the federal court of appeals as one of Adams's so-called "midnight judges."[174] Hence Smith's dilemma. He, like most Federalists, strongly believed that repeal of the Federal Judiciary Act was unconstitutional to the extent its effect was removing sitting federal judges from office.[175] He likewise believed that the New Hampshire Federalists' actions in abolishing the existing courts in order to remove all sitting judges from office was both politically unwise and of questionable constitutionality.[176] How, then, could he in good conscience accept appointment as chief justice?

Leaders of the New Hampshire bar joined Governor Gilman in imploring Smith to accept the post.[177] At the time, three of the most respected members of the bar were Smith, Jeremiah Mason (then serving a term as U.S. Senator), and the young Daniel Webster.[178] This trio would later ride together as counsel for the Trustees of Dartmouth College.[179] But at this crucial moment their lives intersected as Smith agonized over what duty required. Mason's entreaties perhaps carried the day:

> My only fear is respecting your acceptance. I am confident the success of the system will depend on you. Should you decline, I cannot see how it will get into operation. . . . At all events, you must in my opinion accept and hold it for a time, or prepare to see disappointment and confusion ensue. . . . I will only add that Mr. Webster and others here, entirely agree with me in the wishes I have expressed on this subject.[180]

And a few days later:

> I see, by the public papers, you have been appointed chief justice; I hope I shall soon see that you have accepted. Nothing else will put down the clamor raised against the system.[181]

Reluctantly, Smith accepted appointment and the furor abated somewhat, though two of the removed judges would constantly fan the partisan flames for the next three years.[182]

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174. *Id.* at 146:

> He used to say, it was the only office that he had ever greatly desired, or the loss of which he had greatly regretted. In age he looked back on no part of his public life with so much pleasure, though it was a pleasure accompanied always by the feeling, that in losing the office he had been thrown out of the place best fitted for his improvement, distinction, and usefulness.

175. *Id.* at 148–49.

176. *Id.* at 267.

177. *Id.*

178. *Id.* at 261.

179. 2 LORD, *supra* note 141, at 61–62.

180. MORISON, *supra* note 45, at 267–68 (quoting Letter from Jeremiah Mason to Jeremiah Smith (July 6, 1813)).

181. *Id.* at 268 (quoting Letter from Jeremiah Mason to Jeremiah Smith (July 6, 1813)).

182. *Id.* at 273–79; TURNER, *supra* note 167, at 226.

D. The Final Breach and the Board Removes John Wheelock from Office

With the judicial controversy somewhat under control, Governor Gilman, as one of the Dartmouth trustees, now consented to another act which would again fan partisan flames and ultimately contribute to the Democratic-Republicans' return to power in New Hampshire. Whether in hopes of nudging him to retire or genuine belief that he was no longer fit to teach, the trustees in November of 1814 relieved John Wheelock of his cherished duties teaching the curriculum offered to members of the senior class.[183]

This proved the final straw for John. He had endured the humiliation of losing control of the church his father had commanded. Now he had lost control of his father's other great creation.[184] And this latest humiliation not only enraged John, but caused him to fear that the trustees would soon take the ultimate step and formally dismiss him as president, a final public indignity which he would seek to avoid with all of his remaining energy and cunning.[185] John spent the remainder of the year engaging in discreet conversations with his allies and assessing and weighing his options. By the end of the year, he had settled on a plan of action at the urging of, and to be carried out with the assistance of, Elijah Parish.[186]

Parish's loyalty to John had deep roots. His family attended Eleazar Wheelock's church in Lebanon, Connecticut.[187] Parish was only eight years old when Eleazar departed for Hanover to found Dartmouth College, but even at that young age Parish had formed an abiding conviction to follow in Eleazar's pious footsteps.[188] One of his first steps in that direction was to attend Dartmouth College, where he became one of John Wheelock's star pupils, graduating in 1785.[189] In 1787, with John's tacit support, the congregation in Byfield, Massachusetts, called Parish to be their minister.[190] In that post, Parish would be a staunch defender of the Standing Order and church authority.[191] Parish was

183. SMITH, *supra* note 101, at 90; 2 LORD, *supra* note 141, at 61.

184. STITES, *supra* note 107, at 12.

185. *Id.*

186. *Id.* at 12–13.

187. JOHN LOUIS EWELL, THE STORY OF BYFIELD: A NEW ENGLAND PARISH 161 (1904).

188. *Id.*

189. *Id.*

190. *Id.* at 162.

191. *Id.* at 161–65. Parish was met with immediate resistance from more liberal members of the Byfield congregation who objected to his orthodox piety, similar to the resistance which Eleazar Wheelock had experienced in his attempts to bring piety to the unsaved during and after the Great Awakening. But Parish persevered, and dissident efforts were eventually squelched. *Id.*

also an inveterate and outspoken Federalist.[192] From Jefferson's election through the remainder of his life, Parish would preach frequent sermons condemning the Jeffersonians and their actions. In 1807, he would blast the decision to embargo Great Britain.[193] In that same year, Dartmouth College would award him an honorary doctor of divinity degree. In 1812 and thereafter, he would rail against the war. His sermons were frequently published and were in high demand to Federalist audiences.[194]

In short, Parish and John Wheelock were intellectual and religious soulmates of long standing, who also shared a willingness to engage in extended political combat with opponents. As they discussed John's options, their end goal was the restoration of Wheelock's full control and authority over the College, and the installation of Parish as a faculty member to help carry on John's and his father's legacy.

The plan they agreed upon was calculating, shrewd, and devious. Just as he had in 1807, John would appeal to the legislature for help, this time to amend the College charter and take other actions as necessary to ensure that a majority of the trustees were right-thinking and Wheelock-supporting.[195] John and Elijah assumed they could count on Federalist support, and they intended to ensure even broader support by writing and widely circulating a pamphlet setting out their indictment of the trustees in a way that would appeal to Democratic-Republicans, and quickly following up with a request for legislative action before the trustees had a chance to rally their forces.[196]

The pamphlet, published in early May 1815, took two parts. The first, entitled *Sketches of the History of Dartmouth College and Moor's Charity School, with a Particular Account of Some Late Remarkable Proceedings of the Board of Trustees, from the Year 1779 to the Year 1815* ("*Sketches*"), ghostwritten by John, but purporting to be the account of a concerned citizen, was an eighty-eight-page recital of Wheelock's side of numerous disagreements with the trustees and a detailing of various incidences of trustee misuse of College resources to favor one religious faction over another, rather than to respect religious liberties.[197] It purported, of course, to be the observation of one who had

192. *See id.* at 172 ("Parish believed the accession of the Democratic party to power [in 1801] to be a great national calamity . . . and he spoke as he felt.").

193. *Id.* at 171–72.

194. *Id.* at 170–75.

195. STITES, *supra* note 107, at 13.

196. *Id.* at 12–14.

197. *Id.* at 13.

no dog in the hunt, acting only out of concern for ensuring that Dartmouth College was governed to serve the interests of the public rather than the selfish and partisan interests of the trustees. Attached to the pamphlet was Parish's ghostwritten, and purportedly objective, *Review* of the facts and allegations set out in *Sketches*, which not only sided with Wheelock's ghostwritten "facts" but added a full-fledged vilification of the trustees and the danger they posed to Dartmouth College and the citizens of New Hampshire.[198]

The pamphlet's distribution had the desired immediate effect. The editor of the leading Democratic newspaper, the *Concord Patriot*, immediately published an editorial blasting the trustees for using their power to make Dartmouth College a mere adjunct of the Federalist Party, and cast John as a noble defender of the public, ignoring that he, too, was a staunch Federalist.[199] John supported this account of Federalist villainy and his own virtue in a ghostwritten letter to the *Patriot*, purporting to be writing as a concerned member of the Democratic-Republican Party.[200]

The stage was now set to engage the New Hampshire legislature. On June 1, 1815, at the legislature's opening session, John Wheelock presented his *Memorial*, with a copy of *Sketches* attached; after summarizing the charges set out in *Sketches*, the *Memorial* beseeched legislators to take appropriate actions to protect the public's interest in Dartmouth College, and in so doing acknowledged and submitted his charter rights to the legislature's sovereign power to do with the College as it thought best:[201]

> To you, revered legislators! the writer submits the foregoing important considerations. He beholds, in your Honorable body, the sovereign of the State, holding, by the Constitution, and the very nature of sovereignty in all countries, the sacred right, with your duty and responsibility to God, to visit and oversee the literary establishments, where the manners and feelings of the young are formed, and grow up in the citizen in after life; to restrain from injustice, and rectify abuses in their management, and, if necessary, to reduce them to their primitive principles, or so modify their powers as to make them subservient to the public welfare. To your protection, and wise arrangements, he submits whatever he holds in official rights by the Charter of the seminary; and to you his invaluable rights as a subject and citizen.[202]

Wheelock closed his *Memorial* with a suggested course of action:

> And as the Legislature have never before found occasion to provide, by any tribunal, against the evils of the foregoing nature, and their ultimate dangers, he prays that you would please, by a committee invested with competent powers, or otherwise, to look into

198. 2 LORD, *supra* note 141, at 64–65.
199. *Id.* at 65–66.
200. STITES, *supra* note 107, at 14–15.
201. SMITH, *supra* note 101, at 90–94.
202. *Id.* at 93.

> the affairs and management of the institution, internal and external, already referred to, and, if judged expedient in your wisdom, that you would make such organic improvements and model reforms in its system and movements, as, under Divine Providence, will guard against the disorders and their apprehended consequences.[203]

In accordance with Wheelock's request, the legislature appointed a three-member committee of citizens ("Citizens Committee"), to investigate "and to report a statement of facts at the next session of the legislature."[204]

Wheelock and Parish had, indeed, stolen a march on the trustees, who made tentative efforts to put their side of the story before the public and considered dismissing Wheelock as president immediately, as they strongly suspected he was the author of *Sketches* and were angered by the duplicitous campaign he was waging.[205] However, the need to prepare for the coming Citizens Committee investigation consumed much of their time, whereas Parish and Wheelock, in effect, had been preparing their case for many months and had effectively conditioned public opinion as to the righteousness of the president's cause.[206] Moreover, key supporters of the College urged the trustees not to take precipitate action before the Citizens Committee's investigation.[207]

The Citizens Committee convened in Hanover and over the course of three days—August 16 to 18 of 1815—received and heard the evidence that each side wished to be considered.[208] They then adjourned, charged with reporting their findings to the legislature at its next session, not to convene until June 1816. Faced with such uncertainty, the trustees offered a compromise: if Wheelock would publicly disavow the charges of trustee misconduct contained in *Sketches*, he would "be retained in office so long as he lived."[209] After Wheelock refused this offer, the board began the process of dismissing him from his positions as president, professor of history, and trustee, which removals were accomplished at a meeting on the evening of August 26, 1815, by the affirmative vote of eight of the trustees then in

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203. *Id.*

204. STITES, *supra* note 107, at 16–17.

205. 2 LORD, *supra* note 141, at 70: "I intend . . . to show that with the democrats he was a democrat—with every sect of religionists he was one of them—with federalists he was a federalist, and thus he descended to base means to make influence." (quoting Letter from Thomas W. Thompson, Tr., to Ebenezer Adams, Professor (Aug. 5, 1815)).

206. STITES, *supra* note 107, at 13.

207. SHIRLEY, *supra* note 107, at 94–97.

208. 2 LORD, *supra* note 141, at 71–72.

