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Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy

BY BRUCE A. CAMPBELL*

INTRODUCTION

In 1819, the United States Supreme Court announced its decision in *Trustees of Dartmouth College v. Woodward*.¹ In his opinion for the Court, Chief Justice John Marshall set forth what has come to be known as the *Dartmouth College* doctrine, the rule that a charter of a private corporation is a contract protected by the contracts clause of the federal Constitution² from arbitrary state legislative amendment or repeal.

The case arose from an attempt by the New Hampshire legislature to amend the charter of Dartmouth College.³ The College

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¹ 17 U.S. (4 Wheat.) 518 (1819).

² U.S. CONST. art. I, § 10.

³ There are many works on Dartmouth College and the *Dartmouth College* case. See generally, M. BAXTER, DANIEL WEBSTER AND THE SUPREME COURT 65-109 (1966); F. CHASE, A HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER, NEW HAMPSHIRE (1891); H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 9-12 (1969); J. HERBST, FROM CRISIS TO CRISIS 128-31, 146-47, 171-73, 232-43 (1982); J. LORD, A HISTORY OF DARTMOUTH COLLEGE: 1815-1909 (1932); J. MCCOLLUM, ELEAZOR WHEELOCK, FOUNDER OF DARTMOUTH COLLEGE (1939); REPORT OF THE CASE OF DARTMOUTH COLLEGE AGAINST WOODWARD (T. Fairar ed. Portsmouth 1819); L. RICHARDSON, HISTORY OF DARTMOUTH COLLEGE (1932); J. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES (1879); F. STITES, PRIVATE INTEREST AND PUBLIC GAIN (1972); L. TURNER, WILLIAM PLUMER OF NEW HAMPSHIRE, 1759-1850, at 295-302 (1962); J. WHITEHEAD, THE SEPARATION OF COLLEGE AND STATE 53-88 (1973). See also, Allison, *The Rise and Probable Decline of Private Corporations in America* in REPORT OF THE SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, HELD AT SARATOGA SPRINGS, NEW YORK, AUGUST 20, 21 and 22, 1884, at 241 (1884); Baxter, *Should the Dartmouth College Case Have Been Reargued?*, 33 NEW ENG. Q. 19 (1960); Daniell, *Eleazor Wheelock and the Dartmouth College Charter*, HIST. N. H. 3 (1969); *The Dartmouth College Case*, 8 AM. L. REV. 189 (1874); Denham, *An Historical Development of the Contract Theory in the Dartmouth College Case*, 7 MICH. L. REV. 201 (1909); Doe, *A New View of the Dartmouth College Case*, 6 HARV. L. REV. 161

was established as a "religious and literary institution"⁴ through the efforts of the Reverend Eleazor Wheelock, who successfully solicited donations from individuals.⁵ New Hampshire's royal Governor John Wentworth granted Wheelock a charter for Dartmouth College in 1769.⁶ A self-perpetuating board of twelve trustees was incorporated "forever."⁷ A nasty fight between Dartmouth President John Wheelock and the Board of Trustees led to the removal of Wheelock from the presidency, and the quarrel spilled into politics in 1815. The New Hampshire legislature then amended the charter of Dartmouth, changing the College to a University, adding nine new members of the Board of Trustees, and creating a new Board of twenty-five Overseers.⁸ The Board of Trustees of Dartmouth College formally refused to accept the charter amendment⁹ and filed a suit in state court challenging the validity of the legislature's action. When the New Hampshire high court upheld the amendment,¹⁰ the College trustees took an appeal to the United States Supreme Court, where they prevailed.¹¹

For the purpose of applying the federal contracts clause in the *Dartmouth College* case, the Supreme Court distinguished between public corporations, which for the most part remained

(1892); Hagan, *The Dartmouth College Case*, 19 GEO. L.J. 411 (1931); Hall, *The Dartmouth College Case*, 20 GREEN BAG 224 (1908); Jenkins, *Should the Dartmouth College Decision Be Recalled?* 51 AM. L. REV. 711 (1917); North, *The Political Background of the Dartmouth College Case*, 18 NEW ENG. Q. 181 (1945); Noyes, *Webster's Debt to Mason in the Dartmouth College Case*, 28 AM. L. REV. 356 (1894); Orton, *Confusion of Property with Privilege: Dartmouth College Case*, 67 INDEPENDENT 392, 448 (1909); Robbins, *The Private Corporation: Its Constitutional Genesis*, 28 GEO. L.J. 165 (1939); Russell, *Status and Tendencies of the Dartmouth College Case*, 30 AM. L. REV. 321 (1896); Trickett, *The Dartmouth College Paralogism*, 40 AM. L. REV. 175 (1906); Warren, *An Historical Note on the Dartmouth College Case*, 46 AM. L. REV. 665 (1912); Willis, *The Dartmouth College Case, Then and Now*, 19 ST. LOUIS L. REV. 183 (1934).

⁴ 17 U.S. (4 Wheat.) at 627.

⁵ *Id.* at 632-33.

⁶ *Id.* at 519-37.

⁷ *Id.* at 525, 527.

⁸ *Id.* at 539-44; Act of June 27, 1816, ch. 32, reprinted in 8 LAWS OF N.H. 505 (1920).

⁹ J. LORD, *supra* note 3, at 687-94.

¹⁰ Trustees of Dartmouth College v. Woodward, 1 N.H. 111 (1816). Arguments of counsel before the New Hampshire court are reprinted in 65 N.H. 473-624.

¹¹ 17 U.S. (4 Wheat.) at 518.

subject to state legislative control, and private corporations, the charters of which were contracts with the state, protected by the contracts clause from arbitrary legislative amendment or repeal.¹²

The distinction was imprecise, but in general a public corporation was one created for the purposes of government, an instrument of government founded on governmental property.¹³ A private corporation, in contrast, was founded on private property and was not created for purposes of government.¹⁴

In his opinion for the Court, Marshall declared that Dartmouth itself was an "eleemosynary" and a "private corporation"¹⁵ because it was "endowed by private individuals, who . . . bestowed their funds for the propagation of the christian religion among the Indians, and for the promotion of piety and learning generally."¹⁶ Dartmouth was "incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation."¹⁷ In these circumstances, Marshall declared, Dartmouth's charter was "plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties."¹⁸ Because the Crown originally stipulated in the charter-contract that the property of the donors would be held and applied by twelve trustees, the New Hampshire charter amendment increasing the number of trustees to twenty-one and adding a board of overseers "totally changed" the system, unconstitutionally impairing the obligation of the contract.¹⁹

In a rococo concurring opinion, elaborately decorated with citations, Justice Joseph Story identified three types of corpora-

¹² The United States Supreme Court first distinguished between "public" and "private" corporations in dictum in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815). For recent discussions of the public-private distinction, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059-1105 (1980); Newmyer, *Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the Business Corporation*, 25 DEPAUL L. REV. 825 (1976).

¹³ 17 U.S. (4 Wheat.) at 638.

¹⁴ *Id.* at 632-39.

¹⁵ *Id.* at 634.

¹⁶ *Id.* at 633.

¹⁷ *Id.* at 641.

¹⁸ *Id.* at 643-44.

¹⁹ *Id.* at 651-54.

tions. Strictly public corporations, founded solely on public property for governmental purposes, remained fully subject to state legislative control.²⁰ The charters of strictly private corporations, such as Dartmouth, founded principally or exclusively on private property for non-governmental purposes, were protected by the federal contracts clause from arbitrary legislative amendment or repeal, although a legislature could expressly reserve a power to amend or repeal the charter.²¹ A mixed public and private corporation was "in many respects . . . subject to legislative control," although the legislature could not "take away the property of the corporation, or change the uses of its private funds acquired under the public faith."²²

This Article surveys the legal and experiential basis of the *Dartmouth College* doctrine, focusing on the case as involving educational and, indirectly, religious corporations. The Article concludes that *Dartmouth College* was primarily a civil liberties decision in which the Supreme Court imaginatively adapted English common law tradition and the contract clause of the Constitution to advance two complementary goals: first, to protect at least some existing educational and religious institutions from the attacks of legislatures responding to religious and partisan groups, thus advancing the constitutional separation of church and state; and second, to encourage the foundation of new educational and charitable institutions. Part I surveys the English law of corporations, with special attention to the law of charitable corporations, so far as it is relevant to the *Dartmouth College* case. Part II discusses the American experience with the founding and control of colleges as a basis for the *Dartmouth College* decision. Part III discusses the American experience with municipal corporations, business corporations, and corporate reservation clauses as further bases for the decision, and the source of important distinctions drawn by the Court. Part IV summarily analyzes *Dartmouth College* as a civil liberties case, one in which the Court deliberately went beyond the specific in-

²⁰ *Id.* at 667, 669 (Story, J., concurring).

²¹ *Id.* at 675, 681, 684-90, 712 (Story, J., concurring).

²² *Id.* at 694 (Story, J., concurring). Justice Washington also filed a concurring opinion, dividing corporations into two, rather than three, types. *Id.* at 659-62 (Washington, J., concurring).

tentions of the framers to advance associational freedom and the goals of the first amendment's religion clauses against the states.

I. THE INHERITANCE: THE ENGLISH LAW OF CORPORATIONS

What influence did the English law of corporations and charities have upon the formulation of the *Dartmouth College* doctrine? When it decided *Dartmouth College* in 1819, the Supreme Court was well-informed about these aspects of English law.²³ This section answers the question by surveying the English law of corporations, and especially charitable corporations, so far as it had developed and was relevant to *Dartmouth College* in 1819, and by discussing the applicability of the English law to the case.²⁴

A. *The Functions of English Corporations*

English common and statutory law provided conceptual points of departure for the Supreme Court's analysis. Corporations performed several basic functions in the English legal system of the seventeenth and eighteenth centuries. Corporations were used for government in its broadest sense—for organizing and managing municipalities and the like, as well as charitable, religious, commercial and other types of institutions.²⁵

Equally important, the corporation as an "artificial person"²⁶

²³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), concerned the power of Congress to charter a corporate bank and occasioned an extensive investigation of the nature and uses of corporations in England and the United States. *Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1 (1819), concerned the power of an equity court to enforce a bequest to an unincorporated charitable association. J. Story, *Note I. On Charitable Bequests*, 17 U.S. (4 Wheat.) 3 app. (1819) was addressed principally to the issue raised in *Trustees of Philadelphia Baptist Ass'n. Dartmouth College* concerned both corporations and charities.

²⁴ The survey of English law of corporations is complete and correct as far as it goes but is not intended to be a full account. The subjects chosen for analysis and the focus of analysis, were determined by *Dartmouth College*, and by what the Justices apparently knew about the relevant English law.

²⁵ 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 455-56, 458-59 (Oxford 1765 & photo. reprint 1979).

²⁶ *Id.* at 455.

enabled individuals in a group to take property and legal privileges in "perpetual succession," which Blackstone characterized as "the very end of . . . incorporation."²⁷ Perpetual succession was simply the power of appointing new members in place of those who had been removed from membership. Perpetuity as such was not unique to corporations, but could have been, and was, regularly achieved through the use of the trust. The Inns of Court and other venerable English institutions,²⁸ a wide variety of charitable institutions,²⁹ and endowed dissenting academies³⁰ achieved relative permanence through the use of the unincorporated trust. However, the trust device was both inconvenient, because it required endless conveyances,³¹ and risky, since trustees might die, resign, or become incapacitated, necessitating governmental aid to revive the organization.³² As Marshall indicated in *Dartmouth College*, corporations were used chiefly for the purpose of avoiding "the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances."³³

B. *Parliament and Corporations*

The Supreme Court was particularly interested in the relationship between the English government and corporations. Parliament, of course, was omnipotent.³⁴ It could charter a corporation or authorize the crown to do so.³⁵ Perhaps more importantly,

²⁷ *Id.* at 463.

²⁸ 1 S. KYD, A TREATISE ON THE LAW OF CORPORATIONS 7 (London 1794 & photo. reprint 1978); F. MAITLAND, *Trust and Corporation*, in SELECTED ESSAYS 141, 189-196 (1936).

²⁹ W. JORDAN, PHILANTHROPY IN ENGLAND, 1480-1660, at 122 (1959).

³⁰ H. MCLACHLAN, ENGLISH EDUCATION UNDER THE TEST ACTS 4 (1931); Herbst, *The First Three American Colleges: Schools of the Reformation*, in 8 PERSPECTIVES IN AMERICAN HISTORY 38-40 (D. Fleming and B. Bailyn eds. 1974). Although legal perpetuity was probably not a major consideration of business organizations, business, especially after the Bubble Act, 6 Geo., ch. 18 (1720), which restricted the development of the business corporation, often organized under private trusts or partnerships. C. COOKE, CORPORATION, TRUST AND COMPANY 80-88, 95 (1951); A. DuBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720-1800, at 217-19 (1938); Gower, *The English Private Company*, 18 LAW & CONTEMP. PROB. 535, 535-36 (1953).

³¹ 1 S. KYD, *supra* note 28, at 7.

³² Herbst, *supra* note 30, at 38.

³³ 17 U.S. (4 Wheat.) at 636.

³⁴ 1 W. BLACKSTONE, *supra* note 25, at 462.

³⁵ *Id.* at 461.

it could modify or destroy a corporation as easily as create it.³⁶ Even Edmund Burke, who conceded that a charter was a "contract" between Parliament and the incorporated East India Company, insisted that Parliament alone was the judge of whether the company so abused its privileges that the contract was broken.³⁷ In practice, however, Parliament in the eighteenth century usually heeded pleas to respect corporate "vested rights," and seldom took away economically valuable privileges without providing compensation,³⁸ presenting a model of deliberate legislative inaction for Americans to follow.

C. *The Crown and Corporations*

The Supreme Court was much more interested in the English royal prerogative with respect to corporations. Institutionally, limited government in England meant a Crown restricted by law, and the legal relationship between Crown and corporation provided a model of limited government for Americans to study and, partially, to emulate.

Both the legal limitations upon the prerogative power to create corporations and to recharter existing corporations supported Justice Buller's conclusion in a case involving the rechartering of a borough that "the grant of incorporation [is] a compact between the Crown and a certain number of subjects, the latter of whom undertake in consideration of the privileges which are bestowed, to exert themselves for the good government of the place."³⁹

The King's express or implied consent was necessary for the creation of a corporation,⁴⁰ and in the eighteenth century most corporations were created, or recreated, by royal charter.⁴¹ The Crown thus had ultimate control over the terms of a charter, except so far as limited by Act of Parliament or the law. However, even within the area of royal discretion, the King's power was

³⁶ *Id.* at 473.

³⁷ 23 PARL. HIST. ENG. 1317, 1318 (1783).

³⁸ A. DUBOIS, *supra* note 30, at 120, 196 n. 251, 197 n. 252.

³⁹ *King v. Pasmore*, 100 Eng. Rep. 531, 556 (K.B. 1789).

⁴⁰ 1 W. BLACKSTONE, *supra* note 25, at 461; 1 S. KYD, *supra* note 28, at 41.

⁴¹ 1 W. BLACKSTONE, *supra* note 25, at 461.

not absolute. The Crown, by virtue of the prerogative alone, could not impose a corporation on unwilling individuals,⁴² and a majority of those intending to be incorporated had to accept a charter before the corporation could go into operation.⁴³ Thus, persons seeking a charter had some leverage, and the charter which ultimately issued could and often did contain provisions which were compromises between what was fully desired by both Crown and corporators.⁴⁴

Equally important to Americans, after a corporation was created, the Crown could neither dissolve the corporation, nor take away its privileges or immunities by virtue of the prerogative alone.⁴⁵ A corporation could, of course, voluntarily accept a charter modification.⁴⁶

Although the Crown could correct corporate abuses of chartered privileges through writs of mandamus,⁴⁷ prohibition,⁴⁸ and *scire facias*⁴⁹ and informations in the nature of *quo warranto* in the King's Bench,⁵⁰ these procedures were unwieldy and aroused great opposition when used by Charles II and James II for political purposes.⁵¹ In order to retain control over corporations it

⁴² *Rex v. Askew*, 98 Eng. Rep. 139, 147-48 (K.B. 1768).

⁴³ 1 S. KYD, *supra* note 28, at 65; J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES OF THE SUBJECT 124 (London 1820).

⁴⁴ J. LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660-1688, AND ITS CONSEQUENCES 3-4, 88-89 (1969).

⁴⁵ *Rex v. Vice-Chancellor of Cambridge*, 97 Eng. Rep. 1027, 1031 S. C., *sub nom. King v. University of Cambridge*, 96 Eng. Rep. 316 (K.B. 1765); *King v. Pasmore*, 100 Eng. Rep. 531, 534 (K.B. 1789); J. CHITTY, *supra* note 43, at 132; 1 S. KYD, *supra* note 28, at 65-66; 2 *id.* at 447.

⁴⁶ 97 Eng. Rep. 1027, 1031 (K.B. 1765).

⁴⁷ 2 S. KYD, *supra* note 28, at 291-394. On the superintendence of English corporations, see Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369 (1936).

⁴⁸ *Bentley v. Bishop of Ely*, 94 Eng. Rep. 132 (K.B. 1729).

⁴⁹ 3 W. BLACKSTONE, *supra* note 25, at 260-61; J. CHITTY, *supra* note 43, at 330-31.

⁵⁰ 2 S. KYD, *supra* note 28, at 395-445.

