Joseph Story and the *Dartmouth College* Case: Expansion of the Contract Clause

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In 1818, the United States Supreme Court ended the year's term without rendering a decision in the case that would become the foundation for the protection of corporate property rights from state intervention: *Trustees of Dartmouth College v. Woodward.*[1] From the inception of the controversy to the reading of Justice Marshall's opinion on the opening day of the Supreme Court's term in 1819, Justice Joseph Story played a critical role in molding the *Dartmouth College* case into a solid foundation for the "protection to private property against the authority of the government--a principle which became the cornerstone of the American doctrine of constitutional government."[2] Justice Story not only helped create the legal strategy of Dartmouth College's chief counsel, Daniel Webster, but his eloquent concurring opinion repaired the shortfalls of Chief Justice Marshall's opinion.

Appointed to the Supreme Court by President Madison, Story wore the badge of the Jeffersonian Republican Party. However, his political allegiance to the party was questionable at best.[3] Story wrote in his autobiography:

> Though I was a decided member of what was called the Republican party, and of course a supporter of the administration of Mr. Jefferson and Mr. Madison, you are not to imagine that I was a mere slave to the opinions of either, or that I did not exercise an

[1]17 U.S. 518, 4 Wheat 518, 4 L.Ed 629 (1819).

[2]Charles Grove Haines, The Role of the Supreme Court in American Government and Politics: 1789-1835 (New York: University of California Press, 1960), 418.

[3]Jefferson strongly advised Madison not to appoint Story to the Court, calling him a pseudo-Republican. He was appointed only after several others declined Madison's offer

> independent judgment upon public affairs . . . . I was and always have been a lover, devoted lover, of the Constitution of the United States, and a friend to the Union of States. I never wished to bring the government to a mere confederacy of the states; but to preserve the power of the general government given by all the states, in full exercise and sovereignty for the protection and preservation of all the states.[4]

Once on the Court, Story proved to be a strong conservative, defending the "two great principles of Federalist theory: the rights and privileges of private property and the legitimate powers of the national government."[5]

While considered an enemy of property rights by many Federalists, Story had shown concern for the protection of private property throughout his career as a Salem lawyer.[6] Story outraged the southern wing of the Republican Party by representing New England claims in *Fletcher v. Peck* to property repossessed by the Georgia legislature. Story and co-counsel, Robert Harper, rejected states' rights doctrines and demanded protection of private interests through a broad interpretation of the contract clause of the Constitution[7] in their argument presented to and adopted by the Marshall Court. Story never "deviated from the letter of party allegiance, yet all his actions suggested that here was a man as much Federalist as Republican, and perhaps more."[8] Story's true commitment to private property rights became apparent as the *Dartmouth College* case unfolded.

Dartmouth College was originally chartered by the governor of New Hampshire, representing the English Crown, in 1769. The charter, granted to Reverend Eleazar Wheelock, established a school for

[4] William Wetmore Story, Life and Letters of Joseph Story, volume I, (New York: Books for Library, 1851), 128.

[5] James McClellan, Joseph Story and the American Constitution (Norman, Oklahoma: University of Oklahoma Press, 1971), 194.

[6] Ibid., 195.

[7] Article 1, Section 10 of the United States Constitution: "No state shall pass any law impairing the obligation of contracts." The contract clause would be the key to the *Dartmouth College* case.

[8] Gerald T. Dunne, *Joseph Story: 1812 Overture*, Harvard Law Review 77, 245 (1963).

educating Indian children to become Christian missionaries. The charter incorporated Dartmouth College, making Wheelock president and creating a board of trustees with the power to govern the institution.[9]

In June 1816, almost fifty years after Dartmouth College was founded, republican Governor William Plumer led the New Hampshire legislature in passing a law that essentially annulled the royal charter of Dartmouth College. The school's name was changed to Dartmouth University, the board of trustees was enlarged from twelve to twenty-one (the new members to be appointed by the governor), and the state was given the power to regulate the school's curriculum.[10]

The original twelve trustees refused to accept the legislation, resolving that "every literary institution in the State will hereafter hold its rights, privileges and property, not according to the settled established principles of law, but according to the arbitrary will and pleasure of every successive legislature."[11] The college, represented by Daniel Webster, argued before the New Hampshire Supreme Court that the legislation violated both the New Hampshire constitution and the federal contract clause. Chief Justice William Richardson's opinion ruled against the college, arguing that although the charter was a contract, Dartmouth College was a public institution not protected by the contract clause.[12] Richardson, surprisingly a strong Federalist, concluded his opinion with a forceful affirmation of judicial review and national supremacy, seeming to invite an appeal to the Supreme Court.[13] The case arrived on a writ of error and was argued at the close of the 1818 term. The term ended with the Justices still divided on the opinion.

