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Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge

*Morgan D. Dowd**

The author here examines the legal philosophy of Justice Joseph Story. He discusses Story's attempts to reform federal criminal law, his expansion of judicial review, and the decision of Swift v. Tyson. The author concludes that Story made two important contributions to the American legal system—preserving the doctrine of stare decisis and advancing the theory of the supremacy of national law.

Few studies have sought to explicate the legal philosophy of Joseph Story despite his enormous reputation as scholar, Supreme Court justice and professor at the Harvard Law School. Worse still, there has been little critical analysis of nineteenth-century concepts and statements of the law.[1] The purpose of this essay, then, is to examine the validity of Story's legal theories and to evaluate his work as a major contributor to American public law. As a result of this study, it is hoped that progress can be made toward a greater understanding of the man, the justice, and his philosophy of law.

I. The Limiting Factors in Story's Legal Philosophy

Justice Story was in great part a child of the eighteenth century. When Story arrived on the bench the law of reason school was already on the decline and the era of historical jurisprudence beginning.[2] Nevertheless, many of the weaknesses of eighteenth-century rationalism can be found in Story's writings. For one thing his early preoccupation with the doctrine of vested rights led him to assert that the unwritten law was declaratory of the natural law. Property was considered by Story and his contemporaries to be a fundamental

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1. Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law within Thirty-six Days*, 26 Va. L. Rev. 759 (1940); Cassoday, *James Kent and Joseph Story*, 12 Yale L.J. 146 (1903); Hogan, *Joseph Story's Anonymous Law Articles*, 52 Mich. L. Rev. 868 (1954); Hogan, *Three Essays on the Law by Joseph Story*, 28 So. Cal. L. Rev. 19 (1954); Leslie, *The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional Nationalism*, 35 Miss. Valley Hist. Rev. 203 (1948); Newmeyer, *The Whig Politics of Justice Story*, 48 Miss. Valley Hist. Rev. 480 (1961); Pound, *The Place of Judge Story in the Making of American Law*, 1 Mass. L.Q. 121 (1916).

2. The following works were consulted on this material: Cohen, American Thought (1954); Pound, The Formative Era of American Law (1950); Pound, The Spirit of the Common Law (1921); Reuschlein, Jurisprudence—Its American Prophets (1951) [hereinafter cited as Reuschlein].

"social institution"—a natural right and government existed to protect such rights.[3] In fact, early Federalists, including Story, were so impressed with natural rights theories that they went so far as to suggest that the preservation of property was the "primary object of the social compact."[4] The reasons for elevating property to such a level remained constant. Distrustful of the mass and fearful of state legislative action based on hasty majorities, they courted the federal judiciary with the hope that the courts would guarantee them their privileged position in society.

Many states, however, did not respond to the doctrine of vested rights as promulgated by Federalists. State legislatures tended to favor land speculators and holders of title to confiscated estates; very often state judges gave a local construction to deeds, wills and contracts for the sale of land.[5] This countervailing power of the states led to two alternatives for those who desired the preservation of vested rights: the federal judiciary could use natural rights arguments to support the case against the invasion of property; or the federal judges could assume an "indefinite veto power over state legislation" by citing specific constitutional restraints. Federal courts, and more especially the Supreme Court, followed the second choice more frequently. Normative concepts of law were generally avoided when they involved regulation of legislative conduct. Justices Story and Marshall were two major exceptions to this rule. Story in particular used the natural law doctrine to support the private right of holding property and the obligation of private contracts.[6]

A. *Vested Rights: Real Property*

Story's earliest decision involving the identification of private property with the natural law was *Terret v. Taylor*.[7] Here Story related freedom of religion and natural law to the doctrine of vested property rights. The Virginia legislature had at one time granted lands to religious organizations for public worship; later these acts were repealed. A bill in chancery had been filed by representatives of the Established Episcopal Church. The suit in equity involved several complicated land transactions but the main point at issue was whether Virginia could take away title to lands it once had vested in a religious society.

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3. Mason, The Supreme Court in a Free Society 194 (1959).
4. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).
5. See Mason, *op. cit. supra* note 3, at 194-97.
6. See Cahill, Judicial Legislation, A Study in American Legal Theory (1952); Peltason, Federal Courts in the Political Process (1953); Rosenblum, Law as a Political Instrument (1955).
7. Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815).

Story, writing the majority opinion, was particularly critical of Virginia's audacity in treating a well-established church in such a cavalier manner.

> This summary view of so much of the Virginia statutes as bears directly on the subject in controversy, presents not only a most extraordinary diversity of opinion in the legislature, as to the nature and propriety of aid in the temporal concerns of religion, but the more embarrassing considerations of the constitutional character and efficacy of those laws touching the rights and property of the Episcopal Church.[8]

He attacked the state for assuming that church lands could escheat as a result of the Revolution. The state could lawfully take only crown rights: forfeiture of previously created vested rights was impossible. Upon what authority did Story base this interpretation of the law of confiscation? This principle, he stated categorically, was "equally consonant with the common sense of mankind and the maxims of eternal justice."[9] He admitted that the Revolution permitted the Virginia assembly to destroy "compulsive taxation" of the established church. But that was as far as the egalitarian spirit of legislative authority extended. Preservation of property was the major concern of the Constitution. Further weight was added to this proposition by the acquiescence of a "great majority, if not the whole, of the very framers of the constitution."[10] Such a doctrine as the state of Virginia had promulgated was inimical to the good society. Without any curb on state action, public corporations and vested property rights could be dissolved without the consent of the interested parties, *i.e.*, the minority. Therefore, Story's decision that the state of Virginia was prohibited from taking certain church lands was based on the immutable principles of "natural justice—upon the fundamental laws of every free government. . . ."[11]

