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evidenced by their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it; and in the opinion of this Court, precludes the plaintiff, after such a lapse of time, from denying it to be the dividing line between him and the defendants; and neither ought now to be permitted to disturb the possession of the other, under a pretence that the line was not correctly run.

Judgment affirmed.

(CONSTITUTIONAL LAW.)

The Trustees of Dartmouth College v. Woodward.

The charter granted by the British crown to the trustees of Dartmouth College, in New-Hampshire, in the year 1769, is a contract within the meaning of that clause of the constitution of the United States, (art. 1. s. 10.) which declares that no State shall make any law impairing the obligation of contracts. The charter was not dissolved by the revolution.

An act of the State legislature of New-Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void.

Under its charter, Dartmouth College was a private and not a public corporation. That a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.

Error to the Superior Court of the State of New-Hampshire.

This was an action of trover brought in the State Court, in which the plaintiffs in error declared for

two books of records, purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College, from the establishment of the corporation until the 7th day of October, 1816; the original charter, or letters patent, constituting the college; the common seal; and four volumes or books of account, purporting to contain the charges and accounts in favour of the college. The defendant pleaded the general issue, and at the trial the following special verdict was found:

"The said jurors, upon their oath, say, that his Majesty George the Third, King of Great Britain, &c. issued his letters patent, under the public seal of the Province, now State, of New-Hampshire, bearing date the 13th day of December, in the 10th year of his reign, and in the year of our Lord, one thousand seven hundred and sixty-nine, in the words following:

Charter of Dartmouth College.

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, Esq. Governor and commander in chief, in and over our Province of New-Hampshire in New-England in America, that the Reverend Eleazar 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,

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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 employed a number of them as missionaries and school masters 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 school masters in the wilderness, more than could be supported by the charitable contributions in these American colonies.

Whereupon, the said Eleazar 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 the said Eleazar Wheelock requested the Rev. Nathaniel Whitaker, now doctor in divinity, to go over to England for that purpose, and sent over with him the Rev. 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 and generous contributors to the charity, viz.

The Right Honourable William, Earl of Dartmouth, the Honourable Sir Sydney Stafford Smythe, Knight, one of the Barons of his Majesty's Court of Exchequer, John Thornton, of Clapham, in the county of Surrey, 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 Batolph 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 cheerfully 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 Thornton, Samuel Roffey, Charles Hardy, and 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,

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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 and 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 and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon to be formed in that new country, with a learned and 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 honourable, honourable, and worthy trustees, before mentioned, having maturely considered the reasons and 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 and disposal of lands and 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 and 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. And, 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 Redeemer's 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 and will accrue many ways to the institution, and much be done by their example and influence to encourage and facilitate the whole design in view; for which reason, said Wheelock desires, that the trustees aforesaid may be vested with all that power therein, which can consist with their distance from the same.

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Know ye, therefore, That We, considering the premises, and being willing to encourage the laudable and 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 counsel for said province, by these presents, will, ordain, grant, and constitute, that there be a college erected in our said province of New-Hampshire, by the name of *Dartmouth College*, for the education and instruction of youth of the Indian tribes in this land, in reading, writing, and all parts of learning, which shall appear necessary and expedient, for civilizing and 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 politic, in deed, action, and name, and shall be called, named, and distinguished, 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, and mere motion, with the advice aforesaid, do, for us, our heirs and successors forever, will, give, grant, constitute, and ordain, that there shall be in the said Dartmouth College, from henceforth and forever, a body politic, consisting of Trustees of said Dartmouth College. And for the more full and perfect erection of said corporation and body politic, consisting of trustees of Dartmouth College, we, of our special grace, cer-

tain knowledge, and mere motion, do, by these presents, for us, our heirs and successors, make, ordain, constitute, and appoint our trusty and well beloved John Wentworth, Esq. 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, Esq. now president of our council of our said province, George Jaffrey and Daniel Peirce, Esqrs. both of our said council, and Peter Gilman, Esq. now speaker of our house of representatives in said province, and William Pitkin, Esq. one of the assistants of our colony of Connecticut, and our said trusty and well beloved Eleazar Wheelock, of Lebanon, doctor in divinity, Benjamin Pomroy, of Hebron, James Lockwood, of Weathersfield, Timothy Pitkin and John Smalley, of Farmington, and 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, and 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 and their successors shall forever hereafter be, in deed, act, and name, a body corporate and politic, and that they, the said body corporate and politic, shall be known and distinguished, in all deeds, grants, bargains, sales, writings, evidences, or otherwise howsoever, and in all Courts forever hereafter plead and be impleaded by the name of The Trustees of Dartmouth College; and that the said corporation,

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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 franchises, for themselves and their successors, in fee simple, or otherwise howsoever, and to purchase, receive, or build, any house or houses, or any other buildings, as they shall think needful and 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 the 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 the purpose, shall agree, the President, Tutors, and other officers and ministers of said Dartmouth College; and also to pay all such missionaries and school masters as shall be authorized, appointed, and employed by them, for civilizing, and christianizing, and instructing the Indian natives of this land, their several allowances; and also their respective annual salaries or allowances, and all such necessary and

contingent charges, as from time to time shall arise and accrue, relating to the said Dartmouth College: And also, to bargain, sell, let, or assign, lands, tenements, or hereditaments, goods or chattels, and 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 politic 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, and mere motion, to the intent that our said corporation, and body politic, may answer the end of their erection and constitution, and may have perpetual succession and continuance forever, we do, for us, our heirs and successors, will, give, and grant, unto the Trustees of Dartmouth College, and to their successors forever, that there shall be, once a year, and 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 Eleazar Wheelock, as soon as conveniently may be, within one year next after the enrollment of these our letters patent, at such time and 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 altered as they shall hereafter find most convenient. And we farther order and direct, that the said Eleazar Wheelock shall notify the time for holding said first meeting, to be called as aforesaid, by sending a letter

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to each of said trustees, and causing an advertisement thereof to be printed in the New-Hampshire Gazette, and in some public newspaper 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 aforesaid, by the governor or commander in chief of our said province for the time being. And we do also, for us, our heirs and successors, hereby will, give, and grant, unto the said Trustees of Dartmouth College, aforesaid, and to their successors forever, that when any seven or more of the said trustees, or their successors, are convened and 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 and amply, to all intents and purposes, as if all the trustees of said College were personally present—and all affairs and actions whatsoever, under the care of said trustees, shall be determined by the majority or greater number of those seven or more trustees so convened and met together.

And we do further will, ordain, and direct, that the president, trustees, professors, tutors, and all such officers as shall be appointed for the public instruction and government of said college, shall, before they undertake the execution of their offices or trusts, or within one year after, take the oaths and 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 and government, and the succession of the crown in the heirs of the late Princess Sophia, being

protestants, and for the extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;" that is to say, the President, before the Governor of our said Province for the time being, or by one by him empowered to that service, or by the president of our said council, and the trustees, professors, tutors, and other officers, before the president of said college for the time being, who is hereby empowered to administer the same; an entry of all which shall be made in the records of said college.

And we do, for us, our heirs, and successors, hereby will, give, and grant, full power and authority to the president hereafter by us named, and 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 and 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 the said trustees, as aforesaid.

And, further, we do, by these presents, for us, our heirs and successors, create, make, constitute, nominate, and appoint our trusty and well beloved Eleazar Wheelock, Doctor in Divinity, the founder of said

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college, to be President of said Dartmouth College, and to have the immediate care of the education and government of such students as shall be admitted into said Dartmouth College for instruction and education; and do will, give, and grant, to him, in said office, full power, authority, and right, to nominate, appoint, constitute, and ordain, by his last will, such suitable and meet person or persons as he shall choose to succeed him in the presidency of said Dartmouth College; and the person so appointed, by his last will, to continue in office, vested with all the powers, privileges, jurisdiction, and authority, of a President of said Dartmouth College; that is to say, so long and until 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, and grant to the said trustees of said Dartmouth College, and to their successors forever, or any seven or more of them convened as aforesaid, that in the case of the ceasing or failure of a president by any means whatsoever, that the said trustees do elect, nominate, and 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 and government of the students as aforesaid; and 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, until the trustees shall make choice of, and appoint, a president as afore-

said; and 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, and appoint so many tutors and professors to assist the president in the education and government of the students belonging thereto, as they the said trustees shall, from time to time, think needful and 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 and discharge from the service of said Dartmouth College any or all such officers, and elect others in their room and 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, and appoint a treasurer, a clerk, an usher, and a steward for the said Dartmouth College, and appoint to them and each of them their respective businesses and trust; and displace and discharge from the service of said College, such treasurer, clerk, usher or steward, and to elect others in their room and stead; which officers so elected, as before directed, we do for us, our heirs and successors, by these presents, constitute and establish in their respective offices, and do give to each and every of them full power and authority to exercise the same in said Dartmouth College, according to the

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directions, and during the pleasure of said trustees, as fully and 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. And also, that the said trustees and 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 judgment, 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 and 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; and every trustee so elected and appointed shall, by virtue of these presents and such election and appointment, be vested with all the powers and privileges which any of the other trustees of said College are hereby vested with. And we do further will, ordain, and direct, that from and after the expiration of two years from the enrolment 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 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, and 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 Darmouth 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, and they are hereby fully impowered, from time to time, fully and lawfully to make and establish such ordinances, orders, and laws, as may tend to the good and wholesome government of the said college, and all the students and the several officers and ministers thereof, and to the public benefit of the same, not repugnant to the laws and 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 and equal liberty and 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, and of his or their being of a religious profession different from the said trustees of the said Dartmouth College. And such ordinances, orders, and laws, which shall as aforesid be made, we do for us, our heirs and successors, by these presents ratify, allow of, and confirm, as good and effectual to oblige and bind all the students, and the several officers and ministers of the said college. And we do hereby authorize and impower the said Trustees of Dartmouth College, and the president, tutors, and professors, by them elected and appointed as aforesaid, to put such ordinances, orders, and laws, in execution, to all proper intents and purposes.

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And we do further, of our special grace, certain knowledge, and mere motion, will, give, and grant unto the said Trustees of said Dartmouth College, for the encouragement of learning, and animating the students of said college to diligence and industry, and a laudable progress in literature, that they, and 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, and 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; and that they sign and seal diplomas or certificates of such graduations, to be kept by the graduates as perpetual memorials and testimonials thereof.

And we do further, of our special grace, certain knowledge, and mere motion, by these presents, for us, our heirs and successors, give and grant unto the Trustees of said Dartmouth College, and to their successors, that they and their successors shall have a common seal, under which they may pass all diplomas or certificates of degrees, and all other affairs and business of, and 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 and successors, give and grant unto the said trustees of the said Dartmouth College, and their successors, or to the major part of any seven or more of them convened for the service of the said college, full power and authority, from time to time, to nominate and appoint all other officers and ministers, which they shall think convenient and necessary for the service of the said college, not herein particularly named or mentioned; which officers and ministers we do hereby impower to execute their offices and trusts, as fully and freely as any of the officers and 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, and 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 said Dartmouth College, and of his successors, annually, or as often as he shall be thereunto desired or required, to transmit to the right honourable, honourable, and worthy gentlemen of the trust in England before mentioned, a faithful account of the improvements and disbursements of the several sums he shall receive from the donations and bequests made in England, through the hands of said trustees, and also advise them of the general plans laid, and prospects exhibited, as well as a faith-

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ful 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, and there shall be any of the Indian natives remaining to be proper objects of that charity. And, lastly, our express will and pleasure is, and we do, by these presents, for us, our heirs and successors, give and grant unto the said Trustees of Dartmouth College, and to their successors forever, that these our letters patent, on the enrolment thereof in the Secretary's office of our Province of New-Hampshire aforesaid, shall be good and effectual in the law, to all intents and purposes, against us, our heirs and successors, without any other license, grant, or confirmation from us, our heirs and successors, hereafter by the said trustees to be had and obtained, notwithstanding the not writing or misrecital, not naming or misnaming the aforesaid offices, franchises, privileges, immunities, or other the premises, or any of them, and notwithstanding a writ of ad quod damnum hath not issued forth to inquire 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 and singular the privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted, or which are meant, mentioned, or intended to be herein and hereby given and granted unto them, the said Trustees of Dartmouth College, and to their successors forever. In testimony whereof, we have caused these our letters to be made patent, and the public 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.

N. B. The words "and 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," between the first and second lines, also the words "or more," between the twenty-seventh and twenty-eighth lines, also the words "or more," between the twenty-eighth and twenty-ninth lines, and also the words "to all intents and purposes," between the thirty-seventh and thirty-eighth line of this sheet, were respectively interlined before signing and sealing.

And the said jurors, upon their oath, further say, that afterwards, upon the eighteenth day of the same December, the said letters patent were duly enrolled and recorded in the Secretary's office of said Province, now State, of New-Hampshire—And afterwards, and within one year from the issuing of the same letters patent, all the persons named as trustees in the same accepted the said letters patent, and assented thereunto, and the corporation therein and thereby created and erected was duly organized, and has, until the passing of the act of the legislature of the State of New-Hampshire, of the 27th of June, A. D. 1816, and ever since, (unless prevented by said act and the

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doings under the same,) continued to be a corporation.

And the said jurors, upon their oath, further say, that immediately after its erection and organization as aforesaid, the said corporation had, took, acquired, and received, by gift, donation, devise, and otherwise, lands, goods, chattels, and moneys of great value; and from time to time since have had, taken, received, and acquired, in manner aforesaid, and otherwise, lands, goods, chattels, and moneys of great value; and on the same 27th day of June, A. D. 1816, the said corporation, erected and organized as aforesaid, had, held, and enjoyed, and ever since have had, held, and enjoyed, divers lands, tenements, hereditaments, goods, chattels, and moneys, acquired in manner aforesaid, the yearly income of the same, not exceeding the sum of 26,666 dollars, for the use of said Dartmouth College, as specified in said letters patent.

And the said jurors, upon their oath, further say, that part of the said lands, so acquired and holden by the said trustees as aforesaid, were granted by (and are situate in) the State of Vermont, A. D. 1785, and are of great value; and other part of said lands, so acquired and holden as aforesaid, were granted by (and are situate in) the State of New-Hampshire, in the years 1789, and 1807, and are of great value.

And the said jurors, upon their oath, further say, that the said Trusteees of Dartmouth College, so constituted as aforesaid, on the same 27th day of June, A. D. 1816, were possessed of the goods and chattels in the declaration of the said trustees specifi-

ed, and at the place therein mentioned, as of their own proper goods and chattels, and continued so possessed until, and at the time of the demand and refusal of the same as hereinafter mentioned, unless devested thereof, and their title thereto defeated, and rendered invalid, by the provisions of the act of the State of New-Hampshire, made and passed on the same 27th day of June, A. D. 1816, and the doings under the same, as hereinafter mentioned and recited.

And the said jurors, upon their oath, further say, that on the 27th day of June, A. D. 1816, the legislature of said State of New-Hampshire made and passed a certain act, entitled, " An act to amend the charter, and enlarge and improve the corporation of Dartmouth College," in the words following:—

An act to amend the charter, and enlarge and improve the Corporation of Dartmouth College.

" Act of the legislature of New-Hampshire of the 27th of June, 1816.

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,

SECT. 1. *Be it enacted by the senate and house of representatives, in general court convened,* That the

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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.

SECT. 2. *And be it further enacted*, That there shall be a board of overseers, who shall have perpetual succession, and whose number shall be twen-

ty-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 lieutant 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.

SECT. 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

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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.

SECT. 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.

SECT. 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.

SECT. 6. *Be it further enacted*, That the governor and council 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 council 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.

SECT. 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.

SECT. 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 honours, privileges, or benefits of the institution, on account of his religious creed or belief. The theological colleges which

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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.

And the said jurors, upon their oath, further say, that, at the annual meeting of the Trustees of Dartmouth College, constituted agreeably to the letters patent aforesaid, and in no other way or manner, holden at said college, on the 28th day of August, A. D. 1816, the said trustees voted and resolved, and caused the said vote and resolve to be entered on their records, that they do not accept the provisions of the said act of the legislature of New-Hampshire of the 27th of June, 1816, above recited, but do, by the said vote and resolve, expressly refuse to accept or act under the same.

And the said jurors, upon their oath, further say, that the said Trustees of Dartmouth College have never accepted, assented to, or acted under the said act of the 27th of June, A. D. 1816, or any act passed in addition thereto, or in amendment thereof, but have continued to act, and still claim the right of acting, under the said letters patent.

And the said jurors, upon their oath, further say, that, on the seventh day of October, A. D. 1816, and before the commencement of this suit, the said Trustees of Dartmouth College demanded of the said

William H. Woodward the property, goods, and chattels in the said declaration specified, and requested the said William H. Woodward, who then had the same in his hands and possession, to deliver the same to them, which the said William H. Woodward then and there refused to do, and has ever since neglected and refused to do, but converted the same to his own use, if the said Trustees of Dartmouth College could, after the passing of the said act of the 27th day of June, lawfully demand the same, and if the said William H. Woodward was not, by law, authorized to retain the same in his possession after such demand.

And the said jurors, upon their oath, further say, that on the 18th day of December, A. D. 1816, the legislature of said State of New-Hampshire made and passed a certain other 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," in the words following:

Act of the 18th of December, 1816.

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

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time and place appointed, whereby the proceedings of said corporation have hitherto been, and still are delayed:

SECTION 1. *Be it enacted by the senate and house of representatives, in general Court convened,* 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.

SECTION 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.

SECTION 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 18, 1816.

And the said jurors, upon their oath, further say, that on the 26th day of December, A. D. 1816, the legislature of said State of New-Hampshire made and passed a certain other act, entitled, "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," in the words following:—

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Act of the 26th of December, 1816.

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 by the senate and house of representatives in general Court convened, 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 trea-

surer 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 superintendance 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 26, 1816.

And the said jurors, upon their oath, further say, that the said William H. Woodward, before the said 27th day of June, had been duly appointed by the said Trustees of Dartmouth College, secretary and treasurer of the said corporation, and was duly qualified to exercise, and did exercise the said offices, and perform the duties of the same; and as such secretary and treasurer, rightfully had, while he so continued secretary and treasurer as aforesaid, the custody and keeping of the several goods, chattels, and property, in said declaration specified.

And the said jurors, upon their oath, further say, that the said William H. Woodward was removed by said Trustees of Dartmouth College (if the said trustees could, by law, do the said acts) from said office of secretary, on the 27th day of August, A. D. 1816, and from said office of treasurer, on the 27th day of

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September then next following, of which said removals he, the said William H. Woodward, had due notice on each of said days last mentioned.

And the said jurors, upon their oath, further say, that the corporation, called the Trustees of Dartmouth University, was duly organized on the fourth day of February, A. D. 1817, pursuant to, and under the said recited acts of the 27th day of June, and of the 18th and 26th days of December, A. D. 1816; and the said William H. Woodward was, on the said fourth day of February, A. D. 1817, duly appointed by the said Trustees of Dartmouth University, secretary and treasurer of the said Trustees of Dartmouth University, and then and there accepted both said offices.

And the said jurors, upon their oath, further say, that this suit was commenced on the eighth day of February, A. D. 1817.

But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner and form aforesaid found, the said acts of the 27th of June, 18th and 26th of December, A. D. 1816, are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereunto by them, so as to render the plaintiffs incapable of maintaining this action, or whether the same acts are repugnant to the constitution of the United States, and so void, the said jurors are wholly ignorant, and pray the advice of the Court upon the premises. And if upon the said matter, it shall seem to the Court here, that the said acts last mentioned are valid in law, and binding on said trustees of Dartmouth Col-

lege, without acceptance thereof, and assent thereto, by them, so as to render the plaintiffs incapable of maintaining this action, and are not repugnant to the constitution of the United States, then the said jurors, upon their oath, say, that the said William H. Woodward is not guilty of the premises above laid to his charge, by the declaration aforesaid, as the said William H. Woodward hath above in pleading alleged. But if upon the whole matter aforesaid, it shall seem to the Court here, that the said acts last mentioned are not valid in law, and are not binding on the said trustees of Dartmouth College without acceptance thereof, and assent thereto, by them, so as render them incapable of maintaining this action, and that the said acts are repugnant to the constitution of the United States and void, then the said jurors, upon their oath, say that the said William H. Woodward is guilty of the premises above laid to his charge, by the declaration aforesaid, and in that case, they assess the damages of them, the said trustees of Dartmouth College, by occasion thereof, at twenty thousand dollars.

Judgment having been afterwards rendered upon the said special verdict by the Superior Court of the State of New-Hampshire, being the highest Court of law or equity of said State, for the plaintiff below, the cause was brought before this Court by writ of error.

March 10th, and 11th, 1818.

Mr. *Webster*, for the plaintiffs in error. The general question is, whether the acts of the 27th of June, and of the 18th and 26th of December, 1816, are

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valid and binding on the rights of the plaintiffs, *without their acceptance or assent.*

The substance of the facts recited in the preamble to the charter is, that Dr. Wheelock had founded a CHARITY, on funds owned and procured by himself; that he was, at that time, the sole dispenser and sole administrator, as well as the legal owner of these funds; that he had made his will, devising this property in trust to continue the existence and uses of the school, and appointed trustees; that, in this state of things, he had been invited to fix his school permanently in New-Hampshire, and to extend the design of it to the education of the youth of that province; that, before he removed his school, or accepted this invitation, which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, viz. the persons whom he had already appointed to be the future trustees of his charity by his will. The Charter, or letters patent, then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the "Trustees of Dartmouth College;" to have perpetual existence, as such corporation, and with power to hold and dispose of lands and goods, for the use of the College, with all the ordinary powers of corporations. They are in their discretion to apply the funds and property of the College to the support of the president, tutors, ministers, and other officers of the College, and such missionaries and schoolmasters as they may see fit to employ among

the Indians. There are to be twelve trustees forever, *and no more;* and they are to have the right of filling vacancies occuring in their own body. The Rev. Mr. Wheelock is declared to be the FOUNDER of the College, and is, by the charter, appointed first president, with power to appoint a successor, by his last will. All proper powers of government, superintendence, and visitation, are vested in the trustees. They are to appoint and remove all officers at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders, and laws, for the government of the students. And to the end that the persons who had acted as depositaries of the contributions in England, and who had also been contributors themselves, might be satisfied of the good use of their contributions, the president was annually, or when required, to transmit to them an account of the progress of the institution, and the disbursements of its funds, so long as they should continue to act in that trust. These letters patent are to be good and effectual in law, *against the king, his heirs and successors forever*, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties, and immunities, to them and to their successors forever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain.

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After the institution, thus created and constituted, had existed, uninterruptedly and usefully, nearly fifty years, the legislature of New-Hampshire passed the acts in question. The first act makes the twelve trustees under the charter, and nine other individuals to be appointed by the governor and council, a corporation, by a new name; and to this new corporation transfers all the *property, rights, powers, liberties, and privileges* of the old corporation; with further power to establish NEW COLLEGES AND AN INSTITUTE, and to apply all or any part of the funds to these purposes, subject to the power and control of a board of twenty-five overseers, to be appointed by the governor and council. The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the treasurer of the plaintiffs, to retain and hold their property, against their will.

If these acts are valid, the old corporation is abolished, and a new one created. The first act does, in fact, if it can have effect, *create a new corporation*, and transfer to it all the property and franchises of the old. The two corporations are not the same, in any thing which essentially belongs to the existence of a corporation. They have different names, and different powers, rights and duties. Their organization is wholly different. The powers of the corporation are not vested in the same, or similar hands. In one, the trustees are twelve, and no more. In the other, they are twenty-one. In one, the power is a single board. In the other, it is divided between two boards. Although the act professes to

include the old trustees in the new corporation, yet that was without their assent, and against their remonstrance; and no person can be compelled to be a member of such a corporation against his will. It was neither expected nor intended, that they should be members of the new corporation. The act itself treats the old corporation as at an end, and going on the ground that all its functions have ceased, it provides *for the first meeting and organization of the new corporation.* It expressly provides, also, that the new corporation shall have and hold all the property of the old; a provision which would be quite unnecessary upon any other ground, than that the old corporation was dissolved. But if it could be contended, that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest that they impair and invade the rights, property, and powers of the trustees under the charter, *as a corporation*, and the legal rights, privileges, and immunities which belong to them, *as individual members* of the corporation. The twelve trustees were the *sole* legal owners of all the property acquired under the charter. By the acts others are admitted, against *their* will, to be joint owners. The twelve individuals, who are trustees, were possessed of all the franchises and immunities conferred by the charter. By the acts, *nine* other trustees, and *twenty-five* overseers, are admitted against their will, to divide these franchises and immunities with them. If, either as a corporation, or as individuals, they have any *legal rights*, this forcible intrusion of others violates those rights, as manifestly as an entire and complete ouster

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and dispossession. These acts alter the whole constitution of the corporation. They affect the rights of the whole body, as a corporation, and the rights of the individuals who compose it. They revoke corporate powers and franchises. They alienate and transfer the property of the College to others. By the charter, the trustees had a right to fill vacancies in their own number. This is now taken away. They were to consist of twelve, and by express provision, of no more. This is altered. They and their successors, appointed by themselves, were forever to hold the property. The legislature has found successors for them, before their seats are vacant. The powers and privileges, which the twelve were to exercise *exclusively*, are now to be exercised by others. By one of the acts, they are subjected to heavy penalties, if they exercise their offices, or any of those powers and privileges granted them by charter, and which they had exercised for fifty years. They are to be *punished* for not accepting the new grant, and taking its benefits. This, it must be confessed, is rather a summary mode of settling a question of constitutional right. Not only are new trustees forced into the corporation, but new trusts and uses are created. The College is turned into a University. Power is given to create new colleges, and to authorize any diversion of the funds, which may be agreeable to the new boards, sufficient latitude is given by the undefined power of establishing an *Institute*. To these new Colleges, and this *Institute*, the funds contributed by the founder, Dr. Wheelock, and by the original donors, the Earl of Dartmouth

and others, are to be applied, in plain and manifest disregard of the uses to which they were given. The president, one of the old trustees, had a right to his office, salary, and emoluments, subject to the twelve trustees alone. His title to these is now changed, and he is made accountable to new masters. So also all the professors and tutors. If the legislature can at pleasure make these alterations and changes, in the rights and privileges of the plaintiffs, it may, with equal propriety, abolish these rights and privileges altogether. The same power which can do any part of this work, can accomplish the whole. And, indeed, the argument, on which these acts have been hitherto defended, goes altogether on the ground, that this is such a corporation as the legislature may abolish at pleasure; and that its members have no *rights*, *liberties*, *franchises*, *property or privileges*, which the legislature may not revoke, annul, alienate or transfer to others whenever it sees fit.

It will be contended by the plaintiffs, *that these acts are not valid and binding on them without their assent.* 1. Because they are against common right, and the constitution of New-Hampshire. 2. Because they are repugnant to the constitution of the United States. I am aware of the limits which bound the jurisdiction of the Court in this case; and that on this record nothing can be decided, but the single question, whether these acts are repugnant to the constitution of the United States. Yet it may assist in forming an opinion of their true nature and character, to compare them with those fundamental principles, introduced into the State govern-

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ments for the purpose of limiting the exercise of the legislative power, and which the constitution of New-Hampshire expresses with great fullness and accuracy.

It is not too much to assert, that the legislature of New-Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs without their assent, even if there had been, in the constitution of New-Hampshire, or of the United States, no special restriction on their power; because these acts are not the exercise of a power properly legislative.[a] Their object and effect is to take away from one, rights, property, and franchises, and to grant them to another This is not the exercise of a legislative power. To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary. Attainder and confiscation are acts of sovereign power, not acts of legislation. The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is theoretically omnipotent. Yet, in modern times, it has attempted the exercise of this power very rarely. In a celebrated instance, those who asserted this power in parliament, vindicated its exercise only in a case, in which it could be shown, 1st. That the charter in question was a charter of political power. 2d. That there was a great and overruling state necessity, justifying the

a Calder *et ux.* v. Bull, 3 *Dall.* 386.

violation of the charter. 3d That the charter had been abused, and justly forfeited.[a] The bill affecting this charter did not pass. Its history is well known. The act w' ich afterwards did pass, passed *with the assent of the corporation.* Even in the worst times, this power of parliament to repeal and rescind charters has not often been exercised. The illegal proceedings in the reign of Charles II. were under colour of law. Judgments of forfeiture were obtained in the Courts. Such was the case of the *quo warranto* against the city of London, and the proceedings by which the charter of Massachusetts was vacated. The legislature of New-Hampshire has no more power over the rights of the plaintiffs than existed, somewhere, in some department of government, before the revolution. The British parliament could not have annulled or revoked this grant as an act of ordinary legislation. If it had done it at all, it could only have been in virtue of that sovereign power, called omnipotent, which does not belong to any legislature in the United States. The legislature of New-Hampshire has the same power over this charter, which belonged to the king, who granted it, and no more. By the law of England, the power to create corporations is a part of the royal prerogative.[b] By the revolution, this power may be considered as having devolved on the legislature of

a *Annual Reg.* 1784, p. 160. *Parlia. Reg.* 1783. Mr. *Burke's Speech on Mr. Fox's E. I. Bill. Burke's Works,* Vol. III. p. 414. 417. 467, 468. 486.

b 1 *Bl. Com.* 472.

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the State, and it has accordingly been exercised by the legislature. But the king cannot abolish a corporation, or new model it, or alter its powers, without its assent. This is the acknowledged and well-known doctrine of the common law. "Whatever might have been the notion in former times," says Lord Mansfield, "it is most certain now, that the corporations of the universities are lay corporations; and that the crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage."[a] After forfeiture duly found, the king may regrant the franchises; but a grant of franchises already granted, and of which no forfeiture has been found, is void. Corporate franchises can only be forfeited by trial and judgment.[b] In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases.[c] It may accept such part of the grant as it chooses, and reject the rest.[d] In the very nature of things, a charter cannot be forced upon any body. No one can be compelled to accept a grant; and without acceptance the grant is necessarily void.[e] It cannot be pretended that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate, or alter this charter. If, therefore, the legislature has not this power by any

a 3 *Burr.* 1656.

b 3 *T. R.* 244. King v. Passmore.

c The King v. Vice Chancellor of Cambridge, 3 *Burr.* 1656. 3 *T. R.* 240. per Lord Kenyon.

d *Idem*, 1661. and King v. Passmore, *ubi supra.*

e Ellis v. Marshall, 2 *Mass. R.* 277. 1 *Kyd on Corp.* 65, 66.

specific grant contained in the constitution; nor as included in its ordinary legislative powers; nor by reason of its succession to the prerogatives of the crown in this particular; on what ground would the authority to pass these acts rest, even if there were no special prohibitory clauses in the constitution, and the bill of rights?

But there are prohibitions in the constitution and bill of rights of New-Hampshire, introduced for the purpose of limiting the legislative power, and of protecting the rights and property of the citizens. One prohibition is, "that no person shall be deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land." In the opinion, however, which was given in the Court below, it is denied that the trustees, under the charter, had any property, immunity, liberty or privilege, in this corporation, within the meaning of this prohibition in the bill of rights. It is said, that it is a *public corporation*, and *public property*. That the trustees have no greater interest in it than any other individuals. That it is not private property, which they can sell, or transmit to their heirs; and that, *therefore*, they have no interest in it. That their office is a public trust like that of the governor, or a judge; and that they have no more concern in the property of the college, than the governor in the property of the State, or than the judges in the fines which they impose on the culprits at their bar. That it is nothing to them whether their powers shall be extended or lessened, any more than it is

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to the Courts, whether their jurisdiction shall be enlarged or diminished. It is necessary, therefore, to inquire into the true nature and character of the corporation, which was created by the charter of 1769.

There are divers sorts of corporations; and it may be safely admitted, that the legislature has more power over some, than over others.[a] Some corporations are for government and political arrangement; such for example as cities, counties, and the towns in New England. These may be changed and modified as public convenience may require, due regard being always had to the rights of property. Of such corporations, all who live within the limits are of course obliged to be members, and to submit to the duties which the law imposes on them as such. Other civil corporations are for the advancement of trade and business, such as banks, insurance companies, and the like. These are created, not by general law, but usually by grant. Their constitution is special. It is such as the legislature sees fit to give, and the grantees to accept.

The corporation in question is not a *civil*, although it is a *lay* corporation. It is an *eleemosynary* corporation. It is a *private charity*, originally founded and endowed by an individual, with a charter obtained for it at *his* request, for the better administration of *his charity*. "The eleemosynary sort of corporations are such as are constituted for the perpetual distributions of the free alms or bounty of the founder of them, to such persons as he has directed. Of this

[a] 1 *Wooddes.* 474. 1 *Bl. Com.* 467.

are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges both in our universities and out of them."[a] Eleemosynary corporations are for the management of private property, according to the will of the donors. They are private corporations. A college is as much a private corporation as a hospital; especially a college founded as this was, by private bounty. A college is a charity. "The establishment of learning," says Lord Hardwicke, "is a charity, and so considered in the statute of Elizabeth. A devise to a college, for their benefit, is a laudable *charity*, and deserves encouragement."[b] The legal signification of *a charity* is derived chiefly from the statute 43 Eliz. c. 4. "Those purposes," says Sir W. Grant, "are considered *charitable* which that statute enumerates."[c] *Colleges* are enumerated as *charities* in that statute. The government, in these cases, lends its aid to perpetuate the beneficent intention of the donor, by granting a charter, under which his private charity shall continue to be dispensed, after his death. This is done either by incorporating the *objects* of the charity, as, for instance, the scholars in a college, or the poor in a hospital; or by incorporating those who are to be governors, or trustees, of the charity.[d] In cases of the first sort, the *founder* is, by the common law, *visitor*. In early times it became a maxim, that he who gave the property might regulate it in future. *Cujus est dare, ejus est disponere.* This right of *visitation* descended from the founder to his heir, as

a 1 *Bl. Com.* 471.
b 1 *Ves.* 537.
c 9 *Ves.* 405.
d 1 *Wooddes.* 474.

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a right of property, and precisely as his other property went to his heir; and in default of heirs, it went to the King, as all other property goes to the King, for the want of heirs. The right of visitation arises from the property. It grows out of the endowment. The founder may, if he please, part with it, at the time when he establishes the charity, and may vest it in others. Therefore, if he chooses that governors, trustees, or overseers, should be appointed in the charter, he may cause it to be done, *and his power of visitation will be transferred to them*, instead of descending to his heirs. The persons thus assigned or appointed by the founder will be visitors, with all the powers of the founder, in exclusion of his heir.[a] The right of visitation then accrues to them as a matter of property, by the gift, transfer, or appointment of the founder. This is a private right which they can assert in all legal modes, and in which they have the same protection of the law as in all other rights. As visitors, they may make rules, ordinances, and statutes, and alter and repeal them, as far as permitted so to do by the charter.[b] Although the charter proceeds from the crown, or the government, it is considered as the will of the donor. It is obtained at his request. He imposes it as the rule which is to prevail in the dispensation of his bounty in all future times. The king, or government, which grants the charter, is not thereby the founder, but he who furnishes the funds. The gift of the revenues is the foundation.[c] The leading

a 1 *Bl. Com.* 471. *b* 2 *T. R.* 350, 351. *c* 1 *Bl. Com.* 480.

case on this subject is Phillips v. Bury.[a] This was an ejectment brought to recover the rectory house, &c. of Exeter College, in Oxford. The question was, whether the plaintiff or defendant was legal rector. Exeter College was founded by an individual, and incorporated by a charter granted by Queen Elizabeth. The controversy turned upon the power of the visitor, and, in the discussion of the cause, the nature of College charters and corporations was very fully considered; and it was determined that the college was a *private* corporation, and that the founder had a right to appoint a visitor, and give him such power as he thought fit.[b] The learned Bishop Stillingfleet's argument in the same cause, as a member of the House of Lords, when it was there heard, exhibits very clearly the nature of colleges and similar corporations.[c] These opinions received the sanction of the House of Lords, and they seem to be settled and undoubted law. Where there is a charter, vesting proper powers of government in *trustees*, or *governors*, they are *visitors;* and there is no control in any body else; except only that the Courts of Equity or of law will interfere so far as to preserve the revenues and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds.[d]

a Reported in 1 *Lord Raymond*, 5. *Comb.* 265. *Holt*, 715. 1 *Show.* 360. 4 *Mod.* 106. *Skinn.* 447.

b Lord Holt's judgment, copied from his own manuscript, is in 2 *T. R.* 346.

c 1 *Burns' Eccles. Law*, 443.

d Green v. Rutherforth, 1 *Ves.* 472. Attorney General v. Foundling Hospital, 2 *Ves. jr.* 47. *Kyd on Corp.* 195. *Coop. Eq. Pl.* 292.

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"The foundations of colleges," says Lord Mansfield, "are to be considered in two views, viz. as they are *corporations*, and as they are *eleemosynary*. As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally or specially; he may prescribe particular modes and manners, as to the exercise of part of it. If he makes a general visitor, (as by the general words *visitator sit*) the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose and no further. The founder may make a general visitor; and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance."[a] And even if the king be founder, if he grant a charter incorporating trustees and governors, *they are visitors*, and the king cannot visit.[b] A subsequent donation, or engrafted fellowship, falls under the same general visitatorial power, if not otherwise specially provided.[c] In New-England, and perhaps throughout the United States, eleemosynary corporations have been generally established in the latter mode, that is, by incorporating *governors* or *trustees*, and vesting in them the right of visitation. Small variations may have been in some instances adopted; as in the case of Harvard College, where some power of inspection is given to the overseers, but

a St. John's College, Cambridge v. Todington, 1 *Burr.* 200.

b Attorney General v. Middleton, 2 *Ves.* 328.

c Green v. Rutherforth, *ubi supra*. St. John's College v. Todington, *ubi supra*.

not, strictly speaking, a visitatorial power, which still belongs, it is apprehended, to the fellows, or members of the corporation. In general, there are many donors. A charter is obtained, comprising them all, or some of them, and such others as they choose to include, with the right of appointing their successors. They are thus the visitors of their own charity, and appoint others, such as they may see fit, to exercise the same office in time to come. All such corporations are private. The case before the Court is clearly that of an eleemosynary corporation. It is, in the strictest legal sense, a private charity. In King v. St. Catherine's Hall,[a] that college is called *a private eleemosynary lay corporation.* It was endowed by a private founder, and incorporated by letters patent. And in the same manner was Dartmouth College founded and incorporated. Dr. Wheelock is declared by the charter to be its founder. It was established by him, on funds contributed and collected by himself. As such founder, he had a right of visitation, which he assigned to the trustees, and they received it by his consent and appointment, and held it under the charter.[b] He appointed these trustees visitors, and in that respect to take place of his heir; as he might have appointed devisees to take his estate, instead of his heir. Little, probably, did he think, at that time, that the legislature would ever take away this property and these privileges, and give them to others. Little did he suppose, that this charter secured to him and his successors no legal rights. Little did

a 4 *Term Rep.* 233. b *Bl. Com. ub. supr*

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the other donors think so. If they had, the college would have been, what the university is now, a thing upon paper, existing only in name. The numerous academies in New-England have been established substantially in the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College. It may, to-day, have more friends; but to-morrow it may have more enemies. Its legal rights are the same. So also of Yale College; and indeed of all the others. When the legislature gives to these institutions, it may, and does, accompany its grants with such conditions as it pleases. The grant of lands by the legislature of New-Hampshire to Dartmouth College, in 1789, was accompanied with various conditions. When donations are made, by the legislature, or others, to a charity already existing, without any condition, or the specification of any new use, the donation follows the nature of the charity. Hence the doctrine, that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property. The public cannot be charitable in these institutions. It is not the money of the public, but of private persons, which is dispensed. It may be public, that is general, in its uses and advantages; and the State may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds. If the doctrine laid down by Lord Holt, and the House of Lords, in Phillips v. Bury, and recognized and established in all the other cases, be cor-

rect, the property of this college was private property; it was vested in the trustees by the charter, and to be administered by them, according to the will of the founder and donors, as expressed in the charter. They were also *visitors* of the charity, in the most ample sense. *They* had, therefore, as they contend, *privileges*, *property*, and *immunities*, within the true meaning of the bill of rights. They had rights, and still have them, which they can assert against the legislature, as well as against other wrongdoers. It makes no difference, that the estate is holden for certain trusts. The legal estate is still theirs. They have a right in the property, and they have a right of visiting and superintending the trust; and this is an object of legal protection, as much as any other right. The charter declares, that the powers conferred on the trustees, are "privileges, advantages, liberties, and immunities;" and that they shall be forever holden by them and their successors. The New-Hampshire bill of rights declares, that no one shall be deprived of his "property, privileges, or immunities," but by judgment of his peers, or the law of the land. The argument on the other side is, that although these terms may mean something in the bill of rights, they mean nothing in this charter. But they are terms of legal signification, and very properly used in the charter. They are equivalent with *franchises*. Blackstone says that *franchise* and *liberty* are used as synonymous terms. And after enumerating other *liberties* and *franchises*, he says, "it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to main-

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tain perpetual succession, and do other corporate acts; *and each individual member of such corporation is also said to have a franchise or freedom.*"[a] *Liberties* is the term used in *magna charta*, as including franchises, privileges, immunities, and all the rights which belong to that class. Professor Sullivan says, the term signifies the "*privileges* that some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the king; as the chattels of felons or outlaws, and the lands *and privileges of corporations.*"[b] The privilege, then, of being a member of a corporation, under a lawful grant, and of exercising the rights and powers of such member, is such a privilege, *liberty*, or *franchise*, as has been the object of legal protection, and the subject of a legal interest, from the time of *magna charta* to the present moment. The plaintiffs have such an interest in this corporation, individually, as they could assert and maintain in a court of law, not as agents of the public, but in their own right. Each trustee has a *franchise*, and if he be disturbed in the enjoyment of it, he would have redress, on appealing to the law, as promptly as for any other injury. If the other trustees should conspire against any one of them, to prevent his equal right and voice in the appointment of a president or professor, or in the passing of any statute or ordinance of the college, he would be entitled to his action, for depriving him of his franchise. It makes no difference, that this property is to be holden and administered, and these franchises exer-

[a] 2 *Bl. Com.* 37. [b] *Sull.* 41*st Lec.*

cised, for the purpose of diffusing learning. No principle and no case establishes any such distinction. The public may be benefited by the use of this property. But this does not change the nature of the property, or the rights of the owners. The object of the charter may be public good; so it is in all other corporations; and this would as well justify the resumption or violation of the grant in any other case as in this. In the case of an advowson, the use is public, and the right cannot be turned to any private benefit or emolument. It is, nevertheless a legal private right, and the *property* of the owner, as emphatically as his freehold. The rights and privileges of trustees, visitors, or governors of incorporated colleges, stand on the same foundation. They are so considered, both by Lord Holt and Lord Hardwicke.[a] To contend that the rights of the plaintiffs may be taken away, because they derive from them no pecuniary benefit, or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts, is taking an extremely narrow view of the subject. According to this notion, the case would be different, if, in the charter, they had stipulated for a commission on the disbursement of the funds; and they have ceased to have any interest in the property, because they have undertaken to administer it gratuitously. It cannot be necessary to say much in refutation of the idea, that there cannot be a legal interest, or

a Phillips v. Bury. Green v. Rutherforth, *ubi supra*. Vide also 2 *Black*. 21.

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ownership, in any thing which does not yield a pecuniary profit; as if the law regarded no rights but the rights of money, and of visible tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him. The exercise of this right directly and very materially affects the public; much more so than the exercise of the privileges of a trustee of this college. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the Aylesbury case.[a] That was an action against a returning officer, for refusing the plaintiff's vote, in the election of a member of parliament. Three of the judges of the king's bench held, that the action could not be maintained, because, among other objections, "*it was not any matter of profit, either in presenti or in futuro.*" It would not enrich the plaintiff, *in presenti*, nor would it, *in futuro*, go to his heirs, or answer to pay his debts. But Lord Holt and the house of lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived. Individuals have a right

a Ashby v. White, 2 *Ld. Raym.* 938.

to use their own property for purposes of benevolence, either towards the public, or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, *by contracting to give perpetuity to the stipulated manner of exercising it*, to rescind this contract, and seize on the property, is not law, but violence. Whether the State will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause. That all property, of which the use may be beneficial to the public, belongs therefore to the public, is quite a new doctrine. It has no precedent, and is supported by no known principle. Dr. Wheelock might have answered his purposes, in this case, by executing a private deed of trust. He might have conveyed his property to trustees, for precisely such uses as are described in this charter. Indeed it appears that he had contemplated the establishing of his school in that manner, and had made his will, and devised the property to the same persons who were afterwards appointed trustees in the charter. Many literary and other charitable institutions are founded in that manner, and the trust is renewed, and conferred on other persons, from time to time, as occasion may require. In such a case, no lawyer would or could say, that the legislature might devest the trustees constituted by deed or will, seize upon the property, and give it to other persons, for other purposes. And does the granting of a charter, which is only done to perpetuate the trust

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in a more convenient manner, make any difference? Does or can this change the nature of the charity, and turn it into a public, political corporation? Happily we are not without authority on this point. It has been considered and adjudged. Lord Hardwicke says, in so many words, "The charter of the crown cannot make a CHARITY more or less public, but only more permanent than it would otherwise be."[a] The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity. The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private property, and to clothe it with all the security and inviolability of private property. The intent is, that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed. Who ever endowed the public? Who ever appointed a legislature to administer his charity? Or who ever heard, before, that a gift to a *College*, or *Hospital*, or an *Asylum*, was, in reality, nothing but a gift to the State? The State of Vermont is a principal donor to Dartmouth College. The lands given lie in that State. This appears in the special verdict. Is Vermont to be considered as having intended a gift to the State of New-Hampshire in this case; as it has been said is to be the reasonable construction of all donations to the College? The legislature of New-Hampshire affects to represent the *public*, and therefore claims a right to con-

[a] Attorney General v. Pearce, 2 *Atk.* 87.

trol all property destined to public use. What hinders Vermont from considering herself equally the representative of the *public*, and from resuming her grants, at her own pleasure? Her right to do so is less doubtful than the power of New-Hampshire to pass the laws in question. In University v. Foy,[a] the Supreme Court of North-Carolina pronounced unconstitutional and void, a law repealing a grant to the University of North-Carolina; although that University was originally erected and endowed by a statute of the State. That case was a grant of *lands*, and the Court decided that it could not be resumed. This is the grant of a power and capacity *to hold lands*. Where is the difference of the cases, upon principle? In Terret v. Taylor,[b] this Court decided, that a legislative grant or confirmation of lands for the purposes of moral and religious instruction could no more be rescinded than other grants. The nature of the use was not holden to make any difference. A grant to a parish or church, for the purposes which have been mentioned, cannot be distinguished, in respect to the title it confers, from a grant to a College for the promotion of piety and learning. To the same purpose may be cited, the case of Pawlett v. Clark. The State of Vermont, by statute, in 1794, granted to the respective towns in that State, certain glebe lands lying within those towns, *for the sole use and support of religious worship*. In 1799, an act was passed to *repeal the act of* 1794; but this Court declared, that the act of 1794, "so far as it

[a] 2 *Heywood's R.* [b] 9 *Cranch*, 43.

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granted the glebes to the towns, *could not afterwards be repealed by the legislature, so as to devest the rights of the towns under the grant.*[a] It will be for the other side to show, that the nature of the *use* decides the question, whether the legislature has power to resume its grants. It will be for those who maintain such a doctrine, to show the *principles and cases* upon which it rests. It will be for them also, to fix the limits and boundaries of their doctrine, and to show what are, and what are not, such uses as to give the legislature this power of resumption and revocation. And to furnish an answer to the cases cited, it will be for them further to show, that a grant for the *use and support of religious worship*, stands on other ground than a grant for *the promotion of piety and learning.*

I hope enough has been said to show, that the trustees possessed vested liberties, privileges, and immunities, under this charter; and that such liberties, privileges, and immunities, being once lawfully obtained and vested, are as inviolable as any vested rights of property whatever. Rights to do certain acts, such, for instance, as the visitation and superintendence of a college, and the appointment of its officers, may surely be *vested rights*, to all legal intents, as completely as the right to possess property. A late learned Judge of this Court has said, "when I say, that a *right* is vested in a citizen, I mean, that he has the power to do *certain actions*, or to possess *certain things*, according to the law of the land."[b]

a 9 *Cranch*, 292. b 3 *Dal.* 394.