⁵¹ Both Charles II and James II filed information in the nature of *quo warranto* against borough and other corporations seeking forfeiture of their charters on the grounds that they had acted contrary to their charter provisions. Nearly all boroughs capitulated, surrendering their old charters and accepting new ones. In the new charters, the Crown retained the effective power to determine who would serve as corporate officers. The Crown thus secured a royal patronage and substantial influence over local affairs and the selection of representatives to Parliament. See Sacret, *The Restoration Government and Municipal Corporations*, 45 ENG. HIST. REV. 232 (1930); J. LEVIN, *supra* note 44, at 1-16,

created, the Crown often included reservation clauses in original charters or in charters recreating corporations which had their original charters as a result of proceedings on an information in the nature of quo warranto. When the original or revised charter was accepted, the corporators would assent to the reserved power of the Crown, in effect waiving the protective legal restrictions on the royal prerogative.⁵² For example, after the City of Chester defaulted in a proceeding against it on an information in the nature of quo warranto, forfeiting its right to be a corporation, King Charles II granted a new charter, reserving to the Crown the discretionary power to remove corporate officers.⁵³ The Bubble Act, which authorized the Crown to charter two marine insurance corporations, provided that the Crown would reserve a power to terminate the charters if the Crown found the "continuance of the . . . two corporations to be hurtful or inconvenient to the public" at any time after thirty-one years from the issuance of the charter.⁵⁴ In *East India Company v. Sandys*,⁵⁵

82-95, 109-12 app. Only the City of London contested the Crown's information, resulting in a celebrated case. *Id.* at 17-81. *King v. City of London*, (K.B. 1683), in 4 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANORS; FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I, at 769 (2d ed. London 1730) (1st ed. London 1719).

⁵² Although the practice was otherwise, at least in the time of the Tudors, it was thought that where the Crown was the founder of a charity and promulgated statutes for the governance of the institution, the Crown could not promulgate new statutes without proper consent unless the Crown had expressly reserved power to do so in the original charter or statutes. L. SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MORTMAIN, AND CHARITABLE USES AND TRUSTS, 346-47 (London 1836); cf. *Bentley v. Bishop of Ely*, 93 Eng. Rep. 936, 94 Eng. Rep. 305 (K.B. 1730) (*rev'd* H.L.).

⁵³ *Rex v. Amery*, 100 Eng. Rep. 278 (K.B. 1788), *rev'd*, 1 Eng. Rep. 981 (H.L. 1790); 2 S. KYD, *supra* note 28, at 94, 492-511.

⁵⁴ 6 Geo., ch. 18 (1720). For other examples of reservation clauses included in business or guild corporation charters, see, SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I at 455, 464 (4th ed. 1913); SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530-1607, at 42, 77-78, 97, 122, 136, 185, 230, 240, 262 (1913); A. DuBOIS, *supra* note 30, at 51 n.50, 143 n.30, 205 n.290 n.290.

⁵⁵ (K.B. 1684), in 7 A COLLECTION OF STATE-TRIALS AND PROCEEDINGS UPON HIGH-TREASON AND OTHER MISDEMEANORS, FROM THE REIGN OF KING EDWARD VI TO THE PRESENT TIME 493 (2d. ed. London 1735) (1st ed. London 1719) [hereinafter cited as STATE TRIALS]. So far as observed, the first American reference to Jeffrey's mention of the royal reservation clause was by Warren Dutton in his argument in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 443-44 (1837).

Chief Justice Jeffreys upheld the royal grant of a trading monopoly to the East India Company, noting that the King's charter had reserved full power to terminate the grant on three years' notice whenever the King decided the grant was no longer "profitable . . . to this Realm."⁵⁶

Except for charitable corporations, discussed below, English law recognized no permanent distinction between "public" and "private" corporations for the purposes of determining the limits of the royal prerogative.⁵⁷ The limitations on the Crown were the same for borough and other local governmental corporations as they were for other non-charitable corporations. The inclusion of municipal with other types of corporations made some sense, since the English borough was typically a closed corporation concerned principally with trade and, secondarily in some cases, with property holding.⁵⁸

D. *Eleemosynary Corporations*

In the view of the United States Supreme Court, Dartmouth College was not a "public" but a "private" corporation and, more, a private "eleemosynary" corporation. That Dartmouth was eleemosynary, or charitable, was important because only eleemosynary corporations were technically "private" in English

⁵⁶ 7 STATE TRIALS, *supra* note 55, at 556.

⁵⁷ After the Revolution of 1688, the royal courts distinguished between public and private offices in mandamus actions, holding, for example, that a mandamus would not lie to restore a party to a place "in which the publick is in no way concerned." *Vaughan v. Company of Gun-Makers in London*, 87 Eng. Rep. 839, 839 (K.B. 1704). By the late eighteenth century, the King's Bench had eliminated the public-private distinction in mandamus actions. *See Rex v. Barker*, 97 Eng. Rep. 823 (K.B. 1762); 2 S. KYD, *supra* note 28, at 318, 320. For the purposes of determining the scope of corporate jurisdiction, the English courts recognized a distinction between territorially-based governmental corporations "of public concern" and "private societies" which existed only for the better government of its own members. *See City of London v. Wood*, 88 Eng. Rep. 1592, 1598 (K.B. 1702); 2 S. KYD, *supra* note 28, at 395. There was also a loose distinction between public companies which had a large number of members, transferable shares, and a separate management, and private companies which were smaller operations, but the distinction did not depend on incorporation as such. *Gower, supra* note 30, at 535, 536; W. WATSON, A TREATISE OF THE LAW OF PARTNERSHIP 3-5 (rev. 2d ed. London 1807).

⁵⁸ F. MAITLAND, TOWNSHIP AND BOROUGH 95 (1898); J. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 4-6, 14 (1975); Frug, *supra* note 12, at 1090-95.

law, at least for the purposes of determining or characterizing the relationship between the English government and corporations. Between the late sixteenth and the early nineteenth centuries, the English developed a special system of charitable corporations which was a sub-set of the general law governing the prerogative and the royal courts. This law of charitable corporations influenced the Court's analysis in the *Dartmouth College* case.

The "private eleemosynary corporation" was one category within the English classification system. The system was based on the need to determine what persons or courts had jurisdiction to "visit" the corporation, that is, essentially, to superintend the corporation and to resolve intracorporate disputes.⁵⁹ The major division was into "ecclesiastical" and "lay."⁶⁰ In general, ecclesiastical corporations, those composed entirely of "spiritual persons,"⁶¹ were visited only by church officials including, after the Reformation, the King as head of the church.⁶² Lay corporations were all corporations except ecclesiastical, and were in turn subdivided into "civil" and "eleemosynary." The "civil" category comprehended most of the important non-religious corporations in England, including both municipal and business corporations, as well as the Universities of Oxford and Cambridge (but not the colleges within them) and such bodies as the company of surgeons in London.⁶³ The King was said to be the visitor of civil corporations,⁶⁴ but in practice exclusive jurisdiction over lay corporations was in the royal courts, where disputes were resolved according to the course and rules of the common law.⁶⁵ Eleemosynary corporations, including charitable hospitals and colleges within the universities, were a special type of lay corporation. Before the Reformation, charitable corporations were considered ecclesiastical, and subject to visitation by the church,⁶⁶ but as the

⁵⁹ See generally Bridge, *Keeping the Peace in the Universities: The Role of the Visitor*, 86 L.Q. REV. 531 (1970).

⁶⁰ 1 W. BLACKSTONE, *supra* note 25, at 458.

⁶¹ *Id.*

⁶² *Id.* at 468.

⁶³ *Id.* at 469.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 469-70.

authority of the church contracted, public policy and the common law developed a special set of rules for charity. Although charitable corporations (with the exception of those directly connected with the church) became lay, as opposed to ecclesiastical, visitatorial jurisdiction did not automatically go to the King or the royal courts. In the first instance, visitatorial jurisdiction went to the *founder*, the person who first endowed the charity, or the founder's appointee, who exercised the visitatorial jurisdiction according to the corporate charter and statutes generally to the exclusion of the royal courts, so long as revenues were not misappropriated.⁶⁷ A privately-founded charitable corporation with a visitor whose decision on matters within his jurisdiction was final and not subject to appeal to the royal courts was said to be a "private corporation."

The English "private eleemosynary corporation" originated in the Tudor responses to the difficult problems of financing education and alleviating poverty in the late sixteenth and early seventeenth centuries⁶⁸ after the governmental seizure of religious corporations which had performed these functions.⁶⁹ One element of the Tudor program was to encourage the wealthy classes to create the institutions voluntarily and contribute their resources to solve these pressing social difficulties.⁷⁰ The theory was that individuals would be encouraged to commit their wealth to socially useful purposes if they themselves could shape the organization and lay down the terms for the distribution of the bounty. The Elizabethan Statute of Workhouses,⁷¹ for example, provided that a donor could found and incorporate hospitals and work houses by the simple expedient of a deed enrolled in chancery. In all such institutions, the corporation was to be composed of a head and a number of members. Beyond this, the will of the founder controlled. In addition to establishing the rules for

⁶⁷ *Id.* at 471. See *Ex parte Berkhamstead Free School*, 35 Eng. Rep. 270 (Ch. 1813); *Attorney General v. Corporation of Bedford*, 28 Eng. Rep. 323 (Ch. 1754); G. COOPER, A TREATISE OF PLEADING ON THE EQUITY-SIDE OF THE HIGH COURT OF CHANCERY 280 (London 1809).

⁶⁸ G. JONES, HISTORY OF THE LAW OF CHARITY 1532-1827, at 22 (1969).

⁶⁹ 1 S. KYD, *supra* note 28, at 56-57.

⁷⁰ W. JORDAN, *supra* note 29, at 108, 115-16, 149-51.

⁷¹ 39 Eliz., ch. 5 (1597), *made permanent by* 21 Jac., ch. 1 (1623).

the operation of the corporation, the founder could name his heirs or others to visit the institution.

If the wealthy were to be effectively encouraged to grant large sums to charity, it was necessary to prevent the abuse of charitable trusts. Although Chancery had the power to redress the misappropriation of charitable funds, in practice the process was inadequate.⁷² The Elizabethan Statute of Charitable Uses⁷³ provided a more efficient mechanism, authorizing the formation of commissions under the authority of the Chancellor to inquire into the administration of charities and to correct abuses where necessary.⁷⁴ A special provision exempted from commission investigation certain charities, including colleges, which had special governors or visitors appointed by their founders.⁷⁵

The Tudor system of private government of charities was refined and strengthened as a result of the constitutional crisis of the 1680's, but the policy basis decisively shifted from the promotion of charitable giving to the protection of existing institutions from governmental control. The shift was in part precipitated by James II's attempt to dictate who would be President of St. Mary Magdalen College, at Oxford. After the College failed to obey a royal command to elect a Catholic as President,⁷⁶ an Ecclesiastical Commission removed the duly elected President, Dr. John Hough, and nearly all of the fellows.⁷⁷ Dr. Hough had unsuccessfully challenged the jurisdiction of the Commission on the grounds that Magdalen was a "private College" with the Bishop of Winchester as the duly-constituted visitor to superintend the institution.⁷⁸

Magdalen College and other excesses of James II and his courts and commissions still conditioned the legal atmosphere when the important case of *Philips v. Bury*⁷⁹ arose in the early

⁷² G. JONES, *supra* note 68, at 17-22.

⁷³ 43 Eliz., ch. 4 (1601).

⁷⁴ *Id.* § 1.

⁷⁵ *Id.* § 3.

⁷⁶ MAGDALEN COLLEGE AND KING JAMES II 1686-1688, at xii (J. Bloxam ed. 1886) [hereinafter cited as MAGDALEN COLLEGE]; 8 D. HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 279 (London 1770).

⁷⁷ MAGDALEN COLLEGE, *supra* note 76, at xvi-xvii.

⁷⁸ *In re* St. Mary Magdalen College (1687), 4 STATE TRIALS, *supra* note 55, at 262, 275.

⁷⁹ 90 Eng. Rep. 198, (K.B. 1692) *rev'd*, 100 Eng. Rep. 186 (H.L. 1696).

1690s. Exeter College in the University of Oxford was founded by William Stapleton, and incorporated by Queen Elizabeth. The statutes appointed the Bishop of Exeter to be visitor. In 1689, the rector and scholars of the college expelled one Colmer. He appealed, and a visitatorial delegate reversed his expulsion. Thereafter, in the summer of 1690, the Bishop of Exeter attempted a general visitation of the college. The rector and many scholars objected that this visitation was not valid under the statutes and refused to appear before the Bishop when ordered. The Bishop thereupon removed the rector, Dr. Bury, and the non-appearing scholars. The case was brought to test the validity of this removal. In the King's Bench, three justices found for Dr. Bury,⁸⁰ with Chief Justice John Holt dissenting.⁸¹ On appeal to the House of Lords, the judgment was reversed without opinion.⁸² Holt was later assumed to have stated the law of the case.

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

[T]hat we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's Courts; of these there are no particular private founders, and consequently no particular visitor But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them [T]his visitatorial power . . . is an appointment of law; it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate

⁸⁰ 90 Eng. Rep. at 200-12.

⁸¹ 100 Eng. Rep. at 186.

⁸² 90 Eng. Rep. at 229.

the behaviour of the members that partake of the charity What is the visitor to do? He is to judge according to the statutes and rules of the college [I]f he hath a jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter . . . there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the Common Law Courts of England is without precedent [T]he cause of the visitor's sentence is not examinable.⁸³

Holt carefully adapted the old law to the new constitutional regime of royal and judicial restraint and private control of institutions by the English establishment. To a significant extent, prerogative and judicial power stopped, or at least lost much force, where private property began. It was not the mere existence of a visitor which deprived the courts of jurisdiction over privately-founded charitable corporations, but rather that the visitatorial power was an incident of the private property upon which the corporation was erected by a private founder. And even if promotion of charitable giving remained implicitly a reason to favor wholly private control of charitable corporations, it was no longer the stated goal.

The private corporation-private visitor system was designed specifically for what might be called a "separated powers" corporation. The charter incorporated both the head of the institution and those who were to receive the benefit of the charity and gave the whole group ownership and control of the foundation property. Thus, a typical charter would incorporate the rector and scholars of a school, the master and fellows of a college, or the warden and poor of a hospital.⁸⁴ The visitor would be an altogether separate officer and would not own the property, receive any of the foundation revenues or have day-to-day responsibilities for administering the enterprise. If the visitor were active and responsible, he would settle intracorporate disputes and oversee the operations to prevent or redress mismanagement.

⁸³ 100 Eng. Rep. at 189-90.

⁸⁴ The corporations established under the Statute of Workhouses, 39 Eliz., ch. 5, were of the "separated power" type.

Serious problems developed because of the propensity of charitable trustees to abuse their trusts. Whether or not there was a private visitor, equity could entertain an information or an action for an accounting against charitable trustees accused of misappropriating revenues for their personal benefit,⁸⁵ but it could not act to redress abuses, other than those involving revenue, which were within a private visitor's jurisdiction.⁸⁶ Where there were no private visitors capable of acting, because, for example, the founder had appointed no visitors and no heirs could be found, an action against unscrupulous trustees had to be split. That part concerning the direct misappropriation of revenues had to be brought in Chancery. That part of the action which directly concerned other abuses normally within the jurisdiction of the private visitor had to be brought before the Chancellor by petition; the Chancellor, as keeper of the Great Seal, exercised the royal prerogative to enforce the charter and the founder's statutes.⁸⁷ The Chancellor here had a visitatorial jurisdiction necessitated by the non-existence of a private visitor.

The government acquired visitatorial jurisdiction by necessity in some other situations as well. In some separated-power corporations, the visitor was also a governor, creating a conflict of interest, so the courts or the Chancellor had to exercise some control.⁸⁸

The "unitary" charitable corporation, which was essentially

⁸⁵ Attorney General v. Governors of the Foundling Hospital, 30 Eng. Rep. 514 (Ch. 1793); Attorney-General v. Corporations of Bedford, 28 Eng. Rep. 323 (Ch. 1754).

⁸⁶ King v. Bishop of Ely, 101 Eng. Rep. 267 (K.B. 1794); King v. Bishop of Ely, 100 Eng. Rep. 157 (K.B. 1788); Attorney-General v. Talbot, 27 Eng. Rep. 903 (Ch. 1747); Attorney-General v. Lock, 26 Eng. Rep. 897 (Ch. 1744); Attorney-General v. Price, 26 Eng. Rep. 866 (Ch. 1744); Philips v. Bury, 100 Eng. Rep. 186 (K.B. 1692), *rev'd*, (H.L. 1696).

⁸⁷ Attorney-General v. Earl of Clarendon, 34 Eng. Rep. 190 (Ch.; Lord Chancellor 1810); *Ex parte* Dann, 32 Eng. Rep. 715 (Lord Chancellor 1804); Attorney-General v. Dixie, 33 Eng. Rep. 388 (Ch.; Lord Chancellor 1802); *Ex parte* Wrangham, 30 Eng. Rep. 803 (Lord Chancellor 1795); King v. Master and Fellows of Saint Catherine's Hall, Cambridge, 100 Eng. Rep. 991 (K.B. 1791); *cf.* Anonymous, 88 Eng. Rep. 1284 (K.B. 1699) (dictum by Holt, C.J.); G. COOPER, *supra* note 67, at xxcii.

⁸⁸ See, e.g., Dominus Rex v. Episcopum Chester, 93 Eng. Rep. 855 (K.B. 1727) (mandamus issued to corporate officer where the officer was also the visitor, on the grounds that the court had to exercise the visitatorial power where dual office-holding prevented the officer from visiting himself); *cf.* Attorney General v. Dixie, 33 Eng. Rep. 388 (Ch.; Lord Chancellor 1802).

a simple incorporated charitable trust, was equally important. A single set of governors or trustees was incorporated and given full ownership and control of the foundation property. No separate visitor was appointed, and the objects of the charity, that is, the fellows, the scholars or the poor, were not made part of the corporation. The unitary charitable corporation had the obvious advantage of institutional simplicity. It became popular in England during the eighteenth century and was an organizational scheme often used for incorporated colleges in America.⁸⁹ Dartmouth College was a unitary corporation.

