
IN THE
Supreme Court of the United States

THE TRUSTEES OF DARTMOUTH COLLEGE,

Petitioners,

v.

WILLIAM H. WOODWARD,

Respondent.

On Writ of Error to the
Superior Court of Judicature of New Hampshire

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a state legislature violates the Contract Clause when it unilaterally alters a college's charter.

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STATEMENT OF THE CASE

A. The Origins of Dartmouth College

In 1754, Reverend Eleazer Wheelock of Lebanon, Connecticut founded a charity school to educate and bring Christianity to local Indians. The school, funded initially with Wheelock's own money and property, achieved so much success that it attracted more students than it could support. In an effort to meet this demand and expand the school, Wheelock enlisted Reverend Nathaniel Whitaker to travel to England to fundraise for the project, and granted him full power of attorney over his affairs. Wheelock instructed Whitaker to solicit contributions from nine individuals listed in a deed, including the college's future namesake—the Right Honorable William, Earl of Dartmouth. After successfully securing contributions from all nine donors, Whitaker appointed them trustees of the funds they

had contributed. Whitaker then empowered these donors to determine the location of the expanded school. They decided to place the college on a hill in western New Hampshire, right near the Connecticut River.

With the location fixed and the funds in place, Wheelock sought to secure the permanency of his small new school by obtaining a charter of incorporation from the crown. In so doing, Wheelock requested that the crown appoint as the new corporation's trustees a set of twelve individuals already nominated in his will.

B. The Charter of 1769

The Governor of the Province of New Hampshire, acting under the authority of the English crown, granted the charter on December 13, 1769.

The charter laid out the corporate structure of Wheelock's school. The school would be named Dartmouth College and would educate not only Indians, but also "English Youth and any others." Pet. App. 5a. The charter named Wheelock as the founder of the college and appointed him as its president, giving him the power to choose his successor and maintain his position for life—as long as the Trustees of Dartmouth College approved of his tenure. These trustees were incorporated as a body politic, limited to twelve "& no more" in number. Pet. App. 6a. Wheelock himself, as well as the Governor of New Hampshire, were among those named as Trustees. Like the president, the Trustees were empowered to choose their own successors, subject to the agreement of a quorum of seven. The Trustees additionally had the authority to fill any vacancy that might arise in the president's position.

Next, the charter granted the Trustees broad power to govern the school. They were given the authority to acquire land and personal property, and to pay or dismiss the college's professors, tutors, clerks, and other officers. Further, the charter empowered the Trustees to pass "Ordinances, Orders & Laws" to regulate Dartmouth—so long as these regulations comported with general laws of the land and did not discriminate on the basis of religion. Pet. App. 14a (punctuation altered).

The charter also endowed the Trustees and their successors with the college's governing documents: a common seal and the letters patent (a legal document issued by the crown to record the corporation's status). These documents were to be enrolled and recorded in the Secretary's office in New Hampshire. The charter declared that the letters patent "shall be good & effectual in the Law to all intents & purposes against [the crown], [its] heirs, and Successors, without any other License, Grant, or Confirmation from [the crown] * * * ." Pet. App. 16a-17a (punctuation altered). The Trustees accepted the letters patent and assented to the charter's terms.

In the decades that followed, the American Revolution brought social and political upheaval to the colonies. During this time, Dartmouth experienced change of its own. Between 1769 and 1816, the Trustees received gifts, land, and donations, including a gift of land from Vermont in 1785 and gifts of land from the state of New Hampshire in 1789 and 1807. Dartmouth College was growing and prospering as a corporation.

The period also brought political and religious tension to Dartmouth. In 1779, Reverend Wheelock

chose his son, John Wheelock, to be his successor as president of the Trustees of Dartmouth College. John Wheelock embraced Presbyterianism, but the Trustees of the College were predominantly Congregationalists. John Wheelock and the Trustees sparred over the management of the College, the appointment of certain professors, and the filling of vacancies on the board of trustees. In light of this conflict, John Wheelock asked the New Hampshire legislature to intervene with their support. In response, the Trustees fired John Wheelock and appointed Reverend Francis Brown in his stead.

The religious conflict at Dartmouth soon became a political conflict as well. On one side of New Hampshire politics, there was the Federalist Party, with whom the Congregationalist Trustees generally associated. On the other side, there were the Republicans (sometimes called Jeffersonians as well), who were more aligned with Presbyterianism and saw the Trustees as vestiges of the old English aristocracy. When the election of 1816 handed Republicans control of the New Hampshire legislature and the Governorship, they quickly turned their attention to the brewing conflict at Dartmouth.

C. The Acts of the New Hampshire Legislature

In 1816, the New Hampshire legislature passed three acts designed to radically alter the governance of Dartmouth College, upending everything from its name to its board of trustees. The Trustees did not assent to any of these acts.

1. The first act, passed on June 27, 1816, was titled “[a]n Act to amend the charter, and enlarge and

improve the corporation of Dartmouth College.” Pet. App. 18a. Under the act, Dartmouth College would be renamed Dartmouth University. The act expanded the number of trustees from twelve to twenty-one, and transferred all of the former trustees’ rights and property to the new board of trustees, subject to a few changes. The new trustees had the power to organize new colleges and institutes within the university, and could nominate a president—but not appoint him directly.

The act also established a board of overseers comprised of twenty-five individuals, with perpetual succession. The Vermont Governor and Lieutenant-Governor, and the New Hampshire President of the Senate and Speaker of the House would all be members of the board of overseers *ex officio*. This board, operating with a quorum of fifteen, had the power to approve or veto the trustees’ votes on “the appointment and removal of President, professors, and other permanent officers of the university * * * their salaries[,] * * * the establishment of colleges and professorships, and the erection of new college buildings.” Pet. App. 19a. Beyond this supervisory role, these overseers were entitled to appoint nine new trustees to the corporation and fill any vacancies in the board of trustees that arose before the first meeting.

The act further established a treasurer, secretary, and president of the university. The president was required to report to the Governor of New Hampshire about the state of the university—including information about its enrollment, finances, and records. Finally, the act reaffirmed the school’s commitment to the freedom of religion.

2. The second act, passed on December 18, 1816, authorized the Trustees of Dartmouth University to meet and transact on matters within their jurisdiction. The act lowered their quorum from fifteen to nine for business transactions and required only six votes to pass an act or resolution. Additionally, the act enabled the Governor of New Hampshire to call meetings of the board of overseers and to fill any vacancies on that board.

3. The third act, passed on December 26, 1816, imposed a penalty of five hundred dollars on anyone who hindered the ability of the university's officers to fulfill their role. It also named the secretary and treasurer of the board of trustees of Dartmouth College to be the secretary and treasurer of the Trustees of Dartmouth University. The act vested the treasurer with control over the real and personal property of the college until a quorum of trustees could meet.

D. Woodward's Role

Before New Hampshire enacted the relevant legislation, the secretary and treasurer of Dartmouth's board of trustees was William H. Woodward, John Wheelock's nephew. In that role, Woodward maintained possession of the college's property, including its books of records, the college seal, and more. But in the fall of 1816—after the first act was passed—the Trustees of Dartmouth College removed Woodward from his positions, and demanded that he return the college's property. Yet Woodward refused.

On February 4, 1817, the Trustees of Dartmouth University appointed Woodward as *their* secretary

and treasurer. Woodward, still in possession of the college's property, accepted these positions.

E. Procedural History

On February 8, 1817, the Trustees of Dartmouth College filed an action in trover against Woodward for two books of records, the college's seal, four books of the corporation's charges and accounts, and the original letters patent. The Trustees alleged \$50,000 total in damages.

New Hampshire's highest court, the Superior Court of Judicature of New Hampshire, held for Woodward on the constitutional question. The court considered Dartmouth a public corporation, and held that the acts of the legislature neither violated the New Hampshire Constitution nor impaired the rights of the Trustees of Dartmouth College. The court further held that the charter was not a contract protected by the Contract Clause of the U.S. Constitution.

The plaintiffs subsequently appealed to this Court by writ of error.

ARGUMENT

The Founders of our Nation recently endowed America with certain inalienable rights. The Contract Clause of our Constitution is one such guarantee; it prohibits states from passing any law "impairing the obligation of contracts." U.S. Const. art I, § 10. While the Constitution does not itself specify precise definitions of "contract" and "impair," centuries of English common law and this Court's precedent provide more than sufficient guidance. From those sources, this much is clear: no state can alter the fundamental characteristics of any grant creating a private eleemosynary corporation. But the Acts of the New Hampshire legislature do just that.

The charter of 1769 established a private eleemosynary corporation, and the statutes in question seek to abrogate that charter's most essential components.

I. THE CHARTER ESTABLISHING DARTMOUTH COLLEGE IS A CONTRACT.

A. As A Grant Of Incorporation, The Charter Contains All the Requisite Elements Of A Contract.

This Court has held that every contract must possess the following components: two or more parties, mutual assent, and consideration. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810). These elements remain the same, whether the agreement involves an exchange of goods between two individuals, or a grant of incorporation by a king or a state. *R v. Pasmore* (1789) 100 Eng. Rep. 531, 556; 3 T.R. 199, 246 (explaining that a grant of incorporation is “a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place”).

The charter at issue checks all three boxes. First, it binds three parties: Wheelock, the Trustees, and the King. Second, it expresses—and has received—the parties' official assent. And third, it attaches a set of rights and obligations to each party involved.

1. Start with Wheelock. By accepting the grant of incorporation, he agreed to fund and expand his charity school, relocate it to New Hampshire, and “exert [himself] for” the instruction and education of the province's youth. *See Pasmore*, 100 Eng. Rep. at 246. In return, Wheelock secured the power and

privilege to serve as president of the college—and to vest these rights in the successor of his choice.

2. A similar framework applies for the Trustees. In exchange for devoting their services to the college and sustaining its educational mission, they received the privileges of being a franchise. Chief among these benefits was “the power to maintain perpetual succession,” a legally cognizable right that was afforded to them in both their corporate and individual capacities. 1 William Blackstone, *Commentaries* *37 (noting that franchises involve legal rights that extend to both the body politic and its individual members); *Phillips v. Bury* (1694) 100 Eng. Rep. 186, 190; 2 T.R. 346, 353 (explaining that the visitatorial right “is an appointment of law [and] arise[s] from the property which the founder had in the lands assigned to support the charity”); *Green v. Rutherford* (1750) 27 Eng. Rep. 1144, 1149; 1 Ves. Sen. 463, 471 (same). In addition, the Trustees gained the freedom and authority to govern the college as they saw fit, subject only to the terms of the charter and the laws of the land.

3. Through the king, these rights and obligations come full circle. By granting the charter of incorporation, the king ensured the instruction and education of the province’s youth—an act that benefitted both his subjects and his legacy. In so doing, he necessarily “extinguish[ed] * * * his right[s] [as] the grantor,” thereby “impl[ying] a contract not to reassert that right.” *Fletcher*, 10 U.S. at 137 (describing the rights and obligations that attach to a grantor). In other words, once the charter was accepted, as long as Wheelock and the Trustees fulfilled their obligations, the privileges, immunities, and property granted to them were theirs alone, and

theirs to keep. *See id.* (“A party is, therefore, always estopped by his own grant.”). Under any straightforward reading, this exchange of rights and obligations constitutes mutual consideration to which the parties have consented. The law of contracts requires nothing more. *See, e.g.,* Blackstone, *supra*, at *442.

