THE AMERICAN BLACKSTONE

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"I stand alone," dissented Justice McLean from an 1847 decision of the Supreme Court, "but I have the satisfaction to know, that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the Supreme Court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented."[1] The particular question involved the power of Ohio to punish the passing of counterfeit coin. The resulting tangle of civil liberty, state rights and national sovereignty was virtually guaranteed to provoke disagreement on the high court. Unusual, however, was the circumstance that the views of a living judge should be the vehicle for the opinion of a dead one.

It was all the more unusual because Story's bespectacled, Pickwickian figure had been gone from the court almost two years at the time. Yet Justice McLean obviously thought Story's name still capable of arresting the attention of his colleagues, and not without reason. "[I]t is here on this bench," Mr. Chief Justice Taney had remarked during the Story memorial proceedings, ". . . that this loss is most severely and painfully felt. For we have not only known him as a learned and able associate in the labors of the court, but he was also endeared to us as a man, by his kindness of heart, his frankness, and his high and pure integrity."[2]

To be sure, the vast gulf which separated Story's neo-Federalist views from Taney's robust Jacksonianism suggested that the Chief Justice's public remarks be interpreted by the rules which Southern courtesy prescribed for references to the dead. And, in fact, Story's death itself foreclosed only by a matter of days the resignation by which the New England jurist had intended to quit a bench dominated by Taney and the other appointees of Andrew Jackson. Indeed, it was singularly appropriate that Story's *post mortem* opinion be a dissenting one, for during the last eight years of his judicial service he had found himself increasingly in that position. "I am the last of the old race of Judges," he had written, "I stand their solitary representative, with a pained heart, and a subdued confidence."[3] Yet, the Taney

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1. Fox v. Ohio, 46 U.S. (5 How.) 410, 440 (1847).

2. Proceedings of the Court had upon the Death of the Justice Story, 11 L. Ed. 846, 847 (1846).

3. Letter to Harriet Martineau, April 7, 1837, in W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY 275, 277 (1851) [Hereinafter cited as W. W. STORY].

eulogy compromised neither truth nor sincerity, but rather reiterated sentiments previously expressed in private correspondence: "What a loss the court has sustained in the death of Judge Story! It is irreparable, utterly irreparable in this generation; for there is nobody equal to him."[4] Factually, the Chief Justice was correct, for Story was without an American equal. He was the youngest man, then or since, ever appointed to the Supreme Court. He had served with international distinction for over a third of a century. During the last sixteen of those years, he had also been Dane Professor of Law at Harvard where he virtually refounded the law school and worked a profound revolution in American legal education. His Supreme Court opinions alone constituted a *corpus juris* but they were the mere overlay for thirteen volumes more delivered on circuit. In addition, he had authored fourteen legal commentaries, edited and annotated three more, written a book of poetry, and turned out innumerable shorter efforts—signed, anonymous and ghosted—as periodical pieces, law reports, encyclopedia articles, speeches in Congress and drafts of legislation.

On the other side of the Atlantic, the man who would become Lord Chancellor of England joined Taney in eulogy by appraising Story as "greater than any law writer of which England could boast . . . since the days of Blackstone."[5] That Lord Campbell did not concur in Taney's appraisal of Story's uniqueness and actually subordinated the dead judge in his reference involved no deprecation. Quite on the contrary, the highest British praise any American jurist could ever receive would be comparison to Sir William Blackstone (1723-1780), Justice of the Courts of the King's Bench and Common Pleas, Vinerian Professor of Law at Oxford and author of the all-time legal classic, *Commentaries on the Laws of England.*

Two Judges

Story and Blackstone had far more in common than a threefold career as judge, teacher and author. Rather, in each case these offices were the variegated means to the construction of a comprehensive system of law structured around the same interacting elements—a unitary nation-state, an intelligent reverence for institutions and a social order designed (in the key phrase of Blackstone's *Commentaries*) "to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."[6] Both men were children of revolutions—Story, the American, Blackstone, that

4. Letter to Richard Peters, November 1845, in SWISHER, ROGER B. TANEY 442 (1935).

5. 2 W. W. STORY 570.

6. EHRLICH, BLACKSTONE 43 (1959) [Hereinafter cited as BLACKSTONE].

called Glorious—who preached the doctrine that one revolution is enough. Both strove to rationalize and harness the forces of change. Both held this philosophy of conservatism as men who had won their way up from origins thoroughly respectable but closer to the lower than to the upper side of the middle class. Blackstone's father was a silk merchant in London's Cheapside; Story's was a fishing village physician in Marblehead, Massachusetts. The sons of these obscure men shared a gift for getting on; they not only entered the inner ranks of the establishments of their respective times but each became its virtual symbol.

