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# JOSEPH STORY: THE AGE OF JACKSON\*

GERALD T. DUNNE\*\*

Dedication:

To Bray Hammond  
20 November 1886-20 July 1968

[O]ne of these rare and happy spirits who elude the traps which ensnare the rest of us; one of those finer minds, uncommitted to narrow intellectual categories, who contributed a new interpretation to American history. He is one whose "works do follow them."

Reverend Paul Rahmeier, Chaplain at Dartmouth College,  
Memorial Service, August 26, 1968.

## I. TWO INAUGURALS

### A. *King Mob*

One Justice had been injured in an upsetting of a stagecoach, another was ill, and a third was beset by the infirmities of age. As a consequence of these and other mishaps the 1829 Term of the Supreme Court got off to a belated start. Those who sought omens might well see in such individual misfortunes the foreshadowing of an institutional adversity, and certainly nothing in the approaching inauguration of Andrew Jackson offered much comfort to the philosophy of the Marshall Court. Indeed, a deep sense of judicial apprehension had already been suggested by the unavailing efforts

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\*This is the tenth in a series of articles by Mr. Dunne concerning the life of Mr. Justice Story. The earlier articles have been: *Mr. Justice Story and the American Law of Banking*, 5 AM. J. LEGAL HIST. 205 (1961); *Joseph Story: The Germinal Years*, 75 HARV. L. REV. 707 (1962); *The American Blackstone*, 1963 WASH. U. L.Q. 321 (1963); *Joseph Story: 1812 Overture*, 77 HARV. L. REV. 240 (1963); *Joseph Story: The Salem Years*, 101 ESSEX INST. HIST. COLL. 307 (1965); *Joseph Story: The Great Term*, 79 HARV. L. REV. 877 (1966); *The Story-Livingston Correspondence (1812-1822)*, 10 AM. J. LEGAL HIST. 224 (1966); *Joseph Story: The Middle Years*, 80 HARV. L. REV. 1679 (1967); and *Joseph Story: The Lowering Storm*, 13 AM. J. LEGAL HIST. 1 (1969). A portion of this article (pt. I, § A) is reproduced from *Joseph Story: The Salem Years*, 101 ESSEX INST. HIST. COLL. 307 (1965) with the permission of the Essex Institute. Mr. Dunne's biography of Mr. Justice Story will be published in the spring of 1970 by Simon and Schuster.

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of the individual members of that Court to ward off the Jacksonian victory.

Thus, Chief Justice Marshall, in his well-publicized act of voting for the first time in twenty years, obviously cast his ballot for John Quincy Adams rather than Andrew Jackson. Justice Smith Thompson had been even more overt. Remaining on the Court, he had run for Governor of New York with the avowed purpose of carrying the Adams ticket to victory and had come within a hairbreadth of doing so. Justice Bushrod Washington had openly participated in a convention of Adams men in Virginia. Justice Story had been somewhat more subtle. Ostensibly reviewing a life of Washington, he asserted that the forthcoming election merely carried into a new battleground the struggle which the forces of rationalism and order had won but only temporarily—in ratifying the Constitution some forty years earlier. All in all, of the six incumbents—for one ailing member of the seven-man Court died during the campaign—only the maverick South Carolinian William Johnson supported Jackson. And of the entire bench, only the venerable Gabriel Duval exhibited a truly judicial impartiality.<sup>1</sup>

Justice Duval's aloofness was far more the infirmity of age than the abstinence of choice. In the full vigor of his faculties he could well have joined his associates in an extra-judicial electoral activity which itself mirrored an unprecedented nationwide involvement. The mirror, however, inverted the image between court and country, for the choice of the justices was not that of the electorate. The situation was not without irony for the Marshall Court had effected both the hegemony of the national government and its own position at the nuclear center of the constitutional design through a proposition asserted in Story's landmark opinion in *Martin v. Hunter's Lessee*<sup>2</sup>—that the Constitution, an organic law of an organic nation, was the creation, not of the states, but of the whole American people. And, at the 1828 election the people, thanks to a steadily enlarging franchise, had

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1. For the extra-judicial electoral activity and attitudes of the members of the Supreme Court in the election of 1828 see: as to Chief Justice Marshall, 15 MASS. HIST. SOC. PROC. (2) 336; as to Justice Thompson, 7 J. Q. ADAMS MEMOIRS 405 (1874), and S. LIVERMORE, *THE TWILIGHT OF FEDERALISM* 76-80 (1962); as to Justice Washington see, *Proceedings of the Anti-Jackson Convention Held at the Capitol in the City of Richmond with Their Address to the People of Virginia* (1828), copy in the Virginia Historical Society, Richmond, Virginia (my thanks to Mr. William M. E. Rachal of the Society for this item); for Justice Story see Dunne, *Joseph Story: The Lowering Storm*, 13 AM. J. LEG. HIST. (1969); and for Justice Johnson, see Niles' *Weekly Register*, September 16, 1830, and C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 179 (1922) (Hereinafter cited as C. WARREN, HISTORY).

2. 14 U.S. (2 Wheat.) 304 (1816).

spoken. Appropriately, the crowds poured into Washington to celebrate their victory, and the upshot was a democratic bacchanal on inauguration day on which Justice Story saw only "the reign of King 'Mob' . . . triumphant."<sup>3</sup>

Even had the justices the inclination, the state of their docket precluded an extensive participation in the inaugural festivities. The Chief Justice, no complainer even at the threshold of seventy-four, found the 1829 work of the Court, "a laborious Term."<sup>4</sup> It was singularly appropriate that the ever increasing number and complexity of cases awaiting final decision should so sharply underline the elements at work in the Jacksonian revolution. Particularly apparent in these controversies was an entrepreneurial revolt against a mercantilist-agrarian *status quo*. Justice Story himself was especially involved in this ongoing pattern of change, and the 1829 docket showed him significantly contributing to breaking the chain of custom. Thus his opinion in the patent controversy of *Pennock v. Dialogue*<sup>5</sup> provided a powerful stimulant to the new industrial technology. Similarly, his views in *Van Ness v. Pacard*<sup>6</sup> broke new ground in treating fixtures in terms of an increasingly mobile, business-oriented economy rather than a static agricultural economy. And, perhaps affording the most illustrative example of the interplay of law and life was *Inglis v. Sailor's Snug Harbor*,<sup>7</sup> an immensely complicated equity case up from New York, which was argued but not decided at the Term.

Not all states had equity. It was completely absent from Story's native New England whose Puritan inheritance, Dean Pound subsequently observed, detested its personalized and highly eclectic jurisdiction which could relieve fools of their bargains and force sharp men to specifically perform. In addition, there was a widespread and popular suspicion of its juryless procedure, of the enormous range afforded judicial discretion, and of its roots in ancient English doctrine. Yet, notwithstanding an ancient lineage which caused an American case to stand or fall on a forgotten statute of Queen Elizabeth, equity provided an immensely congenial vehicle for settling the disputes of a commercial age with flexibility, speed, and a capability

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3. Letter from Justice Story to Mrs. Story, March 7, 1829, in 1 W. W. STORY, *THE LIFE AND LETTERS OF JOSEPH STORY*, 563 (1851) (Hereinafter cited as W. W. STORY).

4. Letter from John Marshall to Thomas Marshall, March 20, 1829, in Marshall Papers, Virginia Historical Society, Richmond, Va.

5. 27 U.S. (2 Pet.) 1 (1829). See also F. Prager, *The Changing Views of Justice Story on the Construction of Patents*, 5 AM. J. LEG. HIST. 230, 261 (1961).

6. 27 U.S. (2 Pet.) 1 (1829).

7. 28 U.S. (3 Pet.) 99 (1830).

of cutting to the heart of any issue. Law, Story noted a few years earlier, "working as it does into the business of a nation crowded with commerce and manufacturers, must be forever in the rear of equitable principles to be applied to the new combination of circumstances, which are springing up daily to perplex its Courts."<sup>8</sup>

*Inglis* was not a business dispute but a contest for a legacy. The stakes were high, and Daniel Webster said he had made a greater exertion in it than in any case since *Dartmouth College* and in any future case he would ever undertake. The case involved the nature of American nationality, the character of equity powers, New York's anti-Tory legislation, and the consequences of the Anglo-American treaties. Story was deeply familiar with each facet. His *Martin v. Hunter's Lessee* opinion had dealt with the impact of treaty rights on anti-Tory expropriations. He had been a lifelong student and champion of equity jurisdiction. His was perhaps the strongest and most eloquent voice on the juridical consequences of American nationality. And by singular coincidence this constellation of legal issues seemed to him to be brought into focus by a passage in the work of an old friend.<sup>9</sup>

The old friend was the venerable Nathan Dane, and the work was Dane's *General Abridgment and Digest of American Law*, a legal cyclopedia shorn of irrelevant British precedents and fitted to the new and national legal environment. The work of a lifetime, Dane nonetheless saw his *Digest* as a beginning rather than an end. In an astonishing (or perhaps conscious) parallel to the action by which Sir Charles Viner had brought Blackstone to Oxford a half-century earlier, Dane determined to devote the financial fruits of a successful legal abridgment to the establishment of a chair of a truly national law.

Dane cast his net much wider than Viner, for in addition to what he called "Federal law and Federal equity,"<sup>10</sup> he wished his bounty to be framed in a Ptolemaic order which set those elements in a construct of natural law, international law, and commercial and maritime law (at this time still virtually one). He had selected his institution—the near moribund Harvard law school—and he had selected his man—Mr. Justice Story. It was not the first time that association of school and Judge had been envisioned. Previously Harvard had attempted without success to secure the

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8. J. Story, *The Growth of Commercial Law*, MISCELLANEOUS WRITINGS (W. W. Story ed. 1852) 263, 269. (Hereinafter cited as MISCL. WRITINGS).

9. See 28 U.S. (3 Pet.) 99 (1830).

10. See W. W. STORY 4.

Justice's part-time teaching efforts, but now an additional incentive had been given its case—Dane's bounty was expressly conditioned upon the Justice's acceptance. Much as in the case of Story's elevation to the Supreme Court some seventeen years earlier, agreement was virtually pre-ordained—"driven to accept"<sup>11</sup> was the way he put it. To be sure, as in modern negotiations, there were a few abrasively mundane details centering around housing, but other arrangements went forward looking to his academic induction on September 1, 1829. Probably no one, not even Nathan Dane, saw the connection between this inaugural and that which six months earlier had marked the beginning of Jackson's presidency. Yet the two events were related and even star-crossed. For the exuberant folk nationalism of the Jackson inaugural and Dane's quest for a truly national jurisprudence were the interconnected parts of a cultural and historical process by which King Mob would become, in the most literal sense, a constitutional monarch.

### B. *King Law*

Almost six months to the day after the Jackson inaugural, the civic dinner of the year was held at Hamilton Hall in Salem, Massachusetts. The occasion was Story's removal to Cambridge to accept the Dane Professorship. The departure was appropriately scaled for the town's leading citizen whose honors, even without judicial office, were formidable: presently fellow and formerly overseer of the Harvard Corporation, president of the Merchants Bank of Salem, vice president and trustee of the Salem Institute for Savings, vice president of the Bunker Hill Memorial Association, co-founder of the Essex Historical Society, fellow of the American Academy of Arts and Sciences, member of the Massachusetts Historical Society, member of the Massachusetts Agricultural Society, and holder of honorary doctorates in law from Brown, Harvard, and Dartmouth.

Everyone of importance and many of unimportance in Salem attended. The Boston delegation included Mayor Harrison Gray Otis and Senator Daniel Webster, while that of Cambridge included Probate Judge Samuel P. P. Fay and Harvard's president, Josiah Quincy. Even Governor Howe of Illinois was there. Course followed course, toast followed toast, the Boston Brigade Band played and Judge Fay expressed the consensus in pro-

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11. Letter from Joseph Story to Samuel P. P. Fay, August 1, 1829, in 2 W. W. STORY 22. See also 1 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 415-421 (1908) (hereinafter cited as C. WARREN, HARVARD) and SUTHERLAND, THE LAW AT HARVARD 90-95 (1966).

nouncing the dinner “a most *sensible* device, by which the *givers* were made to enjoy as much as the receivers.”<sup>12</sup> For his part, the guest of honor capped the afternoon of speeches with “a most eloquent and feeling address to his fellow citizens from whom he was about to separate, and dwelt on the circumstances of his residence among them for thirty years and his emotions on parting from his early and fast friends.”<sup>13</sup>

Certainly a display of sentiment might be forgiven a man, two weeks away from his fiftieth birthday, and leaving a home of long adoption. Departure came particularly hard in this case. Salem not only held Story’s friendships of a lifetime. Its burying grounds contained what he called the memorials of his love and his sorrow, the wife of his first marriage, and four of the seven children of his second. Moreover, there had been Storys in the area since his uncle Isaac had come many years before to take a pastorate in Marblehead, and his own thirty years of residence had left a mark on the town. “Was a new alms house or school house to be erected, he was one of the building committee,” it would be later written. “To him, we owe more than anyone else the existing excellent condition of the streets of our city . . . . He has served, with his accustomed fidelity and zeal, for many years, on our school committees.”<sup>14</sup> The passing years changed the man as well as the town. In fact, save for his nervous gesture or hearty laugh, it was difficult to believe that this plump and half-bald pillar of the establishment could ever have been the volatile, auburn-haired poet who came over from nearby Marblehead back in 1801. His list of accomplishments then consisted of a Harvard A.B. and a half-finished legal apprenticeship. These were more than offset by an allegiance to Thomas Jefferson in politics and to Unitarianism in religion.

