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ABSTRACT

LAW AND EXPERIENCE IN THE EARLY REPUBLIC: THE EVOLUTION OF THE DARTMOUTH COLLEGE DOCTRINE, 1780 - 1819

By

Bruce Arthur Campbell

In 1819, the United States Supreme Court announced its decision in the case of Trustees of Dartmouth College v. Woodward. Chief Justice John Marshall set forth the Dartmouth College doctrine, the rule that a charter of a private corporation is a contract protected by the federal constitution from arbitrary amendment or repeal.

This study seeks to discover in the first instance why the Supreme Court announced the Dartmouth College doctrine as a principal of constitutional law. On a higher level of historical generality, since it represented a consolidation of forty years of development, Dartmouth College merely serves as a point of reference for a broad analysis of the growth of an American system of political economy and of a number of institutions of higher education, with particular attention to the relationship between government and corporations in each field.

Since the American post-Revolutionary mind had a dual aspect, at once legalistic and pragmatic, both law, in the

sense of traditional legal thinking, and experience are crucial elements in the development of the statutory and case law of corporations after 1780.

This study is organized topically around a central core, the Dartmouth College case. Chapter I describes the case itself. Subsequent chapters discuss the various legal and experiential elements which contributed to the decision, including the English law of corporations, the American experience with charitable and business corporations, and the doctrinal foundation for the decision in both constitutional and non-constitutional law.

Various legal elements made significant contributions to the formation of the Dartmouth College doctrine. Initially, English law provided fundamental conceptions of the corporation which became the starting point of American analysis. The British also had a well developed law of charitable corporations, but American lawyers and judges disagreed as to its interpretation and application. By 1819, a series of decisions on public contracts had laid a doctrinal foundation for the Dartmouth College decision in constitutional law. Although the Supreme Court was originally split on the reach of the contracts clause, a majority finally decided to restrict the protection of the clause to contracts concerning property.

American experience with both business and charitable corporations likewise made significant contributions to the formation of the Dartmouth College doctrine. Between 1780

and 1819, the process of chartering business corporations invited the conclusion that a charter represented a bargain or contract between the incorporators and the legislature, and there was widespread agreement that the business corporation charter was the measure of corporate rights. Moreover, legislatures usually respected chartered rights. In contrast, governmental treatment of educational corporations showed no such theoretical or practical unity. From the late colonial period to 1819, legislatures seriously threatened or actually attacked seven colleges, including Dartmouth, damaging each to some degree. It was obvious from the record that neither government nor education would be well served by allowing these legislative raids to continue. Consequently, the Supreme Court used its constitutional power to restrict state legislative control over private educational corporations. Since there was, apart from property, no developed law of civil liberties on which to draw, the Court defined the Dartmouth College issues in terms of private property, and rationalized its decision in terms of those publicly accepted operational principles which informed governmental relations with business corporations.

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1780 - 1819

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INTRODUCTION

In 1819, the United States Supreme Court announced its decision in the case of Trustees of Dartmouth College v. Woodward. In his opinion for the Court, Chief Justice John Marshall set forth what has come to be known as the Dartmouth College doctrine, the rule that a charter of a private corporation is a contract protected by the federal constitution from arbitrary legislative amendment or repeal.

This study seeks to answer in the first instance two closely related questions. The first is, Why did the Supreme Court announce the Dartmouth College doctrine as a principle of constitutional law? The second, What was the substance and meaning of the Dartmouth College decision in the context of the early national period? On a higher level of historical generality, since it represented a consolidation of forty years of development, Dartmouth College merely serves as a point of reference for a broad analysis of the growth of an American system of political economy and of a number of institutions of higher education, with particular attention to the relationship between government and corporations in each field. Ultimately, the theme is the way in which individuals, special interest groups, political factions, legislatures, and courts cooperated or, in the case of higher education, failed to cooperate in the formation and definition

of the American constitutional order between 1780 and 1819.

The legal and historical method of analysis employed in this study owes much to the instrumental theory of law which has come into favor in the middle decades of the twentieth century. All of those who subscribe to this theory emphasize social factors and operational results over traditional legal analysis as the most important elements of the adjudicatory process. The most extreme commentators treat all legal analysis in judicial opinions as mere rationalization for decision reached on wholly non-legal grounds of personal prejudice, political preference, or economic self-interest. Others view the social and political factors which influence a decision as of prime importance, but do allow that formal analysis can have some impact on events by influencing the direction of judicial thought.

The instrumental theory has had a beneficial effect on the writing of American constitutional and legal history. Although law reviews continue to publish useful research into doctrinal development of particular points, sophisticated legal historians, both within and without the legal profession, have moved far beyond the old legal history to emphasize the interaction between the legal system as a whole and society at large. The most successful exponent of this approach has been James Willard Hurst. In some of his earlier writings, Hurst took a broad over-view of the actual operation of major social institutions in order to discover those "'working principles,' principles defined and expressed primarily by action" which moved society in the nineteenth

century. More recently, Hurst has applied his theory of legal history to give a generally satisfactory account of the relationship between legal institutions and economic development in a single industry in the state of Wisconsin.¹

Although the instrumentalist theory generally and the example of Willard Hurst in particular pointed the way, much evidence suggested that a modification of the general approach was necessary for the period 1780-1819. Especially after the turn of the nineteenth century, it is true, lawyers, judges, and the public everywhere examined the economic and social implications of important cases and legal problems. However, unless a given problem was virtually unprecedented, people also seriously discussed it in terms of received law and general legal concepts. The mind of the early nineteenth century, then, had a dual aspect, at once pragmatic and legalistic. Accordingly, while recognizing the importance of social factors as causal elements in legal development, this study has given an independent status to traditional

¹James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: University of Wisconsin Press, 1956), 5. Law and Social Process in United States History (Ann Arbor: University of Michigan Law School, 1960), 1. Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (Cambridge: Belknap Press of Harvard University Press, 1964). For a competent summary and generally laudatory review of Hurst's work to 1970, see Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," American Historical Review, LXXV (Feb., 1970), 744-756. The best current discussion of the writing of American legal history is Lawrence M. Friedman, "Some Problems and Possibilities of American Legal History," in Herbert J. Bass, ed., The State of American History (Chicago: Quadrangle Books, 1970), 3-21.

legal and doctrinal analysis. Where legal argument figured prominently in public debate and court-room discussion, an attempt has been made to assess the quality of the argument in its legal dimension, and to determine so far as possible its impact on the course of events.

In order effectively to apply this scheme of analysis, a number of special concepts had to be used. Some of these require definition at the outset. Among the concepts peculiar to the legal system which must be understood are "contract" and the distinctions between judicial decisions and judicial opinions, between law and experience, and between procedure and substance. Finally, there are both legal and functional differences between educational and business corporations which must be explained.

A "contract" is a legally enforceable agreement between two or more parties. Leaving aside special situations which are irrelevant here, the only enforceable agreements are bargains, in which each party makes a commitment or gives up something in order to induce the promise or performance of the other party. That which is promised or paid is referred to as "consideration." Thus, in non-legal language, A, a builder, might agree to build a small office building for B. If B does not have the cash to pay for the construction, the builder might agree to accept B's promise to pay in the future, with the further agreement that A may collect the rents until the debt is paid off. In legal terms, A and B have a contract, with A's consideration being the promise to construct the building and B's consideration

being the promise to pay, additionally supported by the agreement that A may collect the rents. In the normal course of events, A would begin to spend money on the building in reliance on B's promise to pay and the security arrangement. When this has happened, modern commentators refer to A as having a "reliance interest" in the contract. The old law had no such neat and compact term for this phenomenon, but referred to money spent or action taken on the "faith" of the contract. The conception of a contract as a bargain and the associated legal ideas of consideration and reliance are important for the proper interpretation of the American system of political economy as it evolved from 1780 to 1819.

When commentators discuss an appellate judicial decision, they often draw a distinction between the decision itself and the supporting opinion. The decision is what was actually decided, in fairly explicit legal or operational terms. A full opinion, on the other hand, is an elaborate judicial statement of the legal bases for the decision, of the limits of the ruling, and of the reasons for reaching the decision. Most opinions are designed principally to justify the decision to the legal profession and the public, and facilitate the use of the decision in subsequent analogous cases. Of course, they vary widely in quality. Some opinions are frank declarations of actual reasons why decisions were reached. Others are deliverately ambiguous on important points, or are artfully constructed rationales designed to justify decisions

reached on largely unstated non-legal grounds.

A related distinction is one between "law" and "experience." Law in this context is a special body of thought, an ideational system with a special language in terms of which social reality is redefined and analyzed. Law is most concretely embodied in judicial opinions, legal treatises, statutes, and constitutions. "Experience" as a component of judicial decision refers broadly to the judicial assessment of the equities of the case at hand, of the larger requirements of the economic, political, and social systems, and of the lessons of history, apart from purely legal considerations or the intellectual apparatus of the law. The "experience" which judges bring to bear in the processes of decision is an uncertain compound of both individual value judgments based on personal interest and prior experience, and more objective social analysis.

A final important analytical distinction is between procedural and substantive law, and more particularly between jurisdiction, a branch of procedure, and substance. Essentially, procedure is a complicated framework of rules by which the legal system itself operates, a sort of legal means through which results are reached. Thus, procedure applies within the legal system, and while it often influences or determines results, it does so only secondarily, through its operation on the parties and the court inside the legal process. Jurisdiction is merely that branch of procedure which deals with the legal authority of a court to hear a particular case and to grant a particular remedy. In

most cases involving two parties, jurisdiction is absolute. Either the court can hear the case or it cannot, and if it cannot the parties are sent on their way, regardless of any considerations of justice. Substantive law, on the other hand, is a set of rules by which society at large is to conduct itself and by which the courts decide the merits of cases brought to them for decision. Thus, in a typical contract case, the court will apply one set of rules to determine whether or not it has jurisdiction, and another set of rules to determine whether a contract has been made, what its terms are, and whether the contract has been breached. It is fundamental to the legal system that jurisdiction and other procedural matters are to be treated separately from the substantive questions. To do otherwise would be absurdly to confuse means with ends, to allow the means to determine results in cases where there is no necessity for doing so.

Since Dartmouth College applied to both educational and business corporations, a full analysis of the decision requires an understanding of the important legal and functional differences between the two types of corporations in the early national period. Business corporations existed almost exclusively as economic entities, invested in and owned by individual stockholders, operated in the market for profit, and regulated by the state with economic matters principally in mind. Educational corporations, on the other hand, were in a much different sphere. They had neither stocks, investors, profits, nor dividends. The corporations' physical assets rarely had a productive capacity apart from

education itself, and if educational institutions could be said to be selling services in a market, it was nonetheless a highly restricted and peculiarly impoverished one. Although education undoubtedly helped to increase economic activity in the long run, the daily operation of educational corporations had a negligible immediate impact beyond the locality in which the school was situated. For these reasons, states did not pay much attention to the economic aspects of educational institutions, except where public property or appropriations were directly involved. Rather, legislatures were much more likely to be concerned with the political ideology, religious persuasion, and partisan allegiance of administrators and faculty, matters which were irrelevant to the governmental regulation of business enterprise.

The subject matter and method of analysis has necessarily influenced the selection and use of sources. Although secondary sources offered leads into the raw materials and often provided necessary background information, the major elements of the study were constructed from a number of types of primary sources. State session laws were fundamental. In the period under consideration, nearly every corporation received a special charter and many received special charter amendments, so it was possible to determine at the outset exactly what legislatures did and did not do with regard to corporations. Of course, statutes alone would not tell the full story and standard sources of political history, that is, newspapers, pamphlets, addresses,

and the like, had to be consulted in order to discover the contours of debate and the economic and political interests which actually prompted legislative action. Even more significant, appellate court decisions in corporate and some non-corporate cases at both the state and federal levels revealed how the legal system thought about and resolved important problems which had often been the subject of intense public debate. Finally, treatises by contemporary British and American authors provided suggestive consolidations and interpretations of existing law.

The study is organized topically around a central core, the Dartmouth College case. Chapter I describes the case itself. Subsequent chapters discuss the various legal and experiential elements which contributed to the decision. Chapter II briefly describes the British law of corporations as it had evolved to the early nineteenth century. Chapter III analyzes the American experience with charitable corporations, and relates this experience to the Dartmouth College decision. Chapters IV through VI examine various aspects of the growth of the business corporation and its relationship to government between 1780 and 1819. Chapter IV discusses the development of the Massachusetts political economy in these years. Chapter V surveys the essential features of Virginia's political economy, and adds an examination of Chief Justice Marshall's continuing involvement in his state's economic activity. Chapter VI offers a survey of the essential features of the political economies of other states. Moving away from state developments,

Chapter VII examines the Supreme Court's laying of the doctrinal foundation for Dartmouth College, with special attention to the area of public contract. In conclusion, Chapter VIII draws the separate elements into a unified summary analysis of the Dartmouth College decision.

I

THE DARTMOUTH COLLEGE CASE

Dartmouth College has its origins in the discovery of the Indian and missionary education business by the Reverend Eleazar Wheelock, an obscure, impecunious, and ambitious pastor in colonial Lebanon, Connecticut. Wheelock had been preparing Indians for college and missionary work for several years when, in 1755, Colonel Joshua More granted about two acres of land in Lebanon to Wheelock and three others as trustees for an expanded Indian charity school. The grant transformed Wheelock's school from a wholly personal operation into something of a legal institution. The trusteeship created in 1755 was the direct legal ancestor of the Dartmouth College board which would successfully defend itself from attack by the New Hampshire legislature sixty years later.¹

¹This account of Dartmouth College up to 1815 is taken largely from the following: Frederick Chase, A History of Dartmouth College and the Town of Hanover, New Hampshire, ed. by John K. Lord (Cambridge: John Wilson and Son, 1891). Hereafter cited as Dartmouth College. John K. Lord, A History of Dartmouth College: 1815-1909 (Concord, N. H.: Rumford Press, 1913). Hereafter cited as History of Dartmouth College. John M. Shirley, The Dartmouth College Causes and the Supreme Court of the United States (St. Louis: G. E. Jones and Company, 1879.) Hereafter cited as Dartmouth College Causes. Leon Burr Richardson, History of Dartmouth College. 2 vols. (Hanover, N. H.: Dartmouth College Publications, 1932). Jere R. Daniell, II, "Eleazar Wheelock and the Dartmouth College Charter," Historical New Hampshire, (Winter, 1969), 3-31. Hereafter cited as "Wheelock and the

Wheelock was a determined promoter, and the school prospered. In the years after 1755, it received money and expressions of support from the Connecticut, Massachusetts, and New Hampshire colonial legislatures, from both Scottish and English missionary societies -- a tribute to Wheelock's political skill -- and from various individual patrons. Although Wheelock petitioned the Connecticut legislature for incorporation, the assembly refused, and as a consolation granted an official legislative endorsement of the school and formal authority to make a public appeal for funds in Connecticut. Even this Wheelock could put to good use. In 1765, he sent the Reverend Nathaniel Whitaker and Occom, one of the first Indian graduates of the charity school, on a fund-raising expedition to England. Armed with the legislative testimonial and the preaching abilities of Occom the pair were able to enlist the considerable promotional skills of the Earl of Dartmouth and other prominent London figures. Whitaker and Occom collected over £9000 in England alone, including £200 from the king, a large sum for such a small

Dartmouth College Charter." The most balanced and by far the best short summary of the background of the Dartmouth College case is Maurice G. Baxter, Daniel Webster and the Supreme Court (Amherst, Mass.: University of Massachusetts Press, 1966), ch. IV, and esp. 65-72. Hereafter cited as Webster. On Eleazar Wheelock, see James D. McCallum, Eleazar Wheelock, Founder of Dartmouth College (Hanover, N. H.: Dartmouth College Publications, 1939). Hereafter cited as Wheelock. For an assessment of Wheelock's character and career, see Richardson, History of Dartmouth College, I, 189-193. On the early beginnings of Moor's Charity School, see Chase, Dartmouth College, 8, 10-11, 16.

operation as Wheelock's school.²

Wheelock would have been fully convinced that this was the age of benevolence had the £9000 been turned over to him directly, but for the moment the fund seemed a mixed blessing. Dartmouth and the other major English contributors made themselves trustees of the fund and insisted not only that they retain possession and full control of its expenditure but also that Wheelock execute a deed of trust placing his office and his school under their control. Faced with a final choice, Wheelock probably would have sacrificed the fund in order to keep his school, but he set out to keep the school without losing the funds. Securing expert legal advice -- Wheelock seems always to have had expert legal advice -- he prepared no less than ten drafts of the proposed trust. As finally accepted by the English trustees, the deed provided for two sets of trustees. An American board was essentially an expanded version of the trust created on paper in 1755, and was to hold all donations received by the school in America. The English board, led by Dartmouth, was to hold all money granted to the Indian charity school in Europe. Wheelock, according to the trust deed, was founder and President, and was to have the power to name his successor,

²On early support for the school, see Chase, Dartmouth College, 16, 23, 26, 28-29, 36. For attempts to secure a charter and the receipt of the Connecticut legislative endorsement, Ibid., 14-15, 37-38. On the English expedition, see Ibid., 46-68 passim, and, generally, Leon Burr Richardson, ed., An Indian Preacher in England, Being Letters and Diaries Relating to the Mission of the Reverend Nathaniel Whitaker to Collect Funds in England for the Benefit of Eleazar Wheelock's Indian Charity School, from Which Grew Dartmouth College (Hanover, N. H.: Dartmouth College Publications, 1933).

subject to the approval of both boards. By choosing as American trustees his friends and associates who understood that their purpose was not to govern the school or to question the president's decisions, Wheelock retained effective control over his Indian school and its property. In practice, the English board was too distant to exercise effective control even over the expenditure of the English funds.³

With the English fund at his disposal, Wheelock's bargaining position was strong as he set out to improve his situation in America. He let it be known that he was going to move the school from Connecticut, and invited bids from colonies and localities interested in attracting an endowed charity school. One of the benefits Wheelock would try to insist upon was a charter of incorporation for his enterprise. As early as 1755, Wheelock's friend and principal legal advisor William Smith, Sr., of New York, a provincial attorney general and later an associate justice of the supreme court, advised him to secure a charter. In March, 1767, Smith again strongly recommended incorporation. "This is the only way," he wrote, "to render the project permanent, to secure wisdom and council equal to the work, to defend it against opposition, and to encourage future donations." However, only Governor John Wentworth of New Hampshire offered incorporation as a part of his bid.

³On Wheelock's early troubles with the English, see Richardson, History of Dartmouth College, I, 62; Chase, Dartmouth College, 55-56, 67-68. The original deed of trust is reprinted in Shirley, Dartmouth College Causes, 48-52.

Wheelock quickly accepted, and prepared to reorganize his school once again.⁴

The problem of drafting a charter was similar to the problem of drafting the English trust deed two years previously. Wheelock wished to extend his enterprise as far as possible while retaining at least a de facto control over the whole operation. Thus he again sought legal advice, and himself searched the charters of other incorporated educational institutions for ideas. The charter of the College of New Jersey, which had been issued in revised form in 1748, proved to be a suitable model.⁵

In August, 1769, Wheelock sent Governor Wentworth a draft charter for an "academy." He included a cover letter containing the following postscript: "If proper, to use the word 'College' instead of 'Academy' in the charter, I shall be well pleased with it." Wheelock had considered expanding his school to a college for white missionaries as early as 1763. New Hampshire seemed a likely place. The province had not incorporated schools to interpose objections, and

⁴Daniell, "Wheelock and the Dartmouth College Charter," 6-10, 21-22. Shirley, Dartmouth College Causes, 21. Smith to Alexander Phelps, March 30, 1767, in Ibid., 24. Chase, Dartmouth College, 12, 95. For the various offers to Wheelock, see Ibid., 90-91, 95-96, 98, 100-102. Richardson, History of Dartmouth College, 79-84.

⁵Shirley, Dartmouth College Causes, 34-35. Chase, Dartmouth College, 115. Daniell, "Wheelock and the Dartmouth College Charter," 23. The Charter of the College of New Jersey, issued Sept. 14, 1748, is reprinted in Thomas Jefferson Wertenbaker, Princeton, 1746-1896 (Princeton, N. J.: Princeton University Press, 1946), 396-404.

local Congregational ministers were sympathetic to the proposal. Fortunately, the Governor accepted Wheelock's suggestion, and the academy was advanced to the status of a college.⁶

The document that finally issued in the name of George III on December 13, 1769, provided for the establishment of "Dartmouth college for the education of the Indian tribes . . . and also of English youth and others." The preamble labelled Wheelock the founder of the Indian charity school. The charter itself specifically named him "founder" of the college, and made him first president with the power to appoint his successor, whom the trustees could reject by a majority vote. Twelve trustees of Dartmouth College were incorporated "forever," with "perpetual succession and continuance." The board would be self-perpetuating, filling its own vacancies. The original trustees included five officers of the New Hampshire

⁶Daniell, "Wheelock and the Dartmouth College Charter," 6, 10, 13-14, 21-22. Wheelock to Wentworth, Aug. 22, 1769, in Shirley, Dartmouth College Causes, 29. Wentworth was anxious to have the new institution located in his province, so he usually conceded to Wheelock on disputed charter provisions. On Oct. 18, 1769, the Governor wrote to Wheelock that he wished "to serve the public Charity under your care." The next day, Wheelock's agent in New Hampshire, Alexander Phelps, wrote that the Governor had "given up almost every thing I asked." On Oct. 28, Wentworth's chief legal advisor, Judge William Parker, wrote Wheelock that he had "spent considerable time with the governor . . . to prevail on him to make such concessions as would suit the gentlemen with you." Ibid., 29, 33, 35. The independence of Dartmouth College from both church and state was thus in large part Wheelock's doing. Later, as the institution got under way, Wentworth tried unsuccessfully to dominate Wheelock. Lawrence Shaw Mayo, John Wentworth: Governor of New Hampshire, 1767-1775 (Cambridge: Harvard University Press, 1921), 116-118.

government, the Governor, three Council members, and the Speaker of the House. Significantly, however, these men were not made trustees ex officio, but became members of the board as individuals, thus being subject to replacement according to the same rules as the other original trustees. At Governor Wentworth's insistence and with Wheelock's apparent approval Dartmouth College was placed on a partially non-sectarian basis. The charter forbade the college to exclude "any Person of any religious denomination whatsoever from free and equal liberty and advantage of Education . . . on account of his . . . speculative sentiments in Religion and his . . . being of a religious profession different from the . . . Trustees."⁷

Initially, the new educational institution was well-supported by the New Hampshire establishment. Many prominent citizens helped with grants of land, much of which had been pledged even before the charter had been issued. In January, 1770, about a month after Dartmouth was chartered, Governor Wentworth fulfilled an earlier promise by granting Landaff township to the college. (Unfortunately, the Landaff grant subsequently failed, and the legislature had to substitute another tract.) On December 19, 1771, Wentworth made a second

⁷Daniell, "Wheelock and the Dartmouth College Charter," 3, 23-31. The charter is reprinted as part of the special verdict in Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 519-537 (1819). Hereafter cited as Dartmouth College.

grant to the college.⁸

The New Hampshire legislature was less generous than the governor and many private citizens. It had no official connection with the founding and endowment of the college, and gave only occasional financial help after 1769. For example, the legislature granted the college a township to substitute for the failed Landaff grant on February 5, 1789. Other grants of land were made in 1792 and 1807. In 1795, the legislature gave permission for the college to raise \$15,000 by lottery, but this, of course, required no state expenditures. According to Shirley, the legislature also gave the college \$900 in 1805, but published laws and resolutions of the New Hampshire legislature contain no record of this particular grant.⁹

⁸Daniell, "Wheelock and the Dartmouth College Charter," 15-16. Chase, Dartmouth College, 121. Charter recital, Dartmouth College, 4 Wheaton, 522. Shirley, Dartmouth College Causes, 8, 26, 53-58, 361. The language of Wentworth's 1770 grant, reprinted Ibid., 53-55, is not that of a public official founding a public institution, but reflects an assumption that the grant is merely one among many already made to a worthwhile enterprise.

⁹Act of Feb. 5, 1789, Nov. Sess., 1789, ch. 46, Laws of New Hampshire, 10 vols. (Various imprints: 1904-1922), V, 396-397. Resolution of Dec. 20, 1792, Nov. Sess., 1792, Ibid., VI, 96. Act of June 18, 1807, June Sess., 1807, ch. 54, Ibid., VII, 601-602. Act of Dec. 31, 1795, Dec. Sess., 1795, ch. 26, Ibid., VI, 294-295. Shirley, Dartmouth College Causes, 8. Lynn W. Turner, William Plumer of New Hampshire, 1759-1850 (Chapel Hill: University of North Carolina Press, 1962), 247, n. 29, hereafter cited as Plumer, states that in addition to land and the 1805 \$900 grant, the legislature granted Dartmouth \$3450 in 1809 for the construction of a medical school building. However, the grant was not made to Dartmouth. The building was constructed with public funds on land donated to the state and it remained the property of the state. Act of June 23, 1809, ch. 18, Laws of N. H. VII, 813-814. Resolution of June 24, 1813, June Sess., 1813, Ibid., VIII, 265. Resolution of Dec. 27, 1816, Nov. Sess., 1816, Ibid., VIII, 590.

The acts of 1789, 1795, and 1807 made certain governmental officials ex officio members of the Dartmouth board of trustees for the limited purpose of administering the state grants and lottery proceeds. This had important negative implications for the state's later contention that Dartmouth was a public, not a private, institution. If the legislature thought the college was public, subject to the full control of the government at all times and for all purposes, such an intrusion into the Dartmouth administrative machinery for the purposes of regulation would seem awkward and unnecessary. More significantly, the limitation of the authority of the state's representatives to the administration of state grants and lottery funds was an implicit acknowledgment that in practice Dartmouth functioned as an autonomous institution, with a private endowment managed only by the trustees. Finally, although the governor occasionally sat with the Dartmouth board, there is no evidence that the eligible New Hampshire officials sat regularly.¹⁰ Even the limited regulatory authority of the state was thus practically unexercised, and Dartmouth operated for nearly half a century, from 1769 until 1816, with no permanent and functional connection with the state.

Shortly after receiving the charter, Wheelock moved his charity school to Hanover, New Hampshire, and began to build Dartmouth College. Although Lord Dartmouth and the other contributors to the English fund had given money only for an

¹⁰Richardson, History of Dartmouth College, I, 223.

Indian charity school, and not at all for the founding of a college for white students, Wheelock carefully mixed the accounts of the school and the college so the latter could benefit from the English largess. The English trustees objected mildly to Wheelock's actions, but allowed him to draw on both principal and interest so that the whole fund was expended by 1775. Thereafter, the charity school continued to exist as a satellite enterprise, but the major institution was Dartmouth College, attended almost exclusively by whites.¹¹

Eleazar Wheelock ran Dartmouth as a personal enterprise until his death in 1779. In his will, the elder Wheelock exercised his charter option by appointing his son John to succeed him as president of the college. It was an unfortunate choice. As one author describes the younger Wheelock,

He lacked generosity and breadth of view, and regarded all matters as they affected him personally. All with whom he had to do were considered either as friends or foes, as supporters or opponents. . . . He inherited from his father an intense will . . . , but what in his father had been relieved by wide sympathies and far-reaching plans was in him narrowed to personal and private affairs. The narrowness of his purpose was not offset by scholarship or learning.

¹¹On Wheelock's questionable use of the English funds in aid of the college, see Chase, Dartmouth College, 117, 239-240. McCallum, Wheelock, 193-194. Richardson, History of Dartmouth College, I, 115-116, 144, 219. The relationship between the charity school and the college was ambiguous from the beginning, and never was satisfactorily straightened out. See Chase, Dartmouth College, 155, 239-243, 279, 281, 588-600, 618-626, 634. At the request of the President and the Board of Trustees, the New Hampshire legislature tried to assign definite responsibility for the charity school within the Dartmouth organization. Act of June 10, 1807, June Sess., 1807, ch. 10, Laws of N. H., VII, 556-557. Act of Dec. 21, 1808, Nov. Sess., 1808, ch. 48, Ibid., 736.

After taking over as President, John Wheelock came to regard the college as his personal property over which his word should be law. And the younger Wheelock did have his way for about a quarter of a century.¹²

After 1800, however, the situation changed. As old trustees who had been associated with the elder Wheelock died or resigned, they were replaced by younger men who had little sense of Dartmouth as a family enterprise and no personal loyalty at all to John Wheelock. On the contrary, the newer trustees saw Dartmouth as an important part of the educational system and intellectual life of upper New England, and they began to act in accordance with this vision, rather than as rubber stamps for the president. By 1810, those holding the more cosmopolitan view of the college were a majority of the board. New faculty appointments made over the objections of the president soon resulted in an informal faculty-trustee alliance. Wheelock, of course, fought desperately first to retain and later to regain the control of "his" institution, as the independent and powerful board of trustees continued to override the president on point after point. By late 1814, the conflict between Wheelock had passed the point where compromise was possible, with the president being the obvious loser.¹³

¹²Chase, Dartmouth College, 561-562. Lord, History of Dartmouth College, 6-7, 116, and the quote, 118. Richardson, History of Dartmouth College, I, 288.

¹³Lord, History of Dartmouth College, 7, 60-61. Richardson, History of Dartmouth College, I, 296-299, 301-303. See, generally, William G. North, "The Political

Wheelock, unwilling to admit defeat, appealed to the public against the trustees. In the spring of 1815, he circulated a pamphlet entitled, "Sketches of the History of Dartmouth College and Moor's Charity School with a Particular Account of Some Remarkable Proceedings of the Board of Trustees from the Year 1779 to the Year 1815." Most of it was either false or irrelevant. He next collected his allegations in a "Memorial" to the New Hampshire legislature. He accused the trustees of, among other things, misappropriating college funds and promoting "party views." In a summary, he declared that all the actions of the trustees tended

to one end; to complete the destruction of the original principles of the College and School, and to establish a new modified system to strengthen the interests of a party or sect, which, by extending its influence, under the fairest professions, will eventually affect the political independence of the people, AND MOVE THE SPRINGS OF THEIR GOVERNMENT.

The legislature provided for a fact-finding commission.

The exasperated trustees at last removed Wheelock from the presidency of Dartmouth.¹⁴

Background of the Dartmouth College Case," New England Quarterly, XVIII (June, 1945), 181-203. Hereafter cited as "Political Background." Wheelock and the trustees originally clashed over who should be the pastor of the Church of Christ at Dartmouth College. This phase of the controversy is traced in Lord, History of Dartmouth College, 1-61.

¹⁴The pamphlet was published with a second polemic of equal quality, "A Candid Analytical Review of the 'Sketches,'" by Elisha Parish, a conservative Federalist minister from Byfield, Massachusetts, whom Wheelock had nominated but the trustees had failed to appoint professor of languages five years earlier. North, "Political

The public controversy engendered by Wheelock's charges quickly became political. Some of the college trustees were Federalist lawyer-politicians who could expect the support of the Federalist party. Although Wheelock himself was nominally a Federalist, he was known to the public as an educator, not as an active politician. This enabled Wheelock to appeal to the Republican party for support against the trustees, and allowed the party to make his cause its own without embarrassment. On May 23, 1815, Isaac Hill, a strong Republican and supporter of religious liberty, took Wheelock's side in his newspaper, the New Hampshire Patriot. Wheelock was presented as a martyred religious liberal unjustly attacked by Federalist trustees who were reactionary in politics and religion alike. By taking Wheelock's pretensions at face value, and by persistently distorting the facts, Hill succeeded in transforming Dartmouth's internecine struggle into an openly partisan contest between Republican religious liberalism and Federalist conservative orthodoxy. From the summer of 1815 until Wheelock's death in 1817, there was a powerful Wheelock faction within the Republican party, a faction determined to punish the trustees and to restore the martyr to his former position within Dartmouth College. Wheelock and his faction were given hope when the Republicans swept the state in the 1816 spring elections on a platform which included the

Background," 184, 187, 192, 193. Richardson, History of Dartmouth College, I, 305. Lord, History of Dartmouth College, 64-65, 75-77. Wheelock's "Memorial" is reprinted Ibid., App. A, 671-674, the quote from 673. The trustees' resolution of removal is in Ibid., 75-76.

"reform" of Dartmouth.¹⁵

In his inaugural address, the new Republican Governor, William Plumer, invited the legislature to consider "the state and condition of Dartmouth." The trouble lay in the charter of 1769. "As it emanated from royalty, it contained principles congenial to monarchy" and "hostile to the spirit and genius of a free government." The most odious provision was that providing for a self-perpetuating board of trustees. "Sound policy therefore requires," continued Plumer, "that the mode of election should be changed, and that trustees, in the future, should be elected by some other body of men." He further suggested that the number of trustees be increased and that the president make annual reports to the Governor.¹⁶

The scope of Plumer's recommendations show that the Governor had broader aims than the mere restoration of the deposed Wheelock. Basically, he wanted to reorganize Dartmouth into a secular, state-controlled, and state-supported university. This involved several specific actions. First, he had to eliminate any strictly denominational influence at Dartmouth, and reform and expand the curriculum. Second, he wanted, in his own words, "to establish the authority of the legislature over the institution, so far as to secure

¹⁵North, "Political Background," 191, 193-194, 198-201. Richardson, History of Dartmouth College, I, 287-288. Lord, History of Dartmouth College, 65-66. On the 1816 campaign and Republican victory, see Turner, Plumer, 236-239. Late in 1815, the Wheelock faction had apparently made a political deal with Plumer. Ibid., 235-236.

¹⁶The relevant portions of Plumer's address are reprinted in Shirley, Dartmouth College Causes, 105-107.

to the people the objects for which it was founded, and to form a useful connection between the government and the college." Third, it was, according to his son and biographer, "an essential part of his plan that the state should extend a liberal patronage to the University, and make it, what it had never been, a well-endowed institution." Finally, in order to fulfill his political commitments, the Governor would also restore Wheelock to the presidency, but he obviously could not restore all of Wheelock's lost authority if the institution were to be placed under state control.¹⁷

The June 27, 1816, "Act to Amend the Charter and Enlarge and Improve the Corporation of Dartmouth College" passed the Senate by a straight party vote, 8-4, and passed the House 96-86, with all the Federalists and only two Republicans voting against the bill. The terms of the act reflected the areas of agreement as well as the strains and compromises between Plumer, who wanted a state university, and the Wheelock faction in the Republican party, which wanted primarily to restore the president to his former autocratic position. The two could agree, for example, that the college ought to be expanded into a "university," complete with several colleges and a new "institute." Likewise, they could agree that the power of the old college trustees had to be checked. This was easily accomplished by increasing the number of

¹⁷Turner, *Plumer*, 245-246, 250, 303. William Plumer, Jr., *Life of William Plumer*, ed. by A. P. Peabody (Boston: Phillips, Sampson and Company, 1857), 439, 440. Hereafter cited as *Life of Plumer*.

trustees from the twelve provided for in the old charter to twenty-one. A further check was provided by the addition of a board of twenty-five overseers which could veto certain important acts of the trustees.¹⁸

The Wheelock faction would not, however, concede Plumer full state control over Dartmouth University. Although the Governor and Council could appoint the original nine new members of the Board of Trustees, after that the board was to become self-perpetuating as under the old charter. This provision was embarrassing to Plumer, who had publicly objected that self-perpetuation emanated from royalty, and was hostile to free government. He even threatened to veto the whole charter amendment on these grounds, but in the end he acknowledged defeat on the issue and signed the bill. At least the Governor and Council could fill vacancies on the Board of Overseers.¹⁹

The college trustees' refusal to surrender control of Dartmouth to the state proved the final undoing of the reorganization scheme. That the trustees resisted at all surprised Plumer, because there were several good reasons for their immediate capitulation. For one thing, a majority of the trustees were strictly volunteers. They derived no material benefit whatsoever from their positions, and economically had nothing to lose. (Three trustees, a minority,

¹⁸Act of June 27, 1816, ch. 32, Laws of N. H., VIII, 505-508. The best account of the negotiations and final passage of the bill is Turner, Plumer, 249-253. Lord, History of Dartmouth College, 89.

¹⁹Turner, Plumer, 250-253.

were also faculty members. Their teaching positions were jeopardized by the reorganization, as a new Republican majority would probably not tolerate a politically hostile faculty.) Furthermore, if the trustees took their case to court, they had no assurance of victory at either the state or federal level. The Republican legislature had changed the New Hampshire judiciary the same day that it had remodeled Dartmouth.²⁰ The college lawyers would face Plumer appointees. The United States Supreme Court offered little more hope. Five of the seven members were Republican appointees -- Brockholst Livingston, Joseph Story, William Johnson, Thomas Todd, and Gabriel Duvall. Only two, Chief Justice John Marshall and Bushrod Washington, were Federalists. Even if partisanship were not a factor in the Supreme Court, the case could go to Washington from the state courts only on the narrow question of whether the charter amendment violated the obligation of contracts clause of the federal constitution. A case could be made that this was what happened, but it certainly was not the strongest of arguments.

None of these reasons, however, was sufficient to induce the trustees to abandon the college to the state. All of the trustees had been touched personally by Wheelock's charges that the board had mismanaged the college funds. As the charter amendment had grown out of these charges, ready assent might be interpreted as confession of their validity, while determined resistance might lead to ultimate vindication. Moreover,

²⁰Ibid., 254-256, 259, 269-270.

five of the trustees were active lawyer-politicians. Three of these had served on the supreme courts of New Hampshire and Vermont. One of the leaders of the trustees, Charles Marsh, reputed to be the best lawyer in Vermont, was a Congressman when the charter amendments were passed. The other leader, Thomas Thompson, had studied law in Massachusetts under Chief Justice Theophilus Parsons, had himself taught Daniel Webster, and was representing New Hampshire in the United States Senate when the controversy with Wheelock spilled into politics. Each of these men had a personal sense of office, a love of power, and respect for organization, all of which were violated by the acts of the state. The instinct to react was fortified by partisan considerations. The charter amendment was a strictly Republican measure, while all but one of the trustees were Federalists. The fact that the Federalist party had committed itself to repeal the Dartmouth charter amendments as soon as it regained control of the government encouraged the trustees to maintain their organization. Finally, the trustees thought the Republican seizure of Dartmouth wrong in principle. They were willing to concede a legitimate interest of the state in the college, and even proposed that the state establish a Board of Overseers with a veto over the acts of the trustees. But the tendency of the acts as passed, they thought, was to convert the college "into a field for party warfare," which could do the cause of higher education in New Hampshire no

good at all.²¹

Principle, then, combined with personal honor, political instinct, and party interest to lead eight trustees to oppose the state's takeover of Dartmouth. On August 28, 1816, the trustees formally refused to accept the charter amendment.²² Thereafter, they struggled to maintain the college as a going concern in the face of the state's determined assault.

Plumer was forced to inaugurate the new Dartmouth University without the cooperation of the college trustees. He was considerably aided when William H. Woodward, who had been the secretary of the college, joined the university trustees and became their secretary and treasurer pro tem. Woodward brought with him the college records, books, seal and other paraphernalia which would tend to establish the university as the legitimate legal successor of the college. Unfortunately, the legislature was not so eager to help the new institution. Although willing to expropriate the property and income of the college, the Republican majority balked at supporting their "state" university, preferring adherence to the platform of governmental austerity over expensive aid to higher education. Despite many urgent requests from

²¹For brief biographies of the twelve Dartmouth trustees, see Lord, History of Dartmouth College, 62, n. 2, 63. On the trustees' willingness to compromise, see Turner, Plumer, 251. Shirley, Dartmouth College Causes, 9-10. "Remonstrance" of the college trustees to the legislature, June 19, 1816, in Lord, History of Dartmouth College, App. B, 679-680.

²²Lord, History of Dartmouth College, App. D, 687-694.

Plumer, the only aid the legislature ever gave the university was a loan of \$4000, and this payable in one year with interest.²³

Governor Plumer was the first to appeal to the courts for assistance. Because the newly reorganized New Hampshire supreme court was composed entirely of his own appointees, the Governor was not afraid of a rebuff. In September, 1816, he requested the opinion of the court as to whether the act amending the Dartmouth charter was within the state's legislative authority. Chief Justice William Richardson and Justice Samuel Bell (the third member of the three-man court had not yet been appointed) replied on November 25. They could think of only one possible ground upon which to challenge the authority of the legislature. Such charter alterations, they wrote, might be "construed to be a violation of private vested rights" which were protected by the state and federal constitutions if the alterations were made "without the consent of the corporation." The justices refused to proceed further because they did not wish to prejudge the "question of right between the legislature and individuals" which was likely to arise in a case before the court.²⁴ Nonetheless,

²³Shirley, Dartmouth College Causes, 114, 116-118. Lord, History of Dartmouth College, 155-156, and a full review of the university's finances, 169-174. Turner, Plumer, 243-244, 299. Resolution of June 19, 1818, June Sess., 1818, Laws of N. H., VII, 744.

²⁴Opinion of the Court, 62 N.H. 704, 705. While the controversy was still before the public and the legislature, both sides mingled legal arguments with appeals to expediency and justice, so that the basic outlines of the legal controversy were clear even before the parties went into court. For the state's approach, see Plumer's address of

the court had isolated one issue which was to be central to all the arguments and opinions in the Dartmouth College case, and had forecast the grounds on which its opinion would rest.

On February 8, 1817, the college trustees instituted an action of trover in the Common Pleas of Grafton County to recover the college records, books, and seal, and \$50,000 damages from Woodward, the secretary who had defected to the university. As Woodward was also presiding judge of the Common Pleas for the county, the proper pleas were filed and by agreement the case was carried directly to the Superior Court to be heard on an agreed set of facts. The case was argued in May by Jeremiah Mason and Jeremiah Smith for the college and by Ichabod Bartlett and New Hampshire's attorney general, George Sullivan, for the university. In September, the case was reargued at Exeter by the same attorneys, except that Daniel Webster closed for the college.²⁵

June 16, 1816, reprinted in Shirley, Dartmouth College Causes, 105-107, and the preamble to the first charter amendment, Act of June 27, 1816, Laws of N. H., VIII, 505. For the case of the college, see "Remonstrance," June 19, 1816, in Shirley, Dartmouth College Causes, 88-89, and the trustees' formal refusal to accept charter alterations, Aug. 28, 1816, reprinted in Lord, History of Dartmouth College, App. D, 687-694.

²⁵Trustees of Dartmouth College v. Woodward, 1 N. H. 111 (1817). This report contained only Chief Justice William Richardson's opinion. The arguments as well as opinions were collected in Timothy Farrar, Report of the Case of the Trustees of Dartmouth College against Woodward (Portsmouth, N. H.: John W. Foster, 1819). Hereafter cited as Report. The arguments delivered in the state court were reprinted from Farrar's Report in 65 N. H. 473 ff. On the dates of the argument, see Lord, History of Dartmouth College, 123-124, 130.

Both Mason and Smith opened their arguments for the college with a consideration of the legal effect of the legislative acts in question. At most, Dartmouth College was totally abolished, and a new corporation, Dartmouth University, was created in its place. At the very least, the charter amendments represented a substantial reduction and infringement of the corporate and individual rights of the college trustees.²⁶

Whether considering the case in light of general principles, or with regard to particular provisions of the state and federal constitutions, it was essential, said the college attorneys, to discuss the nature of corporations and their relationship to the government, because the degree of governmental control varied with the type of corporation involved. Combining English categories and American experience, Smith found three types of corporations. Civil corporations for government were, of course, subject to governmental control. "Private civil corporations," on the other hand, were "created for special purposes," such as banking, writing insurance, or building canals, bridges, and turnpikes. Although these corporations were beneficial to the state, their property and their privileges remained private. The legislature could control "everything not relinquished by the state," but could not infringe its grant by reorganizing the corporation. Finally, the state created "eleemosynary" corporations, such

²⁶ Mason's argument, 65 N. H., 473-502. Smith's argument, Ibid., 524-563. The summary that follows is a composite of the arguments made by the individual attorneys.

as Dartmouth College, for the perpetual distribution of charitable gifts. The essence of these corporations was the property dedicated to charitable uses, and because of the property element, private eleemosynary corporations were no more subject to control by the legislature than private civil (business) corporations.

That the property of Dartmouth was private and that this placed the college beyond legislative control were propositions unlikely to gain easy acceptance by the court. Mason and Smith constructed from the English common law an elaborate and truly ingenious argument to establish their point. They focused on the power of "visitation," the power, by their definition at least, to govern Dartmouth, to determine the organization, to exercise discretionary authority over all its operations. At common law, the right of visitation originally resided in the founder of the charity, the person who made the first gift of lands or funds. "Visitation" sprang from the endowment, from the property committed to the new charity, and had as its primary function the perpetuation of the charity according to the will of the founder. Where the founder was a private citizen, the charity could be legally "private." When the charity was incorporated, the founder would determine the plan or organization, and his will would be embodied in the corporate charter. Although other types of organization were possible, and much used in England, Dartmouth College was typical of the American practice: the charity's trustees were themselves

incorporated, and they took, according to the college attorneys, not only full legal and equitable title to all the property granted to the charity, but also the full power to visit, to govern, the institution.²⁷

The vesting of the property and the visitatorial power in the trustees necessarily limited the power of the state over the college. Although charities in England and the United States were always subject to the general superintendence of the courts, private charities in England were not subject to the control of the king, notwithstanding his grant of a charter, and notwithstanding any benefit the public might receive from the founder's bounty. The king, without the aid of the courts, could neither abolish a corporation, nor give it a new organization, nor amend the charter, without the corporation's consent, for this would illegally interfere with the property and the right of visitation vested in the corporate trustees. The New Hampshire legislature succeeded

²⁷In a letter to Mason dated only "Boston, Sunday Evening," Webster wrote, "There is one point on which I have suspected that my opinion differs from Judge Smith's; I think that the trustees are most clearly visitors, and that this lies at the bottom of our case, and as visitors, I think they are not answerable in any court, while acting within the scope of their visitatorial power." Fletcher Webster, ed., The Writings and Speeches of Daniel Webster. 18 vols. (Boston: Little, Brown and Company, 1903), XVII, 311-312. Hereafter cited as Writings of Webster. (Fletcher Webster gives "1819" as the date of this letter. However, internal evidence indicates late April or early May, 1818. Compare, Webster to Mason, Boston, April 23, 1818, Ibid., 280-281.) According to the published report of the arguments to the New Hampshire court, Smith contended that the "whole power of visitation" was vested in the Dartmouth trustees. 65 N. H., 536. It may be that Smith did not make this argument at all, but that the report was tailored afterwards to show a non-existent consistency among the college attorneys' arguments.

to the crown in this regard, and it therefore could not alter the charter of Dartmouth College. Although they admitted the "omnipotent" power of Parliament, the college attorneys denied that the analogy to Parliament was applicable where legislatures were limited and restrained by written constitutions.

Turning to the New Hampshire constitution, Mason and Smith contended that the charter amendments violated Articles 2, 12, 14, 15, 20, 23, 35, and 37 of the state's Bill of Rights. However, no one of these seemed to cover the case. The real heart of the argument was the contention that the trustees had been unconstitutionally deprived of due process of law. The essential premise, of course, was that the trustees possessed some private rights violated by the charter amendments. Otherwise, the argument was a rather conventional statement of the "separation of powers" theory of the constitution. The constitution had divided the total governmental power among legislative, executive, and judicial branches. The legislature could grant charters and special privileges to individuals, and could make general laws by which private rights and privileges might be forfeited upon trial according to due process of law. But the legislature could not pass special laws declaring forfeitures or directly infringing private rights. Article 15 of the Bill of Rights prohibited the deprivation of rights, privileges, or immunities except

by a trial by jury or by "the law of the land."²⁸ The amendment of a charter without the corporation's consent was a special law infringing private rights, and thus was not the law of the land within this provision.

The college attorneys likewise contended that the charter amendments impaired the obligation of contracts contrary to Art. I., sec. 10 of the United States Constitution. Once again, the essential premise was that the trustees held private property and private rights. Mason and Smith found a triangular series of commitments amounting to contracts within the meaning of the constitutional provision. The king contracted with the founders of the charity that the property given would be forever applied according to the founder's plan. The trustees became the personal representatives of the founder, taking the property and the right of visitation. The trustees themselves also stood in direct contractual relation to the king, as he contracted with the trustees that they would forever be a corporation. The trustees and the founders made similar commitments based on contract. And all these contracts were explicitly or implicitly embodied in the original corporate charter, the obligations of which New Hampshire necessarily impaired by her amendment.

²⁸ N. H. Const. of 1792, Part I, Bill of Rights, in Francis Newton Thorpe, ed., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. (Washington: Government Printing Office, 1909), IV, 2471-2475. Hereafter cited as Constitutions.

Finally, the college attorneys stated the public policy bases of their argument. First, the legislature was generally ill-designed and unfit to exercise direct control over institutions of higher education. Educational policy would not be constant or consistent, but would tend to fluctuate with changes in the composition of the legislature. Positions that should be academic were likely to become "jobs," objects of patronage, which would drive out competent scholars.

In addition, the policy of English and American law was designed to encourage the founding of charities. Allowing founders to form charitable institutions according to their own plans, and then guaranteeing the perpetual existence of these institutions encouraged vain and wealthy individuals to create new institutions as monuments to themselves and their benevolent concern for society. If the rich thought their foundations were always subject to legislative direction, if they thought their charitable donations were mere gifts to the public, argued the college attorneys, then the wealthy would cease to create new charitable foundations. The whole burden of providing higher education and other social services would then fall on the state, to the great detriment of society in the long run.

New Hampshire Attorney General George Sullivan and Ichabod Bartlett, representing the university, could meet the college attorneys head on, and offer a strong argument that the legislature did have the power to alter the charter of Dartmouth College. They rejected, first of all, their opponents' contention that Dartmouth College had been

destroyed by the legislature. Charter amendment and corporate reorganization were not in fact or in law the same as destruction of the corporation.²⁹

Sullivan and Bartlett accepted the contention that there were at least two types of corporations, public and private, but rejected the opposition's tests. The trustees had argued that a corporation, whether business or charitable, was private if its capital or endowment came from private sources. The university attorneys contended that a corporation was public or private according to the end for which it was created and, more technically, according to the location of the "beneficial interest" in the corporate property. Thus, private (business) corporations were established for the benefit of individuals, who retained a personal economic and thus legally beneficial interest in the corporate property. These were in some degree free from legislative control. Public corporations, such as Dartmouth College, on the other hand, were established to promote the welfare of the whole community. Although the corporate property might be committed for the time being to a group of trustees, no individuals had any legally enforceable beneficial interest in the corporate property or franchises. Because the whole beneficial interest in Dartmouth resided in the public, the legislature could

²⁹Sullivan's argument, 65 N. H., 502-524. Bartlett's argument, Ibid., 563-593. The idea that the charter amendment did not actually destroy Dartmouth was supportable in law. But in reality, full power over Dartmouth had been transferred from the existing trustees to two new boards appointed by the state, a reorganization so radical as to justify the contention that the college corporation had been destroyed.

modify the college charter in the public interest without infringing any private rights.

The trustees, according to Sullivan and Bartlett, had no private or personal interest in the college -- indeed, if they had a material interest, they would be in breach of trust. Insofar as they had a right of office -- the right to be trustees -- the charter amendments did not affect them. Furthermore, because they were merely public agents and had no private rights in the corporation, the trustees could not possibly be parties or beneficiaries to a contract of the type protected by the federal constitution. In short, where the college attorneys had emphasized the element of private property and advanced the trustees as the legal holders and appropriate defenders of the property, the university's attorneys found only a public trust and a corresponding absence of a proprietary interest in the trustees.

With regard to the power of the government of New Hampshire, Sullivan and Bartlett quickly rejected the opposition's idea that the New Hampshire legislature was limited to the same extent as the crown. The correct theory was that all the power of Parliament had devolved upon the legislature, and this power remained, except as expressly limited by the state or federal constitution. But no particular state constitutional provision could be found to prevent the legislature from amending charters of public corporations. And as to Article 15 (prohibiting the deprivation of rights, privileges, and immunities except by trial by jury or by the law of the land) so relied upon by the college, the New

Hampshire Superior Court had recently declared that any statute enacted in due form which did not conflict with any other constitutional provision was the law of the land.³⁰

In rebuttal, the university attorneys offered a series of "even if" arguments designed to show that acceptance of some of the opposition's contentions would not necessarily alter the case. Thus, even if the court accepted the idea that the corporation was public or private according to the source of the funds, this did not make Dartmouth private. Although Wheelock had founded the charity school, he did not found the college, which was an entirely separate institution. Indeed, it appeared that Governor Wentworth was a founder by his grant of lands in January, 1770, and, as Blackstone said, a charity founded jointly by the king and a private man would be public, not private.

Similarly, even if Wheelock was the founder of Dartmouth, he did not transfer his power of visitation, relied upon by the opposition, to the college trustees. The charter itself did not assign any visitation rights to the trustees. Moreover, it was absurd to give the trustees the power of visitation, the power to investigate the affairs of the college and to correct abuses. The trustees as visitors would examine their own proceedings as trustees in order to correct their own misapplication of the funds.

³⁰Mayo v. Wilson, 1 N. H. 53 (1817). According to the decision, Article 15 of the state's Bill of Rights "was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law." Ibid., 57.

Furthermore, even if Dartmouth were private, Sullivan and Bartlett argued, the legislature had a right to alter its charter so far as the public good required. They cited the numerous New Hampshire and Massachusetts acts imposing additional duties or new restrictions on banking corporations, which were admittedly private, to show that legislatures habitually restricted vested rights and privileges when the community welfare required it. Indeed, to hold otherwise would be "to sacrifice . . . the interest of the publick to that of every little corporation."³¹

Finally, the university attorneys offered policy reasons why the state should have the power to amend the Dartmouth College charter. Education was a matter of deep public concern, and the legislature had not only a right but a duty to oversee the educational institutions within the state. The corporate form was merely a means to promote the end of education, and to grant Dartmouth immunity from legislative control would be absurdly to elevate means over ends. Moreover, to free Dartmouth from governmental control would be to subordinate the public nature and design of the institution to the private and personal interests of the trustees. Ultimately, the government must control educational institutions, or the institutions would control the government.

A review of the arguments of the two sides in light of the facts which gave rise to and lay behind the case reveals a superlatively hard constitutional problem.

³¹Sullivan's argument, 65 N. H., 506.

Dartmouth College involved the general problem of governmental control of education and educational institutions. More specifically, the true issue was political, whether the government, possibly for the public good but certainly for the partisan advantage of those temporarily in power, could take full control of a basically private institution, an institution which had been originally sanctioned by the government, but which had been functionally independent, except for occasional legal and financial aid, for nearly half a century. In 1817, however, neither the received law nor the applicable institutions provided a conceptual or precedential framework for treating the case purely in terms of the freedom of educational institutions from direction by the political authorities. Except for criminal law, where individual rights were largely procedural, only in the area of property had the Anglo-American law a fairly well-developed concept of individual and organizational freedom from arbitrary governmental control. Thus, the college attorneys found their strongest arguments in property law, and argued strenuously that the main issue in the case was legislative infringement of the founders' property rights. The university attorneys were forced to respond in similar terms, and to add a general plea of overriding public interest in education to justify the state's action.

Chief Justice William Richardson wrote the opinion for the New Hampshire Court. He defined the "real question" as whether or not "these acts constitutionally infringe any

private right of these trustees." In deciding for the state, he accepted the general frame of analysis suggested by Sullivan and Bartlett. In order to determine whether the trustees had any private rights, it was necessary to determine whether the trustees had any beneficial interest in either the property or franchises of Dartmouth, or whether all such beneficial interest was vested in the public at large, as represented by the state. The Chief Justice specifically rejected the contention that the source of the funds was the relevant test of whether a corporation was public or private.³²

Richardson readily conceded that there were private corporations "created for the immediate benefit and advantage of individuals." The property of private canal, turnpike, bridge, banking, insurance, and manufacturing corporations belonged to individuals, and was shielded from legislative interference as ordinary private property. Indeed, the contracts clause of the federal constitution, Richardson indicated, would extend to protect "particular grants, by the legislature, of property or privileges to individuals, for their own benefit." In this, at least, Richardson agreed with the decision later handed down by

³²Richardson's opinion, 1 N. H. 111 ff. Richardson wrote for himself and Justice Samuel Bell. Newly appointed Justice Levi Woodbury, Jr., did not sit in the case, if the docket listings can be believed. He was, however, present when the decision was handed down. Cf., 65 N. H., 624, n. 1. Webster referred to Richardson's opinion as "able, ingenious, and plausible." Webster to Joseph Story, Sept. 9, 1818, in Webster, ed., Writings of Webster, XVII, 287.

the United States Supreme Court.³³

Dartmouth College, however, was a public corporation, subject to the full control of the legislature. It had been created solely for public purposes. The founders had no interest remaining in the property, and even if they did, the present trustees had no standing to represent the founders in court. The trustees had no private interest in the corporate property, for this was legally vested in the corporation itself, a fictional person quite apart from the individual trustees. Apart from the right of office, the mere right to be trustees, which was not at issue in this case, the trustees had no legally defensible interest in the corporation. In any case, a mere changing of the number of members was not dissolution of the old corporation, and the creation of a new one, nor was there any apparent contract with the king that the number of trustees would not be increased.³⁴

Richardson merely put aside the questions of foundation and visitation raised by the college attorneys. The original donations to Dartmouth were "absolute." He suggested the case might be different if the founders had expressly reserved a right to visit and control Dartmouth, because then the corporation might be private. However, since no such right had been reserved, Dartmouth would be classed as "public," fully subject to governmental control.³⁵

³³Richardson's opinion, 1 N. H., 115, 120, 122, 134-135.

³⁴Ibid., 119-121, 122, 125, 134.

³⁵Ibid., 117-118, 121.

Finally, the Chief Justice stated the policy reasons for his decision. It was appropriate, he said, to "weigh the conveniences and inconveniences which would result from a particular construction" of the constitution in order to get a better idea of the intentions of the framers. Courts could prevent some abuses of trust, but their power was inadequate in some respects, as they lacked a power to legislate. Because education was such a great public concern, public policy and the interests of "literature" itself required that trustees not be completely independent, but subject to legislative control. Otherwise, the trustees might use their power and independence for private ends, or to promote the "narrow purposes of a sect or a party." Such an eventuality would prejudice the public against literary institutions, and the public support so necessary for their survival and growth would collapse. And although he conceded that the tendency of his decision was to discourage donations to charitable institutions, Richardson said simply that this consideration was "entitled to no weight in this decision."³⁶

The college forces were disappointed by Richardson's decision, but it was not really unexpected. They quickly prepared a statement of facts in the form of a special verdict and, with the agreement of the university, the case went to the Supreme Court in Washington on a writ of error. In March, 1818, Daniel Webster and Joseph Hopkinson of Philadelphia appeared for the college. United States Attorney

³⁶Ibid., 114, 122, 135-137.

General William Wirt and John Holmes argued for the university.³⁷

Although the Supreme Court was technically confined to a consideration of whether the New Hampshire acts violated the contract clause of the federal constitution, Webster and Hopkinson moved beyond this restricted area to re-establish the general points made by Mason and Smith in the state court. The strategy was sound. By extensive examination of the questions of foundation and visitation, the college attorneys hoped to convince the Supreme Court that the general principles upon which Richardson's opinion rested were erroneous, and that the New Hampshire acts had, by a correct view of the case, violated the state constitution. Moreover, the establishment of private rights vested in the trustees at common law would facilitate the finding of a contract under the federal constitution. Certainly there was no direct indication that the framers of the federal constitution intended the contracts clause to protect charitable corporations. And any argument directly to the contract clause would require begging the essential questions of whether kings and legislatures could contract and whether they actually intended

³⁷Dartmouth College, 4 Wheaton 518. The special verdict containing a brief statement of the facts of the case is found at Ibid., 519-551. See Lord, History of Dartmouth College, 141. At Webster's suggestion, the special verdict was drawn to show that the state did not found and endow the college. Webster to Smith, Dec. 8, 1817, in Webster, ed., Writings of Webster, XVII, 267. Since the state did not found and endow Dartmouth, this was not a difficult thing to do. Cf., Maurice G. Baxter, "Should the Dartmouth College Case Have Been Reargued?" New England Quarterly, XXXIII (March, 1960), 32.

to contract. Basically, the college attorneys reasoned that because the trustees had private rights at common law, there must have been an original contract which gave rise to these rights, and which was protected by the constitution. In addition, Webster argued that the New Hampshire legislative act constituted a deprivation of due process of law inasmuch as only the judiciary could declare a forfeiture of a corporate charter.³⁸

Wirt and Holmes largely confined themselves to restating Richardson's opinion, and even this they did not do very well.³⁹ Had they known the law, they might have effectively challenged although not completely overthrown the college attorneys' analysis of the English cases. Had they known the facts, they could have questioned more effectively their opposition's contention that Dartmouth was founded and had existed as a private institution. The two attorneys did both their clients and the court a disservice by their weak and unsatisfactory presentation.

In spite of the disparity in quality between the college and university arguments, the court could not reach an immediate decision. Marshall announced at the close of the

³⁸Webster's argument, 4 Wheaton, 551-600. Hopkinson's argument, Ibid., 615-624. Webster's closing "peroration" is not included in Wheaton's Reports. An approximation of what Webster said will be found in Rufus Choate's eulogy of Webster, in Samuel Gilman Brown, ed., The Works of Rufus Choate, with a Memoir of His Life. 2 vols. (Boston: Little, Brown and Company, 1862), I, 516-517. Baxter, Webster, 84-85.

³⁹Holmes's argument, 4 Wheaton, 600-606. Wirt's argument, Ibid., 606-615.

argument that the case would have to be continued until the next term, because some of the judges held differing opinions and others had reached no opinion at all. Webster's guess as to the split was probably correct. Marshall and Bushrod Washington were for the college; Gabriel Duvall and Thomas Todd, for the university; Joseph Story, William Johnson, and Brockholst Livingston, undecided. But whatever the split, the indecision inaugurated a long period of unseemly attempts to influence the undecided justices. Webster communicated privately with Story. The college forces convinced Chancellor James Kent of New York that the college's view of the case was correct, and Kent helped to persuade Johnson to vote for the college.⁴⁰

By the beginning of the 1819 term, the court had reached a decision for the college. On February 2, Marshall read the opinion of the court. However, only he and Justice

⁴⁰Webster to Smith, March 14, 1818, in Webster, ed., Writings of Webster, XVII, 276, 277. Story, by his own account, was undecided at the close of the argument. Story to Henry Wheaton, Dec. 30, 1818, quoted in Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court (New York: Simon and Schuster, 1970), 174. Hereafter cited as Story. For Webster's contact with Story, see Webster to Story, Aug. 16, 1818, and Sept. 9, 1818, in Webster, ed., Writings of Webster, XVII, 286-287. On the efforts to bring Justice Johnson to vote for the college, see Shirley, Dartmouth College Causes, 253-254, 264-265. Donald G. Morgan, Justice William Johnson: The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge (Columbia: University of South Carolina Press, 1954), 214-215. For a collection of much of the correspondence relating to the Kent-Johnson meeting, see Charles Grove Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835 (Berkeley: University of California Press, 1944), 420-422. Hereafter cited as Role of the Supreme Court. Livingston's relation to all this is conjectural.

Johnson subscribed to this opinion alone. Washington and Story each wrote separate concurring opinions, and Livingston managed to concur in all three opinions. Duvall entered a silent dissent, and Todd recorded no opinion.⁴¹

Marshall began his opinion by finding a "complete and legitimate contract" in the transactions surrounding the grant of a charter to the college. The only questions were whether the constitution would protect contracts of this type and whether the New Hampshire acts had impaired the contract.⁴²

The Chief Justice conceded that the contracts clause would not protect all charters. New Hampshire's legislature could control Dartmouth if the act of incorporation granted "political power," or created a "civil institution" for the "administration of the government," or if the funds of the college were "public property" or if "the state . . . , as a government," were "alone interested" in the transactions of the college.⁴³

An examination of the charter revealed that none of these conditions were met in the Dartmouth College case. The "funds" of the college "consisted entirely of private donations," which made the corporation "private." The funds were granted for the charitable purpose of education, which

⁴¹Marshall's opinion, 4 Wheaton, 624-654. Washington's opinion, Ibid., 654-666. Story's opinion, Ibid., 666-713. Johnson's and Livingston's concurrence, Ibid., 666. Duvall's dissent, Ibid., 713.

⁴²Marshall's opinion, Ibid., 628. ⁴³Ibid., 629-630.

made the corporation "eleemosynary." The mere fact that the endowment was used for a matter of public concern, education, could not alone enable the legislature to control the institution. Nor did the act of incorporation confer on the legislature any additional power over the college. Charters were granted to charitable institutions chiefly to enable them to hold their property in perpetuity and to manage it more effectively. This legislative grant of power to take and hold property in a particular form for a particular purpose could change neither the private nature of the property, nor the private nature of the institution.⁴⁴

But the most difficult problem in the case, the one, according to Marshall, "on which more doubt has been entertained, than on all that have been discussed," was raised by the fact that the college trustees alone complained of the New Hampshire acts, and these trustees had no beneficial interest to be protected. How could the contracts clause, designed to protect only vested beneficial interest, be extended to the case?⁴⁵

Marshall solved the problem by finding that the original donors' property right in their gifts to Dartmouth was the determinative legal element. At the time the college was founded, the donors agreed with the Crown that their gifts were in "consideration . . . for the perpetual application of the fund to its object in the mode prescribed by themselves." When the Crown issued a charter which was

⁴⁴Ibid., 632-639. ⁴⁵Ibid., 641.

accepted by the Dartmouth trustees, a binding legal contract was created, a "contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties." According to the terms of the contract, the "mode prescribed" for the perpetual application of the funds was through the Dartmouth College corporation. The corporation, that is, the trustees collectively, became by operation of law the assignee of all the rights of the original donors. As such, the trustees stood in the place of the donors, and could in this capacity defend the corporation from assault by the state of New Hampshire.⁴⁶

The Dartmouth charter was a "contract made on a valuable consideration . . . for the security and disposition of property . . ., on the faith of which, real and personal estate" had been "conveyed to the corporation." The contract, then, was within the letter and spirit of the constitutional provision.⁴⁷

Although Marshall admitted that the framers of the constitution probably did not intend the contracts clause to protect the rights of founders of charitable corporations, he thought that "contracts made for the advancement of literature" ought to be within the scope of the clause unless some compelling reasons of public policy could be found for excluding them. But the policy reasons seemed all the other way. These educational institutions did "not fill the

⁴⁶Ibid., 642-644. ⁴⁷Ibid., 644-645.

place which would otherwise be occupied by government, but that which would otherwise remain vacant." As these donations were "complete acquisitions to literature," "any government" ought "rather to encourage than to discountenance" them. Yet "one great inducement to these gifts is the conviction felt by the giver, that the disposition which he makes of them is immutable." Probably no man would found a college believing that the acquisition of a charter made the college a "public institution" subject to "the will of the legislature." Moreover, historically, legislative bodies had been characterized by "fluctuating policy, and repeated interferences" which had "produced the most perplexing and injurious embarrassments" with regard to all types of contracts. The Dartmouth charter was a contract, and both law and policy compelled the conclusion that it was within the constitutional provision forbidding states to impair the obligation of contracts.⁴⁸

Finally, Marshall disposed quickly of the question of whether the New Hampshire acts had actually impaired the obligation of the state's contract. The original donors, said the Chief Justice, "contracted for a system" which included a self-perpetuating board of trustees. That system was "totally changed," as the "will of the state" was "substituted for the will of the donors, in every essential operation of the college." Judgment was entered for the college trustees.⁴⁹

⁴⁸Ibid., 644, 646-648.

⁴⁹Ibid., 650-653. Judgment, Ibid., 714-715.

The course of Marshall's reasoning reveals that he, and the Court, had accepted Webster's basic contention that Dartmouth College could be treated for legal and constitutional purposes as one involving property. By focusing on the property and contract rights of the college founders, and by confining its statement and formal assessment of the policy issues largely to matters related to property, the Court obscured the crucial political aspects of the case, but, at the same time, it shrewdly avoided the appearance of substituting its political judgment for that of the New Hampshire legislature.

The opinion which Marshall read on February 2 contained important statements which were subsequently deleted. On April 16, Story wrote to Marshall complaining of the latter's express dismissal of Webster's argument that the New Hampshire act deprived the college trustees of due process of law. On April 28, Marshall replied. He graciously consented to omit his reference to this part of Webster's argument, and went on to explain the basis of his original objection:

The expression that a legislature might perform some judicial functions was carelessly introduced, but was introduced with a view to the prohibitions on the states contained in the constitution of the United States, not with a view to the interior regulations made by state constitutions. My idea was that it was entirely a subject for state regulation with which the courts of the United States could have no concern. I had understood that in Rhode Island & Connecticut the legislature or some branch of it exercised certain judicial powers, & I knew that in New York their Senate was like the House of Lords in England a court of Dernier resort.⁵⁰

⁵⁰John Marshall to Joseph Story, April 28, 1819. MS. Berg Collection, New York Public Library. Quoted with the

Washington's opinion was brief and to the point. He was not as quick as Marshall to find a contract in the Dartmouth charter (Marshall had taken four sentences), but concluded nonetheless that a corporate charter was a "franchise" in English law, which amounted to a contract under the American constitution. He further concluded, on the strength of a few English and American precedents, that Dartmouth was a private eleemosynary corporation whose charter was not subject to legislative alteration.⁵¹

Story's opinion was the most elaborate of all. He accepted Richardson's premise that business corporation charters were contracts protected by the constitution, but added, citing an early Massachusetts case, that the legislature might expressly reserve a power to alter or repeal a charter. An extensive examination of the English law led to the conclusion that charters of charitable corporations, such as Dartmouth, were also constitutionally protected contracts. Story went beyond his colleagues, however, in suggesting

permission of the Henry W. and Albert A. Berg Collection, The New York Public Library, Astor, Lenox and Tilden Foundations. In Satterlee v. Matthewson, the Supreme Court adopted Marshall's view, holding that there was nothing in the federal constitution which prohibited the legislature of a state from exercising "judicial functions." 2 Peters 380, 413 (1829). Washington delivered the opinion of the court. However, in his dissent in Inglis v. Trustees of Sailors' Snug Harbor, Story said that the Dartmouth College case "in its principles" forbade a legislature from divesting the legal title of charitable trustees in an effort to enforce a testamentary charitable trust. Only the judiciary, declared Story, could enforce the trust. 3 Peters 99, 153 (1830). Cf., Story's opinion, Wilkinson v. Leland, 2 Peters 627, 657 (1829).

