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R. Kent Newmyer

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# JUSTICE JOSEPH STORY'S DOCTRINE OF "PUBLIC AND PRIVATE CORPORATIONS" AND THE RISE OF THE AMERICAN BUSINESS CORPORATION

*R. Kent Newmyer\**

*The corporation's broad capital base, centralized management, perpetuity, and offer of limited liability made it the ideal medium for American economic expansion during the nineteenth century. However, a conflict existed between the need for regulation of the corporation and the desire to provide the individual with an investment free from state control. Professor Newmyer describes how that conflict was resolved in Trustees of Dartmouth College v. Woodward. The author relates the critical role of Justice Joseph Story in that case and suggests that Story, through his doctrine of public and private corporations, is largely responsible for the transformation of the corporation into the modern business organization it is today.*

## I. INTRODUCTION

The form of business organization which carried the United States into the industrial age was the corporation. Outnumbered though it was by individual, unincorporated firms and partnerships until well past the Civil War, the corporation offered unique advantages to the dynamic segment of the business community, putting it at the cutting-edge of economic growth. By facilitating the accumulation of capital from a broad base without sacrificing centralized management, the corporation especially suited a country lacking consolidated wealth. The principle of limited liability, when applied to the corporation, attracted investment capital, while the principle of corporate perpetuity allowed for a long-range, rational development of this capital. The corporation also fit the American cultural scene, as Tocqueville observed, because it was an ideal instrument by which a republican government could perform its obligation to enterpris-

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\* Professor of History, University of Connecticut; B.A. 1952, Doane College; Ph.D. 1959, University of Nebraska.

ing citizens.<sup>1</sup> Consolidated wealth sufficient to underwrite large-scale economic projects did not exist in the early nineteenth century.<sup>2</sup> For the state to bestow economic prerogatives on select individuals would be to create a privileged elite which was antithetical to the principle of republican equality. In view of the multiplicity and scope of the undertakings and the embryonic state of public administration, it was impractical for the government to assume the burden of economic enterprise. For the state to extend corporate status, sovereign power, and economic privilege to associations of individuals, however, was a solution which satisfied both economic expediency and republican ideology. This was reflected in the phenomenal growth of business incorporation during the first three decades of the nineteenth century.<sup>3</sup>

Despite the congeniality between the corporation and government, there was a large area of conflict and tension between the two during the formative period of corporate development. The corporation, all agreed, was a creature of the state, "an artificial being, invisible, intangible, and existing only in contemplation of law," as described by Justice Marshall in *Trustees of Dartmouth College v. Woodward*.<sup>4</sup> But having been created by law, a fundamental question had to be answered: would the corporation derive its legal rights by analogy to the individuals who comprised it or from the public authority that created it? If the former, then the corporation, in addition to the power accrued by its associative character, would fall heir to the impressive body of property rights given to individuals by Anglo-American law. If the latter, then the state could control corporate power in the interest of the public.

The Court's first answer to the question, in *Head & Amory v.*

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1. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 342 (1966 ed.).

2. For a discussion of the general problem, see Callender, *The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations*, 17 Q. J. ECON. 111 (1902).

3. E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS* 11 (1954). Dodd notes:

[B]y 1830 the New England states alone had created nearly 1,900 business corporations, including nearly 600 manufacturing and mining companies in addition to public utilities, banks, insurance companies, and a few business enterprises of other types.

4. 17 U.S. (4 Wheat.) 250 (1819).

*Providence Insurance Co.*,<sup>5</sup> emphasized the public nature of the corporation and implied legislative control of it. The corporation, Chief Justice Marshall declared in his opinion, "is the mere creature of the act to which it owes its existence" and "all its powers" and the manner in which they may be used are determined by this act.<sup>6</sup> Coming as it did during the initial stage of corporate growth, the decision looked to the mercantilist tradition of the eighteenth century and to the fact that most corporations, such as those in turnpikes, canals, banks, hospitals, and insurance, were of a public nature.<sup>7</sup> For the state to claim large supervisory authority over these public service corporations was both practical and consistent with eighteenth century habits. Such regulation made less sense, however, when corporations entered manufacturing, the main area of their expansion during the early nineteenth century.<sup>8</sup> Here the public nature of the corporation was less apparent and the right and need of state regulation less obvious.

