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# THE NATIONALISM OF SWIFT V. TYSON\*

J. S. WATERMAN\*\*

Had *Swift v. Tyson*<sup>1</sup> been decided differently by Judge Joseph Story legal literature would be considerably less in volume.<sup>2</sup> If the historical importance of the decision can be judged by the controversies over it, other explanations of it can perhaps be condoned.

John Chipman Gray explained the decision by an analysis of Judge Story's character and position. Judge Story's fondness for glittering generalities, his restless vanity, his place as the oldest judge on the bench, and his preparation of a work on bills of exchange, Mr. Gray said, conspired to produce the doctrine designated by the name of "Swift v. Tyson."<sup>3</sup> Such an explanation, if written today, would perhaps be quite in accord with modern biographies of a psycho-analytical nature.

But Thomas Jefferson, had he lived till 1842, might have said that one could not have expected more from a "pseudo-Republican"<sup>4</sup> or a product of Massachusetts jurisprudence—that queer mixture of Mosaic principles, of a little dash of common law, and a lot of original notions of their own—which had never produced a first-rate common law lawyer.<sup>5</sup> And any good Virginia "Republican" leader could have said of the decision that it was but another phase of the judicial nationalism begun by Marshall.<sup>6</sup>

## II

The history of the appointment of Story to the bench and his political views may throw some light on the decision. When President Madison in 1811 appointed Joseph Story of Massachusetts to the Supreme Court of the United States,<sup>7</sup> the Federalists in New Eng-

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<sup>1</sup> 16 Pet. 1, 10 L. ed. 865 (1842).

<sup>2</sup> For a list of articles on *Swift v. Tyson* see: FRANKFURTER AND KATZ, *CASES OF FEDERAL JURISDICTION AND PROCEDURE* (1931) 159; MEDINA, *CASES ON FEDERAL PROCEDURE* (1926) 82.

<sup>3</sup> GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1924) 253.

<sup>4</sup> 11 *THE WORKS OF THOMAS JEFFERSON* (Ford ed. 1904) 143, a letter of 1810.

<sup>5</sup> *Id.* at 151, 154, a letter of 1810.

<sup>6</sup> 4 BEVERIDGE, *MARSHALL* (1919) c. 6.

<sup>7</sup> 3 LEWIS, *GREAT AMERICAN LAWYERS* (1908) 137; WARREN, *A HISTORY OF THE AMERICAN BAR* (1911) 272; 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1923) 400-426.

land viewed the act with their accustomed alarm over the stability of the young nation.<sup>8</sup> Of the appointment it was said:

"I remember my father's graphic account of the rage of the Federalists when 'Joe Story, that country pettifogger, aged thirty-two,' was made a judge of our highest court. He was a bitter Democrat in those days, and had written a Fourth of July oration which was a red flag to the Federal bull."<sup>9</sup>

Jefferson, who was personally interested in the appointment of a successor to Justice Cushing of Massachusetts, because of the legal controversy with Livingston<sup>10</sup> over the *batture* in New Orleans, thought that Story was a "tory," the worst he could say of any man; too young no doubt, to resist Marshall; and of questionable political faith, despite his alleged "Republicanism."<sup>11</sup> Story in turn thought none too highly of the Virginia visionary,<sup>12</sup> whose embargo legislation of 1807 had almost ruined maritime New England.<sup>13</sup>

Jefferson at one time desired the appointment of Judge John Tyler of Virginia to the Supreme Bench, as Cushing's successor, whose "soul never quailed" and who could measure "his powers by the side of Chief Justice Marshall."<sup>14</sup> At any rate, Tyler would be no "milk-and-water associate" who could not maintain an independence of judgment against Marshall.<sup>15</sup>

Story possessed character enough to resist Marshall, had he cared to; but instead the two soon became firm friends and no one wor-

<sup>8</sup> WARREN, JACOBIN AND JUNTO (1931) 160.

<sup>9</sup> QUINCY, FIGURES OF THE PAST (1884) 188.

<sup>10</sup> 11 JEFFERSON, *op. cit. supra* note 4, 141, 153, letters of 1810. Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411 (D. Va. 1811).

<sup>11</sup> 1 WARREN, *op. cit. supra* note 7, 406.

<sup>12</sup> 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL (1908) 235-238. Story said that a "pseudo-republican was one who dared to venture a doubt upon Mr. Jefferson's infallibility." 1 W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY (1851) 185.

<sup>13</sup> See MACDONALD, SELECT DOCUMENTS (1905) 176, for the Embargo Act of 1807. See also SEARS, JEFFERSON AND THE EMBARGO ACT (1927); AMES, STATE DOCUMENTS ON FEDERAL RELATIONS (1906) 25.

". . . the apparent object of Mr. Jefferson being to destroy the commercial interests, with a view of rendering the country self-subsistent. . . .

"Already its results [the Embargo Act] had been disastrous to the commerce of the sea-board States, and particularly to New England, which was then almost wholly commercial in its enterprise. . . ."

1 STORY, *op. cit. supra* note 12, at 171. See *id.* at 183-187, to the effect that Jefferson's policy was for New England to do everything and to have nothing and that "our own interests" are sacrificed.

<sup>14</sup> 11 JEFFERSON, *op. cit. supra* note 4, at 140. 1 TYLER, LIFE AND TIMES OF THE TYLERS (1884) 186, a letter of Jefferson written in 1810.

