What Was the *Dartmouth College* Case Really About?

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INTRODUCTION

In 1769, King George III issued a Royal Charter incorporating twelve persons as The Trustees of Dartmouth College with the right of self-perpetuation. The charter also identified one of the trustees, Eleazar Wheelock, as the founder and initial president of the

corporation, with the right by provision in his last will and testament to appoint his successor in office. The purpose of the grant was to establish a college in New Hampshire, and this was done in the fall of 1770. Shortly before his death in 1779, Eleazar provided in his will that his son John, then away fighting in the American Revolution, would be his successor as president. John accepted the office, and was the dominant force in the affairs of Dartmouth College until a falling out with the board of trustees led to his removal from office in 1815. John's efforts to regain office led the New Hampshire legislature to amend the Charter of 1769, authorizing a new board, whose trustees then reappointed John to the presidency. The old trustees refused to accept the legitimacy of the new board, and Dartmouth College split into warring camps, each purporting to be the legitimate corporation, and each with its own body of students and faculty. The old trustees filed suit seeking to invalidate the New Hampshire legislation. On February 2, 1819, fifty years after the issuance of the charter, John Marshall read in open court his famous opinion in the *Dartmouth College* case, *Trustees of Dartmouth College v. Woodward*, holding that the New Hampshire legislation violated the Contract Clause of the Constitution.[1]

This Article is the first modern work of corporation law scholarship fully examining the *Dartmouth College* case as it was lived and understood at the time. Earlier scholars, the author of this Article included,[2] have relied on the case to make doctrinal and theory-of-the firm arguments about Supreme Court precedents regarding the constitutional rights of corporations. Moreover, these earlier works have primarily focused on, and found talismanic meaning, in two sentences in Marshall's opinion:

> 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. [3]

With this prior focus, corporate law scholars typically have viewed the importance of the *Dartmouth College* case as early evidence of what the founders and the jurists in that case might have thought

1. 17 U.S. (4 Wheat.) 518, 665 (1819).

2. *See* Charles R. T. O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank of Boston v. Bellotti, 67 GEO. L.J. 1347 (1979) (discussing the difficulty in applying familiar constitutional principles to corporations, and analyzing the underlying conceptual doctrines that have guided the Court in its previous decisions).

3. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636.

had they been presented with a question concerning a corporation's First Amendment rights.[4] Supreme Court Justices in modern corporate speech cases have used Marshall's two sentences similarly.[5]

The contribution and focus of this paper is understanding the *Dartmouth College* case in a broader historical sense, as an integral part of two ongoing struggles. The first involved the contest between liberty and power that characterized the founding of America and its subsequent evolution from a disparate collection of English colonies and English colonists hewing to English norms and customs into a separate nation with a decidedly different, more egalitarian and democratic set of norms and values. The second, beginning to emerge in full force as the *Dartmouth College* controversy proceeded, concerned the onset of the Industrial Revolution and the competing interests of the federal government, state legislatures, individual citizens, and incorporated capital.[6]

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4. *See*, *e.g.*, Naomi R. Lamoreaux & William J. Novak, *An Introduction* to CORPORATIONS AND AMERICAN DEMOCRACY 1, 3 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (stating "Chief Justice John Marshall laid out the basic principle [of limited corporate rights] in the famous *Dartmouth College* case . . . ," and then citing the aforementioned two sentences from the opinion); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 880–81 (2016) (citing the two sentences before stating,

> As an originalist matter, therefore, it was impossible for the First Amendment to generally accord business corporations broad expressive rights because the understanding at the time was that corporations only had the rights specifically granted in their charters, and that corporations were not in any way persons like actual human beings.

5. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 823–28 (1978) (Rehnquist, J., dissenting) (citing Marshall's two sentences as the analytical framework that the majority should have used); Citizens United v. FEC, 558 U.S. 310, 428–29 (2010) (Stevens, J., concurring in part, dissenting in part) (citing Marshall's two sentences and other sources to establish that the Framers did not intend to extend First Amendment protections to corporations); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 751–52 (2014) (Ginsburg, J., dissenting) (citing the first of Marshall's two sentences to explain why "[u]ntil this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA").

6. *See generally* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993). The scholarly effort to understand what the founding generation thought and believed when declaring independence, when adopting the Articles of Confederation, and when later adopting the Constitution has been described as "accomplished in the face of almost unimaginable difficulty . . . represent[ing] an extraordinary effort of rescue, a retrieval of something which in the course of time had become all but lost." *Id.* at 5. Thus, if Alexis de Tocqueville had been dropped into the American colonies in 1765, as Eleazar Wheelock was seeking a charter for what would become Dartmouth College, or into the young American nation in 1790, or anytime in between, his famous book would have described an America unrecognizable as a modern democracy. In contrast, shortly before Tocqueville's actual visit to America in 1831, "the principal components for a structure of norms and social values most appropriate to the workings of a capitalist, democratic, equalitarian culture were fully in place . . . though not very much before then . . . ." *Id.* Thus, the *Dartmouth College* case, litigated between 1817 and 1819, sits at a critical juncture in the creation of modern America as "no subsequent rearrangements of value[s] or transformations in modes of

Viewed through this more comprehensive lens, the *Dartmouth College* case highlights key aspects of the American story: the centrality of religion and the struggle for religious tolerance; the centrality of private property and the tension between majority rule and vested property rights; the ongoing battle to properly define the public and private realms; and the simmering competition for power and authority both between the Supreme Court and other branches of the federal government, and between the Supreme Court and state legislatures. All of these aspects of the American story played out in the *Dartmouth* case against the differing visions of the Federalists and the Jeffersonians, and against the backdrop of the Yazoo land controversy and the Federal Judiciary Act of 1801.

Moreover, the early history of Dartmouth College provides a case study in the nature of wealth creation and business leadership before and after the Revolution. Dartmouth College was founded by Eleazar Wheelock, a preacher turned entrepreneur who used religion and government grants to create both personal wealth and an important institution. Eleazar's successor in control of Dartmouth College—his son John—illustrates the not-uncommon shortcomings of second-generation leadership; John's missteps and personal failings alienated his board and key constituents. The resulting battle for control of Dartmouth College played out over nearly a decade before its resolution by the U.S. Supreme Court.

Viewed through this broader lens, previously unexamined portions of the *Dartmouth College* opinions come into view, and the oft-cited two sentences in Marshall's opinion take on a new light as but part of a larger and more nuanced analytical framework in which a corporation is presumed ab initio to have the same constitutional rights as natural persons, absent clear textual or other evidence to the contrary. As the Article shows, what Marshall thought about corporations changed dramatically as the *Dartmouth College* case unfolded, as did the views of Joseph Story, writing in concurrence. What Marshall and Story previously thought yielded to a richer understanding of the corporation's emerging role in American society and the need to adapt the constitutional meaning of personal liberties, property rights, and constitutional interpretation accordingly.

The paper proceeds as follows: Part I describes and contextualizes the larger historical, legal, social, and cultural backdrop in which the *Dartmouth College* controversy took place. Part II explores

thought and feeling could compare in magnitude to those that occurred in the fifteen years or so prior to 1830." *Id.*

the genesis and prelitigation aspects of the *Dartmouth College* controversy. Part III examines the *Dartmouth College* litigation in the courts of New Hampshire. Part IV follows the case from the courts of New Hampshire to the ultimate decision by the U.S. Supreme Court. The conclusion follows.

I. THE HISTORICAL BACKDROP

A. Summary Overview

The *Dartmouth College* case played out in New Hampshire, and finally in the U.S. Supreme Court, against the backdrop of the Federalist Party's decline in power and influence, both nationally and in New England. With Jefferson's ascendancy in 1801, the Federalists became a weak minority party nationally, and the party's grip on New England came under increasing attack by the Democratic-Republicans.[7] The run-up to and War of 1812 brought a brief resurgence in Federalist power, but this proved a last gasp.[8] The Democratic-Republicans' resounding victory in the 1816 presidential and congressional elections marked the end of the Federalists as a national political party. It also marked for extinction the Standing Order in New England—the dominant political and cultural alliance between Congregationalist ministers and leading citizens that traced its roots and authority to the founding Puritans.[9]

The struggle between the Federalists and their opponents in the early years of the eighteenth century was rooted in earlier struggles between the colonies and England that gave rise to the American Revolution.[10] And that struggle was rooted in tensions between the English people and their kings that gave rise to the Magna Carta in 1215, and the constantly evolving role of the common law and Parliament as counterweights to the power of the Crown and as

7. Phillip J. Lampi, *The Federalist Party Resurgence, 1808-1816: Evidence from the New Nation Votes Database*, 33 J. EARLY REPUBLIC 255, 259 (2013).

8. *Id.* at 261–66, 280.

9. *See id.*; DONALD B. COLE, JACKSONIAN DEMOCRACY IN NEW HAMPSHIRE: 1800-1851, at 30–31 (1970). For the origins, nature, dominance, and decline of the "Standing Order" in New England, see CHRISTOPHER GRASSO, A SPEAKING ARISTOCRACY: TRANSFORMING PUBLIC DISCOURSE IN EIGHTEENTH-CENTURY CONNECTICUT (1999); RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765 (1967); and PETER S. FIELD, THE CRISIS OF THE STANDING ORDER: CLERICAL INTELLECTUALS AND CULTURAL AUTHORITY IN MASSACHUSETTS, 1780-1833 (1998).