If such be the true nature of the plaintiffs' interests under this charter, what are the articles in the New-Hampshire bill of rights which these acts infringe?

They infringe the *second article*; which says, that the citizens of the State have a right to *hold and possess property*. The plaintiffs had a legal property *in* this charter; and they had acquired property *under* it. The acts deprive them of both. They impair and take away the charter; and they appropriate the property to new uses, against their consent. The plaintiffs cannot now *hold* the property acquired by themselves, and which this article says, they have a right to hold. They infringe the *twentieth article*. By that article it is declared, that in questions of property, *there is a right to trial*. The plaintiffs are devested, without trial or judgment. They infringe the *twenty-third article*. It is therein declared, that *no retrospective laws shall be passed*. This article bears directly on the case. These acts must be deemed *retrospective*, within the settled construction of that term. What a *retrospective law* is, has been decided, on the construction of this very article, in the Circuit Court for the first circuit. The learned Judge of that circuit, says, "every statute which takes away, or impairs, vested rights, acquired under existing laws, must be deemed retrospective."[a] That all such laws are retrospective, was decided also in the case of Dash v. Van Kleek,[b] where a most learn-

a Society v. Wheeler, 2 *Gal.* 103.
b 7 *Johns. R.* 477.

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ed Judge quotes this article from the constitution of New-Hampshire, with manifest approbation, as a plain and clear expression of those fundamental and unalterable principles of justice, which must lie at the foundation of every free and just system of laws. Can any man deny, that the plaintiffs had *rights*, under the charter, which were legally *vested*, and that by these acts, those rights are *impaired?*[a] These

a " It is a principle in the English law, as ancient as the law itself," says Chief Justice Kent, in the case last cited, " that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non praeteritis.* (*Bracton, lib.* 4, *fol.* 228. 2 *Inst.* 292.) The maxim in *Bracton* was probably taken from the civil law, for we find in that system the same principle, that the law-giver cannot alter his mind to the prejudice of a vested right. *Nemo potest mutare consilium suum in alterius injuriam.* (*Dig.* 50. 17. 75.) This maxim of Papinian is general in its terms ; but Dr. Taylor (*Elements of the Civil Law*, 168.) applies it directly as a restriction upon the law-giver ; and a declaration in the *code* leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim, et de praeterito tempore, et adhuc pendentibus negotiis cautum sit.* (*Cod.* 1. 14. 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future as contradistinguished from past contracts and vested rights. (*Perezii Praelec. t.*) It is, indeed, admitted, that the prince may enact a retrospective law, provided it be done *expressly;* for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes ; for the separation of the judicial, from the legislative power, was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was

acts infringe also, the *thirty-seventh article* of the constitution of New-Hampshire; which says, that the powers of government shall be kept separate. By these acts, the legislature assumes to exercise a *judicial power*. It declares a *forfeiture*, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property, and private privileges. It shall not judge, by *act*. It shall not decide, by *act*. It shall not deprive, by *act*. But it shall leave all these things to be tried and adjudged by the law of the land. The *fifteenth article* has been referred

called the *interlocutio principis*; and this, according to Huber's definition, was, *quando principes inter partes loquuntur, et jus dicunt*. (*Praelec. Juris. Rom. Vol.* 2. 545.) No correct civilian, and especially no proud admirer of the ancient republic, (if any such then existed,) could have reflected on this interference with private rights, and pending suits, without disgust and indignation; and we are rather surprised to find, that under the violent and irregular genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows, that it must be founded in the clearest justice. Our case is happily very different from that of the subjects of Justinian. With us, the power of the law-giver is limited and defined; the judicial is regarded as a distinct independent power; private rights have been better understood, and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering, is now to be regarded as sacred."

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to before. It declares, that no one shall be "deprived of his property, immunities, or privileges, but by the judgment of his peers, or the law of the land." Notwithstanding the light in which the learned Judges in New-Hampshire viewed the rights of the plaintiffs under the charter, and which has been before adverted to, it is found to be admitted, in their opinion, that those rights are *privileges* within the meaning of this *fifteenth article* of the bill of rights. Having quoted that article, they say: "that the right to manage the affairs of this college is a privilege, within the meaning of this clause of the bill of rights, is not to be doubted." In my humble opinion, this surrenders the point. To resist the effect of this admission, however, the learned judges add, "But how a privilege can be protected from the operation of the law of the land, by a clause in the constitution, declaring that it shall not be taken away but by the law of the land, is not very easily understood." This answer goes on the ground, that the acts in question *are laws of the land*, within the meaning of the constitution. If they be so, the argument drawn from this article is fully answered. If they be not so, it being admitted that the plaintiffs' rights are "*privileges*," within the meaning of the article, the argument is not answered, and the article is infringed by the acts. Are then these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone: "And first, it (i. e. law) is a *rule:* not a transient sudden order from a superior, to, or concerning, a par-

ticular person; but something permanent, uniform, and universal. Therefore, a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law."[a] Lord Coke is equally decisive and emphatic. Citing and commenting on the celebrated 29th chap. of *Magna Charta*, he says, "no man shall be disseized, &c. unless it be by the lawful judgment, that is, verdict of equals, or by the *law of the land*, that is, (to speak it once for all,) *by the due course and process of law.*"[b] Have the plaintiffs lost their franchises by "due course and process of law?" On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?" By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's

a 1 *Bl. Com.* 44. *b* *Co. Ins.* 46.

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estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country. "Is that the law of the land," said Mr. Burke, "upon which, if a man go to Westminster-Hall, and ask counsel by what title or tenure he holds his privilege or estate *according to the law of the land*, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know *what the law of the land is?* Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?" That the power of electing and appointing the officers of this college is not only a right of the trustees as a corporation generally, and in the aggregate, but *that each individual trustee has also his own individual franchise in such right of election and appointment*, is according to the language of all the authorities. Lord Holt says, "it is agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the

particular members, and to be enjoyed by them in their private capacity. Where the privilege of election is used by particular persons, *it is a particular right, vested in every particular man.*"[a]

It is also to be considered, that the president and professors of this college have rights to be affected by these acts. Their interest is similar to that of *fellows* in the English colleges; because they derive their living wholly, or in part, from the founder's bounty. The president is one of the trustees, or corporators. The professors are not necessarily members of the corporation; but they are appointed by the trustees, are removable only by them, and have fixed salaries, payable out of the general funds of the college. Both president and professors have *freeholds* in their offices; subject only to be removed, by the trustees, as their legal visitors, for good cause. All the authorities speak of fellowships in colleges as *freeholds*, notwithstanding the fellows may be liable to be suspended or removed, for misbehaviour, by their constituted visitors. Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate, but the only support of literary men, who have devoted their lives to the instruction of youth. The president and professors were appointed by the twelve trustees. They were accountable to nobody else, and could be removed by nobody else. They accepted their offices on this tenure. Yet the legislature has appointed

[a] 2 *Lord Raym.* 952.

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other persons, with power to remove these officers, and to deprive them of their livings; and those other persons have exercised that power. No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men; of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature, and the instruction of youth, in the quiet retreats of academic life. Whether, to dispossess and oust them; to deprive them of their office, and turn them out of their livings; to do this, not by the power of their legal visitors, or governors, but by acts of the legislature; and to do it without forfeiture, and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question, of which there would seem to be but one side fit for a lawyer or a scholar to espouse. Of all the attempts of James II. to overturn the law, and the rights of his subjects, none was esteemed more arbitrary or tyranical, than his attack on *Magdalen College*, Oxford: And, yet, that attempt was nothing but to put out one president and put in another. The president of that college, according to the charter and statutes, is to be chosen by the fellows, who are the corporators. There being a vacancy, the king chose to take the appointment out of the hands of the fellows, the legal electors of a president, into his own hands. He therefore sent down his mandate *commanding* the fellows to admit, for president, a person of his nomination; and in as much as this was directly against

the charter and constitution of the college, he was pleased to add a *non obstante* clause of sufficiently comprehensive import. The fellows were commanded to admit the person mentioned in the mandate, "*any statute, custom or constitution to the contrary notwithstanding, wherewith we are graciously pleased to dispense, in this behalf.*" The fellows refused obedience to this mandate, and Dr. Hough, a man of independence and character, was chosen president by the fellows, according to the charter and statutes. The king then assumed the power, in virtue of his prerogative, to send down certain *commissioners* to turn him out; which was done accordingly; and Parker, a creature suited to the times put in his place. And because the president, who was rightfully and legally elected, *would not deliver the keys, the doors were broken open.* "The nation, as well as the university," says Bishop Burnet,[a] "looked on all these proceedings with just indignation. It was thought *an open piece of robbery and burglary, when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold.*" Mr. Hume, although a man of different temper, and of other sentiments, in some respects, than Dr. Burnet, speaks of this arbitrary attempt of prerogative, in terms not less decisive. "The president, and all the fellows," says he, "*except two, who complied,* were expelled the college; and Parker was put in possession of the office. This act of violence, of all those which were committed during

a Hist. of his own times, *vol.* 3. *p.* 119.

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the reign of James, is perhaps the most illegal and arbitrary. When the dispensing power was the most strenuously insisted on by court lawyers, it had still been allowed, that the statutes which regard *private property* could not legally be infringed by that prerogative. Yet, in this instance, it appeared that even these were not now secure from invasion. The privileges of a college are attacked; men are illegally dispossessed of their property for adhering to their duty, to their oaths, and to their religion." This measure king James lived to repent, after repentance was too late. When the charter of London was restored, and other measures of violence retracted, to avert the impending revolution, the expelled president and fellows of Magdalen college were permitted to resume their rights. It is evident that this was regarded as an arbitrary interference with *private property*. Yet private property was no otherwise attacked, than as a person was appointed to administer and enjoy the revenues of a college, in a manner and by persons *not authorized by the constitution of the college*. A majority of the members of the corporation would not comply with the king's wishes. A minority would. The object was, therefore, to make this minority, a majority. To this end, the king's commissioners were directed to interfere in the case, and they united with the *two complying fellows*, and expelled the rest; and thus effected a change in the government of the college. The language in which Mr. Hume, and all other writers, speak of this abortive attempt of oppression, shows that colleges were esteemed to be, as

they truly are, private corporations, and the property and privileges which belong to them, *private* property, and *private* privileges. Court lawyers were found to justify the king in dispensing with the laws; that is, in assuming and exercising a Legislative authority. But no lawyer, not even a court lawyer, in the reign of king James the second, as far as appears, was found to say, that even by this high authority, he could infringe the franchises of the fellows of a college, and take away their livings. Mr. Hume gives the reason; it is, that such franchises were regarded, in a most emphatic sense, *as private property.*[a] If it could be made to appear, that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature, and that the property holden belonged to the State, then indeed the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of *privileges* and *immunities*; and these are holden by the trustees expressly *against* the State forever. It is admitted, that the State, by its Courts of law, can enforce the will of the donor, and compel a faithful execution of the trust. The plaintiffs claim no exemption from legal responsibility. They hold themselves at all times answerable to the law of the land, for their conduct in the trust committed to them. They ask only to hold the property of which they are owners, and the franchises which belong to them, until they shall be found by due course and process of law to have forfeited them. It can make no difference,

a Vide a full account of this case in State Trials, 4 *Ed. vol.* 4. *p.* 262.

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whether the legislature exercise the power it has assumed, by removing the trustees and the president and professors, directly, and by name, or by appointing others to expel them. The principle is the same, and, in point of fact, the result has been the same. If the entire franchise cannot be taken away, neither can it be essentially impaired. If the trustees are legal owners of the property, they are *sole* owners. If they are visitors, they are *sole* visitors. No one will be found to say, that if the legislature may do what it has done, it may not do any thing and every thing which it may choose to do, relative to the property of the corporation, and the privileges of its members and officers.

If the view which has been taken of this question be at all correct, this was an eleemosynary corporation; a private charity. The property was private property. The trustees were visitors, and their right to hold the charter, administer the funds, and visit and govern the college, was a *franchise* and *privilege*, solemnly granted to them. The use being public, in no way diminishes their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property. They take away privileges, immunities, and franchises. They deny to the trustees the protection of the law; and they are retrospective in their operation. In all which respects, they are against the constitution of New-Hampshire.

2. The plaintiffs contend, in the second place, that the acts in question are repugnant to the 10th section

of the 1st article of the constitution of the United States. The material words of that section are: "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

The object of these most important provisions in the national constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument. "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favour of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the

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community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding."[a] It has already been decided in this Court, that a *grant* is a contract, within the meaning of this provision; and that a grant by a State is also a contract as much as the grant of an individual.[b]

a *Letters of Publius, or The Federalist*, (No. 44., by Mr. MADISON.)

b In Fletcher v. Peck, 6 *Cranch* 87. this Court says, "a contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. If under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the State sovereignties, it is not

It has also been decided, that a grant by a State before the revolution, is as much to be protected as a grant since.[a] But the case of Terret v. Taylor, before cited, is of all others most pertinent to the present argument. Indeed, the judgment of the Court in that case seems to leave little to be argued or decided in this.[b] This Court, then, does not admit the doc-

to be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States, are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights, for the people of each State."

a New-Jersey v. Wilson, 7 *Cranch*, 164.

b "A private corporation," says the Court, "created by the legislature, may lose 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 This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government, may be abolished. In respect, also, to *public* corporations which exist only for public purposes, such as counties, towns, cities, &c. the legislature may, under proper limitations, have a right to change modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous

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trine, that a legislature can repeal statutes creating private corporations. If it cannot repeal them altogether, of course it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators. If, therefore, it has been shown that this college is to be regarded as a private charity, this case is embraced within the very terms of that decision. A grant of corporate powers and privileges is as much a *contract* as a grant of land. What proves all charters of this sort to be *contracts*, is, that they must be accepted, to give them force and effect. If they are not accepted they are void. And in the case of an existing corporation, if a new charter is given it, it may even accept part, and reject the rest. In Rex v. Vice Chancellor of Cambridge,[a] Lord Mansfield says, "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, and acting either under a former charter, or under prescriptive usage. The *latter*, a corporation already existing, are *not* obliged to accept the new charter *in toto*, and to receive either all or none of it; they may act *partly* under it, and

laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

[a] 3 *Burr.* 1656.

partly under their old charter or prescription. The validity of these new charters must turn upon the *acceptance* of them." In the same case, Mr. Justice Wilmot says, "It is the *concurrence* and *acceptance* of the university that gives the *force* to the charter of the crown." In the King v. Passmore,[a] Lord Kenyon observes, "some things are clear: when a corporation exists, capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it."[b] In all cases relative to charters, the *acceptance* of them is uniformly alleged in the pleadings. This shows the general understanding of the law, that they are grants, or contracts; and that *parties* are necessary to give them force and validity. In King v. Dr. Askew,[c] it is said, "The crown *cannot oblige* a man to be a corporator without his consent; he shall not be subject to the inconveniences of it, without *accepting* it and *assenting* to it." These terms, "*acceptance*," and "*assent*," are the very language of contract. In Ellis v. Marshall,[d] it was expressly adjudged, that the naming of the defendant, among others, in an act of incorporation did not, of itself, make him a corporator; and that his *assent* was necessary to that end. The Court speak of the act of incorporation as a *grant*, and observe, "that a man may refuse a *grant*, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." But Mr. Justice Buller, in King

a 3 *T. R.* 240.
b *Vide also*, 1 *Kyd. on Cor.* 65.
c 4 *Burr.* 2200.
d 2 *Mass. R.* 279.

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v. Passmore, furnishes, if possible, a still more direct and explicit authority. Speaking of a corporation for government, he says, "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be *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." This language applies, with peculiar propriety and force, to the case before the Court. It was in consequence of the "privileges bestowed," that Dr. Wheelock and his associates, undertook to exert themselves for the instruction and education of youth in this college; and it was on the same consideration that the founder endowed it with his property. And because charters of incorporation are of the nature of contracts, they cannot be altered or varied, but by consent of the original *parties*. If a charter be granted by the king, it may be altered by a new charter granted by the king, and accepted by the corporators But if the first charter be granted by parliament, the consent of parliament must be obtained to any alteration. In King v. Miller,[a] Lord Kenyon says, "Where a corporation takes its rise from the king's charter, the king by granting, and the corporation by accepting, another charter, may alter it, because it is done with the consent of all the parties who are competent to consent to the alteration."[b] There are, in this

a 6 *T. R.* 277.

b Vide also, 2 *Bro. Ch. R.* 662. *Ex parte* Bolton School.

case, all the essential constituent parts of a contract. There is something to be contracted about; there are parties, and there are plain terms in which the agreement of the parties, on the subject of the contract, is expressed. There are mutual considerations and inducements. The charter recites, that the founder, on his part, has agreed to establish his seminary in New-Hampshire, and to enlarge it, beyond its original design, among other things, for the benefit of that province; and thereupon a charter is given to him and his associates, designated by himself, promising and assuring to them, under the plighted faith of the State, the right of governing the college, and administering its concerns, in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendance, visitation, and government. Is not this a contract? If lands or money had been granted to him and his associates, for the same purposes, such grant could not be rescinded. And is there any difference, in legal contemplation, between a grant of corporate franchises, and a grant of tangible property? No such difference is recognized in any decided case, nor does it exist in the common apprehension of mankind.

It is therefore contended, that this case falls within the true meaning of this provision of the constitution, as expounded in the decisions of this Court; that the charter of 1769, is a contract, a stipulation, or agreement; mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. That the acts in question *impair* this con-

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tract, has already been sufficiently shown. They repeal and abrogate its most essential parts.

Much has heretofore been said on the *necessity* of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined, which might otherwise be without remedy. Abuses, it is contended, might arise in the management of such institutions, which the ordinary courts of law would be unable to correct. But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause which, upon its merits, is indefensible. It would be sufficient to say, in answer, that it is not pretended, that there was here any such case of necessity. But a still more satisfactory answer is, that the apprehension of danger is groundless, and, therefore, the whole argument fails. Experience has not taught us that there is danger of great evils or of great inconvenience from this source. Hitherto, neither in our own country nor elsewhere, have such cases of necessity occurred. The judicial establishments of the State are presumed to be competent to prevent abuses and violations of trust, in cases of this kind, as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom. Under the government and protection of the general laws of the land, those institutions have always been found safe, as well as useful. They go on with the progress of society, accomodating themselves easily, without sudden change or

violence, to the alterations which take place in its condition; and in the knowledge, the habits, and pursuits of men. The English colleges were founded in Catholic ages. Their religion was reformed with the general reformation of the nation; and they are suited perfectly well to the purpose of educating the protestant youth of modern times. Dartmouth College was established under a charter granted by the provincial government; but a better constitution for a college, or one more adapted to the condition of things under the present government, in all material respects, could not now be framed. Nothing in it was found to need alteration at the revolution. The wise men of that day saw in it one of the best hopes of future times, and commended it, as it was, with parental care, to the protection and guardianship of the government of the State. A charter of more liberal sentiments, of wiser provisions, drawn with more care, or in a better spirit, could not be expected at any time, or from any source. The college needed no change in its organization or government. That which it did need was the kindness, the patronage, the bounty of the legislature; not a mock elevation to the character of a university, without the solid benefit of a shilling's donation to sustain the character; not the swelling and empty authority of establishing *institutes* and *other colleges*. This unsubstantial pageantry would seem to have been in derision of the scanty endowment and limited means of an unobtrusive, but useful and growing seminary. Least of all was there a necessity, or pretence of necessity, to infringe its legal rights, violate its fran-

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chises and privileges, and pour upon it these overwhelming streams of litigation. But this argument, from *necessity*, would equally apply in all other cases. If it be well founded, it would prove, that whenever any inconvenience or evil should be experienced from the restrictions imposed on the legislature by the constitution, these restrictions ought to be disregarded. It is enough to say, that the people have thought otherwise. They have, most wisely, chosen to take the risk of occasional inconvenience from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restraints; and they have not rendered these altogether vain and nugatory by conferring the power of dispensation. If inconvenience should arise, which the legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No legislature in this country is able, and may the time never come when it shall be able, to apply to itself the memorable expression of a Roman pontiff; "*Licet hoc* DE JURE *non possumus, volumus tamen* DE PLENITUDINE POTESTATIS."

The case before the Court is not of ordinary importance, nor of every day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the invio-

lability of their charters. It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate.

When the Court in North-Carolina declared the law of the State, which repealed a grant to its university, unconstitutional and void, the legislature had the candour and the wisdom to repeal the law. This example, so honourable to the State which exhibited it, is most fit to be followed on this occasion. And there is good reason to hope, that a State which has hitherto been so much distinguished for temperate councils, cautious legislation, and regard to law, will not fail to adopt a course which will accord with her highest and best interest, and, in no small degree, elevate her reputation. It was for many obvious reasons most anxiously desired, that the question of the power of the legislature over this charter should have been finally decided in the State Court. An earnest hope was entertained

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that the judges of that Court might have viewed the case in a light favourable to the rights of the trustees. That hope has failed. It is here that those rights are now to be maintained, or they are prostrated forever. *Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium appellem? quem obtestor? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quae spe exigua extremaque pendet, temerimus; nihil est præterea quo confugere possimus.*

Mr. *Holmes*, for the defendant in error, argued, that the prohibition in the constitution of the United States, which alone gives the Court jurisdiction in this case, did not extend to grants of political power; to contracts concerning the internal government and police of a sovereign State. Nor does it extend to contracts which relate merely to matters of civil institution, even of a private nature. Thus marriage is a contract, and a private contract; but relating merely to a matter of civil institution, which every society has an inherent right to regulate as its own wisdom may dictate, it cannot be considered as within the spirit of this prohibitory clause. Divorces unquestionably impair the obligation of the nuptial contract; they change the relations of the marriage state, without the consent of both the parties, and thus come clearly within the letter of the prohibition. But surely, no one will contend, that there is locked up in this mystical clause of the constitution a prohibition to the States to grant divorces, a power

peculiarly appropriate to domestic legislation, and which has been exercised in every age and nation where civilization has produced that corruption of manners, which, unfortunately, requires this remedy. Still less can a contract concerning a public office to be exercised, or duty to be performed, be included within this prohibition. The Convention who framed the constitution, did not intend to interfere in the exercise of the political powers reserved to the State governments. That was left to be regulated by their own local laws and constitutions; with this exception only, that the Union should guarantee to each State a republican form of government, and defend it against domestic insurrection and rebellion. Beyond this, the authorities of the Union have no right to interfere in the exercise of the powers reserved to the State. They are sovereign and independent in their own sphere. If, for example, the legislature of a particular State should attempt to deprive the judges of its Courts (who, by the State constitution, held their places during good behaviour) of their offices without a trial by impeachment; or should arbitrarily and capriciously increase the number of the judges so as to give the preponderancy in judicature to the prevailing political faction, would it be pretended that the minority could resist such a law, upon the ground of its impairing the obligation of a contract? Must not the remedy, if any where existing, be found in the interposition of some State authority to enforce the provisions of the State constitution? The education of youth, and the encouragement of the arts and sciences, is one of the most

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important objects of civil government.[a] By our constitutions, it is left exclusively to the States, with the exception of copy rights and patents. It was in the exercise of this duty of government, that this charter was originally granted to Dartmouth College. Even when first granted under the colonial government, it was subject to the notorious authority of the British parliament over all charters containing grants of political power. It might have been revoked or modified by act of parliament.[b] The revolution, which separated the colony from the parent country, dissolved all connexion between this corporation and the crown of Great Britain. But it did not destroy that supreme authority which every political society has over its public institutions. That still remained, and was transferred to the people of New-Hampshire. They have not relinquished it to the government of the United States, or to any department of that government. Neither does the constitution of New-Hampshire confirm the charter of Dartmouth College, so as to give it the immutability of the fundamental law. On the contrary, the constitution of the State admonishes the legislature of the duty of encouraging science and literature, and thus seems to suppose its power of control over the scientific and literary institutions of the State. The legislature had, therefore, a right to modify this trust, the original object of which, was the education of the Indian and English youth of the province. It is not necessary to contend, that it had the right of wholly di-

a Vattel, L. 1. *c.* 11. *s.* 112, 113. *b* 1 *Bl. Com.* 485.

verting the fund from the original object of its pious and benevolent founders. Still it must be insisted, that a regal grant, with a regal and colonial policy, necessarily became subject to the modification of a republican legislature, whose right, and whose duty it was, to adapt the education of the youth of the country to the change in its political institutions. It is a corollary from the right of self-government. The ordinary remedies which are furnished in the Court for a misuser of the corporate franchises, are not adapted to the great exigencies of a revolution in government. They pre-suppose a permanently established order of things, and are intended only to correct occasional deviations, and minor mischiefs. But neither a reformation in religion, nor a revolution in government, can be accomplished or confirmed by a writ of *quo warranto* or *mandamus*. We do not say, that the corporation has forfeited its charter for *misuser;* but that it has become *unfit for use* by a change of circumstances. Nor does the lapse of time from 1776 to 1816, infer an acquiescence on the part of the legislature, or a renunciation of its right to abolish or reform an institution, which being of a public nature, cannot hold its privileges by prescription. Our argument is, that it is, at all times, liable to be new modelled by the legislative wisdom, instructed by the lights of the age.

The conclusion then is, that this charter is not such a contract as is contemplated by the constitution of the United States; that it is not a contract of a private nature, concerning property or other private interests: but that it is a grant of a public na-

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ture, for public purposes, relative to the internal government and police of a State, and, therefore, liable to be revoked or modified by the supreme power of that State.

Supposing, however, this to be a contract such as was meant to be included in the constitutional prohibition, is its obligation impaired by these acts of the legislature of New-Hampshire?

The title of the acts of the 27th of June, and the 18th of December, 1816, shows that the legislative will and intention was to *amend* the charter, and *enlarge* and *improve* the corporation. If by a technical fiction the grant of the charter can be considered as a contract between the king (or the State) and the corporators, the obligation of that contract is not *impaired*; but is rather *enforced*, by these acts, which continue the same corporation, for the same objects, under a new name. It is well settled, that a mere change of the name of a corporation will not affect its identity. An addition to the number of the colleges, the creation of new fellowships, or an increase of the number of the trustees, do not impair the franchises of the corporate body. Nor is the franchise of any individual corporator impaired. In the words of Mr. Justice Ashurst, in the case of the King v. Passmore,[a] "the members of the old body have no injury or injustice to complain of, for they are all included in the new charter of incorporation; and if any of them do not become members of the new incorporation, but refuse to accept, it is their

[a] 3 *T. R.* 244.

own fault." What rights which are secured by this alleged contract are invaded by the acts of the legislature? Is it the right of *property*, or of *privileges?* It is not the former, because the corporate body is not deprived of the least portion of its property. If it be the personal privileges of the corporators that are attacked, these must be either a common and universal privilege, such as the right of suffrage, for interrupting the exercise of which an action would lie; *or* they must be monopolies and exclusive privileges, which are always subject to be regulated and modified by the supreme power of the State. Where a private proprietary interest is coupled with the exercise of political power or a public trust, the charters of corporations have frequently been amended by legislative authority.[a] In charters creating artificial persons for purposes exclusively private, and not interfering with the common rights of the citizens, it may be admitted that the legislature cannot interfere to amend without the consent of the grantees. The grant of such a charter might perhaps be considered as analogous to a contract between the State and private individuals, affecting their private rights, and might thus be regarded as within the spirit of the constitutional prohibition. But this charter is merely a mode of exercising one of the great powers of civil government. Its amendment, or even repeal, can no more be considered as the breach of a contract, than the amendment or repeal of any other law. Such repeal or amendment is an ordinary act of public

a. Gray v. The Portland Bank, 3 *Mass. R.* 364. The Commonwealth v. Bird, 12 *Mass. R.* 443.

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legislation, and not an act impairing the obligation of a contract between the government and private citizens, under which personal immunities or proprietary interests are vested in them.

The *Attorney-General*, on the same side, stated, that the only question properly before the Court was, whether the several acts of the legislature of New-Hampshire, mentioned in the special verdict, are repugnant to that clause of the constitution of the United States, which provides, that no State shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

Beside its intrinsic difficulty, the extreme delicacy of this question is evinced by the sentiments expressed by the Court, whenever it has been called to act on such a question.[a] In the case of Fletcher v. Peck, the Court says, "The 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. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts are to be considered as void. The opposition between the constitution and the law should be such

a Calder *et ux.* v. Bull *et ux.* 3 *Dall.* 392, 394, 395. Fletcher v. Peck, 6 *Cranch*, 87. New-Jersey v. Wilson, 7 *Cranch*, 164. Terret v. Taylor, 9 *Cranch*, 43.

that the judge feels a clear and strong conviction of their incompatibility with each other."[a] In Calder *et ux.* v. Bull *et ux.*[b] Mr. Justice Chace expressed himself with his usual emphatic energy, and said, "I will not decide any law to be void, *but in a very clear case.*" Is it, then, *a very clear case* that these acts of New-Hampshire are repugnant to the constitution of the United States?

1. Are they bills of attainder? The elementary writers inform us, that an *attainder* is "the stain or corruption of the blood of a criminal capitally condemned."[c] True it is, that the Chief Justice says, in Fletcher v. Peck,[d] that a bill of attainder may affect the life of an individual, or may confiscate his estate, or both. But the cause did not turn upon this point, and the Chief Justice was not called upon to weigh with critical accuracy his expressions in this part of the case. In England, most certainly, the first idea presented is that of corruption of blood, and consequent forfeiture of the entire property of the criminal, as the regular and inevitable consequences of a capital conviction at common law. Statutes sometimes pardon the attainder, and merely forfeit the estate. But this forfeiture is always complete and entire. In the present case, however, it cannot be pretended that any part of the estate of the trustees is forfeited, and, if a part, certainly not the whole.

2. Are these acts "laws impairing the obligation

a 6 *Cranch*, 128.
b 3 *Dall.* 395.
c 4 *Bl. Com.* 380.
d 6 *Cranch*, 138.

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of contracts?" The mischiefs actually existing at the time the constitution was established, and which were intended to be remedied by this prohibitory clause, will show the nature of the contracts contemplated by its authors. It was the inviolability of private contracts, and private rights acquired under them, which was intended to be protected;[a] and not contracts which are in their nature matters of civil police, nor grants by a State of power, and even property, to individuals, in trust to be administered for purposes merely public. "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," says Mr. Justice Chace, "were inserted to secure *private rights.*"[b] The cases determined in this Court, illustrate the same construction of this clause of the constitution. Fletcher v. Peck was a case where a State legislature attempted to revoke its grant, so as to devest a beneficial estate in lands; a vested estate; an actual conveyance to individuals as their private property.[c] In the case of New-Jersey v. Wilson, there was an express contract contained in a public treaty of cession with the Indians, by which the privilege of perpetual exemption from taxation was indelibly impressed upon the lands, and could not be taken away without a violation of the public faith

a *The Federalist*, No. 44. 1 *Tucker's Bl. Com.* part 1. Appendix, 312.

b Calder *et ux.* v. Bull *et ux.* 3 *Dall.* 390.

c 6 *Cranch*, 87.

solemnly pledged.[a] Terret v. Taylor was also a case of an attempt to devest an interest in lands actually vested under an act amounting to a contract.[b] In all those instances, the property was held by the grantees, and those to whom they had conveyed, beneficially, and under the sanction of *contracts*, in the ordinary and popular signification of that term. But this is an attempt to extend its obvious and natural meaning, and to apply it by a species of legal fiction to a class of cases which have always been supposed to be within the control of the sovereign power. Charters to public corporations for purposes of public policy are necessarily subject to the legislative discretion, which may revoke or modify them as the continually fluctuating exigencies of the society may require. Incorporations for the purposes of education and other literary objects, in one age, or under one form of government, may become unfit for their office in another age, or under another government.

This charter is said to be a contract between Doctor Wheelock and the king; a contract founded on a donation of private property by Doctor Wheelock. It is hence inferred, that it is a private eleemosynary corporation; and the right of visitation is said to be in the founder and his heirs; and that the State can have no right to interfere, because it is neither the founder of this charity, nor contributor to it.

But if the basis of this argument is removed, what becomes of the superstructure? The fact that Doctor Wheelock was a contributor, is not found by the

a 7 *Cranch*, 164. *b* 9 *Cranch*, 43.

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special verdict; and not having been such in truth, it cannot be added under the agreement to amend the special verdict. The jury find the charter, and that does not recite that the college was a private foundation by Doctor Wheelock. On the contrary, the real state of the case is, that he was the projector; that he had a school on his own plantation, for the education of Indians; and through the assistance of others had been employed for several years in cloathing, maintaining, and educating them. He solicited contributions, and appointed others to solicit. At the foundation of the college, the institution was removed from his estate. The honours paid to him by the charter were the reward of past services, and of the boldness, as well as piety, of the project. The State has been a contributor of funds, and this fact is found. It is, therefore, not a private charity, but a public institution; subject to be modified, altered, and regulated, by the supreme power of the State.

This charter is not a contract within the true intent of the constitution. The acts of New-Hampshire, varying in some degree the forms of the charter, do not impair the obligation of a contract.

In a case which is really a case of contract, there is no difficulty in ascertaining who are the contracting parties. But here they cannot be fixed. Doctor Wheelock can only be said to be a party, on the ground of his contributing funds, and thus being the founder and visitor. That ground being removed, he ceases to be a party to the contract. Are the other contributors alluded to in the charter, and enume-

rated by Belknap in his history of New-Hampshire, are they contracting parties? They are not, before the Court; and even if they were, with whom did they contract? With the King of Great Britain? He, too, is not before the Court; and has declared, by his Chancellor, in the case of the Attorney General v. The City of London,[a] that he has no longer any connexion with these corporations in America. Has the State of New-Hampshire taken his place? Neither is that State before the Court, nor can it be as a party, originally defendant. But suppose this to be a contract between the trustees, and the people of New-Hampshire. A contract is always for the benefit and advantage of some person. This contract cannot be for the benefit of the trustees. It is for the use of the people. The *cestui que use* is always the contracting party; the trustee has nothing to do with stipulating the terms. The people then grant powers for their own use. It is a contract with themselves!

But if the trustees are parties on one side, what do they give, and what do they receive? They give their time and labour. Every society has a right to the services of its members in places of public trust and duty. A town appoints, under the authority of the State, an overseer of the poor, or of the highways. He gives, reluctantly, his labour and services; he receives nothing in return but the privilege of giving his labour and services. Such appointments to offices of public trust have never been considered

a The Attorney General v. The City of London, 3 *Bro. Ch. Cas.* 171. 1 *Ves. jun.* 243.

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as contracts which the sovereign authority was not competent to rescind or modify. There can be no contract in which the party does not receive some personal, private, individual benefit. To make this charter a contract, and a private contract, there must be a private beneficial interest vested in the party who pays the consideration. What is the private beneficial interest vested in the party in the present case? The right of appointing the president and professors of the college, and of establishing ordinances for its government, &c. But to make these rights an interest which will constitute the end and object of a contract, the exercise of these rights must be for the private individual advantage of the trustees. Here, however, so far from that being the fact, it is solely for the advantage of the public; for the interests of piety and learning. It was upon these principles that Lord Kenyon determined, in the case of Weller v. Foundling Hospital,[a] that the governor and members of the corporation were competent witnesses, because they were trustees of a public charity, and had no private personal interest. It is not meant to deny that mere right—a franchise—an incorporeal hereditament, may be the subject of a contract; but it must always be a direct, individual, beneficial interest to the party who takes that right. The rights of municipal corporators are of this nature. The right of suffrage there belongs beneficially to the individual elector, and is to be exercised for his own exclusive advantage. It is in relation to these town

[a] *Peake's N. P. Cas.* 154.

corporations that Lord Kenyon speaks, when he says, that the king cannot force a new charter upon them.[a] This principle is established for the benefit of all the corporators. It is accompanied by another principle, without which it would never have been adopted: the power of proposing amendments at the desire of those for whose benefit the charter was granted. These two principles work together for the good of the whole. By the one, these municipal corporations are saved from the tyranny of the crown; and by the other, they are preserved from the infinite perpetuity of inveterate errors. But in the present case there is no similar qualification of the immutability of the charter, which is contended for in the argument on the other side. But in truth, neither the original principle, nor its qualification, apply to this case; for there is here no such beneficial interest and individual property as are enjoyed by town corporators.

3. But even admitting it to be a case of contract, its obligation is not impaired by these legislative acts. What vested right has been devested? None! The former trustees are continued. It is true, that new trustees are added, but this affords no reasonable ground of complaint. The privileges of the House of Lords in England are not impaired by the introduction of new members. The old corporation is not abolished, for the foundation as now regulated is substantially the same. It is identical in all its essential constituent parts, and all its former rights are

[a] Rex v. Passmore, 3 *T. R.* 244.

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preserved and confirmed.[a] The change of name does not change its original rights and franchises.[b] By the revolution which separated this country from the British empire, all the powers of the British government devolved on the States. The legislature of New-Hampshire then became cloathed with all the powers, both of the king and parliament, over these public institutions. On whom, then, did the title to the property of this college fall? If before the revolution it was *beneficially* vested in any private individuals, or corporate body, I do not contend that the revolution devested it, and gave it to the State. But it was not before vested *beneficially* in the trustees. The *use* unquestionably belonged to the people of New-Hampshire, who were the *cestuy que trusts*. The *legal* estate was indeed vested in the trustees before the revolution by virtue of the royal charter of 1769. But that charter was destroyed by the revolution,[c] and the legal estate, of course, fell upon those who held the *equitable* estate—upon the people. If those who were trustees, carried on the duties of the trust after the revolution, it must have been subject to the power of the people. If it be said, that the State gave its implied assent to the terms of the old charter, then it must be subject to all the terms on which it was granted; and among these, to the oath of allegiance to the king. But if to avoid

a See the Mayor of Colchester v. Seaber, 3 *Burr.* 1866.

b 1 *Sand.* 344. n. 1. Luttrel's Case, 4 *Co. Rep.* 87.

c Attorney General v. City of London, 3 *Bro. Ch. Cas.* 171. S. C. 1 *Ves. jun.* 143.

this concession, it be said, that the charter must have been so far modified as to adapt it to the character of the new government, and to the change in our civil institutions; that is precisely what we contend for. These civil institutions must be modified, and adapted to the mutations of society and manners. They belong to the people, are established for their benefit, and ought to be subject to their authority.

Mr. *Hopkinson*, in reply, insisted, that the whole argument on the other side proceeded on an assumption which was not warranted, and could not be maintained. The corporation created by this charter is called a *public* corporation. Its members are said to be *public officers*, and agents of government. They were officers of the king, it is said, before the revolution, and they are officers of the State since. But upon what authority is all this taken? What is the acknowledged principle which decides thus of this corporation? Where are the cases in which such a doctrine has ever prevailed? No case, no book of authority, has been, or can be, cited to this purpose. Every writer on the law of corporations, all the cases in law and equity, instruct us that colleges are regarded in law as private eleemosynary corporations, especially colleges founded, as this was, by a private founder. If this settled principle be not overthrown, there is no foundation for the defendant's argument. We contend that this charter is a contract between the government and the members of the corporation created by it. It is a contract, because it is a grant of valuable rights and privileges; and every grant im-

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plies a contract not to resume the thing granted. Public offices are not created by contract or by charter. They are provided for by general laws. Judges and magistrates do not hold their offices under charters. These offices are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power. There is nothing like this in the origin of the powers of the plaintiffs. Nor is there in their duties, any more than in their origin, any thing which likens them to public political agents. Their duties are such as they themselves have chosen to assume, in relation to a fund created by private benefaction, for charitable uses. These duties relate to the instruction of youth: but instructors of youth are not public officers. The argument on the other side, if it proves any thing, will prove that professors, masters, preceptors, and tutors, are all political persons and public officers; and that all education is necessarily and exclusively the business of the State. The confutation of such an argument lies in stating it. The trustees of this college perform no duties, and have no responsibility in any way connected with the civil government of the State. They derive no compensation for their services from the public treasury. They are the gratuitous administrators of a private bounty; the trustees of a literary establishment, standing, in contemplation of law, on the same foundation as hospitals, and other charities. It is true, that a college, in a popular sense, is a public institution, because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them.

But in a legal and technical sense, they are not public institutions, but private charities. Corporations may, therefore, be very well said to be for public use, of which the property and privileges are yet private. Indeed, there may be supposed to be an ultimate reference to the public good, in granting all charters of incorporation; but this does not change the property from private to public. If the property of this corporation be public property, that is, property belonging to the State, when did it become so? It was once private property; when was it surrendered to the public? The object in obtaining the charter, was not surely to transfer the property to the public, but to secure it forever in the hands of those with whom the original owners saw fit to entrust it. Whence, then, that right of ownership and control over this property, which the legislature of New-Hampshire has undertaken to exercise? The distinction between public, political, or civil corporations, and corporations for the distribution of private charity, is fully explained, and broadly marked, in the cases which have been cited, and to which no answer has been given. The hospital of Pennsylvania is quite as much a public corporation, as this college. It has great funds, most wisely and beneficently administered. Is it to be supposed, that the legislature might rightfully lay its hands on this institution, violate its charter, and direct its funds to any purpose which its pleasure might prescribe? The property of this college was private property before the charter; and the charter has wrought no change in the nature or title of this property. The school had existed as a charity school,

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for years before the charter was granted. During this time it was manifestly a private charity. The case cited from Atkyns, shows, that a charter does not make a charity more public, but only more permanent. Before he accepted the charter, the founder of this college possessed an absolute right to the property with which it was endowed, and also the right flowing from that, of administering and applying it to the purposes of the charity by him established. By taking the charter, he assented that the right to the property, and the power of administering it, should go to the corporation of which he and others were members. The beneficial purpose to which the property was to be used, was the consideration on the part of the government for granting the charter. The perpetuity which it was calculated to give to the charity, was the founder's inducement to solicit it. By this charter, the public faith is solemnly pledged, that the arrangement thus made shall be perpetual. In consideration that the founder would devote his property to the purposes beneficial to the public, the government has solemnly covenanted with him to secure the administration of that property in the hands of trustees appointed in the charter. And yet the argument now is, that *because* he so devoted his property to uses beneficial to the public, the government may, *for that reason*, assume the control of it, and take it out of those hands to which it was confided by the charter. In other words, *because* the founder has strictly performed the contract on his part, the government, on its part, is at liberty to violate it. This argument is equally unsound in morality and in law.

The founder proposed to appropriate his property, and to render his services, upon condition of receiving a charter which should secure to him and his associates certain privileges and immunities. He undertook the discharge of certain duties, in consideration of obtaining certain rights. There are rights and duties on both sides. On the part of the founder, there is the duty of appropriating the property, and of rendering the services imposed on him by the charter, and the right of having secured to him and his associates the administration of the charity, according to the terms of the charter, forever. On the part of the government, there is the duty of maintaining and protecting all the rights and privileges conferred by the charter, and the right of insisting on the compliance of the trustees with the obligations undertaken by them, and of enforcing that compliance by all due and regular means. There is a plain, manifest, reasonable stipulation, mixed up of rights and duties, which cannot be separated but by the hand of injustice and violence. Yet the attempt now is to break the mutuality of this stipulation; to hold the founder's property, and yet take away that which was given him as the consideration upon which he parted with his property. The charter was a grant of valuable powers and privileges. The State now claims the right of revoking this grant, without restoring the consideration which it received for making the grant. Such a pretence may suit despotic power. It may succeed where the authority of the legislature is limited by no rule, and bounded only by its will. It may prevail in those systems in which injustice is

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not always unlawful, and where neither the fundamental constitution of the government sets any limits to power, nor any just sentiment or moral feeling affords a practical restraint against a power which in its theory is unlimited. But it cannot prevail in the United States, where power is restrained by constitutional barriers, and where no legislature is, even in theory, invested with all sovereign powers. Suppose Dr. Wheelock had chosen to establish and perpetuate this charity by his last will, or by a deed, in which he had given the property, appointed the trustees, provided for their succession, and prescribed their duties. Could the legislature of New-Hampshire have broken in upon this gift, changed its parties, assumed the appointment of the trustees, abolished its stipulations and regulations, or imposed others? This will hardly be pretended, even in this bold and hardy argument—and why not? Because the gift, with all its restrictions and provisions, would be under the general and implied protection of the law. How is it in our case? Why, in addition to the general and implied protection afforded to all rights and all property, it has an express, specific, covenanted assurance of protection and inviolability, given on good and sufficient considerations, in the usual manner of contracts between individuals. There can be no doubt that, in contemplation of law, a charter, such as this, is a contract. It takes effect only with the assent of those to whom it is granted. Laws enjoin duties, without or against the will of those who are to perform them. But the duties of the trustees, under this charter, are binding upon them

only because they have accepted the charter, and assented to its terms.

But taking this to be a contract, the argument of the defendant is, that it is *not such a contract* as the constitution of the United States protects. But why not? The constitution speaks of contracts, and ought to include all contracts for property or valuable privileges. There is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection. The decisions which have already been made in this Court are a complete answer to the defendant's argument.

The Attorney General has insisted, that Dr. Wheelock was not the founder of this college; that other donors have better title to that character; and that, therefore, the plaintiff's argument, so far as it rests on the supposed fact of Dr. Wheelock's being the founder, fails. The first answer to this is, that the charter itself declares Dr. Wheelock to be the founder, in express terms. It also recites facts, which would show him to be the founder, and on which the law would invest him with that character, if the charter itself had not declared him so. But if all this were otherwise, it would not help the defendant's argument. The foundation was still private; and whether Dr. Wheelock, or Lord Dartmouth, or any other person, possessed the greatest share of merit in establishing the college, the result is the same, so far as it bears on the present question. Whoever was founder, the visitatorial power was assigned to the trustees, by the charter; and it, therefore, is of no importance whether the founder was one individual or another. It

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is narrowing the ground of our argument to suppose, that we rest it on the particular fact of Dr. Wheelock's being founder; although the fact is fully established by the charter itself. Our argument is, that this is a private corporation; that the founder of the charity, before the charter, had a right of visiting and governing it, a right growing out of the property of the endowment; that by the charter, this visitatorial power is vested in the trustees, as assignees of the founder; and that it is a privilege, right, and immunity, originally springing from property, and which the law regards and protects, as much as it regards and protects property and privileges of any other description. By the charter, all proper powers of government are given to the trustees, and this makes them visitors; and from the time of the acceptance of the charter, no visitatorial power remained in the founder or his heirs. This is the clear doctrine of the case of Green v. Rutherforth, which has been cited, and which is supported by all the other cases. Indeed we need not stop here in the argument. We might go farther, and contend, that if there were no private founder, the trustees would possess the visitatorial power. Where there are charters, vesting the usual and proper powers of government in the trustees, they thereby become the visitors, and the founder retains no visitatorial power, although that founder be the king.[a] Even then, if this college had originated with the government, and had been founded by it; still, if the government had given a charter to

[a] 2 *Ves.* 328. 1 *Ves.* 78.

trustees, and conferred on them the powers of visitation, and control, which this charter contains, it would by no means follow, that the government might revoke the grant, merely because it had itself established the institution. Such would not be the legal consequence. If the grant be of privileges and immunities, which are to be esteemed objects of value, it cannot be revoked. But this case is much stronger than that. Nothing is plainer, than that Dr. Wheelock, from the recitals of this charter, was the founder of this institution. It is true, that others contributed; but it is to be remembered, that they contributed to Dr. Wheelock, and to the funds while under his private administration and control, and before the idea of a charter had been suggested. These contributions were obtained on *his* solicitation, and confided to *his* trust.

If we have satisfied the Court that this charter must be regarded as a contract, and such a contract as is protected by the constitution of the United States, it will hardly be seriously denied, that the acts of the legislature of New-Hampshire impair this contract. They impair the rights of the corporation as an aggregate body, and the rights and privileges of individual members. New duties are imposed on the corporation; the funds are directed to new purposes; a controlling power over all the proceedings of the trustees, is vested in a board of overseers unknown to the charter. Nine new trustees are added to the original number, in direct hostility with the provision of the charter. There are radical and essential al-

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terations, which go to alter the whole organization and frame of the corporation.