The importance of the *Dartmouth College* case was plainly understood when it was argued. The Court's decision would define the character of the American corporation and that role it would play in the economy. It had already been established in Justice Story's opinion in

[9] Edward G. White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35 (New York: Macmillan, 1988), 612-13.

[10] McClellan, 200.

[11] White, 613.

[12] R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (Chapel Hill: University of North Carolina Press, 1985), 130.

[13] Dunne, 166.

Terret v. Taylor that a charter was considered a contract protected by the Constitution.[14] The question presented by the *Dartmouth College* case was whether a corporation was public in character and therefore subject to legislative regulation. If so, investors would be reluctant to buy stocks and the corporation's future bleak. However, if the corporation, whose function is often of a public nature, were protected from any government intervention, public welfare could be jeopardized.

When the Court convened on the opening day of the 1819 term, the state was prepared for another round of argument, to be delivered by its new counsel, William Pickney.[15] Chief Justice Marshall, instead, announced that the Court had reached a decision on the *Dartmouth Case* and began to read his opinion. Marshall concluded, without analysis, that Dartmouth's charter was indeed a contract. Further, that Dartmouth College was a private eleemosynary institution, not a public one, and, therefore, protected under the contract clause of Article 1. It was likewise clear, according to Marshall, that the New Hampshire legislation impaired the operation of the college, and thereby violated the contract. The state supreme court's decision was reversed.

Three written opinions were presented. Chief Justice Marshall's plurality opinion for the Court obtained the concurrence only of Justice William Johnson and H. Brockholst Livingston. Livingston, however, also concurred with the separate concurring opinions written by Justice Story and Justice Bushrod Washington. Justice Gabriel Duvall dissented.[16] In short, no opinion commanded a majority of the six justices, thus leaving the door open for the lower courts later to follow the more persuasive reasoning of Justice Story.

The role played by Justice Story in the *Dartmouth College* case seemed ordinary in the eyes of the many observers in the Court that day. However, Story's influence on Marshall and Story's concurring opinion were essential in making a forceful precedent of corporate contract law.

> Judging from the events leading up to the arrival of the case on the Supreme Court docket, from certain weaknesses in Marshall's

[14] *Trustees of Dartmouth College v. Woodward.* 17 U.S. 518, 4 Wheat 518, 4 L..Ed.. 629 (1819). Justice Story, concurring.

[15] Haines, 402.

[16] *Trustees of Dartmouth College v. Woodward,* Justice Story, concurring.

> opinion, and from the nature of Story's concurring opinion, it seems clear that both Marshall and Story regarded the former's controlling opinion to be somewhat unsatisfactory, and that Story was, in many respects, the real genius behind the Dartmouth College decision.[17]

Marshall's opinion, while clear and concise, "carried the seeds of destruction with it."[18] Before Story wrote his concurring opinion, he mastered Marshall's reasoning in the case and took note of the weaknesses. Filling in the gaps and correcting the mistakes in logic, Story answered the shortfalls of Marshall's opinion with common law and vested rights theory.

Marshall's definition of public and private corporations fell short of protecting the American corporation. Instead of making a vested rights argument, Marshall focused on the contract clause's application to Dartmouth College as a private eleemosynary institution. Story, however, believed that a general inquiry into all corporations under common law was essential to the *Dartmouth* case. "Here was the missing link in Marshall's narrower argument. And from this broad approach came Story's doctrine of public and private corporations, which was the crucial bridge from private eleemosynary educational institutions to the American business corporation."[19] Developing Marshall's private-public definition, Story reversed the commonwealth tradition of defining corporations by the nature of their business. Private corporations, he wrote, were businesses whose capital was private, regardless of the nature of the corporation. Expanding this definition, Story cited several examples:

> Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes . . . If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the

[17]McClellan, 202.

[18]Ibid., 204.

[19]Newmyer, 131.

> founder, or the nature of the objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. . . But, a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake a public nature.[20]

Story realized that government regulation of private corporations would make investors hesitate to buy stock. His public-private doctrine was a practical response to protect corporations from governmental interference.

Marshall's decision jumped quickly from defining Dartmouth College as a private institution to providing protection under the Constitution's contract clause. Under this interpretation, Marshall's decision could be construed to mean that once a corporation has been created by a charter, the legislature can never again effect the business's operation. Were that the case, state legislatures would then be hesitant to grant charters, causing national economic stagnation. To prevent this, Story recognized the possibility of creating "escape clauses" in corporate charters, reserving the right to the states to restrict the corporation in the future.[21] In applying that principle to the case before the Court, however, Story noted that no escape clause had been created:

> When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter.[22]

Limited to constitutional issues, Marshall avoided developing a vested right doctrine in his opinion and instead focused on the contract clause. Story's concurring opinion, however, packed common law and vested rights theory into the meaning of the contract clause. The

[20] *Trustees of Dartmouth College v. Woodward*, Justice Story, concurring.

