

Thomas Jefferson and Justice Joseph Story's Rival Conceptions of Christianity in the
Common Law System of the United States

by
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ABSTRACT

This Honors thesis deals with the conflict between President Thomas Jefferson and Supreme Court Justice Joseph Story over the application of Christianity in the Common Law System of the United States. The thesis looks into the writings and speeches of the individuals to reveal their opinions of what role religion should play in the common law system of the United States. President Thomas Jefferson's posthumous publication of his essay calling for strict-separation from Christianity and common law was met by Justice Joseph Story arguing that the Christianity was part of the very being of common law, and simply could not be separated from common law.

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INTRODUCTION

In 1829, Supreme Court Justice Joseph Story delivered a scathing rebuke of recently deceased President Thomas Jefferson's posthumous publication of an essay claiming that the common law system in the United States should not be based in Christianity. President Jefferson and Joseph Story became heated rivals while both were elected officials, and Story saw this posthumous publication as an opportunity to have the last word on the conflict with his archenemy. President Jefferson's article was published in March of 1829, and Justice Story took his first possible public address—his inaugural discourse as Dane Professor of Law at the University of Harvard Law School in the summer of that same year—to attack every possible aspect of Jefferson's essay. This was the first of four public venues where Story attacked Jefferson's thesis, spanning from the summer Jefferson's essay was published to the year Story died.

The core tenet of this thesis, and the conflict between Jefferson and Story, is the influence of English common law on its American counterpart during the first half-century of the nation. Broadly, common law is the combination of custom and judicial precedent. Common law deals with the issues like rights, contracts, and inheritance. Common law focuses more on the specifics of each case, assessing the facts of each case by looking at the whole of the common law existing when the case comes up. Nations without a common law system tend to rely on a civil law system. In civil law systems, there is a principal source of codified law, such as written statutory law, which is intended to cover any legal issues that might arise in a civil law case. One of the main differences between civil law and common law is the reliance on past decisions as direction for future decisions. In civil law, the emphasis resides on the judge interpreting the law or

statue at issue in the case. This is countered by common law, in which cases can be decided by the judge's consideration of the issue at hand and previous cases with similar facts; however, judges are not bound in common law solely to interpret law as they are in civil law (Matheson 202-203).

The system of common law we have in the United States was started in England centuries before. When America created the legal foundation of the new nation, the Americans borrowed heavily from their English counterparts, taking the common law, legal structures, and legal officers (Hall 20-21; Matheson 203). The Constitution of the United States explicitly states America's reliance on common law. The Seventh Amendment to the U.S. Constitution states, "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law" (US Const. amend. VII). Other common law tenets were also spelled out in the Constitution, such as the Fifth Amendment's right to not be forced to testify against oneself and the Seventh Amendment's right to trial by jury (Matheson 203). In addition to these legal aspects, American common law also took on the religious portions of the English common law (Hall 26-27), part of which is the topic of this thesis.

One of the most often reoccurring debates in the nearly two and a half centuries of our nation's history is the appropriate role that religion should play in the United States government. This is not a new, modern conflict, but rather an issue that was already enshrined in heated debate by the turn of the Nineteenth Century. In the early 1800s, political leaders of the infant nation began taking definitive stances on both sides of the issue. This paper's topic is a small snapshot of two of the major players in the lengthy

history of this debate: President Thomas Jefferson and Supreme Court Justice Joseph Story. To call this particular clash of ideals a “conflict,” however, is most likely an exaggeration. The material in this conflict from President Jefferson is limited to one essay written by a twenty-one-year-old Jefferson that, by his explicit instructions, remained unpublished until after his death, and two letters from Jefferson in which he alluded to his essay. Justice Joseph Story’s responses, all of which occurred after Jefferson’s death and his essay’s publication, came on four separate occasions: Justice Story’s inaugural discourse as Dane Professor of Harvard Law School, an article published in the *American Jurist and Law Magazine*, Justice Story’s *Commentaries on the Constitution*, and Justice Story’s majority opinion in the 1844 case of *Vidal v. Girard’s Executors*.

Thomas Jefferson needs little introduction. Jefferson was the principal author of the Declaration of Independence, exceptionally impressive considering Jefferson was one of the youngest delegates present at the Second Continental Congress (Tucker v.1, 77). Jefferson then returned to his home state of Virginia, where he served in the Virginia House of Delegates for three years before serving as Governor for a year (Peterson 101–02, 114, 140; Tucker v.1, 134). Jefferson was elected to and served in the Continental Congress of the United States until the Congress of the Confederation chose Jefferson to succeed Benjamin Franklin as the United States Ambassador to France (History.com; Tucker v.1, 194). Upon Jefferson’s return to the United States in late 1789, newly elected President George Washington appointed Jefferson as the nation’s first Secretary of State, where Jefferson served until he resigned in December, 1793 due to conflicts with Secretary of the Treasury, Alexander Hamilton, and President Washington (Tucker v.1, 334; Chernow 427.). In the 1796 election, Jefferson ran against Washington’s Vice

President John Adams, to whom he narrowly lost the vote in the electoral college: 71-68 (U.S. Electoral College). Because of how the Electoral College and Presidential elections ran at the time, Jefferson as the second-place contestant served as Vice President. In the election of 1800, Jefferson would once again challenge Adams. The result of the election was a tie in the Electoral College, which threw the election to the House of Representatives to break the tie between the top two candidates in the Electoral College, where the House of Representatives chose Jefferson to win the election of 1800 (Wood 284–85). After leaving the Presidency in 1809, Jefferson focused on his educational interests, founding and building the University of Virginia (Tucker 479). Jefferson would spend the next several decades of his life content to stay at his Virginia home, Monticello, while corresponding with numerous influential fathers of the American Republic, including his one-time rival, John Adams, where he would pass away in 1826 (Monticello; Ellis 213, 230).