B. *Vested Rights: Private Contracts*

Justice John Marshall in *Fletcher v. Peck*[12] set in motion a series of decisions which promoted national judicial regulation of the contract clause.[13] When Marshall declared that the revocation of land grants was unconstitutional (since it involved the sanctity of a private

8. *Id.* at 48.
9. *Id.* at 50.
10. *Id.* at 51.
11. *Id.* at 52.
12. 10 U.S. (6 Cranch) 87 (1810).
13. "From the Nation's beginning, the States had lax notions as to the sacredness of public contracts, and often violated the obligations of them." 3 BEVERIDGE, LIFE OF JOHN MARSHALL 557 (1919); THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 653-56 (Story ed. 1852). See also SCHWARTZ & HOGAN, JOSEPH STORY 120-52 (1959).

contract) he was echoing Alexander Hamilton's sentiment that such action by state legislatures was contrary to the "first principles of national justice and social policy."[14] The question remained, however, whether corporate charters as well as public grants were protected under the aegis of article I, section 10 of the Constitution. The *Dartmouth College* case decided in 1819 by Marshall and Story sought to answer that issue.[15]

Justice Marshall's analysis of the *Dartmouth College* controversy can be broken down into two questions. Was the contract in question protected by the federal constitution? And if so, was the contract impaired by the state legislative acts? The Chief Justice related the charter to a contract; contracts which were mentioned in the Constitution pertained only to those dealing with private property and confer rights which may be asserted in a court of justice.[16] Charters contained rights; therefore, the Constitution recognized a charter as a contract and protected it as private property. Stretching the case to cover every possible loophole, Marshall concluded that while it was true legislatures had certain powers to annul corporate rights, still, in the final analysis, a valid contract continued in existence. He affirmed this principle despite the fact that the original donors no longer had any actual interest in the property. The state acts were declared to be unconstitutional as violating the impairment of contract.[17]

Justice Story wrote a concurring opinion and approached the case on a different level. Not only was his opinion sweeping in respect to its coverage of common law corporations, but it related the contract clause to the doctrine of vested rights and natural law. The touchstone of Story's decision in the *Dartmouth* case lay, however, not in his review of corporations, charters, or contracts, but rested

14. SCHMIDHAUSER, THE SUPREME COURT, ITS POLITICS, PERSONALITIES, AND PROCEDURES 71 (1960). For a general discussion of the contract clause, see WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938).

15. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). Background reading which proved helpful to the Dartmouth case included: HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835, 379-423 (1960); Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); Hagan, *The Dartmouth College Case*, 19 GEO. L.J. 411 (1931); Harris, *Judicial Review in the United States of America*, 56 DICK. L. REV. 177 (1952).

16. See HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION (1919); Issacs, *John Marshall on Contracts: A Study in Early American Juristic Theory*, 7 VA. L. REV. 413 (1921); Stinson, *Marshall and the Supremacy of the Unwritten Law*, 18 AM. L. REV. 856-57 (1924); Mendelson, *John Marshall's Short Way with Statutes*, 6 KY. L.J. 284-89 (1948).

17. The Trustees of Dartmouth College v. Woodward, *supra* note 15, at 629. See also CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919); OSTER, THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL (1914).

solely on the question which Marshall chose to evade. Was the charter dissolved at the time of the Revolution and thus reduced to a mere nullity by 1775?[18] Story answered this query by reviving a common law decision of Lord Thurlow.[19] He believed it was a principle of the common law as well as international law that when an empire was divided it did not foreclose rights of property already vested. Such a maxim he found was consonant with "the common sense of mankind, and the maxims of eternal justice."[20] Thus, in the *Dartmouth* case Story posited the doctrine of "acquired rights" and tied it to the natural law. In this way he hoped to place the decision on the broadest possible footing.[21]

The *Dartmouth* decision provided a good example of how Marshall and Story were in effect writing into the Constitution their own economic, political and social philosophies.[22] Story went much further than John Marshall in narrowing the legitimate areas of state competency. The impact of the *Dartmouth College* case was not felt immediately. In time, the decision was incorporated into the struggle between those favoring the growth of public corporations (public power theorists) and those seeking the protection of corporate rights at the state level (private power theorists). And at the turn of the century the doctrine of natural rights was resurrected and used to justify corporate monopolies.[23]

II. The Positive Factors in Story's Legal Philosophy

Three American jurists were primarily responsible for the transformation of common law principles as they emerged into a national system of law.[24] Chief Justice Marshall in his famed constitutional interpretations laid the framework for judicial review by incorporating the common law into the federal constitution. Chancellor Kent—celebrated New York judge, writer and teacher—exercised considerable

18. Trustees of Darmouth College v. Woodward, *supra* note 15, at 696. See also Jenkins, *Should the Dartmouth College Decision be Recalled?* 51 Am. L. Rev. 711 (1917).

19. Trustees of Dartmouth College v. Woodward, *supra* note 15, at 707.

20. *Ibid.*

21. The doctrine of "acquired rights" is discussed in Gould, An Introduction to International Law 507-33 (1957). See also Leslie, *The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional Nationalism,* 35 Miss. Valley Hist. Rev. 203 (1948).

22. Bauer, Commentaries on the Constitution, 1790-1860 (1952); Mendelson, *Sectional Politics and the Rise of Judicial Supremacy,* 9 J. Pol. 255 (1947): Moses, *The Friendship between Marshall and Story,* 35 Am. L. Rev. 321 (1901).

23. For a very able discussion of the results of the Dartmouth College case, see Corwin, *op. cit. supra* note 17, at 167-72.

