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Justice Story, the Supreme Court, and the Obligation of Contract

Morgan D. Dowd

The political structure of the United States in the early 19th century found itself engaged in a struggle between the proponents of State legislative supremacy, on the one hand, and those who favored a strong central government on the other. Professor Dowd, in his article entitled Justice Story, The Supreme Court, and the Obligation of Contract, places into this historical setting the efforts and accomplishments of Supreme Court Justice Joseph Story in promoting the cause of nationalism. Story, as a champion of private rights, fought diligently to develop, and then to preserve, the concept of the inviolability of private contracts. The author develops in detail Story's impact on the Marshall Court, and especially his utilization of the contract clause of the Constitution to bypass State regulation and hostile State court systems. The author concludes that while the impact of Story's constitutional philosophy in the area of the contract clause was significant, it has now fortunately slipped into constitutional history and his concept of a public interest which aided a few has been discarded for a theory which provides aid for many.

I. INTRODUCTION

Law is an expression of the interests of a given group or groups of a society during any specific period. In the early 19th century there were at least three objectives of the law as interpreted by the courts: to bring order to the various social relationships within the existing society, to protect the individual's vested rights (that is, his private property), and to watch over the rights of the community as a whole. Emphasis on civil liberties as we know them today was in general lacking, since the individual needed to be protected more from others in the society than from personal attack by the federal or State government. The prevalent idea of law in this early setting was Euclidian in nature: within limitations, it was an absolute and deductive science. Of more importance, it was truly expressive of the interests of the group or groups in power. Thus, when John Marshall announced in Fletcher v. Peck that whenever property rights vested they could

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2 10 U.S. (6 Cranch) 87 (1810).
not be displaced by legislative fiat, he was espousing a purely logical but highly artificial interpretation of the constitutional system. And so it was with the myriad decisions rendered by the Supreme Court in this formative period of American law.⁴

The mystique of the obligation of contract had its genesis in the economic conditions preceding the construction of the Constitution. The States had been notoriously incapable of regulating commerce, and hence they had developed a laxity toward enforcing public contracts.⁵ Congress could make contracts with the States but the latter could with impunity fail to execute them. When the nation passed into a series of economic crises after 1783, the States, not having any common regulations of commerce, were unable to control the various inflationary spirals. Debtors in turn were able to persuade State legislatures to cancel existing debts. Thus, State legislatures were frequently goaded into passing emergency legislation at the expense of the creditor class. Suspension of debtors' contracts became a commonplace occurrence.⁶

The complexion of early politics took on a dual aspect partly as a result of this dichotomy between the debtor and the creditor. Those who favored a strong central government which would regulate interstate (and in some instances intrastate) commerce became known as nationalists. Those who were opposed to a vast national government reasoned that the nation's economic ills could best be cured through a decentralized system largely on a State-by-State basis. The latter earned the sobriquet of States-righters. The former were champions of the theory of natural rights, while the latter were proponents of State legislative supremacy.⁷

With the development of the national court system in 1789, a large corpus of law was steadily developed by federal judges who defended private property and helped promote the growth of national law and corporations. The States fought a rearguard action with the Supreme Court by attempting to stem the growth of an ever-

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⁵ “From the Nation's beginning, the States had lax notions as to the sacredness of public contracts, and often violated the obligations of them.” III A. Beveridge, The Life of John Marshall 557 (1919). See also S. Lipset, The First New Nation (1963); J. Story, Life, Character, and Services of Chief Justice Marshall, in The Miscellaneous Writings of Joseph Story 653-56 (W. Story ed. 1852).


broadening national judiciary. Together, John Marshall and Joseph Story laid the groundwork for eventual federal usurpation of interstate commerce through a series of decisions involving the doctrine of vested rights. They were highly successful in one aspect: the development of the obligation of contract theories.\(^7\)

Story and Marshall adopted a public interest concept of the contract. Basing their ideas in part on a strained interpretation of the English common law, they were able to utilize the contract clause to bypass "state regulation . . . [and] hostile state court systems."\(^8\) The Constitution did not treat a contract in any great detail. At common law both unilateral contracts (in which the parties agreed that one should perform and the other pay for the services) and bilateral contracts (in which both sides made mutual promises to perform for a sufficient consideration) were recognized. The courts had also accepted that part of the common law dealing with executory contracts (contracts with specific conditions to be fulfilled) and executed contracts (where the conditions had been met). But on questions of public policy involving the State and individuals or the private rights of individuals versus municipalities, the law was relatively undeveloped.

John Marshall in *Fletcher v. Peck*\(^9\) started in motion a series of decisions which promoted national judicial regulation of the contract clause. When he declared that the revocation of land grants was unconstitutional since it involved the sanctity of a contract he was echoing Alexander Hamilton's sentiments that such action by State legislatures was contrary to the "first principles of national justice and social policy."\(^10\) The case stretched the contract clause to include public grants as within the purview of the Constitution. In *New Jersey v. Wilson*\(^11\) (1812), Marshall declared that a contract which had been made between the colony of New Jersey and the Delaware Indians exempting lands from taxation was enforce-

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\(^7\) See *Joseph Story* 120-52 (M. Schwartz & J. Hogan eds. 1959).

\(^8\) J. Schmidhauser, *supra* note 6, at 71-72.


\(^11\) 11 U.S. (7 Cranch) 164 (1812).
able. The question remained, however, whether corporate charters as well as public grants were protected by article I, section 10, of the Constitution. Seven years elapsed before the Court was again to be heard on the contract clause and vested rights. The Trustees of Dartmouth College v. Woodward case, decided in 1819, in accord with the philosophies of Marshall and Story, emerged as a cause célèbre in American constitutional law.

II. Trustees of Dartmouth College v. Woodward

A. The Setting of the Dartmouth College Case

In 1816 the Republican Party of New Hampshire made a complete sweep of the State elections, an event which ushered in a period of unusual legislative activity. Reform of various institutions, including Dartmouth College, was in the minds of numerous public officials. Newly elected Governor William Plumer set the stage for change in his inaugural address when he announced that the college was a State concern and thus should be subject to State regulation. For a longer period than most men could recall, he added, the State had contributed funds to aid the development of the school. Now the time had arrived for the State to exercise its legal authority over public institutions. Furthermore, the original Royal Charter contained certain sections which he felt were "hostile to the spirit and genius of a free government." These limitations included the power of the trustees to appoint their own successors and to nominate or dismiss the president of the college at their whim, thus frustrating any possibility of State control. In considering the college to be a public institution, he suggested that

13 The following background material has proved helpful in placing the Dartmouth case in its historical context: Denham, An Historical Development of the Contract Theory in The Dartmouth College Case, 7 MICH. L. REV. 201 (1909); Fairman, The Supreme Court and the Constitutional Limitations on State Governmental Authority, 21 U. CHI. L. REV. 40 (1953); Hall, The Dartmouth College Case, 20 GREEN BAG 244 (1908); Harris, Judicial Review in the United States of America, 56 DICK. L. REV. 177 (1952); Hogan, The Dartmouth College Case, 19 GEO. L.J. 411 (1951); Jenkins, Should the Dartmouth College Decision Be Recalled?, 51 AM. L. REV. 711 (1917).

15 John Wheelock had recently been replaced as president by the trustees. Id. at 234.
the legislature take the necessary steps to remedy the existing corporate charter.\textsuperscript{16}

In June, and again in December 1816, the New Hampshire Legislature passed separate acts calling for a general reorganization of Dartmouth College. The legislation called for plans to revamp the charter by increasing the number of trustees to 21, changing the name to Dartmouth University, and creating a Board of Overseers to act as a watchdog agency over the trustees.

B. The Dartmouth Case in the State Courts

The old guard Federalist trustees refused to recognize the acts and brought an action in trover to recover the books of record, original charter, corporate seal, and other materials which were in the possession of the new trustees and the recently reinstated treasurer William Woodward.\textsuperscript{17} Suit was instituted during the February 1817 term in the court of common pleas and the case was moved to the superior court of judicature in May.\textsuperscript{18} The cause was argued for the college by the well-known lawyers Jeremiah Mason and Jeremiah Smith.\textsuperscript{19} The defendant's case was handled by the attorney general of New Hampshire. The court requested that a reargument be heard, and this time the defense added Ichabod Bartlett while the plaintiff engaged the young, up-and-coming attorney Daniel Webster.