B. The American Revolution Has No Bearing On The Charter’s Status As A Contract.

The charter contained all the elements of a contract in 1769, and each of those elements remains in place today. The only thing that has changed is the role of the King; following the revolution, his rights and obligations devolved on the New Hampshire legislature, untouched and intact. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50 (1815) (“The state itself succeeded only to the rights of the crown; and, we may add, with many a flower of prerogative struck from its hands.”). Were it otherwise, the revolution would have dissolved each and every charter, along with each and every grant of individual and corporate rights. But this Court has expressly foreclosed that result. As the Court explained, “[t]he dissolution of the form of government [does] not involve in it a dissolution of civil rights, [and] * * * the division of an empire creates no forfeiture of previously vested rights of property.” *Id.* The charter is thus as much a contract before the revolution as it is today.

II. THE CHARTER IS A CONTRACT WITHIN THE MEANING OF ARTICLE I § 10 OF THE CONSTITUTION.

The charter establishing Dartmouth College is not just any contract, however. It is a contract that falls squarely within the Constitution’s protective scope—for two separate reasons.

First, Article I § 10 applies to agreements between individuals and states, including those in the form of grants. *Fletcher*, 10 U.S. at 86-88. The charter at issue undeniably fits that description.

Second, as the Superior Court correctly noted in its opinion below, the Contract Clause applies to “all contracts relating to private property,” and “was not intended to limit the power of the states, in relation to * * * their own civil institutions.” *Trs. of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 132 (N.H. 1817); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (noting that the Contract Clause was “inserted to secure private rights”). Here, the grant established an eleemosynary corporation, vesting private property rights in twelve trustees. As such, it is a “contract relating to private property” and within the meaning of § 10.

A. Dartmouth College Is An Eleemosynary Corporation.

Like most academic institutions across New England, Dartmouth College is an eleemosynary corporation. It was founded to educate and cultivate young members of society, a purpose that has long been recognized as charitable. 43 Eliz. c. 4 (including colleges among the list of charities); *see also Attorney Gen. v. Wharwood* (1750) 27 Eng. Rep. 1188, 1190; 1 Ves. Sen. 534, 537 (“The establishment of learning is

a charity.”); Blackstone, *supra*, at *471 (explaining that eleemosynary corporations include “all hospitals for the maintenance of the poor, sick and impotent; and all colleges both in our universities and out of them.”). But unlike civil corporations, which similarly serve a public, altruistic function, eleemosynary corporations are not founded and controlled by the government; rather, they are endowed and founded by individuals. *Phillips*, 100 Eng. Rep. at 186. Indeed, eleemosynary corporations are “the creatures of the founder * * * [who] may delegate his power” to a visitor and “prescribe particular modes and manners as to the exercise of part of it.” *St. John’s Coll., Cambridge v. Todington* (1757) 97 Eng. Rep. 245, 269; 1 Burr. 158, 200. In the present case, Wheelock is the college’s founder, a fact expressly declared in the charter. Pet. App. 11a. And, per the terms of the contract, the Trustees are the college’s visitors, tasked with overseeing the college’s functions and ensuring that the charity perpetuates Wheelock’s vision. *See* Pet. App. 11a-15a.

B. All Eleemosynary Corporations Are Private.

The characteristics that make Dartmouth College an eleemosynary corporation are the same ones that make it a private corporation. It was founded by a private individual, its endowment consists of private funds, and its charter explicitly authorizes the Trustees—not the crown—to manage the corporation. These are the hallmark features of a private charity, drawn from bedrock principles of common law.

Take Lord Holt's opinion in *Phillips v. Bury*,¹ the guiding case on the distinction between public and eleemosynary corporations. 100 Eng. Rep. at 186. There, Queen Elizabeth had granted a charter incorporating Exeter College, which—like Dartmouth—was founded by an individual. 91 Eng. Rep. 900, 901; 1 Ld. Raym. 4, 5. Through the charter, the founder appointed the Bishop of Exeter as visitor, delegating to him the power to manage the college and resolve any internal disputes. *Id.* In preserving the Bishop's decision to replace the college's rector, Lord Holt explained that the college was a "private and particular corporation[] for charity," and that the visitor, accordingly, had the "authority to inspect the actions and regulate the behavior of the members that [participated] in the charity." 100 Eng. Rep. at 190. Lord Holt then clarified that whereas civil corporations have "no particular private founders and consequently no particular visitor," eleemosynary corporations are "founded and endowed by private persons, [and] are subject to the private government of those who erect them." *Id.* at 189-190.

Almost a century later, the King's Bench applied these principles in a case particularly relevant to the one before the Court. *R v. St. Catherine's Hall* (1791) 100 Eng. Rep. 991, 998; 4 T.R. 233, 243-244. Just like Dartmouth, St. Catherine's Hall was founded and endowed by a private individual and incorporated by letters patent. *Id.* at 991. Based on these facts, there

¹ Lord Holt's opinion was initially a dissent from the majority of the King's Bench, *Phillips v. Bury* (1694) 91 Eng. Rep. 900, 902; 1 Ld. Raym. 4, 8, but his opinion ultimately won the favor of the House of Lords, which reversed the Bench's decision below, *id.* at 903.

was no question in the court's mind whether St. Catherine's Hall was a private eleemosynary corporation. As a result, the court refrained from intervening in the college's affairs given its private status. *Id.*; see also 2 Henry Ballou & John Fonblanque, *Treatise of Equity* 206 (1805) (explaining that when a charter establishes a charity and delegates visitation rights to trustees, courts lack original jurisdiction to "direct the management of the charity or the conduct of * * * trustees").

Taken together, these cases stand for a simple proposition: eleemosynary corporations are private in nature, and their members are free to lawfully govern the corporation according to the dictates of the charter—without interference from third parties, including the king or the court.

**C. Private Corporations Remain Private,
Even When They Serve A Public
Function.**

Eleemosynary corporations do not forfeit their private character by providing benefits to the public. If they did, private charities would cease to exist, as the entire concept would be meaningless.

1. By definition, eleemosynary corporations benefit the public. But as centuries of common law have recognized, these corporations operate independently of the government. See Blackstone, *supra*, at *471 (noting that colleges and hospitals, as eleemosynary corporations, "are constituted for the perpetual distributions of the free alms or bounty of the founder of them, to such persons as he has directed"). In the instant case, the government did not play any role in endowing or founding the college. In fact, until the New Hampshire legislature passed the Acts

in question, the government had no voice in determining the individuals tasked with governing the college—let alone the duties they performed.

If Dartmouth is a public institution by virtue of its charitable purpose—a point the lower court apparently relied on in its decision below, 1 N.H. at 117, 133-134—the same reasoning would apply to all individuals and organizations involved in the public sphere. For instance, all professors would become public officers, as they provide educational services for the benefit of society. Similarly, all hospitals would become public institutions (and doctors, public servants), regardless of whether the hospitals were privately founded. Yet professors and doctors are not public officials. Unlike judges or politicians—who are officers of the public—professors and doctors do not swear any public oath, their duties are not prescribed by general laws, and they are not paid through public funds. Serving the public through a private charity is worlds apart from serving the public as a state actor. *See, e.g., Phillips*, 100 Eng. Rep. at 190 (detailing the differences between private charities and civil corporations).

That is why no precedent exists to support the Superior Court’s novel conception of private charities.

2. But the Superior Court went even further in charting new territory. It decided that the Trustees had no private interest in the college because their rights could not “be sold or transferred, * * * descend[ed] to their heirs, or * * * be assets in the hands of their administrators.” 1 N.H. at 119. In other words, the Trustees “ha[d] no greater interest in [the college’s mission] * * * than any other

individuals in the community.” *Id.* Without any private rights to call their own, the Trustees could not lay claim to a private corporation. *Id.*

This reasoning finds no basis in the law. To the contrary, the idea that rights must confer some pecuniary or heritable benefit was considered—and expressly rejected—over one hundred years ago. *Ashby v. White* (1703) 92 Eng. Rep. 126, 138; 2 Ld. Raym. 939, 958. In *Ashby*, the plaintiff brought an action against a government official for refusing to recognize his vote in a parliamentary election. *Id.* at 126. The House of Lords ruled for the plaintiff and reversed the decision of the King’s Bench, which had concluded that the plaintiff had no private cause of action since the right to vote was a public matter, not one “of property or profit.” *Id.* at 129, 138. As the House of Lords emphasized, just because the exercise of a right may involve the public, that does not mean that individuals retain no private interest in the right, or that the state can withdraw that right if and when it so desires. *See id.* at 134-136.

Here, the charter vested the Trustees with the power and discretion to govern the functions and property of the college, including the authority to elect its officers. Under the holding of *Ashby*, these are private rights, and their non-heritable and nonpecuniary nature is irrelevant. *See id.*²

² The fact that the plaintiff in *Ashby* was a private individual does not impact the case’s application to the present controversy. As the *Ashby* court explicitly noted, although “a franchise should be vested in the corporation aggregate,” the rights benefit “the particular members.” 92 Eng. Rep. at 135. Thus, any rights that the charter vested in the Trustees as a corporate body are also “to be enjoyed by [the members] in their private capacity.” *Id.*

3. That Dartmouth College was established by a charter and received land from the state does not change the analysis. If anything, it reinforces it.

a. To start, the entire purpose of incorporating a charity is to ensure that the founder and visitors enjoy perpetual succession. *See Pasmore*, 100 Eng. Rep. at 539. Indeed, the only real difference between a charter of incorporation (granted by a governmental figure) and a private deed of trust (granted from one citizen to another) is that the former automatically eternalizes the trust, obviating the need to renew it over time. *See generally* Blackstone, *supra*, at *19-47, *295-343 (explaining basic principles of incorporeal hereditaments and deeds). Charters of incorporation simply present a more convenient way of accomplishing what one could achieve through a private conveyance. But no case or legal authority suggests that the execution of a deed—conveying private property to individuals for charitable use—transfers private property rights to the public. And the same is true for charters of incorporation. “The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be.” *Attorney Gen. v. Pearce* (1740) 26 Eng. Rep. 454, 2 Atk. 87.

It makes little sense, then, to argue that by seeking and accepting the king’s charter, Wheelock relinquished the private status of his charity. This is especially the case when the charter explicitly enables the Trustees to enforce their rights against the crown, the body theoretically in charge of public corporations. If the charter had transformed the private charity into a public one, this provision would be superfluous, if not nonsensical—the Trustees would have no particular interest in the

public corporation and thus no rights to enforce against the crown. See *Phillips*, 100 Eng. Rep. at 190.

b. It seems equally implausible to contend that the New Hampshire legislature's grant of lands to the college converted the charity into a public corporation. To be sure, this grant provided state lands for public benefits. But once New Hampshire executed the grant, it "extinguished" its right to the property, *Fletcher*, 10 U.S. at 137, and the college's public use of the lands did not confer or return any rights to the state.

Consider *Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 335-337 (1815). There, the state of Vermont passed legislation repealing a previous grant of land to the town of Pawlet for the specific use of public worship. *Id.* at 335-336. The Court ruled in favor of the town, finding that the legislature could not repeal the grant; even though the state had granted the lands to the town for public use, the land belonged to Pawlet. *Id.* at 336; see also *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 87-89 (N.C. 1805) (holding that the state of North Carolina could not repeal a grant of land to the trustees of a university, notwithstanding the fact that the university served a public purpose).

The same principles apply here. The state of New Hampshire cannot "reassert" any rights over the property that it previously granted to the college. The reason is simple: It has no remaining property rights to assert, and the public nature of the college's use does not change that reality.

* * *

Article I § 10 protects contracts from governmental interference, specifically those involving private property. A charter incorporating the trustees of a private charity is such a contract, and no state legislature can impair that contract's obligations.