Had each father's rank been higher, each son might have settled for less. Both Blackstone and Story had an aptitude for versifying; each left the full-time pursuit of poetics with great reluctance and took (using, curiously, a common phrase) a lawyer's farewell of the muse.[7] Each detested much of his legal apprenticeship. Both would-be poets were badly shocked on their first reading of the gnarled prose of Sir Edward Coke. Blackstone found *Coke upon Littleton* "too much for Hercules,"[8] while Story actually wept in attempting to understand it—"My tears dropped upon the book, and stained its pages."[9] Both had a hand in reforming the mode and content of instruction for apprentices who followed them. Both did so as a consequence of stimulating bounty which produced the Vinerian Chair of Law at Oxford on one side of the Atlantic, and, on the other, Harvard's Dane Professorship. Blackstone had been suggested in the first case, Story in the second, as the initial incumbent of a teaching office intended as an instrumentality of a uniform national jurisprudence. And, from these counterpart forums, both incumbents taught and wrote the law, not in terms of techniques for practitioners, but rather as general principles whose possession was the proper attainment of any liberally educated man. Each became a judge after a lackluster legislative career. Each had a co-adjutor on the bench who was more statesman than judge as Blackstone drew strength and balance from Lord Chief Justice Mansfield while Story's partnership with Chief Justice Marshall is a by-word of American legal history.

The Full Life of Joseph Story

Yet, comparisons between the two fall far short of a series of mirror images. There are differences as well as similarities. In terms of literary craft, Story's style falls far short of Blackstone's surpassingly readable prose. Contrarywise, Blackstone's undistinguished record on

7. LOCKMILLER, SIR WILLIAM BLACKSTONE 15, 191-194 (1938) [Hereinafter cited as LOCKMILLER]; 1 W. W. STORY 107.

8. LOCKMILLER 17.

9. 1 W. W. STORY 74.

the bench cannot begin to be compared with Story's mastery of the judicial process. Most significant of all the differences, however, was one of activity. Blackstone's achievements in large measure came serially, while Story's were largely concurrent. Perhaps health was partly responsible, for Story was blessed with a robust physique, and, in fact, was something of a brawler in his younger days. ("Mr. Joseph Story & Hearsey Derby had an open engagement at fisty cuffs," ran a Salem minister's diary entry in 1803.[10]) On the other hand, Blackstone suffered from the classic indisposition of the British aristocracy. ("I write this from my Bed to which I am confined by the Gout, which attacked me on Friday last."[11])

Even making full allowance for physical disparity, Story's immersion with the workaday world had a character so intense as to make the full life of Sir William Blackstone seem that of a recluse. Happily, it was an involvement which amplified rather than limited Story's legal career. Thus, Story, the Father of American admiralty, grew up in maritime Marblehead, practiced law for ten years in maritime Salem and never lost an attachment for men who go down to the sea. ("I was born among the hardy sons of the ocean."[12]) An architect of American patent law, he had a lively interest in inventors and the mechanic arts. ("I am hurried away to attend some experiments to be made by Mr. Fulton on the Torpedo."[13]) He structured the American law of negotiable instruments with the benefit of practical banking experience in bills, notes and checks. ("Judge Story . . . from the incorporation of the Merchants Bank . . . was a Director, and for many years President; and under his advice . . . it became a model Bank."[14]) He was a world-wide authority on the law of trusts and charity with an unflagging concern for philanthropy in practice. ("I had great pleasure in visiting the Philadelphia Lunatic Hospital, which, on the whole, is rather superior to that in New York."[15]) He exerted a germinal influence on the American law of corporations by firsthand knowledge of the necessity of reshaping legal forms of organization to the needs of an industrial age. ("In order to increase and revive the business of Salem . . . Joseph Story and ninety-six others petitioned the General Court for modification in the law of manufactures."[16]

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10. 3 BENTLEY, THE DIARY OF WILLIAM BENTLEY 141 (1911).

11. Letter to Mr. Richmond, January 20, 1767, in Heaney, *The Letters of Sir William Blackstone*, 1 AM. J. LEGAL HIST. 373 (1957).

12. 18 ANNALS OF CONGRESS 977 (1809).

13. Letter to Mrs. Story, February 17, 1810, in W. W. STORY 196, 197.

14. BAUER, COMMENTARIES ON THE CONSTITUTION 160-61 n. 178 (1952).

15. Letter to Mrs. Story, February 5, 1814, in 1 W. W. STORY 249-50.

16. 2 FELT, ANNALS OF SALEM 162 (1845).

Story's law work was far more than empirical responses to the market place, although some denigrating comments suggest this as its measure and limit. He could also be the lawyer's lawyer *par excellence.* Many commentators attempted the subject of equity. "[N]one of their works," says a British legal historian, "equalled in renown and longevity, the *Commentaries on Equity Jurisprudence* of Judge Story, which first appeared at Boston in 1826 and was re-edited many times, the last being in London as late as 1920."[17] Similarly, in the area of conflicts of law where Story received the accolade "to have passages of his work transformed into articles of a code of a foreign country, and even into a treaty, and all this long after his death."[18]