The New Hampshire Superior Court consisted of William Richardson (Chief Justice), Samuel Bell, and Levi Woodbury. Chief Justice Richardson wrote the unanimous decision upholding the laws of the State. The opinion was well reasoned and fairly well destroyed the plaintiff's legal arguments that the legislature had no constitutional right "to authorize the appointment of new trustees, without the consent of the corporation."\textsuperscript{20} Chief Justice Richardson distinguished private corporations from public corporations, insisting that the former included such institutions as banks, insurance companies, and manufacturing concerns while the latter consisted of counties, towns, parishes, and the like. A private corporation, he thought, was responsible only for its members and was

\textsuperscript{16} Id. at 240-58.
\textsuperscript{17} 1 C. Haines, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 380-82 (2d ed. 1960).
\textsuperscript{18} IV A. Beveridge, supra note 4, at 233-34.
\textsuperscript{20} Id. at 626.
subject only to a general regulation on the part of the State; public corporations, however, were created for public purposes and were built on public trust. He dismissed the issue as to whether or not Dartmouth College was a public or a private corporation by insisting that "it does not appear that [the college] was subject to any private visitation whatever." Moreover, he found that the objects of the charter had always been of public concern, thus voiding any private tangible interests which the original trustees might claim. In this way he was able to avoid the question of legislative interference with a private corporation.

The college had not presented a very imaginative argument. One minor point was raised, however, which Judge Richardson examined at some length. Article I, section 10 of the Federal Constitution stated that no State shall impair the obligation of contract. The judge pointed out that no case had been decided by either a federal or State court where a charter was considered to be a common law contract. While he respected the original purpose of the clause — to protect private rights of property — he believed that it must be interpreted "in its common and ordinary acceptance, as an actual agreement between parties" and not merely as a legal fiction. He emphatically stated:

[The clause was] not intended to limit the power of the states, in relation to their own publick officers and servants, or to their own civil institutions, and must not be construed to embrace contracts, which are in their nature, mere matters of civil institution; nor grants of power and authority, by a state to individuals, to be exercised for purposes merely publick.

There were certain well-recognized and legitimate interferences on the part of the State vis-a-vis the private rights of individuals which were considered essential to maintaining harmony in the body politic, and no one had ever declared these acts to be an impairment of contract and contrary to public policy. Judge Richardson cited such examples as the marriage contract countermanded by a divorce decree, contracts with conditions precedent leading to forfeiture of rights and remedies, the enlarging and decreasing of territorial limits of a town, and the imposition of new duties or the limitation of certain powers and privileges on the citizens in a State.

21 Id. at 629.
22 Id. at 639.
23 Id. at 639-40.
Richardson concluded his opinion by restating the issues of the case. Schools which operate on State funds are public corporations; to construe them to be otherwise would admit that the State has no powers with respect to public institutions. If he ruled in any other manner he felt he would permit all public bodies to be placed beyond legislative control. Even assuming for the sake of argument that the charter could be construed as a contract, he maintained that no government could long exist which allowed contractual relationships to become absolute and free from legislative interference for an unspecified period of time. He closed with a very prophetic remark. Institutions should operate in the public interest and not merely for the few. It was a statement that reflected the opinion of the majority of the New Hampshire citizenry and was typical of the sentiments that heralded the era of Jacksonian democracy.24

C. The Appeal of Dartmouth College to the Supreme Court

The college and its counsel did not take the defeat lightly. Indeed, they had anticipated an adverse decision before it was actually rendered, and as a result were busily engaged in preparing the case for the United States Supreme Court. It was felt that a more sympathetic ear would be given to their cause in Washington. Daniel Webster was the moving force behind the appeal. His activity did not center around the technicalities of the suit; he left the legal research up to his trusted friends and cocounsel, Mason and Smith.25 Nevertheless, he was the political mainspring and con-

24 The Chief Justice ably reflected the feeling of the people when he said: I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those, whom the people annually elect to manage their publick affairs, cannot be trusted, who can? The people have most emphatically enjoined it in the constitution, as a duty upon the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and publick schools. And those interests will be cherished, both by the legislature and the people so long as there is virtue enough left to maintain the rest of our institutions. Whenever the people and their rulers shall become corrupt enough to wage war with the sciences and liberal arts, we may be assured that the time will have arrived, when all our institutions, our laws, our liberties must pass away,— when all that can be dear to freedom, or that can make their country dear to them, must be lost, and when a government and institutions must be established, of a very different character from those under which it is our pride and happiness to live. Id. at 643.

25 Letter from Daniel Webster to Jeremiah Mason, Nov. 27, 1817, in 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 266 (F. Webster ed. 1857) [here-
stitutionalist for the college. He was aware of the limitations of the college's cause — that it was being appealed on the narrow question of a public versus private contract — and he therefore suggested that several fictitious cases of ejectment²⁶ be brought in Vermont federal court in order to give a wider basis of jurisdiction and to raise all the possible constitutional issues.²⁷

The first indication of possible collusion between Webster and Justice Story, a member of the Supreme Court, in the Dartmouth case can be traced to a letter from Webster to Mason dated early in January 1818. He wrote: “I saw Judge Story as he went on. He said he had had a correspondence with you about ‘things’; but company being present, did not say what things.”²⁸ Again on February 22, Webster referred to Story’s involvement with the affair without indicating what his actual role was. “The judge volunteered to tell me what correspondence had taken place, and he seems to be fixed in his purpose in that particular.”²⁹

In the meantime both sides were preparing their briefs soon to be argued before the Supreme Court. Daniel Webster, aided by the able Joseph Hopkinson, represented the college. Their opponents were William Wirt and John Holmes. The former had been Attorney General of the United States and a man whom his friends referred to as "a ripe and splendid orator."³⁰ The oral arguments made before the Court closely paralleled those of the original suit, with perhaps more emphasis on the contract clause than in the lower court.³¹ When the argument was finished in mid-March, Chief Justice Marshall announced that the question was so important that the Court, in all likelihood, would not render a decision in the 1818 term. The real reason, however, was that the Court was badly divided. Webster believed that Marshall, Washington,

²⁶ Ejectment would be used to oust the new trustees from control of college land located in Vermont.

²⁷ Letter from Daniel Webster to Jeremiah Mason, Dec. 8, 1817, in LETTERS OF DANIEL WEBSTER 74-75 (C. Van Tyne ed. 1902) [hereinafter cited as LETTERS].

²⁸ Letter from Daniel Webster to Jeremiah Mason, Jan. 1818, in 1 PRIVATE CORRESPONDENCE, supra note 25, at 270.

²⁹ Letter from Daniel Webster to Jeremiah Mason, Feb. 22, 1818, in id.

³⁰ 1 S. BROWN, THE WORKS OF RUFUS CHOATE 515 (1862).

³¹ See Letter from Daniel Webster to Reverend Francis Brown, March 11, 1818, in 16 WRITINGS AND SPEECHES OF DANIEL WEBSTER 40 (nat’l ed. 1903) [hereinafter cited as WRITINGS]; Letter from Daniel Webster to Reverend Francis Brown, March 13, 1818, in 1 PRIVATE CORRESPONDENCE, supra note 25, at 275.
and Story favored the college; Duval and Todd were opposed; and Livingston and Johnson were undecided.\textsuperscript{32}

Now, with the \textit{Dartmouth College} case argued, both camps retired to evaluate their respective positions. The State of New Hampshire had made a poor showing. Attorney Holmes had apologized to the Court that “he had not had time to study the case.”\textsuperscript{33} By not ruling against the State, the Supreme Court created a false impression that they might support the university. But members of the bench who favored the college were pleased at the stay, for they believed that the opportunity was at hand to convince a workable majority to restrain the New Hampshire Legislature.\textsuperscript{34} Of equal significance was a series of cognate cases which were being prepared for the circuit court at Portsmouth — Judge Story's legal bailiwick. Webster spoke several times with Story during the months of March and April and he was quite convinced that Story not only supported his cause but was willing to go to considerable lengths to uphold his case.\textsuperscript{35} The Judge advised him that the fictitious diversity cases should be readied as soon as possible, and that he would personally call a special session if necessary to have the cases heard. He also indicated that he would not give an opinion in the district court. Instead he would send the cases directly on to Washington, \textit{pro forma}.\textsuperscript{36} The question of Story's participation in the case no longer rested on idle speculation. Story told Webster he wanted a case “which shall present all the questions”\textsuperscript{37} and one which would allow the Court to give a sweeping opinion. John Shirley remarked that Story wanted to give a broad decision on the violation of the natural rights of the obligation of contract, thus ending legislative interference in private vested rights forever.\textsuperscript{38}

\begin{enumerate}
\item See Letter from Daniel Webster to William Sullivan, March 13, 1818, in 16 \textit{WRITINGS}, \textit{supra} note 31, at 41; Letter from Daniel Webster to C.J. Smith, March 14, 1818, in 1 \textit{PRIVATE CORRESPONDENCE}, \textit{supra} note 25, at 276.
\item 1 S. BROWN, \textit{supra} note 30, at 515.
\item Note the very able discussion in 1 C. HAINES, \textit{supra} note 17, at 394-98.
\item See Letter from Daniel Webster to Francis Brown, March 30, 1818, in 1 \textit{PRIVATE CORRESPONDENCE}, \textit{supra} note 25, at 279. In this letter, Webster stated: “I doubt whether Judge Story will incline to give an opinion, and rather think he will prefer that the case should go directly to Washington. In this particular, however, he must take his own course.” \textit{Id}. \textit{See also} Letter from Daniel Webster to Jeremiah Mason, April 23, 1818, in \textit{id}. at 281.
\item Letter from Daniel Webster to Jeremiah Mason, April 23, 1818, in \textit{id}.
\item \textit{Id}.
\item See J. SHIRLEY, \textit{DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES} 277 (1879).
\end{enumerate}
Throughout the summer and fall Webster communicated with Story. Many of Story's letters have disappeared, presumably destroyed on purpose by Webster. But the letters of Webster have been preserved and they reveal how he was coached by the Judge. On the 9th of September 1818, Webster sent Story copies of the briefs used in the several cognate cases instituted May 1.