More important was the practical fact that individuals would not invest money in corporate enterprises if the state retained the power to control their investments. To encourage venture capital in corporations, which was necessary if America was to undertake the large-scale operations technologically possible at that time, investment capital would have to be made secure. To free the corporation from state regulation, on the other hand, would obscure the impact on the public of these new concentrations of political and economic power. How were these conflicting needs to be balanced and by whom?

## II. *Trustees of Dartmouth College v. Woodward* AND STORY'S DOCTRINE OF PUBLIC AND PRIVATE CORPORATIONS

Perhaps nowhere was the dilemma more explicit or the implication of the Court's resolution of it more clear than in the doc-

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5. 6 U.S. (2 Cranch) 127 (1804).

6. *Id.* at 167.

7. DODD, *supra* note 3.

8. For an extended discussion of the changes in the nature of early American corporations and the resulting legal transformation, see O. & M. HANDLIN, *COMMONWEALTH, A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS 1774-1861*, at chs. V, VI (1947).

trine of public and private corporations announced by Justice Joseph Story in his separate concurring opinion in *Trustees of Dartmouth College v. Woodward*.<sup>9</sup> In that case the Court laid the foundation of American law governing the relationship between corporations and state authority. Building on *Fletcher v. Peck*,<sup>10</sup> where the Court held that a legislative grant to a private land company was a contract within the meaning of article I, section 10 of the Constitution, Marshall ruled that a state charter to a corporation was also a contract within the meaning of the contract clause. The consequences of this decision were immense. Privately endowed educational corporations, such as Dartmouth, were now protected by the United States Constitution against state interference; the legal foundation of private education was in place. Furthermore, the new business corporation came under the protective mantle of the contract clause. The tendency, begun by the Court in the *Providence Insurance Co.* case, to define corporate rights by reference to the authority that created them was silently abandoned. Legislative charters vested property rights in the corporation which could not be altered unless the right to do so had been specifically reserved in the charter. Assured of this protection, capital flowed into corporations, insuring their preeminence as vehicles of economic growth.

Chief Justice Marshall was the hero of this legal drama, but Story's role was crucial to the outcome and, more than Marshall's, revealed the creative impact of the *Dartmouth College* decision. Story understood the radical law-making potential of the college cause. He had followed it from its inception in New Hampshire, not as an impartial observer, but as an active partisan of the college and a useful friend of its chief counsel, Daniel Webster. Story had been one of those "few friends" who, after the argument in 1818, had received copies of Webster's argument with instructions to "send them to each of such Judges as you think proper . . ."<sup>11</sup> More importantly, Story advised Webster on the strategy of litigation.<sup>12</sup> Coming to the Supreme Court as it

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9. 17 U.S. (4 Wheat.) 250, 317 (1819) (Story, J., concurring).

10. 10 U.S. (6 Cranch) 48 (1810).

11. Letter from Webster to Story, Sept. 9, 1818, in 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 287 (J.W. McIntyre ed. 1903).

12. For an extended discussion of the Story-Webster relationship, see Newmyer, *Daniel*

did on a writ of error to the New Hampshire Supreme Court, the case was confined to the federal question of whether the New Hampshire law regulating the college corporation was repugnant to the Federal Constitution. Story, as well as Webster, wanted to put the case on a broader ground, one which would permit the Supreme Court to consider not only the contract clause of the Federal Constitution but the whole range of legal limitations on state regulation of corporate property which had been discussed before the New Hampshire Supreme Court. Story wanted the case brought directly into the federal courts under diversity of citizenship jurisdiction, so that a broad consideration of the issue would be possible. In addition, such a strategy would provide a fall-back position should the case be nullified by the feared death of Woodward or should the Supreme Court rule against the college.

