

Winter 1972

Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court

Robert H. Duesenberg

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Robert H. Duesenberg, *Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court*, 6 Val. U. L. Rev. 233 (1972).

Available at: <https://scholar.valpo.edu/vulr/vol6/iss2/7>

This Book Review is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



BOOK REVIEW

JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT. By Gerald T. Dunne. New York: Simon & Schuster. 1970. Pp. 485. \$12.95.

The importance of the Supreme Court to the structure and development of the United States has been recognized from the beginning of the Republic. President Washington, in constituting the first Court, wrote: "I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system."¹ The power of the Court was not, however, immediately felt. For three years it had little business to transact, and while it had occasion to assert its supremacy during these early years, the effect was more to prove itself capable of functioning in the federal system than to arouse state hostility in the manner of its decisions soon after 1800. It was not until *Marbury v. Madison*² and the years of the Marshall Court that it offered the proof—that has endured for nearly two centuries—of William Grayson's proclamation in the Virginia ratifying convention that "[t]his [supreme] court [*sic*] has more power than any Court under Heaven."³ Joseph Story, as a member of the Marshall Court, was a judicial pillar of almost equal dimension to Chief Justice Marshall. It is remarkable that we have waited so long for a biography of his life. Gerald Dunne has provided a good one.

Joseph Story was appointed to the Supreme Court in 1811. He was not President Madison's first choice, and ex-president Jefferson pressed hard for another, chiefly because of his disdain for Story. Two Madison nominees declined to serve even though confirmed. During the interval between these two nominees, the Senate considered and rejected yet another nominee. Madison, not to be pressed by his predecessor, appointed Story to succeed to the chair vacated by the death of Justice Cushing. At the time Story ascended to the Court he was Speaker of the Massachusetts House of Representatives. He was rising in the profession and was respected because of his prolific writings. Justice Story was only thirty-two years of age at the time of his appointment and still holds the distinction of being the youngest person ever to be appointed

1. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 31 (1926).

2. 5 U.S. (1 Cranch) 368 (1803).

3. 2 J. ELLIOT, *DEBATES* 414 (1828).

to the Court. He served on the Court until his death in 1845.

During his years on the Court, Justice Story had an enormously critical influence on American law and life. Perhaps more of his effect was forged outside the Court than from within, for from 1829 until his death he was also a professor of law at Harvard Law School; in addition, he was the author of numerous *Commentaries*⁴ on various areas of the law. Joseph Story's appointment to Harvard gave the Law School immediate prestige, resulted in a surge in enrollment and influenced its development of "academic and intellectualized training for the legal profession"⁵ that sounded the death knell of the law office apprenticeship. His methodology, supplanting the read-lecture process, made Harvard "a prototype of a national development"⁶ in legal education.

Joseph Story's post at Harvard was a great platform for the *Commentaries*, but the *Commentaries* also were of singular significance to the bench and bar. During this era, few decisions were printed and circulated to guide the profession in its quest for the law. Blackstone was the leading text for American lawyers, and the treatises of Story were the only fundamental texts of American law.

When Joseph Story was appointed to the Court he was aligned politically as a weak Jeffersonian Republican (Dunne notes that Jefferson and Story never really liked each other). He seconded Marshall in the "transformation of the Supreme Court from tribunal of justice to an organ of Government."⁷ He left the Court a Whig, having become frequently frustrated, indeed often embittered, with the Jacksonian brand of nationalism that finally characterized the Court after Marshall's death. Albeit, he developed a firm juridical rapport with Marshall's successor, Chief Justice Taney, which was not portended by Justice Story's aggressive dissent in *Charles River Bridge v. Warren Bridge*.⁸ As Dunne comments, later accolades on opinions of Chief Justice Taney are as elegant as any praise of Chief Justice Marshall.

As did all the justices in the first decades of the Court, Justice Story rode circuit, an extremely taxing burden that caused more than one justice to resign the Court and others to decline appointment. His jurisdiction was the New England Circuit. Justice Story's contributions

4. For a listing of these *Commentaries* and other writings of Joseph Story, see G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 442 (1970).

5. *Id.* at 321.

6. *Id.*

7. *Id.* at 351.

8. 36 U.S. (11 Pet.) 496 (1837).

as a circuit justice were immense. The trade of the nation then was largely by sea, and Justice Story by his involvement created the American law of admiralty.

From Washington, Story's opinions were not legion; Marshall wrote the majority of the opinions for his Court. However, the opinions of Justice Story were always significant. He spoke for the Court in one of its great supremacy decisions, *Martin v. Hunter's Lessee*,⁹ since the Chief Justice had stepped aside because of family and professional interests. Though the Court, as then constituted, had been selected from the party of Thomas Jefferson, it firmly established in the *Martin* case the federalist principle of the power of the federal judiciary to review the decisions of state courts in cases involving federal questions.

While on the Court, Joseph Story was also a bank president. This connection undoubtedly had much to do with his understanding of the law of commerce and his recognition of the change that was taking place in the country's industry. The form of wealth in America was changing from tangible to intangible assets. More than anyone else, Story had an influence which was seminal in the developing American law of commerce. His *Commentaries* included the law of bills of exchange and promissory notes.

The commercial ties of Story are also the reason cited by Dunne for his own initial interest in the life of Joseph Story. As counsel for the Federal Reserve Bank in St. Louis, Dunne, who is now vice-president, became intrigued with Story's influence in banking. A point of research became a contract of devotion. The product is handsome; it is reflective of the turbulent era of federal growth. Its many references to state and party politics and to the relationships of the justices and the workings of the Court are vignette-like and enhance the book's excellent readability without detracting from its scholarship.

The word pictures Dunne paints are vivid. For instance, we not only gain an insight into how significant the court reporter was in those days, but also acquire a respect for Mr. Wheaton and an impression that, at times, he may have extended his sense of professional proprieties.

As to Story, his prodigious strengths as a jurist, as a professor, as a creator and synthesizer of an American law are told quickly, interestingly and without labor. And his quality as a sensitive human being shines through all in a way that makes for delight in that finally, after all these years, someone has written a biography of Justice Joseph Story.

ROBERT H. DUESENBERG*

9. 14 U.S. (1 Wheat.) 304 (1816).

* Member of the Missouri Bar.