

From Republican Scholar to Federalist Judge:  
The Transformation of Joseph Story

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## FROM REPUBLICAN SCHOLAR TO FEDERALIST JUDGE: THE TRANSFORMATION OF JOSEPH STORY

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Joseph Story sat on the Supreme Court with Chief Justice John Marshall and in many ways it seemed like Marshall simply overshadowed the younger justice. However, Story began his political and legal career as a member of the Republican Party. What changed his mind, why did he change from a supporter of the Jeffersonian Democratic-Republicans to a firm defender of the Federalist Party while on the Supreme Court? Story's letters, speeches, and *Commentaries* were analyzed to find evidence. Kent Newmyer, Gerald Dunne, and Joseph McClellan are three modern historians who were consulted as well. Story was not a man to be led by others' opinions, once he was convinced in his own mind that a course of action was right, he would not be swayed until he saw that that course was no longer allowing him to follow his conscience. While a young man he defended the Republican Party but as he grew to respect the law and especially the English common law—practiced also in America—the Republican Party became more and more restrictive. Finally convinced that the best way was to defend the “science of law,” and the study of jurisprudence over all other considerations, he saw that the Federalist Party would allow him to do just that. An examination of his decisions in *Prigg v. Pennsylvania* and the *Amistad* cases, demonstrate how Story would defend the Constitution and the law over all other secondary considerations, even against his personal beliefs. Rather than being overshadowed by Marshall's personality, Story decided on a course of action first and then saw that the Federalist party, rather than the Republican would allow him to follow that course.

## FROM REPUBLICAN SCHOLAR TO FEDERALIST JUDGE: THE TRANSFORMATION OF JOSEPH STORY

In 1841 the Supreme Court ruled that the negroes who had mutinied aboard the Spanish schooner, the *Amistad*, were free. They were not property of the Spanish and therefore could not be returned to those who did not own them. The author of the decision, Justice Joseph Story, seemed to have struck a blow for the abolitionist cause. A Fayette, Missouri newspaper, *Boon's Lick Time*, described the decision as bestowing "life and liberty upon the unfortunate Africans... [the decision] will be hailed with honest and generous delight, not only among us of the North, but as we believe by good men everywhere."<sup>1</sup> Almost exactly one year later, the Supreme Court published their decision, again written by Justice Story, for *Prigg v. Pennsylvania*. The Court ruled that a law in Pennsylvania that limited the fugitive slave clause was unconstitutional and that Congress was solely invested with the right and responsibility to enact laws to enforce the fugitive slave clause. Even today law professor Paul Finkelman called this decision "intellectually dishonest, based on inaccurate historical analysis, judicially extreme when it need not have been, and inhumane in its immediate results and in its long-term consequences."<sup>2</sup> These two decisions, although they seem to be on the opposing sides of the slavery issue, were written by a man who believed that the common law and the Constitution of the United States were the guiding principles in judicial life. While Story's first education and early inclinations made the Republican Party a better fit, his devotion to the "science of the law," and the judiciary caused him to choose to align himself with the Federalist Party for the majority of his life.

In 1811, thirty-two year old Joseph Story became the youngest man ever appointed to the Supreme Court of the United States. He had practiced law for only ten years and had absolutely

no judicial experience.<sup>3</sup> Story spent the next thirty-four years on the court until his death in 1845. He served with the great Chief Justice John Marshall and the infamous Chief Justice Roger Taney, author of the *Dred Scott* decision. Marshall wrote many of the major opinions himself during his tenure on the bench and Story tended to agree with Marshall in most cases. They agreed so much that historians were tempted to say Story was simply overshadowed by the force of Marshall's Federalist personality and agreed with whatever the brilliant justice would say. The puzzling fact, though, was that for the first half of his life, Story was a dedicated member of the Republican Party. Historian Kent Newmyer recorded that while young Story was studying at Harvard he was actually whipped by his Federalist classmates for adhering to the party of Thomas Jefferson. Newmyer described the reason for the altercation as "not republicanism, to which new orthodoxy both Federalists and Republicans pledged their loyalties, but how its guiding principles should be applied, how preserved."<sup>4</sup>

Story made undeniable contributions to the early interpretation and application of the Constitution, as well as to the growth of Harvard Law School. He was not just a Supreme Court justice—he was also the first Dane professor of law at Harvard law school. His son, William Story, argued that although Mr. Dane founded the professorship, Joseph Story was the "*fundator perficiens*" or the developing founder, of the school. William Story claimed that "the creation of the School, the great enlargement of its funds, and the erection of the building itself, are mainly due to my father."<sup>5</sup> Story was also the author of *Commentaries on the Constitution of the United States of America*, the first exhaustive examination of the Constitution, examining the history and then the document itself, line by line. When he first joined the Supreme Court in 1811 his vast legal knowledge made up for his lack of experience and he quickly found his place as a companion to the other justices.<sup>6</sup>

Story's impact on the formation and molding of the early government was important enough to require an examination of how he came to stand firmly on the principles he used to shape his beliefs. What changed his mind, what drew him from the Republican Party to the more Federalist mindset of his years on the court? Story's study of law after graduation from Harvard instilled in him the beginnings of the love of, what he called, the "science of law," a science which required a profound understanding of philosophy, history, and human nature.<sup>7</sup> It was an objective view of the law, not as filled with hazy opinions or personal beliefs, but made up of fact and intricate precedent that needed to be understood. His view of the importance of the law in American life resulted in personal enmity between Story and Jefferson and eventually was the catalyst that would drive him to the Federalist ideology.

