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### The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?

Jed Handelsman Shugerman

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Jed Handelsman Shugerman, *The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?*, 52 CONN. L. REV. 1251 (2021).

ALWD 7th ed.

Jed Handelsman Shugerman, *The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?*, 52 Conn. L. Rev. 1251 (2021).

APA 7th ed.

Shugerman, J. (2021). *The (joseph) stories of newmyer and cover: hero or tragedy?*. *Connecticut Law Review*, 52(4), 1251-1262.

Chicago 17th ed.

Jed Handelsman Shugerman, "The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?," *Connecticut Law Review* 52, no. 4 (February 2021): 1251-1262

McGill Guide 9th ed.

Jed Handelsman Shugerman, "The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?" (2021) 52:4 Conn L Rev 1251.

AGLC 4th ed.

Jed Handelsman Shugerman, "The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?" (2021) 52(4) *Connecticut Law Review* 1251

MLA 9th ed.

Shugerman, Jed Handelsman. "The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?." *Connecticut Law Review*, vol. 52, no. 4, February 2021, pp. 1251-1262. HeinOnline.

OSCOLA 4th ed.

Jed Handelsman Shugerman, "The (Joseph) Stories of Newmyer and Cover: Hero Or Tragedy?" (2021) 52 Conn L Rev 1251 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

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# CONNECTICUT LAW REVIEW

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VOLUME 52

FEBRUARY 2021

NUMBER 4

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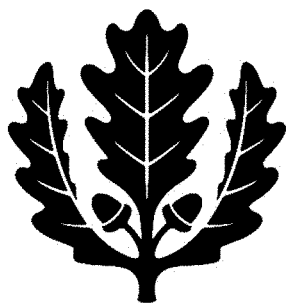
## Essay

### The (Joseph) Stories of Newmyer and Cover: Hero or Tragedy?

JED HANDELSMAN SHUGERMAN

*Kent Newmyer's classics Supreme Court Justice Joseph Story: Statesman of the Old Republic and John Marshall and the Heroic Age of the Supreme Court are important stories about the architects and heroes of the rule of law in America. In Newmyer's account, Story played a crucial role preserving the republic and building a legal nation out of rival states, and Newmyer's Story is fundamentally important for students of American history. But in Robert Cover's account in Justice Accused on northern judges' deference to slavery, Story is an anti-hero. Sometimes Story stayed silent. In Prigg v. Pennsylvania, Story overvalued formalistic comity. This Essay suggests that Story missed vital opportunities to write a judicial opinion more forcefully recognizing the rights of fugitive slaves under the Fifth Amendment's due process clause, a preview of Dred Scott but in reverse.*

*One can find a balance between Newmyer's empathetic charity and Cover's non-empathetic clarity, to see the value of the rule of law through both interpretations. Thus, they both teach us about law, leadership, and life.*



## The (Joseph) Stories of Newmyer and Cover: Hero or Tragedy?

JED HANDELSMAN SHUGERMAN \*

“As [Justice Oliver Wendell] Holmes put it, ‘[Justice Joseph Story] has done more than any other English-speaking man in this century to make the law luminous and easy to understand.’”<sup>1</sup> R. Kent Newmyer brings in this apt description in his epilogue to *Supreme Court Justice Joseph Story: Statesman of the Old Republic*.<sup>2</sup> It’s all the more appropriate on this occasion because Newmyer makes his subjects—America’s great justices—luminous, and makes their decisions, their complex ideas, and their legacies easy to understand.