209. *Id.* at 72*; see also* STITES, *supra* note 107, at 19.

office (the "Octagon").[210] Wheelock chose not to attend the meeting; trustees Gilman (then governor of the state) and Stephen Jacob formally dissented and protested these actions.[211] Two days later, the trustees elected the Reverend Francis Brown, a College alumnus and respected scholar, to replace Wheelock as president.[212]

E. The Election of 1816—The Democratic-Republicans Regain Power

The trustees' removal of Wheelock was to prove a political nightmare for the Federalist Party in New Hampshire. With the conclusion of the War of 1812 nearing, the Federalists' main complaint against Democratic-Republican leadership at the national level was of swiftly receding impact.[213] At the local level, the Dartmouth controversy was enabling the Democratic-Republicans to rekindle citizen outrage over the 1813 court repeal and court packing, and to paint the Federalists as defenders of religious orthodoxy and social elitism.[214]

In June 1815, the Federalist Party had chosen not to renominate sitting governor John Taylor Gilman as their gubernatorial candidate. Instead they nominated prominent Federalist lawyer and sitting Court of Common Pleas judge Timothy Farrar, Sr.[215] But Farrar, in his role as Dartmouth College trustee, would two months later join the other members of the Octagon in voting for John Wheelock's removal from office.[216] The resulting public outcry over Farrar's involvement caused the Federalists to seek another nominee.[217] Gilman, the sitting governor, was the logical choice, particularly since as a Dartmouth College trustee he had voted against Wheelock's removal and written a public protest. Gilman, however, was in no mood to be the party's fallback choice. Five other Federalists also refused the nomination, which finally went to the aristocratic Anglophile James Sheafe, the richest man in the state and an easy target for the Democratic-Republicans.[218]

In contrast to the Federalists, the Democratic-Republicans had, in William Plumer, a popular and proven candidate. Plumer had been

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210. 2 LORD, *supra* note 141, at 72–78.

211. *Id.* at 72, 75, 77–78 (board had only eleven members from 1813 to 1816).

212. *Id.* at 78; STITES, *supra* note 107, at 21. Brown was not only a respected pastor and scholar, but possessed "administrative talents, circumspection and diplomacy [which] made him Wheelock's opposite in practically every regard." STITES, *supra* note 107, at 21.

213. STITES, *supra* note 107, at 22.

214. 2 LORD, *supra* note 141, at 78–81.

215. TURNER, *supra* note 167, at 236.

216. *Id.* at 236–37.

217. STITES, *supra* note 107, at 23.

218. *Id.* at 23–24; TURNER, *supra* note 167, at 236–37.

elected governor in 1812, turned out of that office in 1813 when the populace chose John Taylor Gilman, and defeated by Gilman in his attempts to regain the governorship in 1814 and 1815.[219] But Plumer's defeats had not been due to his perceived shortcomings, but rather due to the short-lived rise of the Federalist Party throughout New England.[220] Unlike his opponent, Sheafe, Plumer was the product of humble beginnings. Without a formal college education, he had nonetheless educated himself to become a Baptist preacher, a respected lawyer, and an accomplished historian.[221] And, unlike Sheafe, Plumer was a genuine progressive for his time, having repeatedly acted to assert and defend religious and personal liberties.[222]

As expected, the Dartmouth College controversy and the Judiciary Act of 1813 were the central issues in the campaign, and Plumer proved to be the perfect standard bearer given the issues and the general resentment that had built up against the Federalists. Plumer won the governorship easily, and his party captured both houses of the state legislature with comfortable margins.[223] The public and John Wentworth now waited to see how Plumer and his party would legislate with regard to the two issues that had dominated the election campaign.

F. The June 1816 Legislative Session—the Remodeling of the New Hampshire Judiciary and Dartmouth College

1. Remodeling the Judiciary

How to proceed with respect to the judiciary was the simpler of the two principal issues that Plumer faced as the legislature prepared to convene. However, the actions taken with regard to the judiciary were to have profound implications for the Dartmouth College controversy itself.

In his inaugural address to the legislature on June 6, 1816, Plumer's message with regard to the judiciary was as expected. He contended that the 1813 legislation abolishing the existing New Hampshire courts, and thereby ending the terms in office of sitting

219. SHIRLEY, *supra* note 107, at 94–97.

220. *Id.*

221. *Id.*

222. WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 50–51, 59, 112–13 (A.P. Peabody ed., Bos., Phillips, Sampson & Co. 1857); *see also* SHIRLEY, *supra* note 107, at 76–78.

223. 2 LORD, *supra* note 141, at 80–83; TURNER, *supra* note 167, at 237–38; PLUMER, *supra* note 222, at 431–32.

jurists, was an unconstitutional method of removal.[224] The judges who had accepted office in the new courts in 1813 did so knowing that the removal of the old judges was unconstitutional; therefore, the current sitting judges were unfit to hold office and should be removed for cause as allowed by the New Hampshire Constitution, and the prior court system should be reinstated.[225] The Democratic-Republican-controlled legislature agreed.[226] Before the session's conclusion, the legislature and the governor would exercise their joint authority to remove the sitting jurists for cause.[227] Subsequently, the legislature would repeal the 1813 judiciary legislation, the effect of which was to recreate the Courts of Common Pleas and the Superior Court of Judicature which previously existed.[228]

Two of the seventeen sitting jurists removed from office were key participants in the governance of Dartmouth College.[229]

One was Dartmouth College Trustee, Octagon member, and short-lived Federalist gubernatorial candidate, Timothy Farrar, Sr.[230] His son, Timothy Farrar, Jr., also a lawyer, and former law partner to Daniel Webster, would play a key role in creating the court reports that form our understanding of the *Dartmouth College* case.[231]

The other was William Henry Woodward, John Wheelock's nephew, who held the offices of secretary and treasurer of Dartmouth College. Despite the arguable hypocrisy involved in reappointing a judge he had just removed for cause, Plumer would eventually appoint Woodward as chief judge for District Two of the revived Courts of Common Pleas, the district in which Dartmouth College was located.[232] Woodward would soon become a central actor in the Dartmouth College controversy and would be the named defendant in the famous case.

Also removed from office was Jeremiah Smith, chief justice of the New Hampshire Supreme Court. Thus, Smith again suffered the same fate that repeal of the Federal Judiciary Act of 1801 had inflicted.[233] Smith would soon become one of the lawyers for the Trustees of Dartmouth College in the litigation that would end in the U.S. Supreme Court.

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224. TURNER, *supra* note 167, at 244.

225. *Id.* at 244–45, 255; S. JOURNAL, June Sess., at 19–21 (N.H. 1816).

226. TURNER, *supra* note 167, 254–55.

227. *Id.*

228. *Id.* at 253–58; PLUMER, *supra* note 222, at 437–38.

229. N.H. S. JOURNAL at 147–48; 2 LORD, *supra* note 141, at 61–62.

230. TURNER, *supra* note 167, at 259–61.

231. *See infra* notes 398–411 and accompanying text.

232. PLUMER, *supra* note 222, at 445; TURNER, *supra* note 167, at 256–60.

233. MORISON, *supra* note 45, at 279; N.H. S. JOURNAL at 147.

2. "Amending" the Dartmouth College Charter

During the 1816 election campaign, Plumer had given John Wheelock's supporters reason to believe that Plumer would be supportive of legislative action to return John to the Dartmouth presidency.[234] However, Plumer did not feel bound to John's agenda. Plumer had a sincere and overriding belief that universities should be, and inherently were, public institutions, and this conviction was his primary motivation.[235] Moreover, as he considered the charge he would give to the legislature, Plumer had in hand the Citizens Committee's report which would be delivered to the legislature early in its session, and Plumer knew the report would be a nonfactor in the legislative deliberations concerning Dartmouth College.[236] Contrary to the hopes of both sides in the controversy, the Citizens Committee had dutifully summarized each side's contentions and evidence, but had made no findings of fact and offered no recommendations for resolving the controversy.[237] Thus, Plumer knew that he had an opening to pursue his own agenda.

In his inaugural address to the legislature on June 6, Plumer emphasized the importance of education to a republic, the specific importance of Dartmouth College to the citizens of New Hampshire, and his agenda for new-modeling the College charter:

> As [the Dartmouth College charter] emanated from royalty, it contained, as was natural it should, principles congenial to monarchy. Among others it established trustees, made seven a quorum, and authorized a majority of those present to remove any of its members which they might consider unfit or incapable, and the survivors *to perpetuate the board by themselves electing others to supply vacancies*. This last principle is hostile to the spirit and genius of a free government. Sound policy therefore requires that the mode of election should be changed, and that trustees in future should be elected by some other body of men. To increase the number of trustees, would not only increase the security of the college, but be a mean of interesting more men in its prosperity. . . .
>
> The college was formed for the public good, not for the benefit or emolument of its trustees; and the right to amend and improve acts of incorporation of this nature, has been exercised by all governments, both monarchical and republican. . . .
>
> These facts shew the authority of the legislature to interfere upon this subject; and I trust you will make such further provisions as will render this important institution more useful to mankind.[238]

234. TURNER, *supra* note 167, at 235–36.
235. *Id.* at 244–45; PLUMER, *supra* note 222, at 439–40.
236. *See* TURNER, *supra* note 167, at 245–50.
237. *Id.* at 249–50.
238. N.H. S. JOURNAL at 26–28.

Plumer then moved quickly to put a concrete proposal before the legislature: The bill he initially proposed would remove all of the existing trustees from office, create a new fifteen-member board of trustees and a much larger board of overseers, with the members of each board to be directly named in the Act. Vacancies in the board of overseers would be filled by the governor and his council; vacancies in the board of trustees would be filled jointly by the board of overseers and the governor. Finally, the governor and his council would have the right to visit the college every five years.[239]

This radical transformation was more than either side to the Dartmouth controversy had wanted, and each side independently lobbied the legislature to both preserve the self-perpetuating power of the College's board of trustees and its autonomy from outside oversight, and for a finding of facts favorable to their own side.[240] Hope of achieving the last goal was dashed for both sides when the legislature chose to focus only on reforming the charter.[241]

After nearly three weeks of furious negotiations, the legislature adopted a compromise bill that greatly disappointed the governor, as none of the current trustees were removed, and the board of trustees retained significant power to perpetuate itself in office. However, the Octagon and supporters of the original charter were equally disappointed.[242]

Under the legislation adopted on June 27, 1816 ("the Charter-Amendment Act"), the corporation was renamed Dartmouth University, the board of trustees was increased from twelve to twenty-one, and the governor was empowered to name the nine new trustees plus fill any vacancies occurring before or during the first meeting of the new board.[243] Thereafter, the board of trustees would have full power to remove a trustee and to fill any vacancies whether arising from death, retirement, or removal.[244] Additionally, a new twenty-five-member board of overseers was created; the governor and his council were empowered to name the initial overseers and to fill any subsequent

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239. TURNER, *supra* note 167, at 248–49.

240. *Id.* at 251.

241. N.H. S. JOURNAL at 104–07. After the Citizens Committee's Report was disseminated to the legislature and debated, the Senate resolved on June 21, 1816, that the difficulties and controversy at Dartmouth College were the result of defects in the charter, and that efforts should be focused solely on correcting those defects so that future disharmony would not occur, rather than on trying to determine who among the officers and trustees were most at fault for difficulties which are primarily traceable to the defective governance provisions in the charter.

242. TURNER, *supra* note 167, at 18–20, 250–53.

243. TIMOTHY FARRAR, REPORT OF THE CASE OF THE TRUSTEES OF DARTMOUTH COLLEGE AGAINST WILLIAM H. WOODWARD 18–22 (Bos., John W. Foster & West, Richardson & Lord 1819).

244. *Id.* at 21.

vacancies, however arising.[245] The Act left the trustees with operating control of the university.[246] However, significant trustee decisions, such as the appointment, compensation, or removal of the corporation's president, other officers, or professors, or the erection of new building or colleges, were subject to the board of overseers' review and veto.[247] Significantly, the Charter-Amendment Act formally created two corporate offices—treasurer and secretary—having the obligations customary for such offices.[248] Additionally, however, the secretary and the president now had public obligations to make reports to the board of overseers and the governor.[249] Moreover, the governor and his council were granted the power and responsibility "to inspect the doings and proceedings of the corporation and of all the officers of the university, whenever they deem it expedient—and they are hereby required to make such inspection and report the same to the legislature of this state as often as once in every five years."[250]

In the view of Plumer and the legislative majority, all that the Act had done was amend the Dartmouth College charter. In the view of opponents, there could be no amendment unless the Trustees of Dartmouth College accepted it.[251] Perhaps neither side understood that the actual effect of the legislation was for a period of time to leave the original corporation—the Trustees of Dartmouth College—in existence, and to bring to life a new, competing corporate body, Dartmouth University.