III. THE ACTS OF THE NEW HAMPSHIRE LEGISLATURE IMPAIR THE OBLIGATIONS OF THE CHARTER.

Our Founders protected private property contracts in the Constitution for a reason: "The right of the citizens to the free enjoyment of their property" is "a great and fundamental principle of a republican government." *Terrett*, 13 U.S. at 50-51. If the legislature were free to impair such contracts, citizens would be subject to the "fluctuating policy * * * [of] public councils," undermining the "personal security and private rights" that the Framers considered so essential to modern society. The Federalist No. 44, at 249 (James Madison) (E.H. Scott ed., 1898).

Thus, as this Court recently recognized, it is one thing for the state to "change, modify, enlarge or restrain" public corporations that are created by and for the public. *Terrett*, 13 U.S. at 52. But is quite another for the state to "repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and * * * vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without [the corporators'] consent." *Id.* That is exactly what has happened here. The Acts of the New Hampshire legislature abrogate key elements of the charter without the Trustees' consent. Such a result vitiates

“principles of natural justice” and violates the Constitution. *Id.*

A. The Acts Repeal The Charter’s Essential Components.

The Acts of the New Hampshire legislature do not simply change the college’s name. They change its entire identity.

Start with the most flagrant violations. The charter calls for twelve trustees, “& no more,” Pet. App. 6a, but the Acts add nine trustees to the corporation anyway, Pet. App. 18a. The charter vests the Trustees with the right to “hold, possess, and enjoy, tenements, hereditaments, jurisdictions, and franchises, *for themselves and their successors.*” Pet. App. 7a (emphasis and punctuation added). Yet the Acts transfer these rights from the original board of trustees to the new and expanded one. Pet. App. 18a. Whereas the charter grants the Trustees the sole right to appoint their successors, Pet. App. 13a, the Acts instruct the governor and council to “fill all vacancies [in the board of trustees] that may occur previous to, or during the first meeting.” Pet. App. 21a. And when it comes to appointing professors and the president, the Acts relegate the Trustees to the role of nominating candidates, taking away their final say in the matter. Pet. App. 20a-21a. As for the president himself, his position is deeply unstable. In the original contract, the president could only be removed by the Trustees. Pet. App. 11a. Under the Acts, a board of twenty-five overseers—with no prior connection to the college—now makes the ultimate removal decision, with free rein to approve or reject the trustees’ initial determination. *See* Pet. App. 19a.

But the Acts do not just violate specific terms of the charter. They also add a host of substantive provisions that were entirely absent from the original contract. Chief among them is the creation of the board of overseers mentioned above. Beyond appointing or removing the president, this board has the power to “inspect and confirm, or disapprove and negative, [other] votes and proceedings of the Board of Trustees.” *Id.* The Acts also authorize the establishment of additional colleges and institutes, thrusting new duties upon the Trustees and diverting their funds accordingly. *See* Pet. App. 18a-19a. Finally, the Acts go so far as to impose penalties on Trustees who refuse to comply with these new provisions. Pet. App. 24a-25a.

In short, the Acts strip the Trustees of their essential duties. As visitors, the Trustees—and only the Trustees—are empowered to “inspect” and “regulate” the charity. *Phillips*, 100 Eng. Rep. at 190. But under the Acts, the Trustees themselves are the object of inspection. In fact, it is difficult to see how the Trustees maintain any of their visitatorial powers when their authority over the corporation’s most critical functions has been transferred to this new board of overseers—a board to which the charter did not delegate any powers. *See Green*, 27 Eng. Rep. at 1149 (noting that when a charter incorporates trustees, “no visitor can arise by implication, [as] the trustees have that power”).

The same is true for Wheelock. As the founder of an eleemosynary corporation, he alone has the power to set “the particular laws and constitutions” of the charity. *Phillips*, 100 Eng. Rep. at 190. Even the Trustees, under the law of corporations, are “not [to] be left to themselves, * * * but pursue the intent and

design of him that bestowed [visitatorial rights] upon them.” *Id.* Yet through the Acts, the legislature seeks to accomplish what the original parties to the contract could not—substitute its own intent and design for that of Wheelock’s.

Put simply, Dartmouth University is not the “creature[] of the founder,” *Todington*, 97 Eng. Rep. at 269, but the creature of the state. That is not what the parties contracted for, and it is not within the legislature’s power to effectuate.

B. The Acts Modify The Charter Without The Trustees’ Consent.

The Acts violate the Contract Clause for an independent reason: they attempt to rewrite the terms of the charter without the Trustees’ consent. These new terms—so different in kind and scope from the original charter—have the effect of creating a new contract. *See, e.g.*, Blackstone, *supra*, at *442 (noting that a contract, by definition, requires “an agreement upon sufficient consideration to do or not to do a *particular* thing”) (emphasis added).

In establishing Dartmouth University, the New Hampshire legislature was not writing on a clean slate. Instead of creating its own public corporation, which could have implemented the state’s own intent and design, it chose to amend and radically alter an existing corporation and college. But “there is a vast deal of difference between a new charter granted to a new corporation, (who must take it as it is given), and a new charter given to a corporation already in being * * *.” *R v. Vice Chancellor of Cambridge* (1765) 97 Eng. Rep. 1027, 1031; 3 Burr. 1656, 1656. An existing corporation is “not obliged to accept [a] new charter” either in part or in full, and “the

validity of * * * new charters must turn on the acceptance of them.” *Id.*; *see also Pasmore*, 100 Eng. Rep. at 553 (same). “It is the concurrence and acceptance of the [college] that gives the force to the charter * * *,” *Vice Chancellor of Cambridge*, 97 Eng. Rep. at 1033, so without consent, the charter is void.

These same principles apply regardless of the legislature’s stated intent to “enlarge and improve” Dartmouth College. *See* Pet. App. 18a. No matter what the legislature believes is in the best interest of the college, it cannot force a private corporation to change the terms of its charter. “[T]hat a man may refuse a grant * * * [is] a principle too clear to require the support of authorities. * * * Although the legislature may wisely determine that a certain use of his property will be highly beneficial to him,” he has a right to make that decision for himself. *Ellis v. Marshall*, 2 Mass. (1 Tyng) 269, 277 (Mass. 1807). The Trustees have made their decision; they do not accept the legislature’s new terms.

In spite of this decision, the New Hampshire legislature persists in circumventing bedrock principles of law. It has decided to penalize the Trustees for making a choice that the law permits them to make. In so doing, the legislature has not just rewritten the terms of a private corporation’s charter—it has also attempted to rewrite the law for its own benefit.

* * *

To be clear, the Trustees do not declare any immunity from the law. Eleemosynary corporations, while “subject to the private government of those who erect them,” must still comply with general laws of the land. *Phillips*, 100 Eng. Rep. at 190; *see also*

Terrett, 13 U.S. at 51 (noting that a private corporation may “loose [sic] its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture”). The Trustees do not suggest anything to the contrary. What they do protest, however, is the legislature’s attempt to divest them of their rights and property without their consent. The “fundamental laws of every free government, * * * the spirit and the letter of the constitution of the United States, and * * * the decisions of most respectable judicial tribunals” counsel in favor of “resisting such a [result].” *Terrett*, 13 U.S. at 52.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Superior Court below.

Respectfully submitted,

NEAL KUMAR KATYAL

Counsel of Record

NATALIE SALMANOWITZ

Washington, DC

Counsel for Petitioners

APPENDIX

APPENDIX A

THE CHARTER OF 1769

GEORGE THE THIRD by the grace of God of Great Britain France and Ireland KING Defender of the Faith, and so forth. –

To ALL to whom these Presents shall come.
GREETING

WHEREAS it hath been represented to our Trusty and well beloved John Wentworth Esquire Governor and Commander in Chief in and over our Province of NEW HAMPSHIRE in New England in AMERICA, that the Reverend ELEAZER WHEELOCK of Lebanon in the Colony of Connecticut in New England aforesaid, now Doctor in Divinity, did on or about the year of our Lord one thousand seven hundred and Fifty four at his own expense, on his own Estate and Plantation set on foot an Indian Charity-School and for several years through the assistance of well-disposed Persons in America, clothed, maintained and educated a number of the Children of the Indian Natives with a view to their carrying the Gospel in their own Language and spreading the knowledge of the Great Redeemer among their Savage Tribes, and hath actually employ'd a number of them as Missionaries and Schoolmasters in the Wilderness for that purpose: and by the blessing of God upon the endeavours of said Wheelock the design became reputable among the Indians insomuch that a larger number desired the Education of their Children in said School, and were also disposed to receive Missionaries and

Schoolmasters in the Wilderness more than could be supported by the charitable Contributions in these American Colonies.--

Whereupon the said Eleazer Wheelock thought it expedient that endeavours should be used to raise Contributions from well disposed Persons in England for the carrying on and extending said undertaking, And for that purpose said Eleazer Wheelock requested the Reverend Nathaniel Whitaker now Doctor in Divinity to go over to England for that purpose, and sent over with him the Reverend Samson Occom an Indian Minister who had been educated by the said Wheelock, And to enable the said Whitaker to the more successful performance of said Work on which he was sent, said Wheelock gave him a full Power of Attorney by which said Whitaker solicited those worthy & generous Contributors to the Charity Vizt. The Honorable WILLIAM Earl of DARTMOUTH, The Honorable Sir Sidney Stafford Smythe Knight, one of the Barons of his Majesty's Court of Exchequer, JOHN THORTON of Clapham in the County of Surry Esquire, SAMUEL ROFFEY of Lincoln's Inn fields in the County of Middlesex Esquire, CHARLES HARDY of the parish of Saint Mary-le-bonne in said County Esquire, DANIEL WEST of Christ's church Spitalfields in the County aforesaid Esquire, SAMUEL SAVAGE of the same place Gentleman, JOSIAH ROBERTS of the parish of Saint Edmund the King Lombard Street, London Gentleman, and Robert Keen of the parish of Saint Botolph Aldgate London, Gentleman, to receive the several Sums of Money which should be contributed, and to be Trustees for the Contributors to such Charity, which they chearfully agreed to--

Whereupon the said Whitaker did by virtue of said Power of Attorney constitute and appoint the said Earl of Dartmouth, Sir Sydney Stafford Smythe, John Thorton, Samuel Roffey, Charles Hardy & Daniel West Esquires, and Samuel Savage, Josiah Roberts and Robert Keen Gentlemen to be Trustees of the Money which had then been contributed, and which should by his means be contributed for said Purpose; which Trust they have accepted as by their engrossed Declaration of the same under their Hands and Seals well executed fully appears, and the same has also been ratified by a deed of Trust well executed by the said Wheelock,--

And the said Wheelock further represents that he has by power of Attorney for many weighty reasons, given full Power to the said Trustees to fix upon and determine the place for said School most subservient to the great end in view, and to enable them understandingly to give the preference, the said Wheelock has laid before the said Trustees the several Offers which have been generously made in the several Governments in America to encourage and invite the settlement of said School among them for their own private emolument, and the increase of Learning in their respective places as well as for the furtherance of the general design in view.

And whereas a large number of the Proprietors of Lands in the western part of this our Province of New Hampshire, animated & excited thereto by the generous example of his Excellency their Governor, and by the liberal Contributions of many Noblemen and Gentlemen in England; and especially by the consideration that such a situation would be as convenient as any for carrying on the great design

among the Indians; and also considering that without the least impediment to the said design the same School may be enlarged & improved to promote Learning among the English & be a means to supply a great number of Churches & Congregations which are likely soon to be formed in that new Country with a learned & orthodox Ministry; they the said Proprietors have promised large Tracts of Land for the uses aforesaid, provided the School shall be settled in the western part of our said Province. And they the said Right Honorable, Honorable and worthy Trustees before mentioned having maturely consider'd the reasons & arguments in favour of the several Places proposed, have given the preference to the western part of our said Province lying on Connecticut River, as a situation most convenient for said School;

And the said Wheelock has further represented a necessity of a legal Incorporation in order to the safety and well being of said Seminary, and its being capable of the tenure & disposal of Lands & bequests for the use of the same.