The ensuing three decades brought respectability to Story’s party and Story’s church but laid a heavy hand on Salem itself. Story began his practice when the Salem ships still exemplified the town motto, carrying shipments *divitis Indiae ad ultimum sinum*—to the farthest port of the rich East. By 1829, however, the nascent industrialism, itself part and parcel of the Jacksonian revolution, was fast replacing Salem’s maritime glories with some drab and half-successful manufacturing enterprises. In a closely related consequence many leading figures were moving. William Gray, the

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12. Salem Gazette, September 4, 1829.

13. *Ibid.*

14. Letter from John W. Treadwell to William W. Story, August 25, 1847, in 2 W. W. STORY 207-208. See also 4 AMERICAN JURIST 298, 507 (1830).

richest merchant, William Prescott, the leading lawyer, and Nathaniel Bowditch, the world-renowned mathematician, had all gone. And now Justice Story was leaving.

Yet he did not go without playing a part in a rear-guard effort to facilitate the transition from commerce to industry. In a move paralleling the legal transformation of the corporation which he was effecting from the bench, Story joined in the town meeting's petition for removal of a stockholder liability in manufacturing corporations. Along the same line he had backed an abortive venture for a municipal milldam corporation, planned as power source for infant industry. The latter effort foundered badly ("Poor Salem remains still down at the heel with her stockings about her feet")<sup>15</sup> and the town which was once the proud second city of the commonwealth became an exporter of her famous men.

If Salem declined, however, Cambridge flourished, and the difference between them was symbolized in the way the farewell banquet had been outshone by the inaugural feast which had been staged a few days earlier to commemorate the reorganized foundation of the Harvard Law School. The company was impressive, the program long, and the puns polished ("Non timeo Danaos et dona ferentes")<sup>16</sup> as Professor Story was formally inducted into office. Assuming academic duties with him was John Hooker Ashmun, a rising twenty-nine year old lawyer who was named to serve as Royall Professor in a full-time teaching capacity. Story gave a long inaugural address ("in English," noted the program).<sup>17</sup> Eighteen thousand words in length, the lecture was the typical product of an age which liked its oratory by the hour. Exemplifying a stoic naturalism, Story traced law through its foundations in the very order of things to the overstructure of all human effort, and while proclaiming its attainment the proper office of every liberally educated man, pleaded for its involvement with the actual concerns of life by a body of specialists trained to its use. In coming to a conclusion, the new professor hailed Dane as the American Viner and then in an extraordinary denial of the history which was about to unfold noted that "here the parallel must stop."<sup>18</sup>

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15. Letter from Henry Coleman to Joseph Story, February 4, 1827, in Story Papers, Library of Congress. See also 2 AMERICAN JURIST 92 and 104 (1829) and 1 J. FELT, ANNALS OF SALEM 162 (1845).

16. C. WARREN, HARVARD 16.

17. 2 W. W. STORY 7.

18. J. Story, *The Value and Importance of Legal Studies*, MISCL. WRITINGS, 547.



Neither the modesty of the disclaimer nor the overall character of the address as the proclamation of a new conservatism served to impress a young minister named Ralph Waldo Emerson, who had come for the Ashmun inaugural and complained that "a good many people wd. rather have heard what he had to say for himself than to hear Judge Story . . . but Mr. A. contented himself with promising to behave well."<sup>19</sup> The subject of the barbed remark was beyond it. Story had a new field and was anxious to get on with the work. "We have at present twenty-eight law students . . .," he exulted. "I perceive there is a vast labor before me."<sup>20</sup>

### C. *The Twenty-Fifth Section*

Story's inaugural pictured the American ideal as an essentially transplanted continuation of the great European tradition of civility, order, and rationality. The Jacksonian view, however, was not so much an Americanized transplantation of an old order but the institution of a genuinely new one. Contradicting Story's inaugural oration, this view of a *via media* between aboriginal barbarism on one hand and an over-civilized decadence on the other was asserted about the same time.<sup>21</sup> The latter doctrine appeared, not in the formal presidential inaugural, but in Andrew Jackson's first State of the Union message which went to the newly convened 21st Congress on December 10, 1829. Moreover, it was more implicit than articulate, but still could be pieced out from two presidential references. One was a *de facto* ultimatum to the Indian tribes in Georgia and Alabama struggling against repressive state legislation—"emigrate beyond the Mississippi or submit to the laws of those States."<sup>22</sup> The other, somewhat more subtle, concerned the second Bank of the United States. Noting that the bank's charter would soon expire and that its stockholders would seek a renewal, the president ominously commented: "Both the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow-citizens . . ."<sup>23</sup>

Externally dissimilar, the bank and the Indians were seen as common enemies, one a decadent monopoly, the other a primitive barbarism. Both

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19. Letter from Ralph Waldo Emerson to Anne Lyman, August 26, 1829, in 1 R. W. EMERSON, *THE LETTERS OF RALPH WALDO EMERSON* 432 (Rusk ed. 1939).

20. Letter from Joseph Story to Simon Greenleaf, October 20, 1829, in 1 C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 432 (1908).

21. See generally J. WARD, *ANDREW JACKSON, SYMBOL FOR AN AGE* (1955).

22. 2 MESSAGES AND ADDRESSES OF THE PRESIDENTS 458 (Richardson ed. 1896) (Hereinafter cited as RICHARDSON).

23. *Id.* at 462.

were marked for a destruction which was seen as an unfortunate, but inevitable, consequence of their very natures, for both stood in the way of a surging *laissez faire* sense of enterprise whose seemingly diverse faces—financial, industrial, and agricultural—drew on a singularity of purpose of self-made men to civilize the wilderness and found a new order of things.<sup>24</sup> Thus, the emerging forces in commerce, industry, and finance which found the regulating hand of the second Bank of the United States an increasingly galling constraint shared essentially the outlook of the land-hungry emigrants who saw the Indian enclaves as an intolerable anachronism. If the Federal bank<sup>25</sup> and the Indians had common enemies, they also shared a common protection in a federally guaranteed status. Scores of treaties with the United States, some antedating the Constitution itself, confirmed the Indians in their tribal lands; and Chief Justice Marshall's landmark opinion, *McCulloch v. Maryland*,<sup>26</sup> had given the Federal bank a power-constitutional vindication. Yet the seemingly settled status of both issues was called into question by the presidential message. And what was really challenged was the Supreme Court's capacity to be the ultimate arbiter of any constitutional issue.

The presidential message said nothing about the slavery issue which cut across all others like a sinister fault-line. It was in part bound up with the land-hunger underlying the Indian question, for the massive new plantation system differed from its pastoral antecedents almost as much as the new industrialism differed from the old commerce. There was one singular circumstance, however. However much the two new economic orders drew on similarly motivated systems of *laissez faire*, the institution of slavery ranged them implacably as opponents. Useless to one system, indispensable to the other, it colored all issues, exacerbated particularly the differences over the tariff, and inevitably manifested itself in bitter sectional and constitutional controversy.

Thus, the tangled complex of constitutional issues raised by Jackson's first message to Congress was vividly illustrated a few days later when Senator Foot (occasionally spelled Foote) of Connecticut introduced a proposal to restrict the sale of western lands. Much as the way a great battle suddenly develops from the accidental clash of pickets in an obscure village, so

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24. My debt throughout this article, as elsewhere, to Bray Hammond's *BANKS AND POLITICS IN AMERICA* (1957) is obvious.

25. Mr. Hammond's use of "federal bank" for the second Bank of the United States (p. 205) is followed here.

26. 17 U.S. (4 Wheat.) 316 (1819).

did the Foote resolution quickly escalate into what the Washington press called "the great debate."<sup>27</sup> Quickly outraging the constitutional propositions in the presidential message, although in a sense deriving from them, there suddenly surfaced a basic issue. The question was whether the Union was one or many; and Daniel Webster and Robert Hayne traded indecisive, if Homeric, blows.

Art, it is said, knows its own truth, and the painter whose hand struck off the heroic canvas, "Webster's Reply to Hayne," suggested, wittingly or otherwise, the larger dimensions of the exchange. Presiding and yet depicted almost as one of the principals is Vice President John C. Calhoun, now close to resignation as a consequence of a steadily eroding political relationship with Jackson. Less prominent but still apparent in the background is Justice Joseph Story, still unmoved from the nationalism of his youth. To what extent Calhoun and Story supplied the weaponry of the actual debaters can only be surmised.

Certainly the two principal spokesmen had outside resources. Indeed, Webster even made a sarcastic suggestion that Hayne "[had] at his elbow . . . some high-minded and lofty spirit . . . ready to supply . . . everything, down even to a forgotten and moth-eaten two-penny pamphlet."<sup>28</sup> But Hayne needed no two-penny pamphlet, for Calhoun had already published his *South Carolina Exposition*, which presented a powerful case for the Constitution as a union of sovereignties and asserted, for each of them, a right of nullification or, as Hayne preferred to call it, "constitutional resistance."<sup>29</sup> Similarly, Story had preceded Webster as the exponent of the nationalist interpretation of the Constitution. His opinion in *Martin v. Hunter's Lessee* validated the legitimacy of section 25 of the Judiciary Act of 1789 which authorized appeals to the Supreme Court from state tribunals in cases of controverted constitutionality, and this was really what was at issue in the Webster-Hayne confrontation.

Indeed, paralleling Webster's famed trilogy to the nationalist sword ("Liberty and Union, now and forever, one and inseparable")<sup>30</sup> was his threefold canonization of the Supreme Court as the cutting edge of the blade ("one tribunal established by all, responsible to all, with power to decide for all . . .")<sup>31</sup> and his avowed recognition of the role of the federal

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27. Niles' *Weekly Register*, February 27, 1830.

28. GALE & SEATON, *DEBATES IN CONGRESS* (22nd Cong. 1st Sess.), 62 (1830).

29. *Id.* at 73.

30. *Id.* at 80.

31. *Id.* at 78.

judiciary. For after noting the impact of the constitutional provisions making its own and derivative provisions the supreme law of the land and providing that the judicial power of the United States should extend to its construction and interpretation, Webster eulogized the effect of the two provisions on the national government and the Union:

They are in truth the key-stone of the arch. With them it is a constitution; without them it is a confederacy. In pursuance of these clear and express provisions, Congress established at its very first session, in the Judiciary Act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a Government.<sup>32</sup>

And all this Story had said in *Martin v. Hunter's Lessee*. Whether he played a closer role in the great debate is a fascinating question. Relevant, of course, is his virtually lifetime service as the "Jupiter Pluvius from whom Mr. Webster sought to elicit peculiar thunder for his speeches . . ." <sup>33</sup> Particularly significant seems Webster's admission that at this time he was in the midst of other pressing engagements, and did not make any of his speeches what they should have been. Intrinsic evidence also is indicative, and particularly revealing is an appendix subsequently placed in the record and which obviously came from a researcher rather than an orator. The appendix contains a 1787 report from a committee of the old Confederation Congress concerning public lands, an 1809 resolution of the Virginia legislature characterizing the Supreme Court as the ultimate constitutional tribunal, and (a particularly malicious touch) an 1816 Calhoun speech in favor of a collective tariff.

The judicial issue as raised in the Webster-Hayne exchange sputtered on indecisively until the end of the session in late spring,<sup>34</sup> and it overshadowed anything on the Supreme Court's calendar. Story's principal interest seemed to concern his new professorship. ("I shall be glad . . .

32. *Id.* at 78.

33. 1 PARKER, ADDITIONAL SPEECHES, ADDRESSES, AND OCCASIONAL SERMONS 169 (1855). And on the general question of Story's assistance to Webster *see* W. W. STORY 235 and E. BAUER, COMMENTARIES ON THE CONSTITUTION 160-161-178 (1952). Of possible significance is Story's absence on account of illness. *See* Daniel Webster to Jeremiah Mason, February 27, 1830 in 1 D. WEBSTER, PRIVATE CORRESPONDENCE 439 (P. Webster ed. 1857) (Hereinafter cited as D. WEBSTER). On the other hand, an apocryphal Webster quotation suggests that the orator was self-sufficient. "Give yourself no uneasiness, Judge Story; I will grind him as fine as a pinch of snuff," C. WILTSE, JOHN C. CALHOUN, NULLIFIER 58 (1949).

34. *See* 2 C. WARREN, HISTORY, 181-184.

to work with the Law Students. I am impatient to prepare some written lectures . . . .")<sup>35</sup> There was, however, an epilogue to the great debate which may have made him wish he had stayed in Washington. This concerned the celebrated exchange of toasts between Vice President Calhoun and President Jackson at the celebration of Jefferson's birthday on April 13, 1830.

It was, of course, singularly ironic that an event designed to promote solidarity would provide the occasion for a dramatic and spectacular fission. To be sure, a combination of factors worked toward disarray as the social crisis produced by Mrs. Calhoun's rejection of the barmaid wife of the Secretary of War illustrated the basic instability of Jackson's widely diverse cabinet and ultimately brought it down. But the truly irrepressible conflict concerned whether the United States was one or many, and Jackson's cannonshot toast, "Our Federal Union—it can and must be preserved," compressed days of Webster's rhetoric and pages of Story's *Martin* opinion into a single terse imperative.