That Story's legal work could synthesize deduction and experience appropriately characterized the spirit of a man who cannot run unless he sprints. Hence, the rest of the Story record—a full social life, an extensive correspondence, dedicated duty as overseer and fellow of the Harvard Corporation, service as president of the American Unitarian Association, and, generally, an unfailing capacity to become involved in all matters of national, regional, or local interest. ("Judge Story, with fully two men's stated work, had time for every good cause and worthy enterprise. There was no public meeting for a needed charity, for educational interests, in behalf of art or letters, or for the advancement of a conservatively liberal theology, in which his advocacy was not an essential part of the program."[19])

The Uses of Adversity

But more important than distinctions in the amount and intensity of energy are those concerned with the environment of its expenditure. Here one man rode, while the other resisted, the main currents of their times as they shared in a common and continuing enterprise. Their common doctrine of institutional conservatism was far easier to preach in the England of George III than it was in the America of Jefferson and Jackson, and doubly so when the preacher shared a particular rapport with the ruling political elite. The extent of Blackstone's identification with crown and court is suggested by the especial virulence reserved for him in the anti-royalist letters of Junius: "Doctor Blackstone is solicitor to the queen . . . for the defence of truth, of law, and reason, the Doctor's book may be safely consulted; but whoever wishes . . . to rob a country of its rights, need make no scruple of consulting the Doctor himself."[20]

17. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 694 (1956 5th ed.).
18. Valladão, *The Influence of Joseph Story on Latin-American Rules of Conflict of Laws* 3 AM. J. COMP. L. 41 (1954).
19. PEABODY, HARVARD REMINISCENCES 58 (1888).
20. LOCKMILLER 100.

Story, the law apprentice fresh from Harvard College, read with relish "the masterly writings of Junius."[21] He also read the masterworks of the English law including "that most elegant of all commentaries, Mr. Justice Blackstone's . . ."[22] Somewhere in this apprenticeship Story changed from a freethinker to an institutionalist. Perhaps Blackstone was the catalyst; some fine testimonials exist to Blackstone's power of persuasion. "The more I read," recalled Abraham Lincoln of the *Commentaries,* "the more intensely interested I became. Never in my whole life was my mind so thoroughly absorbed. I read until I devoured them."[23] Jefferson testified from the opposite point of view: "[W]hen . . . the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession . . . began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves to be Whigs, because they no longer know what Whiggism or republicanism means."[24]

Irrespective of the cause of Story's conversion, the consequence was a career of conservatism running from the presidency of Jefferson to the presidency of Polk, and comments from each adorn Story's public work as a pair of terminal epithets. Jefferson vigorously protested Story's appointment to the Supreme Court on the grounds that the New Englander was "too young . . . [and] unquestionably a tory."[25] Polk vowed the Story career would have no sequel: "I resolved to appoint no man . . . likely to relapse into the . . . doctrines of . . . Judge Story."[26]

Yet, if history suggests any lesson at all, perhaps it is how wide of the mark men's efforts are apt to go and what unexpected and actually perverse results attend their endeavors. Blackstone's *Commentaries* assert the supreme power of Parliament and as to "our distant plantations in America" explicitly deny that "the common law of England as such has . . . allowance or authority there."[27] Yet, the *Commentaries,* immensely popular in America from their first publication, proved a veritable quarry of intellectual and juridical apologetics for the Revolution and were cited time and again to prove that the "absolute rights of every Englishman," held by the colonists included not only the heritage of the common law but also civil and political liberty,

21. 1 W. W. STORY 81.

22. *Id.* at 73.

23. Lincoln quoted in LOCKMILLER 178.

24. Letter from Jefferson to Madison, February 17, 1826, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 726 (Koch & Pedens ed. 1944).

25. Letter to James Madison, October 15, 1810, in 5 BRANT, JAMES MADISON 168 (1956).

26. Diary entry quoted in SWISHER, ROGER B. TANEY 444 (1935).

27. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 35-36 (Ehrlich ed. 1959).

taxation with representation, due process of law, and limitation of the king's prerogative.[28]

In like manner did Joseph Story's work have consequences which he did not foresee, much less intend. He was acutely aware of the dangers inherent in the extremes of the democratic process and he actually went so far as to assert that the highest political question was the protection of the property-owning part of the community from the inroads of poverty and vice. Yet, this very attitude was an alloy which strengthened rather than weakened for it tempered a bent for innovation with a reverence for the old, rashness with a taste for regularity, and majority despotism with a sense of transcendent right. In short, it was the countervailing force which made democracy viable. As de Tocqueville acutely observed: ". . . without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained."[29]

The Libertarian Conservatives

Along this line there is another item where Blackstone and Story stand in substantial accord. This was in a strong humanitarian instinct. In both, it was unquestionably based on *noblesse oblige* rather than democratic idealism but was nonetheless genuine for all that. In Blackstone it took the form of a sustained effort to reform the barbarous prison system of his day. In Story its manifestation was an almost militant instinct of religious tolerance.