To those without an intimate knowledge of Supreme Court or American history, Joseph Story may be an unknown member of a distant American past. Joseph Story was born into an extremely patriotic home, with his father being a member of the group responsible for the Boston Tea Party (William W. Story, *Misc. Writings* 2). Story attended Harvard Law School, where he would graduate second in his class (Dunne 23). In 1805, Joseph Story was elected to the Massachusetts State House of Representatives, where he served until 1808 when he was selected to fill a vacant seat in the United States House of Representatives. While serving out the remainder of the unexpired term, Representative Story would make a life-long enemy of then-President Thomas Jefferson after Jefferson perceived Story as the leader of the opposition to Jefferson's trade

embargo, which would be repealed while Story was serving in the U.S. House of Representatives. Upon his return to Massachusetts, Story would be reelected to the state House of Representatives, and be elected as the Speaker of the Massachusetts state House in 1810 (Oyez). In late 1811, President James Madison nominated Joseph Story to serve on the Supreme Court. Confirmed just three days after his nomination at thirty-two years old, Justice Joseph Story remains to this day the youngest Justice to ever be appointed to the Supreme Court, and one of the few individuals ever nominated for the Supreme Court with no prior judicial experience. Story would remain on the Court until his death in 1845 (Abraham 67). During his lengthy career on the Court, Justice Story pursued several other areas of interest in his time not occupied by the Court. Justice Story was awarded the inaugural Harvard Law School's Dane Professor of Law position (William W. Story, *Misc. Writings* 2). While a faculty member at Harvard, Justice Story wrote extensively on various subjects. It was during this time period that Justice Story wrote his *Commentaries on the Constitution of the United States* (Newmyer 181). The *Commentaries* have been considered the most expansive and widely debated work on Constitutional Law in pre-Civil War America, lauded by American jurist and legal scholar James Kent as an "incomparable monument of sound and healthy and incontestable constitutional principles" (Swindler 18; William W. Story, *Misc. Writings* 135).

After more than three decades on the Court, Justice Story realized that the Supreme Court had moved well beyond the extents of his ideological spectrum. Not wishing to be in constant opposition to the decisions of the Court, Justice Story began to clear his docket in 1845 for the last time with the intent to retire from the Supreme Court (Newmyer 380-381). It was in this process of beginning his retirement from the Court

that Justice Story fell sick and passed away in September of 1845 at the age of sixty-five (William W. Story v.2 *Life and Letters*, 546-48.). In his more than three decades on the Court, Justice Story left a lasting impression, leading some to call him “the greatest constitutional scholar of his day” (Sekulow 620).

ORIGIN OF CONFLICT

President Jefferson and Justice Story's conflict over the application of Christianity in common law took place after Jefferson died in 1826, with the posthumous publication of Jefferson's "Whether Christianity Is Part of the Common Law?" (Jefferson 453-64). This was followed by four responses from Justice Story over the next several years, with Story's first public refutation of Jefferson's thesis coming in the summer of 1829 at his inaugural address as the Dane Professor of Law at Harvard Law School (William W. Story v. 2 *Life and Letters*, 6-7; Id. at 8-9). This was not, however, Jefferson and Story's first conflict in their public careers. Jefferson and Story clashed more than two decades earlier, when Thomas Jefferson was the President and Joseph Story was a U.S. Representative from his home state of Massachusetts.

During Thomas Jefferson's term as the third President of the United States, Joseph Story was moving up the ranks of the heavily outnumbered Republicans in the Massachusetts House of Representatives (Powell 1290). In 1808, near the very end of Jefferson's second term as President, Story was elected to serve in the United States House of Representatives to serve out the unexpired term of a seat made vacant by the death of the current representative from the district (William W. Story, *Misc. Writings* 29). Story only served in the House of Representatives for three months (December 1808-February 1809), but in that short amount of time, Story stood up to the head of the Republican Party—Jefferson himself—over Jefferson's foreign trade embargo with several European nations. Story believed that Jefferson's trade embargo was heavily slanted towards protecting the interest of the southern agricultural states, including

Jefferson's home state of Virginia, while harming the Northeastern states that relied heavily on manufacturing. Story firmly believed that if Jefferson's trade embargo were to be continued, it could facilitate irreconcilable differences between the North and the South, and eventually lead to the decay of the Union (William W. Story, v.1 *Life and Letters* 174-175.). Story's devotion to his home state and the preservation of the Union influenced him ultimately to devote his short time in national office to personally ensure that Jefferson's trade embargo would be defeated (Dunne 60-69). By taking such an active role in the defeat of Jefferson's trade embargo, Joseph Story would estrange himself from President Jefferson for the rest of his public life (Bauer 138). When looking back on his conflict with Jefferson over the trade embargo and the subsequent fallout between Story and the President, Story defended his continued, albeit strained, association with the Republican Party, maintaining that:

The Republican party then and at all other times embraced men of very different views on many subjects. A Virginia Republican of that day, was very different from a Massachusetts Republican, and the anti-federal doctrines of the former state then had and still have very little support or influence in the latter State (William W. Story, *Misc. Writings* 30).