24. See McCloskey, The American Supreme Court (1960) and Mendelson, Capitalism, Democracy and the Supreme Court (1960).

control over the common law as it developed in the states. But it was Joseph Story's unique opportunity to directly affect the common law from his vantage point as Supreme Court and district judge, lecturer in the Harvard Law School and author of systematic classics on American law. His contributions to American law have been calculated by some to be as great as that of Lord Coke to English jurisprudence.[25]

One of the limitations of eighteenth-century rationalism was a loss of vision of past societies. Story, on the contrary, placed great emphasis on time-worn and trusted institutions. He formulated an historical basis for the political system and showed how it was confirmed in a written constitution. Moreover, by adeptly employing the historical method, Story was able to begin work on the codification of American law by comparing it with other legal systems. His ultimate purpose was to provide the law with a stability that he often found lacking in democratic institutions. By using the civil law to buttress his Supreme Court decisions he gave them an international appeal which in turn prevented a purely provincial jurisprudence.[26]

III. The Criminal Law

The explication and codification of the criminal law became two of the major goals of Justice Story.[27] By applying common law rules and showing their logical relationship to comparative legal principles Story formulated the doctrine that criminal jurisprudence should develop along the lines of judicial guidance rather than legislative deliberation. In Story's first full term the Supreme Court considered the question of a federal common law of crimes. Justice Johnson in *United States v. Hudson & Goodwin*,[28] speaking for the majority, emphasized judicial restraint in matters where Congress had not delegated jurisdiction. It was a rule of constitutional law, he said, that the federal courts did not have criminal jurisdiction in common law cases. Story disagreed privately with Johnson but prudence dictated that he should not dissent.[29]

25. Story's reputation was well established in his lifetime. See Reuschlein 52.

26. Letter From Joseph Story to Francis Lieber, Aug. 15, 1837, quoted in 2 Life and Letters of Joseph Story 277-79 (Story ed. 1851); Letter From Joseph Story to John Hall, Sept. 1, 1821, Hall MSS, Historical and Philosophical Soeiety of Ohio.

27. Codification of the Common Law, Report of Commissions in Massachusetts to Determine Expedience and Practicality of Reducing Common Law to Code, in The Miscellaneous Writings of Joseph Story 696-734 (Story ed. 1852).

28. 11 U.S. (7 Cranch) 32 (1812).

29. Professor Crosskey takes the position that the four Republiean judges affirmed the decision while Marshall, Washington, and Story dissented. However, he offers no evidence to support this position. 2 Crosskey, Politics and the Constitution 782 (1953).

The following year Story disregarded the *Hudson-Goodwin*[30] decision and ruled in *United States v. Coolidge*[31] that the Constitution provided the basis for a federal criminal law.[32] Three years elapsed before the Court reviewed Story's circuit case. Again, by a per curiam vote, Story's colleagues repudiated his constitutional theory and left standing the *Hudson-Goodwin ratio*.[33] Loyal to Marshall's desire for unanimity on the bench, Story refused to dissent for a second time, although he remained firmly convinced that a federal common law of crimes existed and was enforceable by federal courts.[34]

Unable to convince a majority of his brethren, Story went outside the Court either to lobby for judicial reform by code or to write model treatises of the law.[35] Story proposed two methods of revising the criminal law. One was a general revision of all criminal laws bringing into line those laws inconsistent with each other in the various states. The revisal procedure, he admitted, was difficult and probably would not be accomplished except by persons "long and intimately acquainted with the administration of criminal justice in the Courts of the United States."[36] The second approach was federal legislation extending the common law to include offenses committed on the high seas and admiralty cases as well as municipal crimes. Such a course of action was perfectly feasible and could be accomplished, he felt, in the single section of a bill.[37]

There has been, however, considerable confusion in the past as to Story's purpose in proposing model codes. Some writers have contended that he sought to change the American legal system and in

30. *Supra* note 28.

31. 25 Fed. Cas. 619 (No. 14857)(C.C.D. Mass. 1813).

32. *Ibid.*

33. United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

34. Story wrote: "Excepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804 (as I have been very authoratively informed), held a like opinion. Since that time, there has been a difference on the Bench, and it is still a question which we all hold unsettled. I believe, however, that none of us entertain any doubt as to the authority of Congress to invest us with this jurisdiction, so far as it applies to the sovereignty of the United States." MSS of 1816 probably addressed to William Pinkney, 1 LIFE AND LETTERS OF JOSEPH STORY 293-300 (Story ed. 1851). But see United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1816).

35. Chancellor Kent once suggested to Story that his Commentaries contained "Too much of foreign discussion & authority. . . ." Story explained, "I could not well see, how I could avoid introducing it without leaving future accounts in ignorance of important sources of information, & even without bringing up the knowledge of the learned in the common law some views of principles which had carried continental jurists in an opposite light. . . ." Joseph Story to Chancellor Kent, May 17, 1834, Story MSS, Mass. Hist. Soc. 27.

36. Joseph Story to John McPherson Berrien, July 23, 1842, 2 LIFE AND LETTERS OF JOSEPH STORY 406 (Story ed. 1851).

37. Joseph Story to John McPherson Berrien, Feb. 8, 1842, *Id.* at 402.

its place erect a Continental code.[38] Story's personal papers do not bear out such charges. In an unpublished letter Story presented his philosophy of codes in the following manner:

> A . . . code, recognising in a fixed form & in a lucid way & (which) had the great principles of . . . law, would of itself be a very great public Helping. In my view the great object of a code . . . ought not to be, so much the formation of new principles for future cases, as the positive enactment, as fundamental, of those, which have been already . . . acted upon, & affirmed.
>
> A revision of a Code once in fifty years by embodying in a fixed shape the addition of new principles & the limitations & exploitations of old . . . made in the intermediate period, by the highest Courts of Justice, would perpetually bring the law into a state approximating the exactness of Science.[39]