⁵¹Washington's opinion, 4 Wheaton, 654-666.

that the contracts clause might protect grants of franchises and authorities which were not valuable to the holders. Story thus thought that the constitutional protection of the contracts clause ought to be extended to some public as well as to private corporations.⁵²

Dartmouth College v. Woodward was not the only court case raising the question of the validity of New Hampshire's charter amendments. Shortly after Richardson handed down his opinion adverse to the college, and while the college attorneys were preparing to file a writ of error in the United States Supreme Court, Webster, perhaps acting on a suggestion made to him by Story, recommended that the college bring additional actions against the university in the United States Circuit Court. The problem was that the writ of error would allow the Supreme Court to handle the case only on relatively narrow constitutional grounds. Webster apparently thought that a federal court which had jurisdiction based on diversity of citizenship could overthrow Richardson's constitutionally-based opinion on the strength of such general principles as due process of law. Today, of course, this would be unthinkable. But in 1817 the etiquette of the federal system had not been fully worked out. Section 34 of the Judiciary Act of 1789, which said that state laws would apply in diversity suits, had received no definitive

⁵²Story's opinion, Ibid., 666-713, and esp., on the reservation clause, 675, 680, 708, 712. Cf., Marshall's opinion, Ibid., 638.

interpretation. In 1815, the Supreme Court had heard two non-constitutional cases over which the federal courts had subject-matter jurisdiction, and had decided them on the basis of general principles. In one, Town of Pawlet v. Clark, Webster had been an attorney on the winning side, so he, at least, would have some faith in this approach. The other, Terrett v. Taylor, had been decided in the face of contrary state court interpretation of applicable Virginia law. Story, who often tried to extend the boundaries of federal court jurisdiction, apparently wanted a test case for the proposition that a federal court having subject-matter jurisdiction could override on general principles a state court's constitutional decision. The college attorneys, who had little faith in their contract clause argument, hoped to oblige him.⁵³

The college trustees took Webster's suggestion. In February and March of 1818, they made several conveyances of college land to Vermont citizens, who promptly initiated actions for possession in the United States Circuit Court at Portsmouth, New Hampshire. In May, the cases were continued until fall, at which time the college and university agreed to take the actions to the Supreme Court by a pro forma certificate of division of opinion. The actions were to

⁵³Baxter, "Should the Dartmouth College Case Have Been Reargued?" 24, 26-27, 35. On the "cognate cases," see, generally, Lord, History of Dartmouth College, 141-167, passim. Webster to Mason, April 28, 1818, in Webster, ed., Writings of Webster, XVII, 282-283. Act of Sept. 24, 1789, sec. 34, 1 Statutes at Large (U.S.) 73, 92. Town of Pawlet v. Clark, 9 Cranch 292 (1815). Terrett v. Taylor, 9 Cranch 43 (1815). Hereafter cited as Terrett. Cf., Story to Mason, Oct. 6, 1819, in Shirley, Dartmouth College Causes, 246.

go up on a narrow special verdict, with the stipulation that additional facts could be added later by mutual agreement of the attorneys. These "cognate cases" were before the Supreme Court in February, 1819, when Marshall announced the court's decision for the college in the principal case.⁵⁴

At this point, the cognate cases took on a new significance. The university had understandably been dissatisfied with the performance of Wirt and Holmes, and wanted to have the case reargued. Moreover, University President William Allen became convinced that even by the college's theory of the law in the case, the unmistakable tendency of the facts was to show that Dartmouth had been founded and had existed as a public university, not a private college. Late in 1818, the university hired William Pinkney, one of the best lawyers in the country, to reargue the case before the Supreme Court. The university forces also prepared a series of "new facts" justifying the reargument and, of course, a decision for the university.⁵⁵

These plans could not be carried out. Although Pinkney attempted to enter a motion for reargument on the morning of February 2, 1819, Marshall turned his "blind ear" to the attorney, announced quickly that the court had reached a decision in the cause, and proceeded to read his

⁵⁴Lord, History of Dartmouth College, 145, 154, 159. Baxter, "Should the Dartmouth College Case Have Been Reargued?" 26-27, 28.

⁵⁵Baxter, "Should the Dartmouth College Case Have Been Reargued?" 21-22, 27. Shirley, Dartmouth College Causes, 202, 286-290.

opinion. The cognate cases were remanded to the circuit court for further proceedings.⁵⁶

Probably, as Baxter concludes, a full reargument would not have changed the result of the Dartmouth College case, unless the court changed its opinion as to the law.⁵⁷ As interpreted by the court, the contracts clause focused on individual initiative and private property as the legally operative elements, and did not require the complete absence of state involvement or public funds from corporations in order to be applicable. Moreover, realistically, the great weight of the evidence favored the college's view that Dartmouth had been in a non-legal sense a private institution. No amount of argument could change the fact that the New Hampshire government had had no substantial permanent connection with Dartmouth and had given only occasional, ad hoc financial assistance. Ultimately, the university's contention that Dartmouth College had been founded and had existed for half a century as a public institution rested on a doubtful interpretation of past events and a few shabby legal technicalities. Thus, a reargument before the Supreme Court would have been largely a waste of time.

The last act in the Dartmouth College case took place in Story's Circuit Court in Portsmouth, which had the duty of making a final disposition of the cognate cases. Late

⁵⁶Shirley, Dartmouth College Causes, 203. Baxter, "Should the Dartmouth College Case Have Been Reargued?" 28.

⁵⁷Baxter, "Should the Dartmouth College Case Have Been Reargued?" 35.

in May, 1819, the university attorneys submitted their new facts for Story's consideration. He said he found nothing in the new documents to vary the charter recitals (apparently referring to the naming of Wheelock as founder), and entered final judgment for the college trustees.⁵⁸

The Dartmouth College decision became a permanent part of American constitutional law. Even though the Court's opinion was couched narrowly in terms of property rights and property-related contracts, the crucial issue in the case was the extent of governmental power over educational institutions, and the effect of the decision was to limit severely the direct power of state governments over education by guaranteeing the organizational integrity and political independence of privately-founded schools. Dartmouth College thus laid a firm constitutional foundation for the development of a dual system of education, in which a public sector would be governmentally financed and publicly controlled, and an alternative private sector would be largely free from political interference. Both the English law and the American experience which prompted the decision will be analyzed in greater detail in Chapters II and III below.

Apart from educational institutions, Marshall's opinion left little doubt that the Dartmouth College decision would have the collateral effect of protecting business corporations from unwarranted governmental interference with their chartered privileges. Marshall's definitions of private corporation

⁵⁸Lord, History of Dartmouth College, 165-167.

and constitutionally protected contract focused on individual initiative and private property as the legally operative elements. If these elements were present in the case of Dartmouth College, surely they were present in the case of a profit-making joint stock corporation. Indeed, the logical structure of Marshall's opinion indicates that the Court simply assumed that the contracts clause reached business corporations.⁵⁹ The legal and experiential bases of this assumption will be examined in Chapters II, IV, V, VI, and VII.

⁵⁹ Some analysts contend that the Dartmouth College decision was not intended to extend to business corporations. Robert Sprague Hall, "The Dartmouth College Case," Green Bag, XX (May, 1908), 244-245. Dunne, Story, 179-180. In addition to the terms and logic of the opinions, much evidence suggests that the Court had business corporations at least in mind when it decided Dartmouth College. This evidence is presented and analyzed in subsequent chapters.

II

THE INHERITANCE

Although the Declaration of Independence in 1776 severed America's formal connection with Great Britain the new country's political values and legal institutions remained primarily those inherited from the British past. For this reason, American legal analysis in the Confederation and early national periods began with an inquiry into British constitutional arrangements and the statutory and common law.

What was true generally was also true of corporations. Americans started with English conceptions of the corporation, and then shaped the legal institution to fit American needs. It is the purpose of this chapter to survey the base point, the English law of corporations, as it had developed to the early nineteenth century. The account is not intended to be an evenly-balanced summary. Rather, primary emphasis is placed on what Americans found useful to them in the long English experience with corporations. Thus, with an eye to subsequent American developments, this chapter surveys the creation and control of corporations by the Parliament and Crown, the various social functions of corporations, and the legal characteristics and categorization of corporations at common law. Finally the chapter surveys in some detail the development of the law of charitable corporations

from the late sixteenth to the early nineteenth centuries, an area of special relevance to the Dartmouth College case.

By the end of the eighteenth century, the relationship between the British government and most types of corporations was well settled. Parliament, of course, was omnipotent. It could authorize the chartering of corporations and grant such special privileges as legal monopoly. Perhaps more important, it could modify or destroy a corporation as easily as create it. Even Edmund Burke, who conceded that a charter was a "contract" between Parliament and the incorporated East India Company, insisted that Parliament alone was the judge of whether the company so abused its privileges that the contract was broken. In practice, however, Parliament usually heeded pleas to respect corporate "vested rights," and seldom took away economically valuable privileges without providing compensation.¹

As a matter of practice, the Crown rather than Parliament was usually responsible for the creation and superintendence of corporations. However, the royal prerogative

¹Sir William Blackstone, Commentaries on the Laws of England. 4 vols. Ed. by William Carey Jones (San Francisco: Bancroft-Whitney Company, 1915), I, 473, 485. Hereafter cited as Commentaries. The power of parliament to dissolve a corporation eliminated the idea that a corporation was necessarily immortal. Stewart Kyd, A Treatise on the Law of Corporations. 2 vols. (London: J. Butterworth, 1793-1794), I, 17; II, 446. Hereafter cited as Corporations. Edmund Burke, Speech on Fox's East India Bill, House of Commons, Dec. 1, 1783, in T. C. Hansard, ed., The Parliamentary History of England, from the Earliest Period to the Year 1803 (London: 1814), XXIII, cols. 1317, 1318. On parliamentary respect for vested rights, see Armand B. DuBois, The English Business Company after the Bubble Act, 1720-1800 (New York: The Commonwealth Fund, 1938), 120, 196, n. 251, 197, n. 252. Hereafter cited as English Business Company.

was hedged with all sorts of substantive and procedural limitations. To be sure, it was a long-standing rule that the King's consent, whether express or implied, was absolutely necessary to the creation of a corporation. Initially, too, the Crown could frame the charter as it wished. But the Crown could not impose a corporation on unwilling individuals. A majority of those intended to be incorporated had to accept the charter before it could go into operation. A corporation could thus be framed to serve the private purposes of the incorporators at least as much as the public purposes of the Crown. Moreover, no particular individual could be made a member of a corporation without his consent. Even more important, once a charter had been accepted and a corporation erected, the King could neither vary nor take away any charter rights, nor modify or repeal the charter itself by virtue of his prerogative alone.² The charter had become the measure of corporate rights against the Crown.

Although the Crown could correct corporate abuses of chartered privileges through writs of mandamus or informations in the nature of quo warranto in the King's Bench, these

²Blackstone, Commentaries, I, 472. Kyd, Corporations, I, 39, 41, 44, 65, 66, 67; II, 447. Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject (London: Joseph Butterworth and Son, 1820), 124, 126. Hereafter cited as Prerogatives. William S. Holdsworth, A History of English Law. 16 vols. (London: Methuen and Co., Ltd., 1903-1965), IX, 48. Hereafter cited as English Law. Rex v. Vice-Chancellor of Cambridge, 3 Burrow 1647, 1656, 1661 (1765). S.C. 1 Blackstone Reports 547, 549. Rex v. Doctor Askew, 4 Burrow 2186, 2199, 2200, 2201 (1768). An existing corporation might voluntarily accept changes in corporate rights, or even a whole new charter.

procedures were unwieldy, and inoperative when corporations were within their chartered rights. Consequently, the Crown began to retain substantial control over many corporations by inserting reservation clauses and other restrictions in original charters. As they necessarily assented to this reserved governmental authority when they accepted the charter, corporators could hardly complain later that regulation by the Crown exceeded the bounds of the Crown's legal power. Several types of restrictions and reservations were prominent in trading corporation charters. Often, the Crown would simply limit the duration of the corporation, so, after the time period expired, the corporators would have to seek a new charter and the Crown would have the opportunity to impose new restrictions or conditions. In many other charters, from the reign of Elizabeth through the Glorious Revolution and into the eighteenth century, the Crown reserved the power to revoke the corporate charter after a stated period of time if the Crown and Privy Council found that the continued existence of the corporation would be contrary to the public interest. Occasionally, when Parliament would order the chartering of a corporation, it would direct the King to reserve to himself a power to revoke the charter when he found it expedient to do so. For example, the Bubble Act, which, among other things, authorized the Crown to charter two marine insurance corporations, provided that the Crown would reserve a power to terminate the charters if the Crown found the "continuance of the . . . two corporations to be

hurtful or inconvenient to the public" at any time after thirty-one years from the issuance of the charter.³

³On the king's power to superintend corporations, see, generally, Roscoe Pound, "Visitatorial Jurisdiction over Corporations in Equity," Harvard Law Review, XLIX (Jan., 1936), 369-395, and esp. 370-372. Kyd, Corporations, II, 174, 291-395, 403-445. Blackstone, Commentaries, I, 480-481. Richard Wooddeson, A Systematical View of the Laws of England; As Treated in a Course of Vinerian Lectures, Read at Oxford, During a Series of Years, Commencing in Michaelmas Term, 1777. 3 vols. (Dublin: 1792-1794), I, 472-473. Hereafter cited as Lectures. Holdsworth, English Law, IX, 65-67. Chitty, Prerogatives, 131. The most celebrated quo warranto case was King v. City of London (1683), in Francis Hargrave, ed., A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanors. 11 vols. (4th ed.; London: 1776-1781), III, 546 ff. Hereafter cited as State Trials. See, generally, Jennifer Levin, The Charter Controversy in the City of London, 1660-1688, and its Consequences (London: University of London, The Althone Press, 1969). The writ of scire facias was available to repeal or revoke charters when they were contrary to law, void for uncertainty or deception, or unjust and injurious to the rights of third persons. Chitty, Prerogatives, 330-331. For the use of the scire facias in connection with the Bubble Act, see DuBois, English Business Company, 6-10. On reservation clauses, see Ibid., 104-105, 126. Cecil T. Carr, "Introduction," Select Charters of Trading Companies, A. D. 1530-1707 (London: Selden Society, 1913), xix. Hereafter cited as Select Charters. For examples of royal reservation clauses, see the following business corporation charters: "Merchant Adventurers of England," sec. 12 (1564), in G. W. Prothero, ed., Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I (4th ed.; Oxford: Clarendon Press, 1913), 464. "East India Company," sec. 27 (1600), in Ibid., 455. "Merchants of London Trading to the Levant Seas," (1601), in Select Charters, 42. "Merchants of London Trading into France," (1612), in Ibid., 77-78. "King's Merchant Adventurers of the New Trade," (1616), in Ibid., 97. "Starchmakers of the City of London," (1623), in Ibid., 122. "Goldwiredrawers of the City of London," (1624), in Ibid., 136. "Royal Fishing of Great Britain and Ireland," (1676), in Ibid., 185. "Company for Smelting Down Lead," (1693), in Ibid., 230. "Company for Digging and Working Mines," (1694), in Ibid., 240. "Charitable Corporation," (1708), in Ibid., 262. "London Assurance Company," (1720), cited in DuBois, English Business Company, 143, n. 30. "York Building Company," (1728), in Ibid., 51, n. 50. "British Linen Company," (1747), in Ibid., 205, n. 290. Bubble Act, sec. 16, 6 Geo. I, c. 18 (1719), 14 Statutes at Large (Pickering ed., 1765), 244, 254.

This royal reservation was not a mere boilerplate provision, or a casual addition. On the contrary, it was taken very seriously by Crown officers and prospective corporators alike. For example, in 1704, Thomas Byfeild and eleven other promoters petitioned the Crown to grant them a charter to carry on a general trade with the American colonies and, also, to import naval stores. The draft charter presented to the Privy Council by the Board of Trade contained a provision reserving to the Crown the power to terminate the corporation by Order in Council. In their joint report requested by the Council, both the Attorney General and the Solicitor General strenuously insisted upon the retention of this reservation. However, the prospective corporators strongly objected to a broad reservation clause, and more than once requested that it be eliminated or at least narrowed. In the end the project was vetoed by Queen Anne, but the attention paid to the reservation clause and the hard bargaining over it illustrate its importance in the English scheme.⁴

Despite the prominence of the reservation clause in royal charters, and its presence in some acts of Parliament, judicial references to reservation clauses were very few. Apparently, only one English case decided before 1800 mentions the charter reservation in a trading corporation charter. In East India Company v. Sandys, decided in 1684, the defendant challenged the trading monopoly which the King had

⁴W. L. Grant and James Munroe, eds., Acts of the Privy Council of England, Colonial Series (Hereford: 1910), II, 464-469.

granted to the company. In an opinion upholding the grant, Chief Justice Jeffreys noted that the King's charter had reserved full power to terminate the grant on three years' notice whenever the King decided the grant was no longer "profitable . . . to this Realm." Jeffreys' full opinion was not readily available, however, because it was not published in a standard law report until 1778 and then only in the State Trials, a collection unlikely to be searched by English or American lawyers for precedents on the subject of business corporations. The only other judicial reference to a royal reservation clause came in King v. Amery, where the King's Bench upheld the reserved power of the Crown to remove any principal officer of a chartered municipal corporation.⁵

⁵East India Company v. Sandys (1684), in Hargrave, ed., State Trials, VII, 493, 556. Hargrave, "Preface," Ibid. For the full reservation clause, see the Charter granted the East India Company by Charles II, April 3, 1661, in Charters Granted to the East-India Company, from 1601; Also the Treaties and Grants Made with, or Obtained from, the Princes and Powers in India, from the Year 1756 to 1772 (n. p.: [1773]), 78. So far as observed, the first American reference to Jeffreys' mention of the royal reservation clause was by Warren Dutton in his argument in Charles River Bridge v. Warren Bridge, 11 Peters 420, 443-444 (U. S. 1837), rev'g 24 Mass. 344 (1829). Hereafter cited as Charles River Bridge. For the use of the reservation clauses in the charters of municipal corporations, see King v. Amery, 2 Term Reports 515, per Justice Ashurst, 568, and argument, 560 (1788); rev'd by the House of Lords, 2 Brown Parliamentary Reports 336 (1790). See Kyd, Corporations, II, 94, 492-496, 503-511. For the background of these clauses in borough charters, see J. H. Sacret, "The Restoration Government and Municipal Corporations," English Historical Review, XLV (April, 1930), 232-259. Amery was cited by Story for the authority that the king could not alter a corporate charter in the absence of a reservation clause. Dartmouth College, 4 Wheaton, 675.

Although by the end of the eighteenth century England had adapted the corporation to serve a wide variety of governmental, economic, religious, and charitable purposes, legal commentators often ignored realistic functional distinctions as they searched for the legal "essence" of the corporation. Stewart Kyd, whose treatise on corporations was influential in both England and the United States, did as well as any. For Kyd, a corporation was a legal synthesis, a "union of . . . several circumstances," no one of which was startling or unknown to other aspects of English law. The resulting synthetic device, the corporation, was

a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.⁶

This definition requires some explication in order to be fully understood. A corporation was, first of all, a creation of the law, and in this sense was a legally conferred right or capacity to act as an entity. This franchise to be was distinct from other privileges and

⁶Kyd, Corporations, I, 12-13. For a brilliant review of the common law theory of one type of corporation, the borough, in an earlier period, see Heinz Lubasz, "The Corporate Borough in the Common Law of the Late Year-Book Period," *Law Quarterly Review*, LXXX (April, 1964), 228-243. Hereafter cited as "The Corporate Borough."

immunities which the corporation might possess and exercise for its benefit.⁷

If the corporation was legally capable of acting as a distinct entity, it was also a "collection of many individuals." Not only did "natural persons essentially constitute the body politic," but each member had a legally defensible "right" to act with others as a corporation. It followed that Kyd was impatient with the metaphysics which conceived of the corporation as "invisible" and "immortal."⁸ This emphasis on the individual and very human composition of the body politic, moreover, had important legal and practical implications. It was impossible to discuss the rights and duties of corporations without discussing the rights and duties of individual members. Corporate rights and property were in this sense merely individual rights and property.

Probably the most important legal component of the corporation was "perpetual succession," an "incident" necessarily attached by operation of law to every corporation. Perpetual succession, as Blackstone put it, was "the very end of . . . incorporation." It was simply the power of appointing new members in the place of those who had been

⁷Kyd, Corporations, I, 14-15. Blackstone, Commentaries, II, 37. C. A. Cooke, Corporation, Trust and Company (Cambridge: Harvard University Press, 1951), 66-67, 78.

⁸Kyd, Corporations, I, 16-17. The conception of the corporation as "invisible" and "immortal" came from Sir Edward Coke's opinion in Le case de Suttons Hospitall, 10 Coke 23a, 32b (1612). Hereafter cited as Suttons Hospitall. Cf., Marshall's opinion, Dartmouth College, 4 Wheaton, 636.

removed from membership for one reason or another, without the necessity of doing anything else. As Blackstone indicated, perpetuity was not the distinctive feature of the corporation. Through the private trust, large amounts of property could be held by and for groups such as the Inns of Court forever. However, the trust required a multitude of complicated deeds and conveyances, all properly drawn and executed in due time. It was the succession, the efficient change of membership and thus of ownership, which was distinctive about the corporation, and of immense practical importance.⁹

Kyd also noted in his general definition that any corporation could exercise "a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it."¹⁰ As reflected

⁹Blackstone, Commentaries, I, 475. Blackstone found four other "incidents" of every corporation: to sue and be sued in the corporate name, to purchase and hold lands, to have a common seal, and to make by-laws. Kyd repeated the five incidents, Corporations, I, 69. The implied powers of every corporation were first set forth by Coke in Suttons Hospitall, 10 Coke, 30b-31a. Coke also laid down the rule that it was impossible to take forever without incorporation. Ibid., 26b. On the use of the trust to hold property "in perpetuity," see Kyd, Corporations, I, 6-7. Frederic W. Maitland, "Trust and Corporation," in Maitland: Selected Essays, ed. by H. D. Hazeltine, G. Lapsley, and P. H. Winfield (Cambridge: Cambridge University Press, 1936), 141-222. Hereafter cited as Selected Essays. In addition to the Inns of Court, Maitland noticed several other eighteenth-century unincorporated associations. Ibid., 186-187, 191-195, 207. W. K. Jordan notes the extensive use of the transfer-retransfer system to achieve perpetuation of the trustees of unincorporated charitable trusts. Philanthropy in England, 1480-1660: A Study of the Changing Pattern of English Social Aspirations (London: George Allen and Unwin, Ltd., 1959), 122. Hereafter cited as Philanthropy in England.

¹⁰Kyd, Corporations, I, 12-13.

in the law, these "political rights," or corporate powers, were of two basic types, governmental and group property-holding.

"The general Intent and End of all Civil Incorporations," wrote an anonymous commentator at the beginning of the eighteenth century, "is, for better Government." A corporation was thus created for a public purpose -- government. It was a bundle of "political rights" which added up to a delegation of power, of jurisdictional control, over specified territories or types of human activity or both. Some corporations, such as cities, towns, and boroughs had a general jurisdiction over particular territories. Early merchant guilds, closely related to boroughs, also had territorial jurisdiction, but often exercised power for more limited economic purposes. Later, the incorporated "regulated company," in which each member traded with his own stock subject to the rules and regulations of the corporation, was likewise governmental in character. The corporate body exercised a delegated political power in order to regulate the economic activities of its members.¹¹

The corporation was never an exclusively governmental device but had always been associated with group ownership of property. According to Holdsworth, the technical concep-

¹¹ [Anonymous], The Law of Corporations: Containing the Laws and Customs of All the Corporations and Inferior Courts of Record in England (London: 1702), 2. Blackstone, Commentaries, I, 467-468. Cooke, Corporation, Trust and Company, 17, 19 ff., 51. On regulated companies, see Carr, "Introduction," Select Charters, xx-xxi. Holdsworth, English Law, VIII, 206. Cf., Kyd, Corporations, II, 103-107.

tion of the corporation as a group capable of holding property was first received into the English law to provide a rationalization for the religious associations which held the property of the church. After the Glorious Revolution, even incorporated boroughs came to function primarily as property-holding and property-managing institutions. The borough corporations began to manage the commons and to exercise their privileges and immunities for the private benefit of their members instead of for the benefit of the town at large.¹²

In the joint stock corporation, which emerged in the late seventeenth and early eighteenth centuries, the public governmental aspect of the corporation was almost completely subordinated to the property-holding function. Government became, in twentieth century terms, management. Unless a special privilege, such as monopoly power, was granted, the corporation's political jurisdiction had disappeared entirely into the ownership and control of the capital stock. Although the joint stock corporation was expected ultimately to serve the public good, this would only be the result of giving primary attention to the private interests of its members. Moreover, the "succession" of members was even easier than

¹²Holdsworth, English Law, III, 471. On the English borough as a property-holding body, see, generally, Frederic W. Maitland, Township and Borough (Cambridge: Cambridge University Press, 1898), esp. 95. Maitland, Selected Essays, 217. King v. Pasmore, 3 Term Reports 199 (1789).

before as shares in the stock were freely transferrable.¹³

Unfortunately, the Bubble Act of 1719 cut off the free development and extensive use of the corporation as a device for business organization. Passed in the wake of a financial panic caused in part by over-speculation in corporate stocks, the Bubble Act forbade persons to act as a corporation or to raise a transferrable stock without explicit authority from the Crown or Parliament. Following this act, the organizers of business enterprise adapted the partnership and private trust to serve many of the purposes of the corporation. The privately drawn deed of settlement replaced the charter as the "constitution" of the organization. Under certain limitations, shares were transferrable. Although business got by with expedients such as these, the law of business corporations nearly ceased to develop after the Bubble Act. Those corporations which survived the Bubble Act or were chartered thereafter simply did not produce enough litigation to enable the courts to create a comprehensive case law. This would have important implications for Americans when they began to use the corporate device to promote economic growth in the late eighteenth century. Even by then, the courts found little usable English law

¹³Cooke, Corporation, Trust and Company, 50-79. See, generally, William Robert Scott, The Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies to 1720. 3 Vols. (Cambridge: Cambridge University Press, 1912). Cf., Frank Evans, "The Evolution of the English Joint Stock Limited Trading Company," Columbia Law Review, VIII (May, June, 1908), 339-361, 461-480.

relative to the special problems of business corporations.¹⁴

Despite the use of the corporation in England as an instrument for both governmental purposes and private gain, the English law developed no formal categorization of corporations by "public" and "private" functions. Rough distinctions had emerged by the early nineteenth century in connection with problems on the extent of corporate jurisdiction. For example, in 1702, Chief Justice Holt contrasted the power of the London Common Council with that of the Corporation of Glaziers. The Common Council, or "any other corporation of publick concern" could bind all who came within the "city or precinct." The Corporation of Glaziers, on the other hand, was a "private society" which existed only for the better government of its own members, and thus had no authority over non-members. In the late eighteenth century, Kyd summarized the whole line of cases:

. . . there seems to be a very important distinction between the power of such a court of a private company, established merely for purposes of trade, and that of a superintendent court of a corporation for the purpose of general government.

¹⁴Bubble Act, sec. 18, 14 Statutes at Large (Pickering ed., 1765), 255-257. Cooke, Corporation, Trust and Company, 80-88, 95. L. C. B. Gower, "The English Private Company," Law and Contemporary Problems, XVIII (Autumn, 1953), 535-536. Hereafter cited as "English Private Company." Dubois, English Business Company, is a valuable survey of the organization of English business after the Bubble Act, although he probably over-estimates the degree to which the Act crippled business operations, and the degree to which business operated without the aid of courts. James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970 (Charlottesville: University Press of Virginia, 1970), 7-8. Hereafter cited as Legitimacy of the Business Corporation.

Nonetheless, Kyd's distinction does not seem to have been firmly established. William Watson, in his work on partnership, published in 1807, divided business organizations themselves into "public" and "private." "Public" organizations were incorporated trading or financial companies, such as the East India Company or the Bank of England, and unincorporated deed of settlement companies for trade and insurance. The public companies were characterized by the large number of members, transferrable shares, and a separate management. A "private partnership," in contrast, consisted of "two or three dealers, or not many more, trading under a firm." Watson's distinction was thus a matter of size, not function.¹⁵

The formal system of classification which the English law had developed was based on the legal need to determine what persons or courts had superintending or "visitatorial" authority over particular corporate institutions. The key element in the system was jurisdiction. The major division was into "ecclesiastical" and "lay." In general, ecclesiastical corporations, those composed entirely of "spiritual persons," were visited only by church officials. In the sixteenth and seventeenth centuries, the King, as head of

¹⁵City of London v. Wood, 12 Modern Reports 669, 680 (1702). This case was cited as controlling by Chief Justice John Marshall in Bank of the United States v. Deveaux, 5 Cranch 61, 90 (1809). Hereafter cited as Deveaux. Kyd, Corporations, II, 395. Cf., Ibid., I, 27-29; II, 103-107, 394, 397. William Watson, A Treatise of the Law of Partnership (2d ed. rev.; London: J. Butterworth, 1807), 3-5. Cf., Gower, "English Private Company," 536.

the Anglican church, visited corporations such as the universities which were connected to the church. "Lay" corporations, on the other hand, were under the jurisdiction of secular authorities, usually the royal courts. Lay corporations were subdivided into "civil" and charitable, or "eleemosynary" corporations. The "civil" category comprehended most of the important corporations in England, including both municipal and business corporations as well as such collegiate bodies as the company of surgeons in London. The royal courts had general supervisory jurisdiction over these institutions. Charitable corporations, however, were a special type of lay institution. Before the Reformation, the church had visitatorial jurisdiction over charitable corporations, but as the authority of the church contracted, public policy and the common law, for reasons which will be examined below, developed a special set of rules for charity. Although charitable corporations (with the exception of those directly connected with the church) became lay, as opposed to ecclesiastical, visitatorial jurisdiction did not automatically go to the King. In the first instance, it went to the founder, who might be the King, but more often was a private citizen. If a private person was the founder of the charity, then the corporation would be private, and the visitor could usually superintend the charity to the exclusion of the King's courts.¹⁶ It should be noted that this

¹⁶Blackstone, Commentaries, I, 470-471, 480-482. Kyd, Corporations, I, 22-27, passim. Samuel Williston, "History of the Law of Business Corporations before 1800," Harvard Law Review, II (Oct., 1888), 105, wrote that the

classification of corporations was useful so long as the question under discussion was jurisdiction. Once a court had determined the jurisdictional question, however, the classification system was of little or no utility in the solving of substantive problems, and the English lawyers and judges ignored it.

The charitable corporation was the subject of a special line of constitutional and legal development from the time of the Tudors until the early nineteenth century. Because the law of this type of corporation was well developed and had a significant impact on the Dartmouth College case, it deserves separate and more detailed treatment.

The origins of the early modern law of charitable corporations are in the Tudor response to the difficult problems of financing education and alleviating the growing poverty in the late sixteenth and early seventeenth centuries. The essence of the Tudor solution was to encourage the wealthy classes, the mercantile aristocracy and the landed gentry, voluntarily to create the institutions and contribute their resources to solve these pressing social difficulties. Both

English "classification is based on differences of fact rather than on differences in legal treatment." This is true only if jurisdiction is a matter of fact rather than of law, a dubious proposition. Anthony Highmore, A Succinct View of the History of Mortmain; and the Statutes Relative to Charitable Uses; with a Full Exposition of the Last Statute of Mortmain, 9 Geo. II. c. 36. and Its Subsequent Alterations: Comprising the Law As It now Stands Relative to Devises, Bequests, Visitation, Leases, Taxes, and Other Incidents to the Establishment of Public Charities (2d ed. rev.; London: J. Butterworth, 1809), 398, 411-412. Hereafter cited as Mortmain.

policy and law were framed to achieve the desired results. First, the government allowed private donors a great deal of freedom to establish charitable enterprises according to their own plans. The theory was that individuals would be encouraged to commit their wealth to socially useful purposes if they themselves could shape the organization and lay down the terms for the distribution of the bounty. Second, the government sought to provide an efficient enforcement mechanism in order to protect the interests of both donors and the state. Prospective donors wanted assurance that their funds would not be diverted from their designated purposes by negligent or dishonest trustees. The state, only secondarily interested in donors' wishes, wanted all charitable trusts fully applied in order to achieve the maximum alleviation of outstanding social problems.¹⁷

The Elizabethan Statute of Workhouses, enacted in 1597, was one major device for encouraging the foundation of poor houses. It was essentially a general incorporation act, providing that a donor could found and incorporate hospitals and work houses by the simple expedient of a deed enrolled in chancery. In all such institutions, the corporation was to be composed of a head and a number of members. Beyond this, the will of the founder controlled. He could name the corporation, designate the place, the head, number of members, and decree the rules, statutes, and ordinances under

¹⁷Jordan, Philanthropy in England, 108, 115, 126, 149-151.

which the corporation would operate. He could name his heirs or others to "visit" the corporation, to superintend the institution to make sure the will of the founder was being carried out.¹⁸

Whether a charitable corporation was founded under the Statute of Workhouses, or under a special act of Parliament, or by letters patent from the Crown, similar legal rules applied. Whoever first donated the property to establish the institution was deemed the "founder" in law. Because this foundation was based on property, the founder's powers were legally designated as property rights. Initially, the founder was the "legislator" for the charity, as one judge described him, because he laid down the statutes to govern the institution. After the corporation was in operation, however, the founder could not unilaterally revise his statutes unless he had originally reserved a power to do so. In the eighteenth century, this rule was applied to charitable corporations founded by the Crown as well as to those founded by private individuals.¹⁹ The reservation clause

¹⁸ Statute of Workhouses, 39 Eliz. c. 5 (1597), 7 Statutes at Large (Pickering ed., 1763) 2, Made permanent by 21 James I c. 1 (1623), Ibid., 250. Jordan, Philanthropy in England, 98, 115-116. This general incorporation law was extensively discussed in legal literature read by Americans. It was examined in Sir Edward Coke, The Second Part of the Institutes of the Laws of England (London: 1797), 720-727. Blackstone noted it, Commentaries, I, 474. Kyd's discussion, Corporations, I, 56-61, 102, paralleled Coke's.

¹⁹ Blackstone, Commentaries, I, 477, 480-481. Kyd, Corporations, I, 50-51; II, 103. For the founder as "legislator," King v. Bishop of Ely, 2 Term Reports 290, per Justice Ashurst, 336 (1788). Hereafter cited as Bishop of Ely. Philips v. Bury, Skinner, 447, 513 (1694). S. C. 2 Term

requirement for charitable corporations thus paralleled that for municipal and trading corporations.

Another property right of the founder was the power to appoint a visitor to superintend the corporation. If the founder did not exercise his right, he was the visitor, and the "visitatorial" power descended to his heirs at death. The visitor was essentially a judicial officer. He made sure there was no misappropriation of funds or negligent administration and also settled disputes which arose within the corporation. In all cases, the founder's statutes or general intent were to be the visitor's "rule of law." In general, where there was a visitor his decision on matters within his jurisdiction was final and could not be reviewed by the royal courts. This was true even of royal foundations.²⁰

If allowing donors a large amount of freedom to organize

Reports 346. Hereafter cited as Philips. Doctor Bentley v. Episcopum Eliens', Fitz-Gibbons 305, 313 (1729). King v. Bishop of Ely, 1 Wm. Blackstone Reports 71, 84 (1757). Hereafter cited as Bishop of Ely. For a charter reservation with regard to statutes, see Le case de Suttons Hospitall, 10 Coke 1a, 4b (1612). Cf., Eden v. Foster, 2 Peere Williams 325 (1725). Hereafter cited as Eden.

²⁰The nature and extent of the visitatorial power was an issue in many cases and a favorite of treatise writers. The most complete account is Highmore, Mortmain, 395-431. See also Kyd, Corporations, II, 174-290. Kyd's account was partially superseded by new decisions handed down after the publication of his treatise. Philips, 2 Term Reports, 352, 353. Bishop of Ely, 2 Ibid., 336. Attorney General, at the relation of Mapletoft v. Master, Fellows and Scholars of Clare-Hall, 3 Atkyns 662, 673 (1747). Cf., Case of Kirkby Ravensworth Hospital, 8 East 221 (1807). Hereafter cited as Kirkby Ravensworth Hospital. Green v. Rutherford, 1 Vesey Sr. 462, 472 (1750). Hereafter cited as Green. Attorney General v. Price, 3 Atkyns 108 (1744). Hereafter cited as Price.

and control their charitable foundations was an essential part of the Tudor program, it was also necessary to prevent the abuse of charitable funds. Throughout the period under consideration, chancery had the power to redress the misappropriation of funds by officers and members of charitable corporations. In theory, at least, no charitable corporation was too private to avoid chancery's superintendence of charitable funds. In practice, however, the process by which charitable corporations were brought into court -- an information by the attorney general at the relation of interested private parties -- was cumbersome and expensive. The Elizabethan Statute of Charitable Uses of 1601 provided a more efficient mechanism. The act authorized the establishment of charitable commissions under the authority of the Chancellor. The commissions could take evidence on the existence and government of charities, and make orders for the correction of abuses touching lands or tenements. These orders, however, were not to be contrary to the statutes of the founders. The purpose was to secure the faithful execution of the trust, not to modify it. A special proviso showed a similar respect for the property rights of founders by exempting from commission investigations "any college, hospital, or free school, which have special visitors or governors, or overseers appointed them by their founders." Nonetheless, where visitors were also trustees, and thus in a position to abuse the trust, the Chancellor ruled that the special exemption

was not intended to prevent an investigation.²¹

The ultimate result of the Tudor policy on charities was the creation of a series of remarkably independent private governments. Charitable corporations had their own constitutions in their charters and founders' statutes. More distinctively, they had their own judiciaries from which there was no appeal on matters within their jurisdiction. Only when the private governments broke down under actual or threatened corruption did chancery intervene in the affairs of charitable corporations.²²

This system of private government was extended and strengthened as a result of the religious, political, and constitutional crisis of the late 1680's. In the spring of 1687, St. Mary Magdalen College, at Oxford, prepared to elect a new president, the old one having died. James II ordered the college to elect Anthony Farmer, a convert to Catholicism. The vice-president and fellows replied that

²¹ Holdsworth, English Law, IX, 58. John Fonblanque [Henry Ballow], A Treatise of Equity, with the Addition of Marginal References and Notes. 2 vols. (3d ed. rev.; Philadelphia: P. Byrne, 1805, 1807), II, 205, n. a. Attorney General v. Corporation of Bedford, 2 Vesey Sr. 505, 506 (1754). Hereafter cited as Bedford. Ex parte Berkhamstead Free School, 2 Vesey and Beames 134, 137, 138, 144 (1813). Hereafter cited as Berkhamstead Free School. Statute of Charitable Uses, 43 Eliz. c. 4, 7 Statutes at Large (Pickering ed., 1763), 43. Case of Sutton Colefield, in George Duke, The Law of Charitable Uses, Revised and Much Enlarged; with Many Cases in Law Both Antient and Modern: Whereunto Is now Added, the Learned Reading of Sr Francis Moor, Kt. Sergeant at Law. (London: Henry Twyford, 1676), 68-69. Hereafter cited as Charitable Uses. Hynshaw v. Mayor of the Corporation of Morpeth, in Ibid., 69. Kirkby Ravensworth Hospital, 8 East 221.

²² Highmore, Mortmain, 401-402, 430-431.

Farmer was ineligible according to the statutes of the college, but the King refused to nominate anyone else. On April 15, the college elected Dr. John Hough to be President, ignoring the King's directions. In June, the Ecclesiastical Commission held hearings on the college's failure to obey the royal command. Among other things, Dr. Hough challenged the jurisdiction of the commission to visit the "private College," citing the royal charter, the founder's statutes, and the fact that the Bishop of Winchester was the duly-constituted visitor. The commission, however, had been given jurisdiction notwithstanding any law or statute to the contrary. Dr. Hough and all but two fellows were removed from the college, and Samuel Lord, Bishop of Oxford, also a convert to Catholicism, was made President. In the fall of 1688, James II, threatened by William of Orange, ordered the college to be resettled according to its charter and statutes. This was done, but it was too late to save the King.²³

Magdalen College and other excesses of James II and his courts and commissions still conditioned the legal atmosphere when the important case of Philips v. Bury arose in the early 1690's. Exeter College in the University of Oxford was founded by William Stapleton, and incorporated by Queen Elizabeth. The statutes appointed the Bishop of Exeter to be visitor. In 1689, the rector and scholars of

²³Proceedings against St. Mary Magdalen College in Oxford (1687), in Hargrave, ed., State Trials, IV, 262 ff. David Hume, The History of England, from the Invasion of Julius Caesar to the Revolution in 1688. 8 vols. (Rev. ed.; London: T. Cahill, 1770), VIII, 278-280.

the college expelled one Colmer. He appealed, and a visitatorial delegate reversed his expulsion. Thereafter, in the summer of 1690, the Bishop of Exeter attempted a general visitation of the college. The rector and many scholars objected that this visitation was not valid under the statutes, and refused to appear before the Bishop when ordered. The Bishop thereupon removed the rector, Dr. Bury, and the non-appearing scholars. The case was brought to test the validity of this removal. In the King's Bench, three justices found for Dr. Bury, with Chief Justice John Holt dissenting. On appeal to the House of Lords, the judgment was reversed without opinion. Holt was later assumed to have stated the law of the case.²⁴

Holt's opinion was a merging of prior legal developments in the area of charitable corporations with the constitutional principles which had emerged from the Glorious Revolution. The crucial passages follow:

[T]hat we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's Courts; of these there are no particular private founders, and consequently no particular visitor: . . . But private and

²⁴Philips, Skinner 447. Skinner was counsel for Bury before the House of Lords, so his report is probably the most accurate of several available. Holt's opinion was reprinted from the original manuscript, 2 Term Reports 346. Kyd, Corporations, II, 197-226.

particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them: . . . [T]his visitatorial power . . . is an appointment of law; it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behaviour of the members that partake of the charity; . . . What is the visitor to do? He is to judge according to the statutes and rules of the college. . . . [I]f he hath a jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter, . . . there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the Common Law Courts of England is without precedent. . . . [T]he cause of the visitor's sentence is not examinable.²⁵

Some elements of Holt's opinion require comment. The categorization was built primarily around the extent of jurisdiction of royal courts. Most corporations were public because the royal courts had original or appellate jurisdiction to settle corporate disputes. Charitable corporations were private because they had judicial officers, visitors, whose decisions were final. Moreover, Holt emphasized that the private corporation's exclusive jurisdiction over intramural affairs was a property right of the founder. This indicated the shift in focus of the British constitution and the public policy and law of charitable corporations. During the Tudor period, and especially under Elizabeth, the state's policy called for giving donors a large degree of personal control over their contributions. Now, in the aftermath of the Stuart constitutional crisis, Holt seized upon

²⁵₂ Term Reports, 352-354.

the property aspect of earlier law to insulate established foundations, some of which were very rich and very powerful, from royal and even judicial control.

Finally, a secondary element of Holt's categorization of corporations seems to be the differing rules of law which control public and private corporations. Public corporations were to be governed by the "laws of the land," and the "validity and justice" of "particular and private laws and constitutions" made by public corporations were examinable in the King's courts. Private charitable corporations, on the other hand, were subject to the statutes of their founders, which provided the rules of law for the corporate visitors.²⁶ Holt's distinction on these grounds will not bear close examination. First, virtually all charters of charitable corporations provided that the statutes which a founder gave could not be contrary or repugnant to the statutes of the realm or the law of the land. In this sense, the laws of the land did control private corporations. Second, chartered public corporations of all types were in the first instance controlled by their charter provisions, just as private charitable corporations. Although charter provisions varied widely, there was thus little generic difference between the laws of decision for public and private corporations. Jurisdiction remained the primary and only real basis for the public-private distinction.

The basic principles announced in Philips v. Bury

²⁶Ibid., 352.

provided the foundation for development of much of the law of charitable corporations in the eighteenth and early nineteenth centuries. Where there was a visitor who had jurisdiction over the parties and subject matter, the courts would not review his decision. When a visitor exceeded his power, however, the courts could intervene. Thus many cases turned on whether a visitor had jurisdiction or not. A more important line of cases concerned the problem of what to do when there was no private individual or group legally capable of visiting a charitable corporation. For example, where the Crown founded a charitable corporation, but did not appoint a visitor, the King's Bench would inquire into the proceedings and issue a mandamus to restore a person improperly removed from his office. The King's Bench also assumed jurisdiction where one person exercised a number of offices, including that of visitor, in the corporation. The Bishop of Chester, as warden of Manchester College, refused to admit a chaplain who had been properly elected. When the chaplain asked the King's Bench for a mandamus, the Bishop stated that he was visitor and denied that the court had jurisdiction. The court granted the mandamus on the grounds that the Bishop's visitatorial power was suspended in light of the obvious conflict of interest. In other cases, the private founder appointed no visitors, and there were no heirs, or none could be located, to exercise the visitatorial power. Here, too, the royal courts had jurisdiction.²⁷ The basic concern of

²⁷Highmore, Mortmain, 396-397, 402, 404, 408-415.
King v. Chancellor, Masters and Scholars of the University

all these cases was that those responsible for the administration of charitable corporations not be left to their own devices where there was no legal superintendence.

For a time, there was a problem of which court was to assume jurisdiction where there was no visitor or the visitatorial power was suspended. During most of the eighteenth century, the King's Bench shared jurisdiction with Chancery. In 1791, however, the King's Bench decided that it did not have jurisdiction where there was no visitor, but that the visitatorial power devolved upon the King, to be exercised by the Chancellor under the great seal. Although this decision was vigorously disputed, the Chancellor nevertheless began to act as visitor of charitable corporations where there was none other. Technically, the Chancellor's visitatorial power in these cases was a part of the royal prerogative, to be exercised by petition. It was, however, a special type of prerogative. The Chancellor was not to decide according to his uncontrolled discretion, but was, as a regular visitor, to be governed by the statutes of the founder.²⁸

of Cambridge, 1 Strange 557 (1723). Dominus Rex v. Episcopum Chester, 2 Strange 797 (1727). Cf., 2 Geo II c. 29, 16 Statutes at Large (Pickering ed., 1765), 81. Green, 1 Vesey Sr., 47. King v. Master and Fellows of Saint Catherine's-Hall, Cambridge, 4 Term Reports 233 (1791). Hereafter cited as St. Catherine's Hall.

²⁸St. Catherine's Hall, 4 Term Reports, 243. Cf., a dictum by Lord Holt, Anonymous, 12 Modern 232, 233 (1699). Ex parte Wrangham, 2 Vesey Jr. 609, 617, per arg.; 619 (1795). Ex parte Dann, 9 Vesey Jr. 547, 548 (1804). Attorney-General v. Dixie, 13 Vesey Jr. 519, 533 (1805). Hereafter cited as Dixie. Attorney General v. Earl of Clarendon, 17 Vesey

As the Chancellor in his capacity as personal representative of the Crown began to assume a greater role in the superintendence of charitable corporations, the court of equity sharpened its old distinction between abuses of charitable trusts which involved the misappropriation of revenue for the benefit of the trustees, and those abuses which were merely departures from the founder's statutes in such matters as elections. To a large degree the distinction was unreal since the election of an unqualified person to a fellowship, for example, was as much a departure from the will of the founder and a misappropriation of revenues as an abuse which redounded to the immediate benefit of the trustees. Nonetheless, the distinction came to have great procedural significance. Equity could always entertain an information or an action for accounting against charitable trustees accused of misappropriating the revenues for their personal benefit. However, where there was a visitor, equity would not act to redress abuses other than those involving revenue which were within the private visitor's jurisdiction. And where there was no visitor, or the visitors could not act because of a conflict of interest, an action against unscrupulous trustees had to be split. That part of the action which directly concerned the revenues had to be brought on an information in the court of equity; that part which concerned other abuses

Jr. 491, 498-499 (1810). Hereafter cited as Clarendon. George Cooper, A Treatise of Pleading on the Equity-Side of the High Court of Chancery (London: A. Strahan, 1809), xxvii. Hereafter cited as Pleading.

normally within the province of a private visitor had to be brought before the Chancellor by petition.²⁹

The complications of the English law of charitable corporations did not end here. There were two types of charitable corporations, and the distinction was sometimes important. In the most prominent type, what might be called the "separated power" corporation, the charter incorporated both the officer and those who were to receive the benefit of the charity, and gave the whole group ownership and control of the foundation property. Thus, a typical charter would incorporate the rector and scholars of a school, the master and fellows of a college, or the warden and poor of a hospital. The visitor would be an altogether separate officer, and would neither own the property nor receive any of the foundation revenues. Assuming an absence of collusion between the visitor and the rest of the organization, the visitor was an appropriate person to audit the corporate accounts and otherwise oversee the operations to prevent fraud. Most of the eighteenth century cases involved separated power corporations, and the law was generally constructed to fit this institutional arrangement. In the "unitary" type of charitable corporation, the objects of the charity, the scholars, the fellows, the poor, and so forth, were not included in the corporation and there was usually no separate

²⁹ Bedford, 2 Vesey Sr. 505 (1754). Berkhampstead Free School, 2 Vesey and Beames, 137, 138, 144. Cf., Price, 3 Atkyns 108. Dixie, 13 Vesey Jr., 535. Clarendon, 17 Vesey Jr. 498-499.

visitor appointed by the founder. Instead, a single set of governors or trustees were incorporated, and given full ownership and control of the foundation property.³⁰ The unitary charitable corporation had the obvious advantage of institutional simplicity. It became popular in England in the eighteenth century and was the organizational scheme most often used in America. Dartmouth College, for example, was a unitary charitable corporation.

The problem of jurisdiction over the unitary corporation was extremely complicated. As noted above, the Statute of Charitable Uses specifically exempted from investigation by the charity commissioners any college, hospital, or free school which had special visitors, governors, or overseers. In the seventeenth century, the Chancellor ruled that this proviso did not exempt unitary corporations from inquiries into the use of the revenues. Early in the eighteenth century, the problem arose again in the case of Eden v. Foster. The trustees of the free grammar school of Birmingham, citing a dictum of Lord Coke that governors should visit where no visitors were appointed, objected to a commission investigation. The court resolved that the word "governor" in a charter or private statute did not imply "visitor," and that where governors received rents and profits they should be accountable for the use of the receipts. In 1744, Chancellor

³⁰Kyd, Corporations, I, 26-27. The Statute of Workhouses (1597) provided for the chartering of separated powers corporations.

Hardwicke stated that Chancery had jurisdiction to investigate the application of the revenues of a unitary corporation, but the trustees had an "absolute" authority over other aspects of the charity. These cases led Kyd to the conclusion that the governors of a unitary corporation had "a kind of visitatorial power with respect to the objects of the charity," but were under the control of Chancery with respect to the application of the revenues.³¹

However, the absolute control of the governors of a unitary corporation over non-pecuniary matters seemed to end early in the nineteenth century. In Attorney General v. Dixie the Chancellor, acting on a petition as the representative of the Crown, removed improperly elected governors where a visitor had himself been acting as governor. It

³¹Case of Sutton Colefield, in Duke, Charitable Uses, 68-69. Eden, 2 Peere Williams, 326-327. Suttons Hospital, 10 Coke, 31a. Cf., Philips, 2 Term Reports, 352-353. Attorney General, at the relation of Gray v. Lock, 3 Atkyns 164, 165 (1744). Kyd, Corporations, II, 187, 195. Attorney General v. Governors of the Foundling Hospital, 2 Vesey Jr. 42, 47, 49 (1793). Wooddeson, Lectures, I, 476. Two expressions of apparently different rules by Lord Chancellor Hardwicke appeared in the mid-eighteenth century. In one case, Attorney General v. Middleton, 2 Vesey Sr. 327 (1751), Hardwicke seemed to state that the trustees of a unitary corporation had full visitatorial authority where no visitors were expressly appointed by the founder. However, the report of this case is thoroughly garbled. See Kyd's criticism, Corporations, II, 194-195. In a broad and unqualified dictum in Green, in 1750, Hardwicke made the same statement. 1 Vesey Sr., 472. These two isolated statements cannot be treated as declaring the law. They are contrary to many holdings made both before and after 1750-1751, and run counter to other statements made by Hardwicke himself. The point is important because Justice Joseph Story, in his opinion in the Dartmouth College case, insisted on treating Middleton and the Green dictum as good law, 4 Wheaton, 675, 681, despite overwhelming evidence to the contrary.

seems that the rule with regard to separated power corporations would now be applied to unitary corporations. Where governors and visitors were one, the Chancellor, either in place of the King or in his court of equity, had all the visitatorial power there was.³²

Taken together, the developments in the case law during the eighteenth and early nineteenth centuries show an important change of emphasis in the law of charitable corporations since Philips in 1694. Holt's category of "private corporations," so far as it depended upon jurisdictional considerations, had been by-passed, qualified, hedged with exceptions, and otherwise rendered obsolete by innovations. The most important development was the decision that the Chancellor acting as representative of the King had broad visitatorial powers over charitable corporations where there was a conflict of interest in visitors who were also governors. Charitable corporations thus subject to visitation by the public authorities were not strictly private within Holt's original definition. In fact, the public-private distinction had become technically irrelevant in a large number of cases, and by the early nineteenth century the courts almost never bothered with it.

Still, it is important to note that many of these changes in the technicalities of jurisdiction were at the periphery. The central legal theory of the charitable corporation remained much the same as it had been since the

³²Dixie, 13 Vesey Jr., 535, 539, 541. Cooper, Pleading, xxvii.

days of Elizabeth. It was still the creature of the founder, whose property right (as Holt called it) allowed him to draw statutes and to visit the corporation himself or through heirs or appointees. Where there were visitors capable of acting, the King's courts could not examine the affairs of the corporation except in cases of abuse of trust. To a large, if diminishing, extent, the charitable corporation remained a self-contained private government, beyond the reach of the public executive and judicial authorities.

Whatever the legal theory of charitable corporations, in reality the system of private administration of charities had become inefficient and corrupt by the beginning of the nineteenth century. Only a fraction of the resources legally committed to education, relief of poverty, and other charitable purposes was actually spent as the donors intended. In 1795, Chief Justice Kenyon complained of grammar schools which were merely "empty walls without scholars, and every thing neglected but the receipt of the salaries and emoluments." During a special Parliamentary investigation of the education of the poor conducted from 1816 to 1818, Henry Brougham, a Whig reformer, uncovered evidence of widespread abuses in charitable foundations. In the case of trusts, the problem sometimes was in the original constitutions, many of which gave inadequate power to the trustees to manage the trust profitably, or failed to provide legal authority to replace dead or resigned trustees. Both corporations and trusts, however, were subject to negligence and willful mismanagement

by the holders of the property. To support his demand for greater investigative powers, Brougham laid before Parliament example after example of corruption and negligence in the administration of charitable institutions. His strongest criticism was directed at charities with "special visitors." In one case, land had been bequeathed to the mayor and twelve aldermen of a borough in trust for the support of a school. The mayor and aldermen leased the land to themselves at a rent far below the actual market value. The mayor and aldermen were also the special visitors charged with superintending the trust.³³

The major institutional reason for the sorry condition of charities was the lack of effective supervision by the courts, and especially Chancery. The problem was not the technical lack of jurisdiction. As noted above, where there was a supportable allegation of breach of trust, equity's jurisdiction was adequate and could be supplemented in many cases by a petition to the Chancellor. Rather, the problem

³³King v. Archbishop of York, 6 Term Reports 490, 493 (1795). Speeches of Henry Brougham, House of Commons, May 8, 18, June 3, 8, 1818, in T. C. Hansard, ed., The Parliamentary Debates from the Year 1803 to the Present Time: Forming a Continuation of the Work Entitled "The Parliamentary History of England from the Earliest Period to the Year 1803" (London: 1818), XXXVIII, cols. 596-601, 761-763, 1219, 1294-1295. Hereafter cited as Parliamentary Debates. "Report from the Select Committee on Education of the Lower Orders," June 3, 1818, Ibid., col. 1212. Review of "The Speech of Henry Brougham, Esq., M. P. in the House of Commons, May 8th, 1818, on the Education of the Poor and Charitable Abuses. Ridgeway, 1818," Edinburgh Review, XXX (Sept., 1818), 486-502. Chester New, The Life of Henry Brougham to 1830 (Oxford: Clarendon Press, 1961), 198-227, and esp. 211-212, 214-220. Hereafter cited as Brougham.

was excessive complexity of the law (jurisdiction was only the beginning), long delays, sometimes amounting to years, and high expense. The last factor was crucial. A charge of breach of charitable trust had to be brought by private parties who themselves had to bear the cost of preparing the suit, and had to pay all the costs if they lost. This was enough to dissuade nearly all from going into Chancery to redress charitable abuses. The same difficulties had rendered the charitable commission under the Statute of Elizabeth obsolete and ineffective. The case invariably went from the commission to Chancery, where it was swallowed in delay and expense. Sir Samuel Romilly, a Brougham supporter who himself tried many charity cases in equity, told the Commons that it was "impossible" to redress charitable abuses through Chancery.³⁴

Brougham advocated the creation of a special commission with comprehensive powers to investigate the administration of charitable trusts. The mere threat of exposure would prompt many trustees to take immediate action to correct deficiencies. The information collected would provide the basis for further action to correct existing abuses and prevent recurrences. Brougham strongly denied that his investigations would be an unwarranted interference with private

³⁴Speech of Sir Samuel Romilly, House of Commons, June 13, 1818, Hansard, ed., Parliamentary Debates, XXXVIII, cols. 1230-1231. Speeches of Henry Brougham, House of Commons, May 8, June 13, 1818, Ibid., cols. 606-607, 1221, 1224. Cf., Speech of Lord Chancellor Eldon, House of Lords, May 27, 1818, Ibid., cols. 976-977.

property and vested rights. He examined the legislative history since the time of Elizabeth and concluded that the "law regards the inheritance of the poor as matter of public, not of private jurisdiction." The idea that charitable funds held by trustees were "private property" was, declared Brougham, "utterly repugnant to the whole law of England." A bill embodying most of Brougham's suggestions passed the Commons in the spring of 1818.³⁵

In the House of Lords, the Tories counter-attacked. Many of the richest charitable foundations were in the hands of Tory lords and churchmen who as trustees or visitors ignored their charges or turned the foundations to personal economic or political advantage. Lord Chancellor Eldon, one of the strongest opponents of Brougham's commission bill, contended that no "honourable man" would become a charitable trustee in the future if trustees "were to be exposed to suspicious and vexatious inquiries into all of the details of their duty." This rather missed the point, since it hardly advanced the cause of charity to have "honourable" trustees who neglected or abused their trusts. More important, Eldon contended that the courts of justice "ought to have nothing to do" with charities which had special visitors appointed by the founders. On these grounds, Eldon was opposed to any

³⁵New, Brougham, 214. Speech of Henry Brougham, House of Commons, May 8, 1818, Hansard, ed., Parliamentary Debates, XXXVIII, cols. 602-606. Review of "A Letter to Sir Samuel Romilly, M. P. from H. Brougham, Esq. M. P. F. R. S. upon the Abuse of Charities. Eleventh Edition. London, Longman & Ridgeway. Edinburgh, Constable. 1818," [Etc.], Edinburgh Review, XXXI (March, 1819), 505-506.

legislative interference with visitors except where it was "proved" that the visitors had abused their trust. In the same vein, the Tory Quarterly Review stated its opposition to the Brougham proposals in terms of property rights. The appointment of visitors was a prerogative of the founder. Investigations would interfere with the will of the donor, and would be an unwarranted public assumption of the visitors' private "privileges." The Lords responded by amending Brougham's bill almost out of existence. Among other things, the Lords exempted from investigation the universities of Oxford and Cambridge, the colleges of Westminster, Eton, and Winchester, and any "charitable institution for the purposes of education, which have special visitors, governors or overseers appointed by their founders." The Commons, to the disgust of Brougham, accepted the Lords' amendments.³⁶

Attention centers on the conflicting theories of the nature of charitable trusts in English law. Although the

³⁶Speech of Lord Chancellor Eldon, House of Lords, May 27, 1818, Hansard, ed., Parliamentary Debates, XXXVIII, cols. 977-978. Review of "First, Second, Third, Fourth and Fifth Reports of the Select Committee to Inquire into the Education of the Lower Orders in the Metropolis, and to report their Observations thereupon, together with the Minutes of the Evidence taken before them from time to time, to the House: and who were instructed to consider What May Be Fit to Be Done with Respect to the Children of Paupers Who Shall Be Found Begging in the Streets in and near the Metropolis, or who shall be carried about by Persons asking Charity, and whose Parents, or other Persons who [whom] they accompany, have not sent such Children to any of the Schools provided for the Education of Poor Children. 1816--1818." [Etc.], Quarterly Review, XIX (July, 1818), 499, 506, 517, 565, 567-568. Hereafter cited as Review of "Reports of the Select Committee." For the Commission Bill as passed, see 58 Geo. III, c. 91, esp. sec. 12, 58 Statutes at Large 375, 379 (1818). New, Brougham, 214-216.

positions of extreme partisans such as Brougham and Eldon were no doubt determined by political considerations, the question of whether charitable trusts and corporations were essentially public or private was of interest to those who wished to make an objective assessment. The disagreement was over the correct interpretation of more than two centuries of legislative and judicial development of the charitable corporation. Here the Tories had by far the better argument. The charitable corporation as a private government had been in existence at least since the time of the Tudors. Originally, the Tudor monarchs and parliaments had allowed a large degree of private control in order to encourage the voluntary commitment of private resources to charity. After the Revolution of 1688, there was a heightened emphasis on the property element in the charitable corporation as a part of the general trend toward institutional independence from royal control. By the early nineteenth century, some inroads had been made in the area of jurisdiction (inroads not sufficiently acknowledged by the Tories), but most charitable corporations still existed as essentially private governments. The most Brougham and the Whigs could realistically claim from history was a right to insist on a vigorous public enforcement of charitable trusts. Under the circumstances, this was probably enough. Brougham was wrong, however, when he went on to assert that charitable funds had always been "public."

In conclusion, by the early nineteenth century, the corporation had been molded into a useful organizational

device within the English common law. In a strictly legal sense, the treatise writers' search for the essential characteristics of the corporation had so refined the legal idea of a corporation that analysis could move to a more sophisticated level. On a broader scale, England had also discovered the wide range of social functions the corporation could serve. Political units, religious orders, charitable institutions, joint stock business enterprises, and any other social organization involving government (in the widest sense) and property holding could be incorporated. Special charters provided the means by which the English could shape the corporate device to perform these different functions efficiently. In addition, charters could grant a large measure of legal autonomy or, if they included reservation clauses, could preserve the necessary amount of royal control.

Americans borrowed from the English the basic raw materials with which to build a corporation law suited to American conditions. The importance of the English contribution should not be underestimated. The English had invented, or at least redefined, the corporation in terms of the common law so that the Americans were spared the frustrating and time-consuming process of social and legal invention. By reference to the English law, Americans could profit from several centuries of English experience. Thus Americans habitually looked, in the words of Chief Justice John Marshall, "to the origin of corporations, to the manner in which they have been framed in that government

from which we have derived most of our legal principles and ideas, . . . [and] to the uses to which they have been applied."³⁷ In the case of charitable corporations, at least, where the English law was relatively well developed, Americans went beyond general characteristics to explore detailed legal rules and institutional arrangements.

Still, the creation of an American law of corporations was primarily a matter of adaptation. The shaping of the imported raw material was controlled at every step by the American legal system's perception of what was appropriate in a domestic context. The investigation of these American developments is the subject of the next several chapters.

³⁷McCulloch v. Maryland, 4 Wheaton 316, 421 (1819). Hereafter cited as McCulloch.

III

THE CHARITABLE CORPORATION IN AMERICA:

LAW AND EXPERIENCE

A major question for historians seeking to explain a constitutional decision is the degree to which the Supreme Court reached its decision on the basis of the individual political beliefs of its members and of a somewhat more objective social analysis as opposed to more technical legal considerations. Since constitutional decisions affect the public order, the Justices must consider the probable effects of their contemplated action, and weigh these effects on scales of competing social values. The scales may be tipped by judicial prejudice, partisan allegiance, economic self interest, or class identification, and they may be redressed by a relatively objective, informed analysis of the needs of society at large. On the other hand, the Supreme Court also measures a case and its decision by the law, an indefinite collection of judicial decisions, statutes, constitutions, and governmental practices. Intellectually, law provides a common language and a fund of ideas with which to define and discuss issues. Judicial opinions in prior cases are vehicles for conveying institutional values from the past to the present. Judgments in analogous cases

supply objective standards by which to measure proposed action in a given case against the actions of other courts at other times. Even where brief and vague, constitutional and statutory provisions control the scope of the ruling. Institutionally, limitations on jurisdiction and remedies help confine the power of the Court. Ideally, these objective legal considerations will complement informed social analysis and at least partially offset the judicial tendency to reach constitutional decisions on the basis of political preference alone.

The purpose of this chapter is to examine these legal and policy bases of the Dartmouth College decision, so far as they related to educational corporations. The history of American governmental relations with colleges before 1819 is surveyed first. Then the focus shifts to a review and assessment of several important legal issues, whether and in what sense the Dartmouth College case involved property rights, whether Dartmouth was technically a private corporation, and whether the contracts clause extended to governmental grants which did not involve property rights.

By 1819, America had been incorporating charitable institutions for over a century and a half. In the colonial and early national period, virtually all important colleges and universities, whether founded by government or by private groups, were incorporated. Unfortunately, relations between government and college authorities had not always been smooth. Between 1760 and 1819, governments in at least seven colonies

and states -- Connecticut, Pennsylvania, Virginia, Massachusetts, New York, North Carolina, and, of course, New Hampshire -- seriously threatened or actually attacked college administrations.¹ Although it is not certain that the Supreme Court in 1819 knew the history of Connecticut's attack on Yale or Pennsylvania's attack on the College of Philadelphia, the final resolution of these two situations anticipated later developments in other states. The Justices were, however, either acquainted with or personally involved in the attacks by Virginia, Massachusetts, New York, and North Carolina on colleges in those states. The outcome of these attacks directly influenced the results in the Dartmouth College case.

Yale was organized by a group of Connecticut ministers at the beginning of the eighteenth century. The college was

¹According to Donald G. Tewksbury, nine "permanent colleges" were founded in America during the colonial period, and twenty-eight in the period 1780-1819. The Founding of American Colleges and Universities before the Civil War with Particular Reference to the Religious Influences Bearing upon the College Movement (New York: Teachers' College, Columbia University, 1932), 16, Table I. Hereafter cited as American Colleges. Cf., Beverly McAnear, "College Founding in the American Colonies, 1745-1775," Mississippi Valley Historical Review, XLII (June, 1955), 24-44. For a survey of relations between legislatures and colleges in the colonial and early national periods, see Willard Wallace Smith, The Relations of College and State in Colonial America, unpublished Ph.D. dissertation, Columbia University, 1949. Hereafter cited as College and State. Smith's discussions are sometimes too brief, and occasionally omit important episodes. Helpful, but very uneven, is Richard Hofstadter and Walter P. Metzger, The Development of Academic Freedom in the United States (New York: Columbia University Press, 1955). Hereafter cited as Academic Freedom. See also, Bernard Bailyn, Education in the Forming of American Society: Needs and Opportunities for Study (New York: Vintage Books, 1960). Bailyn's challenging interpretations, searching questions, and extensive bibliography offered many suggestions.

not immediately incorporated, but the Connecticut General Assembly indicated their support by passing an enabling act and granting an initial annual revenue of 120 pounds. In the early years, the college administration and the General Assembly cooperated in the business of governing the young institution. After the first generation, however, the college administration began to resent legislative interference and to assert its independence. The trustees, foreshadowing events to come, ignored for five years a 1723 legislative act making the college rector one of their number.²

The turning point came with the appointment of Reverend Thomas Clap to the Yale rectorship in 1739. An ambitious, forceful, contentious, and often tactless man, Clap consolidated effective control over the College in his own hands,

²Franklin B. Dexter, "The Founding of Yale College," Papers of the New Haven Colony Historical Society, III (1882), 1-31. The first "charter" of Yale, "An Act for Liberty to erect a Collegiate School," Oct. 9, 1701, is in Thomas Clap, The Annals or History of Yale-College, in New Haven, in the Colony of Connecticut, from the First Founding Thereof, in the Year 1700, to the Year 1766: With an Appendix, Containing the Present State of the College, the Method of Instruction and Government, with Officers, Benefactors and Graduates (New-Haven: John Hotchkiss and B. Mecom, 1766). Hereafter cited as Annals. The act reads like a business agreement, referring to the founding ministers as "Trustees, Partners or Undertakers for the . . . School," Ibid., 6, 7. Abiel Holmes, The Life of Ezra Stiles, D.D.LL.D. A Fellow of the American Philosophical Society; of the American Academy of Arts and Sciences; a Corresponding Member of the Massachusetts Historical Society; Professor of Ecclesiastical History; and President of Yale College (Boston: Thomas and Andrews, 1798), App. II, 383. Hereafter cited as Stiles. On the 1723 act, see Clap, Annals, 34, and Louis Leonard Tucker, Puritan Protagonist: President Thomas Clap of Yale College (Chapel Hill: University of North Carolina Press, 1962), 63-64, 73. Hereafter cited as Clap. The following account owes much to Tucker's excellent biography.

successfully asserted independence of the institution from the General Assembly, and nearly destroyed the College in the process. The first step was the securing of a formal corporate charter from the legislature in 1745. The new charter gave the institution a firmer legal basis and elevated Clap to the position of "President." Next, Clap, with the consent of a majority of his trustees, exercised his new power by attempting to convert Yale into a Congregational seminary. He leased college lands to accumulate funds, and established the first professorship of divinity in 1755. The same year the Assembly cut off its annual grant. In 1757, Clap organized a college church.³

President Clap's religious doctrines and activities, his heavy-handed methods, and new financial difficulties at Yale provoked a slowly widening and intensifying reaction among the Connecticut establishment, and especially among the majority faction known as the "Old Lights." An anticlerical physician named Benjamin Gale poured out a series of vitriolic anti-Clap pamphlets. Gale thought that Yale was a public, secular educational institution and that Clap's activities represented a perversion of Yale's secular purposes, and he demanded a re-assertion of traditional legislative power over the institution, beginning with a full-scale public investigation of Clap's administration. In 1763, a number of prestigious

³The 1745 charter, originally drawn by Clap, is in Clap, Annals, 45-52. Tucker, Clap, 73-74, 185-186. Edmund S. Morgan, The Gentle Puritan: A Life of Ezra Stiles, 1727-1795 (New Haven: Yale University Press, 1962), 107. Hereafter cited as Stiles.

laymen and clergymen heretofore unassociated with the controversy submitted a memorial demanding that the legislature appoint a special committee to "visit" the college with a view to taking immediate action to redress Clap's abuses.⁴

The legislature did not immediately issue a commission of visitation, but the public outcry was so great that it took the extraordinary step of calling Clap before the Assembly to answer the charges contained in the memorial. Not only did the President capably defend his policies on the merits but he also strongly questioned the power of the Assembly to investigate Yale. The college, he said, had been founded by the ten ministers before the legislature had passed its enabling act of 1701. Citing the Case of Sutton's Hospital, Philips v. Bury, and the Statute of Workhouses, Clap contended that the founding trustees and their successors were "visitors" by the common law and that therefore the legislature had no right to visit the college. Although the

⁴On the developing opposition to Clap, see Tucker, Clap, 185-192 passim. Holmes, Stiles, App. II, 398-399. Morgan, Stiles, 104-108. Clap attempted to answer his critics, and formulated positions he would later use before the legislature in The Religious Constitution of Colleges, Especially of Yale-College, in New-Haven, in the Colony of Connecticut (New London: T. Green, 1754). On the general subject of the impact of Benjamin Gale's agitation and the relationship between Yale and the Assembly, see Tucker, Clap, 193, 201-231. For a summary of the contents of the 1763 memorial, and the circumstances surrounding its presentation, see Ibid., 223-225; Clap, Annals, 69-70; Benjamin Trumbull, A Complete History of Connecticut, Civil and Ecclesiastical, from the Emigration of Its First Planters, from England, in the Year 1630, to the Year 1764; and to the Close of the Indian Wars. 2 vols. (New Haven: Maltby, Goldsmith and Co. and Samuel Wadsworth, 1818), II, 327-333. Hereafter cited as History of Connecticut.