<sup>15</sup> 11 JEFFERSON, *op. cit. supra* note 4, 140-142.

shipped the Chief Justice more than the young "Republican" appointee.<sup>16</sup> One can hardly accuse Story of being a renegade,<sup>17</sup> for despite the fact that he was appointed a member of the Supreme Court as a "Republican," he was never an admirer of the Virginia leaders.<sup>18</sup> His choice for the bench by President Madison came long after one appointee had declined, another had been rejected by the Senate, and a third appointment confirmed but refused by the appointee. His selection was due to the fact that few "Republican" lawyers were available in New England, a section supposedly entitled to Cushing's successor.<sup>19</sup>

Though Story might have indulged in some youthful indiscretions in his "Fourth of July oration," his politics was not the agrarian states' rights philosophy of Jefferson.<sup>20</sup> Story's views were nationalistic<sup>21</sup> and "espoused the new gospel of capitalism, with none of the agrarian prejudices of the landed gentry to hold him back";<sup>21a</sup> ideas of which Jefferson and his disciples could not be accused of being particularly fond.<sup>22</sup>

<sup>16</sup> 4 BEVERIDGE, *op. cit. supra* note 6, c. 2; Moses, *The Friendship Between Marshall and Story* (1901) 35 AM. L. REV. 321. Story dedicated, in a laudatory introduction, his work on constitutional law of 1833 to Marshall.

<sup>17</sup> For the attacks on Story as a renegade and the explanation of his emancipation from his party and the early prejudices in favor of Mr. Jefferson's abstractions, see 1 STORY, *op. cit. supra* note 12, at 277.

<sup>18</sup> For Story's attitude on states' rights, see a letter of 1819 in which he said: "All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he [Pinkney] brushed away with a mighty besom." *Id.* at 325.

<sup>19</sup> 5 ADAMS, HISTORY OF THE UNITED STATES (1891) 359; 11 JEFFERSON, *op. cit. supra* note 4, at 151; ORTH AND CUSHMAN, AMERICAN NATIONAL GOVERNMENT (1931) 520. In 1801 Story said that there were not more than five or six lawyers in Massachusetts who dared avow themselves to be "Republicans." 1 STORY, *op. cit. supra* note 12, at 96.

<sup>20</sup> MERRIAM, AMERICAN POLITICAL THEORIES (1924) c. 4; BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY (1915).

For Jefferson's attitude on the importance of agriculture in the new nation, see PARRINGTON, THE COLONIAL MIND (1927) 346-349; 6 THE WRITINGS OF THOMAS JEFFERSON (Washington ed. 1854) 335.

<sup>21</sup> GETTEL, HISTORY OF POLITICAL THOUGHT (1924) 418.

<sup>21a</sup> PARRINGTON, THE ROMANTIC REVOLUTION IN AMERICA (1800-1860) (1927) 301.

See also 2 STORY, CONSTITUTION OF THE UNITED STATES (5th ed. 1891) §§1057, 1058; *infra* note 58.

See also Judge Story's views on the "citizenship" of a corporation for purposes of diversity of citizenship: 2 STORY, *op. cit. supra* note 12, at 469; 2 WARREN, *op. cit. supra* note 7, at 395.

<sup>22</sup> 4 JEFFERSON, *op. cit. supra* note 4, at 85.

"The Southern States are accused of a hostility to commerce; but this is by no means true, in the extent to which we are taught to believe. . . . The truth is that the Southern States have no hostility to commerce, as such; they have a system of reasoning on the subject which is abstract and peculiar;

Story's views were stated in his own language when he said:

"Nay, a Virginia republican of that day, was very different from a Massachusetts republican. . . . I was avowedly a believer in the doctrines of Washington, and little infected with Virginia notions, as to men or measures."<sup>23</sup>

After his accession to the bench in 1811, Story proved that the Virginia dynasty never made a worse guess than when they selected him. Jefferson's hope of republicanizing<sup>24</sup> the bench by appointments from his party proved futile and it was his fears rather than of the Federalists which were realized. The staunchest of Federalists could now approve of Story, whose constitutional decisions<sup>24a</sup> should take their place along with those of Marshall as nationalistic. In fact, some of the anti-nationalists later feared Story, an alleged "miserably frivolous bookworm," even more than Marshall.<sup>25</sup>

### III

Though Story came to the bench as a "Republican" his decisions were not "infected with Virginia notions" as can be shown by two important opinions, both prior to *Swift v. Tyson*, which are seldom discussed together.

In 1813 Judge Story while on the circuit, in *United States v. Coolidge*,<sup>26</sup> affirmed a then current Federalist view<sup>27</sup> that there were Federal common law crimes.<sup>28</sup> Story perhaps did not include all and their opposition to it results less from dislike, than from a fear that all other objects will be sacrificed to it." 1 STORY, *op. cit. supra* note 12, at 182, a letter of 1809.  
"So much for the Virginia desire to destroy commerce." *Id.* at 193, a letter of 1809.

<sup>23</sup> 1 STORY, *op. cit. supra* note 12, at 128.

<sup>24</sup> 11 JEFFERSON, *op. cit. supra* note 4, at 153.

<sup>24a</sup> For these decisions see: 3 LEWIS, *op. cit. supra* note 7, 138-167.

<sup>25</sup> 2 WARREN, *op. cit. supra* note 7, at 179.