Blackstone's endeavors we can put down to the interior promptings of philanthropy. Story's, however, had experimental roots. As a Jeffersonian and a Unitarian, he had drawn upon his head the double wrath of the Massachusetts elite whose political instrument was the Federalist party and whose ecclesiastical arm took its coloration from Calvinist orthodoxy. Ostracism was its usual sanction. "I have seen him," said an old lady of Story's early days in Salem, ". . . when [gentlemen] would treat him with marked neglect and refuse to shake hands with him."[30] This was not the only sanction, however. A Massachusetts minister, in setting out the fierce rivalries in the early Jeffersonian administration, recounted how Story was, "on account of his political opinions, knocked down in the street, beaten, and forced to take shelter in the house of a friend, whither he fled, bleeding, and covered with the mud of the streets."[31]

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28. *Id.* at 41-53.

29. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 286 (Vintage ed. 1960).

30. Quoted in 1 W. W. STORY 89.

31. 1 PARKER, ADDITIONAL SPEECHES, ADDRESSES, AND OCCASIONAL WRITINGS 178 (1867).

Happily, Story's reaction to persecution was libertarian rather than retributive. Thus, his posthumous dissent spoken through Justice McLean concerned his effort to give the widest sanction to the double jeopardy prohibition of the Constitution. Even more typical was a whole-hearted detestation of enforced religious conformity. Typical of his stout counter-offensive was the part he played in securing the Harvard LL.D. for Catholic William Gaston because *inter alia,* he was "most anxious that a Protestant university should show its liberality by doing homage to a gentleman of a different faith."[32] If an epitaph for Joseph Story could be chosen from the enormous range of his works, perhaps the finest would be a passage from one of his speeches which bears far more resemblance to Thomas Jefferson than Sir William Blackstone:

> I stand not up here the apologist for persecution, whether it be by Catholic or Protestant, by Puritan or Prelate, by Congregationalist or Covenanter, by Church or State, by the monarch or the people. Wherever, and by whomsoever, it is promulgated or supported, under whatever disguises, for whatever purposes, at all times, and under all circumstances, it is a gross violation of the rights of conscience, and utterly inconsistent with the spirit of Christianity. I care not, whether it goes to life, or property, or office, or reputation, or mere private comfort, it is equally an outrage upon religion and the unalienable rights of man.[33]

The Shadow of John Marshall

That this particular facet of Story's public philosophy has won him neither credit nor commemoration shows the more generally low estate of his historical fortunes. It is all the more astonishing considering the range, the relevance and the persistence of his legal doctrines. Thus, almost a century after his death his name was cited in both the majority and dissenting opinions concerning the content of the general welfare clause of the Constitution.[34] In like measure

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32. Letter to William Sullivan, October 22, 1826, in Connor, William Gaston, 43 PROCEEDINGS (N. S.) AM. ANTIQ. SOC. 381, 429 (1933).

33. *History and Influence of the Puritans* (Adress to the Essex County Historical Society, September 18, 1828), in MISCELLANEOUS WRITINGS OF JOSEPH STORY 440 (W. W. Story ed. 1852) [hereinafter cited as MISCL. WRITINGS].

34. United States v. Butler, 297 U.S. 1 (1935). Mr. Justice Roberts for the majority: "We shall not review the writings of public men or discuss legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one." *Id.* at 66. Mr. Justice Stone dissenting: "That the governmental power of the purse is a great one is not now the first time announced. Every student of government and economics is aware of its magnitude and its existence. . . . [B]oth were recognized by Hamilton and Story, whose views of the spending power . . . have hitherto been generally accepted." *Id.* at 86-87.

was the sanction of the Eichmann trial based in part upon his doctrine of a universality of jurisdiction over "the common enemies of all mankind."[35] And, in a completely different field, does each new adoption of the Uniform Commercial Code vindicate his vision of comprehensive, commonsense and national body of law for business transactions. Against this background one is almost tempted to conclude that the muse of history has glanced at Story's complex personality, his long and crowded life, his profuse works and then passed on, preferring the measure of less complicated men. Part of the reason, however, is the sheer neglect by professional historians of the role of law in general, and the Supreme Court in particular, in the formation of American political and economic institutions. Another fact is Story's lack of that epigrammatic touch by which a Marshall, a Holmes or a Cardozo can make a phrase glow with particular memorability.

There are other reasons. Those who seek a moral in history may find a vindication of Emerson's warning that indulgence in vanity or the apprehension over reputation will inevitably vitiate the intended result. Unquestionably, Story was a most vain man, persistently seeking to be an object of attention, to be liked and to dominate every conversation. There was no malice in Story's idiosyncrasy but rather an almost child-like desire to be appreciated. Similarly, the root of conversational failings was noted by an acute English observer: "[W]hen he was in the room few others could get in a word; but it was impossible to resent this, for he talked evidently not to bear down others, but because he could not help it."[36] This failing brings us to the real and ironic reason for Story's obscured historic stature—he is immured in the shadow of one of the few men who was able to talk him down.