Story shared the general incredulity ("Are the reports of the Birthday Dinner . . . mere gossip or true?")<sup>36</sup> for presidential assertion was largely unexpected. Yet it had been foreshadowed in a brief note which Jackson sent Webster after the great debate: "There is no cause more sacred than the preservation of this, our Union, and you have done more to further it in a day than others have achieved in years."<sup>37</sup> Indeed, the private presidential note constituted a sharp revisionary codicil to the nuances of the first message to Congress, and it would have immense future significance for both the Supreme Court and section 25 of the Judiciary Act.

## II. THE EDUCATION OF A PRESIDENT

The ambiguities and contradictions in the various Jacksonian messages manifested themselves in three singularly sequenced events in 1832. The first was a covert criticism of the Court in March of 1832 when presidential inaction spoke louder than words, although words there were. The second, in July, was an explicit denial of the Court's position as ultimate interpreter of the constitutional design. The third, in December, was a ringing asser-

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35. Letter from Joseph Story to George Ticknor, March 10, 1830, in 2 W. W. STORY 35.

36. Letter from Joseph Story to Daniel Webster, April, 1830, in 1 D. WEBSTER 154-155.

37. Quoted in GERSON, *OLD HICKORY* 253 (1964).

tion of the Court's competence in such a role under the twenty-fifth section and an expressed willingness to defend the status by force of arms, if need be.

#### A. *New Echota*

The Indian question, which had partially underlain the great debate was most acute, not on the territorial frontier, but in the original states and there with respect to the most civilized tribes. Its specific focus was the Cherokees. Readily adopting the white men's ways in everything from the alphabet to slavery, they had even dabbled in *real politik* when back in 1812 they took the American side against the Creeks and served as Jackson's valued allies in his great victory at Horseshoe Bend. In July of 1827 at their tribal capital of New Echota they went further yet, combining a declaration of independence with the adoption of a Constitution. Asserting complete autonomy, save for the supervening sovereignty of the federal government, they explicitly denied any state authority over their land or people, and promulgated a constitution based on that of the United States. The possibility that this action violated their very model by setting up one state within the territory of another, and its effects upon the federal government's hopelessly conflicting obligations—for Washington had promised the Indians to protect their lands and had promised Georgia to clear them—had been debated indecisively in John Quincy Adams' cabinet. With characteristic vigor Jackson put the matter at issue by recommending Indian submission or removal in his first message to Congress.

Eleven days after the message the Georgia legislature took the President at his word by declaring the Cherokee constitution null, extending Georgia's county and court organization to the Cherokee lands, and generally moulding a comprehensive pattern of repression and control. Congress moved somewhat more slowly but by May of 1830 it passed an Indian Removal Act along the lines requested by the President. It did so over the vigorous opposition of Webster on the Senate floor and with the possibility of constitutional challenge from a powerful array of talent. Ex-Attorney General William Wirt, Chancellor Kent, and Jeremiah Evarts of Boston, editor of the *Christian Herald*, had been enlisted in the Cherokee cause.

The Indians' advisors began with the doubtful counsel of suggesting that the President be informed of the forthcoming resort to the Federal judiciary. "Tell [President Jackson] that you wish to have the matter decided by the Supreme Court. . . . You may rest assured that if you will get your case clearly before the Supreme Court, your rights will be defended,"

Evarts counselled.<sup>38</sup> The Cherokees' conversations with the President were a dismal failure. Jackson heard the Indians out and abruptly dismissed them: "Sir, your audience is ended. There is nothing I can do for you."<sup>39</sup> One Cherokee bitterly regretted a lost opportunity: "If I had known Jackson would drive us from our homes, I would have killed him that day at Horseshoe."<sup>40</sup>

Obviously, the Cherokees would have been better advised to avoid talk at all, since the President had already adopted the Georgia position that their tribal government was an unconstitutional excrescence and had clearly implied in his first message to Congress that he felt himself every bit the co-equal of the Supreme Court in construing the constitutional text. With the President, the state, and Congress ranged in opposition, the prospects seemed bleak, but Wirt thought he found his opportunity in the case of George Tassell, a Cherokee accused of murdering another member of the tribe. By the Cherokee constitution Tassell was subject only to tribal law. Nonetheless, by Georgia law he was under the jurisdiction of the Hall County Superior Court which tried him and sentenced him to death. As Wirt sought to bring the case before the Supreme Court, the comments of the Georgia Judge suggested some ominous overtones:

Now, without intending the least disrespect to that [Supreme] Court, to whose constitutional authority, this and all other state courts, I hope will most cheerfully submit, this question can never go from a court in which I preside, until the people of this state agree to it.<sup>41</sup>

The implications quickly came to pass. On December 12, 1830, the Supreme Court issued its citation in response to Wirt's plea. The state responded by executing Tassell forthwith, and the Governor wrote Jackson that the Cherokees should by now realize the "utter imbecility of placing any further reliance on the Supreme Court."<sup>42</sup>

The Cherokees, however, had a second string to their bow, and an obvious sympathizer in Justice Story as well. Shocked at the "intemperate and indecorous" execution of Tassell, the Justice noted with obvious satis-

38. Letter from Jeremiah Evarts to John Ross, July, 1830, in G. WOODWARD, *THE CHEROKEES* (1963) (Hereinafter cited as G. WOODWARD).

39. Quoted in I. PEITHMAN, *RED MEN OF FIRE* 61 (1964).

40. *Id.* at 72.

41. Niles' *Weekly Register*, October 2, 1830.

42. Letter from Governor Troupe to President Jackson, January 3, 1831, in G. WOODWARD 165.

faction that "[u]nrequested by the Court, the question is presented in another form."<sup>43</sup> It came in an application for an injunction against Georgia's repressive laws which the Cherokees submitted to the Court as a matter of original jurisdiction on the grounds that they were "a foreign nation" entitled by the Constitution to begin proceedings there.

Speaking for a divided Court, Marshall held otherwise. Carefully refraining from any endorsement of the Jacksonian thesis that the Cherokees had formed an unconstitutional sub-state, the Chief Justice simply read history, precedent, and international law to the effect that the Cherokees were not a "foreign nation" within the contemplation of the Constitution.<sup>44</sup> Joining Justice Smith Thompson's contrary reading of the same record, Story ranged himself in opposition to the Chief Justice—his first constitutional break with Marshall since their disagreements over the prize and confiscation cases of the War of 1812. Nor did the return home from the 1831 Term and further reflection change his view, as he strongly asserted a sense of being "more and more satisfied that we are right."<sup>45</sup>

He had his chance to assert his position when still another of the Cherokee cases came before the Court next year at the 1832 Term. White missionaries had been jailed under a Georgia repression statute and were seeking release through the writ of the Supreme Court. On March 7, 1832, they seemed to have obtained their freedom along with a vindication of Cherokee rights when the Georgia statutes were invalidated by the Court.<sup>46</sup> "[G]lorious news," went the announcement to the Cherokees. "The laws of the state are declared by the highest judicial tribunal of the country to be null and void."<sup>47</sup>

Exaltation was premature, however, for it failed to take account of the presidential reaction. Story had been apprehensive ("I do not believe the President will interfere"),<sup>48</sup> and rightly so. "[T]he [members of the] Su-

43. Letter from Joseph Story to George Tichnor, January 22, 1831, in 2 W. W. STORY 49.

44. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 515 (1831).

45. Letter from Joseph Story to Richard Peters, June 24, 1831, in 2 W. W. STORY 46.

46. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

47. Letter from Elias Boundinot to Stan Watel, March 7, 1832, in G. WOODWARD 168.

48. Letter from Joseph Story to George Tichnor, March 8, 1832, in 2 W. W. STORY 83. See also Choust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of its Injunction against the State of Georgia?*, 5 AM. J. LEG. HIST. 76 (1960).



preme Court . . . have united to embarrass me,"<sup>49</sup> exploded the President; and this irate response was mild compared to that of the presidential supporters both in and out of Congress. "The decision," wrote Story to a Harvard friend, "produced a very strong sensation in both houses."<sup>50</sup> Perhaps he was fortunate that the level of legislative response went no higher than it did. "If I had a seat in the H. of R.," commented John Randolph to Jackson, "I would move an impeachment of the Ch. J. and Story."<sup>51</sup>

### B. Philadelphia

Throughout the Union, the Cherokee repression was seen in different modes. In New Echota it was obviously a prelude to disaster. In Charleston, increasingly restive over the tariff, the episode was seen as an admirable example of state self-help in the face of unwarranted federal intrusion. A young French traveler, Alexis de Tocqueville, saw the unfolding of a Greek tragedy ("[T]he success of the Cherokees proves that the Indians are capable of civilization, but it does not prove that they will succeed at it").<sup>52</sup> In Philadelphia, headquarters of the Federal bank and still the financial capital of the United States, the fate of the Cherokees seemed an ominous prelude to another proscription. To be sure the bank's charter, in addition to its constitutional vindication in *McCulloch v. Maryland*, had several years to run, but the unavoidable nature of the confrontation was clear. The anti-Jackson forces accordingly made a virtue of adversity as the bank was deliberately chosen as the campaign issue for the 1832 election. A re-chartering bill was passed by Congress and thrust on the President.

Predictably it came back with a sharp veto message, written in large measure by Roger Taney, future Chief Justice of the United States Supreme Court, who now explicitly stated what had been implied by the first presidential message and underlined in the case of the Cherokees:

It is maintained by the advocates of the Bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent . . . .

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49. Letter from President Jackson to Anthony Butler, March 6, 1832, in 4 A. JACKSON, CORRESPONDENCE 415 (Bassett ed. 1929) (Hereinafter cited as A. JACKSON).

50. Letter from Story to George Tichnor, note 48 *supra*.

51. Letter from John Randolph to President Jackson, March 18, 1832, in 4 A. JACKSON 422.

52. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 359 (Vintage ed. 1960) (Hereinafter cited as DE TOCQUEVILLE).

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, not as it is understood by others . . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>53</sup>

This declaration of executive independence was accompanied by several other unprecedented passages. One was a vigorous, albeit ambiguous, attack on the judicial logic of *McCulloch v. Maryland*. Another was a stinging attack on the monopolistic character of the bank. And a third came in the conclusion as a stirring restatement of the Jacksonian creed:

In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law, but when the laws undertake . . . to make the rich richer . . . the humble members of society—the farmers, mechanics, and laborers . . . have a right to complain . . . .<sup>54</sup>

Webster delivered a powerful counter-attack on the Senate floor and then, with a view to printing an amplified version for the upcoming presidential campaign, dispatched a marked copy of the veto message to Story:

Now, my dear sir, the object of this is to request you to turn to the message, read this part of it, and give me, in a letter of three pages, a close and conclusive confutation, in your way, of all the nonsense in this particular. It will take you less than half an hour. Pray . . . let me have it . . . in 2 or 3 days.<sup>55</sup>

In this case Webster had particularly strong grounds for assuming that Story's assistance would be forthcoming. Well before its foundation, Story had been an enthusiastic proponent of the Federal bank. Nor was his posi-

53. 2 RICHARDSON 581-582.

54. *Id.* at 602.

55. Letter from Daniel Webster to Joseph Story, July 21, 1832, in C. SWISHER, ROGER B. TANEY 201-202 (1938) (Hereinafter cited as C. SWISHER).

tion solely a legal one. Although he had moved from Salem, Story had continued in the presidency of the Merchants Bank, and as a conservative banker, he was doubtless sympathetic to the Federal institution's cause. He also was a close personal friend of Nicholas Biddle, the Federal bank's president. All these factors justify the conclusion that Webster's request did not go unanswered. As Professor Swisher notes, the only thing we do not know about Webster's printed attack on the veto message is the extent to which it was the product of a member of the Supreme Court.

### C. Charleston

On December 10, 1832, six months to the day after the veto of the Federal bank recharter bill, another presidential message was delivered from the White House. Equally powerful and stirring, it was profoundly different in content. If the July message chided the Supreme Court's assumption of power, the December message defended it. If the earlier message remonstrated against Marshall's opinion in *McCulloch v. Maryland*, the later one vindicated Story's views in *Martin v. Hunter's Lessee*. If the first pronouncement implicitly criticized the review of state court judgments by the Supreme Court under section 25 of the Judiciary Act of 1789, the second specifically defended it. Moreover, it put the prestige and, if need be, the power of the presidency behind the continuing exercise of that jurisdiction.

