This method of legal science therefore gave an assurance that judicial power would not be arbitrary power. In that sense, Story agreed with Lord Coke that "no man ought to take it on himself to be wiser than the laws."<sup>15</sup>

The second important strain in Story's jurisprudence was republicanism. Here Newmyer points out the significance of Story's youth and

11. See, e.g., J. STORY, *Codification of the Common Law* in MISCELLANEOUS WRITINGS, *supra* note 10, at 698, 719:

When once a doctrine is fully recognized as a part of the common law, it forever remains part of the system, until it is altered by the legislature. A doctrine of the common law settled three hundred years ago is just as conclusive now in a case, which falls within it, as it was then. No court of justice can disregard it, or dispense with it; and nothing short of legislative power can abrogate it. With us the notion that courts of justice ought to be at liberty from time to time to change established doctrines, to suit their own views of convenience or policy, would be treated as a most alarming dogma, subversive of some of the best rights of a free people, and especially of the right to have justice administered upon certain fixed and known principles. Our ancestors adopted in its fullest meaning the maxim, that it is a wretched servitude, where the law is vague and uncertain. Hence it is, that precedents in our courts of justice are of very high authority, and, with rare exception, conclusive as to the principles, which they decide and establish; and subsequent judges are not at liberty to depart from them, when they have once become a rule of rights or of property.

12. See NEWMYER, *supra* note 4, at 119, 243; STORY, *supra* note 10, at 507-08 ("[The law] must forever be in a state of progress, or change, to adapt itself to the exigencies and changes of society. . .").

13. NEWMYER, *supra* note 4, at 113.

14. Thus the imprecise process of constitutional construction was to be rationalized by applications of 19 scientific rules of interpretation. *Id.* at 191-92. When hemmed in by scientific rules, judicial power was not arbitrary power. See *id.* at 105.

15. Quoted in J. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 35 (1967).

education in the period immediately following the Revolution.<sup>16</sup> In that era of literal nation-building, every young man of talent faced a world of unbounded possibilities. "Those touched by this revolutionary vision," Newmyer explains, "were compelled to think and act boldly, comprehensively, idealistically, and passionately—to see the nation in providential terms and themselves as instruments of civic regeneration."<sup>17</sup>

In concrete terms, this outlook often translated into matters of economics. The greatness of the republic was to be realized in ever-expanding commerce and capital formation. Insofar as law contributed to this vision, Story felt that it would have to be free and flexible and responsive to the constantly changing features of the economy and society:

In free governments, and in those where the popular interests have obtained some representation or power, however limited, . . . [we can] trace a regular progress from age to age in their laws, a gradual adaptation of them to the increasing wants and employments of society, and a substantial improvement, corresponding with their advancement in the refinements and elegancies of life.<sup>18</sup>

Change for the better was within the power of the good citizen, and was, in fact, his pressing duty. The success of the republic thus depended on the exercise of human will.<sup>19</sup>

Newmyer's description of legal science and republicanism therefore suggests a certain tension between the two notions. The former, in positing a knowable legal technique, assumed elements of constancy. The latter, in assuming law to be shaped by ever changing economic and social needs, was premised on the law's fluid and dynamic character. Such a conflict is not entirely surprising given the age in which Story lived and worked. The early nineteenth century has been seen as a cusp in the development of the idea of American Law. In contrast to the eighteenth century, which has been viewed by modern legal historians as a period in which the common law "was conceived of as a body of essentially fixed doctrine,"<sup>20</sup> the period in question saw the "emer-

16. See NEWMYER, *supra* note 4, at xv-xvi, 30-36.

17. *Id.* at xvi. See also *id.* at 386-87.

18. J. STORY, *The Progress of Jurisprudence* in MISCELLANEOUS WRITINGS, *supra* note 10, at 198, 199. Story's model in this regard was Lord Mansfield. See *id.* at 205-11.