General Assembly retained power to rectify a "breach of trust" and to reform "any such Misconduct in the Corporation, as should be plainly detrimental to the Public Good," still the legislature could not investigate the conduct of the college affairs committed to the discretion of the President and fellows without being "altogether arbitrary" and infringing the corporate charter. Besides, said Clap, "to have Visitors over Visitors . . ., would make endless Trouble and Confusion." The legislature, perhaps more for political than legal reasons, declined to proceed further with the memorial and did not formally visit the college. Considering this a great victory over his enemies, and a significant acknowledgment of the independence of Yale from legislative control, Clap published his argument as a pamphlet, The Annals or History of Yale College.⁵

Yale's troubles did not cease with Clap's vindication, or even with his passage from the scene. The college sunk deeper into financial difficulty during the Revolutionary War years. Many still believed that Yale ought to be a secular public institution. In 1784, a New Haven pamphleteer published a competent refutation of Clap's argument, contending, in terms paralleling those later used by university

⁵Clap, Annals, 70-77. Holmes, Stiles, App. II, 399. Tucker, Clap, 225-230. Tucker acknowledges that Clap's legal arguments helped his cause, but lays his "acquittal" to the fact that Clap's political allies controlled the legislature. Ibid., 229-230. Dexter, "The Founding of Yale College," 12, objected to Clap's account of the founding of Yale. Before Clap was hauled before the Connecticut Assembly, that body had investigated the college, but apparently had not asserted a formal visitatorial authority. Smith, College and State, 52-54.

attorneys and Chief Justice Richardson, that the General Assembly had all the power of the British Parliament and that Yale was fully subject to its direction. Finally, in 1792, under the leadership of its new President, Reverend Ezra Stiles, Yale made its peace with the legislature. In return for a large grant of funds, the college agreed to accept the governor, lieutenant governor, and six members of the council as members of the Board of Trustees.⁶

It is not certain that the Justices of the Supreme Court in 1819 knew the history of Yale's relations with the Connecticut Assembly. Warren Dutton, a Massachusetts lawyer who was close to Webster, believed that the history was not presented to the Court at the time of the argument of the Dartmouth College case early in 1818. However, individual Justices, at least, may have become better informed about

⁶See, generally, Morgan, Stiles, for an excellent account of the career of Clap's successor. On the financial condition of Yale and its relations with its critics and the government during the Revolutionary and Confederation periods, see Ibid., 299, 304-306, 319, 349-353, 357, 410, 412. [Samuel Whittelsey Dana], Yale-College Subject to the General Assembly (New Haven: Thomas and Samuel Green, 1784). Act of May, 1792, in R. R. Hinman, Elisha Phelps, and Leman Church, eds., Resolves and Private Laws of the State of Connecticut. From the Year 1789 to the Year 1836. Published by Authority of Resolutions of the General Assembly, Passed May 1835 and 1836, under the Supervision of a Special Committee. 2 vols. in 1. (Hartford: John B. Eldredge, 1837), 477-478. Hereafter cited as Private Laws of Connecticut. The 1792 act did not represent an attack on Yale's charter, as it was not to go into effect until it was accepted by the Yale trustees. This was done by unanimous vote in June, 1792. Holmes, Stiles, 318-319; App. II, 398, 399-401. The Connecticut Constitution of 1818, Art. 8, sec. 1, confirmed the Yale charter as modified by the 1792 act. Thorpe, ed., Constitutions, I, 545.

Yale during the period of maneuver in the summer and fall of 1818. The September edition of the North American Review, which contained a lengthy review by Story on the subject of maritime law, coincidentally contained several references to Connecticut and Yale. An anonymous reviewer of a collection of Timothy Dwight's sermons referred to the "conciliatory" 1792 Connecticut act which had been "countenanced and facilitated by President Stiles." The reviewer cited the sketch of the history of Yale which appeared as Appendix to Holmes' Stiles. The September, 1818, edition also announced the publication of Benjamin Trumbull's History of Connecticut during July and August. Trumbull's History contained a full account of Clap's troubles. Webster at least had the edition in hand. On September 9, Webster wrote Story to compliment him on his article. The December, 1818, issue of the North American Review reviewed Trumbull's History of Connecticut, mentioning Yale but not Clap's difficulties. Finally, Appendix No. VI of Timothy Farrar's Report of the Dartmouth College case, published in August, 1819, was composed of excerpts from Trumbull and Clap's Annals.⁷ Still, the final

⁷[Warren Dutton], Review of "Report of the case of the Trustees of Dartmouth College against William H. Woodward, argued and determined in the Superior Court of Judicature of the State of New Hampshire, November, 1817: and on Error, in the Supreme Court of the United States, 1819. By Timothy Farrar, Counsellor at Law. Portsmouth, N. H. Published by John W. Foster and West, Richardson and Lord, Boston. J. J. Williams, Printer, Exeter," [Etc.], North American Review and Miscellaneous Journal, X (Jan., 1820), 100. (The copy of the North American Review in the Graduate Library at the University of Michigan is autographed "Wm. Plumer's" on the title page, and ascribes this Review to "W. Dutton," p. 83. According to Dodd, American Business Corporations,

link is missing: there is no direct evidence that Story or any other Justice actually knew of Yale's history before the Dartmouth College case was decided. It may have been that the Connecticut experience merely supported and confirmed the Dartmouth College decision after the fact.

Whatever the impact of the history of Yale on the Dartmouth College decision itself, a review of the Connecticut experience led to important conclusions as to the constitutional position of corporations in the state. In 1795, Zephaniah Swift, a politician, lawyer, and future Chief Justice, summed up the result of forty years of agitation in A System of the Laws of the State of Connecticut. This was the first treatise to define the American category "private corporation" and its unique constitutional position. According to Swift, "Yale-college, the society of physicians, and the

32, n. 67, the Review is also attributed to Dutton by a marginal writer in Harvard's Widener Library copy.) [Joseph Story], Review of "Laws of the sea with reference to maritime commerce during peace and war -- from the German of Frederick J. Jackson, advocate, Altona, 1815. By William Frick, Counsellor at Law. Baltimore; E. J. Coale, 1818. pp. 636," Ibid., VII (Sept., 1818), 323-347. [Anonymous], Review of "Theology; explained and defended, in a series of sermons; by Timothy Dwight, S. T. D. L. L. D. late president of Yale College. With a Memoir of the Life of the Author, Middletown, Con.; Clark and Lyman; 1818. 5 vols. vol. i 8 vo.," Ibid., 356-357. "American Publications in July and August," Ibid., 434. Trumbull, History of Connecticut, II, 327-333. Webster to Story, Sept. 9, 1818, in Webster, ed., Writings of Webster, XVII, 287. Webster included with this letter five copies of his printed argument in the Dartmouth College case. [Anonymous], Review of "A Complete History of Connecticut, civil and ecclesiastical, from the emigration of its first Planters from England in 1630, to the year 1764, and to the close of the Indian Wars. By Benjamin Trumbull, D.D. 2 vols. 8 vo. pp. 1166. New Haven, Maltby, Goldsmith and Co. and Samuel Wadsworth, 1818," in North American Review and Miscellaneous Journal, VIII (Dec., 1818), 115-117. Farrar, Report, App. No. VI, 401-406.

banks of Hartford and New-London" were all "private corporations." Although the legislature had "the power of dissolving or altering all corporations of a public nature," it could not dissolve "corporations of a private nature" except through the courts on an "information in the nature of a quo warranto."⁸ In 1819, the Supreme Court of the United States would rely upon the contracts clause of the federal constitution, but its legal analysis was fundamentally the same as Swift's.

In Pennsylvania, the governmental attack on a college founded in the colonial period was much more severe and for a time more successful than the attack on Yale. The College, Academy and Charity School of Philadelphia had been chartered in 1753 and 1755 after a successful subscription campaign by a number of prominent Philadelphia citizens, including Benjamin Franklin. During the Revolution, the college Provost, William Smith, and the trustees were suspected of Loyalist sympathies. Despite the provision of the Pennsylvania Constitution of 1776 which confirmed the privileges

⁸Zephaniah Swift, A System of the Laws of the State of Connecticut. 2 vols. (Windham, Conn.: John Byrne, 1795-1796), I, 225, 228. Hereafter cited as A System of the Laws. The authority of Swift's statement is perhaps increased because in the early 1790's he was a member of the faction in the Connecticut Assembly which insisted upon establishing a governmental connection with Yale. It is difficult to tell how influential Swift's volumes were, but the list of "Subscribers" appended to Volume II includes James Kent, Alexander J. Dallas, William Rawle, St. George Tucker, George Tucker, Jeremiah Smith, who argued the Dartmouth College case in the New Hampshire courts, and Elijah Paine, who was a Dartmouth College trustee. For a competent sketch, see Simeon E. Baldwin, "Zephaniah Swift," in William D. Lewis, ed., Great American Lawyers (Philadelphia: John C. Winston Company, 1907), II, 99-104.

and immunities of all religious, educational, or other charitable corporations, the radical "Constitutionalist" party removed all the existing college officials and replaced them with politicians and officers of the state in 1779.⁹

Smith and the deposed trustees never accepted the charter amendment, and worked for a decade to secure the restoration of the old charter. They were aided in this regard by the supporters of the Bank of North America. The Bank's Pennsylvania charter had been repealed by the legislature in 1784, and the pro-bank faction agitated for its restoration. In a polemical pamphlet written in 1786, Peletiah Webster argued that legislative acts which vested rights or interests in companies of men were public contracts which could not be repealed. Among these public contracts were not only bank charters but also acts "for incorporating churches, universities, hospitals, schools, &c. in consideration of money paid, or to be paid by the contributors."¹⁰

⁹ Edward Potts Cheyney, History of the University of Pennsylvania, 1740-1940 (Philadelphia: University of Pennsylvania Press, 1940), 17-52, 104-125. Hereafter cited as University of Pennsylvania. Act of Nov. 27, 1779, ch. 871, in James T. Mitchell and Henry Flanders, eds., The Statutes at Large of Pennsylvania from 1682 to 1801 Compiled under the Authority of the Act of May 19, 1887. 16 vols. (Various Imprints: 1896-1911), X, 23-31. Hereafter cited as Statutes at Large of Pennsylvania. Pa. Const. of 1776, "Frame of Government," sec. 45, in Thorpe, ed., Constitutions, V, 3091. Cf., generally, Albert Frank Gegenheimer, William Smith, Educator and Churchman, 1727-1803 (Philadelphia: University of Pennsylvania Press, 1943).

¹⁰ Cheyney, University of Pennsylvania, 146-150. [Peletiah Webster], An Essay on Credit, in Which the Doctrine of Banks Is Considered, and some Remarks are made on the present State of the Bank of North-America (Philadelphia: Eleazar Oswald, 1786), 23, 34-35. Italics in original. Hereafter cited as Essay on Credit. The Bank of North America is treated more fully below, Ch. VI.

The efforts of the bank and college forces were rewarded. The Bank of North America was rechartered in 1787. Two years later, on March 6, 1789, the legislature restored the charters and property of the College of Philadelphia to Smith and the old trustees. The preamble of the restoration act stated that the old officers had been deprived of their charters and estates "without trial by jury, legal process or proof of misuser or forfeiture . . .; all of which is repugnant to justice, a violation of the Constitution of this Commonwealth, and dangerous in its precedent to all incorporated bodies." Subsequently, the Pennsylvania Constitution of 1790 reconfirmed the privileges of corporate bodies and added a provision forbidding the legislature to pass any law impairing contracts.¹¹

Political difficulties with colleges were not confined to the north. The question of the constitutional and legal status of the College of William and Mary was agitated in Virginia from the 1770's until 1819 and beyond. This particular issue was an aspect of the larger problem of the nature and extent of the state's role in the promotion and control of higher education in Virginia. Thomas Jefferson figured

¹¹Cheyney, University of Pennsylvania, 150. Act of March 6, 1789, Statutes at Large of Pennsylvania, XIII, 188-189. Pa. Const. of 1790, Art. VIII, sec. 3, Art. IX, sec. 17, in Thorpe, ed., Constitutions, V, 3099, 3101. The act of 1789 did not abolish the University of the State of Pennsylvania which had been created by the act of 1779. For a time, the College of Philadelphia and the University existed as separate institutions. When this proved unsatisfactory, the two were merged by agreement into the University of Pennsylvania. Act of Sept. 30, 1791, Statutes at Large of Pennsylvania, XIV, 184-187. Cheyney, University of Pennsylvania, 150-165.

prominently, forcing the issue whenever it seemed expedient to do so, and in large part determining the contours of the political and legal debate.

The College of William and Mary was founded by royal charter issued on February 8, 1692/3 at the solicitation of the Virginia Assembly. The institution clearly enjoyed a "public" foundation, as the King and Queen made an initial grant of 20,000 acres of land and receipts from Virginia quit rents, a penny tax to be levied on each pound of tobacco exported from Virginia and Maryland, and from the office of surveyor-general for Virginia. The Virginia Assembly supplemented these grants and revenues with additional funding and specific appropriations throughout the colonial period. The charter named a number of persons and their successors "to be the true, sole and undoubted Visitors and Governors of the . . . College," with "full and absolute . . . power" to make rules for the institution, and created a close institutional connection with the established church.¹²

During the Revolution, education and educational institutions, as almost everything else in Virginia, were considered

¹²The charter of William and Mary is reprinted in Henry Hartwell, James Blair, and Edward Chilton, The Present State of Virginia, and the College (1727), ed. by Hunter Dickinson Farish (Charlottesville, Va.: Dominion Books, The University Press of Virginia, 1962), 72-94. See sec. IX, p. 81, for the authority of the "governors." On the foundation and growth of colonial William and Mary, see U. S., Bureau of Education, The College of William and Mary: A Contribution to the History of Higher Education, with Suggestions for Its National Promotion, by Herbert Baxter Adams, Circulars of Information, No. 1 (Washington, D.C.: Government Printing Office, 1887), 12-22.

for reform. Thomas Jefferson's proposals for educational reform were contained in draft bills 79, 80, and 81 of the Report of the Committee of Revisors of the laws, submitted to the General Assembly on June 18, 1779. Bill No. 80 was "for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support." Jefferson proposed the severance of the close ties between the college and the Anglican Church, and the remodeling of William and Mary into a state-controlled, fully state-supported institution.¹³

The long preamble to Bill No. 80, however, is more important here than the details of the proposed reform. Jefferson, anticipating opposition to his Bill on the legal grounds that the college was a "private" institution not subject to legislative control, made the preamble a detailed legal brief, sans citations, for the proposition that William and Mary was a public institution. Jefferson was fully aware

¹³Robert Polk Thomson, "The Reform of the College of William and Mary, 1763-1780," Proceedings of the American Philosophical Society, CXV (June 17, 1971), esp. 188, 201-205, 207-208, is indispensable for understanding the position of William and Mary in Virginia and Jefferson's proposals. Hereafter cited as "Reform" A basic source for Jefferson's Revolutionary educational plans remains his "Autobiography," (1821), in Paul Leicester Ford, ed., The Works of Thomas Jefferson. 12 vols. (New York: G. P. Putnam's Sons, 1904-1905), I, esp. 75-76, 78 on William and Mary. Hereafter cited as Works of Jefferson. For the text of Jefferson's education bills, see Julian P. Boyd, ed., The Papers of Thomas Jefferson. 15 vols. to date. (Princeton, N. J.: Princeton University Press, 1950), II, 534-535, with "Editorial Notes," and esp. Bill No. 80, 535-542, with "Editorial Notes," 542-543. Hereafter cited as Papers of Jefferson. See also, Roy J. Honeywell, The Educational Work of Thomas Jefferson (Cambridge: Harvard University Press, 1931). Hereafter cited as Educational Work of Jefferson.

of the elements of the legal argument, insofar as they derived from the English law. In 1771, Jefferson as a lawyer had challenged the jurisdiction of a Virginia court, relying upon and quoting at length Chief Justice Holt's opinion on private corporations in the case of Philips v. Bury. The preamble to Bill No. 80 thus included detailed evidence to support the conclusion that the college,

being erected and constituted on the requisition of the General Assembly, . . . being founded and endowed with the lands and revenues of the public, and intended for the sole use and improvement, and no wise in the nature of a private grant, . . . is of right subject to the public direction, and may by them be altered and amended, until such form be devised as will render the institution publicly advantageous in proportion as it is publicly expensive.¹⁴

Although Bill No. 80 failed to pass the Virginia legislature, Jefferson was able to accomplish some of his reforms by other means. In 1779, he was elected one of the visitors of William and Mary, and in that capacity succeeded in abolishing the college's grammar school and in reorganizing the curriculum and professorships.¹⁵

The abolition of the grammar school produced the case of Bracken v. Visitors of William and Mary College. The displaced teacher, Reverend John Bracken, brought suit to

¹⁴Boyd, ed., Papers of Jefferson, II, 535-539; the quotation, 538. Jefferson's argument, Godwin v. Lunan, Jefferson Reports 96, 97-108 (1771). He quoted Philips v. Bury at length, Ibid., 100-101.

¹⁵Jefferson, "Autobiography," in Ford, ed., Works of Jefferson, I, 76, 78. Thomson, "Reform," 209-211. Honeywell, Educational Work of Jefferson, 8, 11, 56.

challenge the authority of the college visitors to abolish his job. The case was adjourned to the Court of Appeals "on account of difficulty," where it was heard late in 1790. The college hired John Marshall, then a competent young attorney, to defend its "Jeffersonian" reform.¹⁶

At the outset, Marshall challenged the jurisdiction of the court on the grounds that William and Mary was "a mere Eleemosynary institution, with Visitors appointed for its government." The court interrupted Marshall to stipulate that the court would not have jurisdiction if the college were a "private Eleemosynary institution," but the court wanted to hear argument on the college's status. Admitting that the college was founded on donations from the king and the government, Marshall insisted, on the authority of Philips v. Bury and other English cases, that the college was "private" anyway. The crucial point was that William and Mary had appointed visitors to superintend their charity. Once these were appointed, the corporation was in the same class with "private Eleemosynary" corporations founded by individuals, and the Virginia court could have no jurisdiction

¹⁶Bracken v. Visitors of William and Mary College, 3 Call 573 (1790). Hereafter cited as Bracken. For a brief record of the progress of the case through the courts, see Irwin S. Rhodes, The Papers of John Marshall: A Descriptive Calendar. 2 vols. (Norman, Okla.: University of Oklahoma Press, 1969), I, 100. Hereafter cited as Papers of Marshall. On Bracken, see Thomson, "Reform," 199, 200, 200, n. 13, 205. Brief and unsatisfactory accounts of the Bracken cases are found in Sadie Bell, The Church, the State, and Education in Virginia (Philadelphia: 1930), 179-180, 366-367 (hereafter cited as Education in Virginia), and Hofstadter and Metzger, Academic Freedom, 460-461.

over removals within the visitors' power.¹⁷ Insofar as this argument applied to the Crown, it was well-founded in English law.

Marshall's argument was designed to serve two purposes. First, it was calculated to advance the immediate interests of his client, William and Mary, which wanted primarily to avoid a damage judgment in favor of Bracken. If the court decided it did not have jurisdiction the college would win, regardless of the merits of the case. Second, and more broadly, Marshall was offering a rebuttal to Jefferson's contention that the college was a public institution, and was asking the court to declare it a private corporation, at least partially immune from governmental control.

According to Edmund Pendleton, the President of the Court of Appeals, a majority of the judges thought that William and Mary "had a public and not a private foundation." Although Pendleton did not elaborate, the close involvement of the Virginia Assembly in the founding of the college must have been crucial. The English law of private charitable corporations relied upon by Marshall might extend to royal foundations, but certainly did not embrace a corporation originally sponsored and continually supported by the legislature. Since William and Mary was public, the Virginia courts had jurisdiction to decide the case and others which

¹⁷Marshall's argument, Bracken, 3 Call, 580, 591-594. In addition to Philips v. Bury, Marshall relied principally on Bentley v. Episc' Eliens., 2 Strange 912 (1732); King v. Bishop of Chester, 1 Wm. Blackstone Reports 22 (1748); Bishop of Ely, 1 Wm. Blackstone Reports 71 (1757).

might arise. On the merits, the court decided that the visitors had power to remove the grammar school teacher, so Bracken had no legal grounds for complaint.¹⁸ If Marshall failed to fulfill his secondary goal of having the college declared to be private, he at least won his case.

It is difficult to assess the ultimate impact of the Bracken case on Marshall's Dartmouth College opinion. At least, the case educated Marshall as to the jurisdictional nature of the visitatorial power, and as to the necessity of finding other, stronger grounds on which to base a constitutional limitation on the legislature. The Chief Justice did not mention visitation at all in his Dartmouth College opinion. Beyond this, it seems that Marshall took to heart the Virginia court's focus on the nature of foundation as the major element. Dartmouth College was private because its funds were private, not because special governors were appointed. By the same token, the Bracken decision stood even after the Dartmouth College decision. William and Mary was public because its foundation was public.¹⁹

¹⁸Bracken, 3 Call, 599, as explained by Bracken v. William and Mary College, 1 Call 161, 163-164 (1797). Pendleton had been a member of the Committee of Revisors with Jefferson and at least approved the draft of Bill No. 80 which labelled the college as a public institution.

¹⁹At the time of the Dartmouth College decision, Marshall held honorary degrees from Harvard, the College of New Jersey (Princeton), and the University of Pennsylvania. Virginia legislative charters had named him trustee of the Richmond and Hallerian academies in 1803 and 1807, respectively. Charter of "The Trustees of 'The Richmond Academy,'" sec. 1, Act of Dec. 29, 1803, Dec. Sess., 1803, ch. XXII, in Samuel Shepherd, The Statutes at Large of Virginia, From October Session 1792, to December Session 1806, in Three

The Virginia story did not end with the Bracken decisions in the 1790's. Jefferson apparently never abandoned his belief that William and Mary could be, and should be, remodeled by the Virginia legislature into a secular, state-supported institution. In 1816, when Jefferson wrote to Governor William Plumer of New Hampshire to congratulate him on his speech advocating modifications of the Dartmouth College charter, Jefferson's praise reflected his long held beliefs and his thorough legal analysis:

The idea that institutions, established for the use of the nation, cannot be touched or modified, even to make them answer to their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself.²⁰

After the War of 1812, however, Jefferson had begun to focus more directly on the creation of a totally new educational institution. His efforts were rewarded on January 25, 1819, when the Assembly chartered the University of Virginia. Jefferson was taking no chances. Section 9 carefully provided that the "university shall, in all things,

Volumes, (New Series) Being a Continuation of Hening. 3 vols. (Richmond: Samuel Shepherd, 1835-1836), III, 34-36. Hereafter cited as Shepherd. Charter of "The Trustees of the Hallerian Academy," sec. 1, Act of Jan. 6, 1807, Dec. Sess., 1806, ch. LXXXIII, Ibid., 335. Rhodes, Papers of Marshall, I, 474, 477, 493, 541, 554: II, 91.

²⁰For a late expression of Jefferson's belief that William and Mary was a "public institution," see Jefferson to Joseph C. Cabell, May 16, 1824, in Albert Ellery Bergh, ed., The Writings of Thomas Jefferson. 20 vols. (Washington, D. C.: Jefferson Memorial Association, 1903), XVI, 35. Jefferson to William Plumer, July 21, 1816, in Plumer, Life of Plumer, 440.

and at all times, be subject to the control of the Legislature." On February 2, Marshall admitted in his Dartmouth College opinion that "there may be an institution, founded by government, and placed entirely under its immediate control."²¹

Harvard College, in Massachusetts, was the oldest college in the country. Throughout the colonial period it had a close institutional and working relationship with the Massachusetts provincial government, and for this reason could realistically be classified as a public institution. The state constitution of 1780 sought to preserve governmental control by providing that the legislature might alter the college government "in as full a manner as might have been done by the Legislature of the late Province of Massachusetts Bay." The constitution also confirmed the historic division of Harvard's administrative authority between the President and Fellows, known colloquially as "the Corporation," and a Board of Overseers, which had some legislative functions as well as a superintending authority roughly analogous to

²¹ Philip Alexander Bruce, History of the University of Virginia. 5 vols. (New York: Macmillan Company, 1920), I, esp. 65-233 passim. for Jefferson's role. Act of Jan. 25, 1819, sec. 9, Dec. Sess., 1818, ch. XIX, Va. Acts (Ritchie), 17. Marshall's opinion, Dartmouth College, 4 Wheaton, 634. According to Tewkesbury, American Colleges, 166, 167, Table XXII, at least 6 "state universities," defined as those "placed by legal stipulation under the predominant control of the state" were founded prior to 1819: University of Georgia (1787); University of North Carolina (1789); University of Vermont (1791); Ohio University (1804, founded as American Western University in 1802); Miami University (Ohio, 1809); University of Maryland (1812).

the "visitatorial power."²²

After the turn of the nineteenth century, a controversy arose concerning the membership of the Board of Overseers. Traditionally, it had been composed of certain governmental officers and Congregational clergymen of various towns. In 1810, however, "friends of the College," principally Federalists, began to complain that this scheme excluded "individuals particularly qualified" from the Board. With an eye to progress the Federalist legislature passed a bill drawn by Theophilus Parsons, Fellow of Harvard since 1806 and a staunch Federalist who was Chief Justice of the Massachusetts supreme court. The bill, which was accepted by the Corporation and Overseers, greatly reduced the number of ex officio positions, and provided for the election of fifteen clergymen and fifteen laymen by the College alumni. Predictably, the new Board was almost exclusively Federalist.²³

Predictably, too, the new board came under attack with the ascendance of the Republicans under Elbridge Gerry.

²²Josiah Quincy, The History of Harvard University. 2 vols. (Boston: Crosby, Nichols, Lee and Co., 1860), II, 174-176. Hereafter cited as Harvard. For official provincial actions relative to Harvard's government in the colonial period, see Ibid., I, App. No. LXVIII, 586-612. Mass. Const. of 1780, Part II, ch. V, sec. 1, art. III, in Thorpe, ed., Constitutions, III, 1907.

²³Quincy, Harvard, II, 294-295 for the quotations. Theophilus Parsons, Memoir of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts; with Notices of His Contemporaries (Boston: Tichnor and Fields, 1859), 285, 286, 291. Hereafter cited as Parsons. Samuel Eliot Morison, The Life and Letters of Harrison Gray Otis, Federalist, 1765-1848. 2 vols. (Boston: Houghton Mifflin Company, 1913), I, 252. Hereafter cited as Otis. Smith, College and State, 29-30, 130, 133, 135-136.

When the Republican legislature proposed to repeal the "reform" of the Overseers, the Federalist Corporation announced its opposition, and appointed Parsons to prepare a memorial challenging the legislative authority to repeal the 1810 act. Later, Jeremiah Smith used Parsons' memorial in the preparation of his case for the Dartmouth trustees and excerpts appeared in Farrar's Report.²⁴

Parsons' argument was very simple. He admitted that technically the General Court had not founded Harvard as a private college, but contended that the Assembly had surrendered its legislative authority over the institution to the Corporation and its visitatorial power to the Board of Overseers. Although the General Court could alter the Harvard government with the consent of the Corporation and Overseers, it could not unilaterally make an alteration because such a change would impair the vested rights of Overseers and adversely affect the Harvard Corporation. All changes wrought in the past by the provincial General Court were with the consent of the Harvard authorities or were arbitrary legislative dictations. Consequently, the present legislature had no authority to restore the pre-1810 arrangement over the opposition of the Corporation and the Overseers.²⁵

The Republicans, however, relying on the colonial

²⁴Parsons, Parsons, 291-292. Quincy, Harvard, II, 301. Shirley, Dartmouth College Causes, 168. Farrar, Report, App. No. V, 397-400.

²⁵Shirley, Dartmouth College Causes, 168-174, and esp. 170-173.

precedents, repealed the 1810 act on February 29, 1812, thus restoring the traditional membership of the Overseers.

The Harvard Corporation and Overseers formally rejected this act, on the grounds that the legislature could not change the visitatorial power without consent of those affected. Nonetheless, the 1810 Board voted that it was "not disposed to bring its rights to the test of judicial decision," and surrendered to the reconstituted Board. In 1814, the matter came to a close with the repassage and formal re-acceptance of the 1810 reform. Although the Massachusetts constitution continued to allow legislative control of the college, the principle that the legislature could not intervene without the consent of the Harvard authorities had been strongly advanced.²⁶

In April, 1818, about a month after the argument of the Dartmouth College case in Washington, Joseph Story was named a member of the Harvard Board of Overseers. If there had been any doubt as to where the Justice's sympathies were, this seemed to settle the matter. In his concurring opinion, delivered in 1819, Story indicated he would extend the contract clause far beyond the limits set in the court's opinion. The constitution, thought Story, should protect all state grants to hospitals and colleges, whether the grants were "for special or general purposes, for public charity or particular beneficence." Nor would Story limit the constitutional protection to contracts respecting property in the

²⁶Quincy, Harvard, II, 302-304. The Overseers' resolution is quoted Ibid., 303.

strict sense. It reached all "immunities, dignities, offices or franchises, or other rights . . . deemed valuable in law," including contracts "for the exercise of a mere authority." Although Harvard and a few other colleges, such as William and Mary and Columbia, were not technically "private," all of them could, under Story's construction, claim the full protection of the contracts clause.²⁷

In New York, as elsewhere, relations between the legislature and colleges were sometimes rough. The principle college was Columbia, which had been founded as King's College with money collected in a legislatively sponsored public lottery. Although the movement which led to the founding of the college got under way in the late 1740's, the actual organization was delayed by a bitter political dispute over the nature and control of the new institution. A faction led by William Livingston, the father of Brockholst, held out for a fully secular, state-supported and controlled college. The Anglicans and their allies, however, finally secured a charter in 1754 which created a semi-autonomous institution closely associated with the Church of England. The trustees or "Governors" were made a self-perpetuating body, and were given full authority to administer and to "visit" the college. The charter guaranteed that "no Visitation, Act or Thing, . . . concerning the . . . College, [would] be . . . done, by any other . . . Persons whatsoever."

²⁷Dunne, Story, 171. Harvard also gave LL.D.'s to Justices Livingston and Johnson during 1818. Ibid. Story's opinion, Dartmouth College, 4 Wheaton, 697-700.

It was doubtful, however, that the royal governor's charter could prevent the provincial assembly from visiting or regulating the college, especially since the institution was originally endowed with funds raised by legislatively sponsored public lotteries.²⁸

Columbia prospered during the remainder of the colonial period, but the Revolutionary War put it virtually out of existence. Early in 1784, the few surviving Governors petitioned the legislature to revive the corporation, to remove Anglican control, and to make the college "the Mother of an University." In the acts of May 1 and November 26, 1784, the legislature created the Regents of the State of New York, and gave them comprehensive authority over all secondary and higher education in the state. Since in practice the Columbia faction dominated the Regents, the new scheme in effect put the college in charge of New York's entire educational system.²⁹

²⁸The Charter of the College of New-York, in America (New York: Parker and Weyman, 1754), 9, 11. See also, The Additional Charter Granted to the Governors of the College of New-York, in America (New-York: Parker and Weyman, 1754). Beverly McAnear, "American Imprints Concerning King's College," Papers of the Bibliographical Society of America, XLIV (Fourth Quarter, 1950), 303-304, 308, 318, 321, 334, 337. George Dangerfield, Chancellor Robert R. Livingston of New York; 1746-1813 (New York: Harcourt, Brace and Company, 1960), 22. Milton M. Klein, "Democracy and Politics in Colonial New York," New York History, XL (July, 1959), 239.

²⁹Beverly McAnear, "The Raising of Funds by the Colonial Colleges," Mississippi Valley Historical Review, XXXVIII (March, 1952), 593, and 593, n. 8. Petition from the Governors of King's College to the Legislature, March 24, 1784, in Daniel J. Pratt, Annals of Public Education in the State of New York, in N. Y., University of the State

The Board of Regents did not carry out their tasks effectively. During the period 1784-1787, the Regents dealt almost exclusively with the affairs of Columbia, and made no serious effort to promote secondary or higher education anywhere else in New York. As demands rose in the legislature for action on the educational system, the Regents recommended that the control of education be partially decentralized and that "each . . . College . . . be entrusted to a distinct corporation." Although the Columbia faction in the Board of Regents and the Legislature apparently envisioned nearly complete autonomy for their college, while the "country" program included a large degree of state support and control, a compromise was finally reached.

The legislature reformed the whole system on April 13, 1787.³⁰

of New York, Eighty-Ninth Annual Report of the Regents of the University (Albany: Jerome B. Permenter, 1876), 673. Hereafter cited as Annals -- Eighty-Ninth Report. Act of May 1, 1784, Feb. Sess., 1784, ch. LI, N. Y. Laws (Holt), 69-71. Act of Nov. 26, 1784, Oct. Sess., 1784, ch. XV, Ibid., 23-24. Frank C. Abbott, Government Policy and Higher Education: A Study of the Regents of the University of the State of New York, 1784-1949 (Ithaca, New York: Cornell University Press, 1958), 11. Hereafter cited as Government Policy. Sidney Sherwood, "The University of the State of New York: History of Higher Education in the State of New York," in U. S., Bureau of Education, The University of the State of New York: History of Higher Education in the State of New York, Circular of Information, no. 3, 1900 (Washington, D. C.: Government Printing Office, 1900), 50-52. Hereafter cited as University of New York. Elsie Garland Hobson, Educational Legislation and Administration in the State of New York from 1777 to 1850 (Chicago: University of Chicago, 1918), 18-25. Hereafter cited as Educational Legislation.

³⁰Minutes of the Regents, 1784-1787, Pratt, Annals -- Eighty-Ninth Report, 683-733 passim. Report of the Regents' special committee, Feb. 16, 1787, Ibid., 726-727. Act of April 13, 1787, Jan. Sess., 1787, ch. LXXXII, N. Y. Laws (Loudon), 156-162. Abbott, Government Policy, 12-14. Sherwood, "University," in University of New York, 58, 61-75.

The new plan was a considerable improvement over the old one. The Regents of the University of the State of New York were given the power to incorporate both academies and colleges, the latter of which would enjoy all the rights of Columbia College. Immediate administrative power over the colleges would be vested in individual boards of trustees, which would be self-perpetuating. The compromise nature of the act, however, was reflected in the ambiguities with regard to the authority of the Regents to supervise colleges. Section three specifically "required" the Regents to "visit and inspect all the Colleges, . . . and yearly to report the State of the same to the Legislature." On the other hand, sections seven, eight, and ten "absolutely ratified and confirmed" Columbia's original 1754 charter, with all its "Rights, Privileges, Franchises and Immunities." These included that provision which exempted Columbia from any "Visitation, Act or Thing" by anyone except the trustees.³¹

Although the legislature often made sizable grants to Columbia between 1787 and 1819, many New Yorkers were unhappy with the college's semi-autonomous existence under the charter of 1754 and the act of 1787. It was charged that the college was a relic of royalty and a citadel of privilege out of place in a democratic society. In 1807, when the Columbia trustees requested certain alterations in their charter, the legislature attempted to bring the college under the

³¹Act of April 13, 1787, Jan. Sess., 1787, ch. LXXXII, N. Y. Laws (Loudon), 157-159.

control of the state. Section six of the bill required that future vacancies on the Columbia board of trustees be filled by the legislatively appointed Regents, instead of the remaining trustees.³²

This attempt to terminate the independence of Columbia was primarily the result of the factional divisions which agitated New York politics. In 1807, a majority of the legislature was Republican, but the Republicans were badly divided between Livingstonian and Clintonian factions. At the beginning of the session, Livingstonians and Federalists united to select a Council of Appointment friendly to both groups. The new Council not only filled available government positions with members of the coalition, but began removing Clintonians from office in order to create more vacancies. This dismissal of Republicans by Republicans violated the first rule of political morality in New York, and it provoked a reaction among some Livingstonian legislators, who deserted their faction for the Clintonians. On

³²For legislative grants to Columbia, see Hobson, Educational Legislation, 145-150. John Howard Van Amringe, "King's College and Columbia College," in Brander Matthews, et. al., eds., A History of Columbia University, 1754-1904, Published in Commemoration of the One Hundred and Fiftieth Anniversary of the Founding of King's College (New York: Columbia University Press, 1904), 85-86. Hereafter cited as "Columbia College." Robert Ernst, Rufus King: American Federalist (Chapel Hill: University of North Carolina Press, 1968), 298-299. Hereafter cited as King. King became a member of the Columbia board of trustees in 1806. Alfred B. Street, The Council of Revision of the State of New York; Its History, a History of the Courts with Which Its Members Were Connected; Biographical Sketches of Its Members; and Its Vetoes (Albany: William Gould, 1859), 344. Hereafter cited as Council of Revision.

February 16, 1807, a large majority of Republican legislators repudiated the Livingstonian Governor, Morgan Lewis, and nominated the Clintonian Daniel D. Tompkins to carry the Republican banner in the spring gubernatorial elections. Shortly thereafter, the Clintonians, now narrowly in control in the legislature, leveled another attack on the Federalist-Livingstonian coalition in the Columbia College charter amendment. Most of the Columbia trustees were Federalists, but at least one important member, Treasurer Brockholst Livingston, was a leader of the rival Republican faction.³³ The College bill, as noted, would gradually replace these trustees with people appointed by the Regents, who were themselves chosen by the legislature. The Columbia College bill was thus simply another episode in the perennial battle for office in New York.

The Council of Revision vetoed the Columbia charter amendment. The Council was composed of the Livingstonian Republicans Governor Morgan Lewis and state Supreme Court Justice Smith Thompson, and the Federalist Chief Justice James Kent. Lewis had been a Columbia trustee from 1784 to

³³Jabez D. Hammond, The History of Political Parties in the State of New York, from the Ratification of the Federal Constitution to December, 1840. 2 vols. (4th ed. rev.; Buffalo: Phinney and Co., 1850), I, 235-240. Street, Council of Revision, 344. Milton Halsey Thomas, ed., Columbia University Officers and Alumni, 1754-1857 (New York: Columbia University Press, 1936), 18, 70. Hereafter cited as Columbia University Officers. Irving Kass, Politics in New York State 1800 - 1830 (Syracuse, N. Y.: Syracuse University Press, 1965), esp. 9-27, finds that the contest for office, and not social, economic, or ideological divisions, was the primary factor which moved New York politics.

1804, and Kent had been the school's professor of law from 1793 to 1798. In his opinion for the Council, Kent admitted that the legislative interference with the college might be justified by some "strong public necessity." However, there was no such necessity in the present case, and the objectionable amendment was made without the consent of the corporation. "It is a sound principle in free governments," wrote Kent, "that charters of incorporation, whether granted for private or local, or charitable, or literary or religious purposes, were not to be affected without due process of law, or without the consent of the parties concerned." The Senate voted to override the Council's veto, but the Clintonians could not muster the necessary votes in the House.³⁴

Columbia got its revised charter in 1810, without the objectionable provisions, but this did not end attempts to compromise the college's independence. In 1817, a public campaign was launched to persuade the Columbia trustees to merge with Washington College, a recently chartered and inadequately endowed institution. The campaign grew out of Governor Daniel Tompkins' efforts to develop Staten Island. Between 1814 and 1816, Tompkins had purchased nearly 700 acres of land on the Island, and in the latter year had begun steamboat ferry service to Manhattan. He next proposed to found a partially state supported college on his land, in

³⁴Thomas, ed., Columbia University Officers, 13, 67. Street, Council of Revision, 344-345.

order to promote rapid development of the area. With the support of his old political ally, DeWitt Clinton, Tompkins got a charter for Washington College from the Board of Regents. However, aside from the land, the Governor's new institution had neither endowment nor operating funds. For these, the Governor looked to Columbia. Printed petitions objecting to the maintenance of a college in Manhattan and extolling Staten Island as an ideal location for an educational institution were circulated and submitted to the Board of Regents. Obliging, the Regents voted to ask the Columbia trustees to merge with Washington College. Tompkins, as might be expected, notified Columbia that the Regents' recommendation had his enthusiastic support. After extensive deliberation, however, the Columbia trustees rejected the proposal. It would not, they said, be "consistent with the Duty of Faithful Trustees, and necessary for the Advancement of Literature and Science" to unite with the new college. Brockholst Livingston, now both treasurer and chairman of the board of Columbia, personally informed Tompkins of the trustees' decision. Neither the Governor nor the Regents took further action. Columbia remained haughtily independent on Manhattan, and Washington College came to an early end.³⁵

³⁵Act of March 23, 1810, Jan. Sess., 1810, ch. LXXV, N. Y. Public Laws (Southwick), 34-37. Ray W. Irwin, Daniel D. Tompkins, Governor of New York and Vice President of the United States (N. Y.: The New-York Historical Society, 1968), 213-218. Van Amringe, "Columbia College," 103-104. Franklin B. Hough, Historical and Statistical Record of New York during the Century from 1784 to 1884 (Albany: Weed, Parsons and Company, 1885), 360-362.

It is important that Brockholst Livingston, who was appointed to the United States Supreme Court in 1806, was in the center of all these events. He had been named to the New York Board of Regents in the original act of 1784, and was chosen treasurer at the first meeting. The act of 1787 transferred him from the Regents to the Columbia board of trustees, where he served as treasurer from 1787 on. In 1816, he was elected chairman of the board and held this post along with his treasurer's job until his death in 1823.³⁶

Livingston thus had more experience and a greater personal interest in college administration than any other member of the federal Supreme Court. After the argument of the Dartmouth College case in 1818, Livingston may have been temporarily undecided -- the law was complex and the relevant facts were anything but clear -- but there could be little doubt that his real sympathies were with Dartmouth. After all, he had been working for decades to keep Columbia out of the hands of the New York legislature and the Regents. As treasurer and chairman of the board of Columbia, which had been founded with public funds, Livingston voted with the majority in the Dartmouth College case and also agreed with Story that constitutional protection ought to be extended to publicly founded educational institutions.³⁷

³⁶Thomas, ed., Columbia University Officers, 9, 13, 17, 18, 70. Pratt, Annals -- Eighty-Ninth Report, 89, 684.

³⁷Before the opening of the 1819 term, Story sent Livingston a copy of his opinion in the Dartmouth College case. Livingston replied that he hoped it would be adopted "without alteration." Livingston to Story, Jan. 24, 1819,

Unlike the educational institutions discussed above, the University of North Carolina was founded after the Revolution. Although the North Carolina constitution of 1776 directed the legislature to establish a university, the pressures of the war and dislocations under the Confederation delayed action. Finally, on December 11, 1789, the legislature chartered the institution. The board of trustees, originally composed of state officers, judges, lawyers, and prominent politicians, was to be self-perpetuating.³⁸

The new university was not well-endowed, and had to rely in part on private subscriptions. Except for a loan of \$10,000, later made a gift, the state provided no direct monetary aid before the Civil War. The legislature did, however, give the university a number of legal claims held by the state. In 1789, for example, the legislature granted

in William W. Story, ed., Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University. 2 vols. (Boston: Charles C. Little and James Brown, 1851), I, 323. Hereafter cited as Life of Story. Livingston had prepared an opinion, but did not publish it. Dunne, Story, 179. Henry Wheaton to Timothy Farrar, Aug. 2, 1819, in Shirley, Dartmouth College Causes, 296. Albert J. Beveridge surmised that Livingston was "influenced" by the opinion of Chancellor James Kent on the Dartmouth College case. Life of John Marshall. 4 vols. (Boston: Houghton Mifflin Company, 1916-1919), IV, 257. Hereafter cited as Marshall. Unless it is assumed that Livingston was disposed against Dartmouth, it is hard to know what influence Kent could have had.

³⁸N. C. Const. of 1776, sec. 41, in Thorpe, ed., Constitutions, V, 2794. Act of Nov. Sess., 1789, ch. XX, N. C. Laws (Hodge and Wills), 14-16. Kemp P. Battle, History of the University of North Carolina from Its Beginning to the Death of President Swain, 1789-1868. 2 vols. (Raleigh: Edwards and Broughton Printing Company, 1907-1912), I, 1-4, 143. Hereafter cited as University of North Carolina.

the university all property which had in the past or would in the future escheat to the state upon the death of the owner without heirs capable of taking. The university thus received land warrants belonging to some deceased Revolutionary War veterans, and land of those whose heirs were not citizens of North Carolina. In 1794, the university received all lands and rights in land which had been confiscated from Loyalists during the Revolution and which had not yet been sold. Proceeds from future sales and from collections on mortgages formerly held by Loyalists would constitute a fund the interest of which could be used by the university for ten years. At the end of this period, both principal and interest would be at the disposal of the legislature.³⁹

By 1800, a combination of factors transformed this mild legislative support for the university into active hostility. For one thing, the members of the self-perpetuating board of trustees and the faculty were mostly Federalists. Republicans charged that non-Federalist faculty members had been improperly dismissed and that the university inculcated principles hostile to republican government. Equally important, in order to benefit from the state grants, the university had to prosecute its claims vigorously in courts all over the state. Victories enlarged the institution's treasury but also created stronger political opposition. Suits under

³⁹Grant of escheats, Act of Nov. Sess., 1789, ch. XXI, N. C. Laws (Hodge and Wills), 16. Grant of confiscated lands, Act of Dec. Sess., 1794, ch. III, N. C. Laws (Hodge and Wills), 2-3. Battle, University of North Carolina, I, 9, 10, 17, 136.

the grant of confiscated lands were especially unpopular. Some persons had lived on such land for almost twenty years when university lawyers asserted title and demanded payment.⁴⁰

In 1800, the Republican-dominated legislature repealed the grants of confiscated lands and escheats. The loss of the confiscated lands was not very serious because the grant was scheduled to terminate in four years and court decisions in favor of purchasers and British heirs rendered it almost worthless anyway. Escheats, on the other hand, had provided the university with a good deal of income, and might continue to do so.⁴¹ Although this repeal of prior grants was qualitatively

⁴⁰ Battle, University of North Carolina, I, 136-137, 141-142. Delbert Harold Gilpatrick, Jeffersonian Democracy in North Carolina, 1789-1816 (New York: Columbia University Press, 1931), 129-130. Hereafter cited as Jeffersonian Democracy. Published court reports reveal the extent of legal activity. For suits under the confiscation act, see, e. g., Cunningham v. Michael, Cameron and Norwood 77 (Ct. of Conference 1800); Hughes v. Trustees of the University, Ibid., 370 (Ct. of Conference 1802). For suits for escheats, University of North-Carolina v. Johnston, 1 Haywood 373 (Superior Ct. 1796); Trustees of the University v. _____, 2 Ibid. 104 (Superior Ct. 1799); Trustees of the University v. Gilmour, Ibid. 129 (Superior Ct. 1800); Trustees of the University v. Sawyer, Taylor 114 (Superior Ct. 1799). See also, Blount v. Horniblea, 2 Haywood 36 (Superior Ct. 1798) and a companion case, University v. Horniblea, Ibid. 39 (1798); Trustees of the University of North Carolina v. Campbell, 1 Murphey 185 (Ct. of Conference 1808).

⁴¹ Act of Nov. Sess., 1800, ch. 5, in Francois-Xavier Martin, ed., The Public Acts of the General Assembly of North Carolina. Volume II. Containing the Acts from 1790 to 1803; Revised and Published under the Authority of the Legislature (Newbern, N. C.: Martin and Ogden, 1804), 150. For the important judicial decisions against the university under the confiscation act, see Ray v. McCulloch, Cameron and Norwood 492 (Ct. of Conference 1804). Hereafter cited as Ray. Trustees of the University v. Rice, Ibid. 497 (Ct. of Conference 1804). Battle, University of North Carolina, 136-138, 143. Gilpatrick, Jeffersonian Democracy, 127, 130. Some Republicans in the legislature opposed these attacks on the university and supported proposals for increased state aid. Ibid., 144, n. 5.

different from the threatened or actual seizures of educational institutions by Pennsylvania, New York, and Massachusetts legislatures, it was perhaps more serious. The full withdrawal of state aid would nearly destroy the university.

The board of trustees refused to accept the act of 1800, and brought an action of ejectment for escheated lands in order to test its validity. The Court of Conference, in a broad opinion by Judge Francis Locke, held the act unconstitutional in Trustees of University of North Carolina v. Foy. Locke relied in part on the provision in the North Carolina Bill of Rights which declared that no freeman could be deprived of his life, liberty, or property except by the law of the land. Holding that this provision applied to corporations as well as individuals, Locke stated that the "law of the land" meant "a trial by Jury in a court of Justice, according to known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution." The case at bar certainly did not involve an action for forfeiture for misuser or nonuser under the common law. There were two reasons why the act of 1800 was inconsistent with the constitution of North Carolina. First, the university had been "erected" by the constitution, not the legislature, and thus stood "on higher grounds than any other aggregate corporations." As the legislature could not constitutionally destroy the university by repealing the charter, so it could not accomplish the same thing indirectly, by repealing state grants necessary

There was a second and more general reason why the repeal of the grant of escheats was unconstitutional. The court held that constitutional protections against legislative control of private property applied to university property as well. It seemed "difficult," explained Locke, "to conceive of a corporation established for merely private purposes" because every corporation was established to promote some public good. In many corporations, the members had "a private interest coupled with the public object." The property of these corporations, as the property of individuals, was not "subject to the arbitrary will of the Legislature." Similarly, even though the university trustees were "a corporation established for public purposes," and had, individually, "no private interest beyond the general good," still, Locke declared, the legislature could not control university property.⁴³

⁴²Trustees of the University of North Carolina v. Foy, 1 Murphey 58, 81-89 (Ct. of Conference 1805). Hereafter cited as Foy. S. C., less fully reported, 2 Haywood 310, 374. For the "law of the land" provision, see Const. of 1776, Declaration of Rights, Art. 12, in Thorpe, ed., Constitutions, V, 2788. For a good discussion of Foy, see Edward S. Corwin, "The Doctrine of Due Process of Law before the Civil War," Harvard Law Review, XXIV (March, 1911), 381-384.

⁴³Foy, 1 Murphey, 88-89. A year earlier, the Court had held that at the Revolution the title and possession of individuals' lands in North Carolina "were irrevocably fixed, . . . beyond the control of any future law which the legislature . . . might thereafter enact; and a line was then drawn between public and private property, never thereafter to be violated." Ray, Cameron and Norwood, 493-494. For later cases in which the North Carolina court struck down legislative acts on similar grounds, see Allen v. Peden (Sup. Ct. 1816), in Carolina Law Repository, II (March, 1816),

After the decision in Foy, the legislature restored the escheats, and moved to establish a closer governmental connection with the university. Henceforth, the Governor would be ex officio President of the Board of Trustees. In addition, if a university trustee failed to attend any meeting for two years, the board was given the authority to declare his seat vacant, and to request the legislature to appoint a replacement. Otherwise, the university organization remained unchanged.⁴⁴

Although there was no Justice from North Carolina on the United States Supreme Court when the Dartmouth College case was heard, the Court was informed of the Foy decision by Webster, who cited it in his argument.⁴⁵ Marshall, who rode circuit in North Carolina, may have learned of the case from his personal and professional acquaintances in Raleigh.

638 (special legislative act emancipating slaves against wishes of legal owner "in violation of the fundamental law of the land."); Robinson v. Barfield, 2 Murphey 390 (Sup. Ct. 1818) (special legislative act validating an invalid deed an unconstitutional exercise of judicial powers by the legislature).

⁴⁴Restoration of escheats, Act of Nov. Sess., 1805, ch. IV, N. C. Laws (Gales), 2. Charter amendment, Act of Nov. Sess., 1805, ch. VII, Ibid., 12-13. Both Gilpatrick, Jeffersonian Democracy, 144, and Battle, University of North Carolina, I, 150, say that the legislature assumed power to fill all vacancies on the board of trustees. This may have become the practice by informal arrangement, but it was not decreed by the act of 1805. As written, the act took no powers from the board; it merely added a process for replacing delinquent trustees.

⁴⁵Webster's argument, Dartmouth College, 4 Wheaton, 575, 599.

By early 1819, the Supreme Court had enough essential facts about most, and perhaps all, of the clashes between governments and colleges to make a realistic assessment of the American experience. Although the details varied from state to state, there was a coherent pattern beneath the superficial diversity. From the dates of their foundation, it appeared, all colleges needed some legislative support in the form of financial aid or statutory assistance. In general, government cooperated with college authorities to promote higher education. Occasionally, this cooperation broke down. College boards of trustees were attacked as nefarious cabals conspiring to destroy political democracy, to raise up an aristocracy, to banish the true religion, or to establish a false one. Political leaders sought partisan advantage with demands for legislative action to "improve" or "reform" college organization. At the least, colleges were thrown into the political limelight, and became the subjects of extended controversies which everywhere had an unsettling effect. At the most, where legislative intervention was actually carried out, the result was severe institutional disruption. Although political leaders and factions often gained temporary advantages, history recorded no significant permanent gains for higher education. As Webster told the Court, it would be "dangerous" to allow colleges to remain "subject to the rise and fall of popular parties, and the fluctuations of political opinions. . . . [L]earned men will be deterred from devoting themselves

to the service of such institutions. . . . Colleges and halls will be deserted by all the better spirits, and become a theatre for the contention of parties."⁴⁶

The Dartmouth College case was merely the latest in the series, and essentially no different. The affair had begun as a nasty but rather insignificant intramural quarrel between President Wheelock and the college trustees. After Wheelock had been ousted, he made common cause with the Republican party against the predominantly Federalist trustees. Amid erroneous charges of religious bigotry, political conspiracy, and abuse of trust, the Republican legislature attempted to seize control of the institution by increasing the number of trustees, packing the new board, and creating a new board of overseers. At the same time, the legislature appropriated no funds to support the expanded administrative apparatus or the new colleges and institutes which were also to be created. By thus pursuing partisan advantage, the New Hampshire legislature had immobilized and all but destroyed a valuable educational institution.

This historical record of the relationship between government and colleges, including the record of the relationship between New Hampshire and Dartmouth, placed the case in perspective and helped to define the ultimate issue in the case as political, whether, in Marshall's words, "education" was "altogether in the hands of government." Equally important, the historical record suggested the appropriate

⁴⁶Ibid., 599.

resolution of the problem, and provided the ultimate policy basis for the decision. The Court thus concluded that the public welfare could best be served by withdrawing at least some of the nation's colleges from "the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments."⁴⁷ The decision effectively foreclosed, as a constitutional matter, further legislative attacks upon private colleges and laid the foundation for the more extensive development of a sector of higher education which was free from governmental control.

However, the Justices' belief in the desirability of restricting legislative control of colleges was not the sole factor leading to the Court's decision in the Dartmouth College case. Sitting as a court, the Justices were required at least to consider the applicable law in defining the issues, rationalizing the decision, and limiting the scope of the ruling. In the Dartmouth College case it was impossible to rely upon the American law of charitable corporations for the simple reason that there was no such law. There were very few judicial decisions of any kind on charitable corporations, and those which had been made were not directly relevant. Both lawyers and judges were forced to turn to English cases and treatises as a major source of law.

The college attorneys confidently rested their case primarily on the English law. Webster's presentation before

⁴⁷Marshall's opinion, Ibid., 634, 648.

the Supreme Court was the fullest refinement of the argument. Essentially, Webster contended that Dartmouth College, properly considered in light of applicable English law, was a property case, that Dartmouth College itself was, under English law, a private charitable corporation, that the trustees were the only visitors, and that these propositions, taken together, compelled the conclusion that the New Hampshire legislature could not constitutionally amend the college charter.

Although Webster's argument was ingenious, a close examination of the English precedents, summarized above, in light of the facts and ultimate issues in the Dartmouth College case, reveals many serious flaws. The "private charitable corporation" was itself an antique legal category in England by 1818. As noted, a number of cases after 1800 had rendered it obsolete, and the English no longer paid much attention to it. Webster simply failed to explain these cases.

Even if the private charitable corporation remained a vital legal conception, its application to the Dartmouth College case was questionable. The category as defined by Holt in Philips v. Bury was procedural, based solely on the royal courts' lack of jurisdiction to review corporate decisions on internal affairs. The Dartmouth College case, on the other hand, was not even remotely related to these jurisdictional problems. It concerned instead a much different question of substantive constitutional law, whether the New Hampshire legislature could unilaterally

amend the charter of Dartmouth. Webster insisted by forceful repetition that the English cases on procedure ought to resolve American constitutional issues, but he never quite explained why, in legal terms, procedural ought to control substantive law.⁴⁸

Finally, it is doubtful that Dartmouth College was, as Webster contended, a fully private corporation. Since Dartmouth was a unitary corporation, having trustees but no separately appointed visitors, the college was squarely within the exceptions to the "private corporation" category which the English had developed since Eden v. Foster in 1725. In England, the college would be at least quasi-public, subject to control by the Lord Chancellor exercising the royal prerogative. In America, where there was no official to administer the royal prerogative, charitable corporations were, according to a dictum by New York's Chancellor James Kent, fully public, subject as all other corporations to control by the common law courts.⁴⁹ Whether abstracted from

⁴⁸ Webster persistently distorted the concept of "visitation power" to make it include not only judicial functions but all the governmental and administrative power within the charitable corporation. 4 Wheaton, 563-567 passim, 596. Cf., Smith's argument, 65 N. H., 534-537 passim, 548-549, 560. Apparently, this was an effort to inflate the significance of the English cases by making it appear that they meant to find a total corporate independence.

⁴⁹ Although Webster contended before the Supreme Court that the trustees of Dartmouth were legally the visitors, privately he had doubts on this point. Webster to Mason, [Late April or Early May, 1818], in Webster, ed., Writings of Webster, XVII, 311-312. Kent's opinion, Attorney General v. Utica Insurance Company, 2 Johnson's Chancery Reports 371, 388-389 (1817). Cf., Fuller v. Plainfield Academic School, 6 Conn. 532 (1827).

English law, or applied to the American context, Webster's cases simply did not, in a technical sense, support his argument.

Whatever the flaws in Webster's technical application of the case law, there was another sense in which Webster was correct. Although he never quite sprung himself loose from technical detail, he was really presenting the court a review of the broad English tradition of private administration of charitable corporations. He correctly emphasized that, legally, the property rights of the founder had been the original basis of corporate independence. And citing the adverse reaction to James II's attack on Magdalen College, Webster noted that privileges and immunities of members of charitable corporations had been beyond the reach of the Crown at least since 1688.⁵⁰

Webster actually expanded this aspect of his argument in the summer of 1818. It will be recalled that the English had been debating the nature of charitable trusts in conjunction with the controversy over Henry Brougham's proposed parliamentary investigation of charitable abuses. On August 16, Webster wrote Story that he had "been looking over a file of English newspapers, in order to learn the proceedings of Parliament, at its late session, on the subject of redressing abuses in charities." Webster summarized what he had found, noted that he was sending the newspapers along,

⁵⁰ Webster's argument, Dartmouth College, 4 Wheaton, 563-564, 568-569, 571, 574, 584-587.

and included the following:

I think its [the Brougham Commission Bill's] history shows, 1. That the English lawyers recognize a difference between charities having visitors, and such as have none. Indeed, I did not observe, till lately, that the commissions, issued under the statute of Elizabeth [Charitable Uses], do not extend to charities with visitors. 2. I think we may see that Parliament is not supposed to have the power of new-modelling, and directing to new uses, at its own pleasure, charitable funds, arising from donations of individuals, and by them subjected to the forum domesticum.⁵¹

At the state court level, at least, the university attorneys, Bartlett and Sullivan, were neither blinded nor overwhelmed by their opponents' barrage of English precedent. They correctly pointed out that the "visitatorial power," which lay at the base of the English "private charitable corporation," was only judicial in nature, and had no direct relevance to the question before the court. Likewise, the university attorneys saw that the Dartmouth trustees were not made visitors by the charter. They contended that under the rule of Eden v. Foster the trustees were not visitors by operation of law. Sullivan stressed the absurdity of making trustees the visitors of themselves.⁵² Unfortunately,

⁵¹Webster to Story, Aug. 16, 1818, in Webster, ed., Writings of Webster, XVII, 286. Webster did not say which "newspaper" he was sending, but it was probably the Quarterly Review, XIX (July, 1818), which contained the Tory Review of "Reports of the Select Committee," 492-596. Excerpts from this Review appeared in Farrar's Report, App. No. IV, 395-396. It is not known whether Webster or others associated with the college forces called the attention of other Supreme Court Justices to this article.

⁵²Sullivan's argument, Dartmouth College, 65 N. H., 518, 522. Bartlett's argument, Ibid., 581. In his opinion for the New Hampshire court, Richardson denied that the Dartmouth trustees were visitors. 1 N. H., 121.

these points were not made at all by Wirt and Holmes before the federal Supreme Court. Had the latter two attorneys been prepared, they might have taken some force out of Webster's argument, so far as it depended upon a strict reading of British case law.

Marshall's opinion for the Supreme Court was based in part on the English law of charitable corporations as expounded by Webster, but the Chief Justice declined to follow the attorney's lead into a detailed examination of English precedents. Marshall seemed to read the English law as a whole, as a valuable record of human experience which provided general legal conceptions which were the starting point of analysis. Thus, he accepted the basic argument that the founders of Dartmouth had legally enforceable property rights which were involved in the case, and that historically this type of property right had been the basis of the considerable independence of charitable corporations in the common law system. Similarly, Marshall thought that the property-related policy reasons which were used to justify the English system might apply equally to America. If wealthy men were allowed to control the ultimate disposition of their charitable gifts, then they would be encouraged to make socially useful benefactions. Conversely, if every charitable gift was merely a gift to the public or to the legislature, then wealthy men would be deterred from founding charitable enterprises, and social needs served by private charity would go unsatisfied. While relying on these general legal

and policy bases derived from the English law, however, the Chief Justice refused to apply the elaborate technical rules of the English system to the case at hand. He thus did not even mention the visitatorial power, or develop the idea that Dartmouth was, under English law, a private corporation for jurisdictional purposes.⁵³

It is difficult to know how much weight either Marshall or the rest of the Court gave the policy argument that allowing wealthy men substantial and continuing control over their charitable donations would encourage the founding of charitable enterprises in America. There was at least one reason why Marshall, the Court, and most Americans might find the argument mildly persuasive. They all shared the general assumption, at once derived from and supportive of the American system of political economy, that the public good was best served by allowing the individual a large amount of freedom to control his own property. It appears that Marshall linked this general American assumption in favor of private control of property with the originally British idea concerning the best way to promote charitable giving in order to form a property-related rationale for the Dartmouth College decision.

However, the argument itself will not bear close

⁵³Marshall's opinion, Dartmouth College, 4 Wheaton, 630 ff. Webster wrote that Marshall's opinion "was in his own peculiar way. He reasoned along from step to step; and, not referring to the cases, adopted the principles of them, and worked the whole into a close, connected, and very able argument." Webster to Mason, Feb. 4, 1819, in Webster, ed., Writings of Webster, XVI, 44.

examination. Americans had had long experience with charity by 1819, but there was no objective evidence one way or the other as to which public policy would encourage and which would discourage the creation of charitable foundations. Allowing individuals a perpetual property right in their donations would not necessarily substantially increase the founding of charitable enterprises in the United States. In England, the existence of a relatively large upper class with great wealth and a sense of separation from the mass of Englishmen may have made their policy appropriate and successful. In America, however, there were very few men of great wealth, so even if the assumption were correct, the number of charitable enterprises founded by individuals as a result of the Court's decision would be very small, and the effect on society at large would be marginal. On the other hand, allowing the legislature a constitutional discretion to control charitable enterprises would not necessarily reduce the number of new foundations. The personal, humanitarian, and religious motives inspiring gifts to charity are very strong, and are therefore unlikely to be totally defeated by the presence of a mere possibility of future legislation concerning a particular foundation. Similarly, there is little justification for Marshall's apparent assumption that private foundations filled important social needs that would necessarily go unmet in their absence. If the public need was great enough, either the state or voluntary associations could perform the needed services.

From society's point of view, the choice was not between something and nothing, as Marshall implied, but between alternative means of accomplishing the same results.

Furthermore, there is good evidence that neither Marshall nor the Court thought that promoting charitable giving was itself of critical importance. The same term in which the Court decided Dartmouth College, it determined in Trustees of the Philadelphia Baptist Association v. Hart's Executors, a diversity suit, that the federal court had no jurisdiction in equity to enforce a charitable bequest where at the date of death there were no persons in existence legally capable of taking the bequest and where the objects of the bequest were indefinite. While there were some considerations of federalism present in Baptist Association, these were not insurmountable, as the Court discovered in 1844 when it effectively overruled the case. Rather, the main theory and effect of the Baptist Association ruling was to refuse court enforcement of a wide variety of testamentary bequests to charity.⁵⁴ The Court simply could not have reached this decision had it truly believed that public policy demanded the promotion of charitable giving,

⁵⁴ Trustees of the Philadelphia Baptist Association v. Hart's Executors, 4 Wheaton 1 (1819). Baptist Association was nominally distinguished but effectively overruled by Vidal v. Girard's Executors, 2 Howard 127 (1844). See, generally, Howard S. Miller, The Legal Foundations of American Philanthropy, 1776-1844 (Madison, Wisc.: State Historical Society of Wisconsin, 1961), and Irvin G. Wyllie, "The Search for an American Law of Charity, 1776-1844," Mississippi Valley Historical Review, XLVI (Sept., 1959), 203-221.

and that the property rights of donors to charity had significant constitutional implications.

Both the quality of the argument and the decision in Baptist Association indicate that the Supreme Court was not persuaded that public policy required the encouragement of charitable giving, or that allowing individuals a perpetual property right in their donations was necessary to effectuate that policy. Rather, Marshall used the argument because it tapped the general American prejudice in favor of private property and because it offered some justification for his focus on property as the operative legal element in Dartmouth College.

In contrast to the Chief Justice, Story examined the English law of charitable corporations at great length, attempting to show that the English precedents required a decision for Dartmouth College. Taking his cue from Webster, Story distorted the English law in order to find that Dartmouth was fully private, and failed to say why procedural should control substantive law. Moreover, he showed a complete lack of respect for discreet English legal categories. For example, Story's contention that the Crown could "not force upon a private corporation a new charter" was correct as far as it went, but he used English cases concerning municipal corporations (which he defined elsewhere as public) to support his point.⁵⁵ Story ignored the obvious fact that

⁵⁵ Story's opinion, Dartmouth College, 4 Wheaton, 668, 707.

he was dealing with a general restriction on the power of the Crown, not anything peculiar to English private corporations. In addition, the Justice defined "private corporation" to include business as well as charitable corporations, something the English had never done, and then used English cases indiscriminately to support his wide-ranging analysis. The ultimate result of Story's manipulation of legal language and citations was a new and previously unknown pattern of "English" law, a pattern which was, however, suited to his own views.

Overall, Bushrod Washington's opinion fell somewhere in between the opinions of his two colleagues. On crucial doctrinal points he was much closer to Marshall than to Story, emphasizing private property and private foundation as the determinative elements in the Dartmouth College decision. On the other hand, he cited a few English cases, such as Philips v. Bury, and apparently agreed with Story and Webster that they were applicable to the case at hand. Washington's warning against the assumption that there was "any implied decision . . . of any other case, than the one immediately before" the Court⁵⁶ was notice to Virginia that the Bracken decisions, to the effect that William and Mary was a public corporation, were not being overruled by implication.

Whatever the differences among the members of the Court over the content of the English law and its relevance to

⁵⁶Washington's opinion, Dartmouth College, 4 Wheaton, 659.

Dartmouth College, the five majority Justices united in accepting Webster's basic contention that the case could be treated for legal and constitutional purposes as involving legislative interference with the property rights of founders. In Marshall's opinion for the Court, and Washington's concurring opinion, at least, the political issues which lay at the heart of the case and which could be resolved directly only by a broad assessment of the American experience were subordinated to a canvass of the property issue. This did not, of course, affect the Court's final decision, since careful analysis of both the political and the property issue suggested the same result.

Focusing on the property aspect of the Dartmouth College case was in part a tactical maneuver by the Court designed to make the decision appear less radical than it really was and to minimize possible adverse public reaction to the decision. Since there was a widespread (if not universal) acceptance of the idea that governmental authorities could not legitimately infringe rights of private property, the Court could without substantial political danger strike down New Hampshire's charter amendment as a constitutional defense of property rights. In addition to aligning itself with general American attitudes concerning private property, the Court, as indicated, could appear to be advancing the ultimate public good by adopting the English rationale that allowing individuals a continuing property right in their charitable donations would encourage the foundation of

charitable enterprises. On the other hand apart from property, there was nothing in the federal constitution itself and no broadly developed law of civil liberties which appeared to require the freedom of educational institutions from governmental control. Unless the Court was willing to provoke a hostile public reaction by making truly radical departures in the law while drastically extending its power and modifying its nominally limited role in the federal system, it could not strike down New Hampshire's charter amendment simply on the grounds of protecting an abstract liberty of educational institutions. Fortunately, Webster's contention that there was a property element in the Dartmouth College case was technically correct, historically and legally, so the Court could legitimately focus on property without violating current legal theory or prevailing public attitudes.

The decision of a majority to base their opinions on the property element was also closely related to the resolution of another issue in the case, the reach of the contracts clause. Technically, Dartmouth College was before the Court on a writ of error to determine whether New Hampshire's charter amendment violated the contract clause of the federal constitution, and a judgment for the college would require a finding that the charter was a constitutionally protected contract. Earlier cases had held that public contracts involving property rights were within the meaning of the

clause,⁵⁷ and all five of the majority Justices agreed that the Dartmouth charter, representing an agreement with the Crown and state for the disposition of the founders' property, was a contract in this sense. However, at least two Justices, Story and Livingston, raised the question of whether the contracts clause might extend to governmental contracts and grants which did not concern property rights in the traditional sense. At issue was not only the legal grounds for the Dartmouth College decision, but also whether the contracts clause would be broadly construed as a general restriction on the power of state governments to regulate domestic institutions.