I send you five copies of our argument. If you send one of them to each of such of the judges as you think proper, you will of course do it in the manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs. The truth is, the New Hampshire opinion is able, ingenious, and plausible. It has been widely circulated, and something was necessary to exhibit the other side of the question.

And to cover every possible angle, Webster, at some considerable personal expense, had sent to England for certain works on the common law (Duke on Charitable Uses; Highmore on Mortmain) which were not available in the States. “These books,” he told Francis Brown, “are now lent to Judge Storey [sic].”

How did Story consider his position? Doubtless he did not want it to appear that he favored one side over the other. Therefore, he heard the various subsidiary law suits in October, allowed defense counsel Ichabod Bartlett to state new facts not found in the original action, but refused to enter an opinion. Story, nevertheless, allowed a direct appeal, on a writ of error, to the Supreme Court. When Governor Plumer tried to make Judge Story's position uncomfortable by appointing him to the Board of Overseers at Dartmouth University, he refused outright. On the other hand, he encouraged Justice William Johnson to visit New York's famed jurist James Kent, knowing full well that Kent would try to convince Johnson to go along with Marshall, Washington, and himself. Finally, he drew up his opinion for the Dartmouth case.

39 See Letter from Daniel Webster to Joseph Story, Aug. 16, 1818, in 1 Private Correspondence, supra note 25, at 286. “According to your wish, I send you a copy of such memoranda of cases, &c., as I have met with, relative to the college question. They are of small importance.” Id.
40 Letter from Daniel Webster to Joseph Story, Sept. 9, 1818, in id. at 287.
41 Letter from Daniel Webster to Francis Brown, Dec. 27, 1818, in Dartmouth College Library, MS. 818,511.
42 See Letter from Daniel Webster to Joseph Story, June 29, 1818, in Massachusetts Historical Society, Story MSS. 51; Letter from William Allen to William Pinkney, Sept. 10, 1818, in Dartmouth College Library, MS. 818,510.1; Letter from Jeremiah Mason to Charles Marsh, Sept. 11, 1818, in id., MS. 818,511; Letter from William Allen to Selma Hale, Dec. 6, 1818, in id., MS. 818,656.
43 J. Shirley, supra note 38, at 270-75.
even before the 1819 term began, and circulated it freely to several influential judges and lawyers, as well as to the justices of the Court. So persuasive was this tactic that it apparently won over Brockholst Livingston, one of the two original dissenters:

I return your opinion in the case of Dartmouth College, which has afforded me more pleasure than can easily be expressed. It was exactly what I had expected from you, and hope it will be adopted without alteration. What you say of the contract of marriage, is a complete answer to the difficulty made on that subject, and I am not sorry that you have taken notice of the Legislature dissolving this contract, which has been passed in this State. As to the effect of the separation of the two countries on the charter of this College, in addition to what you say, it appears to me that its existence is admitted by the very acts which are complained of.

D. The Dartmouth College Opinion in the Supreme Court

The Supreme Court convened on the morning of February 2, 1819 to deliver an opinion in the Trustees of Dartmouth College v. Woodward case. William Pinkney, the famed Baltimore lawyer, diplomat, and man of letters, had replaced Ichabod Bartlett for the State of New Hampshire. Fully expecting that he would be able to reargue the case, Pinkney waited politely until the Justices were seated. As he rose to address the Court, John Marshall began to read his opinion in a sonorous monotone. Marshall obviously was aware that Pinkney was seeking the Court's attention, but ignored him, as did the rest of the bench. And this was done for a definite purpose. Marshall, with Story's help, had mustered a near unanimous decision and they were not about to retreat. Five of the judges present were with the majority: Marshall, Washington, Livingston, Johnson, and Story. The lone dissenter was Gabriel Duval; he chose not to write an opinion. Justice Todd was absent. In Webster's words the decision "goes the whole length — & leaves not an inch for the University."

The best oral argument that the State of New Hampshire could make was that the federal government's control over the States did not extend to its internal affairs; that questions of State gov-

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44 Letter from William Prescott to Joseph Story, Jan. 9, 1819, in 1 LIFE AND LETTERS OF JOSEPH STORY 324 (W. Story ed. 1851) [hereinafter cited as STORY].
45 Letter from Brockholst Livingston to Joseph Story, Jan. 24, 1819, in id.
47 1 C. HAINES, supra note 17, at 402.
48 Letter from Daniel Webster to Ezekiel Webster, Feb. 2, 1819, in Dartmouth College Library, MS. 819,152.7.
ernment, education, or private contractual arrangements were protected by the State's police powers and, hence, barred federal intervention. The college, on the other hand, argued to exclude State control of the educational process. As Joseph Hopkinson told the Court, if the States were upheld it would prove "that professors, masters, preceptors, and tutors, are all political persons and public officers; and that all education is necessarily and exclusively the business of the state." Interestingly enough, both parties to the litigation presented a case for limited federal activity; the former excluded federal participation while the latter desired only that the rights of private property be protected. Neither advocated federal regulation of the educational process.

Turning, however, to Marshall's decision, we find that he ignored in part the pleas of counsel in arriving at his conclusion that "education is an object of national concern, and [the] proper subject of legislation" — a proposition which all would admit. Thus, at the start, he placed the case on a national footing and structured the decision as a definitive answer to the States.

Marshall's analysis of the Dartmouth College controversy can be broken down into two questions. Was the contract protected by the Federal Constitution? And if so, was the contract impaired by the State legislative acts? This was subtle sophistry, for it dismissed the issue whether a contract existed in fact. How did Marshall justify this line of thought? "It can require no argument," he wrote, "to prove that the circumstances of this case constitute a contract." This was extremely fallacious legal reasoning for it did not contain a single element of proof from either the common law or statutory law. It was a mere logical deduction from a faulty premise; nonetheless, it formed the basis of his decision.

The Chief Justice then related the charter to a contract; contracts which are mentioned in the Constitution pertain only to those dealing with private property and "confer rights which may be asserted in a court of justice." Charters contain rights; there-

49 17 U.S. (4 Wheat.) at 600.
50 Id. at 616.
51 Id. at 634.
52 Id. at 627; see W. Hunting, The Obligation of Contracts Clause of The United States Constitution (1919); Isaacs, John Marshall on Contracts. A Study in Early American Juristic Theory, 7 VA. L. REV. 413 (1921).
53 See Mendelson, John Marshall's Short Way with Statutes; a Study in the Judicial Use of Legislation To Expound the Constitution, 15 KY. L.J. 284 (1948); Stinson, Marshall and the Supremacy of the Unwritten Law, 58 AM. L. REV. 856 (1924).
fore, the Constitution recognizes a charter as a contract and it protects it as private property. As to the claim that there was a distinction between private and public corporations, Marshall could find nothing public in the case. The source of the funds to run the school was private (an outright distortion of the facts, since the school had been founded on a State lottery); the application of the funds used at the school was private (only partly correct); and the acts of incorporation were private (true only if the British colonial government was recognized as being legitimate at the time the State acts were passed). Stretching the case to cover every possible loophole, Marshall concluded that while it was true that Parliament had certain powers to annul corporate rights (quo warranto proceedings), still in the final analysis a valid contract continued in existence. He affirmed this principle even though the original donors no longer had any actual interest in the property. The state acts were declared to be unconstitutional as violating the contract clause of the Constitution. It was a solipsism that defied explanation.