Although Story remained immensely popular in his home district during his short term in the U.S. House of Representatives, Story did not seek reelection to the U.S. Congress, which he most likely would have won, almost assuredly because of this conflict with President Jefferson and the mainstream, southern Republicans (William W. Story, *Misc. Writings* 29).

In 1809, Joseph Story returned to Massachusetts and state politics upon the completion of his term in Washington, D.C. Story was once again elected to the Massachusetts House of Representatives, and chosen to be the Speaker of the House (William W. Story, *Misc. Writings* 35). In 1810, Story was summoned back to Washington, D.C. upon the death Supreme Court Justice William Cushing (Dunne 77). Since Justice Cushing was from New England, President James Madison thought it best to maintain the geographical balance of the Supreme Court, and select the next Justice from New England as well. There was no lack of potential candidates for Madison to nominate to the Supreme Court, as “Madison noted how the stony soil of New England seemed to be growing a bumper crop of candidates” (Dunne 78; Warren 407). When Story arrived in Washington, D.C., he did not seriously consider himself a contender for the vacant Supreme Court seat since Story knew he was at least seventh on Madison’s list of potential Justice nominees (Dunne 78). Before he finally nominated Joseph Story, Madison had an exceptional amount of trouble and embarrassment with his Supreme Court nominees.

Levi Lincoln was the first individual Madison nominated to fill Justice Cushing’s vacant seat. Lincoln seemed to possess everything Madison could possibly want in a Supreme Court nominee. Lincoln was a former member of the Massachusetts House of Representatives, Massachusetts State Senate, U.S. House of Representatives, Massachusetts Lieutenant Governor, Massachusetts Governor, United States Secretary of State, and United States Attorney General, all within a whirlwind thirteen years (Lincoln 160). Lincoln, however, objected to even being considered for the vacant seat on the Court. Over Lincoln’s vocal objections, Madison nominated him to fill Justice Cushing’s

seat. The Senate easily confirmed Lincoln, however a significant decline in Lincoln's eyesight forced him to refuse the seat on the Court (Dunne 79). Madison's second nominee was an obscure federal revenue collector with little legal experience from Connecticut: Alexander Wolcott. Jefferson may have influenced Madison to choose Wolcott, since Wolcott was one of the strongest defenders of Jefferson's trade embargo in the New England states. The Senate, however, did not share Jefferson and Madison's admiration for Wolcott, as Wolcott would be defeated by the largest margin in the history of Senate confirmation votes (24-9), a title he still holds (Dunne 80). Embarrassed by such utter failure on his first two nominees to the Supreme Court, Madison thought he could score a quick victory and easy confirmation by nominating someone the Senate simply could not refuse: John Quincy Adams. Adams, son of President John Adams, was serving at the time as the United States ambassador to Russia. Madison, not wanting to wait for Adams's response to his offer of the Court seat, nominated him to be the next Supreme Court Justice. Upon unanimous confirmation in the Senate, Madison sent Adams another letter informing him of his newly confirmed position on the United States Supreme Court. To Madison's shock and utter dismay, Adams declined the nomination (Dunne 80). Madison's problems with the Supreme Court only became even worse when Supreme Court Justice Samuel Chase of Maryland passed away while Madison was waiting for Adams' response. The geographic power struggle only became more strained because the most recently deceased Justice was from Maryland, which led to an all out power struggle between Virginia and Maryland delegations and politicians for the vacant seat. If the nominee to replace deceased Justice Chase were from either the North or the South, the previous balance of power on the Court would be altered. After this conflict

brought division even to Madison's cabinet, with several high ranking members of Madison's administration threatening resignation over the Supreme Court nominations, Madison decided to take several months of meditation and careful consideration before he selected his next two nominees (Dunne 80). In November of 1811, one year and two months after the first vacancy appeared on the Court, Madison nominated Joseph Story and former Maryland Chief Justice and Comptroller of the Treasury Gabriel Duvall as the next Justices to the United States Supreme Court. The Senate overwhelmingly confirmed both Story and Duval three days later (Dowd 265).

To say Jefferson was displeased with Madison's consideration of Joseph Story is an understatement. When Jefferson first heard that Madison was considering Story and another individual who opposed his Embargo Act (Ezekiel Bacon) to fill Justice Cushing's seat, Jefferson sent his former Secretary of State a scathing letter. Jefferson did not mince words in letting Madison know in his letter exactly what he thought about seeing Joseph Story on the court, which read, in part, "Story and Bacon are exactly the men who deserted us [on the Embargo Act]. The former unquestionably a tory, and both are too young" (Brant 168). Sore from his defeat on the Embargo Act less than three years earlier, Jefferson still held resentment for Story, a feeling that would not subside throughout Story's time on the Court.

