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Gerald T. Dunne's Justice Joseph Story and the Rise of the Supreme Court (book review)

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In late March and early April of 1941, Henry Steele Commager delivered the Gaspar G. Bacon Lectures on the Constitution of the United States at Boston University. His subject was Joseph Story. Devoting two of his three lectures to what he termed Story's nationalism and conservatism, Commager skillfully interwove the man and his ideas with the era. It is difficult to determine what more Mr. Dunne has added in his four hundred or so pages to what Mr. Commager in only sixty pages so effectively surveyed.

Mr. Dunne's book, most of which appeared in various law reviews and scholarly journals prior to publication as a relatively unaltered, complete volume, is in no real sense a biography. Rather as the title implies, Dunne has focused on Story's role in raising the United States Supreme Court to its preeminent position in the American constitutional structure. The volume, therefore, is not as extensive an effort as Mark DeWolfe Howe's two volumes on Justice Holmes. The closest comparison that can fairly be made is with Leonard Levy's book on Chief Justice Shaw. But Levy examined a state court judge who had a rarely paralleled influence on American private law development, and who was only infrequently concerned with constitutional issues. It would have been interesting to see how Levy would have treated Story.

The author has chosen to concentrate on fitting major cases and historical events into a neatly emerging sequence most often called (by Mr. Dunne) "nationalism." One certainly cannot ignore national strains in studying the Marshall Court. But there is much more to the reflective appraisal of this period than the resonating themes of the painful beginnings of a nation and its by-product—the search for an indigenous American law. A man of Story's intelligence and searching mind cannot simply be denoted nationalistic or conservative. Mr. Dunne has not completely nor accurately portrayed the problems that confronted Story—those of the distribution of power in a democracy, law and a democratic society, law and economy, and others. We, therefore, have a relatively elementary lesson in political, social, intellectual, constitutional, and legal history. The complexity and subtlety of the forces in the period and the tensive nature of the times are only incidentally
noted. Mr. Dunne describes the evolution and growth of ideas and constitutional doctrine as if they were fashioned out of an inevitable fiber. They simply were not—ideas and doctrines were pressured, coaxed, mulled, and changed, but Mr. Dunne only gives us the final, packaged product.

The author has carefully sketched Story's growing sense of alienation from his society and Court. Yet we find Story enjoying a harmonious relationship with Chief Justice Taney, successor of Story's revered Marshall, and symbol of the Jacksonian capture of the High Court. Story and Taney were not particularly apart on most issues. Why? Mr. Dunne does not quite answer that question. He talks of both Story's and Taney's coexisting efforts to reform corporate law, and the subsequent impact, once ameliorating measures were implemented, on American industrial growth. True, but the intellectual and legal foundations that led these two men to reason independently and yet conclude in basic accord were quite distinct. Mr. Dunne ignores the disparity lurking beneath the surface, and instead emphasizes the apparent agreement that is easily discernible.

Not as much an "amateur effort" (as the author characterized it himself) as a traditional approach, Mr. Dunne's book does not even add appreciably to our view of Story's nationalism that Commager and others have provided. The book is perhaps unnecessarily constricted or delimited by its emphasis on "the Rise of the Supreme Court." Choosing the subject matter is, however, clearly the author's prerogative. But the book probably would have more enduring value if Mr. Dunne had selected and studied in far greater detail the common law or private law opinions of Story in both the United States Circuit Court and Supreme Court. What we have instead is a conventional view of Story updated with the latest primary and secondary sources. The tradition, best exemplified by Charles Warren, has made important contributions to American constitutional history. What that tradition needs is occasional, discriminating revision, not repetition. Mr. Dunne's book is the only full-scale, modern attempt to grapple with Story that we have at this time. And so it probably will be referred to often. But it has not helped us to a better understanding of Joseph Story than we had before.

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