The problem of jurisdiction over the unitary corporation was extremely complicated. The Statute of Charitable Uses specifically exempted any college, hospital, or free school which had special visitors, governors, or overseers, from investigation by the charity commissioners.⁹⁰ In the seventeenth century, the Chancellor ruled that this proviso did not exempt unitary corporations from inquiries into the use of revenues.⁹¹ Early in the eighteenth century, the court of equity held that where no separate visitors were appointed, the word "governor" in a charter did not imply "visitor," and that where governors received rents and profits, they were accountable to a charitable commission for the use of the revenues.⁹² In 1744, Chancellor Hardwicke stated that governors who received revenues should be accountable for their use, but that the trustees had an "absolute" authority over the non-revenue aspects of the charity.⁹³

⁸⁹ See, e.g., Charter of Yale College, reprinted in T. CLAP, THE ANNALS OR HISTORY OF YALE—COLLEGE, IN NEW HAVEN, IN THE COLONY OF CONNECTICUT, FROM THE FIRST FOUNDING THEREOF, IN THE YEAR 1700 TO THE YEAR 1766, at 45 (New-Haven 1766); Charter of King's College, which was later renamed Columbia, THE CHARTER OF THE COLLEGE OF NEW YORK, IN AMERICA (New York 1754).

⁹⁰ 43 Eliz., ch. 4.

⁹¹ *In re Sutton Colefield* (Ch. 1636) in G. DUKE, THE LAW OF CHARITABLE USES, REVISED AND MUCH ENLARGED: WITH MANY CASES IN LAW BOTH AGAINST AND MODERN 68 (London 1676); *Hynshaw and Pydwers and the Mayor of Morpeth* (Ch. 1630), in *id.* at 69.

⁹² *Case of Birmingham School*, 25 Eng. Rep. 125 (Ch. 1725). However, if the poor were incorporated and received revenues, "governors" were considered visitors. 25 Eng. Rep. at 126. Such a corporation would be a separated power corporation.

⁹³ *Attorney-General v. Lock*, 26 Eng. Rep. 897, 898 (Ch. 1744). See also *Attorney General v. Middleton*, 28 Eng. Rep. 210, 212 (Ch. 1751), where Chancellor Hardwicke seemed to state that the trustees of a unitary corporation had full visitatorial authority

Giving trustees of unitary charitable corporations absolute control over non-monetary matters was indefensible because it invited abuses in the election of trustees, the filling of places, and the like. Not surprisingly, the system did not survive long. The unitary corporation without separate visitors was indistinguishable in principle from the separated power corporation in which there was no visitors capable of acting. By the early nineteenth century, the system of discipline constructed for separated power corporations without visitors had been extended to unitary corporations. The Chancellor, exercising the royal prerogative for the Crown, had authority to correct non-monetary abuses, while the court of equity superintended application of the revenues.⁹⁴

As a practical matter, the English system of superintending charities did not work well at all. Enforcement was intolerably complicated and expensive, and the absence of effective supervision invited widespread abuses of charitable trusts. In 1795, Chief Justice Kenyon complained of grammar schools which were merely "empty walls without scholars, and every thing neglected but the receipt of the salaries and emoluments."⁹⁵ After the turn of the century, as the *Dartmouth College* case developed in America, the Whig reformer, Henry Brougham, proposed comprehensive Parliamentary investigations of charitable abuse.⁹⁶ He strongly criticized charities with "special visitors,"⁹⁷ and argued, incorrectly, that the law regarded the "inheritance of the poor as matter of public not of private jurisdiction"⁹⁸ The Tory *Quarterly Review* responded that the appointment of visitors was a prerogative of the founder,⁹⁹ and that investigations would interfere with the will of the donor¹⁰⁰ and would be

where no visitors were expressly appointed by the founder. However, the report of this case is thoroughly garbled. See 2 S. KYD, *supra* note 28, at 194-95. Hardwicke was reported to have made the same statement in a broad and unqualified dictum in *Green v. Rutherford*, 27 Eng. Rep. 1144, 1149 (Ch. 1750).

⁹⁴ See, e.g., *Attorney-General v. Dixie*, 33 Eng. Rep. 388 (Ch; Lord Chancellor 1802).

⁹⁵ *King v. Archbishop of York*, 101 Eng. Rep. 664, 666 (K.B. 1795).

⁹⁶ See generally C. NEW, *THE LIFE OF HENRY BROUGHAM TO 1830*, at 198-227 (1961).

⁹⁷ 38 PARL. DEB. (2d ser.) 1219 (1818); *Report of the Select Committee on Education of the Lower Orders*, in *id.* at 1212.

⁹⁸ 38 PARL. DEB. (2d ser.) 603 (1818).

⁹⁹ *Review*, 19 Q. REV. 492, 565 (1819).

¹⁰⁰ *Id.* at 517.

an unwarranted public assumption of the visitors' private "privileges."¹⁰¹

On the United States Supreme Court, Justice Story, at least, was well-informed about the contours of English debate. After the *Dartmouth College* case had been argued, but before it had been decided, Daniel Webster, an attorney for Dartmouth College, wrote Story that he had "been looking over a file of English newspapers, in order to learn the proceedings of Parliament, at its late session, on the subject of redressing abuses in charities."¹⁰² Webster summarized what he had found, and stated:

I think its [the Brougham Commission Bill's] history shows, 1. That the English lawyers recognize a difference between charities having visitors, and such as have none. Indeed, I did not observe, till lately, that the commissions, issued under the statute of Elizabeth [Charitable Uses], do not extend to charities with visitors. 2. I think we may see that Parliament is not supposed to have the power of new-modelling, and directing to new uses, at its own pleasure, charitable funds, arising from donations of individuals, and by them subjected to the *forum domesticum*.¹⁰³

E. *The English Law of Charitable Corporations and the Dartmouth College Case*

In a narrow and technical sense, the English law of private visitation was not relevant at all to the *Dartmouth College* case.¹⁰⁴ Under English law, visitation was essentially supervisory, to ensure compliance with existing charters, statutes, and rules, while New Hampshire's amendment of the Dartmouth charter was a legislative reorganization of the school, an act not even dis-

¹⁰¹ *Id.* at 517, 565.

¹⁰² Letter from Daniel Webster to Justice Joseph Story (Aug. 16, 1818), reprinted in 17 WRITINGS AND SPEECHES OF DANIEL WEBSTER 286 (F. Webster ed. 1903). Webster did not say which "newspaper" he was sending, but it was probably 19 Q. REV. (July, 1818), containing a *Review* at 492, 565. Excerpts from this review appeared in REPORT OF THE CASE OF DARTMOUTH COLLEGE AGAINST WOODWARD, *supra* note 3, at 395 app. Story cited the Whig EDINBURGH REV. twice in his *Note I: On Charitable Bequests*, 17 U.S. (4 Wheat.) at 3 app., 8 app n.(a) and 20 app. n.(c).

¹⁰³ Letter from Daniel Webster to Justice Joseph Story, *supra* note 102, at 286.

¹⁰⁴ Robbins, *supra* note 3, at 177-79.

tantly analogous to visitation.

Even if the Supreme Court assumed that the royal prerogative and the location of the visitatorial power as such were somehow relevant as to whether the New Hampshire legislature could amend the Dartmouth charter, the Court drew the wrong conclusion from the English precedents, viewed technically, and reached the wrong result. Dartmouth was a unitary charitable corporation, an incorporated charitable institution with no separate visitors. The Court stated that the Dartmouth corporation was the "assignee" of all the founder's and original donors' property rights¹⁰⁵ so that the founder's and original donors' "whole legal and equitable interest" was in the corporation.¹⁰⁶ The Dartmouth corporation would thus have had the visitatorial power incident to the founder's and donors' property. However, it was absurd that the Dartmouth trustees should visit themselves. As stated above,¹⁰⁷ the English law in such cases treated the visitatorial power with respect to non-pecuniary matters as a branch of the royal prerogative to be exercised for the Crown by the Lord Chancellor. Since, as the Court held, New Hampshire succeeded at the Revolution to the "rights and obligations" of the Crown,¹⁰⁸ New Hampshire had visitatorial power over Dartmouth and had the power to amend the Dartmouth charter.

In a technical sense, the Supreme Court in *Dartmouth College* stood the royal prerogative on its head. Because Dartmouth was a private unitary charitable corporation, the Crown had greater prerogative power over it than over any other type of lay corporation. Yet the Court held that New Hampshire's authority over Dartmouth was severely restricted by the contracts clause. In contrast, the Crown's prerogative power over municipal and other "public" corporations was as restricted as over any other type of lay corporation. Yet the Court indicated that the states had nearly full authority to regulate public corporations,¹⁰⁹ and this even though the states succeeded to the rights and duties of the Crown.

¹⁰⁵ 17 U.S. (4 Wheat.) at 642.

¹⁰⁶ *Id.* at 654.

¹⁰⁷ See text accompanying notes 90-94 *supra*.

¹⁰⁸ 17 U.S. (4 Wheat.) at 643.

¹⁰⁹ *Id.* at 629-30.

Marshall fully understood the problem which the English law of visitation posed in the *Dartmouth College* case.¹¹⁰ In his opinion for the Court, he neither mentioned visitation as such nor relied upon it as a basis for decision. In *Philadelphia Baptist Association* (decided at the same term as *Dartmouth College*), Marshall noted that the Crown had a "right of visitation, which is an acknowledged branch of the prerogative,"¹¹¹ and questioned how far the prerogative power of the Crown could be exercised by American governments to establish charities.¹¹² Marshall probably had similar doubts concerning the location and exercise of the prerogative power of visitation to superintend charities in America.¹¹³

In his concurring opinion, Justice Story not only relied upon the English law of private visitation, but deliberately misstated it to support the decisions.¹¹⁴ In the context of a broad inquiry purportedly into the rights and duties of corporations at common law, Story declared without qualification, ignoring the unitary corporation such as Dartmouth, that "where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character."¹¹⁵ The visitatorial discretion of the Dartmouth College trust-

¹¹⁰ McClellan charges that Marshall did not understand the common law rules of contracts and corporations which were applicable to the *Dartmouth College* case. J. McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 204-05 (1971). McClellan is incorrect. Marshall's opinions in *Dartmouth College*, *Philadelphia Baptist Ass'n*, *McCulloch*, and other cases show a firm grasp of the relevant English law and, unlike Story, an appreciation of both the extent to which American constitutional and legal institutions were different from England's and the extent to which technical English rules should not be taken out of context to support decisions reached on other grounds. See *Trustees of Philadelphia Baptist Ass'n v. Harts' Ex'rs*, 17 U.S. (4 Wheat.) at 1; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 316.

¹¹¹ 17 U.S. (4 Wheat.) at 39.

¹¹² *Id.* at 50.

¹¹³ New York's Chancellor James Kent doubted whether the English prerogative power of visitation existed at all in New York's chancery court. *Attorney General v. Utica Ins. Co.*, 2 Johns., ch. 371, 388-89 (N.Y. 1817).

¹¹⁴ See 17 U.S. (4 Wheat.) at 673-77 (Story, J., concurring). McClellan states that Story's opinion was "[s]olidly reasoned . . . with full citation to the English commentators and appropriate Anglo-American decisions." J. McCLELLAN, *supra* note 110, at 205. Story's opinion was not solidly reasoned, many citations were inappropriate, and inconvenient significant qualifications were not mentioned. See text accompanying notes 115-17 *infra*.

¹¹⁵ 17 U.S. (4 Wheat.) at 675 (Story, J., concurring). Story cited *Philips v. Bury*, 91

tees "was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied."¹¹⁶ Partly on this basis, Story thought that the Crown could not by virtue of its prerogative alter or amend the corporate charter without the consent of the corporation, at least in the absence of an expressly reserved power to do so.¹¹⁷ In Story's opinion, the logical conclusion, in light of the contract clause, was that New Hampshire could not amend the Dartmouth charter.

Justice Washington also purported to rely upon the English law of visitation to support the decision for Dartmouth College. Citing *Philips v. Bury*,¹¹⁸ which, he said, "contains all the doctrine of corporations connected with this point,"¹¹⁹ Justice Washington concluded, "[A] college, founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government."¹²⁰ Washington's analysis was technically superficial.

Putting aside the numbing technicalities of the common law, one discovers an English constitutional and legal tradition of lim-

Eng. Rep. 900, 100 Eng. Rep. 186 (K.B. 1692), *rev'd* (H.L. 1696); *Green v. Rutherford*, 27 Eng. Rep. 1144 (Ch. 1750); *Attorney-General v. Middleton*, 28 Eng. Rep. 210 (Ch. 1751); *In re Sutton's Hospital*, 77 Eng. Rep. 960 (K.B. 1612), all weak authority. See note 93 *supra*. On this point he ignored such cases as *King v. Master and Fellows of Saint Catherine's Hall, Cambridge*, 100 Eng. Rep. 991 (K.B. 1791); *Ex parte Wrangham*, 30 Eng. Rep. 803 (Lord Chancellor 1802); *Attorney General v. Dixie*, 33 Eng. Rep. 388 (Ch.; Lord Chancellor 1795); *Eden v. Foster*, 24 Eng. Rep. 750, 25 Eng. Rep. 125 (Ch. 1726). It is unclear why Story overstated the limitations on the prerogative power over private eleemosynary corporations. In another case, Story wrote that at the Revolution the "state [of Virginia] itself succeeded only to the rights of the crown; and . . . with many a flower of prerogative struck from its hands." *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50 (1815). Perhaps it was because Story stated no principle which would determine which flowers had been stricken and which had not.

¹¹⁶ 17 U.S. (4 Wheat.) at 681 (Story, J., concurring). Story's statement was too strong. The Lord Chancellor exercising the royal prerogative had jurisdiction to determine whether the trustees properly operated the charity under the charter. He could correct for negligent administration as well as fraudulent misapplication. And the King's Bench could issue a mandamus to compel a visitor to act on a matter within his jurisdiction. *King v. Bishop of Ely*, 100 Eng. Rep. at 183 n.a. (K.B. 1788).

¹¹⁷ Story was generally correct, but the limitation on the prerogative applied to all English lay corporations, including "public" municipal corporations.

¹¹⁸ 91 Eng. Rep. at 900, 100 Eng. Rep. at 186.

¹¹⁹ 17 U.S. (4 Wheat.) at 659 (Washington, J., concurring).

¹²⁰ *Id.* at 665.

ited government which provided a loose and imperfect model for the Court in the *Dartmouth College* case. Especially as a result of the Glorious Revolution, the English had limited the prerogative power of the Crown over all lay corporations. In common with most of the Revolutionary generation, Marshall treated many limitations on the Crown as salutary limitations on all governmental power. However, Marshall did not ignore Parliament. Acknowledging that the English Parliament was "omnipotent,"¹²¹ Marshall was exaggerating only slightly when he stated that had Parliament annulled the Dartmouth charter immediately after its issuance in 1769, "the perfidy of the transaction would have been universally acknowledged . . . [T]he contract would at that time have been deemed sacred by all."¹²²

The English system of private government of charitable institutions was an aspect of the broader constitutional and legal tradition which was especially relevant to the *Dartmouth College* case. Although the obvious need to supervise charities more effectively had forced the expansion of royal prerogative power over private charitable institutions in the late eighteenth and early nineteenth centuries, there remained the established legal tradition of private government of charity based on the complementary policies of encouraging the foundation of charitable institutions and of protecting existing institutions from despotic control by the Crown. Marshall was appealing to this tradition when he identified the foundation and funds of Dartmouth as private, and characterized Dartmouth as a private, eleemosynary corporation.¹²³ The process of creating new corporations, the contents of the charters, including the occasional reservation clause, and the protected legal position of lay and especially private eleemosynary corporations invited American analysis in terms of contract. In *Dartmouth College*, Marshall essentially adopted, or, rather, adapted the English constitutional and legal tradition of private government of charities, based ultimately on private property, to support the decision.

Although the English constitutional and legal tradition influ-

¹²¹ *Id.* at 643.

¹²² *Id.*

¹²³ *Id.* at 632-34.

enced the Court, the *Dartmouth College* decision and its supporting analysis followed primarily from the American experience with colleges and other incorporated institutions from the late colonial period until 1819. To that subject we now turn.

II. THE AMERICAN EXPERIENCE: PROMOTION AND PROTECTION OF COLLEGES

Dartmouth College concerned the relationship between government and religious and educational institutions in nineteenth-century America. As Marshall framed the issue, "Is education altogether in the hands of government?"¹²⁴ Since education and religion were closely connected, the problem of government's relation to education could not be separated from the problem of government's relation to religion. The Marshall Court's decision was primarily the result of the Court's assessment of the American experience with the founding and control of colleges from the late colonial into the early nationalist period. The Court concluded that sound public policy required a constitutional system to promote the establishment of new institutions and to accommodate diverse and competitive religious and political groups in a free society.

A. Promotion

Although the American colonies began and initially grew as religiously homogeneous societies, they became more diverse in the middle and late eighteenth century,¹²⁵ and this trend toward religious diversity accelerated during the early nineteenth century.¹²⁶ The evolution from religious homogeneity to religious diversity affected the relationship between the state and both

¹²⁴ *Id.* at 634. Marshall stated, "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." *Id.* at 645.

¹²⁵ See S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 99-384, 527-32, 572-73, (1972); G. DARGO, *ROOTS OF THE REPUBLIC* 77-107 (1974); E. GAUSTAD, *HISTORICAL ATLAS OF RELIGION IN AMERICA* 1-36, 175 app. (rev. ed. 1976).

¹²⁶ S. AHLSTROM, *supra* note 125, at 387-509, 532-39; E. GAUSTAD, *supra* note 125, at 37-140 *passim*.

church and education, and influenced the result in the *Dartmouth College* case.

Religiously homogeneous societies produced America's earliest colleges—Harvard in Massachusetts, William and Mary in Virginia, and Yale in Connecticut.¹²⁷ The homogeneity was reflected in the alliance between the colonial governments and the established church, with church and state cooperating to create institutions of higher education to serve social and religious needs.