The issue of the reach of the contracts clause was originally posed by New Hampshire's Chief Justice Richardson in his Dartmouth College opinion. He admitted that the contracts clause protected "all contracts relating to private property, whether executed or executory, and whether between individuals, between states, or between states and individuals." He insisted, however, that the word "'contracts' must be taken in its common and ordinary acceptance, as an actual agreement between parties, by which something is granted or stipulated, immediately for the benefit of the actual parties."

⁵⁷Fletcher v. Peck, 6 Cranch 87 (1810) (state's grant of land to individuals for a valuable consideration is a contract within the constitution.) Hereafter cited as Fletcher. New Jersey v. Wilson, 7 Cranch 164 (1812) (treaty between a colony and Indians that Indian land would forever be tax exempt is a contract within the constitution.) Hereafter cited as Wilson. These and other earlier cases are discussed infra, ch. VII.

Thus, the contracts clause would not protect "grants of power and authority, by a state to individuals, to be exercised for purposes merely public." And equally important, the contracts clause would not protect contracts which were "mere matters of civil institution."⁵⁸

Richardson's construction of the contracts clause was not extensively argued by the attorneys before the United States Supreme Court. Webster tacitly accepted Richardson's general propositions, but argued that Dartmouth was a private corporation, and this its charter necessarily involved a bargain over valuable privileges and property. Holmes and Wirt merely repeated Richardson's contention that Dartmouth was a public institution.⁵⁹

Among the Justices, Story, with whom Livingston expressed agreement, was the most eager to overturn Richardson's construction of the contracts clause. Although Story carefully excepted grants of political power or authority to public officers, he thought that the contracts clause protected other types of governmental grants of "authority," even though the grants did not involve economically valuable privileges or property. Furthermore, the Justice denied that any bargain had to be made between the government and the grantees of either authority or property in order to create

⁵⁸Richardson's opinion, Dartmouth College, 1 N. H., 132-133.

⁵⁹Webster's argument, Dartmouth College, 4 Wheaton, 589-596. Holmes's argument, Ibid., 603-604. Wirt's argument, Ibid., 608-610.

a constitutionally protected public contract. In the language of the law, he contended that the grantees had to give no "consideration" whatever for their grant. Thus, even publicly founded corporations, such as colleges and hospitals, which had received corporate franchises and public endowments, would be protected by the contracts clause just as the privately founded Dartmouth.⁶⁰

On balance, Story's broad interpretation of the contracts clause was as excessive as his treatment of the English law of charitable corporations. By defining nearly all governmental grants as executed contracts, the Justice went far beyond the usual understanding of contract which, as Richardson had noted and even Webster had agreed, was rooted in bargain and mutual agreement between parties. Furthermore, in the past the Supreme Court had confined the use of the contracts clause to those cases involving property rights. The extension of the clause to restrict legislative control over grants of authority would have been a sharp break with this line of decisions. Had Story's views been adopted, the contracts clause might have become an open-ended warrant for

⁶⁰Story's opinion, Ibid., 668-669, 684, 690, 694, 696-700. In line with this argument, Story placed a new emphasis on the "entity theory" of corporations: a charter was a contract between the state and the corporation itself, as distinguished from the corporate founders and members, so that the corporation held property and had rights apart from its members. Ibid., 690-693. However, when dealing with the specific problems raised by the Dartmouth College case, Story relied upon the "associational theory" in finding a contract between the Crown and "every benefactor" of the college. Ibid., 689. Thus Story did not eliminate the associational element in corporate organization as Dunne contends. Story, 181-182.

the Supreme Court to strike down virtually any legislative action which disturbed an existing state of affairs.

It is not difficult to determine why Story took such an advanced position. On one level, as indicated above, the Justice wished to provide constitutional protection for publicly founded Harvard College, and, more directly, for his own position on Harvard's Board of Overseers. Similarly, Story was a charter member of the Massachusetts General Hospital, a publicly founded charitable institution which had been incorporated in 1811. Unless the contracts clause were extended to cover institutions not founded with private funds, both Harvard and the General Hospital would remain as vulnerable to legislative attack as before the Dartmouth College decision. In a broader sense, however, Story was fearful of what future political developments might bring. In March, 1818, a few days after the close of the argument in the Dartmouth College case, Story expressed his anxiety to an old acquaintance:

[A] new race of men is springing up to govern the nation; they are the hunters after popularity, men ambitious, not of the honor, so much as of the profits of office, -- the demagogues whose principles hang laxly upon them, and who follow not so much what is right, as what leads to a temporary vulgar applause. There is great, very great danger that these men . . . will rule the nation; and if so, we may yet live to see many of our best institutions crumble in the dust.⁶¹

⁶¹Charter of Massachusetts General Hospital, Act of Feb. 25, 1811, Jan. Sess., 1811, ch. XCIV, Mass. Laws (Adams, Rhoades and Co.), 339-342. The charter created a corporation to be managed by a small board of trustees and to be superintended by a board of visitors composed of governmental officers. The legislature made a conditional grant of

A man so deeply disturbed by the currents of democracy which flowed after the War of 1812 would understandably want to restrict legislative power as much as possible.

Marshall, in his opinion for the Court, emphatically rejected Story's interpretation of the contracts clause. "Taken in its broad, unlimited sense," wrote Marshall, "the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which . . . ought to vary with varying circumstances." The contracts clause, held Marshall, was intended only "to restrain the legislature . . . from violating the right to property." Synthesizing the principles of traditional contract law with general principles derived from the English law of charitable corporations, the Chief Justice went on to conclude, as noted, that the Dartmouth charter was a contract within the constitutional prohibition because it concerned the donation of funds to the college in consideration for the perpetual

property worth about \$20,000, and reserved a power to alter, amend, or repeal the charter. An Act of June 14, 1813, May Sess., 1813, ch. XLII, Ibid., 266-267, repealed the reservation clause, restricted the superintending authority of the board of visitors and otherwise limited governmental control of the institution. In December, 1816, Story was appointed by the trustees to a committee for the town of Salem to raise private subscriptions to get the Hospital under way. See N. I. Bowditch, A History of the Massachusetts General Hospital (Not Published. Printed by John Wilson and Son, 1851), 3-9, 13, 14, 24, 400. The quoted letter: Story to Ezekiel Bacon, March 12, 1818, in Story, ed., Life of Story, I, 311.

application of the property according to the charter provisions.⁶² The suitably narrow construction of the contracts clause thus fit nicely with the emphasis on the founders' property rights as the determinative element in the case, and gave the whole opinion an aspect of comfortable moderation.

On the question of the reach of the contracts clause, Washington's opinion was substantially the same as that of Marshall. Washington confined his discussion largely to the problems at hand, employing the standard approach to contracts, and emphasizing the element of private property.⁶³

If the above interpretation of the opinions in the Dartmouth College case on the subject of contracts is correct, Marshall's opinion for the Court represented the true opinion of only two of the seven Justices, Marshall and Johnson, with Washington so close as to be in virtual concurrence. The Chief Justice's opinion must have become the "opinion of the Court" through a compromise which brought the trio another vote in order to form the required majority. The opinion itself, however, cannot be labelled a compromise between a narrow and a broad construction, because Marshall's was the narrowest possible interpretation consistent with a decision for the college. If there was any compromise it was by Livingston, who is listed as concurring with all three written opinions in the case. Having failed to

⁶²Marshall's opinion, Dartmouth College, 4 Wheaton, 628, 642-644.

⁶³Washington's opinion, Ibid., 656-659.

persuade two other Justices to adopt the enlarged view held by himself and Story, Livingston voted with Marshall, Johnson, and Washington in order to avoid an unsettling three-two split on the important constitutional question of the extent of the contracts clause.

In summary, Dartmouth College had both a political and a property dimension. The primary issue was political, stated generally, whether state government could control all educational institutions. Even a casual review of the American record of governmental relations with colleges showed uniformly bad results where legislatures were free to control institutions of higher education. During the late colonial, Confederation, and early national periods, most American colleges had been the subject of extended public controversy or of direct political attack. If partisan factions had gained temporary advantages from their assaults, neither government nor education had made any demonstrable gains in the long run, and many institutions, including Dartmouth, had been seriously damaged. An objective consideration of the American experience, then, led to the conclusion that the Court ought to secure the freedom of colleges such as Dartmouth from further governmental attack.

Because of its role as a law court and its position in the American constitutional system, the Supreme Court was expected to ground its decisions in the constitutional text and received law, and a mere recitation of policy reasons justifying a particular result was wholly insufficient.

Unfortunately, there was neither a developed law of civil liberties nor a specific constitutional provision applicable to the states which reached the political essence of the Dartmouth College case. Story's suggested interpretation of the contracts clause as reaching all governmental grants except those to public officials and subdivisions was merely a transparent rejection of traditional ideas of contract and of the contracts clause, and thus could not pass for valid legal analysis.

There was a second aspect of the Dartmouth College case, however, one which did sound in the traditional law of property and contract. Adopting Webster's basic arguments along these lines, the Court identified the property rights of Dartmouth's founders as the determinative legal element in the case. The founders had made a contract with the Crown for the perpetual disposition of their funds, a contract embodied in the corporate charter. New Hampshire's charter amendment, substituting a new system of college government for that originally agreed to, was an unconstitutional impairment of the obligation of the contract. These propositions were loosely reinforced by generalized appeals to the sanctity of contracts and by an argument, uncritically borrowed from the English, that securing donors' property rights would encourage the foundation of charitable enterprises. By thus focusing on property law, the Court nominally preserved its limited role in the American constitutional system, and made its decision acceptable to the American

people.

As private property and the charter-contract were the stated bases of the decision, so they defined the limits of the Dartmouth College doctrine, at least initially. It was certainly clear that the doctrine would provide constitutional protection from governmental interference to fully private educational institutions. Measured by the key elements of Marshall's opinion, fully private institutions were those which had been privately founded, which had no organic relation with government, and which were not made subject to direct legislative control by the express terms of their charters. On the other hand, at least three and possibly four major categories of incorporated schools remained subject to a significant degree of legislative control. First, although Marshall did not mention reservation clauses in his opinion, it seems that a legislature could expressly reserve the power to alter, amend, or repeal the charter of a privately founded school. The Chief Justice did not suggest that private donors could not found institutions subject to legislative control, nor did he declare that a legislature could not insist upon an effective reservation clause as a condition for granting a charter. Rather, the burden of Marshall's opinion was that the express terms of the charter controlled, even though they were not entirely favorable to the corporation. Second, publicly founded institutions remained subject to legislative direction, even though they had self-perpetuating

boards of trustees and no functional connection with the government. It could be argued, as Brockholst Livingston may have done on the basis of his experience at Columbia, that such an institution was in reality no different from Dartmouth, especially where the legislature gave no regular financial support. Nonetheless, the majority of the Court finally held that since the contracts clause extended only to matters of property, the source of the endowment at the time the charter was granted was the legally operative element. Third, state universities which were founded and supported by legislatures and which had an organic connection with government were obviously beyond the reach of the contracts clause. Finally, and most ambiguously, unendowed incorporated institutions which existed solely on fees paid by their students may or may not have been intended to be covered by the Dartmouth College decision. The absence of an endowment meant that there was no property on which to base a constitutionally protected contract. On the other hand, where the school had been organized by the teachers themselves, it could be said that they had a beneficial interest in the charter, and the legislature certainly had no direct basis of concern in the absence of a public foundation or a reservation clause.

The Dartmouth College doctrine had important implications for American higher education. Most immediately, of course, the decision created a small constitutionally protected private sector which would take its place beside

a much larger public sector. If anything, the implications for the future were even more significant. The Court had rejected suggestions that the system of education be either virtually all public or all private. Instead, the Court created a dual system in which a number of possibilities would be available to the people and state governments.

On the one hand, a legislature could found or control through the exercise of reservation clauses all or any part of the educational institutions chartered within the state after 1819. On the other hand, with legislative approval, individuals and groups could create educational institutions effectively free from state interference and direct political control. Precisely because it allowed such a wide variation, this constitutional system was neatly adapted to the fluid, decentralized, democratic society of the early nineteenth century.

IV

BUSINESS CORPORATIONS:

THE POLITICAL ECONOMY OF MASSACHUSETTS

Business corporations¹ have a curious relationship to the Dartmouth College decision. Although the Court's decision applied most immediately to privately founded charitable corporations, the terms and rationale of Marshall's opinion clearly encompassed business corporations by emphasizing private property and the constitutionally protected contract which arose when individuals consigned their funds to corporations in reliance on the state's charter.

Most important in the present context is the relationship between the whole problem of business corporations and the processes by which the Supreme Court reached the Dartmouth College decision. Discounting as indefensible

¹The term "business corporation" is used to mean a corporation created primarily for the purpose of making money for its owners. A corporation might profit its owners either directly through operations which generate a dividend or indirectly through the provision of some service or other economic advantage, or both. Thus, even a chartered bridge which could not collect toll might be a business corporation if it was created to improve the commercial value of lands owned by the corporation's sponsors. Incorporated towns and counties provided some services which were economically advantageous, but they were not incorporated primarily to make money for individuals, nor were they in any sense owned by individuals.

the idea that the Supreme Court gave no thought whatsoever to business corporations in reaching its decision, there are essentially two possibilities. First, it might be argued that however concerned the Court was with establishing the political independence of charitable institutions, it was even more concerned with establishing the constitutional independence of business corporations from state legislatures. With the latter purpose primarily in mind, the argument goes, the Court ruled for Dartmouth College, and framed its opinion in terms of property and contract so there could be little doubt that the decision would protect business corporations from rapacious state legislatures. While there is circumstantial evidence to provide a basis for these inferences, there is little direct evidence in the Justices' opinions to support this conclusion.

Available evidence strongly supports an alternative interpretation. As a matter of practice in nearly all states, and a matter of law in some, when the Dartmouth College case arose business corporations were already effectively free from all direct legislative controls except for the regulatory authority specifically reserved in charters. Close examination of both the content and structure of the Justices' opinions in light of their personal experiences indicates that they simply assumed an existing independence of business corporations, an independence supportable in law in terms of private property and contract, and justifiable in policy by the need to attract private wealth into socially

useful projects. Implicitly drawing an analogy, the Court held that privately founded charitable institutions, at least, would in the future be as independent as business corporations had been in the past, for basically the same legal and policy reasons. The Dartmouth College decision, then, changed virtually nothing in the actual operation of the political economy of business corporations, but extended the essential features of the system into a new area, charitable corporations.

This latter interpretation of the Dartmouth College decision rests in the first instance on the proposition that business corporations were functionally independent of governmental control, apart from special charter provisions, before 1819. It is the purpose of this and the following two chapters to examine several important aspects of the development of the American system of political economy from 1780 to 1819 to determine the extent to which business corporations had become legally and practically free from legislative direction by 1819, and the reasons why the system evolved as it did. The present chapter traces the economic, political, and legal aspects of the development of business corporations in Massachusetts. Chapter V examines the Virginian political economy, and shifts the focus somewhat to consider Chief Justice Marshall's relation to his home state. Chapter VI is a general survey of the political economies of other states.

The broadest and most influential modern analysis

of the pre-1820 development of the American business corporation and of the relationship of this development to the Dartmouth College decision, has been by Oscar and Mary Handlin in Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861, originally published in 1947, and recently re-issued in a slightly revised edition. The Handlins presented their book as a record of the "large body of ideas, unformalized preconceptions, that embodied peoples' notions of the kind of world in which they lived and the kind of world in which they wanted to live." If it were merely an intellectual history, there would be little occasion to discuss it here. However, Commonwealth is, in addition to being an intellectual history, an insitutional history, a challenging and complex interpretation of the constitutional and legal development of the political economy of Massachusetts.²

According to the Handlins, the Massachusetts government created by the constitution of 1780 was an "absolute sovereignty," theoretically and actually "omnipotent." The legislature "drew freely upon the normal legislative power, a power to which it recognized no limits but those set by

²Oscar Handlin and Mary Flug Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861 (rev. ed.; Cambridge: Belknap Press of Harvard University Press, 1969), xv, xvi. Hereafter cited as Commonwealth. Preliminary findings were published in articles. See, generally, Oscar Handlin and Mary Flug Handlin, "Origins of the American Business Corporation," Journal of Economic History, V (May, 1945), 1-23, and Oscar Handlin, "Laissez-Faire Thought in Massachusetts, 1790-1880," Ibid., III (Supplement; Dec., 1943), 55-65.

feasibility and utility." This absolutely sovereign, omnipotent state was a "commonwealth," a moral entity "with an identity and interests of its own, apart from those of the groups within it." One of the major activities of the commonwealth was the promotion of economic growth through various types of state action. The corporation soon became the legislature's primary "instrument for the realization of restless ambitions" in the economic sphere. All corporations were agencies of the state, chartered with privileges and political power to fulfill some social function deemed worthy of advancement by the legislature. Corporations were subject to complete governmental control, which included summary dissolution, at all times.³

Various pressures generated within Massachusetts politics resulted in moving the government from the old system of "mercantilism" towards a new political economy of "liberalism." The process was underway by 1800 and perhaps half completed by 1820. The effective power of the "commonwealth" idea declined. In a society in which nearly all people held and highly valued property, the idea that there were property rights which the state could not infringe gained wide acceptance. People began to appeal to the courts for protection against legislative action which adversely affected their economic interests, citing provisions in the Bill of Rights designed to protect private property from attack.

³Handlin and Handlin, Commonwealth, 29, 51-52, 56, 61, 64, 92, 94-97, 151-153; "Origins of the American Business Corporation," 17-22, and esp. 22.

With regard to specific problems which arose as a result of the growth in the numbers and power of corporations, litigants urged "novel distinctions" in order to persuade the courts to restrict legislative power either to aid or to regulate business corporations. In a series of decisions on these problems after 1800, the Massachusetts courts "gradually undermined and transformed the law" of corporations as it had existed in the early days of the commonwealth. They began to develop a legal distinction between "public" corporations which remained subject to full governmental control and "private" (usually business) corporations which were in many respects shielded from legislative interference. Although this distinction was analytically unsound and had been developed in response to no informed idea of enlightened public policy, it was recognized by the United States Supreme Court in the non-constitutional case of Terrett v. Taylor (1815) and finally given constitutional significance in the Dartmouth College decision.⁴

To the extent that Commonwealth represents a substantive interpretation of institutional developments, instead of an assortment of reactions of Massachusetts citizens to the events of their time, the Handlins' thesis is flawed. There is very little evidence to support and much evidence cited by the Handlins themselves to refute the conclusion that the state of Massachusetts was ever a moral entity

⁴Handlin and Handlin, Commonwealth, 21-22, 25, 134, 136-140, 142-143, 147, 153-160, 243.

with interests of its own apart from the people, omnipotent, with no limits on its power but expediency. This distant antecedent of the federal New Deal simply never existed. Similarly, the legal development of the business corporation was not as the Handlins contend, from the public agency completely at the mercy of the state to a private economic institution rather arbitrarily protected from legislative attack by the courts. The development proceeded along different lines.⁵

This dissertation starts from a more traditional analysis of early American constitutionalism. The Massachusetts constitution of 1780 established the institutional outlines of the new government, and assigned sufficient powers to ensure effective, positive government which could advance the public interest. At the same time, in order to be sure that the new government did not become tyrannical in the manner of the English government of George III, the people insisted not only on wide-spread access to power through the political system, but also on limitations on governmental power in the form of a Bill of Rights. Because constitutional government was experimental, and because the times were

⁵Robert A. Lively, "The American System: A Review Article," Business History Review, XXIX (March, 1955), 82-84, has stated that the Handlins' "hypotheses . . . out-reached their evidence" with regard to the contribution state promotions actually made to economic growth. The Handlins replied that they were not attempting "to measure the actual effect of legislation on economic development." Commonwealth, xiv. This dissertation concentrates on institutional aspects of the Handlins' study, and reaches a general conclusion similar to Lively's.

highly uncertain, both the constitution itself and the Bill of Rights were general and ambiguous. Operational details of all branches of government as well as more precise constitutional limitations would be worked out in the decades following 1780.⁶

The development of the political economy, including such major institutions as the business corporation, took place within this general framework. Although the people of Massachusetts were familiar with educational, religious, and governmental corporations, before 1780 they had little experience with the corporation as a strictly economic organization. The business corporation was thus frankly experimental at first, and could be perfected as an economic and legal institution only through the acquisition of experience. As with constitutional government in general, so with the development of the business corporation in particular. The historical movement was from ambiguity and experimentalism in the 1780's toward definition and routine after the turn of the nineteenth century.

The first significant Massachusetts institution which resembled the business corporation, and which had an important relation to later developments, was the organized common field, which originated in the colonial period. A common field was technically owned by a number of individuals

⁶Cf., Oscar Handlin and Mary Handlin, eds., The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780 (Cambridge: Belknap Press of Harvard University Press, 1966), 22, 28, 324, 325, 350, 375.

as tenants in common, and operated as a unit for a variety of purposes. Undivided land provided pasturage for livestock, as well as timber, stone, grass, and earth, with each proprietor's share being proportionate to the size of his interest in the field. Divided land was sometimes cultivated "in severalty," that is, by each owner acting independently of his neighbor, but then pastured in common after the crops were in. Similarly, marshland or land bordering ponds was often divided, but required common management to yield maximum benefits to the owners. Despite significant variations in details of ownership, topographical features and economic function, all these fields had similar problems of apportioning benefits and, more difficult in an agricultural economy where labor and cash were scarce, of allotting costs. Improving the land, draining, clearing, the maintenance of fences, the defense of legal title, suits involving stray or interloping livestock, further division and sale of undivided land, all these and more required co-operative effort if the fields were to be beneficial to their owners. The difficulties which naturally developed among the actual users of common fields were complicated when land speculation and absentee ownership became widespread and created strains between resident and non-resident proprietors.⁷

⁷On the colonial development of the organized proprietors of common fields, see, generally, Roy H. Akagi, The Town Proprietors of the New England Colonies: A Study of Their Development, Organization, Activities and Controversies, 1620-1770 (Philadelphia: University of Pennsylvania Press, 1924), and esp. on the economic functions of common fields,

In the colonial period, from 1692 on, Massachusetts developed legal institutions to permit the common fields to function effectively as economic units. In 1784 and 1786, various colonial acts were consolidated into general statutes. Any two proprietors could force the rest to organize simply by applying to a justice of the peace for a warrant to call a business meeting. The majority of those present could make rules and regulations, assess the proprietors to meet expenses, sell land, and conduct other business related to the operation of the field. Proprietors, furthermore, could sue and be sued as a unit. Although the statutes did not specifically mention incorporation, Massachusetts' Attorney General James Sullivan referred to the proprietors' organizations as "a new species of corporations, with new organs of action, and under a new mode of existence," different from the eleemosynary, religious, and governmental corporations so common in Massachusetts. The proprietors remained a quasi-corporation, however, because individuals held title directly to the property involved; in a real corporation, the corporate entity owned the property, and individuals owned

48-49, 103-104, 109-111, 138, 141, 175, 189, 190, 209. Hereafter cited as Town Proprietors. For the relationship of land policy to the development of a particular town, see Kenneth A. Lockridge, A New England Town: The First Hundred Years: Dedham, Massachusetts, 1636-1736 (New York: W. W. Norton & Company, Inc., 1970), 8, 9, 16-17, 40, 71, 80, 136-137, 148. The legal status and attributes of the common fields in the early statehood period are described by James Sullivan, The History of Land Titles in Massachusetts (Boston: I. Thomas and E. T. Andrews, 1801), 116-117, 122-123, 171-173, 175-177, 196-197, 249-252, 299-301. Hereafter cited as Land Titles. See Handlin and Handlin, Commonwealth, 90-94, 96, 107, 131, 138-142, 151, 156, 217, 236.

shares in the corporation.⁸

In granting legal authority to organize common fields into functioning economic units, the legislature was extremely careful to balance conflicting interests. If, in the name of property rights, individuals were given an absolute veto on the acts of the majority, most proprietors' organizations would come to a halt. Thus, the majority was given ample authority to enforce its decisions. It could levy fines for the breaking of rules. If an individual failed to pay his assessments, the organization could in most cases sell enough land to make up the deficit, although the individual retained a one-year right of redemption. The legislature ratified the practice of selling lands in lieu of levying taxes by allowing the organizations to sell both divided and undivided land at will, although Attorney General Sullivan doubted whether this provision could survive a test under the constitution of 1780. Finally, the majority could dissolve

⁸For major state provisions, see Act of March 10, 1784, Jan. Sess., 1784, ch. XVI, Mass. Acts and Laws (Adams and Nourse), 81-85. Act of Feb. 24, 1786, Feb. Sess., 1786, ch. XV, Ibid., 401-405. Act of March 9, 1791, Jan. Sess., 1791, ch. XXV, Ibid. (Adams), 95. Act of June 15, 1796, printed as ch. I, Nov. Sess., 1796, Ibid. (Young and Minns), 34. Act of June 12, 1818, May Sess., 1818, ch. XI, Mass. Laws (Russell and Gardner), 13. There were, of course, many other acts on special subjects which extended to common fields. Sullivan, Land Titles, 196. Cf., Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 159, 164 (1804). Hereafter cited as Rogers. For a "Petition for Partition," see John Anthon, American Precedents of Declarations, Collected Chiefly from Manuscripts of Chief Justice Parsons and Other Accomplished Pleadings in the State of Massachusetts, Digested and Arranged under Distinct Titles and Divisions, and Adapted to the Most Modern Practice (New York: Stephen Gould, 1810), 399.

the field at any time.⁹

On the other hand, because a minority or an individual might be subject to unequal and prejudicial treatment if the majority had absolute control over all matters relating to the common field, the legislature provided many checks on the organization's power. If an individual thought his assessment was disproportionately high, or his fence-mending duties too great, he might appeal the matter to the Court of General Sessions of the Peace. An individual whose lands in a common field were "so rocky or barren" that he had "never improved them" had to pay no assessments at all. A minority of proprietors who thought their lands could be better managed in a separate common field could apply to the court for such a partition. Similarly, any individual desiring to improve his own lands, and willing and able to bear extra burdens which this might entail, could have his share set off from the common field on application to the Supreme Judicial Court or the appropriate Court of Common Pleas. In line with the same principle of protecting individual enterprise, the legislature often specifically excluded individuals from the operation of special acts incorporating general fields. It seems, in sum, that a man owning land in a common field had a variety of options. He could participate in the proprietors'

⁹ Act of Feb. 24, 1786, Feb. Sess., 1786, ch. XV, Mass. Acts and Laws (Adams and Nourse), 401-405. Akagi, Town Proprietors, 77-79, 224-229. Sullivan, Land Titles, 116-117, 123, 172.

organization and bear his share of the common cost; he could join with other proprietors to create a separate, more advantageous common field; or he could have his share set off, so long as he would maintain fences and improve the land in accordance with the general legislative regulations.¹⁰ The one thing he could not comfortably do was nothing; the law consistently favored property in action over mere

¹⁰Act of Feb. 24, 1786, Feb. Sess., 1786, ch. XV, Mass. Acts and Laws (Adams and Nourse), 401-405. On partition, see Ibid. Act of March 11, 1784, Jan. Sess., 1784, ch. XVIII, Ibid., 87-89, as amended, Act of Feb. 14, 1787, Jan. Sess., 1787, ch. XXXVI, Ibid., 626-627. Act of March 9, 1786, Feb. Sess., 1786, ch. XXIII, Ibid., 411-413. Akagi, Town Proprietors, 108. Sullivan, Land Titles, 175-176, 197, 250. For special acts incorporating general fields, but specifically excluding named individuals, or all those who did not petition for incorporation, or excluding all lands fenced "in severalty," see Act of June 27, 1782, May Sess., 1782, ch. IV, Mass. Acts and Laws (Adams and Nourse), 135-137. Act of Nov. 30, 1785, Oct. Sess., 1785, ch. XIX, Ibid., 336-338. Act of Oct. 28, 1785, Oct. Sess., 1785, ch. II, Ibid., 315-316. Act of March 10, 1797, Jan. Sess., 1797, ch. LI, Ibid. (Young and Minns), 102-104. Act of March 3, 1798, Jan. Sess., 1798, ch. XLIX, Ibid., 205-206. Act of March 4, 1800, Jan. Sess., 1800, ch. L, Ibid., 404. Act of March 7, 1803, Jan. Sess., 1803, ch. LXXIV, Ibid., 179-180. Act of Feb. 27, 1807, Jan. Sess., 1807, ch. XCIX, Mass. Laws (Adams and Rhoades), 134-136. Act of June 27, 1811, March Sess., 1811, ch. LVI, Ibid., 455-456.

The Handlins treat incorporated general fields as "organs of government" having the "power to coerce for some desirable end" and "to enforce decisions" against individuals. Incorporated general fields, they contend, were distinguished from mere "voluntary organizations" from which "a member . . . was always free to secede and to withdraw his share of the property." Commonwealth, 90-92. Cf., Ibid., 150. The elaborate provisions in Massachusetts law for appeal to the courts and the partition of lands, as well as the established legislative practice of exempting individuals from a specially chartered general field, show that the Handlins greatly over-estimated the coercive aspects of the proprietors' organizations. In general, the legislature pressured individual members of common fields, but it did not often compel.

speculation.

The system governing proprietors' organizations was built primarily by the provincial and state legislature, with the appellate courts playing at most a marginal role. After 1804, when the state began its series of official reports, the Massachusetts supreme court continued to respect the system as it had been created. In Proprietors of Monumoi Great Beach v. Rogers (1804), the plaintiffs, as a corporate organization, brought suit for trespass. Although as individuals they had sown grass in the field, they could prove no official corporate act since 1756. The defendant, admitting that at common law the acts of individual, unorganized tenants in common would stand as the acts of all, nonetheless challenged the right of the proprietors' corporation to bring suit after decades of corporate inactivity. The court upheld the right of the corporation to sue, declining to rule that proprietors' organizations had narrower rights than unorganized tenants in common. Writing seriatim, three of the four justices agreed in substance with Justice George Thatcher that the "powers of proprietors of common and undivided lands are not abridged, but enlarged by the statutes." About a decade later, the same court rejected the contention that a member of a proprietary corporation could not petition for a partition of lands under the 1786 statute. A proprietary corporation was merely a tenancy in common, said the court, and it was "essential to an estate in common to be

subject to partition."¹¹ The proprietors' organizations were convenient economic devices, but did not abridge or repeal common law or statutory rights of individuals.

On balance, the system of proprietors' organizations developed by provincial and state legislation, and sanctioned by the highest state court after 1800, is an early expression of those "working principles" found by James Willard Hurst to inform early nineteenth century legal development. As the public interest was defined in terms of expanding production, the law favored property in action, and was hostile to rentier interests.¹² Speculators who held land in common and who neither contributed to common expenses of improvement nor partitioned the land for individual development were at a severe disadvantage. At the same time, individual creative effort was to be encouraged, and the law ensured that the enterprising individual did not have to remain subject to the group. These principles, first worked out in colonial legislation, were carried over into state legislation on proprietors' organizations, and would continue to inform legislative and judicial developments concerning the proper relationship between the government, business corporations, and individuals.

Because true business corporations, which the state began to charter in the 1780's, were highly experimental

¹¹Rogers, 1 Mass., 162-165. Mitchell v. Starbuck, 10 Mass. 5, 12, 20 (1813).

¹²Hurst, Law and the Conditions of Freedom, 5-10, 24-25, 37, 43.

in the beginning, and politically more controversial, economically more powerful, and legally more sophisticated than the traditional small quasi-corporate proprietors' organizations, the legislature insisted on chartering each business corporation individually. Although the legislative history of each charter varied in matters of detail, the chartering process itself came to exhibit characteristic patterns of political and economic relationships. Nominally, of course, each charter was granted on the finding that the activities of the proposed corporation would somehow advance the public interest. The legislature would hardly charter an organization whose operations would adversely affect the state. In reality, the granting of a charter could be a complex affair, involving, in the case of an important undertaking, public controversy and political maneuvering among special interest groups, rival entrepreneurs, larger, more amorphous sections of the people, whose fortunes might be affected by the project, and among legislators desiring to protect the long-run public interest.

The dynamics of the chartering process, the political and economic patterns which emerged as legislative charters increased in numbers, can be illustrated by reference to the chartering of corporations to build toll bridges around Boston.

The city of Boston, as Daniel Webster once told the United States Supreme Court, was "an exception in the ocean," accessible by land only on the south, across the Boston

Neck. Unless they went far out of their way, people and goods from western, northern, and northeastern Massachusetts could reach the city only by boat either directly from the point of embarkation, or by land carriage taken across the Charles River on one of several uncertain ferries. As a result of these unsatisfactory conditions, the Massachusetts legislature was under a great deal of pressure to approve proposals to build bridges which would cut time and distance off the journey to and from Boston. As one newspaper article put it, "free access to the metropolis" in a "direct, smooth, and unencumbered course," was the "right of those who live on the extremities of the state."¹³

Despite the public demand for improved transportation, the state itself constructed no bridges, but consistently deferred to private entrepreneurs. Sponsors of toll bridges were primarily real estate speculators who wished not only to profit from the toll but also to increase the commercial value of their lands in and around Boston by constructing bridges adjacent to them and streets over them. The Charles River Bridge, incorporated in 1785, revitalized Boston's North End and part of Charlestown. The West Boston Bridge, incorporated in 1793, was sponsored largely by real estate interests in Cambridge and Boston's West End section. After Andrew Craigie finally received the charter to build the

¹³Webster's argument, Charles River Bridge, 11 Peters, 516. On the difficulty of getting to and from Boston before the bridges were built, see Frederick L. Oliver, "The Bridges of the Charles," Proceedings of the Bostonian Society (1952), 34. Independent Chronicle, Jan. 30, 1804.

Canal Bridge between Boston and Lechmere Point, Cambridge, in 1808, he was able to sell a large amount of his Cambridge land at a three hundred per cent profit. Similarly, the South Boston Bridge, chartered in 1806, was sponsored by speculators who wished to improve the route to Boston from the Dorchester Neck, where they owned a considerable amount of vacant land. In each case speculators planned and initiated the projects. They offered the state to construct the physical facilities in return for incorporation and permission to collect tolls. The legislature, in each case, accepted the offer and concluded the bargain.¹⁴

The legislature was often called upon to choose between

¹⁴For a brief history of bridges around Boston, see Charles River Bridge, 24 Mass., 377-391. For the Charles River and West Boston Bridges, see also Stanley I. Kutler, Privilege and Creative Destruction: The Charles River Bridge Case (Philadelphia: J. B. Lippincott Company, 1971), 7-14. Hereafter cited as Privilege. A useful map appears at 24 Mass., 388, and as the frontispiece to Kutler, Privilege. Columbian Centinel, Jan. 18, 1792, Feb. 11, 1792. Boston Gazette, June 18, 1804. James Sullivan, The Path to Riches. An Inquiry into the Origin and Use of Money; and into the Principles of Stocks and Banks. To Which Are Subjoined Some Thoughts Respecting a Bank for the Commonwealth (Boston: P. Edes, 1792), 54. Hereafter cited as Path to Riches. Morison, Otis, I, 243. Letter, Otis to Robert Goodloe Harper, April 19, 1807, in Ibid., 283. Joseph Stancliffe Davis, Essays in the Earlier History of American Corporations. 2 vols. (Cambridge: Harvard University Press, 1917), II, 187. Hereafter cited as American Corporations. Josiah Quincy, A Municipal History of the Town and City of Boston, during Two Centuries. From September 17, 1630, to September 17, 1830 (Boston: C. C. Little and J. Brown, 1852), 246-247. Walter Muir Whitehill, Boston: A Topographical History (2d ed.; Cambridge: Belknap Press of Harvard University Press, 1968), 49-51, 74-78. Hereafter cited as Topographical History. Lucius R. Paige, History of Cambridge, Massachusetts, 1630-1877 (Boston: H. O. Houghton and Company, 1877), 176-177, 183-184, 186. Hereafter cited as Cambridge. Oliver, "The Bridges of the Charles," 38-39. Handlin and Handlin, Commonwealth, 98-99, 102-103.

rival groups of entrepreneurs. In 1785, the state favored the Charles River Bridge proprietors over a second group which proposed a bridge from Boston to Cambridge, instead of to Charlestown. In 1792, the legislature rejected stockholder claims that the Charles River Bridge corporation had an exclusive right to bridge the Charles, and granted a charter to the West Boston Bridge.¹⁵

The four-year competition for the charter to build the third bridge over the Charles, however, is a better example of how private groups competed for the state's favor. In between the Boston terminals of the West Boston Bridge and the Charles River Bridge was Barton's Point, a promontory ideal for the terminal of the third bridge. The only real question was the location of the terminal on the opposite shore. From 1804 to 1808 rival groups petitioned the General Court for permission to build in a spot most favorable to each of their respective interests. The controversy provoked a pamphlet war, and widespread newspaper commentaries.

The Newburyport Turnpike Corporation, which had been authorized to construct a road from Newburyport to Boston, favored a toll bridge from Prison Point, Charlestown, to Barton's Point, Boston, in order to shorten the length of their road ten miles and reduce the high cost of land acquisition at the Boston end. As a Prison Point-Barton's

¹⁵Charles River Bridge v. Warren Bridge, 24 Mass., 377-380. Handlin and Handlin, Commonwealth, 102. Kutler, Privilege, 8-9, 13-14.

Point bridge would be only a short distance from the Charles River Bridge, that corporation led the opposition to the Newburyport plan.¹⁶

The Middlesex Canal Corporation suggested a different location for the third bridge over the Charles. The canal had been completed to the Charlestown Mill Pond, but the major problem remained of getting canal boats across the river to Boston. Since the proposed Newburyport Turnpike bridge was too far east to be of use to the canal, the Middlesex Canal Corporation petitioned for a bridge from Lechmere's Point, Cambridge, to Boston. This proposal, of course, was opposed by the proprietors of the West Boston Bridge, who feared a loss of revenues and control of further real estate development in Cambridge.¹⁷

¹⁶Newburyport Turnpike Corporation, Act of March 8, 1803, Jan. Sess., 1803, ch. LXXXII, Mass. Acts and Laws (Young and Minns), 194-198. H. Follansbee Long, "The Newburyport and Boston Turnpike," Historical Collections of the Essex Institute, XLII (April, 1906), 116-117, 120. Petitions of the Newburyport Turnpike Corporation to the General Court, Independent Chronicle, Feb. 13, 1804, June 20, 1805. For opposition of the Charles River Bridge corporation, see Charles River Bridge v. Warren Bridge, 24 Mass., 383. Columbian Centinel, Feb. 4, June 2, 1804.

¹⁷Middlesex Canal Corporation, Act of June 22, 1793, May Sess., 1793, ch. XXI, Mass. Acts and Laws (Adams and Larkin), 325-328. Attorney General James Sullivan was the major promoter of the canal. He was the corporation's first president, and remained in that office until his death in 1808. Thomas C. Amory, Life of James Sullivan: with Selections from His Writings. 2 vols. (Boston: Phillips, Sampson and Company, 1859), I, 361, 363, 365. Hereafter cited as Sullivan. For the route of the canal and notice of efforts to get a tow-path across the Charles, see Ibid., 368-369. Christopher Roberts, The Middlesex Canal, 1793-1860 (Cambridge: Harvard University Press, 1938), 114, 115, 196. Still another proposal took the needs of the Canal

By 1805, the legislature, caught in the cross-fire of conflicting private interests, had been able to decide that a bridge could be built from Barton's Point, Boston, across the Charles, but had made no decision as to the terminal on the opposite shore. To break the deadlock, the canal and turnpike corporations reached a compromise in the spring of 1806, and submitted a joint petition for a bridge from Charlestown to Boston.¹⁸

A third force, however, one ultimately more powerful than the canal and turnpike corporations put together, came upon the scene to complicate matters. Andrew Craigie, a real estate speculator and financier, had been buying land around Lechmere's Point, Cambridge, since the early 1790's, so that he owned about three hundred acres by 1807. He had signed the original Middlesex Canal petition for a bridge from Lechmere's Point, but he strenuously opposed the 1806 compromise which would result in a new bridge from Charlestown

into account. In 1804, Loammi Baldwin suggested the construction of dry docks at Charlestown, between the Charles River Bridge and Prison Point, the construction of a dam from Prison Point to Lechmere's Point, Cambridge, and the construction of a bridge from Lechmere's Point to Barton's Point, Boston. Thoughts on the Study of Political Economy as Connected with the Population, Industry and Paper Currency of the United States (Cambridge: Hilliard and Metcalf, 1809), App., 83, 103-104. For the Canal's opposition to the Newburyport Turnpike proposal, see petition of the proprietors of the Middlesex Canal, New England Palladium, April 24, 1804. For the alternative proposal, Ibid., July 30, 1805; Independent Chronicle, Jan. 27, 1806. "The Communication of the Middlesex Canal Corporation to the Proprietors of the Canal, at their Meeting on the 3d of May, 1805," New England Palladium, May 7, 1805. On opposition by West Boston Bridge, see Columbian Centinel, March 2, 1805.

¹⁸Independent Chronicle, July 28, 1806.

to Boston.¹⁹

At this point, Craigie acquired, and skillfully played, his trump card in order to ensure legislative approval of the bridge from Lechmere Point. In 1806 and 1807, he purchased a warranty deed made originally by the Commonwealth in 1779 which had turned out to be bad. On June 21, 1806, Craigie submitted to the legislature a claim against the state for damages for breach of warranty. After a legislative committee reported that the claim was good, and ought to be honored, the speculator announced that he would release all his claims under the 1779 deed if the legislature would approve the Lechmere Point location for the third bridge. Otherwise, he would insist on money damages.²⁰

Craigie's claim placed the legislature in an unfortunate position. It could refuse to pay a claim acknowledged by its own committee to be valid, a refusal which the powerful Yazoo interest could hardly tolerate; it could pay the claim, a move certain to be politically unpopular; or it could grant permission to build the third bridge from Lechmere's Point to Boston. The latter alternative obviously involved the fewest negative political consequences. Thus, the

¹⁹Paige, Cambridge, 183-184. L. F. Kebler, "Andrew Craigie," in Dictionary of American Biography, ed. by Allen Johnson, Dumas Malone, Harris E. Starr, Robert Livingston Schuyler, 21 vols. in 11 (New York: Charles Scribner's Sons, 1959), IV, 497-498.

²⁰Paige, Cambridge, 183-186. Canal Bridge Corporation, Act of Feb. 27, 1807, Jan. Sess., 1807, ch. LXXXVIII, Mass. Laws (Adams and Rhoades), 112-118.

February, 1807, charter of the "Proprietors of the Canal Bridge," as explained by an additional act of February, 1808, gave Craigie power to locate and build the third bridge where he wanted it. On May 9, 1808, Craigie formally released his claim against the state in consideration for the rights granted by the 1807 and 1808 acts. As construction of the bridge from Lechmere's Point to Boston began, the speculator sold the first of his Cambridge lands at as much as three hundred per cent profit.²¹

Much the same pattern of private initiative-private reaction-legislative response emerged in connection with the chartering of the South Boston Bridge and the development of the Boston Neck by the Front Street Corporation. In 1803, a number of wealthy and politically powerful real estate speculators, including Harrison Gray Otis, purchased about one third of the sparsely-populated Dorchester Peninsula, which lay just south and south-east of Boston, and came to be known as South Boston. The speculators, desiring to speed settlement of the area by improving access to Boston, petitioned the legislature for a charter to construct a bridge from Dorchester Point northward to Boston across the channel forming the entrance to the cove which lay to the east of the main harbor. The owners of lands and wharves

²¹Act of Feb. 27, 1807, Jan. Sess., 1807, ch. LXXXVIII, Mass. Laws (Adams and Rhoades), 112-118, as explained by Act of Feb. 26, 1808, Jan. Sess., 1808, ch. LX, Ibid., 259-262. "Report" by the Commissioners to locate the bridge, Ibid., 262-264. Amory, Sullivan, I, 369. Paige, Cambridge, 186.

fronting on the cove formed the South End Association to oppose the proposed bridge on the grounds that it would impede navigation and reduce the commercial value of the lands and wharves. An acrimonious debate between the South Boston speculators and the South End Association followed.²²

When the legislature proved indisposed to favor either group at the expense of the other, the South End Association and the South Boston group worked out a compromise early in 1804. Acting nominally in the public interest, the legislature simply wrote the terms of the private compromise agreement into law. A number of South End proprietors were chartered as the "Front Street Corporation" to build a special street from Town's Landing near the southern end of the Boston Neck northward towards Boston along the eastern side of the Neck. The South Boston speculators were incorporated as "The Proprietors of the South Boston Bridge," with permission to build not across the straits on a north-south line, but on an east-west line between Dorchester Point and Town's Landing, the foot of Front Street.²³

²²[Anonymous], "An Answer to a Pamphlet, Entitled, 'Considerations on the Public Expediency of a Bridge from One Part of Boston to Another'" (Boston: E. Lincoln, 1806). Hereafter cited as "Answer." Columbian Centinel, Jan. 4, 7, 11, 14, 28, 1804, Jan. 29, 1805.

²³For the text of the compromise dated Feb. 18, 1804, see Columbian Centinel, Feb. 6, 1805. For the "Report of the joint committee of both Houses on the Compromise," see "Answer," Appendix No. 3, pp. 3-4. Front Street Corporation, Act of March 6, 1804, Jan. Sess., 1804, ch. XLVIII, Mass. Acts and Laws (Young and Minns), 418-421. South Boston Bridge, Act of March 6, 1804, Jan. Sess., 1804, ch. XLVII, Ibid., 415-418. Cf., Annexation of part of Dorchester to Boston, Act of March 6, 1804, Jan. Sess., 1804, ch. XLV, Ibid., 412-414.

This brief examination of the process of granting charters to Boston bridge corporations reveals what little substantive contribution the state made to the planning of internal improvement projects. Except where the state itself had some prominent interest, as in the case of the location of the Canal Bridge, the legislature deferred to private groups, and even put the force of law behind private compromises, as in the case of the South Boston Bridge controversy.

It should not be concluded, however, that the state played a wholly passive role in the granting of charters. Although private groups planned and initiated projects, the legislature retained the ultimate power to define the terms of a corporate charter, and it used these terms to provide protection for private or public interests which might be adversely affected by the operations of the corporation. Consequently, most charters of bridge and other internal improvement corporations contained not only the grant of such privileges as incorporation, the right to take toll, and the power of eminent domain, but also a variety of conditions and regulations under which the corporation would have to operate. Those who petitioned for the charter could reject it, of course, on the grounds that the conditions and regulations were too burdensome; but once the charter was accepted, the corporation took not only the benefits but also the burdens of the grant.

The use of the state's power to establish regulations

and conditions in corporate charters can be illustrated by a survey of provision on tolls included in charters granted over the first quarter century after 1780. All toll bridge charters, for example, included an elaborate schedule of rates. Although a few charters set no time limit on the collection of tolls, most provided that they could be collected "forever," or for 20, 40, 50, 60, 70, or 75 years, at the end of which time, some charters added, the bridge would become the property of the state. Many charters further reserved to the government the right to regulate the amount of toll any time after 10, 20, 25, 30, 40, 50, or 75 years from the opening of the bridge. The tolls charged by one corporation were subject to legislative alteration from the beginning. On corporate pleas that the bridges had been more expensive than expected, the legislature sometimes increased the amount of toll, or extended the time during which it could be collected, or collected without further regulation by the government. In the rare cases where the toll was reduced or a time period shortened to the detriment of the corporation, this action seems always to have been balanced by the provision of some new beneficial privilege granted at the request of the corporation. No act has been found which directly and clearly reduced charter privileges with regard to toll, although the chartering of a competing bridge might, of course, reduce total revenues.²⁴

²⁴See the charters in the session laws, 1785-1805; a full list would be more than tedious. Fourteen were chartered from 1785-1800. Davis, American Corporations, II,

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Canal charters contained similar provisions with regard to tolls. Rates were set in the charter. Typically, the corporation could collect the tolls forever, but the legislature reserved a power to regulate the rates after 30, 40, 50, 70, or even 100 years. Investors apparently took these limits seriously. When the Middlesex Canal corporation complained that a charter reservation allowing the legislature to regulate tolls after forty years had caused "great discouragements and embarrassments . . . in the execution of that project," the General Court modified the charter to guarantee a minimum rate of toll to the corporation "forever."²⁵

Toll provisions applicable to turnpike corporations varied slightly from those in bridge and canal charters. For about seven years after the creation of the First Massachusetts Turnpike Corporation in 1796, the legislature did

188, Table IX. For a general summary of provisions, see Edwin Merrick Dodd, American Business Corporations until 1860, with Special Reference to Massachusetts (Cambridge: Harvard University Press, 1954), 236-241. Hereafter cited as American Business Corporations. For the provision subjecting tolls to legislative regulation from the beginning, see Belfast Bridge charter, Act of Feb. 10, 1801, Jan. Sess., 1801, ch. IV, Mass. Acts and Laws (Young and Minns), 445-446. For an example of an amendment which both increased and decreased toll bridge benefits, see Act of June 22, 1799, May Sess., 1799, ch. XXII, Ibid., 329-330, amending Act of March 19, 1793, Jan. Sess., 1793, ch. XXXIV, Ibid. (Adams), 261-263. The rate of toll was increased by the 1799 amendment, but the time during which the toll was to be free from legislative regulation was cut in half. Cf., Act of Feb. 13, 1796, Jan. Sess., 1796, ch. VIII, Ibid. (Adams and Larkin), 538, amending Act of Feb. 11, 1795, Jan. Sess., 1795, ch. IX, Ibid., 442-444.

²⁵For a review of canal company charters, see Dodd, American Business Corporations, 247-257. Amendment to the Middlesex Canal charter, Act of Jan. 25, 1800, Jan. Sess., 1800, ch. III, Mass. Acts and Laws (Young and Minns), 342.

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not reserve a right to alter tolls in turnpike charters, but did uniformly reserve the power to dissolve the corporation whenever the revenues equalled capital and maintenance costs plus twelve per cent yearly interest. As most turnpikes showed little, if any, profit, this provision was merely a matter of form. For the two years from 1803 until the enactment of the general incorporation statute, many turnpike charters reserved to the legislature the power to regulate turnpike tolls according to the weight of the carts and width of the wheels. The "Act defining the general powers and duties of Turnpike Corporations" passed on March 16, 1805, did not reserve a right to alter tolls, but did provide that the legislature could dissolve a turnpike corporation after twenty years, or sooner if the corporation had earned a twelve per cent profit.²⁶

The grants of toll at set rates, the limits on duration, and legislative reservations of the right to alter tolls on specified conditions reflect important aspects of the

²⁶For a review of turnpike company charters, see Dodd, American Business Corporations, 241-247. For the general act, see Act of March 16, 1805, Jan. Sess., 1805, ch. LXXIX, Mass. Acts and Laws (Young and Minns), 647-652. After 1805, the legislature incorporated by reference the provisions of the general act into each special turnpike charter. The first reservation of the power to alter the charter to reduce corporate revenue was in section three of the charter of the Proprietors of the Androscoggin Boom, Act of Feb. 13, 1789, Dec. Sess., 1788, Mass. Acts and Laws (Adams and Nourse), 773-775. The corporation was to collect lumber floating down the river, and secure it for a fee. It was probably not expected to make a profit from its revenues, but being for the economic advantage of its organizers, it was clearly a business corporation. Cf., Handlin and Handlin, Commonwealth, 106. Davis, American Corporations, II, 345, App. B.

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chartering process and of the whole system of political economy as developed by the legislature and entrepreneurs after 1780. The legislature consistently wanted to protect the interests of travellers and shippers and place an outer time limit on the privileges granted. Private entrepreneurs who petitioned for incorporation and other benefits wanted to know with reasonable certainty not only their privileges, but also the qualifying limitations, conditions, and reservations which might reduce the value of their investments in the future.

In short, every internal improvement charter from the beginning in the 1780's was understood to represent a bargain between the legislature and the entrepreneurs. The integrity and continued functioning of the system required that the legislature continue to honor the terms of the bargain, whatever the legislature's theoretical constitutional power over incorporated enterprises. If the legislature began to renege on its commitments, drastically to reduce privileges or increase burdens, those with surplus capital would shun internal improvements, and would seek alternative investments in domestic and foreign markets. In such a situation, either internal improvements would not be constructed at all, or the state would have to assume the burden of construction and management itself, which would entail an increase in taxes. Consequently, the legislature stayed well within the understood limits of its bargain with investors, and very rarely, if ever, (no case has been found), drastically

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altered a charter to the detriment of an internal improvement corporation. The system, then, operated to give the charter-bargain the force of a legal "contract," as Attorney General James Sullivan suggested in 1792.²⁷ In practice, the charter became the measure of both corporate rights and legislative power.

It is important to note that the development of this political economy of internal improvements was not the result of, or even significantly influenced by, competition between the Federalist and Republican parties. All major groups agreed that an improved transportation network benefited the areas immediately affected and ultimately the whole state. Who would be directly aided and who would be disadvantaged economically by a given project depended almost exclusively

²⁷Sullivan, Path to Riches, 57. Cf., Ibid., 54. The crucial passage is quoted in full in Davis, American Corporations, II, 314. The Handlins acknowledge that the state's specifications of the number of years which a corporation might collect tolls amounted to "commitments" which the state had to honor if the system were to continue to function properly. The importance of these commitments is then discounted: "What the nature was of an omnipotent state's commitments, in this or in any other respect, was irrelevant so long as the Commonwealth honored them to lure capital into the enterprises it sponsored." Commonwealth, 153. Cf., on the reservation clause, Ibid., 152. However, that the legislature kept its end of the bargains is not evidence that the commitments or their "nature" was irrelevant. It is evidence that the legislative commitments were a most important element of the Massachusetts system, of such a nature that they had to be honored. To anticipate a point developed more fully below, when, after 1800, the courts indicated they would protect chartered rights, they were merely giving legal effect to a previous understanding between the state and entrepreneurs, and to a functional imperative of the system. It was a short step from giving legal force to a legislative-entrepreneurial bargain to calling that bargain a "contract."

on patterns of real estate ownership, patterns which were in no way related to partisan divisions. Thus contests over bridges in Boston pitted Federalist against Federalist,²⁸ and ad hoc Federalist-Republican coalitions against one another. The settled operating principle that a charter was the measure of corporate rights and legislative power was the result of political accommodation among the interest groups involved, but not the result of a partisan political accommodation.

Although ultimately reaching much the same result, the political economy of banking corporations developed differently from that of internal improvements. The special role of banks in the economy initially placed them in a class apart from the more numerous canal, bridge, and turnpike corporations. Although entrepreneurs were often reluctant to invest in internal improvements because of their high costs and delayed returns, no such difficulty existed with regard to banks. After the 1790's, when investors had discovered that banks could not only be profitable but also a ready source of credit for favored borrowers, the problem was not to encourage the founding of banks, but rather to keep the number within reasonable limits. Moreover, there was a greater degree of public interest in banking than in internal improvements. Bridge, canal, and turnpike corporations were confined to

²⁸Robert East, "Economic Development and New England Federalism, 1803-1814," New England Quarterly, X (Sept., 1937), 437. Hereafter cited as "New England Federalism."

essentially local construction projects, and the damage that a mismanaged or inadequately regulated corporation could do was limited. Banking operations, on the other hand, potentially affected the whole economy. Attorney General James Sullivan contended in 1792 that unregulated banks chartered for "private emolument" were extremely "dangerous." Not only was the currency of the whole state liable to be debased by the excessive issue of unsecured paper money, but the bank incorporators would "be able to command the markets, monopolize by themselves, or their confidential connections, what articles they please, to fix a capricious estimate on everything, and unduly to influence all the measures of government."²⁹ For this reason, the government initially retained a large, if imprecisely defined, residual control over banking corporations and especially their currency operations. Finally, unlike internal improvements, partisan politics was heavily involved in the evolution of a state banking policy.

Before the founding of the first state bank, the Massachusetts Bank, in 1784, no one in Massachusetts had a very good idea of how to run a large-scale banking institution. In the colonial period, London had tightly controlled the monetary system, and banking in Massachusetts had been confined to small private partnerships. The founders of the Massachusetts Bank accordingly had to write to the Bank of North America in Philadelphia for suggestions on how to

²⁹ Sullivan, Path to Riches, 55-56.

establish and manage their new business. The brief, almost casual charter granted in 1784 by the state indicated a similar ignorance of banking in the legislature. In addition to the usual corporate powers, the charter limited the amount of personal estate which the bank might hold, and reserved to the legislature a right to examine the books. Not much else of importance was said, and several crucial matters were simply not mentioned. There were no restrictions on the amount of capital, nor were there any limits on the amount of notes which might be issued. No provisions were made to safeguard the bank's creditors. And perhaps most important, the charter neither assigned a term of years after which the bank would be rechartered or dissolved, nor did it specifically grant the corporate privileges in perpetuity.³⁰

Although the legislature had probably expected the Massachusetts Bank to serve much of the state's economy, the bank's conservative policy of providing credit almost exclusively to a select group of Boston merchants and financiers led to legislative dissatisfaction. In response to widespread popular complaints about granting such dangerously unrestricted banking privileges for the exclusive benefit of the few stockholders and insiders, the legislature in 1792

³⁰Norman S. B. Gras, The Massachusetts First National Bank of Boston, 1784-1934 (Cambridge: Harvard University Press, 1937), 9-13, 209-214. Hereafter cited as Massachusetts Bank. Massachusetts Bank charter, Act of Feb. 7, 1784, Jan. Sess., 1784, ch. II, Mass. Acts and Laws (Adams and Nourse), 54-56. The charter was primarily a copy of the Congressional charter of the Bank of North America. Dodd, American Business Corporations, 201.

took the extraordinary step of summarily amending the bank's charter over the strenuous objections of the corporation. According to the amendment, notes and loans were not to exceed twice the amount of specie reserves on hand, and the bank was to report to the governor and council on these matters every six months. Notes of under five dollar denominations could not be issued. The bank was forced to sell its stock in the Bank of the United States. Although the bank tried unsuccessfully to get this charter amendment repealed, on the grounds that it abridged the corporation's chartered rights, it never brought the act to a judicial test.³¹

Despite the 1792 amendment which brought the corporation under some measure of control, the issue of the Massachusetts Bank continued to agitate the state, and the question of the extent of the state's power over the institution continued to be raised. Attorney General James Sullivan in a polemical tract entitled Path to Riches, published in 1792 after the passage of the charter amendment, proposed that the legislature completely repeal the bank's charter, and create a single public corporation as a state banking monopoly. Although he acknowledged that the legislature could not repeal the charters of bridge and canal companies, he contended the case of the Massachusetts Bank was different because its charter amounted to a special gift of property

³¹Gras, Massachusetts Bank, 25, 62-63, 79-80, 82, n. 56. Davis, American Corporations, II, 69. Act of March 9, 1792, Jan. Sess., 1792, ch. XLVIII, Mass. Acts and Laws (Adams), 188-189.

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to the corporators, an exclusive privilege from which the state derived no benefit, and which the state could not constitutionally grant. A decade later Sullivan had altered his position somewhat. In 1802, in response to a request from a legislative committee for an official opinion as to whether or not the charter of the Massachusetts Bank was "perpetual," the Attorney General suggested that the failure of the legislature to limit the charter's duration amounted to a grant of perpetuity by implication. Although the absence of judicial authority precluded the rendering of a definitive opinion on the extent of legislative power over "perpetual" corporations, Sullivan continued, it was his understanding that since 1780 the "public opinion" had been that the legislature could not "at pleasure" dissolve incorporated "[b]ridges, turnpikes, canals and aqueducts," or those institutions chartered "for the promotion of religion, morals, literature, and the arts and sciences," or those "for the management of money and the maintenance of corporate credit." Sullivan allowed that public opinion might distinguish banks from all of these, but he indicated that legislative authority over towns, parishes, and quasi-corporate tenancies in common was not questioned.³² Whatever guidance the legislators received

³²Sullivan, Path to Riches, 47, 53-54, 57. "Opinion of the Attorney General of Massachusetts, on the Life of the Corporation, 1802," in Handlin and Handlin, Commonwealth, App. D, 254-261, and esp. 256-258. By failing to note that Sullivan in 1792 carefully distinguished the Massachusetts Bank charter, which he thought repealable, from bridge and turnpike charters, which he contended could not be repealed, the Handlins seriously distort Sullivan's 1792 position. Commonwealth, 254. "Origins of American Business Corporations,"

from this opinion, they delayed action on the Massachusetts Bank question for another decade.

Meanwhile, the Massachusetts Bank had not retained its monopoly in the state. Perceiving the advantages enjoyed by the Massachusetts Bank's members and favored customers, other groups of financiers and merchants began to demand separate banks to serve their interests. The Union Bank of Boston was chartered in 1792 to serve the expanding economy of Boston. Before the end of 1800, five more banks had been chartered to serve mercantile centers outside the capital city. After 1800, the pace temporarily accelerated, as the legislature issued sixteen new banking charters between 1802 and 1806.³³

The increased knowledge of the banking processes gained between 1784 and 1792 enabled the legislature to regulate banking much more closely through the inclusion of detailed provisions in banking charters. Accordingly, all banking charters issued after 1792 contained elaborate regulations, limitations, and restrictions designed to protect

20-21. Cf., Dodd's interpretation of Path to Riches, American Business Corporations, 21, n. 17, 202. The Handlins consequently over-estimate the degree of change which Sullivan's 1802 "Opinion" represented. Commonwealth, xii, 254. At most, the 1802 "Opinion" reflected the idea that bank charters, like bridge, canal, and turnpike charters, were the measure of both corporate privileges and legislative regulative power. This was not a new idea.

³³Davis, American Corporations, II, 70-78. Paul Goodman, The Democratic-Republicans of Massachusetts: Politics in a Young Republic (Cambridge: Harvard University Press, 1964), 40-41, 171. Hereafter cited as Massachusetts. In 1792, the Bank of the United States established a branch in Boston. Dodd, American Business Corporations, 202.

the economy and the public. Equally important, starting with the charter of the Union Bank, all banking charters were of limited duration. By the middle of 1810, all except four bank charters in the state were scheduled to expire between June and October, 1812. This meant that the state could revise nearly its whole banking system in 1812 without doing any violence to banks' chartered rights, which would simply disappear when the charters ended.³⁴

Apart from charter provisions, the state retained a residual power to regulate currency, which the legislature occasionally exercised by general laws applicable to all banks. A 1799 act, for example, forbade all banks, except the Nantucket, to issue any note of under five dollars denomination. The 1799 and related acts were repealed a decade later. An 1809 act also increased damages for banks' failure to redeem their notes on demand as required by law. None of these had a retroactive effect, and none appeared to alter or repeal privileges specifically granted by banking charters.³⁵

³⁴ For a review of the provisions of bank charters, 1792-1806, see Dodd, American Business Corporations, 202-206. The charters of the following banks were not scheduled to expire in 1812: Massachusetts Bank; Portland Bank, chartered for 20 years, Act of June 15, 1799, May Sess., 1799, ch. V, Mass. Acts and Laws (Young and Minns), 298-300; Essex Bank, chartered for 20 years, Act of June 18, 1799, May Sess., 1799, ch. VIII, Ibid., 305-307; Northampton Bank, chartered for 10 years, Act of March 1, 1803, Jan. Sess., ch. LVII, Ibid., 131-135.

³⁵ Act of June 22, 1799, May Sess., 1799, ch. XXXII, Mass. Acts and Laws (Young and Minns), 339. Act of March 4, 1809, Jan. Sess., 1809, ch. XCIX, Mass. Laws (Adams and Rhoades), 502-504. Act of June 20, 1809, May Sess., 1809, ch. XXXVII, Ibid. (Adams, Rhoades, and Co.), 47. Cf., Brown v. Penobscot Bank, 8 Mass. 445 (1812), discussed below. Hereafter cited as Brown.

Because banking was so important to the economy, and because banking privileges were so valuable, the granting of bank charters became the subject of partisan contention. The political complexion of the legislature is thus a matter of some importance. Prior to 1800, the state was in the hands of the Federalists. Bank charters went to Federalist groups, and state banking policies, both permissive and regulatory, were the product of Federalist counsel. After 1800, the Republican party began to rise in strength, and to challenge Federalist domination of the state. The Federalists retained control of the legislature until 1806, when the Republicans gained a slim majority. The Republicans increased their power the next year, but lost control to the Federalists in 1809. After the spring elections of 1810, the Republicans again had a majority, which they managed to retain the following year. In the crucial session of 1812, the Federalists had a strong majority in the House, and the Republicans, who had severely gerrymandered Senatorial districts, gained a more than two-to-one margin in the Senate.³⁶

As the two party system grew in Massachusetts after 1800, the problems of banking policy grew more difficult and more controversial. Serious divisions grew within each party, and between the two, on the question of whether or not to increase the number of chartered banks in the state. Within

³⁶Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic (New York: Oxford University Press, 1971), 215, 220-221, 229. Hereafter cited as Jeffersonian Crisis. Goodman, Massachusetts, 37-42, 179-180. Columbian Centinel, May 30, 1812.

the Federalist party, those groups which already possessed banking charters resisted the extension of banking privileges to anyone else, Federalist or Republican. A majority of Federalists, however, were not associated with an existing bank, and insisted that they, too, should be allowed to exercise banking privileges. In the Republican party, some, such as Attorney General Sullivan, favored a state banking monopoly which would combine state and private capital and thus opposed the chartering of more private banks. Others, less enthusiastic about a state monopoly, simply resisted the increase of the number of incorporated banks, or favored the total abolition of banking corporations and a return to the private partnership system which had prevailed in the colonial period. A significant minority of Republicans, however, wished to have their own chartered banks, or, as a less satisfactory alternative, wished to be allowed membership in predominantly Federalist institutions.³⁷

Between 1802 and 1806, when the Federalists controlled the government, the majority faction of that party succeeded in chartering sixteen new banks. Although all of these appear to have been dominated by Federalist financial interests, at least four were the product of a bipartisan coalition of Federalists and those minority Republicans who favored an expansion of the banking system, and who offered Federalists their support in return for a grant of shareholder status in

³⁷Goodman, Massachusetts, 41, 170-171, 177-178. East, "New England Federalism," 434-436.

the new institutions.³⁸

As the Republicans took control of the Massachusetts legislature in 1806, the policies of the national administration resulted in a cessation of trade to Europe and a depression in New England. Many Massachusetts banks were forced to suspend payments, and large numbers of worthless notes, especially from banks outside Boston, plagued the economic system. Under these circumstances, those Republicans who opposed the expansion of the number of bank charters dominated their party. Those Federalists who had recently received charters from the legislature joined their colleagues who were associated with older institutions in opposing further expansion. As a result, the Republican faction which advocated the grant of new banking charters to worthy partisans remained for the time being a minority. No new bank charters were issued by the legislature before 1811.³⁹

³⁸ Goodman, Massachusetts, 170-171. East, "New England Federalism," 434-436.

³⁹ Goodman, Massachusetts, 175-177. Dodd, American Business Corporations, 206. Goodman, in attempting to characterize the Republican party in Massachusetts in the early national period, over-emphasizes the degree to which the party represented upward-mobile commercial groups challenging an established Federalist elite in the field of banking before 1811. Massachusetts, 170-171, 176, 178. First, the most serious and successful challenge to the established banking elite came from within the Federalist party in the years 1802-1806. Thus, the Federalist party was the party of aspiring bankers in those years. Second, even when the Republicans did control the government after 1806, not a single new banking charter was issued for five years. Cf., David Hackett Fischer, The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy (New York: Harper and Row, 1965), 203-211, who cites Goodman and in general subscribes to his theses. Hereafter cited as American Conservatism. An alternative

By 1811, conditions were ripe for compromise between the dominant factions within the Republican party and for decisive action within the Republican-dominated legislature. Nearly all Massachusetts bank charters were to expire before the end of 1812, and it became apparent that the Bank of the United States would likewise cease to exist. By failing to renew the old Federalist charters, and merely substituting new banks controlled by Republicans, the party could satisfy the anti-expansionist sentiment in its ranks while at the same time meeting Republican demands for new charters. Consequently, the 1811 legislature rejected petitions from existing Federalist banks for renewed charters, and began the process of creating new Republican banks by creating the Merchants Bank of Salem and the huge State Bank. The charters of these institutions were similar in many respects, and more elaborate than those granted by previous legislatures, containing several new and more stringent requirements

analysis of Massachusetts politics, suggested by Ellis, Jeffersonian Crisis, 184-229, finds the Republicans split into "moderate" and "radical" factions on the issues of judicial and legal reform, with state policy usually being determined by a coalition of moderate Republicans and moderate Federalists. A major problem in applying this analysis to banking, however, is the difficulty of characterizing the various positions. Those Republicans who wished to abolish all incorporated banks could fairly be labelled radicals. But were those Republicans who favored a state banking monopoly which combined public and private capital radical or moderate? Similarly, how are Republicans who opposed the state monopoly but favored the expansion of charters to be characterized? If the expansionist Republicans of 1806-1810, a minority in their party, were radical, were the expansionist Federalists of 1802-1806 likewise radical? American politics are infinitely complex, and Ellis's quadratic analysis breaks down at some points, just as more conventional dualistic analyses.

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and regulations. Both charters were to expire in 1831.⁴⁰

Unfortunately, the Republican plans to create a series of new banks were not completed before the spring elections of 1812. At that time, the Federalists won control of the House, although the Senate remained strongly Republican. An impasse quickly resulted. The House passed a bill to renew the charters of the existing Federalist banks. The Senate easily rejected the House bill, and passed a series of bills to create new Republican banks. The House indignantly rejected the Senate's bills. Finally, a Committee of Conference on the subject of Banks reached a compromise which was acceptable to both houses. Most of the banks due to expire were reorganized and several new banks were created. Except for certain matters such as size and relationship to the state, all these banks, new or revived, were subject to the same charter provisions as the State Bank. This meant added charter restrictions for some existing banks, but had the advantage of subjecting all the banks to the same regulations. Furthermore, all charters were to expire at the same time in 1831, which would give the legislature the opportunity to undertake a comprehensive revision of the banking system at that time with no violation of chartered rights.⁴¹

⁴⁰Dodd, American Business Corporations, 207-209. Goodman, Massachusetts, 179-180. Charter of Merchants' Bank of Salem, Act of June 25, 1811, May Sess., 1811, ch. LXXXII, Mass. Laws (Adams, Rhoades and Co.), 494-500. Charter of the State Bank, Act of June 26, 1811, May Sess., 1811, ch. LXXXIV, Ibid., 501-507.

⁴¹Columbian Centinel, June 10, 17, 20, 24, 1812. Charters of 20 banks, Acts of June 23, 1812, May Sess., 1812, chs. XXXIV-LIII, Mass., Laws (Russell, Cutler and Co.), 47-125.