"Solus in the dialogue," Story once called John Marshall,[37] a point amplified by a legend of American legal history. This particular bit of folklore makes a typical conference of the Supreme Court during John Marshall's tenure consist of brilliant soliloquy in which the Chief Justice expounds his views and then remarks: "Such appears to me to be the law of the case; though I have not, I confess, looked much into the books . . . if I am correct, our brother Story here . . . can give us the cases from the twelve tables down to the latest term-reports.[38]

35. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826). See also Treves, *Jurisdictional Aspects of the Eichmann Case*, 44 MINN. L. REV. 557, 571-72 (1963).

36. Lord Morpeth quoted in Heaney, *The Letters of Joseph Story*, 2 AM. J. LEGAL HIST. 68, 82 (1959).

37. 2 W. W. STORY 505.

38. Quoted in PLUMMER, LIFE OF WILLIAM PLUMMER 205-06 (1857). See also Goebel, *John Marshall* in JOHN MARSHALL 125 (Jones ed. 1960).

The Soldier and the Scholar

It is doubtful whether John Marshall ever said any such thing, but the legend that he did is significant and merely states by way of a fiction the conclusion of a contemporary observer of the nineteenth century scene: "Judge Story, and men of that class are *great* for their law knowledge. Chief Justice Marshall is, . . . *great* in another sense; that is, in their arguments they relied not so much on books as on the resources of their own minds. Greatness in the latter sense is esteemed greater than in the former."[39] In short, for Story the law was a system; for Marshall, an instrument. Marshall, the Chief Justice, is essentially indistinguishable from the diplomat who confronted Talleyrand, or the congressman who confounded the Jeffersonian opposition, or even the soldier, cold and hungry at Valley Forge. Marshall is no judge at all but rather a statesman-soldier who brings all the resources of his iron will and charismatic personality to the task of shaping his times to his measure. Story, contrarywise, was the philosopher and scholar, the builder of legal *summas*, and this from almost the minute he had dried his tears over *Coke upon Littleton*. He undertook the role with some sacrifice because he also had a taste for restrained opulence—blooded horses, good ("but not showy") clothes, fine society. A substantial cut in income was required to accept Madison's appointment to the Supreme Court, but he took it nonetheless "to pursue, what of all things I admire, juridical studies . . . ."[40]

That Madison made the appointment over Jefferson's opposition should inter any idea that Story became Marshall's convert after he joined the Court. A nominal member of the old Democratic-Republican Party, Story showed his independence early in the game when he broke ranks time and again to defend the Federalist bench of Massachusetts. He had outraged the southern wing of his party in his long-term advocacy of the New England claims to the scandal-tainted Yazoo lands. Finally, during his brief stint in Congress at the beginning of 1809, he had been instrumental in repealing the embargo whereby Jefferson sought to interpose economic isolation as a substitute for war—or so Jefferson thought and never forgave him.

The counterpart of the hostility with Jefferson was affinity with Marshall. It was, however, a rapport of peers and one reached from diverse points of origin. Indeed, when we test the quality of the relationship, not in similarities but in differences, it becomes clear how very much Story was his own man, and how little his filial reverence for Marshall inhibited disagreement when an important point of

39. Letter from G. W. Strong, December 31, 1827, in 1 THE DIARY OF GEORGE TEMPLETON STRONG xv (Nevins & Thomas ed. 1952).

40. Letter to Nathaniel Wililams, November 30, 1811, in 1 W. W. STORY 201.

law was involved. "I hold it an indispensable duty not to surrender my judgment, because a great weight of opinion is against me—a weight which no one can feel more sensibly than myself."[41]

The Modern Corporation

This substantial variation in attitude manifested itself in the development of the corporation, or more precisely, the transformation of an instrument of communal service to accommodate the demands of a new industrial age. Thus, it has become a virtual convention of economic historiography to begin the American corporate cycle with Marshall's *Dartmouth College* opinion, and read into it the legal foundations of financial and industrial capitalism. It is true that Marshall implied as much when he made Dartmouth's royal charter a contract between the college and New Hampshire and, as such, beyond the constitutional power of the latter state to repeal or amend. Nevertheless, he only implied it; his explicit references concern only municipal bodies and private charities. It is in Story's concurring opinion that we find the principle extended to business enterprises. Contemporary opinion, both friendly and hostile, recognized Story's analysis as novel and significant. Chancellor Kent endorsed these "new and interesting views"; David Henshaw, the Jacksonian leader of Massachusetts, irately complained that "Judge Story, in the same case, was much more explicit, and develops the doctrine of the Court more boldly than John Marshall."[42]

This creative revisionism, as a few historians have noted, involved a radical change in traditional analysis.[43] The mere fact that public authority granted a charter meant the corporation had, in some sense, a "public" purpose and, taken on its face, this characteristic suggested ability of the chartering authority to regulate, revise, or even revoke the privilege it had granted. Story, however, discarded any purpose and substituted property as a starting point and achieved a twofold division in result—on one hand, private corporations holding private property, and, on the other, public corporations charged with government or administration. One group the state could regulate without restraint; the other it could approach only with the deference required by vested right and private interest.