By the middle of the eighteenth century, migration between colonies and the growth of dissenting sects had broken down the religious homogeneity which had provided the social basis for early American colleges.¹²⁸ The growing religious diversity weakened the alliance between church and state, and forced changes in the relationship between college and state. Attempting to reconcile religious particularism and responsibilities and an increasing diverse population, governments chartering colleges gave substantial control to the religious denomination which had founded the new institution, while requiring toleration of professors and students of diverse religious backgrounds.¹²⁹

Especially after the turn of the nineteenth century and the beginning of the Second Great Awakening of religious enthusiasm, the American trend toward religious diversity accelerated, as formerly small denominations grew rapidly, new sects and denominations were created, and old denominations suffered internal conflict and division.¹³⁰ New colleges were founded and operated on a much more religiously particularistic and local basis than they had been in the late colonial period. The Presbyterians, for example, who had founded Princeton in 1746 as an "in-

¹²⁷ Herbst, *supra* note 30, at 7, 8, 11-12, 43-44; Herbst, *The Eighteenth Century Origins of the Split between Private and Public Higher Education in the United States*, 15 HIST. EDUC. Q. 273, 273 (1975) [hereinafter cited as *Eighteenth Century Origins*]; J. HERBST, *supra* note 3, at 1-47.

¹²⁸ *Eighteenth Century Origins*, *supra* note 127, at 273-74.

¹²⁹ *Id.* at 274-76; J. HERBST, *supra* note 3, at 63-65, 82-110. The Dartmouth charter of 1769 made the Congregational founder, Rev. Eleazor Wheelock, president for life, with authority to appoint his successor by will. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) at 529-30. However, the College was prohibited from "excluding any person of any religious denomination whatsoever . . . on account of his . . . speculative sentiments in religion." *Id.* at 533.

¹³⁰ S. AHLSTROM, *supra* note 125, at 387-402, 415-54.

tercolonial instrument of social integration and reformation,"¹³¹ between 1774 and 1794 established six colleges,¹³² which by 1820 had become "bastions of Presbyterian orthodoxy and important weapons in the sectarian competition"¹³³ After Orthodox Congregationalists founded Andover Theological Seminary in 1807 as an alternative to Unitarian Harvard,¹³⁴ the sectarian theological seminary became the accepted institution for training ministers in many Protestant denominations.¹³⁵ According to one authority, eighteen colleges with denominational connections were founded in America between 1780 and 1819.¹³⁶ Neither the theological seminaries nor, with some exceptions, the new colleges had substantial connections with the governments of the states in which they were founded.

Dartmouth College was decided in this context of accelerating religious division, intensifying denominational competition, and educational particularism. As the people of the early nineteenth century believed that legal policy generally should decentralize decision-making to encourage economic growth,¹³⁷ so the

¹³¹ H. MILLER, *THE REVOLUTIONARY COLLEGE* 67 (1976).

¹³² *Id.* at 124-28.

¹³³ *Id.* at xx.

¹³⁴ Naylor, *The Theological Seminary in the Configuration of American Higher Education: The Ante-Bellum Years*, 17 *HIST. EDUC. Q.* 17, 19 (1977).

¹³⁵ *Id.* at 17.

¹³⁶ D. TEWKSBURY, *THE FOUNDING OF AMERICAN COLLEGES AND UNIVERSITIES BEFORE THE CIVIL WAR* 211 - 220 app. (1932). See also J. HERBST, *supra* note 3, at 244-53 app. Historians differ as to the extent non-public colleges founded during and after the Revolution were connected to religious denominations. One author believes that the institutions were best characterized ecumenically as "Christian colleges." Naylor, *The Ante-Bellum College Movement: A Reappraisal of Tewksbury's Founding of American Colleges and Universities*, 13 *HIST. EDUC. Q.* 261, 266-70 (1973). Another contends that after 1800, new colleges were essentially local enterprises in which denominational ties were secondary. Potts, *American Colleges in the Nineteenth Century: From Localism to Denominationalism*, 11 *HIST. EDUC. Q.* 363, 367-68 (1971); Potts, "College Enthusiasm" As Public Response, 1800-1860, 47 *HARV. EDUC. REV.* 28 (1977). J. Herbst sees substantial diversity. See J. HERBST, *supra* note 3, at 189-205, 226-31. Whether individual colleges were denominational, broadly Christian or primarily local is not too important for the *Dartmouth College* case. There were some significant religious connections, and most of these institutions were not the creation of the state, but were the product of voluntary, private individual and group effort.

¹³⁷ See generally J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3-32 (1956); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

Marshall Court believed that constitutional policy should be framed to encourage the voluntary establishment of such useful institutions as schools and colleges. Borrowing a premise of the Elizabethans which was still serviceable in the nineteenth century, the Marshall Court concluded that there was a connection between encouraging people voluntarily to found socially useful institutions and ensuring that such institutions would not be "altogether in the hands of government."¹³⁸ Marshall wrote:

These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.¹³⁹

In short, Dartmouth and similar institutions should be substantially free from legislative controls so there would be more of them.

After the Revolution, denominational and local groups were not the only founders of new institutions of higher education. In response to the growing diversity in religion and the particularistic emphasis of many colleges, some states created state universities.¹⁴⁰ One of these was Jefferson's University of Virginia, chartered by the Virginia legislature about a week before Marshall delivered the *Dartmouth College* decision.¹⁴¹ The legislation

¹³⁸ 17 U.S. (4 Wheat.) at 518.

¹³⁹ *Id.* at 647. Story said that making private charitable donations the property of government "would extinguish all future eleemosynary endowments . . ." *Id.* at 672 (Story, J., concurring).

¹⁴⁰ *Eighteenth Century Origins*, *supra* note 127, at 277-78; J. HERBST, *supra* note 3, at 206-12; D. TEWKSBURY, *supra* note 136, at 167.

¹⁴¹ Act of Jan. 25, 1819, ch. 19, 1819 Va. Acts 15. On the founding of the University

creating the University of Virginia carefully provided that the University would "in all things, and at all times, be subject to the control of the Legislature."¹⁴² In his opinion in *Dartmouth College*, Marshall, not wishing to discourage the development of state schools while encouraging the founding of private ones, acknowledged "[t]hat there may be an [educational] institution founded by government, and placed entirely under its immediate control"¹⁴³

B. *Protection*

The proper relationship between state governments and existing colleges, most of which had religious connections, was the principal constitutional question addressed by *Dartmouth College*. The problem had become increasingly acute as the growing religious and political diversity in America from the late colonial and into the early national period produced many conflicts between governments and colleges. This subsection notes most of these controversies,¹⁴⁴ and reviews in some detail the conflict between New Hampshire and Dartmouth, and controversies over William and Mary in Virginia, Harvard in Massachusetts, and Columbia in New York. The review shows the nature and scope of the constitutional problem as seen by the Supreme Court, and leads to the conclusion that the Court in *Dartmouth College* was protecting institutions from democratic majorities,

of Virginia, see generally, P. BRUCE, HISTORY OF THE UNIVERSITY OF VIRGINIA 65-233 (1920); 6 D. MALONE, JEFFERSON AND HIS TIME 233-82, 365-425 (1981).

¹⁴² Act of Jan. 25, 1819, ch. 19, § 9, 1819 Va. Acts 15, 17.

¹⁴³ 17 U.S. (4 Wheat.) at 634.

¹⁴⁴ The literature on the relationship between legislatures and colleges in the late colonial and early national periods is large, but scattered. The most detailed treatments are individual college histories and biographies of leading figures. Only a few works focus directly on the problem. J. HERBST, *supra* note 3, is the best, although some interpretive force is lost in the kaleidoscopic detail. Herbst does not seem to understand the significance of the private visitor in the English system. J. WHITEHEAD, *supra* note 3, surveys Columbia, Dartmouth, Harvard and Yale from 1776 to 1876. The author's thesis, that "a distinction between private and public or state institutions was not commonly recognized before the Civil War," *id.* at 4-5, is untenable. See also W. Smith, *The Relations of College and State in Colonial America* (1949) (unpublished Ph.D. dissertation. Columbia University); R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955).

thus separating state from church, and advancing religious and educational liberty.

The question of the constitutional and legal status of the College of William and Mary was debated in Virginia from the 1770's until 1819 and beyond. This particular issue was an aspect of the larger problem of the nature and extent of the state's role in the promotion and control of higher education in Virginia.

The College of William and Mary was founded by royal charter issued on February 8, 1693¹⁴⁵ at the solicitation of the Virginia Assembly.¹⁴⁶ The institution clearly enjoyed a "public" foundation, as the King and Queen made an initial grant of 20,000 acres of land and of receipts from certain quit rents, taxes, and fees.¹⁴⁷ The charter named a number of persons and their successors "to be the true, sole and undoubted Visitors and Governors of the . . . College," with "full and absolute . . . power" to make "statutes" for the institution,¹⁴⁸ and created a close institutional connection with the established Anglican Church.¹⁴⁹ The Virginia Assembly supplemented the original financial support with additional funding and specific appropriations throughout the colonial period.¹⁵⁰

During the Revolution, education and educational institutions, as almost everything else in Virginia, were considered for reform. Thomas Jefferson's proposals for educational reform were contained in draft bills 79, 80, and 81 of the *Report of the Committee of Revisors* of the laws,¹⁵¹ submitted to the General

¹⁴⁵ Charter of William and Mary, reprinted in H. HARTWELL, J. BLAIR, & E. CHILTON, *THE PRESENT STATE OF VIRGINIA, AND THE COLLEGE* 72 (London 1727). On the founding and government of William and Mary, see J. HERBST, *supra* note 3, at 29-37.

¹⁴⁶ H. ADAMS, *THE COLLEGE OF WILLIAM AND MARY* 14-15 (U.S. Bureau of Education Circulars of Information No. 1, 1887); Bridge, *The Rev. John Bracken v. The Visitors of William and Mary College: A Post-Revolutionary Problem in Visitation Jurisdiction*, 20 WM. & MARY L. REV. 415, 416 (1979); J. HERBST, *supra* note 3, at 30-31.

¹⁴⁷ Charter of William and Mary §§ 14, 15, 16, reprinted in H. HARTWELL, J. BLAIR, & E. CHILTON, *supra* note 145, at 86-92.

¹⁴⁸ *Id.* § 9, at 81-82.

¹⁴⁹ H. ADAMS, *supra* note 146, at 18-19.

¹⁵⁰ *Id.* at 15, 20.

¹⁵¹ COMMITTEE OF REVISORS, *REPORT OF THE COMMITTEE OF REVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA IN M. DCC, LXX, V I (1784)*, reprinted in 2 *THE PAPERS OF THOMAS JEFFERSON* 526, 535, 544 (J. Boyd ed. 1950) [hereinafter cited as *THE PAPERS OF THOMAS JEFFERSON*].

Assembly on June 18, 1779.¹⁵² Bill No. 80 was "for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support."¹⁵³ Jefferson proposed the severance of the close ties between the college and the Anglican Church, and the remodeling of William and Mary into a state-controlled, fully state-supported institution.¹⁵⁴

The long preamble to Bill No. 80, however, is more important here than the details of the proposed reform. Jefferson, anticipating opposition to his bill on the legal grounds that the college was a "private" institution not subject to legislative control, made the preamble a detailed legal brief, *sans* citations, for the proposition that William and Mary was a public institution subject to public direction.¹⁵⁵

Jefferson's bill failed to pass the legislature.¹⁵⁶ Because William and Mary was so closely connected with the Anglican Church, Virginia Presbyterians and other dissenters opposed state aid to the institution.¹⁵⁷ In addition, according to Jefferson, sectional interests contributed to the defeat of the bill.¹⁵⁸

Although Bill No. 80 failed to pass the Virginia legislature, Jefferson was able to accomplish some of his reforms by other means. In 1779, he was elected one of the visitors of William and Mary and in that capacity succeeded in abolishing the college's grammar school and in reorganizing the curriculum and professorships.¹⁵⁹

¹⁵² J. Boyd, *Editorial Note*, 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 151, at 307.

¹⁵³ 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 151, at 535.

¹⁵⁴ For a discussion of Jefferson's proposals with respect to William and Mary, see *id.* at 542. For a discussion of the position of William and Mary in Virginia, see Thompson, *The Reform of the College of William and Mary, 1763-1780*, 115 PROC. AM. PHIL. SOC'Y 187, 188, 201-05, 207-085 (1971).

¹⁵⁵ 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 151, at 535-39; Thompson, *supra* note 154, at 207-08. Jefferson was fully aware of the legal argument, so far as it derived from English law. See *Godwin v. Lunan*, Jefferson's Reports 96, 100-02 (Va. Gen. Ct. 1771) (Jefferson's argument).

¹⁵⁶ J. Boyd, *supra* note 152, at 543.

¹⁵⁷ Thompson, *supra* note 154, at 208-09; T. JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in 1 THE WORKS OF THOMAS JEFFERSON 3, 75-76 (P. Ford ed. 1904) [hereinafter cited as T. JEFFERSON, AUTOBIOGRAPHY]; J. HERBST, *supra* note 3, at 185.

¹⁵⁸ T. JEFFERSON, AUTOBIOGRAPHY, *supra* note 157, at 76.

¹⁵⁹ Thompson, *supra* note 154, at 209-11; T. JEFFERSON, AUTOBIOGRAPHY, *supra* note 157, at 78.

The abolition of the grammar school produced the case of *Bracken v. Visitors of William and Mary College*.¹⁶⁰ The displaced teacher, Reverend John Bracken,¹⁶¹ brought suit to challenge the authority of the college visitors to abolish his job. The case was adjourned to the court of appeals "on account of difficulty,"¹⁶² where it was heard late in 1790. The college hired John Marshall, then a competent young attorney, to defend its "Jeffersonian" reform.

At the outset, Marshall challenged the jurisdiction of the court on the grounds that William and Mary was "a mere Eleemosynary institution, with Visitors appointed for its government."¹⁶³ The court interrupted Marshall to stipulate that the court would not have jurisdiction if the college were a "private Eleemosynary institution," but the court wanted to hear argument on the college's status.¹⁶⁴ Admitting that the college was founded on donations from the king and the government, Marshall insisted, on the authority of *Philips v. Bury* and other English cases, that the college was "private" anyway.¹⁶⁵ The crucial point was that William and Mary had appointed visitors to superintend their charity. Once these were appointed, the corporation was in the same class with "private Eleemosynary" corporations founded by individuals, and the Virginia court could have no jurisdiction over removals within the Visitor's power.¹⁶⁶

Marshall's argument was designed to serve two purposes. First, it was calculated to advance the immediate interests of his

¹⁶⁰ 7 Va. (3 Call) 573 (1790). The best treatment of *Bracken* is Bridge, *supra* note 146. See also Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259 (1966); Swindler, *Another Early College Charter Case*, 1971 Y.B. SUP. CT. HIST. SOC'Y 38; C. Cullen and H. Johnson, *Editorial Note*, 2 THE PAPERS OF JOHN MARSHALL 67 (C. Cullen and H. Johnson ed. 1977); J. HERBST, *supra* note 3, at 219-20.

¹⁶¹ On Bracken, see Goodwin, *The Reverend John Bracken (1745-1818)*, 10 HIST. MAGAZINE PROTESTANT EPISCOPAL CHURCH 354 (1941).

¹⁶² 7 Va. (3 Call) at 579.

¹⁶³ *Id.* at 580.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 580, 591-94. Marshall relied upon *King v. Bishop of Ely*, 96 Eng. Rep. 39 (K.B. 1757); *King v. Bishop of Chester*, 96 Eng. Rep. 12 (K.B. 1732); *Bentley v. Episc' Eliens*, 93 Eng. Rep. 936 (K.B. 1732); *Philips v. Bury*, 91 Eng. Rep. 900, 90 Eng. Rep. 469 (K.B. 1694).

¹⁶⁶ 7 Va. (3 Call) at 580, 591-94.

client, William and Mary, which wanted primarily to avoid a judgment in favor of Bracken. If the court decided it did not have jurisdiction the college would win, regardless of the merits of the case. Second, and more broadly, Marshall was offering a rebuttal to Jefferson's contention that the college was a fully public institution and was asking the court to declare it had the same independence as a private corporation.

According to Edmund Pendleton, the President of the Court of Appeals, a majority of the judges thought that William and Mary "had a public and not a private foundation."¹⁶⁷ Although Pendleton did not elaborate, the close involvement of the Virginia Assembly in the founding of the college may have been crucial. The English law of private charitable corporations relied upon by Marshall might extend to royal foundations, but perhaps did not embrace a corporation originally sponsored and continually supported by the Virginia legislature. Since William and Mary was public, the Virginia courts had jurisdiction to decide the case and others which might arise. On the merits, the court decided that the visitors had power to remove the grammar school teacher, so Bracken had no legal grounds for complaint.¹⁶⁸ If Marshall failed to fulfill his secondary goal of having the college declared to be as free from government control as private corporations, he at least won his case.

It is difficult to assess the ultimate impact of the *Bracken* case on Marshall's *Dartmouth College* opinion. At least, the case ed-

¹⁶⁷ *Bracken v. William and Mary College*, 5 Va. (1 Call) 161, 163-64 (1797).