10. *See* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776 (2d prtg. 1991) (detailing the root causes that transformed American colonists from loyal English subjects in 1765 to revolutionaries a decade later).

expressions of the rights and privileges of the English people.[11] Central to this multicentury conflict was the evolving nature of property rights, including the rights conferred by the grant or existence of a corporate charter.[12]

B. The Colonists as English "People"

At England's infancy, the concept of individual rights to liberty and property was deeply iengrained in society:

> Englishmen valued their rights to their personal liberty and property—rights that were embedded in their common law. The common law had deeply held principles including, for example, the notions that no one could be a judge in his own cause and that no one, not even the king, could legally take another's property without that person's consent. These rights and liberties belonged to all the people of England, and they adhered in each person as a person. Their force did not depend on their written delineation; they existed in the customary or unwritten law of England that went back to time immemorial.[13]

Set against this were the prerogatives of the king, which entailed both the absolute right to govern and the corresponding responsibility to safeguard the English people.[14] It was the king's persistent infringement on the people's liberties that gave rise to periodic efforts to obtain the king's written acknowledgment of a right in question, which "in the early middle ages took the form of coronation oaths and assizes and charters issued by the crown."[15] This ongoing struggle ultimately led to the Glorious Revolution and in 1689 to the English Bill of Rights, whereby the king conceded important governance rights and powers to Parliament.[16]

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11. Gordon Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1422–25 (1999); P.B. Waite, *The Struggle of Prerogative and Common Law in the Reign of James I*, 25 CANADIAN J. ECON. & POL. SCI. 144 (1959).

12. *See, e.g.*, Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts,* 120 ENG. HIST. REV. 879 (2005) (discussing the use of quo warranto in the first half of the seventeenth century as a tool by which the Crown controlled corporations); Robert H. George, *The Charters Granted to English Parliamentary Corporations in 1688*, 55 ENG. HIST. REV. 47 (1940) (discussing the substantial changes that occurred during King James II's reign and "attack" on English parliamentary corporations).

13. Wood, *supra* note 11, at 1423.

14. *See id.* at 1424:

> [T]he king had his right to govern, and the people had their equally ancient and equally legitimate rights to their liberties and their property. Indeed, it is perhaps not too much to say that the whole of English constitutional history can be seen as a struggle between these two competing sets of rights.

15. *Id.*

16. *Id.* at 1425.

Of critical importance is the English people's understanding of their Bill of Rights as the American Revolution approached:

> So convinced were Englishmen in the decades following 1689 that tyranny could come only from a single ruler that they could hardly conceive of the people tyrannizing themselves. Once Parliament became sovereign, once the body that represented and spoke for them—the House of Commons—had gained control of the crown authority that had traditionally threatened their liberties, the English people lost much of their former interest in codifying and listing their personal rights. Charters defining the people's rights and contracts between the people and government no longer made sense if the government was controlled by the people themselves. . . . By the time of the American Revolution, therefore, most educated Englishmen had become convinced that their rights existed only against the crown. Against their representative and sovereign Parliament, which was the guardian of these rights, they existed not at all.[17]

Importantly, the Glorious Revolution and the English Bill of Rights did not change the hierarchical nature of English society. English people of all sorts understood that the Revolution and its benefits skewed heavily in favor of landholders and what in America would be seen as "the better sort."[18] Thus, the rights of the English "people" were primarily the rights of landholding men, and those rights respected and reinforced the social hierarchy.[19]

In the decade immediately preceding the American Revolution, Parliament with the king's support rolled out a series of acts that a critical mass of colonists viewed as violations of their rights as Englishmen.[20] Infringement of rights granted via corporate charters—returning to the repugnant actions that had marked the reigns of James I and James II—were central to the growing view.[21] Colonists saw their corporate rights as especially vulnerable in light of Parliament's disregard for the charters of the City of London, the Massachusetts Bay colony, the province of Quebec, and the colony of Grenada.[22] This concern heightened when Parliament enacted the East India Company Act of 1773, imposing fundamental changes on the corporation that bore its name.[23] The colonists' worst fears came to pass with the passage of the Massachusetts Government Act of 1774, which amended the Massachusetts Charter of 1691 to severely curtail colonists' self-

17. *Id.* at 1425–26.

18. 1 HARRY L. WATSON, BUILDING THE AMERICAN REPUBLIC: A NARRATIVE HISTORY TO 1877, at 140 (2018).

19. *Id.* at 139–40, 164–68.

20. The initial flurry of parliamentary actions included the Stamp Act of 1765, the Quartering Act of 1865, the New York Restraining Act of 1767, and the Townsend Revenue Act of 1767. MAIER, *supra* note 10, at 51–60, 113–16, 145–49.

21. *See id.* at 186 ("Now charters seemed no more respected by British authorities than the rest of the law.").

22. *Id.* at 183–87.

23. *Id.* at 187.

governance rights.[24] Parliament's repeated assaults on corporate charter rights, and the king's disdain for the colonists' pleas for his intervention, were a significant factor in pushing the colonists to the point of open rebellion.[25]

C. The American Revolution and the Constitution—the Colonists Become Americans and the Rights and Privileges of the "Better Sort" Are Contested

In the conduct and immediate aftermath of the American Revolution, the relationship between the individual and the state, and the nature of individual liberties and property rights, faced an American reconceptualization of the English constitutional system. Before the Revolution, rights and obligations were viewed as a contract between two equals—Parliament (as representative of the people) and the king—and there was little distinction perceived between public and private spheres:

> [E]ven as late as the eve of the Revolution the modern distinction between public and private was still not clear. The people's ancient rights and liberties were as much public as private, just as the king's rights—his prerogatives—were as much private as they were public. So-called public institutions had private rights and private persons had public obligations.[26]

Moreover, the obligations of public service corresponded with one's place in the social hierarchy in which landowning was a dominant factor. Public office, including military service, was uncompensated, and the ranks were filled hierarchically, with the king at the top as England's largest landowner.[27]

Before the Revolution, the hierarchical rights of the "better sort" were similarly entrenched in the American colonies, and once called or elected to service in a particular post, there was a strong expectation of permanent tenure, akin to vested rights in property.[28]

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24. *Id.* at 218.

25. *Id.* at 186–87, 225.

26. Wood, *supra* note 11, at 1429.

27. *See id.* at 1429–30:

> Indeed, everyone in the society had an obligation to help govern the realm commensurate with his social rank—the king's being the greatest because he stood at the top of the social hierarchy. Thus important offices were supposed to be held only by those who were already worthy and had already achieved economic and social superiority. Just as gentlemen were expected to staff the officers' corps of the army, so were independent and wealthy gentlemen of leisure and education expected to supply leadership for government.

28. *See* BUSHMAN, *supra* note 9, at 268 ("The assumption had always been that 'Gentlemen of approved Capacity and Fidelity' were to remain in office, however unpopular their actions, so

The Revolution destroyed the contractual and hierarchical underpinnings of American colonial society. Gone was the automatic respect and right to govern to which the better sort felt entitled. Moreover, there was nothing resembling a king for the assemblage of former colonies; instead the common interests of the newly independent states were entrusted to a joint-venture-like confederacy of limited scope and power. Within each newly independent state, the legislatures assumed the power and authority of the English Parliament unchecked by a king, and also unburdened by Parliament's perceived role as defender of the people against the predations of a wayward king. In a word, each state fashioned itself a republic, and the ascendancy to political power of "middling men" and men of the lower classes put in doubt the governance and property rights of the "better sort" who had dominated colonial life before the Revolution.[29]

Unchecked by a king, colonial and then state legislatures showed little restraint in confiscating the property of British loyalists[30] and, during the Confederacy, passing laws abridging the property rights of creditors.[31] Concern that unbridled state legislative authority threatened the liberties and property rights of the better sort was one of the main reasons that the young nation, led by those who later became predominantly identified as Federalists, jettisoned the Articles of Confederation, replaced it with the Constitution, and included therein the Contract Clause.[32]

While concern for untrammeled state legislative power was a clear impetus in the creation of the new Constitution, the desire to temper state legislative power was balanced by fear of creating a central government that would fall prey to the perceived failings of the English system that had led to the Revolution; this fear fueled the separation of

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long as their character was unimpeached."); 1 WATSON, *supra* note 18, at 253 ("Colonial gentlemen had assumed that most voters would defer to men of wealth, education, and social distinction.").

29. Wood, *supra* note 11, at 1432–35; 1 WATSON, *supra* note 18, at 230. The natural submission to the rule by the "better sort" before the Revolution was visceral and widespread, as recounted by Reverend Devereux Jarrett, the son of a carpenter, in his autobiography. 1 WATSON, *supra* note 18, at 199–200:

> [W]e were accustomed to look upon, what were called *gentle folks*, as beings of a superior order. . . . A *periwig*, in those days, was a distinguishing badge of *gentle folk*—and when I saw a man riding the road, near our house, with a wig on, it would so alarm my fears, and give me such a disagreeable feeling, that I dare say, I would run off, as if for my life. Such ideas of the difference between *gentle* and *simple*, were, I believe, universal among all of my rank and age.

30. 1 WATSON, *supra* note 18, at 184, 216; Brett Palfreyman, *The Loyalists and the Federal Constitution: The Origins of the Bill of Attainder Clause*, 35 J. EARLY REPUBLIC 451, 452–53 (2015); ELKINS & MCKITRICK, *supra* note 6, at 10.