<sup>26</sup> 1 Gall. 488, Fed. Cas. No. 14,857 (D. Mass. 1813). See also 1 Wheat. 415, 4 L. ed. 124 (1816).

In *Swift v. Tyson*, Mr. Dana for the defendant, who opposed Story's view in that case, discussed in his argument Story's views in the *Coolidge* case and stated that the question raised in this latter case was again presented in *Swift v. Tyson*, 16 Pet. at 11, 10 L. ed. at 868-9.

<sup>27</sup> See the remarks of Chairman of the Congressional Committee, to consider the extension of the Sedition Act of 1798, who stated that the statute should be continued as the Federal common law crime of seditious libel, which was based on the law of England prior to the Revolution, was ameliorated by the Sedition Act and was therefore more objectionable than the statute. ANNALS OF 6TH CONGRESS (1799-1801) 916-917, debate of Jan. 21, 1801.

<sup>28</sup> For the history of the cases on Federal common law crimes, see: RAWLE, CONSTITUTION (2d ed. 1829) c. 29; 1 KENT, COMMENTARIES 331; 1 STORY, CONSTITUTION OF THE UNITED STATES (5th ed. 1891) §158; WHARTON, STATE

common law crimes but limited them to those against the sovereignty of the United States and to those within the powers conferred on the Federal government by the Constitution. This decision certainly was not in accord with the ideas of the Virginia "Republicans." Madison, who appointed him to the bench, had as early as 1800 prepared a long report to the Virginia Assembly which denounced the idea of Federal common law crimes.<sup>29</sup> Later St. George Tucker in 1803 in his edition of Blackstone had expressed the same view,<sup>30</sup> and Jefferson considered the idea of any Federal common law, criminal or civil, as but a step to accomplish a monarchy peaceably.<sup>31</sup>

Even if the non-statutory crimes for which the Federal courts could punish were to be confined solely to admiralty jurisdiction,<sup>32</sup> which was the issue in the *Coolidge* case,<sup>33</sup> New England maritime commerce would have been far safer. And Story, no doubt, expressed the fears of the commercial groups when he pointed out that depredations on foreign trade could go on with the national government powerless to prevent them in the absence of Federal criminal statutes or a Federal common law of crimes.<sup>34</sup>

This decision exalted the power of the national government in the protection of commerce and invoked the aid of the common law for that purpose; surely these ideas were no part of the legal philo-

TRIALS (1849) 85, n.; 1 WHARTON, CRIMINAL LAW (10th ed. 1896) §254; WARREN, A HISTORY OF THE AMERICAN BAR (1911). For support for Story's view in this case, see Warren, *New Light on the History of the Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 73.

<sup>29</sup> 4 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION (1901) 546, 561, "Madison's report on the Virginia resolutions of 1798-'9, exploding the common-law doctrine, and recognized as a masterpiece of logic, gave the Federalists a fearful shock." 1 TYLER, *op. cit. supra* note 14, at 258.

<sup>30</sup> See 1 TUCKER, BLACKSTONE (1803), editor's appendix, 378, n. E. to the effect that there is no federal common law. See 5 *id.* at 3, n. A, to the effect that there are no federal common law crimes.

<sup>31</sup> 9 JEFFERSON, *op. cit. supra* note 4, 87, 139. 4 THE WRITINGS OF JEFFERSON (Washington ed. 1854) 301.

<sup>32</sup> See LONG, CASES ON CONSTITUTIONAL LAW (1926) 471, n. 2, to the effect that the only instance where Congress exercises a legislative power as a result of jurisdiction conferred on the judiciary is in the case of admiralty.

<sup>33</sup> "But the subsequent case of *Coolidge* did not fall within that principle, because the offense there charged was clearly a case of admiralty jurisdiction, and the courts of the United States would seem to have had general and exclusive jurisdiction over the case." 1 KENT, COMMENTARIES 338; see also 1 WHARTON, CRIMINAL LAW (10th ed. 1896) 268, n. 3.

<sup>34</sup> 1 STORY, *op. cit. supra* note 12, 247, 297.

For the importance of a national admiralty jurisdiction, as opposed to state jurisdiction, in relation to trade, see FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1928) 7.

ophy of the Virginian "Republicans." Thus in two years after his selection, the new appointee was showing his emancipation from early predilections, if any, to "Virginia notions."

#### IV

In 1816, in *Martin v. Hunter's Lessee*,<sup>35</sup> Story announced his views on the nature of the judicial power of the Federal courts and first stated his constitutional views on the relation of the states to the Federal government.<sup>35a</sup>

In a dictum he said of the Federal courts:

"If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. . . . It would seem, therefore, to follow that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original jurisdiction. . . . But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."<sup>36</sup>

Since the dictum was historically unsound<sup>37</sup> and not justified by the language of the Constitution<sup>38</sup> it has not been followed.<sup>30</sup> It serves, however, to show his distinctly nationalistic attitude and his desire to increase the power of the Federal judiciary; a desire perhaps justified to some extent at the time because Federal jurisdiction was confined largely to cases of diversity of citizenship and did not include original jurisdiction over Federal questions.<sup>40</sup>

But the anti-nationalists had no such desire to expand the juris-

<sup>35</sup> 1 Wheat. 304, 4 L. ed. 97 (1816).