Story, then, had a dual purpose in his attempts to systematize American criminal law. First, by saying what the law was and documenting it by historical references he sought to prevent a premature, crude codification.[40] And while he was an admirer of Continental codes, he nevertheless, realized that the common law was much more imprecise and plastic, suiting his needs in re-directing American jurisprudence.[41] Secondly, Story desired unity in the law at a time when local elements both on the bench, in Congress and in the states threatened to upset his cherished dreams of federalism.[42]

IV. Federal Jurisdiction

Justice John Marshall had laid the constitutional basis in *Marbury v. Madison*[43] for the Supreme Court's power of judicial review. But the decision did not settle all the questions arising from article III of the Constitution. It left unresolved three specific problems: (1) what was the maximum grant of judicial power vested in the federal courts?; (2) to what degree could the Congress control the Supreme

38. See the arguments pro and con in Reuschlein 52.

39. Joseph Story to Thomas Grimke, c. 1827, Weld-Grimke MSS, William C. Clements Library.

40. See James Kent to Joseph Story, June 30, 1823, Story MSS, Massachusetts Historical Society, 18, 28.

41. He used the idea of codes, Reuschlein states "only to build up the common law and not as a wedge to pry open the door so that another system might ease its way in." Reuschlein 52.

42. Story worked very closely with Francis Lieber in his attempts to present to the world a unified system of American jurisprudence. See Joseph Story to Francis Lieber, Lieber MSS, Huntington Library, Jan. 14, 1837; Dec. 19, 1837; Apr. 10, 1836; Feb. 9, 1836; July 30, 1835; Oct. 14, 1835; Aug. 16, 1834; July 28, 1833; Mar. 22, 1833; Dec. 19, 1831; Dec. 15, 1831; Oct. 6, 1831; Feb. 23, 1831; Aug. 5, 1830; July 29, 1830; Dec. 15, 1829; Oct. 17, 1829; Apr. 17, 1829; Nov. 22, 1828.

43. 5 U.S. (1 Cranch) 137 (1803).

Court with respect to its appellate jurisdiction?; and (3) to what extent could the Court declare acts of state legislatures unconstitutional? The dramatic struggle between the nationalists on the nation's highest bench and the legal officers who championed states' rights highlighted the Marshall-Story era.[44]

The major difficulty was traceable to the compromises of the Constitutional Convention. Article III reflected a balance of interests. It was an uneasy accommodation between the majoritarians (nationalists) who wanted exclusive original jurisdiction for the Supreme Court and the minoritarians (states' righters) who wanted to preserve the substantive and procedural law of the states even in cases when national law was at stake. The Judiciary Act of 1789, of course, was a victory for the nationalists since it created a national judicial system with appellate jurisdiction in the Supreme Court. But the specific details of appellate jurisdiction for the high Court were worded carelessly. Thus the basis for conflict between the nation and the states was ensured before the ink of the signers of the Constitution was dry.[45]

From the outset two rival groups attempted to control each other. Federalist judges read the Judiciary Act of 1789 as one which extended the jurisdiction of lower federal courts. This action was taken with the expectation that local law "would not bar enforcement of federal laws."[46] State judges, however, disagreed with these interpretations. They believed there was no mandate from Congress derived from the spirit of the Constitution that gave countenance to Federalist doctrines.[47]

The Supreme Court in *Marbury v. Madison*[48] had challenged a national law and declared it unconstitutional. The question remained, however, whether the Court should have the right to review state acts and declare them null and void. This issue was considered at the Constitutional Convention. Proposals to curb hostile state acts ranged from a congressional veto to federal appointment of state governors. In the end all the plans were rejected.[49] There remained, nonetheless, a hard core of federal judges who believed that the power to void state acts rested with them. In *Fletcher v. Peck*,[50] Chief Justice Marshall put their theory into practice over the objections of numerous state judges and the Congress. He ruled that the Supreme Court had the right of jurisdiction over acts of the state

44. See MASON & LEACH, IN QUEST OF FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 167-227 (1960).
45. HURST, THE GROWTH OF AMERICAN LAW 116 (1950).
46. *Ibid.*
47. *Ibid.*
48. *Supra* note 43.
49. MASON & LEACH, *op. cit. supra* note 44, at 156-57.
50. *Supra* note 12.

legislature.[51] But that case had come up via the federal courts and the reversal of state court decisions was not at stake. The question remained moot until Story's decision in *Martin v. Hunter's Lessee.*[52]

A. *Martin v. Hunter's Lessee*

Martin v. Hunter's Lessee produced one of the most sweeping decisions that Story ever issued concerning the judicial supremacy of the Supreme Court over the states.[53] Story divided his opinion into three parts. First, he discussed the constitutional power allotted to the Congress and the federal courts as found in the Constitution. He believed that the people had granted the Supreme Court powers to limit state actions which were incompatible with the objects of the national government. Hence, he assumed that the high Court did not depend on state sovereignty to determine its proper jurisdiction.[54]

The second, and major question presented in *Martin v. Hunter's Lessee* concerned the question as to whether Congress was obligated to establish inferior federal courts, bestow appellate jurisdiction on them, and give these courts a free hand in choosing the law to be followed.[55] Story felt that if Congress refused to create lower federal courts, in all probability the judicial power would be frustrated and the Constitution disobeyed. Similarly, it seemed to be a correct assumption that Congress could not withhold appellate jurisdiction any more than it could prevent the Court from possessing original jurisdiction. The judicial power, Story wrote, extended to all cases in law and equity enumerated in the Constitution. But apart from federal questions the Court's jurisdiction also extended to state tribunals. The power of the Supreme Court over federal appellate jurisdiction was exclusive and the operative rules of law to be applied were those of the federal not state courts.[56]

Story chose to rebut the states' righters who contended that extension of federal appellate jurisdiction was an encroachment upon state sovereignty.