G. The Post-Legislative Session Intrigue—Compromise, Submit, or Fight?

As the conclusion of the legislative session neared, Governor Plumer turned to the problem of filling the seventeen vacant judgeships in the newly recreated courts.[252] Plumer was keenly aware of the political problem that filling these posts presented, especially if he appointed only Democratic-Republicans. Just as the appointment of the respected Jeremiah Smith as chief justice had helped dampen the uproar in the aftermath of the Judiciary Act of 1813, his removal from

245. *Id.* at 19.
246. *Id.*
247. *Id.*
248. *Id.* at 20.
249. *Id.*
250. *Id.* at 21.
251. *Id.* at 18–22; TURNER, *supra* note 167, at 250–53.
252. TURNER, *supra* note 167, at 258.

that post now was a particular problem.[253] Plumer sought his five-member council's agreement to have Federalist Jeremiah Mason appointed to replace Smith as chief justice.[254] Mason was as esteemed as Smith as both a lawyer and statesman; he had served New Hampshire in the U.S. House of Representatives, was then serving in the U.S. Senate, and, along with Smith and Daniel Webster, was at the pinnacle of Federalist Party leadership. Indeed, Plumer had once himself been at that pinnacle of Federalist leadership before his change of parties, and he still valued the opinion and esteem of his former leadership colleagues, Mason and Smith.[255]

Despite Plumer's entreaties, the council's three Democratic-Republican members would not accept Mason's appointment. Instead, the council offered commissions to serve on the Supreme Judicial Court to two Democratic-Republicans, Samuel Bell and William Richardson, the latter as chief justice; and one Federalist, George Upham.[256] In all, Plumer initially obtained the council's approval to fill the vacant judicial posts with seven Federalists and ten Democratic-Republicans.[257]

As Plumer focused on his judicial appointments and also made appointments to the trustee and overseer positions created by the Charter-Amendment Act, the College and its supporters considered how to proceed.[258] As much as the Charter-Amendment Act was a setback for the College faction, the controversy might have ended at this point. The College had been operating well for nearly a year under President Brown's calm and skillful hand, and the Octagon and Brown might have been content to allow control of the board of trustees to pass to the new University board if they could be assured that President Brown and the current professors would be allowed to continue their competent service.[259] Had the key decisionmakers understood how committed Plumer was to avoiding partisan division during his administration, and how little he cared to vindicate Wheelock, they might well have submitted to the Act.[260]

But the Octagon, Brown, and the key faculty members—Adams and Shurtleff—were leery of what was to come. Once in place, a new majority could remove Wheelock's enemies from the board of trustees,

253. *Id.* at 256–58.
254. *Id.* at 259.
255. *Id.* at 259–61.
256. *Id.* at 259.
257. *Id.* at 257–59.
258. SHIRLEY, *supra* note 107, at 110–11.
259. SMITH, *supra* note 101, at 100–01.
260. TURNER, *supra* note 167, at 258–60.

from the presidency, and from positions on the faculty.[261] And some of Plumer's appointments as University trustees were especially worrisome. In particular, the appointments of William Woodward and Professor of Medicine Cyrus Perkins, both strong Wheelock supporters, were interpreted in the worst possible light, and as signs of disrespect for the positions and service of President Brown and Professors Shurtleff and Adams.[262]

Letters to President Brown reflect the Octagon's concerns and evolving plans. On July 4, 1816, Charles Marsh, a Vermont-based College trustee, and cousin of Jeremiah Mason,[263] wrote:

> I have no doubt in my own mind that the Act is altogether unconstitutional and must be so decided could the question come before a competent and dispassionate court. . . . I now wish that we had seasonably removed the secretary [William Woodward] so as to have possessed ourselves of the records.[264]

On July 15, 1816, trustee Asa McFarland reported his canvas of leading legal authorities:

> [Trustee Thomas] Thompson saw Judge Peabody, Mr. Mason, Webster and Farrar[.] They gave it as their decided opinion that it would be the duty of the Trustees to maintain their original corporate right, and try the issue.[265]

On July 27, Marsh again wrote:

> I still think it a great object to prevent their having a quorum, for in that case they can do no official act, nor accept the grant.[266]

As the College faction mulled its future course of action, Plumer continued to struggle with judicial appointments. The Governor was determined to heal the partisan divide if possible, and his judicial appointments showed it, but many in the opposing party were urging the Federalist nominees to refuse the proffered commissions. Ultimately all but William Woodward declined to serve.[267] When Federalist William Upham refused his commission as chief justice, Plumer made a last-ditch effort to temper partisanship urging the council to reconsider its refusal to appoint Jeremiah Mason, who was as widely respected as Jeremiah Smith, as chief justice of the Supreme

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261. SHIRLEY, *supra* note 107, at 113.

262. *Id.* at 110–12.

263. *Id.* at 76.

264. 2 LORD, *supra* note 141, at 91 (quoting Letter from Charles Marsh, Tr., to Francis Brown, President, Dartmouth Coll. (July 4, 1816)).

265. *Id.* at 92 (quoting Letter from Asa McFarland, Tr., to Francis Brown, President, Dartmouth Coll. (July 15, 1816)).

266. *Id.* (quoting Letter from Charles Marsh, Tr., to Francis Brown, President, Dartmouth Coll. (July 27, 1816)).

267. TURNER, *supra* note 167, at 260–62.

Court of Judicature. Democratic-Republican William Richardson, who had agreed to accept appointment as chief justice, enthusiastically offered to instead serve as an associate justice if the council would agree.[268] When the council acquiesced, Plumer on August 11, 1816, wrote to Mason:

> [P]ermit me to inquire if you are appointed Chief Justice . . . will you accept the office? It has long been my desire that you should have that office, and I think it will be offered to you, provided I have assurance you will accept it. It is an office worthy your ambition, and one I hope you will hold till you are removed to the bench of the Supreme Court of the United States.[269]

It is interesting to speculate how the *Dartmouth College* case would have been decided by a New Hampshire Superior Court of Judicature acting with the Federalist, Jeremiah Mason, as its Chief Justice Mason. However, by letter dated August 18, 1816, Mason declined the position.[270]

As Mason's letter declining appointment was in transit to Plumer's home in Epping, Plumer was on his way to Hanover, where he arrived on August 20 to prepare for the first meeting of the University board.[271] It is unlikely that he learned of Mason's decision for at least several days thereafter, and may not have learned Mason's decision when the University trustees attempted to assemble for their first meeting on August 26.

On August 23, the College trustees met. Though notified of the meeting, neither William Woodward, who had been asked to bring with him the College records, nor Governor Plumer, attended.[272] Likewise, trustee and former governor Gilman, who had grown disenchanted with both sides in the controversy, refused to attend, but agreed not to resign and to remain neutral. Trustee Jacob, who had also opposed Wheelock's removal, also refused to attend as he planned to accept the authority of the Act and attend the first meeting of the University board as one of its trustees.[273] Effectively the College board now had nine working trustees—the members of the so-called Octagon and President Brown (the "College Trustees"). Without publicly tipping their hand, the College Trustees informally decided to resist and frustrate the implementation of the Act.[274]

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268. PLUMER, *supra* note 222, at 445.

269. JEREMIAH MASON, MEMOIRS OF JEREMIAH MASON (1873), *reprinted in* MEMOIR, AUTOBIOGRAPHY AND CORRESPONDENCE OF JEREMIAH MASON 1, 147 (G.J. Clark ed., 1940) (quoting Letter from William Plumer, Governor of New Hampshire, to Jeremiah Mason (Aug. 7, 1816)).

270. PLUMER, *supra* note 222, at 446–47.

271. TURNER, *supra* note 167, at 263.

272. STITES, *supra* note 107, at 34–35.

273. *Id.* at 35 n.66.

274. 2 LORD, *supra* note 141, at 93–94.

On the morning of August 26, 1816, Governor Plumer walked to the university library, the place where the College Trustees normally met, in anticipation of holding there the first meeting of the University Trustees. The door was locked. As the day wore on and his requests for assistance were politely declined, Plumer realized that the College Trustees and supporting faculty members would not provide access to normal meeting spaces. The University board finally convened in William Woodward's college office at 5:00 p.m., only to find that the College Trustees would not attend, leaving the new University board two short of the required quorum of eleven.[275]

On the morning of August 28, the College Trustees met and formally asserted their right to be governed under the Charter of 1769.[276] After adjourning, the College Trustees then conducted commencement under the authority of the old charter.[277] Frustrated but undaunted, the quorum-short University Trustees continued to meet in Hanover through August 30, making detailed plans for the University that they expected would be ratified whenever the University board could achieve a quorum. They then adjourned until September 17, in hopes that they would be able to validly organize at that time.[278]

Meanwhile, the College Trustees began to prepare for litigation and to perfect their claims under the 1769 charter. The linchpin of their strategy focused on William Woodward, who had fully defected to the University camp, but continued to hold the title of College secretary and treasurer and to possess the College charter, seal, and official records, including titles to and other evidence of the College's property (the "College records and property").[279] Beginning in June 1816, Woodward had refused to attend trustees' meetings.[280] Moreover, he had attended the quorum-deficient meetings of the University Trustees held August 26–30 as both a newly appointed trustee and as the University's treasurer and secretary. Since Woodward had chosen to accept the authority of the Charter-Amendment Act, the College Trustees resolved that Woodward had abandoned his offices, and, if not, he was to be removed. To the vacant posts of secretary and treasurer, the board appointed Mills Olcott and instructed him to demand that Woodward

275. *Id.* at 96; TURNER, *supra* note 167, at 264.

276. 2 LORD, *supra* note 141, at 95–96 ("*Resolved,* that we the Trustees of Dartmouth College do not accept the provisions of [the Act to Amend the Charter] but do hereby expressly refuse to act under the same.").

277. *Id.* at 96–97.

278. *Id.* at 97.

279. *Id.* at 97–99.

280. *Id.* at 99.

The next day, the University faction seized control of Dartmouth's facilities.[309] Dartmouth's spring term was about to commence, and the College faction quickly repaired to spaces located throughout Hanover, including faculty and student lodgings, and the attached libraries, which contained almost as many books as the main library that had fallen into University hands.[310] Almost all of the students and faculty continued to support the authority of the College Trustees, as did the vast majority of Hanover residents. At first only two students, and never more than ten or so, would choose to be educated by the trustees claiming under the Charter-Amendment Act despite the obvious advantages the University had via access to seized facilities. This state of affairs would continue until the resolution of the Dartmouth litigation.[311]

On April 4, 1817, John Wheelock died, content that Dartmouth University was in the hands of family and friends and that his legacy would be preserved.[312] As expected, Wheelock left Dartmouth University a sizeable bequest, having a value approximately double the gifts he had made on February 1.[313]

III. THE LITIGATION IN THE NEW HAMPSHIRE COURTS

A. Preliminaries—The Issue Is Joined

As Plumer and the University Trustees began the process of giving birth to Dartmouth University in place of Dartmouth College and in giving Wheelock the vindication he sought, the College Trustees, on February 8, 1817, finally instituted the legal action that they had been contemplating for months.[314] Styled as an action in trover, the College Trustees sought to recover from William Woodward certain of the College records and property—its seal, its official records, and its books of accounts—that Woodward, acting as secretary and treasurer of the University, had refused to relinquish.[315]

The suit, properly filed in the Court of Common Pleas for Grafton County, posed an immediate problem. William Woodward was

309. *Id.* at 120–21.

310. *Id.* at 132. The University faction would attempt to take the student libraries by force in November 1817 only to be rebuffed by the students. The ensuing charges and countercharges badly damaged the University faction in the court of public opinion. *Id.* at 131–38.

311. *See id.* at 121–38, 155–57 (discussing the continuing financial difficulties of the College faction due to its lack of students).

312. STITES, *supra* note 107, at 43.

313. 2 LORD, *supra* note 141, at 115–16; SHIRLEY, *supra* note 107, at 141.