31. 1 WATSON, *supra* note 18, at 216–18.

32. Wood, *supra* note 11, at 1434–35.

federal-government power into legislative, executive, and judicial branches, so that neither the federal government as a whole, nor any of its constituent parts, would be a new source of tyranny and invasion of individual liberties and property rights.[33]

D. The Federalists and the Jeffersonians

During the Washington and Adams Administrations, concern that the federal government would be a new source of tyranny competed with fears that unchecked democracy would lead to destruction of the young nation. The Revolution and its aftermath had engaged and empowered ordinary citizens, and they did not want to go back to the days in which they lived in awe of, and in submission to, the "better sort."[34] On the other hand, the Federalists, under a facially neutral Washington and the clearly Federalist Adams, viewed political associations and democratic participation of ordinary citizens with great suspicion, and this fear increased as the French Revolution moved quickly from a seeming affirmation of the ideals of the American republic to chaos and the slaughter of political opponents.[35] But the actions taken to thwart perceived risks of sedition caused a popular fear that the Federalists were intent on recreating the old hierarchical, perhaps even monarchical system.[36] Jefferson's election signaled a resounding rejection of the Federalists, who would never again hold the presidency or a majority in either house of Congress.[37]

The Federalists, however, remained in control of the Supreme Court.[38] From this bastion, they would strongly influence the development of American society and provide a counterbalance to the Democratic-Republicans.[39] Among the important questions which the

33. 1 WATSON, *supra* note 18, at 220–26.

34. *See id.* at 200 ("Except in a few places . . . ordinary white men would no longer submit to the worst pretensions of self-styled gentlemen.").

35. WATSON, *supra* note 18, at 242–43, 272 (discussing the political positions of the Federalists).

36. *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 20 (1971) (stating that the Jeffersonians viewed the Federalists as "tories and monarchists dedicated to the subversion of the principles of 1776").

37. *But see* Lampi, *supra* note 7, at 280 (stating that reports of the Federalists' "early demise" have been greatly exaggerated, and that "in the two decades following Jefferson's election Federalists staged an amazing electoral comeback").

38. *See* ELLIS, *supra* note 36, at 14 ("[Because Washington and Adams] view[ed] their Jeffersonian critics as a morally reprehensible faction bent on overthrowing the government and destroying the constitution, . . . [their] appointments to the national judiciary went exclusively to members of the Federalist party . . . .").

39. *See id.* at 3–68.

Supreme Court would face almost immediately, and would continue to face up and through the *Dartmouth College* case, was the old question of vested rights in an American context—the authority of Congress or a state legislature to undo judicial appointments, land grants, or charters.

1. The Judiciary Act of 1801, Vested Rights in Judicial Offices, The Early Years of the Marshall Court

The Judiciary Act of 1801, enacted in the closing days of the Adams Administration, became an early point of tension; one of its reforms was to abolish the existing federal circuit courts and establish six new circuit courts with sixteen new circuit judgeships, thereby relieving Supreme Court Justices of circuit court responsibilities.[40] The Act also created original federal jurisdiction for cases in law and equity that had been exclusively the domain of state courts.[41] When Adams moved in the last days of his presidency to quickly fill these and other vacant judicial posts with Federalists, while separately appointing John Marshall as Chief Justice of the Supreme Court, the Judiciary Act of 1801 became fodder for Democratic-Republican outrage.[42]

Jefferson, who favored decentralization, agricultural interests, and state power, saw the Federalists as seeking to remove their defeated leaders to positions in the federal judiciary and to use that bastion to pursue their nationalist, mercantile, and business-favoring agenda through expanded federal jurisdiction.[43] Not surprisingly, one of the first concerns of the new Democratic-Republican controlled Senate was to repeal the Judiciary Act of 1801, thereby eliminating the sixteen newly created circuit courts, and effectively removing from office the occupant jurists, who otherwise would have served for life, absent impeachable conduct.[44] Jeremiah Smith of New Hampshire, later to be an advocate for the trustees in the *Dartmouth College* case, was one of the federal judges so appointed who was effectively removed

40. Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMANS. 543, 546 (2012).

41. C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC, THE CASE OF *FLETCHER V. PECK* 1–5 (1966).

42. Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494–95, 519–21 (1961). Ultimately, only thirteen of Adams's nominees accepted office and were confirmed; Jefferson filled two of the posts with Democratic-Republicans and left one unfilled. Glickstein, *supra* note 40, at 543, 548–49 .

43. *See* Turner, *supra* note 42, at 494 ("The Federalists have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased.").

44. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

from office on July 1, 1802.[45] To Federalists, this action seemed a violation of fundamental principles, a violation of vested property rights, and perhaps a violation of the Contract Clause.[46]

This tension over the Judiciary Act of 1801 came to an early head in the person of William Marbury, to whom Adams had extended a last-minute appointment as a justice of the peace for the District of Columbia. Marbury's commission was undelivered before the Jefferson Administration took power, and the new secretary of state, James Madison, refused to issue it. Marbury sought mandamus from the U.S Supreme Court to compel Madison to issue the commission.[47]

Marbury's petition gave the Federalist Party–dominated Court, and Chief Justice Marshall, an opportunity to wage war against the recently empowered Democratic-Republicans, but such a move would have further incited Jeffersonian wrath. In Marshall's first great opinion, the Court adroitly claimed for itself the right of judicial review, while avoiding a conflict with the new administration.[48] Marshall asserted that Marbury had a "vested legal right" in the judicial office to which he had been appointed.[49] However, Marbury had filed his petition in the wrong court; the congressional provision that facially granted the Supreme Court original jurisdiction over Marbury's claim was itself unconstitutional.[50] Despite Marshall's favorable opinion on the substance of Marbury's vested rights claim, the remedy available and the limits imposed on legislative power were unclear.[51] Uncertainty and disputes about the nature of a judicial officer's vested rights would be an important issue in the Dartmouth College controversy and the *Dartmouth College* case.

45. Turner, *supra* note 42, at 497–98. Then-Secretary of State John Marshall was instrumental in Smith's appointment to the Court. JOHN H. MORISON, LIFE OF THE HON. JEREMIAH SMITH, LL.D. 143–45 (Bos., Charles C. Little & James Brown 1845).

46. Glickstein, *supra* note 40, at 549–50; James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 220, 224–27 (1992).

47. O'Fallon, *supra* note 46, at 220.

48. 1 WATSON, *supra* note 18, at 255.

49. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

50. *Id.* at 173–80; 1 WATSON, *supra* note 18, at 255.

51. The circuit judges removed through the repeal of the Judiciary Act of 1801 seriously considered—but ultimately chose not to file—a lawsuit challenging the constitutionality of their removal. Glickstein, *supra* note 40, at 558–78.

2. The Yazoo Lands Controversy, *Fletcher v. Peck*, Joseph Story's Role in the Vested Rights Debate, and Story Joins Marshall on the Supreme Court

Exacerbating tension over the Judiciary Act of 1801 was the Yazoo lands controversy. After the Revolution, Georgia claimed ownership of a huge tract of land west of the Chattahoochee River known as the Yazoo lands, a claim challenged by various Indian tribes and by the national government.[52] In 1795, Georgia's legislature granted thirty-five million acres of the Yazoo lands to four companies engaged in the type of land speculation common in the latter stages of prerevolutionary America and the early years of the new republic.[53] A public uproar ensued, and the subsequent contest for control of the Georgia legislature featured charges that the Yazoo grants were the product of legislative corruption.[54] One year later, on February 13, 1796, the newly elected Georgia legislature passed an act revoking the Yazoo land grants.[55] On that same day, the New England Mississippi Land Company ("the New England Company"), formed specifically for the purpose of speculating in Georgia lands, and in which many prominent New England citizens were investors, purchased eleven million plus acres of the Yazoo lands for $1,138,000.[56] When news of the repealing act arrived, the New England Company was left with essentially unmarketable and worthless title to the Yazoo tract.[57]

The New England investors immediately claimed vested rights in the purchased Yazoo lands and threatened litigation.[58] Their claim was supported by the legal opinion of Alexander Hamilton "that Georgia's attempted repeal was barred by the provision of the United States Constitution forbidding a state to impair the obligation of contracts."[59] The New England Company's litigation threats further fueled Jefferson's outrage over the 1801 Federal Judiciary Act. If that act were allowed to stand, the federal courts would have jurisdiction

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52. MAGRATH, *supra* note 41, at 1–5.

53. *Id.* at 1–7. "Speculation in lands was the most absorbing American enterprise during the later Colonial, the Revolutionary, and the early Republican periods." DANIEL M. FRIEDENBERG, LIFE, LIBERTY AND THE PURSUIT OF LAND 321 (1972) (quoting THOMAS PERKINS ABERNATHY, FROM FRONTIER TO PLANTATION IN TENNESSEE 19 (1932)).

54. MAGRATH, *supra* note 41, at 7–15; FRIEDENBERG, *supra* note 53, at 167–68 ("There is proof that almost all of the legislators of Georgia were bribed, either directly by money or through a speculative interest.").

55. MAGRATH, *supra* note 41, at 7–15.

56. *Id.*

57. *Id.* at 10–15.

58. *Id.* at 20–69; FRIEDENBERG, *supra* note 53, at 269.

59. GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 25 (1970).

over lawsuits seeking to validate the Yazoo land grants. Repealing the Judiciary Act returned jurisdiction over such suits back to the state courts.[60]

In 1802, Georgia ceded its western land claims, including the contested Yazoo tracts, to the United States.[61] Now Yazoo land claimants had access to the federal courts, which repeal of the 1801 Judiciary Act had denied, and they soon arranged for a lawsuit, undoubtedly collusive, to be filed in the United States District Court for the District of Massachusetts, styled *Fletcher v. Peck*.[62] Peck had sold Fletcher 1,500 acres of Yazoo land.[63] In the bargain and sale contract, Peck covenanted that his title ran from the Georgia legislature's 1795 Act and that "[t]he title to the premises so conveyed by the State of Georgia . . . had been in no way constitutionally or legally impaired by virtue of any subsequent legislation of the State of Georgia."[64] Fletcher argued that the Georgia legislature's 1796 Act cut off Peck's title; Peck, echoing Alexander Hamilton, argued that Georgia's 1796 repealing act was an unconstitutional impairment of contract rights the 1795 Act had created.[65] In 1807 the Massachusetts Federal Circuit Court ruled in Peck's favor on vested rights grounds.[66] The case was appealed to the United States Supreme Court, which in 1809 found the pleadings to be defective, but allowed correction, and held the case over to be reargued during its 1810 term.[67]

Concurrently with the litigation in *Fletcher v. Peck*, the New England Company pressed Congress to grant compensation. Bills were introduced and voted on in 1804, 1805, and 1806, but despite President Jefferson's backing and desire for compromise, failed to garner necessary support, primarily due to the opposition of Virginia Congressman John Randolph, a hardline anti-Federalist.[68]

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60. MAGRATH, *supra* note 41, at 57–58.

61. *Id.* at 35.

62. *Id.* at 53–55. "Beyond any doubt the case of Fletcher against Peck was a collusive suit, an arranged case between friendly 'adversaries' acting on behalf of the New England Mississippi Land Company." *Id.* at 54.

63. *Id.* at 54.

64. *Id.* at 54–55.

65. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

66. MAGRATH, supra note 41, at 55–56.

67. *Id.* at 59–68.

68. *Id.* at 37–49.

> Randolph saw the land speculators as a species of the financial capitalists whom he despised [and believed that] Federal recognition of the claims would mean a repudiation of the validity of the Georgia repeal act, and this ran counter to his conviction that federal powers under the Constitution should be strictly construed so as not to trespass on the more important rights of the states.

At this point the New England Company turned to then twenty-seven-year-old Joseph Story, hiring him in 1807 to lobby Congress.[69] Story, a lawyer and politician already renowned for his intellect, had overcome his membership in the Democratic-Republican Party to earn the trust and respect of prominent New England Federalists, including the principal investors in the New England Company.[70] Story travelled to Washington in May 1807 and again in January 1808, taking the opportunity not only to walk the halls of Congress, but also to meet with President Jefferson and Secretary of State James Madison, to attend sessions of the Supreme Court, and to frequently meet and dine with the Justices at the boarding house lodgings they shared. [71]

It was in the last of these pursuits that Story and Marshall discovered themselves kindred spirits. They shared a love of conversation and poetry, the travails of working with publishers, a deep admiration of George Washington, and "[t]here were common bonds in their Unitarianism, in an apprehension of the extremes of the Jeffersonian faith, and, above all, in a reverence for the judicial process."[72] Importantly, they shared an appreciation for the matter which brought Story to Washington: the insecurity of land titles if state legislatures could ignore and counteract grants from a previous sovereign.[73] In the 1790s Marshall and his brother had made substantial investments in Virginia lands, the titles to which were traced to Baron Fairfax.[74] The Virginia legislature subsequently refused to recognize the validity of Baron Fairfax's claim, confiscated the property, and purported to sell it to other investors.[75] The title to some of those lands was still in dispute in 1810 and would not finally be decided until 1816.[76] Undoubtedly Marshall and Story commiserated and discussed the similar troubles of the New England Company and its investors.[77]

Id. at 41; *see also* DUNNE, *supra* note 59, at 50 ("Jefferson in power dismissed as metaphysical subtleties the [strict construction and states' rights] doctrines he formerly preached, and on the Yazoo case he threw his weight on the side of practical compromise.").

69. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 57 (1985).

70. *Id.* at 55–58.

71. DUNNE, *supra* note 59, at 47–59; *see also* NEWMYER, *supra* note 69, at 66. As Story described in 1808, "I daily spend several hours [at the Supreme Court] and generally, when disengaged, dine and sup with the judges." MAGRATH, supra note 41, at 68.

72. DUNNE, *supra* note 59, at 58.

73. MAGRATH, *supra* note 41, at 73–74.

74. *Id.*

75. *Id.*

76. Charles F. Hobson, *John Marshall and the Fairfax Litigation: The Background of* Martin v. Hunter's Lessee, 1996 J. SUP. CT. HIST. 36, 48.

77. DUNNE, *supra* note 59, at 57.

Story's lobbying efforts with Congress were wholly unsuccessful.[78] However, in 1810 he was again called into the service of the New England Company, this time as an attorney to represent the defendant, Peck, at the final argument before the Supreme Court, held on February 15, 1810.[79] This honor further signaled Story's ascendancy to the very top of any list of America's leading lawyers.[80]

On March 16, 1810, Marshall delivered the Court's unanimous opinion upholding the circuit court's judgment in Peck's favor and stating in the strongest terms possible the protections the Constitution afforded to vested property rights:[81]

> In this case the legislature may have had ample proof that the original grant was obtained by practices which . . . would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that guilt which infected the original transaction.[82]

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state. No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.[83]

> [Therefore], the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[84]

Story's relationship building in Washington soon bore further fruit as James Madison appointed him to the Supreme Court in November 1811.[85] Story took office in 1812 at the age of thirty-two, delighted that he would now be able "to pursue, what of all things I admire, juridical studies."[86]

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78. *Id.* at 58–59.

79. *Id.* at 73–74.

80. *Id.* at 73. For the date of oral arguments in *Fletcher v. Peck*, see ANN ASHMORE, SUP. CT. OF THE U.S., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: UNITED STATES REPORTS VOLUMES 2 – 107 (1791–1882), at 9, https://www.supremecourt.gov/opinions/datesofdecisions.pdf (updated Dec. 26, 2018) [https://perma.cc/RK9P-PBUC].

81. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

82. *Id.* at 87, 134–35.

83. *Id.* at 137–38.

84. *Id.* at 139.

85. DUNNE, *supra* note 59, at 80–81; NEWMYER, *supra* note 69, at 70–71.

86. NEWMYER, *supra* note 69, at 71.

Story and Marshall, already friends, would become judicial soulmates and the dominant architects of constitutional law jurisprudence for the next decade; each would play central roles in determining the reach of the decision in *Fletcher v. Peck*, and the *Dartmouth College* case would become the crucible for deciding the extent to which the Contract Clause protected judicial tenure and other statuses and grants, including state-granted corporate charters.[87]

II. THE GENESIS AND PRELITIGATION ASPECTS OF THE DARTMOUTH COLLEGE CASE

A. The Founder—Eleazar Wheelock

Born in Windham, Connecticut, in 1711, Eleazar Wheelock (hereinafter "Eleazar") at a young age exhibited great scholarly promise, which his father, a successful farmer and church deacon, nourished with the best instruction available.[88] At some point in his mid-teens Eleazar had a religious conversion experience and determined to devote his life to the "work of the gospel."[89] In 1735, after completing studies in classics and religion at Yale College, Eleazar was ordained minister of the Second Congregational Church in Lebanon, Connecticut, less than ten miles from his hometown, Windham. That same year he married Sarah Davenport Maltby, a widow with three young children.[90]

Eleazar's first decade in Lebanon was a whirlwind of religious preaching and fervor, coupled with managing the twenty-five-acre homestead given to him by his parish, and, to supplement his income, creating and maintaining the Latin School, a college preparatory academy for local youth.[91] Almost immediately he became a friend of Jonathan Edwards and a key participant in the Great Awakening.[92] He quickly achieved prominence as one of Connecticut's three most sought-

87. *See* Morgan D. Dowd, *Justice Story, the Supreme Court, and the Obligation of Contract*, 19 CASE W. RSRV. L. REV. 493, 493–96 (1968); NEWMYER, *supra* note 69, at 78–83

88. WILLIAM B. SPRAGUE, ANNALS OF THE AMERICAN PULPIT: TRINITARIAN CONGREGATIONAL 397 (N.Y., Robert Carter & Bros. 1859); DAVID MCCLURE & ELIJAH PARISH, MEMOIRS OF THE REV. ELEAZAR WHEELOCK, D.D. 11–13 (Newburyport, Edward Little & Co. 1811). Eleazar followed in the early footsteps of his great-great grandfather, a graduate of Cambridge University and an "eminent preacher of the gospel" who migrated to the colonies in 1637 to escape "persecution for nonconformity to the established religion." MCCLURE & PARISH, *supra*, at 11–13.

89. MCCLURE & PARISH, *supra* note 88, at 13; *see also* SPRAGUE, *supra* note 88, at 398.

90. DICK HOEFNAGEL, ELEAZAR WHEELOCK AND THE ADVENTUROUS FOUNDING OF DARTMOUTH COLLEGE 4 (2002).

91. *Id.* at 5–15.