> It is a mistake, [to aver] that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states, in some of the highest branches of their prerogatives. . . . The language of the constitution

51. *Ibid.*

52. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

53. Charles Warren contended that Story's personal experience with the New England Federalists' attacks on the judiciary convinced him of the necessity for the Supreme Court to assert its powers over the states. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 51 (1923).

54. Martin v. Hunter's Lessee, *supra* note 52, at 328-29.

55. *Id.* at 331.

56. *Id.* at 340.

> is also imperative upon the states, as to the performance of many duties. . . . When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exereise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.[57]

State judges, Story emphasized, were not independent entities. They were pledged to support the federal as well as the state constitution. Loyalty to the Constitution was also prompted out of a desire for uniformity. The purpose of a Constitution was to make federal law the supreme law of the land. If state judges differed in "learning and integrity," if they represented diverse geographical units, or if the Supreme Court lacked the power to review state court decisions, then the future of constitutional law would be jeopardized.[58]

The third and final topic considered by Story was the removal power. No express constitutional provision could be found allowing Congress to sanction the removal of cases from state courts to federal courts when a federal question was at stake. Spencer Roane and numerous state judges had been severely critical of this part of section 25 of the Judiciary Act. But the clamor of southern state judges did not change Story's mind. Removal was implied "as a power necessary and proper to carry into effect some express power."[59] Removal was an effective method of achieving federal appellate jurisdiction and a writ of error was the proper remedy to guarantee protection against arbitrary state action. In short, federal courts had to have removal power or else public and private interests would be exposed to irreparable harm.[60]

B. *The Swift v. Tyson Doctrine*

From the outset the Federalists had favored strong federal courts with virtually unlimited powers. Anti-federalists wanted to avoid a federal system altogether, placing great reliance on state tribunals. Although the Federalists won out eventually at the Constitutional

57. *Id.* at 343-44.
58. *Id.* at 348.
59. *Id.* at 349.
60. On questions of national supremacy Story was a strict majoritarian; when, however, the matter concerned property, he became a supporter of minority rights.

Convention by achieving a federal court system, there were still fundamental issues of jurisdiction and law to be resolved. One such procedural debate between the nation and the states was diversity litigation.

The Federalists had wanted federal courts to be placed on a broad footing. Thus they proposed in 1789 that when cases and controversies "between citizens of diverse states" arose the federal courts should be able to hear and settle the law.[61] Federalists desired a national interpretation for at least two distinct reasons: they feared out-of-state litigants would be treated unfairly in state court trials, and they believed that people of the commercial classes would receive better treatment in a less prejudiced federal rather than in a hostile, debtor-controlled state court. They were probably correct in both of their assumptions. The real difficulty lay, however, not in determining federal diversity suits, but in finding the correct law to apply in federal courts.[62]

Section 34 of the Judiciary Act was worded very ambiguously. It spoke of the "laws of the several states." Did this mean state decisional laws as well as state statutory laws? Charles Warren, a keen student of the Court and the early legal history of the country, has said "Yes."[63] Others have interpreted the act as a restraint on federal power. A second query—Was there a federal common law of the United States?—remained unanswered until 1834.[64] Then in a famous but now forgotten lawsuit involving two Supreme Court Reporters—Henry Wheaton and Richard Peters—the Court as obiter dicta stated that "there can be no common law of the United States."[65]

The denial of federal common law was not Justice Story's understanding of the constitutional system. He had proposed a federal criminal code based on uniform common law principles. Unable to realize this goal he turned his sights on transforming the jungle of the commercial world into a more stable and consistent system of negotiable instruments modeled on the experience of continental jurisprudence. Starting as early as 1835 Story attempted in a great number of circuit decisions to apply either his own interpretation of what the state law was or to use an analogy to a federal common law.[66]

61. See 2 WARREN, *op. cit. supra* note 53, at 362.
62. HURST, *op. cit. supra* note 45, 110.
63. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).
64. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 273 (1941).
65. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).
66. See, *e.g.*, Briggs v. French, 4 Fed. Cas. 117 (No. 1871) (C.C.D. Mass. 1835); Donnell v. Columbian Insurance Co., 7 Fed. Cas. 889 (No. 3987) (C.C.D. Mass. 1836); Flagg v. Mann. 9 Fed. Cas. 289 (No. 4847) (C.C.D. Mass. 1837); Williams v. Suffolk Ins. Co., 29 Fed. Cas. 1402 (No. 17738) (C.C.D. Mass. 1838).

Story also labored quite strenuously between 1828 and 1842 to refine diversity jurisdiction and to build up a corpus of commercial law. He rejected earlier Supreme Court decisions which departed from his views—*e.g.*, Justice Iredell's opinion in *Maxwell's Lessee v. Levy*[67] limiting federal judicial power over state bills and notes was "wholly unsatisfactory."[68] Iredell and his like, said Story, were extremely jealous of federal jurisdiction and they assumed that the federal courts were unable to extend their jurisdictional authority. This decision had misinterpreted congressional intent. Thus by focusing his attention on one overriding objective Story was able to hammer away at the proposition that on questions of diversity litigation and commercial law the courts of the United States were not precluded from discovering the law and were not bound by the local construction stemming from state courts. The climax of Story's battle to achieve commercial uniformity was realized in *Swift v. Tyson*.[69]

C. *Swift v. Tyson*

Justice Story had waited a long time to deliver his legal opinion in *Swift v. Tyson*. It was certainly a strange thing that the decision was handed down in the Taney era. But in retrospect, John Marshall, while a nationalist in terms of congressional powers, was not a proponent of general theories of law. What Story accomplished in *Swift v. Tyson* was the establishment of a federal common law in commercial matters.[70] Story ruled that the New York law of negotiable instruments did not have to be followed by the federal courts since the law was derived from New York's interpretation of the general common law. No local practice, custom, procedure, or statute, he said, was involved.