Justice Story approached the case on a different level. Not only was his opinion sweeping in respect to its coverage of common law corporations, but it related the contract clause to the doctrine of vested rights. Furthermore, he provided a legal basis (albeit the question remains how correct it was) for the decision which was totally absent in Marshall's tour de force.

Story accepted Marshall's two questions on the status of the charter and the impairment of contract as being pertinent to the discussion. He examined at great length the "nature, rights, and duties of aggregate corporations at common law." At the outset he distinguished public corporations from private institutions. In this respect he had some difficulty explaining how private trustees could accept public charity and yet remain immune from State control. The college was a private institution, he declared, because the act of incorporation made it so. But in making this allegation he realized the shortcomings of such a line of reasoning; it was in direct conflict with English precedent. For instance, observe how he stumbled along in trying to justify the status of the institution:

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55 Id. at 635-38.
56 Id. at 654.
58 17 U.S. (4 Wheat.) at 667 (concurring opinion).
The charity, then, may, in this sense, be public, although it may be administered by private trustees; and, for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. 59

Not being totally satisfied with his argument, he added to his already circumlocutious opinion "that because the charity is public, the corporation is public . . . manifestly confounds the popular, with the strictly legal sense of the terms." 60 But was it not Story who was confounding the issues? His fear that every hospital and college would come under the State's authority and be a public corporation was justified. England was already on the march toward establishing charitable public institutions. Story chose to ignore such progress since it was anathema to his public philosophy. He believed that the function of a State legislature was a limited one. It was not to determine the rights of public versus private corporate bodies: the judicial branch assumed that responsibility. Instead legislators should exercise a visitorial power to "correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled." 61 It was essentially the reverse in England, however, where the courts were being forced to follow, rather than lead, Parliament on matters of public policy.

Having established that the college was a private eleemosynary institution, Story discussed at some length the charter as a contract. Counsel for the State had denied that a charter could be a contract for lack of sufficient consideration. Story disagreed with this interpretation of the common law. The situation was something more than an executory contract; it was an irrevocable gift coupled with implied agreements on the part of Dr. Wheelock, founder of the school.

It has never been doubted, that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money. A fortiori, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. 62

This was a most perplexing statement of the English law of

59 Id. at 671.
60 Id.
61 Id. at 673.
62 Id. at 687.
contracts. In truth he was referring to the terms of a trust, which would be valid only during the life of the trustees. A corporation had been created by the Crown with the avowed purpose of distributing in perpetuity charitable donations from private and public sources. Thus, in each succeeding generation, a valuable consideration would be deemed to exist between the founder, the trustees, and the benefactors although no legal consideration passed to validate the agreement. It was a form of contract in perpetuity — a legal anachronism — and one which never existed in English common law.63

The attorneys for the State of New Hampshire had made an interesting point in their oral argument. There were, they said, certain classes of contracts over which the Supreme Court did not exercise review; marriage contracts constituted such a class.64 Then they related marriage to the case at bar, arguing that such matters were domestic and purely within the province of the State. Marshall agreed that the legislature was limited only where property rights were involved. In this case, however, he believed that a charter was a contract with tangible property rights. Story, on the other hand, accepted this statement of the law as accurate but held some reservations. Laws regulating divorces, remedies in breach of marriage contracts, and forfeitures of rights in marriage agreements did not impair contractual obligations. If, however, the legislature invested itself with the power to dissolve a contract without recognizing a breach on either side and did so against the wish of the parties and without any form of judicial review, the case was quite different. “I certainly am not prepared to admit such a power,” he wrote, “or that its exercise would not entrench upon the prohibition of the constitution.”65 Story was determined to give as little authority to State legislatures over vested rights as was humanly possible.

The touchstone of Story’s decision in the Dartmouth College controversy lay, however, not in his review of corporations, charters, or contracts, but solely on the question which Marshall chose to

64 17 U.S. (4 Wheat.) at 600 (concurring opinion).
65 Id. at 696.
evade. Was the charter dissolved at the time of the Revolution and thus reduced to a mere nullity in 1819? If this were the case then the majority decision rested on shifting sand. What justification could be made if it were decided that the charter's contractual obligations were terminated in 1775? Story answered this query by reviving a common law decision of Lord Thurlow and by positing the ratio of that case. He believed it was a principle of the common law, as well as of international law, that when an empire was divided it did not foreclose rights in property already vested. Such a maxim he found was consonant with "the common sense of mankind, and the maxims of eternal justice."

But this was not an accurate description of the political situation in New Hampshire during the 1775-83 period. A full-fledged revolution had been carried out; the British colonial government had been displaced; and previously vested foreign rights disappeared with the emergence of the new federal and State governments. State legislatures had even confiscated the property of numerous wealthy Tories and this was accomplished by strictly legal procedures. The rights of individuals having an interest in foreign corporations during a revolution or war have always hung in the balance by a delicate thread. Nineteenth century international law recognized the right of a revolutionary government to cancel existing contractual obligations if either reparation or arbitration settlements were made when the country became more stable. Hence, the Jay Treaty provided the arbitration machinery in settling confiscated British estates. But in the *Dartmouth* case it was argued that the corporation had "acquired rights" from the Crown which could not be divested. This was neither true in fact nor in theory.

By positing the doctrine of "acquired rights" Story provided a twisted interpretation of municipal and foreign conflict of laws. His decision had the effect of forcing the central Government to provide absolute protection for private corporations while it excluded State legislative control. In other words, it tended to federalize all British-owned corporations created before the war, even though

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68 For a thorough discussion indicating that the charter was dissolved, see Jenkins, *Should the Dartmouth College Decision Be Recalled?*, 51 AM. L. REV. 711 (1917).
67 17 U.S. (4 Wheat.) at 707 (concurring opinion).
70 Id. at 516-21.
they had descended in the interim into American hands and were recognized as American corporations. Fearful that property rights would be disturbed by State legislators, Story dramatized the effects of State regulatory legislation. It was an argument that the lawyers for New Hampshire did not dwell upon but it probably would have made little difference, since the Court was bent on maintaining the status quo of all private property relationships.\textsuperscript{71}

The \textit{Dartmouth} decision was quite typical of the early Marshall Court's pronouncements. Marshall and Story were in effect writing into the Constitution their own economic, political, and social philosophies.\textsuperscript{72} Story went much further than John Marshall in staking out the legitimate areas of State competency. Actually he was upset that the case did not go far enough. "I always had a desire that the question should be put upon the broad basis you have stated," he told Jeremiah Mason 6 months after the case was decided. He added that "it was matter of regret that we were so stinted in jurisdiction in the Supreme Court, that half the argument could not be met and enforced."\textsuperscript{73} There are two possible interpretations of these remarks. First, they may have been made in reference to the writ of error from the State Supreme Court of New Hampshire limiting the case to the narrow issue of deciding whether there was an impairment of the obligation of contract. Second, they may have referred to Story's grand design to relate the contract clause to a theory of natural law and thus place the principles of constitutional government beyond the pale of legislative control. In this respect he was unable to definitively draw the line between legitimate acts of State legislatures and those which he

\textsuperscript{71} Story had truly adopted the Federalist position on private property by 1819. There is some question that several years prior to 1819 he had been a loyal Republican friend of university officials. From the time of his elevation to the bench, however, his sentiments lay with the upper levels of New England society. For a keen discussion on Story's early political sentiments, see 1 C. Haines, \textit{The Role of the Supreme Court in American Government and Politics}, 1789-1835, at 411-15 (2d ed. 1960).


\textsuperscript{73} Letter from Joseph Story to Jeremiah Mason, Oct. 6, 1819, in 1 STORY, \textit{supra} note 44, at 323.
deemed to be unconstitutional and subversive to a well-ordered society.

Did Marshall restrain Story in the writing of this opinion? Or did Story exercise a certain control over the Chief Justice? With respect to the first query, Marshall could have waited for the new cases to come up, held a rehearing, and placed the decision upon a much broader foundation. Instead he chose to limit the jurisdictional question and declare the individual act of the State of New Hampshire to be contrary to the spirit of the Constitution. The second point is an interesting one upon which to speculate. In May of 1819 John Marshall wrote to Story that he was "much obliged by the alterations you have made in the opinion in the Dartmouth College case, & am highly gratified by what you say respecting it." Did this refer to Story's historical and philosophical treatment of English corporations — to his development of the contract clause? Perhaps he had corrected Marshall's interpretation of the common law, as was so often the case in other decisions. Or the situation may have been the obvious one in which Marshall was grateful that Story had provided extensive documentation, thus helping to solidify Marshall's constitutional law.