92. GEORGE M. MARSDEN, JONATHAN EDWARDS: A LIFE 216–21 (2003).

after itinerant preachers.[93] Unfortunately, that participation and prominence caused tension between Eleazar and the Standing Order, many of whom viewed the popular evangelists as fanatical, disrespectful, and dangerous to public order.[94] This blowback caused Eleazar to abandon itinerant preaching and turn his excess energies to addressing the economic wellbeing and security of his family, and to the Latin School.[95] It was in this latter endeavor that he first encountered Samson Occom, a nontraditional student who would later become central to Eleazar's entrepreneurial endeavors.[96]

In 1743, Eleazar agreed to take Samson Occom into the Latin School.[97] Occom, a then nineteen-year-old Mohegan Indian, had been converted to Christianity by Eleazar's brother-in-law and sought Eleazar's instruction so that he could better read and understand the Bible, and could then return to his native community as a missionary.[98] After four years under Eleazar's tutelage, Occam departed as an Eleazar devotee, and with a knowledge of English, Latin, Greek, and the scriptures, which enabled him to receive ordination as a minister without the normal requirement of college education.[99]

It is unclear exactly when Eleazar hit upon the idea of creating a charity school for the education and Christianizing of Indian youth. Undoubtedly, though, the idea sprang from his experience with the Latin School and with educating Occom, and from the opportunity presented by the French and Indian War, which commenced in 1754. For many years the English government and charitable benefactors had shared an interest in Christianizing and civilizing the Indians on whose lands the colonists steadily encroached, and to that end competed with the French and the Jesuits who instead offered Catholicism and a much more limited intrusion into Indian lands. The prevailing English strategy was to send English missionaries into Indian country to do this work, but with the war's outbreak it was no longer safe for missionaries to follow that path.[100] Eleazar offered a different plan—send Indian youth to me and I will educate and Christianize them to be missionaries who will be accepted back into their communities to spread the gospel

93. JAMES DOW MCCALLUM, ELEAZAR WHEELOCK 8–38 (1939); HOEFNAGEL, *supra* note 90, at 5–9; MARSDEN, *supra* note 92, at 216–21, 320, 323.

94. MCCALLUM, *supra* note 93, at 19–41.

95. MCCLURE & PARISH, *supra* note 88, at 20.

96. HOEFNAGEL, *supra* note 90, at 9–15.

97. *Id.*

98. *Id.*

99. MCCLURE & PARISH, *supra* note 88, at 16–17; HOEFNAGEL, *supra* note 90, at 12–13.

100. MCCALLUM, *supra* note 93, at 75–78; HOEFNAGEL, *supra* note 90, at 16–17; FRIEDENBERG, *supra* note 53, at 96.

and the ways of the English.[101] Samson Occom was Eleazar's Exhibit A—an example of the type of Anglified Indian missionary that his school would produce.[102]

In pursuit of this new endeavor, Eleazar took in his first two Indian students in 1754.[103] Concurrently, he began to have great success in obtaining charitable gifts to support this activity.[104] One of the most important early donors was wealthy farmer Joshua Moor, who gifted a dwelling and schoolhouse located on two acres of land adjoining Eleazar's homestead, and the school was thereafter "named Moor's Indian Charity School."[105] Meanwhile, the Latin School continued the instruction of non-Indian youths, but the line between the two schools was blurry at best.[106]

Moor's gift became the personal property of Eleazar, operating as what we would now call a sole proprietor, subject only to whatever restrictions the deed of gift theoretically imposed. However, Eleazar quickly found that, unlike Moor, many donors were unwilling to make charitable gifts that could easily be used for purposes other than those intended. As early as 1755 Eleazar was advised to seek a corporate charter, which would provide donors with assurance that their gifts would go to a permanent entity supervised by a board of trustees appointed by the king, rather than directly or indirectly into Eleazar's coffers.[107] It would take Eleazar fourteen years to achieve the charter he began seeking soon after.

Eleazar's fundraising efforts touched potential donors not only in the colonies, but also in England and Scotland. In 1765 Eleazar dispatched Samson Occom and another emissary to England, a trip that generated eleven thousand pounds in gifts and the creation of an English trust to safeguard the use of the donated funds; one of the prominent trustees was Lord Dartmouth.[108] Eleazar also set up an

101. BAXTER PERRY SMITH, THE HISTORY OF DARTMOUTH COLLEGE 11–12 (Bos., Houghton, Osgood & Co. 1878); MCCALLUM, *supra* note 93, at 75–78.

102. HOEFNAGEL, *supra* note 90, at 16–18.

103. MCCLURE & PARISH, *supra* note 88, at 23.

104. *Id.* at 23–25.

105. *Id.* at 25 (emphasis omitted).

106. HOEFNAGEL, *supra* note 90, at 10–33.

107. JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES 21–24 (Leonard W. Levy ed., Da Capo Press 1971) (1895); FRANCIS N. STITES, PRIVATE INTEREST AND PUBLIC GAIN: THE *DARTMOUTH COLLEGE* CASE, 1819, at 2–3 (1972); HOEFNAGEL, *supra* note 90, at 20.

108. MCCALLUM, *supra* note 93, at 150–66; HOEFNAGEL, *supra* note 90, at 30–31.

American trust to which many colonial gifts were funneled.[109] These trusts were not wholly satisfactory to either Eleazar or his donors.[110]

As Moor's Charity School grew, so did Eleazar's ambitions, which coincided with the rapid expansion of Connecticut and the allure of land and land speculation, which began to grip the colonies in the three decades before the Revolution. During this period, land companies sprang up as speculative intermediaries seeking profit from resale, rather than from personal settlement and use. Because the lands in question were often claimed by more than one colony, by both the English and the French kings, and by various Indian nations, this speculative activity would generate numerous competing and uncertain land titles.[111] This practice was to play out later in the Yazoo land fraud that was to play such a pivotal role in American law and politics, culminating with the case of *Fletcher v. Peck*.[112]

In Connecticut, frontier land speculation centered on the Susquehanna Company, formed in 1753 to appropriate the Wyoming valley in what is now northeastern Pennsylvania, land that Connecticut claimed under its Royal Charter of 1662.[113] In New Hampshire and what is now Vermont, land speculation centered on grants made by the royal governors of New York and New Hampshire.[114] Further south, the speculative activity centered on the Ohio Land Company and the Ohio territory, and that speculative activity was so threatening to the French and affected Indian nations that it was a primary cause of the French and Indian War.[115] At that war's end in 1763, settlement on America's frontiers became relatively safe, and Eleazar sought in earnest to capitalize on the value of Moor's Charity School.[116]

Land speculation in New England essentially involved buying the right to create townships and selling that land at a profit to settlers. A township with amenities was more likely to attract settlers, increasing the value of speculators' land.[117] As Eleazar had come to

109. MCCLURE & PARISH, *supra* note 88, at 25.

110. HOEFNAGEL, *supra* note 90, at 30–32; STITES, *supra* note 107, at 3–4.

111. FRIEDENBERG, *supra* note 53, at 109–36.

112. *See supra* Section I.D.2 (describing how competing claims for the Yazoo lands led to Joseph Story's rise to prominence and the Supreme Court's affirmation of property rights).

113. *The Susquehanna Settlers,* CONNECTICUTHISTORY.ORG (Apr. 29, 2015), https://connecticuthistory.org/the-susquehanna-settlers/ [https://perma.cc/SXD7-879G].

114. FRIEDENBERG, *supra* note 53, at 73–84, 311–13.

115. *Id.* at 95–103.

116. England's attempt to restrain westward settlement via the Proclamation of 1763 in order to avoid further costly skirmishes or outright war with Indian nations would be one of the causes of the American Revolution. *See id.* at 109–99.

117. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 59–62, 73–78 (1920).

realize, he had assets of great value to land speculators—the ability to provide budding townships both a ready-made school and a number of congregants eager to resettle wherever Eleazar might go.[118] And the value of his assets would be even greater if he could offer not just a preparatory academy but a full-scale college.

Foreshadowing the way modern entrepreneurs play one political jurisdiction against another in search of the best deal and design business plans to fit investors' preferences, Eleazar began offering his school, now described as including a budding college, to competing townships and colonies in return for land grants and a corporate charter.[119] The horse trading with various competing locations played out over more than a decade, with the Susquehanna Company and various towns and colonies making firm offers or expressing strong interest.[120]

Ultimately, Eleazar struck a bargain with John Wentworth, the royal governor of New Hampshire.[121] Wentworth wanted settlers in the western Connecticut valley and needed an excuse to build a road from Portsmouth to the interior of the colony. He also wanted for New Hampshire the amenity that Massachusetts and Connecticut had long possessed—a college. Eleazar, who had dreamed of founding a college, offered both a credible plan to expand his existing school, and a substantial group of followers who would relocate to New Hampshire. To induce Eleazar to provide these benefits to New Hampshire, Wentworth offered a corporate charter and substantial land grants for both the prospective college and for Eleazar personally.[122]

The charter was not the product of royal fiat in its design. Wheelock prepared the first draft in his own hand, apparently advised by four lawyers, and Wentworth then inserted substantial changes advised by his own lawyer.[123] Each side eventually compromised, as in modern business deals. Ultimately, the charter, issued in 1769 by Wentworth as the agent of King George, incorporated twelve persons as The Trustees of Dartmouth College, granted that incorporated body the right to self-perpetuate, and named Eleazar as president.[124] While the

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118. MCCALLUM, *supra* note 93, at 188.

119. *Id.* at 167–76.