19. See NEWMYER, *supra* note 4, at 36.

20. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 1 (1977).

gence of an instrumental concept of law," in which the law was a "creative instrument for directing men's energies toward social change."<sup>21</sup> These tendencies of stasis and movement are evident in the two different aspects of Story's jurisprudence that Newmyer identifies. The question remains, however, of whether and how Justice Story reconciled the concepts of republicanism and legal science in his own mind and in his work. If his thinking was characterized by any kind of schizophrenia, he seemed entirely unaware of it. The demands of republicanism and legal science appeared to him to be not merely compatible but complementary.<sup>22</sup>

There are several possible explanations. One is that Story's commitment to a stabilizing and rationalizing legal science was a sham. According to this view, Story's main ambition was not to limit or channel legal change in any predetermined way but merely to put the control of such change in more reliable hands, namely, those of the judges. Story camouflaged this essentially political preference with the fine and neutral sounding rhetoric of legal science.<sup>23</sup>

It is difficult, at this date, to judge Story's sincerity or the degree to which his views might have been the product of self-deception. Certainly the Story who emerges from this biography preferred the policy making of the judges to that of the political branches, and devoted much of his life to promoting the power of the courts. Newmyer notes that for Story "lawyers, judges, the courts and the common law were a corrective to, even an alternative to, the bumbling work of politicians and legislatures."<sup>24</sup> But the constancy and frequency with which Story

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21. *Id.*

22. *See, e.g.,* NEWMYER, *supra* note 4, at 137-38. The elusive character of these concepts and the ambiguity of the labels attached to them is underscored by the fact that another commentator has identified roughly the same tendencies in Story but accorded them exactly the opposite names. Professor Powell sees Story's emphasis on legal science as a preference for flexible pragmatic law, and he views Story's commitment to republicanism as having the potential to bind the judge to a static, text-bound interpretation of the Constitution. *See* Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 *YALE L.J.* 1285, 1307 (1985).

23. *See* M. HORWITZ, *supra* note 20, at 255-57.

24. NEWMYER, *supra* note 4, at 63. *See also id.* at 143, where Newmyer explains that: Story assigned courts in general and the Supreme Court of the United States above all others a central role in economic rule making. Judges working in the common-law mode, more than legislators and politicians (and the two increasingly merged in Story's perception), were uniquely qualified to lead the old republic into the new economic age. This was a heavy burden of statesmanship, given the magnitude of social and economic change and the inchoate structure of American law. Undaunted, Story willingly put judges in the front line of policy making with the promise that judge-made law would be relevant and, at the same time, true to the basic morality of property rights on which it rested.

relied on the idea of an independent science of law argue against the suggestion that it was a cynical political device. Story undoubtedly preferred the rule of judges, but it is more reasonable to think that this preference resulted from his belief in the possibility of legal science than to think that it caused that belief.<sup>25</sup>

There is another, more plausible explanation for the prominence of both legal science and republicanism in Story's thought. The law that emerged from the constraints of legal science was, to Story, better law for the tasks required to perfect the republic. The order and stability of scientific law would promote the moral and material improvement of society, and, in particular, would enhance the economic activity that preoccupied republican society. Story sought some fixed assurance as to the roles of law and the state in stimulating or impeding development. Professor Hurst recognized this need for order in his well-known conclusion that "[o]nly within some minimum framework of reasonably predictable consequences were men likely to cultivate boldness and energy in action." Law provided that framework for the release of energy.<sup>26</sup> Newmyer cites an 1824 letter from Daniel Webster to Story that captures this attitude: "It is a great object to settle the concerns of the community, so that one may know what to depend on."<sup>27</sup> As Story pointed out over and over again, legal science was applied science; it was practical science.<sup>28</sup> In early nineteenth century America, practicality implied accommodation and facilitation of change. The law could provide the fixed reference points that guaranteed that change would be useful. Story aimed, in Newmyer's words, for a "law-fashioned rational economic environment."<sup>29</sup> Orderly law was thus compatible with the aspirations and methods of the shapers of the republic, the practical men "who knew what they wanted the law to do."<sup>30</sup>

25. "Law and politics for him were different ways of doing things: One was based on principle and science and the other on compromise and short-term self-interest." NEWMYER, *supra* note 4, at 71-72.