STORY ON THE COURT

Justice Story was a highly active Supreme Court Justice. He wrote the opinion of the Court in one of the Supreme Court's first major cases involving religious liberty, *Vidal v. Girard's Executor* (43 U.S. 127 (1844)). In this case, Justice Story upheld the promotion and usefulness of Christian values and the Bible in public schools (43 U.S. 127 (1844)). Justice Story continued to take an active roll in Supreme Court cases involving religion.

In all of Supreme Court history, no Justice has written as prolifically on matters of religion, specifically Christianity's impact "upon public and political law," as Joseph Story. Not only did Story write the opinion in *Vidal v. Girard's Executor*, he also wrote extensively off the Court regarding the religion clauses (Sekulow 2).

Justice Story would remain active on the Supreme Court for thirty-five years, until he was the last Justice from the Marshall Court remaining on the Court. Of all the opinions issued during the Marshall Court era, Story penned more opinions than any Justice other than Chief Justice Marshall (Turley). Even though Chief Justice Marshall wrote more opinions than Justice Story, Marshall understood that Story's opinions exhibited a certain depth, more so than his own opinions, with the Chief Justice once commenting after publishing an opinion, "Now, Story, that is the law; you find the precedents for it" (Turley). In 1845, understanding the ideological shift that had taken place over his nearly four decades on the Court and not wishing to remain in constant opposition to the new ideological makeup of the Court, Justice Story decided that 1845 would be his last

session on the Court. While Justice Story was clearing his docket to finish his final year on the Court, he became ill and passed away in late 1845 (Newmyer 380-381; William W. Story, v.2 *Life and Letters* 546-48).

JEFFERSON'S ESSAY

When one thinks of individuals throughout American history who showed reserve and tried to keep from “ruffling feathers,” Thomas Jefferson is not going to be near the top of that list. That makes it all the more interesting that the article President Jefferson wrote laying out the reasons why he believed Christianity should not be considered as part of the common law system remained unpublished until his death, more than sixty years later (Jefferson 453-454). We can attempt to speculate exactly why Jefferson waited so long to publish this article. Jefferson potentially feared political blowback from such a secular statement in a nation where the majority of citizens considered themselves Christian; however, Jefferson never did specifically explain why he refused to publish his essay. He does, however, hint as to the reasons it remained unpublished, which we will discuss further on in this paper. In the essay, Jefferson explains why he believes Christianity should not be considered as a part of America's common law system.

Jefferson's essay begins by looking at a case from the old English legal system, decided by Sir John Prisot (Rigg 402). The case's overall question was how much respect the ecclesiastical laws should be given in a common law court (Jefferson 454). Jefferson's entire argument that Christianity is not part of the common law system hangs on one translation. The case that Prisot decided was from the early-1400s, which meant that even though the case was an “English” case, the decision was written in French. In his case, Prisot makes the following claim: “*à tiels leis que ils de seint eglise ont en ancien scripture, covient à nous à donner credence.*” Around two-hundred years later, another English judge, Finch, would go back to Prisot and quote this passage, translating

it into English for the first time in English judicial history: “to such laws of the church as have warrant in holy scripture, our law giveth credence” (Jefferson 455). Jefferson holds that this translation of “holy scripture” points specifically to “[ancient] written laws of the church,” not the Bible or Christian scriptures (Jefferson 455). It is on this claim that Jefferson bases his assertion that the modern concept that “Christianity is part of the common law” is false.

After Jefferson makes his claim about the mistranslation, he spent the next several paragraphs tracing how this alleged mistranslation got passed down through English legal tradition. In 1658, Wingate quoted Finch (but cited Prisot) and placed the idea of a Christian basis into English common law (Jefferson 456). Sir Matthew Hale restated the principle when he held that “Christianity is parcel of the laws of England” without citing any precedent (Jefferson 456). This principle came to be commonly held in English law through 1728, when in the case of *King v. Woolston*, the court would not even consider the possibility that blasphemy might not be a criminal activity, citing Sir Matthew Hale (Jefferson 456). When Sir William Blackstone wrote his *Commentaries on the Laws of England*, he also built on Sir Matthew Hale’s claims, saying “Christianity is part of the laws of England” (Jefferson 457). Thus, Jefferson laid out that the entire belief of Christianity being part of the English common law:

Thus we find this string of authorities, when, examined to the beginning, all hanging on the same hook; a perverted expression of Prisot’s; or on nothing. For they all quote Prisot, or one another, or nothing. For they all quote Prisot, or one another, or nobody. (Jefferson 457).

Jefferson gives several reasons he believes that “*ancien scripture*” could not be referring to the Bible. First, Jefferson claims if the translation is to be considered as referencing Christian Holy Scriptures, it must only refer to the Old Testament instead of the New Testament, which would go against what the future judges and lawyers wanted (Jefferson 455). Jefferson then argues that ecclesiastical law does not derive its authority from scriptures, but rather the former draws authority from common law (Jefferson 455). In his last point, Jefferson argued that the ecclesiastical law in question in Priset’s case is not even part of Christian Scriptures, but it arose out of ecclesiastical discretion. Jefferson claims there is simply no basis in Priset’s case that Finch could use as the foundation of his claim that the *ancien scripture* is referring to Christian Holy Scriptures (Jefferson 456). Jefferson only makes these claims once in his essay, and does not go into details on specifically how each of these points discredits the potential of the original translation being correct, assuming that his reader can make any connections that are left unstated.