120. HOEFNAGEL, *supra* note 90, at 36–38; MCCALLUM, *supra* note 93, at 112–19. Expressions of interest extended from Nova Scotia to the southern colonies, leading Eleazar to exclaim in his correspondence, "We can have the pick of America." MCCALLUM, *supra* note 93, at 113 (internal quotation marks omitted).

121. MCCALLUM, *supra* note 93, at 167–76.

122. *Id.* at 167–73; LAWRENCE SHAW MAYO, JOHN WENTWORTH: GOVERNOR OF NEW HAMPSHIRE 1767-1775, at 105–07 (1921).

123. *See* MCCALLUM, *supra* note 93, at 167–73.

124. *See id.* at 172–76.

charter gave the president control of day-to-day operation of the College, it vested ultimate power and authority in the incorporated trustees.[125] Eleazar had hoped to have a majority of the original trustees composed of his nominees.[126] Wentworth, however, insisted on splitting the incorporated board fifty-fifty, naming Eleazar, five of Eleazar's nominees, and six persons holding colonial offices at the pleasure of the king and owing primary loyalty to the king, including Wentworth himself.[127] The charter also granted Eleazar the power to name his successor as president by provision in his last will and testament.[128]

The exact location for the College was not specified in the charter, and several townships in New Hampshire competed for selection. Eleazar eventually preferred, and prevailed on Wentworth to accept, what is now Hanover in westernmost New Hampshire as the winning location.[129] Whether it was part of Eleazar's calculus or not, the location would play a key role in the evolution of Dartmouth College. Hanover was on the banks of the Connecticut River, which later would become the boundary between New Hampshire and Vermont. The College would become a central actor in the religious and social life of the community that straddled the river, and would be able to draw support, including land grants, not only from New Hampshire but also from the emerging political entity that would become Vermont. Importantly, Governor Wentworth made good on his promise of land and autonomy for Wheelock and the College—"a district three miles square, called Dresden, was created, to be under the immediate jurisdiction of Dartmouth College, and special jurisdiction over this little empire was given to [Eleazar] as its magistrate."[130]

In 1770, Eleazar and the initial cadre of Dartmouth College faculty, students, and family members trekked to Hanover, and by fall had constructed the first College buildings and commenced College

125. As was to become important in the later *Dartmouth College* case, the charter actually incorporated twelve persons as "the Trustees of Dartmouth College" with the authority as body politic to hold and administer the property of the corporation. References hereafter to the "Trustees of Dartmouth College" are to the incorporated body. References to "trustees," are to the natural persons holding those positions at a given time.

126. As Eleazar had early written to one of his legal advisors, he no longer wanted to be subject to the whims of independent trustees. He wrote: "I am quite Sick of the tho't of conducting a Charity School by a Body—they Won't attend so as to understand it—they are diffident—too Sudden and peremptory in their Conclusions before they have well weighed matters . . . ." HOEFNAGEL, *supra* note 90, at 26.

127. SHIRLEY, *supra* note 107, at 28–37.

128. *Id.* at 53.

129. MCCALLUM, *supra* note 93, at 176.

130. SHIRLEY, *supra* note 107, at 65.

operations.[131] Eleazar was the center of this new domain. "[Eleazar's] personal friends from Connecticut swarmed up the valley and located above and below him on both sides of the river. Fifty-two people from Connecticut settled Hanover, and eight hundred families from Connecticut gathered in a few towns on the New Hampshire side alone."[132] For his devoted flock and the College students and faculty, Eleazar continued his preaching in collaboration with the existing, but previously struggling, Hanover town church, over whose affairs he soon had much influence.[133]

The theoretical threat to Eleazar's control of the College represented by Governor Wentworth and his five appointees to the board never developed, both because Wentworth was immediately a devoted supporter of the College and because with the coming of the Revolution, he and the British-loyalist trustees were de facto removed from the board and eventually replaced with nominees of Eleazar's choosing.[134] Effectively, then, the College, the College Church, and the Dresden district adjoining Hanover were under Eleazar's personal and paternal sway from the outset.

Finally with the authority and autonomy he had long sought, Eleazar would spend his remaining years nurturing Dartmouth College, preaching and ministering to his devoted flock in the local church, keeping the College afloat in the politically and fiscally challenging early years of the American Revolution, and quietly building his personal estate. He worked tirelessly in all of these roles until almost the moment of his passing.[135] At his death in 1779, he would bequeath to his legatees "sums, which at that time, would have been considered an ample fortune."[136]

B. The Second President—John Wheelock

It is difficult to identify the exact starting point of the tension between Dartmouth's second president, John Wheelock (hereinafter "John" or "Wheelock"), and the College's trustees that made the famous *Dartmouth College* case inevitable. However, it is not without merit to view the starting point as the death of John's father, Eleazar.[137]

131. MCCALLUM, *supra* note 93, at 178–82.

132. SHIRLEY, *supra* note 107, at 65.

133. 1 FREDERICK CHASE, A HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER, NEW HAMPSHIRE 7, 188–89 (John K. Lord ed., Cambridge, John Wilson & Son 1891).

134. MAYO, *supra* note 122, at 129–30; 1 CHASE, *supra* note 133, at 318, 556.

135. MCCALLUM, *supra* note 93, at 181–205; 1 CHASE, *supra* note 133, at 217–395.

136. MCCLURE & PARISH, *supra* note 88, at 123; *see also* 1 CHASE, *supra* note 133, at 559.

137. STITES, *supra* note 107, at 6; 1 CHASE, *supra* note 133, at 563.

In his last will and testament, executed twenty-two days before his death, Eleazar named John, one of his younger sons by his second marriage, to succeed him in office as president and trustee.[138] This appointment came as a surprise and likely a shock to John. Eleazar had not kept secret prior drafts of his will in which he had named other children or associates to be his successor, and had not told John of his final plans.[139] Had John immediately accepted the presidency, perhaps his relations with the other trustees would have been strong at the outset rather than strained. Instead, John made the trustees court him for over a year before agreeing to accept the appointment, which, during that interregnum, left the College adrift and its survival at heightened risk.[140]

But perhaps even John's immediate acceptance of the presidency would not have changed the course of events. John was but twenty-five years old at his father's death, lacked training in theology, and lacked his father's personal magnetism, religious stature, and earned respect. Thus, when John finally assumed the presidency, he was without some of the good will and unquestioned right to lead and command that Eleazar had enjoyed and hoped to transfer to his successor, and he faced at the outset a group of trustees not completely under his sway.[141]

To his credit, once in office John proved to be a very sound businessman and steered the College from the brink of financial ruin to solid ground.[142] As a member of Dartmouth's first graduating class and a former tutor at the College, John did have a strong understanding of the institution and its mission. Moreover, John actually wanted to be a teacher and scholar, and he embraced that role.[143]

Nonetheless, he gradually lost ground with the trustees. Like his father, he was by nature an autocrat, and tried to ensure that anyone hired as a professor or nominated to fill a vacancy among the trustees was a loyal personal friend.[144] Like his father, he pursued private profit along with enhancement of the College's well-being. Though not a minister, John, like his father, sought to exert control over local church affairs. However, John's preference for his own personal interests in

138. SHIRLEY, *supra* note 107, at 44; 1 CHASE, *supra* note 133, at 561–62.

139. 1 CHASE, *supra* note 133, at 563.

140. *Id.* at 564; STITES, *supra* note 107, at 6–7.

141. 2 JOHN KING LORD, A HISTORY OF DARTMOUTH COLLEGE: 1815-1909, at 2–3 (1913).

142. SMITH, *supra* note 101, at 77–80.

143. *Id.* at 76 ("In 1772, he was appointed a tutor, and was devoted to the business of instruction until the beginning of the Revolution.").

144. Eleazar had soured on independent trustees through his experiences with a trust set up to protect donors. *See supra* note 126 and accompanying text (discussing Eleazar's aversion to accommodating independent trustees' impulsive tendencies).

these matters seemed to take center stage rather too often and too insistently.[145] And John's lack of personal charm and punctilious manner did not help matters.[146]

The seeds for the eventual break in relations can certainly be traced to the twenty-three-thousand-acre land grant John obtained from the Vermont legislature in 1785. Half of the grant was to the trustees for the support of Dartmouth College and half was to John as president of, and for the support of, the Moor's Charity School.[147] When Eleazar had negotiated with Governor Wentworth for land grants, some of which he sought for himself, there was no conflict of interest; he was a sole proprietor, and it was for him to decide how to divide opportunities and properties between different activities for which he was solely responsible. But when John negotiated with Vermont for lands, he was wearing three hats, and only one of them was looking out for the interests of Dartmouth College. The grants for the benefit of the unincorporated Moor's Charity School, in which the trustees claimed no interest, could, under John's sole control, end up in his personal estate unless Vermont kept a watchful eye. It is unknown whether the trustees initially questioned why the Vermont legislature had divided the land grants as they did, or whether John had induced the legislature to favor the Moor's Charity School, then devoid of any Indian or charity students if in existence at all, to the disadvantage of the College.[148] And, in any event, since the College's part of the land grants covered more than half of the College's operating expenses, the trustees might have been inclined at the time to be grateful rather than suspicious of John's actions.[149]

But in 1799, the Vermont legislature began to question whether the 1785 land grants were valid and eventually took steps to void them.[150] John believed trustee Nathaniel Niles, who had been a member of the Vermont legislature in 1785, was an agent of Vermont interests in this matter, and tension between the two men thereafter infected the board and gradually led to a complete breakdown of trust between a majority of the board and John.[151] One asserted basis for voiding the

145. STITES, *supra* note 107, at 7–10; 1 CHASE, *supra* note 133, at 560–61; 2 LORD, *supra* note 141, at 6 ("[A]t the end of his presidency he was the possessor of over twelve hundred acres of land that had belonged to the College.").