314. STITES, *supra* note 107, at 41.

315. SHIRLEY, *supra* note 107, at 142–43.

not only a defendant in the case but also, thanks to Governor Plumer, the chief judge for the Court of Common Pleas in Grafton County. It would be ethically and politically unacceptable for either Woodward, or one of the two judges who served under him, to hear and decide the case. Negotiations between the parties ensued, and it was agreed to fashion a jointly acceptable special verdict to be adopted by the Court of Common Pleas and forwarded to the state's highest court, the Superior Court of Judicature, for decision at its May term in Haverhill, New Hampshire.[316]

Ultimately it was agreed to frame the issue so that whoever prevailed in the litigation would have a virtually unchallengeable right to act and control the school, its properties, and its fortunes. If the Charter-Amendment Act, as amended, was determined to be lawful, then William Woodward would prevail, and the University Trustees would have been validly empowered and fully entitled to take all of the actions done on and since their first meeting on February 6, 1817.[317] Conversely, if the College Trustees had rightfully resisted the authority of the Charter-Amendment Act, then the Charter of 1769 remained in full force, William Woodward had validly been removed as secretary and treasurer and must return the College property and records, and the formation and subsequent actions of the University Trustees were void or voidable at the instance of the College Trustees.[318]

The arguments at Haverhill were inconclusive.[319] The superior court had only a week to devote to all of the matters before it, and neither party was fully satisfied with the arguments presented.[320] Thus, at the request of the parties, the court continued the case to be reargued in full at its September term, to be held in Exeter, New Hampshire.[321]

B. Exeter—The Arguments Before the New Hampshire Superior Court of Judicature

1. The Setting

The *Dartmouth College* case was reargued before the Superior Court over two full days commencing on September 19, 1817, before a packed crowd of lawyers, clergymen, and a sprinkling of College

316. STITES, *supra* note 107, at 41; FARRAR, *supra* note 243, at 1–28.
317. FARRAR, *supra* note 243, at 27–28.
318. *Id.*
319. STITES, *supra* note 107, at 45.
320. *Id.* at 44–45.
321. *Id.* at 45.

Trustees and faculty.[322] The central actors at Exeter—the advocates and justices—were of exceptionally high quality, as were the arguments made and the opinion of the court rendered some weeks later. Not physically present at Exeter, but looming over the proceedings, were the Justices of the U.S. Supreme Court, to whom an appeal of the anticipated opinion in favor of William Woodward and the University seemed likely. And among those ultimate deciders, John Marshall and Joseph Story were casting the largest shadows. Casting an equally large shadow was the Supreme Court's opinion in *Fletcher v. Peck*.[323]

2. Woodward's Advocates

George Sullivan, the state's attorney general, and Ichabod Bartlett had represented Woodward at Haverhill and would do so again at Exeter. Both were part of the new Dartmouth University governance structure as overseer and trustee, respectively, and both were fine lawyers, who would represent Woodward and the University's interests well.[324] However, as their contribution to the ultimate U.S. Supreme Court decision ends at Exeter, I will not dwell on their biographies. In contrast, the College lawyers deserve greater attention.

3. The College Advocates

Jeremiah Mason and Jeremiah Smith had represented the College at Haverhill. At Exeter, they were joined by Daniel Webster.[325] This was a legal team of unparalleled experience and skill.[326] Mason was renowned throughout New England for his legal knowledge and craftmanship.[327] Smith was equally renowned for his legal acumen and had been able to hone his mastery of legal theory during his eight years

322. *Id.* at 46.

323. *See supra* Part I.D.2.

324. STITES, *supra* note 107, at 44, 49–51, 60; TURNER, *supra* note 167, at 298; MASON, *supra* note 269, at 165.

325. STITES, *supra* note 107, at 44–46.

326. PLUMER, *supra* note 222, at 178–79.

327. ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 90 (1997):

> "If there be in the country a stronger intellect," asserted the admiring [Daniel] Webster, "if there be a mind of more native resources, if there be a vision that that sees quicker or sees deeper into whatever is intricate, or whatever is profound, I must confess I have not known it."

as an appellate jurist.[328] However, Mason and Smith shared one weakness—they were only average orators.[329]

Daniel Webster was the perfect addition to the team. Unlike Mason and Smith, Webster had neither exceptional intellect, nor legal knowledge, nor interest in legal theory. What Webster uniquely brought to the table were legendary oratorical skills. The tributes to Webster's speaking skills, without more, could fill a book, but the following description captures his gifts:

> When he began to speak, his voice was low, his massive head sunk upon his chest, eyes fixed upon the floor . . . . Soon the voice swelled and filled the room, his head now erect, his eyes "black as death." The voice, ah, "no lion in Africa ever had a voice like him. . . . They all said—lawyers and judges and people—that they never heard such a speech, or anything like it. They said that he talked like a different creature from any of the rest of them, great or small—and there were men there that were not small." As he spoke, "[h]is whole countenance was radiant with emotion." And the listening audience sat transfixed.[330]

Mason and Smith would provide the powerful and carefully crafted legal arguments for the College, at Exeter and later at the U.S. Supreme Court, while Webster would bring those arguments to life with his unique ability to understand and capture his audience. But the trio shared political alliances and friendships that would also be of great importance going forward. Smith, Mason, and Webster were at the pinnacle of Federalist Party leadership in New England.[331] Specific to the battle to come after Exeter, Smith was greatly admired by John Marshall, and Mason and Webster were friends of, and greatly admired by, Joseph Story.[332] The trio's political skills, friendships, and connections would complement their legal and oratorical skills to the very end of the litigation.

4. The Superior Court of Judicature and Chief Justice Richardson

The quality of the Superior Court of Judicature's three justices was a testament to Governor Plumer's character, courage, and political skill. Influential Democratic-Republicans had wanted the three posts, and Plumer, instead, chose individuals with little political clout but

328. MASON, *supra* note 269, at 165 n.a ("[Daniel] Webster said of him: 'He knows everything about New England, and as to law he knows so much more of it than I do, or ever shall, that I forbear to speak on that point.' " (quoting Letter from Daniel Webster to James Kent, C., New York Ct. of Chancery (1825))).

329. *Id.*

330. REMINI, *supra* note 327, at 79–80.

331. STITES, *supra* note 107, at 18.

332. SHIRLEY, *supra* note 107, at 151–52; MASON, *supra* note 269, at xi*;* REMINI, *supra* note 327, at 162.

appropriate skill and character.[333] As Jeremiah Mason noted, "three more men so well qualified as the present judges, and who would accept the office, could not be found in the State."[334]

The associate justices, Samuel Bell and Levi Richardson, brought complementary skills and knowledge to the bench, but as their contributions end at Exeter, we will not dwell on their fascinating biographies.[335] The central actor, whose opinion would be appealed to the Supreme Court and frame the arguments for the University interests in that forum, was Chief Justice William Richardson.

Richardson had lived in Massachusetts since matriculating to Harvard College and had served that state in Congress for three years before resigning and returning to his native New Hampshire in 1814 to serve as the Portsmouth-based U.S. Attorney. Plumer appointed Richardson despite intense objection that he lacked sufficient residence in the state. Richardson was to serve with great distinction as chief justice of the Superior Court of Judicature until his death in 1838.[336]

5. The Nature of the Arguments Presented

The College advocates thought they had a fighting chance to prevail in the New Hampshire litigation. However, their best instincts told them that party would determine the outcome, and that the goal must be to proceed on the assumption that an appeal to the Supreme Court would be required to vindicate the Dartmouth College Trustees.[337]

With that likely prospect in mind, Mason, Smith, and Webster's strategy at Exeter had two prongs—first, make the strongest case possible under the New Hampshire Constitution and common law principles, and second, establish that the Charter of 1769 gave the trustees vested contract rights protected by the Contract Clause of the

333. TURNER, *supra* note 167, at 267–69.

334. SHIRLEY, *supra* note 107, at 150 (internal quotation marks omitted).

335. Bell had previously served as New Hampshire's governor for four years and as a U.S. Senator for three terms; he was "a man of immense erudition and great business capacity, a thorough lawyer, and possessed of great moral courage." SHIRLEY, *supra* note 107, at 149. Woodbury, a great believer in state's rights, would go on to serve New Hampshire as Governor and U.S. Senator, and the nation as Secretary of the Navy, Secretary of the Treasury, and from 1845 until his death in 1851, as a U.S. Supreme Court Justice. *Id.* at 149–50; Paul Finkelman, *Levi Woodbury*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT 615 (Melvin Urofsky ed., 2006).

336. SHIRLEY, *supra* note 107, at 149.

337. STITES, *supra* note 107, at 45 (Webster, in a letter to Jeremiah Mason, June 28, 1817, wrote that it "would be a queer thing if Gov. P's Court should refuse to execute his laws").

U.S. Constitution under the rationale John Marshall had set out in *Fletcher v. Peck*.[338]

Mason and Smith argued on September 19, with the former speaking for two hours and the latter for four. Both sought to paint this as a critical juncture in the effort begun with the Constitutional Convention to protect private property against the tyranny of unconstrained state legislative authority and majority rule, and thus another struggle between Marshall and like-minded jurists, on one hand, and Jeffersonians on the other.[339] On the twentieth, Daniel Webster spoke for an hour, presenting closing arguments for the College Trustees. It does not appear that Webster did more than reinforce the points made by Mason and Smith.[340]

Also on the twentieth, Sullivan and Bartlett presented the defense of the Charter-Amendment Act. Speaking for only three hours, they challenged each of the plaintiff's points, and made Jeffersonian arguments for why both the state of New Hampshire and the American republic deserved and would be better served by a decision in defendant's favor.[341] The best of those arguments are reflected in the opinion that the Superior Court of Judicature would soon render.

C. The Richardson Opinion

The Exeter arguments provided the New Hampshire Superior Court justices with a comprehensive account of legal precedents and theories to consider. The justices took their time in doing so, and tensions rose for both sets of litigants during the interlude. Finally, on November 6, 1817, Justice Richardson delivered the court's unanimous decision in favor of Woodward and the Charter-Amendment Act.[342]

Richardson's opinion[343] was a masterpiece.[344] Because he was writing for the highest court in the state, he did not have to worry that his interpretation of New Hampshire's constitution would be overruled, but he did understand that the College Trustees would likely appeal to the U.S. Supreme Court on Contract Clause grounds and would rely

338. *Id.* at 40. *See generally* FARRAR, *supra* note 243, at 28–69, 104–60.

339. STITES, *supra* note 107, at 46–49.

340. *Id.* at 51; FARRAR, *supra* note 243, at 206 (describing how the unofficial reporter tactfully noted: "Mr. Webster closed the argument by a reply on the part of the plaintiffs; but as his views of the case are more fully disclosed in his argument before the Supreme Court of the United States, it is here omitted").

341. STITES, *supra* note 107, at 49–51.

342. *Id.* at 52.

343. FARRAR, *supra* note 243, at 206–35.

344. See Daniel Webster's comment, *infra*, at text accompanying note 365.

heavily on Chief Justice Marshall's opinion in *Fletcher v. Peck*, in which Joseph Story had represented the prevailing party. Richardson was a close friend of Joseph Story, and he believed Story would support the constitutionality of the Charter-Amendment Act.[345] Richardson thus crafted his opinion with Marshall in mind, hoping to gain his support by showing that a proper and respectful understanding and application of Marshall's broader jurisprudence in fact compelled a decision supporting the constitutionality of the Charter-Amendment statute.