If we are right in the view which we have taken of this case, the result is, that before, and at the time of, the granting of this charter, Dr. Wheelock had a legal interest in the funds with which the institution was founded; that he made a contract with the then existing government of the State, in relation to that interest, by which he devoted, to uses beneficial to the public, the funds which he had collected, in consideration of the stipulations and covenants, on the part of the government, contained in the charter; and that these stipulations are violated, and the contract impaired, by the acts of the legislature of New-Hampshire.

Feb. 2d, 1819.

The opinion of the Court was delivered by Mr. Chief Justice MARSHALL.

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the State Court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New-Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs.

The Superior Court of Judicature of New-Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this Court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This Court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

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The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New-Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "an act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New-Hampshire, and the governor and lieutenant governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New-Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have

brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

The Charter of Dartmouth College is a contract

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

What species of contracts are included in the constitutional prohibition of State laws impairing the obligation of contracts.

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude,

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would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "*contract*" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this

description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to retrain the States in the regulation of their civil institutions, adopted for internal goverment, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be

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public property, or if the State of New-Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist, that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes then the duty of the Court most

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seriously to examine this charter, and to ascertain its true character.

Dartmouth College is a private eleemosynary corporation.

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on, and extending, his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money, which had been, and should be, contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New-Hampshire; that situation being supposed favourable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighbourhood having made large offers of land, on condition, that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c. "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body

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corporate, with power, *for the use of the said college*, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, *being one of the trustees*, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain, or of New-Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest

contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder[a] of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It

[a] 1 *Bl. Com.* 481.

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is then an eleemosynary,[a] and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have

[a] 1 *Bl. Com.* 471.

supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact, that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary—Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from

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the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural person exercising the same powers would be. If, then, a natural person, em-

ployed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely, and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accom-

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plishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act

change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New-Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and 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," &c. Do these expressions bestow on New-Hampshire any exclusive right to the property of the college, any exclusive interest in the labours of the professors? Or do they merely indicate a willingness that New-Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighbourhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt, that

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doubt is completely removed by an inspection of the entire instrument.

The particular interests of New-Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New-Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New-Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of christianity, and of education generally, not the interests of New-Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors

were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

The charter of Dartmouth College, is a contract, the obligation of which cannot be impaired by a State law.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a Court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about

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which the constitution is solicitous, and to which its protection is extended.

The Court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively,

are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New-Hampshire succeeds,) were the original

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parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The

case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand. There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if

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they can appear in Court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, Charity, and Education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in Court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel, that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have so far withdrawn science, and the useful arts, from the action of the State governments. Why then should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions, made for the security

of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine, that the framers of our constitution were

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strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they

selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient, that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the Doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New-Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New-Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavours, would lead to the opinion, that he united a sound understanding to that humanity and

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benevolence which suggested his undertaking. It surely cannot be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science, and of liberal principles, pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe, that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the Court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this Court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New-Hampshire, to which the special verdict refers.

From the review of this charter, which has been taken, it appears, that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated, that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

The acts of New-Hampshire, of the 27th of June, and 13th and 26th of December, 1816, impair the obligation of the charter of Dartmouth College.

By the revolution, the duties, as well as the powers, of government devolved on the people of New-Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts, and rights, respecting property, remained unchanged by the revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the State. But the constitution of the United States has imposed this additional li-

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mitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New-Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New-Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the cor-

poration. They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

It seems, that the trustees of Dartmouth College have a beneficial interest therein.

In the view which has been taken of this interesting case, the Court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea, that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, *being one of the trustees*, shall exercise the office of president, until the trustees shall make choice

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of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party, who appears in Court to assert that interest; yet it is by no means clear, that the trustees of Dartmouth College have no beneficial interest in themselves.

But the Court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New-Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State Court must, therefore, be reversed.

Mr. Justice WASHINGTON.—This cause turns upon the validity of certain laws of the State of New-Hampshire, which have been stated in the case, and which, it is contended by the counsel for the plaintiffs

in error, are void, being repugnant to the constitution of that State, and also to the constitution of the United States. Whether the first objection to these laws be well founded or not, is a question with which this Court, in this case, has nothing to do: because it has no jurisdiction, as an appellate Court, over the decisions of a State Court, except in cases where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in *favour* of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is *against* the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission.

The clause in the constitution of the United States which was drawn in question in the Court from whence this transcript has been sent, is that part of the tenth section of the first article, which declares, that "no State shall pass any bill of attainder, ex post facto law, or any law *impairing the obligation of contracts.*" The decision of the State Court is against the title specially claimed by the plaintiffs in error, under the above clause, because they contend, that the laws of New-Hampshire, above referred to,

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impair the obligation of a contract, and are, consequently, repugnant to the above clause of the constitution of the United States, and void.

There are, then, two questions for this court to decide:

1st. Is the charter granted to Dartmouth College on the 13th of December, 1769, to be considered as a contract? If it be, then, 2dly. Do the laws in question impair its obligation?

A grant is a contract.

1. What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.[a] Under this definition, says Mr. Powell, it is obvious, that every feoffment, gift, grant, agreement, promise, &c. may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved: these must all concur, because the regular effect of all contracts is on one side to acquire, and on the other to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of Fletcher v. Peck,[b]

a *Powell on Contr.* 6. b 6 *Cranch*, 87.

in which it was laid down, that a contract is either executory or executed; by the former, a party binds himself to do or not to do a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the State governments to pass laws impairing the obligation of contracts.

The creation of a private corporation by charter, is such a grant as includes the obligation of a contract, which no State legislature can pass laws to impair.

If, then, a grant be a contract, within the meaning of the constitution of the United States, the next inquiry is, whether the creation of a corporation by charter, be such a grant, as includes an obligation of the nature of a contract, which no State legislature can pass laws to impair?

A corporation is defined by Mr. Justice Blackstone[a] to be a franchise. It is, says he, "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is neces-

[a] 2 *Bl. Com.* 37.

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sary. The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant.[a] It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it. There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, and also, that in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate.

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making bye-laws. The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. Mr. Justice Buller, in the case of the King v. Passmore,[b] says, that the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration

a 2 *Bl. Com.* 37. b 3 *T. R.* 246.

of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone,[a] may be forfeited through negligence, or abuse of its franchises, in which case the law judges, that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void.

It appears to me, upon the whole, that these principles and authorities prove, incontrovertibly, that a charter of incorporation is a contract.

Distinction between public and private corporations.

2. The next question is, do the acts of the legislature of New-Hampshire of the 27th of June, and 18th and 26th of December, 1816, impair this contract, within the true intent and meaning of the constitution of the United States?

Previous to the examination of this question, it will be proper clearly to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this Court of any other case, than the one immediately before it.

We are informed, by the case of Philips v. Bury,[b] which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz. such as are for public government, and such as are for private charity. The first are those for the government of a town, city, or the like; and being for public advantage, are

a 2 *Bl. Com.* 484. b 1 *Ld. Raym.* 5. S. C. 2 *T. R.* 346.

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to be governed according to the law of the land. The validity and justice of their private laws and constitutions are examinable in the king's Courts. Of these there are no particular founders, and consequently no particular visitor. There are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and, as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full to prove, that a college is a private charity, as well as a hospital, and that there is, in reality, no difference between them, except in degree; but they are within the same reason, and both eleemosynary.

These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king or government may bestow upon it, and having no other founder or visitor than the king or government, the *fundator incipiens.*

The validity and justice of its laws and constitution are examinable by the Courts having jurisdiction over them; and they are subject to the general law of the land. It would seem reasonable, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the foundation. These trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them, than an ordinary trustee, who is called upon in a Court of Equity to execute the trust. They accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure. But the case of a private corporation is entirely different. That is the creature of private benefaction for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws, and visitation, and not to the general control of the government; and all these powers, rights and privileges, flow from the property of the founder in the funds assigned for the support of the charity. Although the king, by the grant of the charter, is in some sense the founder of all eleemosynary corporations, because without his grant they cannot exist; yet the patron or endower is the perficient founder, to whom belongs, as of

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right, all the powers and privilege, which have been described. With such a corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain.

It has been shown, that the charter is a contract on the part of the government, that the property with which the charity is endowed, shall be for ever vested in a certain number of persons, and their successors, to subserve the particular purposes designated by the founder, and to be managed in a particular way. If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be the managers of the fund. If it appropriate the fund intended for the support of a particular charity to that of some other charity, or to an entirely different charity, the grant is in effect set aside, and a new contract substituted in its place; thus disappointing completely the intentions of the founder, by changing the objects of his bounty. And can it be seriously contended, that a law, which changes so materially the terms of a contract, does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract be of its essence, how

is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old charter?

This course of reasoning, which appears to be perfectly manifest, is not without authority to support it. Mr. Justice Blackstone lays it down,[a] that the same identical franchise, that has been before granted to one, cannot be bestowed on another; and the reason assigned is, that it would prejudice the former grant. In the King v. Passmore,[b] Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter. The reason is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and, therefore, it cannot be altered or added to without such consent.

But the case of Terrett v. Taylor,[c] fully supports the distinction above stated, between civil and private corporations, and is entirely in point. It was decided in that case, that a private corporation, created by the legislature, may lose its franchises by misuser, or non-user, and may be resumed by the government under a judicial judgment of forfeiture. In respect to public corporations which exist only for public purposes, such as towns, cities, &c. the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased. But it is denied, that it has power to repeal

[a] 2 *Bl. Com.* 37. [b] 3 *T. R.* 246. [c] 9 *Cranch*, 43.

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statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws; and that it can, by such repeal, vest the property of such corporations in the State, or dispose of the same to such purposes as it may please, without the consent or default of the corporators. Such a law, it is declared, would be repugnant both to the spirit and the letter of the constitution of the United States.

The obligations of the charter of Dartmouth College, are impaired by the laws in question.

If these principles, before laid down, be correct, it cannot be denied, that the obligations of the charter to Dartmouth College are impaired by the laws under consideration. The name of the corporation, its constitution and government, and the objects of the founder, and of the grantor of the charter, are totally changed. By the charter, the property of this founder was vested in twelve trustees, and no more, to be disposed of by them, or a majority, for the support of a college, for the education and instruction of the Indians, and also of English youth, and others. Under the late acts, the trustees and visitors are different; and the property and franchises of the college are transferred to different and new uses, not contemplated by the founder. In short, it is most obvious, that the *effect* of these laws is to abolish the old corporation, and to create a new one in its stead. The laws of Virginia, referred to in the case of Terrett v. Taylor, authorized the overseers of the poor to sell the glebes belonging to the Protestant Episcopal Church, and to appropriate the proceeds to other uses. The laws in question devest the trustees of Dartmouth College of the property vested in them

by the founder, and vest it in other trustees, for the support of a different institution, called Dartmouth University. In what respects do they differ? Would the difference have been greater in principle, if the law had appropriated the funds of the college to the making of turnpike roads, or to any other purpose of a public nature? In all respects, in which the contract has been altered without the assent of the corporation, its obligations have been impaired; and the degree can make no difference in the construction of the above provision of the constitution.

It has been insisted in the argument at the bar, that Dartmouth College was a mere civil corporation, created for a public purpose, the public being deeply interested in the education of its youth; and that, consequently, the charter was as much under the control of the government of New-Hampshire, as if the corporation had concerned the government of a town or city. But it has been shown, that the authorities are all the other way. There is not a case to be found which contradicts the doctrine laid down in the case of Philips v. Bury, viz. that a college founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.

It is objected, in this case, that Dr. Wheelock is not the founder of Dartmouth College. Admit he is not. How would this alter the case? Neither the king, nor the province of New-Hampshire was the founder; and if the contributions made by the governor of New-Hampshire, by those persons who

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granted lands for the college, in order to induce its location in a particular part of the State, by the other liberal contributors in England and America, bestow upon them claims equal with Dr. Wheelock, still it would not alter the nature of the corporation, and convert it into one for public government. It would still be a private eleemosynary corporation, a private charity endowed by a number of persons, instead of a single individual. But the fact is, that whoever may mediately have contributed to swell the funds of this charity, they were bestowed at the solicitation of Dr. Wheelock, and vested in persons appointed by him, for the use of a charity, of which he was the immediate founder, and is so styled in the charter.

Upon the whole, I am of opinion, that the above acts of New-Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently, that the judgment of the State Court ought to be reversed.

Mr. Justice JOHNSON concurred, for the reasons stated by the Chief Justice.

Mr. Justice LIVINGSTON concurred, for the reasons stated by the Chief Justice, and Justices WASHINGTON and STORY.

Mr. Justice STORY. This is a cause of great importance, and as the very learned discussions, as well here, as in the State Court, show, of no inconsiderable difficulty. There are two questions, to which the appellate jurisdiction of this Court properly applies.

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1. Whether the original charter of Dartmouth College is a contract within the prohibitory clause of the constitution of the United States, which declares, that no State shall pass any "law impairing the obligation of contracts." 2. If so, whether the legislative acts of New-Hampshire of the 27th of June, and of the 18th and 27th of December, 1816, or any of them, impair the obligations of that charter.

The nature and different kinds of aggregate corporations.

It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights, and duties of aggregate corporations at common law; that we may apply the principles, drawn from this source, to the exposition of this charter, which was granted emphatically with reference to that law.

An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it. Among other things it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members; and

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may contract with them in the same manner as with any strangers.[a] A great variety of these corporations exist in every country governed by the common law; in some of which the corporate existence is perpetuated by new elections, made from time to time; and in others by a continual accession of new members, without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits.[b]

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corpora-

a 1 *Bl. Com.* 469. 475. 1 *Kyd Corp.* 13. 69. 189. 1 *Woodes.* 471. &c. &c.

b 1 *Bl. Com.* 469. 470. 471. 482. 1 *Kyd Corp.* 25. 1 *Woodes.* 474. Attorney General v. Whorwood, 1 *Ves.* 534. St. John's College v. Todington, 1 *Bl. Rep.* 84. S. C. 1 *Bur.* 200. Phillips v. Bury, 1 *Ld. Raym.* 5. S. C. 2 *T. R.* 346. Porter's Case, 1 *Co.* 22. *b.* 23.

tions are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities; and cannot be

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shaken but by undermining the most solid foundations of the common law.[a]

It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity, which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense the language was unquestionably used by Lord Hardwicke in the case cited at the argument;[b] and, in this sense, a private corporation *may well enough be denominated a public charity.* So it would be, if the endowment, instead of being vested in a corporation, were assigned to a private trustee; yet in such a case no one would imagine that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authorities. Lord Hardwicke, in the case already alluded to, says, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be; but it is the extensiveness, which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular

a Phillips v. Bury, 1 *Ld. Ray.* 5. 9. S. C. 2 *T. R.* 346.

b Attorney General v. Pearse, 2 *Atk.* 87. 1 *Bac. Abr. tit. Charitable Uses*, E. 589.

object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor house-keepers, is of this kind." The charity, then, may, in this sense, be public, although it may be administered by private trustees; and, for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke.[a]

When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal sense of the terms. And if it stopped here, it would not be very material to correct the error. But it is on this foundation, that a superstructure is erected, which is to compel a surrender of the cause. When the corporation is said at the bar to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such

a The case of Sutton's Hospital, 10 *Co.* 23.

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an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, Courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord Holt down to the present day.[a] Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet, who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy, as we now find of law to sustain it.

An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered, what is deemed a foundation,

a Rex v. Bury, 1 *Ld. Ray.* 5. S. C. *Comb.* 265. *Holt*, 715. 1 *Show.* 360. 4 *Mod.* 106. *Skin.* 447. and Ld. Holt's opinion from his own MS. in 2 *T. R.* 346.

and who is the founder. This cannot be stated with more brevity and exactness than in the language of the elegant commentator upon the laws of England: "The founder of all corporations (says Sir William Blackstone,) in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital." [a]

To all eleemosynary corporations a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. [b] The nature and extent of this visitatorial power has been expounded

a 1 *Bl. Com.* 480. 10 *Co.* 33. *b* 1 *Bl. Com.* 480.

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with admirable fulness and accuracy by Lord Holt in one of his most celebrated judgments.[a] And of common right by the dotation the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs.[b] This visitatorial power is, therefore, an hereditament founded in property, and valuable in intendment of law; and stands upon the maxim, that he who gives his property, has a right to regulate it in future. It includes also the legal right of patronage, for as Lord Holt justly observes, "patronage and visitation are necessary consequents one upon another." No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred, that the founder meant to part with it in their favour; and he may divide it among various persons, or subject it to any modifications or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee.[c] In the construction

a Phillips v. Bury, 1 *Ld. Ray.* 5. S. C. 2 *T. R.* 346.

b 1 *Bl. Com.* 482.

c Eden v. Foster, 2 *P. W.* 325. Attorney General v. Middleton, 2 *Ves.* 327. St. Johns College v. Todington, 1 *Bl. Rep.* 84. S. C. 2 *Bur.* 200. Attorney General v. Clare College, 3 *Atk.* 662. S. C. 1 *Ves.* 78.

of charters too, it is a general rule, that if the objects of the charity are incorporated, as for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character.[a]

When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or devest the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change, or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well settled doctrines of the common law.[b]

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises, by misuser or nonuser

a Phillips v. Bury, 1 *Ld. Ray.* 5. S. C. 2 *T. R.* 346. Green v. Rutherforth, 1 *Ves.* 472. Attorney General v. Middleton, 2 *Ves.* 327. Case of Sutton Hospital, 10 *Co.* 23. 31.

b See Rex v. Passmore, 3 *T. R.* 199. and the cases there cited.

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of them. It is subject to the controling authority of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where indeed the visitatorial power is vested in the trustees of the charity in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the Court of Chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts to redress grievances, and suppress frauds.[a] And where a corporation is a mere trustee of a charity, a Court of equity will go yet farther; and though it cannot appoint or remove a corporator, it will yet, in a case of

a 2 *Fonb. Eq. B.* 2. *pt.* 2. *ch.* 1. *s.* 1. *note* (a.) *Coop. Eq. Pl.* 292. 2 *Kyd Corp.* 195. Green v. Rutherforth, 1 *Ves.* 462. Attorney General v. Foundling Hospital, 4 *Bro. Ch.* 165. S. C. 2 *Ves. jun.* 42. Eden v. Foster, 2 *P. W.* 325. 1 *Woodes.* 476. Attorney General v. Price, 3 *Atk.* 108. Attorney General v. Lock, 3 *Atk.* 164. Attorney General v. Dixie, 13 *Ves.* 519. *Ex parte* Kirkby Ravensworth Hospital, 15 *Ves.* 304. 314. Attorney General v. Earl of Clarendon, 17 *Ves.* 491. 499. Berkhamsted Free School, 2 *Ves. & Beames*, 134. Attorney General v. Corporation of Carmarthen, *Coop. Rep.* 30. Mayor, &c. of Colchester v. Lowten, 1 *Ves. & Beames*, 226. Rex v. Watson, 2 *T. R.* 199. Attorney General v. Utica Ins. Co. 2 *Johns. Ch. R.* 371. Attorney General v. Middleton, 2 *Ves.* 327.

gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands.[a]

Thus much it has been thought proper to premise respecting the nature, rights, and duties of eleemosynary corporations, growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College.

It begins by a recital, among other things, that the Rev. Eleazer Wheelock, of Lebanon, in Connecticut, about the year 1754, at his own expense, on his own estate, set on foot an Indian charity school; and by the assistance of other persons, educated a number of the children of the Indians, and employed them as missionaries and schoolmasters among the savage tribes; that the design became reputable among the Indians, so that more desired the education of their children at the school, than the contributions in the American colonies would support; that the said Wheelock thought it expedient to endeavour to procure contributions in England, and requested the Rev. Nathaniel Whitaker to go to England as his attorney, to solicit contribution, and also solicited the Earl of Dartmouth, and others, to receive the contributions and become trustees thereof, which they cheerfully agreed to, and he constituted them trustees accordingly by a power of attorney, and they testified their acceptance by a sealed instrument; *That the said Wheelock also authorized the trustees to fix and de-*

a Mayor, &c. of Coventry v. Attorney General, 7 *Bro. Parl. Cases*, 235. Attorney General v. Earl of Clarendon, 17 *Ves.* 491. 499.

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termine upon the place for the said school; and, to enable them understandingly to give the preference, laid before them, the several offers of the governments in America, inviting the settlement of the school among them; that a large number of the proprietors of lands, in the western parts of New-Hampshire, to aid the design; and *considering that the same school might be enlarged and improved to promote learning among the English*, and to supply the churches there with an orthodox ministry, promised large tracts of land for the uses aforesaid, *provided the school should be settled in the western part of said province;* that the trustees thereupon gave a preference to the western part of said province, lying on Connecticut river, as a situation most convenient for said school: *That the said Wheelock further represented the necessity for a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and diposal of lands and bequests for the use of the same;* that in the infancy of said institution, *certain gentlemen whom he had already nominated in his last will* (which he had transmitted to the trustees in England) *to be trustees in America, should be the corporation now proposed;* and lastly, *that there were already large contributions for said school in the hands of the trustees in England*, and further success might be expected; for which reason the said Wheelock desired they might be invested with all that power therein, which could consist with their distance from the same. The charter, after these recitals, declares, that the king, *considering the premises*, and being willing to

encourage the charitable design, and that the best means of education might be established in New-Hampshire for the benefit thereof, does, of his *special grace, certain knowledge,* and *mere motion,* ordain and grant, that there be a college erected in New-Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes, *and also of English youth and others;* that *the trustees of said college shall be a corporation forever, by the name of the trustees of Dartmouth College:* that the then governor of New-Hampshire, the said Wheelock, and ten other persons, specially named in the charter, shall be trustees of the said college, and that *the whole number of trustees shall forever thereafter consist of twelve, and no more;* that the said corporation shall have power to sue and to be sued by their corporate name, and to acquire and hold for *the use of the said Dartmouth College,* lands, tenements, hereditaments, and franchises; to receive, purchase, and build any houses for *the use of said college,* in such town in the western part of New-Hampshire, as the trustees, or a major part of them, shall by a written instrument agree on; and to receive, accept, and dispose of any lands, goods, chattels, rents, gifts, legacies, &c. &c. not exceeding the yearly value of 6,000*l.* It further declares, that the trustees, or a major part of them, regularly convened, (*for which purpose seven shall form a quorum,*) shall have authority to appoint and remove the professors, tutors, and other officers of the college, and to pay them, and also such *missionaries* and *schoolmasters as shall be employed by the trustees for instructing the Indians,* salaries and

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allowances, as well as other corporate expenses, out of the corporate funds. It further declares, that, *the said trustees*, as often as one or more of the trustees shall die, or, by removal or otherwise, shall, according to their judgment, become unfit or incapable to serve the interests of the college, shall have power *to elect and appoint other trustees* in their stead, so that when the whole number shall be complete of *twelve trustees*, *eight* shall be resident freeholders of New-Hampshire, and *seven* of the whole number, laymen. It further declares that the trustees shall have power from time to time to make and establish rules, ordinances, and laws for the government of the college not repugnant to the laws of the land, and to confer collegiate degrees. It further appoints the said Wheelock, whom it denominates "the FOUNDER of the college," to be president of the college, with authority to appoint his successor, who shall be president until disapproved of by the trustees. It then concludes with a direction, that it shall be the duty of the president to transmit to the trustees in England, so long as they should perpetuate their board, and as there should be Indian natives remaining to be proper objects of the bounty, an annual account of all the disbursements from the donations in England, and of the general plans and prosperity of the institution.

Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government in any manner to alter, amend, or control the charter. It is also appa-

rent, from the very terms of the charter, that Dr. Wheelock is recognized as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place it is apparent, that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was, in the sense already explained, a public charity, that is, for the general promotion of learning and piety; but in this respect it was just as much public before, as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action, and granting a perpetuity of corporate powers and franchises the better to secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power; but the whole government and control, as well of the officers as of the revenues of the college, being with his consent assigned to the trustees in their corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the State; but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with

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the usual privileges and franchises of such corporations, and, among others, with a legal perpetuity, and was exclusively under the government and control of *twelve* trustees, who were to be elected and appointed, from time to time, by the *existing* board, as vacancies or removals should occur.

The charter of Dartmouth College, is a contract within that clause of the constitution which prohibits the States from passing any law impairing the obligation of contracts.

We are now led to the consideration of the first question in the cause, whether this charter is a contract, within the clause of the constitution prohibiting the States from passing any law impairing the obligation of contracts. In the case of Fletcher v. Peck,[a] this Court laid down its exposition of the word "contract" in this clause, in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one, in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the Governor of a State under a legislative act. It determines, in the most unequivocal manner, that the grant of a State is a contract within the clause of

[a] 6 *Cranch*, 87. 136.

the constitution now in question, and that it implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king.

But it is objected, that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, it purporting to be granted *ex mero motu*, and further, that no contracts merely voluntary are within the prohibitory clause. It must be admitted, that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficacy to nude pacts. But it must, on the other hand, be also admitted, that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, *bona fide*, into grant, neither the king nor any private person, who may be the grantor, can recal the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee.[a] And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely

[a] 2 *Bl. Com.* 441. *Jenk. Cent.* 104.

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within the principle, and is, in the strictest sense of the terms, a grant.[a] Was it ever imagined that land, voluntarily granted to any person by a State, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land titles had their origin in gratuitous grants of the States, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract, that the grantees should hold, and the grantor should not reassume the grant, as much as if it had been founded on the most valuable consideration.

But it is not admitted that this charter was not granted for what the law deems a valuable consideration. For this purpose it matters not how trifling the consideration may be; a pepper corn is as good as a thousand dollars. Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of benefit, or any act done, or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer.[b]

With these principles in view, let us now examine

a 2 *Bl Com.* 317. 346. *Shep. Touch. ch.* 12. *p.* 227.

b Pillans v. Van Mierop. per Yates, J. 3 *Burr.* 1663. Forth v. Staunton, 2 *Saund. Rep.* 211. Williams' note 2, and the cases there cited.

the terms of this charter. It purports, indeed, on its face, to be granted "of the special grace, certain knowledge, and *mere motion*" of the king; but these words were introduced for a very different purpose from that now contended for. It is a general rule of the common law, (the reverse of that applied in ordinary cases,) that a grant of the king, at the *suit of the grantee*, is to be construed most beneficially for the king, and most strictly against the grantee. Wherefore, it is usual to insert in the king's grants a clause, that they are made, not at the suit of the grantee, but of the special grace, certain knowledge, and mere motion of the king; and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities.[a] But the charter also, on its face, purports to be granted in *consideration of the premises* in the introductory recitals. Now, among these recitals it appears, that Dr. Wheelock had founded a charity school at his own expense, on his own estate; that divers contributions had been made in the colonies, by others, for its support; that new contributions had been made, and were making, in England for this purpose, and were in the hands of trustees appointed by Dr. Wheelock to act in his behalf; that Dr. Wheelock had consented to have the school established at such other place as the trustees should select; that offers had been made by several of the governments in America, inviting the

a 2 *Bl. Com.* 347. *Finch's Law*, 100. 10 *Rep.* 112. 1 *Shep. Abridg.* 136. *Bull. N. P.* 136.

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establishment of the school among them; that offers of land had also been made by divers proprietors of lands in the western parts of New-Hampshire, if the school should be established there; that the trustees had finally consented to establish it in New-Hampshire; and that Dr. Wheelock represented that, to effectuate the purposes of all parties, an incorporation was necessary. Can it be truly said that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied contract by Dr. Wheelock, if a charter is granted, that the school shall be removed from his estate to New-Hampshire? and that he will relinquish all his control over the funds collected, and to be collected, in England, under his auspices, and subject to his authority? that he will yield up the management of his charity school to the trustees of the college? that he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied, that he gave up the right any longer to maintain the charity school already established on his own estate; and that the funds collected for its use, and subject to his management, were yielded up by him as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity school, and, in virtue of this endowment, declares him the founder of the college. It matters not whether the funds were great or small; Dr. Wheelock had procured them by his own influence, and they were under his control, to be applied to the

support of his charity school; and when he relinquished this control he relinquished a right founded in property acquired by his labours. Besides; Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a pepper corn be, in the eye of the law, of sufficient value to found a contract, as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted, that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money. *A fortiori*, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage *(jus patronatus)* is of great value in intendment of law. Nobody doubts, that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which cannot be legally sold to the intended incumbent.[a]

In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations on his part in the charter itself. He relinquished valuable rights, and undertook a laborious office in consideration of the grant of the incorporation.

[a] 2 *Bl. Com.* 22. note by Christian.

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This is not all. A charter may be granted upon an executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet *in fieri*. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it. This was the doctrine asserted by the late learned Mr. Justice Buller, in a modern case.[a] He there said, "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be 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," (i. e. the place incorporated.) It will not be pretended, that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant without consideration, and, therefore, revocable at the pleasure of the grantor. Yet here, the funds are to be managed, and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services without reward, exclusively for the benefit of others, for public charity, can it be reasonably argued, that these services are less valuable to the government, than if performed for the private emolument of

a Rex v. Passmore, 3 T. R. 199. 239. 246

the trustees themselves? In respect then to the trustees also, there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them in execution of a charity, from which they could receive no private remuneration.

There is yet another view of this part of the case, which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter, the trustees, and their successors, in their corporate capacity, were to receive, hold, and exclusively manage, all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor

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upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter.

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist, as to the founder, the trustees, and the benefactors. And upon the soundest legal principles, the charter may be properly deemed, according to the various aspects, in which it is viewed, as a several, contract with each of these parties, in virtue of the foundation, or the endowment of the college, or the acceptance of the charter, or the donations to the charity.

And here we might pause: but there is yet remaining another view of the subject, which cannot consistently be passed over without notice. It seems to be assumed by the argument of the defendant's counsel, that there is no contract whatsoever, in virtue of the charter, between the crown and the corporation itself. But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt, that the grant would have been an executed contract with the corporation; as much so, as if it had been to any private person. But it is supposed, that as this corporation was not then in existence, but was created and its franchises bestowed, *uno flatu*, the charter cannot be construed a contract, because there was no person *in rerum natura*, with whom it might be made. Is this, however, a just and legal view of the

subject? If the corporation had no existence so as to become a contracting party, neither had it for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority, wherever it is necessary to effectuate the objects of the grant.[a] From the nature of things, the artificial person called a corporation, must be created before it can be capable of taking any thing. When, therefore, a charter is granted, and it brings the corporation into existence without any act of the natural persons who compose it, and gives such corporation any privileges, franchises, or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose.[b] And if the corporation have an existence before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument at a subsequent period? It behooves those also, who hold, that a grant to a corporation, not then in existence, is in-

a. Case of Sutton's Hospital, 10 *Co.* 23. Buckland v. Fowcher, cited 10 *Co.* 27, 28.; and recognized in Attorney General v. Bowyer, 3 *Ves. jun.* 714. 726, 727. S. P. *Highmore on Mortm.* 100, &c.

b *Ib.*

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capable of being deemed a contract on that account, to consider, whether they do not at the same time establish, that the grant itself is a nullity for precisely the same reason. Yet such a doctrine would strike us all as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights, or property, on the corporation it created. It may be admitted, that two parties are necessary to form a perfect contract; but it is denied that it is necessary, that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee to the first child of A. to be hereafter born; as soon as such child should be born, the estate would vest in it. Would it be contended, that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked in a case of a gratuitous grant by the king or the legislature to A. for life, and afterwards to the heirs of B., who is then living. Take the case of a bank, incorporated for a limited period, upon the express condition that it shall pay out of *its corporate funds* a certain sum, as the consideration for the charter, and after the corporation is organized a payment duly made of the sum *out of the corporate funds*; will it be contended, that there is not a subsisting contract between the government and the corporation, by the matters thus arising *ex post facto*, that the charter shall not be revoked during the stipulated period? Suppose an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of cer-

tain lands belonging to the State in certain proportions; if a person afterwards born, pays the stipulated sum into the treasury, is it less a contract with him, than it would be with a person *in esse* at the time the act passed? We must admit that there may be future springing contracts in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be in respect to natural persons, why not also in respect to artificial persons, created by the law, for the very purpose of being clothed with corporate powers? I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, the grant is just as much an executed contract, as if its prior existence had been established for a century.

Supposing, however, that in either of the views which have been suggested, the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature.

It is, in the first place, contended, that it is not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institution, such as the contract of marriage, or to grants of power to State officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest.

It is admitted, that the State legislatures have

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power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases, where the constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature. But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended, that the legislature of a State can diminish the salary of a judge holding his office during good behaviour? Such an authority has never yet been asserted to our knowledge. It may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendant, that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corpora-

tions are,) does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This Court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.[a]

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts, recognized as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed, that when acquired *bona fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this Court.[b] A *general* law regulating divorces from the contract of marriage, like a law regulating

a Terret v. Taylor, 9 *Cranch*, 43. Town of Pawlet v. Clark, 9 *Cranch*, 292.

b *Ib.*

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remedies in other cases of breaches of contracts, is not necessarily a law impairing *the obligation of such a contract.*[a] It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to *general* laws regulating divorces upon breaches of that contract. But if the argument means to assert, that the legislative power to dissolve such a contract, without *any breach* on *either side, against the wishes* of *the parties*, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made, (and marriage is always in law a valuable consideration for a contract,) it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition, as any other contract for a valuable consideration. A man has just as good a right to his wife, as to *the property* acquired under a marriage

[a] See Holmes v. Lansing, 3 *Johns. Cas.* 73.

contract. He has a legal right to her society and her fortune; and to devest such right without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate. I leave this case, however, to be settled, when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument, derived from this source, does not press my mind with any new and insurmountable difficulty.

In respect also to grants and contracts, it would be far too narrow a construction of the constitution, to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee for the benefit of a particular *cestui que trust*, or for any special, private or public charity, cannot be the less a contract because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage.[a] The fallacy of the argument consists in assuming the very ground in controversy. It is not admitted, that a contract with a trustee is in its own nature revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer

[a] 2 *Bl. Com.* 21.

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in its own way. The truth is, that the government has no power to revoke a grant, *even of its own funds*, when given to a private person, or a corporation for special uses. It cannot recal its own endowments granted to any hospital, or college, or city, or town, for the use of such corporations. The only authority remaining to the goverment is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

Another objection growing out of, and connected with that which we have been considering, is, that no grants are within the constitutional prohibition, except such as respect *property* in the strict sense of the term; that is to say, beneficial interests in lands, tenements, and hereditaments, &c. &c. which may be sold by the grantees for their own benefit: and that grants of franchises, immunities, and authorities not valuable to the parties, *as property*, are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption. There are many rights, franchises, and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant of the next presentation to a church, limited to the grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favour of third persons, without compensation, is another in-

stance. A grant of lands to a trustee to raise portions or pay debts, is, in law, a valuable grant, and conveys a legal estate. Even a power given by will to executors to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship.[a] Many dignities and offices, existing at common law, are merely honorary, and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the less a contract on that account. In respect to franchises, whether corporate or not, which include a pernancy of profits, such as a right of fishery, or to hold a ferry, a market, or a fair, or to erect a turnpike, bank, or bridge, there is no pretence to say that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseizin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant.

a *Co. Lit.* 113. *a.* Harg. and Butler's note 2. *Sugden on Powers*, 140. Jackson v. Jansen, 6 *Johns. Rep.* 73. Franklin v. Osgood, 2 *Johns. Cas.* 1. S. C. 14 *Johns. Rep.* 527. Zebach v. Smith, 3 *Binn. Rep.* 69. Lessee of Moody v. Vandyke, 4 *Binn.* 7. 31. Attorney General v. Gleg, 1 *Atk.* 356. 1 *Bac. Abr.* 586. (*Gwillim edit.*)

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Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded as a contract for the use and dominion of property. Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him *for that very reason.* But it is otherwise where a power is to be exercised in aid of a right vested in the *grantee.* We all know that a power of attorney, forming a part of a security upon the assignment of a chose in action, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest.[a] So if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature; and there can be no doubt that such grants are contracts within the prohibition in question.

In respect to *corporate franchises*, they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse.* They are not mere naked powers granted to the corporation; but powers coupled with an interest. The property of the corporation vests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied, that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its or-

a Walsh v. Whitcomb, 2 *Esp.* 565. Bergen v. Bennett, 1 *Caines' Cases in Error*, 1. 15. Raymond v. Squire, 11 *Johns. Rep.* 47.

dinary franchises. "It is likewise a franchise," says Mr. Justice Blackstone, "for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom."[a] In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend, that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights in their character, as corporators. The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege.[b]

a 2 *Bl. Com.* 37. 1 *Kyd on Corp.* 14. 16.

b Ashby v. White, 2 *Ld. Raym.* 938. 1 *Kyd on Corp.* 16.

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This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demesnes of the corporation, held by it, not, as the argument supposes, for the use and benefit of the people of New-Hampshire, but, as the charter itself declares, "for the use of Dartmouth College." There were not, and in the nature of things could not be, any other *cestui que use* entitled to claim those funds. They were indeed to be devoted to the promotion of piety and learning, not at large, but in that *college*, and the establishments connected with it; and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New-Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, or annul their discretion in the application of them, or distribute them among its own favourites. Could the legislature of New-Hampshire have seized the land given by the State of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative, until it is established, that the legislature may lawfully take the property of A. and give it to B.; and if it

could not take away or restrain the corporate *funds*, upon what pretence can it take away or restrain the corporate *franchises?* Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college and to the cause of religion and learning.

Thus far, the rights of the corporation itself, in respect to its property and franchises, have been more immediately considered. But there are other rights and privileges belonging to the trustees collectively, and severally, which are deserving of notice. They are entrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The *jus patronatûs* is vested in them. The visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs, it escheats to the government.[a] It is a valuable right founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right in return for his endowment, as for any other equivalent? and, if instead of holding it as an hereditament, he assigns it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a collective right in all the trus-

a Rex v. St. Catherine's Hall, 4 *T. R.* 233.

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tees; each of them also has a franchise in it. Lord Holt says, "it is agreeable to reason, and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man."[a] Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If ousted unlawfully from his office, the law would, by a mandamus, compel a restoration.

It is attempted, however, to establish, that the trustees have no interest in the corporate franchises, because it is said, that they may be *witnesses* in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting, that in a suit brought against a charitable corporation for a recompence for services performed for the corporation, the governors, constituting the corporation, (but whether entrusted with its *funds* or not by the act of incorporation does not appear) are competent witnesses against the plaintiff.[b] But assuming this case to have been rightly decided, (as to which upon the authorities there may be room to doubt,) the corpo-

a Ashby v. White, 2 *Ld. Raym.* 938. 952. Attorney General v. Dixie, 13 *Ves.* 519.

b Weller v. The Governor of the Foundling Hospital, *Peake's N. P. Rep.* 153.

rators being technically parties to the record,[a] it does not establish, that in a suit for the corporate property vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish, that in a suit for the corporate franchises to be exercised by the trustees, or to enforce their visitatorial power, the trustees would be competent witnesses. On a mandamus to restore a trustee to his corporate or visitatorial power, it will not be contended, that the trustee is himself a competent witness to establish his own rights, or the corporate rights. Yet why not, if the law deems that a trustee has no interest in the franchise? The test of interest assumed in the argument proves nothing in this case. It is not enough to establish, that the trustees are sometimes competent witnesses; it is necessary to show, that they are always so in respect to the corporate franchises, and their own. It will not be pretended, that in a suit for damages for obstruction in the exercise of his official powers, a trustee is a disinterested witness. Such an obstruction is not a *damnum absque injuria*. Each trustee has a vested right, and legal interest in his office, and it cannot be devested but by due course of law. The illustration, therefore, lends no new force to the argument, for it does not establish, that when their own rights

a Attorney General v. City of London, &c. 3 *Bro. Ch. c.* 171. S. C. 1 *Ves. jun.* 243. Burton v. Hinde, 5 *T. R.* 174. Nason v. Thatcher, 7 *Mass. R.* 398. *Phillips on Evid.* 42. 52. 57. and notes. 1 *Kyd on Corp.* 304. &c. *Highmore on Mortm.* 514.

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are in controversy, the trustees have no legal interest in their offices.

The principal objections having been thus answered satisfactorily, at least to my own mind, it remains only to declare, that my opinion, after the most mature deliberation is, that the charter of Dartmouth College, granted in 1769, is a contract within the purview of the constitutional prohibition.

The charter of Dartmouth College was not dissolved at the revolution.

I might now proceed to the discussion of the second question; but it is necessary previously to dispose of a doctrine which has been very seriously urged at the bar, viz. that the charter of Dartmouth College was dissolved at the revolution, and is, therefore, a mere nullity. A case before Lord Thurlow has been cited in support of this doctrine.[a] The principal question in that case was, whether the corporation of William & Mary's College in Virginia, (which had received its charter from King William, and Queen Mary,) should still be permitted to administer the charity under Mr. Boyle's will, no interest having passed to the college under the will, but it acting as an agent or trustee under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the Court. Lord Thurlow directed a new scheme, because the college belonging to an independent government, was no longer within the reach of the Court. And he very unnecessarily added, that he could not now consider the college as a corporation, or as another report[b] states,

a Attorney General v. City of London, 3 *Bro. Ch. C.* 171. S. C. 1 *Ves. jun.* 243.

b 1 *Ves. jun.* 243.

that he could not take notice of it as a corporation, it not having proved its existence as a corporation at all. If, by this, Lord Thurlow meant to declare, that all charters acquired in America from the crown, were destroyed by the revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principle of the common law, which has been recognized as well in this, as in other Courts, that the division of an empire, works no forfeiture of previously vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice.[a] This objection, therefore, may be safely dismissed without further comment.

The acts of New-Hampshire in question impair the obligations of the charter of Dartmouth College.

The remaining inquiry is, whether the acts of the legislature of New-Hampshire now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt certainly is to force upon the corporation a new charter against the will of the corporators. Nothing seems better settled at the common law, than the doctrine, that the crown cannot force upon a private corporation a new charter; or compel the old members to give-up their own franchises, or to admit new members into the corporation.[b] Neither can the crown compel a man

a Terrett v. Taylor, 9 *Cranch*, 43. 50. Kelly v. Harrison, 2 *Johns. Cas.* 29. Jackson v. Lunn, 3 *Johns. Cas.* 109. Calvin's case, 7 *Co.* 27.

b Rex v. Vice Chancellor of Cambridge, 3 *Bur.* 1656. Rex v. Passmore, 3 *T. R.* 240. 1 *Kyd on Corp.* 65. Rex v. Larwood, *Comb.* 316.

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to become a member of such corporation against his will.[a] As little has it been supposed, that under our limited governments, the legislature possessed such transcendant authority. On one occasion, a very able Court held, that the State legislature had no authority to compel a person to become a member of a mere private corporation created for the promotion of a private enterprise, because every man had a right to refuse a grant.[b] On another occasion, the same learned Court declared, that they were all satisfied, that the rights legally vested in a corporation, cannot be controled or destroyed by any subsequent statute, unless *a power for that purpose be reserved to the legislature in the act of incorporation.*[c] These principles are so consonant with justice, sound policy, and legal reasoning, that it is difficult to resist the impression of their perfect correctness. The application of them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this Court in this case.

A very summary examination of the acts of New-Hampshire will abundantly show, that in many materal respects they change the charter of Dartmouth College. The act of the 27th of June, 1816, declares that the corporation known by the name of the Trustees of Dartmouth College shall be called the Trustees of Dartmouth University. That the whole number of trustees shall be *twenty-one*, a ma-

a Rex v. Dr. Askew, 4 *Bur.* 2200.
b Ellis v. Marshall, 2 *Mass. Rep.* 269.
c Wales v. Stetson, 2 *Mass. Rep.* 143. 146.

jority of whom shall form a quorum; that they and their successors shall hold, use, and enjoy forever, all the powers, authorities, rights, property, liberties, privileges, and immunities, heretofore held, &c. by the trustees of Dartmouth College, except where the act otherwise provides; that they shall also 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 and displace officers, and determine their duties and compensation; to delegate the power of supplying vacancies in any of the offices of the university for a limited term; to pass ordinances for the government of the students; to prescribe the course of education; and to arrange, invest, and employ the funds of the university. The act then provides for the appointment of a board of twenty-five overseers, fifteen of whom shall form a quorum, of whom five are to be such *ex officio*, and the residue of the overseers, as well as the new trustees, are to be appointed by the governor and council. The board of overseers are, among other things, to have power, "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." The act then provides, that the president and professors shall be *nominated by the trustees*, and *appointed* by *the over-*

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seers, and shall be liable to be suspended and removed in the same manner; and that *each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.* The supplementary act of the 18th of December, 1816, declares that *nine* trustees shall form a quorum, and that *six* votes at least shall be necessary for the passage of any act or resolution. The act of the 26th of December, 1816, contains other provisions, not very material to the question before us.

From this short analysis it is apparent, that, in substance, a new corporation is created including the old corporators, with new powers, and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees in their corporate capacities. The quorum is no longer *seven*, but *nine*. The old trustees have no longer the sole right to perpetuate their succession by electing other trustes, but the *nine* new trustees are in the first instance to be appointed by the governor and council, and the new board are then to elect other trustees from time to time as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a *minority* of the old board, co-operating with the new trustees, possess the unlimited power to remove the *majority* of the *old* board. The powers, too, of the corporation are varied. It has authority to organize new colleges in

"the university, and to establish an institute, and elect fellows and members thereof." A board of overseers is created, (a board utterly unknown to the old charter,) and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trustees are in future only to nominate, and the overseers are to approve, the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A., in trust for special purposes, can the grant be revoked, and a new grant thereof be made to A., B., and C., in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A. and B., for the use of a college, or a hospital, of private foundation, is not the obligation of that grant impaired when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A. and B., is it no violation of their right to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank, or insurance company, by the terms of its charter, be under the management of directors, elected by the stockholders, would not the

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rights acquired by the charter be impaired if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us, that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment it is perfectly clear, that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare, that the acts of the legislature of New-Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predicament in which this Court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different States, between a State and its citizens, and between different States. It stands, therefore, in the midst of

jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that.

Under these impressions I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavoured to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country.

Mr. Justice DUVALL dissented.[a]

a In the discussions which arose in France in 1786, upon the new charter then recently granted to the French East India Company, it seems to have been taken for granted by the lawyers on both sides, to whom the questions in controversy were submitted by the Company, and by the merchants who considered themselves injured by its establishment, that if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited for non-user or misuser. The advocates, (M. M. LACRETELLE and BLONDE,) who were consulted by the merchants of the kingdom opposed to the establishment of the Company, denied its legal existence, on the ground that the king had been surprised in his grant; that it was not yet perfected by the issuing of letters patent,

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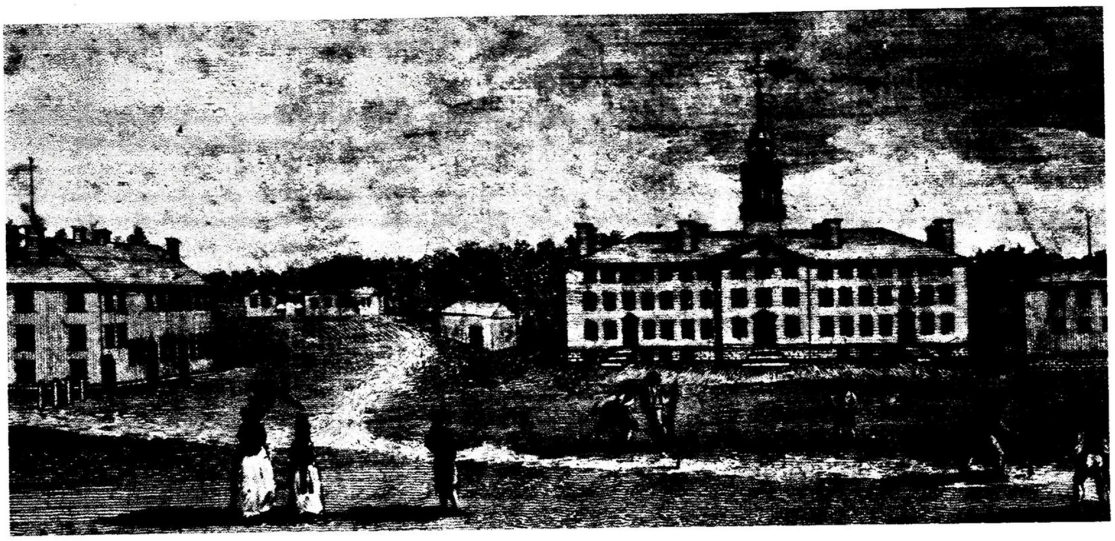
Upon the suggestion of the plaintiff's counsel, that the defendant had died since the last term, the Court ordered the judgment to be entered *nunc pro tunc* as of that term, as follows:

JUDGMENT. This cause came on to be heard on the transcript of the record, and was argued by counsel. And thereupon all and singular the premises being seen, and by the Court now here fully understood, and mature deliberation being thereupon had,

nor duly registered by the parliaments; and that it both might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy.