<sup>35a</sup> 1 STORY, *op. cit. supra* note 12, at 277. See 1 WARREN, *op. cit. supra* note 7, 443, for a discussion of this case. See Warren, *Federal Criminal Law and State Courts* (1924) 38 HARV. L. REV. 545, 568, to the effect that this view was a favorite Federalist one.

<sup>36</sup> See *infra* note 59.

<sup>37</sup> Mr. Wilson and Mr. Madison said in debates in the Federal Convention of 1787, "that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the legislature to establish or not to establish them." 5 ELLIOT, *op. cit. supra* note 29, at 159.

THE FEDERALIST (Lodge, 1888) No. 81, 511, No. 82, 516; WARREN, THE MAKING OF THE CONSTITUTION (1928) 236-327. See also Brown, *The Jurisdiction of Federal Courts* (1929) 78 U. OF PA. L. REV. 179, 180.

<sup>38</sup> Art. 111, §2.

<sup>39</sup> *Kline v. Burke Const. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226, 24 A. L. R. 1077 (1922); *Ex parte McCardle*, 7 Wall. 506, 19 L. ed. 264 (1869). See, however, COUNTRYMAN, THE SUPREME COURT AND ITS APPELLATE POWER UNDER THE CONSTITUTION (1913) c. 3.

<sup>40</sup> To the effect that federal questions were not within the scope of the original jurisdiction of inferior federal courts until 1875, see FRANKFURTER AND KATZ, *op. cit. supra* note 2, 734-735.

diction of Federal courts, even within their constitutional limits, and were willing to allow the state courts to continue to deal with Federal questions as a matter of original jurisdiction.<sup>41</sup>

Of the opinion as a whole it has been said:

"Mr. Henry Adams<sup>42</sup> asserts that Chief Justice Marshall achieved one of his greatest victories by causing Justice Story, a Republican, raised to the Bench in 1811 for the purpose of contesting his authority, to pronounce the opinion of the Court in the case of *Martin v. Hunter's Lessee*."<sup>43</sup>

## V

Finally in 1842 in *Swift v. Tyson*,<sup>44</sup> when the court was Democratic however,<sup>45</sup> came a decision in which it was held that the Federal courts, in diversity of citizenship cases,<sup>45a</sup> on questions of general commercial jurisprudence<sup>46</sup> should use their own judgment as to what is the state law. Granting that there is no Federal common law,<sup>47</sup> Story seems to have intended in the field of commercial jurisprudence to build up a body of unwritten law which did not necessarily follow the law of the state whose decisions should perhaps have governed the case.<sup>48</sup>

<sup>41</sup> Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 53; ORTH AND CUSHMAN, *op. cit. supra* note 19, at 510.

<sup>42</sup> 9 ADAMS, *op. cit. supra* note 19, at 191.

<sup>43</sup> 1 CARSON, *THE SUPREME COURT OF THE UNITED STATES* (1902) 245. See also BABCOCK, *RISE OF AMERICAN NATIONALITY* (1906) 293.

<sup>44</sup> *Supra* note 1.

<sup>45</sup> 2 WARREN, *op. cit. supra* note 7, at 362.

<sup>45a</sup> James Wilson in a debate in Pennsylvania on the adoption of the proposed Federal Constitution, said that the diversity of citizenship jurisdiction of the federal courts was granted to prevent destroying the sources of credit and to protect the creditor classes from tender and other laws. 2 ELLIOT, *op. cit. supra* note 29, at 491.

<sup>46</sup> The phrase "general law" has been used in later cases instead of the more restricted one, "commercial jurisprudence." (1928) 77 U. OF PA. L. REV. 105, 108, n. 23.

This article assumes that the original scope of *Swift v. Tyson* was confined to "the general principles and doctrines of commercial jurisprudence." For an extension of "the assumed dominion into new fields" see *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U. S. 518, 48 Sup. Ct. 404 72 L. ed. 681 (1928).

<sup>47</sup> "*Swift v. Tyson* created for commercial cases a common law of the United States. Before that, the existence of such a thing had often been denied." Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1894) 8 HARV. L. REV. 328, 343. See also the argument of Mr. Dana for the defendant in *Swift v. Tyson* that there is no federal common law. 16 Pet. 1, 11, 10 L. ed. at 868-9; *supra* note 26.

<sup>48</sup> While RAWLE, *op. cit. supra* note 28, at 254, argued that there were federal common law crimes he stated that "the term, laws of the several states," appearing in §34 of the Judiciary Act of 1789, embraced the common law as well as statutes. See also Warren, *supra* note 41, at 81, for a discussion of the original draft of the Judiciary Act of 1789.

Such a decision as this Jefferson would have resented.<sup>49</sup> He had an early aversion to merchants and commerce,<sup>50</sup> a later dislike for the Federal judiciary,<sup>51</sup> and a still later distaste for Judge Story.<sup>52</sup> Admitting that *Swift v. Tyson* has produced no harmful results, the states' rights group and agrarian followers of Jefferson could not have, if they had but thought about it, approved this decision. Clearly here was a chance to build up a national body of commercial law, in a field in which Congress had no power to legislate,<sup>53</sup> and by a body of men over which the people of the states had no legislative control.<sup>54</sup> No more anti-Jeffersonian scheme could be imagined than this,—of non-elective Federal judges formulating commercial law and ignoring state decisions. Today such a decision by a Federal court might not seem unusual but in the earlier days of the republic, when antagonism to the Federal judiciary was at times strong and the state courts perhaps more jealous, such an opinion was obviously a markedly nationalistic one.<sup>55</sup>

Some may consider Story's decision in *Swift v. Tyson* no more than an expression of his desire to build up a uniform body<sup>55a</sup> of

<sup>49</sup> THE WRITINGS OF JEFFERSON (Washington ed. 1854) 486, includes a notation of 1812 which also interprets §34 of the Judiciary Act of 1789 as including common law as well as statutes. See also 9 JEFFERSON, *op. cit. supra* note 4, at 73, for Jefferson's prediction of the effect of a federal common law on state courts.