Newmyer does not achieve luminosity by oversimplifying these men or the law they made. He grapples with their complexities and contradictions, but he also has a gift for context and for humanizing these jurist giants in black robes. Newmyer hails Chief Justice John Marshall as a hero in a heroic age, and then nails Chief Justice Roger Taney as a villain in a villainous age. His books *John Marshall and the Heroic Age of the Supreme Court*<sup>3</sup> and *The Supreme Court Under Marshall and Taney*<sup>4</sup> are legal history classics, insightfully synthesizing for lawyers, and readably familiarizing for non-lawyers (and without overly lionizing). But Newmyer’s best work is *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (1985).<sup>5</sup>

Yale History PhDs have been handing down from generation to generation a model reading list for our third-year oral examinations. There are many outstanding legal historians with long careers and only one book on the list; many more aspire to have one book on the list. Newmyer is a member of a small club with multiple books on that list, and they deserve to be on it for any student who wants to understand law, politics, and culture from the Founding to the Civil War. Newmyer shows how

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\* Professor, Fordham Law School. Thanks to Mary Bilder and Steven Wilf for wonderful contributions and to Kent Newmyer for the inspiration.

<sup>1</sup> R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 383 (G. Edward White ed., 1985).

<sup>2</sup> *Id.*

<sup>3</sup> R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001).

<sup>4</sup> R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* (1968).

<sup>5</sup> NEWMYER, *supra* note 1.

biography is a powerful way to understand how those forces shaped Americans' lived experiences and American law.

Biography is also enormously challenging. It is one thing to construct a book around an argument, and to pick and choose discrete moments to make such a book manageable. But constructing a book around a person imposes a duty to capture both the whole person and the world around them—over many decades. He opens his book with an anecdote from the archives, where a “bedraggled” old man confronted him about working on a Story biography.<sup>6</sup> “Young man . . . studying Joseph Story could ruin your career!”<sup>7</sup>

Instead, Newmyer dug deep into Story's life, and in turn, Story propelled Newmyer on a start of an illustrious career. How did he avoid the pitfalls of biography? I offer two observations. First, Newmyer had a thesis: he relied on Story's life to trace civic republicanism's journey in America from anti-imperial revolution to nationalistic conservatism.<sup>8</sup> It's a story that explains some puzzles and surprises in American history: why and how the Revolution happened; why the early republic—as it grew to span a continent and increasingly depended on slavery and immigration—did not fracture across party lines or geographic lines for so long; why elites failed to confront slavery for so long; and after Story's death, why northern elites did not simply wave goodbye when the South seceded. Newmyer was writing in the midst of American historians doing the best work on republicanism in the Atlantic world, and he drew on those insights to drive a big biography with some big ideas. Newmyer also addressed one of the problems with this historiography. One critique is that these historians made civic republicanism too abstract, and not concrete or human enough. It's hard for judges to interpret law through the civic republican turn if the ideas are vague. But Newmyer's biography succeeded in making these ideas more comprehensible, which in turn helps scholars and judges understand constitutional history.

A second observation about biography is that it helps to have an emotional connection to the subject. The history profession's old goal of “objectivity” is not only a fantasy (that “noble dream”<sup>9</sup>), but it can also drag down a project. It seemed to me—and I am speculating—that Newmyer succeeded because he grew to love and sympathize with Joseph Story. The story of civic republicanism and conservative capitalist nationalism comes alive because Newmyer wanted to bring Story to life.

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<sup>6</sup> *Id.* at ix.

<sup>7</sup> *Id.* (internal quotation marks omitted).

<sup>8</sup> *Id.* at xv–xvi.

<sup>9</sup> See, e.g., PETER NOVICK, THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION 1–3 (1988) (discussing the goal of objectivity among historians).

Another great legal scholar who studied Story shows the power of the opposite emotional approach. Robert Cover wrote the seminal *Justice Accused: Antislavery and the Judicial Process*<sup>10</sup> coming out of the civil rights era and Vietnam era with intensely negative feelings towards the antebellum judges who knew that slavery was wrong, but used formalism and procedure to avoid confronting or combatting slavery. It would be unfair to contrast Cover as having enmity for Story, as opposed to Newmyer's empathy; to suggest villain versus hero. But it is fair to say that Cover is driven by moral outrage over the retreat to formalism in order to hide from conscience. It may be fair to contrast Newmyer's Story-as-tragic-hero versus Cover's Story-as-anti-hero (a Cover Story? Sorry.).