The "science of law," as Story phrased it, was one of the most powerful influences on his life. An understanding of his views about law demonstrated his determination to continue in the path that he had been convinced was right. The science of law and its influence shaped how he taught at Harvard, how he decided cases on the bench, and how he would live his life. In a letter to a "Mr. Fay" on September 15, 1801 Story described how "the science claims me as a fixed devotee;--it rules me, and with my studious inclination, binds me more firmly to literary pursuits."<sup>8</sup> Story believed law had a strong effect upon the "manners, habits, and feelings" of a country and indeed, a people's "happiness [depended] upon a uniform and enlightened administration of public justice."<sup>9</sup> This meant that the law was not to be used or twisted for a person's private use but was to be studied and examined to be able to help protect the rights and freedoms of a country.

The best descriptions of Story's "science of law" are found in his speech accepting the Dane Professorship of Law at Harvard Law School and in some of his writings concerning the

study of law for his students. When Story was appointed the first Dane Professor of Law at Harvard Law School he used his acceptance speech to, as he described it, “give some account of the foundation [of the chair], and of the studies which it proposes to encourage.”<sup>10</sup> He then proceeded to explain why he believed the study of the law vital to the preservation of their country.

First, Story declared that while physical and mathematical sciences have their place, the science of jurisprudence was “in its widest extent...to compass every human action; and in its minute details to measure every human duty.”<sup>11</sup> Story maintained that this science affected every human, in every walk of life, in fact, and he told his listeners “that there is not within the compass of human attainment any science, which has so direct a tendency as this, to strengthen the understanding, to enlarge its powers, to sharpen its sagacity, and to form habits of nice and accurate discrimination.”<sup>12</sup> Story continued to expand on his definition, including observations from other orators and jurists describing the point and duties of the law. “Law is a science, which must be gradually formed by the successive efforts of many minds in many ages; that its rudiments sink deep into remote antiquity, and branch wider and wider with every new generation ...”<sup>13</sup> It was not an easy study, it required complete dedication and sacrifice to master it, but, to Story, it was of such importance to merit such dedication.

Story believed the judicial system was the backbone of the American Constitution and therefore had to be protected. He claimed that “upon the actual administration of justice in all governments, and especially in free governments, must depend the welfare of the whole community.”<sup>14</sup> Law guarded communities and governments and guaranteed the freedom won in the Revolution would be preserved. The importance of this topic demanded the utmost care in its study and he warned his future students that “the law is a science, in which there is no substitute

for diligence and labor.”<sup>15</sup> He believed that in the study of the law and the dedication to its truth was the salvation of a government. Without a firm grasp of the roots of law, a country would tumble quickly.

More particularly, Story advocated a deep understand of *common law*, the law of England based upon precedent. This was opposed to the statue law, practiced in France, in which all laws were interpreted literally. In common law, the lawyers and judges were more important, and they had to be aware of the precedents, the law in question, and how the situation related to the law, in order to interpret and apply it correctly. It became a question of dissecting the current question to see what precedent could be or should be applied and then adding in the new decision to what had come previous.

A nineteenth century French aristocrat, Alexis de Tocqueville, compared English, American, and French law and concluded that the differences in the three occurred because the “English and Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decisions of their forefathers.”<sup>16</sup> One result of the use of common law was that to understand law required intensive study. Tocqueville compared the American lawyers to Egyptian hierophants, “for, like them, he is the sole interpreter of an occult science.”<sup>17</sup>

Story’s commitment to the science of law meant that eventually he would have to choose the political party that would best allow him to interpret and apply the law as that science dictated. Tocqueville maintained that in early America the legal profession was the “most powerful existing security against the excesses of democracy.”<sup>18</sup> If this was true then that profession would most naturally drift to the Federalist Party where the ideology feared the excesses of democracy and the fickle passions of the people.

The impact of Story's choice is only understood in the context of the differences between the two parties. The differences between the Jeffersonian Democratic-Republicans and the Federalists were so pronounced that Story could not remain neutral, but would have to choose one or the other. During George Washington's presidency two political parties begin to grow around the dynamic personalities of the Secretary of the Treasury, Alexander Hamilton, and the Secretary of State, Thomas Jefferson. Generally Hamilton advocated a looser reading of the Constitution, for the power to be more concentrated in the hands of the federal government, and promoted the advantages of a treaty with Great Britain. Jefferson and the Republicans, on the other hand, wished to keep the federal government weaker and put the power into the hands of the people. They also promoted the value of a treaty with France. Each of these differences would contribute, in some way, to why Story chose the Federalist ideology.

One of the main questions between the two parties was who was supposed to have the power in the new government. The Federalists believed that humans were, in general, controlled by selfish interests. James Madison reminded his readers in *Federalist 51* that men were selfish and ambitious, that as they were "framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>19</sup> The new party drew heavily from these ideas and believed that the right way to direct the country would be to place the power in the hands of the elite who were educated enough to "act beyond their own interest."<sup>20</sup>

American historian Lance Banning described the question that divided the two parties as basically the maintenance of liberty in a popular state.<sup>21</sup> Each position had specific ideas on what would most damage the application and enjoyment of the liberty won through the war. Two opposing fears had been inherited from British political thought and experiences. The first came

from classical and British exponents of balanced government—the theory here was that liberty “was often endangered by its own excesses.”<sup>22</sup> Alexander Hamilton and James Madison, two of the authors of the *Federalist Papers*, thought that popular license, selfishness, and local politics would be the points from where the greatest threats to liberty would come. To avoid these vices they advocated a government where the well-educated were the ones with the power. This power would be divided among three branches, and each of those branches would have a check on the others. However, only the lower house of Congress would be directly elected by the people. The people with a greater sense of the world would be able to rise above petty local squabbles and do what was right for the people. For the new Constitution to succeed it had to have final authority, it had to be “the supreme law of the land.”<sup>23</sup> This was the ideology that the Federalist Party promoted as they went into the 1790s. Some of these ideas were seen in the Constitution where only the House of Representatives were elected by direct vote by the people. Each successive body of people—the Senate, the president and the judiciary—were separated by the people by another layer. The Senate was elected by the House, the President by the Electoral College, and the judiciary was appointed by the president. Their goal was to protect government from the mob mentality of the common people and allow the best to rise to the top.