The ironic turnabout in the presidential position not only reversed the July polemics and the spring inaction in the case of the Cherokees but also represented a *volte-face* within the legislative program where as early as 1830 a repeal of the 25th section had been underway. One of the principal Jacksonians, Missouri's Thomas Hart Benton, had vigorously attacked the underlying philosophy given by the 25th section when he began his argument with the flourish:

The State of Missouri has been summoned by a writ from this Court under a "penalty" to be and appear before this Court. In the language she is commanded . . . Language of this kind does not seem proper when addressed to a sovereign State . . .<sup>56</sup>

The point left a mark. Chief Justice Marshall, writing the majority opinion striking down Missouri's "loan office certificates" as constitutionally invalid

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56. 28 U.S. (4 Pet.) 410, 419 (1830).

bills of credit, went out of his way to respond to Benton's criticism. Marshall was also upset by the dissenting opinions. "[I]t requires no prophet," he wrote Story, "to predict that the 25th Section is to be repealed or to use a more fashionable phrase, to be nullified by the Supreme Court of the United States."<sup>57</sup>

Marshall had taken the "nullified" from the lexicon of the great debate between Hayne and Webster. Yet it was not without significance that the debate was a multilateral exchange with one of the other participants being Thomas Hart Benton. Indeed Benton's contribution to the debate paralleled his argument in the *Craig* case. In the Senate he asserted that "power to decide on the Federal constitutionality of State laws . . . is a power to govern the State." And as early as 1829 Benton had attacked Federal judicial power in his St. Louis newspaper.<sup>58</sup> He also had strategically placed associates in the Jacksonian camp who shared his views. One associate, Richard Johnson, had long been a critic of the expanding jurisdiction of the Supreme Court.<sup>59</sup> Another, also a Kentuckian but of Yankee origin, was Amos Kendall. Kendall rose from the so-called kitchen cabinet to the cabinet itself and, unlike Story, denied that the Constitution had provided any "common arbiter."<sup>60</sup>

All this suggests that a half-formed design to clip the Court's wings by repealing the 25th section had germinated in the early stages of the administration. Early in 1830 from Richmond, a strong point of Jacksonian support, Marshall wrote cryptically of a new disposition to prostrate the Judiciary. And sometime prior to 1833—for a variety of reasons—the proposal received presidential support, or at least this was the thrust of an uncontradicted statement made February 28, 1833, on the floor of Congress to a Jacksonian floor leader. "It is well known in the House," declared Congressman Daniel of Kentucky to James K. Polk, the presiding officer of that body, "that the President was in favor of the repeal of the 25th Section—this, you yourself well know."<sup>61</sup> In actuality, sometime before this assertion by Congressman Daniel the proposal lost the presidential endorsement and was discarded. The turnabout was due to conditions in

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57. Letter from John Marshall to Joseph Story, October 15, 1830, in 2 C. WARREN, HISTORY 187.

58. Register of Debates, 21st Congress, 1st Session, February 1, 1830. See also St. Louis *Beacon*, Oct. 17, 1829.

59. See, e.g., Dunne, *Joseph Story: The Middle Years*, 80 HARV. L. REV. 1679 1699-1700, 1705 (1967).

60. A. KENDALL, AUTOBIOGRAPHY 222 (Stickney ed. 1872).

61. 2 C. WARREN, HISTORY 199-200, n. 3.

South Carolina where a fast moving sequence of events late in 1832 proved Story to be right when he insisted in *Martin v. Hunter's Lessee* that federal power was indeed the very bond of union. The specific issue, however, which proved him right was the tariff, which in November of 1832 was declared null and void in South Carolina by a popularly elected convention of that state. Enforcement of the tariff was forbidden within the state after February 1, 1833, and details of resistance were left to the legislature. The issue came to a head, not in the soaring rhetoric of the ordinance of nullification, but in a workaday legislative enactment which forbade appeals of the tariff issue to the federal courts and provided for fine and imprisonment of any state official furnishing a record for federal review. Accordingly, the heart of the confrontation was thrust upon Jackson in the form of a contest on the federal judiciary.

Initially the President seemed mild and even conciliatory, an attitude quite consistent with his position on the Indian question and the ambiguities of his July veto message. But just as his countering toast at the Jefferson Day banquet of 1830 had stunned friend and foe alike, the ultimate presidential response to nullification came in the form of a cannonshot constitutional exegesis. Largely written by Secretary of State Livingston, but at the President's direction, the message was an eloquent and vigorous restatement of the doctrines urged in Story's *Martin v. Hunter's Lessee* and "Webster's Reply to Hayne." The President's major concern was in defining the nature of the Union: "the Constitution of the United States . . . forms a government, not a league."<sup>62</sup> Asserting that the federal courts, not the states, held the ultimate right of constitutional construction, he thunderingly denounced the attempted nullification, not of the tariff, but of section 25 of the Judiciary Act of 1789: "Here is a law of the United States, not even pretended to be unconstitutional, repealed by the authority of a small majority of the voters of a single state."<sup>63</sup>

Story could scarcely believe the turn of events. "The President's proclamation is excellent, and contains the true principles of the Constitution; but will he stand to it?"<sup>64</sup> A like incredulity gripped Governor Hayne. "[T]he president himself . . .," Hayne asserted, "has exercis[ed], as is known to all the world—the right to refuse to execute acts of Congress and

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62. 2 RICHARDSON 648.

63. *Id.* at 647.

64. Letter from Joseph Story to Richard Peters, December 22, 1832, in 2 W. W. STORY.

solemn treaties, even after these had received the sanction of every department of the federal government."<sup>65</sup> He then cited Jackson on a right he claimed for himself: "That the . . . right of deciding, finally and exclusively, as to the validity of acts of Congress . . . belongs to the judiciary . . . has been denied by none more strongly than the president himself who, on a memorable occasion refused to acknowledge the binding authority of the federal court . . . ."<sup>66</sup>

Story need not have been so apprehensive, nor Hayne so outraged. Jackson, his hand strengthened by an overwhelming victory at the polls, was engaging in a political maneuver that far surpassed any of his military maneuvers in boldness and ingenuity. In an extraordinary combination of threat and blandishment, he disarmed the nullifiers but permitted them to salvage some vestiges of pride in their defeat, as the tariff was further revised and the offending ordinance repealed. Perversely, the Cherokee controversy contributed to the very vindication of judicial power, for Jackson had stripped South Carolina of her natural allies in the southernmost states.

An extraordinary episode marked the turn of events. Story, amazed, wrote home that he and the Chief Justice "were to be counted among the president's warmest supporters." He even recounted how, at a state dinner, "President Jackson specially invited me to drink a glass of wine with him . . . . Who would have dreamed of such an occurrence?"<sup>67</sup>

### III. THE AMERICAN LAW

#### A. *Two Doctors from Harvard*

Even more symbolic than the toast in which Story joined President Jackson was the honorary doctorate of laws which Harvard bestowed on Jackson in mid-1833, thereby making the chief executive and senior associate justice co-holders of that title. The Harvard honors came as the climax of the President's northern tour in which New England's thundering reception more than made up its previous electoral distaste. To be sure, some stiff-necked Yankee opposition remained. In a gross libel on Jackson's crisp military prose John Quincy Adams protested vainly against Harvard's bestowing her honors on a barbarian who could scarcely write his name. In a tart New England response citing precedents of earlier de-

65. Quoted in Niles' *Weekly Register*, January 5, 1833.

66. *Ibid.*

67. Letter from Joseph Story to Mrs. Story, January 27, 1832, in 2 W. W. STORY 119.

gress, the head of the University, Josiah Quincy, replied that if the electorate had twice decided Jackson knew enough law to be their ruler, Harvard would not say the American people were wrong. Quincy had served with Story back in the Tenth Congress, and he may well have looked to the future as well as the past. For while John Marshall was still in high intellectual vigor, the Chief Justice was close to eighty and Quincy had already expressed a public hope of the succession falling to Story. ("The Supreme Court," Quincy had toasted a few years earlier, "in event of a vacancy, may it be raised one Story higher.")<sup>68</sup>

Myth, it is said, expresses in its own way a profundity of truth beyond the power of unaffected facts, and the new-found rapport between Harvard's two doctors of law, upon which Quincy had based his hopes, was best reflected in a fable growing out of the Harvard ceremony. As the tale had it, following the long Latin oration pronounced by Quincy and in response to the cries of some supporters for an appropriate reply, Jackson responded with the only two Latin phrases he knew: "E pluribus unum, sine qua non." And as one historian has noted the fable—actually put abroad by Jackson's detractors—merely put in a poetic Latin epigram the reply with which Jackson had previously faced down Calhoun.<sup>69</sup>

But Jackson's apochryphal Harvard response did more than restate his toast at the Jefferson Day dinner. It also summarized a *tour de force* of his fellow doctor of laws which had been published six months earlier. This was Story's three volume *Commentaries on the Constitution With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution*. Dedicated to Marshall, the work appropriately combined appeals to history, utility, and philosophy, for a nationalist interpretation of the Constitution. Starting from a close examination of the charters and history of the colonies, working through the abortive Confederation and closing with a line-by-line commentary of the constitutional text, the work was at once a towering sequel to the Federalist Papers and an artifact of apprehensive pessimism about the world unfolding around the author.

Schematically, Story's monumental exegesis divided along three lines. One was a point-by-point response to the strict construction—states' rights doctrine which the great Virginia jurist, St. George Tucker, appended to an 1803 edition of Blackstone's *Commentaries*.

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68. Quoted in LORENTZ, *THE HUNDRED BOSTON ORATORS* 269 (1859); see also J. QUINCY, *FIGURES OF THE PAST* 269 (1926).

69. G. WOODWARD 85-86.

The Story-Tucker exchange was a dignified and intellectual debate in which professors of Harvard and William and Mary, much like divines of Rome and Geneva, exchanged their solemn disputations. It thus differed from the second level of the polemic work which, distinguished by a note of personal pique, was philosophical rather than legal. This was the remonstrance against Thomas Jefferson, whose posthumously published correspondence had gone off in 1829 like a bomb with reverberations reaching the floors of Congress, striking Story among many others.<sup>70</sup> Although Story and Jefferson had never liked each other since their first meeting in a strained White House interview back in 1807, Story had managed not only to suppress his antipathy but even to accord Jefferson persistent public and private compliment.<sup>71</sup> His forbearance seemed shabbily repaid when from beyond the grave Jefferson pilloried him as a Tory, a pseudo-republican, and a party deserter. Uncharacteristically responding in kind, Story denounced the Jefferson letters as "the most precious melange of all sorts of scandals,"<sup>72</sup> went out of his way to denounce Jefferson's religious views in his Harvard inaugural,<sup>73</sup> and defended himself in an autobiographical letter to his son ("pseudo-republican I may have been, but so was everyone who doubted Mr. Jefferson's omniscience").<sup>74</sup> And, in a final Parthian fusillade, he strung a skein of barbed anti-Jefferson footnotes through the *Commentaries on the Constitution*.<sup>75</sup>

70. MEMOIRS, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON (1829).

71. The first correspondence between Story and Jefferson seems to have been Story's sending the President copies of his two works, *THE POWER OF SOLITUDE* (1805) and a *SELECTION OF PLEADINGS* (1805) in "feeble testimony of the high regard which I entertain for those talents which from the dawn of the revolution to the present moment have been rigorously employed in creating and preserving an independent nation." Joseph Story to President Jefferson, January 4, 1806, in Story Papers, Essex Institute, Salem, Mass. Again in 1816, Story sent Jefferson a copy of his eulogy of Samuel Dexter as a "token of . . . gratitude and respect . . ." Letter of May 25, 1816, Story Papers, Massachusetts Historical Society, Boston, Mass. Also, on the occasion of the deaths of Jefferson and Adams on July 4, 1826, Story gave a powerful and moving oratorical tribute to both. See Records of Town of Salem, July 28, 1826.

72. Letter from Joseph Story to Samuel P. P. Fay, February 15, 1830, in 2 W. W. STORY 33.

73. *THE SPECIOUS PROBLEM OF ONE OF OUR MOST DISTINGUISHED STATESMEN*, MISCL. WRITINGS at 517.

74. Letter from Joseph Story to William W. Story, January 23, 1832, in 1 W. W. STORY.

75. See, e.g., J. STORY, *COMMENTARIES ON THE CONSTITUTION* 40, 159, and 163 (1833) and 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION* 164 and 169 (1833). And see M. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 32-36 and 49-97 (1966).



But there was an anti-Jacksonian theme running through the *Commentaries* as well, and here Story illustrated his painful alienation from the surging democratic forces in American life. For the new and vigorous party system produced by the fissioning of the old Republicans into Whig and Democratic components, his only commentary was a repetition of Washington's warning on the evils of faction. The new and invigorated presidency, perhaps best typified in a constantly changing cabinet, in a coterie of unofficial advisers, and in purposeful use of federal payroll, provoked only a discourse on the potential harm of the powers of appointment. And the notion of the evergrowing capability of the common man to have some choice in his destiny provoked the brooding reflection with which Story cut short his panegyric on the American destiny and closed his last volume—that all this “may perish in an hour by the folly of its only keepers, THE PEOPLE.”<sup>76</sup>

### B. *The Commentaries*

Story's work on the Constitution was not the first fruit of his Dane professorship. The initial produce appeared almost a year before under the title, *Commentaries on the Law of Bailments with Illustrations from the Civil and Foreign Law*. Significantly, the title page made no reference to judicial office but described the author only as “Dane Professor of Law in Harvard University.” That the topic of bailments had been chosen as the first work was doubtless due to the suggestion of Nathan Dane. Persuasive also to Story must have been the attraction of providing an American counterpart to the English case of *Coggs v. Bernard*,<sup>77</sup> where Lord Justice Holt had reached across the channel to enrich the drab and scanty common law on the temporary possession of personal property with the rich sophistication of the Roman code. The instrumental possibilities of such cross-fertilization in an American context were particularly fascinating, for foreign law, Story insisted in his preface, “cannot be a matter of indifference to any who study the law, not as a mere system of arbitrary rules but as a rational science.”<sup>78</sup> Indeed providing strength and vitality to Story's view of the law was a nationalist vision which in its own way echoed Jackson's nullification proclamation, “[T]o hope that America may yet be reserved the

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76. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 760 (1933).