Throughout his life, Jefferson made only two references on the record about this essay that have been preserved to modern day. In 1814, Dr. Thomas Cooper wrote to Thomas Jefferson asking him what he thought about the inclusion of the Ten Commandments in common law. Jefferson took this as an opportunity to include an excerpt from his then-unpublished essay on that subject. In introducing an excerpt from his article, Jefferson shed the only light we have on the reason his essay remained unpublished for, at that time, nearly fifty years.

They were written at a time of life when I was bold in the pursuit of knowledge, never fearing to follow truth and reason to whatever results

they led, and bearding every authority which stood in their way (Lipscomb v.14, 85).

This is the only time we get an indication why Jefferson refrained from publishing his essay when he wrote it in the mid-1700s. Jefferson talks about his fearless pursuit of truth and reason as the cause for the boldness he displayed in his essay. The “excerpt” which Jefferson includes is nearly his entire essay. Jefferson ended his letter to Dr. Cooper by commenting on the original question from Dr. Cooper about the Ten Commandments, and why they should not be included in the English common law. Jefferson responded by calling the basis for the principle to include the Ten Commandments in the English common law a “manifest forgery” (Lipscomb v.14, 97). Although Jefferson’s “boldness” for knowledge, truth, and reason may have faded between the half century when he originally wrote his essay and this letter, his belief that Christianity should not be part of the United States’ common law system did not similarly fade.

The second and final reference Jefferson made to his essay is in an 1824 letter to Major John Cartwright. Just a few years before Jefferson’s death, Cartwright sent Jefferson a copy of his new volume on the English Constitution to be included in the University of Virginia’s library, which Jefferson read and responded to approvingly (Lipscomb v.16, 42). In Cartwright’s work on the English Constitution, he made a lengthy, formal contradiction of the premise that Christianity is part of common law (Lipscomb v.16, 48). Jefferson was elated to find a similarly-minded individual, and went on to give a synopsis of Jefferson’s own thoughts on how this “judiciary usurpation of legislative powers” had taken place over the course of English legal tradition (Lipscomb v.16, 48). President Jefferson’s letter to Major Cartwright would be the last time

Jefferson referred to his essay until it was published, at Jefferson's direction, after his death as an appendix in a collection of Jefferson's writings.

JOSEPH STORY'S RESPONSES

Justice Joseph Story's first encounter with President Jefferson's proposed thesis was when one of Story's close friends, Edward Everett, brought Jefferson's letter to Major John Cartwright to Story's attention (Newmyer 119). The comments he read from Jefferson shocked Story. In a response to Everett, Justice Story wrote: "It appears to me inconceivable how any man can doubt, that Christianity is part of the Common Law of England, in the true sense of this expression" (William W. Story v. 1 *Life and Letters*, 430). This small sample would be the only part of Jefferson's thesis Story would see for years. It would not be until after Jefferson's death that Story would see Jefferson's completed essay on the subject.

When Jefferson published his essay laying out the reasons he believed Christianity is not part of the English and United States common law systems, Justice Joseph Story was in the middle of his second decade on the United States Supreme Court. President Jefferson's essay was released in March of 1829 as an appendix to his *Reports of Cases Determined in the General Court of Virginia, from 1730 to 1740, and from 1768 to 1772*. Over the summer of 1829, Justice Story, like numerous legal scholars of the day, had been able to acquire and study Jefferson's essay. In the August of that year, Justice Joseph Story was inaugurated as the first Dane Professor of Harvard Law School. Justice Story used this inaugural address to begin his public refutation of Jefferson's essay (William W. Story v.2 *Life and Letters*, 8-9). Justice Story did not mince words for the recently deceased Jefferson. In his speech, Story addressed about Jefferson's essay and the issue of Christianity in common law. Focusing on Jefferson's attack on the maxim

that Christianity is part of the common law, Story noted, “notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true, as it is beautiful” (Joseph Story, *Discourse 21*).

Story continued in his speech to address the issue raised by Jefferson. Story explained that at no point in the history of common law has it ever failed to recognize Christianity as the bedrock of its legal system (Joseph Story, *Discourse 21*). Story gave examples of ways Christianity has been incorporated into common law, including recognizing Christian holidays and festivals, giving Christians more consideration as witnesses, and making actions offensive to Christian morals illegal (Joseph Story, *Discourse 21*). Story did not, however, blindly defend all the actions of common law courts in the name of Christianity. Story pointed out that common law fails when it becomes the enforcer of one sect of Christianity over other, either Catholicism or Protestantism (Joseph Story, *Discourse 21*). Other than this one potential downfall, Story claims that the morals of a Christian-based common law are “the purest and most irreproachable” (Joseph Story, *Discourse 21-22*). Story continued his inaugural address by moving on to various different subjects, however, this would not be the last time Story publicly addressed Jefferson’s essay.