On the other hand it was contended by the Company that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old Company which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756, (but which suspension was at the time solemnly protested against by the parliament of Paris as illegal;) that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested as a right of property, of which they could not be deprived by any authority in the kingdom. "En effet, quand le roi accorde un privilége exclusif, ce privilége est le prix d'une mise de fonds, dans un commerce hazardeux, dont l'entreprise est jugée avantageuse à l'etat. Delà naît par conséquent un contrat synallagmatique, qui se forme entre le souverain et les actionnaires. Delà naît un droit de propriété qui devient inébranlable pour le souverain lui-même." And of this opinion were the advocates (M. M. HARDOIN, GERBIER, and DE BONNIERES,) consulted by the company. *See a Collection of Tracts on the French East Company, Paris, 1788, in the Library of Congress.*

it appears to this Court, that the said acts of the legislature of New-Hampshire, of the twenty-seventh of June and of the eighteenth and twenty-sixth of December, Anno Domini, 1816, in the record mentioned, are repugnant to the constitution of the United States, and so not valid; and, therefore, that the said Superior Court of Judicature of the State of New-Hampshire erred in rendering judgment on the said special verdict in favour of the said plaintiffs; and that the said Court ought to have rendered judgment thereon, that the said trustees recover against the said Woodward, the amount of damages found and assessed, in and by the verdict aforesaid, viz. the sum of twenty thousand dollars: Whereupon it is considered, ordered, and adjudged by this Court, now here, that the aforesaid judgment of the said Superior Court of Judicature of the State of New-Hampshire be, and the same hereby is, reversed and annulled: And this Court proceeding to render such judgment in the premises as the said Superior Court of Judicature ought to have rendered, it is further considered by this Court, now here, that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of twenty thousand dollars, with costs of suit; and it is by this Court, now here, further ordered, that a special mandate do go from this Court to the said Superior Court of Judicature to carry this judgment into execution.



WILL TO RESIST

The Dartmouth College Case

By RICHARD W. MORIN '24

Librarian of the College, Emeritus

150 years ago, in February 1819, the United States Supreme Court in the case of "Trustees of Dartmouth College vs. William H. Woodward" rendered one of its landmark decisions. In a new account that concentrates on the College side of the case, Mr. Morin tells the full story of the controversy, from the first campus quarrel to the climax in Washington, where Daniel Webster successfully defended the independence of his alma mater.

DARTMOUTH ALUMNI MAGAZINE, April 1969

THE Dartmouth College Case belongs to two societies. The first is the Dartmouth College family itself; the second is the larger community of legal scholars and practitioners, and Constitutional historians. The College family tends to view with a mixture of pride and regret this required sharing. The second society — the professional one — regards the members of the first with a kind of amused tolerance. Unmoved by the dramatic rescue of a "small college," the professional society indulges the Dartmouth College family only so long as it does not insist on dealing in misty-eyed irrelevancies in its claim on the Case. It will not long be in doubt which of the two constituencies is the more favored in the following account.

Chartered in 1769 in the name of the British sovereign, George III, Dartmouth, the last of the Colonial colleges, was predesigned to test, fifty years later before the United States Supreme Court, the right of private education to survive. Behind the historic decision in *Trustees of Dartmouth College v. William H. Woodward,* known to lawyers and laymen alike as the Dartmouth College Case, lay years of upheaval and bitterness which cast into balance the very life of the institution. This festering torment, ended only by Chief Justice Marshall's opinion in 1819, took shape in the opening years of the nineteenth century. But it might be said to have had its earliest beginnings in a provision of the charter itself which authorized Eleazar Wheelock, founder and first President of the College, to name his own successor as President. At the time, in view of Eleazar Wheelock's single-handed elevation of the College from a dream to a reality, nothing could have seemed more natural than the granting to him of such a power. In fact, at the moment of the College's birth, and for long thereafter, it was impossible to distinguish between it and Wheelock, so completely did the former depend upon the energy, resourcefulness, and determination of the latter. Though the charter vested the supervision of the College in twelve Trustees of which Wheelock was but one, it was Wheelock who had in fact selected most of the Trustees appointed by the charter, and acquiesced in the remainder. Throughout Eleazar Wheelock's life those Trustees and their successors were content to leave to the founding father the entire control of the institution. His skillful guidance seemed to them evidence of the wisdom of such a course, and when Eleazar Wheelock by his will appointed his son John to succeed him it is probable that none among the Trustees conceived that a day could come when the Board would choose to exercise its charter power to remove John Wheelock from the presidency. On the contrary their dominant concern was to persuade John Wheelock to accept the office, in the face of his own reluctance to do so.

Putting aside his personal preferences, John Wheelock became the second President of Dartmouth College on October 19, 1779 at the age of 25. He was the second son of Eleazar, and actually had been his father's third choice to succeed him. His older brother, Ralph, who was his father's first choice as successor, had become incurably ill. The founder's second choice was his stepson, the Rev. John Maltby, whose death preceded Dr. Wheelock's. There appears to have been no consideration given to a selection outside the family. That a son should inherit the presidency followed naturally upon the founder's custom of looking upon the College as a private family preserve. After all, to whom did the College owe its existence? To George III in theory; to Colonial Governor John Wentworth as the instrument of the sovereign; but to Eleazar Wheelock in fact. On whom rested the authority not only for the day-to-day life of the College but for its fundamental direction and supervision? In theory on the Trustees perhaps; but in practice this responsibility was Eleazar's and his alone. Equally spontaneous was it for John Wheelock, once in office, to view himself as in every way his father's natural successor, in authority as well as title.

For the next 25 years John Wheelock reigned without challenge, dedicated and despotic. The early part of his rule was generally beneficial to the institution, despite his disposition to find too often an identity between his own interests and those of the College. This relatively smooth course might have continued indefinitely had no changes occurred in the makeup of the Board of Trustees. However, as Trustee replacements occurred in the early years of the nineteenth century, serene acceptance by the Board of all presidential acts began to fade, and in the face of opposition, John Wheelock exposed qualities of wilfulness which had not before come harmfully to the surface in his official conduct.

The instrument for polarizing Trustee opposition to John Wheelock was Nathaniel Niles. Elected to the Board as early as 1793, Niles was a Princeton graduate and resident of Fairlee, Vt. Qualified both as a lawyer and as a minister, he remained on the Board until 1820, a lone Republican* among Federalists. At first the Board's only independent voice, he was joined in 1801 by Thomas W. Thompson of Concord, N. H., a Harvard graduate, lawyer, Federalist Member of Congress, and later United States Senator. The next potential dissenter was Timothy Farrar, New Hampshire resident, graduate of Harvard, lawyer, and judge, who became a Trustee in 1804. Following him was Elijah Paine of Williamstown, Vt., elected to the Board in 1806. Like Farrar, Paine was a lawyer-judge; he was, moreover, a former United States Senator. Two

* Based on Jeffersonian principles the Republican Party, as it officially called itself, held control of the Presidency of the United States throughout most of the first half of the nineteenth century. In New Hampshire it was ascendant during the liveliest part of the College controversy. Though its members were known, almost interchangeably, as "Republicans" or "Democrats," only the former term is used here, in the interest of consistency, quotations excepted. By the 1830s the terms "Democratic Party" and "Democrats" had become more common.

Trustees died between the annual meetings of 1808 and 1809. One was old Professor John Smith, friend, admirer and subservient of both the Wheelocks, Dartmouth teacher since 1774 and Trustee since 1788, and a central factor in the church controversy later described. These two vacancies were filled at the August 1809 annual meeting by the elections of Charles Marsh of Woodstock, Vt., a Dartmouth graduate during John Wheelock's presidency and a lawyer by profession who had declined appointment to the Vermont Supreme Court; and Asa McFarland, also a Dartmouth graduate in the John Wheelock era, a former Dartmouth tutor, and at the time of his election the pastor of the First Congregational Church in Concord, N. H. Thus by 1809 there were already in office six of the eight Trustees later to make up the famous Octagon that stood in defiance of the powers of the State of New Hampshire to precipitate the Dartmouth College Case. Within the Board it was evident by that year that a serious conflict with President John Wheelock would be difficult to avoid.

THE collision between President and Board, though probably inevitable under the abrasive force of John Wheelock's imperious and demanding mien, arose directly out of the church controversy. This long, complex, and today almost incomprehensible struggle began in 1804 with the desire of a majority of the members of the local church to drop Professor Smith, who had long served as its pastor, in favor of the new Professor of Theology at the College, Roswell Shurtleff. President Wheelock was unwilling to see his personal control over the church thus weakened, a control made possible by the subservience of Professor Smith, its pastor. The disagreement heated into a quarrel which lasted for ten years during which John Wheelock called into play his extraordinary capacity for artfulness and dissimulation. His efforts to enlist the power of the Board on his side in the controversy partially succeeded in the early years when its majority was still supine. Wheelock's determination to rule or ruin (he was called "Samson" behind his back by foes and friends alike) split the church into two contesting fragments. As his hold over the whole weakened, he increased his efforts to enlist the official voice of the Trustees in support of his ends. Worried by the suspicion that they were being asked to act beyond their jurisdiction, the Trustees sought to be peacemakers. As is common to this role, they were reviled by both sides. The lack of success attending their halfhearted and informal endeavors increased their disposition to resist being drawn by the President into direct battle. When in 1811 Wheelock charged his Board with misappropriating the Phillips Fund (which supported the professorship of divinity) by permitting Professor Shurtleff to devote part of his time to preaching to that branch of the local church to which Wheelock was opposed, the Trustees by a vote of seven to three rejected the President's contention and for the first time took a formal stance in opposition to him. The same seven Trustees likewise noted that they had "long labored to restore the harmony which formerly prevailed in this Institution without success and it is with reluctance they express their apprehension that if the present state of things is suffered to remain any great length of time the College will be essentially injured."

At the same meeting the seven rebellious Trustees called into question the President's authority to determine by himself instances of delinquency among the students, and by the same split vote that authority was declared to rest not in the President alone but in a majority of the "Executive Officers" of whom the President was only one, and the faculty the balance.

Other blows to the President occurred. In addition to the death of the pliable Professor Smith, he lost by the same cause a second supporter on the faculty. Their replacements, Professor Ebenezer Adams and Rev. Zephaniah Swift Moore, threatened his hegemony within the institution. Moore had been chosen by the Trustees contrary to Wheelock's express desire that the appointment be accorded to his sycophantic friend, the Rev. Elijah Parish. The wisdom of the Trustees was demonstrated when Parish later joined Wheelock in his anonymously printed attacks on the Board.

The Octagon was completed in 1813 when the Rev. Seth Payson of Rindge, N. H., was elected as Trustee to succeed the Rev. Dr. Burroughs, whose Trusteeship dated back to the days of Eleazar Wheelock's leadership. The President was left with but two supporters on the Board: former New Hampshire Governor John T. Gilman, Trustee since 1807, and Stephen Jacob, Windsor, Vt., lawyer, and Trustee since 1802. It could not then have come wholly as a surprise to John Wheelock when in November 1814 the Board voted that the President be "excused from hearing the recitations of the Senior Class . . .," ostensibly to relieve him "from some portion of the burdens which unavoidably devolve on him." Simultaneously the Senior Class recitations were transferred to Professors Shurtleff, Adams, and Moore. (Up to this time, and until after the controversy was settled, the full teaching complement of the undergraduate college consisted of the President, three Professors, and two tutors. In addition two other Professors conducted the instruction at the recently established Dartmouth Medical School.)

A forcible curtailing of his teaching duties was an indignity which even a less volatile man than John Wheelock could not let pass. For him it was evidence that his situation had become desperate. Henceforth it was to be a battle without quarter. If he were to prevail he must enlist on his side the public and, if possible, the state legislature. To that end he offered to the College Trustees a resolution calling upon the legislature "to examine . . . into the situation and circumstances of the College . . . to enable them to rectify anything amiss. . . ." The Board voted down the resolution. Thus the base was cannily laid for an appeal to the legislature by Wheelock himself, in the role of a victim of a tyrannical Board unwilling to allow the State to examine it.

IT was the age of the printed tract, and John Wheelock chose that medium to arouse those who might support him against the Trustees. Consistent with his attachment to the devious, he elected to publish his diatribe anonymously, though so intelligent a man could hardly have expected that the identity of the author would long remain concealed.

Disingenuously entitling his pamphlet *Sketches of the History of Dartmouth College and Moor's Charity School with a particular account of some late remarkable proceedings from the year 1779 to the year 1815,* Wheelock wrote it during the winter of 1814-15, with the help of his son-in-law, the Rev. William Allen, of Pittsfield, Mass., and Elijah Parish, the man whom Wheelock had been unable to persuade the Board to receive on the faculty. During the composition of the *Sketches* the President and Parish exchanged frequent letters. The correspondence reveals a ludicrously conspiratorial design, and makes it clear that at least Parish derived

the utmost titillation from the deviousness of its development. It was agreed that the latter should prepare, also anonymously, a *Review* of the *Sketches* for simultaneous publication. Of his *Review* Parish wrote Wheelock in March, "My object has been to keep my own temper and make everybody else angry . . . biting satire where the author . . . seems to say only what he is compelled to say, but yet like a soft secret gas it penetrates the very bones. . . . My object has been to make the reader respect the P_____t, but despise the Pr_____f_s & hate the Tr_st__s." In truth this description could have been applied accurately to the *Sketches* themselves. The two pamphlets finally appeared in May 1815, and Wheelock and a few trusted friends immediately caused them to be widely distributed, not neglecting the members of the legislature due to convene in Concord the following month. In this he was aided by Isaac Hill, explosive editor of the *New Hampshire Patriot* and the most unrestrained voice in the State against the Federalist party. Hill saw an opportunity for the Republicans to make common cause with the beleaguered President against a Board of Trustees who, with the single exception of Niles, were Federalists, some possessing considerable influence in the councils of that party. Hill, and the others who took up the cry, found no difficulty in overlooking Wheelock's own record of Federalist sympathies.

THE period 1815-1820, during which the College controversy matured and was resolved, stands as a troubled one for the nation as a whole. The War of 1812 had just come to an end. Throughout the land the Federalist party was in bad repute largely because of an intemperate, single-minded, and some said seditious resistance to "Mr. Madison's war." In New Hampshire, Federalist attitudes had bred a deep distaste among the people, creating a fertile field to root a union of Republican antipathies and John Wheelock's grievances. The prospect of dealing a blow at Federalist pretensions was sufficient inducement to most New Hampshire Republicans to link themselves with the Wheelock cause.

The preparation of the *Sketches* seems not to have been anticipated by the Trustees, and thus the attack fell upon them without warning. In the course of 88 printed pages they found themselves charged, directly or by inference, with a bounteous list of sins: forcible change of "the first principles and design of the institution," misapplication and perversion of College funds, religious intolerance, arresting the College's progress and diminishing its financial resources, advancing the cause of a particular religious sect at the expense of others, neglecting the educational aims, secretly manipulating Board decisions, collusion in electing officers and Trustees against the President's wishes, packing the Board and College offices with supporters, depriving College officers of their religious rights and privileges, supporting a schism in the local church, violating the charter and remodelling the form of government it prescribed, destroying the constitutional rights of the President.

But most important to Wheelock's grand design was the claim that the Trustees held themselves "unamenable to a higher power," that is, to the state legislature. This was a theme that Parish elaborately embroidered in his *Review,* accusing the Trustees of making themselves an "independent government in an independent State," of constituting the Board an "organized aristocracy . . . to manage the State," of possessing a will to "rule the State."

By plan the simultaneous appearance of the *Sketches* and the *Review* was quickly followed by a *Memorial* addressed by Wheelock to "The Honorable Senate and House of Representatives, in General Court convened." In this he recalled "the patronage and munificence" which the State had accorded the College, reminded the legislature of its unique "power to correct or reform" abuses at the College, and cautioned that "those who hold in trust the concerns" of the College "have forsaken its original principles." Wheelock found reason to believe "that they [the Trustees] have applied property to purposes wholly alien from the intention of the donors," that they have "transformed the moral and religious order of the institution by depriving many of their innocent enjoyment of rights and privileges," that they have violated the charter by prostrating the rights with which it expressly invests the presidential office," and committed sundry additional offenses. A delayed fuse produced a final explosion. Said Wheelock, the Trustees were bent upon a "new system to strengthen the interests of party or sect which . . . will eventually effect the political independence of the people, *and move the springs of their government.*"

It was not Wheelock's invitation to the legislature to intervene that by itself so shook the Trustees. Exercises of the State's power in behalf of the College had been sought previously, and with some frequency, at the instigation of the Trustees themselves. But in this instance Wheelock's request for intercession was contrary to an express vote of the Trustees, and rested upon a monumental distortion of the truth. Outrageous as the charges must have appeared to anyone in possession of the facts, they were endowed by their manufacturer with a color of reasonableness calculated to arouse the sympathy of the uninformed. Most serious was the receptivity on the part of those legislators who were willing to regard the Board as a threat to the body politic, and indeed to the survival of democracy itself!

Before the Trustees had had time to develop a strategy for defense, a bill was introduced and passed by a large majority with eager Republican support in the June 1815 session of the legislature. It called for a committee "to investigate the concerns of Dartmouth College . . . and the acts and proceedings of the Trustees . . . and to report a statement of facts at the next Legislature." Wheelock wrote of his satisfaction to his brother-in-law, William Allen: "Our business is accomplished in the whole that I desired in my Memorial . . . the state are friendly to justice and the rights of humanity, and they begin to discover seriously the aristocratic spirit of the *Junto.*" Thus the controversy between President and Trustees was almost overnight converted from a subject of loose gossip in limited circles into a major political issue with statewide implications.

The new phase was felt at once in the community of scholars on the Hanover plain. One student wrote to his father in July 1815: "This affair . . . will ruin the College. If the President succeeds the Professors will leave. . . . This will be a death blow to the College, or at least its reputation will be destroyed for the present. But if the President should not succeed it is generally supposed . . . he would establish another college at Concord which would soon rival this on account of the superior local advantages. . . . About 12 of my Class [1818] talk of leaving College to enter some others. . . . Whether the President's charges are correct . . . I cannot say, but this I can say, I believe his conduct has not been altogether blameless."

The legislature's committee of enquiry elected to meet in Hanover in mid-August. Both the President and the Trustees were put on notice to be available for testimony. Wheelock on August 5 sent an urgent letter to Daniel Webster in

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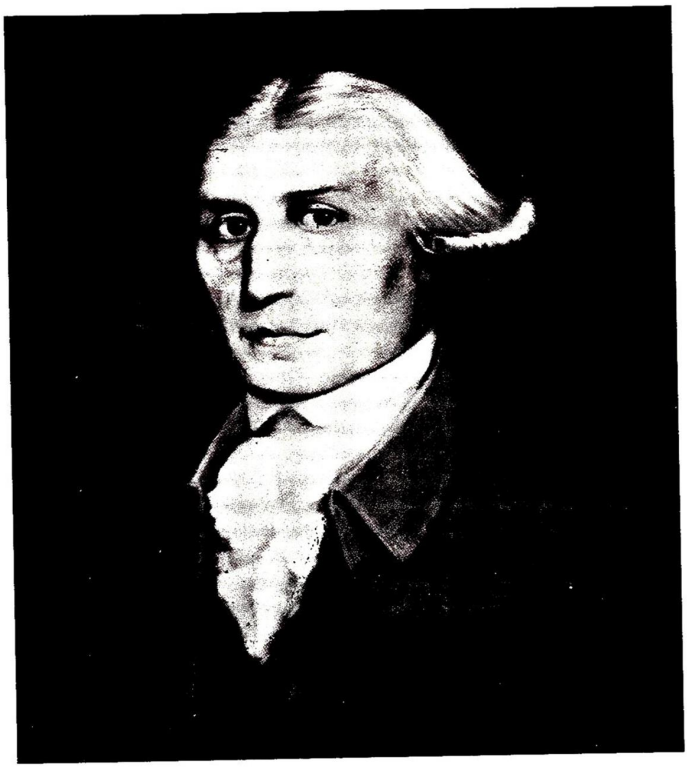
Portsmouth requesting Webster to represent him at the committee hearing. But Webster was away and did not receive Wheelock's plea until too late. Even had he received it timely, Webster, as he later declared, would not have accepted the assignment. In contrast to present-day practice, he did not consider appearance before a legislative committee as a proper engagement of his professional services. He declared icily to a protagonist of Wheelock who upbraided him for letting the President down: "I regard that certainly as no *professional* call, and should consider myself as in some degree taking sides personally and individually for one of the parties by appearing as an advocate on such an occasion. This I should not choose to do until I know more of the merits of the case." Indeed Webster's sympathies already rested with the Trustees. His letter continued: "I certainly have felt, in common with everybody else as I supposed, a very strong desire that the Trustees, for many of whom I have the highest respect, should be able to refute in the fullest manner charges which if proved or admitted would be so disreputable to their characters." And Webster chided his correspondent gently about his readiness to believe ill of the Trustees: "I am not quite so fully convinced as you are that the President is altogether right and the Trustees altogether wrong. When I have your fulness of conviction perhaps I may have some part of your zeal."

As the committee hearing approached, Wheelock's anxieties increased and, having no word from Webster, he engaged Judge Hubbard of the Vermont Superior Court, a Windsor resident, to represent him. The committee met in Hanover at the President's house and at once concluded to "confine themselves to the consideration of the facts" relating "to such subjects as might be presented for this consideration by the President and by the Trustees." The President submitted to the hearing a written "specification of charges" which did not extend beyond a single printed page when later published, as distinguished from the more than 80 pages that made up his undisciplined recital in the *Sketches*. It may be assumed that the constraints of a quasi-judicial hearing and the necessity for supporting his statement by "records, affidavits and other documents" mercifully squeezed out the surplusage.

The substance of the President's written charges was that the Trustees had improperly diverted College funds and had otherwise expended funds extravagantly, and had interfered with the proper functioning of the local church and with the charter powers of the President. The committee's report, not released until the following April, merely summarized the facts relating to the circumstances on which Wheelock relied to support his charges. It refrained from pronouncing judgment on the degree to which the facts sustained the accusations. But no reader could fail to be impressed by how feeble was the evidence, and it was not difficult to read between the neutral and unadorned lines a certain committee impatience with the man who had chosen to heat to the boiling point the internal affairs of the College. One wonders what damping effect the committee findings might have had on later unhappy developments in the legislature had the report received the wide readership attained by the sensational *Sketches,* instead of being obscured for eight months in the committee's files.

A few days after the legislative committee concluded its hearings the Trustees assembled in Hanover for their regular annual meeting, just preceding the Commencement ceremonies of August 1815. Present were the eleven men then



President John Wheelock, from the portrait by U. D. Tenney.

Trustee. After the Board had proceeded routinely through two days of formalities, Charles Marsh introduced on the third day a resolution which took note of "two certain anonymous pamphlets" published since the last annual meeting, and proclaimed:

> Whereas there is reason to believe that some member of this board or officer of the College is the author of or has had some agency in the publication of said pamphlets and whereas said pamphlets contain many charges defamatory to the board and individual members thereof and calculated to injure the reputation of this institution and impair the usefulness thereof, Resolved that a committee of three be appointed by ballot to enquire into the origin of the said pamphlets . . .

For the resolution were the eight votes of the Octagon and against it the votes of Governor Gilman and Mr. Jacob. Messrs. Thompson, Paine, and Payson were named to the committee. The Board adjourned to the following day when its committee reported that while "the nature of the case precludes the committee from obtaining positive evidence . . . evidence of a circumstantial kind has been obtained which leaves no room . . . to doubt that President Wheelock was the principal if not the sole author of the pamphlet entitled *Sketches of the History of Dartmouth College* etc., and that through his means both the pamphlets mentioned were published and circulated." The report went on to list the evidence, including numerous public attributions of the *Sketches* to Wheelock "without any disavowal on his part" and "an anonymous letter in the handwriting of President Wheelock . . . sent to Isaac Hill, Editor of the New Hampshire Patriot accompanied with a bundle of said pamphlets in which letter the said Hill was requested to distribute them among the members of the Legislature."

making up the full Board of twelve Trustees, Governor Gilman holding office both as an elected and as an *ex officio*

The President, who was not in attendance when the committee reported, was furnished a copy of the report and given

an "opportunity to offer any explanation he sees fit to suggest" by ten o'clock the following morning. The President did not appear the next day, but filed with the Board a long letter entirely unresponsive to the issue of his role in the preparation and distribution of the *Sketches*. The President concluded by asserting that "considering the Hon^ble^ Legislature of the State have, for the public good taken into their own hands to examine and regulate the concerns of the College . . . it would be wholly improper and unbecoming me to submit to any trial on charges now exhibited before your body. . . . I hereby protest against the proceedings . . . and utterly deny your right of jurisdiction in the present case."

The Board thereupon by a vote of 10 to 0 affirmed its jurisdiction over the subject matter, and accepted the report by the earlier 8 to 2 vote. The Board then adopted by the same 8 to 2 vote a resolution removing Wheelock from the office of President of the College for which the following reasons were recited:

> *First* He has had an agency in publishing & circulating a certain anonymous pamphlet entitled "Sketches of the History of Dartmouth College & Moors Charity School" & espoused the charges therein contained before the Committee of the Legislature. Whatever might be our views of the principles which had gained an ascendancy in the mind of President Wheelock we could not, without the most undeniable evidence have believed that he could have communicated sentiments so entirely repugnant to truth, or that any person who was not as destitute of discernment as of integrity would have charged on a public body as a crime those things which notoriously received his unqualified concurrence & some of which were done by his special recommendation — The Trustees consider the above mentioned public action as a gross and unprovoked libel on the Institution and the said Dr Wheelock neglects to take any measures to repair an injury which is directly aimed at its reputation & calculated to destroy its usefulness.
>
> *Secondly* He has set up & insists on claims which the charter by no fair construction does allow — claims which in their operation would deprive the corporation of all its powers. He claims a right to exercise the whole executive authority of the College which the charter has expressly committed to "the Trustees with the President, Tutors & Professors by them appointed" — He also seems to claim a right to control the corporation in the appointment of executive officers, inasmuch as he has reproached them with great severity for chusing men who do not in all respects meet his wishes & thereby embarrasses the proceedings of the board.
>
> *Thirdly* From a variety of circumstances the Trustees have had reason to conclude, that he has embarrassed the proceedings of the executive officers by causing an impression to be made on the minds of such students as have fallen under censure for transgressions of the laws of the institution, that if he could have had his will they would not have suffered disgrace or punishment.
>
> *Fourthly* The Trustees have obtained satisfactory evidence that Dr Wheelock has been guilty of manifest fraud in the application of the funds of Moors School by taking a youth who was not an indian, but adopted by an Indian tribe under an indian name, and supporting him on the Scotch fund, which was granted for the sole purpose of instructing & civilizing Indians. —
>
> *Fifthly* It is manifest to the Trustees, that Dr. Wheelock has in various ways given rise and circulation to a report that the real cause of the dissatisfaction of the Trustees with him was diversity of religious opinions between him and them when in truth and in fact no such diversity was known or is now known to exist as he has publickly acknowledged before the committee of the Legislature appointed to investigate the affairs of the College.

The Trustees went on to say that they had acted "from a denied the Board's authority to remove the President, and the charge of fraud against Wheelock in the application of the funds of Moors School as unsupported by the evidence.

The Board then proceeded to elect the Rev. Francis Brown of North Yarmouth, Maine, as President of Dartmouth College, having had indications from one of the Trustees that Brown would not refuse. A committee was appointed to inform Brown and request his acceptance. After adopting a "statement of facts" summarizing what had taken place at this momentous board meeting, the Trustees adjourned, naming a September date one month hence to reassemble.

During the interval there occurred the publication of the Trustees' answer to the *Sketches* which they titled *A Vindication of the Official Conduct of the Trustees of Dartmouth College*. They elected to offer it for purchase only, at fifty cents, though the *Sketches* had been available for the asking and had indeed been thrust upon all willing readers. Those persons who made the effort to secure and read the *Vindication* must have found in it telling answers to accusations made by the *Sketches*. Meticulously drafted (after all it was the joint work of two of the lawyers on the Board) it contrasted sharply with the *Sketches*, both as to claims and style. The tool was the scalpel rather than Wheelock's broad axe, but each was equally dipped in venom.

On September 26 the Board reassembled to welcome Francis Brown to the presidency. Only the Octagon were present for the occasion and for the simple inauguration ceremonies which followed. It was to be the last meeting of the Trustees before the legislature brought down the walls upon them.

From the moment the legislature had appointed its fact-finding committee in the preceding spring there had hung over the Trustees a pervasive worry as to what steps might ultimately be taken. They were mindful that Wheelock's maneuvering had enlisted some highly influential, if shrill, voices among the Republicans at a time when there was reason to expect the Republicans might upset the Federalists in the state elections scheduled for March 1816. Moreover, the probable Republican candidate for Governor, William Plumer, was known to be highly impatient with the controversy that had disrupted the College. The Trustees were likewise mindful that the Wheelock attributions to them of an uncompromising religious orthodoxy would arouse the religious liberals in the State, regardless of their party affiliations.

Many friends of the College shared the Trustees' apprehension. Jeremiah Mason, then a United States Senator, leading Federalist and later one of the College's counsel, had written to his cousin, Trustee Charles Marsh, in mid-August indicating he had heard rumors of the Board's intention to remove the President. "I greatly fear," said Mason, "such a measure adopted under present circumstances . . . would have a very unhappy effect on the public mind." Mason noted that a legislative enquiry was pending and declared that "the Legislature . . . for certain purposes have a right to enquire into alleged mismanagement of such an institution. . . . Should the Trustees during the pendency of the enquiry . . . take the judgment into their own hands by destroying the other party, they will offend and irritate at least all those

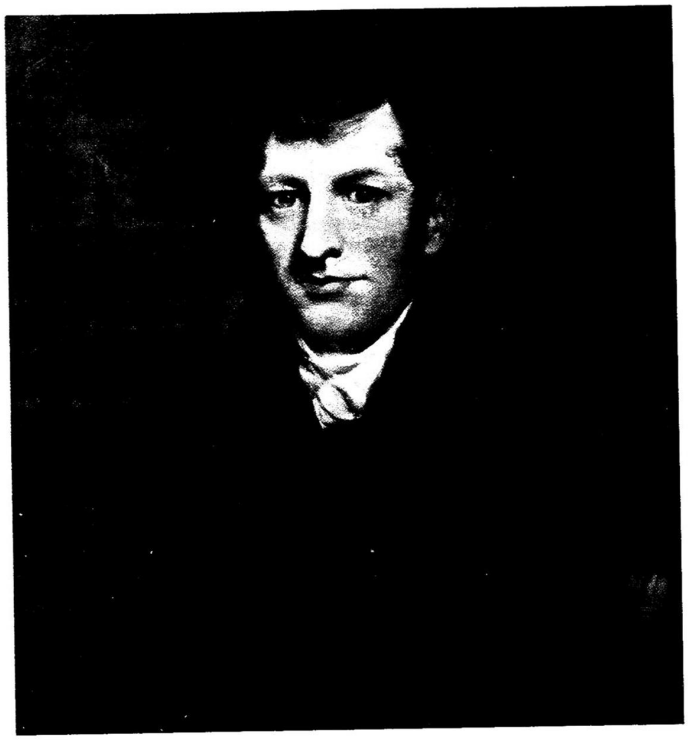
deep conviction that the College can no longer prosper under his presidency."

Governor Gilman and Mr. Jacob, the two dissenters, who were in favor of making the enquiry. . . . If the statements of the President are as incorrect as I have heard it confidently asserted an exposure of that incorrectness will put the public opinion right. It may require time but the results must be certain. . . . A very decisive course against the President by the Trustees at the present time would create an unpleasant sensation in the public mind, and would I fear be attended with unpleasant circumstances." Mason excused himself for expressing so strong an opinion on a subject "in which I have only a common interest." He confessed, he said, to being "somewhat influenced by fears that some of the Trustees will find it difficult to free themselves entirely from the effects of the severe irritation they must have lately experienced."

Mason's warning was before the Board at the time the dismissal of the President occurred, and they endeavored to counteract the effects which Mason anticipated by associating with the resolution of dismissal a declaration that "the measure cannot be construed into any disrespect to the Legislature of New Hampshire whose sole object in the appointment of a committee to investigate the affairs of the College must have been to ascertain if the Trustees had not forfeited their charter and not whether they had exercised their charter powers discreetly or indiscreetly — not whether they had treated either of the executive officers of the College with propriety or impropriety." The weakness of the Trustees' disclaimer was that, though it enunciated a good legal principle, the distinction which it drew was too esoteric to make a public impression. Another astute observer correctly predicted a public revulsion at the Wheelock removal which "will probably bring in Plumer [expected Republican candidate for Governor]", and produce a "revolution in the Politicks of the State" to continue until it has "destroyed one of the fairest Literary Institutions of the Country." Such a forecast came perilously close to realization.

The Trustees clung to the hope that their dismissal of the President would in fact quiet down the furor, as was indicated in Marsh's reply to Mason, written after the dismissal had occurred. Likewise clear from Marsh's letter was the conviction that they had no real alternative to the dismissal. "I only regret" wrote Marsh to Mason, "that you, Mr. Webster and some few others could not have been with us [at the Trustees meeting at which Wheelock was removed] and have taken a view of the whole ground." If the President had been left in office, asserted Marsh, he would have retained powers of resistance "which he cannot now call into action. . . . The decisive measure being taken, we think that Federalists who under other circumstances might be otherwise inclined will abandon the concerns of the College to the care of the Trustees and still rally around the standard of political party."

Events moved swiftly in the ensuing months. John Wheelock had warned Francis Brown before the latter's inauguration that he, Wheelock, would continue to consider himself "the rightful President of Dartmouth College" and that he felt confirmed in this view "by the tenor and spirit of the charter and by high authorities in Law." Wheelock conducted himself accordingly and forbade tenants of the institution to pay rent to any but himself. He received communications of support from sundry sources, including one from Elisha Ticknor, successful Boston merchant and father of George Ticknor. Reports from elsewhere in Massachusetts and from Portsmouth indicated widespread sympathy with him. The New Hampshire press, virulent whenever it spoke, was divided in its support, with the balance probably in favor of Wheelock



President Francis Brown, painted by S. F. B. Morse.

the Woodward offices. Thus locally the affairs of the Trustees rested in the hands of President Brown and Olcott. Brown sought to establish his authority in the eyes of tenants of College properties. But the latter refused to pay the rents "so long as Doctor Wheelock claims them likewise." This was a blow to the College as it was desperately in need of funds.

Among the Hanover citizenry the majority seemed to favor the Trustees but there were some conspicuous exceptions including, embarrassingly, Dr. Cyrus Perkins, principal figure at the Dartmouth Medical School. For the rest the faculty were in full support of the Trustees. Apprehension among the students is illustrated by a letter which Rufus Choate, then in his first year at Dartmouth, wrote in early March 1816. "Respecting the affairs of this College," said Choate, "everything is at present in dread uncertainty. A storm seems to be gathering . . . and may burst on the present government of the College. . . . If the State be Democratic a revolution will take place, probably President Brown may be dismissed. In that case the College will fall."

As the March 1816 New Hampshire elections approached Trustee Thompson, then attending as a Senator the session of Congress in Washington, wrote his brother-in-law, Mills Olcott, in Hanover: "I do hope & pray that our friends throughout the State will duly appreciate the necessity of making an extraordinary exertion for the preservation of the College. . . ." Thompson, who shared rooms in Washington with Daniel Webster, observed that "we talk up the affairs of learning and politics at a great rate." Trustee Charles Marsh was likewise serving in Washington as a member of Congress from Vermont, and shared lodgings there with his cousin Jeremiah Mason. There were thus unhappily removed from

Wheelock.

William H. Woodward, Secretary and Treasurer of the Board and nephew of the deposed President, had forsaken the Trustees to stand by his uncle; and Mills Olcott, lawyer and long-time Hanover resident, had been appointed to fill the role of principal correspondent with President Brown and the other Trustees.

The Federalists had nominated James Sheafe for Governor, while the Republicans selected as their candidate William Plumer, a former United States Senator from New Hampshire, and one who had not been reticent in expressing his displeasure at the state of affairs at Dartmouth College. After his nomination Plumer wrote to Col. Ames Brewster, a Wheelock supporter in Hanover:

> From the information I have received from various parts of the State there is a high probability that in every branch of the government this year there will be a Republican majority, and I think a cordial disposition to do justice to the injured Wheelock. If I should have any part to act in the government I will make at least an effort to reduce the wrong he has suffered and repair the injuries that have been arbitrarily inflicted on the literary institution which he has nurtured and over which he has so long and ably presided. Will it not be requisite that his friends in your vicinity should before June [when the new Legislature was to convene] devise a system not only to restore him to his rights but to prevent the College being again exposed to similar evils?

Plumer's election was overwhelming and, contrary to the Trustees' hopes and indeed expectations, it came about not only through Republican support but also the support of many Federalist friends of John Wheelock. That public opinion — or at least opinion in influential circles — was now running against the Trustees became all too clear. In early April President Brown wrote to a clerical colleague who had some acquaintance with the new Governor and with Samuel Bell, Dartmouth 1793, another towering Republican figure whom the new Governor was about to appoint to the New Hampshire Superior Court. Brown spoke of the Trustees' and his own desire to "disseminate correct information among men of influence," deplored "the accidental circumstance that some leading Federalists in the State belong to the Board of Trustees has been seized by Dr. W. as furnishing him with the means of enlisting on his side the political feelings of the opposition party," denied "that political considerations were among the inducements of the Dr's removal," and declared wistfully that "those who have not been brought to act with Dr. Wheelock know very little of the man. And those who have long acted with him are frequently surprised by some new exhibition of his character." Brown covered dispassionately and in some detail the facts of the controversy from the Trustees' viewpoint, and then concluded with the following appeal:

> I have thought that at this time of excitement and general anxiety respecting the College this communication might not be unacceptable to you nor without its use to us. In the company of your friends I wish you to make that use of its contents which you judge to be prudent and proper. I mention particularly the Hon. Sam[l] Bell with whom I have not had the pleasure of an acquaintance, but who has been a Trustee of the College and who I think might employ an influence for our benefit. With the Hon. Mr. Plumer's feeling in relation to the College I have not been made acquainted. I have no doubt however that measures have been taken before this time by Dr. W. to induce him to insert a paragraph into his speech or message at the opening of the Legislature bearing on the Trustees. I hope he will think proper to omit the College dispute altogether or if he should speak of it to avoid anything more than to announce the general subject.

the New Hampshire scene four of its most influential Federalists who might have helped guide opinion in the State away from the Republican view. However, they made the most of their association in Washington, with Marsh filling be in Concord for the opening of the legislature in June. There he was joined by his fellow Trustees, Asa McFarland and Elijah Paine, as representatives of the Board, and President Brown was likewise on hand to observe the events affecting the College.

When Governor Plumer addressed the legislature on June 6 he noted that the College's charter had "emanated from royalty" and "contained . . . principles congenial to monarchy," including the provision for a self-perpetuating Board of Trustees. This provision he called "hostile to the spirit and genius of a free government." Plumer claimed a right for the State "to amend and improve acts of incorporation of this nature." The Governor's message and the belated report of the fact-finding committee which had met in Hanover the preceding August were referred to a special committee of legislators. Without waiting for the report of the Hanover hearing to be printed the special committee brought in a bill entitled "An act to amend, enlarge and improve the Corporation of Dartmouth College." Despite formal remonstrance by the representatives of the Trustees and an offer by them, fortunately rejected, to compromise by accepting a Board of Overseers drawn from State officers with a veto over the Trustees, an act was passed by both houses voting along party lines.

To concede by hindsight that Jeremiah Mason was right and the Trustees wrong in their evaluation of the consequences of their dismissal of John Wheelock by no means leads to a conclusion that the dismissal should not have been made when it was. With comfortable Republican majorities in both houses of the legislature supporting a Republican Governor, it is probable that forbearance on the part of the Trustees would not have forestalled the fateful June 1816 legislation. On the other hand, if they had continued to be saddled with an antagonistic President and had lacked the extraordinary leadership of the new President Francis Brown, their capacity to resist the consequences of the legislature's determined attack would have been immeasurably reduced.

The legislation altered the name of the institution from the "Trustees of Dartmouth College" to the "Trustees of Dartmouth University."* It increased the number of Trustees from 12 to 21, "the majority of whom shall form a quorum for the transaction of business" (a petard which later hoisted the University Trustees in a most embarrassing way). The new Board was given "all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed . . . by the Trustees of Dartmouth College." Another provision created "a Board of

* To avoid confusion between the two Dartmouths each of the

Meanwhile Congressman Marsh in Washington, through letters to President Brown in Hanover and to the other Trustees, endeavored to develop a strategy to forestall action by the legislature adverse to the Trustees. But only Senator Thompson among the principal Washington strategists could

terms "University" and "College" is reserved for only one of the institutions. This exclusivity, while a convenient artifice, does not accord with the practice of the period. Before the forced duality of the institution, persons identified with Dartmouth frequently used the term "university" in a generic sense to apply to the College. So too the authorities of the University during its brief life occasionally used "College" adjectively in referring to elements of the University, as for example "the College chapel."

Overseers, who shall have perpetual succession and whose number shall be twenty-five," with power to "confirm, or disapprove . . . votes and proceedings of the Board of Trustees." From New Hampshire the President of the Senate and the Speaker of the House, and from Vermont the Governor and Lieutenant Governor, were made *ex officio* Overseers. The New Hampshire Governor and Council were given authority to "fill all the vacancies on the Board of Overseers" and "complete the present Board of Trustees to the number of twenty-one . . . and . . . to fill all vacancies that may occur previous to, or during the first meeting of the said Board of Trustees." Finally the Governor was authorized "to summon the first meeting of . . . Trustees and Overseers to be held at Hanover on the 26th day of August next."

The effect of the enactment upon the Trustees was stunning; nor was it the more acceptable for being inevitable. "I cannot endure the pain," wrote Senator Thompson who had witnessed the legislature's headstrong attack, "to recollect the proceedings . . . much less can I bring myself to write the disgusting details. . . . Our friends belonging to the Legislature and every other one whom I have met advise us to refuse to accept the new act or to accede in any shape to the new Legislature's modifications." A few days later Charles Marsh, in response to an enquiry from President Brown, gave his view that "the act is altogether unconstitutional and must be so decided could the question come before a competent and dispassionate court." Marsh, too, urged resisting the act rather than yielding. Thompson on a visit to Portsmouth, where he found much pro-College sentiment, conferred with his fellow Trustee, Timothy Farrar, and with Daniel Webster and Jeremiah Mason. He reported their common view to be that the Trustees should "maintain the original corporate rights and try the issue." Farrar urged an immediate approach to Jeremiah Smith, as well as to Mason and Webster, to obtain their guidance as to what specific measures should be pursued.

Thompson recommended that President Brown call a meeting of the Trustees for late August to decide upon a course of action. The meeting should be, said Marsh, "in precisely the same style as though the Legislature [had] not attempted to interfere." He stressed the importance of the Trustees avoiding "every act which can be construed into a recognition of the authority of the Legislature to encroach on our powers and rights in the manner they have attempted to do. . . . Our adversaries must be aware that . . . we shall at some time or other be able to . . . unravel all their proceedings. This consideration will probably check them more than any other. . . . The measure of *resistance* . . . is the only one which . . . affords any share of hope. . . . [We must] go as far as we can . . . to execute the powers vested in us by the Charter, and when we have gone this far to adopt the Quaker system of withholding our active cooperation in anything done by others — we must continue to keep this corporation alive."

These brave words, at a dismally low point in the College's fortunes, were a clear call to civil disobedience. But Marsh also had an eye for the practical difficulties, of which one was the College's extreme shortage of funds. Particularly was he solicitous about the precarious financial situation of Dartmouth University," which with the twelve old Trustees would complete the complement of twenty-one prescribed by the legislature. At the same time, the twenty-one members of the new Board of Overseers were named. That advance consent to serve had not been obtained in all cases is evident from the refusal of membership by Justice Joseph Story of the United States Supreme Court whom Plumer had listed among his appointments.

The legislature had carefully prescribed August 26 as the date of the first meeting of the new Board, and Hanover as the location. When the Governor sent notices of the meeting to the old Trustees the responses were in most instances discreet and noncommittal. The replies of Trustees Farrar and Payson were perhaps a bit more expansive than the circumstances required, but this merely illustrated that while these two men were actively aligned with the Octagon, they were by age and preoccupation a bit more removed from the center of strategy planning than were, for example, Marsh, Thompson, McFarland and, of course, Brown.

President Brown issued his call for a Hanover meeting of the College Trustees for the same date that the statute had fixed for the University Board meeting. When the appointed time arrived — Monday, August 26, 1816 — there ensued a ludicrous two-day minuet between Governor Plumer, as temporary chairman of the University Board, and President Brown, each declining to recognize the existence of the other's Board. Plumer and his followers met in the office of the disaffected College Treasurer, William H. Woodward, while the College Trustees met in the study of President Brown. At the Plumer meeting but nine persons were in attendance out of the full complement of twenty-one. Among these was Stephen Jacob, the only Trustee present from the old Board. Others formerly identified with the College were William H. Woodward and Cyrus Perkins. Also in attendance was Levi Woodbury, Dartmouth 1809, later appointed by Governor Plumer as judge of the New Hampshire Superior Court.

Present at the meeting of the College Board, in addition to President Brown, were Thompson, Farrar, Paine, Marsh, McFarland, Smith, and Payson. Of the Octagon only Niles was missing. By that time all had formally declined to attend the Governor's meeting. The old Board's first act of business was to adopt a defiant resolution of resistance: "We the Trustees of Dartmouth College do not accept the provisions of an act of the Legislature of New Hampshire approved June 27 . . . but do hereby expressly refuse to act under the same."

President Brown immediately transmitted the resolution to the University Board. The point of no return had in effect been reached.

At least the five lawyers among the Octagon could have been under no illusions about the seriousness of the step they had chosen to take. Yet the solemnity of the situation had it moments of comic relief. The old Trustees saw their strategy succeed when the unhappy Governor Plumer, after fruitless summons to President Brown and associates to at-

President Brown. "I feel this subject much at heart" he wrote the President, "and especially when I reflect how much trouble and anxiety you . . . have experienced." Characteristically, Brown seemed to worry far less about his plight than did his associates.

Meanwhile, in late July the Governor and Council, exercising their new authority, appointed nine new "Trustees of [illegible] fruitless summons to President Brown [illegible] tend the University Board meeting, was unable to obtain a quorum. In consequence the Governor was forced to declare his meeting adjourned, without his Board having been able even to organize, to say nothing of taking substantive action.

It was not an outcome designed to endear the old Trustees to the Governor. Nor was his discomfiture relieved when he learned that so tightly had the legislature seen fit to prescribe the time and place for the first Board meeting, and his powers with respect thereto, that a miscarriage having occurred, he was without authority, until corrective legislation could be obtained, to call another meeting.

This contretemps left Francis Brown, his Board, and his loyal faculty unexpectedly in undisputed charge of the institution. The 1816 Commencement exercises followed immediately upon the Trustees' decision to resist. It was to be the last such ceremony without threat of University interference until 1819. The occasion produced an unexpected and munificent gift to the College from John B. Wheeler, an Orford N. H., merchant. His donation of $1000 was intended to enable the Trustees, in his words, "to test their rights by a suit at law." The amount was the equivalent of two-thirds of a whole year's endowment income. While the full measure of the Trustees' gratitude was not registered until nearly ninety years later when a new dormitory was named Wheeler Hall, the gift produced immediate and enormous benefits, both real and psychological.* Over the College community hung the full weight of ultimate uncertainties. "It is to be feared that the best days of this institution are over," wrote one student to a friend. "Should the game be pursued the sons of Dartmouth may prepare to see their alma mater thrown into convulsive agitation from which she cannot recover . . . we may expect an overturn here. In that case I shall go to some other college."