77. 2 Raymond 909 (1703).

78. J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS 394 (1st ed. 1832).

honor of still improving it by a more intimate blending of each system in her own administration of civil justice."<sup>79</sup>

Exemplifying the thesis, Story's *Bailments* ran an extraordinary range from the codes of Justinian to the American frontier—deposits, mandates, loans, powers, postmasters, stagecoach drivers, and bank cashiers. In short, it was the Story opinion expanded to book length. Superbly organized, lucidly written, comprehensive in breadth, and accurate in research, the book laid out the law as it was and from time to time also gave a nudge to what ought to be ("I have . . . availed myself occasionally of the freedom belonging to a commentator to express a doubt or deny a dogma").<sup>80</sup> The work was immensely popular. To be sure, it has no competition save the American edition of Sir William Jones' *Essays on Bailments*, slim outlines of scarcely over one hundred pages. But it was not lack of competition which made for success, but rather the immense practicality of a manual for a *milieu* increasingly concerned with the complexities of commercial and industrial enterprise.

Appropriately, it was the ongoing convergence in the workaday business of an enterprising nation and an enterprising world that formed the basis of Story's next great work of 1834, misleadingly named *Commentaries on the Conflict of Laws*, or in full, *Commentaries on the Conflict of Laws, Foreign and Domestic in Regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills*. Dedicated to James Kent, and again drawing heavily upon the European civilians, it systematized—the English legal historian Dicey said it almost created—a whole branch of the law. It also laid the groundwork for the theory which would complete and crown the cornerstone Story laid in *Martin v. Hunter's Lessee*—a theory of a general commercial law which the Federal courts might, and indeed, should pronounce without reference to aberrant local decisions. One specific base rested upon the sheer necessity:

The whole system of agencies, purchases and sales, credits, and negotiable instruments rests on this foundation; and the nation which should refuse to acknowledge the common principles, would soon find its whole commercial interest reduced to a state, like that, in which it now exists with savage tribes, with the barbarous nations of Sumatra, and with the other portions of Asia, washed by the Pacific.<sup>81</sup>

79. *Ibid.*

80. *Id.* at ix.

81. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 202 (1st ed. 1834).

The other, asserted more cautiously, touched on the nature of American nationalism, and had to be read against the background of his *Hunter's Lessee* opinion:

To no part of the world is [the subject of conflicts] of more interest and importance than to the United States, since the Union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of these states, which call for constant administration of extra-municipal principles.<sup>82</sup>

He closed the work on conflicts on a note of hope, both national and international. Quoting the same line from Cicero which would be the linch-pin of his concept of a general commercial law—that true law is right reason in agreement with nature—he asserted the aspiration that “the comity of nations will be but another name for the justice of nations.”<sup>83</sup>

Yet unbelievably in this series of legal pyrotechnics, lightening up an ever-widening sky, the best was yet to come and it appeared late in 1836 with his *Commentaries on Equity Jurisprudence*. This in truth was the masterpiece encompassing within its systematic framework the extraordinary system whose very plasticity proved at once its own vitality and the despair of its commentators. Even for Story's towering talents the work was formidability itself. Originally he thought he might cover the subject in a book of five hundred pages. Before he was finished, however, this estimate had been exceeded more than twice over. It takes a modern lawyer, engrossed with a conventional workload, almost more time to read Story's *Commentaries* than it took the author to write them. “Think of this,” he wrote in spring of 1836, “I have published a volume of six hundred and ninety pages last year, and am to write another of the same size this year.”<sup>84</sup> The extraordinary complex job of organization and writing came on top of his Supreme Court duties, his Harvard lectures, and his circuit travels. Yet for all Story's genius it at first seemed that in putting his hand to equity he had overreached himself. “I am overwhelmed by my labors,” he wrote in

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82. *Id.* at v.

83. *Id.* at 532. See also Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years Later*, 44 HARV. L. REV. 15 (1934); Nadelmann, *Joseph Story's Contribution to American Conflicts Law*, 5 AM. J. LEG. HIST. 230 (1961); and Valladae, *The Influence of Joseph Story on Latin American Rules of Conflict of Laws*, 3 AM. J. COMP. LAW 41 (1954).

84. Letter from Joseph Story to Francis Lieber, April 10, 1836, in 2 W. W. STORY 230.

early 1835. "I have three works in the press. My *Equity Commentaries* is going through a cut proofs; and the closing part is not yet written. Next week I go on my circuit in Maine."<sup>85</sup> It took all his extraordinary gifts—the photographic memory, the long years of dedicated reading, the superb sense of order and sequence, the ability to write at first draft—to finish the job by November of 1836.

Going through fourteen American and three English editions (the last published in London in 1920)—*Commentaries on Equity Jurisprudence* crowned the many efforts Story had undertaken on behalf of equity—his early support in the Massachusetts legislature, his prose efforts in the *North American Review*, and his pleading in the constitutional convention. Yet curiously, although litigants changed their domicile to get his jurisdiction in his native New England,<sup>86</sup> the assemblies remained unmoved. Needless to say, Story was delighted with the result. In part it marked the half-way point of the labors he set for himself. "I have now published seven volumes and in five or six more, I can accomplish all I propose."<sup>87</sup> Yet, for the first time in his life an apprehensive sense of *ars longa, vita brevis* crept into his optimistic ebullience: "If my life should be spared a few years longer I hope to accomplish the entire series of works which I contemplate."<sup>88</sup>

### C. Codification: Bridge and Battleground

The sharpest collision between the legal nationalism of Story and the folk nationalism of Jackson came in the many-rooted and many-faced codification movement. Formally an effort to cast the law into more systematic and comprehensive forms, the movement both reflected and influenced the circumstances of its environment. At the most elemental level, it could be seen as a natural response to the ever-increasing output and complexity of the statutes, court decisions, and legal writings of an increasingly complex society. At a more intellectualized level, there was an increasing tendency to transfer the methodology and order of the physical sciences to the uni-

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85. Letter from Joseph Story to Richard Peters, February 2, 1835, in Richard Peters Papers, The Historical Society of Pennsylvania.

86. "It is now almost a matter of course, that a citizen of this state, having a cause of any magnitude in amount or principle, steps over the line and becomes the temporary resident of another state, in order to avail himself of the jurisdiction of the United States court." *Providence Journal* quoted in *Niles' Weekly Register*, December 3, 1825.

87. Letter from Joseph Story to John Brazer, November 10, 1836, in 2 W. W. STORY 240.

88. *Ibid.*

verse of law. And on a closely related plane, the evolving humanities, particularly history, emphasized the roots and relationships of the common law to the great tradition of the Roman codes.

Yet cutting across these forces was a cleavage—reformist versus institutionalist—which saw the confrontation between Sir William Blackstone and Jeremy Bentham transferred to America upon the latter's offer to codify American law. "This 'Codification,' formed by a closet politician in Europe . . .,"<sup>89</sup> sneered one New England paper in opting for conservatism. But on American soil, the reformist view found the democratic revolution a particularly congenial environment. Thus, an 1834 Independence Day address of a Yankee labor leader emphatically asserted a contrary view:

The judiciary . . . is the headquarters of the aristocracy. And every plan to humble and subdue the people originates there. One of the most enormous usurpations of the judiciary is the claim . . . of common law jurisdiction. Common law, although contained in ten thousand different books, is said to be unwritten law, deposited only in the head of the judge, so that what he says is common law, *must be* common law.

. . . .

Of all the reforms . . . the reform of the judiciary and the law is the most important.<sup>90</sup>

This view, that the popular assembly was every bit the equal of the judiciary in deciding legal and constitutional questions, drew on a pre-existing and appropriately Jeffersonian hostility to both judicial review and judicial legislation.<sup>91</sup> Its consequence flowered in a persistent effort to keep judiciary on a short bridle through low salaries, short terms, and legislative recall.

But another consequence was to force Story from reform to reaction.

89. *Columbian Centinel*, June 10, 1818.

90. Frederick Robinson, "A Program for Labor," July 4, 1834, in J. L. BLAU (ed.), *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY* 320, 328 (1947).

91. Jefferson's hostility toward judicial legislation and apparently toward Lord Holt's action in *Coggs v. Barnard* was evidenced early:

I have added, also, a Disquisition of my own on the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation, and its incorporation into the legitimate system, by usurpation of the Judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation.

JEFFERSON, *REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1768 TO 1772* (1829).

Originally he was understood to be "very decidedly in favor of reducing the whole of our Law into a written text."<sup>92</sup> Yet this allegiance was both qualified and concealed, and a critical turnabout came in 1836 with his appointment to a commission to consider codification of the law of Massachusetts. The commission report seemed reasonable and balanced, for in a lucid exposition it persuasively pleaded the impossibility of setting out the entire range of the law in a written code, and suggested codifying only that part "of daily use and familiar application."<sup>93</sup> Yet this seemingly reasonable position was merely an overlay for the hostility and insecurity of an anti-democratic pessimism:

Much against my will [he wrote] I was placed at the head of the commission. We shall report favorably to the codification of some branches of the Common Law. But the report will be qualified and limited in its objects. We have not yet become votaries of Jeremy Bentham. But the present state of popular opinion here makes it necessary to do something . . .<sup>94</sup>

Needless to say Story dominated the body,<sup>95</sup> and the way he did is best summed up by a brief line from the Secretary of the Commission: "I have taken the pains to obliterate everything in the Report which might seem to harmonize with some of the radical notions of the day."<sup>96</sup>

Yet Story's total response was in fact far more constructive than his foot-dragging contribution on the Massachusetts Commission. True enough, he, more than any other single man, defeated the American codification movement, at least in its most extreme form. However, he did so by endowing American law with the very systemization, clarity, and harmony that the most vociferous codifiers demanded. In part, his success was due

92. Letter from Joseph Story to Henry Wheaton, in Dunne, *Joseph Story: The Lowering Storm*, 13 AM. J. LEG. HIST. 1 (1969).

93. See 2 W. W. STORY 241-250. The report anticipates that modern jurist, Jerome Frank: "[T]here has been and still is much criticism of the power exercised by judges in construing statutes, that Bentham, Livingston, and their disciples (some even in our time) have insisted that all 'law' must emanate solely from the legislature and have tried, through codification, to destroy all 'judicial legislation.' Repeated attempts on the European continent to exploit that notion have invariably proved disappointing." *Guiseppi v. Walling*, 144 F.2d 608, 620 (2nd Cir. 1944).

94. Letter from Joseph Story to John Williams, December 26, 1836, in 15 MASS. HIST. SOC. PROC. (2nd Ser.) 221 (1902).

95. "You will I am sure pardon my saying that if Judge Story be on the Commission, and of course at its head, the work must be substantially his work." Thropilus Parsons to Charles Sumner, April, 1836, in 1 C. WARREN, HARVARD 503, n. 2 (1908).

96. Letter from L. S. Cushing to Joseph Story, December 30, 1836, in Story Papers, Essex Institute, Salem, Mass.

to the fact that the extreme demands of the codifiers were simply impossible to fulfill. Within the bounds of possibility, however, his counter-attack surged to victory along two interrelated lines. One was in his writing, particularly the *Commentaries*, which itself provided a codification, par excellence, of American law. The other was the Harvard Law School.

#### D. A Law School at Cambridge

In the struggle between reform and institutionalism nowhere were the character and consequence of legal education better recognized than by Jefferson himself. "When Blackstone became the students' hornbook," he had written Madison, "from that moment, the profession (the nursery of our Congress) began to slide into Toryism, and nearly all the young brood of lawyers are now of that hue . . . . [T]hey no longer know what . . . Republicanism means."<sup>97</sup> Tory was indeed the epithet that Jefferson's posthumous correspondence applied to Story, and the target of the criticism would have accepted the substance, if not the label, of the charge. For it was Blackstone, not Bentham, that was the core of the school which Story re-founded at Harvard, and it was Sir William's *Commentaries* supplemented by Standard English works and a growing number of American ones that formed the basis of the curriculum. Instruction was through recitation from the text, moot courts were held, and dissertations asserted and defended as a preliminary to graduation.

There were two differences. The rote instruction, the mechanical recitation, the deadening discipline which had hitherto characterized Harvard pedagogy vanished with the appearance of a teacher who relished both the subject and the people he taught.

[He was] always ready and profuse in his instructions, anxiously seeking out all the difficulties which perplexed the student and anticipating his wants, leaving no stone unturned by which the rugged paths of the law might be made smoother . . . .

[The students] love him more than any instructor they ever had before. He treats them all as gentlemen, and is full of willingness to instruct. . . . The good scholars like him for the knowledge he distributes; the poor (if any there be), for the amenity with which he treats them and their faults.<sup>98</sup>

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97. Letter from Thomas Jefferson to James Madison, February 17, 1826, in KOCH & PEDEN, *LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 726 (1944).