The other theory, inherited from the conspiracy fears of the English Whigs, was a fear of the “corruption of free governments by ministerial influence and the drive for power of their executive parts.”<sup>24</sup> Banning claimed that the origins of the Jeffersonian Republicans were found in the Antifederalist rhetoric, who in turn had inherited a fear of conspiracy from the Whig.<sup>25</sup> In 1818 Jefferson prepared his papers for publication and even then, over twenty years after the party struggles for power in the early country, he insisted that the struggles “were contests of principle between the advocates of republican and those of kingly government.”<sup>26</sup> He saw his

party as the protectors of the republican spirit while the Federalists attempting to place too much power into the hands of the elite and trying to create aristocracy. The influences of the French Revolution and his observances of the dangers of great power in the hands of the executive shaped how he would react to the new government. Jefferson and those that followed him feared the rise of an aristocracy as Hamilton pushed for a national bank. The office of the president, a strong executive was terrifying. Each side could not work together because the fears of one party were what the other side believed would save the country. The Republicans saw that the solutions employed by the Federalists, especially the nationalist rhetoric Hamilton employed, as being the very danger they feared.<sup>27</sup> Jefferson believed in the power of the people if they were properly educated and allowed to grow and improve. During Jefferson's inauguration address in 1800 he challenged the ability of the elite to rule the people. He asked if man cannot be trusted with government of himself, can he, "then be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question."<sup>28</sup> If humans were not capable of governing themselves then how could the elite, who were also humans, do any better?

The judiciary was another division between the parties—Republicans, particularly Jefferson, hated the thought that anyone could be appointed for life. He saw the Supreme Court as exactly what they had fought against a few years before. However, the Federalists saw the solidarity of the judiciary as the perfect balance to the two-year terms of the House of Representatives. The issue of the judiciary, the country each side supported—England for the Federalists, France for the Republicans—and the strength of Jefferson's personality, each proved to be issues that concerned Story's choice of allegiance in the next few years.

In 1800 the presidency passed from the Federalists to Thomas Jefferson and the Republican Party. Story was a Republican at this time—according to Newmyer this was due, at least in part, because of his father’s admiration of Jefferson and his father’s preference for the Republican Party. Story’s party allegiance was also due to many of his personal and religious beliefs. Newmyer described the situation by saying that Story, as “a Unitarian who like Rousseau, Southey, and the German romantics and who had a fierce sense of social justice could hardly have been anything but a Republican, seeing that the Federalists branded such liberal views as un-Christian, un-American, Frenchified heresies.”<sup>29</sup> William Wetmore Story, Story’s son and editor of Story’s papers, wrote that while Story was attending Harvard, his religious beliefs began to shift. Story’s uncle, Isaac Story, was a staunch Calvinist preacher who thundered warnings of man’s depravity and sin from the pulpit, but Story soon rejected many of these ideas. William Story claimed that the effect of college and new companions, and moving from Marblehead to Harvard, wrought a complete change of view. While new desires for learning and knowledge were waking up in Story, he was also walking and wandering in the countryside and there “his heart assumed its natural hue of cheerfulness, and he no longer believed in the total depravity of man.”<sup>30</sup> This was another example of Story’s determination to believe what he was convinced was right, regardless of opposition. Story embraced the Unitarian beliefs which were “considered as nearly a convertible term with Atheism.”<sup>31</sup> However, interestingly, Story’s son described him as

free from a spirit of bigotry and proselytism. He gladly allowed every one freedom of belief, and claimed only that it should be a genuine conviction and not a mere theologic [sic] opinion, considering the true faith of every man to be the necessary exponent of his nature, and honoring a religious life more than a formal creed. ... He believed that whatever is sincere and honest is recognized of God...and that in the sight of God it is not the truth or falsity of our views, but the spirit in which we believe, which alone is of vital consequence.

While the beliefs themselves did not fit in with the more conservative Federal Party, the way he held those beliefs were not strictly Republican. Jefferson preferred to have no opposition in the party that bore his name, and while there were people who disagreed with actions, he was the face and driving force behind the Party. He expected all others to fall in line behind. Story's tolerance of other belief systems became a problem when he attempted to apply that also to politics and think outside party lines.

However, there was another problem building that would challenge Story's allegiance to the Republican Party as the Jeffersonians continued to press their advantage over the Federalists. John Adams had made certain that the Federalist ideology would not be finished with his presidency. With John Marshall as the Supreme Court Chief Justice and the judicial branch of government filled with Federalist judges, the Republican Party saw lawyers and judges as "parasites and aristocrats."<sup>32</sup>

Jefferson did not hate law, but he did not like the fact that the justices were appointed for life or that they were able to challenge him. He was trained as a lawyer and he even wrote to a friend detailing Jefferson's recommended course for the study of law for his friends' son.<sup>33</sup> Law was not the problem, the emphasis of the Federalist Party on the power of law was, for Jefferson, the issue. Story faced a problem where his natural inclinations and his chosen allegiance and profession were at odds with each other. The Republican Party embraced many of his religious and philosophical views but saw his chosen profession as questionable at best and un-patriotic at worst.