And the said Wheelock has also represented that for many weighty reasons it will be expedient at least in the infancy of said Institution or 'till it can be accommodated in that new Country and he & his Friends be able to remove and settle by and round about it, that the Gentlemen whom he has already nominated in his last Will (which he has transmitted to the aforesaid Gentlemen of the Trust in England) to be Trustees in America should be of the Corporation now proposed & also as there are already large Collections for said School in the hands of the aforesaid Gentlemen of the Trust in England

and all reason to believe from their singular wisdom, piety and zeal to promote the Redeemers cause (which has already procured for them the utmost confidence of the Kingdom) we may expect they will appoint Successors in time to come who will be men of the same Spirit whereby great good may & will accrue many ways to the institution & much be done by their example and influence to encourage and facilitate the whole design in view; for which reasons said Wheelock desires that the Trustees aforesaid may be vested with all that power therein which can consist with their distance from the same

KNOW YE THEREFORE, that We considering the Premises and being willing to encourage the laudable & charitable design of spreading Christian Knowledge among the Savages of our American Wilderness and also that the best means of Education be established in our Province of New Hampshire for the benefit of said Province, DO of our special grace certain knowledge and mere motion by and with the advice of our Council for said Province by these Presents WILL, ordain, grant & constitute that there be a College erected in our said Province of New Hampshire by the name of DARTMOUTH COLLEGE for the education & instruction of Youth of the Indian tribes in this Land in reading, writing & all parts of Learning which shall appear necessary and expedient for civilizing & christianizing Children of Pagans as well as in all liberal Arts and Sciences; and also of English Youth and any others, and the Trustees of said College may and shall be one body corporate and politick in deed action & name, and shall be called, named & distinguish'd by the Name of the TRUSTEES OF DARTMOUTH COLLEGE

And further we have willed given granted constituted and ordained and by this our present Charter of our special grace certain knowledge & mere motion with the advice aforesaid Do for us our heirs and Successors for ever will give grant constitute & ordain that there shall be in the said DARTMOUTH COLLEGE from henceforth and for ever a body politick consisting of Trustees of said Dartmouth College and for the more full & perfect erection of said Corporation & body politick consisting of Trustees of Dartmouth College We of our special grace certain knowledge & mere motion Do by these Presents for us our Heirs & Successors make ordain constitute and appoint our trusty and well beloved JOHN WENTWORTH Esquire Governor of our said Province, and the GOVERNOR of our said Province of New Hampshire for the time being and our Trusty and well beloved THEODORE ATKINSON Esquire now President of our Council of our said Province GEORGE JAFFREY & DANIEL PIERCE Esquires both of our said Council and PETER GILMAN Esquire now Speaker of our House of Representatives in said Province & WILLIAM PITKIN Esquire one of the Assistants of our Colony of Connecticut & our said trusty and well beloved ELEAZER WHEELOCK of Lebanon Doctor in Divinity, BENJAMIN POMROY of Hebron JAMES LOCKWOOD of Weathersfield TIMOTHY PITKIN & JOHN SMALLEY of Farmington & WILLIAM PATTEN of Hartford all of our said Colony of Connecticut Ministers of the Gospel (the whole number of said Trustees consisting and hereafter forever to consist of TWELVE & no more) to be Trustees of said Dartmouth College in this our Province of New Hampshire

And we do further of our special grace certain knowledge and mere motion for us our Heirs and Successors will give grant and appoint that the said Trustees & their Successors shall for ever hereafter be in deed act & name a body corporate & politick & that they the said body corporate & politick shall be known & distinguished in all deeds grants bargains sales writings evidences or otherwise howsoever & in all Courts for ever hereafter plead and be impleaded by the Name of the Trustees of Dartmouth College and that the said Corporation by the name aforesaid shall be able and in law capable for the use of said Dartmouth College to have get acquire purchase receive hold possess and enjoy tenements hereditaments jurisdictions and franchizes for themselves and their Successors in fee simple or otherwise howsoever & to purchase receive or build any House or Houses or any other buildings as they shall think needful & convenient for the use of said Dartmouth College and in such Town in the western part of our said Province of New Hampshire as shall by said Trustees or the major part of them be agreed on their said Agreement to be evidenced by an instrument in writing under their hands ascertaining the same And also to receive and dispose of any Lands goods chattels and other things of what nature soever for the use aforesaid And also to have accept and receive any rents profits annuities gifts legacies donations or bequests of any kind whatsoever for use aforesaid so nevertheless that the yearly value of the Premises do not exceed the Sum of six thousand pounds Sterling and therewith or otherwise to support and pay as the said Trustees or the major part of such of them as are regularly convened for that purpose shall agree the President

Tutors and other Officers & Ministers of said Dartmouth College & also to pay all such Missionaries & Schoolmasters as shall be authorized appointed & employed by them for civilizing & christianizing & instructing the Indian Natives of this Land their several allowances & also their respective annual Salaries or allowances & all such necessary & contingent charges as from time to time shall arise & accrue relating to the said Dartmouth College And also to bargain sell let set or assign Lands tenements or hereditaments goods or chattels & all other things whatsoever by the name aforesaid in as full and ample a manner to all intents and purposes as a natural person or other body politick or corporate is able to do by the laws of our realm of Great Britain or of said province of New Hampshire

And further of our special grace certain knowledge & mere motion to the intent that our said Corporation & body politick may answer the end of their erection & Constitution & may have perpetual succession & continuance for ever We do for us our heirs and Successors will give & grant unto the said Trustees of Dartmouth College & to their Successors for ever that there shall be once a year & every year a meeting of said Trustees held at said Dartmouth College at such time as by said Trustees or the major part of them at any legal meeting of said Trustees shall be agreed on the first meeting to be called by the said Eleazer Wheelock as soon as conveniently may be within one year next after the enrollment of these our Letters Patent at such time & place as he shall judge proper And the said Trustees or the major part of any seven or more of them shall then determine on the time for holding the annual

Meeting aforesaid which may be alter'd as they shall hereafter find most convenient And we further order and direct that the said Eleazer Wheelock shall notify the time for holding said first meeting to be called as aforesaid by sending a letter to each of said Trustees & causing an advertizement thereof to be printed in the New Hampshire Gazette & in some publick News Paper printed in the Colony of Connecticut But in case of the Death or incapacity of the said Wheelock then such meeting to be notified in manner as aforesaid by the Governor or Commander in Chief of our said Province for the time being And we do also for us our Heirs & Successors hereby will give and grant unto the said Trustees of Dartmouth College aforesaid & to their Successors for ever that when any seven or more of the said Trustees or their Successors are convened & met together for the service of said Dartmouth College at any time or times such seven or more shall be capable to act as fully & amply to all intents & purposes as if all the Trustees of said College were personally present-- & all affairs & actions whatsoever under the care of the said Trustees shall be determined by the majority or greater number of those seven or more Trustees so convened & met together

And we do further will ordain & direct that the President Trustees, Professors & Tutors & all such Officers as shall be appointed for the publick instruction & government of said College shall before they undertake the execution of their respective Offices or Trusts or within one year after take the Oaths & subscribe the declaration provided by an act of Parliament made in the first year of King George

the first entitled "An act for the further security of his Majesty's Person & Government & the succession of the Crown in the heirs of the late princess Sophia being Protestants & for the extinguishing the hopes of the pretended Prince of Wales & his open & secret Abettors" that is to say the President before the Governor of our said Province for the time being or by one by him impowered to that service or by the President of our said Council & the Trustees Professors Tutors & other Officers before the President of said College for the time being who is hereby impower'd to adminster the same an entry of all which shall be made in the Records of said College

And we do for us our heirs & Successors hereby will give & grant full Power & Authority to the President hereafter by us named & to his Successors or in case of his failure to any three or more of the said Trustees to appoint other occasional meetings from time to time of the said seven Trustees or any greater number of them to transact any matter or thing necessary to be done before the next annual meeting and to order notice to the said seven or any greater number of them of the times & places of meeting for the service aforesaid by a letter under his or their hands of the same one month before said meeting Provided always that no standing Rule or order be made or altered for the regulation of said College nor any President or Professor be chosen or displaced nor any other matter or thing transacted or done which shall continue in force after the then next annual meeting of said Trustees as aforesaid

And further we do by these Presents for us our Heirs and Successors create make constitute

nominate & appoint our Trusty and well beloved ELEAZER WHEELLOCK Doctor in Divinity the FOUNDER of said College to be PRESIDENT of said DARTMOUTH COLLEGE and to have the immediate care of Education & government of such Students as shall be admitted into said DARTMOUTH COLLEGE for instruction & education and do will give & grant to him in said Office full power authority & right to nominate appoint constitute & ordain by his last will such suitable & meet person or Persons as he shall chuse to succeed him in the Presidency of said Dartmouth College & the person so appointed by his last Will to continue in Office vested with all the powers privileges Jurisdiction & authority of a President of said Dartmouth College that is to say so long and untill such appointment by said last Will shall be disapproved by the Trustees of said Dartmouth College

And we do also for us our heirs and Successors will give & grant to the said Trustees of Dartmouth College & to their Successors for ever or any seven or more of them convened as aforesaid that in case of the ceasing or failure of a President by any means whatsoever that the said Trustees do elect nominate & appoint SUCH qualified person as they or the major part of any seven or more of them convened for that purpose as above directed shall think fit to be PRESIDENT of said DARTMOUTH COLLEGE and to have the care of the Education & government of the Students as aforesaid & in case of the ceasing of a President as aforesaid the Senior Professor or Tutor being one of the Trustees shall exercise the Office of a President untill the Trustees shall make

choice of & appoint a President as aforesaid & such Professor or Tutor or any three or more of the Trustees shall immediately appoint a meeting of the body of the Trustees for the purpose aforesaid AND also we do will give and grant to the said Trustees convened as aforesaid that they elect nominate & appoint so many Tutors and Professors to assist the President in the Education & government of the Students belonging thereto as they the said Trustees shall from time to time & at any time think needful & serviceable to the interests of said Dartmouth College And also that the said Trustees or their Successors or the major part of any seven or more of them convened for that purpose as above directed shall at any time displace & discharge from the service of said Dartmouth College any or all such Officers & elect others in their room & stead as before directed And also that the said Trustees or their Successors or the major part of any seven of them which shall convene for that purpose as above directed do from time to time as occasion shall require elect constitute & appoint a TREASURER a CLERK an USHER & a STEWARD for the said DARTMOUTH COLLEGE & appoint to them & each of them their respective businesses & trusts & displace & discharge from the service of said College such Treasurer Clerk Usher or Steward & to elect others in their room & stead which Officers so elected as before directed We do for us our heirs & successors by these Presents constitute & establish in their respective Offices & do give to each & every of them full power & Authority to exercise the same in said Dartmouth College according to the directions & during the pleasure of the said Trustees as fully & freely as any like Officers in any of our Universities

Colleges or Seminaries of learning in our Realm of Great Britain lawfully may or ought to do, & also that the said Trustees & their Successors or the major part of any seven or more of them which shall convene for that purpose as is above directed as often as one or more of said Trustees shall die or by removal or otherwise shall according to their judgement become unfit or incapable to serve the interests of said College do as soon as may be after the Death removal or such unfitness or incapacity of such Trustee or Trustees elect & appoint such Trustee or Trustees as shall supply the place of him or them so dying or becoming incapable to serve the interests of said College & every Trustee so elected & appointed shall by virtue of these Presents & such election & appointment be vested with all the Powers & priviledges which any of the other Trustees of said College are hereby vested with And we do further Will ordain & direct that from & after the expiration of Two years from the enrollment of these Presents such vacancy or vacancies as may or shall happen by death or otherwise in the aforesaid number of Trustees shall be filled up by election as aforesaid so that when such vacancy or vacancies shall be filled up unto the complete number of TWELVE Trustees Eight of the aforesaid whole number of the body of Trustees shall be resident and respectable Freeholders of our said Province of New Hampshire & seven of said whole number shall be Laymen.