146. STITES, *supra* note 107, at 6.

147. SHIRLEY, *supra* note 107, at 44; SMITH, *supra* note 101, at 80.

148. STITES, *supra* note 107, at 8–9.

149. 1 CHASE, *supra* note 133, at 626.

150. *Id.* at 621, 624–25.

151. 1 CHASE, *supra* note 133, at 618. Niles was everything that John Wheelock was not—having served in Congress and as a member of the Vermont Supreme Court, and being "an

1785 grants was that the Moor's Charity School had not been in existence either at the time of the grant or since. The real concern was that Vermont was getting little benefit from the grants, and the belief that John was using the portion of the grants he controlled for personal rather than charitable purposes.[152] It was now impossible for the trustees not to question why the Moor's Charity School was a grantee in the first place.

Prior to the Vermont challenge, the only activity for which Moor's Charity School resources were being used was running a college preparatory school for Hanover-area youth, none of whom were charity cases. It would be tempting to conclude that what was really in operation was the Latin School created by Eleazar in the 1730s, rather than Moor's Charity School.[153] To counter the charge that this was not really a charity school, John recruited two Indian students and one needy white student, and widely publicized both the existence and importance of the mission of Moor's Charity School.[154] The controversy between John and Vermont dragged on for eight years. In 1806, the Vermont legislature offered to settle the dispute: if John and the trustees would agree to surrender the 1785 land grants under which each had control of half of the land-grant income, Vermont would reissue the grants directly to the Trustees of Dartmouth College for the benefit of the College and Moor's Charity School as the Dartmouth board should see fit. John refused this compromise, which would have entailed significant loss of personal control over the land grants and likely would have resulted in a significant increase in the portion of the land-grant income devoted to College purposes.[155] Vermont finally agreed to leave the grants in place when, in 1807, John successfully petitioned the New Hampshire legislature to incorporate him, personally, as the president of Moor's Charity School.[156] John's conduct with respect to the Vermont land grants, and especially his use of political capital in petitioning the New Hampshire legislature for a personal corporate charter, rather than accepting the compromise offered in 1806, opened a gaping wound in his relationship with many of the College trustees.[157]

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inventor, manufacturer, poet, lawyer, priest, physician, and metaphysician . . . [of whom] Jefferson once said [ ] 'He was the ablest man I ever knew.' " SHIRLEY, *supra* note 107, at 82.

152. 1 CHASE, *supra* note 133, at 618, 624.

153. *Id.* at 618.

154. *Id.* at 618–19; STITES, *supra* note 107, at 9.

155. 1 CHASE, *supra* note 133, at 620–22.

156. SHIRLEY, *supra* note 107, at 45–47; 1 CHASE, *supra* note 133, at 625–26.

157. STITES, *supra* note 107, at 9.

As the Vermont problems moved towards resolution, new problems surfaced. The College had been trying for a number of years to hire a professor of divinity, with the expectation that such person would not only instruct at the College, but also pastor the town church. Yet, when the position was filled in 1804, John obstinately refused to allow new Professor of Divinity Shurtleff to assume that role. Instead, John demanded that Shurtleff share the position with Professor Smith, the president's strongest ally on the Dartmouth faculty, who had been serving as pastor for many years. Perhaps John questioned Shurtleff's loyalty, as he was a friend of Nathaniel Niles, or perhaps he sensed that Shurtleff would never be as subservient as John demanded. In any event, though a majority of the Hanover members of the church strongly desired to have Shurtleff be their sole pastor, they were outnumbered by Vermont members of the church, who felt beholden to John and yielded to his wishes, though many, too, wished to have Shurtleff as their pastor. The vast majority of the Hanover members refused to submit and continued to petition John to allow Shurtleff to be their pastor. Despite the calls for compromise by two independent advisory councils who were called in to mediate, John steadfastly refused. As a result, most of the Hanover members made the decision to break away and form a new church.[158]

As the church controversy simmered, a majority of the trustees, led by Nathaniel Niles, began to openly rebel and assert the governance rights granted them under the charter. In 1809, they rejected John's nominee to fill a vacant trustee post and elected their own choice instead.[159] In 1810, John nominated ally Elijah Parish to fill the vacant language professorship. Parish, a minister in Byfield, Massachusetts, was a stern, arrogant man and a staunch supporter of John and the Standing Order.[160] The trustees appointed another candidate instead.[161] In 1811, almost all of the Hanover members of the town church formally departed and were officially recognized as a separate congregation by regional Congressionalist authorities. Soon after, Professor Shurtleff, disobeying John's wishes, agreed to informally pastor the breakaway church, and two of Dartmouth's three other faculty members soon joined the new congregation.[162] John viewed these actions as the equivalent of treason, and sought the trustees' support for a new College church to be housed in the small College

158. 2 LORD, *supra* note 141, at 16–56.

159. *Id.* at 60.

160. *See infra* text accompanying notes 186–198 (discussing the relationship between Elijah Parish and the Wheelock family).

161. 2 LORD, *supra* note 141, at 60.

162. *Id.* at 32, 45, 60.

chapel rather than share the spacious town meeting house with the breakaway church. Further, he asked the trustees to confirm that as professor of religion, it would be Professor Shurtleff's obligation to pastor the new College church. John justified his request on the grounds of student needs, but it was obvious he hoped to damage the prospects of the breakaway Hanover congregation. A majority of the trustees refused to have the College's resources used in this way, seeing it as inconsistent with the charter's promise to respect religious liberties.[163] To add insult to injury, and to prevent John from retaliating against any dissenters at the College, the trustees also took away John's disciplinary powers.[164]

For the next three years, John and the dominant faction on the board coexisted in their roles. Each viewed the other with barely masked hostility. Each bided their time: the trustees hoping John, aging and in failing health, would resign; while John was secretly calculating how to regain dominance.[165]

C. The New Hampshire Judicial Controversy: The Brief Return to Power of the Federalists.

As this uneasy truce played out, the political fortunes of the Federalists took a turn for the better. Democratic-Republicans had taken control of the New Hampshire executive and legislative branches in 1805, and except for a brief return to shared control with the Federalists in 1809, remained in power until the election of 1813.[166] As the Democratic-Republicans took control in New Hampshire, William Plumer, who four years later would play a pivotal role in the remodeling of Dartmouth College's charter, changed parties. As a member of the Federalist Party, Plumer had served as speaker of the New Hampshire House of Representatives and as a U.S. Senator. In 1812, heading the Democratic-Republican ticket, Plumer was elected governor. His tenure was to be short.[167] The economic and psychic impact of the War of 1812 on New England lifted Federalists' boats throughout the region. In New Hampshire's election of 1813, the Federalists' nominee for governor, John Taylor Gilman, who was a Dartmouth College trustee, defeated

163. *Id.* at 57–60.

164. *Id.* at 61.

165. STITES, *supra* note 107, at 10–11.

166. COLE, *supra* note 9, at 21–26.

167. LYNN WARREN TURNER, WILLIAM PLUMER OF NEW HAMPSHIRE, 1759–1850, at 201–05 (1962); ALBERT H. HOYT, MEMOIR OF WILLIAM PLUMER, SENIOR 8–10 (Bos., David Clap & Son 1871).

Plumer, as the Federalists also captured strong majorities in both houses of the New Hampshire legislature.[168]

Rather than proceed with some humility and respect for the vanquished Democratic-Republicans, the now Federalist-controlled legislature immediately moved to abolish the existing state courts and create new courts in their place, thereby ending the terms in office of the sitting New Hampshire jurists.[169] There were creditable policy reasons for taking both steps, including the fact that the quality of some of the sitting jurists was questionable to say the least.[170] But to the public at large it looked exactly like the congressional Democratic-Republicans' repeal of the Federal Judiciary Act of 1801, which Federalists had derided as partisan politics of the worst sort and an unconstitutional violation of the sitting jurists' lifetime tenure. Now, it was the Democratic-Republicans who righteously defended the sanctity of judicial tenure and the Federalists who stood exposed as usurpers of power.

The political backlash and public outrage, fueled by the Democratic-Republican press, was immediate and intense. Newly elected Federalist Governor John Taylor Gilman sought to quell the uproar by appointing near-universally respected Federalist, Jeremiah Smith, who had served as chief justice of the Superior Court of Judicature from 1802 to 1809, as chief justice of the newly created supreme court. Gilman implored Smith to accept the position.[171] "On all sides, it was considered impossible for the new court to get under weigh [sic], unless Mr. Smith would consent . . . ."[172]

For Jeremiah Smith, the offer of appointment presented an agonizing dilemma. The position was one that in normal circumstance he would jump at. His highly successful career as a lawyer had been interspersed with stints serving New Hampshire on the superior court, for four terms as a member of the U.S. House of Representatives, and for one term as governor.[173] But of all these roles, serving as an appellate jurist had both given Smith more satisfaction and suited his temperament and character better than his other pursuits. Indeed, the only position he had enjoyed and treasured more than serving as chief justice of New Hampshire's highest court was his short-lived stint on

168. COLE, *supra* note 9, at 24–26; TURNER, *supra* note 167, at 204–05.

169. TURNER, *supra* note 167, at 225–26.

170. *See* MORISON, *supra* note 45, at 265 ("There were confessedly, in the old [court] system, serious imperfections, which were remedied by the new [system]. . . . [B]ut the main object in making the change undoubtedly was to get rid of incompetent judges.").

