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Review of “Justice Joseph Story and the Rise of the Supreme Court,” By Gerald T. Dunne

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JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT. By Gerald T. Dunne. New York: Simon and Schuster, 1970. Pp. 459. \$12.95.

Justice Story poses a difficult challenge to his would-be biographer. Story's achievement, writes Leonard Levy in a statement appearing on the dust jacket of Gerald Dunne's book, "was so formidable and his literary remains so complex and extensive that he has frightened off biographers." During his thirty-four year tenure on the Supreme Court, he produced nine commentaries on American law, served as Dane Professor of Law at Harvard for sixteen years, presided over a bank, acted as an overseer and then as a Fellow of the Harvard Corporation, rode circuit, wrote essays and delivered public addresses, and maintained an extensive correspondence. A prodigious worker, a man of quick intelligence and encyclopedic knowledge, he took a leading and often a decisive part in the great American controversies about the law which arose in the first half of the nineteenth century.

Although he was a warm partisan in these battles, Story cannot be precisely indentified by the political labels of his time. He was one of the major figures of an intellectual elite which championed the cause of an American establishment composed of merchants, successful entrepreneurs, members of the learned professions, and various retainers and allies. As a group, they actively fostered economic and social change, but they were also alarmed by the mounting evidence of social instability in America and profoundly distrustful of both the Benthamite and Romantic reformer.

To men of this stamp, a belief in the possibility of creating an impregnable structure of laws and legal institutions was a practical necessity. Law might provide order, while accommodating desirable change, in a nation which appeared to be all sail and no anchor, and they set themselves upon the stupendous task of fashioning in one generation an American law, and an American legal profession.

Story's place was at the head of this vast enterprise, and Dunne has not shrunk from the challenge of confronting the whole man. He touches upon every facet of Story's career within the relatively narrow scope of several hundred pages, an undertaking that requires rather breathtaking feats of compression and puts a high premium on incisive and epigrammatic statement. Throughout this book, whether we observe Story delivering an opinion, writing a commentary, or attempting

to mold a new kind of American lawyer at Harvard, the subject is caught by a dramatic, pencil-thin spotlight which quickly suggests its highlights, but may leave us wishing for a fuller illumination.

As a result, Story's role in the development of an American law remains somewhat unclear. We must guess at the state of the law as Story found it, the exact choices he faced, the quality of his resolutions. Because Dunne's focus is so sharply fixed upon Story and the Supreme Court, we cannot trace the process of legal change outside of the Federal court system to the states, where Story's ideas and influence were also at work. Finally, we still cannot tell where Story fitted into the patterns of thought in his time.

Perhaps these objections reflect the reviewer's bias toward the styles of legal history and biography displayed in Willard Hurst's *Law and the Conditions of Freedom in the Nineteenth Century United States*¹ and in the study of Chief Justice Shaw of Massachusetts by Leonard Levy,² and also the reviewer's conviction that legal controversy during this period might be profitably examined along lines suggested by Perry Miller.³

Yet this lingering desire to know more, to grasp wholly the nature of Story's legal achievement and to understand fully his place in American life, is largely owing to Dunne. He has given us a first biography which brings Story forcefully to our attention and removes him, one hopes forever, from the shadow of John Marshall. From the vantage point afforded by this survey of Story's career we can see more clearly than ever before what we must reckon with in any account of American legal history from 1800 to 1850.

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1. W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956).

2. L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

3. P. MILLER, *The Legal Mentality in THE LIFE OF THE MIND IN AMERICA* 99 (1965).

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