And we do further of our special grace certain knowledge and mere motion will give and grant unto the said Trustees of Dartmouth College that they and their Successors or the major part of any seven of them which shall convene for that purpose as is

above directed may make & they are hereby fully impowered from time to time fully and lawfully to make and establish such Ordinances Orders & Laws as may tend to the good and wholesome government of the said College & all the Students & the several Officers & Ministers thereof & to the publick benefit of the same not repugnant to the Laws & Statutes of our Realm of GREAT BRITAIN or of this our Province of NEW HAMPSHIRE and not excluding any Person of any religious denomination whatsoever from free & equal liberty & advantage of Education or from any of the liberties and privileges or immunities of the said College on account of his or their speculative sentiments in Religion & of his or their being of a religious profession different from the said Trustees of the said Dartmouth College And such Ordinances orders & Laws which shall as aforesaid be made We do by these presents for us our heirs & Successors ratify allow of & confirm as good & effectual to oblige & bind all the Students & the several Officers & ministers of the said College And we do hereby authorize & empower the said Trustees of Dartmouth College & the President Tutors & Professors by them elected & appointed as aforesaid to put such ordinances laws and orders in execution to all proper intents & purposes

And we do further of our special grace certain knowledge & mere motion Will give & grant unto the said Trustees of said Dartmouth College for the encouragement of Learning and animating the Students of said College to diligence & industry & a laudable progress in Literature that they & their Successors or the major part of any seven or more of them convened for that purpose as above directed do

by the President of said College for the time being or any other deputed by them give & grant any such degree or degrees to any of the Students of the said College or any others by them thought worthy thereof as are usually granted in either of the Universities or any other College in our Realm of Great Britain, & that they sign & seal Diplomas or certificates of such Graduations to be kept by the Graduates as perpetual memorials & testimonials thereof

AND we do further of our special grace certain knowledge & mere motion for us our heirs & Successors by these Presents give & grant unto the Trustees of said Dartmouth College & to their Successors that they & their Successors shall have a common SEAL under which they may pass all Diplomas or Certificates of degrees & all other affairs & business of & concerning the said College which shall be engraven in such a form and with such an inscription as shall be devised by the said Trustees for the time being or by the major part of any seven or more of them convened for the service of the said College as is above directed.

AND we do further for us our heirs & Successors give and grant unto the said Trustees of the said Dartmouth College & their Successors or to the major part of any seven or more of them convened for the service of the said College full power & authority from time to time to nominate & appoint all other Officers & Ministers which they shall think convenient & necessary for the service of the said College not herein particularly named or mention'd which Officers & Ministers we do hereby impower to execute their Offices & Trusts as fully & freely as

any of the Officers & Ministers in our universities or Colleges in our REALM of GREAT BRITAIN lawfully may or ought to do

AND further that the generous Contributors to the support of this design of spreading the knowledge of the only true God and Saviour among the American Savages may from time to time be satisfied that their liberalities are faithfully disposed of in the best manner for that purpose & that others may in future time be encouraged in the exercise of the like liberality for promoting the same pious design it shall be the duty of the President of the said Dartmouth College & of his Successors annually or as often as he shall be thereunto desired or required to transmit to the Right honorable, honorable & worthy Gentlemen of the Trust in England before mentioned a faithful account of the improvement & disbursements of the several Sums he shall receive from the Donations & bequests made in England through the hands of said Trustees & also advise them of the general plans laid & prospects exhibited as well as a faithful account of all remarkable occurrences in order if they shall think expedient that they may be published And this to continue so long as they shall perpetuate their board of Trust & there shall be any of the Indian Natives remaining to be proper Objects of that Charity AND lastly our express Will & pleasure is and we do by these Presents for us our heirs and Successors give & grant unto the said Trustees of Dartmouth College & to their Successors forever that these our Letters Patent or the enrollment thereof in the Secretary's OFFICE of our Province of New Hampshire aforesaid shall be good & effectual in the Law to all intents &

purposes against us our heirs and Successors without any other License Grant or Confirmation from us our heirs & Successors hereafter by the said Trustees to be had & obtained notwithstanding the not writing or misrecital not naming or misnaming the aforesaid Offices Franchises Priviledges Immunities or other the Premises or any of them and not withstanding a writ of Ad quod Damnum hath not issued forth to enquire of the Premises or any of them before the ensealing hereof any Statute Act Ordinance or Provision or any other matter or thing to the contrary notwithstanding. TO HAVE AND TO HOLD ALL & singular the Priviledges Advantages Liberties Immunities and all other the Premises herein & hereby granted & given or which are meant mentioned or intended to be herein & hereby given & granted unto them the said TRUSTEES of DARTMOUTH COLLEGE & to their Successors for ever. IN TESTIMONY whereof We have caused these our Letters to be made Patent and the publick Seal of our said Province of NEW HAMPSHIRE to be hereunto affixed WITNESS our Trusty and well beloved JOHN WENTWORTH Esquire Governor and Commander in Chief in and over our said Province &c. this THIRTEENTH day of DECEMBER in the TENTH year of our Reign and in the year of our Lord one thousand seven hundred and Sixty nine.--

APPENDIX B

**THE ACTS OF THE NEW HAMPSHIRE
LEGISLATURE**

**I. An Act to amend the charter, and enlarge
and improve the corporation of Dartmouth
College:**

Whereas, knowledge and learning generally diffused through a community, are essential to the preservation of a free government, and extending the opportunities and advantages of education is highly conducive to promote this end, and by the constitution it is made the duty of the legislators and magistrates to cherish the interests of literature, and the sciences, and all seminaries established for their advancement; and as the college of the State may, in the opinion of the legislature, be rendered more extensively useful: therefore --

1. Be it enacted, &c. that the corporation, heretofore called and known by the name of the Trustees of Dartmouth College shall ever hereafter be called and known by the name of the Trustees of Dartmouth University; and the whole number of said trustees shall be twenty-one, a majority of whom shall form a quorum for the transaction of business; and they and their successors in that capacity, as hereby constituted, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the Trustees of Dartmouth College, except so far as the same may be varied or

limited by the provisions of this act. And they shall have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof: to appoint such officers as they may deem proper, and determine their duties and compensation, and also to displace them; to delegate the power of supplying vacancies in any of the offices of the university, for any term of time not extending beyond their next meeting: to pass ordinances for the government of the students, with reasonable penalties, not inconsistent with the constitution and laws of this State; to prescribe the course of education, and confer degrees; and to arrange, invest and employ the funds of the university.

2. And be it further enacted that there shall be a Board of Overseers, who shall have perpetual succession, and whose number shall be twenty-five, fifteen of whom shall constitute a quorum for the transaction of business. The President of the Senate, and the Speaker of the House of Representatives of New Hampshire, the Governor and Lieutenant Governor of Vermont, for the time being, shall be members of said board, *ex officio*. The Board of Overseers shall have power to determine the times and places of their meetings, and manner of notifying the same; to inspect and confirm, or disapprove and negative, such votes and proceedings of the Board of Trustees as shall relate to the appointment and removal of President, professors and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new

college buildings: provided always that the said negative shall be expressed within sixty days from the time of said Overseers' being furnished with copies of such acts: provided also that all votes and proceedings of the Board of Trustees shall be valid and effectual, to all intents and purposes, until such negative of the Board of Overseers be expressed, according to the provisions of this act.

3. Be it further enacted that there shall be a treasurer of said corporation, who shall be duly sworn, and who, before he enters upon the duties of his office, shall give bonds, with sureties, to the satisfaction of the corporation, for the faithful performance thereof; and also a secretary to each of the Boards of Trustees and Overseers, to be elected by the said Boards, respectively, who shall keep a just and true record of the proceedings of the Board for which he was chosen. And it shall furthermore be the duty of the secretary of the Board of Trustees to furnish, as soon as may be, to the said Board of Overseers, copies of the records of such votes and proceedings, as by the provisions of this act are made subject to their revision and control.

4. Be it further enacted that the President of Dartmouth University, and his successors in office, shall have the superintendence of the government and instruction of the students, and may preside at all meetings of the trustees, and do and execute all the duties devolving by usage on the president of a university. He shall render annually to the Governor of this State an account of the number of students, and of the State of the funds of the University, and likewise copies of all important votes and proceedings of the corporation and Overseers, which

shall be made out by the secretaries of the respective Boards.

5. Be it further enacted that the President and professors of the University shall be nominated by the Trustees, and approved by the Overseers, and shall be liable to be suspended or removed from office in manner as before provided. And each of the two Boards of Trustees and Overseers shall have power to suspend and remove any member of their respective Boards.

6. Be it further enacted that the Governor and counsel are hereby authorized to fill all vacancies in the Board of Overseers, whether the same be original vacancies or are occasioned by the death, resignation or removal of any member. And the Governor and counsel in like manner shall, by appointments, as soon as may be, complete the present Board of Trustees to the number of twenty-one, as provided for by this act, and shall have power also to fill all vacancies that may occur previous to, or during the first meeting of the said Board of Trustees. But the President of said University for the time being, shall, nevertheless, be a member of said Board of Trustees ex officio. And the Governor and Council shall have power to inspect the doings and proceedings of the corporation, and of all the officers of the University, whenever they deem it expedient; and they are hereby required to make such inspection, and report the same to the legislature of this State, as often as once in every five years. And the Governor is hereby authorized and requested to summon the first meeting of the said Trustees and Overseers, to be held at Hanover, on the 26th day of August next.

7. Be it further enacted that the President and professors of the University, before entering upon the duties of their offices, shall take the oath to support the Constitution of the United States and of this State; certificates of which shall be in the office of the secretary of this State, within sixty days from their entering on their offices respectively.

8. Be it further enacted that perfect freedom of religious opinion shall be enjoyed by all the officers and students of the University, and no officer or student shall be deprived of any honors, privileges or benefits of the institution on account of his religious creed or belief. The theological colleges which may be established in the University shall be founded on the same principles of religious freedom; and any man, or body of men, shall have a right to endow colleges or professorships of any sect of the Protestant Christian religion; and the Trustees shall be held and obliged to appoint professors of learning and piety of such sects, according to the will of the donors.

Approved, June 27th, 1816

II. An act in addition to, and in amendment of, “an act, entitled, an act to amend the charter, and enlarge and improve the corporation of Dartmouth College”:

Whereas, the meetings of the Trustees and Overseers of Dartmouth University, which were summoned agreeably to the provisions of said act, failed of being duly holden, in consequence of a quorum of neither said Trustees nor Overseers attending at the time and place appointed, whereby the proceedings of said corporation have hitherto been, and still are delayed:

1. Be it enacted, &c. that the Governor be, and he is hereby authorized and requested to summon a meeting of the Trustees of Dartmouth University, at such time and place as he may deem expedient. And the said Trustees, at such meeting, may do and transact any matter or thing, within the limits of their jurisdiction and power, as such Trustees, to every intent and purpose, and as fully and completely as if the same were transacted at any annual or other meeting. And the Governor, with advice of Council, is authorized to fill all vacancies that have happened, or may happen in the Board of said Trustees, previous to their next annual meeting. And the Governor is hereby authorized to summon a meeting of the Overseers of said University, at such time and place as he may consider proper. And provided a less number than a quorum of said Board of Overseers convene at the time and place appointed for such meeting of their Board, they shall have power to adjourn, from time to time, until a quorum shall have convened.