Richardson began by asserting the centrality of what today we might call a question of corporate theory: "In order to determine the question submitted to us, it seems necessary in the first place to ascertain the nature of corporations."[346] To make that determination, Richardson cited Marshall's analysis in *Bank of the United States v. Deveaux*,[347] decided in 1809, a case none of the attorneys for either side had referenced in the arguments at Exeter.[348]

In *Deveaux,* faced with the issue of whether for federal diversity jurisdiction purposes the Bank of the United States could be considered a citizen of Pennsylvania, the residence of its stockholders, Marshall opined that as an "invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, [the Bank] is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name."[349] And, indeed, Marshall held that the Bank's members did have a right to sue in their corporate name and to attribute to the corporation their citizenship.[350] In effect, Marshall held that the corporate entity is but a set of legal faculties to be utilized by natural persons. The corporation itself has no interests, purposes, or ends; it is only a means to an end utilized by the incorporated natural persons.[351]

Accordingly, Richardson noted:

> In deciding a case like this, where the complaint is that corporate rights have been unconstitutionally infringed, it is the duty of the court to strip off the forms and fictions with which the policy of the law has clothed those rights, and look beyond that intangible creature of the law, the corporation which in *form* possesses them, to the individuals and to the publick, to whom in *reality, they* belong, and who alone can be injured by a violation

345. SHIRLEY, *supra* note 107, at 239.
346. FARRAR, *supra* note 243, at 210.
347. 9 U.S. (5 Cranch) 61 (1809).
348. *See* FARRAR, *supra* note 243, at 28–206.
349. 9 U.S. (5 Cranch) at 86.
350. *Id.* at 91–92.
351. FARRAR, *supra* note 243, at 211.

> of them. This action, therefore, though *in form* the complaint of the corporation, must be considered as in *substance* the complaint of the trustees themselves.[352]

Building further on *Deveaux*, Richardson reasoned:

> [A] corporation may be considered as a body of individuals having collectively particular faculties and capacities which they can employ for their own benefit, or for the benefit of others, according to the purposes for which their particular faculties and capacities were bestowed. In either view it is apparent, that all beneficial interests both in the franchises and the property of corporations, must be considered as vested in natural persons, either in the people at large, or in individuals; and that with respect to this interest, corporations may be divided into *publick* and *private*.[353]

Since the defining characteristics of a corporation are the purposes and intended beneficiaries for which a corporation is created, then the determination of whether a particular corporation is public or private does not depend on who founded or provided initial funding or property.[354]

This was a power move by Richardson. The contours of the evolving American understanding of the public and private realms were developing obliquely in cases like *Fletcher v. Peck* and *Terrett v. Taylor*. Here was a boldly transparent answer to the question of how the public and private realms should be understood in relation to the corporation.[355]

Richardson then applied his framework to explain the nature of, and realm occupied by, the private corporation. If individuals were incorporated for commercial purposes—to do business as a bank, manufacturing company, or turnpike operator, for instance—the corporation would be private if the profits were intended to benefit the incorporated persons and their assigns, even if all of the funds for the intended endeavor were initially provided by the legislature.[356] Conversely, if the State should incorporate a commercial venture reserving to itself the profits, such would be a public corporation even if the necessary funds were provided via gifts from private individuals.[357] And if the State should purchase stock in a private business corporation, such a corporation would remain a private one, so far as the stockholders' rights are concerned, so long as even one share of stock remained in private hands.[358]

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352. *Id.* at 216.
353. *Id.* at 210–11.
354. *See id*. at 213.
355. *See* NEWMYER, *supra* note 69, at 129–36.
356. FARRAR, *supra* note 243, at 211.
357. *Id.* at 212.
358. *Id.* at 211–13.

Though dicta, Richardson's follow-on assertion was clearly aimed at forestalling any claims that upholding the Charter-Amendment Act would threaten private property:

> It [is] unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of *private corporations*. It may not however, be improper to remark, that it would be difficult to find a satisfactory reason why the property and immunities of such corporations should not stand, in this respect on the same ground with the property and immunities of individuals. [359]

Applying then the same framing lens to the Trustees of Dartmouth College, Richardson found the Charter of 1769 to unambiguously create a public corporation:

> It was created for the purpose of holding and managing property for the use of the college; and the college was founded for the purpose of "spreading [Christianity] among the [Indians] and of furnishing "the best means of education" to the province of New-Hampshire. These great purposes are surely, if any thing can be, matters of publick concern. Who has any private interest either in the objects or the property of this institution? The trustees themselves have no greater interest in the spreading of [C]hristian knowledge among the Indians, and in providing the best means of education, than any other individuals in the community. Nor have they any private interest in the property of this institution,—nothing that can be sold or transferred, that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively publick, and no private loss to them. [360]

Having found that the Trustees of Dartmouth College, though empowered to act as a body politic, were and must be treated as in reality a group of natural persons, questions remained. How are we to understand the nature of the corporate rights and privileges that the charter has bestowed? Are they contractually created rights akin to the real property at issue in *Fletcher v. Peck*? Did the Charter of 1769 convey vested property rights of the kind the Contract Clause was intended to protect?

Richardson concluded that the answer to these questions was "no." Under the contract made by the sovereign, King George III, in whose place the New Hampshire legislature now stood, the trustees were in fact public officers, akin to judges, and sheriffs, and other public officials, who while in office are subject to the will of the public at large, for whose benefit they hold office and exercise corporate powers and privileges.[361] So viewed, each trustee and the trustees collectively served at the pleasure of the legislature. They had no right to complain if the legislature increased the number of trustees, remodeled the corporation's charter and governance structure, or abolished the

359. *Id.* at 215–16.

360. *Id.* at 214–15

361. *Id.* at 215, 229–30.

charter altogether, any more than a jurist might complain should the legislature increase the number of members of the Superior Court or decide to abolish the court altogether. So viewed, whatever contractual rights the trustees had, they did not relate to private property and obligations protected by the Contract Clause:[362]

> This clause, in the [C]onstitution of the United States, was obviously intended to protect private rights of property, and embraces all contracts relating to private property, whether executed or executory, and whether between individuals, between states, or between states and individuals. . . . But this 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.[363]

IV. THE END GAME—THE UNITED STATES SUPREME COURT

A. On to Washington

Richardson's opinion was of great concern to College supporters. They had anticipated losing at the state level, but they had not anticipated such a strong opinion.[364] As Daniel Webster later admitted, "[t]he truth is, the New Hampshire opinion is able, ingenious, and plausible."[365] And, as the College faction prepared to take a writ of error to the U.S. Supreme Court, more bad news arrived; credible sources indicated that Justice Joseph Story would be against them at the Supreme Court.[366]

It had been known that Story counted among his close friends both the recently deceased John Wheelock and Chief Justice Richardson, and that he was a close confidant of Governor Plumer, who had named Story an initial member of the Dartmouth University Board of Overseers, a position Story had declined.[367] Moreover, it now came to light that Story had consulted with Governor Plumer during the legislature's consideration of the Charter-Amendment Act, had given the Governor his approval of the Act, and had now indicated that he agreed with Richardson's opinion.[368]

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362. *Id.* at 216–18, 225–30.

363. *Id.* at 229.

364. DUNNE, *supra* note 59, at 166–67.

365. Letter from Daniel Webster to Joseph Story, J., Sup. Ct. of the U.S. (Sept. 9, 1818), *in* 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 287 (Fletcher Webster ed., 1903).

366. *See* STITES, *supra* note 107, at 73; 2 LORD, *supra* note 141, at 139–42.

367. 2 LORD, *supra* note 141, at 139, 143; SHIRLEY, *supra* note 107, at 239.

368. 2 LORD, *supra* note 141, at 143; DUNNE, *supra* note 59, at 167.

As this word leaked out, supporters of the College at other colleges and universities, including Harvard's president, began to doubt the wisdom of carrying the case to the Supreme Court. As one College supporter reported to President Brown,

> [s]ome of my friends here who sincerely wish success to the cause of your College, have yet a strong wish that it should not be carried to Washington, from an apprehension that, even should the [Supreme] Court take up the cause at large and consider it in all its points, there would be an influence among them which would probably confirm the present decision and thereby increase an hundred fold the weight of its authority.[369]

Meanwhile, University supporters quickly had Richardson's opinion published and widely circulated.[370]

From this point forward ex parte communications between the litigants and Supreme Court Justices became the rule instead of the exception, and it is tempting to conclude that the process which led to the Court's ultimate decision was far more political in nature than judicial, as we now understand those processes. As one chronicle puts it:

> [T]he essential facts of the case were as well understood by the leading minds in New England two years before as two years after the decision; and so of the general grounds taken by both sides. The question was an interesting and important one, constantly mooted in all legal, religious, and political circles.[371]

As part of the lobbying and influence campaign, Webster persuaded the College Trustees to authorize the filing of three federal diversity actions whereby residents of Vermont asserted claims that would allow the federal courts to essentially relitigate the case that was already headed to the Supreme Court on appeal.[372] To facilitate this strategy, the College leased all of the land on which the College buildings and chapel lay to friends residing in Vermont and then filed writs in ejectment interpleading the University Trustees to defend the title to the College properties.[373] Webster, Smith, and Mason believed that other arguments made at Exeter—those founded on the English common law of corporations, the sanctity of vested property rights, and the limits on legislative authority inherent in the American system of government—were stronger than, but also complemented, the Contract Clause basis which the Woodward case presented to the Supreme Court. More importantly, though, these cases would be filed in Joseph

369. 2 LORD, *supra* note 141, at 142 (internal quotation marks omitted).

370. STITES, *supra* note 107, at 58.

371. SHIRLEY, *supra* note 107, at 239.

372. NEWMYER, *supra* note 69, at 131.

373. These were collusive suits similar to the collusive suit filed in *Fletcher v. Peck*, to which Joseph Story had been a party as council for Peck. SHIRLEY, *supra* note 107, at 1–7. Likewise, Story was aware of these collusive suits and eager to assist in having them forwarded to the Supreme Court. NEWMYER, *supra* note 69, at 131.

Story's circuit court in Portsmouth, New Hampshire, and would give Webster, Mason, and Smith significant excuses for conducting ex parte communications with Story, both before and after the arguments at Washington.[374]

The College side decided early on that Webster would take the lead in preparing and conducting the appeal, but the message he would deliver would be principally based on the analysis and arguments that Smith and Mason had presented at Exeter. Webster carefully absorbed Smith and Mason's briefing materials in the months leading up to the Washington arguments and met with Mason on at least one occasion to fine-tune his preparation.[375]

To join Webster in Washington, the College forces decided on Joseph Hopkinson, a capable lawyer then serving the state of Pennsylvania in the U.S. House of Representatives.[376] Webster thought it important that he not appear alone, but rather in association with "some distinguished counsel."[377] Hopkinson was a highly regarded litigator, providing Webster with a teammate of appropriate reputation.[378] Moreover, corralling the competent Hopkinson prevented the University forces from retaining him as Webster suspected they otherwise might.[379] However, Hopkinson was not being retained to carry a heavy load in the coming proceedings. There was no advocate in America with greater experience or skill in arguing before the Supreme Court than Webster. All that was asked or needed from second fiddle Hopkinson was adequate preparation for the limited role he would be assigned.[380]

In contrast to the well-oiled machine that the College advocates, led by Webster, Mason, and Smith, had become, the University preparations were a disaster. Bartlett and Sullivan had performed exceedingly well at Exeter, but the University side chose to retain new

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374. Letter from Daniel Webster to Jeremiah Mason (Apr. 28, 1818), *in* 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER, *supra* note 365, at 282–83:

> The question which we must raise in one of these actions, is, "whether, by the general principles of our governments, the State Legislatures be not restrained from divesting vested rights?" . . . On this question I have great confidence in a decision on the right side. This is the proposition with which you began your argument at Exeter, and which I endeavored to state from your minutes at Washington.

375. STITES, *supra* note 107, at 56–57.

376. *Id.*

377. *Id.* at 56.

378. 2 LORD, *supra* note 141, at 138–39.