The Massachusetts Bank, the oldest bank in the state and an elite Federalist institution, presented a special problem. It was the only banking charter which was not of limited duration. Moreover, all other banks were subject to modern, stringent charter restrictions, while the Massachusetts Bank's lean 1784 charter, even as amended in 1792, left the institution a remarkably wide freedom of action. Understandably, the Republicans were particularly hostile. In 1812, a summary repeal of the bank's charter narrowly failed to pass the Senate when the Senate's President voted to break an eighteen to eighteen tie. Nonetheless, a provision relative to the Massachusetts Bank was included among the compromise banking measures of June, 1812. The charter was to be repealed as of March 1, 1813, unless the corporation agreed to surrender its charter in 1831, and abandon all claims to perpetuity.⁴²

The Bank was placed in a difficult position. It could stand on constitutional principle, taking the state to court to challenge the constitutionality of the legislature's actions. However, chances for success in court were not very good. In Brown v. Penobscot Bank, decided during the March term, 1812, the Massachusetts supreme court had strictly construed the bank's charter to find that the corporation was not entitled to privileges which had not been expressly

⁴²Gras, Massachusetts Bank, 83-84. Act of June 23, 1812, May Sess., 1812, ch. XXXIII, Mass. Laws (Russell, Cutler and Co.), 46-47.

granted by the legislature. Since the Massachusetts Bank had never been expressly granted perpetuity, but claimed a grant by implication, its case was uncomfortably close to Brown. Wisely, the Bank accepted the 1812 act, choosing an assured existence over the risky assertion of constitutional principle.⁴³

The compromise of 1812 signalled the end of the first era of Massachusetts banking legislation. One result was that the Federalists could no longer claim nearly exclusive control of the banking system, but, on the other hand, the Republicans would not completely replace the Federalists either. In a larger sense, the compromise also represented a political and institutional settlement of the troublesome question of the relationship between the government and chartered banks. Essentially, banks could enjoy all the privileges and immunities specifically granted by their charters. The legislature learned that it could reasonably guard both general public and narrow political interests by including regulations and restrictions in charters and by limiting the length of corporate existence. In addition, the legislature retained a residual control over matters not fully covered by charters, such as the currency mix and the legal penalties for banks' failure to obey charter regulations. Despite more than a quarter century of agitation over banks and banking, then,

⁴³Brown, 8 Mass. 445 (1812). Gras, Massachusetts Bank, 84-85. The bank directors may have had inside information as to the disposition of the supreme court from Federalist Chief Justice Theophilus Parsons, who was a stockholder in the Massachusetts Bank as late as July, 1810, Ibid., 548, and who may have still held shares in 1812.

the summary alteration of the charter of the Massachusetts Bank in 1792 remained a unique event, a product of the early experimental period which was never to be repeated.

It is now possible to summarize the whole course of legislative development of the Massachusetts political economy by the legislature and private entrepreneurs and financial interests. The corporation was merely the organizational tool by which self-interested entrepreneurs could make money, and by which the state could avoid spending money, or avoid, in the case of banks, the performing of functions which it was politically inconvenient to undertake. Although many constitutional details remained to be worked out, there came to be general agreement that the charter was the measure of corporate rights and duties and of retained legislative power. Arguments developed for the most part over matters on which charters were silent and ambiguous. In the case of internal improvements, the system operated to give charters the aspect, and security, of formal contracts. Private entrepreneurs offered to construct facilities in return for the grant of incorporation and permission to take tolls; and if the state accepted, the terms of the bargain were embodied in the charter. In general, the legislature honored the terms of charters because it wished to encourage the flow of private capital into internal improvements. An alternative course would have retarded the construction of economically desirable transportation facilities. In the case of banks, the charter became the measure of corporate rights and legislative power

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for the opposite reason. Banking privileges were so valuable, and their exercise so important, that they were the subject of more or less constant political agitation from the mid-1780's on, with commercial and financial groups in both parties demanding access to the banking system for themselves and exclusion or restriction of their rivals. The compromise which resulted from the chaos of 1812 allowed all major groups a share in the banking system, and included a tacit agreement that henceforth charter regulations would be roughly standardized and charter privileges carefully respected while they lasted. The security which an individual banking corporation could find in its charter because of these understood limits on government action suggested that the banking charter, too, had the aspect of a contract with the legislature.

There is no evidence that the Massachusetts courts played more than a marginal role in the development of this system during the quarter century following 1780. The peripheral role of the courts was due in part to the relative absence of important cases involving corporations, and in part to the total absence of official published reports, which meant that the few cases that were decided had little permanent precedential value.

The situation changed somewhat after 1804, when supreme court cases began to be officially reported, and when more cases involving corporations began to arise. An examination of the early case law will reveal, however, that the supreme court confined itself to rationalizing

the system of political economy as it had developed since 1780, and to harmonizing the system with what it perceived to be the rights of individuals.

The first important corporation case, Wales v. Stetson, decided in 1806, provided the Massachusetts supreme court with an opportunity to announce its opinion on the subject of legislative alteration of chartered privileges. The Blue Hill Turnpike Corporation had been chartered on March 7, 1804, and authorized to erect a toll gate "near the dwelling-house of Joseph Hunt." The corporation placed the gate near Hunt's house, but placed it on an "ancient publick highway" which crossed the turnpike. Stetson, a local resident who used the public road, refused to pay toll at the gate, and later chopped it down. Wales, the treasurer of the turnpike corporation, sued Stetson in an action of trespass.⁴⁴

Attorney General Sullivan and J. Richardson defended Stetson. They maintained that the legislature could discontinue public roads only by express words, which were absent from the charter, and not by implication. The corporation's toll gate was thus a mere common nuisance which Stetson had a right to abate. Richardson added that the general turnpike statute passed in 1805 prohibited the erection of turnpike gates on old public roads. The legislature did not confine the general statute of 1805 to

⁴⁴Wales v. Stetson, 2 Mass. 143 (1806). Blue Hill Turnpike charter, Act of March 7, 1804, Jan. Sess., 1804, ch. LXV, Mass. Acts and Laws (Young and Minns), 443-447.

"future grants of turnpike roads," so Blue Hill was bound by its provisions even though the corporation had been specially chartered a year before the passage of the general law. Sullivan likewise maintained that Blue Hill was bound by the 1805 act, although he took a slightly different ground than his colleague. The 1805 act was neither a charter amendment nor a new restriction on Blue Hill's chartered rights. Rather, the 1805 act was "unquestionably intended to be explanatory of all past statutes establishing turnpikes." Neither Richardson nor Sullivan, so far as the record shows, contended that the Blue Hill charter standing alone forbade the turnpike from placing its gate on the old public highway.⁴⁵

Whitman, counsel for the corporation, contended that since Blue Hill had placed its gate near Hunt's house, it had fulfilled the requirement in the charter. The general turnpike act of 1805, he added in response to the opposition, could not "operate to narrow prior grants of rights or to affect the mode of exercising such rights," without "exceeding constitutional restrictions upon the legislature."⁴⁶

Chief Justice Theophilus Parsons, who had only recently taken his seat, delivered the opinion of the court in favor of Stetson. He relied exclusively on Blue Hill's act of incorporation. The "provisions of any statute," said Parsons, laying down a broad rule, "ought to receive such a reasonable construction, if the words and subject matter will admit

⁴⁵2 Mass., 144-145.

⁴⁶Ibid.

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of it, as that the existing rights of the public, or individuals, be not infringed." In this case, it was not "necessary to give a reasonable effect to that statute" that Blue Hill be allowed to cut off the old public highway. The gate thus being a "public nuisance, the defendant had a right to abate it."⁴⁷

Since Parsons had relied on grounds which had not been directly urged by counsel, he was under some obligation to explain why the court ignored the 1805 general turnpike statute in reaching its decision. "After considering the several points made in this cause by counsel," he wrote, "[W]e are . . . satisfied that the rights legally vested in this, or in any corporation, cannot be controuled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." As no such reservation clause appeared in the original Blue Hill charter, the conclusion which followed was that the 1805 general statute could not be given retroactive effect. Although this broad restriction on legislative power was technically, perhaps, a dictum and thus open to future challenge, the opinion itself and the legal context in which it was delivered indicate that the court was announcing in advance the general standard it would apply should an appropriate case arise.⁴⁸

⁴⁷Ibid., 146.

⁴⁸Ibid. The Handlins do not mention the Wales decision. This is the more extraordinary since their book purports to be an intellectual history. Even a dictum by the

The judicial declaration that the legislature could impair vested corporate rights only if it had expressly reserved a power to do so was, of course, merely an elaboration of the Massachusetts system of political economy and not at all a fundamental change. Because the functioning of the system, at least with regard to internal improvements, depended on the honoring of bargains struck with private entrepreneurs, the legislature very rarely, if ever, directly impaired corporate privileges. At the same time, the legislature frequently reserved some control over the most sensitive aspects of corporate activity, such as the collection of tolls.

After 1806, the legislative practice changed very little. Whether Wales was theoretically good law or not, the legislature carefully stayed within the judiciary's restrictions. Reservation clauses were sometimes broader and more elaborate after 1806, but this was in part an extension of a general trend toward more detailed special charters. Section seven

supreme court would seem to be an index of the prevailing conception of the corporation and its relation to the legislature. Two years after Wales, the court laid it down as a rule that "[e]very owner of a water mill or dam holds it . . . under the limitation, that a sufficient and reasonable passage way shall be allowed for the fish." The court added that "[i]f the government should, in its grant of a mill-privilege, expressly or by necessary implication, waive this limitation, it would be bound." Stoughton v. Baker, 4 Mass. 522, 528 (1808). This dictum, as that in Wales, indicates that the court was willing to hold as a matter of law that the legislature was bound to respect the terms of a grant of a valuable privilege, but that the court would strictly construe such grants to protect competing interests.

of the March 3, 1809, "act for defining the general powers and duties of Manufacturing Corporations," for example, contained the broadest possible reservation clause. The legislature reserved the power to repeal all or part of any manufacturing corporation charter at any time and also to "make further provisions, and regulations for the management of the business of the corporation." An 1808 amendment to the general turnpike statute of 1805, on the subject of damages to be paid for the taking of private land, extended specifically to all turnpike corporations which would be created in the future, and to all turnpikes created before 1808, the charters of which "expressly reserved to the legislature" "a right to limit and restrict their power" in the matter of damages.⁴⁹

Whatever the precise status of the reservation clause, however, the Wales decision clearly established that the court regarded the charter as the measure of corporate rights and that the charter would be construed to favor the "existing rights of the public, or individuals." In Brown v.

⁴⁹General Manufacturing Corporations Act, Act of March 3, 1809, Jan. Sess., 1809, ch. LXV, Mass. Laws (Adams and Rhoades), 464-467. By its terms, the reservation clause applied to "any corporation." Given fullest possible effect, the clause would apply to all corporations chartered before 1809, and would also apply to all corporations, manufacturing and non-manufacturing, business and non-business, chartered after 1809. However, no instance has been found of a lawyer, judge, or publicist who suggested such a broad construction. The clause was universally assumed to apply only to the specific subject of the act in which it was contained, manufacturing corporations chartered after 1809. Amendment of the General Turnpike Corporations Act, Act of March 9, 1808, Jan. Sess., 1808, ch. CXII, Ibid., 343-344.

Penobscot Bank, decided in 1812, the court extended these doctrines to banks. The legislature, disturbed that many banks, and especially those "country" banks outside the major trading centers, often refused to redeem their notes on demand, although required by charter to do so, had taken action to remedy the situation. By an act of 1809, all banks which refused to pay their notes on demand would be liable for damages of two per cent per month in addition to the standard six per cent per year normally assessed in damage actions. Brown presented a large amount of notes to the Penobscot Bank, and when the institution refused redemption, he sued for damages under the new law.⁵⁰

Attorney General Perez Morton, appearing for the bank, argued that the corporation's charter, while saying nothing specific about damages, nonetheless contained an "implied condition" that the bank would have to pay the usual six per cent per year damages for failure to redeem its notes. Since the charter containing the implied condition was a "contract" between the legislature and the corporators, the 1809 act increasing damages was "void as impairing the obligation of a contract."⁵¹

Prescott, for the plaintiff, rejected the idea that

⁵⁰Brown, 8 Mass. 445 (1812). The statute in question was Act of June 20, 1809, May Sess., 1809, Ch. XXXVII, Mass. Laws (Adams, Rhoades and Co.), 47. On the problems of note circulation and redemption, see Handlin and Handlin, Commonwealth, 117-119, 252-253.

⁵¹8 Mass., 448.

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any contract between the government and the corporation figured in this case. The 1809 act in question was merely "a rule or measure of damages, . . . which, being wholly prospective in its operation, violates no principle of the constitution." Furthermore, Prescott argued, "[s]o far from this being a measure tending to impair the obligation of contracts, its whole effect is to strengthen the obligation."⁵²

The court upheld the act of 1809, and awarded the plaintiff the damages authorized by the act, extending the doctrine announced in Wales. Since the 1809 act "had no retrospective effect," said the court, "there was no ground of complaint on the part of the banks." The act had taken away nothing which the banks were specifically granted by their charters, and the court refused to exercise its power of construction to fill in the blanks to create constitutionally protected vested rights which might be highly detrimental to the public.⁵³

The opinion in Brown further indicated that the court gave a great deal of weight to the functional imperatives of the banking system. Considering the system as a whole,

⁵²Ibid., 448-449.

⁵³Ibid., 449. The act of June 23, 1812, relative to the Massachusetts Bank, forced the bank to accept a time limit on its charter by March 1, 1813, or be dissolved. The Brown decision, handed down during the March term, 1812, may have been one reason the bank did not challenge the constitutionality of the act. If the court adhered to the policy of strict construction followed in Brown, it would find no implied guarantee of perpetuity in the 1784 charter, which was silent on the matter of duration.

the court found no essential conflict between the interests of the banks and the interests of the public. "Punctuality and promptness in meeting every demand made on [a banking] institution is essential to its very existence; and a failure in this respect, now that bank bills form almost exclusively the circulating medium of the country, is a publick inconvenience of great extent." The legislature therefore had not only the power but the "duty" to correct "an evil, which at the time of passing the law had increased to an alarming degree." The court, then, would allow the legislature wide latitude to remedy any "publick inconvenience," so long as the legislature honored privileges specifically granted or necessarily guaranteed by charter.⁵⁴

In 1815, the court again applied its policy of strict construction in the case of Portland Bank v. Apthorp. In 1812, the legislature had for the first time levied a tax of one per cent per year on the paid-in capital of banks. The Portland Bank, whose 1799 charter said nothing one way or the other about taxation, challenged the constitutional authority of the legislature to tax the bank. The court, stretching the language of the Massachusetts constitution, sustained the tax act of 1812. Chief Justice Isaac Parker, who wrote the opinion for the court, also noted that the Portland Bank's charter contained "no express waiver" of the power to tax, "nor . . . any strong implication of one." The charter was "a privilege to manage their business,

⁵⁴8 Mass., 449.

not an exemption from duty." The tax was, therefore, "perfectly consistent . . . with the rights of the corporation."⁵⁵

In Portland Bank, as in Wales and Brown, a corporate charter had been at issue. Although attorneys argued in Brown that a corporate charter was a contract within the obligation of contracts clause of the federal constitution, the court simply ignored the contention, and treated the problem as one of statutory construction and state constitutional limitations. In so doing, however, the Massachusetts court arrived at much the same results as if it had treated the charter as a contract. This is evident from a comparison of Portland Bank with the case of Providence Bank v. Billings, decided by the United States Supreme Court in 1830, after the Dartmouth College decision had held that a charter was a contract. The pertinent facts of Providence Bank were virtually the same as those of the earlier case. The Bank had been chartered by the Rhode Island legislature in 1791. Nothing was said about taxation. In 1822, Rhode Island levied a tax on the paid-in capital of all state banks. Providence Bank challenged the tax. After the state court sustained the legislative act, the Bank appealed to the United States Supreme Court, complaining that the tax was contrary to the charter and thus an unconstitutional impairment of the obligation of contracts. Chief Justice Marshall

⁵⁵ Portland Bank v. Apthorp, 12 Mass. 252, 254, 257 (1815). Portland Bank charter, Act of June 15, 1799, May Sess., 1799, ch. V, Mass. Acts and Laws (Young and Minns), 298-300. Bank tax, Act of June 23, 1812, May Sess., 1812, ch. XXXII, Mass. Laws (Russell, Cutler and Co.), 45.

wrote the opinion for the court upholding the Rhode Island law. He stated that the power to tax was essential to government and extended to "all persons and property belonging to the body politic." Although the state might grant a tax exemption, Marshall said, "[a]ny privileges which may exempt [a corporation] from the burthens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." Since the charter did not contain an express exemption from taxation, Rhode Island had "made no express contract which has been impaired by the act" in question. The only essential difference between Marshall's opinion in this case and Parker's opinion in Portland Bank is that the former rested on the federal contract clause and the latter did not.⁵⁶

It is not entirely clear why the Massachusetts court treated charters as contracts but never took the step of formally labelling them as such. At least two reasons can be suggested. In the first place, the Massachusetts court had no compelling reason to call charters contracts. The court could achieve the results it wanted on general principles, without locking itself into the narrow and complicated technicalities of contract law. In the second place, to

⁵⁶Providence Bank v. Billings, 4 Peters 514, 560, 562, 563 (1830). Hereafter cited as Providence Bank. Cf., Charles River Bridge, 11 Peters 420 (1837). The Handlins write, "The application of the contract conception to the relations between state and corporations seemed, as late as 1812, 'too fanciful to need any observation,'" citing the Brown case and quoting the words of Prescott without indentifying him as counsel. Commonwealth, 155, and n. 78.

hold that a charter was a contract would almost automatically translate every question of the public law of corporations into a federal question, and would at the very least invite appeals to the United States Supreme Court in cases such as Wales, Brown, and Portland Bank. Massachusetts judges did not have to be as militant states rightists as the Virginians to desire to render final decisions in essentially local matters.

Wales and its offspring had established in a general way the limits of legislative power to affect adversely the chartered rights of corporations. An extremely important case, Ellis v. Marshall, decided in 1807, gave the court an opportunity to establish general standards to control the degree to which the legislature could adversely affect individual rights in order to advance the interests of a corporate enterprise.⁵⁷

The Ellis case involved the Front Street Corporation, the group incorporated on March 6, 1804, to build a street from the terminal of the South Boston Bridge north toward the center of Boston. The charter itself, it will be recalled, was passed by the legislature to give effect to a private agreement compromising the conflict between the land and wharf owners of the South End Association, and the real estate developers who were promoting the South Boston Bridge. The charter incorporated by name a number of individuals, including William Marshall, stated to be owners of the

⁵⁷Ellis v. Marshall, 2 Mass. 269 (1807).

lands over which the new street would pass. Provisions similar to those for the proprietors of common lands set down the mode of calling meetings, and other procedural details, and empowered the majority to assess taxes to pay for the street. According to section three of the charter, if an individual owner refused to pay his tax, the corporation could sell as much of the individual's land as necessary to meet the assessment. Unlike the proprietor of a common field, a member of the Front Street Corporation was given no appeal to a court if he felt he was assessed more than his share. The corporation, furthermore, was not given the power of eminent domain.⁵⁸

Although William Marshall was an owner of lands along the Front Street route, and had been named a corporator by the charter, he had refused from the beginning to recognize the project's existence in any way. He had not subscribed to the original petition requesting the charter, and had not come forward to oppose it. After the corporation was organized, he attended no meetings. When he also refused to pay his assessment, the Front Street Corporation sold part of his land adjoining the street to Ellis, following

⁵⁸Front Street Corporation charter, Act of March 6, 1804, Jan. Sess., 1804, ch. XLVIII, Mass. Acts and Laws (Young and Minns), 418-421. On the construction of Front Street itself, see Edward Stanwood, "Topography and Landmarks of the Last Hundred Years," in The Memorial History of Boston, Including Suffolk County, Massachusetts, 1630-1880, ed. by Justin Winsor, 4 vols. (Boston: James R. Osgood and Company, 1881-1883), IV, 31. Whitehill, Topographical History, 77-78.

the procedures established by section three of the charter.⁵⁹

Ellis had to bring an action of ejectment against Marshall to enforce the sale. Attorney General Sullivan and his colleague, Amory, representing Marshall, stated that their client had never consented to be a corporator, and had never accepted the grant of incorporation. Although they conceded that the state, or a corporation specifically granted the power of eminent domain, might take land on the payment of a just compensation, they contended that the legislature could not, without an individual's consent, and with no provision for compensation whatever, subject his lands "to the will of a corporation," to be sold at the corporation's discretion.⁶⁰

Ellis replied that Marshall must have had constructive notice of the organization of the project, considering the public uproar, and had therefore to be deemed to have consented to the act of incorporation. Even if he had no such notice, the legislature had the power to subject Marshall's lands to assessment when the improvement was for his benefit. This happened every day in the case of common fields, where a minority could call a meeting, and a majority could levy taxes. Similarly, in the case of marshland, a majority of the owners could apply to a court for the appointment of commissioners of sewers, who could enforce assessments on the owners whether the owners consented

⁵⁹2 Mass., 270-271. ⁶⁰Ibid., 271-273.

individually or not.⁶¹

Justice Isaac Parker, for a unanimous court, delivered the opinion in favor of Marshall. Either a town, or any corporation having the power of eminent domain, might take an individual's land upon the provision of compensation. This case, however, was different. The incorporation of Front Street was "a grant or charter," "a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates. . . . [I]t was never before known," continued Parker, that the legislature had "power over the person, to make him a member of a corporation, and subject him to taxation, nolens volens, for the promotion of a private enterprise." Nor could those interested in special projects insert the names of individuals into petitions or charters "by intrigue or mistake," and thus prevail upon the legislature to "press into the service" of the new corporation "those whose lands might be wanted." Because the Front Street charter was a grant, then, and because any man might "refuse a grant," even if acceptance of the grant would "be highly beneficial to him," Marshall had to give his assent, "either express or implied," before he could be subjected to the provisions of the charter. No such consent being found, Marshall got to keep his lands.⁶²

⁶¹Ibid., 273-275.

⁶²Ibid., 276-278. The legislature had itself referred to a corporate charter as a "grant" in section eleven of the General Turnpike Corporations Act, Act of March 6, 1805,

Justice Parker was aware of the importance of the Ellis decision, and was careful to state the reach of the ruling. On the one hand, Parker made it clear that the case was not to affect the organization of common fields or the appointment of commissioners of sewers. Both of these cases differed "materially" from the Front Street Corporation. "The act relative to common fields" was "predicated upon the assent of all who are to be affected by it; and that which provides for the appointment of commissioners of sewers gives an eventual trial by jury to all questions arising under it." Moreover, the acts relative to common fields and sewers were "public acts, promotive of general convenience, and operating equally upon all citizens whose property is intended to be secured or improved by them," whereas the Front Street charter was, again, "obtained at the solicitation of individuals for their emolument or advantage." On the other hand, Parker specifically extended the Ellis decision to cover not only real estate development corporations like Front Street, but "all incorporations to make turnpikes, canals, and bridges," since these, too were grants to enable individuals to realize a profit.⁶³

Jan. Sess., 1805, ch. LXXIX, Mass. Acts and Laws (Young and Minns), 647-652. Ellis merely gave formal recognition in the case law to what the legal system already acknowledged.

⁶³2 Mass., 279. The organized proprietors of common fields are discussed above. For the act providing for the appointment of commissioners of sewers, see Act of Feb. 26, 1796, Jan. Sess., 1796, ch. XXXVIII, Mass. Acts and Laws (Adams and Larkin), 562-564. The distinction drawn by the court was in part analytically unsound, since acts on common fields and sewers, though general in operation, were as much

Although Parker's legal category of incorporated "private enterprise" was not formulated with analytical precision, it did rest on functional distinctions which were themselves based squarely on the realities of the chartering process and of the interests and composition of internal improvement corporations. The Front Street charter was little more than the legislative sanction of a private agreement between warring groups of entrepreneurs. At the time of the Ellis decision, the controversy over the location of the Canal Bridge was still very much alive and in the press, emphasizing the power wielded by speculators in the legislature. A year before, the court had decided Wales, in which a turnpike corporation had illegally placed a gate across a public road in an effort to increase its revenues.⁶⁴ All of these situations highlighted the existence of special economic interests which were eager to take advantage of the state and the public at large for private economic gain. Under these circumstances, it would have been indefensible for the court to allow the legislature to press individuals into the service of corporations on the grounds that the corporations were "agencies" of the state.

In a larger perspective, the problem presented in Ellis was merely a variation of that which had arisen in

for the "emolument or advantage" of individuals as the Front Street and similar charters which authorized particular projects. Cf., Handlin and Handlin, Commonwealth, 140, 155-156.

⁶⁴Wales, 2 Mass. 143 (1806).

connection with the organization of common fields. Essentially, the problem for the state, whether represented by the legislature or the court, was to balance the conflicting economic interests of groups with those of individuals. In the case of common fields, the legislature gave the organization the edge, but checked the power of the majority by allowing an aggrieved individual to appeal to the courts, or even to secure partition of his lands. In the case of Front Street, on the other hand, the corporation had all the power. Marshall's land had already been partitioned, he had no appeal against the size of his assessment, and he had none of the procedural safeguards built into an eminent domain proceeding. The court's decision that the legislature could not conscript Marshall into the Front Street Corporation without providing him more protection was thus merely an application of the values implicit in the common fields system to the newer real estate development and internal improvement corporations. In terms of economic and legal values, then, Ellis reveals a substantial continuity between the late colonial and early national periods.

Ellis was soon followed by other cases in which the court explored the implications of its conclusion that internal improvement corporations were to be treated primarily as profit-making organizations. In Commonwealth v. Cambridge, decided in 1810, the court put another limit on the actions the government could take against an individual in favor of private enterprises. The case grew out of the rivalry

between Craigie's Canal Bridge and the West Boston Bridge over the location of new public roads through the town of Cambridge. Each time one group would propose a new road to its bridge, the other would oppose it as detrimental to its interests. The legislature had given the authority to lay out new roads to the courts of common pleas, which acted on the applications of individuals or groups. If the court granted a request, it ordered the town to purchase the lands at public expense, and to open and maintain the new road. It appears that Craigie occasionally tried to influence the court by formally promising to pay one-half of the cost of opening a road to his bridge so that the common pleas judges would not be dissuaded by public expense from ordering the road applied for. When the West Boston interests complained of this practice, the supreme court agreed, calling Craigie's action "irregular," and ordering it not to be repeated. Although private property rights would have to give way to the public convenience on the provision of a just compensation, said the court, an individual was "injured" when a road was opened across his land "against his consent . . . not for the sake of the publick; but for the sake of private persons or corporations who invade his rights for their own benefit, but in the name of the publick." In the future a jury could discontinue a public road whenever they were satisfied that "private emolument, and not the interests of the inhabitants, had caused the way to be located." As in Ellis, the court contrasted the narrow, pecuniary

interests of private persons and corporations with the rights of individuals, which the court would protect, and the interests of the public, which the court would honor.⁶⁵

A distinction between business and other types of corporations was at least implicit in the Ellis and Cambridge decisions. Suits by individuals against business corporations gave the court the opportunity to be more explicit. In Commonwealth v. Blue Hill Turnpike Corporation, decided in 1809, the supreme court reviewed a lower court judgment which authorized the collection of a damage award from individual stockholders if the turnpike corporation itself did not pay the judgment in six months. Admitting that damages awarded for the taking of land for a public highway could be collected against individual inhabitants of towns, the court nonetheless refused to sanction this process in the case of damages assessed for land taken by a turnpike corporation. The town had general authority to tax its citizens, whereas the turnpike corporation was limited to selling the shares of those who failed to meet assessments. More important, the citizen whose property was taken to satisfy a judgment against the town had, by statute, the right to sue the town for indemnity. The individual stockholder had no such remedy against the turnpike corporation. Thus, towns and business corporations were different, and

⁶⁵ Commonwealth v. Cambridge, 7 Mass. 158, 166-167 (1810). On the competition between West Boston and Canal Bridge interests, see Paige, Cambridge, 199-203. Cf., Craigie v. Mellen, 6 Mass. 7 (1809).

judgments against the latter could be collected only against the corporate funds.⁶⁶

The same line of reasoning was followed in Riddle v. Proprietors of Locks and Canals on the Merrimack River, decided in 1810. Riddle had lost his barge and part of his cargo because of the failure of the corporation to maintain its canal at the depth required by the charter. When Riddle sued for damages in an action of trespass on the case, the proprietors replied that such an action would not lie against a corporation at common law. The court admitted that a "private action" for breach of duty could not be maintained against towns and counties, the inhabitants of which were "quasi corporations," "invested with particular powers without their consent," and totally lacking in special corporate funds. Such "proper aggregate" or "regular" corporations as the canal company, on the other hand, were "supposed to have a corporate fund," and this fund could be reached in a private action for damages for breach of duty. This distinction between business corporations and incorporated or quasi corporate towns and counties was thus derived in large part from real, as opposed to merely legal differences between the two types of corporations. Business organizations had a corporate fund which could be reached; public corporations had no such fund, and, being created

⁶⁶ Commonwealth v. Blue Hill Turnpike Corporation, 5 Mass. 240 (1809). Cf., Andover and Medford Turnpike Corporation v. Willard, 5 Mass. 80 (1809).

to perform a wide variety of governmental functions, were subject to different statutes and legal liabilities.⁶⁷

After Riddle, only the Brown and Portland Bank decisions, discussed above, remained for the court to complete in case law the basic outline of the Massachusetts system of political economy with regard to business corporations. The results of the cases can be easily summarized. The court, finding distinctive attributes and functions in business corporations, easily distinguished them from counties and towns. Incorporated businesses were merely private enterprises, self-interested, for profit, with a corporate fund usually available to satisfy damage judgments. Incorporated towns and counties, on the other hand, had a wide variety of governmental functions, had no special corporate fund, and consequently were subject to a special set of statutes. Organized Proprietors of common fields were in turn distinguished on the basis of peculiar characteristics and functions from other business as well as governmental corporations. The legislature could both aid and regulate standard business corporations so long as appropriate procedures were followed to secure both public and private rights. The legislature could, for example, authorize a business corporation to take the land of an individual on the provision of just compensation, but the legislature could not force a man to become a member of an incorporated private enterprise against

⁶⁷Riddle v. Proprietors of the Locks and Canals on the Merrimack River, 7 Mass. 169 (1810).

his will. Furthermore, although the legislature could not arbitrarily abridge corporate rights or privileges specifically granted by charter, it could with a little foresight adequately provide for regulation in the public interest by limiting the duration of the charter or by reserving the power to alter, amend, or repeal all or part of the charter itself. Finally, the courts construed charters strictly against the corporations and liberally in favor of the state, refusing to hear corporate pleas that every benefit enjoyed necessarily represented a legally vested right whether or not it was specifically guaranteed by charter.

It is apparent that the court did not use its power of judicial review to work any fundamental or essential change in the Massachusetts system of political economy as it had been developed since 1780 by the legislature and private entrepreneurs. Although the court restricted the means available to the legislature both to aid and to regulate business corporations, the focus of the decisions and the attention to functional imperatives make it clear that the primary goal of the court was to rationalize and perfect the system, not to alter or remodel it in terms of abstract doctrines of vested rights. Furthermore, when it restricted both governmental and corporate infringements on the personal or property rights of individuals, the court was merely seeking to harmonize the system of political economy with the essential individualism of the common law tradition and constitutional bill of rights. The early court left

the essential features of the system intact, and allowed both legislature and corporation ample alternative means to advance both public and private interests.⁶⁸

Justice Joseph Story of Massachusetts, appointed to the United States Supreme Court in 1812, was the greatest exponent of his state's system of political economy at the national level. Story's career had given him an intimate association with the Massachusetts system. Admitted to the state's bar in 1801, Story very quickly became prominent in his profession. Before he went to the Supreme Court in 1812, Story had argued at least thirty-six cases before the state Supreme Judicial Court and the important case of Fletcher v. Peck in Washington. In 1805, he was elected to the state House of Representatives as a Republican where he became a leader of his party. After serving in Congress for one session in 1808-1809, Story returned to Massachusetts, and was re-elected to the state's House of Representatives, where he became speaker in January, 1811, the year the legislature began reform and expansion of the banking system. Although Story went to the Supreme Court early in 1812, he maintained close business and professional ties with the state. He was an incorporator of the Merchants' Bank of Salem, chartered in 1811, and President of the bank from 1815 to 1835. He was also listed as a corporator of the

⁶⁸The Handlins state that "specific interpretations in case after case gradually undermined and transformed the law" in the period after 1800. Commonwealth, 139.

Massachusetts General Hospital, as noted, and the Institution for Savings in the Town of Salem, of which he was vice-president from 1818 to 1830. In 1814, the Justice served on a commission to codify Massachusetts colonial and state laws. Few people could have been more familiar than Story with the political, economic, and legal aspects of the Massachusetts system.⁶⁹

Story's judicial opinions reveal the impact of his Massachusetts experience on his legal thinking. In the non-constitutional case of Terrett v. Taylor, decided in 1815, Story, who wrote the opinion for the court, went out of his way to state his view as to legislative powers and restrictions with regard to different types of corporations:

A private corporation created by the legislature may lose its franchise by a misuser or a non-user of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. . . . In respect, also, to the public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was

⁶⁹ The latest biography of Story is Dunne, Story. See also, generally, Story, ed., Life of Story. William H. Hofield, "Joseph Story, 1779-1845," in William D. Lewis, ed., Great American Lawyers, 8 vols. (Philadelphia: John Winston Company, 1907-1909), III, 137, 181. Charter of Merchants' Bank of Salem, Act of June 25, 1811, May Session, 1811, ch. LXXXII, Mass. Laws (Adams, Rhoades and Son, Boston, 1811), 494-500. Massachusetts General Hospital charter, of Feb. 25, 1811, Jan. Sess., 1811, ch. XCIV, Ibid., 329-342. Charter of the Institution for Savings in the Town of Salem, Act of Jan. 29, 1818, Jan. Sess., 1818, ch. LXIV, Ibid. (Russell, Cutler and Co.), 464-466.

originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporations, we are not prepared to admit.⁷⁰

The Dartmouth College decision of 1819 finally gave constitutional authority to Story's basic doctrines by reading them into the contracts clause. Near the end of his concurring opinion, Story cited parenthetically two Massachusetts cases, revealing the source of his ideas. Ellis v. Marshall, he said, "held, that the state legislature had no authority to compel a person to become a member of a mere private corporation." In Wales v. Stetson, the "same learned court declared, that they were all satisfied, that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Story concluded that these principles were "consonant with justice, sound policy and legal reasoning." Story had clearly been asserting the basic principles of his state's political economy at the federal level, and with no little success.⁷¹

⁷⁰Terrett, 9 Cranch, 51-52.

⁷¹Dartmouth College, 4 Wheaton 518, 708. Both Washington and Story specifically cited Terrett in their concurring opinions. Ibid., 663, 695. Marshall did not cite a single case by name, but said his opinion was equally supported by reason, and by the former decisions of this court." Ibid., 650.

The fact that the Massachusetts system bore a uniquely close relationship to the Dartmouth College decision does not mean, of course, that the Supreme Court considered directly or indirectly the law and political economy of no other state. Probably second to Massachusetts in terms of its contribution to the Dartmouth College doctrines was Virginia, whose system was carried to the Supreme Court by John Marshall, the Chief Justice. Marshall, and the impact of the Virginia system on his thinking and on the constitutional law he announced, is the subject of the next chapter.

JOHN MARSHALL AND THE
VIRGINIA SYSTEM OF POLITICAL ECONOMY

The Marshall Court, as Felix Frankfurter said, was "an orchestral and not a solo performance." But if the most significant part of the performance, the precise holding, was typically "a composite product of the Court," it is also true that John Marshall had the primary responsibility for the final arrangement of the number. Marshall could state in his own way the compromise agreements reached by the Court, and could set them in a broad expository framework all his own. Under the heading of "reason" in his opinions, Marshall developed the general principles on which he believed the final decision of the case rested. The principles were in large part the formal articulation of the lessons of history and experience as Marshall perceived them.¹

¹Felix Frankfurter, The Commerce Clause under Marshall, Taney and Waite (Chapel Hill: University of North Carolina Press, 1937), 43, 44. Hereafter cited as Commerce Clause. Frankfurter's conclusions were supported by Donald G. Morgan in "Marshall, the Marshall Court, and the Constitution," in W. Melville Jones, ed., Chief Justice John Marshall: A Reappraisal (Ithaca, N. Y.: Cornell University Press, 1956), 168-185, and esp. 168-170, 177, 183-185. Hereafter cited as Marshall. Other scholars have thought the Marshall Court was virtually a one-man band. Beveridge, Marshall, IV, 59, 61, 89-91, 94. Haines, Role of the Supreme Court, 630,

What was true of most of the Marshall Court's great constitutional decisions was true also of the Dartmouth College case. Although the reach of the decision, particularly with regard to publicly and privately founded charitable institutions, represented a compromise by the Court, the opinion of the Court was pre-eminently Marshall's. Informing those general principles of property and contract law and public policy which he extended to charitable corporations was an extensive experience with the operations of the Virginia political economy in general and of business corporations in particular. The purpose of this chapter is to survey the broad features of the Virginia system, and to single out for special attention problems and issues with which Marshall was directly concerned. Although evidence is sometimes scanty, a full exploitation of what is available, coupled with inferences as to what Marshall should have known, will make it possible to isolate with reasonable certainty the forces which contributed to the formation of Marshall's constitutional opinions relative to the economy.²

referred to Marshall's "domineering attitude and dictatorial control of the Court."

²Marshall's legal career and business affairs before his appointment to the Supreme Court have been covered by Beveridge, Marshall, esp. II, Ch. V. Beveridge is not so complete, however, with regard to Marshall's affairs after 1800. He states that Marshall "seems to have left to his brother and partner, James M. Marshall, the practical handling of his business affairs" after the Fairfax deal. Ibid., II, 173, n. 2. The impact of Marshall's experience on his constitutional opinions has been briefly noticed by Joseph Dorfman in "John Marshall: Political Economist," in Jones, ed., Marshall, 126 ff. Cf., Herbert A. Johnson, "John Marshall," in Leon Friedman and Fred L. Israel, eds., The

The basic features of Marshall's life in Virginia are easily identifiable. He spent most of his adult life in Richmond, almost never being absent for more than a few months at a time, in part because of a desire to care for his invalid wife. He moved at ease in all ranks of Richmond society, and apparently was on comfortable terms with most leaders of the Virginia Republican party. His neighborhood, a center of Richmond elite society, included such members of the "Richmond Junto" as Thomas Ritchie, editor of the Richmond Enquirer. As the state capital and a major commercial center, the town grew rapidly after Marshall established his law practice there in the early 1780's, contributing to his success as a lawyer. Most of his cases concerned property in the broadest sense, not only land but also mercantile contracts of various sorts. His closest business associates, aside from lawyers, were members of the Richmond financial community, composed of merchants and speculators. In the 1790's, this group was the nucleus of the Federalist "interest" and then of the Federalist party which supported the Washington administration's policies in both domestic and foreign affairs. Marshall was a leader of the Richmond

Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions. 4 vols. (New York: Chelsea House, in Association with R. R. Bowker Company, 1969), I, 289. Robert K. Faulkner, The Jurisprudence of John Marshall (Princeton, N. J.: Princeton University Press, 1968), esp. Ch. I, is occasionally useful on the dimensions of Marshall's constitutional "understanding" or "persuasion." Faulkner is not concerned, however, with the source of the understanding or what it was that persuaded Marshall to hold the views he did.

Federalists from the early 1790's, when he showed considerable skill in organizing public meetings to drum up popular support for the administration's handling of the Genêt problem and the Jay Treaty. His political loyalties and service brought him to the attention of the national authorities. President John Adams made him a special emissary to France and, on his return, he was elected to Congress. Adams soon appointed Marshall Secretary of State and then Chief Justice. After taking his position on the bench, Marshall generally abstained from active participation in politics, although he followed public affairs closely.³

³On Marshall's life in Richmond, see esp. Beveridge, Marshall, II, 172; IV, 61. Many useful details about Richmond itself are presented by Samuel Mordecai, Richmond in By-Gone Days: Being Reminiscences of an Old Citizen (Richmond: George M. West, 1856). Hereafter cited as Richmond. See also Myrtle Elizabeth Callahan, History of Richmond As a Port City (Unpublished M. A. Thesis, University of Richmond, Virginia, 1952). Hereafter cited as Richmond As a Port City. Philip Morrison Rice, Internal Improvements in Virginia, 1775-1860 (Unpublished Ph. D. Dissertation, University of North Carolina, 1948), passim. Hereafter cited as Internal Improvements in Virginia. Perhaps the best discussion of Richmond society is Charles H. Ambler, Thomas Ritchie: A Study in Virginia Politics (Richmond, Va.: Bell, Book and Stationery Co., 1913), 13-18. Hereafter cited as Ritchie. On Marshall's legal career and business associations in the 1790's, see Beveridge, Marshall, II, Ch. V, and esp. 181. Marshall's political activities in Virginia are most thoroughly covered by Lisle A. Rose, Prologue to Democracy: The Federalists in the South, 1789-1800 (Lexington: University of Kentucky Press, 1968), esp. 22, 40-44, 75-77, 128-129. See also Harry Ammon's two articles, "The Genêt Mission and the Development of American Political Parties," Journal of American History, LII (March, 1966), 730-732, 736, hereafter cited as "The Genêt Mission"; and "Agricola versus Aristides: James Monroe, John Marshall and the Genêt Affair in Virginia," Virginia Magazine of History and Biography, LXXIV (July, 1966), 312-320. A good summary of Marshall's early career was written by the Chief Justice himself in 1827: An Autobiographical Sketch by John Marshall Written at the Request of Joseph

Both before and after Marshall went to the federal bench, he was associated with various business enterprises. In 1791, Marshall signed a petition requesting that a branch of the Bank of the United States be established at Richmond. Among other things, the petition stated that a scheme was in operation for the establishment of a state bank in Richmond, and a branch of the BUS would render this project unnecessary. When the BUS refused to locate in Richmond, Marshall and other members of the financial community secured a charter of the Bank of Richmond. The project failed to attract enough subscribers, however, and the doors never opened. Whether Marshall purchased stock in Virginia banks after 1800 is not known, but he did purchase some stock in the second Bank of the United States. Marshall was also associated with at least two insurance companies. One, the Mutual Assurance Society against Fire on Buildings of the State of Virginia, founded in 1794, will be discussed below. The other was the Marine Insurance Company of Alexandria, chartered in 1798. When a case involving this company came before the Supreme Court in 1805, Marshall "declined giving an opinion, conceiving himself," in the words of the report, "to be in a remote degree interested in the stock of the insurance company." Finally, Marshall

Story and Now Printed for the First Time from the Original Manuscript Preserved at the William Clements Library, Together with a Letter from Chief Justice Marshall to Joseph Story Relating Thereto. Ed. by John Stokes Adams (Ann Arbor: University of Michigan Press, 1937). Hereafter cited as Autobiographical Sketch.

was associated with the founding of at least two internal improvement companies, the James River Company, chartered in January, 1785, and the Virginia Canal and Navigation Company, chartered in February, 1818. Both of these will be discussed below.⁴

These enterprises were not Marshall's only business ventures. He was also a speculator in land. In the east, he was heavily involved with Robert Morris, to whom he was related by marriage, and was a purchaser, along with his brother, of the Fairfax estate in Virginia's Northern Neck. Ultimately more important, however, than his eastern speculations was Marshall's close association with the west. In the 1780's while Marshall was establishing himself in

⁴"The Bank of the United States. Petitions of Virginia Cities and Towns for the Establishment of Branches, 1791." "Petition from Richmond, Manchester &c.," Virginia Magazine of History and Biography, VIII (Jan., 1901), 293, 294. Charter of the Bank of Richmond, Act of Dec. 23, 1792, Oct. Sess., 1792, ch. LXXVII, in William Walter Hening, ed., The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619. 13 vols. (Various Imprints, 1809-1823), XIII, 599-607. Hereafter cited as Hening. See also, George T. Starnes, Sixty Years of Branch Banking in Virginia (New York: The Macmillan Company, 1931), 19, 24, 25. Hereafter cited as Banking in Virginia. On Marshall's ownership of shares of the second Bank of the United States, see Rhodes, Papers of Marshall, II, 156-157. Marine Insurance Company of Alexandria v. Wilson, 3 Cranch 187, 191 (1805). The company was chartered by Act of Jan. 10, 1798, Dec. Sess., 1797, ch. XX, Shepherd, II, 89-92. For other cases in which Marshall was listed as not sitting or in which the Chief Justice's name does not appear, see Marine Insurance Company of Alexandria v. Tucker, 3 Cranch 357, 384 (1806); Hodgson v. Marine Insurance Company of Alexandria, 5 Cranch 100, 109 (1809); Marine Insurance Company of Alexandria v. Hodgson, 6 Cranch 206 (1810). Marshall delivered the opinion for the Court in Marine Insurance Company of Alexandria v. Hodgson, 7 Cranch 332 (1813).

Richmond, his father and much of his family had gone west to Kentucky. At his father's death, Marshall inherited three large tracts in the western part of that state. Other western land he acquired through military land warrants which had been issued directly to him or which he had purchased on the market. Occasionally, as in the summer of 1799, Marshall himself went west, and purchased hundreds of thousands of acres. It was this economic interest in the west that led Marshall to accept, in the fall of 1812, an appointment by the Virginia legislature to the chairmanship of a commission to survey the upper James and the trans-Allegheny rivers in order to determine the feasibility of opening a trade route to the west by connecting the James with the Ohio river. The Marshall Report recommended that Virginia undertake the project in order to exploit the benefits certain to be created by the further commercial development of the western areas.⁵

Ultimately, Marshall's extensive investments in Kentucky

⁵ On Marshall's connection with Morris, see Beveridge, Marshall, II, 7, 8, 101, 199-200, 202-211, passim. On Fairfax, see Ibid., I, 191-196, 448-449, 458; II, 100-101, 129, 203-211, 371, 373; III, 582; IV, 144-166. Stanley Phillips Smith, "The Northern Neck's Role in American Legal History," Virginia Magazine of History and Biography, LXXVII (July, 1969), 280 ff. On Marshall's association with Kentucky, see Irwin S. Rhodes, "John Marshall and the Western Country, Early Days," Historical and Philosophical Society of Ohio Bulletin, XVIII (April, 1960), 117, 119-121, 123-125. Establishment of the Marshall Commission, Act of Feb. 15, 1812, Dec. Sess., 1811, ch. XXXVII, Va. Acts (Pleasants), 51-52. Report of the Marshall Commission, December 26, 1812, Va., Journal of the House of Delegates, 1812-1813, 83-89. Hereafter cited as "Marshall Report." Beveridge, Marshall, IV, 43.

lands and his appreciation of the commercial possibilities of the west meant that his primary experience with Virginia business investments and with Richmond's legal and financial community would be interpreted not exclusively in light of parochial concerns but in terms of a wider, interstate, nationalist perspective. Marshall's opinions on political economy, the roots of which are the main subject of this chapter, were thus closely related to his economic nationalism, and both were firmly grounded in personal experience.

In Virginia, as in other states where economic activity went beyond agriculture and simple trade, the joint stock corporation was a major organizational device. Article IV of the Virginia bill of rights laid down general standards as to what businesses the legislature could incorporate. It stated that "no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." As applied to corporations, this meant that a business would have to promise significant benefits to the public before it would receive a charter. Canal and river improvement projects, turnpikes, banks, insurance companies were granted corporate powers while, significantly, the import-export trade itself, so vital to the Virginian economy, remained wholly on the basis of private partnership.⁶

⁶Va. Const. of 1776, Bill of Rights, Art. IV, Thorpe, ed., Constitutions, VII, 3812. Rice, Internal Improvements in Virginia, ch. VII, 217-266, and esp. 217-218.

The constitutional requirement that a corporation provide a "consideration" to the public in return for the charter and other privileges indicates that in Virginia, as in Massachusetts, the charter represented a bargain between the public and the corporation's sponsors, with both sides giving a price and receiving a benefit. The term "consideration" was, of course, borrowed from private contract law, where it signified the legal "price" paid by each party to form a binding contract. The charters themselves read like contracts, and indicate the terms of the bargains. For example, the charter of the James River Company, which was granted in 1785, and which became a model for nearly all future charters of internal improvement companies, provided that "for and in consideration of the expences the . . . proprietors will be at" in building and maintaining the canal, the "canals and works, with all their profits, . . . are hereby vested in the . . . proprietors . . . forever, . . . and the same shall be . . . for ever exempt from the payment of any tax . . . whatever." The legislature was even more explicit in its recharter of the Bank of Virginia in 1814. The preamble stated that the "stockholders of the Bank" had "proposed for the acceptance of the General Assembly . . . their terms and conditions of a mutual compact between the stockholders and the commonwealth." The legislature "accepted" the stockholders' proposals, and went on to ratify "the compact which the . . . recited terms and

conditions import."⁷

The feature of the Virginia system which has received most attention from scholars is the relatively large amount of aid given by the state legislature to internal improvement corporations. Before 1816, the state had appropriated over \$200,000 for this purpose, most of which was in the form of stock subscriptions to individual corporations, after the pattern established with the James River and Potowmac Companies. In 1816, a variety of factors, including an increase in trade, pressure from town merchants, and demands from the planter shipping interests, prompted the legislature to establish a permanent Fund for Internal Improvements, with a Board of Public Works to administer it. In general, the state was to continue to subsidize the construction of internal improvements by subscribing to stock in individual corporations, but provision of a permanent fund allowed the subscriptions to be on a more regular basis and the administrative board could bring some system into the program. The primary goal, however, remained that of promotion of private investment in internal improvements. Despite the state subsidies and the increased possibilities

⁷Charter of the James River Company, sec. 9, [Act of Jan. 5, 1785], Oct. Sess., 1784, ch. XIX, Hening, XI, 450-462. The charters of the James River Company and the Potowmac Company were passed the same session, and varied only in matters of detail. These two charters set the pattern for the future. Rice, Internal Improvements in Virginia, 69-73, 77. Recharter of the Bank of Virginia, Act of Jan. 24, 1814, Dec. Sess., 1813, ch. XXXI, Va. Acts (Pleasants), 67-71. In the terminology of the day, a compact was the same as a contract.

of state control, as Carter Goodrich has emphasized, the mixed enterprises of Virginia were always essentially private, that is, planned, organized, financed, and directed by private citizens.⁸

In legal terms, these mixed enterprises came to be regarded as strictly private. In his Dartmouth College opinion, Marshall said a private corporation was one "endowed with a capacity to take property, for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter." A corporation would be public "if the funds . . . be public property, or if the state . . . , as a government, be alone interested in its transactions." While the distinction between the two types of corporations

⁸For the amounts of state subsidies to internal improvements before 1816, see Rice, Internal Improvements in Virginia, 93-95, 149, 265, n. 159. The most complete treatment of the movement leading to the establishment of the Fund for Internal Improvement is Ibid., ch. IV, 102-145, and esp. 102, 130-138. The crucial "Report of the Committee of Roads and Internal Navigation," recommending the establishment of the Fund, was submitted to the House of Delegates on December 23, 1815, and is reprinted in full in Carter Goodrich, ed., The Government and the Economy, 1783-1861 (Indianapolis: Bobbs-Merrill Company, Inc., 1967), 59-77. Goodrich, relying heavily on this Report and evidence as to how the Board of Public Works operated in practice, emphasizes that the main purpose of the Fund was to assist private groups, not to establish a comprehensive governmentally planned and controlled transportation network. "The Virginia System of Mixed Enterprise. A Study of State Planning of Internal Improvements," Political Science Quarterly, LXIV (Sept., 1949), 357-365, 378-383. For the establishment of the Fund, see Act of Feb. 5, 1816, Dec. Sess., 1815, ch. XVII, Va. Acts (Ritchie), 35-39. Cf., for another treatment of the state's contribution to internal improvements, Wiley E. Hodges, "Pro-Governmentalism in Virginia, 1789-1836: A Pragmatic Liberal Pattern in the Political Heritage," Journal of Politics, XXV (May, 1963), 346-350.

is not as finely drawn as might be wished, it seems that Marshall regarded business corporations which were subsidized by the state as private, primarily because of the presence of "funds . . . bestowed by individuals, on the faith of the charter." At any rate, he cleared the matter up in his opinion for the Court in Bank of the United States v. Planters' Bank of Georgia, decided in 1824. The BUS had sued the Planters' Bank, of which the state of Georgia was a corporator, along with individuals, for payment of some of Planters' notes. The suit was brought in the United States Circuit Court for the district of Georgia. The Planters' Bank challenged the jurisdiction of the court, in part on the grounds that since the state of Georgia was a stockholder, a suit against the bank was really a suit against the state, which was prohibited by the eleventh amendment. Marshall rejected this argument. It was, he wrote,

a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. . . . As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are [sic.] expressly given by the incorporating act.

This was precisely the basis on which the Virginia system of mixed enterprise had operated since the 1780's when the state first subscribed to stock in the James River and Potowmac Companies, and it was the apparent basis of the decision by the Virginia General Court in Commonwealth v.

President and Directors of the James River Company, decided in November, 1819.⁹

Other features of the Virginia corporate system were similar to those developed in Massachusetts. When chartering internal improvement corporations, the Virginia legislature carefully prescribed the rate of toll, and usually reserved some power to alter the tolls under certain conditions. As in Massachusetts, the problem was to set the tolls high enough to attract private funds into the company, but also to reserve enough power to lower them in order to protect the future interests of shippers. Although details varied from charter to charter, the legislature usually followed a general pattern. The provision on the regulation of tolls in the 1816 act establishing the Fund for Internal Improvement is typical for navigation companies. If the average income from the tolls collected by the company would support

⁹Marshall's opinion, Dartmouth College, 4 Wheaton, 629-630. Bank of the United States v. Planters' Bank of Georgia, 9 Wheaton 904, 907-908 (1824). The principle stated in the Planters' Bank case was extended in Bank of Kentucky v. Wister, 2 Peters 318 (1829), where the Court, speaking through Justice Johnson, allowed the lower federal court to take jurisdiction of a suit against the Bank of Kentucky even though the state was the sole stockholder in the corporation. Dodd, American Business Corporations, 40. Commonwealth v. President and Directors of the James River Company, 2 Va. Cases 190 (1819). Virginia's Attorney General brought a quo warranto action against the James River Company for failure to perform its charter obligations. The Company argued that the state was barred from bringing the action because it held more than half the outstanding stock. The Attorney General replied that the state had two characters, sovereign and stockholder, and that the state was suing as sovereign. The court held, without opinion, that the state could bring the quo warranto action. Ibid., 194, 196, 197. Hereafter cited as James River Company.

a dividend of more than fifteen per cent per year on the capital, then the legislature could (but was not required to) lower the tolls to the point where the income would pay only fifteen per cent. If the average income paid less than ten per cent per year dividend (a much more likely possibility), then the Board of Public Works was given authority to raise the tolls so they would return a minimum of ten per cent. The company, however, could not benefit from a raise in rates without giving up something in return. If the tolls were raised, the maximum future return could be lowered from fifteen to twelve per cent. Turnpike charters had a slightly different pattern, of which the provision on tolls in the general turnpike corporations act of 1817 is an example. For twenty-one years after the completion of the road, the Board of Public Works (in earlier charters it was usually the legislature) was to regulate the tolls so that the return would not be less than ten nor more than fifteen per cent per year. For the next thirty years, the return was to be between eight and twelve per cent; and thereafter, between six and ten per cent.¹⁰

Although the Virginia legislature often revived or reorganized defunct enterprises, and often amended existing charters at the request of the companies, sometimes balancing a grant of new privileges with a reduction of old ones,

¹⁰ Act establishing the Fund for Internal Improvement, sec. 12, Act of Feb. 5, 1816, Dec. Sess., 1815, ch. XVII, Va. Acts (Ritchie), 35-39. General turnpike corporations act, sec. 29, Act of Feb. 7, 1817, Nov. Sess., 1816, ch. XXXVIII, Va. Acts (Ritchie), 41-45.

only one instance has been found in which the legislature summarily reduced chartered rights over the objections of the corporation. The single exception arose from very special circumstances. In 1804, the legislature incorporated the Richmond James River Company to improve for navigation a short section of the James between Warwick and Rockett's Landing just below Richmond. The company was authorized to take tolls at set rates from all vessels with a draft of five feet or more. However, it soon appeared that this part of the river in its unimproved state was already navigable for any vessel with a draft of up to seven feet. The small boat owners accordingly objected that the legislature could not make them subject to the company's toll. It was arguably unconstitutional, since Article IV of the bill of rights allowed the legislature to grant the special privilege of taking toll only in consideration of public services. The company would provide the small boat owners with no service whatsoever because they were already navigating the James. The same idea was expressed in terms of natural rights. Since the river in its natural state supported the navigation of small boats, it was an infringement of the "natural rights" of the boat owners to require them to pay tolls. The legislature responded to these arguments, and amended the charter to exempt from toll all vessels with a draft of seven feet or less. Although the company objected strenuously, it did not take the matter to court.¹¹

¹¹Charter of the Richmond James River Company, esp. sec. 9, Act of Jan. 23, 1804, Dec. Sess., 1803, ch. CIII,

Because of the probable illegality of the original grant, it would be incorrect to view the repeal of the company's privilege to take toll from small boats as an infringement of the general operating principle that chartered rights were to be honored by the state.

The legislature was not so concerned about retaining control over corporations which were peripheral to the Virginia economy. The few marine insurance corporations, for example, often contained elaborate charter provisions covering organization and operation, but the legislature merely set time limits on the companies' existence and did not reserve control over specific aspects. The same was true of manufacturing and steamboat corporations.¹²

Shepherd, III, 79-82, amended by Act of Jan. 31, 1805, Dec. Sess., 1804, ch. XXXI, Ibid., 156. Argument of Hay, counsel for the defendants, in Currie's Administrators v. Mutual Assurance Society, 4 Hening and Munford 315, 330 (1809). Hereafter cited as Mutual Assurance Society. According to Hay, the reason the company never tested the amendment was that they were "convinced, that their chartered rights were not quite so good, as the natural rights on which their charter had encroached." Ibid., *italics in original*. In section three of the 1805 act, the legislature asserted a right to modify the original charter and the amendment "whenever it shall be deemed expedient." Another amendment, passed in 1806, repealed the reservation. Act of Jan. 27, 1806, Dec. Sess., 1805, ch. LXIX, Shepherd, III, 256-259.

¹²See, e. g., charters of the "Union Insurance Company of Norfolk," Act of Jan. 5, 1811, Dec. Sess., 1810, ch. XXXVIII, Va. Acts (Pleasants), 69-74; "Marine Insurance Company of Richmond," Act of Jan. 11, 1813, Nov. Sess., 1812, ch. LI, Va. Acts (Pleasants), 78-83. The first two marine insurance companies chartered, the Marine Insurance Company of Alexandria, with which Marshall was associated, and the Marine Insurance Company of Norfolk, had no time limitations. They were not chartered "forever" or given "perpetual succession," and were not assigned some lesser limit. See, respectively, Act of Jan. 10, 1798, Dec. Sess., 1797, ch. XX, Shepherd, II, 89-92, and Act of Dec. 18, 1802, Dec. Sess., 1802, ch.

Before 1819, only two charters related to economic affairs contained general reservations of power to alter, amend, or repeal the act of incorporation. One was the charter of the Virginia Insurance Company, a marine insurance group centered in Norfolk. The act was passed on the same day in 1805 as the amendment to the Richmond James River Company charter, and may reflect temporary legislative displeasure at business resistance to the exercise of governmental power. The second charter did not establish a business corporation. It was not too clear just what the Mechanical Benevolent Society of the Borough of Norfolk was supposed to do. The legislature, however, was clear as to what the society could not do. It could pass no "bye-law" which regulated "trade, or the wages of labor," or which limited "the number of apprentices to any trade or craft." The Republican planter majority, some of whom sold lumber and naval supplies to the Norfolk ship-builders, joined with the manufacturers to make sure that the small group of artisans in Norfolk did not organize a union. The general reservation clause was probably inserted on the chance that the legislature had omitted something from its express prohibitions.¹³

XL, Ibid., 437-440. For a typical manufacturing corporation charter, see the "Halifax Manufacturing Society," Act of Jan. 3, 1809, Dec. Sess., 1808, ch. XLVI, Va. Acts (Pleasants), 46-49. The "Potowmac Steamboat Company" charter, Act of Feb. 6, 1813, Nov. Sess., 1812, ch. LIII, Ibid., 84.

¹³Charter of the "Virginia Insurance Company," sec. 3, Act of Jan. 31, 1805, Dec. Sess., 1804, ch. XXII, Shepherd, III, 130-135. This charter carried no time limit. Probably the time limits inserted in later marine insurance charters,

Before 1819, the Virginia Court of Appeals, the state's highest court, heard very few cases in which the judges were called upon to interpret corporate charters or to determine the limits of legislative power over business corporations. Compared to that of Massachusetts, the Virginia supreme court scarcely made a beginning on the "public law" of corporations, much less divided corporations into "public" and "private" categories with relatively sophisticated rules as to the extent of legislative power over each type. Nonetheless, it is possible to determine the Virginia court's general attitude with respect to the constitutional power of the state legislature over private property and vested rights by examining the few relevant non-corporate and corporate cases which were decided.¹⁴

which did not have general reservation clauses, represented a compromise between the legislature's desire to reserve some control over financial corporations and the merchant community's desire to be let strictly alone. Charter of the "Mechanical Benevolent Society of the Borough of Norfolk," secs. 2 and 3, Act of Jan. 19, 1811, Dec. Sess., 1810, ch. XLIII, Va. Acts (Pleasants), 79. For the Norfolk ship building business from the 1780's to the period after the War of 1812, see Thomas J. Wertenbaker, Norfolk: Historic Southern Port, ed. by Marvin W. Schlegel (2d ed. rev.; Durham, N. C.: Duke University Press, 1962), 77, 85-86, 146. Hereafter cited as Norfolk.

¹⁴The following volumes of Virginia reports, covering the years 1790-1818, with a few miscellaneous earlier cases, were examined for cases on business corporations: Washington, vols. I and II; Call, vols. I-VI; Hening and Munford, vols. I-IV; Munford, vols. I-VI. Corporations sometimes appeared as parties in cases not involving issues in corporate law. Otherwise, the following cases involved the interpretation of charters or amendments: Mutual Assurance Society, 4 Hening and Munford 315 (1809); Greenhow v. Barton, 1 Munford 590 (1810); Winchester v. President and Directors of the Bank of Alexandria, 2 Munford 339 (1811); Greenhow v. Buck, 5 Munford 263 (1816). Of these, only the Mutual Assurance Society case has any real significance, and it is discussed below.

In at least two cases the Virginia high court held that legislative acts could not be applied retroactively to affect legal rights to property. In Turner v. Turner's Executrix, which came before the Court of Appeals in 1792, the plaintiff had brought a simple action of detinue for slaves in 1783. It was clear that under the provisions of the 1758 act which covered the case, the plaintiffs would win. However, in 1787, before the case had been finally decided (the Virginia courts were extremely slow), the legislature passed a new law which changed the picture entirely. Under the 1787 revision, the defendants would win. The question was whether the 1787 act applied. Edmund Pendleton, President of the Court, announced the judges' unanimous "Resolution" that it did not.

Having made the law, the legislative [sic.] have no authority afterwards to explain its operation upon things already done under it. . . . For a legislative interpretation, changing titles founded upon existing statutes, would be subject to every objection which lies to ex post facto laws, as it would destroy rights already acquired under the former statute, by one made subsequent to the time when they became vested [:] A power to be deprecated,¹⁵ as oppressive and contrary to the constitution.

The second case in which the court considered the subject of retroactive legislation was Elliott's Executor v. Lyell, decided a decade after Turner. In 1782, Elliott and two others had signed a joint bond. In 1798, the holder of the bond brought suit against Elliott's executor, Elliott

¹⁵Pendleton's opinion, Turner v. Turner's Executrix, 4 Call 234, 237 (1792).

having died in the meantime. By the common law, which was in effect when the contract was made, the death of a joint obligor on a bond (Elliott, in this case) discharged his executors. However, in 1786, the legislature changed the law to make executors of joint obligors liable. The issue was whether the 1786 act applied to Elliott's 1782 contract. Writing seriatim, the four judges of the Court of Appeals unanimously agreed that the 1786 act had a prospective operation only, and could not affect the 1782 contract. Judge Spencer Roane emphatically stood "upon this broad principle, that men, in regulating their contracts, shall have the benefit of existing laws, and not have them overturned or affected by future laws, which they certainly could not foresee, or provide against."¹⁶

Another important case, Turpin v. Lockett, decided in 1804, has some bearing on the problem. Although the case ultimately involved the broad politically and emotionally charged issues of separation of church and state, a subject

¹⁶Roane's opinion, Elliott's Executor v. Lyell, 3 Call 268, 279 (1802). Hereafter cited as Lyell. If extended, the basic principle of the Lyell case would have prevented the Virginian bankruptcy laws from affecting contracts made before their passage. Cf., Sturges v. Crowninshield, 4 Wheaton 122 (1819). Hereafter cited as Sturges. For a short discussion of Virginia's debtor laws, which were revised in the 1790's, see St. George Tucker, Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. With an Appendix to Each Volume, Containing Short Tracts upon Such Subjects As Appeared Necessary to Form a Connected View of the Laws of Virginia, As a Member of the Federal Union. 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), III, 161; IV, 412-422 and notes. Hereafter cited as Blackstone.

beyond the scope of this dissertation, the case also concerned the ownership and control of real property. The Virginia Assembly had legislated many times on the Church of England, both before and after the Revolution. In January, 1802, the legislature decided to confiscate for the use of the state all lands belonging to the Episcopal Church, called "glebe lands" or "glebes" which fit certain descriptions. Specifically, the land had to be "vacant," that is, not presently used to support any Episcopalian minister, and had to be derived, in most cases, from public grants. Most "private donations or subscriptions" were exempted from seizure. Earlier, in 1784 and 1786, the legislature had incorporated and then disincorporated the Episcopal Church in Virginia.¹⁷

Turpin and others were wardens and vestry men of the Episcopal Church of the parish of Manchester, which was without a minister. They challenged the seizure of the glebe lands under the 1802 act, charging that the law was unconstitutional. Rather unsatisfactorily, the court split two to two on the question of constitutionality, so that the act was upheld. Both Spencer Roane and Henry St. George Tucker thought the act was constitutional. Reaffirming his position in the Lyell case, Roane said he would "not

¹⁷Turpin v. Lockett, 6 Call 113 (1804). Act of Jan. 12, 1802, Dec. Sess., 1801, ch. V, Shepherd, II, 314-316. Incorporation of the Protestant Episcopal Church, Oct. Sess., 1784, ch. XLIX, Hening, XI, 532-537. Repeal of the 1784 incorporation, Oct. Sess., 1786, ch. XII, Ibid., XII, 266-267. Cf., Act of Jan. 24, 1799, Dec. Sess., 1798, ch. IX, Shepherd, II, 149. According to Beveridge, during the 1780's "Marshall took only a languid interest in the religious struggle." Marshall, I, 222.

be among those, who assert a right in the government, or even in the people, to violate private rights, and perpetrate injustice." He would "not be more tardy, than those who are more loud and clamorous, to respect the vested rights of individuals, or societies." The question here was not whether to respect vested rights, but "in whom the property in question is vested." After a long analysis, Roane concluded that the Manchester glebes did not belong to the church, but to the government.¹⁸

St. George Tucker took a similar position. He said that it was a "fundamental principle of our constitution, that private property shall be sacred and inviolable." However, the "glebes, as such, were never private property." St. George Tucker also noticed the problem of the 1784 incorporation of the Episcopal Church, and the subsequent repeal. The constitution required, he wrote, that every corporation chartered have "some relation to the community at large." And because of this connection with the community, the legislature was "competent to amend, or repeal its own act [of incorporation], provided," he hastened to add, "it do not annul, or avoid any private right, which may have been legally acquired by any individual in his natural capacity, under such act."¹⁹

Judges Peter Lyons and Paul Carrington were of a different opinion. They thought the glebes had always

¹⁸Roane's opinion, 6 Call, 169-170.

¹⁹St. George Tucker's opinion, Ibid., 152, 156.

belonged to the church, and that consequently the 1802 act was an unconstitutional appropriation of private property. The distinction between corporate rights and individual rights drawn by St. George Tucker was thought to be unreal, because "property being a civil institution, the right to it is, in all cases, conferred by law: Which applies as forcibly to a society, as to an individual."²⁰

One member of the Virginia court, Henry St. George Tucker, expressed a general opinion on the subject of corporations in his annotated edition of Blackstone's Commentaries, published in 1803. Writing of Virginia corporations created since the Revolution, he stated that their "several powers and privileges must . . . depend wholly upon the acts of assembly by which they were first established, or such as have been afterwards made for the special purpose of limiting or enlarging, their privileges, respectively." This might be interpreted to mean that, in St. George Tucker's opinion, the Virginia legislature could limit corporate privileges at will. However, the statement is extremely broad, covering all corporations, including boroughs, cities, and counties, on which the legislature had always acted without restriction. Moreover, the context makes it clear that St. George Tucker was not commenting on the extent of legislative power, but was merely offering the observation that in Virginia, the legislature had primary responsibility over corporations, unlike Blackstone's England, where the

²⁰Opinion of Lyons and Carrington, Ibid., 179-186.

executive -- the Crown -- had this authority.²¹

The case of Currie's Administrators v. Mutual Assurance Society was the closest the Virginia supreme court came to a significant holding on a question of the public law of business corporations. The Mutual Assurance Society against Fires on Buildings of the State of Virginia had been founded on an experimental basis by a group of Richmond citizens in 1794. Within a few years farmers became the majority interest in the Society. They decided that because of the high risk and destructive nature of town fires, the town members ought to pay more for their insurance. Accordingly, the majority petitioned the legislature in the name of the corporation to permit the changes to be made.²²

The legislature passed the requested charter amendment in 1805. The act, however, went far beyond a rational adjustment of premiums and destroyed the very basis of mutual insurance. The "funds" of the Society were, in the words

²¹Tucker, Blackstone, II, 472, n. 2. Cf., Ibid., 467, n. 1.