The early experiences of Story would lay the foundations for his later choices, particularly his choice of allegiances. To begin with, Story's dedication to study and academics was obvious from the beginning—historian Richard Newmyer recorded the account of Story's

acceptance to Harvard University. This dedication was the first step to his devotion to the science of law and the judicial system. When Story went to Cambridge, Massachusetts in late fall 1794 to discover his chances for admission to Harvard he was informed that he would have to pass the regular examination for entrance but he would also be tested on all the studies covered by the freshmen in the first semester. In six weeks then, if Story wanted to be admitted for the spring, he would have to be tested on English grammar, rhetoric, logic, Sallust, the *Odes* of Horace, Livy, three books of Xenophon's *Anabasis*, and two books of Homer's *Iliad*. These books would be tested in their original Greek or Latin.<sup>34</sup> Story wrote in his *Autobiography* that he "sat down boldly to the task, reciting every morning five lessons, which I mastered during the preceding evening, and five or six more in the course of the day."<sup>35</sup> This dedication paid off and at the end of the six weeks he wrote that "I was again offered for examination, and without difficulty obtained my matriculation."<sup>36</sup>

The account of Story's acceptance to Harvard demonstrated his tenacity and academic ability that would accompany him throughout the rest of his life. After graduating second in his class, he went to Marblehead and began his study of law under Mr. Samuel Sewall, "a distinguished counselor at the bar, and a member of Congress, and afterwards a Judge, and finally Chief Justice of the Supreme Court of Massachusetts."<sup>37</sup> From 1798 to 1801, Story read "that most elegant of all commentaries, Mr. Justice Blackstone's work," the "intricate, crabbed, and obsolete learning of Coke," and the history and practice of Common Law back to the feudal and middle ages.<sup>38</sup> Story told his son that for months he would study for fourteen hours a day in attempts to understand the task before him.<sup>39</sup> In these three years Story gained a full appreciation of the dedication that would be required if he was to perfect the skills and knowledge necessary to become what he considered a fully competent attorney.

The choice of Federalist over Republican, and in many ways, law over politics was not made until a few years after his appointment to the Supreme Court. Story began his career as a Republican, while in school he was an outcast to many of his classmates because of his beliefs. He continued in those unpopular beliefs after he passed the bar and as he began to build his reputation as a politician as well. In 1808 he was elected to Congress unanimously by the local Republican Party, however, once he got to Congress he began to show his intentions to refuse to follow strict party policy. Newmyer wrote that Story complained that the Republican Party was not satisfied with simple allegiance and, particularly their leader, President Jefferson, wanted his unswerving devotion. Two examples, the embargo repealed in 1810 and Story's support of raising and securing the salaries of the judiciary branch were examples of where Story chose to act according to his own conscience and not simply what the Republicans were supporting.

The embargo of 1807 was enacted by President Jefferson in an attempt to force Britain and French ships to stop pressing American sailors into war. It was a complete failure, hurting only the American economy and not making any difference to Great Britain or France. When Joseph Story came to Washington D.C. as the Salem, Massachusetts Representative in the first term of 1808, he was caught between the Republican support of the embargo and the fact that Salem's port was filled with empty ships because of the act. While he should have supported it as a Republican, as a representative of a shipping community he felt the responsibility to be faithful to his constituents. During this term Story earned enmity from many of his Republican friends with his vacillation on the subject of the embargo. Historian Gerald Dunne wrote that Story said he "would have voted against it, but now that it was in force it should be given a chance."<sup>40</sup> In 1808 Story came back to Washington as a lame duck, his inability to stand on Republican rhetoric had lost him the reelection. However, it was during this term that the embargo, with help

from Story, was struck down. In a letter to Henry Dearborn, Thomas Jefferson condemned Story in the harshest terms. The defeat of the embargo was personal to Jefferson and he said that he ascribed

all this to one pseudo-republican, Story. He came on (in place of Crowninshield, [Story's predecessor] I believe) and staid only a few days; long enough, however, to get complete hold of Bacon, who giving in to his representations, became panic-struck, and communicated his panic to his colleagues, and they to a majority of sound members of Congress. They believed in the alternative of repeal or civil war, and produced the fatal measure of repeal. This is the immediate parent of all our present evils, and has reduced us to a low standing in the eyes of the world.<sup>41</sup>

In the eyes of Jefferson, Joseph Story had single-handedly brought trouble to American soil by repealing the embargo act. Story could not claim the credit for the repeal of the embargo but by refusing to support blindly the Republican Party policies Story weakened his party's stance and kept them from presenting a united front against the opposition. Jefferson never forgave Story for this betrayal, castigating Story in his memoirs years later. Newmyer wrote that Story was willing to support the embargo but in his own way. Unfortunately his way was not the Republican way and definitely not President Jefferson's way.<sup>42</sup> This embargo incident was only one of several instances when Story refused to stand strong on Republican rhetoric and actually won praise from the Federalists for his policies.

Another instance when Story argued for what he perceived to be the best course of action was when he campaigned for set salaries for justices. Mr. Sewall, the lawyer with whom Story had apprenticed, had just been appointed as the Massachusetts Supreme Court Chief Justice—however he refused to take the job if the salary was to be so inconsistent, both in size and time of payment. Story stepped in during his time as a politician to argue for the importance of the judiciary branch of government and plea for a steady income for justices, so they would be able

to apply justice in the best way possible. Currently the fear of financial recrimination if their decisions were not pleasing to the courts was so real the justices could not administer justice as they should. Story was successful in getting set salaries for the justices, however, as a Republican the judiciary branch should not have been something he supported. By simply supporting the idea of support for the justices, he was going against what many of his fellow party's faithful believed. These examples serve to show that as Story continued to grow in his own beliefs he clashed with the Republicans time and again.