The defendant had argued that the law of New York should govern the case. He further contended that the New York law as expounded by its courts had held in similar cases that such a contractual relationship did not constitute a pre-existing debt for valuable consideration. Justice Story said he had studied the New York decisions. While the Supreme Court of New York had ruled against the debt, the Court of Errors (Chancellor Kent's bailiwick) had never made an official pronouncement.[71] Furthermore, certain recent cases had

67. 2 U.S. (2 Dall.) 381 (1798). See also Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330 (1797).

68. Briggs v. French, *supra* note 66, at 122; Tobey v. Clafin, 23 Fed. Cas. 1323 (No. 14066) (C.C.D. Mass. 1838).

69. 41 U.S. (1 Pet.) 1 (1842).

70. Two studies which tend to be critical of *Swift v. Tyson* are JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 273; and HURST, *op. cit. supra* note 45, at 110.

71. Swift v. Tyson, *supra* note 69, at 18.

"greatly shaken, if . . . not entirely overthrown those decisions . . . ."[72] Therefore, the New York courts had admitted at least a serious doubt as to the application of the law. But it was also questionable, Justice Story reasoned, even if the highest court in New York had developed a legal doctrine, whether it was binding on the federal courts when it differed "from principles established in the general commercial law."[73]

Since the defense had raised a doubt as to the proper interpretation of section 34 of the Judiciary Act, Story took it upon himself to clarify its meaning. The word "laws" in ordinary language usage did not include state decisions. They were, "at most, only evidence of what the laws are and are not of themselves laws."[74] He averred that the Supreme Court had uniformly accepted this interpretation of the clause in question. The Court had limited state law to mean both positive statutes and their construction by local tribunals.[75] Rules of decision, then, would be governed by federal interpretation of the common law. State decisions would be shown the proper respect and attention but they were not binding on federal courts. To Story the law of negotiable instruments—the historic growth of the law merchant—was "not the law of a single country only, but a law of the commercial world."[76] Thus was born the doctrine of *Swift v. Tyson*: the development of commercial jurisprudence.

V. SUMMARY

Justice Story's concern for the protection of individual rights forced him to accept certain myths. Freedom of contract (*i.e.*, the impairment of the obligation of contract) was a confusion of public interest, legal rights and natural law. In the *Dartmouth* case Story demonstrated his grand design to relate the contract clause to a theory of natural law and thus place the principles of constitutional government beyond the pale of legislative control.[77] In this respect he was unable to draw definitively the lines between legitimate acts of state legislatures and those which he deemed to be unconstitutional and subversive of a well-ordered society.[78]

72. *Ibid.*
73. *Ibid.*
74. *Ibid.*
75. *Ibid.*
76. *Ibid.*
77. See WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931).
78. In his zeal to maximize freedom by utilizing absolute precepts of law, Story was actually limiting the freedom of many groups. Unfortunately, in Story's lifetime he was unable to reconcile theories of external constraint and individual freedom. Indeed, it was a dilemma for most nineteenth-century jurists. The following works treat this subject: BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW

Story also proposed an "untenable" theory of the public interest at a time when doctrines of popular sovereignty—the right of universal suffrage, unrestricted limitations on office holding, and the growth of state legislative supremacy reflecting majority will—were finding their way to the Supreme Court. Here we can detect a clash between the fundamental rights as known to the common law and Story's personal social, economic, and political interests which had been fixed by his education, professional associations, and class interests.[79] There was, as Dean Pound tells us, a complete distortion of the common law by the attempt to force it into an alignment with a law of God. "The common law rested on the idea that reason, not arbitrary will, should be the measure of action and of decision."[80] Story, on the other hand, in the vested rights cases used the natural law as a lever to promote his own group interests. The impact of Story's natural law theories remained at the beck and call of late nineteenth-century conservatives. These theories ultimately led to arbitrary law and the guardians of special interests were quick to rediscover that the same great principles could be justified in Social-Darwinism.[81]

In sum, the legal myths perpetuated by Justice Story amounted to a rationalist theocracy of the law. Only the judges could know all the truth. For Story, the supposed task of the justice was to discover the law and once having found it—to make it conform to his own concept of the public will. This rationalistic philosophy did not promote the scientific study of the law. It did not even provide for a growth of the law by taxonomy. Rather, it tended to make the individual judge the sole seeker and purveyor of the law, which, of course, was unsound democratically. Natural rights as Story expressed them were not prescriptions of the law which rational men could easily locate. Instead such rights were normative concepts which men ought to attain. What Story did was to codify normative goals into positive legal concepts. In effect, then, Story's decisions which employed natural law theories were not empirical laws since the validity of such valuational opinions could neither be proved nor disproved scientifically.[82]

Joseph Story's grand design for a codification of the federal common

(1962); DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); SHUMAN, LEGAL POSITIVISM (1963).

79. Schubert, *The Theory of "The Public Interest" in Judicial Decision-Making*, 2 MIDWEST J. POL. 1-15 (1958).

80. POUND, THE SPIRIT OF THE COMMON LAW 96-97 (1921).

81. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1955).