III. THE AFTERMATH OF DARTMOUTH COLLEGE

When Daniel Webster first learned of the Court's favorable decision, he believed that victory for the friends of Dartmouth College was complete. But Webster became more cautious when William Pinkney indicated that he was going to argue the subsidiary cases which Webster and Mason had instituted originally in the lower federal court (and which Judge Story had so conveniently forwarded to the Supreme Court). He warned Timothy Farrar to prevent the New Hampshire Federalists from trumpeting too loudly recent events. Moderation was the keynote. "We have many friends," he explained to Farrar, "who feel the victory as their own, and who would be grieved and mortified to see it abused."
Widespread publication of the Court's opinions could lead to hostile public reaction against both the college and the Court. No one was more keenly aware of the dangers of this kind of reverse publicity than Justice Story. Therefore, on a strictly informal basis, Webster and Story must have mapped the steps to be taken relative to the cognate cases still pending before the Supreme Court. In a letter to Francis Brown dated February 23, 1819, Webster petitioned the bench for a certificate to send the cases back to the circuit court for disposition. This action "would enable Judge Story to know what to do with them in May." The Court granted Webster's request and remanded the cases. This meant that the university people would have to show cause in the lower court (to produce new evidence) in order to merit a new trial. If they failed to convince the circuit court judge (who was Joseph Story), the decision would stand. Webster was quite certain how events would proceed in Story's court.

The cause will be sent back without further discussion here. These verdicts will be set aside, so far as to admit proof of other pertinent facts. They will then, if they please, offer proof of a particular fact. We shall object on the ground that that fact is not material, or pertinent. The judge will decide this, and if they do not like the decision, they will tender a bill of exceptions. Of all the courses which offer themselves, this seems to be the most safe and easy for us.

In order to combat any resistance to the decision from Republicans in New Hampshire, Webster with the aid of Jeremiah Mason, Jeremiah Smith, Timothy Farrar, and Joseph Hopkinson, as well as Justices Marshall, Washington, Story, and Supreme Court reporter Henry Wheaton, agreed to have the Supreme Court's opinions published in book form. Early in March 1819, Webster furnished Story with some of the details of publication:

One of the things I wish to see you most about relates to our College book. Arrangements are made to print it in Exeter. Judge Smith will see to the N.H. case; the proofs of the opinions of the Judges will be sent to you, & of the rest of the Washington case probably to me. At any rate you are to see the proofs of

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78 See text accompanying notes 35-36 supra.
79 See Letter from Cyrus Perkins to William Allen, Feb. 11, 1819, in Dartmouth College Library, MS. 819,161; Letter from Daniel Webster to Francis Brown, Feb. 23, 1819, in 1 PRIVATE CORRESPONDENCE, supra note 25, at 302; Letter from Daniel Webster to Jeremiah Mason, Feb. 24, 1819, in LETTERS, supra note 27, at 78.
80 Letter from Daniel Webster to Timothy Farrar, Feb. 9, 1819, in 29 REGISTER, supra note 77, at 230.
81 Letter from Daniel Webster to Francis Brown, Feb. 23, 1819, in 1 PRIVATE CORRESPONDENCE, supra note 25, at 302.
the Opinions. Lest the book should not get on fast enough for Wheaton, I intend to have the opinions copied . . . I wish to go over the Chief's & Judge W's with you, & to see that every word & letter be right. On this account I wish to see you for two hours soon.82

Less than a month later, Webster changed his mind about the Dartmouth book. His reason was probably motivated by pride. "I shall strut well enough in the Washington Report," he informed Jeremiah Mason, "& if the 'Book' should not be published, the world would not know where I borrowed my plumes —"83 Nonetheless, he was willing to go along with Judge Story's request that the work be published. Story believed the book would be quite useful in convincing New Hampshire citizens of the rightness of the Supreme Court's decision. The only other sources of information were the newspapers and oral transmission, neither of which could be trusted. Therefore, Story reasoned that a book on the development of the case "might be read by other Classes."84

While the friends of the college eagerly sought to find an editor capable of putting the Dartmouth book into shape, the time for the May term in Portsmouth drew near. Webster and Story became singularly familiar with each other. According to Webster they actually discussed how the cases would be presented and what course of action should be taken.85 Glimpses of the behind the scene maneuvering of these two men may be found in several of Webster's private letters. On April 10 he was of the opinion that Story wanted to settle the controversy as soon as possible and hence would not grant a delay in the proceedings. Two days later he visited Story at his home in Salem and reported this conversation to his colleague Jeremiah Mason:

I flatter myself the judge will tell the defendants, that the new facts which they talk of, were presented to the minds of the judges at Washington, and that, if all proved, they would not have the least effect on the opinion of any judge; that unless it can be proved that the king did not grant such a charter as the special

82 Letter from Daniel Webster to Joseph Story, March, 1819, in 14 PROCEEDINGS, supra note 74, at 401.
83 Letter from Daniel Webster to Jeremiah Mason, April 10, 1819, in LETTERS, supra note 27, at 80. Up until March 22, 1819, Webster had been in favor of publishing the book. See Letter from Daniel Webster to Joseph Hopkinson, March 22, 1819, in 16 WRITINGS, supra note 31, at 46; Letter from Daniel Webster to Jeremiah Mason, March 22, 1819, in id. at 47.
84 Letter from Daniel Webster to Jeremiah Mason, April 10, 1819, in LETTERS, supra note 27, at 81.
85 Letter from Daniel Webster to Jeremiah Mason, April 13, 1819, in 16 WRITINGS, supra note 31, at 49.
verdict recites, or that the New Hampshire General Court did not pass such acts as are therein contained, no material alteration of the case can be made. 88

Finally on May 27, 1819, counsel for the university made one last stand to save the school. They presented to Judge Story a “mass of papers” citing new facts in the case. Attorney John Austin read portions of his brief to the Judge in the hope he might persuade him to reconsider. But the university despaired when Story challenged Austin, intimating “that the new facts had no bearing on any part of the Court’s Opinion.” 87 To keep everything above board, Story agreed to examine the papers for a few days before rendering an opinion. But he told Webster in private that he saw nothing which refuted or contradicted “any of these facts and the recitals of the charter.” 88 On June 10, 1819, at the circuit court in Portsmouth, Judge Story dealt the final blow to the university. He ruled that no new facts had been introduced: the Dartmouth College decision stood as valid constitutional law.

Story was not content merely to uphold the Dartmouth case and to collaborate on a work propagandizing the Court’s position. His primary objective was to place the private corporate charter beyond any future State interference. To accomplish this end he advised Webster to visit Chancellor Kent and to suggest that Kent write a review of the “Dartmouth Question.” 89 Kent refused this request. He did so not because he disagreed with Story’s constitutional doctrines, but because a similar case was being heard in the New York Court of Errors. Kent believed he could give more effective recognition to the Supreme Court’s decision in his court than he could in a separate work. 90

From an ethical point of view the Dartmouth decision cannot command great respect today. 91 The case was replete with collu-

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80 Id.
87 Letter from Daniel Webster to Jeremiah Mason, May 27, 1819, in id. at 53.
88 Letter from Daniel Webster to Francis Brown, May 30, 1819, in 1 PRIVATE CORRESPONDENCE, supra note 25, at 306.
89 Letter from James Kent to Joseph Story, Aug. 3, 1819, in 14 PROCEEDINGS, supra note 74, at 413. See also J. Horton, James Kent, A Study in Conservatism 1763-1847 (1939).
90 See Letter from Joseph Story to Chancellor Kent, Aug. 21, 1819, in 1 STORY, supra note 44, at 331.
91 See generally 1 C. Haines, supra note 71, at 412-13. Gerald T. Dunne maintains that Justice Story was very much concerned about several types of private corporations, particularly the Merchants’ Bank of Salem, of which he was a director. Dunne concludes that Story feared governmental control and that this influenced his decision. See Dunne, Joseph Story: The Great Term, 79 HARV. L. REV. 877, 910 (1966).
sive activity between bench and bar; the legal legerdemain of Webster and Story reached scandalous proportions. It was one thing for a judge to interpret the Constitution as he viewed it from his lofty pedestal; it was quite another thing for the judge to step down and enter the political arena by assuming the role of a judicial legislator. Story, of course, was never conscious of any wrongdoing. The stakes were too high for him to be willing to allow unchecked popular opinion to determine the nature of charters and contractual obligations. In a letter to Chancellor Kent, Story described in detail his reasons for desiring the decision to be placed on a broad footing:

My wish was that you should review it, not for the purpose of commending the Court or counsel, but from a higher motive, to lay before the public in a popular shape, the vital importance to the well being of society, and the security of private rights, of the principles on which that decision rested. Unless I am very much mistaken, these principles will be found to apply with an extensive reach to all the great concerns of the people, and will check any undue encroachments upon civil rights, which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt.9

It was a dangerous business for any member of the Supreme Court to become so entangled in a judicial decision, for such action encouraged a disregard of the constitutional system of checks and balances. The Dartmouth College case was written in 1819 at the height of the Marshall-Story Era of constitutional lawmaking; within a few short years the Götterdämmerung would begin.