The early clashes with the Republicans and with Jefferson were only the beginning of Story's change from Republican to Federalist. His appointments to the Supreme Court and to the Dane Professorship at Harvard were very influential in changing many of his attitudes. During his tenure on the court his decisions, especially in the *Amistad* case and *Prigg v. Pennsylvania*, reflected Story's continued emphasis on the primary importance of the law and the Constitution. Story's outline and view of the importance of a study of law as the Dane Professor points to further ideological wedges between his ideas and the Republicans. Finally, the clash with Jefferson over the place of Christianity in common law demonstrated Story's allegiance to the law, as he understood it, over any other authority.

When Story joined the court he was the youngest justice ever to be appointed and he had absolutely no judicial experience. President James Madison had appointed him to the court because of his, albeit questionable, Republican tendencies. Jefferson warned Madison of Story as being a "pseudo-republican," a "tory," and "too young."<sup>43</sup> Jefferson's warnings, at the time, seemed overkill seeing as Story was far down the list of possible acceptable appointees. The offer of judicial appointment went first to a solid Republican lawyer, Levi Lincoln of Massachusetts, then Alexander Wolcott, a loyal party member, and finally John Quincy Adams.

Lincoln excused himself from the nomination, Wolcott was rejected by the Senate, and Adams refused in order to be free to run for president. The list of available Republican lawyers or qualified candidates suddenly looked very thin. Finally, Madison nominated Story, who accepted the nomination gladly, declaring himself free “from the loop-holes to gaze upon the world.”<sup>44</sup> Story was glad to have an excuse to escape from the subjective party politics and compromises that he saw dominating Congress.

As the youngest and most inexperienced of the seven justices, he was worried for a time as to how he would perform in the duties of his office. During the first session of his tenure he wrote a letter to Nathaniel Williams to tell him about the first cases and to respond to a question of how Story was handling the weight of his new high office. Story answered that he was adjusting “with more ease than I expected. I am more at home than I looked to be in so novel an employment.”<sup>45</sup> He may have been inexperienced but his brilliance and deep understanding of common law made him a fit companion for the rest of the Supreme Court Justices.<sup>46</sup> Throughout his life his enemies and friends alike acknowledged his vast knowledge and instant recall abilities. One story tells of John Marshall, after deducing a law from legal principles, “in a train of powerful reasoning,” concluded the discussion of the Supreme Court by saying “such appears to me to be the law in this case; though I have not, I confess, looked much into the books in reference to it. If I am correct, our brother Story, here can give us the cases, from the Ten Tables down to the latest term-reports.”<sup>47</sup> None of Story’s lectures as a professor were preserved—most were given with few, if any notes. A letter from Richard Dana, one of his students, to Story’s son, described Story’s lectures as tales of “the tournament of monarchs and nobles on fields of cloth of gold;--of how Webster spoke in this case, Legaré, or Clay, or Crittenden, General Jones, Choate or Spencer, in that, with anecdotes of the cases and points, an all ‘the currents of the

heady fight.”<sup>48</sup> These stories all point to the immense intellectual ability already demonstrated by the young boy who learned an entire semester of work in six weeks.

Story owed a great debt to John Marshall and he concurred with the Chief Justice on many occasions. However, this was not because he was agreeing blindly to whatever Marshall said. Story had chosen Republicanism at first because it was the best way to express his views, when he was on the court and his views were changing, Marshall was also thinking the same way. There was a difference between agreement with someone and blindly following someone, Story agreed with Marshall, but there was no evidence that Story was a Marshall creation. Two cases, *Prigg v Pennsylvania* and the *Amistad* case demonstrate how Story’s views on the importance of the Constitution as the supreme law of the land were his own. These decisions were also firmly based in Federalist ideology. Both cases were heard and delivered under Taney and, while they seem to have opposing decisions, in fact they were based in the same ideology of supremacy of the Constitution.

*United States v. Amistad* was decided in 1841, the *Prigg* case the year after. The *Amistad* was a Spanish schooner that had been carrying cargo and fifty-four slaves purchased at Havana, Cuba. The slaves had risen up against the crew of the ship and had killed the captain and one member of the crew. Two Spanish sailors had been kept alive aboard to assist with the sailing—the Spaniards set sail for Africa during the day but turned for America during the night in hopes to be rescued. Eventually, the schooner was spotted and taken possession of by American officers of the brig *Washington*. The case especially dealt with the question of what to do with the slaves. They were claimed as slaves by the surviving members of the crew, who demanded they ought to be returned without question. The Queen of Spain claimed that the ship and cargo should be returned to her subjects, “as required by the treaty now subsisting between the United

States and Spain.”<sup>49</sup> Finally, the negroes themselves filed a claim that they were free natives of Africa, not subjects of Spain, and had been unlawfully kidnapped and transported to the island of Cuba. They said that the Spaniards who claimed ownership had “made a pretended purchase of all the respondents...from persons who had no right whatever to the respondents or any of them.”<sup>50</sup>

The Circuit Court of the United States for the District of Connecticut affirmed the right of salvage but decided the slaves were not Spanish property and ordered they be returned to Africa. Justice Story delivered the opinion of the Supreme Court which upheld the Circuit Court decision except for the part that the negroes be returned to Africa—he ordered that they were to be set free. Story wrote that because it was “plain beyond controversy, if we examine the evidence, that these negroes were never the lawful slaves” of any Spanish subjects and the United States was not violating its treaty by refusing to return them to Spain. Since this was the situation, and the evidence supports the claims that they were illegally kidnapped from Africa, they cannot even be held as pirates or robbers, as they were trying to regain their home. He concluded that the decision of the Circuit Court ought to be affirmed, except for its decree that the negroes “be delivered to the President, to be transported to Africa.”<sup>51</sup> Instead, they should be declared free and dismissed from the custody of the court. This case was heralded by abolitionist supporters as a great leap forward, indeed, it was a victory for the anti-slavery cause, but that was only an indirect effect. The primary concern during this case were the questions of what did the treaties between Spain and England demand, and how should the United States constitutionally respond. Story’s conclusions, while against the United States, were upholding the letter of the treaties and the Constitution, regardless of the other issues.