In the spring of 1833, Story published a more in-depth essay in the leading legal journal of Story’s day, the *American Jurist and Law Magazine*, entitled “Christianity a Part of the Common Law.” In his essay, Story systematically refuted Jefferson’s thesis point by point. He began his refutation by addressing Jefferson’s main claim: the original case Jefferson discussed which created the “ancient scripture” debate did, in fact, refer to Holy Scripture. Story argued that the issue in that case was who had the right to the

patronage of a certain church (Joseph Story, *American Jurist* 346-347). Story explained that if the bishop in the ecclesiastical court could not be impartial, the case should move to the common law court. It was in this discussion of whether the case should move from the ecclesiastical courts to the common law courts that Prisot made the comment about *ancien scripture* (Joseph Story, *American Jurist* 347). Story pointed out that this reference to “ancient scripture” must refer to Holy Scripture, because Prisot refers to these “ancient scriptures” as laws “upon which all manner of laws are founded” (Joseph Story, *American Jurist* 347). Story maintains it is inconceivable for Jefferson to claim that these laws upon which all laws are founded are the ancient rules and regulations of the church. Story holds that this is a clear reference to Holy Scriptures, so much so that no lawyer or judge for several centuries noticed the “mistake” that Jefferson discovered on his own (Joseph Story, *American Jurist* 347). Justice Story maintained the explanation of this quote, which gave Jefferson the foundation of his thesis, showed that in fact the only “scriptures” that Prisot could possibly be referring to are the Holy Scriptures, or the Bible.

Story then addressed another issue Jefferson brought up: the several instances where individuals throughout common law history quoted some version of the maxim “Christianity is part of the common law system” without citing any previous judicial decision as precedent. When a case dealing with blasphemy came before Sir Matthew Hale, he stated, “Religion is a part of the law itself, therefore injuries to god are as punishable as to the King or any common power” (Joseph Story, *American Jurist* 348). In the Woolston case, the court would not even consider if publicizing works criticizing Christianity was illegal in a common law court, and cited no precedent for this decision

(Joseph Story, *American Jurist* 348). Justice Story gives these examples to show that while Jefferson correctly noted the several cases that make the statement “Christianity is part of common law” without citing precedent, Jefferson takes this lack of precedent as proof that the maxim has no merit in the common law system. Story argued that this lack of cited precedent shows that the maxim was so widely accepted in the common law courts of the day that the judges saw no need to cite precedent, as any individual reading the case would understand that statement as one of fact, not one of opinion that would need a citation to precedent (Joseph Story, *American Jurist* 347).

At the end of his article, Story makes one final argument for why Christianity is a part of the common law. Story argues that even if the reader were to refuse to acknowledge any previous arguments made in his article, “can any man seriously doubt, that Christianity is recognized as *true*, as a revelation, by the law of England, that is, by the common law?” (Joseph Story, *American Jurist* 348). Justice Story then mentions the various tenets of the English legal system (such as ecclesiastical establishments and what Story describes as “test acts”) that reinforces the notion that Christianity is part of the common law system (Joseph Story, *American Jurist* 348). In his final paragraph, Justice Story makes the claim that Christianity’s standing as a foundation for the English common law system is self-evident, and that Jefferson’s interpretation is a denial of those facts.

Story next addressed Jefferson’s thesis in his *Commentaries on the Constitution*, published in 1833. Throughout Story’s *Commentaries*, Story consistently argued against several of Jefferson’s political positions: not only the application of Christianity in the common law, but also nationalism, the expanding of federal power, and judicial

supremacy – issues where Story broke from the ranks of mainstream Republicans like Jefferson (Powell 8). When dealing with issue of Christianity in the common law in his *Commentaries*, Story makes two seemingly contradictory claims. In the opening of the discussion on the First Amendment, Story writes, “the right of a society or government to interfere in matters of religion will hardly be contested by any persons” (Joseph Story, *Commentaries*, § 1865). Story then follows that observation just a few lines later with the following statement: “it is the especial duty of government to foster, and encourage [Christianity] among all the citizens and subjects” (Joseph Story, *Commentaries*, § 1865). The thought of government interfering, but at the same time fostering, religion is antithetical to modern American’s concept of church and state; however, in Story’s opinion, the government should get involved in Christianity in order to promote and encourage religion (Joseph Story, *Commentaries*, § 1865). Story, anticipating arguments his opponents might make, addressed the issue of freedom of conscience: “This is a point wholly distinct from that of the right of private judgment in matters of religion and the freedom of public worship according to the dictates of one’s conscience” (Joseph Story, *Commentaries*, § 1865). The subtle nuances of Story’s political views on this subject are in his beliefs that while simultaneously advocating for a larger, more expansive federal government which can interfere in religion, the government should use that access to promote not all religions, but rather specifically the Christian religion. Story would go so far as to say,

[T]here will be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to

foster and encourage the Christian religion generally, as a matter of sound policy as well as of revealed truth (Joseph Story, *Commentaries*, § 1867).