After consultation between officials of the college and their lawyers which, through Webster, included Story,<sup>13</sup> three separate actions of ejectment were entered in Story's circuit court at Portsmouth, New Hampshire in the Spring 1818 term.<sup>14</sup> Though nominally to test title to disputed lands which the college had leased to private individuals, these "cognate cases," as they were called, turned on the legality of the New Hampshire act which transformed Dartmouth College into a university. Coming as they did under diversity of citizenship jurisdiction, the circuit court and the Supreme Court on appeal could consider all the legal arguments against state regulation of corporate charters. The problem was to get the cases before the Supreme Court of the United States as quickly as possible. Story assured Webster that the cases would be sent up "in the most convenient way," presumably by a *pro-forma* division between Story and the federal district judge sitting with him at circuit.<sup>15</sup> However, because Marshall's opinion so completely vindicated the college, the cases were never heard by the Supreme Court. Story never got the opportunity to

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*Webster As Tocqueville's Lawyer: The "Dartmouth College" Case Again*, 11 AM. J. LEGAL HIST. 127 (1967).

13. Letter from Webster to Mason, April 23, 1818, *supra* note 11, at 281; letter from Webster to Smith, Dec. 8, 1817, *supra* note 11, at 267.

14. See F. STITES, PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819, at 89-98 (1972) for a lucid discussion of these three cases, plus an excellent analysis of the college's cause on both the state and Supreme Court level.

15. Letter from Webster to Mason, April 23, 1818, *supra* note 11, at 281.

expound fully on the limits of legislative power over corporations, but he was not entirely defeated in his effort to put the issue on broad ground—which brings us to the Court's decision in *Trustees of Dartmouth College v. Woodward* and Story's concurring opinion setting forth his doctrine of public and private corporations.

The college cause originated in 1816 when the Republican-controlled New Hampshire legislature passed a law revising the charter of Dartmouth College by increasing the number of trustees and making them appointees of the governor. This change effectively transformed the college into a state university under state control. Counsel for the college argued before the Superior Court of New Hampshire that the state act exceeded legislative power, violated the state constitution and, since the college charter was a contract, violated the contract clause of the Federal Constitution which prohibited states from impairing the obligation of contracts.<sup>16</sup> These legal bars to state regulation, all parties agreed, could be called into action to protect the college only if it were a *private* corporation. Despite the forceful argument by college counsel on this point, the court was not persuaded. Chief Judge William Richardson's opinion conceded that a charter was a contract which might come within the protecting parameter of article I, section 10 of the Constitution, but went on to hold that Dartmouth College was *not* a private corporation but a public one. Therefore, the contract clause did not apply.<sup>17</sup> This decision was brought to the Supreme Court by a writ of error, was argued in 1818, and decided at the opening of the 1819 term. Chief Justice Marshall delivered the majority decision; Washington and Story entered separate concurring opinions and Duvall registered a silent dissent.

Because the case came on a writ of error it turned on the constitutional question of whether a corporation charter was a contract within the meaning of the contract clause. The Court unanimously ruled that it was. It is important to remember, however,

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16. T. FARRAR, REPORT OF THE CASE OF THE TRUSTEES OF DARTMOUTH COLLEGE AGAINST WILLIAM H. WOODWARD 32-33 (1st ed. 1819).

17. For arguments of counsel on the public-private question on the state level, see generally *id.* at 40-48. See *id.* at 45, 131 for counsel's citation of Story's opinion in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

that neither the arguments of counsel nor the Court's opinion focused on the contract clause issue. Indeed, the Chief Justice simply asserted that a charter was a contract—a proposition so obvious that “it can require no argument.”<sup>18</sup> The problem, he admitted, turned “less on the true construction of the constitution in the abstract, than on the application of those principles to this case.”<sup>19</sup> The crucial question before the Supreme Court, as it had been in the state court, was the status of Dartmouth College. If by its charter it was a “civil institution,” then the state had a right to control it even to the point of revising or amending its charter. If, on the other hand, Dartmouth was a “private eleemosynary institution,” endowed with the capacity to take property bestowed by individuals on the faith of the charter, then the state had no general right of regulation but was controlled entirely by the terms of the charter.