²²Mutual Assurance Society, 4 Hening and Munford 315 (1809). Charter of the Mutual Assurance Society, Act of Dec. 22, 1794, Nov. Sess., 1794, ch. XXVI, Shepherd, I, 307-310. For the early history of the Society, see Mordecai, Richmond, 253-257. Some changes in the allocation of risk were no doubt in order because of the frequency and extent of town fires. Most of Richmond burned down in 1787. Beveridge, Marshall, II, 172. Norfolk had disastrous fires in 1799 and 1804, and would have others in 1805, 1813, 1814, and 1819. Wertenbaker, Norfolk, 128-129. Other fires occurred in Petersburg and Fredericksburg. Mordecai, Richmond, 255. According to Mordecai, the method of calculation of damages encouraged arson, and at least one town was nearly destroyed as a result of persons burning buildings for the insurance. Ibid., 257.

of the act, "divided between town and county, in proportion to the capital subscribed by the towns and country respectively." Henceforth the two funds would be entirely separate, with the country funds insuring plantation and farm buildings, and the town funds insuring urban buildings. The Society's general meeting of January 30, 1805, held the day after the passage of the 1805 act, reorganized the company in accordance with these principles. The new board of directors assessed fixed charges, called "quotas," on the town (but not the country) members, and increased the town members' premiums. The town members were made liable for the quota and the initial premium by the 1805 act, even though they were permitted to withdraw from the Society.²³

James Currie, a Petersburg resident whose cost of insurance had been increased, filed a suit challenging the validity of the charter modifications. On appeal to the state supreme court, counsel for Currie's Administrators (Currie himself having died before 1809) argued that even the majority of the members could not themselves, or with the aid of the legislature, destroy the original plan of the corporation. In general, they said, citing the English example, a "charter" was "not a law, but a compact between the sovereign authority of the state, and a citizen." In this case, the original 1794 charter of the Mutual Assurance

²³Charter amendment, Mutual Assurance Society, Act of Jan. 29, 1805, Dec. Sess., 1804, ch. XXIV, Shepherd, III, 145-149, and esp. secs. 2-5, 13, 14, 17. Mutual Assurance Society, 4 Hening and Munford 315, 316.

Society was a "contract between the state and the original adventurers." The act of 1805, by dividing the funds "among a part and not the whole of the members" was an impairment of the obligation of the charter contract in violation of the federal constitution.²⁴

Counsel for the Society contended that the case simply involved the power of the majority of a corporation to petition the legislature for a change in the charter. Even if the charter were a contract, "the state and the corporation . . . had a right to alter it by mutual consent." But it was not admitted that this charter was a contract. There was "no contract express or implied" by the state in the 1794 charter. Conversely, the Society had "no obligation to the state." Since neither party had any obligation to the other, the idea that the charter was a contract was "absurd." Moreover, he said, citing the example of the legislative alteration "without ceremony" of the tolls of the Richmond James River Company, the legislature had modified its grants before and could do so in this case.²⁵

Only two judges, Spencer Roane and William Fleming, heard the case. The third, St. George Tucker, did not sit. Roane and Fleming wrote separate opinion upholding the 1805 act and the changes it had brought. Although the

²⁴Argument of Taylor and Call for Currie's Administrators, 4 Hening and Munford, 316-319 and, quoted, 317-318. Italics in original.

²⁵Argument of Hay for the Society, *Ibid.*, 319-336, and, quoted, 329, 330, 331. Cf., on the same side, Wickham's argument, *Ibid.*, 336-344.

ultimate basis of decision is not very clear, both emphasized the principle that a majority of members controlled corporate affairs, and, the procedural formalities being met, had the power to represent the whole organization and to bind the minority of members. In this case, the act of 1805 was passed in response to a petition from the majority group, speaking in the name of the whole corporation. Since both public and corporate interests often required charter modifications, this was permissible. Furthermore, the provision in the 1805 act giving any member the right to withdraw was adequate protection for individuals.²⁶

Judge Spencer Roane went far beyond these points. He seized the opportunity to present his views on the whole matter of legislative control of business corporations. His statement was all dictum -- not binding on the Virginia court -- but is important because it is relatively comprehensive and because Roane was a powerful judicial and political leader of the Republican Richmond Junto.²⁷

Roane set forth his views on the general subject of judicial review. He noted that a member of the bar had argued that "the legislature had a right to pass any law,

²⁶Roane's opinion, Ibid., 351-352. Fleming's opinion, Ibid., 355-356.

²⁷For a review of Roane's career, see, generally, Clyde Christian Gelbach, Spencer Roane of Virginia, 1762-1822: A Judicial Advocate of States Rights (Unpublished Ph.D. dissertation, University of Pittsburgh, 1955). Hereafter cited as Roane. For his membership in the Richmond Junto, see Harry Ammon, "The Richmond Junto, 1800-1824," Virginia Magazine of History and Biography, LXI (Oct., 1953), 399. Hereafter cited as "Richmond Junto."

however . . . unjust . . . or unreasonable." This proposition the judge forthrightly rejected. To accept it, he wrote, would be "but to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted." Roane was thus no more in favor of absolute legislative supremacy on the Parliamentary model than Marshall or most of the other great judges of the early national period. On the other hand, a legislative act was entitled to a presumption of constitutionality. Where an act was challenged in court, the judiciary ought not to overthrow it unless it was "palpable and clear" that the act was unconstitutional, or the rights of an individual had been violated. Where the case was "equivocal or equiponderant," legislative judgment should prevail.²⁸

The specific question, however, was what powers the legislature possessed over corporations, and, correlatively, what legal rights of individuals and groups operated to limit these powers. Roane, like the Massachusetts judges, refused to accept the contract theory of corporate charters, but treated the matter on a more general plane. A charter was a legislative act and, in general, it was "the character of a legislative act to be repealable by a succeeding legislature." Nor could "a preceding legislature limit the power of its successor on the mere ground of volition

²⁸Roane's opinion, 4 Hening and Munford, 346-347, 348.

only." More specifically, under the Virginia constitution, the occurrence of certain conditions would allow the legislature to alter corporate charters. Article IV of the bill of rights provided that corporations could not be chartered except "in consideration of public services." If the legislature was deceived or "imposed upon" in the matter of public service, the legislature certainly had the power to alter the charter. Perhaps Roane had in mind the Richmond James River Company situation. If conditions changed after the grant of the original charter, the interests of both the public and the "associated body" might require a charter alteration. This was the case before the court, where the Mutual Assurance Society had requested the change, and the legislature had granted it. In addition, conditions might change so drastically that all "consideration of public service" might cease, in which case the legislature would have constitutional authority to repeal the charter. (In private contract law, failure of consideration is a good defense to a suit to enforce the contract.) Finally, the mere existence of "those petty inequalities and injuries, which arise to some individuals or classes of men, under every general regulation whatsoever," "would not be sufficient" to induce the court to disallow the legislative act. Currie's complaint seemed to fall within this category. "[E]ntire and exact justice" simply could not be achieved.²⁹

On the other hand, there were limits on legislative

²⁹Ibid., 348, 349. Italics in original.

power over corporations. In general, these limits could "only arise from a state of things involving public utility, which includes the observance of justice and good faith towards all men." A little more specifically, no legislative act on the subject of corporations could violate "the principles and provisions of the constitution and bill of rights," "those great rights and principles, for the preservation of which all just governments are founded," or "the vested rights of individuals." Roane did not indicate the precise content or actual severity of these restrictions, but it was clear that he would not hesitate to strike down a legislative act relative to corporations which infringed judicially declared constitutional, natural, or vested legal rights.³⁰

Although not as satisfactory as a fully developed line of doctrinal authority, the results of the Turner and Lyell cases together with the various opinions in the Turpin and Mutual Assurance Society cases are perhaps sufficient to form valid conclusions as to the general approach of the Virginia courts to problems of legislative action affecting private property and corporations. It is clear that these cases were not resolved exclusively or even primarily according to generalized values or political positions concerning democracy, popular sovereignty, legislative supremacy or

³⁰Ibid., 347, 348, 349. Italics in original. Cf., generally, M. E. Hornsnell, "Spencer Roane and the Property of Rights: A Post-Revolutionary View," West Virginia History, XXX (July, 1969), 586-597.

legislative power over the economy. The Virginia judges, Republican for the most part, revealed no consciousness of any division or fundamental conflict between human rights as defended by the legislature and property rights.

The primary judicial value seems to have been an elusive "public utility," in Roane's words. This was not so much a higher law as a higher good to which all public acts ought to conform. The judges recognized that the legislature had the primary responsibility for the public welfare, and accordingly erected a presumption of constitutionality of legislative acts.

But public utility in its broadest sense also included respect for individual property rights, whether these were derived from nature, common law, statutory law, the body of the constitution, or the bill of rights. It was an article of faith that the public good could not be served by infringing individual rights. The question was not whether to protect vested rights, but whether the rights claimed were vested. This was a judicial question, but as much practical as legal. The Virginia judges were not marching to the mechanical drum of the common law of stare decisis. The question of whether a right was vested and entitled to judicial protection might depend on the size and importance of the damage complained of. As Roane indicated, he would not vote to strike down legislative acts to relieve "petty inequalities and injuries." In the Turner and Lyell cases, on the other hand, where the right claimed was serious, and clearly "vested" according to

established legal principles, the judges unanimously moved to restrict the reach of the legislative act in order to protect the individual. Finally, the Turpin case, in which the problems of separation of church and state were inextricably involved with property questions, illustrated the possibilities for wide difference of opinion within the common philosophical framework. All the judges stated their belief that the judiciary ought to protect property rights from legislative infringement. But the judges split down the middle on the question of whether the rights involved were actually vested.

On balance, then, the essential features of the Virginia political economy remained the creation of the legislature and the entrepreneurs, with the courts at most articulating the values implicit in the system. The primary emphasis in legislative policy, especially with regard to vital internal improvements, was the attraction of private investment into the incorporated enterprises. Within limits, narrowed somewhat by the investment of public funds, the success of this policy generally required that the legislature honor the terms of corporate charters. Moreover, even when the state subscribed to large amounts of stock in an individual company, the enterprise remained essentially private, with the state simply voting its shares and otherwise claiming only the power reserved in the corporate charter.

John Marshall, as a sponsor of corporations, a stockholder, speculator, lawyer, politician, and legislator was

familiar with these general features of the Virginia system. After he went to the federal bench, his perspective shifted somewhat, but he retained his business investments and his interest in public affairs. His Virginia experience, however, was not of the abstract system conveniently summarized, but with individual enterprises, the fate of which was determined in large part by the interplay of forces generated by geographical, economic, and political divisions within the state. The actual development of various enterprises within the system was strongly influenced by sectional rivalries and the division between the agricultural and mercantile sectors of the state's economy. In order to form a better idea of the reality of Marshall's experience, it is necessary to determine the nature and extent of these divisions in the years after 1780, the way they affected the projects in which Marshall was interested, and, where possible, the reactions of the Chief Justice.

Geography played a large part in determining the way the Virginia system was actually organized and operated. Virginia was divided into sections, more or less discreet geographic and economic units, by a sort of grid of natural boundaries. The state was divided into four sections by natural boundaries running generally in a north-south direction. The tidewater extended westward from the coast to the fall line; the piedmont extended from the fall line to the Blue Ridge mountains; the Shenandoah valley and the trans-Alleghany followed. Virginia was similarly divided, at

least east of the Blue Ridge, by a series of major rivers running irregularly in an east-west direction. Especially in the matter of internal improvements, which were for the most part local or regional in character, these divisions created economic rivalries and sectional jealousies which influenced development. As if this were not enough, the river system encouraged rivalries within the sections, such as the competition between Norfolk and Richmond for the trade of the upper James River valley; and after Richmond won this battle, the conflict between Norfolk and Petersburg for the trade of Southern Virginia and Northern North Carolina.³¹

More complex divisions which influenced the Virginia political economy were the result of the nature and organization of the state's production and distribution. The agricultural interest was, of course, overwhelmingly predominant, as the vast majority of the people were engaged in the production of tobacco, wheat, corn, livestock, lumber and naval stores for domestic consumption and export. To support this economic activity, the Virginians erected an elaborate system of exchange and credit. Since specie was scarce, very little hard currency changed hands. When "cash" was used, it was one of several varieties of circulating paper, such as tobacco or treasury notes. Much exchange, however, was done on credit, with mortgages, bonds,

³¹Rice, Internal Improvements in Virginia, ch. I, 1-37, and esp. 1-6. Cf., generally, Charles H. Ambler, Sectionalism in Virginia from 1776 to 1861 (New York: Russell and Russell, Inc., 1964). Hereafter cited as Sectionalism.

and notes being given in return for land, goods, and services. Since the evidence of debt which each credit transaction generated could itself be transferred in payment of obligations, this commercial paper served with tobacco and treasury notes as a form of currency. Moreover, the extent of these credit operations was so great that the volume of circulating paper was very large, and it often appeared that everyone in Virginia owed everyone else.³²

Although most Virginians had to struggle to survive economically, a few managed to become wealthy planter capitalists. These men not only grew tobacco and other crops on their large plantations, but also engaged variously in land speculation, trading, manufacturing, processing, and moneylending. As providers of capital and services to the larger agricultural society, they served as bankers and became the major creditor group in Virginia, for a time, the prime beneficiaries of the system.³³ The position of

³²Robert McColley, Slavery and Jeffersonian Virginia (Urbana, Ill.: University of Illinois Press, 1964), 7-33. Hereafter cited as Jeffersonian Virginia. Robert E. Brown and B. Katherine Brown, Virginia, 1705-1786: Democracy or Aristocracy? (East Lansing, Mich.: Michigan State University Press, 1964), 96-108, 114-118. Hereafter cited as Virginia. Aubrey C. Land, "Economic Behavior in a Planting Society: The Eighteenth-Century Chesapeake," Journal of Southern History, XXXIII (Nov., 1967), 478-480, 482. Hereafter cited as "Economic Behavior." The Browns and Land agree that most Virginia debt was locally held, although those debts owed the British certainly became more visible. Brown and Brown, Virginia, 108. Land, "Economic Behavior," 479, 482. Robert Johnson, Government Regulation of Business Enterprise in Virginia, 1750-1820 (Unpublished Ph.D. dissertation, University of Minnesota, 1958), 41, 43-44, 49, 51, 63-65, 132, 135, 165-184. Hereafter cited as Business Enterprise in Virginia.

³³Land, "Economic Behavior," 476-485. McColley, Jeffersonian Virginia, 27-29.

this group was especially strong in the 1780's and the early 1790's when the mercantile community was in disarray as a result of the Revolution, and before the Bank of the United States and the Bank of Virginia had provided the state with a more modern currency system.

The most prominent representative of these great planter capitalists, and also the most sophisticated contemporary analyst of the Virginia system, was John Taylor of Caroline, who published a series of pamphlets in 1794 and a lengthy book in 1814. Grounding his analysis in the ultimate basis of wealth and economic growth in the state, he defined private property as land and those accumulations, including roads and canals, which resulted from the application of talent and labor to land or its produce. Commerce was merely supportive of the basic agricultural system, and thus the interests of commerce and agriculture were, in normal times, the same. Money, whether specie or paper, was necessary and useful so far as it was used to facilitate the exchange of property. Likewise, a private debt, one subsisting between individuals, was unobjectionable as an aid to agriculture. Although there was an unequal distribution of property in Virginia, this was the result of natural differences in talent and industry among individuals. The reliance on individual effort to distribute wealth was actually a positive good since it provided incentives for people to work. It followed that a redistribution of property by law, a levelling agrarian division, would be "malignant," an artificial transfer of

wealth which would produce sloth and ignorance among the people. Taylor recognized that Virginia did not in fact have a fully unified and harmonious economic and social order based exclusively on agriculture after 1790. Indeed, the main thrust of his writing was a call to arms against new disruptive political and economic forces.³⁴ Nonetheless, his analysis and vision were to a significant degree based on the economic realities as perceived by the planter capitalists.

The agricultural interest, including both great and small planters, did not remain the only economic interest group in Virginia. An indigenous mercantile class began to emerge in the 1780's and 1790's as a new force in the state's political economy. Although very few merchants were rich enough to do everything, the range of possible activities was quite broad. A merchant might purchase agricultural goods from the planters, store them in a warehouse in which he owned an interest, sell them to a captain looking for a cargo, or ship them on a vessel built in Norfolk, in which he owned a share, insuring the voyage with a Virginia company. The same merchant would handle goods imported from

³⁴[John Taylor], A Definition on Parties; Political Effects of the Party System Considered (Philadelphia: Frances Bailey, 1794), 8-9. Hereafter cited as Definition on Parties. [John Taylor], An Enquiry into the Principles and Tendency of Certain Public Measures (Philadelphia: Thomas Dobson, 1794), 16-17. Hereafter cited as Enquiry. John Taylor, An Inquiry into the Principles and Policy of the Government of the United States (Fredericksburg, Va.: Green and Cady, 1814), 113, 116-117, 310, 347, 349, 350, 404, 551, 555, 561, 564, 566, 618. Hereafter cited as Inquiry.

Europe, chiefly from England, selling them to planters, usually on credit. More importantly, merchants also engaged in a variety of financial activities, loaning money to planters, sometimes at usurious rates, speculating in foreign and domestic bills of exchange, government bonds, and western lands. These financial activities produced an initially small but growing fund of liquid capital available for investment in economic enterprise. Numerically insignificant in Virginia's total population, the merchants were concentrated in a handful of small urban centers such as Norfolk, Richmond, Petersburg, Fredericksburg, and Alexandria. A perceptive travelling French nobleman, the Duc de La Rochefoucauld-Liancourt, found these merchants "absolutely distinct in their manners and opinions" from the rural majority, and concluded that they formed, "finally, a nation within a nation."³⁵ It was, of course, this mercantile-financial group in Richmond with which John Marshall was associated from the late 1780's on.

From the point of view of the merchants, one great weakness of the Virginia economy in the early 1790's was the absence of banks and an adequate currency. Individual promissory notes might facilitate exchange between the great planter capitalist and his lesser neighbors, but they lacked the liquidity necessary to support specialized commercial activity. What was needed was bank notes, which

³⁵Duc de La Rochefoucauld-Liancourt, Voyage dans les Etats-Unis d'Amerique. Fait en 1795, 1796 et 1797 (Paris: DuPont, 1799), IV, 301-302, 310-311; V, 8-9. Hereafter cited as Voyage. Johnson, Business Enterprise in Virginia, 311, 360-362.

would have a more solid institutional backing. In addition, banks would provide expanded credit facilities and new opportunities for investment. Thus, as noted above, in 1791 the Richmond merchants petitioned for the establishment of a branch of the Bank of the United States in their town. When this was unsuccessful, they obtained a charter for the Bank of Richmond from the legislature, but it failed to be established for a want of subscriptions. Although a bank was established at Alexandria in the 1790's, this served the local area only, and central Virginia remained without state banking facilities until after the turn of the century.³⁶

In his polemical defense of planter capitalism, John Taylor of Caroline attacked the emerging Virginia mercantile community and its demands for reorganization of the state's economy to favor liquid capital. As Taylor saw it, the major division in Virginia was not one of class -- he defended the inequalities which did exist -- but between two "wealthy classes," one resting on "monied capital or stock," the other on land and labor. Bank charters and banking privileges, whether granted by the federal or state government, were a prime means by which monied capital advanced its ends. Since Taylor defined private property as land or the accumulations of labor, it followed that these charters and privileges were not genuine, substantial property, but "political property,"

³⁶"The Bank of the United States. Petitions of Virginia Cities and Towns for the Establishment of Branches, 1791." "Petition from Richmond, Manchester &c.," Virginia Magazine of History and Biography, VIII (Jan., 1901), 291-295. Starnes, Banking in Virginia, 19, 21-25.

an artificial, sham property founded only in law. The income to bankers amounted to a tax of ten to twelve per cent on the people, a legally sanctioned transfer of genuine property from the producers to the rich and idle stock interest. Moreover, the paper currency generated by banks merely served as an instrument for this fraudulent transfer of wealth, and drove out the specie which served as an instrument of honest exchange. Finally, banking molded commerce, which was ordinarily linked to agriculture, into a force economically and politically hostile to the landed interest.³⁷

Development of political parties in Virginia was heavily influenced by economic divisions among the different sections and between the agricultural and emerging mercantile-financial interests. Although there was not a one-to-one correlation between party affiliation and geographic location or occupation of voters, the tendency to divide into parties along sectional and economic lines was much stronger in Virginia than in such other states as Massachusetts, where parties were relatively homogeneous.

From the early 1790's, the basis of the Republican "interest" which rapidly became the Republican "party" in Virginia was the agricultural sector in the state. Economically, the Republicans set themselves against Virginian or federal measures which tended to create large monied

³⁷Taylor, Definition on Parties, 5-6, 9. Inquiry, generally, and esp. 30, 39, 65, 113, 291, 292, 294, 298, 303, 305-306, 310, 311-318, 321, 328, 329, 347, 349-350, 352, 362-363, 564, 565-566, 635-636.

interests or to aid urban commercial groups at the expense of agriculture. Sectionally, the Republicans represented the most populous areas of the state, the tidewater and piedmont.³⁸

After the turn of the nineteenth century, the formation of the Richmond Junto marked the development of a new sophistication in the Republican party organization, and led to new departures in the state's political economy. The Junto, which grew out of a legislative caucus held in Richmond on January 21, 1800, to organize for the coming Presidential election, was an informal organization of about twenty men, primarily large planters and their lawyer allies, who lived in or near Richmond for most of the year. Operating as an unofficial central committee, the Junto gave the Republican party unity, consistency, and informed direction. Its major aims certainly included those of the Republican party at large, to advance and defend the economic and political interests of agriculture east of the Blue Ridge.³⁹ Equally important, however, the Junto promoted the special economic interests of its members in at least two ways. First, it sponsored and then controlled the Bank of Virginia. Second, especially after the War of 1812 it sought to promote the commercial development of Richmond

³⁸Harry Ammon, "The Formation of the Republican Party in Virginia, 1789-1796," Journal of Southern History, XIX (Aug., 1953), 289, 292, 295-296, 308, 310. Hereafter cited as "Formation of the Republican Party." See, generally, Ambler, Sectionalism.

³⁹Ammon, "Richmond Junto," 395-397, 399-400, 417-418.

and the whole James River valley. These economic aspects of the Junto's activities, which are treated more fully below, made the organization a modernizing and moderating influence in Virginia politics.

The Federalists in Virginia were a varied coalition of those who were excluded from effective power in the state government, and who saw their economic interests to be different from those of the Republican majority. Although the sectional vote fluctuated, the districts most likely to be Federalist were those on the periphery of the state, the Eastern Shore, Northern Neck, Shenandoah Valley and other areas west of the Blue Ridge, and, occasionally, the area south and west of the James.⁴⁰

The mercantile and financial community formed a second major element of the Federalist party. The Virginia merchants' association with the Federalist interest in the national government began in the early 1790's, when the Washington administration turned to Richmond merchants and speculators for support for its economic and foreign policy programs. Edward Carrington, John Marshall's brother-in-law, was on close terms with Hamilton in these years, and appears to have served as a contact between Treasury and the Richmond community. In December, 1792, James McClurg of Richmond was made a director of the Bank of the United States.

⁴⁰Norman K. Risjord, "The Virginia Federalists," Journal of Southern History, XXXIII (Nov., 1967), 496-500, 505-508. Hereafter cited as "Virginia Federalists." Rose, Federalists in the South, 191.

Responding to a request from the Washington administration, Marshall himself organized and successfully directed a Richmond meeting in August, 1793, to protest the activities of Citizen Genêt.⁴¹ As the Federalist interest ripened into a party in the middle 1790's, Carrington, Marshall, and others in the Richmond mercantile community became important members of the apparatus. Although the merchant faction was numerically insignificant at the polls, economic power, centralized locations, and legal and political competence offset this deficiency so that the merchants continued to be influential in Virginia's Federalist party and state government.

All of these major divisions in Virginia -- geographic, economic, and political -- affected the course of state government and necessarily affected too the development of individual enterprises with which John Marshall and other members of the mercantile-financial community were associated. One of the first new financial institutions to gain the attention of the Republican planter majority was the Mutual Assurance Society against Fire on Buildings. As indicated in the discussion of the Mutual Assurance Society case

⁴¹Rose, Federalists in the South, 22, 40-44. Ammon, "The Genêt Mission," 730-732. The generalization that Federalists represented an established elite and that the Republicans were challengers, upward-mobile groups eager to participate in established economic and governmental institutions, Fischer, American Conservatism, App. I, 203-211, breaks down in Virginia. The Republicans represented established economic institutions and groups and dominated the state government. Fischer's biographical list of Virginia Federalists is hardly a register of the state's great leaders and families. Ibid., App. II, 370-387.

above, the plan for mutual fire insurance was drawn up in the early 1790's by a group of citizens in the Richmond area, one of whom was John Marshall. Shortly after the Society was chartered, in 1794, and formally organized, Marshall took out insurance on his Richmond home.⁴²

A protracted contest for control of the institution developed between the urban interest, which was numerically a minority of the total membership but which held the largest amount of insurance, and the country interest, which had a majority of members but less insurance. At first, the urban sponsors had effective control. Not only did the towns-people have more insurance, but they also had a superior knowledge of the business, a capacity to attend general meetings in Richmond in person, and the foresight to use proxies from other towns-people who could not attend. The country members had difficulty making it to Richmond for the general meetings, and too often neglected to execute proxies. All this made a difference because both the risks and the losses of the towns-people were greater, and it was to their interest to shift part of the loss to the country people. In 1795, the legislature, defending the interests of the rural majority as usual, attempted to neutralize the power of those with the largest amount of insurance by defining "majority" in the charter to mean either a majority in terms

⁴²Beveridge, Marshall, II, 174. Rhodes, Papers of Marshall, I, 149, 259. The legislature also chartered the Mutual Insurance Company against Fire on Goods and Furniture in the State of Virginia, Act of Dec. 23, 1795, Nov. Sess., 1795, ch. LVII, Shepherd, I, 412-414.

of the number of members or in terms of the amount subscribed. Whatever this curious definition meant in practice, it did not solve the rural members' proxy problem. On January 23, 1800, two days after the Republican caucus which led to the formation of the Richmond Junto, the legislature moved to correct this difficulty and to intrude itself more directly into the affairs of the Society. Acting in response to a "particular request" from the corporation, the legislature stated that it was "difficult to procure a general meeting" because of the "dispersed situation" of the members, and declared that henceforth members of the legislature would represent at the general meetings all absent subscribers who had not appointed their own proxies. Finally, in 1805, the Richmond Junto took full control of the Society, with the legislators taking an active part. At the Society's general meeting, the country majority proposed a basic revision in the plan of the corporation, and quickly secured legislative ratification in the form of a charter amendment. At the Society's meeting held immediately after the passage of the charter amendment, new directors were elected, and Alexander McRae, a leading member of the Junto, was elected president. The funds and risks of the Society were divided into "town" and "country" sections, and the town members were assessed new quotas, for which they were legally liable, and were also charged higher premiums.⁴³

⁴³Act of Dec. 23, 1795, Nov. Sess., 1795, ch. XLI, Shepherd, I, 405-406. Act of Jan. 23, 1800, Dec. Sess., 1799, ch. XV, Ibid., II, 210. Act of Jan. 29, 1805, Dec.

As a result of these changes, many towns-people no longer wished to be insured by the Society. One of those who exercised the option to withdraw was John Marshall. The exact date is not known. However, the "principal agent" of the Society, Samuel Greenhow, tactlessly pressed Marshall for a statement of the reasons for his withdrawal. Marshall's curt reply has survived:

My motive for withdrawing from the company was openly given at the time & was I believe stated in the letter which gave notice of my determination. I consider the interference of the legislature in the management of our private affairs, whether those are committed to a company or remain under individual direction, as equally dangerous and unwise. I have always thought so & I still think so. I may be compelled to subject my property to these interferences, & when compelled I shall submit; but I will not voluntarily expose myself to the exercise of a power which I think so improperly usurped.

With a vigorous collection I should if a member be far from being dissatisfied. The arrears in my opinion ought to be paid & I should not require a second intimation on the subject did I think myself indebted to the company. It is known that those who withdrew have not considered themselves as liable to the requisition. The question is in the court of appeals & we anxiously wish its decision. Finding it delayed longer than was expected, & being desirous of terminating the dispute as to myself, I offered to pay the amount of the requisition but was told that the interest was required in like manner as if the case had been decided against us. This put an end to any further proposition on my part.

Sess., 1804, ch. XXIV, Ibid., III, 145-149, esp. secs. 1-5, 13, 14. For the election of McRae as president, see Mutual Assurance Society, 4 Hening and Munford, 316. For McRae's membership in the Richmond Junto, see Ammon, "Richmond Junto," 399. In 1807, McRae was Lieutenant Governor of Virginia and special counsel for the government in the Burr treason trial, over which Marshall presided. Beveridge, Marshall, III, 407-408, 437-438, 448, 494-495, 522.

I most certainly shall not sit in the cases which are carried into the supreme court, nor shall I even look into the records. Concerning my own case, however, I can, to any person except the judges, express myself as freely as I would on any other subject.⁴⁴

Marshall's motives for withdrawal, and his statement of reasons, must be interpreted in light of the events to which he was referring. The company had been planned and organized by the urban interest of Richmond to give towns-people some protection against the ravages of fire. Country people were invited to participate, and could do so if they agreed to share the losses. By 1805, the situation had been completely reversed, as the country majority controlled Society, and had altered the risks and charges so that many towns-people decided that the costs were too high. As a townsman, a founder of the company, and the subject of extra charges, Marshall certainly had adequate grounds for withdrawal. The "interference of the legislature" to which he referred could include the whole course of legislative action since 1795, but probably meant specifically the explanatory act of 1795, which opened the door to control of the Society by the rural majority, and the act of 1800, by which legislators became proxies for absent members. Effective control of the company, which passed to the legislature

⁴⁴Marshall to Samuel Greenhow, Oct. 17, 1809. Washburn Papers, Massachusetts Historical Society. Quoted with permission. The letter nowhere identified Greenhow or the "company," and does not even state that the company's business is insurance. Samuel Greenhow is identified as the "principal agent" of the Mutual Assurance Society in Greenhow v. Barton, 1 Munford 590 (1810). The case was argued at the March term, 1810, and refers to Greenhow as being the principal agent previous to that time. Ibid., 591.

as a result of the act of 1800, was the "power" which Marshall thought the legislature had "so improperly usurped."

The case in the Virginia Court of Appeals to which Marshall referred was that of Currie's Administrators v. Mutual Assurance Society. Judges Roane and Fleming, as noted above, decided against Currie, Marshall, and other towns-people who had withdrawn from the Society. (Roane, a leading member of the Richmond Junto, was unlikely to declare his party's operations illegal.) Unfortunately, it is impossible to compare the Virginia court's analysis of the case with Marshall's, because the latter never stated a legal opinion. Although Marshall did admit that the "arrears," but not the interest, "ought to be paid," his letter to Greenhow was merely an expression of a personal opinion. It said nothing directly about the constitutionality of the Virginia acts of 1795, 1800, and 1805, or about the technical legality of the company's 1805 requisition.

If Marshall did believe the company's actions illegal, however, he was alone in this among the judges who considered the problem and published their opinions. In 1803, Congress and the Virginia legislature had authorized the Mutual Assurance Society to do business in Alexandria, in the District of Columbia. When the company revised its operations in 1805, the Alexandria members were hurt as much as those who lived in Virginia towns. Suits were brought in the federal court for the District challenging the company's requisition. These were the "causes . . . carried into the

supreme court" to which Marshall referred in his letter to Greenhow. Since the Supreme Court was sitting as an appellate court in a federal jurisdiction, it was not technically bound by the prior decision of basically the same issues by the Virginia court. Nonetheless, in 1810 the Court decided the companion cases of Korn and Wisemiller v. Mutual Assurance Society and Atkinson v. Mutual Assurance Society in favor of the company. The takeover of the Mutual Assurance Society by Virginia's country majority may have been unfortunate; but, the Virginia and United States high courts agreed, it was not illegal.⁴⁵

The Republicans and the Richmond Junto were interested in other financial institutions in the state. Since the early 1790's it had become apparent that the interests of most planters in central Virginia might be served by a state bank. Notes of Maryland banks had been circulating widely in Virginia, and demands had been raised within the Republican party for a more adequate local currency. Furthermore, a state bank under proper supervision could provide loans to individuals, capital to finance needed public improvements, and services to the government. Using these arguments,

⁴⁵For the acts permitting the Mutual Assurance Society to operate in Alexandria, see Virginia Act of Jan. 27, 1803, Dec. Sess., 1802, ch. V, Shepherd, II, 406-407; Congressional Act of March 3, 1803, Seventh Cong., 2nd Sess., ch. XXIII, 2 Statutes at Large (U. S.) 227. Korn and Wisemiller v. Mutual Assurance Society, 6 Cranch 192 (1810). Atkinson v. Mutual Assurance Society, 6 Cranch 202 (1810). The opinion for the court in each case was written by Justice Johnson. Although Cranch did not list Marshall as absent in these two cases, it is probable that he did not sit.

the Junto began a campaign for a state bank. On January 30, 1804, the legislature responded by chartering the Bank of Virginia. Similar to the Bank of the United States, it had a "mother" bank in Richmond, and branches in Norfolk, Fredericksburg, and Petersburg. The most important features of the charter were those giving the state ultimate control of the corporation. The state was to subscribe to a large amount of the stock, and the voting in stockholders' meetings was weighted so the state could elect a majority of the directors. In practice, a majority of the directors were Republicans, and the major officers were prominent members of the Richmond Junto. By chartering this bank, the Republican planter majority had compromised with modernity in financial matters, to the disgust of such die-hard conservatives as John Taylor, but had conceded nothing in the way of economic power to its merchant adversaries.⁴⁶

Predictably, the Federalist mercantile community was hostile to the Bank of Virginia from the beginning. Not the least annoying aspect of the enterprise was that the state's subscription, which assured planter control, was to

⁴⁶ Charter of the Bank of Virginia, Act of Jan. 30, 1804, Dec. Sess., 1803, ch. CXVIII, Shepherd, III, 100-108. Hereafter cited as "Charter of the Bank of Virginia." Ambler, Ritchie, 26-28. Starnes, Banking in Virginia, 29-36. Ammon, "Richmond Junto," 401. The only state bank in operation in Virginia prior to 1804 was the Bank of Alexandria. However, this served the Alexandria area only and had little influence on subsequent policy. Starnes, Banking in Virginia, 21-24. The state and the Junto also retained control of the Farmers' Bank of Virginia, chartered by the Act of Feb. 13, 1812, Dec. Sess., 1811, ch. VII, Va. Acts (Pleasants), 7-15.

be financed by the proceeds of sales of merchants' licenses, which had to be purchased from the state annually. One Federalist attacked the Bank as a "state engine for state purposes," and warned merchants that it would be "converted into an engine for your oppression." John Marshall's reaction was no different from that of many others in the financial community. He wrote his brother from Richmond on April 1, 1804:

The novel principle introduced into the law establishing the Virginia bank of giving direction of it entirely to the legislature is so very exceptionable that very few of the monied men of this place appear disposed to subscribe to it. I would not trust a single dollar to it.⁴⁷

Marshall was concerned with other projects which were affected by the divisions within Virginia society. The proposal to construct a trade route to the west had been seriously advanced as early as the 1780's. As noted above, Marshall served as chairman of a commission to explore the possibilities of opening such a route by connecting the James with the Great Kanawha and Ohio river by means of a turnpike and certain river improvements. The Marshall Report, submitted in December, 1812, told the legislature that development of the route was feasible, although it

⁴⁷ Charter of the Bank of Virginia, sec. 12, Shepherd, III, 100-108. For the act requiring merchants to purchase licenses, see Act of Oct. Sess., 1786, sec. 7, ch. XXVI, Hening, XII, 286. Virginia Gazette, April 28, 1804, quoted in Starnes, Banking in Virginia, 33. John Marshall to James M. Marshall, April 1, 1804. Library of Congress, Beveridge Collection. Marshall added: "Some . . . think that, should the bank fail, which is very doubtful, the shares will not long remain at par."

would be expensive. The commission recommended that the project be undertaken for a variety of reasons. First, and most important, Virginia ought to enter the competition for the "interesting prize" of western commerce. The west was an "extensive and fertile country, a country increasing in wealth and population with a rapidity which baffles calculation." Although the export trade would continue to flow down the Mississippi, a James River - Ohio River connection might allow Virginia to capture the import trade of most of Kentucky and Ohio, and part of southwestern Pennsylvania. Goods produced in these areas of the west for consumption in the eastern United States might likewise flow through Virginia. Second, those who resided within the western part of Virginia itself would gain easier access to the James River markets. This would spur the economic growth of the region, and check emigration from the state.⁴⁸

The proposal to develop the James River route to the west received remarkably wide support in the period immediately following the War of 1812. Key legislative committees and the new Board of Public Works accepted the recommendations of the Marshall Report in principle. Thomas Ritchie's Richmond Enquirer, the organ of the Junto and always a booster of Richmond commerce, likewise supported the undertaking. Nonetheless, adequate legislative appropriations were not

⁴⁸"Marshall Report," 87-89. Wayland Fuller Dunaway, History of the James River and Kanawha Company (New York: Columbia University Press, 1922), 9-20. Hereafter cited as James River Company. Rice, Internal Improvements in Virginia, 64-69, 91-93.

forthcoming. For political reasons, the state's program of subsidies to public improvements had to be based on a careful allocation of funds among all sections of the state, with most of the total going to those sections east of the Blue Ridge. The planter majority east of the Blue Ridge simply refused to spend large amounts of money on a project which would directly benefit only the Richmond-Norfolk commercial interests, and the Federalist farmers and manufacturers in the western part of the state.⁴⁹

Before 1819, the degree of improvement of the James River east of the mountains was more openly controversial than the proposed route to the west. In 1785, the James River Company had been chartered to make the river navigable from the highest point practical near the Blue Ridge to the tidewater, which in 1785 was at Richmond. Marshall was a stockholder, served on legislative committees to examine the organization's finances, and assisted in the passage of bills to help the company during the 1780's and 1790's when the company was clearing the river and constructing its works. Members of the Republican leadership were

⁴⁹"Report from the Committee on Roads and Internal Navigation," Richmond Enquirer, Jan. 27, 1818, p. 4, col. 1. "Annual Report of the Board of Public Works," (1816), Ibid., Dec. 21, 1816, p. 2, col. 5. Ambler, Ritchie, 64. Risjord, "Virginia Federalists," 513. Ammon attributed the Richmond Enquirer's support for turnpikes and canals to the west to a political desire to keep the west loyal to states rights. "Richmond Junto," 410-411. However, after the War of 1812, prominent members of the Junto speculated in commercial real estate near Richmond and in corporations chartered to improve the lower James. The Junto thus had an economic stake in opening a route to the west. These projects are discussed below.

also involved with the company. Dr. William Foushee, who became postmaster of Richmond and a prominent member of the Richmond Junto after 1800, was president of the company from 1790 to 1818.⁵⁰

The James River Company's most difficult problems of construction were presented by the stretch between the end of the canal at the basin in Richmond and the James River tidewater, which by 1800 had stabilized at Rockett's Landing about a mile below the city. Since the charter required completion of the canal to the river and the tidewater below the Richmond basin, the Company was obligated at least to make the attempt. The distance was not far, but the descent was relatively steep, and the ground was soft. Although the technology of the period was not sophisticated enough to solve the engineering problems at a reasonable cost, the company, under pressure to fulfill its charter obligations, hired one Ariel Cooley to attempt the connection. On October 17, 1811, he proudly opened twelve locks, and a scow was ceremoniously passed between the basin and the river. Unfortunately, immense quantities of dirt also passed from the basin to the river, so that the locks filled with silt and had to be closed permanently.⁵¹

⁵⁰Charter of the James River Company, [Act of Jan. 5, 1785], Oct. Sess., 1784, ch. XIX, Hening, XI, 450-462. Beveridge, Marshall, I, 217-218; II, 56-57; IV, 42, n. 2. Rhodes, Papers of Marshall, I, 96, 236-238. Mordecai, Richmond, 233-234.

⁵¹Rice, Internal Improvements in Virginia, 4, 123-124. Mordecai, Richmond, 234-235. Niles Weekly Register, I (Nov. 2, 1811), 151.

Richmond merchants, some of whom were stockholders in the James River Company, could not have been unhappy at the long failure to connect the upper basin with the lower James. The lack of a suitable navigation made Richmond a physical bottleneck and commercial monopoly through which all produce from upstream and all merchandise from downstream had to pass to their respective markets. Everything had to be transshipped at Richmond. If the canal basin were successfully connected to the river, farmers and shippers could sail past Richmond and Rockett's without unloading, depriving the town of a significant amount of business.

After the War of 1812, prominent members of the Richmond Junto and others associated with them undertook a series of projects designed to capitalize on Richmond's commercial advantages. In February, 1816, the group obtained charters for two internal improvement companies. One, the Richmond Navigation Company, was to deepen the channel of the James River from Warwick, a small town about four miles below Richmond, to the wharves at Rockett's Landing. The other, the Richmond Dock Company, was to improve the river from Rockett's to Richmond itself. The purpose of these improvements was to allow ocean-going vessels and the new steamboats to sail up the James to Rockett's or Richmond. Previously, sizable vessels could sail only to Warwick, and most stopped at Norfolk. If all vessels could sail to Richmond, Norfolk and Warwick would be by-passed, and the Richmond monopoly would be correspondingly strengthened.

At the same time, these entrepreneurs sought partially to rearrange the commercial patterns of Richmond itself. They purchased land just below Richmond, and began to construct new warehouses, docks, and even homes in preparation for the ocean-going ships.⁵²

Unfortunately, this real estate boom totally collapsed in late 1818. On September 30, 1818, in another vain attempt to open British ports by closing those of America, Congress embargoed shipping to places in the British Empire which remained closed to American ships. In Virginia, this meant a severe curtailment of shipments to the British West Indies, a significant market for the state's agricultural products.⁵³ The drastic reduction in demand for port facilities doomed the Richmond real estate ventures. Shortly, the financial panic of 1819 made a difficult situation worse.

Nonetheless, for about three years after the War of 1812, the speculative activities of the Junto -- internal improvement corporations and commercial real estate, in

⁵²Charter of the Richmond Navigation Company, Act of Feb. 22, 1816, Dec. Sess., 1815, ch. LIII, Va. Acts (Ritchie), 87-93. Among those listed as corporators were Spencer Roane, Thomas Ritchie, William Wirt, and Dr. John Brockenbrough. Charter of the Richmond Dock Company, Act of Feb. 19, 1816, Dec. Sess., 1815, ch. LIV, Ibid., 94-103. These were interlocking enterprises. Six men served as commissioners to open subscriptions in both companies. The Richmond Dock Company also contemplated a connection between the James River canal basin and the river, but a special charter provision required that all canal boats going downstream unload at Rockett's or above. The Richmond monopoly would be preserved. See also, Rice, Internal Improvements in Virginia, 8-9, 226-229. Mordecai, Richmond, 217-225. Callahan, Richmond As a Port City, 55, 62.

⁵³Wertebaker, Norfolk, 146-148.

addition to banking -- were extremely significant in the political economy of Virginia. These ventures represented the maturation of the Junto from a central committee for the Republican planter majority into a separate economic force in the state. Politically, the Junto Republicans moved into an informal alliance with Federalist mercantile interests and for a time, at least, the Virginian political landscape looked very much like that of many northern states. Although there were attacks from the extremes, some of which are discussed below, policy was ultimately set by commercially minded moderates of both parties.

The farmers along the upper James, who were required both to send and receive goods through the Richmond bottleneck, would not be helped much by the Junto's relocation of the Richmond docks a mile downstream. They would still have no choice but to deal with the town's merchants. In 1816, a movement began to destroy this "odious monopoly," as one petition called it, by constructing a canal from the head of the falls above Richmond to the tidewater, along the south side of the James. Since the James River canal, Richmond, and Rockett's Landing were on the north side of the James, the new canal would allow the farmers to by-pass Richmond altogether. After they got to the tidewater on the south side of the James, small boats could easily sail to Norfolk. The commercial effect would be to create competition between Richmond and Norfolk merchants for the farmers' business, which, it was believed, would raise the

prices paid for agricultural produce, and lower prices paid for imported consumer goods. Despite opposition from the Richmond Junto and some Federalists, the proposal gained momentum in the legislature. In 1817, the bill to incorporate the "Manchester Canal Company" failed to pass the House by a single vote. The next year, the House passed the bill, 93 to 60, but the Senate disagreed, suggesting direct action against the James River Company instead of the creation of a second corporation.⁵⁴

The bill to charter a company to construct a new canal parallel to the old raised important questions concerning the power of the legislature to reduce the privileges and profits of corporations. The proposed canal would acquire a double benefit at the expense of the James River Company. It would attract business around Richmond, reducing revenues, and, since it would not begin until the head of the falls, it would benefit from the improvements (such as they were) made in the upper James by the old company.

The issues were debated at length in the legislature and the press from the end of 1816 through the early months of 1818. Those in favor of chartering the Manchester Canal Company stressed the fact that the James River Company was paying sixteen per cent per year dividends while the charter requirements had not been met. Many denied that chartering

⁵⁴Rice, Internal Improvements in Virginia, 402-403. Dunaway, James River Company, 40-41. The House votes are in Richmond Enquirer, Feb. 11, 1817, p. 3, col. 5, and Feb. 10, 1818, p. 3, col. 5.

a second company would in any way affect vested rights. Since the James River Company had failed to comply with the conditions of its charter it had, according to one legislator, "virtually forfeited" its charter. It was not only the "right" but also the "duty" of the legislature to charter a second company.⁵⁵

The defenders of the James River Company and the Richmond monopoly contended that the legislature did not have the power to issue the second charter. A report of the House Committee of Roads and Internal Navigation, dated December 26, 1816, said that the new canal would represent a violation of the James River Company's charter. "Publica Fides," in a letter to the Richmond Enquirer, referred to the James River charter as a "bargain" in which the state granted toll in return for the improvement of the river. The state should keep its end of the bargain by refusing to authorize the second canal. "Virginian" agreed, but used the language of contract:

the legislature are one of the contracting parties; and yet they are modestly asked to take the whole power and property into their own hands -- to dissolve the contract without the consent, or a legal hearing, of the other party

The writer found that there was no distinction between the legislature's duty to respect "any . . . private right" and its duty to uphold "the vested rights of the James river

⁵⁵Richmond Enquirer, Jan. 28, 1817, p. 3, col. 1; Feb. 13, 1817, p. 3, col. 1 for summaries of the legislative debates. See also "Juriscola" letters, Ibid., Dec. 13, 1817, p. 4, col. 1; Dec. 18, 1817, p. 4, col. 1.

company."⁵⁶

The Manchester Canal bill never passed both houses of the Virginia legislature. Apparently, the votes of both Republicans and Federalists who were economically interested in the Richmond monopoly, or who opposed on principle the establishment of a legislative precedent hostile to property rights, provided the margin of defeat. As in the north, moderate sections of both parties combined to protect the established system from disruption.

Unfortunately, no letter or other private expression of opinion has survived to indicate what John Marshall thought of the proposal to charter the Manchester Canal to compete with the James River Company. At least it is possible, and intriguing, to speculate on the impact which the controversy may have had on Marshall's Dartmouth College opinion. The Chief Justice wrote this opinion in Richmond during the summer of 1818 before the controversy had been finally settled. Certainly he did not have to reach into the mists of legal theory for the idea that a corporate charter was a contract. He had to go no further than the Richmond Enquirer, edited by his friend and neighbor, Thomas Ritchie. Perhaps this was why Marshall was so quick to find a constitutionally

⁵⁶Report of the Committee of Roads and Internal Navigation, Dec. 26, 1816, Richmond Enquirer, Dec. 27, 1816, p. 3, col. 5. "Publica Fides," Ibid., March 6, 1818, p. 3, col. 3. "Virginian," Ibid., Dec. 30, 1817, p. 4, cols. 1, 2. "Virginian" was a reply to the "Juriscola" letters. Although Thomas Ritchie, editor of the Enquirer, was associated with those who wished to preserve the Richmond monopoly, his paper fairly presented both sides of the Manchester Canal controversy.

protected contract in the Dartmouth College case. "It can require no argument to prove, that the circumstances of this case constitute a contract," he began. The contracts clause of the constitution extended to "contracts respecting property, under which some individual could claim a right to something beneficial to himself." The Dartmouth College charter, he continued, "is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within the spirit also." Logically, these general propositions embrace business corporations, and it is not too much to suggest that Marshall formulated them with such corporations as the James River Company specifically in mind. Indeed, for Marshall, the main problem in the case was whether the fact that Dartmouth College was a charitable corporation would "create a particular exception, taking this case out of the prohibition contained in the constitution."⁵⁷

⁵⁷Marshall's opinion, Dartmouth College, 4 Wheaton, 627, 628, 644. The Manchester Canal controversy was very similar to that involved in Charles River Bridge, 11 Peters 420 (1837). In that case, the legislature of Massachusetts chartered a company to construct the Warren Bridge from Boston to Charlestown right beside the Charles River Bridge. After the investment in the Warren Bridge was paid off, the bridge became free, and the Charles River Bridge was forced out of business. The case was argued before the United States Supreme Court in 1831, but had to be continued, and was still pending when Marshall died in 1835. Kutler, Privilege, 3, 54, 57-58, 173-179. There is no direct, reliable evidence concerning Marshall's position on the

If the Richmond monopoly had been temporarily saved by the defeat of the Manchester Canal bill, the James River Company itself was not. People continued to complain not only that the corporation had failed to link the basin with the tidewater, but also that it had failed to improve and maintain the upper James as required by the charter. While neglecting charter obligations, the critics pointed out, the company had collected tolls and paid a dividend of twelve per cent before the War of 1812, and sixteen per cent after the War.⁵⁸

Responding to the growing number of complaints, the legislature, on February 25, 1818, directed the state's attorney general to institute quo warranto proceedings to determine whether the James River Company had "failed to perform the conditions, on which they were authorized by the laws regulating their charter, to demand and receive

Charles River Bridge case. Kutler, on the basis of indirect and admittedly unreliable evidence, suggests that Marshall sided with the Warren Bridge. Ibid., 173-179. Given Marshall's moderate views on the question of vested rights, and his own sponsorship of enterprises designed to compete with existing internal improvement corporations, this is not at all unlikely.

⁵⁸Dunaway, James River Company, 32, 34-41. Rice, Internal Improvements in Virginia, 403-405. Before 1818, the legislature had appointed many commissions to investigate the degree of improvement in the upper James. Most of these commissions failed to perform their duties, but one did, in 1812, and informed the legislature that the James River Company had not improved the river to the extent contemplated by the charter. Dunaway, James River Company, 34-35. The legislature gave the company three years to correct the problem, Act of Feb. 18, 1813, Nov. Sess., 1812, ch. XXXIII, Va. Acts (Pleasants), 43-44, but did not enforce its edict after the war.

tolls." On September 24, 1818, the attorney general obtained a rule from the county court at Richmond directing the company to show cause why the charter should not be vacated. The company appealed this ruling, but lost before the General Court in November, 1819. Finally, in 1820, the state purchased the company, and the quo warranto action was dismissed.⁵⁹

Again, no evidence has survived of Marshall's private opinion on the state's direct attack on the James River Company charter by the quo warranto action. Although he may have objected to the destruction of the company itself on policy grounds, he could have had no legal or constitutional objection to the course followed by the state. Corporations in England and America had always been legally bound to follow the terms of their charters, and if they did not do so the executive could bring actions against them. The government's scrupulous regard for these legal processes in the case of the James River Company meant that no violence was done to accepted principles of chartered rights. Nothing

⁵⁹"Resolutions directing proceedings to be instituted against the James River Company; and a survey to be made of the James River and its branches," Feb. 25, 1818, Dec. Sess., 1817, Va. Acts (Ritchie), 225-226. James River Company, 2 Va. Cases 190. Technically, the action was an information in the nature of a writ of quo warranto. Act of Feb. 17, 1820, Dec. Sess., 1819, ch. LVI, Va. Acts (Ritchie), 39-47. Dunaway, James River Company, 42-43. Rice, Internal Improvements in Virginia, 406-414 passim. At the time of the quo warranto proceeding, the Commonwealth and such public corporations as the Board of Public Works and the Literary Fund owned 390 of the 700 outstanding shares. James River Company, 2 Va. Cases, 194.

in Marshall's judicial opinions suggests that he thought otherwise.

One other enterprise with which Marshall was associated should be noted. On February 26, 1818, the legislature chartered the Virginia Canal and Navigation Company. Seventeen commissioners, any four of whom could serve, were appointed to open the subscription books in Richmond during the late spring and early summer of 1818. Others were appointed to open the books in Petersburg. First on the list of those appointed for Richmond was "John Marshall." His association with the enterprise was not publicized in print. The announcements of the opening of subscriptions at Swan's and Washington's Taverns did not mention his name. In the tight commercial world of Richmond, however, this could have made little difference. It is possible to imagine Marshall taking a break from his labors on an early draft of the Dartmouth College opinion to urge tavern patrons to purchase a few shares in the new venture.⁶⁰

⁶⁰ Charter of the Virginia Canal and Navigation Company, esp. sec. 1, Act of Feb. 26, 1818, Dec. Sess., 1817, ch. LX, Va. Acts (Ritchie), 96-105. Hereafter cited as "Virginia Canal Co. charter." The company was dominated by the Richmond faction. The charter itself was apparently uncontroversial. Leave to bring in the bill to incorporate the company was granted by the House on February 12, only two weeks before its final passage. Richmond Enquirer, Feb. 14, 1818, p. 3, col. 2. No debate is recorded. For some of the announcements of meetings of the commissioners and the opening of the books, see Ibid., April 21, 1818, p. 3, col. 6; May 19, 1818, p. 4, col. 6; May 26, 1818, p. 3 col. 5; June 12, 1818, p. 4, col. 4; June 16, 1818, p. 4, col. 5. Aside from the charter, no evidence has been found linking Marshall with this company. There can be little doubt, however, that the Marshall named was the Chief Justice. A search of available materials has revealed no other "John

The charter did not indicate just where the new improvements were to be located. It rather ambiguously authorized a "Communication . . . between the waters of Roanoke, or Chowan river, or any of the tributary streams to the latter, and James river or the waters thereof" and also connections "between James River and the Potowmac, or between James River and any of the rivers or waters intermediate between it and the Potowmac." This seems to authorize the construction of canals and turnpikes almost anywhere between the North Carolina and Maryland borders.⁶¹

It is probable, however, that the Virginia Canal and Navigation Company represented an alliance between Richmond and Petersburg commercial interests to save for themselves part of the commerce which was threatened to be diverted by the development of the Roanoke and Meherrin Rivers in south-central and south-western Virginia. As Richmond attempted to divert commerce from Norfolk by constructing a deep water port, Norfolk turned its attention to capturing

Marshall" living in the Richmond area at the time. Although there might have been one, there was certainly none important enough to be listed as a sponsor of a significant internal improvement company. Irwin S. Rhodes, compiler of The Papers of John Marshall: A Descriptive Calendar, pointed out that the position of the Marshall name at the head of a list of seventeen prominent Richmond citizens was indicative of his rank and, it may be added, of his potential value to the enterprise. Letter to the author, Nov. 21, 1970. Herbert A. Johnson, at the time of this writing Co-Editor of The Papers of John Marshall at Williamsburg is similarly of the opinion that it is "most probable that the John Marshall involved was the Chief Justice." Letter to the author, July 31, 1968.

⁶¹Virginia Canal Co. charter, secs. 21 and 24.

for itself commerce which had usually flowed from southwestern Virginia over land to Lynchburg and down the James to Richmond. If the Roanoke River was made fully navigable, produce could flow down the river to Albemarle Sound in North Carolina, and then northward through the Dismal Swamp Canal to Norfolk for sale and export. (Albemarle Sound was cut off from the sea by sand bars.) Accordingly, the Virginia legislature, in cooperation with that of North Carolina, chartered the Roanoke Navigation Company in January, 1817. Richmond, it appears, retaliated with the Virginia Canal and Navigation Company, which would construct canals and turnpikes between the upper Roanoke and the James in order to preserve the traditional flow of commerce.⁶²

The nature of the Richmond membership also suggests that a primary goal of the Virginia Canal and Navigation Company was saving commerce for the city. Marshall, of course, had always been a promoter of Richmond commerce and the James as a commercial route. The second individual listed as a corporator was Joseph Gallego, a wealthy grain miller whose works were in or near Richmond on the James. When he died in July, 1818, most of his \$154,000 estate was real

⁶²On the plan to develop the Roanoke system for the benefit of the southern part of Virginia, see Rice, Internal Improvements in Virginia, 220, 222-226. Rice does not mention the Virginia Canal and Navigation Company. Charter of Roanoke Navigation Company, Act of Jan. 25, 1817, Nov. Sess., 1816, ch. XLI, Va. Acts (Ritchie), 73-82. On North Carolina's interest, see Clifford R. Hinshaw, Jr., "North Carolina Canals before 1860," North Carolina Historical Review, XXV (Jan., 1948), 1, 19-20, 23, 25.

property in Richmond. In his will, dated May 13, 1818, Gallego had foreseen a decline in the value of his holdings. Since he would be primarily concerned with preserving the value of his estate, Gallego's investment in the company makes sense only if the project were designed to save commerce for the city. Finally, four of the corporators had also served as commissioners to take subscriptions in the Junto's Richmond Navigation Company, and at least one corporator, Alexander McRae (of all people), was himself a member of the Junto.⁶³

The commerce of Petersburg, located on the Appomattox River above its junction with the James, was also threatened by the Norfolk offensive, and this explains the inclusion of Petersburg merchants in the company. The Roanoke navigation alone would divert some produce from the Appomattox, but the proposed improvement of the Meherrin, which was closer to the Appomattox than the Roanoke, was even more serious. In 1816, a joint Virginia and North Carolina commission recommended a route down the Meherrin to the Chowan River in North Carolina, and from the Chowan to the Dismal Swamp Canal and Norfolk. In February, 1818, the Virginia legislature chartered the "Upper Meherrin Navigation Company." A part of the commerce of Petersburg might be saved by a connection between either the Nottoway or the Meherrin

⁶³ Virginia Canal Co. charter, sec. 1. On Gallego, see Mordecai, Richmond, 98, 266. Callahan, Richmond As a Port City, 45, 46. Gallego's Ex'ors v. Attorney General, 3 Leigh 450, 451-453 (1832).

(tributaries of the Chowan) and the Appomattox, and Petersburg merchants were apparently included in the Virginia Canal and Navigation Company with this project in mind.⁶⁴

The Virginia Canal and Navigation Company was a strictly private affair. Although the state retained an option to purchase shares later, it subscribed nothing at the beginning. Furthermore, the company was given "full power . . . to designate the . . . routes" of the new improvement. This amounted to a statutory declaration of independence from the Board of Public Works in the matter of location.⁶⁵

In other respects the charter was very carefully drawn to give the company the greatest possible benefits. The original capital was set at \$150,000, but a majority of the stockholders could increase this amount at any time. The ratio of capital expended to the amount of toll authorized for the James River canal was to be applied to set the rates for the new company. In any event, the legislature committed itself to set the tolls so the company would return a minimum of fifteen per cent "clear profit." Unlike most other canal companies, no maximum return was set. The charter also contained the standard vesting clause with the perpetual tax exemption "in consideration of" the stockholders' "expences."

⁶⁴Summary report of the Virginia and North Carolina commissioners to investigate the Roanoke-Meherrin-Chowan route, Niles Weekly Register, X (July 20, 1816), 342. Charter of the "Upper Meherrin Navigation Company," Act of Feb. 24, 1818, Dec. Sess., 1817, ch. LXI, Va. Acts (Ritchie), 105-108.

⁶⁵Virginia Canal Co. charter, secs. 17, 25.

The company had to begin construction within eighteen months of its organization, and was required to finish within ten years. However, the company could lose only those works not begun or completed in time, or not constructed according to other requirements in the charter. The Virginia Canal and Navigation, unlike the James River Company, could not lose all of its works for failure to complete a part. On balance, although no individual charter provision was unique, with the possible exception of the qualified exemption from a quo warranto action, the combination gave the new corporation more beneficial "franchises, privileges, and immunities" than any other private internal improvement company in the state.⁶⁶

Despite the extraordinary number of privileges, it does not appear that the new company proceeded very far with the construction of its canals and turnpikes. The Congressional embargo of the fall of 1818 and the panic of 1819 had the same depressing effect on this as other internal improvement enterprises in the state.

It is not entirely clear why Marshall chose to sponsor this particular corporation, among all those he could have joined. Realistically, he could not have hoped for a large immediate return on his investment. All internal improvements took a long time to construct, and this company would

⁶⁶Ibid., secs. 8, 19, 20, 21, 24, 26. This charter was drafted by a master. It may be the work of Marshall, but there is no evidence on the matter one way or the other.

face stiff competition from the Roanoke and Chowan projects, reducing the possibility of large profits. Nonetheless, Marshall's participation was consistent with his support for the development of the James River line of commerce. And most important, the Virginia Canal and Navigation Company was, in terms of finance and control, a strictly private enterprise in a period of expanding state activity in the field of internal improvements. The legislature was not only increasing subsidies to internal improvement corporations, but was also taking voting stock in them, and requiring that they be supervised closely by the Board of Public Works. Yet Marshall had long been opposed to state participation in business enterprises. He had opposed the legislative control of the Bank of Virginia when it was founded in 1804, and had written to Greenhow in 1809 that legislative interference in corporate affairs was "dangerous and unwise." The new Virginia Canal and Navigation Company, with its full complement of legal privileges and substantial independence from state participation and control, was an experimental alternative to mixed enterprise, a sort of "model" corporation to demonstrate the strength and utility of strictly private corporations. Marshall was simply giving practical expression to beliefs he had held for half a lifetime.

Finally, it would be difficult to believe that Marshall's participation in the Virginia Canal and Navigation Company did not have some influence on his Dartmouth College opinion. The Chief Justice was in Richmond while the canal company

was being organized in the spring and summer of 1818, and this was at least close to the time when he wrote his opinion.⁶⁷ The Manchester Canal controversy, in which publicists used the contract theory of corporate charters to defend the James River Company, had not yet been put to rest. In a broader perspective, even though the Virginia legislature had in the past acted responsibly with regard to business corporations, the control of the moderate Richmond Junto had recently slipped, and the emotional anti-mercantile bias of the country majority was temporarily in the ascendancy. Fear of future developments, then, might have led the Chief Justice to formulate his Dartmouth College opinion with the need to protect business corporations specifically in mind. Nonetheless, the future had not arrived in 1819, as the Virginia government continued to use available legal tools, and Marshall was still protecting an existing system of political economy rather than judicially creating a new one.

If the above interpretation of Marshall's membership in the canal company is correct, however, it would be unfair and an oversimplification to attribute the Dartmouth College

⁶⁷ Marshall was in Richmond most of the time the new corporation was getting organized. He was there in late March and early April, but left to hold his Circuit Court in Raleigh, North Carolina, which he did on May 12 and 13. Rhodes, Papers of Marshall, II, 134, 135, 148. Two weeks later, on May 27, he delivered his opinion for the Circuit Court in Richmond in United States v. The Schooner Little Charles, 1 Brockenbrough 347, 350 (1818). He was in town on June 9, June 24, and July 22. Rhodes, Papers of Marshall, II, 137, 145, 148. According to Beveridge, the Dartmouth College opinion was written "in Virginia" in the summer, fall, and early winter of 1818. Marshall, IV, 220.

opinion solely to Marshall's desire to protect his investment from direct legislative attack. Rather, on a deeper level, both Marshall's sponsorship of the company and his opinion in the Dartmouth College case proceeded from a core of belief in the superior utility of private, non-governmental enterprise.

A full review of Marshall's experience over the four decades following the 1780's reveals the extent to which the stated principles of his Dartmouth College opinion were derived from his association with the Virginia political economy. From the very beginning, Marshall's primary associations were with the commercial and financial interests of Richmond. As traders in goods, speculators in land, lenders of money, providers of liquid capital, and dealers in commercial paper, the merchants had economic interests different from those of the planter majority. Although the technical legalities were respected, the planter majority often exerted its political power in the legislature to control economic institutions against the wishes of, or even at the expense of, the merchant minority. The legislature retained control over the Bank of Virginia and other state banks, assisted the reorganization of the Mutual Assurance Society to favor country members, failed to support adequately the construction of a trade route to the west, and mounted a concerted attack on the James River Company and Richmond's advantageous commercial position. Although the Republican Richmond Junto moved into commerce and commercial real estate after the

War of 1812, and in the process moved into an informal alliance with merchant groups with similar interests, the near success of the campaign to charter the Manchester Canal indicated that the Junto moderates could not exercise total control over the planter majority. Certainly Marshall had some grounds for fear that the future might bring direct, full-scale attacks on successful business corporations, or at least on those dominated by Richmond financial interests. The Dartmouth College decision would protect these corporations at least from the most flagrant and arbitrary legislative assaults.

Nonetheless, whatever Marshall's apprehensions for the future, his Dartmouth College opinion so far as it related directly to the law of property was primarily an adoption of the essential operating principles of the Virginian political economy as they had developed in the past. Despite the severe economic and sectional divisions which agitated state politics from 1785 on, the corporate charter was the measure of both legislative power and corporate rights and duties. With a single exception, the legislature seems never to have reduced summarily the privileges of a business corporation. Even this exception, the repeal of the charter provision allowing the Richmond James River Company to collect tolls from small boats navigating its canal, was arguably nothing more than the formal voiding of a grant which the legislature could not constitutionally make. Otherwise, the legislature exercised control of

corporations pursuant to regulations contained in original charters. Usually, the state participated in the management of corporations simply by holding stock and exercising its voting privileges. Although the takeover of the Mutual Assurance Society by the country interest may have been regrettable from the standpoint of Marshall and other urban dwellers, neither the Virginia Court of Appeals nor the United States Supreme Court found it illegal. Similarly, the quo warranto action against the James River Company was the accepted legal means for punishing a corporation which had failed to perform its charter obligations. In short, the principle of respect for chartered rights remained at the center of the Virginian practice with which Marshall was so familiar, and he simply made it the basis for his constitutional opinion.

Correlatively, it should be added at this point, because the Dartmouth College doctrines as formulated by Marshall were based on prior Virginian practice, the decision itself produced no change in the way the state's system of political economy actually operated. Had it been law as early as 1790, all the things the legislature did from which Marshall and his associates suffered could probably have been done anyway. After 1819, the legislature had only to do what it had already been doing for forty years in order to stay within the constitutional limitation.

Marshall's appropriation of his state's operating principle of respect for chartered rights was not a sentimental

or parochial elevation of the familiar into American constitutional law. Rather, the Chief Justice had concluded on the basis of his own experience that respect for corporate rights would serve the national interest by promoting the economic growth of Virginia and all other states. Since the early 1780's, Virginia had encouraged the private organization and financing of internal improvement enterprises by chartering corporations and granting them rights to take toll, special tax exemptions, and other privileges designed to minimize risks and maximize returns. Even after the creation of the Fund for Internal Improvement and the Board of Public Works, the primary emphasis continued to be on private capitalization. While some investment would always come from those planters who would directly benefit from individual projects, this source could not provide enough capital for large scale improvements. Instead, Virginia had to rely in part on the mercantile and financial communities. As an investor himself, and from his long association with the Richmond merchants, Marshall knew that paper inducements were not enough to attract a significant amount of mercantile capital out of commerce, foreign bills of exchange, speculation in western lands, and the like. Merchants also required guarantees that the inducements would survive success, that the planter-dominated legislature would not reduce or eliminate corporate privileges after enterprises had matured. In the 1790's, and under the tutelage of the Junto after 1800, the charter privileges

of Virginia's internal improvement corporations had generally been honored. Marshall, like the Junto, sought to continue this protection of existing corporations in order to promote economic growth.

Marshall's Virginia experience likewise influenced his use of the contracts clause of the federal constitution as the vehicle by which his policies were given effect. The idea that a business corporation charter was a constitutionally protected contract was a part of the common fund of ideas with which Virginians debated issues of public policy. In large part, the contract theory followed from the realities of the chartering process. As early as 1796, Marshall outlined the system in his argument before the United States Supreme Court in the case of Ware v. Hylton:

Banks, canal companies, and numerous associations of similar description, are formed on the principle of voluntary subscription. The nation is desirous that such institutions should exist; individuals are invited to subscribe on the terms of the law; and, when they have subscribed, they are entitled to all the benefits, and are subjected to all the inconveniences of the association.⁶⁸

This was another way of saying that a charter represented a freely negotiated bargain, a voluntary agreement between the legislature and investors with the provision of some service to the public in mind. Marshall's Dartmouth College opinion, following the lead of Virginian lawyers and commentators, simply redefined the Virginian system in terms of formal contract law in order to give it a logical and

⁶⁸Marshall's argument, Ware v. Hylton, 3 Dallas 199, 212 (1796). Hereafter cited as Ware.

comfortable position in constitutional doctrine.

Finally, the most remarkable thing about Marshall's opinion was that it was so moderate, considering the negative aspects of his Virginia experience. A lesser man than Marshall might have become embittered by the long series of legislative attacks on the interests of the mercantile community, and might have tried to use his judicial power to free himself and his Richmond associates from all further legislative harassment, perhaps by Story's expansive reading of the contracts clause. However, the Chief Justice showed an extraordinary capacity to view his experience objectively and to draw from it insightful generalizations as to the minimum institutional requirements to keep the system functioning properly. Consistently with his theory that the federal constitution marked only the "great outlines" of American governmental institutions,⁶⁹ Marshall subordinated his own immediate economic interests and personal sentiments to the broader judicial purpose of defining only the outer limits of political action with respect to business corporations. Thus, the Dartmouth College decision left untouched the normal processes and usual results of democratic politics at the state level, and reached only those legislative actions which threatened the integrity of the whole system of political economy. The decision and Marshall's supporting opinion is further evidence that the Chief Justice was a statesman of the first magnitude.

⁶⁹McCulloch, 4 Wheaton, 407.

VI

THE CHARTER: LEGISLATIVE POWER AND CORPORATE RIGHTS IN STATES OTHER THAN MASSACHUSETTS AND VIRGINIA

Despite important differences between the political economies of Massachusetts and Virginia, a comparison reveals that the two states were remarkably similar in their treatment of business corporations. Although occasionally each state saw vigorous political agitation against such established corporations as the Massachusetts Bank and the James River Company, the legislatures of both states successfully resisted direct legislative repeal of corporate charters. In practice, charters became the measure of both corporate rights and retained legislative power.

Ideally, a full analysis should be made of sectional and economic divisions and partisan contests in each of the other states in order to arrive at a total picture of the political economy of each state and, by consolidation, of the country as a whole. Since limitations of time and patience make such an extensive investigation impossible, an alternative method has been adopted. This chapter will, first, survey the broad outlines of the system of political economy relative to business corporations before 1819 in states other than Virginia and Massachusetts, relying on session

laws and secondary sources. Second, this chapter will examine in more detail important developments in Pennsylvania, Connecticut, North Carolina, and New Hampshire.