379. STITES, *supra* note 107, at 57.

380. *See id.* (explaining how Webster, who was principally responsible for preparing the appeal, initiated employment with Hopkinson for his legal ability and to prevent him from being retained by the University).

counsel for the Washington arguments. They first selected John Holmes, a lawyer by trade, but by inclination and attributes best suited for the role of politician.[381] Holmes was then representing Maine in the U.S. House of Representatives, and the fact that Holmes would not require reimbursement of travel expenses unfortunately played a major role in his retention.[382] Almost immediately, friends of the University voiced concerns that Holmes would not be up to the task of leading the University efforts before the Supreme Court.[383] Perhaps Plumer and others had not realized how poorly regarded Holmes was as lawyer. If so, they soon did. As one writer put it, "[w]ere you sensible . . . of the low ebb of Holmes's reputation here, you should I think hesitate to trust the cause with him."[384]

To compensate for the weakness of their first choice, University forces turned to William Wirt, the recognized leader of the Virginia bar and an advocate of great skill and reputation. In testament to his stature, Wirt had recently been appointed Attorney General of the United States, making him, on paper, an appropriate foil for Daniel Webster. Moreover, Webster had firsthand knowledge of Wirt in action and considered him a more than worthy opponent.[385]

As the University forces had come to fear, Holmes was ill-suited for the task at hand. He made matters worse by devoting little time to preparation.[386] However, Wirt turned out to be a bad choice as well. Wirt was overwhelmed by the backlog of pending cases and briefs that needed writing in his recently assumed role as attorney general.[387] Thus, when the arguments began at Washington, neither Holmes nor Wirt knew critical basic facts about the *Dartmouth College* case, and neither had prepared or carefully rehearsed the legal arguments they would make.[388]

B. The Supreme Court Arguments

1. The Proceedings on March 10–12, 1818

On the morning of March 10, Daniel Webster commenced his famous argument before the Supreme Court that was to end five hours

381. *Id.* at 58.
382. *Id.*
383. *Id.* at 58–59.
384. *Id.* at 59.
385. *See id.* at 59–60.
386. *Id.* at 58–59.
387. *Id.* at 66.
388. *Id.* at 59, 66–67

later.[389] As universally recorded, Webster's performance was one of his best and totally transfixed the Justices, but the substance of Webster's remarks was mostly the work of Jeremiah Smith and Jeremiah Mason, as will be explained in the next subpart.

John Holmes had the unenviable task of following Webster. Taking the lead for the University side on the afternoon of the tenth, Holmes spoke for three hours.[390] His performance was every bit as bad as the University supporters feared—high in emotion and rhetorical flourishes, low to lacking in substance.[391]

The following day, William Wirt began his presentation.[392] Early on, he argued the significance of Eleazar Wheelock not being the founder of the College corporation. When confronted with the fact that the College charter expressly identified Eleazar as the founder, the flustered and ill-prepared Wirt had what was described by on-lookers as a breakdown.[393] The Court granted Wirt's request to return the next day to resume his arguments.[394]

On March 12, Wirt completed his arguments in creditable fashion, having spent the previous afternoon and evening regaining his composure and plugging holes in his deficient preparation. But, like Holmes, he added nothing to the Court's understanding of the case beyond what they could glean from Richardson's excellent and persuasive opinion.[395]

Joseph Hopkinson then closed the proceedings, speaking for an hour and a half. Hopkinson's closing remarks broke no new ground. As he would later write to President Brown, Webster's argument on the tenth left Hopkinson with "little to do but to follow his steps and repeat his blows."[396] In every real sense, Webster's performance on March 10 was both the opening and closing argument for the College.

2. The Source of Webster's Substantive Arguments

To understand what we know about the substance of Webster's arguments on the morning of March 10 requires the acknowledgment of another central actor—Timothy Farrar, Jr., who we have briefly

389. SHIRLEY, *supra* note 107, at 239.
390. *Id.*
391. *Id.* at 231.
392. *Id.* at 236.
393. 2 LORD, *supra* note 141, at 149.
394. SHIRLEY, *supra* note 107, at 235–36.
395. *See supra* Part III.C (detailing Richardson's opinion).
396. STITES, *supra* note 107, at 68.

noted before in his role as key advisor to President Brown.[397] Farrar, Jr., compiled the only account of the Exeter proceedings as well as an unofficial account of the Supreme Court arguments. The portion of his report (the "Farrar Report") that records the arguments made at Washington was then similarly memorialized as Wheaton's Report, now the official U.S. Supreme Court record of the arguments and opinions in *Trustees of Dartmouth College v. Woodward*.[398]

Farrar compiled the Farrar Report with the assistance of the advocates, supplementing his own notes with materials they supplied, including their briefing papers.[399] However, this was not a totally objective, disinterested, or independent exercise on Farrar's part. To begin with, Farrar was both a staunch Federalist and a staunch supporter of the College Trustees' cause. Moreover, Farrar, who had been Daniel Webster's law partner in 1813, compiled his Report with the active assistance of Webster and made editing choices to present the College Trustees' attorneys in the best possible light.[400]

If one relied only on Wheaton's official report, or the portion of the Farrar Report that Wheaton's mirrors, one would have the very mistaken impression that the arguments attributed to Daniel Webster in those reports are the entirety of the case he presented at Washington. That would be far from accurate. We are told that at Exeter, Jeremiah Mason and Jeremiah Smith argued on September 19, 1817, with the former speaking for two hours and the latter for four.[401] Yet the arguments attributed to them cover forty-three and fifty-eight pages, respectively, in the Farrar Report, which would hardly reflect such a division of time. The next day, we are told, Sullivan and Bartlett presented the defense of the Charter-Amendment Act, speaking for only three hours. Yet the Farrar Report devotes eighty pages to recording

397. *See supra* notes 296–297 and accompanying text.

398. 17 U.S. (4 Wheat.) 518 (1819). It is unclear the exact process whereby Wheaton ended up with the near identical report of the arguments at Washington as are contained in the Farrar Report, but we can see the agency of both Daniel Webster and Justice Story coordinating the compilation of both reports, and it is clear that Wheaton's own notes were sparse, and that his report depended on and was derivative of the Farrar Report, which was compiled first, and then provided to Wheaton. *See* SHIRLEY, *supra* note 107, at 292–98 (describing the making of the reports). For one of the few differences between Farrar and Wheaton, see 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 246–47 (1919) (citing FARRAR, *supra* note 243, at 280), regarding Webster's claim that it is well established that a state cannot revoke a charter. This argument is omitted from Wheaton's report. *Id.* at 247 n.4. On Story's collaboration with Henry Wheaton, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective*, 83 MICH. L. REV. 1291, 1312–51 (1985).

399. SHIRLEY, *supra* note 107, at 174–75.

400. *See id.* at 175 (quoting a letter from Webster recommending that objectionable material be edited out); 2 LORD, *supra* note 141, at 168 (discussing Webster's involvement).

401. SHIRLEY, *supra* note 107, at 174.

their arguments.[402] It is unlikely that Mason and Smith spent six hours delivering arguments that reduce to ninety-one pages, while Sullivan and Bartlett could in three hours cover nearly the same amount of material.

As to Daniel Webster, we are told that at Exeter, he spoke for less than two hours in presenting closing arguments for the College Trustees.[403] Of that closing argument, the Farrar Report states: "Mr. Webster closed the argument by a reply on the part of the plaintiffs; but as his views of the case are more fully disclosed in his argument before the Supreme Court of the United States, it is here omitted."[404] In his later argument before the U.S. Supreme Court we are told that Webster spoke for nearly five hours, yet the Farrar Report dedicates only forty-six pages to recording Webster's remarks, and the Wheaton Report is of similar length.[405] Assuming the time Webster spent before the U.S. Supreme Court should bear a similar relationship to the pages needed to record his argument as the total time spent by Mason, Smith, Bartlett, and Sullivan at Exeter bore to the pages devoted to recording their arguments, there should be at least fifty more pages devoted to Webster's remarks at Washington.

What is missing from the two reports of Webster's remarks to the Supreme Court is his delivery of the arguments made by Sullivan and Mason at Exeter.

As one of John Marshall's most comprehensive biographers noted, "Webster's address [to the Supreme Court] was a combination of the arguments made by Mason and Smith in the New Hampshire court."[406]

This fact was expressly acknowledged by Webster in his April 23, 1818, letter to Mason:

> As to the college cause, I cannot argue it anymore, I believe. I have told you very often that you and Judge Smith argued it very greatly. If it was well argued at Washington, it is a proof that I was right, because all that I said at Washington was but those two arguments, clumsily put together by me.[407]

And, in a letter to Mason dated April 10, 1818, Webster expressly acknowledged that the Farrar Report would set out the bulk

402. FARRAR, *supra* note 243, at 70–104, 161–206.

403. SHIRLEY, *supra* note 107, at 174.

404. FARRAR, *supra* note 243, at 206.

405. SHIRLEY, *supra* note 107, at 237; FARRAR, *supra* note 243, at 238–84; Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 551–600 (1819).

406. 4 BEVERIDGE, *supra* note 398, at 240.

407. SHIRLEY, *supra* note 107, at 211 (quoting Letter from Daniel Webster to Jeremiah Mason (Apr. 23, 1818)).

of the arguments he had made at Washington that were attributable to Smith and Mason:

> My own interest will be promoted by *preventing* the book [Farrar's Report] . . . . [I]f the "book" should not be published, the world would not know where I borrowed my plumes. But I am still inclined to have the book. One reason is that you & Judge Smith may have the credit which belongs to you.[408]

Thus, the best approximation of the substance of Webster's Supreme Court oration is found by treating the Farrar Report's account of Smith's and Mason's remarks at Exeter as the portion of Webster's actual remarks at Washington that were not reported as such by either Farrar or Wheaton. As we shall see, Webster would make sure that the Supreme Court Justices received printed copies of the substance of Smith's and Mason's arguments before rendering their decision in the case.

C. From the Supreme Court Argument to the Decision

On the morning of March 13, 1818, the Court reconvened, and Marshall announced where the case stood: "Some of the judges have not come to an opinion on the case. Those of the judges who have formed opinions do not agree. The cause must therefore be continued until the next term."[409]

This development caused both sides pause. The decision was obviously up for grabs. Webster thought that Marshall and ultimately Story would be on the College's side, two others probably against, and the other three Justices impossible to predict.[410] The University side was more optimistic, thinking that at least six of the Justices would rule in their favor.[411] Both sides would now engage in activities that today would seem to us more like lobbying than lawyering.

For the College side, the three new federal writs in ejectment were finally filed in Joseph Story's Circuit Court later in March, and Webster met with Story who promised to enter a special verdict and take whatever steps necessary to hurry them on to Washington in time for the Supreme Court's 1819 term.[412] At the same time, Webster was having the substance of his Supreme Court argument printed (the "Webster pamphlet" or "his pamphlet"), including Mason and Smith's

408. *Id.* (quoting Letter from Daniel Webster to Jeremiah Mason (Apr. 10, 1818)) (first alteration in original).

409. *Id.* at 238 (internal quotation marks omitted).

410. STITES, *supra* note 107, at 69.

411. *Id.*; *see also* SHIRLEY, *supra* note 107, at 238–39.

412. DUNNE, *supra* note 59, at 173.

contributions, and he discreetly distributed a few copies to persons of political influence.

Several college presidents attended the arguments at Washington, and the opinion among academic institutions swung heavily in favor of Dartmouth College as the party that should prevail. In May, a Council of Colleges was formed, composed of Dartmouth and seven other New England institutions of higher education. President Brown was invited as the representative of Dartmouth College; President Allen of Dartmouth University was excluded.[413]

In early July 1818, however, the University faction scored a coup in the ongoing battle to influence the Court in Washington. James Kent, the chancellor of New York's Court of Chancery and one of the country's most respected jurists, visited with University supporters on a trip to New Hampshire. While there, Kent read Richardson's opinion and pronounced that he was in full agreement. Webster took this development particularly hard, knowing that Supreme Court Justices Johnson and Livingston were admirers of Kent, and that they and perhaps other Justices as well as the court of public opinion would give great weight to the Chancellor's view, particularly given Kent's strong identification with the Federalist Party.[414] To close associates, Daniel Webster confided that there was now scant hope of success.[415]

Nonetheless, Webster and the College forces pressed on. College supporter Charles Marsh sent Chancellor Kent a copy of Webster's pamphlet, and President Brown made a subsequent trip to visit with the Chancellor.[416] These efforts proved successful. In a letter of August 26, 1818, Kent replied to Marsh, thanking him for the chance to read the pamphlet and recanting his earlier opinion:

> But I will declare to you with equal frankness that the fuller statement of facts in Mr. W.'s argument in respect to the original & reasons & substance of the charter of 1769 and the sources of the gifts, gives a new *complexion to the case* and it is very probable that if I was now to sit down and seriously study the case with *the facts at large* before me that I should be led to a different conclusion from the one I had at first formed.[417]

This information was a tremendous boost to College spirits, as President Brown had learned during his visit with Kent that Supreme Court Justice Johnson had formally asked for the Chancellor's opinion

413. SHIRLEY, *supra* note 107, at 1–7; NEWMYER, *supra* note 69, at 131.

414. SHIRLEY, *supra* note 107, at 253, 255.

415. *Id.* at 250.