The College Trustees again gathered in Hanover for a Board meeting of their own on September 29, 1816. Their first act then was to issue a call to William H. Woodward, still officially holding the office of Secretary of the Board, to attend and deliver "the records and seal appertaining to the office of Secretary." Not unexpectedly Woodward refused either to attend or to deliver the items demanded, whereupon the old Trustees removed him from office and appointed Mills Olcott in his stead.

The reopening of College in October produced about the same number of students as in the preceding academic year, reported Professor Adams. The Professors found, too, that in Hanover "current opinion has been setting more and more favorably for the old Trustees ever since Commencement." A quiet but determined contest prevailed between the officers of the two institutions to collect rents on College properties; but the tenants, understandably, continued to refuse risking wrong payment.

In November the Governor requested enabling legislation to permit calling the University Board together. The legislature readily responded in December by amending the quorum requirements and resolving ambiguities as to the Governor's authority to assemble the new Board. Student Rufus Choate on December 16 in a letter to his brother described the new legislation as "authorizing nine of the new Trustees only to do business, a number which it is supposed can very easily at any time be assembled. That the body will convene immediately perhaps before the end of the term and remove the whole of the present government of the College and supply their places with men of their own party is what the best informed among us confidently expect."

As the year 1816, so full of portent, drew to a close, President Brown polled his Trustees on a proposal to attempt through the courts to obtain a recognition of their charter rights and a rejection of the legislature's effort to alter them. Brown noted that Mills Olcott was securing an informal opinion from Jeremiah Mason on what action to take. Before replies could be received from the Trustees the legislature took a further step, seeming to justify Marsh's earlier judgment expressed to Brown that "no one can tell . . . what in the wantonness of power they may have the madness to attempt." On December 26, 1816 there was passed a statute which came to be known as "the penal act." It provided that anyone who purported to exercise authority on behalf of the institution, except pursuant to the legislation which had established the University, would be subject to a forfeiture of $500, "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." This oppressive hunting license contained the possibility of breaking the old Trustees, as well as the faculty associated with them in operating the College. The $500 penalty was not limited to but one application; it extended to each forbidden act by each individual. Thus, in the course of a single meeting of the old Board each Trustee could conceivably be exposed to a dozen forfeitures each of $500, depending on how many pieces of business were handled at the meeting. The conducting of every class of instruction subjected each loyal faculty member to a similar forfeiture.

JANUARY 1817 was an anguished month for the College Trustees. The "penal act" put their strength of purpose to a severe test. Particularly worried was Senator Thompson whose family obligations and financial resources seemed precariously balanced. Marsh, too, suffered moments of indecision. On the other hand, Judge Farrar ("the sooner the question is decided the better it will be for the College") and Judge Paine ("the only way is to persevere fully in the old order. . . . We ought not to look back") urged a prompt contesting of the legislation. Perhaps bravest among the Trustees, because he trusted most, was the Reverend Asa McFarland, Concord clergyman and youngest member of the Board. Unlearned in the law himself, he supported solely on faith a prompt initiating of legal action. The disquietude of Thompson and Marsh subsided, and by the latter part of January they were in full, and indeed enthusiastic, support of a course of resistance to the end.

It is impossible to weigh fully the influence of an occurrence of the first importance at this moment. Hamilton College, having just lost its president by death, offered the succession to Francis Brown, at double his Dartmouth salary, and of course with assurance that his compensation, whatever it was, would in fact be paid. Hamilton was already a well-established, highly respected, and relatively prosperous college with an unclouded future. That Brown, despite this

* Throughout the controversy the College was constantly in need of funds. Solicitations among alumni and friends went on almost without interruption. Though none was the equal of, nor yet approached, the Wheeler gift of 1816, contributions were steadily fed into Hanover. Individual gifts of fifty cents, a dollar, two dollars, came in from many. There were fewer at five and ten dollars. Twenty dollars marked almost a summit. Rare indeed was the donation of fifty or one hundred dollars. Yet they all added up to sustain the College, precariously it is true, through a period of crisis.

college with an unclouded future. That Brown, despite this temptation and under the most trying conditions, elected to remain as the head of an institution with so dubious a future is telling evidence of the character of this extraordinary man. It is hardly an exaggeration to say, as surely his Trustees themselves felt, that Dartmouth College would have suffered a staggering blow in Brown's departure. There was literally no one else to carry on his kind of inspired leadership, without which the whole cause of the College might well have foundered. Brown's decision put new strength and determination into the Trustees.

Next to be faced was a troublesome, if secondary problem. Throughout much of the nineteenth century, American courts and lawyers were severely trammeled by a complex of intricate formalities and procedural requirements for commencing litigation. Inherited from English common law, the rites, whatever may have been their justification in earlier centuries, had become by this time obsolete accretions serving only to trip up litigants and their lawyers and to harass courts with a proliferation of hearings on basically irrelevant issues. The launching of a suit by the Trustees was, in common with others at this period, beset by the peril of selecting the wrong procedural approach and in consequence encountering an adverse decision on what today would be regarded as an unconscionable technicality. Diverse views among the lawyer Trustees on precisely what form of action to elect were at last resolved, with the aid of counsel, by fixing upon an action in trover against William Woodward in the name of the Trustees of Dartmouth College for the recovery of the minutes of Trustees meetings, the original charter, the seal, and sundry account books, all of which Woodward had retained in his possession on his defection to the new Board.

On February 8, 1817 suit was initiated in the Court of Common Pleas for Grafton County and immediately transferred to the Superior Court of the State of New Hampshire. This was then the State's highest court and ordinarily an appeal court, but the lower Court of Common Pleas was bypassed because the defendant, William Woodward, was himself a judge of that court. Thus the Dartmouth College Case began.

While the strategy of the College had been taking shape, the cause of the University had been suffering. Not until February 4, 1817 did the University Trustees come together in Concord for their first regular meeting. Even then it took two days before a quorum could be obtained, so unwieldy was the size of the Board and so devoid of deep commitment were most of its members. Meanwhile, the two principal University adherents in Hanover had become seriously incapacitated by ill health. Woodward himself, on whom much depended, was so plagued by illness that he briefly contemplated not attending the Concord meeting. But, more seriously, John Wheelock's health had so declined that it was clear his affliction was terminal. The University Trustees were thus denied on-the-scene agents comparable in interest, if not in ability, to Francis Brown and Mills Olcott for the College, a deficiency which was not overcome by the recruiting of William Allen and Dr. Cyrus Perkins in corresponding positions for the University.

The University Board proceeded at the Concord meeting to "discharge and remove" from office President Brown, the resisting Trustees, and the two non-cooperating faculty members, Professors Roswell Shurtleff and Ebenezer Adams, all of whom until then nominally held University positions on the theory that the University was successor to the College. Fully recognizing that the state of Wheelock's health pre-

took over his father's First Congregational Church in Pittsfield, Mass., where he remained until coming to Hanover in 1817. In 1813 he had married Maria Malleville Wheelock, John Wheelock's only child. Allen has been variously described by contemporaries as "inflexible," "stately," "stiff," "unyielding." His manner was said to provoke opposition both from students and associates.

The University Trustees appointed three of their Hanover adherents, Dr. Cyrus Perkins, Amos Brewster, and James Poole, as "superintendants of the College buildings" and directed them "to take possession of the College [as Dartmouth Hall was then known], Chapel and Commons Hall . . . and cause them to be well provided with suitable fastnesses and prevent intrusion by any." This triumvirate made demand on President Brown for the key to the Chapel and on Professor Shurtleff for the key to the library. Both declined to accede, whereupon the "superintendants" without further formalities occupied Dartmouth Hall ("the College"), which housed the library, and the adjoining chapel building. This confrontation was brief and, unlike a later one, nonviolent. In early March Rufus Choate reported the affair from the student viewpoint in a letter to his brother:

> The partisans of Plumer . . . took possession of the College buildings and Library and opened the campaign . . . by uniting in prayer literally with but a single student in the Chapel! President Brown and friends immediately engaged a large and convenient hall as a chapel and entered it that same morning with every scholar in town but the one above-mentioned. The students [have] now nearly all [returned for the opening of a new term] and the following is the number on the side of the university; freshmen none, Sophomores 2, juniors 1, seniors 4; total 7. Possibly 2 or 3 more may join them. . . .

Another student, a junior in the College, wrote to his brother:

> The College students have equally as good instruction as they have had for years past, and their advantages are the same except that we have not access to the College Library. However there are such a variety of books in the Society Libraries it is not considered much of a loss. . . . It appears to be the determination of the old officers not to be frightened from their ranks until it be legally decided, and if it be determined against them, and there is no appeal, undoubtedly a large number of the students will leave. They will not join the University. We wait with anxiety to know the results.

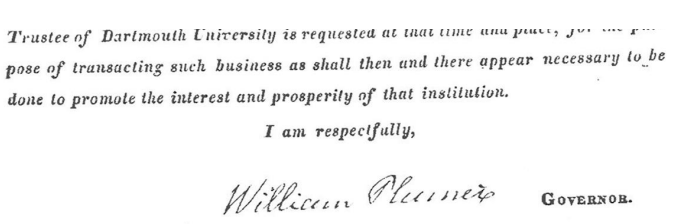
New-Hampshire Executive Department.

Concord, *December* 20, 1816.

Sir,

In pursuance of a law of this State, you are hereby informed, that a meeting of the Trustees of Dartmouth University will be holden on Tuesday the fourth day of February next, at two o'clock in the afternoon of that day, in the hall, commonly called Mason's hall, over the bank in the southerly end of the main street in Concord, in the county of Rockingham. And your attendance as a

cluded his serving as president of the University the new Trustees nonetheless elected him to that office, providing at the same time that the duties of the presidency should be discharged by Wheelock's son-in-law, William Allen. The latter was likewise appointed Phillips Professor of Theology to succeed the deposed Shurtleff. Allen, then 33 years old (he and Francis Brown were only nine days apart in age), was a graduate of Harvard. Son and grandson of clergymen, he had studied theology in Brookline, Mass., and in 1810



Trustee of Dartmouth University is requested at that time and place, for the pur-
pose of transacting such business as shall then and there appear necessary to be done to promote the interest and prosperity of that institution.

I am respectfully,

William Plumer GOVERNOR.

Governor Plumer's call for a meeting of University Trustees.

Dr. Nathan Smith, iconoclast, founder and professor of the Dartmouth Medical School, wrote to Mills Olcott from New Haven: "If there should be a prospect of a pitched battle between the College and the University I hope it will take place before my arrival, as I have not forgotten the sage advice of Falstaff that it is best to come in at the beginning of a feast, and the latter end of a fray."

Though Choate scornfully dismissed the few students who supported the University authorities, the students on the side of the College did not possess all the commitment. A member of the Class of 1817 wrote in early April:

> When I reached Hanover I found division among the students. . . . I did not hesitate to enlist under our ancient President [Wheelock] though his followers were but few, only fourteen and they are but fifteen now. . . . I did not wish to join to assist men whom I considered to be engaged in a bad cause. . . . Dr. Brown, Adams, Shurtleff have left the university and are reduced to the miserable necessity of making a hall a sanctuary for their divinities and to occupy kitchens for recitation rooms. They have no library . . . and teach as private instructors, each class pay their own masters. . . . The situation of the old Board is, as all parties ought to be who resist the laws, distressing.

Almost the last rational acts of John Wheelock were three for the benefit of the University. The first was a conveyance to the University of extensive lands to support a president, contingent upon the validity of the legislation creating the University, and to revert to Wheelock's heirs if the legislation failed. Second was a release to the University of a debt of $6000 said to be owing to him for back salary. Third was the execution of his will granting further lands to the University to establish professorships in Mathematics and Greek, again with the proviso that if the legislation on which the University rested should fail the lands should go elsewhere, this time not to his heirs but to the General Assembly of the Presbyterian Church for the use of the Theological Seminary at Princeton University. The unevenness of his signatures on these documents evidenced the critical state of his health.

The following month John Wheelock died, mercifully spared knowledge of the outcome of his elaborate scheme to put down his enemies. William Allen was elected to succeed him as President of Dartmouth University. One is impelled to reflect on what would have been the result for Dartmouth, and for other private educational institutions, had the Trustees not so constricted Wheelock that he felt driven to break openly with them scarcely a year and a half before his death. With a few more months of Trustee forbearance the chain of events that radically altered the history of private education in America might not have been set in motion.

An almost fortuitous union of forces brought about the successful weathering of the College's ordeal. Evidence of two of these has already been seen: the profound personal involvement of several fulfilled one term as Governor of the State, and ten years as its Chief Justice. With the defeat of the Federalists in 1816 he had returned to private practice in Exeter. A strong Federalist and hostile to Jeffersonian doctrines, Judge Smith had a reputation for caustic wit which he visited freely, in and out of court, upon friend and foe alike.

Mason, nine years younger than Smith, was born in Connecticut. After graduation from Yale he came to New Hampshire, later taking up residence in Portsmouth, then the largest town in the State. For many years he held undisputed supremacy among Portsmouth lawyers, challenged only by Daniel Webster during the latter's brief practice in that place. During his long residence in New Hampshire Mason served as Attorney General of the State and as a Federalist member of the United States Senate. In 1816 he declined to accept appointment as Chief Justice of the New Hampshire Superior Court. When the Dartmouth College Case came on for trial before that court Mason was considered to be among the greatest lawyers of his time. Standing six feet and six inches, he was an imposing courtroom figure.

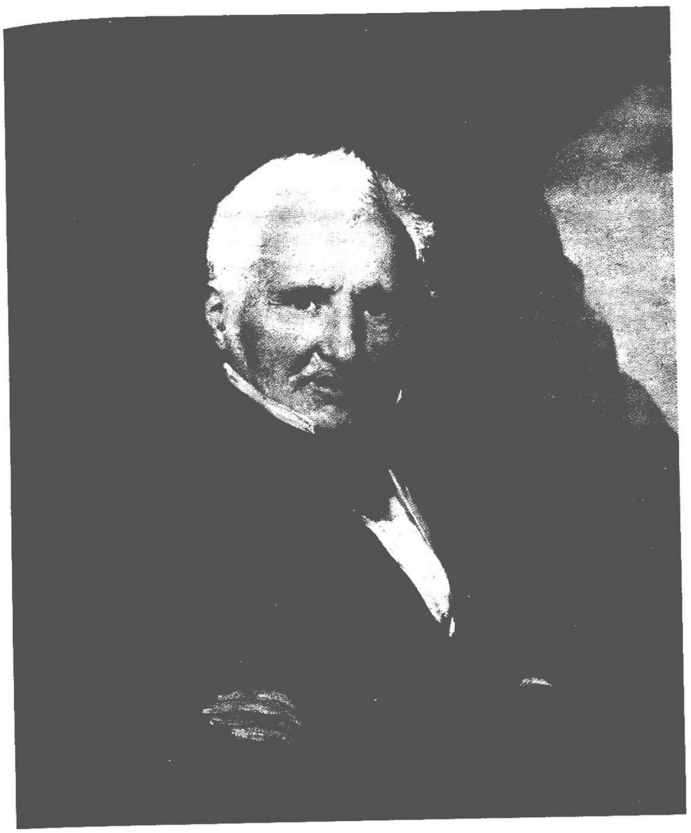
The third and junior counsel was Daniel Webster, then 35 years old. As the only Dartmouth alumnus among the three, his relation with the College had been more intimate than the others, though Smith as Governor of the State had served briefly as an *ex officio* Trustee. In 1816 Webster moved from Portsmouth to Boston. When the case opened he was still much occupied in getting established in his new location, and perhaps in consequence of that his role in the litigation while it was before the New Hampshire court was minor, compared with the participation of Smith and Mason.

It is not clear why Mills Olcott, acting as the Trustees' agent, delayed so long after filing suit before formally retaining counsel. Two months earlier he had consulted Jeremiah Smith on procedural technicalities, and in Washington, Marsh and Thompson had maintained a dialogue on the issues with Jeremiah Mason, fellow member of the national legislature. By letter Thompson too had laid a few of the questions before Webster for his informal views. But as late as mid-April 1817, and only a month before the first hearing of the case was due to occur, there was still some ambiguity about who was representing whom. A friend of the College wrote from Portsmouth to Francis Brown on April 11 that Mason had just turned aside an approach by the University to represent its side, at the same time asserting that "he has not been at all consulted [by the College] in the commencing or conducting of a suit." Thompson wrote to Olcott as late as April 25 saying "Judge Smith talks as if he were not under obligation to prepare himself to argue our College cause next month. I do not know what this means. . . . If any further application is necessary or any fee pray take the necessary steps."

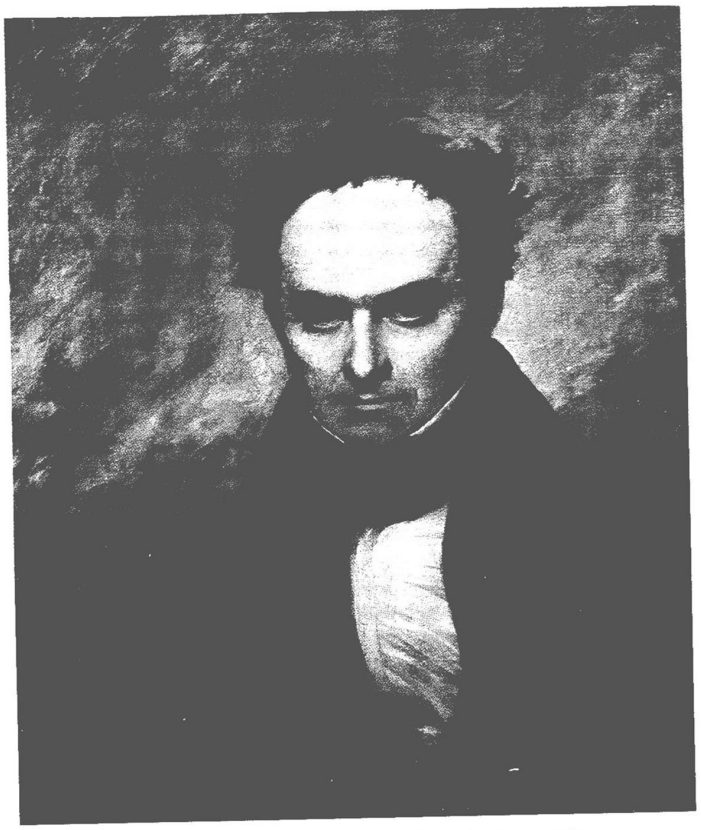
The "necessary steps" were in fact timely taken, for both Mason and Smith appeared at the May term of the Superior Court held in Grafton County at which *Trustees of Dartmouth College vs. Woodward* was docketed. While the principal arguments in the case were deferred until the September

key Trustees, and the steadfast leadership of President Brown. Now to unfold was a third: the preeminence of the College's legal counsel. It is doubtful that the final triumph could have come about had any one of these three elements been lacking.

Beyond all challenge the two senior leaders of the New Hampshire bar at this time were Jeremiah Smith and Jeremiah Mason. Smith, a native New Hampshireman and in his 59th year when the case opened, had been in practice or on the bench for nearly thirty years. During that period he had also served New Hampshire in the United States Congress,



Jeremiah Smith, portrait by Francis Alexander.



Daniel Webster, portrait by Francis Alexander.

suspect a slightly lesser degree of personal involvement on the part of Mills Olcott as the Trustees' agent for the suit. After all he was himself a busy lawyer and, though secretary of the Board, he was not a Trustee. Thus his hide was notably more remote from a threat of goring than were those of the President or the Board members. A letter from Brown to Mason in early August leaves it unclear whether the President detected a lack of diligence on the part of Olcott, or whether he was merely demonstrating a common concern among clients lest their counsel neglect their cause for a competing one. Brown assured Mason:

> Unnecessarily to intrude, even in a concern deeply interesting to myself and friends, upon a gentleman much engaged in public business has hitherto prevented me from writing you. The agency in the College cause is committed by a vote of the Trustees to Mr. Olcott in whose judgment and zeal we all have certain confidence and I have feared it would not be welcome to you to be occupied by letters from the College officers. An omission to write is not, however, to be construed as evidence either of indifference to the cause at issue or of a want of becoming respect and courtesy to one on whose talents and exertions we rely for its support. This consideration forbids any longer delay.

term, it appears that Mason at least made a beginning at the May term in Haverhill, for we find Webster, who was not present at this term, writing to Mason in June that "the College people thought you made a strong impression in their cause."

The reputation of both Smith and Mason before the New Hampshire courts made their services in great demand. The case of Dartmouth College was but one of many litigations requiring their attention. To the Trustees and the President, on the other hand, the case transcended all else. One may

I can think of no other question, except one which should be related to personal character, on the decision of which consequences depend so important to myself and to the other officers of the College as that for which your services are engaged. In case of a failure we will be cast, either without property or but little, upon the world. Some of us have large and all of us growing families and must seek new spheres of action and new means of support. This is a condition in which we should of course be very reluctant to be placed. Add to this that we regard the services of the Charter Trustees as being essential to the prosperity and usefulness of the Institution, and as deriving still greater importance from its bearing on the stability of all similar literary corporations in our country.

Jeremiah Mason, portrait by Chester Harding.

To the Trustees on a recent occasion when I had the offer of an eligible establishment in New York [Hamilton College] I formally proposed the question, in case of my remaining here I must expect them if necessary to prosecute their suit to final decision, though to the Supreme Court of the United States. They promptly and decisively answered in the affirmative. We are not without hope that a favourable decision be given in our Court; though it be otherwise, you may be assured the cause will not be abandoned. I mention this because I have understood that some doubt has been expressed by Judge Smith or yourself whether the Trustees would have the resolution to go forward.

The University, in session since its Board was able to organize in February, elected to hold its first Commencement exercises, in 1817, on the customary date in August long prescribed in the College bylaws. The College, operating of course under the same bylaws, scheduled its Commencement exercises for the same date. On a collision course, each institution asserted its right to use the Meeting House in accord with established practice.

As the day approached rumors of a forcible seizure of the Meeting House by University adherents aroused the students in the College. To forestall any such design, about sixty of the College students and their sympathizers occupied the building, arming themselves with canes and clubs. A counter mobilization of University forces was met determinedly by a heavy guard at each lower window and a battery of stones poised for release at all upper windows and the belfry. The University forces withdrew.

Efforts on the part of President Brown to bring about a compromise by settling on different hours for the respective exercises met with insistence by William Allen that the University have precedence. Those in possession were unwilling to accord it. On Commencement day, seemingly by common consent at the last moment, the College procession moved into the Meeting House at the usual hour of 9 a.m., and the University delayed until 11 o'clock, when its procession marched to the much smaller Chapel in the College yard. Confrontation had been avoided. On that day the College graduated thirty-nine and the University eight.

THE opening of the fall term of the New Hampshire Superior Court at Exeter was scheduled for the following month. The case of the College against the University was set for hearing. Some days before the hearing Webster wrote, on September 4, to Jeremiah Mason in Portsmouth:

Judge Smith has written to me, that I must take some part in the argument of this college question. I have not thought of the subject, nor made the least preparation; I am sure I can do no good, and must, therefore, beg that you and he will follow upon your own manner the blows which have already been so well struck. I am willing to be considered as belonging to the cause and

The State's highest court consisted of three judges, all appointed by Republican Governor Plumer following his election the year before. Of the three, only the Chief Justice, William Richardson, lacked close party identification. The two Associate Justices were Levi Woodbury and Samuel Bell, both active Republicans. Bell, then 47 years old, was a graduate of Dartmouth in the Class of 1793. He had also served as a Dartmouth Trustee from 1808 to 1811. Woodbury, aged 28, was likewise a Dartmouth alumnus, having been graduated in 1809. Ahead of Woodbury lay an extraordinary career, as Governor, Senator, Associate Justice of the U.S. Supreme Court, and, just prior to his death in 1851, as a likely Democratic candidate for President of the United States. Shortly before his appointment to the New Hampshire Superior Court, Woodbury had been named by Governor Plumer as one of the Trustees of Dartmouth University. While conflicting reports make it inconclusive whether or not Woodbury in fact sat on the College's case at that term, both charity and the probabilities suggest that he properly disqualified himself.

The parties to the suit, through their counsel, had previously agreed upon a statement of facts involved in the case. The statement was accepted by the Court as the basis for the arguments.

Mason opened the argument for the College. No stenographic record exists, but when Mason, more than a year later, reconstructed the argument for publication, it occupied nearly thirty closely printed pages. In effect it was an enlargement of the same points that the Octagon made less forcefully a year before in the preamble to their declaration of resistance to the legislative acts. These points, in the order chosen by Mason, were: (a) that Dartmouth College under its charter was a private eleemosynary corporation and not a public corporation such as a city or county, and that in consequence the corporation had legal rights and interests which could not be taken away by the state legislature; (b) the acts in question exceeded the general scope of legislative power because in effect they attempted, without the consent of the Trustees, to abolish the old corporation and transfer its property and privileges to a new one; yet under the essential division of powers upon which a free government rested, no legislature possessed the power to alter private rights; (c) even if, in the abstract, such a power might be claimed to rest in the legislature, the constitution of the State of New Hampshire had expressly declared that none may be deprived of property or privileges "but by the judgment of his peers or the law of the land"; (d) in short, this deprivation could not take place "without due process of law" and from this it followed that the powers which the legislature had attempted to exercise in fact rested solely in the judiciary; and finally, (e) the charter contained all the elements of an executed contract comparable to a grant of land, and was thus protected by that clause of the United States Constitution which provided that "no state shall pass any law

to talk about it, and consult about it, but should do no good by undertaking an argument. If it is not too troublesome . . . give me a naked list of the authorities cited by you, and I will look at them before court. I do this that I may be able to understand you and Judge Smith.

When the session opened all three of the College's counsel were present, as were their opponents. The University had retained George Sullivan, New Hampshire Attorney General, and Ichabod Bartlett, Dartmouth 1808, young Portsmouth lawyer and briefly there a local rival of Daniel Webster. Sullivan was a Dartmouth University Overseer and Bartlett one of its Trustees.

tion which provided that "no state shall pass any . . . law impairing the obligation of contracts."

The argument was learned and replete with citations of authorities to support it. With the knowledge that Thomas Jefferson had congratulated Governor Plumer on his and the legislature's move to convert the College into a state-controlled institution, Mason must have taken sly satisfaction in selecting one of the supporting dicta from Jefferson's *Notes on the State of Virginia* which declared that "an elective despotism was not the government we fought for." Mason concluded with a reference to the far-reaching consequences of the issues involved, which had by now aroused the concern of many beyond the bounds of this particular suit. "If these acts are held to be valid," he stated, "not only this College but every other literary and charitable institution must become subject to the varying and often capricious will of the legislatures. . . . If our seminaries of learning are to be reduced to a state of dependence on the legislatures, and are to be new modelled, to answer the occasional purposes of prevailing political parties, all hopes of their future usefulness must be abandoned."

ATTORNEY GENERAL SULLIVAN, who responded for the defense, was aware that before a determination could be made as to whether the New Hampshire legislature had exceeded its competence, it was necessary to establish what kind of corporation Dartmouth College was. Mason had contended it was a private eleemosynary corporation, and his argument rested upon an acceptance of that classification by the court. Thus Sullivan vigorously took the position that the College was "a public corporation, created expressly — created exclusively for the public interest." He seized upon the words of the charter describing one of the King's aims as being "that the best means of education be established in our Province of New Hampshire for the benefit of said Province." This, he declared, was proof that the College was created "for the benefit of the whole people of the Province of New Hampshire." Equating the College to a parish or a town, Sullivan argued that it possessed all the essential qualities of a public corporation subject to the legislature's right "to alter and amend its charter." But even assuming it was a private corporation, said Sullivan, the legislature had a right to alter it "when the public good requires it." His argument was that the acts of the legislature constituted an exercise of the right of eminent domain. "It would be easy to multiply instances in which the legislature of this State, and those of other states, have limited the powers and taken the rights of private corporations when required by the welfare of the community." Sullivan also denied that the charter constituted a contract, but argued that, even if it be considered a contract, it was not the kind of contract which the pertinent provision of the Federal Constitution was designed to protect. The Constitutional prohibition, he correctly pointed out, arose out of a desire to prevent states from enacting laws enabling debtors to pay debts in depreciated paper or personal property other than money.

Anyway, said Sullivan, the legislation did not destroy the old corporation. There was merely a change in the name, but the corporation retained the rights and privileges which belonged to it before. Moreover, the New Hampshire constitution, concluded Sullivan, expressly charged the legislature with a concern for the education of the people of the State, [illegible] to effect

So did the removal of their self-perpetuating power; so did other provisions of the act which "made a new constitution for this seminary." The Charter Trustees were an eleemosynary corporation, holding property dedicated to charitable uses, not a public corporation forming a component of the State like a county, a parish, or a school district. To deny legislative control of this corporation did not put it beyond the reach of the State, for it was well settled that charitable corporations were subject to the judicial department of the government which would not only protect their rights but enforce the performance of their duties. Legislative control over eleemosynary corporations can be no greater than over private persons, argued Judge Smith in calling attention to the New Hampshire constitutional requirement that no person be deprived of his property or privileges but "by the judgment of his peers, or the law of the land." The "law of the land" surely means, said Smith, "the same law which governs persons in general and not a statute . . . which itself inflicts the injury." In short, the New Hampshire constitutional requirement, in effect, called for "due process"; and the legislature's acts could not qualify.

Jeremiah Smith heaped scorn on the legislature in the usurped role of the courts, a stance safe enough before the judicial branch of the government:

> No body of men can be imagined every way worse qualified for the exercise of the powers now claimed for the legislature. . . . While I entertain the highest respect for the legislature *as legislature,* I have no hesitation in saying that *as judges* they are as bad as the lot of humanity can possible admit. . . . Private property and character would be altogether unsafe in such hands. . . . If there is anything established by our constitution it is that the legislative department of our government should abstain from the exercise of judicial power as every way totally incompetent to the task.

Smith's reputation for acid sarcasm was sustained elsewhere in his argument:

> We have heard it gravely stated as a reason for the interference of the legislature in this case that literary institutions are subject to decay; and that the charter of our college was granted under the authority of the British king, and as it emanated from royalty, so it contained . . . principles congenial to monarchy: — one of these is the power of self perpetuation. This last 'monarchial principle' so hostile to the spirit and genius of a free government has been . . . preserved in all the charters of charitable institutions granted by our legislature.

Smith then asked whether it was to be presumed that the legislature was not aware of its own "anti-republican tendency." And caustically he noted that

> . . . it has been intimated that much good would result to this seminary and to the public from *governmental checks* on its officers and affairs. I am not a convert to these opinions. As there is no royal road to science so there is no such republican road. . . . There is something in political men, generally speaking, which unfits

and Dartmouth College "being a mere instrument to effect these objects, it was both the right and the duty of the legislature to alter and amend the charter in such a manner, as would in their judgment be best calculated to obtain them."

Jeremiah Smith next took up the argument for the Trustees. His presentation later covered 38 printed pages. He denied that the College had been improved by the new laws; the contrary in fact was the case as he demonstrated by witty jibes at some of the provisions. But these considerations were irrelevant, he reminded the Court, because what was at issue was the *power* of the legislature to make the alterations without the Trustees' consent. The Trustees were the constituent members of the corporation, and increasing or diminishing their numbers essentially altered the corporation's makeup.

...something in [illegible] them for the management of an academical institution.... I do not say that such an alliance is as bad as that between church and state; but it is somewhat like it. I had rather see government stand neuter, content itself with seeing fair play between the friends and patrons of learning and its foes than to take upon itself to prescribe systems of education, elect the professors and officers and regulate the interior of colleges as its caprice may direct.

Having unloaded a generous portion of vinegar, Smith deferred to the young Ichabod Bartlett to conclude the argument for the University. Bartlett was no match for the seasoned advocacy of Jeremiah Mason and Jeremiah Smith. He labored verbosely through thirty pages, demonstrating that he could talk as much, but not as well, as the opposition. Webster closed the argument for the Trustees.

In the absence of a stenographic record, what was printed as the arguments of counsel in the formal report of the New Hampshire trial was in fact a collection of statements drawn up at the urging of Timothy Farrar Jr. long after the original pronouncements. In the case of Webster the text of his argument, as printed in the New Hampshire Reports, is in reality Webster's own version of his argument before the United States Supreme Court, prepared by him some eight months later. Though nothing exists in any form, *ex post facto* or otherwise, of the argument Webster actually delivered before the New Hampshire court, it seems safe to conclude, in view of Webster's letter of September 4 to Mason quoted above, that his thinking on the case was far less developed at the State court hearing in September 1817 than it was at the time of the Washington hearing nearly six months later, and that in consequence the presentation at Exeter was less fulsome than the one in Washington. One may also conclude that Webster's Exeter argument, so far as it went, followed quite closely those of Mason and Smith. He almost certainly employed at Exeter a peroration not unlike the one which so moved his hearers in Washington the following March. This assumption rests upon reports by those who heard the Exeter argument that Webster concluded it with an evocation of Caesar in the Senate House, the same image which recurred in the concluding portion of his United States Supreme Court delivery, described hereafter.

THE New Hampshire Superior Court did not hand down its decision until two months after the Exeter hearing. Chief Justice Richardson read the opinion at the November session held at Plymouth.

As Governor Plumer had confidently expected, and other University adherents had earnestly hoped, the decision went against the College. Chief Justice Richardson's opinion dealt first with the question whether the College was a private or a public corporation. "Public corporations are those which are created for public purposes and whose property is devoted to the objects for which they are created," declared the Chief Justice. He noted that Dartmouth College was created for the purpose of "spreading the knowledge of the great Redeemer" among the savages and for furnishing "the best means of education" to the Province of New Hampshire. He deduced that "these great purposes are surely, if anything that of Dartmouth College, is to be construed as a contract within the intent of the Constitution of the United States it will . . . be difficult to say what powers in relation to their public institutions, if any, are left to the states."

Chief Justice Richardson revealed at least a degree of Republican bias by declaring finally: "I cannot bring myself to believe that it would be consistent with sound policy or ultimately with the true interests of literature itself to place the great public institutions, in which all the young men destined for the liberal professions are to be educated, within the absolute control of a few individuals, and out of the control of the sovereign power. . . . The education of the rising generation is a matter of highest public concern and is worthy of the best attention of every legislature. . . . But make the trustees independent and they will ultimately forget that their office is a public trust — will at length consider these institutions as their own — will overlook the great purposes for which their powers were originally given, and will exercise them only to gratify their own private views and wishes, or to promote the narrow purposes of a sect or a party." Whatever may have been Chief Justice Richardson's eminence in the law (and dispassionate legal scholars have given him generally much respect), his competence as a soothsayer was of a lesser order.

Adherents of the College Trustees were not unprepared for the adverse decision. There had been cynical forecasts that only one outcome was to be expected from "Plumer's court." Webster himself, in the privacy of his correspondence, had remarked that it would be odd if the Plumer-appointed court did not enforce "his laws," and in a letter to Francis Brown, a week after the decision was rendered, Webster wrote, "For my part I never expected anything else." Yet Richardson's opinion contains not the slightest suggestion that it lacked judicial integrity. It was only natural that it should have been colored by Jeffersonian doctrines cherished by the Chief Justice, and, for that matter, by the majority of the State's voters. No one today would contend that a reverse bias had not had its effect on the later United States Supreme Court decision in the case. Yet given the predictable philosophical slant of the New Hampshire judges, one questions the wisdom of the earlier advice to the Trustees, both from their own lawyer members and from Jeremiah Smith and Daniel Webster, to bring suit in the State court instead of at once contriving a suit in the Federal Circuit court. The rationale behind such advice was that a by-passing of the State court risked putting the College Trustees in a worse light with Republican-dominated opinion than that in which they had already been placed by the hue and cry arising from John Wheelock's *Sketches*. From the security of hindsight, the risk of alienating a larger segment of public opinion seems to have been less than the risk of an unfavorable decision in the State court.

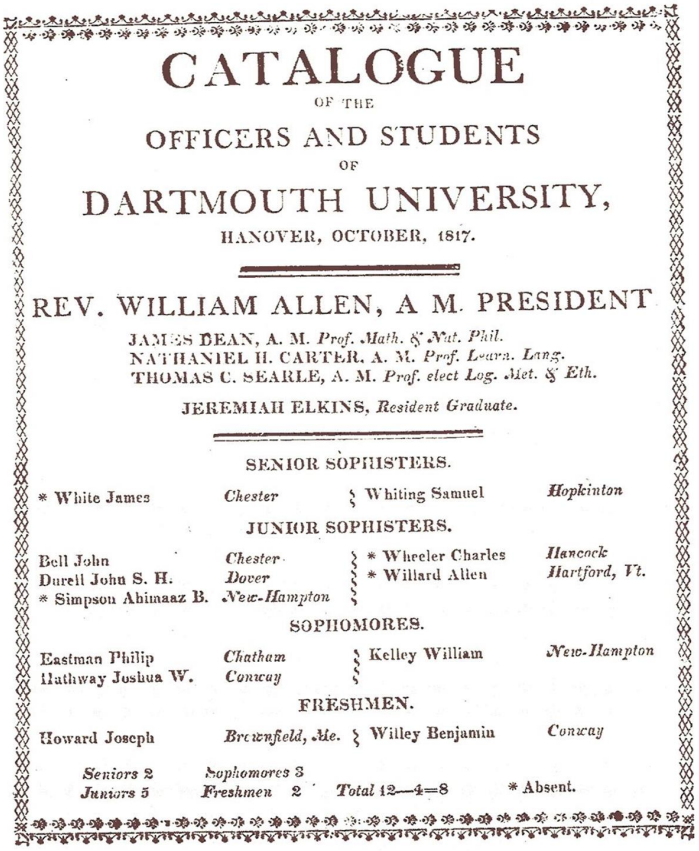
can be, matters of public concern." Once the Richardson opinion reached the pivotal conclusion that Dartmouth College was a public corporation, as the University counsel had contended and the College counsel denied, the balance of the findings against the College followed logically upon this premise. By definition the Trustees, individually or corporately, had no private rights to be infringed, so according to the opinion's reasoning it was immaterial that the State constitution protected the property and immunities of private corporations and private individuals. On the issue of whether or not the acts violated the Federal Constitution the opinion denied that the contract clause was "intended to limit the powers of the states in relation to their own public officers and servants. . . . If the charter of a public institution, like

Though not unexpected, the decision was a blow to College morale in Hanover, and a signal to the University adherents to take a more assertive stance. The climate was converted from one of adjustment to one of rigidity. A student in the College, writing early in the new fall term just before the decision had been rendered, observed that "the University officers have attended the two public lectures. And a circumstance worthy of notice is that when Presid^{t} B. enters the lecture room, the students rise instantly but when Pres^{t} Allen comes they stick to their seats like clods, not a person rises, tho his own pupils are present. Two College students in obedience to their father, but much against their own feelings, have gone to the University, two have entered as freshmen, and their whole number I believe to be thirteen [a contem-

porary University notation dated September 1817 lists 8 students as joining the University that fall — 2 Seniors, 3 Sophomores and 3 Freshmen]. . . . How things are altered. The government indeed appears like the same dignified men, but seem not at home. When I see the two sets of officers in the lecture room (am I correct or is it fancy) I seem to behold in the countenances of one a manly independence, self approbation, perseverance and intrinsic merit; on the other hand, envious inferiority, self distrust, hesitating trepidation and a fear of approaching ill." Though carried away by his own cataloguing, the writer described an institutional atmosphere which, if tense, was yet free of violence.

But the judgment of the New Hampshire court subtly and quickly produced a transformation. A few days after its delivery Rufus Choate wrote to his brother that ". . . the distance between the students of the two institutions at this place is most unpleasantly widened. . . . It is impossible to sit down cooly and composedly to books, when you are alarmed every minute by a report that the library is in danger or that a mob is about collecting or perhaps that we are all to be fined and imprisoned. . . . Even when such reports are entitled to no credit whatever it takes some time to hear them, and also some more to point out their absurdity so that much time on the whole is absolutely wasted." From this agitated scene President Allen, in an open letter addressed to "the Parents and Friends of the Students, late members of Dartmouth College," reported the New Hampshire court's conclusions and criticized the College officers' continued non-observance of the legislative acts. "They still encourage in their pupils," said Allen, "the same confident hopes which have heretofore proved delusive. That they should have influence over the minds of the young gentlemen committed to them is the natural consequence of the relation of students to their instructors; and in times of violent excitement such influence is usually increased and strengthened." But, Allen lamented, the College teachers were "exerting their influence erroneously and in a manner prejudicial to the literary and moral improvement of their pupils as well as injurious to the peace of the University." He concluded his message to parents by advising them to see that their sons join "the legal seminary at Hanover" or withdraw to some other college.

Violence was not long to be repressed. On November 11, word reached University officers that the books belonging to the libraries of the two student literary societies were being "taken from their shelves and boxed for the purpose probably of being removed from college this night." Instantly the University officers directed their inspector of buildings "to take possession of the rooms in which are deposited the Libraries of the Societies of the Social Friends and of the United Fraternity and to secure the doors of them with proper fastness." This touched off a melee that rocked the



CATALOGUE

OF THE

OFFICERS AND STUDENTS

OF

DARTMOUTH UNIVERSITY,

HANOVER, OCTOBER, 1817.

REV. WILLIAM ALLEN, A M. PRESIDENT

JAMES BEAN, A. M. *Prof. Math. & Nat. Phil.*
NATHANIEL H. CARTER, A. M. *Prof. Lawa. Lang.*
THOMAS C. SEARLE, A. M. *Prof. elect Log. Met. & Eth.*

JEREMIAH ELKINS, *Resident Graduate.*

SENIOR SOPHISTERS.

* White James	*Chester*	Whiting Samuel	*Hopkinton*

JUNIOR SOPHISTERS.

Bell John	*Chester*	* Wheeler Charles	*Hancock*
Durell John S. H.	*Dover*	* Willard Allen	*Hartford, Vt.*
* Simpson Abimaaz B.	*New-Hampton*		

SOPHOMORES.

Eastman Philip	*Chatham*	Kelley William	*New-Hampton*
Hathway Joshua W.	*Conway*		

FRESHMEN.

Howard Joseph	*Brownfield, Me.*	Willey Benjamin	*Conway*

Seniors 2 *Sophomores* 3
Juniors 5 *Freshmen* 2 *Total* 12—4=8 * Absent.

October 1817 roster of University faculty and students.

gregate number of students and friends, as nigh as I could judge, was about one hundred and fifty; that of the mob about twenty. You will quickly perceive that they were completely in our power; and it was the determination to break the first man's head who attempted to get out of the room. They were to continue in this situation for about ½ hour when the students thought it advisable to transfer them to an adjoining room. They were conducted, one by one, through the crowd of students having their clubs elevated. . . . In this situation we kept them another ½ hour wholly ignorant of their future destiny and agitated with cruel fears. After this they were conducted down stairs which was lined each side with a row of students having their clubs elevated . . . and conducted to their lodgings. All this was done with less disturbance than one would naturally [expect] from the enraged condition of every student and friend of justice and good order. The fellows themselves even say that they were treated more generously than they could have ex-

proper rashness. This touched on a theme that rocked the Hanover plain.

An observer, then a College sophomore, described the episode in a letter to a friend:

> My pen blushes at the thought of rehearsing the outrages of last evening. About 7 of the clock . . . a mob of the more vicious and indecent, headed by Profs. Dean and Carter [of the University] and Mr. Hutchinson [the University's inspector of buildings] made an outrageous attempt upon the Social Friends Library. While some of the mob was demolishing the door with an ax these three gentlemen stood in silent admiration of the heroic deed. Fortunately the noise reached the ears of the Fraternity which was assembled in society hall. No sooner was the uproar heard than they were at the library door. By this time it was wholly demolished and an entrance into the Library effected. Every student of the College, with some friends, was by this time in his post. The agpected.

This observer's account is corroborated by strikingly similar descriptions on the part of other students, including the officers of the Literary Societies of whom Rufus Choate was one.

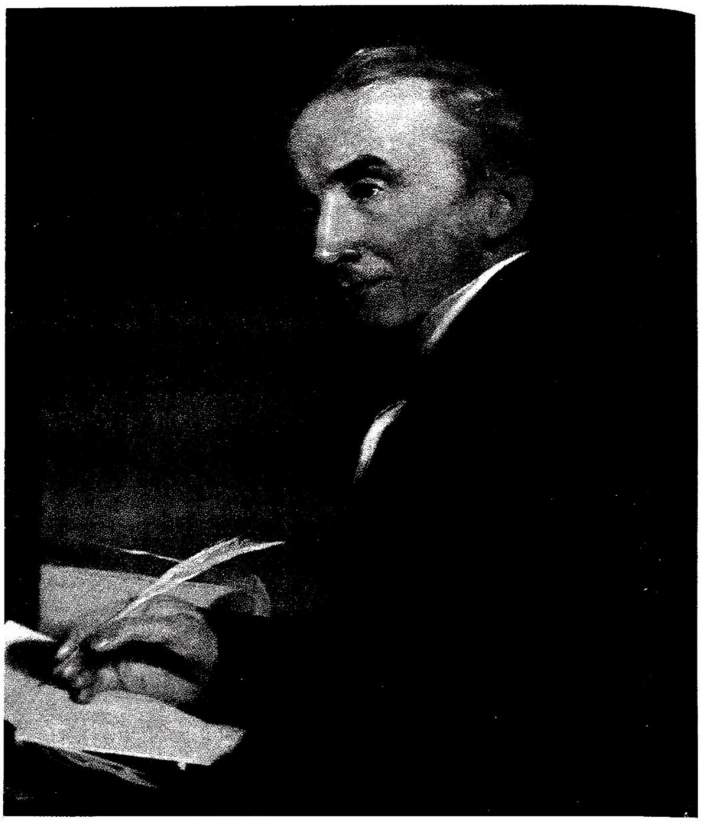
Meanwhile, the College Trustees, in accord with their promise to President Brown, prepared to have their case carried to the Federal Supreme Court. Such a move struck Governor Plumer as foolhardy. "I should think they would not adopt such a course had I not seen too many instances of men suffering passion, wounded pride and sentiment to usurp the place of solid discretion and mature judgment. I think they can have no rational ground to hope for success in the national court, and that the friends of the University have nothing to fear from the result, but the expense and the evils which proceed from a state of suspense."

Referring to a conversation he had just had with Senator Thompson in Boston, Webster on November 15 wrote to Francis Brown saying, "I have thought it probable you would wish my attention to the cause at Washington." Webster could, he said,

> determine by the 25th or 30th of this month whether I shall go to Washington this winter or not and this decision will depend in a great measure on what may be wished in relation to this cause. I have no other great occasion to go, and you will judge whether it will be better that I should go *principally on* this account, or whether better service cannot probably be had at a cheaper rate. I should chuse to associate with me some distinguished counsel. Mr. Thompson and myself have mentioned Mr. Hopkinson of Philadelphia. He is well known to us and I think him capable of arguing the cause as well as any man in the United States.
>
> I am aware that there must be great difficulty in obtaining funds on this occasion. I wish you therefore to write me very plainly what can be done and what cannot, and I will give you my advice as plainly in return. I think I would undertake for a thousand dollars to go to Washington and argue the cause and get Mr. Hopkinson's assistance also. I doubt whether I could do it for a much less sum. Mr. Hopkinson will be very competent to argue it alone and probably would do so for something less, though no counsel of the first rank would undertake this cause at Washington probably under six or seven hundred dollars. . . . There is no cost of any consequence in carrying the cause to W. except counsels fees.

Webster, without waiting for Brown's reply to this letter, sounded out Hopkinson as to his willingness to join with him in arguing the College case. Hopkinson readily consented. Aristocrat, patron of the arts, author of "Hail Columbia," Joseph Hopkinson had started life simultaneously with Dartmouth College, having been born in 1770. A native of Philadelphia and a graduate of the University of Pennsylvania, he had distinguished himself in the law at an early age. He was serving as Federalist Member of Congress from Pennsylvania when enlisted by Webster.