98. Charles Sumner quoted in D. DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* 23-24 (1960).

The other difference was a professional division of labor undertaken in reference to Story's judicial commitments. Story, absent the entire middle term, concentrated in the other two on the subjects of constitutional, civil, and commercial law. Professor Ashmun made appropriate adjustments so as to carry the work of common-law subjects throughout the entire academic year. The professors also differed in their mode of instruction. Ashmun was precise, systematic, and spoke from carefully prepared notes. Story, on the other hand, preferred to rely on his photographic memory and sense of rapport with the class to speak *ad libitem*, often with reference to topical subjects and always with effectiveness:

I attended [ran one report] on Monday at 12 o'clock in the lecture room of the Harvard Law School a lecture by Judge Story on Constitutional Law. He discussed the question "Whether the Constitution was a compact agreement or covenant," touched slightly on the doctrine so popular in South Carolina, and closed with a most beautiful and elegant eulogium on the prospects and happiness of our federated form of government. I was very much pleased with his pleasant and unaffected manners . . . .<sup>99</sup>

The school flourished accordingly. The enrollment crept upward with students coming from widening geographical origins. The law library, whose low estate matched the low watermark of student enrollment, was almost completely reconstituted as Story turned over his private collection to the school for a nominal price. And then, in a solicitation of funds which might serve as a model to modern universities, President Quincy persuaded Nathan Dane to match his original bounty by providing a building to house the books and the professors. Dane Hall, "a beautiful Grecian temple . . . the most architectural and the best-built edifice belonging to the college,"<sup>100</sup> was accordingly dedicated in September, 1832.

A serious setback came in early 1833 with the death of Ashmun which Story felt both professionally and personally ("I feel a pride in declaring that we have worked hand in hand with the most cordial fellowship . . .").<sup>101</sup> Story carried the double teaching load through spring and then had the great fortune to find a successor, Simon Greenleaf of the Maine

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99. Letter from Fred Blount to John Bryan, June 29, 1831, in 23 MASS. HIST. SOC. PROC. (2nd Ser.) 74 (1910).

100. Charles Sumner to Mr. Tower, October 22, 1832, in 1 C. WARREN, HARVARD 447.

101. Letter from Joseph Story to Josiah Quincy, November 3, 1829, in 1 C. WARREN, HARVARD 462.



Bar, who was to be the ideal coadjutor. Temperamentally completely opposite, the two men were as one in talent and reciprocal affection. Story was concerned with general principles, Greenleaf with details. "No wonder," later said a colleague, "that such a man as either of these succeeded; no wonder that a school, in which were two such men, succeeded."<sup>102</sup>

There was far more, however, to the success of the school than these two men, even with one bringing an immense enthusiasm, a towering national reputation, and a natural pedagogy of gifts to the aid of an institution in difficulty. There was also more than Story's stated objective of giving the school "in the view of every student, a decided superiority over every other institution of like nature." To be sure, Harvard turned the corner in terms of enrollment and prestige almost from the first moment of Story's association with it. But it turned the corner, not only for itself but as a prototype of a national development where its influence was both seminal and critical. For it was the development of academic and intellectualized training for the legal profession which not only sounded the death knell for the old law office apprenticeship system (which would take a long time in dying and then go down fighting hard) but also for the millenarian dream of the codifiers of a world wherein every man would be his own lawyer.

Insuring both the relevance and the success of the academic revolution was the commercial orientation which Story brought to the curriculum. It did, to be sure, lay him open to charges that he had vulgarized the majesty of legal education by investing it with a trade-school cheapness. While Story could have answered that a liberal education was the prerequisite, not the product, of legal training, an historically more cogent reply might well be that it was this very workaday concern which involved both the law—constitutional, public, and private—and its institutions in the ongoing entrepreneurial revolution and thereby resulted in the quickening vitalization of the one and the tempering restraint of the other.

A perceptive insight into this interplay came from across the Atlantic. Writing in Paris in 1835, de Tocqueville reviewed his American tour of a few years earlier in a prophetic framework ("in America, I saw more than America")<sup>103</sup> and examined with particular scrutiny the specific constitutional and legal aspects of the American experiment. Acknowledging his dependence on Story's *Commentaries on the Constitution*, de Tocqueville

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102. Professor Parsons quoted in 1 C. WARREN, HARVARD 483.

103. 1 DE TOCQUEVILLE 15.

concluded, as President Jackson had discovered, that it was the federal courts with their territorial and personal jurisdiction and, above all their jurisdiction to determine jurisdiction, that constituted the critical nexus of the American union. Yet above and beyond purely governmental relationships, de Tocqueville also put his finger on the creative tension which arose between the constraint of the emerging American law and the exuberance of American nationalism and concluded, "without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained."<sup>104</sup>

#### IV. SYMBOLS OF AN AGE

##### A. *A Matter of Copyright*

In addition to writing his commentaries and changing the content and character of legal education, Story used one other weapon to blunt the thrust of the codification movement. This was the judicial opinion, where he turned a venerable artifact of the law into a modernized technique of judicature. For Story would take the terse, obscure memorandum of a decision in a particular dispute and change it into a comprehensive and systematic exposition of whatever law bore on the point in question. Thus, each such expression of his views, particularly in important cases, was not so much an award of an individual judgment but a codification in miniature.

To be sure this transformation was not exclusively Story's work, but he played a critical and decisive role in it, and moreover he was well aware of the didactic value of his produce ("... do not omit to have your decisions reported," he advised a fledgling judge).<sup>105</sup> He was also aware of its financial value. His involvement in both aspects had run from an ambitious program to market his circuit court reports to being, *de facto* at least, joint venturer in the twelve volumes published under the name and aegis of Henry Wheaton during the latter's tenure as Supreme Court reporter from 1816 to 1827. While Story does not appear to have received any material gain from the Wheaton reports, he did increase the award of the reporter thanks to extra-judicial contributions of learned notes and erudite appendices, plus enthusiastic, if anonymous, book reviews. His efforts, altruistic at the time, enormously complicated the question of who owed what in the product. Wheaton's immediate reward was the \$1,000

104. *Id.* at 286.

105. Letter from Joseph Story to Joseph Hopkinson, December 16, 1828, in B. A. KONKLE, *JOSEPH HOPKINSON* 260 (1931).

per annum provided for in the Reporter's Act of 1817<sup>106</sup> (a statute which Story helped enact), but there was also a general if diffuse understanding that compensation would also come from the sale of the reports. The association itself was not particularly well known. "I blush to see," Wheaton once acknowledged, "that Chief Justice Spencer (of New York) has very much praised Mr. Wheaton's note on guarantees in *Lanusse v. Barker* in my 2nd volume. *You* know how much of that praise *I* deserve."<sup>107</sup>

The law explosion, the ever-widening Federal jurisdiction, and the quality of the produce combined to give the Wheaton reports an extraordinary popularity with which went, paradoxically enough, something of an increasing embarrassment of riches. Fairly early in his career Wheaton was complaining of the "monstrous bulk"<sup>108</sup> of one of his volumes and along in the next decade Story was expressing the general opinion that "the business of reporting"<sup>109</sup> should be managed more sparingly. When Richard Peters of Philadelphia succeeded to Wheaton's position in 1827, he moved to winnow and update the work of his predecessors through a summarized edition. The foreword suggested an uneasy legal position:

It is not considered that his work will interfere with the interests of those gentlemen who have preceded the reporter in the station he has the honour to hold. Deeply as he is impressed with the absolute necessity of this understanding, he would regret exceedingly such an interference. Their volumes will always be standards for reference, and of the highest authority; and every member of the profession, who has the ability to purchase them, will own them. The legal rights of the proprietors of these most able and valuable works, where they exist, will be carefully respected. Nothing will be inserted in the contemplated publication, but matter in the public record, and which from their nature and other circumstances, are not the subject of literary property. The opinions of the courts are public property.<sup>110</sup>

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106. 3 Stat. 376 (1817).

107. Letter from Henry Wheaton to Joseph Story, June 14, 1819, in Wheaton Papers, Pierpont Morgan Library, New York, New York. (Reprinted with permission.) (Hereinafter cited as Wheaton Papers.) The case is actually in Wheaton's third volume, 16 U.S. (3 Wheat.) 92 (1816), and the note is claimed by Story in a memorandum reprinted in 1 W. W. STORY 283. For other aspects of the Story-Wheaton relationship see Dunne, *Joseph Story: The Middle Years*, 80 HARV. L. REV. 1679, 1684, n. 18 (1967).

108. Letter from Henry Wheaton to Joseph Story, July 2, 1820, in Wheaton Papers.

109. Letter from Joseph Story to Jeremiah Mason, January 8, 1827, in MASON 254.

110. 1 CONDENSED REPORTS OF CASES IN THE SUPREME COURT OF THE UNITED STATES vi (3rd ed. 1844).

Peters turned out to be a prophet of the law, but an inept (or perhaps an extraordinarily astute) judge of sales. Contrary to his assertion, lawyers who were able to afford the original reports showed no inclination to buy them for \$180 when the synoptic version was available for \$36. From faraway Denmark where he was serving as American minister, Wheaton irately watched sales plummet, vainly wrote Webster and Story of his concern, and then returned to America on leave of absence to vindicate his rights. Seeking a permanent injunction and an accounting in the federal circuit court in Philadelphia, his case was considered and dismissed.<sup>111</sup> Reportedly, the district judge had sought Story's advice on the cause, and Story had been rash enough to give it. Wheaton accordingly appealed to the Supreme Court, and, accompanying his cause, was reported on arrival as looking "very mad."<sup>112</sup>

Apparently, his outraged concern continued to the day of final decision, for he looked "strongly excited"<sup>113</sup> when the determinative opinion was read by Mr. Justice McLean in mid-March of 1834. Story had left the Term early, quite possibly to avoid any embarrassment in being present at a conclusion which Peters won on all counts. McLean's opinion was thoroughly Jacksonian. It resolved doubts in favor of free competition and against monopolistic rights with the opinions of the court being declared in the public domain and only the marginal notes being held the subject of literary property. It was also Jacksonian enough to combine a few thrusts against an overweening federal judicial power with a flourish of states-rights rhetoric: "It is clear there can be no common law of the United States. The Federal Government is composed of 24 sovereign states, each of which has its own usages, customs, and common law."<sup>114</sup> Yet it also was Jacksonian that it held the Federal copyright statute not only controlling but pre-emptive and required that it be read *strictissimi juris*—specifically that the 80 copies of the reports which Wheaton had deposited with the Secretary of State under the Reporter's Act could not suffice to satisfy the requirement of a deposit of one required under the copyright statute.<sup>115</sup>

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111. *Wheaton v. Peters*, 29 Fed. Cas. 862 (No. 17,486) (C. C. E. D. Pa. 1832). See generally J. WHICHER, *THE CREATIVE ARTS AND THE JUDICIAL PROCESS* 186-201 (1965).

112. Letter from Horace Binney to John Sergeant, January 15, 1834, in 1 C. WARREN, *SUPREME COURT* 245 n. 2.

113. Letter from Charles Sumner to Joseph Story, March 19, 1834, in Story Papers, Library of Congress.

114. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 673 (1834).

115. 1 Stat. 125 (1790).

Perhaps the cruelest cut which Wheaton endured was the dedication of the synoptic reports to Chief Justice Marshall. It may well have been this circumstance which aroused him to a vituperative fury against Story, exceeding by far anything Thomas Jefferson had to say. In explaining why Marshall's vote went against him on his appeal, Wheaton declared:

I answer that he never studied the cause, and I have the highest authority for this assertion. He pinned his faith on the sleeve of his prevaricating brother, believing that, if the latter had any leaning it was toward me on the friendship the hypocrite once possessed—and which doubtless this continued to pour in that venerable man's ear.<sup>116</sup>

Any doubt as to the identity of the "prevaricating brother" and "the hypocrite" was removed in other references, for Wheaton asserted that Story had conspired with the District Judge to deny him justice at the trial level, and ascribed to Webster an assertion that Peters had something written by "one of their learned bench, which if made public, would condemn him to infamy."<sup>117</sup>

Wheaton's charges seem almost as preposterous as his legal theory that the opinions of the Supreme Court were *inter vivos* gifts to him from the individual justices and thereby his personal property. He did, however, have some ground for complaint; and he was not the only one to remonstrate over the decision. Chancellor Kent himself wrote that "to deny the common law right and to construe the statute with such severity is not palatable to us humble authors."<sup>118</sup> Story's reply was illuminating for the contrast it afforded to his response on the posthumous Jefferson correspondence. Most noteworthy was the forbearance in the face of Wheaton's strictures which unquestionably must have reached his ears. This joined the other nuances in the response to Kent to suggest an apprehension that the ex-reporter had been given something less than perfect justice and explained why Justice Story chose to be absent when the final opinion was read:

I am sorry for the controversy between Mr. Wheaton and Peters, and did all I could to prevent a public discussion of the delicate subject of copyright, in which we all have so deep an interest. . . .

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116. Letter from Henry Wheaton to Eliza Lyman, his sister, May 14, 1837, in E. B. BAKER, HENRY WHEATON 127 (1937).