IV. THE IMPACT OF THE DARTMOUTH COLLEGE CASE ON CONTRACT LAW

The impact of the Dartmouth College case was not felt immediately. In time, however, the decision was incorporated into the struggle between those favoring the growth of public corporations and those seeking the protection of corporate rights at the State level. The decision had the effect of giving carte blanche to private corporations to act as they pleased, relatively free from legislative interference. This was tempered, however, when the States were able to provide a clause in corporate charters reserving the right

92 Letter from Joseph Story to Chancellor Kent, Aug. 21, 1819, in 1 STORY, supra note 44, at 331. See generally Cassoday, James Kent and Joseph Story, 12 YALB L.J. 146 (1903); Haines, Political Theories of the Supreme Court from 1789-1835, 2 AM. POL. SCI. REV. 221 (1908); Latham, The Supreme Court as a Political Institution, 31 MINN. L. REV. 205 (1947).
to alter, amend, or abolish a charter. Two further consequences flowed from the decision. On the one hand, the battle was waged into the late 19th and early 20th centuries over the question of whether corporations should be left largely unregulated (private power theory). This received considerable support from the Court. At the turn of the century the doctrine of natural rights was resurrected and used to justify corporate monopolies. 93

On the other hand, the concept of public corporate growth being held in check by popular State legislatures (public power theory) was given a helping hand by conscientious reformers, and the decisions of Justices Marshall and Story were unable to prevent this. In his day, Marshall was not prepared to hold that the States were incapable of regulating all of their internal affairs (for example, civil institutions); and hence he left open the question of the State police power. And while Story was in basic disagreement with Marshall there was little he could do. In *Gibbons v. Ogden* 94 Marshall advised the nation that "[t]he acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject, [commerce] to a considerable extent . . . ." 95 Story, in his zeal to free municipal corporations from public control, where private property was concerned, was opposed to any development of the police power doctrine. It was the duty of the judiciary, he felt, to safeguard property rights and any encouragement of residual police power might interfere with this end.

Story was far in advance of the legal thinkers of his day. He was fully aware of the reform movement sweeping British and continental politics and he was determined to prevent hasty, ill-advised, popular legislation from polluting the atmosphere of the world he respected. The closing words of his *Dartmouth* opinion were prophetic of the ensuing conflict over popular government exemplified in Jacksonian democracy:

> In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predilection in which this court stands in relation to the nation at large is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state and its citizens, and between different states. It

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93 For a very able discussion of the results of the *Dartmouth College* case, see E. Cowin, *John Marshall and the Constitution* 167-72 (1919).
95 *Id.* at 208.
stands, therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care.98

The Dartmouth case provided a logical link in the long line of decisions expanding the contract clause. In 1823, Justice Washington held in Green v. Biddle97 that an interstate political agreement between Kentucky and Virginia was valid and within the scope of the clause. When Kentucky split off from Virginia and became a separate State, agreements were made whereby the former would recognize the legitimacy of certain Virginia land titles. Due, however, to speculation the titles became unclear and endless litigation in the State courts resulted. To rectify this situation, Kentucky enacted a law which provided that no claimant should be awarded the land unless he met certain requirements, including compensation to the party in possession if any improvements had been made. Such action, it was charged, altered the original agreement.

Justice Bushrod Washington was of the opinion that the contract clause necessarily included contracts between individuals and the State as well as between private citizens. To the objection raised that congressional approval of interstate compacts was a prerequisite (and absent in this case), Washington replied that acceptance on the part of Congress was implied when Kentucky became a bona fide State.98

Once again Story could not resist writing a concurring opinion emphasizing the rights of private property holders. Title to land, he insisted, could not be acquired by unilateral agreement.

Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution and grants of the domain within its own boundaries; and this right must remain until it yields it up by compact or conquest.99

He rejected the argument that the Kentucky legislature had merely changed the remedy — a justifiable police power.

It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as ma-
terially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests.\(^{100}\)

This time Story was less cautious than he had been 4 years earlier. While Washington stressed the contract aspect of the interstate compact, Story urged an appeal to natural rights of property, placing little or no emphasis on constitutional provisions. The case was interesting from still another angle. Justices Todd and Livingston were ill and did not participate; Marshall refused to sit; and William Johnson dissented. The majority, consisting of Story, Washington, and Duval, hardly represented a majority of the Court.\(^{101}\)

*Green v. Biddle* constituted one of five blows that the Supreme Court struck at Kentucky between 1821 and 1825. Federal admiralty jurisdiction was extended over Kentucky's inland waters; a Kentucky law which protected settlers who had made improvements on disputed patents was voided; Kentucky legislation protecting judgment debtors was ignored in favor of creditors; and the Bank of the United States was sustained over State banks. It was small wonder that the decision was severely criticized and that the clamor for reform of the federal judiciary increased steadily.\(^{102}\) The upshot of *Green v. Biddle* was, however, anticlimactic. Kentucky refused to be bound by the decision and it was enforceable only in lower federal courts. In this instance, Story was not very successful in asserting the supremacy of federal law.

The drift toward a federal concept of the contract clause continued in several different forms. For one thing, the doctrine of the impairment of contractual obligations was extended to State bankruptcy laws. In *Sturges v. Crowninshield*\(^{103}\) a New York insolvency law was held to be invalid since it attempted to discharge a contract or debt entered into prior to the passage of the law. The motive behind the Court's decision was to push Congress gently into passing a national bankruptcy law. Marshall, in speaking for the majority, did not deny that in the absence of congressional legis-

\(^{100}\) *Id.* at 17 (emphasis added).


\(^{103}\) 17 U.S. (4 Wheat.) 122 (1819).
lation States could enact bankruptcy statutes, but he held that they were subject to federal preemption.\textsuperscript{104}

The ratio of Sturges was based solely on the fact that the debts involved were incurred before the insolvency act was passed. The State of New York circumvented this obstacle by passing a new bankruptcy law (discharging the future acquisition of debts). The Supreme Court in a divided opinion in \textit{Ogdens v. Saunders},\textsuperscript{105} held that the new State act did not violate constitutional mandates, since the contracts were entered into after passage of the insolvency legislation. Marshall and Story dissented and refused to accept the decision as ruling law. By the end of the Marshall-Story Era the majority of the Court had retreated from the absolute approach regarding the sanctity of bankruptcy contracts. Neither the Chief Justice nor his faithful aide-de-camp were able to convince their brethren that such a doctrine was dangerous to civil society.\textsuperscript{106}

\section*{V. The Charles River Bridge Case}

It has often been said that the death of John Marshall marked the end of national supremacy and that the accession of Roger B. Taney to the position of Chief Justice of the Supreme Court heralded an era of State sovereignty. Such statements are quite inaccurate appraisals of the changes which took place from 1830-45 on the Court. However, lest one assume that the Taney Court was but a continuation of Marshall's nationalism, it should be pointed out that there were some significant departures. For one thing, the personnel of the bench underwent a transformation in this period. After 1835, for instance, there were only two holdovers from the Marshall Court — Story and Thompson. The majority of the appointments to the bench during the Jacksonian Period were classified as "agrarian Democrats" with perhaps two notable exceptions — John McLean and James Wayne.\textsuperscript{107}

The philosophy of nationalism, the protection of corporate rights, and the inviolability of contract at the expense of State sov-

\textsuperscript{104} Id. at 208. \textit{See generally} A. \textit{Kelly} \& W. \textit{Harbison, The American Constitution} 281 (3d ed. 1963).
\textsuperscript{105} 25 U.S. (12 Wheat) 213 (1827).
\textsuperscript{107} The Justices of the Supreme Court included Joseph Story (Madison); Smith Thompson (Monroe); John McLean (Jackson); Henry Baldwin (Jackson); James Wayne (Jackson); Roger B. Taney (Jackson); and Philip Barbour (Jackson).
ereignty which Story had professed a decade earlier ran into stiff resistance from a Court more conscious of the rights of popular majorities and more in sympathy with doctrines of State sovereignty. Dual federalism is the phrase that best describes the Taney rule.\(^{108}\) Therefore, it is not surprising that Story was out of place on the Taney Court. He repudiated such doctrines, becoming more conservative as he fought battle after battle with the new Justices.