Story would go on in his *Commentaries* to discuss the framers' understanding and intent at the time of the drafting of the First Amendment. Story described the general sentiment of the framers during the creation of the First Amendment as the belief "that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship," (Joseph Story, *Commentaries*, § 1868) so much so that, "an attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" (Joseph Story, *Commentaries*, § 1868). As if there could be any doubt remaining, Story wanted to make sure he was abundantly clear in his *Commentaries*:

[The First Amendment] was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government (Joseph Story, *Commentaries*, § 1871).

Story's *Commentaries* made it clear he believed the Constitution and the common law system of the United States were built upon the foundation of not only the acceptance, but also the promotion of Christianity.

The last of Story's public addresses on the subject came in Story's 1844 majority opinion in *Vidal v. Girard's Executors*. In this case, Girard left a massive fortune of over

seven million dollars for the construction of a college to help “poor white male orphans” (Vidal 127-128). Girard left the college to the City of Philadelphia with only one provision:

[N]o ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purpose of the said college (Vidal 133).

Even though Girard had written specifically in his will that there was no strict prohibition on teaching the Bible at the college, that was not enough to keep the case from reaching the Supreme Court (Sekulow 15). The Girard family hired the famous lawyer and statesman Daniel Webster to argue for the voiding of the gift, and the City of Philadelphia argued in favor of establishing the college with Horace Binney. Webster attacked the prohibition of the clergy, asking the Court, “Was there ever an instance before, where, in any Christian country, the whole body of the clergy were denounced?” (Sekulow 15). Binney argued the provision afforded more opportunities for all of the individuals Girard wished to reach out to, assuring there would never be a religious test for admittance to the college (Sekulow 153). In the end, Justice Story and the Supreme Court agreed with Binney and ruled in favor of constructing the college as prescribed in Girard’s will.

The content of Story’s opinion is of interest to this discussion, as he once again addressed the concept of Christianity in common law. Story noted that the Girard family argued that the will went against the common law of Pennsylvania, since Christianity is

part of the common law in Pennsylvania (Sekilow 197). Story once again affirmed the stance he took several decades earlier, holding “the Christian religion is part of the common law” (Sekilow 197). In *Girard*, Story for the first time admitted to possible limitations on his claim. Story stated everyone is “compelled” to admit Christianity is part of the common law, but in the qualified sense that it should not be pushed by the government past the point of violating an individual’s conscience (Sekilow 197). Story believed that the provision in the Girard case did not rise to the level of abuse or blasphemy necessary to make it unconstitutional (Sekilow 197). Story gave two reasons that Girard’s will did not violate the Constitution: first, any individual is capable of teaching the basic principles of Christianity, and the teaching of Christianity was not expressly prohibited in the will (Sekilow 200). Second, Story points out that Girard’s will explicitly allows for the teaching of the Bible in the school (Sekilow 200). This was not, however, simply Justice Story mellowing with time. Story made it clear that if he had found the will to be blasphemous or exceedingly offensive to the Christian religion, he would have invalidated it (Sekilow 199). It is only because Justice Story understood the will as neither derogatory nor offensive to the Christian religion that he ruled in favor of the establishment of the college.

Vidal v. Girard’s Executors would be one of the last cases Justice Story decided for the Court, and the last one he would decide involving the Court addressing religion. Less than a year after the publication of Story’s opinion in *Vidal*, Justice Story would pass away, concluding his more than twenty years of combating the notions Jefferson put forward in his essay.

JEFFERSON AND STORY'S CONFLICT THROUGHOUT HISTORY

The conflict between Jefferson and Story continued to reappear throughout the United States legal history, with one of the most notable instances taking place just a few decades ago in the 1984 case *Wallace v. Jaffree*. In *Wallace*, the Court held a one-minute silence for meditation or private prayer in public schools constituted a violation of the First Amendment's Establishment Clause (Wallace, 472 U.S. 60-61). Justice Rehnquist wrote a scathing dissent in the *Wallace* case. In this dissent, Justice Rehnquist examined the claims from both Jefferson and Story on religion, Christianity, and the Constitution. Rehnquist began his dissent by focusing on the history surrounding the adoption of the Bill of Rights, specifically the First Amendment (Wallace, 472 U.S. 92-100). Rehnquist then looked at the actions the Founders took in the years following the enactment of the First Amendment, noting that the actions of the church and state were very much intertwined (Wallace, 472 U.S. 100-104). Rehnquist continued discussing the history of the Constitution and the Court's interpretation of the Establishment Clause through its most recent cases on the issue (Wallace, 472 U.S. 1004-112). After his discourse on the history of the Establishment Clause, Rehnquist turned his attention to Jefferson's strict-separationist theory of the relationship between the church and state (Wallace, 472 U.S. 91). Rehnquist maintains when one examines the history surrounding the First Amendment, Jefferson's "strict wall of separation" statement comes to be understood as "truly inapt," (Wallace, 472 U.S. 92) a "misleading metaphor," (Wallace, 472 U.S. 92-100) and comments made by an uninvolved individual who received at best a second-hand account of the Convention's proceedings and wrote a "short note of courtesy,

fourteen years after the Amendments were passed by Congress” (Wallace, 472 U.S. 92-100).