82. Two perceptive studies which deal with legal reasoning are: ROSS, ON LAW AND JUSTICE (1959); KELSEN, WHAT IS JUSTICE? (1963). *Cf.* RADCLIFFE, THE LAW AND ITS COMPASS (1960).

law of crimes was not realized in his lifetime. In fact, the nineteenth-century legislative mind was firmly opposed to any notions of codifying statutory or common law. At best the relationship between judge and legislator was an uneasy alliance. Instinctively legislators distrusted judges and lawyers who expounded what the law was and what it ought to be. By the same token members of the bench and bar were highly critical of legislative skills, especially statutes protecting the rights of people (*i.e.*, property rights) in the society. The atmosphere was not conducive to change.[83]

One might be led to believe that nineteenth-century lawyers and judges favored reform of the criminal law. This was not the case. Indeed it can be said with some certainty that the courts in general were exceedingly conservative in changing the rules of the administration of justice. Nineteenth-century jurists were historicists: they feared the excesses which had flowed from the French Revolution and they were determined to control the popular ideas circulating about reform. Furthermore, American jurists believed in the conservative philosophy of respecting the continuity of institutions, traditions, and doctrines. Few jurists then spoke out to improve the law. Their time was spent in worshipping the cult of local jurisprudence.[84]

As a result of this provincial attitude toward a developing legal system, nineteenth-century criminal law was made purposely narrow by various competing groups in Congress and the courts. The law reflected more the social problems of the eighteenth century than the complex issues of an increasingly urban nineteenth-century society. Story's reputation as a great judge is rarely attributed to his work in criminal law. And yet in reviewing his record it would seem to be an act of impropriety not to include his contributions to this vital area of American jurisprudence.[85]

The Supreme Court traditionally has attempted to achieve a sense of national unity by answering general questions of law—but for Justice Story this was not enough. Far too many times he felt that Marshall, and more especially Taney, were reluctant to expand the Court's authority. Story was firmly convinced that the national government through its courts were the only logical agencies capable of solving internal conflicts.[86] For instance, the debate between federal

83. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1950).
84. POUND, THE SPIRIT OF THE COMMON LAW (1921).
85. See Pound, *The Place of Judge Story in the Making of American Law*, 1 MASS. L.Q. 121 (1916).
86. Francis Lieber respected Story's application of common law to fit the needs of a new age and he admired Story's Hamiltonian interpretation of federalism. He "felt the positive law inadequate as a guide to the new order." FRIEDEL, FRANCIS LIEBER NINETEENTH-CENTURY LIBERAL 151 (1947). See also Story, *Value and Importance*

and state jurisdiction, which was a hindrance to the development of a truly consistent national law in the nineteenth century, appears to be a settled question today. Story's decision in *Martin v. Hunter's Lessee* is still the landmark case extending federal jurisdiction of the Supreme Court.[87]

Martin v. Hunter's Lessee was a significant decision for several reasons. First, it highlighted the struggle between the federal government and the states by calling into play the power of federal judicial review over state legislation and state court judgments. Justice Story read section 25 of the Judiciary Act as providing the full locus of power for judicial review—a power which he believed was absolutely essential to maintain national supremacy of law.[88] Secondly, but of equal importance, was Story's ruling on the power to remove cases from state courts to federal jurisdiction. The supremacy of federal law over state law was emphasized as binding on both governmental units. Today, removal of federal suits is provided for in the Federal Rules for Civil Procedure and it is considered to be a substantial aspect of procedural due process.[89]

A third effect of *Martin v. Hunter's Lessee* was, of course, to affirm the power of Congress to regulate the jurisdiction of the inferior federal courts. Not content with asserting congressional prerogative over this area, Story in some obiter dicta declared that it was incumbent on Congress to create lower courts vesting them with complete jurisdiction.[90] Conversely, Congress would be restricted in taking away such jurisdiction once it had been conferred. With respect to the plenary power of Congress over jurisdiction, it must be noted that this concept has not received the support Story desired. Instead, both by legislative fiat and judicial interpretation the power of Congress as to what kinds of jurisdiction it may grant to federal courts has been narrowly construed.[91] This did not mean Congress was unable to create and confer broad jurisdiction. Rather, it reflected an attitude of restricting federal authority especially in cases of dual sovereignty. The reverse proposition—that what Congress makes it may destroy—has met with some stiff resistance from the courts. In this light

of Legal Studies in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 504-44 (Story ed. 1852).

87. Albert Beveridge wrote: "During the entire twenty-four years that Marshall and Story were together on the Supreme Bench the Chief Justice sought and accepted the younger man's judgment and frankly acknowledged his authority in every variety of legal questions, excepting only those of international law or the interpretation of the Constitution." 4 BEVERIDGE, LIFE OF JOHN MARSHALL 1270 (1919).

88. See FORRESTER, FEDERAL JURISDICTION AND PROCEDURE 52-53 (2d ed. 1950).

89. 28 U.S.C. §§ 1441-50 (1958).

90. Story expanded this view in his Commentaries. CONSTITUTION OF THE UNITED STATES 616 (Corwin ed. 1953).

91. *Ibid.*

Martin v. Hunter's Lessee stands at the top of an impressive array of precedents asserting that Congress could not destroy the judicial power of federal courts.[92]

Finally, *Martin v. Hunter's Lessee* announced that state courts had a definite obligation to guarantee due process of law. In effect this meant that Supreme Court decisions affecting states or the federal government had to be accepted by all as the supreme law of the land. Rejection of the Court's authority implied violation of the national will. This aspect of the case later proved to be the backbone of the Court's enforcement power. In the twentieth century the Supreme Court has repeatedly held that article VI still stands as the nation's supreme law.[93]

So, too, there are few cases in American constitutional law which have created more interest and generated more heated controversy than the Court's decision in *Swift v. Tyson.*[94] Story had a direct interest in nurturing the commercial law. He was regarded as one of the great nineteenth century experts in this field, both in Europe, England and the United States. In his own country, he had been dubbed the "commercial justice." This sobriquet was achieved as the result of his multiple volumes on commercial law, the legion of cases he handed down while on the bench and as a result of the role he played as commercial law professor at Harvard Law School.[95] Story's purpose in developing a continental approach for a national system of commercial transactions was easy to understand. He wanted to allow the business world, of which he was an integral part, to enjoy equal privileges and immunities from state to state. If a note were discounted in Massachusetts or a stop-payment order issued on an instrument in Virginia, he wanted identical principles of law to apply in each case. State discrimination against foreign creditors was his *bête noire.*[96]