171. *Id.*

172. *Id.* at 267.

173. *See generally id.* at 45–259 (discussing the career of Jeremiah Smith).

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.

turn over the College records and property, and, if Woodward refused, to take whatever legal actions he deemed necessary to obtain those items.[281] On October 7, 1816, Olcott made formal demand of Woodward for the College records and property, and Woodward refused on the basis that the College Trustees had no authority to act for the remodeled University, and that Woodward continued to rightfully carry out his duties under the authority of the properly amended charter.[282]

As the College Trustees made their demand on Woodward, Plumer was grappling with how to proceed. The Charter-Amendment Act had authorized the governor to convene a meeting of the University Trustees on August 26 but had made no provision for adjourning or calling a meeting at a later day in the event a quorum could not be garnered.[283] As the full implications sank in of his probable lack of authority to call a meeting after the twenty-sixth or to appoint trustees after that date, the Governor cancelled the September 17 adjourned meeting of the University board. The Governor sought legal support for the proposition that such powers were implied in the Charter-Amendment Act and decided to seek a supportive advisory opinion from the superior court. [284]

The legislature already had a special session scheduled for November 1816. Having developed what would prove to be a well-founded doubt that the superior court would give him the advisory opinion he needed,[285] Plumer decided to seek additional legislation to cure the flaws in the Charter-Amendment Act and quell the College Trustees' rebellion.[286]

By Act approved December 18, 1816, Plumer obtained what he needed to activate the University Trustees. That Act: (1) gave the governor power to convene the first meeting of the University Trustees at any time and place, and to fill any vacancy in the board occurring prior to the next annual meeting; (2) decreased the required quorum for a meeting of the trustees from eleven to nine; and (3) gave trustees authority to adjourn their initial meeting, as necessary, until the requisite quorum could be assembled.[287]

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281. SHIRLEY, *supra* note 107, at 116–17.

282. *Id.* at 117–18.

283. TURNER, *supra* note 167, at 265.

284. *Id.* at 266; SHIRLEY, *supra* note 107, at 118–19.

285. The advisory opinion of the Superior Court delivered on November 25, 1816 would confirm the governor had no authority to call a new meeting or fill vacancies occurring after August 26. SHIRLEY, *supra* note 107, at 119–21.

286. *Id.* at 121–22.

287. FARRAR, *supra* note 243, at 23–24.

By subsequent Act, approved December 26, the legislature further strengthened Plumer's hand.[288] First, it imposed substantial civil penalties on persons presuming to act as a Dartmouth officer, professor, or trustee under authority of the old charter, or on persons who "shall in any way directly or indirectly wilfully impede or hinder" persons carrying out those offices under the authority of the Charter-Amendment Act.[289]

Secondly, the December 26 Act further amended the Charter-Amendment Act to negate the College Trustees' claimed removal and replacement of William Woodward:

> *And be it further enacted,* That the person or persons who sustained the offices of secretary and treasurer of the trustees of Dartmouth College, [immediately prior to] the passage of the [College-Amendment Act] shall continue to hold and discharge the duties of those offices, as secretary and treasurer of the trustees of Dartmouth University, . . . [and] shall in his office have the care, management, direction, and superintendence of the property of said corporation, whether real or personal, until a quorum of said trustees shall have convened in a regular meeting.[290]

These new legislative actions were of great concern to the College faction. On January 3, 1817, President Brown wrote to one of his key legal advisors, Timothy Farrar, Jr.:

> Now, what shall we do? One of these four courses must be taken. We must either keep possession and go on to teach as usual, without any regard to the law, or, withdrawing from the college edifice and all the college property, continue to instruct as the officers of Dartmouth College; or, relinquishing this name for the present, collect as many students as will join us, and instruct them as private but associated individuals; or else we must give all up and disperse. Will you give us your opinion, what may be duty or what expedient, as soon as convenient? Particularly, will you give us your opinion whether, supposing this oppressive act to be judged constitutional, we should be liable to the fine, if we instruct as the officers of Dartmouth College, relinquishing, however, the college buildings, the library, apparatus, etc.[291]

Similar inquiries and discussions took place between and among the College faction and its supporters throughout the month as the College Trustees awaited Plumer's next move. The sentiment soon settled on ignoring the new legislation for now and responding to events as they should unfold.

Resistance depended, of course, on the resolve of the College faculty. Four of the institution's six faculty members—including, importantly, Brown, Shurtleff, and Adams, who comprised all of the

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288. *Id.* at 26.

289. *Id.* at 25 (internal quotation marks omitted).

290. *Id.* at 25–26 (internal quotation marks omitted).

291. SMITH, *supra* note 101, at 108 (quoting Letter from Francis Brown, President, Dartmouth Coll., to Timothy Farrar (Jan. 3, 1817)).

academic officers—committed to staying the course.[292] Brown emphasized his resolve by also turning down an offer to become the president of Hamilton College at a significantly higher salary.[293] Of the medical faculty, Dr. Cyrus Perkins, who had already agreed to become a University trustee, was a defector, and Dr. Nathan Smith, though a College supporter, was unwilling to risk the statutory penalties and decided to withdraw from the institution.[294] However, Professor Mussey remained in full support of the College.[295]

But resistance ultimately depended on the resolve of the College Trustees. In that regard, President Brown and Farrar, Jr., became the driving forces in convincing the College Trustees that litigation was ultimately unavoidable, and indeed, to be welcomed. Farrar, Jr. summed up the evolving consensus in his letter to President Brown dated January 26, 1817:

> We cannot, and I believe none of us wish to avoid a legal decision of the question whether the State legislature can destroy or disannul the former charter, and the sooner that question is decided the better it will be for the College.[296]

In reaching this consensus, the College Trustees were "controlled mainly by the positive will of the younger Farrar and the influence of [President] Brown."[297]

Meanwhile, armed with his expanded authority, Plumer proceeded to fill vacancies that had occurred among his original appointments to the University board and to prepare for a meeting of the University Trustees, which he noticed to be held in Concord beginning on February 4, 1817.[298]

At this point, John Wheelock played his last trump card to ensure that the University would perpetuate his legacy. The College Trustees had delayed ousting Wheelock and had put up with his abuses for longer than they otherwise would in hopes that Wheelock would deliver his promised legacy to the College. Likewise, Plumer and the University faction were keen to obtain Wheelock's bounty for the resource-strapped institution, obviating any obligations that might otherwise fall on the state of New Hampshire to care for its new child. On February 1, Wheelock made good on part of his long-promised gifts, deeding seven valuable properties to the Trustees of Dartmouth

292. 2 LORD, *supra* note 141, at 106.

293. *Id.* at 107.

294. *Id.* at 106.

295. *Id.* at 106–07.

296. *Id.* at 108–09 (quoting Letter from Timothy Farrar to Francis Brown, President, Dartmouth Coll. (Jan. 26, 1817).

297. SHIRLEY, *supra* note 107, at 132.

298. 2 LORD, *supra* note 141, at 111.

University.[299] However, such gifts came with the express proviso that title would revert to his estate if the Charter-Amendment Act were invalidated other than "with the consent of the Board of Trustees as then constituted."[300] And the gifts came with the implied proviso that his will could still be changed to favor or disfavor the University.[301]

On February 4, 1817 Plumer and some of the University Trustees arrived in Concord for the scheduled first meeting of the University Trustees, but a quorum was not yet obtainable.[302] Meeting on the same day, and anticipating the actions to be taken by the University Trustees, the College Trustees formally decided to proceed with litigation aimed at invalidating the Charter-Amendment Act.[303]

On February 6, with a quorum finally obtained, the University board began the process of removing from office President Brown, the other College Trustees, and Professors Adams, Smith, and Shurtleff.[304] Without waiting for the removals to be completed, John Wheelock's son-in-law, the Reverend William Allen, was appointed professor of logic and metaphysics.[305] On February 22, the University Trustees completed the removal of Brown, Shurtleff, and Adams, and reappointed Wheelock as president.[306] Since Wheelock was by then too ill to actually serve, they at the same time appointed his son-in-law, William Allen, to serve as interim president.[307]

Brown and the others removed from office prepared a detailed response to the University Trustees' actions, explaining why such actions were unlawful and how the College would respond to a takeover of its facilities, which they distributed to the public on February 28:

> [If University agents use force to] seize on the college buildings and property . . . the undersigned will make no forcible resistance, it not being a part of their policy to repel violence by violence. They will quietly withdraw when they cannot peaceably retain possession, and with the best accommodations they can procure will continue to instruct the classes committed to them until the prevalence of other counsels shall procure a repeal of the injurious act, or until the decision of the law shall convince them of their error, or restore them to their rights.[308]

299. *Id.* at 115.
300. *Id.* at 116 (emphasis omitted).
301. *Id.*
302. *Id.* at 111.
303. SHIRLEY, *supra* note 107, at 132.
304. 2 LORD, *supra* note 141, at 111.
305. *Id.* at 115.
306. *Id.* at 112, 115.
307. *Id.* at 115.
308. *Id.* at 114–15 (internal quotation marks omitted).

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.