After going into greater detail on both Thomas Jefferson’s and James Madison’s views, and why they should be abandoned, Rehnquist provides an alternate interpretation of the Establishment Clause: Justice Joseph Story. Rehnquist makes Story’s non-preferentialist argument, maintaining that the Establishment Clause was intended only to protect against the government promotion of individual sects of Christianity over each other, not prohibit the promotion of Christianity over other religions (Wallace, 472 U.S. 104-105). Rehnquist commented in his dissent:

The Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade the establishment of a national religion, and forbade preference among religious sects or denominations (Wallace, 472 U.S. 106).

Rehnquist continued his defense of Story’s non-preferentialism throughout his dissent, however, the current opinion of the Court does not agree with Justice Rehnquist with regards to his interpretation of the Establishment Clause.

Just as Story responded to Jefferson’s arguments in the early 1800s, renowned Constitutional scholar Leonard Levy countered to Rehnquist’s arguments in the late 1900s. Levy prefaces the “Establishment Clause” chapter of his *Origins of the Bill of Rights* with mention of Rehnquist’s dissent in *Wallace*, and then spends the majority of the chapter specifically addressing the “non-preferentialism” claim articulated by Story and defended by Rehnquist.

Levy opens his rebuttal of Rehnquist by making a relatively simple, yet profound statement:

[T]he clearest proposition about the establishment clause is that it limits power by placing an absolute restriction on the United States: “Congress shall make no law” Reading an empowerment from that is about as valid as reading the entrails of a chicken for the meaning of the establishment clause or for portents of the future (Levy 80).

Levy explains that the First Amendment is not to be misconstrued as allowing any kind of religious laws. Rather, the First Amendment’s Establishment Clause explicitly reinforces that religion is not one of the enumerated powers given to the federal government in the Constitution, and any attempt to use the Establishment Clause to do so is a blatant wresting of the text and intent of the great minds that formed the Bill of Rights (Levy 80-81). Levy then gives extensive quotes from four founding fathers—James Wilson, Edmund Randolph, James Madison, and Richard Dobbs—and concludes that “their remarks show that Congress was powerless *even in the absence of the First Amendment*, to enact laws on the subject of religion, whether in favor of one church or all of them, impartially and equally” (Levy 81). In looking at the intent of the framers, Levy explained that even without the First Amendment, Congress was not permitted to create legislation dealing with religion, and trying to misconstrue the First Amendment as somehow allowing federal meddling in religion is a deliberate intent to manipulate the First Amendment to fit an agenda.

Levy then looked to the history of the First Amendment to show that it would be inconceivable that the individuals calling for such an amendment to the Constitution to

want the federal government to have the ability to legislate in matters of religion. Patrick Henry, who was largely responsible for Virginia's proposed language for the First Amendment, wanted the federal government to stay completely out of the arena of religion, and believed religion should be left entirely to the individual states (Levy 82-83). Virginia was one of the first states to completely privatize the support of religion and religious institutions, and Levy maintains "Virginia did not intend for the United States a power that it denied even to itself" (Levy 83). Through these quotes and examples, Levy maintains that the history surrounding the most notable individuals behind the First Amendment shows that there is no way the First Amendment could be in some way allowing the federal government to support any religion.

One of the final points Levy makes about the Establishment Clause is that the language used in the final draft of the First Amendment was created to be as broad as possible. When Madison originally introduced his draft of the First Amendment, it read that an individual's civil rights should not be abridged "on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed" (Levy 84). The actual text of the Establishment Clause ended up being reduced down to the prevention of a law "prohibiting the free exercise thereof" (Levy 84). This extremely abbreviated version of Madison's original language—especially the deletion of the word "national" from the text—shows that the founders wanted to make sure the First Amendment was as broad as possible so individuals would not attempt to make the First Amendment into a purposeful attempt of the founding fathers to exclude some laws regarding religion while allowing other laws on the subject (Levy 85-87). Levy maintains that the First Amendment, as

ratified, was a broadly worded amendment to assure that no one in the future would attempt to misconstrue the amendment as favoring one religion over another.

CONCLUSION

Although the resurfacing of the Jefferson-Story debate happened relatively recently, this debate died well before Rehnquist's arguments in *Wallace*. By the end of Justice Story's life of service on the bench, he came to the realization that his views were no longer the views of a changing Court (Newmyer 380-381). Although the Supreme Court and individual states would retain remnants of Story's belief that Christianity is part of the common law system for years with laws such as the "Sunday blue laws," in the end, the Court moved closer to President Jefferson's strict-separationism, as the majority opinion in *Wallace v. Jaffree* and additional Supreme Court decisions show. Leonard Levy's work on the Establishment Clause of the First Amendment explained the view the Court has come to accept: the First Amendment is nothing more than a broad reiteration of the fact that the federal government is forbidden from creating laws regarding religion in any way. This conflict over the application of Christianity in the common law brought out the passion of many of the greatest legal minds this nation has ever produced, with the two at the forefront being President Thomas Jefferson and Supreme Court Justice Joseph Story. Their views on this subject set the boundaries in which the debate surrounding the First Amendment's Establishment Clause would occur for decades, and over one hundred and fifty years later, their ideas are causing some of the greatest legal minds of our recent generations, such as Chief Justice Rehnquist and Leonard Levy, to revisit the Story-Jefferson conflict as a hallmark debate over the meaning of this nation's Constitution.

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