Here is a concise summary of Cover's account: Story was a pioneer in conflict-of-laws and comity (one jurisdiction recognizing the different rules of another jurisdiction). Story wrote that only "natural" qualifications and disqualifications deserved comity.<sup>11</sup> Cover wrote, "[S]lavery was his primary illustration for this principle" when Story wrote in 1834.<sup>12</sup> Cover then tells a story of a series of cases in which Story condemns slavery either through his adoption of precedents in his legal publications (such as Lord Mansfield's *Somerset* decision against slavery's legality in England)<sup>13</sup> or in his decisions. Both Cover and Newmyer emphasize his anti-slavery opinion in *La Jeune Eugenie* while riding circuit in 1822. Story does not hold back on the evils:

What is the fact as to the ordinary, nay, necessary course, of this trade? It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the

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<sup>10</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>11</sup> *Id.* at 86.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 87.

weak, and crushing to death the broken-hearted. This is but the beginning of the evils.<sup>14</sup>

Cover highlights Story's bigger picture jurisprudential point: "the nature of moral obligation, may theoretically be said to exist in the law of nations,"<sup>15</sup> meaning the natural law of freedom should be read into international law. Thus, Story ruled against the slave trade.<sup>16</sup>

But then Story's results are more mixed. In *Antelope* in 1825, Chief Justice John Marshall ruled the opposite way in favor of the slave trade, relying on positive law that creates slavery, rather than natural law that would limit it.<sup>17</sup> Newmyer, not Cover, notes that Story "entered no dissent" in *Antelope*.<sup>18</sup> Newmyer puts his emphasis on the legacy of the earlier anti-slavery opinion: "Story, at any rate, never changed his mind on the correctness of his *Eugenie* doctrine, Marshall and *The Antelope* notwithstanding."<sup>19</sup> Notwithstanding? Marshall's decision in *Antelope* may not have formally overturned *La Jeune Eugenie*, but it sharply limited it. Yet Story failed to dissent.<sup>20</sup>

After more time passed, in the 1841 case *Amistad*, Story ruled in favor of freeing slaves who had mutinied on board slave ships and eventually landed in New York.<sup>21</sup> Both Cover and Newmyer mildly praised Story's role.<sup>22</sup> But both authors underscored that Story again relied on positive "municipal law," the narrower fact that Spain abolished slavery, rather than broader human rights against slavery.<sup>23</sup> Both Cover and Newmyer criticize Story's narrow and increasingly positivistic position.<sup>24</sup> Interestingly, Newmyer devotes time to explaining why political events constrained Story's latitude (more sympathetically to Story's political challenges).<sup>25</sup> But Newmyer also criticized Story's approach to find a way to rule in favor of both sides, calling it "bad faith."<sup>26</sup> On a more positive note, he also goes on to explain how another court that same year relied on Story's earlier decisions on conflict-of-laws (including *Amistad*) to free slaves who had mutinied.<sup>27</sup> *Amistad* is a celebrated case, but to his credit Newmyer is

<sup>14</sup> *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 845 (D. Mass. 1822) (No. 15,551).

<sup>15</sup> *Id.* at 846.

<sup>16</sup> *Id.*

<sup>17</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 90 (1825).

<sup>18</sup> NEWMYER, *supra* note 1, at 348.

<sup>19</sup> *Id.* at 350.

<sup>20</sup> *Id.*

<sup>21</sup> *United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 588, 597 (1841).

<sup>22</sup> COVER, *supra* note 10, at 114–15; NEWMYER, *supra* note 1, at 369. Poetically, the case title means *United States v. Friendship*, a bit like the later case, *Virginia v. Loving*.

<sup>23</sup> COVER, *supra* note 10, at 114; NEWMYER, *supra* note 1, at 369.

<sup>24</sup> COVER, *supra* note 10, at 115; NEWMYER, *supra* note 1, at 369.

<sup>25</sup> NEWMYER, *supra* note 1, at 369.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



balanced and more critical of Story than our popular culture might have expected.