26. J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 22 (1956).

27. NEWMYER, *supra* note 4, at 120. On the need for stable rules as a precondition to economic activity, see also M. HORWITZ, *supra* note 20, at 26; Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920* in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 92 (G. Geison ed. 1983). On the more general connection of legal science, legal certainty, and natural law, see R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 14-19 (1940).

28. See, e.g., NEWMYER, *supra* note 4, at xiv, 243, 285.

29. NEWMYER, *supra* note 4, at 120.

30. *Id.* at 45. For Story, the order of legal science complemented economic and social change

This understanding of scientific law in the service of growth is evident in Story's various endeavors. It was an important reason for both his academic writing and his work at the Harvard Law School. In each case, Story saw his efforts as tending toward a single rational scheme of American law against which fruitful individual activity would be easier.<sup>31</sup> Some examples from his judicial work further illustrate the point.

Story professed to believe in a strict enforcement of contracts. With some exceptions,<sup>32</sup> he was unreceptive to refined and technical legal arguments by which individuals, corporations, or governments could avoid contractual liability.<sup>33</sup> Story felt that a strict rule, requiring individuals and enterprises to keep their promises, was good for business.<sup>34</sup> Perhaps his clearest statement to that effect was in his dissenting opinion in the *Charles River Bridge* case.<sup>35</sup> There Chief Justice Taney's majority opinion, insisting on a strict construction of corporate charters against the grantee—and a correspondingly liberal construction with respect to the rights of the state—was characterized by Professor Hurst as “[t]he classic statement of policy in favor of freedom for creative change.”<sup>36</sup> But Story's opinion advocating a more liberal interpretation of the original grant, so as more comprehensively to bind the state to its contract, is also frankly utilitarian and sympathetic to development:

For my own part, 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. No man will hazard his capital in any enterprise in which, if there be a loss, it must be borne exclusively by himself; and if there be a success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the govern-

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in another way as well. Although change, in general, was both welcome and inevitable, certain types of change were more desirable. Because the progress of the republic was tied up with moral growth, legal science was a way to channel and direct human activity to increase not just material well-being, but virtue as well. See, e.g., Newmyer's discussion of Story's moral objections to the holding in the *Charles River Bridge* case, *id.* at 231-35.

31. See, e.g., *id.* at 264, 285.

32. Story made an exception for employment contracts of seamen, which he viewed as inherently harsh and one-sided. See *id.* at 151-53.

33. *Id.* at 153-54.

34. *Id.* at 154.

35. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 583 (1837).

36. J. HURST, *supra* note 26, at 27.

ment means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant, and that success will not be the signal of a general combination to overthrow its rights, and take away its profits. The very agitation of a question of this sort, is sufficient to alarm every stockholder in every public enterprise of this sort, throughout the whole country.<sup>37</sup>

Much the same interpretation may be applied to what was probably the greatest theme of Story's judicial career, the attempt to extend the jurisdiction of the federal courts. His aim in this endeavor was plainly to promote the unification of American law and to assure a forum in which clear, consistent and scientific law could be expected. The piecemeal, often conflicting results that were bound to follow when matters were committed to the numerous independent state systems were the antithesis of the single orderly regime that was his ideal. Here, too, Story sought order not for its own sake but as an entirely practical ambition.

This goal of practical order was apparent in Story's unsuccessful effort to institute a federal common law of crimes against the United States—although here his target was not so much the multiplicity of rules emerging from state courts, as the failure of Congress to supply a criminal code sufficient to protect important interests of the federal government.<sup>38</sup> It was also evident in his more successful effort to establish a broad definition of the federal courts' admiralty jurisdiction. In *DeLovio v. Boit*,<sup>39</sup> his most important circuit opinion on the point, Story canvassed, contended with, and distinguished the English authorities. He then rested, at least in part, on the conviction that "[t]he advantages resulting 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" required the result.<sup>40</sup>

Story's best known effort in federalizing the law, of course, is his

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37. 36 U.S. (11 Pet.) at 608. See NEWMYER, *supra* note 4, at 227.

38. See NEWMYER, *supra* note 4, at 103.

39. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776). It was said that if Story encountered a cob in a bucket of water he would assert over it the admiralty jurisdiction of the United States. See NEWMYER, *supra* note 4, at 207.