A profile of legislative action with regard to business corporations has been constructed. In addition to those of Massachusetts and Virginia, the following session laws were examined: New Hampshire and New York, 1780-1818; Connecticut, Delaware, Georgia, Kentucky, Louisiana, Maryland, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont, 1815-1818. In addition, an investigation of the pre-1815 legislative history of particular corporations in the latter group of states was made when the laws, court cases, or other primary or secondary sources indicated that this would be productive.¹

¹Many secondary sources which discuss relevant aspects of the development of business corporations have already been discussed. Among the most important of these are Davis, American Corporations; Dodd, American Business Corporations; Hurst, Law and the Conditions of Freedom, and Legitimacy of the Business Corporation. See also, Louis Hartz, Economic Policy and Democratic Thought: Pennsylvania, 1776-1860 (Cambridge: Harvard University Press, 1948). Hereafter cited as Pennsylvania. John A. Cadman, Jr., The Corporation in New Jersey: Business and Politics 1791-1875 (Cambridge: Harvard University Press, 1949). Hereafter cited as The Corporation in New Jersey. Shaw Livermore, Early American Land Companies: Their Influence on Corporate Development (New York: Octagon Books, Inc., 1968). Hereafter cited as Early American Land Companies. Benjamin F. Wright, Jr., The Contract Clause of the Constitution (Cambridge: Harvard University Press, 1938). Hereafter cited as Contract Clause. Milton S. Heath, Constructive Liberalism: The Role of the State in Economic Development in Georgia to 1860 (Cambridge: Harvard University Press, 1954). Hereafter cited as Constructive Liberalism. Joseph G. Blandi, Maryland Business Corporations, 1783-1852 (Baltimore: The Johns Hopkins Press, 1934). Hereafter cited as Maryland Business Corporations. A good statistical study, useful chiefly for identification of the numbers and types of business

Before 1819, the overwhelming majority of business corporations were chartered by special legislative acts. Each charter contained, at a minimum, grants of the power to be a corporation, and of the privileges and franchises necessary to carry on the particular business. All but the briefest charters also contained some directions for the organization and operation of the company. Some enterprises received special privileges, such as tax exemptions, or, in the case of banks, a summary process for collecting debts.

Equally significant, charters were also the primary devices by which legislatures controlled the organizations they sanctioned. Since corporations enjoyed only those rights enumerated or necessarily implied in the incorporating act, every grant of power was also understood to be a legal limit on corporate action. Legislatures often specifically required corporations to perform according to the terms of their charters. Internal improvement corporations had to build their works to specifications within a stated time, and maintain them thereafter. In addition, many charters contained specific restrictions on corporate activity, the nature of the restriction varying with the type of business. Banks, for example, were typically forbidden to engage in

corporation charters, is George Herberton Evans, Jr., Business Incorporations in the United States, 1800-1843 (New York: National Bureau of Economic Research, Inc., 1948). A similar study which is confined to Pennsylvania is William Miller, "A Note on the History of Business Corporations in Pennsylvania, 1800-1860," Quarterly Journal of Economics, LV (Nov., 1940), 150-160.

trade. Perhaps the most potent legislative control was the limitation on the duration of charters. After the stated time limit had expired, the corporation ceased to exist as a legal entity, and had to go out of business unless the legislature took further action.²

In addition to charter obligations, restrictions, and limits on duration as devices for control of business corporations, legislatures very early began to include reservation clauses in many charters. There were several types. General reservation clauses reserved legislative power to alter, amend, or repeal any section of the charter. Partial reservation clauses applied only to specific charter provisions, such as the rates of toll. Both general and partial reservation clauses might be unconditional or conditional. Unconditional reservation clauses were exercisable by the legislature at any time. (Since nearly all general reservation clauses were unconditional, the term "general reservation clause" will hereafter refer to an unconditional clause.) Conditional reservation clauses were operative only after the passage of time, the receipt by the company of its original investment plus a designated percentage of profit, or the occurrence of some other event. Obviously, the

²Livermore, Early American Land Companies, 245-271, emphasizes the degree to which legislatures could regulate business through charter provisions, but over-emphasizes the degree to which these regulations actually impaired business operations. Cf., Cadman, The Corporation in New Jersey, 363-368. Hurst, Legitimacy of the Business Corporation, 13-17, 19-22, 122.

number of possible combinations was nearly infinite.³

In 1789, Connecticut became the first state to include a general reservation clause in a business corporation charter, as the legislature reserved a right to alter, amend, or repeal the charter of the silk manufacturers of Mansfield. Thereafter, the state made extensive use of such clauses. At least forty other manufacturing company charters issued before 1819 also had general reservations. The first three banks chartered by Connecticut contained no such clauses, but all those chartered between 1796 and 1819 did. Similarly, all insurance company charters after 1797 contained general reservations, but a 1795 charter did not.⁴

Other states also included reservation clauses in business corporation charters. Massachusetts was the first to reserve an unconditional power to regulate charges by

³Historians and legalists have recognized that reservation clauses existed before 1819, but have generally recognized neither the extent to which they were used nor their important implications for the legal theory of business corporations. An exception is R. N. Denham, Jr., "An Historical Development of the Contract Theory in the Dartmouth College Case," Michigan Law Review, VII (Jan., 1909), esp. 220-221.

⁴Davis, American Corporations, II, 315-316. Most corporate charters are printed in Private Laws of Connecticut. The charters are arranged by types: Banks, 64ff. Insurance Companies, 617 ff. Manufacturing Companies, 723 ff. Turnpike Companies, 1202 ff. Charters listed but not reprinted: Middletown Manufacturing Society, Oct. Sess., 1810, Ch. 1, Conn. Laws (Hudson and Goodwin), 41-43. New Haven Fire Insurance Company, May Sess., 1813, ch. 18, Conn. Laws (Hudson and Goodwin), 131-134. Derby Bank, Oct. Sess., 1809, ch. 1, Conn. Laws (Hudson and Goodwin), 17-21. Eagle Bank of New Haven, Oct. Sess., 1811, ch. 1, Conn. Laws (Hudson and Goodwin), 65-69. Charter of the Connecticut Medical Society, Act of May Sess., 1792, Conn. Acts (T. Green and Sons), 424.

a business corporation. As noted in chapter IV, many other Massachusetts corporations were subject to reservations. In New Hampshire, most manufacturing company charters issued after 1808 reserved a legislative right to alter or to alter and repeal. The state occasionally used the general reservation in other types of business charters, but partial and conditional reservations, along with limits on duration, predominated. Internal improvement company charters often set a maximum return on investment, and reserved a power to reduce the rates of toll when the company's profits were exceeding the statutory limit. After 1809, general reservation clauses began to appear in Pennsylvania banking, insurance, and internal improvement company charters. Some Kentucky manufacturing charters contained general reservations, while others reserved legislative power to repeal in case of violations of charter provisions. In 1818, Georgia reserved full power to alter or repeal the charters of the new Bank of Darien and the Savannah River Navigation Company. The other states -- Delaware, Louisiana, Maryland, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Vermont -- very rarely or never included general reservation clauses in business charters. However, the charters of most relatively large and important enterprises did contain a wide variety of partial and conditional reservations, many designed to protect public and private interests which would be affected by corporate activities.⁵

⁵Charter of the Proprietors of the Androscoggin Boom, Act of Feb. 13, 1789, Sec. III, Dec. Sess., 1788, Mass. Acts

After business corporations were chartered, legislatures as a general rule scrupulously respected their chartered rights. With the few exceptions noted below, none of the states seems to have summarily altered substantive chartered rights of business corporations. What was true of Massachusetts and Virginia, then, was generally true of the other states.

It is erroneous, however, to equate respect for chartered rights with complete corporate independence from legislative control. Since chartered rights extended only as far as the charter, the legislatures had ample freedom of action. Very often, a grant of additional benefits made at the request of a corporation was conditioned on the acceptance of new restrictions. When a charter expired, all

and Laws (Adams and Nourse), 773-775. Laws of New Hampshire, VI-VIII, passim. Hartz, Pennsylvania, 238-239. (In 1784, Pennsylvania chartered a school, and provided that its constitution could not be altered except by the legislature. Act of Sept. 15, 1784, ch. 1109, Statutes at Large of Pennsylvania, XI, 372-376. This was plainly not a true reservation clause, and apparently was not interpreted as such at the time. Act of Sept. 6, 1786, ch. 1236, Ibid., XII, 260-264. Nonetheless, the Pennsylvania supreme court held that the clause was a reservation of legislative power to alter the charter. Commonwealth v. Bonsall, 3 Wharton 559 (1838). For some reason, Kutler, Privilege, 62, thinks the clause worthy of note.) Charter of the Petersburg Steam Mill Company, Act of Feb. 3, 1817, sec. 8, Dec. Sess., 1816, ch. CVIII, Ky. Acts (Gerard and Kendall), 171. Charter of the Green Mountain Iron Manufacturing Company, Act of Feb. 4, 1817, sec. 16, Dec. Sess., 1816, ch. CXVII, Ibid., 222. Charter of the Bank of Darien, Act of Dec. 15, 1818, Sec. 16, in Lucius Q. C. Lamar, ed., A Compilation of the Laws of the State of Georgia, Passed by the Legislature since the Year 1810 to the Year 1819, Inclusive (Augusta: T. S. Hannon, 1821), 102. Hereafter cited as Laws of Georgia. Charter of the Savannah River Navigation Company, Act of Dec. 19, 1818, sec. 7, Ibid., 526. Heath, Constructive Liberalism, 177-179, 314. Cf., Blandi, Maryland Business Corporations, 57, 61-62.

rights expired with it. The legislature could refuse to recharter the corporation, or it could revive the company with a new, more restrictive charter. Reservation clauses were not often exercised, but they were available for use against many corporations. Perhaps the most dramatic use of such a clause was by Pennsylvania. The state's Bank Act of 1814, passed over the governor's veto, created forty banks. The charters would expire in eleven years, and in the meantime section eighteen reserved the power to revoke any privileges which appeared to be "injurious to the citizens." By 1819, mismanagement and financial panic made the banks exceedingly unstable. On March 29, about two months after the Dartmouth College decision, the legislature greatly increased the banks' liability and provided for the summary forfeiture of the charter when any bank failed to redeem its notes in specie. The preamble of the 1819 act pointedly referred to the legislature's reserved power to alter or amend the original charters.⁶ Finally, if a corporation failed to perform its charter obligations, or failed to abide by its charter restrictions, the legislature could direct the filing of a quo warranto action to have the charter forfeited, or the executive might take such action on its own initiative. Taken together, these legal devices, all consistent with a theory of chartered rights, meant that no

⁶Hartz, Pennsylvania, 238-239. Act of March 21, 1814, esp. secs. 17, 18, Dec. Sess., 1813, ch. 98, Pa. Acts (Bioren), 154-173. Act of March 29, 1819, Dec. Sess., 1818, ch. 142, Pa. Acts (Gleim), 224-226.

corporation was far from some form of legislative control.

There were a few exceptions to the general rule that legislatures did not summarily alter chartered rights, but most of these were qualified by special circumstances. Only one clear exception was found after 1810. In 1817, Georgia repealed the section of the charter of the Marine and Fire Insurance Company of the City of Savannah which had granted the company authority to discount domestic bills of exchange. The other exceptions are discussed more fully below, but are mentioned here for completeness. Pennsylvania repealed the charter of the Bank of North America in 1785, but granted another one two years later. The whole episode was a net gain for chartered rights. North Carolina repealed the charter of a river improvement company in 1796. However, the repeal was for a good cause -- the company had not improved the river -- and the same result might have been accomplished by court action. Finally, the Connecticut legislature lowered the tolls of two turnpike corporations in 1799 and 1803. However, no alterations to the detriment of Connecticut turnpike corporations seem to have been made after 1810, perhaps because of an adverse court decision in that year.⁷

⁷Charter of the Marine and Fire Insurance Company, Act of Dec. 16, 1815, Laws of Georgia, 831-833. Repeal of Sec. 5, Act of Dec. 12, 1816, Ibid., 835. Charter of the President, Directors and Company of the Bank of North America, Act of April 1, 1782, ch. 963, Statutes at Large of Pennsylvania, X, 406-408. Repealed, Act of Sept. 13, 1785, ch. 1178, Ibid., XII, 57-58. Recharter, Act of March 17, 1787, ch. 1278, Ibid., XII, 412-416. Charter of "The Company for opening the navigation of the Catawba River," Act of Nov.

These few instances of summary alteration of business charters are conspicuous and important only as exceptions.⁸ Overwhelmingly, legislatures honored the terms of the thousand or so business charters granted before 1819. They did so, moreover, without sacrificing legislative control over important aspects of corporate activity. In short, judging from the legislative record, the dominant working principle around the country was that the corporate charter was the measure of both legislative power and corporate rights.

This profile of legislative action with regard to business corporations needs to be supplemented with accounts of important developments in several states. Ideas of corporate independence from legislative control in the absence of charter reservations were first fully articulated in Pennsylvania in conjunction with a controversy over the charter of the Bank of North America. The Bank was originally chartered by the Confederation Congress to manage the country's finances, but the corporators, uncertain whether Congress

Sess., 1788, ch. 16, N. C. Laws (Hodges and Wills), 6-7. Repealed, Act of Nov. Sess., 1796, ch. 32, N. C. Laws, 32. Charter of the Oxford Turnpike Company, May Sess., 1795, amended Oct. Sess., 1799, in Private Laws of Connecticut, 1415-1417. Green Woods Turnpike Company, Oct. Sess., 1798, amended, Oct. Sess., 1803, ibid., 1282-1283. When the legislature revised rates of toll so as to allow higher rates to be collected from some classes of travellers, but lower rates from others, it is impossible to tell whether the change resulted in an increase or decrease in company revenues.

⁸Cf., Hurst, Legitimacy of the Business Corporation, 119-120.

had the requisite power, sought a charter from Pennsylvania. After some debate, during which proposals to limit the duration of the charter and to reserve a power of repeal were rejected, the Pennsylvania legislature granted the request on April 1, 1782. A little over three years later the legislature repealed the original charter. From 1785 until 1787 the legality and expediency of the repeal were hotly debated. Finally, in 1787, the legislature granted a new charter, which was limited to fourteen years and otherwise less favorable to the Bank than the original.⁹

During the debate over the repeal of the original charter, the Bank was capably defended by James Wilson, Thomas Paine, Peletiah Webster, and Robert Morris, among others. The basic assumption of all their arguments was that a legislative charter amounted to a grant of property rights to individuals and was therefore qualitatively different from a general law for the governance of the whole community. Before the legislature, the defenders of the Bank relied heavily on a due process argument, alleging that the Bank had not had a proper opportunity to be heard and that the legislature could not in any event deprive the Bank of its

⁹ Charter of the Bank of North America, Act of April 1, 1782, ch. 963, Statutes at Large of Pennsylvania, X, 406-408. Repealed, Act of Sept. 13, 1785, ch. 1178, Ibid., XII, 57-58. Recharter, Act of March 17, 1787, ch. 1278, Ibid., XII, 412-416. Lawrence Lewis, Jr., A History of the Bank of North America, the First Bank Chartered in the United States (Philadelphia: J. B. Lippincott and Co., 1882), 44-46, 63, 66, 73. For brief accounts, see Davis, American Corporations, II, 35-44, 310-313. Hartz, Pennsylvania, 68, 78, 236-238.

right to a trial in a court of law without illegally usurping judicial power. In addition, Wilson, who would attend the federal constitutional convention in 1787, and later be appointed to the Supreme Court, argued that the charter was a "compact" between the legislature and the corporators, a compact which could not be departed from "consistently with the rules of good faith." Both Paine and Webster elaborated the contract theory, but the latter went on to describe the sorts of legislative acts which he considered contracts. Included were not only acts incorporating subscribers to a bank but also acts "granting toll to persons who shall build a bridge, for which they contribute their money," and acts "for incorporating churches, universities, hospitals, schools, &c. in consideration of money paid, or to be paid, by the contributors."¹⁰ These propositions constituted a remarkable anticipation of both the rationale and the limits of the Dartmouth College decision.

The Bank of North America was not the only corporation troubled by the Pennsylvania legislature in the Revolutionary and Confederation period. As noted in chapter III, the College of Philadelphia had been founded by numerous prominent

¹⁰ [James Wilson], Considerations on the Bank of North-America (Philadelphia: Hall and Sellers, 1785), 15-17. Thomas Paine, Dissertations on Government, the Affairs of the Bank, and Paper-Money (Philadelphia: Charles Cist, 1786), 10-16, 34. [Webster], Essay on Credit, 23, 34-38. Mathew Carey, ed., Debates and Proceedings of the General Assembly of Pennsylvania, on the Memorials Praying a Repeal or Suspension of the Law Annulling the Charter of the Bank (Philadelphia: Seddon and Pritchard, 1786), passim.

individuals, and had been chartered in the middle 1750's. In part to avoid difficulty with the legislature, the college authorities had pressed, successfully, for a confirmatory clause in the state constitution of 1776. Nonetheless, the legislature removed the officers, trustees, and faculty of the college in 1779, and installed a new set. It was implied that the old authorities were loyalists, and it was specifically charged that they had violated their charter. The displaced college officers did not accept the legislature's action, and the cause of the college became entwined with that of the bank in the mid-1780's, as both the bank and the college forces argued that the legislature had exceeded its constitutional power over corporations. Finally, in 1789, the legislature restored the old charter, declaring that the earlier act had been "repugnant to justice, a violation of the Constitution of this Commonwealth, and dangerous in its precedent to all incorporated bodies." The revised constitution of 1790 retained the provision confirming charters of charitable corporations and added a clause prohibiting the state from impairing its contracts.¹¹

Connecticut was the second state where a theory of corporate chartered rights received early formulation, perhaps

¹¹Cheyney, University of Pennsylvania, 17-52, 120-150. Pa. Const. of 1776, Frame of Government, sec. 45; Pa. Const. of 1790, Art. VII, Sec. 3, Art. IX, Sec. 17, in Thorpe, ed., Constitutions, V, 3091, 3099, 3101. Alteration of the charter of the College of Philadelphia, Act of Nov. 27, 1779, ch. 871, Statutes at Large of Pennsylvania, X, 23-30. Repeal of the alteration, Act of March 6, 1789, ch. 1393, Ibid., XIII, 187-192.

in part as a result of President Clap's successful defense of Yale from legislative investigation in the 1760's. As noted in chapter III, Zephaniah Swift wrote in 1795 that the banks of Hartford and New London, the society of physicians, and Yale were "private corporations." As such, the institutions could be dissolved only by the voluntary surrender of their charters, by the death of all their members, or by a judicially-declared forfeiture for neglect or abuse of charter privileges. Public corporations, in contrast, could be altered or dissolved by the legislature.¹² Swift's analysis was similar to that of the Pennsylvanians, but he added "private corporations" as a special legal category distinguished by a unique relationship to the legislature.

The Connecticut legislature, as noted above, occasionally reduced the amount of tolls which turnpike corporations could collect from certain classes of users. The reductions seemed to favor local users. Where the turnpike shares were widely held throughout a locality, the corporation would have no objection to such a change. It may have been that people initially regarded turnpikes as public corporations, subject to legislative control even in the absence of reservation clauses. Significantly, perhaps, Swift did not include turnpikes in his list of private corporations.

Whatever the original reasons for the charter alterations,

¹²Swift, A System of the Laws, I, 225, 228. The 1792 charter of the Connecticut Medical Society, which Swift labelled "private," reserved legislative power to alter, amend, or repeal. Act of May Sess., 1792, Conn. Acts (T. Green and Sons), 424.

the practice seems to have ceased after 1810. The reason may have been the Connecticut Supreme Court's decision in Inhabitants of the Town of Waterbury v. Clark. The facts of the case were somewhat complicated. A general statute of long standing required towns to build all "needful" bridges within their limits, unless some particular person had this responsibility. The charter of the Waterbury River Turnpike Company, issued in October, 1801, required the company to build bridges which towns were not liable to build and maintain. In October, 1802, the company built a bridge over the Mad River in the town of Waterbury, and sued the town for reimbursement, contending that the town was required to build the bridge under the general statute. Apparently, no final decision was reached in this case. Later, the company brought another action against the town, this one for neglecting to repair the bridge. Meanwhile, the legislature, in May, 1807, passed an act which stated that any bridge built by a turnpike company would be the responsibility of the company, unless the turnpike charter designated which bridges would be built by the company and which by the town.¹³

Waterbury pleaded the 1807 act. Incontestably, the

¹³Inhabitants of the Town of Waterbury v. Clark, 4 Day 198 (1810). Hereafter cited as Clark. For the general statute regulating bridges, see John Treadwell, Enoch Perkins, Thomas Day, eds., The Public Statute Laws of the State of Connecticut. Book I. Published by Authority of the General Assembly (Hartford: Hudson and Goodwin, 1808), 119-120. Waterbury River Turnpike Company charter, Oct. Sess., 1801, Private Laws of Connecticut, 1482-1485. Act of May Sess., 1807, esp. sec. 3, Conn. Acts and Laws (Hudson and Goodwin), 768.

company had built the bridge. The company replied that the 1807 act was unconstitutional. It was, the company argued, "a law impairing the obligation of a contract. . . . The legislature . . . made a grant to a number of individuals upon certain conditions. Those individuals accepted the grant, and performed the conditions." This grant was a contract, with the legislature itself a party. Thus, the legislature could not unilaterally alter the grant without impairing its obligation.¹⁴

Judge John Trumbull wrote an opinion, concurred in by six of the other eight judges, upholding the claims of the company. He gave a strained interpretation of the 1807 act in order to reach the conclusion that the act did not apply to the case at hand. This construction was necessary, said Trumbull, in order to prevent the act "from taking away the legal rights of the turnpike companies, and abolishing grants made to them by the legislature."¹⁵ The implications of this opinion were clear. If the legislature passed laws which abridged charter rights of turnpike companies without their consent, the court would construe the laws as inapplicable, or strike them down as unconstitutional.

¹⁴Argument for the company, Clark, 4 Day, 206.

¹⁵Trumbull's opinion, Ibid., 210. Cf., Canaan v. Greenwoods Turnpike Company, 1 Conn. 1 (1814) for further explanation of Clark and the 1807 statute. Cf. also, State v. Tudor, 5 Day 329, 333-335 (1812), in which Judge Jonathan Ingersoll analyzed some functional and legal differences between business corporations and public corporations. His analysis paralleled that of the Massachusetts courts.

The North Carolina legislature, like that of Connecticut, moved against an existing corporation before 1800, although under somewhat different circumstances. In 1788, North Carolina chartered "The Company for opening the navigation of the Catawba River." Apparently, the company did not perform, because the legislature repealed the charter in 1796 on the grounds that the company had not opened the navigation in accordance with the intention of the act.¹⁶ If the facts recited in the charter repeal are true, the state could have achieved the same result, although with some delay, by means of a suit for forfeiture of the charter on the grounds of non-user. For this reason, it is probably incorrect to treat the 1796 act as an instance of arbitrary legislative action.

After 1800, the North Carolina appellate courts took an especially firm stand against legislative tampering with rights of private property. In Ray v. McCulloch, decided in 1804, the Court of Conference held that at the Revolution the title and possession of individuals' lands "were irrevocably fixed, . . . beyond the control of any future law." Apparently unable to stop here, the court went on to declare that "a line was then drawn between the public and private property, never thereafter to be violated." The next year, as noted in Chapter III, the same court struck down the

¹⁶Charter of "The Company for opening the navigation of the Catawba River," Act of Nov. Sess., 1788, ch. 16, N. C. Laws (Hodges and Wills), 6-7. Repealed, Act of Nov. Sess., 1796, ch. 32, N. C. Laws, 32. It does not appear that the company challenged the legislative repeal in court.

legislature's repeal of its grant of escheats to the University of North Carolina. Judge Francis Locke built his opinion for the court on the theory that the legislature could not abridge the private rights which members had in the corporations to which they belonged.¹⁷

Connecticut, in the specific case of turnpikes, and North Carolina appear to be the only two states where the courts may have played more than a marginal role in the development of the system of political economy. Although it is impossible to say what the Connecticut and North Carolina legislatures would have done with regard to turnpikes and other business corporations in the absence of restrictive judicial decisions, it appears that the course of rulings may have had a direct impact on the development of policy by restraining the legislature from amending corporate charters to the detriment of business enterprises.

If the North Carolina courts enthusiastically protected private property, they were equally zealous in upholding the power of the legislature to make grants of privileges to corporations. In President and Directors of the Bank of Newbern v. Taylor, decided in 1813, the defendant, who owed money on a promissory note, challenged the constitutionality of a charter provision giving the bank the power to proceed against debtors in a summary way. This provision, according to Taylor, was a grant of an exclusive or separate

¹⁷Ray, 1 Cameron and Norwood, 493-494. Foy, 5 Murphey, 88-89.

privilege without consideration, in contravention of the state's bill of rights. The court upheld the charter:

It is not questioned that the Legislature had the power to grant the charter to the Bank of Newbern. The object of this grant was the public good, which the Legislature had in view on the one hand, and the grantees had their private interest in view on the other. To carry into effect the scheme of the bank, it became necessary for the parties to enter into arrangements for that purpose; and one part of the arrangement was, that debts due to the bank might be recovered in a summary way. . . . [T]his privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the bank. It is not for this Court to say whether the Legislature made a good or bad bargain; it is sufficient to see that they contracted under legitimate powers; for over such contracts, Courts of Justice have no control.¹⁸

Bank of Newbern was the first judicial holding that a corporate charter was a legislative contract. Technically, however, it was not a holding that a charter was a contract within the meaning of the contracts clause of the federal constitution. The issue in the case was not whether the legislature could alter a charter, but whether it could grant a special charter privilege in the first place. The federal constitution was not involved. Nonetheless, the North Carolina court defended the bank's charter privilege on the grounds that it was a contract right. The federal supreme court had held three years earlier, in Fletcher v. Peck, that legislative grants were contracts within the constitution.¹⁹

¹⁸Bank of Newbern v. Taylor, 2 Murphey 266, 267 (Sup. Ct. 1813). *Italics added.* Hereafter cited as Bank of Newbern. S. C. Carolina Law Repository, I (March, 1813), 246-247.

¹⁹Fletcher, 6 Cranch 87 (1810).

The conclusion that a corporate charter was a contract within the federal prohibition was logically inescapable.

Parenthetically, it should be noted that Bank of Newbern was very similar to Bank of Columbia v. Okely, which came before the United States Supreme Court in 1819. Maryland had chartered the Bank of Columbia in 1793, before the District of Columbia had come into existence. After the District was created, the bank continued to do business there under the Maryland charter. One provision, similar to that contained in the Bank of Newbern charter, allowed the bank to proceed against its debtors in summary fashion. Okely, a debtor, challenged the summary process as a violation of the Maryland bill of rights and also of the seventh amendment of the federal constitution, which applied because the suit arose in the District of Columbia. The Supreme Court reached the same result as North Carolina, giving full effect to the charter provision. However, in his opinion for the court, Johnson stated that the charter provision in question, summary process for the collection of debts, was not a "chartered right" of the bank. It was merely "the remedy, and not the right," and as such remained subject to Congress's power to regulate judicial procedure in the District.²⁰

²⁰Bank of Columbia v. Okely, 4 Wheaton 235, 244-245 (1819). Johnson's implicit acknowledgment that the Bank of Columbia, a business corporation, had some legally defensible chartered rights is further indirect evidence that the Supreme Court believed in 1819 that the contracts clause extended to business corporation charters. If the clause did not extend to such charters, what was the legal source of the rights to which Johnson referred?

Johnson's dictum was contrary to the sense and substance of the North Carolina theory, and to this extent was a much more moderate position. Under the federal theory, the summary process provision could be altered or repealed without infringing the charter. Under the North Carolina theory, summary process was a part of the legislative contract with the bank, and thus presumably could not be unilaterally altered or repealed without abridging the corporation's chartered rights and running afoul of the federal contracts clause.

New Hampshire added nothing new to the theory or practice of business corporations, but is important because it spawned the Dartmouth College case. New Hampshire consistently respected the chartered rights of business corporations. No instance has been found of the summary alteration of such a charter. When a legislative investigation showed that three banking corporations had violated their charters, the legislature requested the executive to bring a quo warranto action against the offending institutions. In his first inaugural, delivered June 6, 1812, Governor William Plumer acknowledged that many acts of incorporation were "in the nature of grants" and could not "with propriety be revoked without the previous consent of the grantees." As for new charters, he counseled the inclusion of a "reservation authorizing the Legislature to repeal them." Reservation clauses appeared more frequently in 1812 than before, or after. As noted in chapter I, Chief Justice William

Richardson, newly appointed by Plumer, labelled chartered business companies "private corporations" in his Dartmouth College opinion, and indicated that they would come within the reach of the federal contracts clause.²¹ Thus, in New Hampshire, as elsewhere, business corporations were acknowledged to have chartered rights but were also subject to a variety of legal controls.

In conclusion, this overview of the system of political economy with regard to business corporations, combined with what has been learned in closer examinations of Massachusetts and Virginia, reveals that the system put together by Americans in the decades after 1780 was neither a democratic, statist mercantilism nor the full blown economic liberalism of the late nineteenth century. Rather, the system had elements of both mercantilism and liberalism, and represented an inventive attempt to harmonize somewhat disparate political values and social goals. The transcendent political values of personal freedom and individual ownership and control of property were most fully recognized in the voluntaristic nature of the business corporation. Aside from a very few state-owned enterprises, the business corporation was everywhere primarily the result of private initiative and private planning. People were not coerced by the government into these corporations, but could buy stock in them, or not, as

²¹Resolution of June 21, 1811, Laws of New Hampshire, VIII, 59-60. Charters issued June and December sessions, 1812, Ibid., 74 ff. Plumer's inaugural, quoted in North, "Political Background," 198. Richardson's opinion, Dartmouth College, 1 N. H., 111, 115, 116, 120, 122, 134-135.

they chose. Respect for chartered rights drew something from the general deference accorded rights of property, but also represented a functional concession to the reliance interests of those who had voluntarily committed their funds to business enterprises. Economic growth could most easily be promoted by attracting private capital into important enterprises with special governmental grants. These grants of special franchises and privileges for the most part had to be respected if private capital was not to be driven into socially less desirable speculative activities. On the other hand, while conceding much to personal freedom, private property, and economic growth, the early national period was aware of the dangers of unchecked and uncontrolled private power, political or economic. Consequently, when chartering business corporations, legislatures insisted on all sorts of obligations, duties, restrictions, limitations, and reservations in order to protect those public and private interests which might be adversely affected by corporate activity. Since entrepreneurs voluntarily accepted these restrictions along with the benefits, they could offer no legal or constitutional complaints when legislatures subsequently enforced the terms of the charters. The values of personal freedom and private property were thus ingeniously reconciled with a necessary measure of governmental control of important economic institutions.

In most states, this system was primarily the creation of legislatures and local entrepreneurs, and both the

Federalist and Republican parties. The courts played a marginal role, at best, either not ruling on important questions at all, as in Virginia and most other states, or merely rationalizing and perfecting the existing system, as in Massachusetts. Connecticut and North Carolina were the only two states found where court rulings might have had a significant, direct impact on legislative development of policy.

Marshall's Dartmouth College opinion represents the highest judicial expression of the dominant principles of the early national political economy. Faced with the task of supporting the decision for Dartmouth, the Chief Justice framed his opinion in terms of existing general principles of private property, charter rights, and public contract which informed the operation of the political economy in nearly every state. Although his implied analogy between business and charitable corporations breaks down on close examination, politically Marshall succeeded in justifying the Court's decision according to publicly accepted operational principles and social values.

Finally, as the Dartmouth College decision was nominally the product of the political economy, so it changed virtually nothing in the system. Certainly state legislatures lost no powers they had been accustomed to exercising before 1819. Moreover, the full complement of charter obligations, duties, restrictions, limitations, and reservations remained entirely untouched. With regard to the political economy of business

corporations, at least, Dartmouth College was a model of judicial restraint and moderation.

VII

DOCTRINAL BASES:

PUBLIC CONTRACTS AND CORPORATE CHARTERS

While the states were creating a workable system of political economy, the doctrinal foundation for Dartmouth College was being laid in public debate and United States Supreme Court decisions. This chapter will survey important developments in the areas of public contract and corporation law. In the field of contract, it focuses on general developments which anticipated the formulation of constitutional doctrine by the Supreme Court, and especially on the legal and political acceptance of the general proposition that state land grants were constitutionally protected contracts. Because the evolution of corporation law has received extensive treatment elsewhere, only a few cases and theoretical matters are considered here.

Article I, Section 10 of the federal constitution explicitly prohibits states from enacting laws which impair the obligation of contracts. The available evidence does not indicate how far the founding fathers intended the clause to reach. It was clearly designed to prohibit certain stay laws and insolvency acts which benefited debtors at the expense of creditors, and was loosely related to the bankruptcy and

legal tender provisions. Although James Wilson, who attended the convention, and other Pennsylvanian defenders of the Bank of North America had advanced the proposition in 1785 and 1786 that a corporate charter was a legislative contract, there is no evidence that the convention discussed the idea. The contracts clause did not figure prominently in the debate over the ratification of the constitution. There were only a few passing references to the clause as embracing public contracts.¹

In the late eighteenth century and the early part of the nineteenth century the idea of contract was expanding to include a wide variety of individual and collective commitments. Contract was, in the words of one analyst, an "omnivorous conception." At one end of the spectrum, the social contract, or compact, was an important part of the popular political philosophy which insisted that government was limited and ultimately based on the consent of the governed. At the other end, the legal contract was growing extensively to embrace many types of private transactions. John Joseph Powell, whose English treatise was widely read in America, stated that contracts were "applicable to all rights . . . which may lawfully become the subject of traffic," and specifically named "every feoffment, gift, grant, lease, loan, pledge, bargain, agreement, promise." Similarly, the French

¹Wright, Contract Clause, 3-16. Warren B. Hunting, The Obligation of Contracts Clause of the United States Constitution (Baltimore: Johns Hopkins Press, 1919), 15-39, 111-120.

civilian Robert Joseph Pothier, also read and cited by Americans, found that all things in commerce, and those acts not prohibited by public policy could be the objects of legal obligation.² Political philosophy and the legal theory of private enforceable agreements met in the idea of public contract. A legislative act which had to be accepted or relied upon by individuals to be operative, which carried express or implied reciprocal commitments to honor the terms, and from which both specific individuals and the state derived benefit was a legal contract binding both legislature and private parties.

After 1789, land became the first subject of a constitutionally enforceable government contract. Several factors influenced this development. In a society which was still primarily agricultural, the desire to own land was nearly universal, and real estate speculation was a major economic activity. Legally, all private land titles were

²Nathan Isaacs, "John Marshall on Contracts. A Study in Early American Juristic Theory," Virginia Law Review, VII (March, 1921), 427. Clinton Rossiter, Seedtime of the Republic: The Origin of the American Tradition of Political Liberty (New York: Harcourt, Brace and Company, 1953), 403-409. John Joseph Powell, Essay upon the Law of Contracts and Agreements, 2 vols. (Dublin: 1790), I, 7, 235. Swift, A System of the Laws, relied on Powell for his analysis of contracts, I, 42, 379. Powell was cited in argument before the Supreme Court in Grant v. Naylor, 4 Cranch 224, 232 (1808), and Young v. Preston, 4 Cranch 239, 240 (1808). Justice Washington cited Powell in his concurring opinion in Dartmouth College, 4 Wheaton, 656. Robert Joseph Pothier, A Treatise on the Law of Obligations, or Contracts. Trans. by William David Evans. 2 vols. (London: A. Strahan, 1806), I, 75-76. In America, A Treatise on Obligations, Considered in a Moral and Legal View. Translated from the French of Pothier. 2 vols. in 1. (Newburn, N. C.: Martin and Ogden, 1802). Probably translated by Xavier Martin.

ultimately derived from governmental grant. This would have been no problem had the conveyance of millions of acres of vacant land from public to private ownership been a slow, orderly process. However, in many states land was the main stuff of politics. As shifting political factions favored the interests of squatters, revolutionary war veterans, hopeful individuals, and big land companies, they produced a mass of contradictory legislation. Some areas, as the Wyoming section of Pennsylvania and most of Vermont, were the subject of long-standing jurisdictional quarrels which generated conflicting public and private claims. Usually, when a legislature took action which affected the validity of existing land claims, those injured vigorously protested, asserting a reliance interest, and decrying the perfidious attack on vested rights. Reference to the federal constitution added a constitutional element to the claimants' case, as original grants were alleged to be contracts which the state could not impair.

The first references to the federal contracts clause as protecting grants of land seem to have been made in New York. For many years, New York and New Hampshire had been feuding over the territory west of the Connecticut River and east of Lake Champlain. In 1790, the two states appointed commissioners to compromise the dispute and to superintend the formation of the area into the new state of Vermont. In the Council of Revision, New York's Governor George Clinton unsuccessfully opposed the compromise. He objected

to the grant of discretionary authority to settle the disputed land claims. This would render titles insecure and deprive citizens of the "ordinary course of justice." Moreover, Clinton continued, "by this bill, the rights of citizens under charters and letters patent, which may be ranked among the highest species of contracts, may not only be impaired, but extinguished, in direct violation of . . . the Constitution of the United States." About six years later, Alexander Hamilton gave a legal opinion in which he stated that a Georgia land grant of 1795 was a contract protected by the federal constitution.³

The principle that a legislative grant was a contract was more firmly established in legal argument and judicial decision in a series of Pennsylvania cases which grew out of a general act of April 3, 1792, for the sale of vacant lands in the state. The act required the settlement and improvement of the lands within two years of the issue of the original warrant, unless settlement was forcibly prevented by the enemies of the United States. The Holland Land Company bought 464,800 acres, but failed to settle the lands as required. Initially, they were prevented from doing so by an Indian war, which was not finally ended until December, 1795. The Company continued to have difficulty

³Clinton's opinion, March 5, 1790, in Street, Council of Revision, 416-417. C. Peter Magrath, Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck (Providence, R. I.: Brown University Press, 1966), 20-22. Hereafter cited as Yazoo. Hamilton's opinion is reprinted Ibid., App. D, 149-150.

finding settlers, and two years after the end of the Indian war a great deal of land remained unsettled. The Company maintained that this made no difference so long as the speculators persisted in their efforts to find settlers. The Pennsylvania Board of Property agreed at first, but a change of administration brought a reversal of the original ruling. Thereafter, both the Company and the state took the problem into court. Even though the 1792 act was general, not a direct grant to the Company, the state's Republican attorney general, Joseph McKean, argued that the act was a legislative contract, and that the principles of contract law provided the applicable rules of construction. Many of the judges agreed, while holding that the Company had not met the contract's condition precedent of actual settlement within the required time.⁴

Having failed to secure satisfactory results in the state courts, the Company brought several cases in federal circuit court, and took one, Huidekoper's Lessee v. Douglass, to the Supreme Court. There attorney general McKean and

⁴Commonwealth v. Coxe, 4 Dallas 170, 194, 195, 204 (Pa. Sup. Ct. 1800). Attorney-General v. The Grantees, 4 Dallas 237, 239, 244 (Pa. Sup. Ct. 1802). Cf., Morris's Lessee v. Neighman, 4 Dallas 209 (Pa. Cir. Ct. 1800). Paul D. Evans, The Holland Land Company, Buffalo Historical Society Publications, vol. 28 (1924), 31-33, 110-112, 122-127, 136-137, 141-142. Hereafter cited as Holland Land Company. Act of April 3, 1792, esp. sec. 9, ch. 1624, Statutes at Large of Pennsylvania, XIV, 232-239. The act is reprinted in Huidekoper's Lessee v. Douglass, 3 Cranch 1, 1-8 (1805). Hereafter cited as Douglass. Cf., Van Horne's Lessee v. Dorrance, 2 Dallas 304, 320 (U. S. Cir. Ct. 1795) (dictum, Pennsylvania act quieting and confirming titles of Connecticut citizens to land in Pennsylvania not a contract.)

his colleagues again referred to the 1792 act as a "contract," as did Alexander Dallas, who represented the Company. In his opinion for the Court, Chief Justice Marshall accepted the theory that the act was a contract and decided for the Company on the basis of equitable principles.⁵

By 1805, then, the Holland Land Company cases had produced a broad agreement among Pennsylvanian political and legal authorities and the federal Supreme Court on the general proposition that a state land grant was a contract. If this did not put an end to controversy, the disputants and the judges had at least created a mutually acceptable framework within which rational legal argument and informed public debate might proceed.

More notorious and ultimately more important than the New York and Pennsylvania difficulties was the political and legal controversy engendered by the Yazoo speculation. On January 7, 1795, the Georgia legislature, heavily bribed

⁵ Balfour's Lessee v. Meade, 1 Washington C.C. 18, 4 Dallas 363, 2 Fed. Cas. 543 (U. S. Cir. Ct. 1803). Lessee of Huidekoper v. Burrus, 1 Washington C. C. 109, 12 Fed. Cas. 840 (U. S. Cir. Ct. 1804). Huidekoper v. M'Clean, 1 Washington C. C. 136, 12 Fed. Cas. 848 (U. S. Cir. Ct. 1804). In his opinions in all these cases, Bushrod Washington treated the problem as one of statutory construction, not as contract. Douglass, 3 Cranch 1, 11, 44, 52, 70-71. For the results on remand, 1 Washington C. C. 258, 4 Dallas 392, 12 Fed. Cas. 847 (U. S. Cir. Ct. 1805). Warren, Supreme Court, I, 369-370. Evans, Holland Land Company, 144-145, 149-154. Douglass anticipated the case of Fletcher v. Peck in at least three respects: (1) The plaintiffs were a "pressure group" appealing to the United States Supreme Court for support against adverse state action. (2) A state land grant was found to be a public contract. (3) The Court used "equitable" principles to justify a decision for the pressure group.

or in collusion with the speculators, passed an act granting thirty-five million acres of land, known popularly as the Yazoo territory, to four land companies for the price of a half million dollars. As the facts surrounding the grant became known, prominent Georgia politicians condemned the iniquity of their rivals, and secured, on February 13, 1796, the repeal of the grant on the grounds that the 1795 act had been unconstitutional and rendered void by the fraud attending its passage. Subsequently, Georgia conveyed the Yazoo lands to the United States for \$1,250,000. Meanwhile, the original purchasers under the 1795 act had sold large amounts of the land to northern speculators, with a large amount going to the New England Mississippi Land Company, centered in Boston. Contending that the 1795 grant was a contract which could not be repealed, and that they were purchasers for value innocent of any fraud, the New England speculators maintained that they, not Georgia or the United States, owned the Yazoo lands. Although Congress did not acknowledge the speculators' title, the 1803 act accepting the Georgia lands set aside five million acres to satisfy outstanding claims. A bipartisan coalition of New England speculators lobbied for nearly a decade before Congress agreed to pay them about five million dollars compensation.⁶

When the proposal for compensation of the New England speculators came before the House of Representatives in 1804 and 1805, John Randolph, in his first significant break

⁶Magrath, Yazoo, 1-36, 97, 99.

with the Jefferson administration, mounted a vigorous opposition. He offered a series of resolutions, the major points of which were that Georgia's 1795 grant had been invalid, that the 1796 repeal had been proper, and that the speculators had no legal or equitable claim to the Yazoo lands. Although Randolph and his supporters in Congress occasionally appealed to unrestricted state sovereignty to justify the repeal act of 1796, they more often accepted the proposition that a valid state land grant was a contract which could not be impaired under the federal contracts clause. "If Georgia has made a valid contract," said Randolph, "we must execute it." However, Randolph consistently emphasized that the presence of fraud made the 1795 act void from the beginning. What was "impudently called a contract," he said, "was, in reality, a fraud of unprecedented enormity"; what had been called a "fair bargain" was really "a cheat upon the people of Georgia of unparalled audacity and magnitude." Similarly, Caesar A. Rodney, soon to become Jefferson's Attorney General, denied that Georgia's repeal act of 1796 was a violation of the contracts clause, because there had been "no contract formed, either in a legal or equitable sense." Although for political reasons the Jefferson administration desired a compromise with the New England Yazooists, Randolph's opposition effectively prevented the passage of the necessary legislation.⁷

⁷Ellis, *Jeffersonian Crisis*, 87-89, 93-94. Henry Adams, *John Randolph* (Boston: Houghton, Mifflin and Company, 1883), 102-112, 125-130. Randolph speeches, Feb. 20, March

The New England speculators had not ignored the courts as a possible avenue of redress. In 1799, the Massachusetts supreme court ineffectually declared the Georgia repeal act of 1796 to be a violation of the federal contracts clause. On June 1, 1803, a case was filed in federal circuit court in Massachusetts. John Peck, of Newton, Massachusetts, had sold 15,000 acres of Yazoo land to Robert Fletcher of Amherst, New Hampshire, and had attached a series of covenants which stated that the grant of 1795 was valid and the repeal of 1796 invalid. Fletcher brought his action for covenant broken in order to test the principal aspects of the Georgia transactions. After a series of continuances, the circuit court decided the case for Peck. Fletcher took the case to the Supreme Court.⁸

Although Fletcher v. Peck was undoubtedly collusive and seemingly recognized as such by the justices, it was heard by the court. Marshall delivered the opinion of the court, which favored the speculators on every major point. The ultimate basis of his opinion, the general proposition that a legislative grant was a contract which could not constitutionally be repealed, was neither new nor widely

7, 10, 1804, in U. S., Congress, The Debates and Proceedings in the Congress of the United States; with an Appendix, Containing Important State Papers and Public Documents, and All the Laws of a Public Nature; with a Copious Index (Washington: Gales and Seaton, 1852), 8th Cong., 1st Sess., 1039-1040, 1111, 1136, 1139. Hereafter cited as Annals.

⁸Derby v. Blake, in Columbian Centinel (Boston), Oct. 9, 1799; Independent Chronicle (Boston), Dec. 12, 1805. Magrath, Yazoo, 52-56. Fletcher, 6 Cranch 87 (1810).

controversial. What was curious was the intellectual ballet the Chief Justice had to perform in order to bring the principle to bear on the case at hand. He tiptoed around inconvenient points and then jumped to broad conclusions. He declared that the 1795 grant was a contract, but refused to allow the original fraud to impair its validity. His protestations that it was too difficult as a matter of law to determine the types and degree of corruption necessary to impeach a legislative act were vitiated by his later insistence that the Georgia legislature should have gone to court or followed court procedures to have the 1795 act judicially annulled. Marshall went on to state that the question of legislative corruption could not be brought "collaterally and incidentally" before the court in a suit on a private contract. Such an inquiry "would be indecent, in the extreme." Yet he ruled on the constitutionality of the 1796 repeal act, apparently finding neither inconsistency nor indecency in the fact that this issue, too, was brought collaterally and incidentally. Throughout his opinion, the Chief Justice emphasized that the New England speculators were innocent third persons, purchasers without notice of the original fraud, and therefore equitably entitled to the lands. Equating the 1795 legislators with the people of Georgia, Marshall casually dismissed the contention that the people and state of Georgia were as much the victims of legislative corruption as the New England speculators. All things considered, Fletcher v. Peck, which operated to

validate the speculators' title against the United States, was a truly remarkable performance.⁹

After their victory in court, the New England Yazooists still had to secure compensation from Congress. Severe opposition in the House, led by George M. Troup of Georgia and Samuel Farrow of South Carolina, blocked passage of the compensation bill until 1814. Fletcher v. Peck was the focus of attack. It should not have been decided at all, the anti-compensation forces maintained, because it was a feigned case got up between speculators to decide a question of right between them and the United States, which was not a party and which could not constitutionally be a party without the consent of Congress. Moreover, the merits of the case were re-examined, in much the same terms used by Randolph a decade earlier. The anti-compensation forces did not complain that the Supreme Court had invalidated a state legislative act, but that the Court had invalidated the wrong act. If the 1795 act was "lawful," said Farrow, "no subsequent act could rescind or impair contracts made under it." He and Troup consistently emphasized that the 1795 grant was obtained through fraud and corruption, and was therefore void from the beginning.¹⁰ In the end, whatever

⁹Magrath, Yazoo, 54, 65-69. Marshall's opinion, Fletcher, 6 Cranch, 130-139. Justice Johnson wrote a separate opinion, agreeing that a state could not revoke its own grants and that the Court could not void a legislative act which had been obtained through fraud. Ibid., 143-144.

¹⁰Troup speeches, Jan. 20, 1813, Annals, 12th Cong., 2d Sess., 857, 859; March 8, 1814, Ibid., 13th Cong., 2d Sess., 1840-1843, 1848. Farrow speeches, March 8, 23, 1814, Ibid., 1850, 1896-1897.

the specific problems of Fletcher v. Peck, the anti-compensation forces had accepted the Supreme Court's general constitutional principles. A bona fide legislative grant of lands for a consideration was a public contract which could not be constitutionally impaired by a subsequent act, and which the Court, in a proper case, had the authority to enforce.

The final case before 1819 in which the United States Supreme Court applied the contract clause to invalidate a legislative act was New Jersey v. Wilson. In a treaty with the Delaware Indians, the provincial government of New Jersey agreed to purchase lands for the Indians in return for the cession of lands south of the Raritan. The act of 1758 executing this treaty included a provision exempting the lands purchased for the Indians from all taxation. In 1801, the Indians sold their lands and moved to New York. In December, 1804, the New Jersey legislature repealed the tax exemption. When the assessor tried to collect the new taxes, twenty-two purchasers challenged the repeal of the exemption in a mandamus action brought in the name of the state. After the New Jersey Supreme Court ruled that the tax exemption applied only to the Indians, the case was taken to the federal Supreme Court. Marshall held that the original tax exemption was part of a contract between New Jersey and the Indians. Since the exemption was annexed to the land, and increased its value, it went with the land to the purchasers. As assignees of the Indians, the purchasers

could claim the benefit of the original contract, and the state could not impair it.¹¹

Considered on its facts alone, Wilson was a rather narrow holding. The principle that a state might make an enforceable contract concerning land had been firmly established in Fletcher. For Marshall, at least, the Wilson holding might have had another dimension. Most important Virginia internal improvement corporations were tax exempt by the terms of their charters, and Virginia, unlike most states, usually labelled shares of internal improvement corporation stock "real estate." Clearly, the principle of New Jersey v. Wilson would not have to be extended very far to invalidate an attempt by the Virginia legislature to repeal the tax exemption.

By 1815, the Pennsylvania cases, Fletcher v. Peck and its aftermath, and New Jersey v. Wilson had firmly established in constitutional law that a legislative grant was a contract protected by the constitution. As in the development of corporate law traced in other chapters, public debate, legislative action, and state judicial decisions preceded and informed the development of federal law, so that the Supreme Court's decisions rested on fundamental constitutional principles accepted by legal authorities and political leaders of both major parties at all levels

¹¹Wilson, 7 Cranch, 166, rev'g State v. Wilson, 1 Pennington 300 (N. J. 1807). Wright, Contract Clause, 34-37.

of government. Although in retrospect it is clear that the Supreme Court had also by 1815 established its institutional authority to enforce the public contract in an appropriate case, there continued to be disagreements as to what constituted an appropriate case, and what limits the constitution imposed on federal judicial power.

While contract was expanding as a legal concept, the corporate form was rapidly becoming the favorite organizational basis of many types of social institutions. Most of the corporation cases which came before the federal Supreme Court involved religious, charitable, or economic organizations. Although the roots of the law ultimately lay in legislative and corporate practice, specific cases required the court to articulate general conceptions about the corporation in order to support its decisions. Because so much has already been said about the Court's corporate decisions, here it is necessary to review only the few important doctrines and decisions which have not received adequate consideration elsewhere.

Legalists have often debated the question of whether the corporation is really an association of individuals for special purposes, or a fictional person, an abstract legal entity existing apart from individual members.¹² In

¹²See, generally, Frederick Pollock, "Has the Common Law Received the Fiction Theory of Corporations," Law Quarterly Review, XXVII (April, 1911), 219-235. Lubasz, "The Corporate Borough," esp. 228-229. Dodd, American Business Corporations, 65-66, concluded that early state court decisions on the private law of corporations followed the entity theory.

the federal Supreme Court, where most cases involved the public law of non-governmental corporations, the associational theory was usually the basis of decision.

The first cases in which the Supreme Court clearly advanced the association theory were Bank of the United States v. Deveaux, and its companions, Hope Insurance Co. v. Boardman, and Maryland Insurance Co. v. Woods. The Deveaux case involved a suit by the first Bank of the United States to try the right of the state of Georgia to impose a tax on the Savannah branch. Although it was averred that the Bank was composed solely of citizens of Pennsylvania, and that the defendants were all citizens of Georgia, the federal district court ruled that it did not have jurisdiction over the parties, and that no federal question was involved. The other cases involved similar jurisdictional problems. Boardman was a citizen of Massachusetts, and the Hope Insurance Company was averred to be incorporated by Rhode Island. Woods was a citizen of Pennsylvania, and the Maryland Insurance Company was averred to be composed of citizens of Maryland. The basic problem in all the cases was the basis of federal jurisdiction where a corporation was a party.¹³

The Court ruled that the requisite diversity of

¹³Deveaux, 5 Cranch 61 (1809), rev'g 2 Fed. Cas 692 (1808). Hope Insurance Co. v. Boardman, 5 Cranch 57 (1809). Maryland Insurance Co. v. Woods, 5 Cranch 61, 78 (1809). Dudley O. McGovney, "A Supreme Court Fiction," Harvard Law Review, LVI (May, 1943), 864-865. Hereafter cited as "A Supreme Court Fiction."

citizenship would exist when all the shareholders of a corporation had state citizenship different from that of the opposing parties. In his opinion for the Court, Marshall emphasized that a suit involving a corporation was "substantially and essentially" a suit between the individual members of the corporation and the opposing party. Considering the relatively small size, local nature, and limited purposes of most corporations in the early nineteenth century, this "associational theory" was completely realistic.¹⁴

Although the Supreme Court followed the association theory in most cases, the universal necessity for a legislative charter, or at least a legislatively authorized charter, forced the Court to accept the idea that the corporation was also the creature of law. This view was first set forth in Head and Amory v. Providence Insurance Co. in 1804. The basic issue was the degree of formality necessary for the cancellation of a marine insurance policy. In his opinion for the Court, Marshall held the corporation

¹⁴ Deveaux, 5 Cranch, 88-89, 91. McGovney, "A Supreme Court Fiction," 865-869. For a good short discussion of Marshall's theory of corporations, see Dodd, American Business Corporations, 35-38, 42-44. Cf., Gerard C. Henderson, The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law (Cambridge: Harvard University Press, 1918), esp. 55-57. Since most corporations were probably composed of citizens of a single state in the early nineteenth century, Deveaux probably did not exclude many corporations from federal court where substantial diversity existed. The Supreme Court brought the second Bank of the United States under federal jurisdiction by finding that all judicial questions relating to it were federal in nature. Osborn v. Bank of the United States, 9 Wheaton 738 (1824).

to the formalities set forth in the charter. The charter was an "enabling act" which granted the corporation all its powers and specified the manner in which they could be exercised.¹⁵ In short, the charter was the measure of the legal power of the associated individuals.

Whether the corporation was an association of individuals or a legal entity, it was merely a legal tool used by corporators to promote their special interests and chartered by the government with the ultimate intent of advancing the public good. This view received its most complete formulation in McCulloch v. Maryland. Counsel for the state had argued that Congress did not have the authority to charter the Bank of the United States because the power of creating corporations was not among Congress's enumerated powers. Marshall based his opinion for the Bank on the conclusion that incorporation was never an end in itself, but always the means of accomplishing some socially useful purpose. Corporators, he correctly observed, never sought a charter as an end in itself, but always as a means for

¹⁵Head and Amory v. Providence Insurance Co., 2 Cranch 127, 167-169 (1804). Cf., Marshall's argument, Ware, 3 Dallas, 212-213 (1796). In the absence of controlling charter provisions, the common law rule was that corporations could only contract by instruments under seal. This was relaxed in Bank of Columbia v. Patterson's Adm'r, 7 Cranch 299 (1813). In a somewhat ambiguous dictum in his opinion in this case, Justice Story foreshadowed the adoption of the contract theory of the corporate charter. "[A]ll duties imposed on them [corporations] by law," he wrote, "and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie." Ibid., 306. Cf., Dodd, American Business Corporations, 94-95.

accomplishing something else.¹⁶ This, too, was a realistic view of the nature of corporations.

The Supreme Court did not pass directly on the question of legislative control of corporations until the 1815 case of Terrett v. Taylor. Because the case is important, and sometimes misinterpreted, it requires some examination. The case arose in the District of Columbia. The original plaintiffs, Taylor and others, were members of the vestry of the Episcopal Church of Alexandria, which had been in Virginia until the establishment of the District. The vestry claimed equitable title to certain lands in the District, and originally sought injunctions against two groups of defendants. First, they sought a decree of sale against the church wardens who held the land in trust for the Episcopal congregation, but had refused to sell. Second, the vestrymen asked the court to declare that their title was good as against the overseers of the poor of Fairfax County, Virginia, and to enjoin the overseers from ever claiming the church lands in question. These county officials, said the vestrymen, were wrongfully claiming the lands under the Virginia act of 1802 which authorized overseers to sell Episcopal lands and apply the proceeds to the support of the poor. Since neither group of defendants answered the bill, the vestrymen's allegations of fact were deemed to have been admitted, and the lower court granted the injunctions.

¹⁶McCulloch, 4 Wheaton, 411, 421-422 (1819).

The overseers alone appealed to the Supreme Court.¹⁷

Justice Story wrote the opinion of the Court. He could have disposed of the matter very briefly by concluding that the material allegations on the face of the bill established sufficient title to enable the vestrymen to bring the suit to enjoin the overseers from interfering with their efforts to sell. The overseers had no valid grounds for claiming the land themselves, since their claim was based exclusively on the Virginia act of 1802, which, as Story admitted, could have no operation in the District of Columbia.¹⁸

However, Story took the opportunity to examine fully the legal and equitable title of the Episcopal Church of Alexandria to the lands in question under Virginia law. This entailed a sweeping review of Virginia legislation establishing and then disestablishing the Episcopal Church during the colonial, confederation and early national periods. Story concluded that all the relevant grants and confirmations of organizational privileges to the Episcopal Church since the Revolution were still operative, and all the repeals were void. This amounted to an attack on the decision of

¹⁷Terrett, 9 Cranch 43 (1815). Justices Johnson and Todd were listed as absent.

¹⁸Ibid., 52. The overseers claimed under the Virginia Act of Jan. 12, 1802, Dec. Sess., 1801, ch. V, Shepherd, II, 314-316. Art. I, Sec. 8 of the U. S. Constitution granted Congress exclusive jurisdiction over the District of Columbia. Congress first exercised this jurisdiction on Feb. 27, 1801, thereby assuming its constitutional control and excluding Virginia. Cf., Young v. Bank of Alexandria, 4 Cranch 384 (1808) (held, Virginia could legislate for the District until Feb. 27, 1801).

the Virginia Court of Appeals in Turpin v. Lockett, which had upheld the act of 1802 and its predecessors.¹⁹

During the course of his opinion, Story set forth general principles governing the relationship between states and corporations. As noted earlier, he drew the distinction, previously elaborated in Massachusetts, between public and private corporations. The franchises of the former were subject to legislative alteration, but the legislature could not "repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws . . . without the consent or default of the corporators." Story stood "upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals."²⁰

Parenthetically, it might be noted that the constitutionality of the Virginia acts disestablishing the Episcopal Church again came before the Virginia courts. In 1827, the members of an Episcopal church challenged the seizure of their lands by the county overseers of the poor under the act of 1802. The church based its case largely on Story's opinion in Terrett. In the lower court, Henry St. George Tucker denied that Terrett had any application to Virginia.

¹⁹Terrett, 9 Cranch, 46-52.

²⁰Ibid., 52. Story did not refer to the contracts clause, perhaps because even he could not find a contract to support the Virginia Episcopal church.

In the first place, the Supreme Court had no jurisdiction to make a ruling based on the Virginia act of 1802, since that act was not in force in the District of Columbia, where Terrett arose. Story's comments were wholly gratuitous, without legal effect. Even if the act of 1802 were in force in the District, said Tucker, Story's constitutional pronouncements were irrelevant since the title of the Episcopal church to Virginia lands had been totally annihilated by 1786, before the constitution had been written. Significantly, however, Tucker accepted Story's basic distinction between public and private corporations. Story had merely erred in calling the Virginia Episcopal church private. Since it had been established by law and supported with tax revenues it was a public corporation, subject to legislative control.²¹

With Story's flight in Terrett, groundwork was finally laid for the Dartmouth College decision. In terms of American doctrine, Dartmouth College represented the intersection of the line of public contract cases with the growing field of corporate case law. The contract cases had decided that legislative grants for a valuable consideration were constitutionally protected contracts. The corporation cases determined that business and some charitable corporations were

²¹Henry St. George Tucker, Commentaries on the Laws of Virginia, Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School: By Henry St. George Tucker, Chancellor of the Fourth Judicial Circuit. 2 vols. (2d ed.; Winchester, Va.: 1836), I, Book I, 162; II, App., "The Opinion of Chancellor Tucker in the Case of Selden and Others against the Overseers of the Poor of Loudon and Another," 1-6, 11-12, 15. On appeal, Tucker's decision was affirmed per curiam. Selden v. Overseers of the Poor, 11 Leigh 127 (1840).

governmentally sanctioned associations of individuals for socially useful purposes, and Terrett and several state decisions had suggested that private corporations were constitutionally protected. From a political standpoint, the fundamental propositions which made up both contract and corporation doctrine were widely, if not universally, accepted by governmental authorities at both the state and federal levels. Thus, it was neither logically nor politically difficult to proceed to the conclusion that the charter of a private corporation represented a legally enforceable contract. The voluntary commitment of private property to the new organization and the performance of socially useful functions was, technically, adequate consideration of the corporators, and invited the finding of a reliance interest in the charter. The legislative grant of legal privileges and special franchises was the public's consideration. If the corporators were bound by the terms of the charter, not merely its benefits but also its restrictions and obligations, symmetry required that the legislature also be bound. Hence, the charter became the measure of both corporate rights and legislative power, all under the legal umbrella of contract.

VIII

CONCLUSION: THE SUPREME COURT AND THE DARTMOUTH COLLEGE DOCTRINE

Two related questions have prompted examination of the law of corporations and contracts in the early national period, the American experience with business and charitable corporations before 1819, and the major elements of the arguments and various judicial opinions in the Dartmouth College case. The first and primary question is, Why did the Supreme Court decide that the charter of a private corporation was a constitutionally protected contract? The second, What was the substance and meaning of the Dartmouth College decision in the context of the early national period? This chapter will review the background of and summarize the reasons for the Court's promulgation of the Dartmouth College doctrine.

Law can be of considerable intellectual, and thus practical, significance in a difficult constitutional case. At the threshold, lawyers and judges use law in a most fundamental way to define the elements of the problem and the issues which are presented. Standard legal analysis suggests the values which ought to inform the result, and offers a means for rationalizing the final decision in terms of prevailing values and existing legal institutions. The

English law of corporations and the American law of contracts contributed in these ways to the resolution of the Dartmouth College case.

Dartmouth College involved a corporation, an institution recognized by all the participants in the case as thoroughly the creature of law. In the absence of a fully-developed American law of corporations, the English treatises and cases were plumbed for the necessary and fundamental legal conceptions which could provide the starting point of analysis. Marshall's celebrated definition of a corporation in his opinion for the Court was thus merely derivative from English law, different from the others only in completeness and style.

At another level of sophistication, Dartmouth College involved not merely a corporation in its abstract essence, but a charitable corporation. In this area, too, American law was seriously deficient, and British doctrine had to fill the gap. However, neither lawyers nor judges could agree upon the correct interpretation and application of the English law of charitable corporations.

The attorneys for the college made the most imaginative use of the English law of charities. Their opponents rather simplistically contended that charitable corporations were by legal definition and in fact performing public services, and that therefore the state legislature, representing the public interest, had both the right and the duty to regulate them. Mason, Smith, Webster, and Hopkinson reached deep

into English law to redefine the whole case in terms of private property. Essentially, they argued that founders of charitable corporations had a perpetual property right in their donations and that charitable corporations founded with private funds were legally "private," beyond the jurisdiction of the royal courts for most purposes and not subject to control by the Crown. Although the English cases, as applied to the case at hand, did not support all the elements of the college attorneys' argument, it was nonetheless true that the English had traditionally given a considerable degree of independence to charitable corporations, and had identified this independence with the founders' property rights. By extension, the college attorneys persuasively contended, American private charitable corporations were constitutionally beyond arbitrary control by state legislatures.

The Justices of the federal Supreme Court certainly were persuaded by the college attorneys' arguments, but, if the opinions are any indication of the judges' mental processes, different Justices were persuaded in different ways. Story not only accepted the basic elements of Webster's case, but offered an elaborate opinion complete with a massive accumulation of English citations. This was no doubt tactically sound, as it gave the impression that there was a firm doctrinal basis for each of his major points. However, closer examination reveals that Story misapplied English cases and butchered accepted legal categories in

order to support broad conclusions which were not required by the case before the Court.

Marshall likewise responded to arguments based on English law, but his response was qualitatively different from that of Story. The Chief Justice viewed the English law not as a collection of detailed prescriptions, but as a form of institutional history which had particular relevance to America. Thus Marshall accepted the basic idea that Dartmouth College involved the property rights of the founders. Yet even though this proposition was in part derived from English law, it in no sense represented a mechanical application of antique precedents. The rest of his opinion similarly owed something to English law, but the Chief Justice carefully and correctly avoided explicit reliance on common law technicalities.

American doctrinal developments in the area of contract were as important as English corporation law for the resolution of the Dartmouth College case. Since the idea of contract was nearly ubiquitous in political philosophy and public debate during the early national period, courts were prompted to use it in a wide variety of situations. The Supreme Court made its first innovative application of contract principles in a series of cases which held that state land grants were constitutionally protect contracts. Although this exercise of federal judicial review was novel, wide acceptance of the fundamental values implicit in the contract theory blunted political attacks on the Court.

Even those who disagreed with the results in some of the early cases subscribed to the general proposition that a state's valid "public contracts" could not be impaired by legislative action.

Although before 1819 no American court had held that the charter of a corporation was within the contract clause of the federal constitution, the trend was clearly in this direction, at least with respect to business corporations. A North Carolina court had upheld the grant of special privileges to a banking corporation on the grounds that the legislature was free to make any contract it wished with the corporators. Whenever the privileges of existing corporations were threatened by legislative action, corporate defenders asserted that charters were public contracts which could not constitutionally be impaired. In Massachusetts, where the question of legislative power over business corporations was relatively well litigated, courts declined the invitation to declare that a charter was a contract, but nonetheless decided the cases consistently with a contract rationale. On the federal bench, Justice Story consolidated the Massachusetts developments, articulating the distinction between public corporations which were subject to comprehensive legislative regulation and private corporations which were not.

Although five of the Justices agreed to extend constitutional protection at a minimum to privately founded charitable corporations, they disagreed among themselves

as to whether to extend the reach of the contracts clause any further. In his opinion for the Court, the Chief Justice acknowledged the detrimental effect of legislative interference with established institutions, but he insisted that the law of property and the traditionally accepted purpose of the contracts clause together set appropriate limits to the Court's ruling. As a general proposition, said Marshall, the contracts clause extended only to contracts respecting property. Dartmouth was within the clause because it was privately founded, and, by extension, other privately founded charitable institutions would likewise be protected. However, the Court refused to move beyond a doctrinal position which was supportable in terms of the received law; publicly founded institutions remained outside the protection of the contracts clause.

Justice Story, supported by Livingston, argued for a much wider extension of the contracts clause than the majority was willing to permit. Story wanted to break the clause away from a confining exclusive application to private property, and erect it into a general limitation on state legislative activity. He took this advanced position in part because he felt more strongly than most of the other Justices a need for such a general restriction. Story privately expressed fears that demagogic political leaders whom he saw emerging after the War of 1812 might sponsor destructive legislative attacks upon all sorts of established institutions. He had personally witnessed

the detrimental effects of the Massachusetts legislature's attempts to control Harvard, a publicly founded institution from which he had graduated and with which he became personally associated. The Justice apparently saw no good reason for protecting privately founded corporations such as Dartmouth while failing to protect publicly founded charitable institutions which were functionally similar to the private and which were equally valuable, equally threatened, and equally vulnerable. Nonetheless, Story's colleagues, less personally involved, less fearful of the future of American democracy, and more sensitive to the political need for judicial restraint, held the line for a doctrinally moderate ruling.

In addition to law, the American experience with business and charitable corporations played a significant role in the Dartmouth College case. "Experience" in a discussion of the processes of judicial decision making is merely a short-hand reference to the judicial assessment of the equities of the case at hand, of the larger requirements of the economic, political, and social systems, and of the lessons of history, apart from purely legal considerations or the intellectual apparatus of the law. From the standpoint of the individual judge, bringing experience to bear on the processes of decision necessarily requires the application of both personal value judgments and more objective social analysis.

The American experience specifically with business

corporations contributed to the formulation of a rationale to support the Dartmouth College decision. Although there were minor variations from state to state, the contours of experience since 1780 were nearly everywhere the same. The process by which entrepreneurs and legislators created business corporations had all the attributes of a private commercial bargain which resulted in the formation of a legal contract. In the crucial area of internal improvements, entrepreneurs planned individual projects and offered to construct them if the legislature granted permission and the necessary legal privileges. Legislators, anxious to promote economic growth, usually accepted entrepreneurial offers, but added a variety of charter obligations, limitations, and restrictions in order to protect public and private interests which might be adversely affected by corporate operations. Although there was intermittent public agitation for summary alteration or repeal of particular charters, legislatures in practice respected chartered rights of internal improvement corporations because a contrary course might drive away scarce capital and thereby inhibit economic growth. In the field of banking, the dynamics of the chartering process and the policy considerations were different. Since banking charters proved so lucrative, the problem was not to attract investors, but to keep the number of charters within reasonable limits, and to police effectively the existing banking corporations. Nonetheless, the equally pressing need to avoid a drastic fluctuation in personnel

and economic policies in the banking system led to the same results as in the area of internal improvements. By 1816, then, there was a widespread, if not universal, agreement that a business corporation charter was the measure of both corporate rights and retained legislative power.