*Prigg v. Pennsylvania* was another example of how Story saw the indirect or social issues must be secondary to the Constitutional issues in a case. *Prigg* concerned the fugitive slave clause in the fourth article of the Constitution, and how was it going to be enforced. Pennsylvania had passed laws that stated that anyone attempting to “take and carry away, or cause to be taken or carried away...any negro or mulatto from any part or parts of this commonwealth...with a design and intention of selling and disposing of...as a slave or servant for life...shall on conviction thereof...be deemed guilty of a felony.”<sup>52</sup> In essence, Pennsylvania had passed laws that denied the right of any slave holder to regain their slave if that slave should be found in Pennsylvania. When Edward Prigg was hired by the Ashcroft family in Maryland to return Margaret Morgan to them, he was arrested and convicted on the grounds of that Pennsylvania law. Prigg appealed the case, arguing the constitutionality of the law and it came before the Supreme Court in 1842.

Story wrote the majority opinion of this case which declared the Pennsylvania law unconstitutional, that any law denying the rights of the owner to his or her property was in direct conflict with the Constitution’s fugitive slave clause. He considered two parts of the Constitution that “have been thought mutually to illustrate each other.”<sup>53</sup> They were both found in the second section of the fourth article, the first concerned extradition—that any fugitive fleeing one state shall be delivered “to the state having jurisdiction of the crime.”<sup>54</sup> The second, that anyone who was held to service by the laws of one state could not escape that servitude by going to another state “but shall be delivered up, on claim of the party to whom such service or labour may be due.”<sup>55</sup> Therefore, Story found that just because another state did not have slave laws, it did not mean that another state’s slaves could be free by simply crossing state lines. The purpose of this clause was to secure slaveholders the right and title to their property. He cited original intent and

the situation at the time of the Constitutional ratification. These considerations, for Story, protected “the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain.”<sup>56</sup>

Somehow, Story was going to have to unite his deep allegiance to the Constitution and also his personal opposition to slavery. Princeton Provost Christopher Eisgruber claimed that this decision was a decision both in favor of the Constitution and also against the further expansion of slavery.<sup>57</sup> In a charge to the grand jury of the Circuit Court of the United States Story goes so far as to describe slavery as a practice “so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification.”<sup>58</sup> The decision in *Prigg* stood that much stronger knowing that Story decided in favor of what he believed to be constitutionally right, again, no matter the consequences. In *Prigg*, Story did not just decide that the states could not infringe on the master reclaiming their property but the decision also declared who had the responsibility to enforce the Constitutional clause. Story used James Madison’s *Federalist 43* to answer the question. Madison stated that “a right implies a remedy; and where else would the remedy be deposited, then where it is deposited by the Constitution?”<sup>59</sup> Story included in the opinion that only the federal government had the right to enforce the fugitive slave law because it was only in the federal constitution that that right was found. This way, the slave states would not depend on the good will of free states to reclaim their property and the free states would not be required to enforce the statute. This part of the decision was disliked by Chief Justice Taney who was of the opinion that instead, it was the state’s “duty to protect and support the owner when he is endeavouring to obtain possession of his property found within their respective territories.”<sup>60</sup>

Story's decisions showed a deep devotion to the Constitution, regardless of his personal feelings. In *Amistad*, the decision was not based on the moral question of slavery—rather it was an acknowledgement that because the Africans had never been property, they could not be treated as property. He looked at property law in the Constitution instead of heeding the emotional issues that were actually secondary. For *Prigg v. Pennsylvania*, the Constitution's fugitive slave clause had to be defended because it was in the Constitution.

This devotion, regardless of the consequences, was another example of the character of the man who belonged to the Republican Party when, according to his son, it "rendered him very unpopular in the town and state where he lived. Had he been prompted by ambitious motives, he would have been a federalist."<sup>61</sup> It was not until he had studied and been persuaded in his own mind that the law, the judiciary, and the Constitution were of paramount importance that he became a Federalist.

Another instance of Story's dedication to the common law was another argument with Jefferson concerning Christianity and the common law. In 1824 Jefferson wrote a letter claiming that the phrase "*en ancien scripture*" had been mistranslated in 1458 and incorrectly included the laws of the Holy Church in common law.<sup>62</sup> Jefferson wished to set the record straight and remove Christianity from the law once and for all. Story proceeded to answer every accusation Jefferson leveled at Christianity and cited case after case and even the history of common law to drown Jefferson's objections.