Story's concurring *Dartmouth College* opinion was but one episode

41. Story dissenting in The Nereide, 13 U.S. (9 Cranch) 388, 455 (1815).

42. 1 KENT, COMMENTARIES ON AMERICAN LAW 391 (1826). *Remarks upon the Rights and Powers of Corporations, and of the Rights, Powers, and Duties of the Legislature toward Them* reprinted in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 163, 172 (Blau ed. 1947). See also Hall, *The Dartmouth College Case*, 20 THE GREEN BAG 244 (1908).

43. See HANDLIN AND HANDLIN, COMMONWEALTH 168 (1947).

in this extraordinary legal turnabout. An equally significant development was Story's engrafting the ancient law of trusts on the emerging form of the business enterprise. Here the consequence was a viable separation of the functions of ownership and control. Under this division, the capital of a corporation became a trust fund for the successive benefit of creditors and stockholders, the directors became trustees, and the corporation itself increasingly assumed a character and personality distinct from the persons who had provided its resources.[44] The end result was an ideal apparatus of capital formation involving at one and the same time permanent contributions of resources and transferrable, judicially protected, claims.

Paralleling this change in character were changes in function. More than any other judge is Story responsible for abolishing the medieval doctrine which required a corporation to act only by deed under its common seal. Here he substituted (and, let it be noted, over Marshall's dissent and Blackstone's authority) therefor a rule of law permitting corporations to conduct their affairs on the same basis as individuals and unincorporated associations.[45] Externally, this operational revision was paralleled by a theory of comity which Story, the writer, developed involving the presumption that one sovereign would permit operations on its territory of corporations chartered by another with the consequent opening of the entire range of interstate business to corporate enterprise.[46] Finally, there was Story's judicial masterpiece of *Swift v. Tyson*[47] which for over a century enabled the federal courts to develop a comprehensive, systematic and uniform body of judge-made law for interstate business transactions, and which, seemingly dead and buried, rises from its grave in the Uniform Commercial Code.

The Nation-State

This work of structuring the legal instruments of American economic development, large as it is, dwindles in significance when laid alongside Story's counterpart political achievement. It was a work involving a substantial concurrence of outlook with Marshall, but something considerably different than a complete overlay. Marshall was pragmatic, moderate and successful in imposing his views precisely because he stopped short of doctrinaire extremes. Story, on the contrary, was categorical in his vision of the unitary American nation

44. *Id.* at 170.

45. See Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64 (1827); BLACKSTONE 105.

46. See Mr. Chief Justice Taney in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589, citing Story's COMMENTARIES ON THE LAW OF CONFLICTS (1834).

47. 44 U.S. (1 How.) 198 (1842).

and his impatience with the "cobwebs of sophistry and metaphysics about State rights."[48] Indeed, Story's nationalism could respond to an event such as the deaths of Jefferson and Adams on the fiftieth anniversary of the Declaration of Independence with a messianic intensity: "We have just passed the jubilee of our independence, and witnessed the prayers and gratitude of millions, ascending to heaven, for our public and private blessings. . . . We have been privileged yet more; we have lived to witness an almost miraculous event in the departure of the great authors of our independence on that memorable and blessed day of jubilee."[49]

And yet, the perverse ways of history stand epitomized by the fact that the core word of Oliver Wendell Holmes' tribute to John Marshall (". . . when we celebrate Marshall, we celebrate . . . the oneness of the nation . . . ."[50]) was thrown at Story in reproach by a contemporary polemicist. ("His construction of every contested Federal power depends on . . . the necessity of establishing a *one-ness* among the people of the several colonies prior to the revolution."[51]) Symbolizing even more vividly this transposed commemoration is the vast canvas of *Webster's Reply to Hayne.* There Webster stands alone and prominent. There Story is placed as one of many figures in the background. Yet, "it is not possible for me to say," asserted a celebrated New England divine, "how much credit belongs to Mr. Webster for his constitutional arguments and how much to the late Judge Story . . . the Jupiter Pluvius from whom Mr. Webster sought to elicit peculiar thunder for his speeches and private rain for his own public tanks of the law."[52]

Only circumstantial evidence suggests the range and character of this collaboration. We have some of Webster's notes pre-emptorily requesting Story's help. We know that Story's son complained that he could not obtain the judge's "most important letters to Mr. Webster, and . . . Mr. Webster has refused assent to the publication of any letters in my possession."[53] We know that careful analysis has shown Webster's constitutional orations have a parallelism in text and tim-

48. Letter to Stephen White, March 3, 1819, 1 W. W. STORY 325.

49. *Characteristics of the Age,* Phi Beta Kappa oration at Harvard, August 31, 1826. MISCL. WRITINGS 373.

50. Replying from the bench to a motion that Court adjourn February 4, 1901, the centennial of Marshall's taking his seat as Chief Justice, in HOLMES, COLLECTED LEGAL PAPERS 266, 268 (1921).