2. And be it further enacted that so much of the act to which this is an addition as makes necessary any particular number of Trustees or Overseers of said University to constitute a quorum for the transaction of business be, and the same hereby is repealed; and that hereafter, nine of said Trustees, convened agreeably to the provisions of this act, or to those of that to which this is an addition, shall be a quorum for transacting business; and that in the Board of Trustees, six votes at least shall be necessary for the passage of any act or resolution. And provided also that any smaller number than nine of said Trustees, convened at the time and place appointed for any

meeting of their Board, according to the provisions of this act, or that to which this is an addition, shall have power to adjourn from time to time, until a quorum shall have convened.

3. And be it further enacted that each member of said Board of Trustees, already appointed or chosen, or hereafter to be appointed or chosen, shall, before entering on the duties of his office, make and subscribe an oath for the faithful discharge of the duties aforesaid; which oath shall be returned to, and filed in the office of the secretary of State, previous to the next regular meeting of said Board, after said member enters on the duties of his office, as aforesaid.

Approved, December 18th, 1816.

III. An act in addition to an act, entitled, “an act in addition to, and in amendment of, an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College.”

Be it enacted &c. that if any person or persons shall assume the office of President, Trustee, professor, secretary, treasurer, librarian or other officer of Dartmouth University; or by any name, or under any pretext, shall, directly or indirectly, take upon himself or themselves the discharge of any of the duties of either of those offices, except it be pursuant to, and in conformity with, the provisions of an act, entitled, "an act to amend the charter and enlarge and improve the corporation of Dartmouth College," or, of the "act, in addition to and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College," or shall in any way, directly or indirectly, wilfully

impede or hinder any such officer or officers already existing, or hereafter to be appointed agreeably to the provisions of the acts aforesaid, in the free and entire discharge of the duties of their respective offices, conformably to the provisions of said acts, the person or persons so offending shall, for each offence, forfeit and pay the sum of five hundred dollars, to be recovered by any person who shall sue therefor, one-half thereof to the use of the prosecutor, and the other half to the use of said University.

And be it further enacted that the person or persons who sustained the offices of secretary and treasurer of the Trustees of Dartmouth College, next before the passage of the act, entitled, "an act to amend the charter and enlarge and improve the corporation of Dartmouth College," shall continue to hold and discharge the duties of those offices, as secretary and treasurer of the Trustees of Dartmouth University, until another person or persons be appointed, in his or their stead, by the Trustees of said University. And that the treasurer of said University, so existing, shall, in his office, have the care, management, direction and superintendence of the property of said corporation, whether real or personal, until a quorum of said Trustees shall have convened in a regular meeting.

Approved, December 26th, 1816

APPENDIX C

THE SEAL OF DARTMOUTH COLLEGE



In the
Supreme Court of the United States

TRUSTEES OF DARTMOUTH COLLEGE,
Petitioners,

v.

WILLIAM H. WOODWARD,
Respondent.

ON WRIT OF ERROR TO THE SUPERIOR COURT OF
JUDICATURE OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

On December 13, 1769, King George the Third granted a charter to establish Dartmouth College in order to provide “for the education & instruction of Youth of the Indian tribes in this Land in reading, writing & all parts of Learning which shall appear necessary and expedient for civilizing & christianizing Children of Pagans as well as in all liberal Arts and Sciences,” and to “supply a great number of Churches & Congregations . . . with a learned & orthodox Ministry.” J.A. 4a–5a.

Believing that this royal charter should be modified and improved in certain respects, the people of New Hampshire, in the newly independent United States of America, passed three legislative Acts in 1816, designed to render the college “more extensively useful” to the people and thereby promote “knowledge and learning . . . essential to the preservation of a free government.” June 27, 1816 Act (preamble).

The question presented is whether the U.S. Constitution binds the people of New Hampshire to the terms set forth in the King’s charter and thus renders these legislative Acts invalid.

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Origins Of Dartmouth College

In 1754, the Reverend Eleazer Wheelock of Lebanon, Connecticut founded a charity school to educate and bring Christianity to local Indians. The school, funded initially with Wheelock's own money and property, achieved so much success that it attracted more students than it could support. In an effort to meet this demand and expand the school, Wheelock enlisted the Reverend Nathaniel Whitaker to travel to England to fundraise for the project, and granted him full power of attorney over his affairs. Wheelock instructed Whitaker to solicit contributions from nine individuals listed in a deed, including the college's future namesake—the Right Honorable William, Earl of Dartmouth. After successfully securing contributions from all nine donors, Whitaker appointed them trustees of the funds they had contributed. Whitaker then empowered these donors to determine the location of the expanded school. They decided to place the college on a hill in western New Hampshire, right near the Connecticut River.

With the location fixed along the banks of the Connecticut River in Hanover, New Hampshire, and the funds in place, Wheelock sought to secure the permanency of his small new school by obtaining a charter of incorporation from the Crown. In so doing, Wheelock requested that the Crown appoint as the new corporation's trustees a set of twelve individuals already nominated in his will.

B. King's Charter Of 1769

The charter, granted by King George III on December 13, 1769, laid out the corporate structure of Wheelock's school. The school would be named "Dartmouth College" and would educate not only Indians, but also "English youth and any others." J.A. 5a.¹ The charter named Wheelock as the founder of the college and appointed him as its president, giving him the power to choose his successor and maintain his position for life—as long as the Trustees of Dartmouth College approved of his tenure.

Under the charter, the Trustees were incorporated as a body politic, limited to twelve "& no more" in number. J.A. 6a. Wheelock himself, as well as the Governor of New Hampshire, were among those named as Trustees. Like the president, the Trustees were empowered to choose their own successors, subject to the agreement of a quorum of seven. The Trustees additionally had the authority to fill any vacancy that might arise in the president's position.

The charter also granted the Trustees broad power to govern the school. They were given the authority to acquire land and personal property, and to pay or dismiss the college's professors, tutors, clerks, and other officers. Further, the charter empowered the Trustees to pass "Ordinances, Orders & Laws" to regulate Dartmouth—so long as they comported with general laws of the land and did not discriminate on the basis of religion. J.A. 14a (punctuation altered).

The charter also endowed the Trustees and their successors with the college's governing documents: a common seal and the letters patent (a legal document

¹ "J.A." refers to the appendix to petitioners' brief.

issued by the Crown to record the corporation's status). These documents were to be enrolled and recorded in the Secretary's office in New Hampshire. The charter declared that the letters patent "shall be good & effectual in the Law to all intents & purposes against [the Crown], [its] heirs, and Successors, without any other License, Grant, or Confirmation from [the Crown]" J.A. 16a-17a (punctuation altered). The Trustees accepted the letters patent and assented to the charter's terms.

In the decades that followed the King's grant, the colonies declared their independence from the Crown and then fought a war to secure it. The American Revolution brought social and political upheaval, and ultimately freedom, to the colonies. During this time, Dartmouth experienced change of its own. Between 1769 and 1816, the Trustees received gifts, land, and donations, including a gift of land from Vermont in 1785 and gifts of land from the State of New Hampshire in 1789 and 1807. Dartmouth College was growing and prospering as a corporation.

The period also brought political and religious tension to Dartmouth. In 1779, Reverend Wheelock chose his son, John Wheelock, to be his successor as president of the Trustees of Dartmouth College. John Wheelock embraced Presbyterianism, but the College Trustees were predominantly Congregationalists. John Wheelock and the Trustees sparred over the management of the College, appointment of professors, and filling of vacancies on the board. In light of this conflict, John Wheelock asked the New Hampshire legislature to intervene with its support. In response, the Trustees fired John Wheelock and appointed Reverend Francis Brown in his stead.

The religious conflict at Dartmouth soon became a political conflict as well. On one side of New Hampshire politics, there was the Federalist Party, with whom the Congregationalist Trustees generally associated. On the other side, there were the Republicans (sometimes called Jeffersonians as well), who were more aligned with the Presbyterianism practiced by Wheelock, and saw the Trustees as vestiges of the old English aristocracy. When the election of 1816 handed Republicans control of the New Hampshire legislature, they quickly turned their attention to the brewing conflict at Dartmouth.

C. Acts Of The New Hampshire Legislature

In 1816, the New Hampshire legislature, recognizing that “knowledge and learning generally diffused throughout a community are essential to the preservation of a free government,” passed three Acts designed to make Dartmouth College “more extensively useful” to this end. J.A. 18a. The Trustees did not assent to any of these Acts.

1. The first Act, passed on June 27, 1816, was titled “an Act to amend the charter, and enlarge and improve the corporation of Dartmouth College.” J.A. 18a. Under the Act, Dartmouth College would be renamed “Dartmouth University.” The Act expanded the number of trustees from twelve to twenty-one, and transferred all of the former trustees’ rights and property to the new University Board of Trustees, subject to a few changes. The new University Trustees had the power to organize new colleges and institutes within the University, and could nominate a president—but not appoint him directly.

The Act also established a board of overseers comprised of twenty-five individuals, with perpetual

succession. The Vermont Governor and Lieutenant-Governor, and the New Hampshire President of the Senate and Speaker of the House would all be members of the board of overseers *ex officio*. This board, operating with a quorum of fifteen, had the power to approve or veto the trustees' votes on "the appointment and removal of President, professors, and other permanent officers of the university . . . their salaries[,] . . . the establishment of colleges and professorships, and the erection of new college buildings." J.A. 19a. Beyond this supervisory role, these overseers were entitled to appoint nine new trustees to the corporation and fill any vacancies in the board that arose before the first meeting.

The Act further established a treasurer, secretary, and president of the University. The president was required to report to the Governor of New Hampshire about the state of the University—including information about its enrollment, finances, and records. Finally, the Act reaffirmed the school's commitment to the freedom of religion.

2. The second Act, passed on December 18, 1816, authorized the Trustees of Dartmouth University to meet and transact on matters within their jurisdiction. The Act lowered their quorum from fifteen to nine for business transactions and required only six votes to pass an act or resolution. Additionally, the Act enabled the Governor of New Hampshire to call meetings of the board of overseers and to fill any vacancies on that board.

3. The third Act, passed on December 26, 1816, imposed a penalty of five hundred dollars on anyone who hindered the ability of the University's officers to fulfill their role. It also named the secretary and treasurer of the Trustees of Dartmouth College to be

the secretary and treasurer of the Trustees of Dartmouth University. The Act vested the treasurer with control over the real and personal property of the college until a quorum of trustees could meet.

D. William Woodward's Role

Before New Hampshire enacted these Acts, the secretary and treasurer of Dartmouth's Board of Trustees was William H. Woodward, John Wheelock's nephew. In that role, Woodward maintained possession of the college's property, including its books of records, the college seal, and more. But in the fall of 1816—after the first Act was passed—the Trustees of Dartmouth College removed Woodward from his positions, and demanded that he return the college's property. Woodward refused.

On February 4, 1817, the Trustees of Dartmouth University appointed Woodward as *their* secretary and treasurer. Woodward, still in possession of the college's property, accepted these positions on behalf of the newly named Dartmouth University.

II. PROCEDURAL HISTORY

On February 8, 1817, the Trustees of Dartmouth College filed an action in trover against Woodward for two books of records, the college's seal, four books of the corporation's charges and accounts, and the original letters patent. The College Trustees, who also argued that the Acts modifying Dartmouth's charter violated the Contract Clause of the U.S. Constitution, alleged \$50,000 in damages.

New Hampshire's highest court, the Superior Court of Judicature of New Hampshire, granted judgment for Woodward. The court found that Dartmouth was a public corporation, and held that

the Acts modifying the charter did not impair the rights of the College Trustees. The court further held that the charter is not a contract within the meaning of the Contract Clause of the U.S. Constitution.