Story's religious views had remained, since his time at Harvard, decidedly Unitarian rather than Reformed. However, the place of Christianity in the common law had been defended and recognized by Story for years. In his speech accepting the Dane professorship, Story claimed that "one of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of

the common law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines... There has never been a period in which the common law did not recognize Christianity as lying as its foundations.”<sup>63</sup> Story’s response to this specific accusation by Jefferson refuted the point in three ways—first that there had been no mistranslation in the single line Jefferson referenced. The case in question had been decided by Sir John Prisot, the British Chief Justice during the reign of Henry IV in 1460, who had pronounced that the ancient scriptures were common law, “upon which all manner of laws are founded ...”<sup>64</sup> Jefferson argued that this was a mistranslation, that he did not mean the Bible but instead other ancient documents. He said other cases had used it as precedent and the mistake was perpetuated through the centuries. Story examined the evidence and declared that subsequent cases were not quoting Prisot but proceeding “upon a general principle.”<sup>65</sup> This idea that Christianity in common law did not develop from a specific case but a general principle was the second point of Story’s answer. The third point, according to legal historian James McClellan, rested upon common sense and history. Story wrote incredulously to his friend Professor Everett that “Prisot did not make, or declare the law, in the case referred to; he spoke to a fact. ... To suppose [Christianity] had not the entire sanction of the State, is, with reverence be it spoken, to contradict all history.”<sup>66</sup> Story had always defended the place of Christianity, the beauty and morality it lent to common law.<sup>67</sup> The fact that he was able to refute the arguments of Jefferson was an added bonus.

Story was a scholar, a jurist, but, according to Charles Sumner (1811-1874), who wrote a tribute to Story at his death, Story was most proud of his title of “Professor.” Sumner recorded that “in his [Story’s] earlier works he is called on the title-page, ‘Dane Professor of Law.’ It was only on the suggestion of the English publisher, that he was prevailed upon to append the other title, ‘Justice of the Supreme Court of the United States.’”<sup>68</sup> McClellan recorded the words of

one of Story's students who said Story would entertain them for hours "with an unintermitted flow of wit, humor, anecdote, literary criticism, comments on passing events, talk on the highest themes of thought...[he] could talk almost continuously for several successive hours, and leave his hearers with an appetite for more."<sup>69</sup> Newmyer described the success Story had was because "greatness was made accessible."<sup>70</sup> Not only the justice himself, but men like Daniel Webster, Lord Morpeth, and even John Quincy Adams were brought into his class. Story as a professor revealed, again, his dedication to the study of law as a science. It was not a subjective course of study where opinion and personal beliefs carried great weight, but law was taught during Story's tenure as an objective science. For the new lawyers to understand the importance of what they were going to do, they had to understand the past of the law, legal history and common law and the implications for future application.

Harvard Law School became a national law school, Newmyer claimed, "not only because national law was taught there, or because its students came from the whole nation but because they dispersed 'over all the United States.'"<sup>71</sup> The list of names that Story taught became the future leaders of America, Story's ideas were preserved in the best minds of the next generation. Richard Henry Dana, Jr, the author of *Two Years before the Mast*, Rutherford B. Hayes, the future president, many politicians, literary men and men who had impacts on their communities. His students were students, not of the Federalist Party, but of Story's passionately held beliefs about the best way to study law. The Federalist Party had ideas that matched Story's beliefs, but he did not turn Harvard Law School into a Federalist stronghold. This fact, as much as any other story, was evidence for the fact that Story did not follow party ideologies but adhered to what he believed to be true. Newmyer added that under Story's leadership Harvard Law School "became the leading force in shaping American legal education, and with that the profession and to some

extent the law itself.”<sup>72</sup> It was in those halls of Harvard that Story was able to teach the ideas that had shaped his life and decisions.

The Federalist Party was dying by the early 1800s, the Republicans were on the rise and the Federalist ideology was on its way out of favor even when Story took the bench. This was part of what eventually attracted Story to its doors—while the Republicans demanded complete and total allegiance, the Federalists did not have the power to force him to adhere to their strict party guidelines. Story thought like a Federalist by chance, meaning, he made his own decisions undeterred by opposition or disagreement. It so happened that his decisions agreed most closely with the Federalist Party. Newmyer said “instead of demagogues like Thomas Jefferson stood quiet statesmen like Theophilus Parsons and John Marshall.”<sup>73</sup> Tocqueville observed that the American aristocracy “is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar.”<sup>74</sup> If this was true then lawyers belonged to what the Federalists believed would guard the future of America—those who were well-educated and well-placed in society. Story saw an arena without the compromise of politics, where the order and science of law could guide America down the best path.

When Story began his education he was fascinated with literature and this fascination led him to the set of beliefs that lined up with the Republican Party. Once he was finished with his study of law he started to serve his party as best he could. However, he had been so influenced by the importance of a deep and comprehensive study of law to be able to understand government that it did not take very long for his actions, while serving as Republican Representative, to clash with how the party thought he should act. His growing impatience with the politics and compromises of Washington D.C. and the Republican Party and his firm belief in the importance of the law drove him closer to the ideals of the Chief Justice John Marshall. This

was not because Story believed something because Marshall believed it—it was because Marshall’s views matched up with what Story had studied. From the bench with the decisions of *Amistad* and *Prigg v. Pennsylvania*, to his defense of the common law against Jefferson, and his impact as a professor, he was driven by his love of the science of law. He believed that only through an objective and careful study of common law, its precedents and limits of its power, could law be applied to lead a new country. The break with the Republican Party was inevitable once Story began to appreciate the need for law in a country. Story’s dedication to the “science of the law” and his perception of its vital importance to the future of the country led him to a collision course with the Sage of Monticello which drove him from the Republican Party to the Federalist Marshall court.

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<sup>1</sup> "The Africans of the Amistad," *Boon's Lick Times*, April 17, 1841, 1.

<sup>2</sup> Paul Finkelman, "Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism." *The Supreme Court Review* 1994, (1994), 249.

<sup>3</sup> R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, (Chapel Hill and London: University of North Carolina Press, 1985), 75.

<sup>4</sup> Newmyer, *Supreme Court Justice*, 3.