Marshall's treatment of the corporation question in his majority opinion was appropriate to the constitutional resolution he wanted to reach—which is to say, he avoided any sweeping doctrinal pronouncements about corporations. Ignoring his own statement in *Providence Insurance Co.*, he maintained that the character of corporations “does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created.”<sup>20</sup> By this rule, Dartmouth was a private eleemosynary institution entitled by its private character to the protection of the contract clause. The only barrier to this conclusion, and Marshall acknowledged that it was the most troublesome legal question of all, was the possibility that the original investors in the college had relinquished any rights in their property. If there were no beneficial interests, there could be no contractual rights to be violated.<sup>21</sup> Marshall, however, circumvented the barrier. He explained that while the original investors or their descendants no longer had property rights in the corporation, the corporation itself held those rights as their assignee. It therefore “stands in their place, and distributes their

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18. 17 U.S. (4 Wheat.) at 627.

19. *Id.* at 299.

20. *Id.* at 300.

21. *Id.* at 305.



bounty, as they would themselves had they been immortal.”<sup>22</sup> Private property given on faith in the charter, held in trust by the corporation, deserved the protection of the contract clause, and the Court so ruled.

Story’s concurring opinion appears somewhat of an anomaly. The majority opinion was a conclusive victory for the party Story favored, and he agreed fully with the path of legal reasoning which led the majority to its conclusion. His objective in concurring, then, was not to suggest an alternate legal route to the Court’s conclusion but to widen the legal path already hewn by the majority opinion and to open that opinion to the broadest possible interpretation. Indeed, Story’s opinion seems less a concurrence to the Court’s decision than an exegesis on it—one which allowed, at least in part, the expansive interpretation denied him by the failure of the “cognate case”<sup>23</sup> strategy.

While Marshall discretely avoided a scholarly disquisition on the question, Story believed that a general inquiry “into the nature, rights, and duties of aggregate corporations at common law” was essential to the settlement of the college cause.<sup>24</sup> From this general inquiry came his doctrine of public and private corporations. “Public corporations,” he declared, were “such as exist for public political purposes only, such as towns, cities, parishes, and counties.”<sup>25</sup> Private corporations, the focus of his concern, were those whose foundations were private, that is, where the initial capital came from private individuals. “If, therefore, the foundation be private, though under the charter of government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution.”<sup>26</sup> The uses or function of the corporation might even be public, but if the foundation was private so was the corporation, “as much so, indeed, as if the franchises were vested in a single person.”<sup>27</sup> The distinction was crucial to what followed. Public corporations became, by their

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22. *Id.* at 306.

23. *See* text accompanying notes 13-15 *supra*.

24. *Id.* at 317.

25. *Id.* at 318.

26. *Id.*

27. *Id.*

nature and relationship to the government, subject to state regulation; whereas private corporations, because they were private, were beneficiaries of the protection of the contract clause against state control.

The distinction between public and private corporations was not new with the *Dartmouth College* case; nor, contrary to the impression given by Story's concurring opinion, was it an established doctrine in American law. Story had adumbrated the doctrine in *Terrett v. Taylor*,<sup>28</sup> a case involving Virginia's attempt to divest the Anglican church of vested property located within the state. In negating state confiscation, Story used the public-private distinction and defined public corporations in terms similar to those used in his *Dartmouth College* opinion. He did not, however, supply the crucial distinction introduced in his later opinion, which held that a corporation was defined by the nature of its foundation. *Terrett* quickly became the leading American precedent on the subject, and it was relied on by counsel and recognized by the court at the state level in Dartmouth's cause. Antedating *Terrett* were a few inconclusive state court decisions which groped obliquely toward the public-private doctrine,<sup>29</sup> but the case most generally cited as ancient authority and the one relied on by Story was Lord Chief Justice Holt's 1694 opinion in *Philips v. Bury*.<sup>30</sup> Confusion abounded, however, because *Philips v. Bury* predated the modern business corporation, and Lord Holt's opinion was limited strictly to the issue of visitation as applied to charitable institutions.<sup>31</sup> Certainly American judges had come to no agreement as to the meaning and applicability of Holt's ruling. In fact some, like Marshall in the *Providence*

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28. 13 U.S. (9 Cranch) 43, 51-52 (1815).

29. See, e.g., *Waring v. Catawba Corp.*, 2 Bay 109 (S.C. 1797); *Trustees of the Univ. of N.C. v. Foy*, 1 Murphy 58 (N.C. 1805); *Commonwealth v. St. Patrick Benevolent Soc'y*, 2 Binn. 441 (Pa. 1810); *State ex rel Kilbourne v. Tudor*, 5 Day 329 (Conn. 1812).