51. Abel Upshur quoted in HAINES AND SHERWOOD, ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835-1864, 19 (1957).

52. 1 PARKER, ADDITIONAL SPEECHES, ADDRESSES, AND OCCASIONAL SERMONS 169 (1855).

53. 2 W. W. STORY 235.

ing to *Story's Commentaries on the Constitution of the United States* that must be other than coincidental.[54]

Yet, Story would not need this credit if he could but obtain the deserved recognition for his *Commentaries on the Constitution* parallel to that which has been given Blackstone's *Commentaries on the Laws of England.* Perhaps the character of the book as the comprehensive *apologia* for the American nation-state can be glimpsed in the flood of explicit or implicit rejoinders it has provoked down through the years since it was first published in 1833—Henry Baldwin's *A General View of the Origin and Nature of the Constitution and Government of the United States* (1837), Nathan Beverley Tucker's *A Discourse on the Importance of the Study of Political Science as a Branch of Academic Education in the United States* (1840), Abel Upshur's *A Brief Inquiry into the True Nature and Character of Our Federal Government Being a Review of Judge Story's Commentaries on the Constitution* (1840), Alexander Hamilton Steven's *A Constitutional View of the Late War between the States* (1868-1870), Henry S. George Tucker's *Justice Story's Position on the So-Called General Welfare Clause* (1927), and Edgar Lee Masters' *Lincoln the Man* (1931). The work has survived these and other attacks on its intent, purpose, method, logic, and historiography. The countering polemics have been forgotten while the *Commentaries* at least has been carried on the Library of Congress roll of significant American books as "a legal classic of continuing importance and reputation."[55]

STORY THE MAN

Triumphs and Tragedies

In striking contrast to Sir William Blackstone's apparently unruffled personal life and placid progression of successes, Story's achievements were wrought against a background of heartbreak. Private tribulation and public success seemed inextricably blended. He was first elected to the state legislature in the spring of 1805; he lost his first wife and father before summer was out, and recovered just short of moral disintegration. ("I brood in secret over my former love, and darkness sweeps across my mind."[56]) In 1811, he was elected Speaker of the Massachusetts House of Representatives, published the American edition of *Lawes of Assumpsit* and received his nomination to the Supreme Court; it was also the year he lost his first daughter. ("Sweet, patient sufferer gone at last."[57]) In 1815, he wrote his

54. BAUER, COMMENTARIES OF THE CONSTITUTION 152 n.156 (1952).

55. *Representative Books Reflecting American Life and Thought,* Library of Congress release (1960).

56. Letter to S. P. P. Fay, December 19, 1806, 1 W. W. STORY 141.

57. 1 W. W. STORY 209.

seventy-page dissertation in *DeLovio v. Boit*[58] which set the bounds of American admiralty jurisdiction. ("The learned and exhaustive opinion," commented the Supreme Court half a century later, ". . . will always stand as monumental of his great erudition."[59]) This was the year of double tragedy. A girl died in spring ("My youngest daughter, Mary, about eleven months old . . . . This is the second time I have buried a lovely daughter") and a son in fall ("My dear little boy . . . towards the close of October").[60] The year 1819, predicted by Story to be one of the most momentous in the history of the Supreme Court, turned out to be exactly that, with Story writing several landmark opinions; it was also the year in which he lost still another child. ("On Thursday, the 1st day of April, 1819, . . . died my dear little daughter, Caroline Wetmore Story, aged six years."[61]) And, still later, in 1831, (a year without new triumphs because there were now so few left to come his way), the blow fell once more in the death of still another girl ("one of the most beautiful and attractive of human beings, and at ten years of age, every thing her parents could wish."[62]).

Small wonder then that a dark melancholy strain lurked beneath Story's cheerful personality. We may well forgive the frequent references to the tomb which punctuate his private correspondence and public speeches. We can understand his conversational bent, his extraordinary exertions and particularly the journal entry in which he noted "with the world . . . I pass for a cheerful man, and so I am; but my cheerfulness is the effort of labor and exertion to fly from melancholy recollections, and to catch at momentary joy."[63]

The Shore Dimly Seen

The tragic sense of life growing out of an extraordinary succession of bereavements was paralleled by an acute sense of concern for the republic and its institutions. Not unlike the combination of cheerfulness and despair in his private life, such apprehension was mingled with the optimistic exuberance of his nationalist faith. The consequence was a continuing crisis of the man (to use Henry Adams' phrase) caught at the point of contact between worlds past and worlds coming. He faced a crisis of conscience in the clash of his detestation of slavery and his constitutional duty to enforce the Fugitive Slave Act. (Needless to say, he enforced it notwithstanding the

58. 7 Fed. Cas. 418 (No. 3, 776) (C.C.D. Mass. 1815).

59. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 35 (1870).

60. Letters to Nathaniel Williams, May 8, 1815 and December 3, 1815, in 1 W. W. STORY 255, 257.

61. 1 W. W. STORY 332.