117. *Ibid.*

118. Letter from James Kent to Joseph Story, April 11, 1834, in 14 MASS. HIST. SOC. PROC. (2nd Ser.) 417 (1901).

The strict construction of the statute of Congress we adopted with vast reluctance . . . I wish Congress would make some additional provisions on the subject, to protect authors, of whom I think no one more meritorious than Mr. Wheaton. You, as a judge, have frequently had occasion to know how many bitter cups we are not at liberty to pass by.<sup>119</sup>

### E. *A Matter of Deposits*

Imagine, if you will, the excitement that would have attended a disclosure that Mr. Justice Frankfurter not only had been the president and a member of the board of the Cambridge Trust Company during most of his years on the Supreme Court, but had repeatedly intervened with the holders of the public purse to secure and retain a large government desposit in that institution. Although the certainty of the excitement is matched by the impossibility of such dual service today, our present standards should not be projected backward. Mr. Justice Story for many years had been judge, president of one bank, and vice-president of another.<sup>120</sup> Certainly no contemporaries thought that there was anything untoward in this state of affairs—or almost none of them.

The basic reason for the complacent acceptance was rooted in the mercantilistic view of the corporation as an arm of government carrying out a public purpose, and the resulting assumption of propriety for a man prominent in public life to undertake supplementary public service as a bank officer. Indeed, such was the long-lived view of the communal character of the corporation that one of Story's eulogists saw nothing improper in recalling that as speaker of the Massachusetts House of Representatives the future Justice had "exerted his influence"<sup>121</sup> to obtain the charter of the Merchants Bank of Salem, an institution with which he was closely associated for over 20 years.

Characteristic of Story's rise in the world of affairs was his ascendancy to the presidency of the Merchants Bank, which he assumed in 1815. It was characteristic also of the standards of that world that Story's board of directors besought his influence to obtain a government deposit, and that they did so, not in covert and confidential communications, but by

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119. Letter from Joseph Story to James Kent, May 17, 1834, in 2 W. W. STORY 182 (1851).

120. See generally Dunne, *Mr. Justice Story and The American Law of Banking*, 5 AM. J. LEG. HIST. 205 (1961).

121. Letter from John Treadwell to W. W. Story, August 25, 1847, in 1 W. W. STORY 205 (1851).

formal resolutions spread upon the bank records.<sup>122</sup> Needless to say, the quest for the balance was crowned with success, not only in original acquisition but in successful retention. In fact it was in the latter connection that the only remonstrance over Story's banking connection arose. It came about not because the president of the Merchants Bank was also a member of the United States Supreme Court. Rather the complaint—a memorial to the Treasury filed by a competing Salem bank of Jacksonian persuasion—was that government funds were kept in a bank headed by one of the “bitter, uncompromising enemies of the administration.”<sup>123</sup> Unfortunately for the rival bank, its effort came at a time when the Treasury portfolio was held by Louis McLane, who shared Story's views on the value of the federal bank, and who saw to it “that the public money was left undisturbed in the Merchants.”<sup>124</sup> The efforts were unavailing, and Secretary of the Treasury Louis McLane saw to it that the government deposit remained “undisturbed” at the Merchants.

Secretary McLane was less successful in seeing that the government deposit remained “undisturbed” at the Bank of the United States. However, he did manage to fight a delaying action in the campaign against the Bank which President Jackson had launched to hasten the demise of that institution. The *coup de grace* aimed at crippling the bank's operational function by terminating the deposit of the 8 to 9 million Treasury funds which were committed to the bank's safekeeping. There was one exception to the statutory mandate—“unless at any time the Secretary of the Treasury shall otherwise order and direct . . . .”<sup>125</sup> McLane not only had no intention of otherwise withdrawing the funds but actively pressed the bank's case for re-charter. These efforts in part caused him to be transferred to the Department of State in June, 1833, with William Duane of Philadelphia as his successor. Duane proved equally intransigent on ending the government's deposit prior to the veto. He had persuaded Jackson to withhold public criticism of the bank and was himself dismissed within four months. Roger Taney, future Chief Justice of the United States,

122. See Dunne, *Joseph Story: The Great Term*, 79 HARV. L. REV. 877, 893 (1966).

123. Letter from John Treadwell to W. W. Story, August 25, 1847, in 2 W. W. STORY 159 (1851).

124. *Ibid.* McLane, however, took another view of other aspects of Story's public philosophy: “You fear Judge Marshall,” he once wrote, “I fear a thousand times more Judge Story and a line of such miserably frivolous bookworms . . . .” Letter to Martin Van Buren, July 20, 1830, in 2 C. WARREN, HISTORY 179-188.

125. 3 Stat. 266 (1816).

was selected for the post. Three days after taking office, Taney announced that deposits of the government would henceforward be made in groups of seven state-chartered institutions rather than the federal bank.

The action was hotly attacked when Congress convened in Washington in late 1833, and it led to Taney's rejection by the Senate when the President submitted his name for formal confirmation. Following longtime procedure, Senator Daniel Webster requested Story's extra-judicial opinion on the deposit controversy. The reply, written on Christmas Day of 1833, must have come as something of a disappointment. Differing from Webster who thought the funds could only be removed in the threat of insolvency, Story stated his view that no such condition was implied under the statute. However, speaking with all the authority of a jurist, a law writer, and the president of a state-chartered bank, he suggested doubts as to the legal authority of the new depositaries to fulfill certain conditions of their federal contract. Then, not satisfied with a delicate matter of interwoven national and state law which might come before him for judgment, he went on to plant a barb in the man who would one day be his chief. Asserting that Taney's power over the deposit was that of a trustee rather than as an officer in the executive branch, he insisted that

[the decision] belongs to the Secretary and to him alone, and any interference by the President to control or influence his judgment, much more to deter him from exercising his judgment, is, on the part of the President, a departure from his duty, and if the Secretary acts upon the opinion of the President, and not upon his own, I think he virtually violates the charter and abandons his trust.<sup>126</sup>

#### F. *A Matter of Arson*

On August 13, 1834, a public meeting was held in Cambridge at which Story spoke in a solemn and impressive manner. That he dominated the proceedings was characteristic not only of the way he had sunk his roots in his new home town, but also of his outgoing and enthusiastic nature generally. "Judge Story," ran one Harvard reminiscence, "with fully two men's stated work, had time for every good cause and worthy enterprise. There was no public meeting for a needed charity, for educational interests, in behalf of arts or letters, or for the advancement of a conservatively liberal theology, in which his advocacy was not an essential part of the pro-

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126. Letter from Joseph Story to Daniel Webster, December 25, 1833, in 2 W. W. STORY 156 (1851).



gramme."<sup>127</sup> The Cambridge meeting fell under the latter classification for it had been called to protest the burning of a convent in Charleston by an anti-Catholic mob on the night of the preceding August 11.

Not that Story felt any affinity for the works of Catholicism. Rather in his early poetic effort, *Power of Solitude*, he had deplored monkish superstition in the best style of the enlightenment. Although as a child, at a time when Guy Fawkes' torches blazed the length of New England, he had been taken aside by his father and told that the Catholic religion had many excellent and pious men, it was his inherited attitude which made the Charleston arson as much a sign of advancement as regression. That Rome should be met with violent resistance was quite consistent with one element in the Yankee tradition. Yet there was another which appealed to order and rationality. Story, as spokesman for the establishment, asserted a countervailing view, deeply regretting "that in this land of religious liberty, proclaiming its duty to give all citizens and inhabitants an equal protection, a scene should have occurred so inconsistent with law, with justice, and with religion."<sup>128</sup>

Unquestionably, Story's concern was heightened by the fact that the burning of the convent seemed not to be an isolated phenomenon. Rather the episode appeared to be part and parcel of a political and social order in which despotism in the center produced King Mob ascendant throughout the country. Or so it seemed to the anti-Jacksonian opposition which increasingly adopted the name of Whig and looked upon themselves as the intellectual and political descendants of Britain's anti-Tory opposition. A characteristic strain came from New York's Chancellor Kent some four months before the burning of the convent:

This elective American monarchy frightens me. The experiment, with its foundations laid upon universal suffrage and an unfettered and licentious press, is of too violent a nature for our excitable people.<sup>129</sup>

And our "excitable people" were behaving appallingly. Just a month prior to the firing of the convent an anti-Negro riot in New York took both life and property and did so without public comment. Shortly there-

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127. A. PEABODY, *HARVARD REMINISCENCES* 58 (1888).

128. Letter from Joseph Story to Bishop Fenwick, August 13, 1834, in *THE CHARLESTON CONVENT: ITS DESTRUCTION BY A MOB* 22-23 (1870). *Id.* at 22-23. Story Papers, Library of Congress.

129. Letter from James Kent to Joseph Story, April 11, 1834, in 14 *MASS. HIST. SOC. PROC.* (2nd Ser.) 418 (1901).

after the scenes were repeated in Philadelphia. ". . . [T]he worst and most fatal symptom of the times," wrote a foreign observer, "is, that the perpetration of these outrages . . . excites no sensation. The destruction of the churches and school-houses of the blacks in New York was looked on as a show . . . ."130

There was, to be sure, a leaven of hope and humanity at work; but nonetheless the scales seemed distressingly unbalanced in the increasing eruption of "murder, outrage, and destruction which has been exhibited throughout the United States."<sup>131</sup> Things worsened as 1834 passed into 1835. With the new year came the first attempted assassination of a president of the United States. To be sure, the assailant was deranged; but his act could have been prompted by the increasingly violent aspect of the American scene and in any event it seemed an accurate, if ominous, prelude to the long, hot summer of 1835. In July a mob, enraged by a bank failure, held Baltimore for three days and burned the homes of the leading citizens ("destroyed by the mobility" noted the seldom punning John Quincy Adams).<sup>132</sup> Down in Charleston another mob led by no less than ex-Governor Hayne demonstrated the right of nullification by sacking post offices in a quest for abolitionist literature, and did so with the connivance of the local postmaster and the approbation of the postmaster general. In Mississippi, mobs hung suspected slave rebels and suspected card sharks with even-handed partiality. And then the geographical cycle seemed to complete itself with another Northern incident as in October of 1835 a Boston mob of two thousand almost succeeded in lynching William Lloyd Garrison, prominent abolitionist, who for his own safety was lodged in jail.

This time it was an English traveler's turn to be shocked, first at the event, next at the public reaction:

[A]nd even Judge Story, when I asked him whether there was a public prosecutor who might prosecute for the assault on Garrison . . . replied that he had given advice (which had been formally asked) against any notice whatsoever being taken of the outrage—the feeling being so strong against the discussion of slavery, and the rioters being so respectable in the city.<sup>133</sup>

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130. M. CHEVALIER, *SOCIETY, MANNERS AND POLITICS IN THE UNITED STATES* (reprint 1966) 390 (1839).

131. *Id.* at 385.

132. 9 J. Q. ADAMS, *MEMOIRS* 252 (1876).

133. H. MARTINEAU, *AUTOBIOGRAPHY* 24-25 (3rd ed. 1877).

Niles' *Weekly Register* found that the "spirit of riot and a disposition to 'take the law into their own hands' prevails in every quarter." In a two-week period it had observed "five hundred articles relating to the various excitements," and it concluded that "[s]ociety seems everywhere unhinged."<sup>134</sup> Others observed a regression in individual morality: "The old Yankee character appears nearly extinct," noted one diarist in bemoaning the "spirit of riot and insubordination."<sup>135</sup> And John Quincy Adams wondered whether the unprecedented affluence might not be at the root of the trouble as he seemed to foresee both sectional and class war. "We are in a state of profound peace and over-pampered with prosperity; yet the elements of exterminating war seem to be in violent fermentation . . . ."<sup>136</sup>

## V. A COMING TOGETHER

### A. *The Whig Mind*

Story's interrogator on the near-lynching of Garrison was Harriet Martineau, English writer and intellectual. She landed in America in mid-September of 1834, and quickly learned of current political attitudes:

The first gentleman who greeted my arrival in the United States a few minutes after I had landed informed me without delay, that I had arrived during an unhappy crisis; that the institutions of the country would be in ruins before I returned to England; that the levelling spirit was desolating society; and that the United States was on the verge of a military despotism.<sup>137</sup>

This was but the first of many warnings. She wondered about the imminence of military dictatorship in view of the absence of soldiers, save for a few she saw at West Point; otherwise, the views seemed remarkably similar to those she had heard in response to reform efforts in her own Britain. Doubtless the malaise was the same in both cases—the frustration of men of affairs who had been stripped of power and removed from a national vitality which they did not share, much less dominate, and where a generally increasing affluence, their own included, made exclusion all the more bitter.

Certainly in its American application the mob anarchy through the

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134. August 13 and September 5, 1835.

135. P. HONE, *DIARY* 108, 110 (Tuckerman ed. 1839).

136. 9 J. Q. ADAMS, *MEMOIRS* 254 (1876).