<sup>50</sup> For Jefferson's dislike of merchants see 6 THE WRITINGS OF JEFFERSON (Washington ed. 1854) 335, a letter of 1814, wherein he said: "Merchants have no country." 3 BEVERIDGE, *op. cit. supra* note 6, c. 2. *Supra* note 20.

<sup>51</sup> In a letter of 1820 Jefferson referred to the federal judiciary as "the subtle corps of sappers and miners." 12 JEFFERSON, *op. cit. supra* note 4, at 177.

<sup>52</sup> *Supra* notes 4 and 11.

<sup>53</sup> DOBIE, FEDERAL PROCEDURE (1928) 573.

<sup>54</sup> See Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423, to the effect that even since the adoption of the Uniform Negotiable Instruments Act the federal courts have not always followed state interpretations of the act. See also: *State Statutes as Rule of Decision in Federal Courts* (1926) 5 TEX. L. REV. 191.

<sup>55</sup> For an attack on the doctrine of *Swift v. Tyson* because it affects the independence of the state judiciary, see Justice Field's dissenting opinion in *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 401; 13 Sup. Ct. 914, 927; 37 L. ed. 772, 786 (1892).

"*Swift v. Tyson* is depriving them [the states] of their greatest attribute—the right to administer justice." Shelton, *Concurrent Jurisdiction* (1928) 15 VA. L. REV. 137, 144.

See article six of the impeachment charges against Judge Samuel Chase in 1804 where he was charged with ignoring §34 of the Judiciary Act of 1789 in a criminal case. ANNALS OF 8TH CONGRESS, 2D SESSION (1804-1805) 730. KONKLE, JOSEPH HOPKINSON (1931) 99, states generally that Chase was charged with preferring a national body of law to state laws.

<sup>55a</sup> "The argument of the court in *Swift v. Tyson* presupposes the existence of a uniform body of commercial law throughout the civilized world, and stresses the importance of having the federal courts exert their influence upon

commercial law to be enforced in the Federal courts. But clearly its effect was to confer on the Federal courts, by judicial legislation, control over commercial transactions in diversity of citizenship cases and thus greatly to widen the scope of the jurisdiction of the national courts.

Story perhaps had just cause for his desire to build a national body of commercial law, uniform throughout the growing nation and as free as possible from the control of the state. The Supreme Court's experience with the early state tender, insolvency and stay laws had taught it that legislatures were likely to favor the debtor class.<sup>56</sup> And just as Jefferson considered the bulwark of an independent nation to be the rural interests,<sup>57</sup> so Story placed great faith in commerce as the basis of a stable nation.<sup>58</sup>

Story also had feared about 1812 the dissolution of the Union because of the disaffection of commercial interests in New England. While it is customary among some to consider that Marshall was waging a battle to build a national government against the disintegrating influences of the Virginia "Republicans," Story had been equally afraid of dissatisfaction in New England.<sup>59</sup> He knew of the Federalist leaders there who perhaps wished to secede because of the economic effect of the anti-commercial attitude of the Virginia "Republicans."<sup>60</sup>

the state courts to maintain this uniformity." *State Decisions as Precedents in Federal Cases Arising by Reason of Diversity of Citizenship* (1928) 77 U. OF PA. L. REV. 105, 108. See also 2 WARREN, *op. cit. supra* note 7, at 363. On the idea of uniformity in commercial law in relation to *Swift v. Tyson* see (1928) 77 U. OF PA. L. REV. 105, n. 5; 109, n. 28.

<sup>56</sup> *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253 (1825). 2 WARREN, *op. cit. supra* note 7, 107-111; (1928) 77 U. OF PA. L. REV. 105, n. 4; (1923) 37 HARV. L. REV. 49, 82. *Infra* note 66. See also 1 STORY, *op. cit. supra* note 12, at 331, a letter of 1819 to Chancellor Kent.

<sup>57</sup> 4 JEFFERSON, *op. cit. supra* note 4, at 85. *Supra* note 20.

<sup>58</sup> For Story's ideas on commerce in relation to the federal government, see STORY, *MISC. WRITINGS* (1835) 187. See also *supra* note 21a.

<sup>59</sup> 1 WARREN, *op. cit. supra* note 7, 453.

"I am sorry to perceive the spirit of disaffection in Massachusetts increasing to so high a degree; and, I fear that it is stimulated by a desire, in a very few ambitious men, to dissolve the Union. . . . I should deplore as the greatest possible calamity, the separation of the states." 1 STORY, *op. cit. supra* note 12, at 182, a letter of 1809.

"I think the Junto are beginning to lower their tone. A division of the states has been meditated. . . . Pray induce Congress to give Judicial Courts of the United States power to punish all crimes and offenses against the Government as at common law. Do not suffer conspiracies to destroy the Union to be formed in the bosom of the country, and yet no laws exist to punish them." *Id.* at 243, a letter of 1812.