¹⁶⁸ 7 Va. (3 Call) at 599. Bridge argues that, contrary to the decision of the Virginia Court of Appeals, William and Mary's Visitors exceeded their authority under the charter and original statutes when they abolished the grammar school. Bridge, *supra* note 146, at 429-33, 435, 438. However, the charter, § 9, reprinted in H. HARTWELL, J. BLAIR & E. CHILTON, *supra* note 145, at 81, made the visitors not only visitors but also "governors," with discretionary authority to make "statutes," which can certainly be construed to permit any reorganization not inconsistent with the charter itself. Bridge also contends that Bracken's counsel made the fundamental errors of arguing that William and Mary was a public corporation and of seeking mandamus instead of prohibition. Bridge, *supra* note 146, at 435-38. However, the Virginia court *accepted* Bracken's counsel's argument that William and Mary was public. The court denied the writ not because mandamus was the wrong writ, but because the court concluded that the Visitors were within their authority. A prohibition would have been denied on the same ground. Had Bracken been entitled to a remedy, mandamus was the, or at least a, proper writ. *Dominus Rex v. Ballivos de Morpett*, 93 Eng. Rep. 383 (K.B. 1717).

ucated Marshall as to the jurisdictional nature of the visitatorial power, and as to the necessity of finding other, stronger grounds upon which to base a constitutional limitation on the legislature. The Chief Justice did not mention visitation at all in his *Dartmouth College* opinion. Beyond this, it seems that Marshall took to heart the Virginia court's focus on the nature of the foundation as the major element. Dartmouth College was private because its funds were private, not because special governors were appointed.¹⁶⁹ By the same token, the *Bracken* decision stood even after the *Dartmouth College* decision. William and Mary was public because its foundation was public.¹⁷⁰

In a larger sense, Marshall saw that the prolonged controversy over William and Mary did nothing positive for the school, for education, for government, for Anglicans, or for dissenters. The claim that William and Mary was public threatened legislative attack along the lines proposed by Jefferson. If the school's Anglican and local supporters fully endowed the school, the legislature might simply expropriate it for the public. On the other hand, William and Mary's existing sectarian and otherwise narrowly local base restrained the penurious Jeffersonian legislature from actively supporting the school. Not surprisingly, William and Mary languished in the early decades of the nineteenth century, as Jefferson moved on to urge, successfully, the founding of the University of Virginia.¹⁷¹

Unlike Justices Story and Livingston, Chief Justice Marshall apparently had only minimal connections with educational institutions after he became a member of the Supreme Court. He had attended the lectures of Professor George Wythe at William and Mary for about twelve weeks in 1780.¹⁷² In 1803, the Virginia legislature named him, along with many other leading citizens of

¹⁶⁹ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) at 633-34.

¹⁷⁰ In his *Dartmouth College* opinion, Justice Washington distinguished "between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case, than the one immediately before it." 17 U.S. (4 Wheat.) at 659. Washington, who was from Virginia, was probably distinguishing the legally "public" William and Mary and the newly-founded University of Virginia from the "private" Dartmouth.

¹⁷¹ See text accompanying notes 141-42 *supra*.

¹⁷² 1 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 154-60 (1916).

Richmond, a trustee of the Richmond Academy,¹⁷³ and in 1807 named him a trustee of the Hallerian Academy.¹⁷⁴ Four of Marshall's five sons attended Harvard,¹⁷⁵ from which Marshall himself received an honorary degree in 1806.¹⁷⁶ He also received honorary degrees from Princeton in 1802,¹⁷⁷ and the University of Pennsylvania in 1815.¹⁷⁸

Harvard College, founded in Massachusetts in 1636,¹⁷⁹ was the oldest college in the country. Throughout the colonial period it had a close institutional and working relationship with the Massachusetts provincial government,¹⁸⁰ and for this reason could realistically be classified as a public institution.¹⁸¹ The state constitution of 1780 sought to preserve governmental control over Harvard by providing that the legislature might alter the college government "in as full a manner as might have been done by the Legislature of the late Province of Massachusetts Bay."¹⁸² The constitution also confirmed the historic division of Harvard's administrative authority between the President and Fellows, known colloquially as "the Corporation," and a Board of Overseers,¹⁸³ which had some legislative functions as well as a superintending authority roughly analogous to the visitatorial power.

After the turn of the nineteenth century, as Harvard went Federalist in politics and Unitarian in religion,¹⁸⁴ a controversy arose concerning the membership of the Board of Overseers. Traditionally, the Board had been composed of certain governmental officers, including the Massachusetts Senate, and Congregational clergymen of various towns.¹⁸⁵ In 1810, however, princi-

¹⁷³ Act of Dec. 29, 1803, ch. 22, § 1, 1803 Va. Acts 28.

¹⁷⁴ Act of Jan. 6, 1807, ch. 83, § 1, 1806 Va. Acts 33.

¹⁷⁵ 4 A. BEVERIDGE, *supra* note 172, at 73.

¹⁷⁶ *Id.* at 89.

¹⁷⁷ *Id.* Marshall's eldest son attended Princeton. *Id.* at 73.

¹⁷⁸ *Id.* at 89.

¹⁷⁹ S. MORISON, *THREE CENTURIES OF HARVARD 1636-1936*, at 5 (1936).

¹⁸⁰ *Id.* at 5-146 *passim*; J. HERBST, *supra* note 3, at 5-28, 49-55, 150-51. For official actions in regard to Harvard's government during the colonial period, see 1 J. QUINCY, *THE HISTORY OF HARVARD UNIVERSITY* 586 app.-612 app. (Boston 1860).

¹⁸¹ J. HERBST, *supra* note 3, at 8.

¹⁸² MASS. CONST. of 1780, Pt. 2, ch. 5, § 1, art. III.

¹⁸³ *Id.*

¹⁸⁴ S. MORISON, *supra* note 179, at 187-91; J. HERBST, *supra* note 3, at 213.

¹⁸⁵ 2 J. QUINCY, *supra* note 180, at 294.

pally in order to preserve Federalist control of the Board,¹⁸⁶ the Federalist legislature greatly reduced the number of ex officio positions and provided for the election of fifteen laymen by the Board itself.¹⁸⁷ As required by the Act,¹⁸⁸ the Board and Corporation accepted the change.¹⁸⁹ Predictably, the new Board was almost exclusively Federalist.¹⁹⁰

Predictably, too, the new board came under attack with the ascendance of the Republicans. When the Republican legislature proposed to repeal the "reform" of the Overseers, the Federalist Corporation announced its opposition¹⁹¹ and appointed Theophilus Parsons, a leading Federalist and Chief Justice of the Massachusetts Supreme Court, to prepare a memorial challenging the legislative authority to repeal the 1810 act.¹⁹² Later, Jeremiah Smith, a leading attorney for Dartmouth College, used Parsons' memorial in the preparation of his case,¹⁹³ and excerpts appeared in *Farrar's Report*.¹⁹⁴

Parsons' argument was very simple. He admitted that technically the General Court had not founded Harvard as a private college,¹⁹⁵ but contended that the Assembly had surrendered its legislative authority over the institution to the Corporation and its visitatorial power to the Board of Overseers.¹⁹⁶ Although the General Court could alter the Harvard government with the *consent* of the Corporation and Overseers,¹⁹⁷ it could not unilaterally make an alteration because such a change would impair the vested rights of Overseers and adversely affect the Harvard Corporation.¹⁹⁸ All changes wrought in the past by the provincial

¹⁸⁶ S. MORISON, *supra* note 179, at 212; J. HERBST, *supra* note 3, at 213.

¹⁸⁷ Act of March 6, 1810, ch. 113, §§ 1, 2, 1810 Mass. Acts 200, 200-01.

¹⁸⁸ *Id.* § 6, at 202.

¹⁸⁹ 2 J. QUINCY, *supra* note 180, at 295-96.

¹⁹⁰ S. MORISON, *supra* note 179, at 212.

¹⁹¹ 2 J. QUINCY, *supra* note 180, at 301.

¹⁹² T. PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS; WITH NOTICES OF HIS CONTEMPORARIES 291-92 (Boston 1859).

¹⁹³ J. SHIRLEY, *supra* note 3, at 168.

¹⁹⁴ REPORT OF THE CASE OF DARTMOUTH COLLEGE AGAINST WOODWARD, *supra* note 3, at 397 app.

¹⁹⁵ J. SHIRLEY, *supra* note 3, at 169-70.

¹⁹⁶ *Id.* at 171.

¹⁹⁷ *Id.* at 173, 174.

¹⁹⁸ *Id.*

General Court were with the consent of the Harvard authorities or were arbitrary legislative dictations.¹⁹⁹ Consequently, the present legislature had no authority to restore the pre-1810 arrangement over the opposition of the Corporation and the Overseers.²⁰⁰

The Republicans, however, relying on the colonial precedents, repealed the 1810 act on February 29, 1812,²⁰¹ thus restoring the traditional membership of the Overseers. The Harvard Corporation and Overseers formally rejected this act, on the grounds that the legislature could not change the visitatorial power without consent of those affected.²⁰² Nonetheless, the 1810 Board voted that it was "not disposed to bring its rights to the test of judicial decision"²⁰³ and surrendered to the reconstituted Board.²⁰⁴ In 1814, the matter came to a close with the repassage of the 1810 reform, the addition of the Senate to the Board of Overseers,²⁰⁵ and formal acceptance of the new act by the Corporation and Board.²⁰⁶

In the end, the partisan battle for control of the Harvard Board of Overseers had proved to be an exercise in enervating futility, contributing nothing of lasting benefit to Harvard, education, government, or to either political party, except the durable settlement which ended the controversy.

Joseph Story of Massachusetts was closely connected to most of these events. He had graduated from Harvard in 1798.²⁰⁷ A Republican, he was Speaker of the Massachusetts House in 1811 and 1812 when the legislature was considering the proposal to repeal the Federalists' 1810 reform of Harvard²⁰⁸ and, on his way to the Supreme Court, he gave his farewell address just before the

¹⁹⁹ *Id.* at 171.

²⁰⁰ *Id.* at 174.

²⁰¹ Act of Feb. 29, 1812, ch. 157, § 1, 1812 Mass. Acts 593, 593. The Act had no provision conditioning effectiveness on acceptance by the Corporation or Board.

²⁰² 2 J. QUINCY, *supra* note 180, at 302, 303.

²⁰³ *Id.* at 303.

²⁰⁴ S. MORISON, *supra* note 179, at 213.

²⁰⁵ Act of Feb. 28, 1814, ch. 194, §§ 1, 2, 1814 Mass. Acts 469, 469-70.

²⁰⁶ 2 J. QUINCY, *supra* note 180, at 304.

²⁰⁷ C. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 25-26 (1970).

²⁰⁸ *Id.* at 81-82.

passage of the 1812 Republican reform.²⁰⁹ In April, 1818, about a month after the arguments and almost a year before the decision in *Dartmouth College*, Story was named a member of the Harvard Board of Overseers.²¹⁰

If there were any doubt as to where his sympathies lay, Story's election as a Harvard Overseer settled the matter. In his concurring opinion in *Dartmouth College*, Story stated that he would extend the federal contracts clause far beyond the narrow limits set forth in the opinion of the Court to provide substantial protection even for such publicly-founded institutions as Harvard. The federal Constitution, wrote Story, should protect all state grants of funds to hospitals and colleges, whether the grants were "for special or general purposes, for public charity or particular beneficence."²¹¹ Nor would Story limit constitutional protection to contracts respecting property in the strict sense.²¹² The contracts clause reached all contracts concerning "immunities, dignities, offices or franchises, or other rights deemed valuable in law,"²¹³ including contracts "for the exercise of mere authority."²¹⁴ "Each trustee," wrote Story, "has a vested right, and a legal interest, in his office, and it cannot be divested but by due course of law."²¹⁵ Had Story's opinion been law, the Republicans' 1812 modification of the Harvard Board of Overseers would probably have been an unconstitutional impairment of the obligation of contracts.

Story wanted to convert the federal contracts clause into a general substantive due process clause to protect both public and private institutions not only because of the governmental threat to Harvard, but more generally because he feared what the post-War of 1812 politicians, soon to be Jacksonians, might do in society. In March, 1818, a few days after the argument in *Dart-*

²⁰⁹ *Id.* at 82.

²¹⁰ *Id.* at 171. In August, 1818, Harvard granted LL.D.'s to Justices Brockholst Livingston and William Johnson. *Id.*

²¹¹ 17 U.S. (4 Wheat.) at 697 (Story, J., concurring).

²¹² *Id.* at 698 (Story, J., concurring).

²¹³ *Id.* at 699 (Story, J., concurring).

²¹⁴ *Id.* at 700 (Story, J., concurring).

²¹⁵ *Id.* at 705 (Story, J., concurring). Story stated that the corporate trustees had "rights and privileges . . . collectively and separately." *Id.* at 703 (Story, J., concurring).

mouth College, Story expressed his anxiety to an old acquaintance:

[A] new race of men is springing up to govern the nation; they are the hunters after popularity, men ambitious, not of the honor, so much as of the profits of office,—the demagogues whose principles hang laxly upon them, and who follow not so much what is right, as what leads to a temporary vulgar applause. There is great, very great danger that these men . . . will rule the nation; and if so, we may yet live to see many of our best institutions crumble in the dust.²¹⁶

All of the “best institutions” were not private, and Story would have used the federal contracts clause to protect even public institutions administering public property from rapacious legislatures.

New York’s Columbia College, known as King’s College in the colonial period, was born in acrimony in the middle of the eighteenth century.²¹⁷ During a decade-long debate which led to the creation of the new institution, a faction led by Presbyterian lawyer William Livingston, father of future Supreme Court Justice Brockholst Livingston, loudly advocated a fully secular, governmentally-supported and controlled college.²¹⁸ The Anglicans and their allies, however, finally secured a charter in 1754.²¹⁹ About two-thirds of the self-perpetuating Board of Governors were Anglican laymen,²²⁰ and the President of the College was required to be a member of the Church of England.²²¹ The charter gave the governors full authority to administer and to “visit” the college and guaranteed that no one else would do any “Visita-

²¹⁶ Letter from Joseph Story to Ezekiel Bacon (Mar. 12, 1818), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW AT HARVARD UNIVERSITY 311 (W. Story ed. 1851).

²¹⁷ On the early history of Columbia, see D. HUMPHREY, *FROM KING’S COLLEGE TO COLUMBIA, 1746-1800* (1976); McAnear, *American Imprints Concerning King’s College*, 44 PAPERS BIBLIOGRAPHICAL SOC’Y AM. 301 (1950); J. HERBST, *supra* note 3, at 97-110, 137-41, 167-69, 222.

²¹⁸ D. HUMPHREY, *supra* note 217, at 40-43.

²¹⁹ *Id.* at 34-35, 47-52; THE CHARTER OF THE COLLEGE OF NEW YORK, IN AMERICA, *supra* note 89; THE ADDITIONAL CHARTER GRANTED TO THE GOVERNORS OF THE COLLEGE OF NEW YORK, IN AMERICA (New York 1754).

²²⁰ D. HUMPHREY, *supra* note 217, at 77.

²²¹ THE CHARTER OF THE COLLEGE OF NEW YORK, IN AMERICA, *supra* note 89, at 4.

tion, Act or Thing . . . concerning the . . . College"²²² The institution was organized principally with funds raised by legislatively-sponsored public lotteries,²²³ a legislative appropriation of £500 per year for seven years after 1754,²²⁴ and a grant of land from the established Anglican Trinity Church in New York City.²²⁵

In 1784, new men who came to power in New York as a result of the Revolution seized control of King's. In response to the group identifying itself as governors of King's College,²²⁶ the legislature created the Regents of the State of New York, and gave them comprehensive control over secondary and higher education in New York, including control over King's, now renamed Columbia.²²⁷

Because the Regents were ineffective,²²⁸ the legislature reformed the system in 1787.²²⁹ The new Regents of the University of the State of New York were given authority to incorporate and inspect both academies and colleges, the latter of which would be organized and controlled by individual self-perpetuating boards of trustees enjoying all the rights of Columbia College.²³⁰

The 1787 act "absolutely ratified and confirmed" Columbia's original 1754 charter,²³¹ settling Columbia's status as a New York City institution under private, not public, control.²³² The re-

²²² *Id.* at 11.

²²³ D. HUMPHREY, *supra* note 217, at 3, 12, 46, 65; McAnear, *supra* note 217, at 303, 315, 334.

²²⁴ D. HUMPHREY, *supra* note 217, at 46; McAnear, *supra* note 217, at 315.

²²⁵ D. HUMPHREY, *supra* note 217, at 49; THE CHARTER OF THE COLLEGE OF NEW YORK, IN AMERICA, *supra* note 89, at 3.

²²⁶ D. HUMPHREY, *supra* note 217, at 271; The Petition of the Subscribers Governors of the College commonly called King's College (March 24, 1784), reprinted in D. PRATT, ANNALS OF PUBLIC EDUCATION IN THE STATE OF NEW YORK 673 (UNIVERSITY OF THE STATE OF NEW YORK, EIGHTY-NINTH ANNUAL REPORT OF THE REGENTS OF THE UNIVERSITY 1876).

²²⁷ Act of May 1, 1784, ch. 51, 1784 N.Y. Laws 686; D. HUMPHREY, *supra* note 217, at 271-73. On the creation of the Regents, see S. SHERWOOD, THE UNIVERSITY OF THE STATE OF NEW YORK 50-52 (U.S. Bureau of Education Circular of Information No. 3, 1900); F. ABBOTT, GOVERNMENT POLICY AND HIGHER EDUCATION 8-11 (1958).

²²⁸ F. ABBOTT, *supra* note 227, at 12; D. HUMPHREY, *supra* note 217, at 275-77; S. SHERWOOD, *supra* note 227, at 58.

²²⁹ Act of April 13, 1787, ch. 82, 1787 N.Y. Laws 524; D. HUMPHREY, *supra* note 217, at 277-78.

²³⁰ Act of April 13, 1787, ch. 82, 1787 N.Y. Laws 524, 525-26.

²³¹ *Id.* at 526.