30. 91 Eng. Rep. (1 Lord Ray 5) 900 (1694).

31. *Philips v. Bury* raised the question of the power of the Court of King's Bench to review the action of a visitor of Exeter College. Lord Holt ruled that private charitable corporations, i.e. those founded by private persons, are subject to the governance (visitation in this case) of those who create them. Holt's ruling, as E. M. Dodd points out, was meant to distinguish between "ecclesiastical and eleemosynary foundations" and "corporations merely lay constituted for civil purposes." To see his opinion as the foundation for the modern doctrine of public and private corporations would be to wrench it from the context of seventeenth century legal history. See DODD, *supra* note 3, at 17-18.

*Insurance Co. case* or *Locke in Trustees of the University of North Carolina v. Foy*,<sup>32</sup> pushed corporation law away from the public-private dichotomy.

What Story did, and his effort reveals the creative potential of the common law tradition as well as his own brilliant capacity for improvisation, was to weld scattered English and American precedents together into a clear and symmetrical legal doctrine. Absent from his formulation was the doctrinal ambiguity which stemmed from the confused nature of the corporation itself, the ambiguity which had forced Judge Locke to deny altogether the possibility of a "merely private" corporation because "in every institution of that kind the ground of the establishment is some public good or purpose to be promoted."<sup>33</sup>

The confusion, as Story seems to have perceived it, came when one looked to the actual function of the corporation, to its role and impact on society. Conceivably, the definition of public and private might have followed function, which, in fact, Judge Richardson's decision had done.<sup>34</sup> Such a functional approach to corporations would have invited American law to consider the public nature of private corporate property. Had it done so, a foundation might have been laid in the antebellum period for Chief Justice Waite's powerful 1877 ruling in *Munn v. Illinois*<sup>35</sup> that private property "affected with a public interest" is subject to state regulation. For the Court to determine what part of the corporation was "public" and thus subject to legislative control, and what was "private" and hence free from control, would have plunged the Court into a morass of imprecision. This would not have been "legal science" as Story knew it. Furthermore, such an analysis would have failed to put the force of law behind the creative efforts of American capitalists. Story avoided the dilemma by abandoning the functional definition altogether and defining pri-

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32. 1 Murphy 58 (N.C. 1805).

33. *Id.* at 88-89.

34. *Dartmouth College v. Woodward*, 1 N.H. 111, 117 (1817).

35. 94 U.S. 113, 125-26 (1877). This case arose when the Illinois legislature, in response to farmer protests, imposed maximum charges for grain storage. Elevator owners claimed that such a regulation deprived them of private property without due process of law under the fourteenth amendment. Over the powerful dissent of Justice Field, the Supreme Court sustained the law, holding that private property affected with public interest is subject to state regulation.

vate corporations according to their foundation. On the one hand, this definition blinded the law to certain realities of corporate power; on the other hand, it recognized that the corporation was moving from the public arena to the private—from hospitals and charities to businesses and manufacturing concerns. Story's doctrine, for all of its tendencies toward abstract legal principle, was also a practical response to a major aspect of corporate development.

### III. STORY'S DOCTRINE AND THE TRANSFORMATION OF THE AMERICAN BUSINESS CORPORATION

If Story's doctrine of public and private corporations was a response to the historical development of the corporation, it was also a factor in shaping that development. For all of its apparent simplicity, his doctrine had a remarkably protean quality, and it entered the fabric of history not only as law but as propaganda. On both levels it contributed to, and revealed, a fundamental shift in the status of the business corporation.

On the most direct, tactical level, Story's concurrence worked to complement and gird the Court's decision, a symbiosis that hardly could have been unintentional. Marshall did not make any doctrinal statements about private corporations, nor did he supply common law authorities for his argument that Dartmouth College was a private institution. Story did both, and if one believes his own statement in *Allen v. McKean*,<sup>36</sup> his scholarly exposition of public and private corporations in the college case was "well known" to have "had the approbation of the court."<sup>37</sup> To the extent that Story laid a common law foundation under Marshall's constitutional ruling, it strengthened the authority of the majority opinion and its persuasiveness.