40. 7 F. Cas. at 443. See NEWMYER, *supra* note 4, at 123-25.

opinion in *Swift v. Tyson*.<sup>41</sup> There the Court held that a "general" common law, and not state law, provided the rules of decision in commercial cases coming under the federal courts' diversity jurisdiction. *Swift* is the opinion most often cited to demonstrate the formalist and unrealistic basis of Story's jurisprudence, his reliance on a "brooding omnipresence in the sky."<sup>42</sup> But it is clear that the unified and formal vision of the common law that Story enunciated in *Swift* was, to his mind, an important practical tool in creating a legal system appropriate to the profitable exercise of human will. Particularly with respect to questions of commercial law (and *Swift* itself really went no further) the desirability of uniform national rules to promote interstate economic activity was, and is, obviously, a judgment confirmed by the enactment of uniform state laws in this century.<sup>43</sup>

The specific holding of *Swift* demonstrates Story's commitment to order as an instrument of development. The Court found that discharge of an antecedent debt constituted sufficient giving of value to make the taker of a negotiable instrument a holder in due course, notwithstanding a colorable argument that the law of New York, where the transaction took place, was contrary.<sup>44</sup> Story undoubtedly felt that a multiplicity of rules for determining holder in due course status would chill the interstate movement of capital. Story's ideal here (and in the constitutional commerce clause cases to which he subscribed<sup>45</sup>) was a single national market with a single set of rules.<sup>46</sup>

Even Story's judicial disposition toward the terrible questions of

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

42. NEWMYER, *supra* note 4, at 334 (quoting letter from O.W. Holmes to Sir Frederick Pollock, Feb. 17, 1928, in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 214-15 (M. Howe ed. 2d ed. 1961)).

43. See NEWMYER, *supra* note 4, at 290, 296, 333-34; G. GILMORE, THE AGES OF AMERICAN LAW 32-34, 83-86 (1977).

44. Professor Gilmore argued that Story's position that antecedent debt was sufficient value was an entirely uncontroversial point and was law in New York, as well as everywhere else. Consequently, the Court really had no reason to consider the applicability of a general federal common law and must be suspected of seizing the case as an opportunity to announce the federalization of commercial law. G. GILMORE, *supra* note 43, at 32-34. Professor Horwitz, however, suggests that the concept of negotiability presented a live and controversial issue at the time (although all of the anti-negotiability law he cites is statutory) and that the substantive question was quite important. M. HORWITZ, *supra* note 20, at 223-24. Newmyer makes a convincing argument that the choice of law holding was not regarded as particularly novel and was received with widespread indifference. NEWMYER, *supra* note 4, at 336.

45. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Newmyer notes suggestions that Story may have helped Marshall write *Gibbons*. NEWMYER, *supra* note 4, at 127.

46. Thus he included in *Swift* a quotation from Cicero that there could not be one law in Athens and another in Rome. 41 U.S. (16 Pet.) at 19.

slavery demonstrates a commitment to the usefulness, even the morality, of an abstract and settled law.<sup>47</sup> There is little question about Story's personal abhorrence of slavery, and, when the opportunity arose, he expressed it forcefully in his opinions.<sup>48</sup> But Story is probably more frequently identified with his punctilious fidelity to the Fugitive Slave Law in *Prigg v. Pennsylvania*.<sup>49</sup> Newmyer discusses Story's private defense of *Prigg* as a "triumph of freedom," in that it ousted the states of any authority or role in the rendition of fugitive slaves, but reasonably concludes that this explanation was unconvincing.<sup>50</sup> Story's priorities were made plain in his strong endorsement of the fugitive slave provision of the Constitution in his *Commentaries on the Constitution*.<sup>51</sup> At least one public value was more precious than personal liberty, and that was social order.<sup>52</sup> Because nothing else threatened that order like the issue of slavery, it could only be preserved by a strict compliance with the legal arrangements that could suppress or avoid the dangerous controversy.<sup>53</sup> In *Prigg*, as elsewhere, Story put his faith in rules to preserve the environment in which change for the better—even, he vainly hoped, concerning slavery—could occur.<sup>54</sup>