Prior to 1842, the Supreme Court as a group, including John Marshall, had avoided a direct clash with the states on rules of

92. See the able discussion in 2 CROSSKEY, POLITICS AND THE CONSTITUTION 811-17 (1953).

93. "The decision of the Supreme Court in Martin v. Hunter's Lessee went further than any previous judicial pronouncements to establish the relation between National courts and state tribunals which now exists and will continue as long as the Republic endures." 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL 166 (1919); 1 LIFE AND LETTERS OF JOSEPH STORY 277 (Story ed. 1851).

94. 2 CROSSKEY, *op. cit. supra* note 92, at 859-64.

95. In 1840 Story was nominated to membership in the French Institute. See Charles Sumner to David B. Warden, May 28, 1838, Warden MSS, Maryland Historical Society.

96. CODIFICATION OF THE COMMON LAW, REPORT OF COMMISSIONERS IN MASSACHUSETTS TO DETERMINE EXPEDIENCY OF REDUCING COMMON LAW TO CODE, *op. cit. supra* note 86, at 698-734.

decision by avoiding Story's uniformity doctrine. Such indecision, had, in reality, placed the Court in a dilemma. Story contended that if the Court followed state decisions in diversity suits involving important financial questions, one rule of law which was upheld one day might be declared unconstitutional in a different case the next day. Other more states' rights-minded justices felt that if the federal courts made the rules they would tend to be uniform but not binding in state court decisions. In a very real sense, then, Story actually overturned the Supreme Court's early handling of the rules of decision in diversity litigation. *Swift v. Tyson* provided a magnificent example of policy-making by the federal judiciary and remained the law of the land for ninety-six years.[97]

Since Justice Story believed himself both free to discover the law and to make it, the question naturally arises: How far did he intend to extend the Swift doctrine? Reading between the lines of this important decision (plus two other Supreme Court cases in which Story used a similar line of reasoning) we can only conclude that Story distinguished between commercial and non-commercial law. Concerning the former, rules of decision were to be made by the federal courts. In all other cases the states were free to construe their own laws, statutes, etc. If Story had lived another generation he might have been convinced that the federal courts could have constitutionally included all law as within their purview.[98] However, he never professed this opinion and the immediate results of *Swift v. Tyson* cannot be attributed solely to him.[99]

In assessing Story's legal philosophy, then, we find there are two sides to the man. One is the legal absolutist who sought to establish an ideal type of law based on *a priori* reasoning and linked to a theory of natural law. Story's deductive historicism, which was blended with eighteenth-century rationalism was often directly in conflict with Jacksonian democracy. Doctrines such as the preservation of

97. See Frankfurter, *Distribution of Judicial Power between United States and States Courts*, 13 CORNELL L.Q. 499 (1928); Jackson, *The Rise and Fall of Swift v. Tyson: A Dramatic Episode*, 24 A.B.A.J. 609 (1938).

98. Such was the opinion of Justice Daniels in Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855).

99. Nevertheless, many writers on the Court have placed the responsibility for the application of the general common law to Story. Frank, MARBLE PALACE 22; JACKSON, *op. cit. supra* note 64, at 273. Contemporary scholars of public law generally support Story's contention that the commercial world needs to be unified. Despite the steps taken by many state and federal agencies (*e.g.*, Uniform Negotiable Instruments Law, Uniform Conditional Sales Act, Uniform Sales Act, Uniform Commercial Code, Uniform Fraudulent Conveyance Act, Federal Bankruptcy Act, Uniform Warehouse Receipts Act to name just a few) there persists, in the words of Dean Pound, "disquieting symptoms of provincial interpretations in the several states which would involve a gradual return to our former condition of divergent local law" if they continued to be supported. POUND, *op. cit. supra* note 77, at 55.

property, the protection of contractual rights, the limitations on creditors, and the abhorrence of public university suffered severe limitations when applied in a purely deductive manner. Even Story's skillful use of the comparative method was frequently an attempt to establish causal relationships toward an ideal-type law.[100] But the other side of Story—that of the judicial empiricist who promoted a national concept of law through judicial review—holds much to be admired. His attempts to employ the common law as the basis of a national criminal jurisprudence, his constant search to codify criminal and commercial law, his use of judicial review to promote a nationalistic conception of the central government by expanding federal jurisdiction were significant contributions to the development of American public law.[101]

In summary, Story's legal philosophy helped him to solidify two important aspects of our common law system. He preserved the doctrine of stare decisis by emphasizing its role in producing stability in the law. And he advanced the theory of the supremacy of national law as found in article VI of the Constitution, thus strengthening the foundations of constitutionalism. Although he was prone to all the weaknesses of his logic and vanity, there existed within him the spark of judicial empiricism. Few men on the bench have matched Justice Joseph Story's judicial creativeness.[102]

100. The works of Morris Cohen are especially helpful in this type of analysis. LAW AND SOCIAL ORDER (1933); REASON AND LAW: STUDIES IN JURISTIC PHILOSOPHY (1960); AMERICAN THOUGHT (1954).

101. *Supra* note 85.

102. John Frank takes a different view of Story's creative genius. "Joseph Story was a great worker, but it might be contended with a touch of fairness that he was merely an industrious hack." Nonetheless, Frank ranks Story as one of the great scholars of the bench. FRANK, MARBLE PALACE 64.