It is doubtful whether the Court endorsed Story's expansive doctrine. Justice Washington specifically warned against applying the *Dartmouth College* principle to "any other case than the one immediately before it."<sup>38</sup> Duvall dissented altogether and Johnson concurred "for reasons stated by the Chief Justice."<sup>39</sup>

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36. 1 F. Cas. 489 (C.C.D. Me. 1833).

37. *Id.* at 496.

38. 17 U.S. (4 Wheat.) at 314.

39. *Id.* at 317.

Only Livingston specifically mentioned his agreement with Story.<sup>40</sup> Still, Story's opinion melded so harmoniously with Marshall's that it appeared less a radical interpretation of one Justice than a logical and inevitable, if not intentional, consequence of the Court's reasoning.

But Story's doctrine did more, for it broadened the scope of the Court's decision. The Chief Justice's majority opinion focused appropriately on Dartmouth College as a private eleemosynary institution, and in a strict precedential sense the case pertained only to private educational institutions. But the *Dartmouth College* ruling also worked to the advantage of business corporations. John Marshall and the rest of the Court surely must have been aware of this fundamental economic fact. It would be somewhat naive to think they did not understand the potential application of their decision to corporate business.<sup>41</sup> Yet, it was Story who built the most explicit bridge from eleemosynary educational institutions to business corporations. Unlike the Chief Justice, Story did not limit his discussion of corporations to the case at hand, but expounded on corporations in general. If there was doubt about the applicability of his doctrine to business as well as educational corporations, it was removed when, as specific examples of private corporations, he mentioned banks, insurance companies, canal, bridge, and turnpike companies.<sup>42</sup> He repeated this point later with emphasis in *Allen v. McKean*.<sup>43</sup>

Armed with Story's concurrence, the *Dartmouth College* decision played a crucial role in the transformation of the corporation from an association of individuals vested with a portion of sovereignty designed to accomplish public service to an association whose corporate status was a promotional device employed by the state to facilitate the pursuit of private goals by private individuals. Public good did not go unreckoned with in the new dispensation. It was assumed, in the style of Adam Smith, that public good was most closely approximated when the state permitted, indeed, encouraged, individuals to pursue their own eco-

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40. *Id.*

41. For a discussion of this general issue see B. Campbell, *Law and Experience in the Early Republic: The Evolution of the Dartmouth College Doctrine, 1780-1819*, at chs. IV, VIII 1973 (unpublished dissertation in Univ. of Mich. Library).

42. 17 U.S. (4 Wheat.) at 318.

43. 1 F. Cas. at 497.

conomic endeavors. Fictionalized into merely another enterprising individual, the corporation would make its entry into American law and culture as a beneficiary of the formidable protection which Anglo-American law bestowed on individual property rights.

It was logical that the corporation should take on some of the attributes of the individuals who comprised it. Certainly the process of bestowing personality on the corporate form had ancient roots in Western law, and American judges continued the process almost without questioning it. Marshall showed the way in *Bank of the United States v. Deveaux*<sup>44</sup> which dealt with the right of a corporation to sue in federal courts. A corporation was an invisible, artificial creation of the law, admitted the Chief Justice, but it was also the individuals who comprised it, and these individuals have rights which attach to the aggregate.<sup>45</sup> Among the rights that the corporation had in common with individual citizens was the right, under the diversity of citizenship clause of the Judiciary Act of 1789,<sup>46</sup> to sue in federal courts. But if the individual citizen's right to sue could be extended to the corporation, why not other individual rights? Why not extend the right to hold and freely use property as well? This is precisely what the Court did in its *Dartmouth College* decision.

Marshall's identification of the corporation with the individual lay buried in the technical discussion of beneficiary rights. Story's doctrine of public and private corporations, however, went straight to the point and made clear the nature of the legal and cultural shift which was underway. Where the foundation was private, so too was the corporation, just "as if the franchise were vested in a single individual."<sup>47</sup> However, had the Court chosen to determine whether a corporation was public or private by its function in society, and Story himself conceded the point, it would have been forced to conclude with Justice Locke of North Carolina, that most private corporations have a public dimension. To that extent they would be subject to some state regulation. Story's method of determining whether a corporation

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44. 9 U.S. (5 Cranch) 37 (1809).