Taney's concept of the public interest differed sharply from that of Marshall and Story. With the growth of State and local government, as well as the increasing complexity of corporations, there was a widespread need for various types of State regulation. The *Charles River Bridge v. Warren Bridge*\(^{109}\) case best exemplifies the subtle changes occurring in constitutional theory during this period.

It took 6 years to get an answer from the Court on the *Charles River Bridge* lawsuit. Justice Story called Professor John Ashmun's attention to the litigation as early as February 1831. The case, he found, had heavy overtones of influence peddling by Massachusetts politicians.

We are not yet at the Charlestown Bridge cause, though it has been staring us in the face for a week past. I think it will be reached next week, & then comes the tug of war. We have already a deputation from Charlestown to take care of the Court & report progress, and the address of Mr. Morton's [Marcus Morton, one of the justices of the Supreme Judicial Court of Massachusetts] constituents has taken some pains to prevent our falling into great errors without all proper admonitions. I want no better gauge of the man than that as a Judge he is willing to be the candidate of such people with such avowed opinions.\(^{110}\)

The *Bridge* case was argued the week of March 7-11, 1831, but Marshall apparently elected to avoid the issue during the term by


\(^{109}\) 36 U.S. (11 Pet.) 420 (1837). For a discussion concerning the facts of this case, see text accompanying notes 114-15 infra.

not handing down a decision. Justice Story had already made up his mind (long before the case was argued) that charters and contracts of private corporations were sacrosanct. He proceeded to prepare his opinion, which he finished 2 days before Christmas. Story apologized to Jeremiah Mason for the length of his draft, but his purpose, he said, was to convince those of his brethren who had some doubts on the constitutional questions. He hoped it might be possible "to gain allies" by presenting an early opinion. This was a favorite maneuver of Story. By working up an elaborate opinion studded with authorities he would attempt to overawe his brothers and convince them of the rectitude of his position. This tactic was highly effective and successful in the early Marshall period; but as the Court began to change personnel, new men appeared on the bench who could articulate their own political and social philosophies and they were often in direct conflict with the ideas of Joseph Story.

When the Court convened in 1832 the case was reargued, and because the five judges in attendance were divided in opinion the cause was ordered to be continued. Justices Marshall, Story, and Thompson, a familiar triumvirate, were in favor of voiding the decision of the Massachusetts Supreme Judicial Court which had upheld the chartering of a second bridge company. McLean questioned the Court's jurisdiction; Baldwin was on record as opposed, and Johnson and Duval were absent. Without unanimity on the bench, Marshall was unwilling to risk further rupture. The case was put off indefinitely and did not finally come up for disposition until 1837.

In 1650 the Massachusetts Legislature granted Harvard College the right to establish a ferry service from Charlestown to Boston. In 1785 the legislature incorporated a company to build a bridge and to indemnify Harvard for the title. The bridge began service in 1786; in 1792 its charter was extended for 70 years and at the expiration of this period title was to vest in the Commonwealth. The Massachusetts Legislature decided in 1828 to incorporate a second company, the object of which was to erect a bridge close by the first structure. Before construction was completed an in-

111 See Letter from Joseph Story to Jeremiah Mason, Nov. 18, 1831, in J. MASON, MEMOIR AND CORRESPONDENCE OF JEREMIAH MASON 334 (1873).
112 See Letter from Joseph Story to Jeremiah Mason, Dec. 23, 1831, in id. at 337.
113 See Letter from Joseph Story to John H. Ashmun, March 1, 1832, in 2 STORY, supra note 44, at 91.
junction was obtained against the new Warren Bridge Company. It was alleged that the legislation impaired the contractual rights of private corporations. The United States Supreme Court granted a writ of error after the Supreme Judicial Court of Massachusetts had ruled in favor of the Warren Bridge Company.110

Chief Justice Roger B. Taney in his maiden opinion spoke for the majority, and at the outset let it be known he was no devotee of the Marshall-Story school. The argument of vested rights was dismissed as not in point. The grant was by the public to a private corporation; the matter was one of great public concern. Such contractual arrangements were always public and subject to State regulation. Taney indicated that English precedent as well as several cases in American law supported his stand. But the substance of his decision revolved around his political philosophy. The theory of public interest meant that the community as a whole was to benefit from the services of a corporation created by the State. Any diminution of the State's police power to regulate corporations would emasculate good government. "The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations."118 In short, no charter or contract was involved in the decision.

Justice McLean disagreed with Taney. He took the position that the legislation in question attempted to regulate a contract — a substantive right in law.117 But he raised a doubt that the judiciary should interfere with legislative matters. If Massachusetts elected to have two bridges, side by side, was it any concern of the Supreme Court? Nothing could be found in the Constitution forcing States to create a single bridge. He disagreed, however, that any monopoly was present, thereby reserving the query whether the federal government could allow State monopolies of public conveniences. McLean was skeptical of the doctrine of the immunity of vested rights; with the growth of city government, individual landowners daily faced the threat of eminent domain. No one disputed that property owners were provided with certain privileged rights; yet all were agreed that such rights were relative, not ab-

110 Story thought that the case presented "a glorious argument on all sides, strong and powerful . . . . " Letter from Joseph Story to William W. Story, Jan. 28, 1837, in Massachusetts Historical Society, Story MS. 47.
117 Id. at 554 (concurring opinion).
solute. In the final analysis McLean felt the Court lacked jurisdiction, the case being one of local concern and not involving constitutional adjudication. He, therefore, was in favor of dismissing the entire proceedings.\(^{118}\)

The proponents of Jacksonian democracy on the Taney Court were unable to silence the ailing and somewhat crotchety Justice Story. Speaking for himself and Justice Thompson, he delivered a scathing indictment as he dissented from the majority. The sole issue he contended was the obligation of contract, but others had seen fit to indulge themselves in idle speculation.\(^{119}\) The opinion by Story in the *Charles River Bridge* case was far from his best. It retraced the enigmas of the English common law on charters, royal grants, corporations, monopolies, and franchises. As Story said, it was an appeal to the past:

> I stand upon the old law; upon law established more than three centuries ago, in cases contested with as much ability and learning, as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens, secured by public grants. I will not consent to shake their title deeds, by any speculative niceties or novelties.\(^{120}\)

He charged that Taney was inaccurate in describing the case to be one of a royal grant and hence revokable at the will of the legislature. It was a legislative grant subject under the *Dartmouth College* rule to judicial review.\(^{121}\) Story was absolutely correct on this ground. When he discussed whether the legislature could alter or modify private contractual rights, however, (which, of course, he denied could be done) he was back again to his original constitutional construction. Here he was obviously treading on thin ice since the Court had decided to supersede its earlier position and restate the concept of State police power in the area of public and private enterprise.\(^{122}\)

Story took issue with the majority's concept of public interest. If private capital (what he was actually talking about was private monopoly, although he denied this) was uncertain in its commercial transactions due to fear of undue competition, its confidence would be shaken, which in turn would lead to economic panic. If government invited the people to share in bridge building, there

\(^{118}\) *Id.* at 583.

\(^{119}\) *See id.* at 586 (Story, J., dissenting).

\(^{120}\) *Id.* at 598.

\(^{121}\) *See id.* at 645.

\(^{122}\) *See B. Wright,* *supra* note 106, at 168-78.
had to be a correlative duty to safeguard private property. This protection lay in judicial review of State legislative acts.\textsuperscript{123} The weakest part of Story’s argument was his fruitless search into the archaic common law for precedents to support his supposition that franchises, like charters and contracts, were meant to be covered by the Constitution; that they were free from State regulation and that this construction constituted the best interests of the people. He distinguished between a monopoly (“an exclusive right granted to a few, of something which was before of common right”)\textsuperscript{124} and a franchise (“the right to grant exclusive privileges for public services, without ascertaining of what nature those services may be”).\textsuperscript{125} The latter was not a monopoly since “[i]t took from no citizen what he possessed before; and had no tendency to take it from him.”\textsuperscript{126}

Finally Story attempted to salvage his already poorly stated opinion by making two concise appeals. The first plea was for a return to the principles of natural justice which the earlier Marshall Court had enunciated in shaping the ends of central government.\textsuperscript{127} The second petition requested the Court to redefine the nature of public and private grants; the former, he alleged, were for the benefit of the people and of necessity were restricted; the latter were in favor of private enterprise and free from State governmental interference. The root of the problem was in reality, however, the concept of sovereignty — a term which is composed of various shadings of meaning and interpretation. No matter how free governments (referring to State governmental units) may exult the blessings of sovereignty “they are universally held to be restrained within some limits.”\textsuperscript{128} The Massachusetts Legislature was “in no just sense sovereign.”\textsuperscript{129} It was merely the fiduciary agent of the State and could not transcend constitutional boundaries. What Story failed to add was that the legislature could not exceed constitutional dictates of the Supreme Court as interpreted by the individual Justices in a final arbitrating capacity.