After consultation with Thompson and Marsh, President Brown wrote to urge Webster to represent the Trustees before the Supreme Court. Though anxious to secure Webster's services, Marsh had cannily observed that Webster was likely to go to Washington in the winter "whether we engage him to go or not," and indicated he did "not feel well pleased that [Webster] should place the question on that issue." Marsh's deduction was correct for it turned out that Webster had other cases requiring his presence in Washington for the February term of court. Marsh further commented that "if we have to pay the $1000 . . . I shall not shrink from any



Joseph Hopkinson, portrait by Thomas Sully.

ments before the State court, as well as a copy of the opinion of that court.

When by the end of the first week in December Webster had not received the briefs he became anxious and again pointed out to Mason and Smith his dependence upon them. To Mason he said, "Everybody will expect me . . . to deliver the Exeter argument. Therefore the Exeter argument must be drawn out before I go. . . . We must have Richardson's opinion a little before hand . . . that we may consider its weak points if there be any." And to Smith on the same day he wrote, with his customary deference to that distinguished elder lawyer, "Every one knows I can only be the reciter of the argument made by you at Exeter."

It had earlier been understood by the counsel on both sides that if the case were appealed to the United States Su-

share of the burden which my friends think I ought to bear. . . ." It was Marsh's view that Webster was "more likely to get a decision at the next term and will be better prepared for the argument than anyone else whom we can employ except it may be Judge Smith or Mr. Mason." The latter two had ruled themselves out, being unable or unwilling to make the long journey to Washington.

Webster agreed on November 27 to take the case and informed Brown he had already approached Hopkinson "from the fear he might be written to on the other side as I knew Gov. Plumer . . . had a great opinion of his professional talents." Webster announced that he would seek at once a properly certified record of the case in the New Hampshire court, so as to enter it as soon as possible on the Supreme Court docket, and on the same day wrote to Mason to secure it. Webster also notified Mason that he would need, as soon as possible, Mason's and Judge Smith's briefs of their argument before the Supreme Court they would agree among themselves on a written statement of facts in the form of a "special verdict." With the help of President Brown on College history, and under his gentle prodding, Judge Smith and Mason worked out the text of the "special verdict" and succeeded in obtaining its acceptance by Sullivan and Bartlett.

Webster had noted in his letter to President Brown accepting the Washington assignment that he would expect to receive the agreed fee by January 15, the date which Brown had seemingly proposed for payment. Both President Brown and Thomas Thompson were hopeful that some financial assistance would be forthcoming at this juncture from sister educational institutions. It seemed to Thompson that Yale College had "as great a stake in the controversy as anyone, and perhaps as likely to meet with the same troubles." Harvard also was thought of as a source of aid. Despite appeals, neither institution came to the rescue of Dartmouth College.

Any temptation to be censorious should be balanced by reflection whether the Dartmouth Trustees, had the shoe been on the other foot, might not have similarly held back. Such donations were probably beyond the scope of all such institutions at that time. Another reason, less worthily offered as an explanation for restraint on the part of the Harvard community, was reported by a friend of the College seeking contributions in Cambridge. Some preferred, he said, that the case would not be appealed to the Federal Supreme Court because that court "would probably confirm the present [New Hampshire] decision and thereby increase a hundredfold the weight of its authority. . . . The result of a hearing at Washington would be worse than leaving the cause where it is, so far at least as respects [institutions in other states], the authority of the [New Hampshire] decision . . . being so inconsiderable."

THE two Presidents of College and University undertook to cover what today is known as "the alumni circuit," each endeavoring to raise funds to pay for his institution's respective counsel. Brown had considerable success in this at Boston. A special meeting of the Boston alumni had been called for the purpose. A few days later when Thompson encountered him in Portsmouth he found Brown "in high spirits," both from the success of his fund gathering and from the favorable public sentiment toward the College.

President Allen appears to have been in Portsmouth simultaneously and for an identical purpose. At this period the University seems to have been more desperate for funds than the College, uneasy as was the state of the latter. The legislature, having begat the University, was bent on looking the other way when financial claims based on its paternity were pressed. Governor Plumer, too, backed away. He wrote to a friend that "considering my peculiar situation . . . it would be improper for me as an individual to advance or promise any money for [University counsel] fees. It would cause our political enemies to blaspheme."

President Brown engineered another piece of year-end business in the College's cause. Benjamin Gilbert, Hanover lawyer and supporter and confidant of Brown, had to make a journey on personal matters to Richmond, Va., going by way of Washington and Philadelphia. Brown supplied him with letters, copies of the charter, and other relevant documents on the College, instructing him to put them into suitable hands when the opportunity arose. Included also

course impossible to know whether this early access to the text of the Dartmouth charter played any part in the readiness with which Marshall later came to see the issues from the College's point of view.

By the first of the year, too, Webster had become genuinely persuaded of the desirability, if not necessity, of mounting another but simultaneous attack on the University. As all counsel were aware, and perhaps Webster most of all, the appeal from the New Hampshire court to the Federal Supreme Court must rest entirely on the narrow and, many believed, dubious points involving the Federal Constitution, namely whether the charter constituted a contract within the meaning of Article I, Section 10, and if so whether the New Hampshire legislation had impaired its obligations. Strict observance of this limitation would preclude, before the Supreme Court, a recital of, much less an argument based on, the several other grounds that had been urged in the state court against the legislation. Consequently Webster concluded that suits should be started by the Trustees at once in the Federal Circuit Court for the district of New Hampshire on which he was well aware Justice Story of the United States Supreme Court would be sitting.

A basis for original jurisdiction in a Federal court was "diversity of citizenship" of the parties. This condition was met if the opposing parties were residents of different states. "Suppose," speculated Webster in a letter to Brown dated December 8, 1817, "the Trustees should . . . *lease* portions of their N. Hamp lands to a citizen of Vermont?" Webster likewise suggested the idea to Mason and Judge Smith. In writing to the latter Webster observed mysteriously that he had "thought of this the more, from hearing of sundry sayings of a great personage." A few sentences later light is thrown on the identity of the "great personage" by Webster's comment that "perhaps the known pendency of such a suit might induce Judge Story,* who fully intends to make the court's opinion in this case, to consider all the questions in the present cause."

ON President Brown's fund-raising trip to Boston, referred to above, he had stopped there with Webster who then urged that a Circuit Court case be started at once. Brown requested Mills Olcott in Hanover to act accordingly, cautioning him that ". . . it is best to say but little on the subject" and observing pointedly (no doubt a paraphrase of Webster's own words): "If a suit should be commenced, the argument will be had of course before *Judge Story* at Exeter

was a packet for Joseph Hopkinson's use in Washington. Gilbert reported that he came across many people on his journey. "Some," he said, "were inquisitive respecting our troubles. . . . Several remarked that the question the case presents deeply concerned the whole community." But perhaps Gilbert's most useful errand was performed in Richmond when he placed in the hands of a friend of the College a copy of the charter "for the perusal of Chief Justice Marshall." Gilbert reported later that he had satisfied himself after much reflection "that the information the document contained must be acceptable to the Chief Justice and that there could be no impropriety in his having the information, unless the manner of communication should render the motive of giving it suspicious." The friend, who assumed the delivery to Marshall, assured Gilbert that "as soon as the Chief Justice came home from his farm in the country . . . he would wait on [him] and have the documents with him as a neighborly courtesy adopted on his own suggestion." It is of [illegible] in May next."

The College's advisers, Mason and Smith, endorsed Webster's tactic, and — joined this time by Timothy Farrar — struggled with the proper technical procedures to employ in bringing Circuit Court suits.

Meanwhile the cumbersome University machinery was being stirred to action by the unfortunate William Woodward, critically ill as he was. As Secretary of the University

* The name "Smith" rather than "Story" appears here in the printed text of this letter on page 268 of volume 17 of the National Edition of *The Writings and Speeches of Daniel Webster*. It is clear that this is in error. Webster was writing to Judge Smith. Whether the error was a misstatement in the original letter now no longer available, or was made by the editor is not known. It seems certain that Webster used (or intended to use) the name "Story" here; it is consequently supplied. The frequent associations which occurred between Webster and Story, as fellow residents of Massachusetts, could have given occasion for Webster to know of Story's intentions regarding the delivery of an opinion in *Trustees of Dartmouth College v. Woodward.*

Board he endeavored to schedule a meeting of the University Trustees in December 1817, but was plagued again by the difficulty of obtaining a quorum. He wrote to Plumer calling on him "to devise a plan for resisting the efforts of the ex Trustees to remove our cause to the Supreme Court of the United States," adding hopefully that "Mr. Hubbard [a lawyer Trustee of the University] . . . is of opinion they will decline taking any jurisdiction over it." The lumbering slowness of the officers and friends of the University in responding to the likelihood of a new challenge before the United States Supreme Court is difficult to comprehend. Plumer, to whom many of them looked, was determinedly unwilling to believe that the old Trustees would appeal the New Hampshire court decision.

The first warning voice the University people heeded was that of Salma Hale. Hale was a New Hampshire Congressman; he was also a Trustee of the University. From Washington he wrote to the incredulous Plumer on December 19 that a respected Hanover visitor had "observed that the college cause would undoubtedly be removed here this winter." Hale added that his fellow Congressman, Joseph Hopkinson, had "mentioned [the case] a day or two ago, and observed that should it be removed here it was not at all probable that it would be *decided* this winter." Hopkinson seemingly did not feel called upon to inform Hale that he had already been retained to assist in arguing the appeal for the College.

It was not until the last day of the year that the University Trustees met to consider what lay before them. With William Allen presiding, the Board asked Messrs. Sullivan and Bartlett to prepare the necessary papers for a trial before the United States Supreme Court. The Board likewise decided to request John Holmes, a Brown University graduate, Maine resident, and a member of Congress, to be their counsel; and, should he decline, to request Congressman Hale to employ other counsel "with the advice of the friends of the University now at Washington." Not only was the step late but it was disastrous, for Holmes, who readily accepted the assignment, proved to be an entirely unsuitable selection. His on additional counsel being retained. William Wirt, U.S. Attorney General, or Thomas Addis Emmett, famous Irish patriot and New York advocate, were the names suggested.

At this point Plumer supported Hale by declaring himself in favor of employing William Wirt to help Holmes. Plumer volunteered that, had he been at the Board meeting at which Holmes was selected, he should "never have thought of resting the defense with one lawyer." Plumer further offered the backhanded comment that he had been confident "many months since" that Holmes' "reputation both as a statesman and orator would not rise by being a member of Congress." This tardily taken position illustrated again a recurring University weakness. University Trustees on whom reliance was placed simply failed to get around to Board meetings. When Hale finally engaged Wirt, Plumer gave assurance that he had "no doubt the Board of Trustees will not only approve the measure but honorably compensate him for his services." William Wirt, native of Switzerland and a resident of Virginia, successfully combined scholarship with the practice of the law. In 1817 President Madison had appointed him Attorney General of the United States. As was then the custom, he carried on a private practice in addition to his official duties. A man of immense personal charm and oratorical gifts, he was said to have had a marked distaste for the drudgeries of the law.

Hale experienced worrisome delay in obtaining from Sullivan and Bartlett, for the use of the University's counsel in Washington, a list of authorities offered in supporting the University's cause before the New Hampshire court, as well as other essential documentation. Copies of Chief Justice Richardson's opinion were also slow in reaching his hands. When the latter arrived he distributed copies among "the gentlemen of the bar" and was rewarded by at least one of them observing that the Richardson opinion was "unanswerable." Hale needed all the cheer he could extract.

Congressman Hale's task in Washington would have been easier if Woodward's health had permitted his taking a more active part on the home scene. Woodward was the only lawyer in Hanover concerned with University problems and had he been well he might have played a role for the University comparable to that of Olcott or Marsh or Thompson for the College. Allen too was of no great help to Hale. He heard only the views which supported the University. His overconfidence was massive and allowed no room for the kind of doubt that would have made for hard-headed appraisal and constructive effort to improve the cause with which he was himself linked. He was so beset with the mistaken notion

reputation as a politician was well established, but as a lawyer he was second-rate. Moreover, while the style of his oratory was well suited to the stump it was wholly inappropriate before a court.

Hale did not hesitate to notify Woodward and Allen of his misgivings about Holmes, and it fell to the hapless William Woodward to find reasons to support the Trustees' choice. Actually Woodward had been absent from the Board meeting at which the selection was made. In response to Hale's doubts, Woodward came to Holmes' support by asserting that "what appears at first as forbidding and indeed likely to impress some with disgust wears away on further acquaintance. I have thought him extremely ready, of sound mind, and a good lawyer inferior to D. W. only in point of oratory." William Allen felt it necessary to point out to Hale that the Trustees had "made no other provision for counsel," and moreover that he, Allen, did "not distrust the results of the trial in the hands of Mr. Holmes." But powerful friends of the University in Washington quickly and firmly insisted that the College was seeking delay in bringing the case to trial in Washington that he was determined to rush the University into court, though his own forces were only partially mustered and wholly unprepared.

TIME was running out. On February 14, 1818 Webster wrote to Brown that the case was so early on the docket that he had no doubt it would be argued in the current term. He again urged Brown to see that the Circuit Court cases were started promptly, adding that should it become necessary he would say to the Supreme Court "that such actions are either brought or contemplated." Webster found the case attracting much attention in Washington, at least in the circles in which he moved. He had just received the official text of the New Hampshire Superior Court opinion and volunteered to Brown that he found it "not quite so formidable"

Congress Authorizes National Medal

DARTMOUTH'S Bicentennial will come and go, recorded for posterity in pictures and thousands of written words, but nothing commemorating it will last as long perhaps as the national medals being struck in bronze by the U. S. Mint to mark the anniversary.

Reproduced above in actual size, three inches in diameter, are non-metallic proofs of the two sides of the medallion, designed by Rudolph Ruzicka letters "R d" on the reverse identify the designer, Rudolph Ruzicka.

Having a commemorative medal struck by the U. S. Mint is anything but a routine matter. It takes an act of Congress, approved by the President of the United States, to bring it about. And the government requires that the entire cost of producing such commemorative medals shall be borne by the institution or organization to which Congressional permission is given.

the College in a quantity of not less than 2,000 or more than 25,000, and that no medals shall be made after December 31, 1970.

The College has placed with the U. S. Mint an order for two gold medallions and 5,000 in bronze. Official permission from the U. S. Treasury was necessary for the use of that much gold in the two special medals, one to be presented to the Earl of Dartmouth when he visits the College for Com-

of Norwich, Vt., one of America's most noted figures in the field of the graphic arts. The obverse features the Old Pine, a historic symbol relating to the very beginnings of the College. The reverse combines the arms and motto of the Earl of Dartmouth with those of the College. *Gaudet Tentamine Virtus* is translated as "Valor Rejoices in Contest." The small "P" on the obverse side indicates that the medallion was struck at the Philadelphia Mint; the

The bill authorizing the Secretary of the Treasury, through the U. S. Mint, to strike the Dartmouth College Bicentennial Medallion was introduced by United States Senator Thomas J. McIntyre '37 of New Hampshire on June 21, 1968. After a hearing before the Senate Committee on Banking and Currency, it was passed by the Senate in July. The House of Representatives in turn passed the bill on September 16 and it then went to the White House for President Johnson's signature.

According to the bill, "the medals shall be considered to be national medals within the meaning of section 3551 of the Revised Statutes (31 U.S.C. 368)." The bill also provides that the medals can be struck and furnished to

mencement in June and the other to remain in the permanent possession of the College.

The bronze replicas of the gold medallion will be released for distribution by the College after the June 15 presentation to Lord Dartmouth. Since the supply is limited, priority in filling orders for the bronze medal at $10 each will be given to Dartmouth students, faculty, alumni, and parents. An order blank for reserving medals will be found with the advertisement appearing on Page 5 of this issue.

The Dartmouth College Bicentennial Medallion is expected to be in great demand not only among Dartmouth men but also among numismatists. For these latter collectors the fact that it is

"Will to Resist"
continues on Page 69

as he had expected. He added reassuringly, "I shall keep you informed of all material occurrences."

As February expired Hale sent disquieting news to William Allen. Hale had just called on Wirt but was unable to see him "as ill health confined him to his bed." Hale observed that "that may defer the trial a day or two — I think not more." He also reported that Holmes had voiced some doubts, his own or others, about a successful outcome of the case. Hale hastened to assure Allen that he did not share such doubts, and that all to whom he had showed the New Hampshire opinion "pronounce it very able and most unanswerable." Yet for the first time Hale's confidence seemed somewhat shaken.

Governor Plumer, on the other hand, remained parochially unperturbed. On the final day of February he wrote Hale that "the opinion of our [New Hampshire] court reflects much credit, not only on them, but on the State where it was pronounced. I have no doubt that opinion will be confirmed by the Supreme Court of the nation." Plumer was so incautious as to predict that the Supreme Court would pronounce judgment at once "as the law is too clear to require the court to adjourn for advisement."

THE case of *Trustees of Dartmouth College vs. William H. Woodward* was called for trial before the Supreme Court of the United States on Tuesday, March 10, 1818. Present were Daniel Webster and Joseph Hopkinson for the plaintiffs, and William Wirt and John Holmes for the defendants. Presiding was Chief Justice John Marshall, then aged 63. Appointed as Chief Justice in 1801 by President John Adams, he had become an immense force in the shaping of American constitutional law and theory.

Associate Justices sitting were:

Bushrod Washington, 55 years old, a native of Virginia, a former student at William and Mary, and nephew of George Washington. Federalist in sympathies, he had been appointed by John Adams in 1798.

William Johnson, 47 years of age, a South Carolinian and a Princeton graduate. His leaning was toward Federalist views though he had been appointed by Thomas Jefferson in 1804.

ster's presentation consisted largely of informing the court that Dartmouth was a small college but that there were those who loved it. In fact the arguments of counsel consumed three days, and résumés of them occupy more than seventy pages in the official record.

As he had declared he would, Webster followed in general the pattern of the Smith and Mason arguments at Exeter. He first persuasively developed the thesis that, contrary to the holding of the New Hampshire court, the College was a private eleemosynary corporation under the charter, and that as a private corporation ("The Trustees of Dartmouth College") it possessed the same rights as a private individual. He then carried his presentation through all three propositions covered at Exeter. In summary, these were that the acts of the New Hampshire legislature were invalid and not binding upon the Trustees without their consent because they were: (1) "against common right" (an attempt by the legislature to exercise powers reserved to the judiciary in a free government); (2) "against . . . the Constitution of New Hampshire" (an attempt by the legislature, contrary to Article 15 of the State Constitution, to deprive the corporation of "property, immunities, or privileges . . . but by judgment of his peers or the law of the land"); and (3) "repugnant to the Constitution of the United States" (the charter was a contract and the New Hampshire acts impaired its obligation within the meaning of Section 10, Article I).

Only the third point was properly before the United States Supreme Court. Webster blandly justified to the court his coverage of the other two propositions on the ground that "it may assist in forming an opinion of the true nature" of the legislative acts. The Chief Justice made no attempt to restrain him.

Webster was followed by John Holmes who argued that the Constitutional proscription against contract impairment did not extend to the internal government of a state, and that as the charter had created a public corporation no contract within the meaning of the Federal Constitution was present. In any case a charter granted by the King "necessarily became subject to the modification of a republican legislature." The passage of fifty years without a challenge of the charter provisions did not "infer an acquiescence on the part of the legislature or a renunciation of its right to abolish or reform" the charter. Even if the charter were deemed a contract protected by the Federal Constitution its obligations were not "impaired," in Holmes' view, as the

Brockholst Livingston, aged 61, a Princeton graduate and a New York resident. Anti-Federalist and pro-Jefferson in his views, he had been appointed in 1806.

Thomas Todd, aged 53, native of Virginia and, as a resident of Kentucky, the only "westerner" on the court. Appointed by Jefferson in 1807, he shared Jefferson's political faith but tended to side with Marshall on constitutional questions.

Gabriel Duvall, aged 66, native of Maryland which he had represented in Congress as a Republican. He had been appointed by James Madison in 1811.

Joseph Story, aged 39, a Harvard graduate and a resident of Massachusetts where he was a Republican in a Federalist world. At age 32 he was appointed by Madison in 1811 as the youngest justice to serve on the Supreme Court. Next to Marshall, Story became the most distinguished member of that bench by the time of his death in 1845.

Late in the morning of the assigned day, Daniel Webster began his argument before the court. Today, a century and a half later, an impression is sometimes encountered, beyond as well as within the Dartmouth College family, that Webacts in reality improved the institution.

Wirt, who followed Holmes, recognized the limited Constitutional question before the court. This was a charter to a public corporation, urged Wirt, and therefore necessarily subject to legislative discretion. The contract clause in the Federal Constitution was never intended to extend to a state's exercise of that discretion. Inadequately briefed by University strategists in Washington, Wirt, without supporting data, charged that Eleazar Wheelock was not the founder of the College. Webster was able to confound him by an immediate reference to the charter preamble which described Wheelock as "founder." On firmer ground, Wirt argued that Wheelock had not contributed any funds to the College. "The state has been a contributor of funds," he said. "It is therefore not a private charity but a public institution; subject to be modified, altered, and regulated by the supreme power of the state." Like Holmes, Wirt took the position that the "charter was destroyed by the revolution. . . . If those who were trustees carried on the duties after the revolution, it must have been subject to the power of the people. . . . These civil institutions must be modified and adopted to the mutations of society and manners. They belong to the people — are established for their benefit — and ought to be subject to their authority."

Hopkinson, for the College, followed with a reply to Wirt in which he pointed out that the whole argument made against the College rested on the erroneous assumption that the corporation created by the charter was "a public corporation" and "its members . . . public officers or agents of the government." He protested that "the defendant, taking at once for granted everything that is disputed, makes his progress to the end of his case without . . . obstruction." In effect the burden of opposing counsel's argument, according to Hopkinson, was "that all education is necessarily and exclusively the business of the state."

> It is true that a college in a popular sense is a public institution because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them. But in a legal and technical sense they are not public institutions but private charities. Corporations may therefore be very well said to be for public use, of which the property and privileges are yet private. . . . If the property of this corporation be public property, that is, property belonging to the state, when did it become so? It was once private property; when was it surrendered to the public? The object in obtaining the Charter was not surely to transfer the property to the public but to secure it forever in the hands of those with whom the original owners saw fit to entrust it. Whence then that right of ownership and control over this property which the legislature of New Hampshire has undertaken to exercise?

Hopkinson endeavored to spell out the elements of a contract: "In consideration that the founder would devote his property to the purposes beneficial to the public the government has solemnly covenanted with him to secure the administration of that property in the hands of trustees appointed by the charter. . . . There are rights and duties on both sides. The charter was a grant of valuable powers and privileges. The state now claims the right of revoking this grant without restoring the consideration which it received for making the grant. Such a pretense may suit a sovereign power. . . . But it cannot prevail in the United States where power is restrained by constitutional barriers and where no legislature, even in theory, is invested with all sovereign powers."

Hopkinson brushed aside, as irrelevant, all ambiguities as

rich, then Professor of Oratory at Yale College. Professor Goodrich had been directed by his institution to attend the trial, for such value as the experience might have in case Yale found itself facing a similar problem. His celebrated account of Webster's argument was not in fact set down until 1853, and only then at the request of Rufus Choate expressly for the latter's use in a eulogy of Webster who had died the preceding year. One suspects that Goodrich, conscious of the generosity traditionally prescribed for eulogies, did not stint his description of Webster's performance. It is doubtful, too, that the drama had been allowed to suffer any diminution during the intervening thirty-five years as Goodrich described it to his classes in oratory. Though the Goodrich account has often appeared in print no exposition of the Dartmouth College Case would be complete without its recital:

> Mr. Webster entered upon his argument in the calm tone of easy and dignified conversation. His matter was so completely at his command that he scarcely looked at his brief, but went on for more than four hours with a statement so luminous, and a chain of reasoning so easy to be understood, and yet approaching so nearly to absolute demonstration, that he seemed to carry with him every man of his audience, without the slightest effort or uneasiness on either side. It was hardly *eloquence,* in the strict sense of the term: it was pure reason. Now and then for a sentence or two his eye flashed and his voice swelled into a bolder note, as he uttered some emphatic thought, but he instantly fell back into the tone of earnest conversation, which ran throughout the great body of his speech. A single circumstance will show the clearness and absorbing power of his argument. I observed Judge Story sit, pen in hand, as if to take notes. Hour after hour I saw him fixed in the same attitude; but I could not discover that he made a single note. The argument ended, Mr. Webster stood for some moments silent before the court while every eye was fixed intently upon him. At length, addressing Chief Justice Marshall, he said, —
>
> "*This, sir, is my case.* It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country, of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of human life. It is more. It is, in some sense, the case of every man who has property of which he may be stripped, — for the question is simply this: Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit? Sir, you may destroy this little institution: it is

to Eleazar Wheelock's founding and donative roles, and as to which other donors had participated: "The foundation was still private and whether Dr. Wheelock, or Lord Dartmouth, or any other person possessed the greatest share of merit in establishing the college, the result is the same so far as it bears on the present question. Whoever was founder, the visitorial power was assigned to the trustees by the charter and it is therefore of no importance whether the founder was one individual or another."

Hopkinson concluded the presentation of the case by heaping scorn on Holmes' endeavor to tie royal trappings onto the College Trustees, and to make them out as tainted with monarchial proclivities, merely because they existed under a charter granted by a King. The doctrine, offered by Holmes and Wirt, that the Revolution dissolved all prior charters was likewise the target of Hopkinson's eloquence. "In what dream of insanity did this monstrous idea engender itself? . . . No decision or suggestion of any tribunal in our country, legislative or judicial . . . warrants . . . this most wild and pernicious pretension."

More lively than the official record of the arguments were informal comments made about them by observers at the trial. Best known are the observations of Chauncey A. Goodrich; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out: but if you do, you must carry through your work! You must extinguish, one after another all those great lights of science, which, for more than a century, have thrown their radiance over the land! It is sir, as I have said, a small college, and yet *there are those that love it.*. . . ."

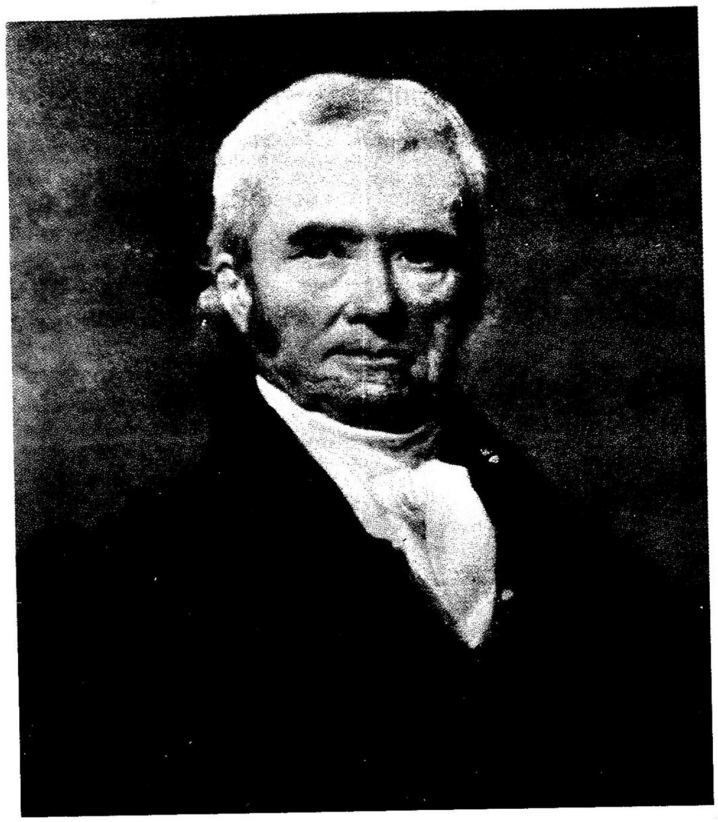
Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked, and he seemed struggling to the utmost, simply to gain the mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you the few broken words of tenderness in which he went on to speak of his attachment to the college. The whole seemed to be mingled with the recollections of father, mother, brother, and all the privations through which he had made his way into life. Every one saw that it was wholly unpremeditated, — a pressure on his heart which sought relief in words and tears.

The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall, gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side, with his small emaciated frame, and countenance more like marble than I ever saw on any other human being, leaning forward with an eager, troubled look; and the remainder of the court at the two extremities, pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look, and every movement of the speaker's face. . . . There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument melted into the tenderness of a child.

Mr. Webster having recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the heart of an audience, —

"Sir, I know not how others may feel (glancing at the opponents of the college before him, some of whom were its graduates), but, for myself, when I see my alma mater surrounded, like Caesar in the senate house, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me and say, — *et tu quoque mi fili! — 'and thou, too, my son.'* "

He sat down: there was a death-like stillness throughout the room for some moments: every one seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling.



Chief Justice John Marshall

In a letter to Judge Smith sent immediately after the trial Webster himself provided a more matter-of-fact account of his presentation. He wrote:

> I opened the case with most of the principles and authorities on which we relied at Exeter. Your notes I found to contain the whole matter. They saved me great labor; but that was not the best part of their service; they put me on the right path, and conduct, as I think, to an irresistible conclusion. On some points of the case, I have varied my views a little. The rogues here in Congress complain that the cause was put on grounds not stated in the court below. There is little or nothing in this. . . . The only new aspect . . . was produced by going into cases to prove . . . ideas which indeed lie at the very bottom of your argument.

But others, if not such gifted raconteurs as Goodrich, were also disinclined to underplay Webster's role. "Webster's argument was said to be the ablest ever delivered in this Court," wrote Eleazar Wheelock Ripley to his cousin, William Allen, in Hanover. Ripley, a New Orleans lawyer and a grandson of Eleazar Wheelock, happened to be in Washington, though he did not attend the trial. His report to Allen was not encouraging: "A friend of ours after hearing [Webster's argument] observed to me 'I am afraid you have

the trial Hale wrote to Allen, "The employment of Mr. Wirt seems every day more correct." Hale's admiration for Wirt's "very able argument" led him, quite unnecessarily to feel concern for what Webster might suffer in consequence. And to Plumer, Hale wrote of Wirt's "mind of a giant," and added from the depth of his delusion that it had "made Webster lower his crest and sit uneasy."

Actually Wirt was at a painful disadvantage in the case. He had been so preoccupied with his duties as Attorney

lost your cause.'" Even Salma Hale grudgingly conceded Webster had "made no little impression . . . was powerful . . . very able. . . ."

Regardless of where their sympathies lay, all united in the view that John Holmes' performance had been dismal. Webster described it in a letter to Mason as "three hours of the merest stuff that was ever uttered in a county court." To Judge Smith Webster wrote that "Holmes did not make a figure. I had a malicious joy in seeing Bell* sit by to hear him, while everybody was grinning at the folly he uttered. Bell could not stand it. He seized his hat and went off."

Salma Hale was more restrained in his comments: "Mr. Holmes was below our moderate expectations." But Ripley was less temperate. To William Allen he wrote: "Holmes ranks low at this Bar. . . . If you have lost the case you may attribute [it] entirely to your improvidence in arranging counsel."

William Wirt, on the other hand, received warm approval from Salma Hale who, after all, had recruited him. During

* New Hampshire Superior Court Justice who, four months before, had participated in the decision against the College, and who was in Washington to attend a Supreme Court hearing in a suit to which he was himself a party, and in which Webster represented him.

is a competent lawyer, and argues a good cause well. In this case he said more nonsensical things than became him."

Webster was full of praise for his associate counsel, Joseph Hopkinson who, he wrote to President Brown, "has entered into this case with great zeal." After Hopkinson's reply to Wirt, Webster described it as "very gratifying and satisfactory to me. . . . Mr. Hopkinson understood every part of the cause, and his argument did it great justice." To Mason, Webster wrote that "Hopkinson made a most satisfactory reply, keeping to the law and not following Holmes and Wirt into fields of declamation and fine speaking."

By the custom of the day, no verbatim transcripts were made of the orally presented arguments, and ordinarily the only record, if any at all, consisted of abbreviated summaries prepared by Henry Wheaton, Washington lawyer, for his monumental *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*. The existence of a more complete record in the case of the *Trustees of Dartmouth College v. Woodward* is due to the efforts of Timothy Farrar. Dartmouth graduate in the Class of 1807, and named for his father who was an "Octagon" Trustee, young Farrar was a Portsmouth lawyer and close friend of both Daniel Webster and Jeremiah Mason. The College cause had aroused his lively interest. With Webster's encouragement, he put together a volume containing not only the opinions in both the New Hampshire and Federal courts but also the arguments presented before each court. Webster, shortly after his argument in the United States Supreme Court, prepared a full and careful statement of it for a purpose which will be referred to hereafter. This he made available to Farrar. Later, expressly for the Farrar volume, Webster prepared a summary of Hopkinson's argument, using notes furnished by Hopkinson. Much less space in Farrar's volume is devoted to the presentations of Holmes and Wirt. Farrar had made a conscientious effort to obtain from the University's counsel full reconstructions of their arguments, but for understandable reasons these men had by the late spring of 1819, when

General that he had not been able to prepare his argument carefully. Exhausted, and conscious of the inadequacy of his preparation, he felt impelled in the middle of his presentation to ask the court for a brief recess until he gathered himself and his thoughts together.

Webster too spoke well of Wirt but not of his performance in this trial. "[Wirt] is a man of talents, and will no doubt make the best of his case," wrote Webster to President Brown before Wirt's argument had begun. But after Wirt had spoken Webster observed to Jeremiah Mason: "[Wirt] is a good deal of a lawyer, and has very quick perceptions, and

> a handsome power of argument; but he seemed to treat this case as if his side could furnish nothing but declamation. He undertook to make out one legal point on which he rested his argument, namely, that Dr. Wheelock was not the founder. In this he was, I thought, completely unsuccessful. He abandoned his first point, recited some foolish opinions of Virginians on the third, but made his great effort to support the second, namely that there was no contract. On this he had nothing new to say. . . . He made an apology for himself, that he had not had time to study the case, and had hardly thought of it, till it was called on."

To Judge Smith, Webster commented, "Wirt has talents,

the College's prospects at the hands of the seven-man Supreme Court: "I have no accurate knowledge of the manner in which the judges are divided. The Chief and Washington, I have no doubt are with us. Duval and Todd perhaps against us; the other three holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance for one of the others. I think we shall finally succeed."

Hale's tally sent to Allen was as usual over-optimistic: "I am really serious when I assure you that I consider our chances of success 5 to 2. It is more than an even chance that the count will stand 6 to 1."

The accustomed University euphoria quickly subsided as they faced realities. First among these was the necessity of paying their counsel. Holmes had concluded his report to Allen with the blunt observation that "Mr. Wirt and your humble servant are of opinion that some fees ought to be forwarded." Also Hale, having deduced from Wirt's comments that $500 would be an appropriate fee for the Attorney General's services, began pressing President Allen for payment by the University. Allen replied that he had "reason to think that the funds [of the University] are not in good state, for I have received *nothing* for my services [for] more than a year." He said that Woodward, as University Treasurer, believed "we must obtain money by solicitation . . . but my chief hope rests upon the Legislature at the session of June." June seemed too far away to Hale and the other University supporters in Washington who had urged Wirt's employment. Hale felt himself personally obligated to Wirt, and in mid-April he wrote to Allen: "I have paid Mr. Wirt $200 & Mr. Ripley paid him $100."

Allen pointedly reminded Governor Plumer that the "difficulties under which we labor . . . will render it important that we secure pecuniary aid from the next legislature in order that we may continue the Institution." In anticipation of favorable action by the legislature the University Board "appropriated" a sum not exceeding five thousand dollars for the payment of counsel, for the payment of salaries due the officers of the University, and for incidental expenses. But the legislature limited its commitment to $4000, and then not as a grant but as a one-year loan to be conditioned upon

the Farrar volume was in progress, rather lost interest in the case. The probabilities are that the truncated renderings of the defense arguments which Farrar finally had to use were in fact prepared by Wheaton in the normal course of his work and lent by him to Farrar in exchange for the longer treatments covering Webster and Hopkinson. In the end both the Farrar and the Wheaton volumes reproduced substantially the same versions of the four presentations, but because the summaries are unequal in depth it is not possible today to compare them even-handedly.

Upon the conclusion of the arguments of counsel, Chief Justice Marshall announced that because of differing views among the judges a decision would be deferred until the next term, a year hence. The prospect of uncertainty so prolonged was more disturbing to University adherents than to the College. The hopes of the former were entering a state of deflation; while the College people had derived bright, new faith from the way the case had gone in Washington. Salma Hale tried to reassure Allen: "The continuance of the cause ought not to diminish our confidence. The importance of the question required it of the Court. . . . The College Trustees were in the same manner elated after the argument at Exeter, & I trust their hopes will in the same manner be disappointed."

For the benefit of Judge Smith, Webster shrewdly analyzed security from the University Trustees in their corporate capacity. At an ensuing meeting, the University Board cut their earlier "appropriation" to fit the cloth.

AMONG THE STIPULATIONS of the legislation creating the University was the requirement of an annual report by the University President to the New Hampshire Governor. This report Allen dutifully filed on July 7. It was a catalogue of University troubles: "The number of students is sixteen; — many students continuing under the instruction of the displaced officers of the seminary who in disregard of the law of the State keep up in Hanover the form of a college." Speaking as of two years after the passage of the enabling legislation, the report stated tersely: "The overseers have not as yet found a quorum." Allen cited the ill health of William Woodward, Secretary and Treasurer of the Board, as an explanation for the President's not having "a copy of the votes and proceedings of the corporation" to include in his report. The same circumstance also served as a justification for the absence of a precise financial account. Allen recalled Woodward's report of the preceding year, which "calculated . . . that there was due to the University . . . upwards of eight thousand dollars; — but being due principally from former students now scattered over the United States, and from lessees of lands in Vermont and New Hampshire many of whom are poor, — it was thought that a large part of the sum due would eventually be lost." Allen estimated that "the sum which the Legislature has resolved to loan to the corporation is not more than will be requisite to meet . . . claims and expenses" for officers' salaries and law suits.

Throughout the winter and spring of 1818 the health of William Woodward steadily declined. In early April, Allen described him as "very feeble." In June, Dr. Cyrus Perkins of the Dartmouth Medical School was appointed by the University Trustees to serve as Treasurer with Woodward, since the latter's health no longer permitted him to perform his duties actively. On August 9 Woodward died, "his mind almost utterly in ruins." Allen correctly described Woodward's death as "a great loss to . . . the University as no one was so well acquainted with its concerns."

DURING the spring and summer of 1818 the College, too, was beset with problems flowing from a prolongation of the uncertainty about its future. Under severe financial pressure, it needed funds not only to keep its officers and faculty from hardship but also to pay further fees for counsel. President Brown set to work again to raise support among friends of the College. The continuing uncertainty likewise rendered acutely difficult the President's efforts to fill a vacancy in his faculty. One candidate, after some euphemistic dodging, finally conceded that "a decision of the Dartmouth cause favourable to the College will be likely to draw after it an affirmative one from me." Chief among the College's preoccupations was the carrying forward of the Circuit Court cases. Though Webster had gone into the March argument before the Supreme Court armed with the knowledge that Circuit Court suits would be started, they were not actually begun until later.

It fell to President Brown, Charles Marsh, and Mills Olcott, with the advice of Jeremiah Mason and Judge Smith, to mount this second front. Three different suits were con-

Federal Supreme Court at its next term in February 1819 when a decision was expected in the principal case, *Trustees of Dartmouth College v. Woodward*. Marsh wrote to President Brown that Story had explained this specification on the grounds that the Woodward case might not permit a consideration of "all the questions that would naturally arise and it was time that the controversy should be finished."

Midst the preoccupations of both institutions with litigation, new and old, the 1818 Commencement appeared as a decorous interlude. Mindful of the undignified occurrences of the preceding year President Brown wrote to President Allen in June, well in advance of the exercises scheduled for August, saying that he and the College Trustees were "very desirous of avoiding at the ensuing Commencement the collision respecting the occupation of the meeting house which was unhappily witnessed at the last Commencement."

> "We consider ourselves to have an unquestionable right to the use of that edifice for our public exercises at the usual time," said Brown, "& we entertain a hope that you will leave us in undisputed enjoyment of a privilege without which we may be seriously incommoded. But we are prepared at this instance to recede from our right rather than to be involved in an unpleasant contest & to hold our Commencement on a different day or even a different week from that heretofore established.
>
> "The object of this communication is to request to be informed by you whether the Trustees & officers of the University intend to claim the meeting house on the [customary] 4th Wednesday in August . . . or whether they will leave the trustees, officers, and students of the College in possession of it on that and the two preceding days unmolested by them or by other persons acting by their authority & at their request."

On the following day President Allen replied equivocally:

> I would inform you that the Commencement in Dartmouth University will be held at the usual time. We have as yet made no particular arrangement as to the place of holding Commencement. The avoidance of a collision, as you intimate, is certainly desirable; but our claims to the meeting house you may have reason to suppose — we consider as strong as you consider yours.

Three days later President Brown expressed to Allen his regret that the latter's reply was "not more explicit":

to mount this second front. Three different suits were contrived, all based on "diversity of citizenship," with Marsh, the Vermont lawyer, designated to attend to procedural aspects peculiar to that State. The suits were begun in late March 1818. One of them was against President Allen to recover possession of certain college buildings under a lease executed for this purpose by the College Trustees. The action was brought by a convenient Vermont plaintiff who turned out to be none other than Charles Marsh himself. A further suit was filed by another willing Vermonter to eject a New Hampshire tenant of the University. A third Vermonter (the accommodating supply seemed inexhaustible) filed still another suit against an additional hapless tenant of the University. These suits were set for initial hearing at the May term of the Federal Circuit Court which was to be conducted in Portsmouth before Judge Story in company with the District Judge. In mid-April Jeremiah Mason wrote to Marsh that "the counsel engaged in your first cause being pretty well exhausted . . . expect you to come [to Portsmouth] with a treasury of new things & that you will take upon you the principal burden of the argument . . ."

It was expected that the defendants, when the term opened, would ask for continuations, so that they might have time to prepare their defenses. This they did. Judge Story, in granting this request, enjoined the defendants to be prepared to try the suits early in the September term. It was important, he said, that one or more of the suits be carried to the

regret that the latter's reply was "not more explicit":

> There are many circumstances which in our judgment render it desirable for all concerned that the Commencements of both institutions should be simultaneously holden. But the experiment of last year shows that the exercises of both cannot, with convenience to either, be performed in the same edifice on the same day.

The University officers were acutely sensitive about the relative smallness of their institution and a corresponding lack of splendor in their Commencement exercises. Brown mercilessly touched the sore spot: "We entertained a hope," he wrote urbanely to Allen, "that you would find yourselves well accommodated in the Chapel; whereas it must be obvious to you that we have no building which would in any tolerable manner answer our purposes, except the meeting house." Determined to be reasonable, Brown repeated his desire to avoid a contest and the resolve of the College Trustees to change the time of their exercises "unless we obtain an assurance from you that the University will not disturb us in the enjoyment of our customary privilege. . . . We wish a distinct declaration of your intentions." He requested a prompt decision because of the need for ample notice to many interested persons. But Allen, four days later, perpetuated the state of uncertainty by replying that "the Trustees whose duty it is according to ancient practise to determine the place, have not acted upon the subject, nor will they meet again until a short time before Commencement." In consequence, the College concluded to hold its exercises one week earlier than the customary date.

Allen evidently notified his Trustees of the exchange with President Brown, for in July, Elijah Parish, conspirator with John Wheelock in the anonymous publication of the *Sketches* and now a Trustee of the University, described his reactions in a letter to Governor Plumer. After a characteristically fawning introduction, Parish wrote:

> No doubt the College and Brown & Co expect great credit for this condescension respecting commencement, but in my opnion they think themselves very cunning. No doubt they will expect all the clergy, and most of those in other professions who ever attend Commencement and are delighting themselves with the anticipation of our diminutive process and empty house . . .

But just before the University commencement Allen wrote to Salma Hale, University Trustee, that hopefully "our performance [at Commencement] will be sufficient in number, & weighty in worth." However, the occasion was dampened by the failure of the Governor to attend. It suffered, too, from the presence of only a half-dozen in the graduating class, as compared with twenty-six graduates from the College the week before.

MEANWHILE the long year between the Washington hearing and the Supreme Court's decision slowly unrolled. Neither Webster nor President Brown was inclined passively to sit out the interval. At the close of the hearings Webster had confidently predicted that at least four of the seven Justices would support the College. But a four-to-three projection posited a precarious margin on which to rely, and Webster determined to do what he could to enlarge it. Thus, when he returned to Boston a week after the Supreme Court hearing, he resolved to put into readable form his own argument. He wrote to Mason on April 22 that "since I came home, a young man in the office has assisted me to copy my minutes, as general decorum seems to prohibit the *publishing* of an argument while the cause is pending. I have no objection to your showing this to any professional friend in your discretion. I only wish to guard against its becoming too public."

Surely Webster's dominant purpose in what became a generous, but selective, distribution of his printed argument during the spring and summer of 1818, was his hope that an exposure to his reasoning would be found persuasive to influential readers, the views of at least some of whom might be treated with respect should they come directly or indirectly to the ears of individual Justices of the Supreme Court. Significantly he wrote to Hopkinson in early July, ". . . many persons, even in the profession, were not well informed as to the grounds of the case. They had read the N. H. opinion and as a very distinguished man among us said to me 'though they revolted from the conclusion they could not exactly see where the fallacy lay'." It seems a fair surmise that the "very distinguished man" was Justice Story, whose *ex camera* remarks Webster was in the habit of obscuring with an anonymous attribution. Webster went on to tell Hopkinson that he had given Justice Story a copy of the printed argument: "It enables our friends to reason on the subject, and puts them to thinking a little."

On target was another sowing of the printed text. During the summer of 1818 James Kent, then Chancellor of the New York Court of Chancery and a highly respected jurist, on a journey from his home in Albany paused briefly in Hanover and in Windsor, Vt. While in the area, encouraged by University adherents, he read the opinion of the New Hampshire Superior Court, and word reached the College forces that the Chancellor had been impressed with the reasoning in that opinion. The tidings were ominous, for Supreme Court Justice William Johnson was a long-time, close friend of Kent and was said to hold a high respect for Kent's opinion on questions of the law. Charles Marsh resolved to send Chancellor Kent a copy of Webster's argument in the hope that it would alter Kent's views. That the tactic had the desired effect was amply established by Kent's reply to Marsh. The Chancellor [illegible] had been "led by the [New Hampshire]

and I have been foolish enough to print three or four copies. . . . These copies are and will remain, except when loaned for a single day, under my own lock and key. . . . There is no title or name to it. These precautions were taken to avoid the indecorum of publishing the creature."

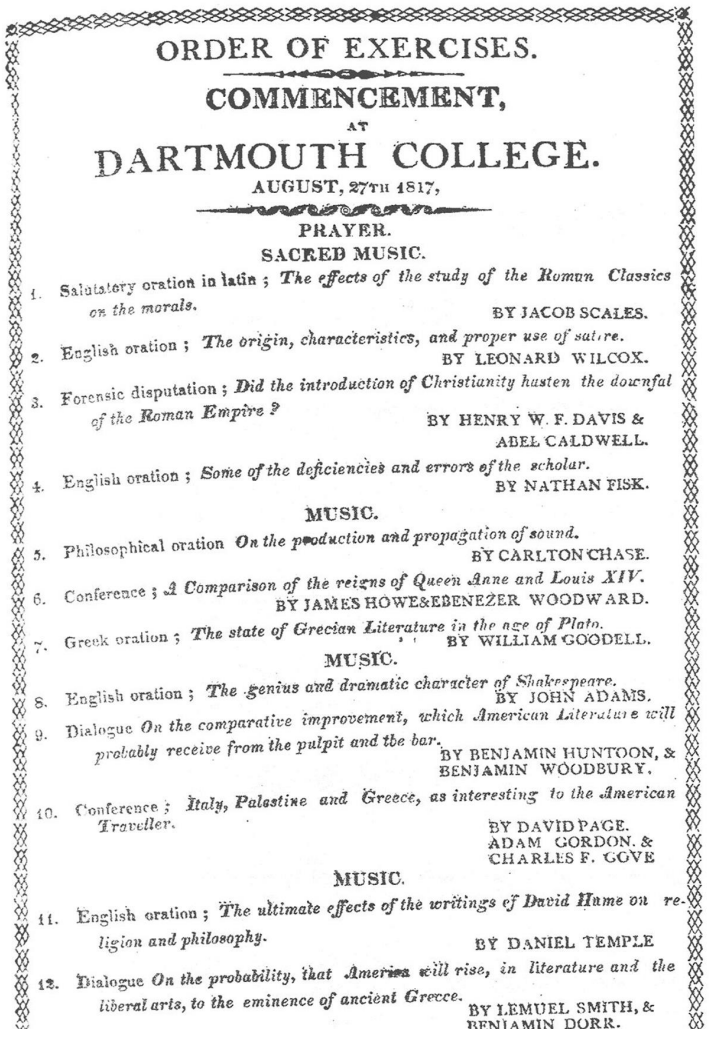
Webster promised to send Mason a copy, but admonished him not to "let Farrar see it, because he would wish to show it to President Brown and all." He added, ". . . perhaps I should do better to burn it, than to send it at all." However, shortly thereafter he sent copies to both Mason and Judge Smith, declaring to the latter that he intended "not to let the [copies] get too much abroad."