²³² D. HUMPHREY, *supra* note 217, at 278.

formed board was composed exclusively of New York City residents. There were no ex officio members, and Episcopalians began to regain some of the authority in the board which they had lost during the revolution.²³³

Although the legislature often made sizable grants to Columbia between 1787 and 1819,²³⁴ many New Yorkers were unhappy with the college's nearly autonomous existence as an urban, elite school. In 1807, the control of Columbia became a subject of party and factional contention. The Republican party was split between Livingstonians and Clintonians.²³⁵ The Livingstonian Republicans combined with Federalists and began removing Clintonian Republicans from office.²³⁶ Many Livingstonians deserted to the Clintonians, and the Clintonians, now in control of the legislature, counter-attacked.²³⁷ One object of the counter-attack was Columbia College, whose board was dominated by Federalists²³⁸ but one of whose important members, Treasurer (and U.S. Supreme Court Justice) Brockholst Livingston²³⁹ was a leader of the Livingstonian Republicans. Columbia was condemned as a relic of royalty and out of place in a democratic society.²⁴⁰ In response to an ill-timed request from the Columbia trustees for certain alterations in their charter,²⁴¹ the legislature passed an act which would have brought Columbia under the control of the state.²⁴² Future vacancies on the Board of Trustees would be filled by the legislatively-appointed Regents, instead of

²³³ *Id.* at 279.

²³⁴ E. HOBSON, EDUCATIONAL LEGISLATION AND ADMINISTRATION IN THE STATE OF NEW YORK FROM 1777 TO 1850, at 145-50 (1918).

²³⁵ I J. HAMMOND, THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK, FROM THE RATIFICATION OF THE FEDERAL CONSTITUTION TO DECEMBER, 1840, at 224-35 (4th ed. Buffalo 1850).

²³⁶ *Id.* at 238.

²³⁷ *Id.*

²³⁸ R. ERNST, RUFUS KING, AMERICAN FEDERALIST 296 (1968).

²³⁹ COLUMBIA UNIVERSITY OFFICERS AND ALUMNI, 1754-1857, at 18 (M. Thomas ed. 1936).

²⁴⁰ R. ERNST, *supra* note 238, at 298-99.

²⁴¹ Van Amringe, *King's College and Columbia College*, in A HISTORY OF COLUMBIA UNIVERSITY, 1754-1904; PUBLISHED IN COMMEMORATION OF THE ONE HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF KING'S COLLEGE 85-86 (B. Mathews ed. 1904).

²⁴² A. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK; ITS HISTORY, A HISTORY OF THE COURTS WITH WHICH ITS MEMBERS WERE CONNECTED; BIOGRAPHICAL SKETCHES OF ITS MEMBERS; AND ITS VETOES 344 (Albany 1854).

by the remaining trustees.²⁴³

The New York Council of Revision,²⁴⁴ composed of the Livingstonian Republicans Governor Morgan Lewis and state Supreme Court Justice Smith Thompson, and the Federalist Chief Justice James Kent,²⁴⁵ vetoed the amendment.²⁴⁶ In his opinion for the Council, Kent admitted that the legislative interference with the college might be justified by some "strong public necessity."²⁴⁷ However, there was no such necessity in the present case,²⁴⁸ and the objectionable amendment was made without the consent of the corporation.²⁴⁹ "It is a sound principle in free governments," wrote Kent, "that charters of incorporation, whether granted for private or local, or charitable, or literary or religious purposes, were not to be affected without due process of law, or without the consent of the parties concerned."²⁵⁰ The New York Senate voted to override the Council's veto, but the Clintonians could not muster the necessary votes in the House.²⁵¹

Columbia got its revised charter in 1810,²⁵² without the objectionable provisions, but attempts to compromise the college's independence continued. In 1817, Governor Daniel Tompkins launched a public campaign to persuade the Columbia trustees to cut its ties with the Episcopalian Trinity Church²⁵³ and merge with Washington College, a recently-chartered and inadequately-endowed institution.²⁵⁴ The campaign grew out of the Governor's efforts to develop his land on Staten Island.²⁵⁵ He proposed

²⁴³ *Id.*

²⁴⁴ N.Y. CONST. of 1777, art. III. The Council of Revision was composed of the governor, chancellor, and any two or more members of the supreme court. It could veto legislation, but the bill could be passed over the Council's veto by a two-thirds majority of each house. *Id.*

²⁴⁵ A. STREET, *supra* note 242, at 344.

²⁴⁶ *Id.*

²⁴⁷ A. STREET, *supra* note 242, at 345.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 344.

²⁵⁰ *Id.* at 345.

²⁵¹ *Id.*

²⁵² Act of Mar. 23, 1810, ch. 85, 1810 N.Y. Public Laws 34.

²⁵³ J. WHITEHEAD, *supra* note 3, at 28.

²⁵⁴ R. IRWIN, DANIEL D. TOMPKINS 214-15 (1968); F. HOUGH, HISTORICAL AND STATISTICAL RECORD OF THE UNIVERSITY OF THE STATE OF NEW YORK DURING THE CENTURY FROM 1784 TO 1884, at 360-61 (1885).

²⁵⁵ R. IRWIN, *supra* note 254, at 213.

to found a partially state-supported college on his land in order to promote rapid development of the area, and he got a charter for Washington College for this purpose from the Board of Regents.²⁵⁶ However, aside from the land, the Governor's new institution had neither endowment nor operating funds.²⁵⁷ For these, the Governor looked to Columbia. Printed petitions objecting to the maintenance of a college in Manhattan and extolling Staten Island as an ideal location for an educational institution were circulated and submitted to the Board of Regents.²⁵⁸ Obliging, the Regents voted to ask the Columbia trustees to merge with Washington College.²⁵⁹ Tompkins, as it might be expected, notified Columbia that the Regents' recommendation had his enthusiastic support.²⁶⁰ After extensive deliberation, however, a special committee of Columbia trustees rejected the proposal.²⁶¹ It would not, the committee said, be "consistent with the Duty of Faithful Trustees, and necessary for the Advancement of Literature and Science" to unite with the new college.²⁶² The Columbia trustees unanimously concurred with its special committees.²⁶³ Justice Brockholst Livingston, now both Treasurer and Chairman of the Board of Columbia,²⁶⁴ personally informed Tompkins of the trustees' decision.²⁶⁵ Neither the Governor nor the Regents took further action. Columbia retained its connection with the Trinity Church²⁶⁶ and remained haughtily independent on Manhattan, while Washington College came to an early end.²⁶⁷

Justice Brockholst Livingston, appointed to the United States Supreme Court in 1806,²⁶⁸ was in the center of all these events.

²⁵⁶ *Id.* at 214-16; F. HOUGH, *supra* note 254, at 361.

²⁵⁷ R. IRWIN, *supra* note 254, at 216.

²⁵⁸ *Id.* at 215-16; F. HOUGH, *supra* note 254, at 360-61.

²⁵⁹ R. IRWIN, *supra* note 254, at 217; F. HOUGH, *supra* note 254, at 362.

²⁶⁰ R. IRWIN, *supra* note 254, at 217.

²⁶¹ *Id.*

²⁶² Van Amringe, *supra* note 241, at 104.

²⁶³ *Id.*

²⁶⁴ COLUMBIA UNIVERSITY OFFICERS AND ALUMNI, 1754-1857, *supra* note 239, at 17,

18.

²⁶⁵ R. IRWIN, *supra* note 254, at 217-18.

²⁶⁶ J. WHITEHEAD, *supra* note 3, at 29.

²⁶⁷ R. IRWIN, *supra* note 254, at 218.

²⁶⁸ Dunne, *Brockholst Livingston*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 391 (L. Friedman & F. Israel eds. 1969).

He had been named to the New York Board of Regents in the original act of 1784²⁶⁹ and was chosen treasurer at the first meeting.²⁷⁰ The act of 1787 transferred him from the Regents to the Columbia board of trustees,²⁷¹ where he served as treasurer from 1787 on.²⁷² In 1816, he was elected chairman of the board and held this post along with his treasurer's job until his death in 1823.²⁷³

Livingston thus had more experience and a greater personal interest in college administration and the relationship between college and state than any other Justice when *Dartmouth College* came before the Supreme Court. After all, he had been working for decades to keep Columbia out of the hands of the New York legislature and the Regents. Leaving Columbia subject to partisan contention, sectarian jealousies, and politicians' entrepreneurial ambitions had produced endless trouble and nothing positive for Columbia or the government. As treasurer and chairman of the board of the publicly-founded Columbia, Livingston agreed with Story that constitutional protection ought to be extended not only to privately-founded but also to publicly-founded educational institutions.²⁷⁴

Many other conflicts arose between college and governmental authorities in the late colonial and early national period. In the middle of the eighteenth century, Yale's President Thomas Clapp

²⁶⁹ Act of May 1, 1784, ch. 51, 1784 N.Y. Laws 686, 687.

²⁷⁰ COLUMBIA UNIVERSITY OFFICERS AND ALUMNI, 1754-1857, *supra* note 239, at 9, 10; Van Amringe, *supra* note 241, at 61; Minutes of the Regents (May 5, 1784), *reprinted in* D. PRATT, *supra* note 226, at 684.

²⁷¹ Act of April 13, 1787, ch. 82, 1787 N.Y. Laws 524, 527.

²⁷² COLUMBIA UNIVERSITY OFFICERS AND ALUMNI, 1754-1857, *supra* note 239, at 18.

²⁷³ *Id.* at 17.

²⁷⁴ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) at 666 (Story, J., concurring). Before the opening of the 1819 term, Story sent Livingston a copy of his opinion in the Dartmouth College case. Livingston replied that he hoped it would be adopted "without alteration." Letter from Brockholst Livingston to Joseph Story (Jan. 24, 1819), *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY, *supra* note 216, at 323. Livingston had prepared an opinion but did not publish it. Letter from Henry Wheaton to Timothy Farrar (Aug. 2, 1819), *reprinted in* J. SHIRLEY, *supra* note 3, at 296; G. DUNNE, *supra* note 207, at 179. Beveridge surmised that Livingston was "influenced" by the opinion of New York's Chancellor James Kent on *Dartmouth College*. 4 A. BEVERIDGE, *supra* note 172, at 257. Unless it is assumed that Livingston was originally disposed against Dartmouth College, it is difficult to know what influence Kent might have had.

consolidated control over the institution²⁷⁵ and over time managed to anger just about all major factions in Connecticut.²⁷⁶ When it was proposed that the legislature visit the college,²⁷⁷ Clap responded that Yale had been privately founded,²⁷⁸ which was probably incorrect,²⁷⁹ and that therefore the legislature had no authority to visit the institution.²⁸⁰ Religious and secular factionalism continued to disturb relations between Yale and the Connecticut legislature until 1792²⁸¹ when a durable compromise settlement was reached.²⁸² In 1795, Zephaniah Swift, Connecticut's future Chief Justice,²⁸³ became the first to define the peculiarly American category of "private corporations," identifying Yale and two Connecticut banks as "private corporations" which the legislature could not dissolve except through the courts.²⁸⁴

During the Revolution, the Pennsylvania legislature, controlled by the radical Constitutionalist party, led in part by Presbyterians, removed all the officials of the College, Academy and Charity School of Philadelphia, who were predominantly Anglicans and suspected Loyalists, replacing the Anglican with a Presbyterian provost.²⁸⁵ The deposed officials never accepted the charter amendment and worked for a decade to secure the restoration of the old charter.²⁸⁶ They made common cause with the

²⁷⁵ L. TUCKER, PURITAN PROTAGONIST 64-65, 72-74 (1962).

²⁷⁶ *Id.* at 114-200; J. HERBST, *supra* note 3, at 66-81.

²⁷⁷ L. TUCKER, *supra* note 275, at 203; J. HERBST, *supra* note 3, at 80-81.

²⁷⁸ L. TUCKER, *supra* note 275, at 226-27; T. CLAP, *supra* note 89, at 70-71; J. HERBST, *supra* note 3, at 115-16.

²⁷⁹ R. WARCH, SCHOOL OF THE PROPHETS 25 n.44, 26-27, 31 (1973); *cf.* J. HERBST, *supra* note 3, at 38-43, 116-17.

²⁸⁰ L. TUCKER, *supra* note 275, at 226-27; T. CLAP, *supra* note 89, at 74-75; J. HERBST, *supra* note 3, at 115-16.

²⁸¹ E. MORGAN, THE GENTLE PURITAN 299, 304-06, 319, 349-53, 357, 410, 412 (1962); J. HERBST, *supra* note, at 174-76.

²⁸² E. MORGAN, *supra* note 281, at 318-19, 419; Act of May, 1792, reprinted in THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 694 (1808).

²⁸³ Baldwin, *Zephaniah Swift*, in 2 GREAT AMERICAN LAWYERS 99 (W. Lewis ed. 1907).

²⁸⁴ 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 225, 228 (Windham, Connecticut 1795).

²⁸⁵ E. CHEYNEY, HISTORY OF THE UNIVERSITY OF PENNSYLVANIA, 1740-1940, at 104-25 (1940); H. MILLER, *supra* note 131, at 133; J. HERBST, *supra* note 3, at 178-79; Act of Nov. 27, 1779, ch. 136, 1779 Pa. Laws 271.

²⁸⁶ E. CHEYNEY, *supra* note 285, at 146-47; J. HERBST, *supra* note 3, at 179-82.

supporters of the Bank of North America, whose Pennsylvania charter had been repealed in 1784. This faction forcefully argued that not only bank charters but also acts incorporating charitable institutions "in consideration of money paid, or to be paid by the contributors" were public contracts which could not be repealed by the legislature.²⁸⁷ In 1789, the legislature restored the charters and property of the College of Philadelphia to the deposed officials.²⁸⁸ The Pennsylvania Constitution of 1790 confirmed the privileges of corporate bodies²⁸⁹ and added a provision forbidding the legislature to pass any law impairing contracts.²⁹⁰

Directed by the North Carolina Constitution to encourage useful learning in one or more universities,²⁹¹ the legislature founded the University of North Carolina in 1789²⁹² and granted it all property which had or would escheat to the state²⁹³ and all lands which had been confiscated from Loyalists during the Revolution and not yet sold in 1794.²⁹⁴ Soon the University was dominated by Federalists and Presbyterians, both minorities in the State.²⁹⁵ In 1800, the Republican legislature repealed the grants of confiscated lands and escheats,²⁹⁶ which threatened to destroy the school. The University's trustees challenged the legislature in court.²⁹⁷ In a broad opinion, the North Carolina high court declared the repeal unconstitutional in part because it violated the

²⁸⁷ [P. WEBSTER], AN ESSAY ON CREDIT, IN WHICH THE DOCTRINE OF BANKS IS CONSIDERED, AND SOME REMARKS ARE MADE ON THE PRESENT STATE OF THE BANK OF NORTH-AMERICA 23, 34-35 (Philadelphia 1786) (emphasis in original).

²⁸⁸ Act of March 6, 1789, ch. 12, 1789 Pa. Laws 16.

²⁸⁹ PA. CONST. OF 1790, art. 8, § 3.

²⁹⁰ *Id.* art. 9, § 17.

²⁹¹ N.C. CONST. OF 1776, § 41.

²⁹² Act of Dec. 11, 1789, ch. 20, 1789 N.C. Sess. Laws 14. 1 K. BATTLE, HISTORY OF THE UNIVERSITY OF NORTH CAROLINA FROM ITS BEGINNING TO THE DEATH OF PRESIDENT SWAIN, 1789-1868, at 1-3 (1907).

²⁹³ Act. of Nov. Sess., 1789, ch. 21, § 2, 1789 N.C. Sess. Laws 16.

²⁹⁴ Act of July Sess., 1794, ch. 3, 1794 N.C. Sess. Laws 2.

²⁹⁵ 1 K. BATTLE, *supra* note 292, at 143; D. GILPATRICK, JEFFERSONIAN DEMOCRACY IN NORTH CAROLINA, 1789-1816, at 129 (1931); H. MILLER, *supra* note 131, at 244.

²⁹⁶ Act of Nov. Sess., 1800, ch. 5, 1800 N.C. Sess. Laws 3.

²⁹⁷ Trustees of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 59 (1805). For discussions of the case, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 381-84 (1911); Knight, *North Carolina's "Dartmouth College Case,"* 19 J. HIGHER EDUC. 116 (1948). *Foy* was effectively overruled by *University of N.C. v. Maultsby*, 43 N.C. (8 Ired. Eq.) 257 (1851).

due process clause of the state constitution.²⁹⁸ Anticipating Justice Story in *Dartmouth College*, the court stated that the property of the University was as completely beyond the control of the legislature as the property of individuals or that of any other corporation, even though the University was established for a public purpose.²⁹⁹

The New Hampshire legislature's attack on Dartmouth College in 1816 was another in the growing number of disruptive governmental assaults on institutions of higher education.³⁰⁰ Functionally, Dartmouth had always been private, with only limited, sporadic contact with the state. The college was established as a result of the persistent efforts of Reverend Eleazor Wheelock. Dartmouth received donations from many individuals, of whom New Hampshire Governor John Wentworth was merely one.³⁰¹ Even if Wheelock was not technically the "founder" as the Dartmouth charter stated,³⁰² Justice Washington was certainly correct that neither the king nor the province of New Hampshire was the founder of Dartmouth.³⁰³

Dartmouth had little functional connection with the New Hampshire government. The original charter had made several provincial officials trustees in their private capacities,³⁰⁴ but these

²⁹⁸ 5 N.C. (1 Mur.) at 87-89. N.C. CONST. of 1776, A Declaration of Rights, § 10, provided, "[t]hat no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." 5 N.C. (1 Mur.) at 88.

²⁹⁹ 5 N.C. (1 Mur.) at 88.