45. *Id.* at 51-52.

46. 28 U.S.C. §1332.

47. 17 U.S. (4 Wheat.) at 317-18.

was private or public circumvented the logic of a functional definition. He ignored the mixture of private and public in the corporation and hypostatized each into a symmetrical and self-contained category. Private corporations divested of their public character were identified more readily with the individual entrepreneur, a metamorphosis which was the cultural essence of the new business corporation.

Story's voice was a powerful one in this transformation of the corporation. The clarity and simplicity of the public-private dichotomy made his doctrine a convenient metaphor in the ongoing argument about corporations, and his status as a great legal scholar gave it a compelling legitimacy. Almost immediately, his theory of public and private corporations entered the current of legal discourse. Story's argument, including his phraseology and examples, was presented as established law in James Kent's *Commentaries on American Law*, the most influential treatise on American law to appear in the nineteenth century.<sup>48</sup> Moreover, Story's definition was accepted as the starting point for reasoning about corporations by Joseph K. Angell and Samuel Ames in their *Treatise on the Law of Private Corporations Aggregate*,<sup>49</sup> the standard work on corporate law for the period. With such advertisement, the doctrine quickly found its way into lawyers' briefs, judicial opinions, and legal periodicals. To be sure, there was bitter resistance to Story's thesis and its conservative non-regulatory implications, but the very passion of the opposition was testimony to the growing momentum of the doctrine.<sup>50</sup>

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48. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 276 (12th ed. O.W. Holmes, Jr. 1873).

49. J. ANGELL & S. AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 8-9 (1832).

50. Powerful opposition to Story and the Supreme Court's pro-corporate views was voiced at the Pennsylvania constitutional convention of 1837. See L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 243-53 (1948). THE UNITED STATES MAGAZINE AND DEMOCRATIC REVIEW, Jan. 1939, at 99-144, captures the passion of the anti-corporate, anti-Court forces. Corporations are singled out as gross violations of American egalitarian principles and the Supreme Court, particularly its *Dartmouth College* decision, is lambasted for its expansion of corporate privilege. Story is designated as the culprit who led the Court, including Chief Justice Marshall, down the primrose path of corporate favoritism. *Id.* at 120.

#### IV. PRIVATE CORPORATIONS, PRIVATE CONTRACT LAW AND THE "TRUE" MEANING OF THE DARTMOUTH COLLEGE DECISION

The principle that corporate charters were contracts protected by article I, section 10, established in the *Dartmouth College* case, became a foundation block of corporate law in the nineteenth century.<sup>51</sup> This principle was a radical shift in constitutional interpretation<sup>52</sup> despite the Chief Justice's assertion that "it can require no argument" to prove it. The view that a charter was a contract had been broached in the 1780's when Pennsylvania repealed the charter of the Bank of North America.<sup>53</sup> The Supreme Court adumbrated the view in *Vanhome's Lessee v. Dorrance*<sup>54</sup> before it explored it more fully in *Fletcher v. Peck*<sup>55</sup> and in *Dartmouth College*. Still, there is no convincing evidence that the framers of the Constitution intended that corporate charters be brought within the purview of article I, section 10. "Contracts" in that article were generally understood to be contracts between private citizens and not public ones between the state and an individual.<sup>56</sup> The Court's decision in *Dartmouth College*, then, was an act of considerable audacity.

The striking implications of the decision are not fully apparent, if one focuses exclusively on the process by which the Court gave new meaning to the contract clause. The truly radical aspect of *Dartmouth College* is not that charters were held to be contracts, which was the logical consequence of *Fletcher v. Peck*, but what followed. Public contracts, that is, ones in which the state was a party, were reduced to the level of private contracts, thus putting them within the interpretive purview of the judiciary and the

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51. See Wells, *The Dartmouth College Case and Private Corporations*, 9 A.B.A. REP. 229-50 (1886), for a useful summary of nineteenth century cases on the subject of *Dartmouth College*.

52. See B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938), for a full discussion of the shift in the meaning of the contract clause.

53. *Id.* at 17-18.