Thus, Story’s dissent in the \textit{Charles River Bridge} case was a

\textsuperscript{123} 36 U.S. (11 Pet) at 603.
\textsuperscript{124} \textit{Id.} at 607.
\textsuperscript{125} \textit{Id.} at 606.
\textsuperscript{126} \textit{Id.} at 607.
\textsuperscript{127} “The reason is plain. The prohibition arises by natural, if not by necessary implication. It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant.” \textit{Id.} at 616-17.
\textsuperscript{128} \textit{Id.} at 642.
\textsuperscript{129} \textit{Id.} at 643.
last-ditch stand by the Whig nationalists to halt the flow of a more liberal constitutional philosophy — a philosophy, it might be added, which had already permeated the minds of the majority of the bench. Story was visibly shaken when longtime admirers, such as Charles Sumner, refused to accept his opinion. Only the hard core nationalists such as Webster and Kent, stood behind Story, clinging to the ideas of days gone past. Chancellor Kent felt the millennium had arrived. The Charles River Bridge case had, as he put it, overthrown “a great principle of constitutional Morality” and threatened to destroy “the Security and Value of legislative Franchises.” He wrote in a similarly vitriolic vein:

> It injures the moral Sense of the Community & destroys the Sanctity of Contracts. If the Legislature can quibble away or whittle away its contracts with Impunity, the People will be sure to follow — *Quidquid delirant reges plectuntur Achivi* — I abhor the Doctrine that the Legislature is not bound by any thing that is necessarily implied in a Contract in order to give it Effect & value, & by nothing that is not expressed in hoc verba. . . . Now we sadly realize that we are to be under the reign of little Men — a pigmy race & that the Sages of the last age are extinguished.

What was Story’s reaction to the case? He continued to press the opinion that the ablest lawyers in the country were opposed to the decision; but it was merely wishful thinking on his part. He shared Chancellor Kent’s fears that “the old constitutional” doctrines were fading away and that the day was gone when “a law of a State or of Congress will be declared unconstitutional.” Without the power of judicial review the Court’s work would be merely advisory; if this happened there would no longer be any agency responsible for protection of vested interests. “A change has come over the public mind,” he wrote to Justice McLean, “from which I augur little good.”

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131 Letter from Charles Sumner to Joseph Story, March 25, 1837, in 15 PROCEEDINGS, *supra* note 74, at 211.
132 “The Charles River Bridge case is decided, and the opinion will be delivered to-day. Mr. Greenleaf has gained the cause, and I am sorry for it. . . . A case of grosser injustice, or more oppressive legislation, never existed. I feel humiliated, as I think every one here is, by the Act which has now been confirmed.” Letter from Joseph Story to Sarah Story, Feb. 14, 1837, in 2 STORY, *supra* note 44, at 268.
133 Letter from Chancellor Kent to Joseph Story, June 23, 1837, in Massachusetts Historical Society, Story MS. 30.
main on the bench; he was half-hopeful that he might curb further invasions of cherished private rights.\footnote{See Letter from Joseph Story to Richard Peters, June 14, 1837, in \textit{id.} at 274.}

In later years the Supreme Court continuously narrowed the artificial line that Story had drawn between public and private property and contractual rights of corporations. In \textit{Munn v. Illinois}\footnote{94 U.S. 113 (1876).} the Court held that it was an accepted historical fact that legislatures possessed the authority to regulate private property for the public welfare. State legislatures scrupulously avoided the \textit{Dartmouth College} case. Instead they altered their corporate charters by reserving the power to amend, and this action was upheld as a public contract by the courts.\footnote{See \textit{supra} note 102, at 203.}

The Supreme Court distinguished in \textit{Stone v. Mississippi}\footnote{See \textit{supra} note 102, at 203.} contracts constitutionally protected (those relating to property rights) from those not covered (governmental or public). Public corporations, it was said, are creatures of the State which organized them, and they can be revoked by the will of the legislature. Such contractual arrangements it was announced are mere privileges and not rights.\footnote{See \textit{supra} note 102, at 203.}

VI. CONCLUSION

Read together, the \textit{Dartmouth College} case and the \textit{Charles River Bridge} case were actually in conflict. The \textit{Bridge} opinion did not declare that a charter was not a contract; but it limited the contract to the "actual provisions of the charter."\footnote{101 U.S. 814 (1879).} The result was a definite victory for the States' righters over the nationalists. It created a balance between the theory of vested rights and public interests.\footnote{See \textit{supra} note 102, at 203.} Today, a public corporation rarely relies on charter privileges or other special favors granted to it by the State legislature in order to resist regulation. The development of the police power was built upon the political conservatism of the Marshall-Story Era. The heavy hand of Marshall and Story as expressed in

\footnote{The constitutional prohibition upon States not to impair obligation of contract does not prevent States from protecting health, morals, public safety, or rights and privileges arising out of such contracts. \textit{New Orleans Gas Co. v. Louisiana Light Co.}, 114 U.S. 650 (1885).}
the *Dartmouth* case and others, however, continued to plague the Court in its changing economic, social, and political role.\(^{142}\)

The Supreme Court remained far from liberal, however, in its interpretation of State legislation which attempted to regulate contractual rights between private individuals. In the 1840's, State laws allowing retrospective relief to judgment creditors were declared to be unconstitutional as violative of the familiar article I, section 10 of the Constitution.\(^ {143}\) Such decisions had the blessing of Justice Story. Later in the century the Court would use the same arguments of classical economics to write the concept of substantive due process into the 14th amendment and to free the States from federal regulation.

The same conservative economic philosophy spilled over into the 20th century. It was not until 1934, 115 years after the famous Marshall-Story decisions upon contractual sanctity, that the Supreme Court was forced to review the earlier opinions of *Dartmouth College* and *Sturges v. Crowninshield*. The depression had created the need for State assistance to farmers who were deeply in debt. The State of Minnesota passed a moratorium on mortgage foreclosures. In *Home Building and Loan Association v. Blaisdell*,\(^ {144}\) a 5-4 test case, Chief Justice Hughes reversed the long trend of cases upholding laissez faire government. Hughes found no impairment of the obligation of contract, distinguishing as had many learned lawyers a century before between contract and remedy. Hughes in effect repudiated nearly all of Story's work on the contract clause. He recognized the extent and the importance of the police power:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time.

> ... With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instru-

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\(^{143}\) In particular, see Bronson v. Kinzie, 42 U.S. (1 How.) 310 (1843). *See also* A. Kelley & W. Harbison, *supra* note 104, at 509-20.

\(^{144}\) 290 U.S. 398 (1934).
ment to throttle the capacity of the States to protect their fundamental interests.\textsuperscript{145}

There were four members of the bench, however, who reflected the Story attitude of an unqualified restriction on State legislative activity. Justice Sutherland, speaking for the minority, revived the Dartmouth ratio, citing the historical necessity of absolute contracts and the fear of the destruction of vested rights.\textsuperscript{146} But in a period of economic crisis neither the majority of the Court nor the nation was willing to listen to the timeworn arguments of the Storys and the Sutherlands. The time was ripe for constitutional change.

The concept of a public interest which aided the few was finally discarded for a theory which provided aid for the many. For all intents and purposes, Story's doctrine of the obligation of private contracts has died a natural and long overdue death. The distinction between private and public contracts, as well as corporations, has been well defined by the courts.\textsuperscript{147} Nevertheless, the impact of Story's constitutional philosophy, at least, in this area was significant. The Court tenaciously held to many of his ideas until the demands of the day forced even the most conservative of the justices to alter their theories of the public interest. Fortunately the grip of Mr. Justice Story on contract law has finally slipped into constitutional history.

\textsuperscript{145}Id. at 442-44.
\textsuperscript{146}Id. at 448 (dissenting opinion). Two recent cases indicate that the Court has not reached a consensus on the concept of the public interest. "Since Fletcher v. Peck... was decided many years ago, it has repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators." Baker v. Carr, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting); cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the Supreme Court ruled that it could inquire into municipal redistricting in which citizens might "suffer serious economic disadvantages." Id. at 343.
\textsuperscript{147}Courts generally distinguish between vested rights and remedies. In Empire State Ins. Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962), an insurer was held obligated by State law. The court stated that "no state statute may be enacted which impairs the obligation of a contract is axiomatic... But this proscription applies to substantive rights as distinguished from mere procedural remedies." Id. at 831.