Another 1841 slavery controversy, *Groves v. Slaughter*,<sup>28</sup> again challenged Story's moral position. Mississippi's Constitution prohibited importing slaves for sale.<sup>29</sup> Slaughter had sold imported slaves in Mississippi, but the buyers refused to pay because they claimed the illegal sale was unenforceable.<sup>30</sup> Justice Smith Thompson, writing for the majority, held that the state constitutional provision by itself was not self-executing, and because the legislature had not passed legislation to implement it, it was unenforceable.<sup>31</sup> Justice John McLean, more strongly than ever announcing his anti-slavery views, concurred for a different reason: the contract was unenforceable because trafficking humans was a creature of local law and, therefore, not enforceable.<sup>32</sup> Other Justices took the opportunity to write more stridently pro-slavery decisions: Chief Justice Roger Taney invoked states' rights to deny any federal role to regulate slavery,<sup>33</sup> and Justice Henry Baldwin made a mirror image argument that the Fifth Amendment and the Privileges and Immunities Clause protected slave owners' rights and should invalidate the state constitutional amendment.<sup>34</sup> Taney would later adopt Baldwin's argument and recognize a substantive due process right for slave owners in *Dred Scott v. Sandford*.<sup>35</sup>

But Story weighed in on none of these positions, because he voted to concur while issuing no opinion of his own.<sup>36</sup> Story had an opportunity to stand with McLean against slavery by invoking constitutional clauses for slaves, not their owners. But he never did. And his concurrence signaled his approval for the states' rights approach. Surprisingly, neither Cover nor Newmyer focused on his silence or criticized him for missing an opportunity to speak out on his anti-slavery views.<sup>37</sup>

This now brings us to the most controversial case in this line of fugitive slaves and personal liberty laws cases: *Prigg v. Pennsylvania*.<sup>38</sup> Pennsylvania state law prohibited blacks from being removed,<sup>39</sup> but Justice Story ruled for a majority that the federal Fugitive Slave Law preempted

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<sup>28</sup> *Groves v. Slaughter*, 40 U.S. 449 (1841).

<sup>29</sup> *Id.* at 449.

<sup>30</sup> *Id.* at 455.

<sup>31</sup> *Id.* at 501–02.

<sup>32</sup> *Id.* at 506–08.

<sup>33</sup> *Id.* at 508.

<sup>34</sup> *Id.* at 515–17.

<sup>35</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 451–54 (1856).

<sup>36</sup> *Groves*, 40 U.S. at 510 (Story, J., concurring).

<sup>37</sup> See COVER, *supra* note 10; NEWMYER, *supra* note 1 (discussing Justice Story without criticizing him for a missed opportunity to speak out on his anti-slavery views).

<sup>38</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>39</sup> *Id.* at 539.

the state anti-slavery law.<sup>40</sup> At the same time, Story's decision gave states latitude to pass new statutes that would forbid state officials from cooperating in the return of fugitive slaves. Over time, Story had become increasingly formalistic and curtailed his earlier efforts.

Robert Cover unsurprisingly focused on Story's decision as a paradigmatic example judge putting formalism over fairness.<sup>41</sup> Story was an expert in comity, and he couldn't craft a way for the state statute to survive? Especially given how he had written before about freedom and natural law prevailing over slavery and positive law? Story and the majority overstated how crucial the Fugitive Slave clause was in the Constitutional Convention for keeping the South on board, as if it were the dealmaker or deal breaker. Cover writes with implicit irony that Cover viewed the acceptance of the Fugitive Slave clause as "a test of the good faith of the participants in the national undertaking,"<sup>42</sup> if the Justices were going to stick to the exaggerated bargain of 1787 in order to keep the nation together. Cover writes:

Story's role in *Prigg v. Pennsylvania* is more difficult to fathom. . . . What was new in *Prigg* was Story's very weak reasoning that the prohibition of the "discharge" of a fugitive in Article IV [of the Constitution] must be interpreted to exclude any interposition of process that might operate to "delay" or "qualify" the enjoyment of the right protected. Such word teasing was especially unconvincing in light of McLean's dissent that included a forceful policy attack against self-help.<sup>43</sup>

"[W]ord teasing" is a generous way to phrase it. Here is the text of the Fugitive Slave clause:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>44</sup>

"Discharge" meant the final freeing of a slave. Surely, a state providing protective measures to confirm a suspected fugitive's identity would neither mean "discharge" nor be a failure to "deliver." Providing extra process under state law could have been read to be consistent with

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<sup>40</sup> *Id.* at 625–26.