<sup>60</sup> See MACDONALD, *op. cit. supra* note 13, at 200, for the report of the Hartford Convention of 1815, where the "Republicans" were charged with "a

While these events occurred many years before the decision of *Swift v. Tyson* in 1842, and can be said to have had no effect on Story's judicial opinions, it must be recalled Story was tenacious in his ideas and doggedly tried to achieve them either by congressional legislation or by judicial decisions. In 1816 we find Story drafting a bill enacting his dictum in *Martin v. Hunter's Lessee*, about which he said:

"The object of this section is to give to the Circuit Court original jurisdiction of all cases intended by the Constitution to be confided to the judicial power of the United States, where that jurisdiction has not been already delegated by law. If it was proper in the Constitution to provide for such a jurisdiction, it is wholly irreconcilable with the sound policy or interests of the Government to suffer it to slumber. Nothing can better tend to promote the harmony of the States, and cement the Union (already too feebly supported) than an exercise of all the powers legitimately confided to the General Government, and the judicial power is that which must always form a strong and stringent link."<sup>61</sup>

And similarly in the field of Federal criminal law Story long continued to point out the necessity of additional criminal legislation and to recommend that common law power of a limited nature over crimes be conferred on the Federal courts.<sup>62</sup>

While by 1842 the New England dissatisfaction had long ceased, and all fear of disunion there was over, Story perhaps had not forgotten the lessons of his younger days and the need of the commercial class for protection at the hands of the Federal courts.<sup>63</sup> Here in

visionary and superficial theory in regard to commerce, accompanied by a real hatred but feigned regard to its interests."

<sup>61</sup> A comment prepared by Judge Story to serve as a basis of a speech to be made by a friend in Congress. 1 STORY, *op. cit. supra* note 12, at 293; FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 36. See also 2 STORY, *op. cit. supra* note 21a, §1590, for a defense in 1833 of the dictum in *Martin v. Hunter's Lessee*.

<sup>62</sup> As late as 1842 Judge Story was still attempting to persuade Congress to enact legislation to grant jurisdiction over common law crimes within the admiralty jurisdiction. Warren, *Federal Criminal Laws and State Courts* (1924) 38 HARV. L. REV. 545, 573, n. 63. See also 1 STORY, *op. cit. supra* note 12, 315, 440. 2 *id.* 373, 402.

Judge Story expressed as early as 1813 in *Van Reimsdyk v. Kane*, 1 Gall. 630, Fed. Cas. No. 16,872 (D. R. I.) the same view that he expressed in *Swift v. Tyson* in 1842.

<sup>63</sup> In speaking of certain constitutional decisions of Marshall it has been said: "They settled the sacred inviolability of contracts, the stability of institutions and, last but most important, nationalism." KONKLE, *op. cit. supra* note 55, at 216. See also ORTH AND CUSHMAN, *op. cit. supra* note 19, 562-3. Corwin, *The Basic Doctrine of American Constitutional Law* (1914) 12 MICH. L. REV. 247, 276.

*Swift v. Tyson* was an opportunity to secure a uniform national commercial law and once again give to commerce the conservative support of a stable judiciary.<sup>64</sup>

Thus when an issue as to whether state decisions should govern suits in the Federal courts in diversity of citizenship cases arose,<sup>65</sup> involving an important but controversial point of the law merchant, Story was able to achieve another judicial victory for the Federal courts over the state judiciary.

By *Swift v. Tyson* a uniform body of commercial law to be formulated by the Federal judiciary was apparently<sup>65a</sup> assured to the business class in diversity of citizenship cases. It was this same court which years before had secured creditors immunity from the radical legislation designed to protect debtors from the execution of judgments.<sup>66</sup> Now the doctrine of *Bay v. Coddington*,<sup>67</sup> harmful perhaps to commerce,<sup>68</sup> was to receive a blow from the Supreme Court of the United States.<sup>69</sup>

<sup>64</sup> To the effect that the purpose of federal jurisdiction in diversity of citizenship cases was to furnish "the sense of security necessary for commercial intercourse," see FRANKFURTER AND LANDIS, *op. cit. supra* note 34, at 8.

<sup>65</sup> See (1928) 77 U. OF PA. L. REV. 105, 106, n. 11; BURDICK, THE AMERICAN CONSTITUTION (1922) 113; STORY, *op. cit. supra* note 21a, §1795, n. 1 (b); and 28 U. S. C. A. §725, for the cases prior to *Swift v. Tyson* on this same issue. For an interesting argument by Daniel Webster in 1841 see *Groves v. Slaughter*, 15 Pet. 449, 490, 10 L. ed. 800, 815 (1841), where he said: "Now, it is contended, that when a citizen of Virginia sues in a court of the United States, he is to be bound by the decisions of the State tribunals. This defeats the provision in the Constitution of the United States. It is a mockery, if this is to be the law." See *infra* note 84.

<sup>65a</sup> For the actual influence of *Swift v. Tyson* in securing uniformity, however, see Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 529, n. 150. See also *Cole v. Penn. R. Co.*, 43 F. (2d) 953, 956 (C. C. A. 2d. 1930). Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 868, 881, n. 23.