137. H. MARTINEAU, *SOCIETY IN AMERICA* 10 (1837).

land seemed to them the natural concomitant of despotism in the center as foretold by the pages of Gibbon. For Story and his cultured contemporaries had read their *Decline and Fall* all too well and the parallel seemed not only obvious but unavoidable—the barracks emperor, absolutism masquerading under republican forms, and blatant self-serving in public life. And, in truth, the popularized presidency did have its distressing manifestations. “The capital of the Union presented a revolting spectacle” wrote a German historian. “Flattery, servility, espionage, tale-bearing, and intrigue thrived as they scarcely had in the most infamous European courts.”<sup>138</sup> Foremost, perhaps, was an aura of surveillance. Within days of the first Jackson inaugural, the Chief Justice himself was writing of the “system of espionage . . . pursued by the hunters after office, [even] if not encouraged by the person to whom the retailers of [illegible] would wish to pay their court.”<sup>139</sup> And certainly nothing in the ensuing years tended to quiet the growing sense of apprehension. “If I talk too freely, burn my letter,” Kent once wrote to Story.<sup>140</sup>

Yet rhetoric became a prison as the Whigs carried public oratory into a stylized private dialogue, and that which began as a flourish of opposition became instead an indispensable part of private conversations wherein participants sought to outdo each other in predictions of disaster. Story’s complex union of optimism and depression was almost tailor-made for this milieu and he participated accordingly as he joined the chorus in both private correspondence and public utterance. “[T]he picture you give of public affairs,” responded his minister to his appraisal in early 1834, “is dark and humiliating in the extreme,”<sup>141</sup> and by summer he passed to open protest in two vigorous remonstrances. One, an anonymous eulogy to Webster, summarized its contents in its title: “Statesmen: Their Rareness and Importance.” “[W]e have few, very few statesmen; we have party men and party leaders . . . we have politicians of all sorts . . . we have demagogues of every rank and degree . . . .”<sup>142</sup> Chief Justice Marshall’s response to a complimentary copy joined in its pessimistic estimate. “To men who think as

138. 2 H. VON HOLST, A CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES (Later trans.) 25-26 (1879).

139. Letter from John Marshall to Thomas Marshall, March 20, 1829, in Marshall Papers, Virginia Historical Society, Richmond, Virginia.

140. Letter from James Kent to Joseph Story, note 118 *supra*.

141. Letter from John Braser to Joseph Story, March 4, 1834, in Story Papers, Library of Congress.

142. 7 NEW ENGLAND MAGAZINE 89 (1834).

you and I do," wrote Marshall, "the present is gloomy enough; and the future presents no cheering prospect."<sup>143</sup>

Story's other undertaking that summer was a lecture, "The Science of Government as a Branch of Popular Government." It gave him an opportunity to counter-attack publicly on several fronts. One riposte was directed at the Jacksonian ideal of simple government and, needless to say, simple law:

If there be any truth . . . it is that in the proposition as a government is free, it must be complicated. Simplicity belongs only to those where one will govern all, where few arrangements are required, because no checks to power are allowed; where law is not a science but a mandate to be followed and not to be discussed; where it is not a rule for permanent action but a capricious and arbitrary dictate of the hour . . . .<sup>144</sup>

The other was an eloquent restatement of Whig foreboding:

Let not Americans forget, that Greece, immortal Greece has been free; and yet, thousands of years have already rolled over her servitude; that Italy, beautiful Italy, has been free, but where is now her republican grandeur? . . . the spirit of liberty is not there; and Rome has become, as it were, the vast sepulcher of her own perished glory.<sup>145</sup>

His words were in sombre contrast to the soaring optimism which had attended his public oratory during the administration of John Quincy Adams, and as time went on his moments of depression deepened and lengthened. Dropping in to see Chancellor Kent on his return from the 1835 Term of the Supreme Court, he confessed that Aristotle, Cicero, and Burke had become the polestars of his political thought, and that he found in their words proof positive of the folly of the new times. Indeed he had been thinking of himself more and more as an American Cicero lately. "I seem almost . . . to be in a dream," he had noted a year earlier, "and to be called back to the last days of the Roman republic, when the people shouted for Caesar, and liberty itself expired with the dark but prophetic words of Cicero."<sup>146</sup> Now he summed it all up to Kent in a terse condemnation that

143. Letter from John Marshall to Joseph Story, October 6, 1834, in 2 W. W. STORY 173 (1851).

144. MISCL. WRITINGS 619.

145. *Id.* at 623; see also WELTER, POPULAR EDUCATION AND DEMOCRATIC THOUGHT IN AMERICA 75 (1963).

146. Letter from Joseph Story to Samuel P. P. Fay, February 18, 1834, in 2 W. W. STORY 154 (1851).

Cicero had prefigured it all—"the evils of democracy as they are and always will be."<sup>147</sup>

### B. *A Jacksonian Thermidor*

In addition to pronouncing orthodox Whig doctrines on complexity of government and on the danger of despotism, Story's speech before the American Institute of Instruction wove in a third element as fully Jacksonian as Whig and tracing its intellectual lineage through the Northwest Ordinance to the Puritan foundations of Story's New England. This was an almost unshakable optimism in the perfecting power of education, and Story gave it a particularly political application. Conceding that the science of government could be taught (for such indeed was the very title of his address), he suggested that the proper mode of instruction was the "constant use of suitable elementary works . . ." <sup>148</sup> And in suiting action to words, he took time from his own incredible schedule to put his *Commentaries on the Constitution* into two simplified texts for non-professional use. One, *The Familiar Exposition*, was designed for college students. The other, *Constitutional Class Book*, was written for the grade schools. Perhaps the latter was the most important version of all, for as Story wrote on Independence Day of 1834:

I shall be glad if the Constitutional Class [Book] should take well to the public, for it may have some tendency to infuse into young minds the true principles of our government. If they are once well established there, it will be difficult under any extravagancies of party spirit wholly to obliterate them.<sup>149</sup>

And indeed he was more right than he intended, for while universal suffrage might have chilled the Whig mind, universal education commanded an increasingly wide approval. And in the very necessities of the case the underlying forces which nurtured and shaped this movement had other tempering and acculturating consequences. Thus, the Jacksonian theoreticians, who increasingly called themselves Democrats, could "acknowledge, in general, a strong sympathy with minorities, and consider that their rights have a high moral claim on the respect and justice of majorities; a claim

147. Quoted in 5 AM. L. REV. 368 (1871).

148. MISCL. WRITINGS 627.

149. Letter from Joseph Story to Charles Sumner ("Student at Law"), July 4, 1834, in Story Papers, Harvard College Law Library.

not always fairly recognized in practice by the latter . . . ."<sup>150</sup> Yet the plain fact of the matter was that to the extent that a concern for minorities—the Indians, the slaves, the handicapped—had a political base, it lay in the Whig party. To be sure, Whig concern sought to fortify political weakness with an appeal to moral sentiment. But it had an authentic core for all of that, and it provided the ultimate nexus whereby the rising spirit of conscientious concern, almost wholly outside the Jacksonian mainstream, found political outlet.

Tending toward the same end of checking and restraining initial exuberance was the inevitable lesson of experience. Like their Jeffersonian forebearers, and indeed as Story's Boston address had suggested, there was more returning to simplicity than simplistic yearnings. Government simply refused to stay simple, as the world about it grew more complex. It became particularly complex and expensive at the state and local level. But even in Washington and despite heroic efforts, federal expenditures not only increased but did so at a faster pace than population.<sup>151</sup> And, in part, it became complex and proliferate through the inevitable process whereby the children devoured their revolution.

The latter development was signalled when the troubled years of 1834-1835 were opened with a new form of violence:

An older and more intimate friend of General Jackson's was Major John Eaton, distinguished as the husband of Peggy Eaton. He had been a Tennessee planter like Jackson himself and became Secretary of War in Jackson's cabinet. But when Mrs. Eaton's social problems brought about reconstitution of the cabinet and her husband's retirement therefrom, he entered the world of private enterprise as president of the company formed to build and operate the Chesapeake and Ohio canal. In the course of labor difficulties that arose soon after, President Jackson had federal troops called out in response to Eaton's appeal. This was the first instance in American Labor history of intervention by the federal military in labor disputes . . . .<sup>152</sup>

For it was no paradox but rather the very logic of history that the first repression of the new industrial order in America came not as a reaction

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150. First Editorial "The Democratic Principle," from *The Democratic Review*, January, 1838, in E. ROZWENC, *THE MEANING OF JACKSONIAN DEMOCRACY* 20 (1963). (Hereinafter cited as E. ROZWENC.)

151. See L. WHITE, *THE JACKSONIANS* 9 (1954).

152. Post-publication interpolation written by the late Bray Hammond for insertion at page 345 in his *BANKS AND POLITICS IN AMERICA* (1957) and reproduced here with the kind permission of Mrs. Hammond.

of the Whig-Federalist conservatives but rather as an official counterblow by the Jacksonian state—or so one observer saw it. “The old war between the King and the Barons is well nigh ended,” wrote Orestes Brownson, “and so is that between the Barons and the Merchants and Manufacturers—landed capital and commercial capital . . . . And now commences the new struggle between the operative and his employer, between wealth and labor.”<sup>153</sup>

Yet such rhetoric succeeded only in alarming the essentially pragmatic Jacksonians whose radicalism encompassed shaking the title deeds of their predecessors but whose conservatism demanded securing their own. Hence, when all was said and done, the makers of the Jacksonian revolution sought equality of opportunity, not of reward, and were compelled by their own logic ultimately to turn to social order and the maintenance of private rights under a rule of law.<sup>154</sup>

### C. *A Sense of Renewal*

That Jacksonian and Whig shared in large measure a common *ethos* and in fact edged toward a common center did not make the process of change any the less agonizing, much less encourage any sense of rapprochement. Indeed the bitter campaign of 1836 in which Martin Van Buren continued the Jacksonian legacy only underscored how much both sides were prisoners of their rhetoric. The Whigs, now doubly despondent at the *arriviste* ascendancy, redoubled their talk of despotism, anarchy, and decay, yet denied it by the immense and zestful activities of their daily lives. Similarly the Jacksonians rang the changes of states rights, strict construction, the common man, and equality of opportunity, all the while using the central government when it suited their purposes to lay the foundations of enterprising, capitalistic industrialism.

To both points of view the enfolding mantle of an authentically American law—constitutional, private, and public—provided something of a common shelter. The Whigs, typified by Story and Kent, mixed an enormous amount of rhetoric as they extolled the glories of the sky and privately hoped that its constraints might somehow secure a social tranquility of vested right and private property. And, after their fashion, so did the Jacksonians as they pressed their own quest for a simple, uncomplicated,

153. Brownson, “The Laboring Classes,” in E. ROZWENC 26.

154. See V. MEYERS, *THE JACKSONIAN PERSUASION* 187 (1957).



and understandable legal order which might legitimize both equality of opportunity and security of reward. And, indeed, beneath the differences the common core of Whig and Jacksonian was strikingly inferred in the messages which the two doctors of law from Harvard delivered within a short time of each other.

One came at the Harvard bicentennial in October, 1836, in an impromptu speech of Story which hailed law as "the great instrument by which society is held together . . ." and then passed to an encomium as fully Jacksonian as Whig in its basic motivation:

Without it, neither liberty, nor property, nor life, nor that which is dearer than life, a good reputation, is for a moment secure. It is, in short, the great elastic power which pervades and embraces every human relation. It links man to man by so many mutual ties, and duties, and dependencies, that, though often silent and unseen in its operations, it becomes at once the minister to his social necessities, and the guardian of his social virtue.<sup>155</sup>

A cryptically parallel theme emerged a few months later in a message from Andrew Jackson. It was an extraordinary document reflecting all the strength and ambiguity of the outgoing president. The Indian removals were seen as a blessing. "[T]he States which had so long been retarded in their development . . . are at length released from this evil."<sup>156</sup> So was the demise of the federal bank ("[T]he paper money system and its natural associations—monopoly and exclusive privilege").<sup>157</sup> But still another passage indicated that the evolving legal and juristic philosophy of the Jacksonian revolution should not be sought in these triumphal asides. Rather the core lesson dealing with both the nature of law and the character of its dispensing instrument appeared in an elliptic and elusive reference which epitomized the vindication which nullification had given both *Martin v. Hunter's Lessee* and section 25 of the Judiciary Act of 1789:

Unconstitutional or oppressive laws may no doubt be passed by Congress . . . . If they are within the reach of judicial authority, the remedy is easy and peaceful . . . and if from the character of the law, it is an abuse of power, not within the control of the judiciary, then free discussion . . . will not fail to redress the wrong . . . . But until the law shall be declared void by the courts or re-

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155. 2 W. W. STORY 255 (1851).

156. 3 RICHARDSON 306.

157. *Id.* at 294.

pealed by the Congress no individual or combination of individuals can be justified in forcibly resisting its execution.<sup>158</sup>

The message was in fact one of farewell. It was dated March 4, 1837, a day fair and springlike, and thus very much like the March 4 of eight years earlier. There was also an extraordinary symbolic touch as the outgoing President Jackson and the incoming President Van Buren rode to the inaugural ceremonies in a coach made from the wood of the *U.S.S. Constitution*. For reminiscent of both the old and new, the basic oak which had formed both ship and coach exemplified the capacity of the basic constitutional material to both admit and constrain the Federalism of the early republic and the exuberant democracy of the Jacksonian revolution of its second growth. To be sure, much of the violence and brutality which made up the dark underside of American life was still there, and slavery continued to present its fatal contradiction to the American dream. Yet through it all persisted a sense of uplifted destiny. Certainly it was this spirit rather than exuberance which was the order of Jackson's last day in the presidency. Indeed there was very little of King Mob in the response which greeted the old president as he left the steps of the capitol. "It was a cry," noted Senator Benton, "such as power never commanded or a man in power never received. It was affection, gratitude, and admiration . . . the acclaim of posterity descending from the bosom of contemporaries."<sup>159</sup>

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158. *Id.* at 247.

159. T. BENTON, THIRTY YEARS VIEW 458 (1854).