³⁰⁰ In addition to those noted above, the Kentucky legislature in 1818 replaced existing trustees of Transylvania University, a majority of whom were Presbyterians, a minority sect in the state, and provided that a new board would be elected by the legislature every two years. Perhaps because Transylvania was founded as a public institution, with legislative control specifically reserved, the displaced trustees brought no legal challenge. See generally N. SONNE, *LIBERAL KENTUCKY, 1780-1828* (1939); J. WRIGHT, *TRANSYLVANIA* (1975). At the turn of the century in Virginia, the legislature remodeled Liberty Hall Academy into the College of Washington. When the Presbyterian trustees objected, the Virginia legislature substantially undid its reformation. See generally Hutcheson, *Virginia's "Dartmouth College Case,"* 51 VA. MAGAZINE HIST. & BIOGRAPHY 134 (1943); O. CRENSHAW, *GENERAL LEE'S COLLEGE* 3-16, 25-31 (1969).

³⁰¹ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) at 665 (Story, J., concurring).

³⁰² *Id.* at 529.

³⁰³ *Id.* at 665.

³⁰⁴ *Id.* at 525.

were replaced over time.³⁰⁵ After 1788, the Dartmouth trustees recognized that the Governor of New Hampshire had an *ex officio* position on the board, but the Governor sat only occasionally.³⁰⁶ Despite repeated requests,³⁰⁷ the New Hampshire legislature gave only sporadic assistance to Dartmouth,³⁰⁸ assuming no permanent responsibility for the welfare of the college.

When the New Hampshire legislature did assist Dartmouth, it often did so on the assumption that it was subsidizing a legally and functionally private institution. Grants of land in 1789³⁰⁹ and 1807,³¹⁰ and a 1795 grant of permission to sponsor a lottery,³¹¹ made certain governmental officials *ex officio* members of the Dartmouth board of trustees for the limited purpose of administering the state grants and lottery proceeds. If the legislature thought the college was public, subject to the full control of the government at all times and for all purposes, such intrusions into the Dartmouth administrative machinery for the purposes of limited regulation were awkward and unnecessary. More significantly, the limitation of the authority of the state's representatives to the administration of state grants and lottery funds was an implicit acknowledgement that in practice Dartmouth functioned as an autonomous institution, with a private endowment managed only by private trustees who did not represent the state. Finally, although the governor occasionally sat with the Dartmouth board, there is no evidence that the eligible New Hampshire officials sat regularly.³¹² Even the limited regulatory authority of the state was thus practically unexercised, and Dartmouth operated for nearly half a century, from 1769 until 1816, with no permanent and functional connection with the state.³¹³

³⁰⁵ J. LORD, *supra* note 3, at 62-63, 62 n.1.

³⁰⁶ F. CHASE, *supra* note 3, at 613-15.

³⁰⁷ F. STITES, *supra* note 3, at 7-8, 117 n.28.

³⁰⁸ *Id.* at 7-8, 117 nn.27-28, 118 nn.31-32.

³⁰⁹ Act of Feb. 5, 1789, ch. 46, *reprinted in* 5 LAWS OF N.H. 396 (1916).

³¹⁰ Act of June 18, 1807, ch. 54, *reprinted in* 7 LAWS OF N.H. 601 (1918).

³¹¹ Act of Dec. 31, 1795, ch. 26, *reprinted in* 6 LAWS OF N.H. 294 (1917).

³¹² 1 L. RICHARDSON, *supra* note 3, at 223-24.

³¹³ When Dartmouth Professor Nathan Smith offered to donate a lot and certain equipment if the state would appropriate money for a new medical building, the legislature appropriated the money on the condition that the lot be conveyed to the state, not Dartmouth. Act of June 23, 1809, ch. 18, *reprinted in* 7 LAWS OF N.H. 813 (1918). After the lot was conveyed, the legislature treated the lot and the building as state property. Resolution of Dec. 27, 1816, *reprinted in* 8 LAWS OF N.H. 590 (1920).

The New Hampshire legislature's attack on Dartmouth in 1816 grew out of a quarrel between Dartmouth President John Wheelock and the Board of Trustees. After the turn of the nineteenth century, and especially after 1810, the Board became increasingly independent of the President, ignoring his recommendations on personnel and gradually stripping him of responsibility and authority.³¹⁴ Exasperated, Wheelock took his case to the public in a pamphlet,³¹⁵ and to the New Hampshire legislature in a *Memorial*.³¹⁶ In his *Memorial*, Wheelock accused the Trustees of misappropriating college funds³¹⁷ and of establishing a new system at Dartmouth which would strengthen the interests of a party or sect and would ultimately influence the government.³¹⁸ The legislature provided for a fact-finding commission,³¹⁹ and the Board of Trustees removed Wheelock from the Presidency of Dartmouth.³²⁰

The Dartmouth College controversy provided the opportunity for New Hampshire's Jeffersonian-Republican party, out of power for several years, to exploit the state's religious divisions to regain control of the government.³²¹ A majority of the Dartmouth Trustees were Federalists and associated with the Congregational church,³²² which still enjoyed a quasi-established status.³²³ Republicans, led by their noisy publicist, Isaac Hill, constructed a coalition of Wheelock supporters, religious liberals, Baptists, Quakers, Methodists, disgruntled Congregationalists, and other dissenters in favor of religious liberty and against Federalist political and religious orthodoxy.³²⁴ Federalists, including the Dart-

³¹⁴ F. STITES, *supra* note 3, at 9-11.

³¹⁵ [J. WHELOCK], 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 (Newburyport 1815).

³¹⁶ J. WHELOCK, MEMORIAL (1815), reprinted in J. LORD, *supra* note 3, at 671 app.

³¹⁷ *Id.* at 672 app.

³¹⁸ *Id.* at 673 app.

³¹⁹ F. STITES, *supra* note 3, at 16-17.

³²⁰ J. LORD, *supra* note 3, at 75-77.

³²¹ 2 W. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1883, at 883 (1971).

³²² F. STITES, *supra* note 3, at 12.

³²³ 2 W. MCLOUGHLIN, *supra* note 321, at 833-93 *passim*; D. COLE, JACKSONIAN DEMOCRACY IN NEW HAMPSHIRE, 1800-1851, at 29 (1970).

³²⁴ 2 W. MCLOUGHLIN, *supra* note 321, at 883, 887-93; D. COLE, *supra* note 323, at 29-30.

mouth Trustees, were accused of wanting to establish a "law religion" which could perpetuate orthodoxy, while Republicans claimed to be the party of religious toleration and universal freedom.³²⁵

After the Republicans won the election of 1816, they did little immediately to disestablish the church,³²⁶ but they did amend the charter of Dartmouth, packing the Board of Trustees and renaming the college "Dartmouth University."³²⁷ The old Trustees refused to accept the amendment³²⁸ and commenced the suit which finally reached the United States Supreme Court.

Once again, a state government's attack on an institution of higher education, this time in the name of religious liberty and for partisan political purposes, produced no direct benefit for the institution concerned, for education generally, or for government. The New Hampshire legislature was no more willing to support Dartmouth University than it had been to support Dartmouth College. The only aid it gave the University was a loan of four thousand dollars.³²⁹

In his opinion for the New Hampshire high court upholding the legislative alteration of the Dartmouth charter, Chief Justice Richardson wrote that he could not "bring himself to believe, that it would be consistent with sound policy, or ultimately with the true interests of literature itself, to place the great public institutions, in which all the young men, destined for the liberal professions, are to be educated, within the absolute control of a few individuals, and out of the control of the sovereign power"³³⁰ There were several reasons for this. Education for the liberal professions was "too intimately connected with the public welfare and prosperity, to be . . . entrusted in the hands of a few,"³³¹ and was "worthy of the best attention of every legislature."³³² If trustees were made "independent," they would "ul-

³²⁵ 2 W. McLOUGHLIN, *supra* note 321, at 889.

³²⁶ *Id.* at 894-95.

³²⁷ Act of June 27, 1816, ch. 32, *reprinted in* 8 LAWS OF N.H. 505 (1920); 17 U.S. (4 Wheat.) at 539-44.

³²⁸ J. LORD, *supra* note 3, at 687 app.; F. STITES, *supra* note 3, at 35.

³²⁹ L. TURNER, *supra* note 3, at 299; J. LORD, *supra* note 3, at 156, 171.

³³⁰ 1 N.H. at 135.

³³¹ *Id.*

³³² *Id.*

timately forget that their office [was] a public trust" and would "exercise [their powers] and to gratify their own private views and wishes, or to promote the narrow purpose of a sect or a party."³³³ Moreover, since educational institutions needed legislative "aid and patronage," which in turn depended upon the favorable estimation of the public, independent trustees who would "dispute the public will" would provoke a long "destructive contest" in which the trustees' "triumph . . . might be infinitely more ruinous than defeat."³³⁴ Consequently, the legislature should be able to control Dartmouth and similar educational institutions and could constitutionally amend the charter.

Before the United States Supreme Court, Daniel Webster, representing Dartmouth, countered Richardson's opinion. The case, said Webster expansively, "affects not this college only, but every college, and all the literary institutions of the country."³³⁵ He warned that if "these institutions [were] subject to the rise and fall of popular parties, and the fluctuations of political opinions . . . [c]olleges and halls [would] be deserted by all better spirits, and become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning."³³⁶

To the question really posed by Richardson and Webster, whether "education [should be] altogether in the hands of government,"³³⁷ Marshall, for the Court, answered "No." His analysis leading to the conclusion that at least some colleges should not be in the hands of government, that sound constitutional policy required protection for some colleges, was curiously generalized, indirect, and fragmented, almost assuming that which was to be shown.

Marshall discussed the policy issue in two different contexts. He assumed that private individuals using private funds to instruct youth were not subject to legislative control.³³⁸ He then asked in various ways whether there were any reasons why incor-

³³³ *Id.*

³³⁴ *Id.* at 136-37.

³³⁵ 17 U.S. (4 Wheat.) at 598-99.

³³⁶ *Id.*

³³⁷ *Id.* at 634.

³³⁸ *Id.* at 634-35, 636, 638.

porated Dartmouth should be treated differently, and summarily concluded that there were not.³³⁹

Addressing the issue of whether Dartmouth came within the ambit of the contracts clause, Marshall stated that the clause was adopted "to guard against a power of at least doubtful utility, the abuse of which had been extensively felt . . . [when] anterior to the formation of the constitution, a course of legislation had prevailed in many . . . of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements."³⁴⁰ After concluding that the Dartmouth charter was a contract,³⁴¹ Marshall stated that the charter-contract would be within the protection of the contracts clause unless there were good reasons for creating a "particular exception" for Dartmouth.³⁴² Searching for reasons to create such an exception,³⁴³ Marshall found that the framers, "feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments," could not have intended to leave contracts for the advancement of literature subject to legislative control.³⁴⁴

Thus indirectly and obliquely, Marshall concluded on the basis of American experience with higher education that state legislatures' "fluctuating policy, and repeated interferences" had "produced the most perplexing and injurious embarrassments" for American colleges, and that sound policy required at least "private" institutions to be given "security and permanence" through federal constitutional protection. Although Marshall did not argue from specific instances, his conclusion followed from any fair reading of the American experience after about 1740, with most of which the Court was familiar. In state after state—in Virginia, Massachusetts, New York, Connecticut, Pennsylvania, North Carolina, and, of course, New Hampshire—legisla-

³³⁹ *Id.* at 634-39.

³⁴⁰ *Id.* at 628.

³⁴¹ *Id.* at 627, 643-44.

³⁴² *Id.* at 644.

³⁴³ *Id.* at 645-50.

³⁴⁴ *Id.* at 647-48.

tive threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions and never any substantial permanent gain for education or government. In light of this record, the benign "public" to whom Chief Justice Richardson thought colleges ought to be responsible was simply an unreal abstraction.

The *Dartmouth College* decision concerned not only educational, but also religious institutions, and more particularly educational institutions with a religious dimension. Marshall stated that Dartmouth itself had been founded for both religious and educational purposes³⁴⁵ and concluded broadly that the law of *Dartmouth College* was the law of all corporations "created for the promotion of religion," as well as for the promotion "of charity or of education"³⁴⁶

Adding religion as an element complicated and refocused the issue, but in the end reinforced the result. The problem was the proper constitutional relationship between popularly-controlled state governments on the one hand and religious and quasi-religious institutions on the other, where there were many religious denominations intensely competing with one another. The historical record to 1819 was dismal. Religious factionalism had been prominent in many of the controversies between college and state: Yale in Connecticut, the College of Philadelphia in Pennsylvania, William and Mary in Virginia, Transylvania in Kentucky, and the University of North Carolina. In New Hampshire, Governor William Plumer, a Jeffersonian liberal, made common cause with the most aggressive dissenting sects to effectively remove Dartmouth from Congregationalist control. Once again, in the long run history recorded no permanent gain for religion, for any particular sect, or for government from the system which allowed denominations to compete openly and vigorously in politics for the prize of governmentally controllable religious and quasi-religious institutions.

Thus, on the basis of the negative historical record, the Supreme Court redefined the constitutional system, partially to protect state governments from the deleterious effects of open de-

³⁴⁵ *Id.* at 633.

³⁴⁶ *Id.* at 645.

nominal competition for political prizes and partially to protect religious and quasi-religious institutions from hostile legislative action. By prohibiting legislative raids on most existing private institutions, the Court removed one of the incentives for rival sects to enter state politics and to make religion and religious institutions subjects of partisan contention, and ensured a measure of stability for fragile religious and quasi-religious institutions. *Dartmouth College* helped to channel denominational energies out of organizing for political raids and into more productive efforts to establish new institutions.

In short, *Dartmouth College* was the first great case to advance the constitutional policies assumed to underlie the first amendment's religion clauses in the federal Bill of Rights; that is, the separation of church and state in order to protect each from the other.³⁴⁷

III. PRESERVING AND USING CONSENSUS: MUNICIPAL CORPORATIONS, BUSINESS CORPORATIONS, AND RESERVATION CLAUSES

In its major constitutional cases, the Marshall Court preferred to draw upon a broad political consensus so far as possible,³⁴⁸ and in at least some of its major decisions, the Court may simply have judicially adopted widely-accepted principles to resolve the problem at hand.³⁴⁹ In *Dartmouth College*, there was plainly no popular consensus as to the proper relationship between college and state. There was only intermittent but persistently recurring political discord. The Marshall Court used its power to settle an important and politically divisive constitutional issue by restricting legislative attacks on private religious, quasi-religious and secular institutions.³⁵⁰

³⁴⁷ Madison, *A Memorial and Remonstrance*, in 8 PAPERS OF JAMES MADISON 298 (1973); *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816-18 (1978).

³⁴⁸ Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 932-47 (1978).

³⁴⁹ *Id.*, citing as examples, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

³⁵⁰ Nelson, *supra* note 348, at 944, is wrong that the Court in *Dartmouth College*

However, the majority in *Dartmouth College* found no cause to go further than necessary. It variously preserved and used popular consensus in dealing with municipal corporations, business corporations, and reservation clauses in the *Dartmouth College* opinions. We now turn to these subjects.³⁵¹

A. *Municipal Corporations*³⁵²

In England, municipal corporations were among the most sacrosanct of chartered bodies, closed, propertied, privileged, and often corrupt.³⁵³ Although colonial America was economically, socially and politically different from the mother country, the legal position of the municipal corporation in the two places was similar.³⁵⁴

The legal position of American municipal corporations, as so many institutions, was uncertain during the quarter-century following the Declaration of Independence, but after 1800 a consensus emerged as to the constitutional status of governmental corporations below the state level.³⁵⁵ Municipal corporations were subject to comprehensive state legislative control, except that legislatures could not directly seize or control corporate property.³⁵⁶ New Hampshire's Chief Justice Richardson emphasized that the legislature controlled municipal corporations,³⁵⁷

merely adopted a popular consensus to decide the case. It is true that Marshall rested his opinion on widely-held principles of property and contract, but as the frequent attacks on colleges and the opinion of the New Hampshire high court show, there was no consensus that these principles extended to colleges. In addition, the New Hampshire legislature did not, as Nelson stated, "revoke" or "repeal" the Dartmouth charter. *Id.* Had the legislature done so, *Dartmouth College* would have been a much easier case.

³⁵¹ The following discussions are merely summaries and are not intended to be complete. Some of the propositions are in the nature of hypotheses.

³⁵² The term "municipal corporations" in the following discussion includes all governmental corporations below the state level: cities, counties, incorporated towns, and the like.

³⁵³ See text accompanying note 58 *supra*.

³⁵⁴ J. TEAFORD, *supra* note 58, at 34. Many colonial cities and towns were not incorporated, so, at least technically, their constitutional and legal status did not depend on the status of corporations. Frug, *supra* note 12, at 1095-99.

³⁵⁵ J. TEAFORD, *supra* note 58, at 64-89.

³⁵⁶ *Id.* at 80, 89-90.

³⁵⁷ Trustees of Dartmouth College v. Woodward, 1 N.H. at 116-17, 125-27, 132-34.

and held that Dartmouth was likewise subject to legislative control because the property of the corporation was devoted to public uses, the trustees of the corporation were public officers, and the public was vitally interested in the institution's operations.³⁵⁸

In holding that Dartmouth was a private corporation whose charter was a constitutionally-protected contract, the United States Supreme Court carefully distinguished public or municipal corporations, which remained for the most part subject to legislative control, from private corporations, which did not, in order to answer Richardson's opinion, and, more important constitutionally, in order clearly to preserve the popular consensus as to the constitutional status of municipal corporations. Although the Court's line between unprotected "public" and protected "private" corporations was perhaps not as precise as might be wished,³⁵⁹ most municipal corporations were plainly public. Public corporations remained subject to state legislative control,³⁶⁰ except, Story added, as to certain corporate property interests which the constitution would protect.³⁶¹

The Court's distinction worked. After *Dartmouth College*, state legislatures controlled municipal corporations, with some restrictions on the extent of control over corporate property.³⁶²

B. *Business Corporations*³⁶³

The business corporation became an essential part of the system of political economy which developed in the four decades following independence.³⁶⁴ The corporation in the agrarian cap-

³⁵⁸ *Id.* at 117-20, 125, 135.

³⁵⁹ Frug, *supra* note 12, at 1101-05.