<sup>66</sup> For discussion of the effect of creation of federal courts on state tender laws, see Friendly, *The Historic Basis of Diversity Jurisdiction* (1927) 41 HARV. L. REV. 483, 491, 495. *Supra* note 56.

<sup>67</sup> 5 Johns. Ch. 54 (N. Y. 1821); 20 Johns. 637 (N. Y. 1822).

<sup>68</sup> "It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper. . . . The doctrine [of *Bay v. Coddington*] would strike a fatal blow at all discounts of negotiable securities for preexisting debts." *Swift v. Tyson*, 16 Pet. at 20, 10 L. ed. at 872.

See, however, to the effect that commercial policy did not require the protection of the holder of the note in *Bay v. Coddington*: 3 KENT, COMMENTARIES, 81, and Kent's opinion in 5 Johns. Ch. 54, 58 (N. Y. 1821).

<sup>69</sup> DILLON, LAWS AND JURISPRUDENCE (1895) 246; BLACK, JUDICIAL PRECEDENTS (1912) §§112, 188.

## VI

In discussing *Swift v. Tyson* as a nationalistic decision, promoting uniformity in commercial law, some reference should be made to the status of the law merchant in 1842. It must be recalled that barely sixty years had passed since Lord Mansfield had reduced the law merchant "to rational and solid principles."<sup>70</sup> This law merchant was looked upon as a branch of the law of nations,<sup>71</sup> to be enforced in suits "between citizens of the same state and also citizens of different states" and nations.<sup>72</sup>

Clearly the law merchant was not considered as a body of "local" law<sup>72a</sup> varying in different states. As Judge Story said in *Swift v. Tyson*: "the law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield, to be in a great measure not the law of a single country only but of the commercial world."<sup>73</sup>

As Mr. Fessenden in his argument for the plaintiff also said before the court in *Swift v. Tyson*:

"If there is any question of law, not local, but widely general in its nature and effects, it is the present question. It is one in which foreigners, the citizens of different states, in their contests with each other, nay, every nation of the civilized commercial world, are deeply interested. . . . But it will be impossible for Congress to regulate commerce between the States, if it be left to State courts to declare authoritatively in the absence of any statute upon the point, the force, and meaning of, and the right of parties under that most important instrument of such commerce—the bill of exchange when drawn and held in and by a citizen of one State, and accepted and payable in and by a citizen of another State."<sup>74</sup>

Story no doubt did not consider the law merchant, when involved in suits between citizens of different states or of the same state, as a matter of "local" law. This being true, it would seem inevitable

<sup>70</sup> 1 WORKS OF JAMES WILSON (1804) 375; 2 STORY, *op. cit. supra* note 12, at 14. 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 1, 13; POUND AND PLUCKNETT, READINGS ON THE HISTORY OF THE COMMON LAW (1927) 223.

<sup>71</sup> 4 BLACKSTONE, COMMENTARIES 66; 1 WILSON, *op. cit. supra* note 70; WOODDESSON, JURISPRUDENCE (1792) lxxix.

<sup>72</sup> 1 WILSON, *op. cit. supra* note 70.

<sup>72a</sup> DOBIE, *op. cit. supra* note 53, at 572.

<sup>73</sup> 16 Pet. at 19, 10 L. ed. at 871. The original language which Story purports to quote from Mansfield reads: "the maritime law is not the law of a particular country, but the general law of nations." *Luke v. Lyde*, 2 Burr. 882, 887 (K. B. 1759). BALDWIN, THE AMERICAN JUDICIARY (1900) 169.

<sup>74</sup> 16 Pet. at 8, 10 L. ed. at 867.

that in commercial questions appearing before the Supreme Court, Story should feel free to follow the illustrious Mansfield,<sup>75</sup> of whom he had said that he had built up in England "a system of commercial law of great beauty and equity."<sup>76</sup> Thus it would be natural to ignore the "local" law of the states to attempt to develop in the United States a national commercial law.<sup>77</sup>

This idea of national uniformity in commercial law was current at that time. In an Ohio opinion in 1846, only four years after the decision of *Swift v. Tyson*, the court said:

"[The rule] is, as we conceive, a rule of sound policy, tending to secure confidence in commercial transactions, and one that should not, for slight causes, be departed from. Rules governing commercial transactions should remain settled and uniform among a people so much inclined and so often compelled to engage in traffic and to deal in bills of exchange as are the people of the United States. Notwithstanding the old rule of Lord Mansfield has been disregarded in some of the state courts, . . . it has been steadily adhered to by the Supreme Court of the United States. It is a rule of commercial law, is incorporated into the system, and affects alike all parts of the Union . . . and the doctrine established by the United States court should be binding throughout the Union upon such a question. The state courts ought to follow it, because it is founded in reason, and for the sake of uniformity."<sup>78</sup>

<sup>75</sup> Jefferson entertained the same ideas of Mansfield's legal training as he did of Story's. 11 JEFFERSON, *op. cit. supra* note 4, at 151.

See a letter of John Quincy Adams to Story, in reply to Story's praise of Mansfield, in 1829 to the effect that Mansfield from "radical sources engrafted his body of Commercial Jurisprudence upon the stock of the Common Law of England,—a law almost entirely agricultural." 2 STORY, *op. cit. supra* note 12, 19, 20. In another letter of the same year, Adams stated to Story that Mansfield had introduced unfortunate principles "into his system of Commercial Law, and fly-blow into the Common Law." *Id.* at 12.