[21] McClellan, 206.

[22] *Trustees of Dartmouth College v. Woodward*, Justice Story, concurring.

procedural "tricks" planned by Story and Webster were then unnecessary for the Court to include broad vested rights principles in their rulings on the contract clause.[23] Story thereby avoided criticism for basing the Court's decision on vested rights:

> The packing of a textual provision with extraconstitutional principles avoided any difficulty that might arise from an appeal to principles that were not embodied in textual language. As the stature of natural law as a body of principles independent of the positive enactments of a nation eroded in the nineteenth century, the summoning up of general principles as a basis for a judicial decision became more problematic. But if those principles had been read into a constitutional provision, the difficulty was surmounted.[24]

Marshall, in answering an attack on the authority of Dartmouth's charter, asserted that all contracts, executed and executory are binding on both parties. However, his analysis stopped here, inviting the criticism that a "charter which was in the nature of a license subject to revocation at any time become a binding and irrevocable contract . . . . Rights may have become vested through such a contract, but those rights are no more sacred than rights which have become vested in any other manner."[25] Story again filled in the gap with common law and practical reasoning. Once a gift is executed, it must be completely irrevocable. Otherwise "in a country like ours, where thousands of land titles had their origin in gratuitous grants of the states,"[26] such a precedent would not only cause general hysteria, but shake the country's economic foundation. For common law backing, Story cited *Fletcher v. Peck* as a precedent:

> A contract executed, is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own

[23]White, 628.

[24]Ibid., 628.

[25]Haines, 407-8.

[26]*Trustees of Dartmouth College v. Woodward*, Justice Story, concurring.

> nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.[27]

Almost as important, was Story's refutation of Marshall's claim that the contract clause only pertained to contracts concerning private property. Story expanded the clause to include "all incorporeal hereditaments,"[28] thereby upholding what he considered to be the full spectrum of protection offered by the contract clause. While not appearing to criticize Marshall's opinion, Story essentially concluded that "Marshall's perfunctory remark was utterly devoid of foundation, either in the common law or the meaning and spirit of the Constitution."[29]

Story's involvement in the *Dartmouth College* case goes well beyond his concurring opinion. Story, with the cooperation of Daniel Webster, was the legal mind behind a plan to ensure that the Supreme Court would rule on the vested rights issue. The original suit brought forward by Webster involved two primary arguments: that the charter was a contract protected by the contract clause of the Constitution and the New Hampshire legislature violated that charter; and that the New Hampshire constitution granted vested rights of which the college had been deprived. Both of these arguments required Dartmouth College to be classified as a private corporation, thereby receiving the protection of vested rights afforded to an individual. The appellate jurisdiction of the United States Supreme Court, provided in Section 25 of the 1789 Judiciary Act, however, limited the Court to constitutional issues and not "the broader issue of whether a state legislature could infringe on vested rights."[30]

Story was determined to have the Supreme Court rule on the issue of vested rights accrued by private corporations. To do this, Story advised Webster to enter three separate suits in Story's circuit court. The cases, falling under the diversity of citizenship jurisdiction would ensure that both the circuit court and the Supreme Court could consider all legal arguments presented by the prosecution. Fulfilling his part of the plan, Story and the district judge disagreed *pro forma* at the

[27]Ibid.

[28]Ibid.

[29]In the words of McClellan, 209.

[30]White, 175.

circuit court level, so that the cases could be taken immediately to the Supreme Court. Story dismissed the objections of university counsel's arguement that the "ejectment suits were fictitious. . . . One observer sympathetic to the university likened Story's action to 'an assumption of power equivalent to French despotism,' but found it consistent with Story's insistence on continually extending the jurisdiction of the federal courts." The three cases, unnecessary after the ruling in *Dartmouth*, were never heard by the Marshall Court. Story, who had anticipated that the cases would be heard, had already been working on his opinion, circulating it to respected judges for their criticism. Believing that vested rights must be included in *Dartmouth*, Story incorporated these writings into his concurring opinion.[31]

The ethics of Story's heavy involvement in the *Dartmouth* case are questionable at best. The Story-Webster collaboration pushed the limits of ethical standards of any time-period since the formation of the United States. Webster, aware that Story was working on his opinion, sent sources and citations to the justice for references.[32] Despite these questionable ethics, Story's involvement in the *Dartmouth* case cannot be easily judged as inappropriate. In order to achieve the primary objective of the Marshall Court, expanding judicial authority, Story's involvement was necessary. Further, the historic role played by the Marshall Court was that of an active participant in defining the division of power in the federal government, not that of a detached moderator. "Story's relationship with Webster in *Dartmouth College* and Marshall's surreptitious intervention in *Martin* may have crossed the line of ethical behavior, even by nineteenth-century standards, and there is evidence that both Story and Marshall took pains to create a public impression that they had approached the *Martin* and *Dartmouth College* cases in a disinterested fashion."[33] Obviously, the justices of the Marshall court perceived the role of the federal judiciary differently. Few Supreme Court decisions have had a greater impact on American historical

[31]Ibid., 177; Newmyer, 131; The investors were residents of another state suing Dartmouth University. Story and the federal district judge sitting with him at the circuit did not actually disagree on the case. Their choice to issue a certificate of division (a statement claiming a disagreement on the appropriate way to rule in the cases) would allow the cases to go immediately before the U.S. Supreme Court for consideration. The move was purely strategic; Story, 323. Cited from a letter to Story from Judge Livingston.

