

May 1966

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Florian Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 Wm. & Mary L. Rev. 259 (1966), <https://scholarship.law.wm.edu/wmlr/vol7/iss2/6>

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WITH JOHN MARSHALL FROM WILLIAM AND MARY TO DARTMOUTH COLLEGE

FLORIAN BARTOSIC*

THE WILLIAM AND MARY CASE

Thomas Jefferson records in his *Autobiography*:

On the 1st of June 1779. I was appointed Governor of the Commonwealth and retired from the legislature. Being elected also one of the Visitors of Wm. & Mary college, a self-electing body, I effected, during my residence in Williamsburg that year, [on December 4, 1779] a change in the organization of that institution by [among other things] abolishing the Grammar School . . . and substituting a professorship of Law & Police . . .¹

At least one person was not pleased with the reorganization of the College, namely, the Rev. John Bracken, master of the grammar school, who because of it was without a position. In October, 1787, almost eight years later, he petitioned a Virginia district court for a writ of mandamus to cause the visitors of the college to restore him to his "place and office of grammar master, and professor of humanity." "[O]n account of difficulty"² the case was adjourned to the General Court of Appeals of Virginia and was argued before that court in December of 1790. Counsel for the College was John Marshall, "the leading lawyer of Virginia",³ one time student at William and Mary⁴ and one day to become "the Great Chief Justice."

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1. 1 THE WRITINGS OF THOMAS JEFFERSON 69-70 (Ford ed. 1892).

2. Bracken v. Visitors of the College of William & Mary, 3 Call. (7 Va.) 573, 579 (1790). The reporter does not explain what the "difficulty" was; presumably, the case was removed to the appellate court because of the complex issues involved.

3. 2 BEVERIDGE, THE LIFE OF JOHN MARSHALL 168 (1916) (hereinafter cited as Beveridge). See Appendix I, List of Cases Argued by Marshall before the Court of Appeals of Virginia, 2 BEVERIDGE 568.

4. Bracken's misfortune had been Marshall's good fortune. When the grammar school was abolished, a chair of Law and Police was established—the first of its kind in the United States and antedated in the English-speaking world only by Blackstone's Vinerian professorship at Oxford. George Wythe was its first occupant, and Marshall in 1780 attended the "course of law lectures given by Mr. Wythe, and of lectures of Natural philosophy given by Mr. Madison the President of William and Mary College". *An Autobiographical Sketch by John Marshall* 6 (Adams ed. 1937). See 1 BEVERIDGE 157-161.

In his opening argument to the court, Marshall, citing three English cases, made the point that a writ of mandamus does not lie in the case of a private eleemosynary institution for which visitors had been appointed. The reporter notes that "Mr. *Marshall* was here stopped, and the position that a *mandamus* will not lie in the case of a private Eleemosynary institution, where Visitors were appointed, was admitted to be law".⁵ Marshall went on to argue that William and Mary was such an institution, and that, even if it were not and the court did have jurisdiction, the writ ought not to issue since the visitors had but exercised the powers conferred upon them by the charter which King William and Queen Mary had granted the College in 1693. But Mr. Bracken's counsel, John Taylor,⁶ implied that the College was a public or quasi-public institution, and he insisted that the visitors had limited powers and that in abolishing the grammar school and discharging its master, they had exceeded their authority. Further, he contended, the meeting at which the reorganization plan was adopted had not been attended by a "sufficient number of members to form a convocation",⁷ proper notice had not been given, and Mr. Bracken had been deprived of his office without a hearing.

The court passed over the interesting and rather detailed arguments of counsel as to whether the college was a private, public or quasi-public institution, and "*on the merits of the case*"⁸ refused the writ to

5. Bracken v. Visitors of The College of William and Mary. *Supra* note 2 at 580. In his rebuttal Marshall declared: "The authorities in support of this position, were too numerous to be opposed." *Id.* at 591. Marshall's citation of authorities in the William & Mary case is emphasized, for he was not a lawyer who relied to any great extent upon precedents. See 2 BEVERIDGE 179, 180. It is interesting to note that he, who was later to distinguish himself as the constitutional statesman par excellence in creating precedents, displayed little inclination or facility for citing authorities as a lawyer.

6. This may have been John Taylor of Caroline, who was later to attack the nationalist principles of Marshall's *M'Culloch v. Maryland* opinion in his States Rights classic, *CONSTRUCTION CONSTRUED, AND CONSTITUTION VINDICATED*. See 4 BEVERIDGE 335-339.