In their Dartmouth College opinions, the Justices of the Supreme Court suggested that the policy reasons for protecting business corporations applied also to privately founded charitable corporations. Legally and logically, the major link between business and charitable enterprises was private property. Charitable donations were regarded as private property over which donors exercised a special and continuing control to the exclusion of the state. Just as American practice and embryonic case law protected the property interests of investors in business corporations to the extent that charters allowed, so, the Court reasoned, law ought to protect private founders' interests in maintaining the organizational integrity of charitable institutions. Functionally, too, analogous considerations recommended the substantial protection of both business and charitable corporations from governmental control. Private investment and economic growth was effectively promoted in the long run by honoring legislative grants of property and privileges to business corporations. The private foundation of educational and other charitable corporations was likewise stimulated, said the Court, so long as founders and donors could be assured that their purposes would continue

to be respected by the government. Conversely, if all charitable donations were held to be merely gifts to the government, subject to unrestricted legislative control, then private individuals would be effectively deterred from making this type of contribution to the public welfare. Essentially, the Court was supporting its new law in the area of charitable corporations with a well-calculated appeal to the familiar and publicly accepted operational principles which underlay the system of political economy.

Although the Court's focus on the founders' property rights for the purposes of rationalizing the Dartmouth College decision was, perhaps, technically legitimate, realistically the property element was only peripheral to the case. The trustees of Dartmouth College, the plaintiffs, had no property interests of their own in the corporation and consequently suffered no economic loss by the charter amendment. The identification of the original donors' interests with those of the trustees would have been strained in any case which arose a half century after the founding of the charity, but it was especially questionable in the Dartmouth College case where a large part of the original endowment had not even been intended for the founding of the college. Moreover, the state did not convert any of the corporate property to its own use; none of Dartmouth's endowment was diverted from the essential purpose for which it had been given, education. Finally, the major property-related policy arguments used to support a decision for

Dartmouth were of questionable validity and doubtful relevance. Whatever the policies necessary to promote the growth of business enterprise, there was no empirical evidence that allowing founders of charitable enterprises a perpetual property right in their donations would significantly affect the level of charitable giving in the United States. The motives for creating a charitable foundation are strong, unlikely to be defeated completely by the mere possibility of future legislation tampering with the charity's organizational structure. And even if the number of charitable enterprises would be reduced by allowing legislatures to control them, there remained alternative means available to fulfill important social needs.

In fact, the real and primary conflicting interests in the Dartmouth College case concerned neither property nor charity, but were political. The central issue was whether the legislature could control all educational corporations, and thus control virtually all significant formally institutionalized education. Although conceding that a legislature might found, endow, and control a state university, Marshall squarely posed the issue, "Is education altogether in the hands of government?"¹ More particularly, could a state government dominated by one major party seize control of a college corporation administered by members of the other major party, even though the college had been privately founded and had existed for a half a century as

¹Marshall's opinion, Dartmouth College, 4 Wheaton, 634.

an independent institution?

Since there was in 1819 no developed constitutional law of civil liberties which would enable the Court systematically to canvass in legal terms the broad political issues which the Dartmouth College case presented, the Court was forced to rely almost exclusively upon the prior American experience with higher education in order to reach a decision on the merits of the central issue. Fortunately, an objective consideration of the record of relations between government and colleges left little doubt as to the appropriate lessons to be drawn. Since the 1760's, colonial and state legislatures had threatened or actually attacked Yale, the College of Philadelphia, William and Mary, Harvard, Columbia, the University of North Carolina, and, of course, Dartmouth. The cause of higher education had in each case been harmed, as fragile institutions had always been unsettled and sometimes positively disrupted. Although political leaders and factions often gained temporary advantages in these affairs, in the long run no legitimate public or governmental interests seemed to be served by allowing these legislative raids to continue. As Marshall concluded, the "fluctuating policy, and repeated interference" of legislatures had "produced the most perplexing and injurious embarrassments."²

Primarily on the basis of the American experience with higher education, then, the Court decided to use its

²Ibid., 648.

constitutional power to turn back New Hampshire's assault on Dartmouth and to prevent legislative attacks on similar institutions in the future for the purpose of advancing the cause of education. Although this was essentially a political decision in a political case, the Justices in their opinions appealed to the law of property and traditional interpretation of the contracts clause in order to justify its decision to the public in familiar and acceptable terms, in order nominally to preserve the Court's role as a legal, adjudicatory institution, and, finally, in order to set rational limits on its ruling.

Dartmouth College applied to both business and charitable corporations, but it applied in different ways. Since it represented an adoption of the current working principles of the nation's political economy, the decision forced no immediate changes in the way states customarily treated business corporations. In order to obey the prescripts of the ruling, states had only to continue the general practice of the preceding four decades, respecting privileges expressly granted by charter, and regulating by means of charter limits, restrictions, reservations, and quo warranto proceedings, all of which remained constitutionally available. Thus, until political and economic changes generated popular demands for significant alterations in the system, the Dartmouth College doctrine was of little importance in the actual operation of the nation's economy.

However, Dartmouth College did resolve important

outstanding questions about the relationship between government and educational corporations. Although the Court's opinion was framed in terms of property rights, the effect of the decision was to guarantee the organizational integrity and political independence of privately founded educational corporations. The ruling not only protected existing private schools, but laid a firm constitutional foundation for the subsequent development of a dual system of education, in which a public sector was governmentally financed and publicly controlled, and an alternative private sector was largely free from political interference. Thus, the decades between 1820 and 1860 saw a rapid expansion of the private sector of higher education, as both state and federal courts interpreted Dartmouth College broadly to protect private schools from governmental intrusion.³ By 1860, Dartmouth College and its progeny had created a constitutional and operational tradition that education would not be altogether in the hands of government, a tradition perfectly suited to the pluralistic, democratic society.

³Tewksbury, American Colleges, 55-56, 64-65, 69-71, 90, 150-151. Hofstadter and Metzger, Academic Freedom, 209-274, *passim*. For cases in which the courts struck down state legislation directed at colleges, see Allen v. McKean, 1 Sumner 276, 1 Fed. Cas. 489 (U. S. Cir. Ct. 1833); Regents of the University of Maryland v. Williams, 9 Gill and Johnson 365 (Md. 1838); Board of Trustees for the Vincennes University v. Indiana, 14 Howard 268 (U. S. Sup. Ct. 1852); City of Louisville v. President and Trustees of the University of Louisville, 15 B. Monroe 642 (Ky. 1855). Cf., Sage v. Dillard, 15 B. Monroe 340 (Ky. 1854).

BIBLIOGRAPHY

BIBLIOGRAPHY

LIST OF REFERENCES

Primary Sources

Cases

Allen v. McKean, 1 Sumner 276, 1 Fed. Cas. 489 (U.S. 1833).

Allen v. Peden, (N.C. 1816), Carolina Law Repository, II
(March, 1816), 638.

Andover and Medford Turnpike Corporation v. Willard, 5 Mass.
80 (1809).

Anonymous, 12 Modern Reports 232 (G.B. 1699).

Atkinson v. Mutual Assurance Society, 6 Cranch 202 (U.S.
1810).

Attorney General v. Corporation of Bedford, 2 Vesey Sr. 505
(G.B. 1754).

Attorney-General v. Dixie, 13 Vesey Jr. 519 (G.B. 1805).

Attorney General v. Earl of Clarendon, 17 Vesey Jr. 491
(G.B. 1810).

Attorney General v. Governors of the Foundling Hospital,
2 Vesey Jr. 42 (G.B. 1793).

Attorney-General v. The Grantees, 4 Dallas 237 (Pa. 1802).

Attorney General, at the relation of Gray v. Lock, 3 Atkyns
164 (G.B. 1744)

Attorney General, at the relation of Mapletoft v. Master,
Fellows and Scholars of Clare-Hall, 3 Atkyns 662 (G.B.
1747).

Attorney General v. Middleton, 2 Vesey Sr. 327 (G.B. 1751).

Attorney General v. Price, 3 Atkyns 108 (G.B. 1744).

Attorney General v. Utica Insurance Company, 2 Johnson's Chancery Reports 371 (N.Y. 1817).

Balfour's Lessee v. Meade, 1 Washington C. C. 18, 4 Dallas 363, 2 Fed. Cas. 543 (U.S. 1803).

Bank of Columbia v. Okely, 4 Wheaton 235 (U.S. 1819).

Bank of Columbia v. Patterson's Adm'r, 7 Cranch 299 (U.S. 1813).

Bank of Kentucky v. Wister, 2 Peters 318 (U.S. 1829).

Bank of Newbern v. Taylor, 2 Murphey 266 (N.C. 1813), Carolina Law Repository, I (March, 1813), 246.

Bank of the United States v. Deveaux, 5 Cranch 61 (U.S. 1809), rev'g 2 Fed. Cas. 692 (U.S. 1808).

Bank of the United States v. Planters' Bank of Georgia, 9 Wheaton 904 (U.S. 1824).

Bentley v. Episc' Eliens', 2 Strange 912 (G.B. 1732).

Ex parte Berkhamstead Free School, 2 Vesey and Beames 134 (G.B. 1813).

Blount v. Horniblea, 2 Haywood 36 (N.C. 1798).

Board of Trustees for the Vincennes University v. Indiana, 14 Howard 268 (U.S. 1852).

Bracken v. Visitors of William and Mary College, 3 Call 573 (Va. 1790).

Bracken v. William and Mary College, 1 Call 161 (Va. 1797).

Brown v. Penobscot Bank, 8 Mass. 445 (1812).

Canaan v. Greenwoods Turnpike Company, 1 Conn. 1 (1814).

Charles River Bridge v. Warren Bridge, 11 Peters 420 (U.S. 1837), aff'g 24 Mass. 344 (1829).

City of London v. Wood, 12 Modern Reports 669 (G.B. 1702).

City of Louisville v. President and Trustees of the University of Louisville, 15 B. Monroe 642 (Ky. 1855).

Commonwealth v. Bonsall, 3 Wharton 559 (Pa. 1838).

Commonwealth v. Blue Hill Turnpike Corporation, 5 Mass. 240 (1809).

- Commonwealth v. Cambridge, 7 Mass. 158 (1810).
- Commonwealth v. Coxe, 4 Dallas 170 (Pa. 1800).
- Commonwealth v. President and Directors of the James River Company, 2 Va. Cases 190 (1819).
- Craigie v. Mellen, 6 Mass. 7 (1809).
- Cunningham v. Michael, Cameron and Norwood 77 (N.C. 1800).
- Currie's Administrators v. Mutual Assurance Society, 4 Hening and Munford 315 (Va. 1809).
- Ex parte Dann, 9 Vesey Jr. 547 (G.B. 1804).
- Derby v. Blake (Mass. 1799), Columbian Centinel (Boston), Oct. 9, 1799.
- Doctor Bentley v. Episcopum Eliens', Fitz-Gibbons 305 (G.B. 1729).
- Dominus Rex v. Episcopum Chester, 2 Strange 797 (G.B. 1727).
- East India Company v. Sandys, VII State Trials (4th ed.) 493 (G.B. 1684).
- Eden v. Foster, 2 Peere Williams 325 (G.B. 1725).
- Elliott's Executor v. Lyell, 3 Call 268 (Va. 1802).
- Ellis v. Marshall, 2 Mass. 269 (1807).
- Fletcher v. Peck, 6 Cranch 87 (U.S. 1810).
- Foster v. Essex Bank, 16 Mass. 245 (1819).
- Fuller v. Plainfield Academic School, 6 Conn. 532 (1827).
- Gallego's Ex'ors v. Attorney General, 3 Leigh 450 (Va. 1832).
- Godwin v. Lunan, Jefferson Reports 96 (Va. 1771).
- Grant v. Naylor, 4 Cranch 224 (U.S. 1808).
- Green v. Rutherford, 1 Vesey Sr. 462 (G.B. 1750).
- Greenhow v. Barton, 1 Munford 590 (Va. 1810).
- Greenhow v. Buck, 5 Munford 263 (Va. 1816).
- Head and Amory v. Providence Insurance Co., 2 Cranch 127 (U.S. 1804).

Hodgson v. Marine Insurance Company of Alexandria, 5 Cranch
100 (U.S. 1809).

Hope Insurance Company v. Boardman, 5 Cranch 57 (U.S. 1809).

Hughes v. Trustees of the University, Cameron and Norwood
370 (N.C. 1802).

Huidekoper's Lessee v. Douglass, 3 Cranch 1 (U.S. 1805),
on remand, 1 Washington C. C. 258, 4 Dallas 392,
12 Fed. Cas. 847 (U.S. 1805).

Huidekoper v. McClean, 1 Washington C. C. 136, 12 Fed. Cas.
848 (U.S. 1804).

Hynshaw v. Mayor of the Corporation of Morpeth, in Duke,
Charitable Uses (1676) 69.

Inglis v. Trustees of Sailors' Snug Harbor, 3 Peters 99
(U.S. 1830).

Inhabitants of the Town of Waterbury v. Clark, 4 Day 198
(Conn. 1810).

King v. Amery, 2 Term Reports 515 (G.B. 1788), rev'd by
2 Brown Parliamentary Reports 336 (G.B. 1790).

King v. Archbishop of York, 6 Term Reports 490 (G.B. 1795).

King v. Bishop of Chester, 1 Wm. Blackstone Reports 22 (G.B.
1748).

King v. Bishop of Ely, 2 Term Reports 290 (G.B. 1788).

King v. Bishop of Ely, 1 Wm. Blackstone Reports 71 (G.B.
1757).

King v. Chancellor, Masters and Scholars of the University
of Cambridge, 1 Strange 557 (G.B. 1723).

King v. City of London, III State Trials (4th ed.) 546 (G.B.
1683).

King v. Master and Fellows of Saint Catherine's Hall,
Cambridge, 4 Term Reports 233 (G.B. 1791).

King v. Pasmore, 3 Term Reports 199 (G.B. 1789).

Case of Kirkby Ravensworth Hospital, 8 East 221 (G.B. 1807).

Korn and Wisemiller v. Mutual Assurance Society, 6 Cranch
192 (U.S. 1810).

Lessee of Huidekoper v. Burrus, 1 Washington C. C. 109, 12
Fed. Cas. 840 (U.S. 1804).

McCulloch v. Maryland, 4 Wheaton 316 (U.S. 1819).

Marine Insurance Company of Alexandria v. Hodgson, 6 Cranch 206 (U.S. 1810).

Marine Insurance Company of Alexandria v. Hodgson, 7 Cranch 332 (U.S. 1813).

Marine Insurance Company of Alexandria v. Tucker, 3 Cranch 357 (U.S. 1806).

Marine Insurance Company of Alexandria v. Wilson, 3 Cranch 187 (U.S. 1805).

Maryland Insurance Co. v. Woods, 5 Cranch 61 (U.S. 1809).

Mayo v. Wilson, 1 N.H. 53 (1817).

Mitchell v. Starbuck, 10 Mass. 5 (1813).

Morris's Lessee v. Neighman, 4 Dallas 209 (Pa. 1800).

New Jersey v. Wilson, 7 Cranch 164 (U.S. 1812), rev'g State v. Wilson, 1 Pennington 300 (N.J. 1807).

Opinion of the Court, 62 N.H. 704 (1816).

Osborn v. Bank of the United States, 9 Wheaton 738 (U.S. 1824).

Philips v. Bury, Skinner 447, 2 Term Reports 346 (G.B. 1694).

Portland Bank v. Apthorp, 12 Mass. 252 (1815).

Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 159 (1804).

Providence Bank v. Billings, 4 Peters 514 (U.S. 1830).

Ray v. McCulloch, Cameron and Norwood 492 (N.C. 1804).

Regents of the University of Maryland v. Williams, 9 Gill and Johnson 365 (Md. 1838).

Rex v. Doctor Askew, 4 Burrow 2186 (G.B. 1768).

Rex v. Vice-Chancellor of Cambridge, 3 Burrow 1647, 1 Wm. Blackstone Reports 547 (G.B. 1765).

Riddle v. Proprietors of the Locks and Canals on the Merrimack River, 7 Mass. 169 (1810).

Robinson v. Barfield, 2 Murphey 390 (N.C. 1818).

Sage v. Dillard, 15 B. Monroe 340 (Ky. 1854).

Proceedings against St. Mary Magdalen College in Oxford,
IV State Trials (4th ed.) 262 (G.B. 1687).

Satterlee v. Matthewson, 2 Peters 380 (U.S. 1829).

Seldon v. Overseers of the Poor, 11 Leigh 127 (Va. 1840),
aff'g Tucker, Commentaries (1836), II, App. 2.

State v. Tudor, 5 Day 329 (Conn. 1812).

Stoughton v. Baker, 4 Mass. 522 (1808).

Sturges v. Crowninshield, 4 Wheaton 122 (U.S. 1819).

Case of Sutton Colefield, in Duke, Charitable Uses (1676)
 68.

Le case de Suttons Hospitall, 10 Coke 1a, 23a (G.B. 1612).

Terrett v. Taylor, 9 Cranch 43 (U.S. 1815).

Town of Pawlet v. Clark, 9 Cranch 292 (U.S. 1815).

Trustees of Dartmouth College v. Woodward, 4 Wheaton 518
 (U.S. 1819), rev'g 1 N. H. 111, 65 N. H. 473 (1817).

Trustees of the Philadelphia Baptist Association v. Hart's
Executors, 4 Wheaton 1 (U.S. 1819).

Trustees of the University v. _____, 2 Haywood 104
 (N.C. 1799).

Trustees of the University v. Gilmour, 2 Haywood 129 (N.C.
 1800).

Trustees of the University of North Carolina v. Campbell,
 1 Murphey 185 (N.C. 1808).

Trustees of the University of North Carolina v. Foy, 1 Murphey
 58, 2 Haywood 310, 374 (N.C. 1805).

Trustees of the University v. Rice, Cameron and Norwood 497
 (N.C. 1804).

Trustees of the University v. Sawyer, Taylor 114 (N.C. 1799).

Turner v. Turner's Executrix, 4 Call 234 (Va. 1792).

Turpin v. Locket, 6 Call 113 (Va. 1804).

United States v. Coolidge, 1 Wheaton 415 (U.S. 1816).

United States v. Hudson and Goodwin, 7 Cranch 32 (U.S. 1812).

United States v. The Schooner Little Charles, 1 Brockenbrough
347 (U.S. 1818).

University v. Horniblea, 2 Haywood 39 (N.C. 1798).

University of North-Carolina v. Johnston, 1 Haywood 373
(N.C. 1796).

Van Horne's Lessee v. Dorrance, 2 Dallas 304 (U.S. 1795).

Vidal v. Girard's Executors, 2 Howard 127 (U.S. 1844).

Wales v. Stetson, 2 Mass. 143 (1806).

Ware v. Hylton, 3 Dallas 199 (U.S. 1796).

Wilkinson v. Leland, 2 Peters 627 (U.S. 1829).

Winchester v. President and Directors of the Bank of
Alexandria, 2 Munford 339 (Va. 1811).

Ex parte Wrangham, 2 Vesey Jr. 609 (G.B. 1795).

Young v. Bank of Alexandria, 4 Cranch 384 (U.S. 1808).

Young v. Preston, 4 Cranch 239 (U.S. 1808).

Legislative Documents

(Connecticut)

Hinman, R. R.; Phelps, Elisha; Church, Leman, eds. Re-
solves and Private Laws of the State of Connecticut.
From the Year 1789 to the Year 1836. Published by
Authority of Resolutions of the General Assembly, Passed
May 1835 and 1836, under the Supervision of a Special
Committee. 2 vols. in 1. Hartford: John B. Eldredge,
1837.

Session Laws. 1792, 1807, 1809-1818.

Treadwell, John; Perkins, Enoch; Day, Thomas, eds. The
Public Statute Laws of the State of Connecticut.
Book I. Published by Authority of the General Assembly.
Hartford: Hudson and Goodwin, 1808.

(Delaware)

Session Laws. 1815-1818.

(Georgia)

Lamar, Lucius Q. C., ed. A Compilation of the Laws of the State of Georgia, Passed by the Legislature since the Year 1810 to the Year 1819, Inclusive. Augusta: T. S. Hannon, 1821.

(Great Britain)

Hansard, T. C., ed. The Parliamentary Debates from the Year 1803 to the Present Time: Forming a Continuation Of the Work Entituled "The Parliamentary History of England from the Earliest Period to the Year 1803." Vol. XXXVIII. London: T. C. Hansard, 1818.

———. The Parliamentary History of England, from the Earliest Period to the Year 1803. Vol. XXIII. London: T. C. Hansard, 1814.

Statutes at Large. Vols. VII, XIV, XVI. Edited by Danby Pickering, 1763-1765. Vol. LVIII. 1818.

(Kentucky)

Session Laws. 1815-1818.

(Louisiana)

Session Laws. 1815-1818.

(Maryland)

Session Laws. 1815-1818.

(Massachusetts)

Session Laws. 1780-1819.

(New Hampshire)

Laws of New Hampshire. 10 vols. Various Imprints: 1904-1922.

(New Jersey)

Session Laws. 1815-1818.

(New York)

Session Laws. 1780-1819.

(North Carolina)

Martin, Francois-Xavier, ed. The Public Acts of the General Assembly of North-Carolina. Volume II. Containing the Acts from 1790 to 1803; Revised and Published, under the Authority of the Legislature. Newbern: Martin and Ogden, 1804.

Session Laws. 1788, 1789, 1794, 1800, 1805, 1815-1818.

(Ohio)

Session Laws. 1815-1818.

(Pennsylvania)

Mitchell, James T. and Flanders, Henry, eds. The Statutes at Large of Pennsylvania from 1682 to 1801. Compiled under the Authority of the Act of May 19, 1887. 16 vols. Various Imprints, 1896-1911.

_____; Martin, J. Willis; Carson, Hampton L., eds. The Statutes at Large of Pennsylvania from 1802 to 1805, Compiled under the Authority of the Act of July 25, 1913. Harrisburg, Pa.: Wm. Stanley Ray, 1915.

Session Laws. 1813-1819.

(Rhode Island)

Session Laws. 1815-1818.

(South Carolina)

Session Laws. 1815-1818.

(Tennessee)

Session Laws. 1815-1818.

(United States)

Congress. The Debates and Proceedings in the Congress of the United States; with an Appendix, Containing Important State Papers and Public Documents, and All the Laws of a Public Nature; with a Copious Index, 8th Cong., 1st Sess., 1804; 12th Cong., 2d Sess., 1813; 13th Cong., 2d Sess., 1814. Washington: Gales and Seaton, 1852-1854.

Statutes at Large. Vols. I, II.

(Vermont)

Session Laws. 1815-1818.

(Virginia)

Hening, William Walter, ed. The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619. 13 vols. Various Imprints: 1809-1823.

Report of the Marshall Commission, Dec. 26, 1812, Journal of the House of Delegates, 1812-1813, 83-89.

Session Laws. 1808-1820.

Shepherd, Samuel, ed. The Statutes at Large of Virginia, From October Session 1792, to December Session 1806, Inclusive, in Three Volumes, (New Series,) Being a Continuation of Hening. 3 vols. Richmond: Samuel Shepherd, 1835-1836.

Books and Treatises

Anthon, John. American Precedents of Declarations, Collected Chiefly from Manuscripts of Chief Justice Parsons and Other Accomplished Pleaders in the State of Massachusetts, Digested and Arranged under Distinct Titles and Divisions, and Adapted to the Most Modern Practice. New York: Stephen Gould, 1810.

Blackstone, Sir William. Commentaries on the Laws of England. Edited by William Carey Jones. 4 vols. San Francisco: Bancroft-Whitney Company, 1915.

Chitty, Joseph. A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject. London: Joseph Butterworth and Son, 1820.

Coke, Sir Edward. The Second Part of the Institutes of the Laws of England. Containing the Exposition of Many Ancient and Other Statutes. London: 1797.

Cooper, George. A Treatise of Pleading on the Equity-Side of the High Court of Chancery. London: A. Strahan, 1809.

Duke, George. The Law of Charitable Uses, Revised and Much Enlarged; with Many Cases in Law Both Antient and Modern: Whereunto Is now Added, the Learned Reading of Sr Francis Moor, Kt. Sergeant at Law. London: Henry Twyford, 1676.

Farrar, Timothy. Report of the Case of the Trustees of Dartmouth College against Woodward. Portsmouth, N. H.: John W. Foster, 1819.

Fonblanque, John [Henry Ballow]. A Treatise of Equity, with the Addition of Marginal References and Notes. 2 vols. 3d ed. rev. Philadelphia: P. Byrne, 1805, 1807.

Hartwell, Henry; Blair, James; Chilton, Edward. The Present State of Virginia, and the College. Edited by Hunter Dickinson Farish. Charlottesville, Va.: Dominion Books, the University Press of Virginia, 1962.

Highmore, Anthony. A Succinct View of the History of Mortmain; and the Statutes Relative to Charitable Uses; with a Full Exposition of the Last Statute of Mortmain, 9 Geo. II. c. 36. and Its Subsequent Alterations: Comprising the Law As It now Stands Relative to Devises, Bequests, Visitation, Leases, Taxes, and Other Incidents to the Establishment of Public Charities. 2d ed. rev. London: J. Butterworth, 1809.

Kyd, Stewart. A Treatise on the Law of Corporations. 2 vols. London: J. Butterworth, 1793-1794.

La Rochefoucauld-Liancourt, duc de. Voyage dans les Etats-Unis d'Amerique. Fait en 1795, 1796 et 1797. 8 vols. Paris: DuPont, 1799.

The Law of Corporations: Containing the Laws and Customs of All the Corporations and Inferior Courts of Record in England. London: 1702.

Pothier, Robert Joseph. A Treatise on the Law of Obligations, or Contracts. Translated by William David Evans. 2 vols. London: A. Strahan, 1806.

_____. A Treatise on Obligations, Considered in a Moral and Legal View. Translated from the French of Pothier. [Probably translated by Xavier Martin]. 2 vols. in 1. Newburn, N.C.: Martin and Ogden, 1802.

Powell, John Joseph. Essay upon the Law of Contracts and Agreements. 2 vols. Dublin: 1790.

Sullivan, James. The History of Land Titles in Massachusetts. Boston: I. Thomas and E. T. Andrews, 1801.

Swift, Zephaniah. A System of the Laws of the State of Connecticut. 2 vols. Windham, Conn.: John Byrne, 1795-1796.

Taylor, John. An Inquiry into the Principles and Policy of the Government of the United States. Fredericksburg, Va.: Green and Cady, 1814.

Tucker, Henry St. George. Commentaries on the Laws of Virginia, Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School: By Henry St. George Tucker, Chancellor of the Fourth Judicial Circuit. 2 vols. 2d ed. Winchester, Va.: 1836.

Tucker, St. George. Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. With an Appendix to Each

Volume, Containing Short Tracts upon Such Subjects As
Appeared Necessary to Form a Connected View of the
Laws of Virginia, As a Member of the Federal Union.
5 vols. in 4. Philadelphia: William Young Birch and
Alexander Small, 1803.

Watson, William. A Treatise of the Law of Partnership.
2d ed. rev. London: J. Butterworth, 1807.

Wooddeson, Richard. A Systematical View of the Laws of England;
As Treated of in a Course of Vinerian Lectures. Read
at Oxford, During a Series of Years, Commencing in
Michealmas Term, 1777. 3 vols. Dublin: 1792-1794.

Collected Works

Bergh, Albert Ellery, ed. The Writings of Thomas Jefferson.
20 vols. Washington, D. C.: Jefferson Memorial As-
sociation, 1903.

Boyd, Julian P., ed. The Papers of Thomas Jefferson. 15
vols. to date. Princeton, N. J.: Princeton University
Press, 1950 - .

Brown, Samuel Gilman, ed. The Works of Rufus Choate, with
a Memoir of His Life. 2 vols. Boston: Little, Brown
and Company, 1862.

Ford, Paul Leicester, ed. The Works of Thomas Jefferson.
12 vols. New York: G. P. Putnam's Sons, 1904-1905.

Story, Joseph. The Miscellaneous Writings, Literary, Critical,
Juridical, and Political, of Joseph Story, LL.D., Now
First Collected. Boston: James Munroe and Company,
1835.

Story, William W., ed. Life and Letters of Joseph Story,
Associate Justice of the Supreme Court of the United
States, and And Professor of Law at Harvard University.
2 vols. Boston: Charles C. Little and James Brown,
1851.

Webster, Fletcher, ed. The Writings and Speeches of Daniel
Webster. 18 vols. Boston: Little, Brown, and
Company, 1903.

Pamphlets

The Additional Charter Granted to the Governors of the College
of New-York, in America. New-York: Parker and Weyman,
1755.

An Answer to a Pamphlet, Entitled, 'Considerations on the Public Expediency of a Bridge from One Part of Boston to Another.' Boston: E. Lincoln, 1806.

Baldwin, Loammi. Thoughts on the Study of Political Economy as Connected with the Population, Industry and Paper Currency of the United States. Cambridge: Hilliard and Metcalf, 1809.

Carey, Mathew, ed. Debates and Proceedings of the General Assembly of Pennsylvania, on the Memorials Praying a Repeal or Suspension of the Law Annulling the Charter of the Bank. Philadelphia: Seddon and Pritchard, 1786.

The Charter of the College of New-York, in America. New York: Parker and Weyman, 1754.

Clap, Thomas. The Annals or History of Yale-College, in New Haven, in the Colony of Connecticut, from the First Founding Thereof, in the Year 1700, to the Year 1766: With an Appendix, Containing the Present State of the College, the Method of Instruction and Government, with Officers, Benefactors and Graduates. New-Haven: John Hotchkiss and B. Mecom, 1766.

———. The Religious Constitution of Colleges, Especially of Yale-College in New-Haven in the Colony of Connecticut. New-London: T. Green, 1754.

[Dana, Samuel Whittelsey]. Yale-College Subject to the General Assembly. New-Haven: Thomas and Samuel Green, 1784.

Paine, Thomas. Dissertations on Government, the Affairs of the Bank, and Paper-Money. Philadelphia: Charles Cist, 1786.

Sullivan, James. The Path to Riches. An Inquiry into the Origin and Use of Money; and into the Principles of Stocks and Banks. To Which Are Subjoined Some Thoughts Respecting a Bank for the Commonwealth. Boston: P. Edes for I. Thomas and E. T. Andrews, 1792.

[Taylor, John]. A Definition of Parties; Political Effects of the Party System Considered. Philadelphia: Francis Bailey, 1794.

[———]. An Enquiry into the Principles and Tendency of Certain Public Measures. Philadelphia: Thomas Dobson, 1794.

[Webster, Peletiah]. An Essay on Credit, In Which the Doctrine of Banks Is Considered, And some Remarks are made on the present State of the Bank of North-America. Philadelphia: Eleazar Oswald, 1786.

[Wilson, James]. Considerations on the Bank of North-America.
Philadelphia: Hall and Sellers, 1785.

Reviews

"A Complete History of Connecticut, civil and ecclesiastical, from the emigration of its first Planters from England in 1630, to the year 1764, and to the close of the Indian Wars. By Benjamin Trumbull, D.D. 2 vols. 8 vo. pp. 1166. New Haven, Maltby, Goldsmith & Co. and Samuel Wadsworth, 1818." North American Review and Miscellaneous Journal, VIII (Dec., 1818), 72-118.

[Dutton, Warren]. "Report of the case of the Trustees of Dartmouth-College against William H. Woodward, argued and determined in the Superior Court of Judicature of the State of New Hampshire, November, 1817: and on Error, in the Supreme Court of the United States, 1819. By Timothy Farrar, Counsellor at Law. Portsmouth, N.H. Published by John W. Foster and West, Richardson and Lord, Boston. J. J. Williams, printer, Exeter." [Etc.]. North American Review and Miscellaneous Journal, X (Jan., 1820), 83-115.

"First, Second, Third, Fourth and Fifth Reports of the Select Committee to Inquire into the Education of the Lower Orders in the Metropolis, and to report their Observations thereupon, together with the Minutes of the Evidence taken before them from time to time, to the House: and who were instructed to consider What May Be Fit to Be Done with Respect to the Children of Paupers Who Shall Be Found Begging in the Streets in and near the Metropolis, or who shall be carried about by Persons asking Charity, and whose Parents, or other Persons who they accompany, have not sent such Children to any of the Schools provided for the Education of Poor Children. 1816-1818." [Etc.]. Quarterly Review, XIX (July, 1818), 492-569.

"A Letter to Sir Samuel Romilly, M.P. from H. Brougham, Esq. M.P.F.R.S. upon the Abuse of Charities. Eleventh Edition. London, Longman & Ridgway. Edinburgh, Constable. 1818." [Etc.]. Edinburgh Review, XXXI (March, 1819), 497-549.

"The Speech of Henry Brougham, Esq., M.P. in the House of Commons, May 8th, 1818, on the Education of the Poor, and Charitable Abuses. Ridgway, 1818." Edinburgh Review, XXX (Sept., 1818), 486-502.

[Story, Joseph]. "Laws of the sea with reference to maritime commerce during peace and war -- from the German of Frederick J. Jackson, advocate, Altona, 1815. By William Frick, Counsellor at Law. Baltimore; E. J. Coale, 1818. pp. 636." North American Review and Miscellaneous Journal, VII (Sept., 1818), 323-347.

"Theology; explained and defended, in a series of sermons; by Timothy Dwight, S.T.D.L.L.D. late president of Yale College. With a Memoir of the Life of the Author. Middletown, Con.; Clark and Lyman; 1818. 5 vols. vol. i. 8 vo." North American Review and Miscellaneous Journal, VII (Sept., 1818), 347-364.

Newspapers

Boston Gazette. 1804.

Columbian Centinel (Boston). 1792, 1804, 1805, 1812.

Independent Chronicle (Boston). 1804, 1805, 1806.

New England Palladium (Boston). 1804, 1805.

Niles Weekly Register (Washington). 1811, 1816.

Richmond Enquirer. 1816, 1817, 1818.

Manuscript Letters

John Marshall to James M. Marshall, April 1, 1804. Beveridge Collection, Library of Congress.

John Marshall to Joseph Story, April 28, 1819. Berg Collection, New York Public Library.

John Marshall to Samuel Greenhow, Oct. 17, 1809. Washburn Papers, Massachusetts Historical Society.

Miscellaneous

"The Bank of the United States. Petitions of Virginia Cities and Towns for the Establishment of Branches, 1791." Virginia Magazine of History and Biography, VIII (Jan., 1901), 287-295.

Charters Granted to the East-India Company, from 1601; also the Treaties and Grants, Made with, or Obtained from, the Princes and Powers in India, from the Year 1756 to 1772. n.p. n. d. [1773].

Great Britain. Acts of the Privy Council of England, Colonial Series. Edited by W. L. Grant and James Munroe. Vol. II. Hereford: 1910.

Hargrave, Francis, ed. A Complete Collection of State-Trials, and Proceedings for High-Treason, and Other Crimes and Misdemeanors. 11 vols. 4th ed. London: 1776-1781.

Marshall, John. An Autobiographical Sketch by John Marshall Written at the Request of Joseph Story and Now Printed for the First Time from the Original Manuscript Preserved at the William L. Clements Library, Together with a Letter from Chief Justice Marshall to Justice Story Relating Thereto. Edited by John Stokes Adams. Ann Arbor: The University of Michigan Press, 1937.

Prothero, G. W., ed. Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I. 4th ed. Oxford: Clarendon Press, 1913.

Richardson, Leon Burr, ed. An Indian Preacher in England, Being Letters and Diaries Relating to the Mission of the Reverend Nathaniel Whitaker to Collect Funds in England for the Benefit of Eleazar Wheelock's Indian Charity School, from Which Grew Dartmouth College. Hanover, N. H.: Dartmouth College Publications, 1933.

Street, Alfred B. The Council of Revision of the State of New York; Its History, a History of the Courts with Which Its Members were Connected; Biographical Sketches of Its Members; and Its Vetoes. Albany, N.Y.: William Gould, 1859.

Thorpe, Francis Newton, ed. The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. Washington, D. C.: Government Printing Office, 1909.

United States. Constitution.

Secondary Sources

Books

Abbott, Frank C. Government Policy and Higher Education:

A Study of the Regents of the University of the State of New York, 1784-1949. Ithaca, N. Y.: Cornell University Press, 1958.

Adams, Henry. John Randolph. Boston: Houghton, Mifflin and Company, 1883.

Akagi, Roy H. The Town Proprietors of the New England Colonies: A Study of Their Development, Organization, Activities and Controversies, 1620-1770. Philadelphia: University of Pennsylvania Press, 1924.

Ambler, Charles H. Sectionalism in Virginia from 1776 to 1861. New York: Russell and Russell, Inc., 1964.

Ambler, Charles H. Thomas Ritchie: A Study in Virginia Politics. Richmond, Va.: Bell, Book and Stationery Co., 1913.

Amory, Thomas C. Life of James Sullivan: with Selections from His Writings. 2 vols. Boston: Phillips, Sampson and Company. 1859.

Bailyn, Bernard. Education in the Forming of American Society: Needs and Opportunities for Study. New York: Vintage Books, 1960.

Bass, Herbert J., ed. The State of American History. Chicago, Ill.: Quadrangle Books, 1970.

Battle, Kemp P. History of the University of North Carolina from Its Beginning to the Death of President Swain, 1789-1868. 2 vols. Raleigh, N.C.: Edwards and Broughton Printing Company, 1907-1912.

Baxter, Maurice G. Daniel Webster and the Supreme Court. Amherst, Mass.: University of Massachusetts Press, 1966.

Bell, Sadie. The Church, the State, and Education in Virginia. Philadelphia: 1930.

Beveridge, Albert J. Life of John Marshall. 4 vols. Boston: Houghton Mifflin Company, 1916-1919.

Blandi, Joseph G. Maryland Business Corporations, 1783-1852. Baltimore, Md.: Johns Hopkins Press, 1934.

Brown, Robert E., and Brown, B. Katherine. Virginia, 1705-1786: Democracy or Aristocracy? East Lansing, Mich.: Michigan State University Press, 1964.

Bruce, Philip Alexander. History of the University of Virginia, 1819-1919. 5 vols. New York: Macmillian Company, 1920.

- Cadman, John W., Jr. The Corporation in New Jersey: Business and Politics 1791-1875. Cambridge: Harvard University Press, 1949.
- Carr, Cecil T., ed. Select Charters of Trading Companies, A. D. 1530 - 1707. London: Seldon Society, 1913.
- Chase, Frederick. A History of Dartmouth College and the Town of Hanover, New Hampshire. Edited by John K. Lord. Cambridge: John Wilson and Son, 1891.
- Cheyney, Edward Potts. History of the University of Pennsylvania, 1740-1940. Philadelphia: University of Pennsylvania Press, 1940.
- Cooke, Colin A. Corporation Trust and Company: An Essay in Legal History. Cambridge: Harvard University Press, 1951.
- Dangerfield, George. Chancellor Robert R. Livingston of New York, 1746-1813. New York: Harcourt, Brace and Company, 1960.
- Davis, Joseph Stancliffe. Essays in the Earlier History of American Corporations. 2 vols. Cambridge: Harvard University Press, 1917.
- Dodd, Edwin Merrick, Jr. American Business Corporations until 1860, with Special Reference to Massachusetts. Cambridge: Harvard University Press, 1954.
- DuBois, Armand B. The English Business Company after the Bubble Act, 1720-1800. New York: The Commonwealth Fund, 1938.
- Dunaway, Wayland Fuller. History of the James River and Kanawha Company. New York: Columbia University Press, 1922.
- Dunne, Gerald T. Justice Joseph Story and the Rise of the Supreme Court. New York: Simon and Schuster, 1970.
- Durrenberger, Joseph A. Turnpikes: A Study of the Toll Road Movement in the Middle Atlantic States and Maryland. Valdosta, Ga.: Southern Stationery and Printing Company, 1931.
- Ellis, Richard E. The Jeffersonian Crisis: Courts and Politics in the Young Republic. New York: Oxford University Press, 1971.
- Ernst, Robert. Rufus King: American Federalist. Chapel Hill: University of North Carolina Press, 1968.

- Evans, George Herberton, Jr. Business Incorporations in the United States, 1800-1943. New York: National Bureau of Economic Research, Inc., 1948.
- Evans, Paul D. The Holland Land Company. Buffalo, N. Y.: Buffalo Historical Society, 1924.
- Faulkner, Robert K. The Jurisprudence of John Marshall. Princeton, N.J.: Princeton University Press, 1968.
- Fischer, David Hackett. The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy. New York: Harper and Row, 1965.
- Frankfurter, Felix. The Commerce Clause under Marshall, Taney and Waite. Chapel Hill: University of North Carolina Press, 1937.
- Friedman, Leon, and Israel, Fred L., eds. The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions. 4 vols. New York: Chelsea House in Association with R. R. Bowker Company, 1969.
- Gegenheimer, Albert Frank. William Smith, Educator and Churchman: 1727-1803. Philadelphia: University of Pennsylvania Press, 1943.
- Gilpatrick, Delbert Harold. Jeffersonian Democracy in North Carolina, 1789-1816. New York: Columbia University Press, 1931.
- Goodman, Paul. The Democratic-Republicans of Massachusetts: Politics in a Young Republic. Cambridge: Harvard University Press, 1964.
- Goodrich, Carter, ed. The Government and the Economy, 1783-1861. Indianapolis: Bobbs-Merrill Company, Inc., 1967.
- Gras, Norman S. B. The Massachusetts First National Bank of Boston, 1784-1934. Cambridge: Harvard University Press, 1937.
- Haines, Charles Grove. The Role of the Supreme Court in American Government and Politics, 1789-1835. Berkeley: University of California Press, 1944.
- Hammond, Jabez D. The History of Political Parties in the State of New York, from the Ratification of the Federal Constitution to December, 1840. 2 vols. 4th ed. rev. Buffalo, N. Y.: Phinney and Co., 1850.
- Handlin, Oscar, and Handlin, Mary Flug. Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861. rev. ed. Cambridge: Belknap Press of Harvard University Press, 1969.

- _____, eds. The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780. Cambridge: Belknap Press of Harvard University Press, 1966.
- Hartz, Louis. Economic Policy and Democratic Thought: Pennsylvania, 1776-1860. Cambridge: Harvard University Press, 1948.
- Heath, Milton S. Constructive Liberalism: The Role of the State in Economic Development in Georgia to 1860. Cambridge: Harvard University Press, 1954.
- Henderson, Gerard Carl. The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law. Cambridge: Harvard University Press, 1918.
- Hobson, Elsie Garland. Educational Legislation and Administration in the State of New York from 1777 to 1850. Chicago, Ill.: University of Chicago, 1918.
- Hofstadter, Richard, and Metzger, Walter P. The Development of Academic Freedom in the United States. New York: Columbia University Press, 1955.
- Holdsworth, William S. A History of English Law. 16 vols. London: Methuen and Co., Ltd., 1903-1965.
- Holmes, Abiel. The Life of Ezra Stiles, D.D.LL.D. A Fellow of the American Philosophical Society; of the American Academy of Arts and Sciences; a Corresponding Member of the Massachusetts Historical Society; Professor of Ecclesiastical History; and President of Yale College. Boston: Thomas and Andrews, 1798.
- Honeywell, Roy J. The Educational Work of Thomas Jefferson. Cambridge: Harvard University Press, 1931.
- Hough, Franklin B. Historical and Statistical Record of the University of the State of New York during the Century from 1784 to 1884. Albany, N.Y.: Weed, Parsons and Company, 1885.
- Hume, David. The History of England, from the Invasion of Julius Caesar to the Revolution in 1688. 8 vols. Rev. ed. London: T. Cadell, 1770.
- Hunting, Warren B. The Obligation of Contracts Clause of the United States Constitution. Baltimore, Md.: Johns Hopkins Press, 1919.
- Hurst, James Willard. Law and the Conditions of Freedom in the Nineteenth-Century United States. Madison: University of Wisconsin Press, 1956.

- . Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915. Cambridge: Belknap Press of Harvard University Press, 1964.
- . Law and Social Process in United States History. Ann Arbor: University of Michigan Law School, 1960.
- . The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970. Charlottesville: University Press of Virginia, 1970.
- Irwin, Ray W. Daniel D. Tompkins, Governor of New York and Vice President of the United States. New York: The New-York Historical Society, 1968.
- Johnson, Allen; Malone, Dumas; Starr, Harris E.; Schuyler, Robert Livingston, eds. Dictionary of American Biography. 21 vols. in 11. New York: Charles Scribner's Sons, 1959.
- Jordan, W. K. Philanthropy in England, 1480-1660: A Study of the Changing Pattern of English Social Aspirations. London: George Allen and Unwin Ltd., 1959.
- Jones, W. Melville, ed. Chief Justice John Marshall: A Reappraisal. Ithaca, N.Y.: Cornell University Press, 1956.
- Kass, Alvin. Politics in New York State, 1800-1830. Syracuse, N.Y.: Syracuse University Press, 1965.
- Kutler, Stanley I. Privilege and Creative Destruction: The Charles River Bridge Case. Philadelphia: J. B. Lippincott Company, 1971.
- Levin, Jennifer. The Charter Controversy in the City of London, 1660-1688, and its Consequences. London: University of London, The Athlone Press, 1969.
- Lewis, Lawrence, Jr. A History of the Bank of North America, the First Bank Chartered in the United States. Philadelphia: J. B. Lippincott and Co., 1882.
- Lewis, William Draper, ed. Great American Lawyers. 8 vols. Philadelphia: John C. Winston Company, 1907-1909.
- Livermore, Shaw. Early American Land Companies: Their Influence on Corporate Development. New York: Octagon Books, 1968.
- Lockridge, Kenneth A. A New England Town: The First Hundred Years: Dedham, Massachusetts, 1636-1736. New York: W. W. Norton and Company, Inc., 1970.

- Lord, John K. A History of Dartmouth College: 1815-1909. Concord, N.H.: Rumford Press, 1913.
- McCallum, James D. Eleazar Wheelock, Founder of Dartmouth College. Hanover, N.H.: Dartmouth College Publications, 1939.
- McColley, Robert. Slavery and Jeffersonian Virginia. Urbana, Ill.: University of Illinois Press, 1964.
- Magrath, C. Peter. Yazoo: Law and Politics in the New Republic. The Case of Fletcher v. Peck. Providence, R.I.: Brown University Press, 1966.
- Maitland, Frederic William. Maitland: Selected Essays. Edited by H. D. Hazeltine, G. Lapsley, P. H. Winfield. Cambridge: Cambridge University Press, 1936.
- . Township and Borough. Cambridge: Cambridge University Press, 1898.
- Matthews, Brander, ed. A History of Columbia University, 1754-1904, Published in Commemoration of the One Hundred and Fiftieth Anniversary of the Founding of King's College. New York: Columbia University Press, 1904.
- Mayo, Lawrence Shaw. John Wentworth: Governor of New Hampshire, 1767-1775. Cambridge: Harvard University Press, 1921.
- Miller, Howard S. The Legal Foundations of American Philanthropy, 1776-1844. Madison, Wisc.: State Historical Society of Wisconsin, 1961.
- Mordecai, Samuel. Richmond in By-Gone Days: Being Reminiscences of an Old Citizen. Richmond, Va.: George M. West, 1856.
- Morgan, Donald G. Justice William Johnson: The First Dissenter. The Career and Constitutional Philosophy of a Jeffersonian Judge. Columbia: University of South Carolina Press, 1954.
- Morgan, Edmund S. The Gentle Puritan: A Life of Ezra Stiles, 1727-1795. New Haven, Conn.: Yale University Press, 1962.
- Morison, Samuel Eliot. The Life and Letters of Harrison Gray Otis, Federalist, 1765-1848. 2 vols. Boston: Houghton Mifflin Company, 1913.
- New, Chester W. The Life of Henry Brougham to 1830. Oxford: Clarendon Press, 1961.

Paige, Lucius R. History of Cambridge, Massachusetts, 1630-1877. Boston: H. O. Houghton and Company, 1877.

Parsons, Theophilus, Jr. Memoir of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts; with Notice of Some of His Contemporaries. Boston: Ticknor and Fields, 1859.

Plumer, William, Jr. Life of William Plumer. Edited by A. P. Peabody. Boston: Phillips, Sampson and Company, 1857.

Quincy, Josiah. A Municipal History of the Town and City of Boston, during Two Centuries. From September 17, 1630, to September 17, 1830. Boston: C. C. Little and J. Brown, 1852.

———. The History of Harvard University. 2 vols. Boston: Crosby, Nichols, Lee, and Co., 1860.

Rhodes, Irwin S. The Papers of John Marshall: A Descriptive Calendar. 2 vols. Norman, Okla.: University of Oklahoma Press, 1969.

Richardson, Leon Burr. History of Dartmouth College. 2 vols. Hanover, N.H. Dartmouth College Publications, 1932.

Roberts, Christopher. The Middlesex Canal, 1793-1860. Cambridge: Harvard University Press, 1938.

Rose, Lisle A. Prologue to Democracy: The Federalists in the South, 1789-1800. Lexington: University of Kentucky Press, 1968.

Rossiter, Clinton. Seedtime of the Republic: The Origin of the American Tradition of Political Liberty. New York: Harcourt, Brace and Company, 1953.

Scott, William Robert. The Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies. 3 vols. Cambridge: Cambridge University Press, 1912.

Shirley, John M. The Dartmouth College Causes and the Supreme Court of the United States. St. Louis, Mo.: G. E. Jones and Company, 1879.

Starnes, George T. Sixty Years of Branch Banking in Virginia. New York: The Macmillan Company, 1931.

Tewksbury, Donald G. The Founding of American Colleges and Universities Before the Civil War with Particular Reference to the Religious Influences Bearing upon the College Movement. New York: Teachers College, Columbia University, 1932.

- Thomas, Milton Halsey, ed. Columbia University Officers and Alumni, 1754-1857. New York: Columbia University Press, 1936.
- Trumbull, Benjamin. A Complete History of Connecticut, Civil and Ecclesiastical, from the Emigration of Its First Planters, from England, in the Year 1630, to the Year 1764; and to the Close of the Indian Wars. 2 vols. New-Haven, Conn.: Maltby, Goldsmith and Co. and Samuel Wadsworth, 1818.
- Tucker, Louis Leonard. Puritan Protagonist: President Thomas Clap of Yale College. Chapel Hill: University of North Carolina Press, 1962.
- Turner, Lynn W. William Plumer of New Hampshire, 1759-1850. Chapel Hill: University of North Carolina Press, 1962.
- Wertenbaker, Thomas J. Norfolk: Historic Southern Port. 2d ed. rev. Edited by Marvin W. Schlegel. Durham, N.C.: Duke University Press, 1962.
- . Princeton, 1746-1896. Princeton, N.J.: Princeton University Press, 1946.
- Whitehill, Walter Muir. Boston: A Topographical History. 2d ed. Cambridge: Belknap Press of Harvard University Press, 1968.
- Winsor, Justin, ed. The Memorial History of Boston, Including Suffolk County, Massachusetts, 1630-1880. 4 vols. Boston: James R. Osgood and Company, 1881-1883.
- Wright, Benjamin F., Jr. The Contract Clause of the Constitution. Cambridge: Harvard University Press, 1938.

Articles

- Ammon, Harry. "Agricola versus Aristides: James Monroe, John Marshall and the Genêt Affair in Virginia." Virginia Magazine of History and Biography, LXXIV (July, 1966), 312-320.
- . "The Formation of the Republican Party in Virginia, 1789-1796." Journal of Southern History, XIX (Aug., 1953), 283-310.
- . "The Genêt Mission and the Development of American Political Parties." Journal of American History, LII (March, 1966), 725-741.
- . "The Richmond Junto, 1800-1824." Virginia Magazine of History and Biography, LXI (Oct., 1953), 395-418.

- Baxter, Maurice G. "Should the Dartmouth College Case Have Been Reargued?" New England Quarterly, XXXIII (March, 1960), 19-36.
- Corwin, Edward S. "The Doctrine of Due Process of Law before the Civil War." Harvard Law Review, XXIV (March, 1911), 366-385, 460-479.
- Daniell, Jere R., II. "Eleazar Wheelock and the Dartmouth College Charter." Historical New Hampshire, (Winter, 1969), 3-31.
- Denham, R. N., Jr. "An Historical Development of the Contract Theory in the Dartmouth College Case." Michigan Law Review, VII (Jan., 1909), 201-225.
- Dexter, Franklin B. "The Founding of Yale College." Papers of the New Haven Colony Historical Society, III (New Haven: 1882), 1-31.
- East, Robert. "Economic Development and New England Federalism, 1803-1814." New England Quarterly, X (Sept., 1937), 430-446.
- Evans, Frank. "The Evolution of the English Joint Stock Limited Trading Company." Columbia Law Review, VIII (May, June, 1908), 339-361, 461-480.
- Goodrich, Carter. "The Virginia System of Mixed Enterprise. A Study of State Planning of Internal Improvements." Political Science Quarterly, LXIV (Sept., 1949), 355-387.
- Gower, L. C. B. "The English Private Company." Law and Contemporary Problems, XVIII (Autumn, 1953), 535-545.
- Hall, Robert Sprague. "The Dartmouth College Case." Green Bag, XX (May, 1908), 244-247.
- Handlin, Oscar. "Laissez-Faire Thought in Massachusetts, 1790-1880." Journal of Economic History, III (Supplement; Dec., 1943), 55-65.
- , and Handlin, Mary Flug. "Origins of the American Business Corporation." Journal of Economic History, V (May, 1945), 1-23.
- Hinshaw, Clifford R., Jr. "North Carolina Canals before 1860." North Carolina Historical Review, XXV (Jan., 1948), 1-56.
- Hodges, Wiley E. "Pro-Governmentalism in Virginia, 1789-1836: A Pragmatic Liberal Pattern in the Political Heritage." Journal of Politics, XXV (May, 1963), 333-360.

- Hornsnell, M. E. "Spencer Roane and the Property of Rights: A Post-Revolutionary View." West Virginia History, XXX (July, 1969), 586-597.
- Isaacs, Nathan. "John Marshall on Contracts. A Study in Early American Juristic Theory." Virginia Law Review, VII (March, 1921), 413-428.
- Klein, Milton M. "Democracy and Politics in Colonial New York." New York History, XL (July, 1959), 221-246.
- Land, Aubrey C. "Economic Behavior in a Planting Society: The Eighteenth Century Chesapeake." Journal of Southern History, XXXIII (Nov., 1967), 469-485.
- Lively, Robert A. "The American System: A Review Article." Business History Review, XXIX (March, 1955), 81-96.
- Long, H. Follansbee. "The Newport and Boston Turnpike." Historical Collections of the Essex Institute, XLII (April, 1906), 113-128.
- Lubasz, Heinz. "The Corporate Borough in the Common Law of the Late Year-Book Period." Law Quarterly Review, LXXX (April, 1964), 228-243.
- McAnear, Beverly. "American Imprints Concerning King's College." Papers of the Bibliographical Society of America, XLIV (Fourth Quarter, 1950), 301-339.
- . "College Founding in the American Colonies, 1745-1775." Mississippi Valley Historical Review, XLII (June, 1955), 24-44.
- . "The Raising of Funds by the Colonial Colleges." Mississippi Valley Historical Review, XXXVIII (March, 1952), 591-612.
- McGovney, Dudley O. "A Supreme Court Fiction." Harvard Law Review, LVI (May, June, July, 1943), 853-898, 1090-1124, 1225-1260.
- Miller, William. "A Note on the History of Business Corporations in Pennsylvania, 1800-1860." Quarterly Journal of Economics, LV (Nov., 1940), 150-160.
- North, William G. "The Political Background of the Dartmouth College Case," New England Quarterly, XVIII (June, 1945), 181-203.
- Oliver, Capt. Frederick L. "The Bridges of the Charles." Proceedings of the Bostonian Society (1952), 33-47.
- Pollock, Frederick. "Has the Common Law Received the Fiction Theory of Corporations?" Law Quarterly Review, XXVII (April, 1911), 219-235.

- Pound, Roscoe. "Visitatorial Jurisdiction over Corporations in Equity." Harvard Law Review, XLIX (Jan., 1936), 369-395.
- Rhodes, Irwin S. "John Marshall and the Western Country, Early Days." Historical and Philosophical Society of Ohio Bulletin, XVIII (April, 1960), 117-136.
- Risjord, Norman K. "The Virginia Federalists." Journal of Southern History, XXIII (Nov., 1967), 486-517.
- Sacret, J. H. "The Restoration Government and Municipal Corporations." English Historical Review, XLV (April, 1930), 232-259.
- Scheiber, Harry N. "At the Borderland of Law and Economic History: The Contributions of Willard Hurst." American Historical Review, LXXV (Feb., 1970), 744-756.
- Smith, Stanley Phillips. "The Northern Neck's Role in American Legal History." Virginia Magazine of History and Biography, LXXVII (July, 1969), 277-290.
- Thomson, Robert Polk. "The Reform of the College of William and Mary, 1763-1780." Proceedings of the American Philosophical Society, CXV (June 17, 1971), 187-213.
- Williston, Samuel. "History of the Law of Business Corporations before 1800." Harvard Law Review, II (Oct., Nov., 1888), 105-124, 149-160.
- Wyllie, Irvin G. "The Search for an American Law of Charity, 1776-1844." Mississippi Valley Historical Review, XLVI (Sept., 1959), 203-211.

Government Publications

- N. Y. University of the State of New York. Eighty-Ninth Annual Report of the Regents of the University. Albany, N.Y.: Jerome B. Parmenter, 1876.
- U. S. Bureau of Education. The College of William and Mary: A Contribution to the History of Higher Education, with Suggestions for Its National Promotion, by Herbert B. Adams. Circulars of Information of the Bureau of Education, No. 1. Washington, D. C. : Government Printing Office, 1887.
- _____. The University of the State of New York: History of Higher Education in the State of New York. Circular of Information, No. 3, 1900. Washington, D.C.: Government Printing Office, 1900.

Unpublished Materials

- Bowditch, N. I. A History of the Massachusetts General Hospital. Not Published. Printed by John Wilson and Son, 1851.
- Callahan, Myrtle Elizabeth. History of Richmond As a Port City. Unpublished M. A. thesis, University of Richmond, 1952.
- Gelbach, Clyde Christian. Spencer Roane of Virginia, 1762-1822: A Judicial Advocate of States Rights. Unpublished Ph.D. dissertation, University of Pittsburgh, 1955.
- Johnson, Robert. Government Regulation of Business Enterprise in Virginia, 1750-1820. Unpublished Ph.D. dissertation, University of Minnesota, 1958.
- Rice, Philip Morrison. Internal Improvements in Virginia, 1775-1860. Unpublished Ph.D. dissertation, University of North Carolina, 1948.
- Smith, Willard Wallace. The Relations of College and State in Colonial America. Unpublished Ph.D. dissertation, Columbia University, 1949.

GENERAL REFERENCES

Primary Sources

- Angell, Joseph K. and Ames, Samuel. A Treatise on the Law of Private Corporations Aggregate. Boston: Hilliard, Gray, Little and Wilkins, 1832.
- Bridgman, Richard Whalley. The Law of Charitable Uses, as Laid Down and Digested by George Duke, esq., in 1676, together with the Learned Readings of Sir Francis Moore, Printed from His Own Manuscript. To Which is Now Added, the Law of Mortmain, as Established by the Statute of 9 George II.c.36; the Whole Continued to the Present Time. London: W. Clarke and Sons, 1805.
- Coke, Sir Edward. The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton. London: J. and W. T. Clarke, 1832.
- Dane, Nathan. A General Abridgment and Digest of American Law, with Occasional Notes and Comments. 8 vols. Boston: Cummings, Hilliard and Co., 1823-1824.

- [Henshaw, David]. Remarks upon the Rights and Powers of Corporations and of the Rights, Powers and Duties of the Legislature toward Them. Embracing a Review of the Supreme Court of the United States, in the Case of Dartmouth College, in New Hampshire, Given in 1819. Boston: Beals and Greene, 1837.
- Kent, James. Commentaries on American Law. 4 vols. New York: O. Halsted, 1826-1830.
- Marshall, John. The Life of George Washington, Commander in Chief of the American Forces, During the War Which Established the Independence of His Country, and First President of the United States. 5 vols. Philadelphia: C. P. Wayne, 1804-1807.
- Smith, William. Account of the College, Academy and Charitable School of Philadelphia in Pennsylvania. (1759). Philadelphia: University of Pennsylvania Library, 1951.
- Story, Joseph. Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution. 3 vols. Boston: Hilliard, Gray, and Company, 1833.
- Warren, Charles. "The Story-Marshall Correspondence." William and Mary Quarterly, 2d ser., XXI (Jan., 1941), 1-26.
- Webster, Peletiah. Reasons for Repealing the Act of the Legislative of Pennsylvania, of September 13, 1785. Philadelphia: Oswald, 1786.

Secondary Sources

Books

- Abbott, Charles C. The Rise of the Business Corporation. Ann Arbor: Edwards Brothers, Inc., 1936.
- Alexander, De Alva Stanwood. A Political History of the State of New York. 3 vols. New York: Henry Holt and Company, 1906-1909.
- Bartlett, Lester W. State Control of Private Incorporated Institutions of Higher Education. New York: Teacher's College, Columbia University, 1926.
- Brown, Robert E. Middle Class Democracy and the Revolution in Massachusetts, 1691-1780. Ithaca, N. Y.: Cornell University Press, 1955.

- Bruchey, Stuart. The Roots of American Economic Growth, 1607-1861: An Essay in Social Causation. New York: Harper and Row, 1965.
- Corwin, Edward S. John Marshall and the Constitution: A Chronicle of the Supreme Court. New Haven, Conn.: Yale University Press, 1919.
- Crozét, Claudius. Outline of the Improvements in the State of Virginia. Philadelphia: C. Sherman, 1848.
- Daniell, Jere R. Experiment in Republicanism: New Hampshire and the American Revolution, 1741-1794. Cambridge: Harvard University Press, 1970.
- Davis, John P. Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State. New York: Capricorn Books, 1961.
- Friedman, Lawrence M. Contract Law in America: A Social and Economic Case Study. Madison: University of Wisconsin Press, 1965.
- Garraty, John A., ed. Quarrels That Have Shaped the Constitution. New York: Harper and Row, 1964.
- Goodrich, Carter, ed. Canals and American Economic Development. New York: Columbia University Press, 1961.
- Goodrich, Carter. Government Promotion of Canals and Railroads, 1800-1890. New York: Columbia University Press, 1960.
- Gunther, Gerald, ed. John Marshall's Defense of McCulloch v. Maryland. Stanford, Calif.: Stanford University Press, 1969.
- Horton, John T. James Kent: A Study in Conservatism, 1736-1847. New York: D. Appleton-Century Company, 1939.
- Jones, Gareth. History of the Law of Charity, 1532-1827. Cambridge: Cambridge University Press, 1969.
- Kirker, Harold, and Kirker, James. Bulfinch's Boston, 1787-1817. New York: Oxford University Press, 1964.
- Labaree, Benjamin W. Patriots and Partisans: The Merchants of Newburyport, 1764-1815. Cambridge: Harvard University Press, 1962.
- Lawson, John William. The History of Banking; with a Comprehensive Account of the Origin, Rise, and Progress, of the Banks of England, Ireland, and Scotland. 2d ed. London: Richard Bentley, 1855.

- Lodge, Henry Cabot. Daniel Webster. Boston: Houghton, Mifflin and Company. 1883.
- McCloskey, Robert G. The American Supreme Court. Chicago, Ill.: University of Chicago Press, 1960.
- Mendelson, Wallace. Capitalism, Democracy, and the Supreme Court. New York: Appleton-Century-Crofts, Inc., 1960.
- Miller, Arthur Selwyn. The Supreme Court and American Capitalism. New York: The Free Press, 1968.
- Moore, N. F. An Historical Sketch of Columbia College, in the City of New York. New York: Leavitt, Trow and Co., 1846.
- Mott, Rodney L. Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by the Courts in the Application of the Concept of the 'Law of the Land.' Indianapolis: Bobbs-Merrill, 1926.
- Myers, Gustavus. History of the Supreme Court of the United States. Chicago, Ill.: Charles H. Kerr and Company, 1925.
- Owen, David. English Philanthropy, 1660-1960. Cambridge: Belknap Press of Harvard University Press, 1964.
- Paul, Arnold M. Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895. Ithaca, N. Y.: Cornell University Press, 1960.
- Place, Charles A. Charles Bulfinch: Architect and Citizen. Boston: Houghton Mifflin Company. 1925.
- Pound, Roscoe. The Formative Era of American Law. Boston: Little, Brown and Company, 1938.
- Rappard, William E. Les Corporations d'Affaires au Massachusetts: Etude d'Histoire Economique et de Legislation Comparée. Paris: V. Girard & E. Brière, 1908.
- Scheiber, Harry N. Ohio Canal Era: A Case Study of Government Aid to the Economy, 1820-1861. Athens, Ohio: Ohio University Press, 1969.
- Servies, James A., comp. A Bibliography of John Marshall. Washington, D.C.: United States Commission for the Celebration of the Two Hundredth Anniversary of the Birth of John Marshall, 1956.
- Shurtleff, Nathaniel B. A Topographical and Historical Description of Boston. Boston: Alfred Mudge and Son, 1871.

- Snow, Caleb H. A History of Boston, the Metropolis of Massachusetts, from Its Origin to the Present Period; with Some Account of the Environs. Boston: Abel Bowen, 1825.
- Swisher, Carl Brent. Roger B. Taney. New York: The Macmillan Company, 1935.
- Sydnor, Charles S. Gentlemen Freeholders: Political Practices in Washington's Virginia. Chapel Hill: University of North Carolina Press, 1952.
- Taylor, George Rogers. The Transportation Revolution, 1815-1860. New York: Rhinehart and Company, Inc., 1951.
- Two Centuries' Growth of American Law, 1701-1901. New York: Charles Scribner's Sons, 1901.
- Warren, Charles. A History of the American Bar. Boston: Little, Brown and Company, 1911.
- _____. The Supreme Court in United States History. 3 vols. Boston: Little, Brown and Company, 1922.
- Zollman, Carl. American Law of Charities. Milwaukee, Wisc.: Bruce Publishing Company, 1924.

Articles

- Allison, Andrew. "The Rise and Probable Decline of Private Corporations in America." Report of the Seventh Annual Meeting of the American Bar Association, Held at Saratoga Springs, New York, August 20, 21, and 22, 1884 (1884), 241-256.
- Blackwell, Thomas E. "The Charitable Corporation and the Charitable Trust." Washington University Law Quarterly, XXIV (Dec., 1938), 1-45.
- Brydon, G. MacLaren. "The Antiecclesiastical Laws of Virginia." Virginia Magazine of History and Biography, LXIV (July, 1956), 259-285.
- Callender, G. S. "The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations." Quarterly Journal of Economics, XVII (Nov., 1902), 111-162.
- "The Contract Clause of the Federal Constitution." Columbia Law Review, XXXII (March, 1932), 476-493.

- Davis, Lance, and North, Douglass. "Institutional Change and American Economic Growth: A First Step Towards a Theory of Institutional Innovation." Journal of Economic History, XXX (March, 1970), 131-149.
- Diamond, Sigmund. "Values as Obstacles to Economic Growth: The American Colonies." Journal of Economic History, XXVII (Dec., 1967), 561-575.
- Doe, Charles. "A New View of the Dartmouth College Case." Harvard Law Review, VI (Nov., Dec., 1892), 161-183, 213-222.
- Easterbrook, W. T. "The Climate of Enterprise." American Economic Review, XXXIX (May, 1949), 322-335.
- Goodrich, Carter. "American Development Policy: The Case of Internal Improvements." Journal of Economic History, XIV (Dec., 1956), 449-460.
- . "Internal Improvements Reconsidered." Journal of Economic History, XXX (June, 1970), 289-311.
- . "Public Spirit and American Improvements." Proceedings of the American Philosophical Society, XCII (Oct. 25, 1949), 305-309.
- Hagan, Horace H. "The Dartmouth College Case." Georgetown Law Journal, XIX (May, 1931), 411-426.
- Hale, Robert L. "The Supreme Court and the Contract Clause." Harvard Law Review, LVII (April, May, July, 1944), 512-557, 621-674, 852-892.
- Hartz, Louis. "Laissez-Faire Thought in Pennsylvania, 1776-1860." Journal of Economic History, III (Supplement; Dec., 1943), 66-77.
- Heath, Milton S. "Laissez Faire in Georgia, 1732-1860." Journal of Economic History, III (Supplement; Dec., 1943), 78-100.
- [Hill, Clement H.]. "The Dartmouth College Case." American Law Review, VIII (Jan., 1874), 189-239.
- Hodges, Wiley E. "The Theoretical Basis for Anti-Governmentalism in Virginia, 1789-1836." Journal of Politics, IX (Aug., 1947), 325-354.
- Howe, Mark De Wolfe. "A Footnote to the 'Conspiracy Theory.'" Yale Law Journal, XLVIII (April, 1939), 1007-1014.
- Hutcheson, James M. "Virginia's 'Dartmouth College Case.'" Virginia Magazine of History and Biography, LI (April, 1943), 134-140.

- Ireland, Robert M. "William Pinkney: A Revision and Re-emphasis." American Journal of Legal History, XIV (July, 1970), 235-246.
- Jenkins, James C. "Should the Dartmouth College Decision Be Recalled?" American Law Review, LI (Sept.-Oct., 1917), 711-751.
- Kessler, W. C. "A Statistical Study of the New York General Incorporation Act of 1811." Journal of Political Economy, XLVIII (Dec., 1940), 877-882.
- Knight, Edgar W. "North Carolina's 'Dartmouth College Case.'" Journal of Higher Education, XIX (March, 1948), 116-122.
- Lerner, Max. "The Supreme Court and American Capitalism." Yale Law Journal, XLII (Feb., 1933), 668-701.
- Mendelson, Wallace. "New Light on Fletcher v. Peck and Gibbons v. Ogden." Yale Law Journal, LVIII (March, 1949), 567-573.
- Noyes, W. S. G. "Webster's Debt to Mason in the Dartmouth College Case." American Law Review, XXVIII (May-June, 1894), 356-367.
- Orton, Jesse F. "Confusion of Property with Privilege: Dartmouth College Case." The Independent, LXVII (Aug. 19, 26, 1909), 392-397, 448-453.
- Rhodes, Irwin S. "John Marshall and the Western Country, Later Days." Historical and Philosophical Society of Ohio Bulletin, XVIII (April, 1960), 187-200.
- Russell, Alfred. "Status and Tendencies of the Dartmouth College Case." American Law Review, XXX (May-June, 1896), 321-356.
- Soltow, James H. "American Institutional Studies: Present Knowledge and Past Trends." Journal of Economic History, XXXI (March, 1971), 87-105.
- Stern, Horace. "The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation." American Law Register, LIII O.S.; XLIV N. S. (Jan., Feb., March, 1905), 1-47, 73-111, 145-149.
- Thompson, Seymour D. "Abuses of Corporate Privileges." American Law Review, XXVI (March-April, 1892), 169-203.
- Trickett, William. "The Dartmouth College Paralogism." American Law Review, XL (March-April, 1906), 175-187.

Warren, Charles. "An Historical Note on the Dartmouth College Case." American Law Review, XLVI (Sept.-Oct., 1912), 665-675.

Willis, Hugh E. "The Dartmouth College Case, Then and Now." St. Louis Law Review, XIX (April, 1934), 183-200.

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