³⁶⁰ 17 U.S. (4 Wheat.) at 629-30.

³⁶¹ *Id.* at 694-95, 697-98 (Story, J., concurring).

³⁶² J. TEAFORD, *supra* note 58, at 90; Frug, *supra* note 12, at 1104-05.

³⁶³ The term "business corporation" in the following discussion means a corporation created primarily for the purpose of making money for its owners.

³⁶⁴ The literature on early American business corporations is vast. See generally J. BLANDI, *MARYLAND BUSINESS CORPORATIONS, 1783-1852* (1934); J. CADMAN, *THE CORPORATION IN NEW JERSEY* (1949); J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1917); E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860, WITH SPECIAL REFERENCE TO MASSACHUSETTS* (1954); G. EVANS, *BUSINESS INCORPORATIONS IN THE UNITED STATES, 1800-1943* (1948); O. HANDLIN & M. HANDLIN, *COMMONWEALTH*

italist economic system of the late eighteenth and early nineteenth centuries was used to promote economic growth by encouraging the formation of capital and providing financial support for the operation of the system. Thus, the most prominent corporations were in the areas of transportation—turnpikes, canals and river improvements, bridges—and finance—banking and insurance.

Most internal improvement corporations were chartered individually by state legislatures. The legislature granted privileges which entrepreneurs deemed necessary to attract investment and imposed duties and restrictions deemed necessary to protect important public or private interests which might be damaged by the enterprise. The whole chartering process suggested a bargain, a contract, between the legislature and entrepreneurs, on the strength of which individuals invested in the corporation. The charters themselves were drawn as contracts, indicating the terms of the bargains. For example, the charter of the James River Company, which was granted by the Virginia legislature in 1785, and which became a model for nearly all future Virginia internal improvement charters, provided that “for and in consideration of the expenses the . . . proprietors will be at” in building and maintaining the canal, the “canals and works, with all their profits” were vested in the proprietors forever and exempted from all taxation.³⁶⁵ The legislature was even more explicit in its recharter of the Bank of Virginia in 1814. The preamble stated that the “stockholders of the Bank” had “proposed for the acceptance of the General Assembly . . . their terms and conditions of

(rev. ed. 1969); L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* (1948); M. HEATH, *CONSTRUCTIVE LIBERALISM* (1954); J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (1970); S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION* (1971); S. LIVERMORE, *EARLY AMERICAN LAND COMPANIES* (1968); R. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855* (1982); Baldwin, *History of the Law of Private Corporations in the Colonies and States*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 236 (1909); Callendar, *The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations*, 17 *Q.J. ECON.* 111 (1902); Handlin & Handlin, *Origins of the American Business Corporation*, 5 *J. ECON. HIST.* 1 (1945); Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 *J. POL. ECON.* 877 (1940); Lively, *The American System: A Review Article*, 29 *BUS. HIST. REV.* 81 (1955); Williston, *History of the Law of Business Corporations Before 1800*, 2 *HARV. L. REV.* 105, 149 (1888).

³⁶⁵ Act of Jan. 5, 1785, ch. 19, § 9, 1784 Va. Acts 10, 11 (1785).

a mutual compact between the stockholders and the commonwealth." The legislature "accepted" the stockholders' proposals and went on to ratify "the compact which the . . . recited terms and conditions import."³⁶⁶ The North Carolina Supreme Court rejected a constitutional challenge to the legislature's grant of a charter privilege to a bank:

It is not questioned that the Legislature had the power to grant the charter to the Bank of Newbern. The object of this grant was the public good, which the Legislature had in view on the one hand, and the grantees had their private interest in view on the other. To carry into effect the scheme of the bank, it became necessary for the parties to enter into arrangements for that purpose; and one part of the arrangement was, that debts due to the bank might be recovered in a summary way [T]his privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the bank. It is not for this Court to say whether the Legislature made a good or a bad bargain; it is sufficient to see that they contracted under legitimate powers; for over such contracts courts of justice have no control.³⁶⁷

After about 1810, there was a broad popular consensus concerning the status of business corporations. As a general rule, legislatures scrupulously respected their chartered rights. With few exceptions, most of which were under special circumstances, none of the states seems to have arbitrarily altered substantive chartered rights of business corporations.³⁶⁸ As a practical matter, if the system of political economy were to work properly, business corporations had to survive success. Legislatures could not attract investment into useful projects if corporate success resulted in a reduction of benefits to stockholders. And where there was a public outcry against an existing business corporation, the

³⁶⁶ Act of Jan. 24, 1814, ch. 31, 1813 Va. Acts 67 (1814).

³⁶⁷ *Bank of Newbern v. Taylor*, 6 N.C. (2 Mur.) 266, 267 (1813). In *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819), decided twenty days after *Dartmouth College*, the United States Supreme Court stated that a charter grant of a summary remedy for recovery of notes was not "a chartered right in the bank," but was a "remedy" subject to legislative control. *Id.* at 244-45.

³⁶⁸ B. Campbell, *Law and Experience in the Early Republic* 322, 324-35 (1973) (unpublished Ph.D. dissertation in Michigan State University Library).

defense, predictably, was stated in terms of respect for chartered rights.³⁶⁹

In the *Dartmouth College* case, both the New Hampshire and United States high courts assumed that charters of business corporations were constitutionally protected from arbitrary legislative amendment or repeal. Chief Justice Richardson defined chartered canal, turnpike, bridge, banking, insurance, and manufacturing companies as "private corporations" whose "property . . . and . . . profits . . . in fact belongs [sic] to individuals."³⁷⁰ He suggested that the "property and immunities of such corporations" should enjoy the same constitutional protections as the property and immunities of individuals.³⁷¹ However, Dartmouth was a public corporation, in a different class from constitutionally protected private corporations.

Chief Justice Marshall did not specifically mention business corporations, but he drew upon the popular consensus as to their protected position in the political economy. He simply stated without argument that the federal contracts clause extended to charters "made on a valuable consideration . . . for the security and disposition of property . . . on the faith of which, real and personal estate has been conveyed to the corporation."³⁷² This plainly comprehended business corporation charters. The question was whether, as Richardson had held, Dartmouth College was different from business corporations;³⁷³ Marshall held that it was not.

Justice Story was even more explicit than Marshall. Story stated that bank, insurance, canal, bridge and turnpike companies whose stock was owned by private individuals were private corporations.³⁷⁴ Again, the question was whether Dartmouth was likewise a protected private corporation, and Story agreed with Marshall that it was.

The Supreme Court thus both used and preserved the pop-

³⁶⁹ Campbell, *John Marshall, the Virginia Political Economy, and the Dartmouth College Decision*, 19 AM. J. LEGIS. HIST. 40, 58-60 (1975); L. HARTZ, *supra* note 364, at 236-37.

³⁷⁰ 1 N.H. at 116.

³⁷¹ *Id.* at 120.

³⁷² 17 U.S. (4 Wheat.) at 644.

³⁷³ *Id.*

³⁷⁴ *Id.* at 669 (Story, J., concurring).

ular consensus that business corporation charters were protected from arbitrary legislative amendment or repeal. The Court used the consensus as a basic principle which, it concluded, should be extended to private religious and educational corporations such as Dartmouth.³⁷⁵ Since the issue was not really the possession and use of property as such, but rather, political control, *Dartmouth College* was a *tour de force*, an imaginative appropriation of the popular respect for private property and contract to the service of diversity, institutional freedom, and civil liberty. And, of course, as the decision rested upon the principle of respect for business corporation charters, so *Dartmouth College* preserved the principle.

C. *Reservation Clauses in Corporate Charters*

Reservation clauses were provisions in corporate charters reserving to the legislature the power to alter, amend, or repeal all or part of the charter, either unconditionally or on the happening of certain events.³⁷⁶ In England, the Crown regularly inserted reservation clauses in corporate charters,³⁷⁷ and some American legislatures, perhaps following England's lead, very early began inserting reservation clauses in charters of business and other corporations. In 1784, when it chartered the City of Hartford, the Connecticut General Assembly reserved the power to alter or revoke the charter if any of its provisions were found to be "inconvenient" or "inadequate."³⁷⁸ In 1789, Connecticut became the first state to include a general reservation clause in a business corporation charter, as the legislature reserved a right to alter, amend, or repeal the charter of the silk manufacturers of Mansfield.³⁷⁹ Thereafter, the state made extensive use of such

³⁷⁵ J. HERBST, *supra* note 3, at 234.

³⁷⁶ General reservation clauses reserved legislative power to alter, amend, or repeal any section of the charter. Partial reservation clauses applied only to specific charter provisions, such as the rates of toll. Both general and partial reservation clauses were unconditional or conditional. Unconditional reservation clauses were exercisable by the legislature at any time. Conditional reservation clauses were operative only after the passage of time, the receipt by the company of the original investment plus a designated percentage of profit, or the occurrence of some other event.

³⁷⁷ See text accompanying notes 52-56 *supra*.

³⁷⁸ Act of May Sess., 1784, 1784 Conn. Public Acts 284, 291.

³⁷⁹ 2 J. DAVIS, *supra* note 364, at 314-15.

clauses.³⁸⁰ In 1789, Massachusetts became the first state to reserve an unconditional power to regulate charges by a business corporation.³⁸¹ Many Massachusetts business corporation charters issued after 1789 contained reservation clauses.³⁸² New Hampshire and Pennsylvania began using general reservation clauses after the turn of the nineteenth century.³⁸³ New York also began using reservation clauses in non-business and business corporation charters after the turn of the century.³⁸⁴ Delaware, Louisiana, Georgia, Virginia, Maryland, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Vermont rarely or never included general reservation clauses in the charters of most relatively large and important enterprises.³⁸⁵

Reservation clauses were consistent with the prevailing assumptions that corporate charters were public contracts and that they were the measure of both corporate rights and corporate duties and liabilities. In the chartering process, the legislature could impose liabilities and duties, and could reserve to itself authority to alter or amend the charter. The prospective corporators could refuse to accept a charter containing a reservation clause, but if they did accept it, they accepted the risk of future adverse legislative action. Although reservation clauses were rarely exercised because of the adverse effect such action would have on the attraction of capital, the clauses were taken seriously. For example, when Massachusetts' Middlesex Canal corporation complained that a charter reservation allowing the legislature to regulate tolls after forty years had caused "great discouragements and embarrassments . . . in the execution of that project," the General Court modified the charter to guarantee a minimum rate of toll to the corporation "forever."³⁸⁶ Justice Story was a charter member of the Massachusetts General Hospital, whose charter created a corporation to be managed by a small

³⁸⁰ B. Campbell, *supra* note 368, at 320.

³⁸¹ Act of Feb. 13, 1789, § 3, 1789 Mass. Acts 773, 774.

³⁸² B. Campbell, *supra* note 368, at 192-94; E. DODD, *supra* note 364, at 41 n.116, 213 n.73, 228-30.

³⁸³ B. Campbell, *supra* note 368, at 321.

³⁸⁴ R. SEAVOY, *supra* note 364, at 25, 37, 51, 66.

³⁸⁵ *Id.* at 251-55, 321.

³⁸⁶ Act of Jan. 25, 1800, ch. 3, 1800 Mass. Acts 342.

board of trustees and to be superintended by a board of visitors composed of governmental officers.³⁸⁷ The legislature reserved a power to alter, amend or repeal the charter. However, when the project failed to prosper, the legislature repealed the reservation clause, restricted the superintending control of the board of visitors, and otherwise limited governmental control over the institution.³⁸⁸

The presence of reservation clauses in some corporate charters and their absence from many others had important implications for the constitutional status of private corporations.³⁸⁹ If charters, and through them corporations, had been subject to general legislative control, reservation clauses would have been legally superfluous. Selective inclusion of reservation clauses in corporate charters makes sense legally only if the absence of a reservation clause meant an absence of legislative power to alter or amend the charter. In general, the charter was assumed to be the measure of corporate rights against the state.

As the Supreme Court in *Dartmouth College* preserved the constitutional status of municipal and business corporations, so as a corollary it preserved the constitutional status and legal function of reservation clauses. Marshall did not specifically mention reservation clauses in his opinion. However, he stated that a legislative power to amend the Dartmouth charter, "a power which is not only not expressed, but is in direct contradiction to its [the charter's] express stipulations," would not be implied.³⁹⁰ Had the Dartmouth charter contained a reservation clause, Marshall was suggesting, there would have been a much different case. And nothing in Marshall's opinion indicated that a reservation clause would not be effective.

Justice Story was more explicit than Marshall about reservation clauses and their legal status. Story repeated the declaration of the Massachusetts high court that "the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legisla-

³⁸⁷ Act of Feb. 25, 1811, ch. 94, 1811 Mass. Acts 339. See generally N. BOWDITCH, A HISTORY OF THE MASSACHUSETTS GENERAL HOSPITAL (Boston 1851).

³⁸⁸ Act of June 14, 1813, ch. 42, 1813 Mass. Acts 266.

³⁸⁹ Denham, *supra* note 3, at 220-21.

³⁹⁰ 17 U.S. (4 Wheat.) at 638.

ture in the act of incorporation.”³⁹¹ Story stated that if the legislature wanted to claim an authority to take away or control powers or franchises vested by the charter in a private corporation or its officers, the legislature would have to reserve a power to do so in the original grant.³⁹²

IV. SUMMARY CONCLUSION: *DARTMOUTH COLLEGE AS A CIVIL LIBERTIES CASE*

Simply stated, the *Dartmouth College* doctrine was that the federal contracts clause protected incorporated private religious, quasi-religious and secular corporations from arbitrary state legislative attack. The Court thus partially established for the first time a constitutional principle of associational freedom and integrity in the context of the religiously and politically diverse and highly competitive early nineteenth-century American society. Inferentially, *Dartmouth College* extended to business corporations, but as to them the case merely adopted and actually reinforced the existing system of political economy. The Court's division of corporations into public and private excluded most municipal corporations from the reach of the *Dartmouth College* doctrine, except as to certain corporate property interests. As in the case of business corporations, so in the case of municipal corporations, the Court's decision respected an existing political consensus.

The Supreme Court reached its decision and formulated the *Dartmouth College* doctrine the way it did for several reasons. The principle basis was the negative American experience with relations between colleges and governments from the late colonial into the early national periods. In state after state, there were serious conflicts between colleges and governments, often caused or exacerbated by denominational competition. These conflicts showed no genuine permanent gain for education, religion, political parties, or government. Colleges were injured, more or less seriously. Political governmental processes were distorted by in-

³⁹¹ *Id.* at 708 (Story, J., concurring) (citing *Wales v. Stetson*, 2 Mass. 143, 146 (1806)).

³⁹² 17 U.S. (4 Wheat.) at 712 (Story, J., concurring).

tensifying denominational competition. On the basis of the historical record, the Supreme Court formulated the *Dartmouth College* doctrine to remove private religious, quasi-religious and secular institutions from state control for their own protection and for the purpose of protecting democratic political processes from the divisive and distorting effects of denominational competition. *Dartmouth College* thus advanced the values implicit in the first amendment religion clauses.

The Supreme Court also believed that the *Dartmouth College* doctrine would promote the voluntary private establishment of socially beneficial institutions. Marshall firmly believed that politically or constitutionally restricted control over private institutions would attract voluntary contributions into all sorts of socially beneficial enterprises, religious or secular, charitable or economic. In this sense, Marshall was merely appropriating for religion and charity the political premise which underlay the American political economy—economic growth was promoted by free enterprise, with the state releasing private energies by playing a merely facilitative role. Correlatively, by restricting the possibilities of controlling private religious and quasi-religious institutions through political action, the Court sought to channel denominational energies into the more beneficial activity of founding new institutions.

The lessons of experience with American colleges and the political economy were reinforced by the English constitutional and legal tradition of the private eleemosynary corporation which the Court drew upon in formulating and justifying the *Dartmouth College* doctrine. At the beginning of the seventeenth century, the Elizabethans had created the private eleemosynary corporation—a charitable institution in which the will of the private founder was enforced by the power of the government—deliberately to promote the establishment of socially beneficial charitable institutions. At the end of the seventeenth century, the English Glorious Revolution refocused the policy basis of the private eleemosynary corporation from promotion to political freedom, as the privateness of charitable corporations came functionally to mean political independence of major social institutions from direct royal control. The common element in the evolution of the English system was private property, a dynamic legal and consti-

tutional institution which advanced both social growth and civil liberty. The Supreme Court in *Dartmouth College* successfully tapped the English tradition in the formulation and justification of the *Dartmouth College* doctrine.

However, apart from drawing upon English legal terminology and a grand English legal and constitutional tradition, the Supreme Court did not rest its decision upon the technical English common law of private eleemosynary corporations. The problem was, as Marshall well realized, that the English common law here simply did not *fit* the American situation. No amount of pushing and hauling could change the fact that the American states had nothing like the King or the royal prerogative as institutions of governmental control or as threats to civil liberty. Similarly, the laboriously constructed English jurisdictional division between visitors and courts and Chancellor as agent of the Crown rationally could provide no rule of decision in a contest between an American state legislature and an incorporated college. Marshall honestly and wisely stayed as far as possible from these technical matters. Story's opinion, so far as it purported to rest upon the technical English common law, either distorted the law or misapplied it by ignoring fundamental differences between the English and American constitutional and legal systems.

Dartmouth College was the Supreme Court's first great civil liberties case. The Court erected at least partial constitutional protection for religious, quasi-religious and secular institutions from predatory majoritarian coalitions acting through state legislatures. The Court, moreover, acted in a thoroughly activist fashion, liberally construing an opaque constitutional guarantee in a fashion which even Marshall admitted was not specifically intended by either the founding fathers or the American people.³⁹³ Both in style and substance, the Marshall Court in *Dartmouth College* anticipated and provided historical precedent for many of the great activist civil liberties decisions of the twentieth century.

³⁹³ *Id.* at 644.