<sup>41</sup> See COVER, *supra* note 10, at 166–67 (illustrating how Justice Story decided the case).

<sup>42</sup> *Id.* at 240.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 162.

the clause, or at least using the canon of constitutional avoidance, the Supreme Court could have interpreted the clause to be only delay, and not discharge. Moreover, note the clause's use of the word "due," which hints at the "due process" clause. How is a state supposed to know to whom such service is due, unless it pursues due process with concrete steps? Would that still be a conflict of law? Preemption was not so developed in the nineteenth century, and it certainly was not so iron-clad and concrete a doctrine that Story couldn't find a way to salvage some of the state Personal Freedom provisions.

Finally, this point about that small word "due" raises a question that is not addressed in any of the *Prigg* opinions, nor by Cover or Newmyer: if just a year earlier, the pro-slavery Justices invoked the Fifth Amendment for slave-owners in *Groves v. Slaughter*, why not invoke it for the slaves themselves in *Prigg*? The claims by fugitive slaves for procedural protections under state law are more "process" than the arguably oxymoronic invocation of substantive due process for slave-owners by Justice Baldwin in *Groves*.<sup>45</sup> In fact, one of the most flagrantly egregiously unfair aspects of the Fugitive Slave Act of 1850 (an act shaped by *Prigg*) was that it paid commissioners twice as much to rule that the suspect was a fugitive rather than free. Imagine if somehow Justices Story and McLean had announced in some format—not necessarily a majority opinion, but just a concurrence or a dissent—the plausibility of a due process claim for suspected fugitives. It clearly fit the constitutional text "due" in both Article IV and in the Fifth Amendment. It was at least a missed opportunity for Justice Story to voice his conscience, while also exhibiting a brilliant and creative legal mind. The fact that he did not attempt such an argument is also a hint that he was seeking political compromise, not legal protection.

Newmyer is more generous and sympathetic. He takes Story seriously, as a realistic nationalist seeking compromise, and as someone who knows a forceful dissent or a clever concurrence does not make law or concrete change. Newmyer is also sharply critical: "'Masks of the law are of two kinds,' according to John Noonan, Jr., 'those imposed on others and those put on oneself.'"<sup>46</sup> This critique is consistent with Cover's thesis about American judges setting aside their own consciences to adopt the formalist role of a judge: putting a mask of performative, professional formalism on oneself to cover over a more human moral sense. I have relied on these concepts of role fidelity in my own work in legal history and torts.<sup>47</sup> Newmyer is insightful in his own critique of Story's opinion, noting

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<sup>45</sup> *Groves*, 40 U.S. at 515.

<sup>46</sup> NEWMYER, *supra* note 1, at 370 (citation omitted).

<sup>47</sup> Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1355 (2010).

Story's "failure to distinguish between state law applying to fugitive slaves and those applying to free blacks was crucial."<sup>48</sup> Story's defense, that states could order their officials not to assist, seems more like a conscience-soothing boycott to keep one's hands clean, rather than get one's hands dirty in the work of justice and resistance.

It's more like the midwestern bloc of the Republican coalition that joined with Lincoln not because of abolition and more because of anti-expansion: they did not want slavery—and specifically African slaves—moving near them, competing against them at lower cost, and devaluing their own labor.<sup>49</sup> Story offered Northerners the chance to boycott and free their conscience, but at the cost of the state power to resist and free humans.<sup>50</sup> Story doesn't acknowledge the hypocrisy of the South asserting states' rights to protect slavery while demanding federal judicial power to allow them to override states' rights and, as slavecatcher, ride into northern states.