54. 2 U.S. (2 Dallas) 304, 319-20 (1795). This case, which appeared before Justice Paterson's Circuit Court for the District of Pennsylvania, involved an act of the Pennsylvania legislature which vested ownership of disputed property in one party which had originally been granted to another party. Paterson employed the doctrine of implied limitations to strike down the state law, but he also stated that the contract clause of the United States Constitution prohibited the act.

55. 10 U.S. (6 Cranch) 87 (1810).

56. See WRIGHT, *supra* note 52, at 3-26.



common law. However, two acts of legal legerdemain were necessary before a legislative charter to a corporation could be considered in this manner. First, the corporation had to be seen as an individual capable of contracting. Second, the state legislature had to be reduced to the level of an individual contracting party. That a corporation could contract was a well accepted principle of law; that the legislature was an individual was a new proposition on which Justices Marshall and Story converged in *Dartmouth College*.

These two legal doctrines permitted the Chief Justice, in *Bank of the United States v. Planter's Bank of Georgia*,<sup>57</sup> to declare that a state assumed the role of a "private citizen" when dealing with banks, even though the state had chartered them and was part owner. Such a statement made explicit the unarticulated, radical assumption of *Dartmouth College*. However, it was Story's famous dissent in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*<sup>58</sup> in 1837 that spelled out fully the radical character of the *Dartmouth College* decision. *Charles River Bridge* involved two bridges built side by side across the Charles River between Cambridge and Boston, one chartered in 1785 and the other in 1828. The question was whether the imprecise wording of the old bridge company's charter implicitly conferred a monopoly upon which the new bridge encroached, in violation of the contract clause of the Constitution and the *Dartmouth College* ruling. Speaking for the majority, Chief Justice Taney upheld the right of the legislature to charter the new bridge company, arguing that the charter issued by the legislature to the old bridge corporation was analagous to a royal grant, which he reasoned from the common law must always be interpreted in favor of the king and against the grantee in doubtful cases. Accordingly, by implication, he refused to extend monopoly rights to the old bridge corporation.

Story's dissent upheld the implied contract asked for by the old bridge corporation and sharply challenged Taney's analogy between a legislative charter and a royal grant. According to Story,

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57. 22 U.S. (9 Wheat.) 904, 907 (1824).

58. 36 U.S. (11 Pet.) 420 (1837). For an extended argument on this point, see Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232, 235-37 (1973).

once the legislature entered the economic arena through grants and charters, it was governed by exactly the same law which governed individuals, that is, private contract law. "Our legislatures neither have, nor affect to have, any royal prerogatives," declared Story, referring to Taney's erroneous analogy between a legislative charter and a royal grant. "What solid ground is there to say [then], that the words of a grant, in the mouth of a citizen, shall mean one thing, and in the mouth of the legislature shall mean another thing?"<sup>59</sup>

Story's message, the same one contained in the *Dartmouth College* decision, was that state legislatures had no prerogative to call forth the vague doctrine of "general welfare" as a justification for regulating corporations. General welfare, the public good, was the cumulative product of individual effort and of the contractual relationships between those individuals. Story put state legislatures and the business corporation under the nineteenth century rubric of individualism. He spoke for a powerful tendency of an age which saw no disjunction between mercantilism and free enterprise.<sup>60</sup> One morality and the common law of contracts governed all. It followed, and here was the fundamental political issue which lay hidden in the interstices of his legal doctrine, that the contract is subject only to judicial inquiry, construction, and abrogation.<sup>61</sup> Judges trained in the science of the law should shape the contours of corporate law and not the demagogic, self-interested politicians who ruled state governments. Thus Story and the Court joined forces in the struggle over the regulation of the business corporation, a problem which would trouble American law for at least the next century.

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59. 36 U.S. (11 Pet.) at 602.

60. While there was considerable governmental intervention in the economy on the state level during the early years of the nineteenth century, there was little inclination among Americans to justify that state action by any elaborate mercantilistic theory. More importantly, state regulations allowed wide latitude for individual enterprise and in many instances were designed to promote it. For a general discussion of the relation between mercantilism and laissez-faire in the early republic, see Lively, *The American System: A Review Article*, 29 *BUS. HIST. REV.* 81-96 (1955).

61. 36 U.S. (11 Pet.) 420 (1837).