The College Trustees subsequently appealed that decision to this Court by writ of error.

ARGUMENT

The Contract Clause of the U.S. Constitution does not prohibit a state legislature from adapting its public institutions to account for social and political change. When King George III granted Dartmouth its charter in 1769, New Hampshire was still a colony of Great Britain. In the intervening years, no less than a Revolution upended the social and political fabric of the Nation and the State. The people of New Hampshire, acting through their legislature, modified one of their foremost educational institutions to fit their new government and society and promote the “knowledge and learning . . . essential to the preservation of a free government.” J.A. 18a. The Constitution does not forbid this exercise in democracy, and it does not bind the free people of America to the charters of a King against which Americans shed blood to gain their independence. This Court should affirm the decision below.

At the outset, the College Trustees bear an extraordinarily heavy burden in asking this Court to declare New Hampshire’s democratically enacted laws invalid. As the Court expressed recently in *Fletcher v. Peck*, “[t]he question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” 10 U.S. (6 Cranch) 87, 128 (1810); *see also*

Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) (“I will not decide any law to be void, but in a very clear case.”). The College Trustees therefore must demonstrate that the New Hampshire Acts present a “very clear” conflict with the Constitution and, in particular, the Contract Clause. They cannot do so.

To the contrary, the New Hampshire Acts comply with the Contract Clause. The reason is simple: Dartmouth’s charter is not a contract at all, let alone a contract governed by the Contract Clause. Even if the charter were such a contract, the Acts of the New Hampshire legislature do not impair any “obligation” protected by the Contract Clause. This Court thus has no warrant to interfere with New Hampshire’s authority over one of its foremost public institutions, and foremost public duties—education. Indeed, it would be perverse to rule that the new U.S. Constitution prevents a State from altering the terms of a royal charter in order to adapt it to our new country. The people of New Hampshire and their countrymen fought a War of Independence to break free of the Crown, not to adopt an instrument that would forever bind them to the King’s terms.

I. THE CONTRACT CLAUSE DOES NOT GOVERN THE DARTMOUTH CHARTER

The Contract Clause does not render the New Hampshire Acts invalid. To begin with, the Dartmouth charter is not a contract. It is a public charter made absent any consideration in exchange for its issuance. Even if the charter could be cast as a contract, it has a public educational purpose that places it squarely within the State’s police power. The Contract Clause exists to protect private rights, not to deprive States of their power to regulate public and

civil institutions. And, in any event, the Contract Clause does not bind the States to prospective commitments that the Crown itself, in the wake of the Revolution, now deems meaningless.

A. The Charter Is Not A Contract

Dartmouth's charter does not fall within the scope of the Contract Clause for the simple reason that it is not a contract. The Constitution does not bar States from impairing any and all agreements; it prohibits them from "impairing the Obligation of *Contracts*." U.S. Const. art. I, § 10, cl. 1 (emphasis added). An examination of the constitutionality of the New Hampshire Acts, then, necessarily begins with the question whether Dartmouth's charter was a contract at all. *Cf. Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract?"). As every student of contract law learns, there can be no contract without consideration: a promisor must receive some bargained-for private benefit (consideration) in exchange for his promise in order to be legally bound by that promise. An agreement without consideration does not form a contract, and accordingly is not protected by the Contract Clause.

The Framers well understood that concept. In 1789, a "contract" was "[a]n act whereby two parties are brought together; a bargain; a compact" or a "writing in which the terms of a bargain are included." 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining contract). A "bargain," in turn, is a "contract or agreement concerning the sale of something" or an "interested

dealing.” *Id.* (defining bargain). When the Framers used “contract” in Article I, § 10, clause 1 of the Constitution, they therefore intended an agreement among parties exchanging consideration.

Because Dartmouth’s charter was made without consideration, it is not a contract. In 1769, the King granted a charter of incorporation. The charter’s text does not suggest the Crown received any private benefit in return for this grant. The charter did not memorialize a sale or any other form of exchange. The charter is the presentation of a gift, bestowing rights and privileges on Reverend Wheelock and the Trustees of Dartmouth College in the expectation that those rights and privileges would provide a public benefit—the education of diverse youths. Because the King did not personally receive anything from this agreement, his gift cannot be understood as a contract. And because the charter is not a contract, it plainly falls outside the scope of the Contract Clause.

The absence of consideration in the grant of Dartmouth’s charter distinguishes this case from this Court’s earlier Contract Clause precedents. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), this Court considered whether the Georgia legislature’s repeal of a land-grant statute unconstitutionally impaired the obligation of contracts. The Court held that the original land-grant statute was a contract, noting that “a grant is a contract executed, the obligation of which still continues.” *Id.* at 137. Importantly, however, Georgia had not merely given away land as a gift. Rather, the State received valuable consideration in exchange for the land it granted. *Id.* at 93 (“Upon payment of 50,000 dollars, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance,

being 200,000 dollars, payable on the first of November, 1795.”). *Fletcher* thus stands only for the principle that where there has been valuable consideration, a grant of land from a State to an individual can constitute a contract.

This case is also readily distinguishable from *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812). In *Wilson*, the Court considered the constitutionality of a particular New Jersey statute that repealed in part an earlier statute granting land to a tribe of Delaware Indians. *Id.* at 165–66. The Court had no trouble finding that the original land grant was a contract, since “[e]very requisite to the formation of a contract is found in the proceedings.” *Id.* at 166. The Court specifically noted “the consideration agreed upon” by the parties. *Id.* at 166–67. In the original statute, the New Jersey legislature had provided the Indians with a parcel of land, which it promised would be exempt from taxation; in exchange, the Indians agreed to release their claim to other land in Southern New Jersey. *Id.* at 165. The state grant in *Wilson* was bargained for in consideration of a tangible benefit to the State—the Indians’ claims to land throughout Southern New Jersey. There was consideration, and the grant was thus held to be a protected contract.

Dartmouth’s charter, unlike the grants in *Fletcher* and *Wilson*, was made without consideration, and therefore is not a contract. Woodward does not dispute that this Court has held that a State’s grant of land for valuable consideration can constitute a contract under the Contract Clause. *Fletcher*, 10 U.S. (6 Cranch) at 137; *Wilson*, 11 U.S. (7 Cranch) at 166–67. But *Fletcher* and *Wilson* have no bearing on a charter of incorporation like Dartmouth’s, made without consideration. That charter is a public gift.

This Court has never held that a gift made without consideration constitutes a contract. It should not upend basic contract law by holding so now.

B. Even If The Charter Is A Contract, It Falls Outside The Scope Of The Contract Clause Because Of Its Public Character

Even if the King's grant were a contract, it would not be one to which the Contract Clause applies. The Contract Clause protects private contractual rights; it does not limit the States' authority over public and civil institutions. The New Hampshire Acts do not impinge on the private rights of the College Trustees or anyone else. Dartmouth College, now Dartmouth University, is a public corporation founded with public funds toward a public purpose; it is precisely the sort of corporation that legislatures have authority to regulate. The New Hampshire Acts are a constitutional exercise of the State's police power over its public offices and civil institutions.

1. The Contract Clause protects private rights, which are not affected by the New Hampshire Acts.

The Contract Clause was drafted to protect private contractual rights. James Madison explained the Framers' intentions in *The Federalist*, defending the inclusion of the Contract Clause in the Federal Constitution despite the availability of similar protection under state constitutions: "Very properly . . . have the convention added this constitutional bulwark in favor of *personal security and private rights*." *The Federalist* No. 44 (James Madison) (emphasis added). The Contract Clause, along with the prohibitions on bills of attainder and ex-post-facto

laws, was necessary because the American people had seen the state legislatures abuse their powers “in cases affecting personal rights.” *Id.* In fact, the Clause was drafted to remedy a very specific problem: that of state legislatures dispensing with the faithful performance of contracts respecting property at the behest of “enterprising and influential speculators,” and to the detriment of the “more industrious and less informed part of the community.” *Id.*

This Court has embraced Madison’s articulation of the purpose of the Contract Clause: “The prohibitions not to make any thing but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure *private rights*.” *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) (emphasis added). There is no reason to change course here.

The New Hampshire Acts do not violate the Contract Clause because they do not infringe any private right. No party—let alone the Petitioners before this Court—has an interest that is affected by an amendment to the charter. Most importantly, the group actually before this Court—the Trustees of Dartmouth College—have no private right of their own impacted by the Acts. Much is made of the Act’s change in the name from Dartmouth College to Dartmouth University. But there is no private interest in the use of *college*. Nor is there anything inherently stigmatic about university. Many of the Nation’s finest schools are universities.

Petitioners argued below that the Acts threaten their private right of visitation, conferred upon them by Reverend Wheelock. That assertion is unfounded. Even assuming that Wheelock, as founder, had a right of visitation, nothing in the record suggests that

he conferred upon the College Trustees any visitation rights in the college, and so they cannot assert a private right that may have been infringed by the New Hampshire Acts. It is established that being named a trustee or governor of a royally chartered school does “not of itself imply visitor.” *Eden v. Foster*, (1725) 24 Eng. Rep. 750, 750; 2 P. Wms. 325, 327. The charter would need to explicitly grant the Trustees the rights of visitation, which it nowhere does. The College Trustees therefore have no visitation rights.

Nor have they pointed to any other private rights that have been infringed by the New Hampshire Acts. The Contract Clause therefore does not protect them.

2. The charter established a public corporation for a public purpose, subject to public regulation.

The charter falls further outside the ambit of the Contract Clause because of its public character. The charter established Dartmouth as a public corporation, founded for a public purpose. Public corporations have traditionally been subject to governmental control. The New Hampshire legislature therefore acted within its authority in amending the charter of this public corporation.

Dartmouth was founded as a public corporation. Whether a corporation is public or private depends on the purposes for which it was founded. Such approach was recognized in *Attorney-General v. Pearce* (1740) 26 Eng. Rep. 454, 454–55; 2 Atk. 87, 88, which noted that it was not the identity of the corporations’ donors, but “in the extensiveness of the benefit accruing from them they may very properly be called publick charities.” To see that Dartmouth was founded for the public benefit, one need look no further than the text

of its charter. The charter explains that it was devised to establish “the best means of Education . . . in our Province of New Hampshire, *for the benefit of said Province.*” J.A. 5a (emphasis added). The charter’s drafters could not have been more explicit that the corporation was founded with a public purpose: to benefit the colony of New Hampshire in the area of education, a matter of unquestionable public concern. The charter established a public corporation.

Even if the public or private status of a corporation did depend on its founder’s identity, the record here does not indicate that Reverend Wheelock was the private founder of the college. True, the charter refers to Wheelock as the “founder,” but that alone does not make him one. The charter nowhere stipulates that Wheelock gave his own funds to found the college. Wheelock certainly had the vision as an educator to solicit donations from English contributors, but that does not make him a founder with visitation rights. The record includes no finding that Wheelock was such a founder. The record does indicate, however, that New Hampshire and Vermont donated their public lands to help found the school. Even if a corporation’s public status were judged by its founding donations, rather than its purpose, the record here supports the view that Dartmouth College was founded as a public corporation.

Public corporations are as subject to regulation and modification by the States as they were subject to public regulation before the Revolution. Of course, the King’s grant “amount[ed] to an extinguishment of the right of the grantor,” and the King became “estopped by his own grant.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810); see 1 William Blackstone, Commentaries *485. But that is not the end of the

matter: when Dartmouth's corporate charter was granted, the public—acting through Parliament—had the power to modify or revoke it at any time. See 1 William Blackstone, Commentaries *485. And after the Revolution, the State of New Hampshire inherited this parliamentary authority to modify the terms of Dartmouth's royal charter, or dissolve it altogether.