416. *Id.* at 253.

417. *Id.* at 262–63 (quoting Letter from James Kent, C., New York Ct. of Chancery, to Charles Marsh, Tr., Dartmouth Coll. (Aug. 26, 1818)).

on the case and indicated that Justice Livingston was interested as well.[418]

Webster also became more aggressive in the distribution of his pamphlet in the aftermath of Chancellor Kent's visit to New Hampshire:

> I send [ ] with great cheerfulness a "sketch" of our view of the question about D. College. . . . If you should think there is any merit in the manner of this argument you must recollect that it is drawn from materials furnished by Judge Smith & Mr. Mason, as well as from the little contributed by myself. The opinion of the [New Hampshire] Court had been a good deal circulated, and I was urged to exhibit in print our view of the case. A few copies only were printed, and those have been used rather cautiously. A respect for the court, as well as general decorum, seem to prohibit the publishing of an argument while the cause is pending. I have no objection to your showing this to any professional friend in your discretion, I only wish to guard against its becoming too publick.[419]

And he was in active correspondence with Justice Story, to whom he wrote on August 16: "According to your wish, I send you a copy of such memoranda of cases, [etc.], as I have met with, relative to the college question."[420]

And on September 9, Webster sent five copies of his pamphlet to Justice Story:

> I send you five copies of our argument. If you send one of them to each 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. . . . [Richardson's opinion] has been widely circulated, and something was necessary to exhibit the other side of the question.[421]

The lobbying continued as both sides waited for the 1819 term of the Supreme Court, but the die had been cast. On February 2, 1819, Webster arrived at the Supreme Court still uncertain of how Justices Story, Washington, and Livingston would rule and whether the Court would grant the University forces a rehearing of the matter to introduce new evidence. Chief Justice Marshall quickly ended that uncertainty. As soon as he took the bench, ignoring newly retained University counsel, Charles Pickney, who was poised to ask for reargument, Marshall announced that the case had been decided in favor of the College Trustees and then read his opinion.[422] Six days later, the College supporters took control of all Dartmouth facilities as of right.[423]

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418. DUNNE, *supra* note 59, at 171–72.

419. 2 LORD, *supra* note 141, at 152 (quoting Letter from Daniel Webster to Jacob McGaw (July 27, 1818)).

420. Letter from Daniel Webster to Joseph Story, J., Sup. Ct. of the U.S. (Aug. 16, 1818), *in* 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER, *supra* note 365, at 286.

421. Letter from Daniel Webster to Joseph Story, J., Sup. Ct. of the U.S. (Sept. 9, 1818), *in* 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER, *supra* note 365, at 287.

422. STITES, *supra* note 107, at 78.

423. 2 LORD, *supra* note 141, at 164–65.

Disposition of the three pending ejectment suits and various minor disputes remained to be settled, but in short order the Supreme Court's decision was accepted as the final word on the Dartmouth College charter dispute in the minds—if not the hearts—of both sides in the controversy.[424]

D. The Supreme Court Opinions

From the beginning of his tenure, Chief Justice Marshall had urged the Court to speak with one voice, and his fellow Justices had usually complied. Concurring opinions had been rare, and dissents rarer.[425] So, the *Dartmouth College* case is immediately notable because there were two concurring opinions and a dissent. In addition to Marshall's majority opinion, Washington and Story wrote concurring opinions. Justice Livingston concurred in all three opinions. Justice Johnson concurred only with Marshall's opinion. Justice Duvall, who would only record two dissents during the entirety of his nearly twenty-three years on the Court, dissented, but without an explanatory opinion. Justice Todd, due to illness, took no part in the case.[426]

1. The Contract Clause Issue

The only issue actually before the Court was a narrow one—was the College Amendment Act an unconstitutional abridgement of the contract rights of the Trustees of Dartmouth College?[427] On this narrow issue the three opinions all agreed with the College position, as argued at Exeter, New Hampshire, by Jeremiah Mason and Jeremiah Smith, whose arguments had been provided to the Justices by Webster, both in his formal argument to the Court on March 10, 1818, and via the materials he circulated to them, using Joseph Story as the conduit.[428]

Both Mason and Smith asserted, citing the English case of *Phillips v. Bury*, that the central pillar of the Richardson opinion was founded on a misunderstanding of the law of corporations. The grant of incorporation to a private person creates private property, even

424. *Id.* at 162–76.

425. Herbert A. Johnson, *John Marshall*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT, *supra* note 335, at 331–32.

426. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 666, 713 (1819); SHIRLEY, *supra* note 107, at 202; John Paul Jones, *Gabriel Duvall*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT, *supra* note 335, at 179.

427. FARRAR, *supra* note 243, at 235–36; SHIRLEY, *supra* note 107, at 208.

428. *See supra* Part IV.C.

if the purpose of the corporation is to be a charitable or eleemosynary undertaking.[429]

Second, citing *Fletcher v. Peck*, they both argued that the Charter of 1769 not only created private property rights and privileges, but was also a contract of the type protected by the Contract Clause of the Constitution.[430] As Mason put it,

> The charter of 1769 is a contract, within the true meaning of that term, as used in the [C]onstitution of the United States. Every grant, whether from a private individual, or from a state, is a contract. A grant from a state being necessarily made, with great deliberation and formality, constitutes a contract of the most solemn nature. It is of familiar knowledge, that a grant from one individual to another, either of lands, or of incorporeal rights, amounts in legal estimation to a contract. In like manner, a similar grant, from a state to an individual, constitutes a contract. A state incurs the same obligation from its grant, as a private individual does; and it has no more power to abolish its grants, or discharge itself from their obligation, than a private individual has. No just government can desire to possess such power.[431]

Finally, both Exeter advocates asserted that the Charter-Amendment Act impaired the contract rights of the College Trustees in violation of the Contract Clause since it attempted to change in a material way the provisions of the Charter of 1769 without the trustees' consent.[432] As Smith succinctly noted on this point,

> I confess it does seem strange to me, that any advocate should now be found, gravely to contend, that the acts have made no essential change in the corporation as constituted by the charter. They have changed the name, the number of members, the manner of their appointment, and of maintaining a perpetual succession; have created a board of overseers, chosen and to be perpetuated by the state, have divested the corporation of the property given it by the founders and other donors—have altered the uses for which it was given, and applied it to new uses and trusts[ ]—have appointed an officer for the corporation and invested him with power to hold their property against their will. They have made a new constitution for this seminary.[433]

Marshall, Story, and Washington completely agreed with Mason and Smith's basic arguments.[434] The Charter of 1769 was a contract within the meaning of the Contract Clause, and the New Hampshire legislature had wrongfully impaired those rights.

As Justice Washington noted at the beginning of his opinion, the Court had proper jurisdiction only to address the claimed violation of the Contract Clause, and he limited his twelve-page opinion to a logical and coherent application of the arguments made by Mason and Smith

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429. FARRAR, *supra* note 243, at 38–42.

430. *Id.* at 54, 63–68, 156–60.

431. *Id.* at 64.

432. *Id.* at 29–32, 105–10.

433. *Id.* at 109.

434. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 643–47, 651–53, 655–66, 700–02, 706–12 (1819).

to explain why the College Amendment Act was unconstitutional.[435] In contrast to Washington's, Justice Story's and Chief Justice Marshall's opinions spanned forty-seven and thirty pages, respectively.[436] For Story and Marshall, much more was of interest than a narrow decision of the limited issue before the Court.

2. Justice Story's Opinion

a. Story's Intellectual Passions

Joseph Story had an intense intellectual interest in, and love of, the law. As a young lawyer, he had faced an American legal landscape heavily dependent on English law and precedents and almost totally devoid of American legal treatises. He devoured Blackstone's Commentaries, and he relied on what he learned as he served his clients. His approach to both the practice of law and his treatise writing was scientific. He would look first to English law and then determine the extent to which it should be adopted or modified for application in America. This process of transforming English precedents into a derivative, but uniquely great American system of law transfixed him.[437]

Neither Story nor anyone else on the Court was a specialist in corporation law.[438] Story had dealt with few corporate matters in practice, and corporation matters were just beginning to multiply as Story joined the Court.[439] Thus, the *Dartmouth College* case drew Story's interest because it gave him an opportunity to learn more about the emerging American law of corporations. He used the bully pulpit of his concurring opinion primarily in an attempt to influence that emerging law.

b. Adopting and Transforming English Precedents

In his Exeter argument, Jeremiah Smith had explained the English precedents concerning eleemosynary corporations and how those precedents should be transformed for application in America. This scientific remolding of British precedents to suit the evolving American

435. *Id.* at 654–66.

436. *Id.* at 666–713, 624–54.

437. NEWMYER, *supra* note 69, at 40–45. Even before joining the Court, Story had merged his intellectual love of the law with his practical knowledge to write five treatises for practitioners on a variety of subjects. *Id.* at 68–69.

438. *Id.* at 80.

439. *Id.* at 64–67.

environment was exactly what Story had been doing most of his professional life.

As Smith described, the typical English eleemosynary corporation was funded by one or more persons. In contributing the assets that the corporation would need to carry out its purposes, the founder was merely changing what legal person owned the private property donated. They were not changing the nature of property ownership from private to public:[440]

> [B]y the incorporation, [they] acquire a new faculty, or power for the management, and application of this property to the use designated by them. Their right, as individuals, to the property thus dedicated would cease, and become vested in the same persons in their new character. The effect of the incorporation would be, to unite several wills into one will**;** and several persons into one artificial person, capable in law to hold, manage and apply this fund.[441]

When the typical English eleemosynary corporation was formed, individuals for whom the bounty was created assumed the use of the property, and the founder was presumed to retain a right of visitation. In the setting of a college or university, the bounty would be used "to maintain a certain number of instructers [sic] and students, and to procure the buildings, books and accommodations necessary for the purpose of education."[442] The founder, either expressly, or by necessary implication, would retain the power of visitation to make sure that the funds were properly applied.[443]

In America, however, this normal circumstance rarely occurred due to the absence of large stores of accumulated wealth. Instead, it became the common practice for the founder to designate himself and other respected persons as the trustees of the eleemosynary corporation, and in such case, whether by express provision or implication, the trustees assumed the role of visitation, collectively overseeing the use of the corporation's property and bounty by the intended beneficiaries. Instead of the bounty of one founder or a few founders, the American use of the eleemosynary corporation usually was a vehicle for the solicitation and acquisition of needed resources over time and from many donors, which would occur after incorporation. This, of course, is exactly what was done by Eleazar Wheelock.[444]

With this understanding of English common law, the final step was the recognition that the contract involved in the formation of the corporation was twofold; the sovereign impliedly promised that it would

440. FARRAR, *supra* note 243, at 115–17.
441. *Id.* at 115.
442. *Id.* at 117.
443. *Id.* at 117–20.
444. *Id.* at 120–26.

recognize the rights of the artificial entity created to the same extent as if the corporation's properties were still held by natural persons, and the incorporated persons promised to use their corporate privileges to further the charitable purpose for which their charter had been granted, subject to supervision by a court of law in the case of misuse.[445]

Not surprisingly, Story adopted Smith's description of English common law and its application in America, along with Smith's analysis of Eleazar Wheelock's role as founder and the reasons why corporate form was essential to the accomplishment of Eleazar's charitable designs. Story's version takes up the first twelve pages in his opinion.[446]

c. The Business Corporation and the State

Story initially had agreed with the Richardson opinion.[447] Even as he came to see its fatal flaw, it had stimulated his thinking about the emerging use of corporations by private business interests and provided him with a starting point for expressing his views.