The two great themes of Story's jurisprudence, legal science and republicanism, thus fit together in the idea of legal order in the service of social and economic change. This combination is in no way confined to the peculiar circumstances of Story's time. That law is, in its largest

47. Professor Gilmore regarded Story's slavery opinions as marked by an "entirely foreign" formalism. G. GILMORE, *supra* note 43, at 38. For the reasons indicated in the text, I do not regard formalism as foreign to Story's jurisprudence. For a thoughtful consideration of Story's accommodation of his positions on slavery and the judicial role, see R. COVER, *JUSTICE ACCUSED* 131-48, 238-43 (1975).

48. See *United States v. LaJeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), discussed in NEWMYER, *supra* note 4, at 347-50; *United States v. Amistad*, 40 U.S. (15 Pet.) 518 (1841), discussed in NEWMYER, *supra* note 4, at 368-70.

49. 41 U.S. (16 Pet.) 539 (1842).

50. See NEWMYER, *supra* note 4, at 372-77.

51. *Id.* at 352, 377.

52. Speaking to the fugitive slave question in 1843, Story said:

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. . . .

NEWMYER, *supra* note 4, at 378. See also *id.* at 352-53.

53. He therefore hated the abolitionists. See *id.* at 357.

54. Story was a gradualist. He believed slavery would fade away in a process that would be "peaceable, rational, gradual and institutional." *Id.* at 351. See R. COVER, *supra* note 47, at 131-48, 238-43.

sense, a human instrument, cannot seriously be questioned. It achieves its aims, however, not by the prescription of results for individual instances, but by the prior establishment of general rules. The law sacrifices precision in its substantive accomplishments to the supposed benefits of predictability and stability. Our law is, then, at any time, a compromise between two kinds of social values, those of substance and those of form.<sup>55</sup>

Story's amalgamation of these two notions, however, seemed to involve something more. He envisioned a common law that would, through the application of legal science, continue to become both clearer and simpler and, at the same time, better suited to the real needs of society.<sup>56</sup> Order and movement were thus symbiotically connected. To Story, order was always in movement and that movement was always toward more perfect order.<sup>57</sup>

It is [the common law's] true glory, that it is flexible, and constantly expanding with the exigencies of society; that it daily presents new motives for new and loftier efforts; that it holds out forever an unapproached degree of excellence; that it moves onward on the path toward perfection, but never arrives at the ultimate point.<sup>58</sup>

A perceptive review of Story's life and writing, such as that provided by Newmyer, makes clear that Story believed that there was a proper direction in human history, and that it could be discerned and followed.<sup>59</sup> In the law, this confidence is best expressed in the maxim of

55. General rules may also have the virtue of minimizing mistakes in individual applications of a general policy. On the relative benefits of policy-making by general rule and individual instance, see R. COVER, *supra* note 47, at 146-47; Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

56. Story foresaw an ever-increasing area of behavior that would be governed by rules: May I add, in the language of the eminent living jurist (Sir James Mackintosh) whom I have already cited, that "there is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason; and gradually contracting, within the narrowest possible limits, the domain of brutal force and arbitrary will.

J. STORY, *supra* note 18, at 239 [citations omitted].

57. J. STORY, *supra* note 10, at 526.

58. *Id.*

59. By the end of his life, however, Story had doubts that this would occur. See NEWMYER, *supra* note 4, at 308-09.

Lord Mansfield (whom Story so much admired) that the common law "works itself pure."<sup>60</sup> More generally, this "path toward perfection" embraces the idea of progress, an idea that suffuses much of Story's writing. It is in that idea that legal science and republicanism merge, and it may be that idea, more than anything else, that separates Story's world from ours.<sup>61</sup>

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60. Mansfield used the phrase in his argument as Solicitor-General in *Omychund v. Barker*, 1 Atk. 22, 33, 26 Eng. Rep. 15, 23 (1744). The full sentence from which it is drawn reads: "A statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament."

61. See R. GABRIEL, *supra* note 27, at 19-20.