It would be very odd if the republican citizens of New Hampshire—having fought a Revolution to end the arbitrary and malicious rule of the King—now found themselves bound more irrevocably to the terms of their former King's charter than they were when they were his subjects. If the rights of self-government declared by and for the People in 1776 and enshrined in the Constitution in 1789 mean anything, they must entail that the New Hampshire legislature's powers with respect to Dartmouth's royal charter are as broad as Parliament's once were. The New Hampshire legislature properly holds the power to modify charters of incorporation like Dartmouth's, and the New Hampshire Acts were an appropriate exercise of that power.

3. Expanding the Contract Clause to cover civil and political institutions would strip States of basic, inherent powers.

Where no private rights have been abridged, the Contract Clause does not limit New Hampshire's power over its public institutions. The contrary rule promises sweeping consequences respecting not only public corporations but also many other fundamental institutions understood to be the exclusive preserve of state regulation. A ruling for the College Trustees in this case would contravene the original purpose of the Contract Clause, yield absurd results, and disrupt the

constitutional balance of power between the federal government and the States.

If the Contract Clause were construed to blindly shield from reform all agreements pertaining to basic civil and political institutions—without respect to the purposes at which the Clause is aimed—many of the States’ most fundamental powers would be called into question. Divorce impairs the obligation of a marriage. Yet nobody contends that a State violates the Contract Clause when it issues a divorce. State legislatures frequently divide or enlarge towns, altering those towns’ charters. *See, e.g., Colburn v. Ellis*, 7 Mass. 89 (1810). Yet those state actions are not considered to violate the Contract Clause. Similarly, state and local officers like judges and justices of the piece are granted their offices by the State, pursuant to statute. But modifying the nature or number of these offices does not violate the Contract Clause. The Contract Clause has never been stretched so far as to prevent States from regulating and reforming their civil and public institutions.

A State’s provisions for education—as much as its policies on marriage, its arrangements for local government, and its appointment of public officers—are at the core of its civil and public life, and fall uniquely within the regulatory competence of state government. The Constitution leaves the regulation and promotion of education to the States. The only role for the federal government in promoting learning is through the encouragements of arts and sciences by copyrights and patents. U.S. Const. art. I, § 8. The education of youths is a state function that especially reflects and advances the particular beliefs and priorities of the State’s citizens; the direction of

education policy is apt to change as the beliefs and priorities of the State's citizens evolve.

New Hampshire has reasonably chosen to exercise its police power over education by modifying the governance of its leading institution of learning. Indeed, as the New Hampshire legislature recognized, “knowledge and learning . . . are essential to the preservation of a free government.” J.A. 18a. The Contract Clause does not forbid New Hampshire, or any other State, from adapting such an institution to the local needs of the present day, so that its educational services may be “rendered more extensively useful. *Id.* Allowing States to regulate their educational institutions reflects the delicate federal-state balance of power the Framers established, and which this Court should not disturb.

More generally, the Framers of the Constitution deliberately provided for only narrow areas of federal intervention in state governance. Indeed, the federalist balance the Framers struck mostly places the federal government in the role of protecting the authority of States: it guarantees States a republican form of government and promises to defend them against domestic rebellion. *See* U.S. Const. art. IV, § 4. Expanding the reach of the Contract Clause to permit federal intrusion into one of the most fundamental subjects of state authority—education of its people—would disrupt that balance.

C. The College Trustees' Claims As Trustees Are Unenforceable Because They Are Founded Upon Royal Authority

The State of New Hampshire and its people have the authority to modify the Dartmouth charter not only because it establishes a public corporation but

also because the Revolution severed the College Trustees' legal estate under the Crown's charter. That estate has now reverted to the beneficiaries of the trust: the people of New Hampshire.

The Dartmouth charter established a trust for the benefit of New Hampshire (J.A. 5a), giving the people of New Hampshire an equitable estate in the trust. The College Trustees once held the legal estate under the charter. But as the Crown's own lawyers, as well as the English courts, have stressed, the King's relationship to (and prospective obligations under) the royal charters establishing American colleges was destroyed by the Revolution. *See Attorney-General v. The Mayor and City of London*, (1790) 29 Eng. Rep. 472, 474–75; 3 Bro. C. C. 171, 177–78.

The Revolution left the College Trustees without any enforceable legal estate under English law, since their "claim as trustees" was founded upon the Great Seal of the Realm. *Id.*, 29 Eng. Rep. at 474; 3 Bro. C. C. at 176. Today that royal seal has no purchase in these independent and free United States of America. It would be highly incongruous for American courts to treat the College Trustees' legal rights under the King's charter with greater solicitude than do the King's courts at Westminster.

The beneficiaries of the trust, the people of New Hampshire, have now seen fit to modify the charter so as to better serve their particular needs. The terms of the old charter make plain the need for modification and updating in light of political and social changes. It stipulates, for example, that Dartmouth's president, trustees, professors, tutors, and other officers must take an oath of allegiance to the King. J.A. 9a–10a. New Hampshire's effort to rid itself of the vestiges of monarchy, and to create an educational

institution worthy of a free people, is not offensive to the Constitution. The Contract Clause should not be construed to upset the State's continuing experiment in self-government. It does not bar the people of New Hampshire from adapting and updating the Dartmouth charter to the conditions of a free land.

II. NEW HAMPSHIRE'S LEGISLATURE HAS NOT IMPAIRED THE OBLIGATIONS OF THE DARTMOUTH CHARTER

Even if the charter is a contract protected by the Contract Clause, New Hampshire has not impaired any "obligations" protected by that Clause.

A. New Hampshire Did Not Alter The Fundamental Character Or Purpose Of The Charter

Petitioners greatly overstate the significance of the legislature's changes. One of their foremost complaints, for example, is that the Act of June 27 changed the name of the school from Dartmouth College to Dartmouth University. But it is well established that merely changing the name of a corporation does not alter the original rights, privileges, or franchises it affords. *See Luttrell's Case*, (1600) 76 Eng. Rep. 1065, 1067–68; 4 Co. Rep. 86 a, 87 a ("If a corporation have franchises or privileges by grant or prescription, and afterwards they are incorporated by another name . . . the new body will enjoy all the franchises, privileges, and hereditaments which the old corporation or body politic had either by grant or prescription."). Changing the College's name to Dartmouth University thus did not impair any rights enshrined under the charter, let alone violate the U.S.

Constitution. Those who love Dartmouth College need love Dartmouth University no less.

The expansion of the Board of Trustees likewise did not impair the obligation of Dartmouth's charter. Adding members to a corporation's governing board does not alter that corporation's fundamental character. In *Mayor & Commonalty of Colchester v. Seaber*, (1766) 97 Eng. Rep. 1140 (K.B.) 1141–43; 3 Burr. 1866, 1868–71, it was held that ousting a corporation's mayor and aldermen, and replacing them with a new group of burgesses, did not “destroy[]” or “dissolve[]” the corporation; to the contrary, the corporation retained all of its “rights and privileges.” The New Hampshire Acts make even smaller corporate modifications than those discussed in *Seaber*. The charter upheld in *Seaber* not only added burgesses to the town's governing body, but also deprived the mayor and alderman of their positions. The New Hampshire Acts, which do not deprive any original trustees of their positions on the board, cannot be understood to have impaired the corporation's rights or privileges. This result makes common sense. For example, new members join the House of Lords with some regularity. Nobody considers the House of Lords to have been abolished, or its rights and privileges changed, by the introduction of new members. The New Hampshire Acts did not so alter the Dartmouth charter either.

Nor has the legislature's modification of the State's role in Dartmouth's governance fundamentally altered the character of the Dartmouth charter. The State of New Hampshire has played a significant role in Dartmouth's governance from the beginning. New Hampshire helped found Dartmouth College, as the record shows, by donating

land to the school. And as addressed above, the school was founded “for the benefit” of New Hampshire and its people. Finally, the charter provided that the Governor of New Hampshire and other New Hampshire officials would sit on Dartmouth’s board of governing trustees. New Hampshire’s relationship with Dartmouth is nothing new. The New Hampshire Acts merely modified the State’s preexisting role in the school’s governance. They did not impair the design of the Dartmouth charter.

To the contrary, the New Hampshire Acts’ amendments to Dartmouth’s charter were made in furtherance of its original purpose. That distinguishes this case from *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). In *Terrett*, the Court treated as void a Virginia statute that purported to seize various lands that had previously been recognized as property of the Episcopal Church. *Id.* at 45, 48. The Court held that the statute impaired the obligation of the original land grants. Yet, importantly, the Court’s decision recognized that Virginia’s disestablishment of the Episcopal Church ran afoul of the Contract Clause only insofar as it purported to destroy “the right of [a] . . . corporation . . . to . . . its own property.” *Id.* at 50. The Court expressly recognized the State’s power to “abolish[]” any private corporation’s “exclusive privileges” to the extent those privileges are “inconsistent with the new government.” *Id.* at 52. So too, the Court recognized, a State “change, modify, enlarge or restrain” the charters of any “*public corporations*, which exist only for public purposes,” so long as those changes secure the corporations’ “property for the uses of those for whom and at whose expense” the property was “originally purchased.” *Id.*

The New Hampshire Acts fall squarely within the state authority recognized in *Terrett*. Though they modify Dartmouth's governance in some respects, they do not deprive the corporation of its rights or privileges, and they do not change the corporation's public business, which is to use its property for the education of local youths. *Terrett* does not resolve this case in Petitioners' favor; it only highlights the limits of the Contract Clause as it operates in this case.

Because the Acts' modifications to the charter preserve the fundamental purpose of the original charter, they do not "impair[] the Obligation" of the charter. U.S. Const. art. I, § 10, cl. 1.

B. The Constitution Does Not Enshrine Prospective Obligations Imposed By A Royal Charter

More fundamentally, any prospective obligations that existed under the charter, such as those pertaining to how the college would be governed going forward, ceased with the Revolution that freed Americans from the King's reign; they do not bind the College Trustees, the State of New Hampshire, or any other party against which the original charter might operate. As discussed above, the King's lawyers, as well as the English courts, have lately refused to honor the prospective commitments created by royal charters that established American colleges. *Cf. Attorney-General v. The Mayor and City of London*, (1790) 29 Eng. Rep. 472, 474–75; 3 Bro. C. C. 171, 177–78 (refusing to recognize, in the wake of the Revolution, a charitable obligation otherwise due to the College of William and Mary). It would be perverse to hold that royal commitments that the

King deems meaningless today nevertheless forever bind the States under the Contract Clause.²

III. HOLDING THAT THE CONTRACT CLAUSE DOES NOT APPLY HERE WILL IN NO WAY IMPEDE ECONOMIC GROWTH

The Contract Clause unquestionably serves an important function in restricting the impairment of private contracts. The stability guaranteed by that Clause may well be a cornerstone of this country's economic growth. But holding that the charter at issue here—which was issued by the Crown, and pertains to an inherently public subject—is not protected by the Contract Clause will in no way impede the development of private capital or private corporations in this country. A private corporation, formed by private individuals to pursue non-public objectives, will not be impacted by a ruling respecting the legislative Acts at issue in this case.

At stake here, instead, is the freedom of the people of New Hampshire to adapt the inherently public objectives of a royal charter, granted before Americans declared their independence from the King, to the conditions of our new Nation. Nothing in the Constitution denies the people of New Hampshire that freedom. Indeed, the last thing the Framers meant to do is to adopt a Constitution that would bind the people to the legacy of the Crown. A ruling for the College Trustees here would do just that.

² A royal land grant is different. The grant is complete when the patent is issued. By contrast, the charter here purports to impose prospective obligations on the governance of the school.

CONCLUSION

The judgment of the Superior Court of Judicature of New Hampshire should be affirmed.

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