Newmyer gives Story and his son several pages and a lot of latitude to justify the decision, even if Newmyer adds his skepticism to these justifications:

The complication comes from what Story himself (and his son, too) thought he had accomplished. Upon his return to Massachusetts in the spring of 1842, he spoke of his opinion in *Prigg* "repeatedly and earnestly" to his family and friends as a "triumph of freedom."<sup>51</sup>

To his credit, Newmyer sharply contrasts what Story did and what he says he did. Newmyer is rightly skeptical. But Newmyer's telling comes across as Story's confusion or self-delusion. It is worth contemplating if Story was acting in good or bad faith, that he knew he had compromised not only politically but in the gravest moral sense, and was desperate to tell others and himself it was not betrayal. This is more than a "complication,"<sup>52</sup> more like a moral crisis that Cover sees.

And this is a challenge in biography. How much should an author credit their subjects for how they see themselves and describe themselves to the world? How much should the author generously interpret them as operating in good faith, or critically in bad faith? There is no sign that Story was in cognitive or emotional decline in 1842. But it's hard to read his *Prigg* opinion and then his own celebration of it as a "triumph of

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<sup>48</sup> NEWMYER, *supra* note 1, at 373–74.

<sup>49</sup> ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 3–4 (1970).

<sup>50</sup> NEWMYER, *supra* note 1, at 373–74.

<sup>51</sup> NEWMYER, *supra* note 1, at 372.

<sup>52</sup> *Id.*

freedom,<sup>53</sup> and not instead see a tragedy for freedom, a tragedy of regret and guilt, of a judicial career built on pursuing justice and fairness, and to then realize on some haunting level that all those years of work and genius led him to a zenith in the legal triumph for slave hunters. Story sacrificed his principles of freedom for nationalism and comity, but he died before he could see how all these compromises—including the spreading conflict over fugitive slaves and slave hunters—still tore the country apart into civil war.<sup>54</sup>

In light of these deep failings by Story in *Prigg* and missed opportunities in *Antelope*, *Groves*, and *Amistad*, how should we think of Story? Is Cover right in *Justice Accused* to make it partially “Story Accused”? Cover may have been too cynical, but it is key to understand that Cover’s thesis is not about lying and deception. He is making a deeper point about the banality of evil. Judges like Story enabled the evil of slavery by conceiving of their role as juridical bureaucrat. And this may be an implicit or unintentional critique in Newmyer’s title. Whereas Arendt’s bureaucrat can enable evil through role fidelity triumphing over conscience, so too can Newmyer’s statesman participate in “heroic” evil. The goals may be noble: the rule of law, stability, compromise. But by putting on the mask of “statesman” and “hero,” what evils are our leaders enabling? Are they compromising our most basic principles for their heroic legacy?

Perhaps the bottom line is to find a balance between Newmyer’s empathetic charity and Cover’s non-empathetic clarity. And perhaps a bottom line today is that the rule of law is just as important as ever. It depends on being wise and reflective about how the rule of law is constructed and whom it is supposed to serve. In the 2020s, it is more difficult to see Story’s core value of “nationalism” as a noble or heroic principle worth sacrificing fellow humans’ life and liberty, and worth sacrificing the civic republican ideals that first propelled Story to greatness.

A final bottom line is that we can engage in these debates to help us understand our current crisis of republicanism and the rule of law vs. nationalism, our current crisis of statesmen vs. demagogues, because we have learned so much from outstanding and thoughtful legal scholars like Robert Cover and Kent Newmyer.

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<sup>53</sup> *Id.*

<sup>54</sup> See *A Man of Letters: Joseph Story (1775-1845)*, HARV. L. TODAY (Oct. 1, 2012), <https://today.law.harvard.edu/a-man-of-letters-joseph-story/> (noting Story’s death year); Dr. James McPherson, *A Brief Overview of the American Civil War*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> (noting the date of the start of the Civil War) (last visited Jan. 17, 2021).

Kent, thank you for your expert craft of biography, and through biography, thank you for teaching us about law, leadership, and life.