[32]White, 618.

[33]Ibid., 180

development than the *Dartmouth College* case. The case enhanced the prestige of Marshall's court, limited state encroachment on private rights, and provided a gateway for the growing role of corporations in American history. Story himself saw: "[T]he vital importance, to the well-being of society and the security of private rights, of the principles on which that decision rested. Unless I am very much mistaken, these principles will be found to apply with an extensive reach to all the great concerns of the people, and will check any undue encroachments upon civil rights, which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt."[34] As the corporation matured and widespread abuses of the corporate privilege followed, later courts allowed increased government regulation at the cost of private property rights. Yet, the concern for the protection of property rights remains strong--following in the vested rights tradition incorporated into American law with the *Dartmouth College* case.

The *Dartmouth* case became a legal instrument exploited by private businesses in their quest for prosperity, free of governmental interference. By allowing this freedom to the American corporation, the Marshall court ensured the economic vitality needed for the growth and advancement of a new nation. The *Dartmouth* case catalyzed the relationship between the government and the economy in the ninteenth century by allowing the corporate charter to be defined as a contract. The ruling allowed the rapid growth of industrial organization and "made possible a breadth of application for the clause which would have astonished most, if not all, of those who voted for its adoption in 1787 and 1788."[35] While bringing corporations under the protection of the contract clause required "correcting" the intent of the men who wrote the Constitution, the change was necessary for the survival and affluence of American economic expansion.

The success of constitutionalism can be attributed to the flexibility allowed by a "living constitution," adaptable to a changing society. It was Story's concurring opinion that took this extra step and provided a vested rights doctrine applicable to the American corporation, an entity which dominated the evolution of American business. "Thus, it has become a virtual convention of economic historiography to begin the

[34]Story, 331. Story to Chancellor Kent.

[35]Benjamin Fletcher Wright, The Contract Cause of the Constitution (Cambridge: Harvard University Press, 1938), 39-40.

American corporate cycle with Marshall's *Dartmouth College* opinion, and read into it the legal foundations of financial and industrial capitalism."[36] Marshall merely implied this in his opinion, but Story specifically confirmed that the ruling should be extended to corporate organization.

The *Dartmouth* case continued the success of the Marshall Court in expanding the power of the national government over states rights. *Marbury v. Madison* and *Martin v. Hunter's Lessee* took the crucial first steps in creating an appropriate division of power in the American federal system. While these cases created the federal judiciary's authority, it was the *Dartmouth* case which used this authority to protect businesses from the state encroachment.

> Another significant step had been taken to incorporate, by means of judicial interpretation, the doctrines of Federalism into our constitutional law. The principle of federal supremacy over the state courts, as announced in *Martin v. Hunter's Lessee*, and the denial of the right of a state to tax an instrumentality of the federal government, for the establishment of which there was no express warrant in the Constitution in *McCulloch v. Maryland*, were now supplemented by a rule which laid a heavy hand upon the exercise of state powers.[37]

When Marshall assumed the position of Chief Justice in 1801, he understood that his Court must "reinforce the movement toward a stronger national government," and that to do this it "would have to establish its position as an authoritative interpreter of the Constitution."[38] Still facing an imbalance in the nation-state relationship, the *Dartmouth* case forced the states to concede to the national government the right to dictate the government's authority over private enterprise, bringing the balance of sovereignty in the federal system closer to effective government.

The Court understood the need for policy promoting economic development and enhancing national authority over the states. Their

[36]Gerald T. Dunne, Washington University Law Quarterly, "The American Blackstone," June 1963, No. 3., 331.

[37]Haines, 418-19.

[38]R. Kent Newmyer, The Supreme Court under Marshall and Taney (Arlington Heights: Cromwell, 1968), 24.

response, promoting the Federalist cause in the battle against state rights, sacrificed government authority for the sake of corporate rights under the contract clause. Justice Story went further, incorporating a doctrine of vested rights into the constitutional protection of private enterprise. His role in expanding the contract clause ensured the success of the *Dartmouth* decision. With Story's guidance, the Court created a legal doctrine which rewrote the contract clause of the Constitution into a "living" concept which would adapt to the changing needs of society rather than becoming obsolete with age.