62. Letter to Chancellor Kent, June 24, 1831, in 2 W. W. STORY 56.

63. 1 W. W. STORY 333.

abolitionist reproach that "even Story sullied . . . the lustre of a long life . . . by . . . infamy."[64]) He was troubled by the increasing bitterness between sections of the country—"too proud to brook injury . . . too close to make retaliation distant or ineffectual"—and the foreboding that such differences might erupt in a civil war all the more deadly "because our lineage, laws, and language are the same."[65]

But most of all was he troubled by the rising tide of democracy, and had seen in the enthusiastic crowds at Jackson's first inaugural both symbol and fact of "the reign of King 'Mob' . . . triumphant."[66] The apprehension grew over the ensuing years. Its extent was noted during the closing days of 1841 when a distinguished English visitor dined at the Story home. "The judge our host," Lord Morpeth confided to his diary, "talked with incessant but pleasant and kindly flow; the conversation approached very near to treason against their own constitution; they pronounced it an utter failure. . . ."[67] While Story here might have spoken with his characteristic exaggeration, his pessimism as to the fate of the republic was set out more moderately but almost as despairingly in the closing lines of the *Commentaries on the Constitution.* For there, after a sustained panegyric to the country's character and destiny, he abruptly closes on the note that all this "may perish in an hour by the folly of its only keepers, THE PEOPLE."[68]

In Omnibus Caritas

Yet, his public and private shortcomings—faith darkened with doubt, hope touched with despair—never impaired his charity. He was "as much distinguished," said an old judge who trained him, "by his never-failing kindness as by his legal attainments."[69] His letters home—chatty, tender, and frequent—vividly show in season and out of season, the attentive and dutiful husband. "Farewell, my dear wife," ran a typical close, "may you ever be as happy as you deserve, and rest assured, that never can I feel more bliss than when I see your eyes beam with pleasure in acknowledging me as your husband."[70] A characteristic passage concerned a son he was soon to lose: "[O]ur dear little boy is now almost nine months old . . . I . . . picture him in your arms, dancing to my favorite tune, or hallooing 'dad, dad,

64. Wendell Phillips quoted in BARTLETT, WENDELL PHILLIPS: BRAHMIN RADICAL 89 (1961).

65. STORY, COMMENTARIES ON THE CONSTITUTION 718 (Abr. Ed. 1833).

66. Letter to Mrs. Story, March 12, 1812, in 1 W. W. STORY 563.

67. SCHLESINGER, AGE OF JACKSON 323 n.4 (1946).

68. STORY, *op. cit. supra* note 65, at 718-19.

69. Judge Putnam to W. W. Story, May 28, 1846, in 1 W. W. STORY 85.

70. Letter to Mrs. Story, February 5, 1814, in 1 W. W. STORY 249, 251.

dad.' "[71] But it was not only with those he loved was he unfailingly "simple and authentic, gregarious and humane, generous, and affectionate.[72] Rather, these qualities were extended to high and low. Were you a physician seeking a government berth? Story was not only capable of attesting "your undeviating integrity and uncommon urbanity of manner"[73] but of getting reluctant associates to joining in signing it. Were you a Gloucester fisherman hard-pressed by the wartime restrictions of 1814 and anxious to resume your craft? You naturally bespoke the "benevolent exertions" of Mr. Justice Story.[74] Were you a newly-arrived and penniless immigrant desperately seeking contributions for a prospective encyclopedia? "The only condition this kind-hearted man made," recalled Francis Lieber, "was that I should not publish the fact that he had contributed the articles in the work until some period subsequent to their appearance."[75] Were you an insignificant urchin carrying letters to the post? Even here you could count on unsolicited kindness. If the most attractive side of Story's public philosophy is epitomized by his speech on religious tolerance, a companion epitaph, illustrating the ethic which ruled his private life, apears in a passage from his correspondence showing just such concern. In January 1815, Congressman Story had just broken with President Jefferson, had done his best to upset the administration's embargo, and was contemplating a return home with his political fortunes at crisis and his future enshrouded with doubt. None of this apprehension showed in his letter home, but only concern of a different type. "The post boy waits," Story wrote in closing, "It is a cold, rainy night. I ought not keep him shivering at a late hour."[76] Sir William Blackstone had commemorated the sentiment in *The Lawyer's Prayer:*

> Power, fame, and riches I resign—
> The praise of honesty be mine,
> That friends may weep, the worthy sigh
> And poor men bless me when I die.[77]

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71. Letter to Mrs. Story, March 12, 1812 in 1 W. W. STORY 218.

72. Commager, *Joseph Story*, in GASPAR G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES 93 (1953).

73. Letter of Story and others to President Madison, May 8, 1809, in STORY MANUSCRIPTS, Essex Institute.

74. Letter of Eban Dale and others to Story, February 10, 1814, in STORY MANUSCRIPTS, Essex Institute.

75. Quoted in HARLEY, FRANCIS LIEBER 57 (1899).

76. Letter to Mrs. Story, January 15, 1809, in STORY MANUSCRIPTS, Essex Institute.

77. LOCKMILLER 71.