<sup>5</sup> Joseph Story, *Life and Letters of Joseph Story*. Ed. William Wetmore Story, v. 1, (Boston, MA: C.C. Little and J. Brown, 1951), *Life and Letters*, 3.

<sup>6</sup> Gerald Dunne, *Justice Joseph Story*, (New York, NY: Simon and Schuster, 1970). 91.

<sup>7</sup> Joseph Story, "Value and Importance of Legal Studies," *Miscellaneous Writings*. Compiled by William Wetmore Story. (Boston, MA: Charles C. Little and James Brown. 1852.) 547.

<sup>8</sup> William Wetmore Story, *Life and Letters*, 72.

<sup>9</sup> Story, *Miscellaneous Writings*, 67.

<sup>10</sup> Story, "Dane Professorship Speech," *Miscellaneous Writings*, 503.

<sup>11</sup> *Ibid.*, 504.

<sup>12</sup> *Ibid.*, 506.

<sup>13</sup> *Ibid.*, 509.

<sup>14</sup> *Ibid.*, 519.

<sup>15</sup> *Ibi d.*, 523.

<sup>16</sup> Alexis de Tocqueville, *Democracy in America*, 257.

<sup>17</sup> *Ibid.*, 258.

<sup>18</sup> 254.

<sup>19</sup> James Madison, "Federalist 51," *The Federalist Papers*. Ed. Isaac Kramnick. (New York, NY: Penguin Books, 1987), 319.

<sup>20</sup> Benjamin Barlowe, "Federalists vs. Republicans: The Nature of Man in a Republic 1787-1800," (Senior Thesis, Liberty University, 2011).

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- <sup>21</sup> Banning, *The Jeffersonian Persuasion*, 127.
- <sup>22</sup> *Ibid.*, 126.
- <sup>23</sup> Madison, "Federalist 44," *The Federalist Papers*, 291.
- <sup>24</sup> Banning, *The Jeffersonian Persuasion*, 126.
- <sup>25</sup> *Ibid.*, 115.
- <sup>26</sup> *Ibid.*, 13.
- <sup>27</sup> *Ibid.*, 136.
- <sup>28</sup> Jefferson First Inauguration Address quoted in Barlowe, "Federalists vs. Republicans."
- <sup>29</sup> Newmyer, *Supreme Court Justice*, 45.
- <sup>30</sup> William Wetmore Story, *Life and Letters*, I, 56.
- <sup>31</sup> *Ibid.*, 57.
- <sup>32</sup> Newmyer, *Supreme Court Justice*, 45.
- <sup>33</sup> Morris L. Cohen and Thomas Jefferson. "Thomas Jefferson Recommends a Course of Law Study." *University of Pennsylvania Law Review* 119, no. 5 (Apr., 1971): 824.
- <sup>34</sup> *Ibid.*, 21.
- <sup>35</sup> Joseph Story, "Autobiography," *Miscellaneous Writings*. 14.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Ibid.*, 18.
- <sup>38</sup> *Ibid.*, 19.
- <sup>39</sup> *Ibid.*, 18.
- <sup>40</sup> *Ibid.*, 63.
- <sup>41</sup> Thomas Jefferson, "Jefferson to Henry Dearborn, 16 July 1810," *The Works of Thomas Jefferson*, Federal Ed., 12 vols. (New York, NY: 1904-05), II: 398-99.
- <sup>42</sup> Newmyer, *Supreme Court Justice*, 62.
- <sup>43</sup> *Ibid.*, 70.
- <sup>44</sup> Joseph Story to Nathaniel Williams, 30 November 1811, *Life and Letters of Joseph Story*, (Boston, MA: C.C. Little and J. Brown, 1951), 200-201.
- <sup>45</sup> 213.
- <sup>46</sup> Dunne, *Justice Joseph Story*, 91.
- <sup>47</sup> As quoted in William Plummer, Jr., *Life of William Plumer*, 205-206.
- <sup>48</sup> Story, *Life and Letters*, II, 321.
- <sup>49</sup> *United States v. Amistad*, 40 U.S. 518., (1841).
- <sup>50</sup> *Ibid.*
- <sup>51</sup> *Ibid.*
- <sup>52</sup> *Prigg v Pennsylvania*, 41 U.S. 539. (1843).
- <sup>53</sup> *Ibid.*
- <sup>54</sup> *Ibid.*
- <sup>55</sup> *Ibid.*
- <sup>56</sup> *Ibid.*
- <sup>57</sup> Christopher Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *The University of Chicago Law Review* 55 (Winter, 1988), 279.
- <sup>58</sup> Story, *Miscellaneous Writings*, 358.
- <sup>59</sup> *Prigg v Pennsylvania*, 41 U.S. 539. (1843).
- <sup>60</sup> *Ibid.*
- <sup>61</sup> Story, *Life and Letters* I, 98.
- <sup>62</sup> James McClellan, *Joseph Story and the American Constitution*, (Norman, OK: University of Oklahoma Press, 1971), 118.
- <sup>63</sup> Story, *Miscellaneous Writings*, 517.
- <sup>64</sup> Story, *Life and Letters*, I 432.
- <sup>65</sup> *Ibid.*, 433.
- <sup>66</sup> *Ibid.*, 430.
- <sup>67</sup> Story, *Miscellaneous Writings*, 517.
- <sup>68</sup> Story, *Life and Letters*, II, 618.

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<sup>69</sup> McClellan, *Joseph Story*, 58.

<sup>70</sup> Newmyer, *Supreme Court Justice*, 253.

<sup>71</sup> *Ibid.*, 264.

<sup>72</sup> *Ibid.*, 270.

<sup>73</sup> *Ibid.*, 72.

<sup>74</sup> Tocqueville, 259.