To begin with, Story took Richardson's opinion as the framework for establishing not only the possibility of creating private eleemosynary corporations, but also for claiming for private business corporations the rights that Richardson had conceded:[448]

> Another division of corporations is into public and private. . . . [P]ublic corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, an hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.[449]

Story's next move was to assert that the corporation was a party to the contract with the king. This was a tricky move because the corporation did not come into existence until the charter was granted.

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445. *Id.* at 156–57.

446. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 666–78 (1819).

447. *See supra* notes 366–368 and accompanying text.

448. *See supra* notes 355–359 and accompanying text (discussing Richardson's view that a corporation would be private if it was rich for commercial purposes and was intended to benefit the incorporated persons; and, conversely, a corporation would be public if it was incorporated by the state and profits were to be reserved for the state).

449. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 668–69.

How could it be a party to that which had been entered into before its existence?

> From the nature of things, the artificial person called a corporation, must be created, before it can be capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence, without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence, by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. And if the corporation have an existence, before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument, at a subsequent period?[450]

Establishing that the corporation was a party to the express contract with the sovereign allowed Story to opine as to the nature of implied provisions arising from the act of incorporation.

> The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be for ever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation, according to the general law of the land. As, soon, then, as a donation was made to the corporation, there was an implied contract, springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor, upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter.[451]

This notion of a separate contract between the state and the corporation, and between the corporation and its donors, combined with Story's unnecessary concession that a legislative reservation of a right to amend a corporation's charter would be constitutional, would in the business corporation context become a central feature in the debate over shareholders' vested rights that would be contested until the middle of the twentieth century.[452]

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450. *Id.* at 691 (citation omitted).

451. *Id.* at 689–90.

452. *See, e.g.*, Morris v. Am. Pub. Utils. Co., 122 A. 696, 700 (Del. Ch. 1923):

> That a corporate charter is a contract has been long settled. . . . [I]t is spoken of as "a dual contract—one between the state and the corporation and its stockholders, the other between the corporation and its stockholders." That there is a third aspect in which the contract may be regarded would appear clear, for not only is there a contractual tie binding in the two respects observed . . . but there is as well a contractual relation in many particulars existing between the stockholders inter sese.

(citation omitted).

d. Vested Rights in Judicial Office

Finally, Story took the occasion to opine on whether the protections of the Contract Clause would extend so far as to make unconstitutional the New Hampshire Federalists' 1813 action, and Democratic-Republicans' 1816 retaliatory action, in removing jurists with life-time tenure, not through a finding of misbehavior, but by the simple mechanism of terminating the judicial offices held.[453] This had been a festering sore between Federalists and Democratic-Republicans since the 1802 repeal of the Federal Judiciary Act of 1801. Jeremiah Smith, Jeremiah Mason, and Chief Justice Richardson had all felt the effects of these legislative actions, and so had Governor Plumer. The Dartmouth controversy might never have occurred but for the political fallout from this long-simmering political controversy:

> It is admitted, that the state legislatures have power to enlarge, repeal and limit the authorities of public officers, in their official capacities, in all cases, where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities; they are to exercise them only during the good pleasure of the legislature.[454]

With this concession, Story sought to assure state legislatures that the Supreme Court would not use the Contract Clause to referee party disputes internal to the states.[455]

3. Chief Justice Marshall's Opinion

For Chief Justice Marshall, Richardson's opinion and its reliance on Marshall's analysis in *Bank of the United States v. Deveaux* caused a rethink of his approach to the corporation and the applicability of British precedents.[456] In *Deveaux*, Marshall had begun with the seemingly obvious proposition: "That invisible, intangible, and artificial

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453. *Dartmouth Coll.*, 17 U.S. at 693–94.

454. *Id.*

455. Story would have preferred straying even further from the issues directly before the Court, to hold that the Charter-Amendment Act violated the fundamental principles underlying the American system of government, as Jeremiah Mason had argued at Exeter. Story confided to Mason subsequent to the decision in October 1819:

> "I always had a desire that the question should be put on the broad basis you have stated; and it was a matter of regret that we were so stinted in jurisdiction in the Supreme Court, that half the argument could not be met and enforced. You need not fear a comparison of your argument with any in our annals."

4 BEVERIDGE, *supra* note 398, at 251.

456. *See supra* notes 347–354 and accompanying text (demonstrating how Richardson relied and built on Marshall's analysis in *Bank of the United States v. Deveaux* and Marshall's broader jurisprudence).

being, that mere legal entity, a corporation aggregate, is certainly not a citizen . . . ."[457] Whether a suit could be maintained in federal court depended, then, on whether the corporation or its stockholders were the real party in interest. As to that point, Marshall noted the primacy of British precedents: "As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character."[458] Then, after solely examining British precedents, Marshall concluded that the corporate entity was not the real party at interest and effectively pierced the corporate veil so that the Bank's stockholders' citizenship could be used to satisfy the diversity requirement for federal jurisdiction:

> If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union. . . . That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution of the national tribunals.[459]

The *Deveaux* doctrine was overruled by the Supreme Court after Marshall's death, and, in explaining its change of course, the Court noted that Marshall had long regretted his reasoning in *Deveaux*.[460] A careful read of his opinion in *Trustees of Dartmouth College* suggests Marshall's regret ran much deeper than the narrow confines of *Deveaux*. To begin with, counter to his approach in *Deveaux*, Marshall cited no British cases. In fact, he cited no American cases, not even his

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457. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809).

458. *Id.* at 88.

459. *Id.* at 86–88.

460. *See* Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555–56 (1844):

> We remark too, that the cases of *Strawbridge and Curtiss* and the *Bank and Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court have at all times partaken of the same regret, and that whenever a case has occurred on the circuit, involving the application of the case of the *Bank and Deveaux*, it was yielded to, because the decision had been made, and not because it was thought to be right.

own decision in *Fletcher v. Peck*, which the other four Justices in the majority had expressly found to be controlling precedent.[461]

The two sentences, below, are the most quoted passage from Marshall's opinion and are where I began the journey that has become this Article:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.[462]

But what immediately follows those two sentences is critical to an understanding of Marshall's opinion:

> These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.[463]

When one reads the entirety of this passage, and not just the first two sentences, one is struck by how well Marshall understood the attributes of corporate form.

And for Marshall, these corporate attributes were essential to the evolution of the institution known as Dartmouth College:

> The founders of the college, at least, those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected.[464]

Applying to *Trustees of Dartmouth College* the analysis used in *Deveaux* would reduce the corporation to the natural persons who for

461. The only two citations Marshall made in his opinion were to a legal dictionary, and he did so without providing the reader with any understanding of what the dictionary entries said, or were based on. For the two citations, see Trs. of Dartmouth Coll. v. Woodward, 17 U.S (4 Wheat.) 518, 633–34 (1819).

462. *Id.* at 636.

463. *Id.*

464. *Id.* at 641.

the time being occupied the office of trustees. While this might be appropriate for ensuring that no property rights that individuals had before incorporation would be lost by the act of incorporation, it would ignore the interests of other persons who Marshall now saw were part of Dartmouth College viewed as an institution. Marshall saw, as did Smith, that Dartmouth College as an institution would never have existed but for the entrepreneurial efforts of Eleazar Wheelock, and that the institution that had evolved over time was a result of the contractual bargain made by Wheelock and John Wentworth, acting as agent of King George III:

> Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing for ever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.[465]

It was this contractual bargain, the result of Eleazar Wheelock's lengthy efforts to obtain a corporate charter so as to capitalize on the value of the educational enterprise he had created, that the State of New Hampshire had unconstitutionally violated. It was this contractual bargain that had resulted in an institution—Dartmouth College—that was entitled in its own right to constitutional protections.

CONCLUSION

What began for me as a quick look to discover Marshall's vision of corporate rights, and the meaning of the oft quoted two sentences in his opinion, expanded into an extended journey. Not only did Marshall's views turn out to be complex and capable of several interpretations, but so did the views of other key participants. Moreover, the scope of my understanding of the Dartmouth College controversy kept growing with

465. *Id.* at 642.

each discovery, and I came to see how the case, broadly viewed, fit into, and was part of, the creation of modern America.[466]

But as to Marshall's views, I kept coming back to Daniel Webster's famous closing peroration to his argument at Washington, not recorded in the official report of the case, where after pausing, and with voice trembling, he looked to the Chief Justice and said:

> "*This, sir, is my case*. It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country, of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of human life. It is more. It is, in some sense, the case of every man who has property of which he may be stripped,—for the question is simply this: Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit? Sir, you may destroy this little institution: it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out: but if you do, you must carry through your work! You must extinguish, one after another all those great lights of science, which, for more than a century, have thrown their radiance over the land! It is, sir, as I have said, a small college, and yet *there are those that love it*. . . . "[467]

Webster's words must have been in the back of Marshall's mind as he analyzed the intended reach of the Contract Clause:

> Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity or of education, are of the same character. The law of this case is the law of all. . . . Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded, in order to leave them exposed to legislative alteration?
>
> All feel, that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not.[468]

Marshall's opinion in the *Dartmouth College* case reflects a different view of the corporation than his opinion in *Deveaux*. Rather than solely an abstract legal concept and useful tool for carrying on charitable purposes or a business for profit, Marshall now acknowledged the legal rights of corporations viewed as social institutions with stakeholders and constituents whose interests could not wholly be captured through a standard contractual or alter ego analysis. Further, Marshall held that a constitutional right available to natural persons should presumptively be available to prevent a state from impairing a corporation's charter rights.

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466. *See* ELKINS & MCKITRICK, *supra* note 6, and accompanying text (explaining that the Dartmouth College controversy occurred at the beginning of the Industrial Revolution, a time of significant transformation and tension in modes of thought in the United States).

467. 2 LORD, *supra* note 141, at 148.

468. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 645–46.

> It is not enough to say, that this particular case [— the corporate charter as a contract—] was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.[469]

Rather than the oft-quoted two sentences in his opinion, it is Marshall's recognition of the corporation as a social institution and constitutional person, and the provocative implication of his contract clause analysis—holding that corporations should be presumed ab initio to have the same rights as natural persons absent clear textual or other evidence to the contrary—that is relevant to our ongoing debates about the respective roles, rights, and responsibilities of natural persons, the three branches of the federal government, state legislatures, and the modern corporation.

Debates about the constitutional rights of corporations will continue in the years ahead. In the narrow direct-governance ambit of the *Dartmouth College* case, for instance, we are now seeing questions as to whether a state may amend its corporation code and thereby compel the corporations it has chartered to meet board-of-director diversity requirements.[470] Is this a legitimate exercise of a state's reserved charter-amendment power, or an impermissible infringement on property rights under the Contract Clause? Does it matter whether the statutory mandates impair the efficiency of the corporation, or are opposed by a majority of a corporation's members or shareholders?

Now and in the future, important questions will go far afield from the Contract Clause setting of the *Dartmouth College* case, as we have recently seen in *Citizens United* and *Hobby Lobby*. Moreover, it can be expected that future cases regarding corporate constitutional rights will assert claims that would have seemed unthinkable, or even unintelligible, to the founders, and even to many of us today. The legacy of the *Dartmouth College* case is to see these coming debates as rooted in the continuing struggle between liberty and power that has characterized the American nation from its gestation to the present, and to see the unique role of the Supreme Court in mediating these debates and adapting the Constitution to the changing needs of the American people. As such, the *Dartmouth College* case should not be cited for Marshall's views about the artificial nature of the corporation,

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469. *Id.* at 644–45.

470. *See, e.g.*, Cydney Posner, *New Challenge to California Board Diversity Laws*, COOLEY PUBCO (July 19, 2021), https://cooleypubco.com/2021/07/19/new-challenge-california-board-diversity-laws/ [https://perma.cc/UU97-LB36].

but for what it tells us about the human rights which a corporation, as a social institution, reflects and embodies, and which in proper cases the Constitution protects.