Webster soon overcame his hesitancy about enlarging the circulation of this printed version of his argument. A transformation akin to what happened to the loaves and the fishes was undergone by the "three or four copies" which he had acknowledged printing; for in the course of the ensuing weeks he distributed a considerably larger number to, among others, Brown and Farrar. By July a copy had reached the students at the College. Webster urged President Brown to do what he could to prevent them making "indiscreet use of it. . . . Pray caution the students against publishing it, or any part of it." Among other copies sent out by Webster, one went to a lawyer alumnus of the College with the explanation that he had been moved to "exhibit in print our view of the cause" as counteractive to the widely circulated opinion of the New Hampshire Superior Court. To preserve the proprieties, Webster added: "A respect for the [Supreme] Court, as well as to examine all the facts, agree fully with you. But still there was some reserve, which perhaps arose altogether from an apprehension that I should imprudently report what he might say, — but possibly it may be otherwise.

readily conceded he had been "led by the [New Hampshire] opinion to assume the fact that Dartmouth College was a public establishment for purposes of a general nature. . . . But I will declare to you with equal frankness that the fuller statement of the facts in Mr. Webster's argument in respect to the origin and reasons and substance of the charter of 1769 and the sources of the gifts, *gives a new complexion to the case,* and it is very probable that if I was now to sit down and seriously study the case with *the facts at large* before me, that I should be led to a different conclusion from the one I had at first formed."

FURTHER INDICATION of the harvest which the printed text produced came in July when Justice Story asked for several additional copies. In supplying them Webster continued to show concern about the proprieties. He said to Story, "If you send one of them to each of such of the judges [of the Supreme Court] as you think proper, you will of course do it in the manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs. The truth is, the New Hampshire opinion is able, and something was necessary to exhibit the other side of the question."

President Brown on a visit to Albany in September was able to confirm Chancellor Kent's agreement with the Webster argument. Kent readily conceded he had initially favored the reasoning of the New Hampshire Court. Brown, quick



ORDER OF EXERCISES.

COMMENCEMENT,

AT

DARTMOUTH COLLEGE.

AUGUST, 27TH 1817,

PRAYER.

SACRED MUSIC.

1. Salutatory oration in latin ; *The effects of the study of the Roman Classics on the morals.* BY JACOB SCALES.
2. English oration ; *The origin, characteristics, and proper use of satire.* BY LEONARD WILCOX.
3. Forensic disputation ; *Did the introduction of Christianity hasten the downfal of the Roman Empire ?* BY HENRY W. F. DAVIS & ABEL CALDWELL.
4. English oration ; *Some of the deficiencies and errors of the scholar.* BY NATHAN FISK.

MUSIC.

5. Philosophical oration *On the production and propagation of sound.* BY CARLTON CHASE.
6. Conference ; *A Comparison of the reigns of Queen Anne and Louis XIV.* BY JAMES HOWE & EBENEZER WOODWARD.
7. Greek oration ; *The state of Grecian Literature in the age of Plato.* BY WILLIAM GOODELL.

MUSIC.

8. English oration ; *The genius and dramatic character of Shakespeare.* BY JOHN ADAMS.
9. Dialogue *On the comparative improvement, which American Literature will probably receive from the pulpit and the bar.* BY BENJAMIN HUNTOON, & BENJAMIN WOODBURY.
10. Conference ; *Italy, Palestine and Greece, as interesting to the American Traveller.* BY DAVID PAGE. ADAM GORDON, & CHARLES F. GOVE

MUSIC.

11. English oration ; *The ultimate effects of the writings of David Hume on religion and philosophy.* BY DANIEL TEMPLE
12. Dialogue *On the probability, that America will rise, in literature and the liberal arts, to the eminence of ancient Greece.* BY LEMUEL SMITH, & BENJAMIN DORR.

In Webster's reply to Brown he claimed, not without sangfroid, that he had "never doubted for a moment on which side C. K.'s mind must ultimately rest. I have studied him (and his work) many years, & think I understand him. . . . His opinion will have weight wherever it is heard. I hope he will express himself as occasion may offer."

In September the continued Circuit Court cases came before Story in Exeter. The University was again represented by Messrs. Sullivan and Bartlett, and Mason and Smith remained the College's representatives. Charles Marsh, as one of the plaintiffs, was present. Just before the Court hearings Webster visited Exeter where he consulted with his associates and with Marsh. He was able to report to Brown that "the causes look quite promising. I think there will be little doubt of some or all of them going up." Webster had early specified to Mason that "the question we must raise in one of these actions, is, 'whether, by the general principles of our governments, the State legislature be not restrained from divesting vested rights?' This is of course independent of the constitutional provision respecting contracts. . . . [It] is the proposition with which you began your argument [before the New Hampshire Superior Court] and which I endeavored to state from your minutes at Washington. The particular provision of the New Hampshire Constitution no doubt strengthens this general proposition in our case; but in general principles I am very confident the court at Washington would be with us."

The Circuit Court hearings went off to the complete satisfaction of Marsh. He reported to Olcott and Brown in Hanover that a special verdict had been agreed upon in all three cases, and that he had seen "nothing unfavorable to our eventual success. . . . The court appeared resolved to have the causes prepared in such a manner as to have them carried to Washington avowing as the reason that the real question

13. English oration } *The partialities and prejudices of great minds.*
BY MARSHALL SHEDD.

MUSIC.

14. English oration *On National Character,* by Mr GEO. KENT candidate for the degree of Master of Arts.

MUSIC.

DEGREES CONFERRED.

15. Valedictory address } *The effects of literary retirement on intellectual character.*
BY JAMES MARSH.

SACRED MUSIC.
PRAYER.

The controversy produced no shortening of Commencement.

to appreciate the significance of the Chancellor as an ally, reported at some length to Webster:

> I think it may be of some importance to the right decision of the case, that the chancellor should not only have a correct opinion, but should be induced to declare it. Judge Johnson has been here. This the chan. mentioned, & he also said that the judge conversed on our case, & remarked that the court had a cause of 'awful' magnitude to decide &c. From what I learn from other sources the judge has formally requested the chan.'s opinion. This opinion, if given, will also have great influence on Judge Livingston. Now I think the chan. on examination of the case, cannot fail to be right. He had, he said, great pleasure in reading your argument, and spoke in terms sufficiently flattering of the legal ability & logical power displayed it it, & added he should probably, if he had time

to Washington avowing as the reason that the real question in controversy would be more fairly and fully presented than in the former action." Marsh also informed Brown that he had "written Mr. Webster . . . to have the actions entered early on the docket of the Supreme Court."

WHILE the College had widened its attack by instituting the Circuit Court cases, the University had simultaneously mounted a counteroffensive directed at obtaining a re-argument of the principal case before the Supreme Court in Washington.

So shocked had the University protagonists been by the contrast between the performance of their counsel in Washington and that of the College, and so unprepared were they for the failure of the Supreme Court to decide at once in their favor, that they looked for an explanation which would reflect not upon their cause but upon the College and its counsel. The managers of University strategy grasped at a supposition that Webster and Hopkinson had improperly introduced points in the case at Washington which had not been offered in the New Hampshire court, and had buttressed them with misstatements of fact. Thus the University determined, if possible, to bring about a reopening of the case in Washington, enabling their counsel to introduce "new facts" controverting those advanced by the College counsel.

Because of the technicalities involved there is a temptation to leave unmentioned or to slur over the supposed basis for a new argument in the principal case, as claimed by the University. But without some understanding of it the balance of the legal maneuvering appears to be only a meaningless ballet. The following explanation suffers from oversimplification, but it will convey an idea of what was involved.

Between the time of the New Hampshire and the Washington arguments Webster had given special attention to the English doctrine regarding charitable trusts and had conducted some correspondence with Justice Story on the subject. In presenting the case to the Supreme Court he had laid a new emphasis on Eleazar Wheelock's role as *founder* of the College, and upon the privileges of control which accrued to the founder of a charitable trust, capable of being passed on to succeeding trustees. Thus Webster developed the thesis that the elder Wheelock, as founder, had caused his privileges and powers to descend to the Trustees of the College, where they continued to be lodged, as unchallengeable as they would have been in his own hands. This was more a shift in emphasis than the introduction of a different argument, as Webster declared to Judge Smith. Long after Webster had delivered his argument, he received from England some books on charitable uses "not to be had here" which convinced him that in his argument he had arrived, by *a priori* reasoning, at the correct view. He remarked to President Brown in December 1818 had he had the books "a year ago they would have saved me a good deal of labor." He added significantly, they are "now leant to Judge Story."

BUT whether Webster's points before the Supreme Court constituted a different argument, or an old one remodeled, they rested heavily upon Wheelock's being in fact the "founder" of the College, to have been in harmony with Governor Wentworth's own impression of Lord Dartmouth's interest, for when Wheelock proposed that the new College be named Wentworth in his honor, the Governor countered with the recommendation that it be called Dartmouth College. However, after all the formalities had been completed and the College had come into existence under the 1769 charter, Wheelock received word from Lord Dartmouth indicating that the English Trustees disassociated themselves from the new college. In fact Lord Dartmouth took the position that the application of any of the Trust funds to the College would be an intolerable diversion.

It is not difficult to imagine the consternation which this communication must have caused Wheelock. But he had before bent with the wind in pursuit of his great design, and he was prepared to do so again to retain access to the English funds. He restored to life by legerdemain Moor's Charity School as an institution separate and apart from the College. Only after his assurance to the Earl of Dartmouth that the English money would be used exclusively in support of Moor's School did the English Trust continue to remit to Wheelock.

Though documentation of this sequence was at all times available in the Wheelock files, as the events themselves dropped more distantly into the past and as death removed persons with firsthand knowledge of them, a disposition arose in the College family to view the historical background of the institution as the charter preamble described it, rather than as it had actually occurred. This misconception thrived on a certain vagueness which had come to permeate the status of the Charity School in the minds of persons lacking intimate association with the College's past. In consequence, a legend early took hold and, despite its not infrequent disproof, still persists in many minds. The legend is that the English donors, including the second Earl of Dartmouth for whom the College was named, were in fact donors to the new

as the charter preamble declared him to be. In substantiation of this, Webster alluded to the elder Wheelock's own gifts to the College and his instrumentality in obtaining contributions from English donors by way of the English Trust of which the second Earl of Dartmouth was chairman. It was on this point that the University now thought they had Webster skewered.

To understand the basis for the University's fresh expectations it is necessary to scrutinize certain circumstances associated with the granting of the College's charter. In applying to John Wentworth, Royal Governor of the Province of New Hampshire, for a charter, Eleazar Wheelock intended that the newly chartered institution would encompass and, indeed, replace his earlier creation, Moor's Indian Charity School, that the latter would cease to exist as a separate entity. The new entity — the College — was to take over the aims of the Charity School — the educating and Christianizing of Indians — and merge them into a matrix which, "without the least impediment to said design . . . may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon [to be] formed in that new country, with a learned and orthodox ministry." It seems evident from the foregoing language in the charter's preamble, which Wheelock himself drafted, that he assumed the men in England, including Lord Dartmouth, who held the funds donated there for the benefit of Moor's Indian Charity School would accept this enlargement of purpose as being consistent with the terms under which the funds had been collected and were being held in trust. This assumption seems College and specifically encouraged its establishment.

It would seem certain that Webster, and all of his contemporaries, grew up in the acceptance of this legend, for after all, it was consistent with the text of the preamble to the College's charter. Thus when he and his fellow counsel, in their endeavor to establish that Dartmouth College was not a public corporation but a private eleemosynary corporation, represented to both the New Hampshire Superior Court and the United States Supreme Court that part of the initial charitable gifts to the College came from English donors, led by the Earl of Dartmouth, they were asserting a widely held misunderstanding. So general was the assumption that events had occurred as described in the charter that not even the University officers and their counsel appeared aware of the factual divergencies until after they had passed through trials in both courts. It is clear at least that President Allen, guiding the hands of University counsel, did not make an effort to uncover, until after the Washington hearing, a record of what had actually happened in the early days.

By the August 1818 meeting of the University Board, Salma Hale, William Allen, Cyrus Perkins and others had become convinced that a motion for a reargument before the Supreme Court should be made. This was to be based not only on "new facts" with respect to the English donors, but also with respect to College counsels' assertions that Eleazar Wheelock was the "founder" of the College and himself a contributor of funds to it. The "new facts" were directed toward demonstrating that the King and the Province of New Hampshire were the sole sources of initial gifts to the College, and were intended to strengthen the proposition that the College was indeed a "public corporation." Accordingly, at its August meeting the Board authorized the employment of counsel to secure a reargument and, remembering their earlier improvident selection, they turned this time to William Pinkney of Baltimore. He accepted.

In choosing Pinkney, the University authorities put their fortunes in the hands of one generally acknowledged to be a leader of the American bar. Formerly U.S. Attorney General under James Madison, Pinkney was fifty-four years old when engaged by the University. He had not long before returned from two years abroad as American minister to Russia. Vain, flamboyant in his dress and manner, Pinkney invariably turned an appearance in court into a performance. But with all his questionable qualities of manner, he was regarded as the most versatile advocate of his time.

On Pinkney's acceptance of the assignment to secure a reargument of the University's case before the Supreme Court, President Allen wrote him in early September that

> the Trustees of Dartmouth University will not fail duly to estimate the liberality with which, out of regard to a learned Institution, your services are proferred. With the assurance, which you have given, of your best exertions as counsel in their behalf, they will rest satisfied, that a cause so interesting to themselves and so important in its results to our country could not be entrusted to better hands.

From Hanover, Allen forwarded to Pinkney in Washington a summary of Webster's argument ("The argument is printed, but most cautiously kept from us. I have however read it in a wretched Mss & have made the enclosed very short abstract"). Allen said he had "lately examined all the papers belonging to Dr. Eleazar Wheelock relating to the School & College. I find facts opposed to Mr. Webster's statement . . . of which I can at a future time apprise you."

Shortly thereafter, while attending to business in Exeter, Webster learned that the University had retained Pinkney.

> College, as occasions require. . . . Why it is I will endeavor to explain to you on some future occasion. I have been laboring through the [Eleazar Wheelock] "narratives," etc, etc. of which I intend to attempt something like a digest, & transmit the same to you in due season. . . .
>
> And now, Sir, as to compensation for yourself & Mr. Hopkinson in the new causes, will you tell me what it should be? I intend to make a new effort, if Providence permits, in N.H. & should be glad to know the sum necessary to be raised before you go to Washington. It is my present intention to be in Boston by the middle of January.

Webster replied at once, saying:

> It will not be necessary to decide on the subject of other counsel until I see you . . . suffice it to say, at present that, although if nothing should be necessary in the way of argument but a reply, Mr. Hopkinson, or myself, might do that, yet if it should be necessary to go over the whole ground again, some new hand must come into the cause. My own impression is to apply, in case of need, to some gentleman there on the spot. Let this rest until January.
>
> As to money and compensation, etc, I hardly know what to say about it. As to myself, considerations of that sort have not added greatly to my interest in the case. I am aware, also, that others, whose labors are more useful than mine, are obliged to confer gratuitous service. The going to Washington, however, is no small affair, and is attended with inconvenience to my practise here. My other inducements to attend the ensuing term are not great, not so much so as last year, while the sacrifice here will be greater.
>
> As to Mr. Hopkinson, he has put the case on such ground, that nothing can be done about his compensation till a final decision. If that should be as we hope, something honorable must be done for him; towards which I expect to contribute in proportion to my means, and in common with other friends. I hope you will be here a little sooner than January 15, as I hope to be able to set off by that time. I rely on you for all necessary knowledge of Moor's Charity School; not caring so much about it as you seem to. The cause has gone too far to be influenced by small circumstances of variance. . . .
>
> I wish you to understand that if I go to Washington, and am

Webster learned that the University [illegible]

"This will occasion another argument at Washington," said Webster to President Brown, "which I regret, on some accounts. I do not fear that it will increase the danger to our cause, which I trust will grow brighter by discussion, but who is to argue it on our side. I do not feel as if I could ever undertake it again, & hardly know what to recommend to you. As Bro. Holmes retires probably from the cause the next time, I think it would be prudent for me to retire with him. Of all these things we must consult hereafter."

Webster also notified Marsh of his reluctance to appear for the College in a reargument at Washington, and Marsh, no doubt much concerned, forwarded the letter to Brown, who on November 4 wrote to Webster:

> . . . in the judgment of all the friends of the College we must rely chiefly on you, in the contemplated discussions at Washington. Nor do I think this will require a new argument on the old ground. For if you propose to the court & the adverse counsel that the plaintiffs have nothing to add, & mention this in season, is it at all probable they will require anything more. But *if they should,* what shall we do? Why, indeed, I know not. For who would be willing to go over the same ground after you, which you would be unwilling to retrace yourself. To me it is clear, that no man in the country would undertake this task. Mr. Marsh mentions that Judge Smith or Mr. Mason might possibly be persuaded to go on. We should repose the most entire confidence in either of them. But what could they say which had not been said. I despair on this point; and therefore I do not believe they would go. . . . But I beg you to allow us to expect that you will yourself reply to Mr. Pinkney . . . it will not be possible for any man, not deeply versed in the history of D.C. & Moor's I.C.S. to possess the requisite knowledge to enable him to unravel & explain all the matters & things. . . . Indeed a considerable part is unintelligible by anybody. The School is *alter, et idem* with the paid for it, any thing necessary to new counsel there, I shall pay. It is not my intention that any arrangement of this sort shall increase expense. I am not certain that a new argument will be ordered, and I am still more doubtful whether a new opening on our side will be called for. But this is possible, and if so, some gentleman must repeat our view, and add what he or we may have obtained new. This event of course of things is not probable, but possible.

Webster wrote to Hopkinson to alert him to Pinkney's probable entry into the case, and to suggest a course of action. Hopkinson replied that he had already encountered Pinkney "who told me he was engaged in the cause of the University, and that he is desirous to argue it, if the court will let him":

> I suppose he expects to do something very extraordinary in it, as he says Mr. Wirt was not strong enough for it, has not back enough! There is a wonderful degree of harmony and mutual respect among our opponents in this case. You may remember how Wirt and Holmes thought and spoke of each other.
>
> On receiving this information from Mr. Pinkney I seriously reflected upon the course it would be proper for us to take; and I assure you most truly, I decided precisely in favor of that suggested by you. It cannot be expected we shall repeat our argument merely to enable Mr. Pinkney to make a speech, or that a cause shall be reargued, because, after the argument has been concluded, and the court has the case under advisement, either party may choose to employ new counsel. I think if the court consents to hear Mr. Pinkney, it will be a great stretch of complaisance, and that we should not give our consent to any such proceeding; but if Mr. Pinkney, on his own application, is permitted to speak, we should claim our right of reply. The court cannot want to have our argument repeated; and they will hardly require us to do it for the accommodation of Mr. Pinkney. However, we shall have an opportunity to consult more fully in these matters.

A THREAT to the College's fortunes began to show itself in another quarter in the closing months of 1818. Beginning with a slight indisposition evident at Commencement in the preceding August, President Brown's health took an ominous turn by the end of the year. It was a cause for profound concern on the part of all friends of the College. In December, Webster urged him to postpone a promised fund-raising trip to Boston "until your recovery is complete. . . . As far as relates to any provision for the expenses at Washington, etc., I would have everything remain as it is. . . . Let us hear from you every week respecting your health." Later in the month Webster again protested against President Brown's journeying to Boston just to raise funds for counsel fees: "That object *must not* be put in competition with your health. The season is severe. Exposure might endanger you — & I would by no means have you come here at any risk. Give me all the information you can by *your pen* & let me go. Among other things set down all the inaccuracies which you have noticed in my argument."

As additional reports reached the ears of President Brown [illegible] lock papers back in Hanover than the University Trustees insisted they be returned to Sullivan and Bartlett to obtain the consent of the College's counsel to include them in a statement of facts to go up with the Circuit Court cases to the Supreme Court in Washington.

Judge Smith, to whom Sullivan ultimately submitted the papers, assured Brown that the so-called "new facts" would not be found to be of much significance. The College's counsel succeeded in limiting the factual statement to the actual texts of the newly offered documents, and avoided the sanctifying of any deductions from them. "You need not apprehend," wrote Smith to the President, "any sacrifice of your interest by *neglect* of your counsel — an appeal lies to J. Story as to the papers to be admitted — whether it will be made or not [I] can't yet say."

Thus as 1819 opened, Webster prepared himself for the Washington trip. Timothy Farrar in Portsmouth sent to him the certified records of the Circuit Court cases, observing "one of the papers herewith . . . is not included in any argument yet made, viz. the letter from the Trust in England to Eleazar Wheelock." The letter to which Farrar referred was the one written in 1771 in which the English Trustees, including the Earl of Dartmouth, disassociated themselves from the College, and insisted that the Trust funds not be diverted from the Indian Charity School to the College. It seems certain that this was the first time Webster had actually seen the text of that letter. Farrar reported new Portsmouth rumors of ultimate University success. "I understand," he said, "Master Ichabod [Bartlett] has lately spoken in a way to induce the belief that there is an open door between him, or some of these folks, & the judges — that they have expressed themselves very fully upon the subject — and that it is perfectly certain the cause will be decided in their favour."

Shortly after mid-January, Webster set off for Washington, "prepared," as he wrote Brown, "with all the necessary

regarding the "new facts" with which the University expected to reverse the tide, he anxiously passed them on to Webster. The latter, however, continued to minimize their significance: ". . . all these ideas of theirs had occurred to me & I think they are not formidable — perhaps there may be more in them than I am aware."

Meanwhile, President Allen was pressed to get into Pinkney's hands any information that might be helpful in supporting a request for a new argument. From a frantic search through "the old papers of Dr. E. Wheelock" Allen concluded that ". . . they prove some facts of consequence, which put down the position of Mr. Webster. . . . They prove that Dr. W. furnished no funds to the college — that Lord Dartmouth furnished none & disclaimed all connection with the Charter — that the college was built on the King's lands, & that the King gave the said lands to the trustees for the use of the College in 1771, 2 years after the date of the Charter — that Dr. W claimed the [Moor's Indian Charity] School as his own after the charter."

Allen sent the elder Wheelock's papers first to Sullivan for use in preparing a statement of facts for use in a new special verdict for the Circuit Court cases. But two weeks after the Circuit Court hearings were finished, Allen had neither heard the outcome from Sullivan nor received the return of the Wheelock papers. In consequence, he had been unable either to inform Pinkney of the results or to send original documentation on the "new facts." Finally, in late November, two months after the Circuit Court hearings, Allen sent copies of the Eleazar Wheelock documents to Pinkney. At the same time, having learned that Sullivan and Bartlett had made no use of the original documents after all, Allen sent a special messenger for their recovery. But no sooner were the Wheelock papers prepared, as he wrote Brown, with all the necessary papers."

THE University forces sent Dr. Cyrus Perkins to advise with Pinkney, despite Hale's feeling that it was unnecessary. On January 18 Perkins reported from Baltimore to Allen that he had had "repeated conferences with Mr. Pinkney. . . . He does nothing about [the case] except I am there. I see more than ever the importance of someone being on the ground to attend to these great folks & remind them of what they have to do."

Perkins assured Allen that "Mr. P. will come out in the majesty of his strength . . . [he] professes to feel strong in the cause — hopes that Mr. W. will appear on the floor again; from which it is to be inferred that he feels ready and able to meet him on the question. . . . Mr. Pinkney is very civil & very patient to hear any suggestions on the subject — much more so than I had anticipated."

Then as the end of January approached, Perkins wrote again to Allen, this time from Washington:

> I spent longer in Baltimore than I had intended, to please Mr. Pinkney who would not dismiss me till he thought he had derived all the assistance which I could render him, in explaining the papers relating to our cause & in helping him to understand the history & present state of our affairs.
>
> I have been with Mr. Wirt & exhibited to him the papers. But owing to the press of business just at this moment he was unable to give much attention to the subject. . . . Mr. Wirt being engaged in several important causes before ours on the docket he observed he should be under the necessity of first going into an examination & preparation of these, before he should be able to give much attention to ours. He requested me, in the meantime, to make out a reference to the several papers and documents which go to the establishment of the important points on which we are to rely. Mr. Pinkney & Mr. Wirt both complain that the special verdict [which emerged from the Civil Court cases] is very imperfect. . . .

THE February 1819 term of the Supreme Court of the United States opened on the first day of the month. On that day Webster wrote to Farrar: "Mr. Pinkney will be in town today, and I suppose will move for a new argument in the case vs. Woodward. It is most probable, perhaps, that he will succeed in that object, although I do not think it by any means certain. Not a word has as yet fallen from any judge on the cause. . . . All that I have seen, however, looks rather favorable. I hope to be relieved of further anxiety by a decision for or against us. . . . I'd not have another such cause for the College plain and all its appurtenances."

But the next day Webster's expectations of Pinkney failed to materialize, and all the last-minute efforts of Allen, Perkins, Hale, Pinkney, and Wirt to redirect the course of the *Trustees of Dartmouth College v. Woodward* turned out to be barren. On the second day of the term, February 2, 1819, "[Pinkney] being in court," as Webster later described the scene to Mason, "as soon as the judges had taken their seats, the Chief Justice said that in the vacation the judges had formed opinions in the College cause. He then immediately began reading his opinion, and, of course, nothing was said of a second argument." The same day Webster wrote triumphantly to President Brown:

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object which will be conferred on the corporation as soon as it shall be created. The charter is granted and in its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

Marshall proceeded to supply answers to the two basic questions: (1) Is the contract one within the protection of the U.S. Constitution; (2) If so, is it impaired by the acts of the New Hampshire legislature? He conceded that

> If the act of incorporation [the charter] be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one on which the legislature of the state may act according to its own judgment, unrestrained by any limitation in its power imposed by the constitution of the United States.
>
> But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; there may be more difficulty in the case. . . . Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. . . . Or if they have themselves disappeared, it becomes a subject . . . of enquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether . . . the trustees be not so completely their representatives in the eye of the law as to stand in their place, not

> All is safe & certain. The Chief Justice delivered an opinion this morning, in our favor, on all the points. In this opinion Washington, Livingston, Johnson & Story, Justices, are understood to have concurred, Duval, Justice, it is said dissents — Mr. Justice Todd is not present. The Opinion goes the whole length, & leaves nothing further to be decided. I give my congratulations on this occasion, & assure you that I feel a load removed from my shoulders much heavier than they have been accustomed to bear.

Joseph Hopkinson enclosed Webster's letter to Brown with one of his own, saying with characteristic grace: "I would have an inscription over the door of your building, 'Founded by Eleazar Wheelock, Refounded by Daniel Webster'."

On the side of the University, Dr. Perkins reflected his astonishment to President Allen:

> The Opinion of the Court has been given this afternoon most unexpectedly on the cause as argued last term — *and against us!!* I went into court by pure accident, while the opinion was in reading by Judge Marshall — and even our counsel was not there till just the close of the opinion!! They had no intimation that it was to have been delivered without a new argument.

(The variation between Webster's report and that of Perkins as to the presence of Pinkney suggests the latter may have left the courtroom in the course of Marshall's delivery which began in the morning, and then returned at its conclusion in the afternoon.)

The Chief Justice began by asserting that "the single question now to be considered is, Do the acts [of the New Hampshire legislature] . . . violate the constitution of the United States?" He affirmed the court's cautious approach to state enactments and said that "in no doubtful case, would [the court] pronounce a legislative act to be contrary to the constitution." Marshall then reviewed the terms of the 1769 only as respects the government of the college but also as respects the maintenance of the college charter.

Marshall then moved to an examination of the charter "to ascertain its true character." He reviewed the recitals in the preamble, including the gathering of funds held in England to further Wheelock's purpose "for the instruction of Indians in the Christian religion," the election of a site on the Connecticut River, "the proprietors in the neighborhood having made large offers of land on conditions that the college should there be placed." He referred to Eleazar Wheelock's application to the crown for "an act of incorporation." It was granted, said Marshall, "in consideration of the premises [the actual words in the charter are: "considering the premises"] for the education and instruction of the youth of the Indian tribes etc. . . . and also of English youth and any others," thereby creating the Trustees of Dartmouth College as "a body corporate with power *for the use of said college,* to acquire real and personal property, and to pay the President, tutors and other officers of the College such salaries as they shall allow." Marshall noted that the charter declared Eleazar Wheelock to be "the founder of said College."

The Chief Justice went on to say that

> from this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is perhaps not very important who were the donors. The probability is that the Earl of Dartmouth and other trustees in England were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be that Dr Wheelock was the founder of the college. . . . But be that as it may, Dartmouth College is really endowed by private individuals . . . for the promotion of piety and learning generally. . . . It is then an eleemosynary, and as far as respects its funds, a private corporation.

The Chief Justice next considered whether "such a contract" was one which "the constitution intended to withdraw from the power of state legislation." He concluded that "the consideration for which they [the original donors and founders] stipulated is the perpetual application of the fund to its object." Though those persons are no longer present "the corporation is the assignee of their rights, stands in their place, distributes their bounty as they would themselves have distributed it had they been immortal."

"It is more than possible," the Chief Justice recognized, "that the preservation of rights of this description was not particularly in the view of the framers of the constitution. . . . [Yet] the case being within the words of the rule must be within its operation likewise, unless there be something in the liberal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify . . . an exception." He did not find such an exception justified in the case of eleemosynary corporations. "The opinion of the court after mature deliberation, is that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to be equally supported by reason, and by the former decisions of this court."

The question remained whether the New Hampshire acts had in fact impaired the obligation of that contract. After a review of the acts Marshall concluded that under the legislation "the system is totally changed":

> The Charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely sub-

Rufus Choate, then a member of the Senior Class at the College, wrote to his brother: "When [the news] reached here . . . the bells were rung, cannons fired, bonfires lighted and a thousand other unseemly demonstrations of joy exhibited not to the credit of the rabble that did it or the great men that gave permission. . . ." Judge Niles, senior Trustee of the College who lived a few miles up the Connecticut River from Hanover, reported to President Brown that "a friend . . . informed me that they had heard cannon at Hanover . . . and regarded the firing as announcing that information of a decision in the College cause had arrived." Niles observed, one hopes tongue in cheek, that having concluded "that our friends would not have expressed their joy in this way I instantly saw our cause for lost." In a postscript written on learning the facts, Niles added, "I confess I am mortified by the manner in which it has been *noised about.*"

The other Trustee members of the Octagon sent congratulations to President Brown, anticipating a Board meeting to be called, as one of them suggested, "as soon as decency will permit after the funeral obsequies are performed for the decease of our illegitimate sister."

But the "illegitimate sister" had no intentions of expiring, at least not until all possibilities of revival had been exhausted. There was still the pendancy of the Federal Circuit Court cases. The University party at once transferred its hopes to them, as a means of correcting the factual errors which they saw as having determined an erroneous decision by the Supreme Court. They were egged on, in pre-election zeal, by Republican newspapers in New Hampshire

servient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of the contract on the faith of which their property was given.

Thus, on grounds that the New Hampshire acts were "repugnant to the constitution of the United States" Marshall ordered "the judgment of the State Court . . . be reversed."

JUSTICES Washington and Story filed separate concurring opinions, and Justices Johnson and Livingston concurred without written opinions. Justice Duvall dissented and Justice Todd, absent, took no part in the decision. The outcome was an overwhelming 5 to 1 decision in the College's favor. A few days later Justice Livingston, in describing the decision process noted that "each of the Judges, who united in the judgment [reached his own conclusions] without any previous consultation at the last term of the court, or at any time since . . . and the views which were taken on this subject were not essentially different."

Story's opinion, unlike Marshall's intuitive pronouncements, was buttressed with references to a multitude of supporting authorities. Justice Livingston praised it to Story, saying "it affords me more pleasure than can be expressed." The Marshall and Story opinions, in juxtaposition, lend support to the tale that Marshall was wont to declare to Story: "There is the law. Now you must find the authorities."

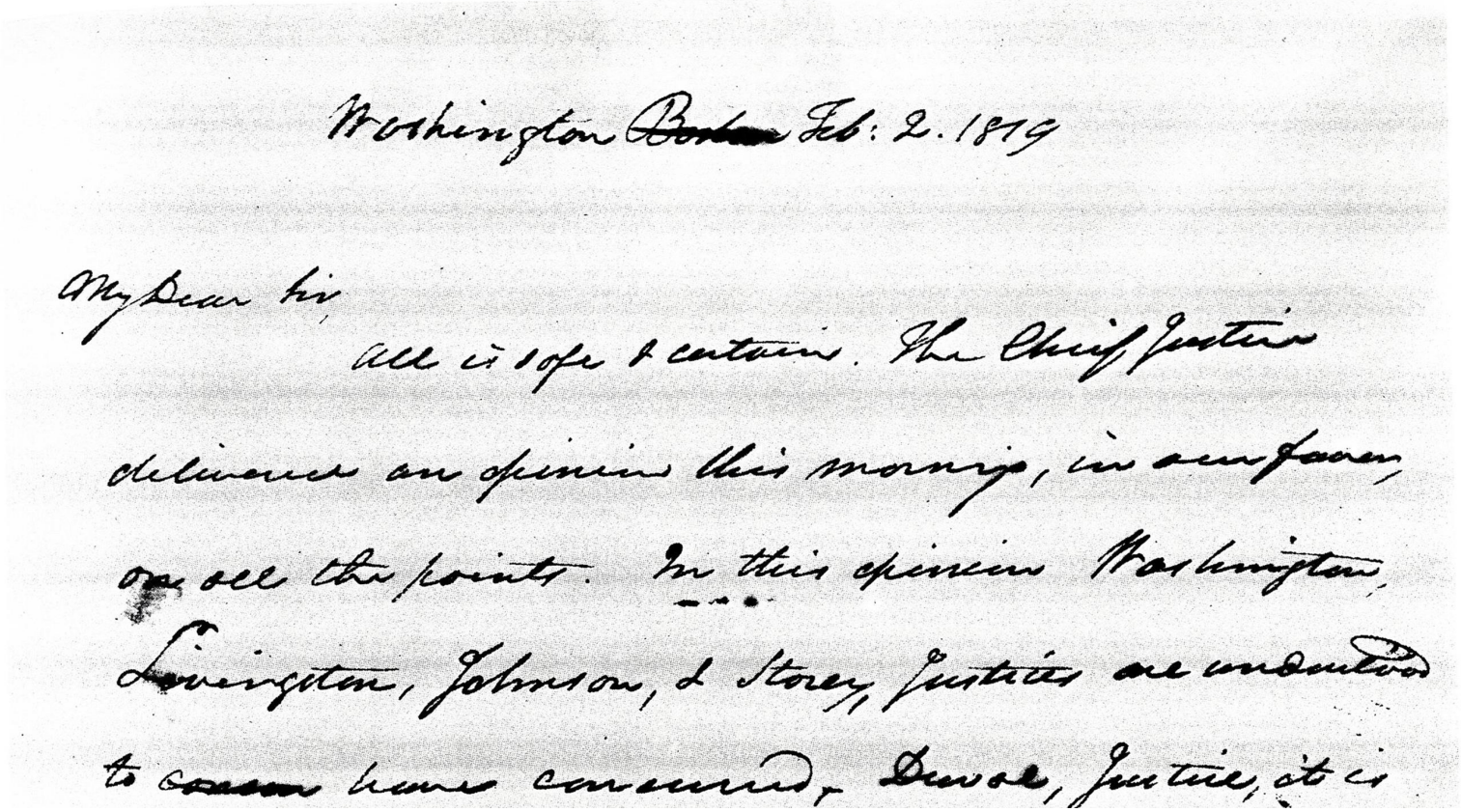
Report of the College victory did not reach Hanover until February 8, six days after the decision. Greeted with quiet dignity by President Brown and the other officers of the College, the tidings stirred many of the students and other College adherents in the village to pour out their enthusiasm.

pers in New Hampshire.

Dr. Cyrus Perkins voiced the University's dismay by describing Marshall's opinion as misstating "almost every fact" in reliance upon the charter preamble and the arguments of College counsel. "It is most unfortunate for us," he lamented to Allen, "that our cause had not been better prepared at the last term. Even Mr. Hale . . . did not know that the statement . . . that the Indian School was incorporated by the name of Dartmouth College was an incorrect statement. They instructed Mr. Wirt last term to state in answer to Mr. Webster that Lord Dartmouth was the founder of the College!!" At least Perkins was impartial in his accusations against his fellow workers. In letters to Allen he charged, "But for the numbskulls we had for counsel" in New Hampshire, the proper facts would have been established in a special verdict. Mr. P[inkney] is most prodigeously vexed with the management of the cause in N. H. & says if it should be lost it will be lost by the very slovenly manner in which it has been conducted."

Pinkney continued boldly to assert both to his clients and to opposing counsel that he was eager either to reargue the principal case or argue an appeal of one of the Circuit Court cases in the Supreme Court. Webster wrote Mason that "Mr. Pinkney *says* he means to argue one of them; but I think he will alter his mind. There is nothing left to argue on." In Webster's view neither Pinkney nor Wirt had any real desire to prolong the controversy, in view of the broad sweep of the Marshall and Story opinions. They seemed, indeed, to be decisive against the University, even taking as granted the "new facts" which the University sought to have considered.

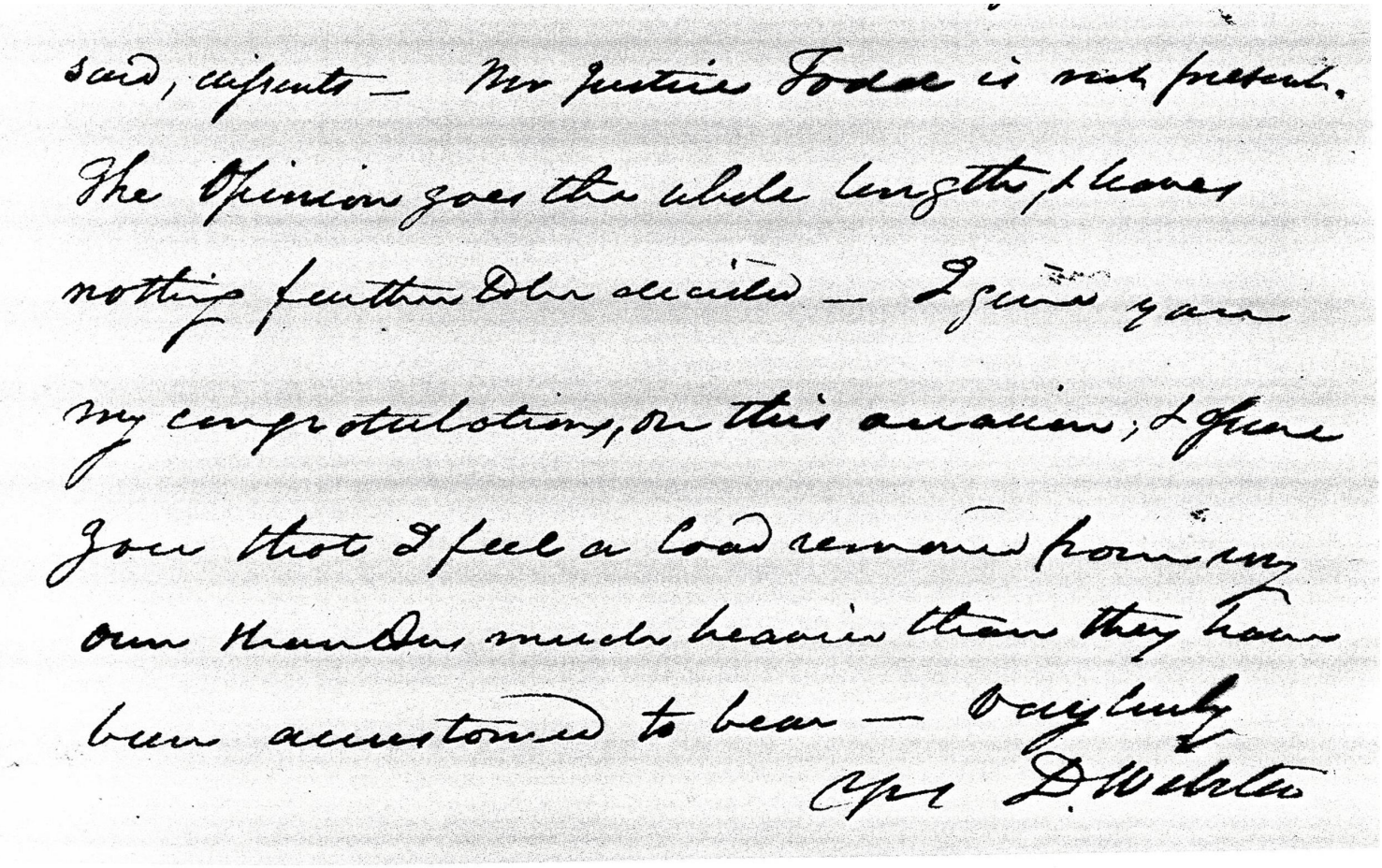
Shortly after the middle of February it was agreed, in what Webster described to Judge Smith as "a conversation between Bench & Bar," that the Circuit Court cases should be sent back to the Circuit Court in New Hampshire, where the University might move to introduce its "new facts," and from



Washington [redacted] Feb: 2. 1819

My Dear Sir

All is safe & certain. The Chief Justice delivered an opinion this morning, in our favor, on all the points. In this opinion Washington, Livingston, Johnson, & Story, Justices are understood to concur. Duval, Justice, it is


said, assents — Mr Justice Todd is not present.
The Opinion goes the whole length, & leaves
nothing for the Court to decide — I give you
my congratulations, on this occasion; & I feel
sure that I feel a load removed from my
own shoulders much heavier than they have
been accustomed to bear — Very truly
Yrs D. Webster

Daniel Webster's letter to President Brown reporting the Supreme Court's decision in favor of the College.

which an appeal might be taken to the Supreme Court in Washington. In a letter to Jeremiah Mason, Webster predicted that "when the [New Hampshire] election is over, there will be no great inclination to keep up the contest."

By late February judgment in the principal case of *Trustees of Dartmouth College v. Woodward* was formally entered in the Federal Supreme Court in the College's favor, and the New Hampshire Superior Court was directed to carry the judgment into execution. This was a signal for the College authorities to exercise their new legitimacy on the Hanover plain. President Brown requested President Allen to surrender possession of the College buildings long held by the University. Allen declined, whereupon Brown informed him that "the Government of the College, after consulting gentlemen of legal information . . . concluded to occupy the chapel tomorrow morning." The College took similar possession of the tutors' rooms.

On March 1, William Allen issued a notice to "the Students and Friends of Dartmouth University" that, in consequence of these acts, "the officers of instruction in the University are reduced to the necessity of suspending the discharge of the duties, in which by the authority of the State they have been engaged." University instruction ceased soon after. The faculty scattered, as did the University students. Most of the latter transferred to the College, while the remainder entered

two of the twelve places on the Board during that period. As noted earlier, Gilman declined to join the Octagon in their break with John Wheelock. This flowed less from a conviction that Wheelock was right than from a feeling that the other Trustees were acting too hastily and disproportionately in removing Wheelock from the presidency. Though Gilman was opposed to the Trustees' course, he was deeply devoted to the College. He resolved not to add to the College's problems by resigning from the Board while the controversy raged; but he attended no meetings after the fateful one in 1815 which dropped John Wheelock. Now that the conflict was about to end, Gilman sent to President Brown his resignation which, he said, "would have taken place some years ago if I had thought it would have been beneficial to the College, or was wished for by the Board, but I had reason to think otherwise."

To fill the vacancy created by Gilman's resignation the Board immediately elected Jeremiah Mason, who later declined despite Daniel Webster's urging. The Board likewise appointed a committee "to demand of the Rev'd William Allen the Library & apparatus belonging to the College." The Board also formally re-adopted the old College seal which had throughout the controversy been in the possession of the University.

After approving a fee of $500 to Joseph Hopkinson "for his services in arguing [the] cause at Washington . . ." the Board took occasion to record their

> highest respect for the zeal, perseverance & distinguished ability displayed by their counsel, the Hon. Jeremiah Smith, Jeremiah

Union College in New York. But Allen obstinately retained possession of the keys to the Library and a room containing the "philosophical apparatus." He declared to Governor Plumer that "unless you should advise to the contrary" he would continue to deny College access to these quarters. Governor Plumer, vexed that a Federal court had had the temerity to invalidate a New Hampshire statute, advised him to hold the line "until the question was finally settled by the court who have *assumed* jurisdiction." Allen and Hale briefly endeavored to sustain each other's morale by discussing sundry devices for attacking the College and preserving the University. Among them was a plan for new litigation against the College Trustees, based on the naive hope that the New Hampshire courts might elect a course of "opposition and resistance" to the United States Supreme Court. But to all but the most dedicated University supporters it was evident that a denouement had arrived. Choate, in a letter to his brother, observed late in March that "Pres. Allen, as he is fool enough to call himself, is the only University man on the ground."

On April 14 the Trustees of the College gathered for their first meeting since their respectability had been reestablished by the highest court of the land. As usual, President Brown had punctiliously included in the call the Governor of the State, as *ex officio* Trustee of the College. Governor Plumer, with equal formality, stubbornly declined, assigning as his reason that ". . . a difference of opinion exists between us as to the question of right to hold the proposed meeting, and as those who claim the authority to adjudicate on that right have not made a final decision I think it my duty to decline attending your meeting."

Further evidence of the changing order lay in the resignation of John Gilman at the April Trustees meeting. In 1794 Gilman had become an *ex officio* Trustee as Governor of New Hampshire. After his governorship ended he had continued on the Board as an elected member. When he was again Governor of the State from 1813 to 1816 he occupied

Mason, Daniel Webster & Joseph Hopkinson in conducting their cause against the late W^m^ H. Woodward, and in procuring a decision in the Supreme Court of the United States which gives stability to the immunities of this and all other similar Institutions; — and feeling the inadequacy of any pecuniary acknowledgment they have been able to make, and strong desire to give some more appropriate expression of their gratitude, as well as to gratify the present and future officers & Students, and present and future friends and patrons of the College: request the before named Gentlemen to sit for their Portraits to be executed by Stewart [sic], and placed in an appropriate apartment of the College; that the Treasurer be authorized to pay the expense that may arise in execution of the preceding vote, procure suitable frames for the Portraits, and take charge of them when executed.*

In addition to tidying up after the storm, the Board moved decisively into the future. It rearranged the College calendar, directed that "The President & Professors be a Committee for reviewing the laws of the institution," instructed another committee "to address the Public on the Prospects of the College," and assigned to a third committee a duty "to apply to the Legislature for indemnity or further aid on account of losses & injuries . . . sustained in consequence of late Legislative acts in relation to the College."