<sup>76</sup> 2 STORY, *op. cit. supra* note 70.

<sup>77</sup> *Carpenter v. Insurance Co.*, 16 Pet. 495, 511, 10 L. ed. 1044, 1051 (1842). See also *Watson v. Tarpley*, 18 How. 517, 521, 15 L. ed. 509 (1856).

<sup>78</sup> *Treon v. Brown and Fuller*, 14 Ohio 482, 487 (1846). "On a question of commercial law, however, it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several states and of the U. S., but also between our courts and those of England. . . ." *Stalker v. M'Donald*, 6 Hill 93, 95 (N. Y. 1843). BLACK, *op. cit. supra* note 69, at 371.

"It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform law of *all*, as it is now of *most* of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest to the commercial world." *Carlisle v. Wishart*, 11 Ohio 172, 191 (1842).

See 2 Warren, *op. cit. supra* note 7, at 363, n. 1, citing an excerpt from a current law journal expressing a desire for federal statutes on negotiable paper and insurance to promote a uniform commercial law on these two subjects. It was suggested that Judge Story draft the bills.

## VII

Nathan Dane, who established the chair at the Harvard Law School which Story occupied from 1829 to 1845,<sup>79</sup> perhaps influenced Story's views on uniformity. Dane in 1823 had said:

"Our true course is plain; that is, by degrees, to make our laws more uniform and natural, especially when there is nothing to make them otherwise but local feelings and prejudices. We have, in the common and federal law, the materials of national uniformity in many cases. We have a national judiciary promoting this uniformity. . . . We only want a general efficient plan supported with energy and national feelings."<sup>80</sup>

In a review of Dane's *Abridgment* in 1826 Story quoted with approval this excerpt from the introduction to the work:

". . . A great republic . . . is the natural field of law and equity; but to produce these in perfection, there must be a *national* character. The rules of law and equity, in important matters, must be uniform, and pervade the whole nation."<sup>81</sup>

Dane, strongly Federalist in his views, in establishing a professorship in the Harvard Law School, desired that "national law" be taught as opposed to the "law of the jurisdiction." Story, the new professor, was to teach law "equally in force in all branches of our Federal Republic" and ignore the law in use and in force in a single state only.<sup>82</sup> This Federalist point of view in law teaching, which marks the beginning of our "national law schools," no doubt influenced Story's views on a general American common law.<sup>83</sup>

Therefore, in *Swift v. Tyson*, it was not difficult for Judge Story, long a professor in "a national law school" and a text-writer of national law books,<sup>84</sup> particularly since the law of negotiable instruments was in issue, to base his decision on "general principles of commercial jurisprudence" instead of "local" law.

## VIII

Thus the decision of *Swift v. Tyson*, when rendered, was an attempt to promote national uniformity in commercial law and also a

<sup>79</sup> 2 Story, *op. cit. supra* note 12, 1-9.

<sup>80</sup> Cited in 1 WORKS OF JAMES WILSON (Andrews ed. 1895) 335, n. 3.

<sup>81</sup> STORY, *op. cit. supra* note 58, at 343; DANE, ABRIDGMENT (1823) 14.

<sup>82</sup> REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) 143, 292. See also 1 WARREN, *op. cit. supra* note 12, at 419.

<sup>83</sup> CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL (1918) 68-69.

<sup>84</sup> See Pound, *Judge Story in the Making of American Law* (1916) 1 MASS. L. Q. 121, 135, for the influence of Story as a text-writer in developing a general common law in the United States.

means of giving broad powers to the Federal judiciary in dealing with commercial transactions; a power certainly not expressly conferred by the Federal Constitution on the Federal government. The principle of *Swift v. Tyson*,<sup>85</sup> unlike that of *United States v. Coolidge*<sup>86</sup> and the dictum in *Martin v. Hunter's Lessee*,<sup>87</sup> has persisted and should be considered as nationalistic as Marshall's decisions on the relation of the states to the Federal government.<sup>88</sup>

An excerpt from a discussion of another subject seems applicable to *Swift v. Tyson*. It reads:

"Under the leadership of such men as Chief Justice Marshall, Justice Joseph Story, and Daniel Webster,<sup>89</sup> it came to be an accepted view that nationalist, conservative, and commercialist views of American law and politics were looked upon as sound statesmanship and opposite views were identified with ruin and disunion."<sup>90</sup>

<sup>85</sup> *Supra* note 1.

<sup>86</sup> *Supra* note 26.

<sup>87</sup> *Supra* note 35.

<sup>88</sup> *Fletcher v. Peck*, 6 Cranch 87, 3 L. ed. 162 (1810); *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (1819); *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. ed. 204 (1824). 5 CHANNING, A HISTORY OF THE UNITED STATES (1921) 309; MACDONALD, JACKSONIAN DEMOCRACY (1906) 248; HOCKETT, HISTORY OF UNITED STATES (1927) 341; CORWIN, MARSHALL AND THE CONSTITUTION (1919) c. 5.

<sup>89</sup> For the friendly relations between Story and Webster see: 2 FUESS, WEBSTER (1930) 455; LODGE, WEBSTER (1884) 138-139.

<sup>90</sup> HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930) 196. See also Haines, *Histories of the Supreme Court From the Federalist Point of View* (1923) 4 S. W. POL. SCI. Q. 1, 22.