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* One must guess at why this objective was not promptly realized, though a lack of College funds to match the warmth of the Trustees' gratitude was perhaps sufficient reason. In any event, it was not until fifteen years later in 1834 that the Board, adverting to the unfulfilled resolution of 1819, called upon Dr. George C. Shattuck to see, on its behalf, that the portraits were executed. Dr. Shattuck was a graduate of the College and its Medical School. He had become a highly successful Boston physician. Within a year after the Trustees request to him the College was the recipient of admirably painted likenesses of the four counsel. Two of them — Daniel Webster and Jeremiah Smith — were painted by Francis Alexander; the one of Joseph Hopkinson was done by Thomas Sully; while Jeremiah Mason's was the work of Chester Harding — each artist one of the most distinguished of his time. In the end it was Dr. Shattuck who gave the portraits to the College, and so precious College funds were spared after all. These paintings remain in the College's possession. They are reproduced on pages 13 and 18 of this account.

fendants should by June 10 show to the judge by affidavit, such new facts, as shall in his opinion, take the case out of the principle settled at Washington."

On May 27, University counsel journeyed to Boston, where Story was then sitting, to offer the "new facts." This appearance Webster described to Mason. Having been presented by University counsel with "a mass of papers," Story thought "there was nothing in them," said Webster, "but has taken the papers for a day or two; to examine them before he gives formal decision. . . . The Judge intimated the *new facts* had no bearing on any part of the Court's opinion." Webster also wrote to assure President Brown: "These new facts whether true or false, have nothing to do with the questions; and you may expect judgment and execution in the causes in the Circuit Court, June 10, as by arrangement made at Portsmouth."

As usual Webster's forecast was accurate. The litigation begun two years before came to an abrupt end, with Justice Story ruling that the new facts, even if conceded, could not change the principle established at Washington. Ten days later William Allen sent to President Brown "all the keys of the buildings which he still held in his possession." Surrender was complete.

PRESIDENT Brown now set about to pick up the pieces. He directed the College's agent for the

Justice Joseph Story

Meanwhile, College counsel had given formal notice to the University counsel of the College's intention to proceed to final judgment in the Circuit Court cases in the May term. College counsel were determined to avoid, if possible, a continuation of the cases to the fall term. Intent on this objective, Webster reported to Jeremiah Mason an account of a conversation with Justice Story at the latter's home in Salem:

> As to the College Cause, you may depend on it that there will be difficulty in getting delay in that case, without reason. I flatter myself the judge will tell the defendants, that the new facts which they talk of, were presented to the minds of the judges at Washington, and that if all proved, they would not have the least effect on the opinion of any judge; that unless it can be proved that the king did not grant such a charter as the special verdict recites, or that the New Hampshire General Court did not pass such acts as are herein contained, no material alteration of the case can be made.

It is difficult to escape the conclusion that Webster was here paraphrasing Story's actual words.

The May term of the Circuit Court for New Hampshire, Story presiding, opened early in the month at Portsmouth. In addition to Mason, Webster was himself present to represent the College, and he reported the outcome in a letter to Hopkinson on May 9: "The counsel for the University pressed for delay, not being ready with their *new facts*. We opposed, & insisted that it was time to bring the litigation to an end and that they ought to have been prepared; especially as we admonished them formally immediately after my return from Washington that we should press for trial. The Judge saw no reason for delay; but we finally agreed that judgment should be entered . . . on the verdicts as they stand, unless the De-

collecting of rents to reassure the College's tenants, who had understandably withheld their rent payments until they knew to whom they could safely be paid. He began searching for a replacement, on the medical school faculty, for Dr. Perkins whose resignation, not unpredictably, had coincided with the final evaporation of University hopes. He urged Timothy Farrar, the younger, to transfer his law practice from Portsmouth to Hanover to attend to the College's legal business and to perform other services for the College. A hundred other matters pressed upon the President's attention. Evidence from distant places, some trivial, some of the first importance, indicated that there was abroad in the land a renewed confidence in the College's future. Thus Thaddeus Stevens, who had been graduated in 1814, wrote from Gettysburg, Pa., recalling that when he left the Hanover plain he owed the College a small sum. Now that matters had been resolved he was, he said, ready to pay. And Isaiah Thomas, distinguished printer and publisher, sent from Worcester, Mass., a large gift of books to the liberated College. A century and a half later they are among the valued treasures in the College's library.

President Brown took an active interest in drawing up, at the Trustees' direction, a financial claim against the New Hampshire legislature to cover losses and damages to the College resulting from the voided legislation. The University people similarly occupied themselves in preparing a claim against the State to accomplish an orderly receivership. A last meeting of University Trustees assembled to appoint a committee, headed by William Allen, to report to the legislature on "the state of the concerns of the Corporation, and the amount of its debts, dues & claims." The report reminded the legislature that the officers and teachers who worked for the University, "in fulfilling your wishes," had done so "in the faith that the acts [of the legislature] . . . were valid." The report professed "perfect confidence that the Honorable Legislature will provide for the reward of these services."

The College authorities, on the other hand, submitted to the legislature an itemized account totaling nearly $9000 in damages and costs, saying they had "a good and valid claim against individuals [meaning Allen and associates] but it would better accord with . . . the honor and dignity of the State that . . . provisions should be made for remuneration" by the legislature.

The two pleas were referred to the same legislative committee. But backbiting in University circles had not ceased, for two University Trustees let it be known that Allen was "too craving" in demanding a salary of $1200 for himself, and openly hoped that "the legislature will not allow him that sum." The legislative committee pared the University request, largely in the Allen salary component, and recommended payment of the balance. There remained, however, the question of how much if anything the legislature would actually appropriate.

In late July one of the displaced University faculty wrote from Albany, New York, to a friend in Hanover that he had "attended Commencement at Union College . . . [where he] saw the Senior Class of *Dartmouth University* take their degrees."

In August the College Trustees came together again, at the first uncontested Dartmouth Commencement in three years. Freed from preoccupations with litigation and concerned once more for the onward daily movement of the College, the Trustees set the course by adopting a wholly new set of "Laws" to govern a restored community of scholars. Webster's brother Ezekiel was elected to fill the vacancy on

became the conspicuous symbol of an evil day in the College's history.

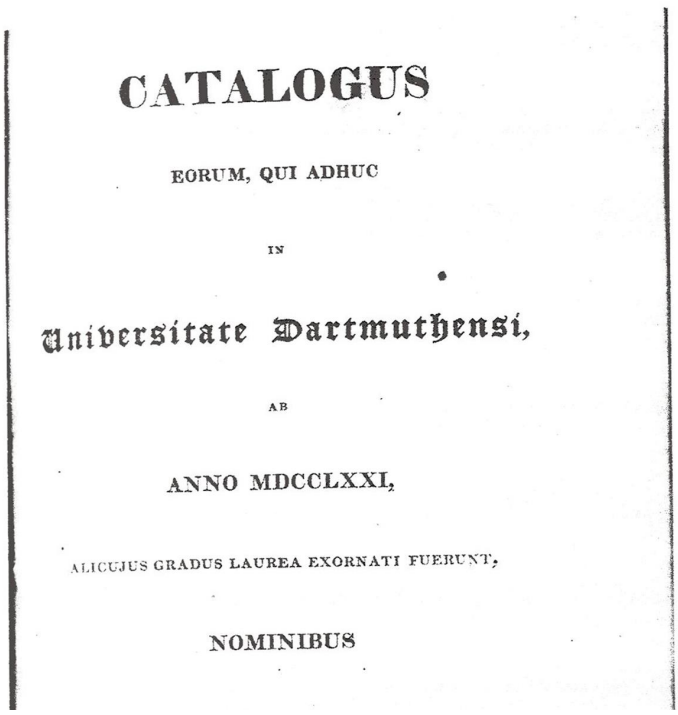
There were lesser actors in the long scene who also found themselves victims of events. Dr. Cyrus Perkins, graduate of the Dartmouth Medical School and distinguished teacher there since 1810, had chosen to align himself with the University, moved probably by the loyalties of his wife, a daughter of Professor John Smith, John Wheelock's most devoted supporter in church and faculty. When the decision went against the University, Perkins knew that there was no longer a place for him in Hanover. Regretfully he sold his home and took up the practice of medicine in New York. The three teachers at the University (Carter, Dean, and Searle) lost their employment in mid-term, and departed Hanover with little to their names except claims against the legislature for unpaid back salary, only one of which was ever honored, and then only in part. The Rev. William Allen, whose position as President was extinguished with the University, also faced the prospect of redirecting his career. He arouses perhaps less sympathy for his predicament, for unlike Perkins, he was one to whom the Hanover institution had only recently had an appeal. Moreover, his resourcefulness assured a deft landing on his feet no matter which direction he jumped. In the summer of 1819, Allen was offered the pastorship of the Congregational Church in Princeton, N. J. But he had a grander design, and when later in the year Bowdoin College tendered him its presidency he accepted.

the Board which Jeremiah Mason had declined, and Daniel himself was in Hanover for the Commencement exercises, to receive in person the outpourings of gratitude. Among the twenty-five voted Bachelor of Arts degrees was Rufus Choate, whose undergraduate career had spanned the controversy. Chancellor Kent was awarded, in absentia, an honorary LL.D. The Trustees likewise voted to buy from President Brown his recently acquired residence overlooking the College green on the west side (later known as the Sanborn house), and to allow him the use of the house in addition to his salary. With the knowledge that President Brown's health was in serious decline, the Trustees resolved that during an absence or disability on his part "the senior Professors" were to "perform all the public duties pertaining to the Office of President of the College."

THE four years of upheaval had produced casualties. With the arrival of peace, the victims from both College and University were revealed as men for whom each side could feel some measure of sympathy and regret. The first of them was President John Wheelock who had died early in the battle, but probably not early enough to have escaped forebodings of the destruction of his hopes. Occurring in April 1817, when the University fortunes were at their apogee, his death, however, spared him personal participation in the collapse of his dreams and any suspicion of the low esteem in which he would be held by succeeding generations in the Dartmouth College family. Then came William H. Woodward, nephew of John Wheelock, whose loyalty to his uncle placed him first among the targets at which the College Trustees directed their attack. Dying when the University forces were still full of hope, Woodward also must have had intimations of the coming defeat. Though himself no schemer, and far less an instigator than John Wheelock, Woodward had been caught up in an ambience where his name, almost as much as John Wheelock's, Many thought it a promotion, mindful of the state of Dartmouth's finances and the long road ahead to restoration.

The College had suffered no casualties during the heat of the battle, but now that the contest had been won, the gallant Francis Brown was to be lost to the College in whose rescue his role had been so decisive. Immediately after the College's first Commencement in its new day of freedom, President Brown, ill with what had been diagnosed as pulmonary tuberculosis, set out with his wife, Elizabeth, on a trip to northern New York State, in an attempt to stay the progress of his ailment. How financially bereft he was is suggested in a letter to Thomas Thompson in which he said he had expected "to have a little spare money of my own to use on the journey, but as usual my merchant bills exceed expectations, and it is necessary for me to part with nearly all the money I have." Concluding that the one hundred dollars from the College might not be enough for the journey he said he would "be glad to receive" an additional fifty from the College Treasurer. From Saratoga Springs a few days later the President reported courageously to Charles Marsh his "perhaps improving symptoms."

But the journey failed to provide the relief expected, and when President Brown returned to Hanover in September he was so weakened as to be unable to attend regularly to his duties. Unfortunately, the belief prevailed that a palliative might be found in still another journey, particularly as it would remove the President from the severity of a Hanover winter. Consequently, on October 11, 1819, President and Mrs. Brown, with their chaise and horses, started southward down the Connecticut River valley, then a thoroughfare of autumn crimson and gold. They left behind them their children in the care of a woman secured for the purpose. A purse privately assembled among friends of the President supplemented the Brown family's slender means for the journey. Stopping along the way with their many acquaintances and church colleagues, the pair moved at a leisurely pace. At the end of the month Dr. Nathan Smith wrote from New Haven to Mills Olcott: "President Brown passed this way . . . but I was absent and did not see him. . . . From the



CATALOGUS

EORUM, QUI ADHUC

IN

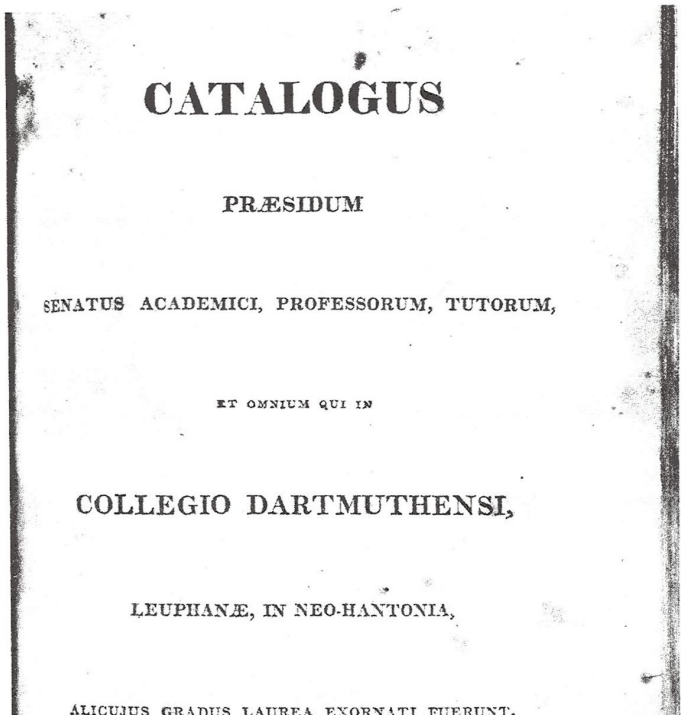
Universitate Dartmuthensi,

AB

ANNO MDCCLXXI,

ALICUJUS GRADUS LAUREA EXORNATI FUERUNT,

NOMINIBUS



CATALOGUS

PRÆSIDUM

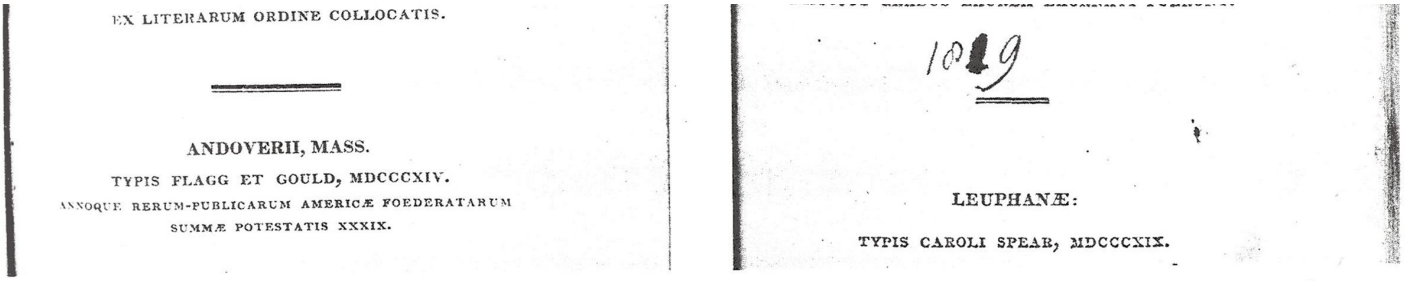
SENATUS ACADEMICI, PROFESSORUM, TUTORUM,

ET OMNIUM QUI IN

COLLEGIO DARTMUTHENSI,

LEUPHANÆ, IN NEO-HANTONIA,

ALICUJUS GRADUS LAUREA EXORNATI FUERUNT.



EX LITERARUM ORDINE COLLOCATIS.

ANDOVERII, MASS.

TYPIS FLAGG ET GOULD, MDCCCXIV.

ANNOQUE RERUM-PUBLICARUM AMERICÆ FOEDERATARUM SUMMÆ POTESTATIS XXXIX.

1819

LEUPHANÆ:

TYPIS CAROLI SPEAR, MDCCCXIX.

Before the Dartmouth College Case, the college catalogues almost always used the word "University" (as in 1814, left). After the controversy and the Supreme Court's decision, the 1819 catalogue significantly appeared with "College" which has been used ever since.

account given me by those who saw him I am apprehensive that there must have been some insanity on the part of his friends at Hanover or they would not have suffered him to have set out on such forlorn hope."

Elizabeth Brown kept a diary of their journey. Her pathetic account shows that her husband's health was a problem throughout, with good days more and more outbalanced by the bad. Their way took them through Philadelphia, Baltimore, Washington, and Richmond. In early December they reached North Carolina, whence they moved on to Charleston, South Carolina, in time for Christmas. Beginning in December Mrs. Brown kept a separate journal, presumably removed from her husband's eyes, in which she recorded her alarm at the President's health, and inscribed her prayers: ". . . cut him not off in the midst of his days, in the midst of his usefulness." In the secrecy of these pages she noted both her own and her husband's fears that he would not live to return to Hanover.

By February 1820 they had reached Georgia ("plum and peach trees in bloom"). From Savannah they turned back homeward in April. In May, again enroute through North Carolina, Elizabeth Brown wrote: "The country and farms we passed for a day or two seem more like dear New England than anything I have seen before at the south." And of their lodging that night she noted that "Chief Justice Marshall put up at the same house." Thus passed on the road two figures who, in their separate ways, had been central to the preservation of the College at one of the most critical times in its history.

In early June the Browns started back up the Connecticut valley, arriving in Hanover on June 22. "[We] found our dear children and friends well. . . . May we have hearts to praise the Lord for all his goodness to us on this very long journey," noted Elizabeth in a closing entry in her journal. The next month, July of 1819, the President died at the age of 36.

It is tempting to reflect on what different route the College might have been led had President Brown not been lost to it "in the midst of his usefulness." His qualities of leadership, his perseverance, his strength of purpose, his personal charm and capacity to command eager response and, indeed, devotion from his students, had all been amply demonstrated in the four years of his presidency. Notable, too, was his ability to translate into dollars for the institution the confidence which he inspired in the eyes of alumni and friends of the College. The immense respect and affection in which he was held by a vigorous Board of Trustees was also a powerful basis for accomplishment.

There can be no doubt that the College was sorely in need of strong leadership. The years ahead called first for recovery of the ground lost during the controversy. An atmosphere troubled by bitterness and strife had had its effect on the number and kind of students enrolled. In 1814, the year before the contest between President Wheelock and the Trustees broke into the open, the College graduated thirty-three seniors of whom exactly one-third came from Massachusetts, and the balance, in a three to two ratio, from New Hampshire and Vermont. But in 1820 the graduating class numbered twenty-five, with New Hampshire accounting for more than one-half the total and with only one-sixth drawn from outside New Hampshire and Vermont. Vigorous and experienced guidance was requisite at this juncture to build the College into a strong institution, capable of sustaining competent teachers and the physical resources essential to a quality education, so that students might be drawn from beyond parochial limits. Francis Brown eminently possessed those qualities needed to hasten the College toward its destiny. His loss was a calamity which measurably delayed a realization of the institution's potential.

As indicated at the outset this account has been primarily concerned with a lay view of the Dartmouth College Case, and even more particularly

cerns of the people and will check any undue encroachments on civil rights which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt."

That Story's views came to be shared by Kent was evident in 1840 on the appearance of Kent's famous *Commentaries on American Law*. In that work the Chancellor referred to "this celebrated case," calling it "one of the most full and elaborate expositions of the constitutional sanctity of contracts." Kent concluded that "the decision . . . did more than any other act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions."

Charles Warren pointed out in *The Supreme Court in United States History* (1920) that up to 1800 there had been only 213 corporations of all kinds chartered in the United States, of which only eight were manufacturing corporations. Warren placed the beginning of the growth of the business corporation in 1815, with the close of the War of 1812. "Unquestionably," he wrote, "the decision [in the Dartmouth College Case] came at a peculiarly opportune period; for business corporations were for the first time becoming a factor in the commerce of the country, and railroad and insurance corporations were, within the next fif-

with a College family view of it. Although there is no intention to expand an essentially insular treatment into a comprehensive study, it is appropriate, before bringing this to an end, to identify some essentially professional points of view regarding the effect of the decision upon the larger society.

For the College and its constituents the full impact of the Supreme Court decision was of course immediate and conclusive. But almost as quickly came a recognition on the part of bar and bench that the Marshall opinion had pushed notably further the Constitution's protection of private rights against state encroachment. In his *Life of John Marshall,* Albert J. Beveridge suggests that Marshall's long-held economic and political convictions led him irresistibly to regard contracts as sacred, the stability of institutions as essential, and the preeminence of national authority as indispensable. With an awareness of the Chief Justice's predilections, and a familiarity with his earlier decision holding states to promises on grounds of contract, "Nobody," says Beveridge, "should have expected from John Marshall any other action than he took in the Dartmouth College Case."

The only specific questions which the Supreme Court had before it were whether the Dartmouth charter was a contract of the sort protected by the Constitution, and if so whether the State of New Hampshire had impaired the obligation of that contract. An affirmative answer on both these counts, involving as it did a finding that Dartmouth College was a private eleemosynary corporation, produced a doctrine which it could be assumed would extend at least to any other private eleemosynary corporation in a similar situation. But it remained to be determined how much farther the doctrine would be allowed to reach. It quickly became clear that the Court intended to apply the same rule to private business corporations, but only the prescience of a Justice Story could have foreseen the true sweep of the decision's effect.

Story, in a letter to Chancellor Kent written six months after the decision, referred to "the vital importance to the well-being of society, and the security of private rights, of the principles on which the decision rested." He continued, "Unless I am very much mistaken, these principles will be found to apply with an extensive reach to all the great con-

teen years, about to become a prominent field for capital." The freedom from capricious interference by state legislatures, which the decision assured, provided a stability for corporate activities that increased enormously the use of the corporate device. From this flowed, however, not only great benefits to the economy of the nation but social evils of the first order as well. Impregnable behind the bastion erected by the Dartmouth College Case, each business corporation so inclined was in large measure free to conduct itself solely in its own selfish interests.

For as long as the Case had been seen as merely throwing a protective shield around private educational institutions, few persons, other than doctrinaire Democrats on the Jeffersonian model, were disposed to view it as unsatisfactory. But once that protection appeared to extend equally to business corporations engaged in outrageously anti-social activities, legislators, lawyers and judges alike began looking for ways to limit the Case's capacity for harm. Except from within the sanctuary of the law journals, little attempt has been made to mount a frontal attack against the decision, on grounds that it was in error in assimilating corporate charters to contracts. But other means have been at hand to keep under control its unwanted by-products. The first of these lay in the unchallenged power of state legislatures, in connection with the original issuance of charters, to place restrictions upon corporate freedom. In the exercise of this power, as Justice Story pointed out in his opinion in the Dartmouth College Case, the legislature might reserve a right to alter or even revoke the charter of a corporation. It is interesting to note that the Massachusetts legislature was not unmindful in the 1790s of the opportunity to retain a means of control over charitable corporations. R. N. Denham, writing on the Dartmouth College Case in the January 1909 issue of *Michigan Law Review,* pointed out that the Massachusetts legislature reserved a right to make certain alterations in the government of Harvard, Williams, and Bowdoin. But many states, even with the knowledge of the consequences of inaction, were slow in tailoring their incorporating machinery to preserve routinely this power over new corporations. Professor Gerald Gunther of the Stanford University Law School in a note on the contract clause in his *Cases and Materials*

on Constitutional Law (1965), observes that "the relatively protected position of corporations later in the Nineteenth Century . . . was due less to any shield supplied by the Court than it was to the legislatures' own unwillingness to impose restraints."

A SECOND type of limitation on the consequences of the decision was successfully urged upon the Supreme Court under Marshall's successor, Chief Justice Taney, whose social outlook differed sharply from his immediate predecessor's. It was the doctrine that the contract created by a corporate charter must be strictly construed as conferring no more rights than were expressly stated. This restraining principle was found acceptable in *Charles River Bridge v. Warren Bridge,* decided in 1837, Justice Story dissenting. In that case Daniel Webster was on the losing side.

Yet a third type of restraint upon the sweeping language of Chief Justice Marshall arose in the Supreme Court's practice, at least as early as the 1870s, of upholding some modifications of corporate rights by a state legislature through

In 1886 William P. Wells, University of Michigan law professor, read a paper entitled *The Dartmouth College Case and Private Corporations* at the annual meeting of the American Bar Association. He pointed out the early acclaim accorded the decision, and the later deterioration in esteem for it, quoting as an illustration of the change Justice Cooley's comment in the 1870s that "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations having greater influence in the country at large and upon the legislation of the country than the states to which they owe their corporate existence." Professor Wells reviewed both the beneficial and the evil results, and concluded that the courts were controlling the harmful effects without the abandonment of good features that a specific reversal would involve. The control he identified was the tendency of the courts to hold in check the doctrine of the Dartmouth College Case in those situations in which the public interest was adversely affected.

A thoughtful retrospective glance at the Case was recorded in 1892 by Charles Doe, graduate of Dartmouth College in 1849 and Chief Justice of the New Hampshire Superior Court from 1870 until his death in 1894. Judge Doe, writing in the *Harvard Law Review*, concluded that the 1817

the exercise of "police power," a power to act for the protection of the public. And still another limitation, recognized at a very early date, was the exercise of the states' overriding powers of "eminent domain," resting philosophically on much the same basis as the "police power."

The atmosphere of controversy around the decision in the Dartmouth College Case grew more heated beginning in the 1870s, when large corporate enterprise was often under scrutiny because of nefarious practices of certain operators. In an article published in the *United States Law Review* in 1874, C. H. Hill assumed that Chief Justice Marshall was led to his decision not by legal principles but by "the seeming hardship of the case, and by a feeling that public policy demanded it." Hill claimed a power for state legislatures to do precisely what the New Hampshire legislature did, and declared that such a power was not limited to charitable corporations but "applies *a fortiori* to great mercantile corporations like railways. Indeed, had the decision in the Dartmouth College Case extended no further than to the charters of eleemosynary institutions, we should not have taken the trouble to review it. . . . But when we come to huge monopolies like railways, the necessity of some power of supervision becomes apparent. . . . The control they require is legislative . . . not judicial." Hill seems to have believed that all exercise of "police power" was precluded by the opinion. He volunteered the view that Dartmouth College "as Dartmouth University . . . would have enjoyed equal prosperity and that the dangers to which her eloquent son thought her exposed were to a great extent fictitious and imaginary." Hill concluded that "if the decision cannot be controlled and limited without completely overruling it, a declaratory amendment to the Constitution" should be sought rather than a judicial reversal.

John M. Shirley, lawyer and a New Hampshireman by origin, published in 1879 an ill-arranged work of nearly 500 pages entitled *The Dartmouth College Causes*. He vigorously disagreed with the arguments of counsel on behalf of the College and with the opinions in the Supreme Court. He supported wholeheartedly the University position and Chief Justice Richardson's opinion in the New Hampshire Superior Court. A tendency to ascribe improper motives and conspiratorial conniving to College counsel and other supporters betrays a bias that greatly weakens Shirley's reasoning.

[illegible] in the Harvard Law Review,
New Hampshire Superior Court decision of his predecessor, Chief Justice Richardson, had been in error. Doe's view was that though the State had power to revoke the charter, it lacked power to take control of the corporate property, and that the State's attempt to direct the management of the College's property was in violation of the Constitution of the State of New Hampshire. Chief Justice Doe further concluded that the decision in the United States Supreme Court was also in error in holding that the College's charter was a contract within the meaning of the proscription in the Federal Constitution.

In 1901 the Centennial of John Marshall's appointment as Chief Justice of the United States was celebrated in many states. At the New Hampshire celebration the speaker was Jeremiah Smith, son by a late marriage of the Jeremiah Smith who had been College counsel in the Dartmouth College Case and one-time Chief Justice of the New Hampshire Superior Court. Jeremiah Smith, the younger, who was himself a distinguished practitioner and teacher of law at Harvard, observed, "Of all Marshall's decisions the one most frequently doubted in this State is that in the Dartmouth College Case. No lawyer likes to be compelled to choose between the conflicting views of two such jurists as Richardson and Marshall. It seems presumptuous to differ from either; still more to differ from both. And yet I, for one, am inclined to say that *both* these great judges were wrong; . . . that Richardson erred when he held that the amendatory statutes were *not* in violation of the Constitution of New Hampshire; and that Marshall erred when he held that the statutes *were* in violation of the Constitution of the United States. . . . I incline to endorse the views on this subject expressed by Judge Doe."

Professor Smith pointed out that the case was decided in the United States Supreme Court solely under the contract clause, and "long before the adoption of the Fourteenth Amendment" to the Federal Constitution, which proscribed states from depriving persons of property "without due process of law." He noted that "the reasoning of both Mr. Mason [before the New Hampshire Superior Court] and Judge Doe [in his article] clearly demonstrates that the New Hampshire Statutes of 1816, if enacted today, would be in violation of that amendment. . . . The reasoning in Marshall's opinion tends irresistibly to the same conclusion. . . . His error, if error there was, is in the assertion that the grant of a corporate charter involves a contract on the part of a state, within the meaning of . . . the United States Constitution." (Professor Smith, in view of the occasion on which he was making his remarks, felt it necessary to add: "That Marshall made occasional mistakes may be safely admitted without seriously detracting from his judicial reputation.")

Professor Paul A. Freund of the Harvard Law School in his recent work *On Law and Justice* noted that "where Marshall heard only a single voice emanating from the contract clause, his successors have attuned themselves to stereophonic sound." Freund describes Chief Justice Marshall's doctrines in some cases as "going beyond the necessities of the . . . problem, doctrines which plagued constitutional law for a long time, because they could not contain the counter pressures from state interests that had been slighted in the formula." He concludes that "the general direction of Marshall was characteristically wise, but the momentum of doc-

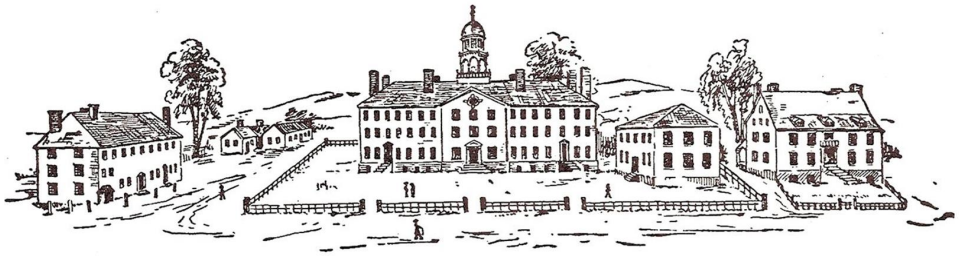
One sometimes hears it said today in lawyers' shop-talk that "the Dartmouth College Case is no longer good law." This is a manner of speaking. It is true that Marshall's words have been leashed, but it is also true that the doctrine of the Case has never been expressly repudiated by the United States Supreme Court, as was, for example, the principle of "separate but equal." Nor is the Case ever likely to receive that kind of negative distinction. Admittedly, however, the passage of time has rendered it a somewhat elderly dragon, diminished in both stature and energy. It retains a capacity to emit smoke and fire, should an assault be made again on an ancient college charter encasing the aspirations of a founder and donors long dead. But even in its original preserve it is subject to being immobilized on a command to "charge!" in the name of public policy or a rival constitutional exigency. Thus, seen from beyond the Hanover Plain, *Trustees of Dartmouth College v. Woodward* is perhaps now but a small Case, and yet . . .

trine shot beyond the mark, and other generations were obliged to retrace some giant steps in order to follow a viable course."

An inclination to assign to the Dartmouth College Case a central and heroic role in nineteenth-century laissez faire industrial development in America should be tempered by less exuberant estimates identifying the Case as but one of many shaping influences, most of which were more irresistible in their suasion. Benign in the cradle period of the nation's industrial might, the Case's later status as handmaiden to evil was of relatively short duration, as a result of the corrective restraints already mentioned. Accordingly, no present-day member of the Dartmouth College family need feel weighed down by a vision of the College's freedom bought at the price of public suffering from endless corporate chicaneries. Conversely it is well to keep in mind that it was the College, not the world, that was saved on that second day of February 1819 when Chief Justice John Marshall read his opinion in the Dartmouth College Case.

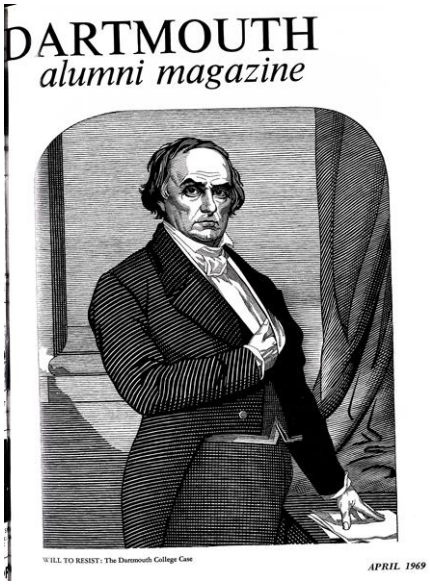
About the Author:

IN WRITING HIS ACCOUNT of the Dartmouth College Case, Richard W. Morin had the advantage of the legal training and practice which preceded his joining Dartmouth's administrative staff, first as Executive Officer of the College and then, for 18 years, as Librarian. Following graduation from Dartmouth in 1924 he took his law degree at Harvard and also studied at Oxford University and *École des Sciences Politiques* in Paris. He served as U. S. Vice Consul in Paris (1929-33) and then with the U. S. Department of State in Washington for two years before returning to his native city of Albert Lea, Minn., to practice law. Again in Washington in 1942, he helped organize the State Department's Offices of Public Information and Public Affairs, and was deputy director of the latter. Three more years of law practice in Albert Lea preceded his return to Dartmouth in 1948. He retired last year and now is Librarian of the College, *Emeritus*.



WILL TO RESIST

DARTMOUTH ALUMNI MAGAZINE | APRIL 1969



English 52.11
Government 60.18
History 90.06

Daniel Webster and the Dartmouth College Case

Professor Robert Bonner (History), Professor Russell Muirhead (Government), and Professor Donald Pease (English)

Office hours:
Bonner: Monday 11:10-1, Carson 208
Muirhead: Tuesdays 9-10, Silsby 115
Pease: Wednesday 11-1, Sanborn 219

Winter 2019

Because of the significance of the issues it addressed -- the contract clause and due process, the relationship between the law and American private corporations, the separation of church and state, the legal status of public and private U.S. Universities, the federal bench's ability to constrain state legislatures -- *Dartmouth College v. Woodward* (1819) is considered one of the most influential cases in Supreme Court History. *Dartmouth College v. Woodward* also frames the legal and rhetorical skills of Daniel Webster, the alum (Class of 1801) and the attorney whom Dartmouth Trustees retained to represent Dartmouth's cause before the Supreme Court. Webster's advocacy brought him into national prominence.

For many, the Dartmouth College Case is known only for the Webster's utterance (said to have brought tears to Justice Marshall's eyes): "It is, Sir, as I have said, a small college. And yet, there are those who love it."

The 200th anniversary of the Dartmouth College Case provides the occasion to deepen our understanding of this seminal case and the alum who argued it before the Supreme Court.

The Tuesday class will feature the lecture format to enable the faculty to examine the Dartmouth College Case from their disparate disciplinary perspectives. The Thursday class will be devoted to student-led discussion. Between the two class meetings each week, we ask students to post items for discussion on the course discussion board—and these items will be the basis of our Thursday discussions.

Beyond the class, we will travel to Washington DC for a reenactment of the case in the United States Supreme Court. The coach will leave Hanover at 3pm on Wednesday January 30, and will return on Friday morning February 1st, arriving back in Hanover by 6pm on Friday. The reenactment will take place on Thursday evening. **Participating in this trip is a course requirement, and any student who cannot make the trip should drop the course at the start of the term.**

Additionally, the class will participate in a conference of legal scholars who will be assembling at Dartmouth on Friday March 1st and Saturday March 2nd. Students will be expected to attend conference presentations, and some students will be asked to present summaries of their own work on their final research projects. **Again, participation in this conference is a course requirement.**

Assignments; listed by portion of overall grade

30% Weekly posts on Canvas, due by 6pm every Wednesday. These posts should address the assigned readings; posts should be one paragraph at most. The most original, intriguing, and insightful posts will be the basis for the class discussions on Thursdays.

20% Class presentations and discussions, Thursdays

50% A twenty-page research paper

Brief Overview of the Dartmouth College Case

In 1769 the Royal Governor of New Hampshire, acting under the authority of King George III, granted the trustees of Dartmouth College a charter to carry out educational work among Native Americans of the colony. The Dartmouth College case arose in 1815, when Jeffersonian members of the New Hampshire legislature declared that the American Revolution had voided the charter of its binding authority. After handing control over the affairs of the institution to the Governor of New Hampshire, the state legislature forced the College to become a public institution, "Dartmouth University." The deposed trustees of the College objected, and after a state court ruled in favor of the New Hampshire legislature, they retained Dartmouth alumnus Daniel Webster (1801) to persuade the Supreme Court of the United States to declare the actions of the New Hampshire legislature unconstitutional. Webster argued the College's case against William H. Woodward, the state-approved secretary of the new board of trustees. On February 2, 1819, Chief Justice Marshall issued the court's ruling that, despite the fact that New Hampshire was no longer a royal colony, the charter was nonetheless a valid contract between the King and the trustees, hence protected from legislative interference by the contract clause of the constitution. Marshall's opinion emphasized that the term "contract" referred to transactions involving individual property rights, not to "the political relations between the government and its citizens."

The case was not limited to the question as to whether the New Hampshire laws regulating the College's governance violated the contract clause of the United States Constitution. The threat the New Hampshire legislature posed to Dartmouth and to private education in general also extended to a broad array of economic interests affected by state interference with corporate property and vested rights. The Marshall Court's decision that a corporation charter constitutes a contract proved to be of immense significance for the subsequent business history of the country. As a bastion of *laissez faire* and a boon to corporate development. the case helped usher in large-scale commercial development against Jeffersonian agrarianism.

Yet this account of the case's impact neglects what the New Hampshire legislators at the time considered a more significant constitutional debate. Like most American colleges founded in the colonial period, Dartmouth College was considered a church–state school. In 1815, it was customary for state legislatures to regulate institutions that performed public roles. New Hampshire legislators who insisted that Dartmouth was a civil institution that needed to be "disestablished" from the church invoked separation of church and state clauses from the constitution as legal warrant for this argument. State legislators failed to establish Dartmouth's status as a "public" institution; they nonetheless succeeded in forging distinctions between public and private that shape how we think today

The case also brought about a dramatic change in the reputation of Dartmouth's "favorite son". Before Dartmouth retained him as it chief advocate Daniel Webster had achieved a modicum of fame in New Hampshire legal circles for the workman-like competence of his legal arguments. *Dartmouth College v. Woodward* supplied him the occasion to establish national prominence as the chief expounder of the Constitution and the champion of a conservative elite against the incursions of Jacksonian democracy. The educative impact of the case on the public's understanding of the functional relationship between the law and corporate capitalism bolstered Webster's standing in the economic class whose interests he helped to consolidate that same year as counselor for the Second Bank of Boston in *McCulloch* v. Maryland (1819).

Webster credited the instruction he received at Dartmouth for his skills in oratory and logical reasoning. He modeled the form and style of his arguments on the principles of rhetoric that Dartmouth alumnus Caleb Bingham (1784) laid out in T*he Columbian Orator,* which had become the standard classroom textbook when Webster matriculated in 1797. Caleb Bingham described *The Columbian Orator* as instruction in the cultivation of eloquence, which Webster hailed as the "civic virtue" that sustained the nation's commitment to political freedom.

Syllabus ***While the instructors reserve the right to alter the readings, they will do so only for compelling reasons.***

Week One: The Dartmouth College Case	
Thursday January 3	An Introduction to the course with brief remarks from the faculty on the disparate perspectives each will bring to the case

Week Two: Webster's Argument and the Supreme Court's Ruling in the Dartmouth College Case	
Tuesday January 8	An analysis of Webster's argument and Chief Justice Marshall's Opinion
Thursday January 10	Discussion organized around selections from the following readings: Baxter, Maurice G. *Daniel Webster and the Supreme Court*, (University of Massachusetts Press 1966), chapter 1 (pp. 1-35) and chapter 4, (pp. 65-109) Chapter 2 (pp. 36-64 optional).

	Corwin, Edward Samuel, *John Marshall and the Constitution, A Chronicle of the Supreme Court,* Chapter 6. Chief Justice Marshall's opinion in *Trustees of Dartmouth College v Woodward,* 17 U.S. 518 (1819) available here (under "Case" tab): https://supreme.justia.com/cases/federal/us/17/518/ Justice Story's concurring opinion in *Trustees of Dartmouth College v Woodward,* 17 U.S. 518 (1819) available here (under "Case" tab): https://supreme.justia.com/cases/federal/us/17/518/

Week Three The Historical Context	
Tuesday January 15	*Dartmouth v. Woodward* amidst an "Era of Good Feelings"
Thursday January 17	Discussion of the historical context, selections from these works: Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* David Hackett Fisher, *The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* Rosemarie Zagarri, *Revolutionary Backlash: Women and Politics in the Early American Republic* Jennifer Green, ""An Opinion of Our Own": Education, Politics, and the Struggle for Adulthood at Dartmouth College, 1814–1819."

Week Four: The Rhetorical Structure of Webster's Argument	
Tuesday January 22	An Analysis of the Rhetorical Structure of Webster's argument
Thursday January 24	Discussion of the Rhetorical Structure of Webster's argument Daniel Webster's oral argument before the Supreme Court, available here: https://www.constitution.org/dwebster/dartmouth_oral.htm Erikson, Paul D., "A Poetry of Events: Daniel Webster and the Rhetoric of the Constitution and Union" Ganter, Granville, "The Active Virtue of The Columbian Orator" Smith, Craig R. "Daniel Webster's Epideictic Speaking: A Study in Emerging Whig Virtues" Waxman, Seth, "In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century"

Week Five: Supreme Court Reenactment	
Tuesday January 29	Prepping for the 200th Anniversary reenactment No Canvas post due on Wednesday
Wednesday	Trip to the U.S. Supreme Court for reenactment of *Dartmouth*

January 30 to Friday February 1	*College v. Woodward*

Week Six: The Dartmouth College Case & the American Union	
Tuesday February 5	Daniel Webster and the Defense of the American Union
Thursday February 7	Discussion of the Dartmouth College Case and American Union SELECTIONS FROM WEBSTER SPEECHES, TBD Dubofsky, Melvyn. "Daniel Webster and the Whig Theory of Economic Growth: 1828–1848" Simpson, Brooks D. "Daniel Webster and the Cult of the Constitution"

Week Seven: History of the Dartmouth College Case Reception	
Tuesday February 12	A discussion between Professor Robert Bonner and Associate Justice James Bassett
Thursday February 14	Student discussion of the reception history Selection from Newmyer, *Supreme Court Justice Joseph Story* "The Supreme Court of the United States" (1838 *US Magazine*) Hofstadter, "The Old Time College" selection Selection from Neem, *Creating a Nation of Joiners* Newmyer, R. Kent. "Justice Joseph Story's Doctrine of 'Public and Private Corporations" and the Rise of the American Business Corporation" Taylor, Seth. "Daniel Webster, the Boston Associates, and the U.S. Government's Role in the Industrializing Process, 1815–1830"

Week Eight: Daniel Webster: Eloquence as a Civic Virtue	
Tuesday February 19	Daniel Webster's Oratory and America's Civil Religion
Thursday February 21	Student discussion Webster's Oratory within the context of United States civil religion Ferguson, Robert, *Law and Letters in American Culture* Smith, Craig R. "Daniel Webster's Epideictic Speaking: A Study in Emerging Whig Virtues" Szasz, Ferenc M. "Daniel Webster—Architect of America's 'Civil Religion'"

Week Nine: The Dartmouth College Case and Constitutional Law	
Tuesday **February 26**	A round table discussion with Professor Russell Muirhead, Professor Sonu Bedi, and Professor Tom Barnico
Thursday **February 28**	Student discussion Shirley, M. *Dartmouth College Causes and the Supreme Court of the United* States (St. Louis, 1879) Long, J.R. Cases on Constitutional Law, p.240 Beveridge, Albert J. B. *The Life of John Marshall Frontiersman, Soldier, Lawmaker: 1755* -1786 Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence*

Week Ten: Summary Discussion	
Tuesday **March 5**	Collective discussion of the ongoing significance of the Dartmouth College Case

Primary Texts

Van Tyne, Claude H., ed. *The Letters of Daniel Webster, from Documents Owned Principally by the New Hampshire Historical Society* (1902).
Webster, Fletcher, ed. The Private Correspondence of Daniel Webster. 2 vols. (1857).
Wiltse, Charles M., Harold D. Moser, and Kenneth E. Shewmaker (Diplomatic papers), eds., The Papers of Daniel Webster, (1974–1989). Published for Dartmouth College by the University Press of New England. ser. 1. Correspondence: v. 1. 1798–1824. v. 2. 1825–1829. Legal papers: v. 1. The New Hampshire practice. v. 2. The Boston practice. Speeches and formal writings: v. 1. 1800–1833. v. 2. 1834–1852

Additional Readings

Bartlett, Irving H. "Daniel Webster as a Symbolic Hero. New England Quarterly *45 (December 1972): 484–507.*
Baxter, Maurice G. *Daniel Webster and the Supreme Court* (1966).
Baxter, Maurice G. *One and Inseparable: Daniel Webster and the Union.* Cambridge, Mass.: Harvard University Press, Belknap Press, 1984.
Brown, Thomas. "Daniel Webster: Conservative Whig. *In Politics and Statesmanship: Essays on the American Whig Party, (1985) pp. 49–92.*
Dalzell, Robert F., Jr. *Daniel Webster and the Trial of American Nationalism, 1843-1852.* New York: Norton, 1975.
Dubofsky, Melvyn. "Daniel Webster and the Whig Theory of Economic Growth: 1828–1848. *New England Quarterly 42 (December 1969): 551–72.*
Erikson, Paul D. A Poetry of Events: Daniel Webster and the Rhetoric of the Constitution and Union. New York: NYU Press, 1986.
Farrell, James M. "'Above all Greek, above all Roman Fame': Classical Rhetoric in America

during the Colonial and Early National Periods". *International Journal of the Classical Tradition* 18:3, 415-436.
Ferguson, Robert. *Law and Letters in American Culture* (Cambridge: Cambridge University Press, 1984)
Formisano, Ronald P. *The Transformation of Political Culture: Massachusetts Parties, 1790s–1840s* (1983).
Gantner, Granville "The Active Virtue of The Columbian Orator" *The New England Quarterly 77 (December 2010):* 463-476
Howe, Daniel Walker. *What Hath God Wrought: The Transformation of America, 1815–1848* (2007).
Johnson, Herbert Alan. *The Chief Justiceship of John Marshall, 1801–1835*. Columbia: University of South Carolina Press, 1997.
Nathans, Sydney. *Daniel Webster and Jacksonian Democracy*. Baltimore: Johns Hopkins University Press, 1973.
Newmyer, R. Kent, "Daniel Webster as Tocqueville's Lawyer: The Dartmouth College Case Again" R. Kent Newmyer, *The American Journal of Legal History*, 127- 147 1967
Newmyer, R. Kent, "Justice Joseph Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation" *DePaul Law Review*, Volume 25 Issue 4 Summer 1976 Article 3 , 825-841
Prince, Carl E., and Seth Taylor. "Daniel Webster, the Boston Associates, and the U.S. Government's Role in the Industrializing Process, 1815–1830." *Journal of the Early Republic* 2 (Fall 1982): 283–99.
Remini, Robert V. *Daniel Webster: The Man and His Time*. New York: W.W. Norton Co., 1997.
Shewmaker, Kenneth. *Daniel Webster, The Completest Man.* Hanover: University Press of New England, 1990
Simpson, Brooks D. "Daniel Webster and the Cult of the Constitution," *Journal of American Culture' 15 (Spring 1992): 15–23.*
Smith, Craig R. "Daniel Webster's Epideictic Speaking: A Study in Emerging Whig Virtues"
Smith Craig R. *Daniel Webster and the Oratory of Civil Religion*. Columbia: University of Missouri Press, 2005.
Szasz, Ferenc M. "Daniel Webster—Architect of America's 'Civil Religion'," *Historical New Hampshire* 34 (Fall/Winter 1979): 223–43.
Tobias, Marilyn. *Old Dartmouth on Trial: The Transformation of the Academic Community in Nineteenth-Century America.* New York: New York University Press, 1982.
Waxman, Seth, "In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century" *The Journal of Appellate Practice and Process*, vol. 3, No.2 (Fall 2001) 521-531.