7. Bracken v. Visitors of the College of William and Mary. *Supra* note 2, at 589.

8. *Id.* at 599; In the second William and Mary case, Bracken v. College of William and Mary, 1 Call. (5 Va.) 161, 163, 164 (1797), President of the Court, Pendleton, who also sat on the court that heard the first case, gives us his explanation of why the court in 1790 denied the petition for a mandamus "on the merits": "1st. To shew the case had been fully entered into, as if the papers had been before us on the return of the mandamus. 2d. To meet an objection warmly insisted on, that the General Court had no power to intermeddle with the affairs of the College, upon the *English* precedents, applying to private donations for Colleges; but which some of the judges at least, of whom I was one, thought did not apply to our College, which had a public and not a private foundation: and to avoid a supposition, that the denial was on that ground . . ."

restore Bracken to his former position. While the case (statement of facts, arguments of counsel and opinion) amounts to twenty-six pages in *Call's Reports*, the court's opinion consists of four lines.

The Rev. Mr. Bracken, however, was not to be put off so easily. He went to court again, this time with an action for arrearages of salary. In this second case a Mr. Randolph appeared for the college, John Marshall having gone to France on the X Y Z mission.⁹ The district court found against him, and the matter was again brought before the Court of Appeals. But the appellate court made short shrift of the appeal: "if he had no right to the office, he could have none of the salary."¹⁰

Of course, the fascinating question presents itself: to what extent did the reasoning of Marshall, the lawyer, in the *William and Mary* case affect the opinion of Marshall, the Chief Justice, in *Dartmouth College*?¹¹

MARSHALL AS LAWYER AND AS CHIEF JUSTICE

That *Dartmouth's* charter was a contract—a crucial and basic issue in the 1819 case—Marshall thought was at most one step removed from the self-evident: "It can require no argument to prove, that the circumstances of this case constitute a contract."¹² Nevertheless he did devote four sentences to the point. Then he addressed himself at much greater length to the following questions before resolving them in the affirmative:

1. Is this contract protected by the constitution of the United States?
2. Is it impaired by the acts [of the New Hampshire legislature] under which the defendant holds?¹³

The facts, the holding and the significance of the *Dartmouth College*

9. 2 BEVERIDGE 257-289.

10. *Bracken v. Visitors of the College of William and Mary*. *Supra* note 8, 1 Call (5 Va.) at 164.

11. Surely Marshall had access to 3 Call which had appeared in 1805. Beveridge records that "Marshall . . . prepared his opinion under his trees at Richmond and in the mountains during the vacation of 1818 . . ." 4 BEVERIDGE 274.

12. *Trustees of Dartmouth College v. Woodward*, 4 Wheat., (17 U.S.) 518, 627 (1819). David Loth has commented: "As was customary with the Chief Justice, he devoted most of his opinion to proving points which had general agreement, and stated the really controversial elements as a simple fact. In this case, the only new point he was deciding was whether such a charter as *Dartmouth* possessed was a contract." LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 296 (1949).

13. *Ibid.*

14. 4 BEVERIDGE 277.

case are well known. In the words of Beveridge, "[i]t reassured investors in corporate securities, and gave confidence and steadiness to the business world",¹⁴ and Charles Beard saw it as "a spectacular event more important in American educational history than the founding of any single institution of higher learning".¹⁵ Professor Fred Rodell has sketched the political background of the case and has outlined Marshall's opinion of thirty pages with a conciseness and clarity that are as refreshing to students of the Supreme Court as they must be depressing to the pedantic monograph boys.

In order to sustain his academic fellow Federalists, John Marshall had to rule that a charter was the same as a contract (this was brand-new legal doctrine); that the promises of the British Crown in granting the charter were still binding, despite the Revolution, on the state of New Hampshire (this was also new); and that therefore the New Hampshire statute was unconstitutional because it "impaired the obligation of contracts." By such tortuous and unprecedented legal argumentation,¹⁶ with an assist from Webster's sentimentality, Marshall managed to hold the fort for Dartmouth's Federalist trustees.¹⁷

It is clear that the *William and Mary* case, in which Marshall had represented the College, was not directly in point with the *Dartmouth* case. In the latter, it was the legislature of New Hampshire which had reorganized the College; in the former, the visitors of the College had effectuated the reorganization. In the New Hampshire case, the issue was the constitutionality of the action of the legislature; the issue in the Virginia case was the legality of the action of the visitors in removing the grammar master. However, at the heart of both controversies were the charters granted by the British Crown to the Colleges. Chief Justice Marshall asserted in the *Dartmouth* case: "It becomes then the duty of the Court most seriously to examine this charter, and to ascertain its true character."¹⁸ In the *William and Mary* case John Taylor, counsel for Mr. Bracken, had affirmed:

The charter is the magnet, from whence every part of the business must take its direction. It is the constitution of the College, and, like all other constitutions, ought to be preserved inviolate. In this instance

15. 1 BEARD, *THE RISE OF AMERICAN CIVILIZATION* 819 (1928).

16. There are two citations to Blackstone, but not a single case is cited by the Chief Justice. By way of contrast, see Justice Story's precedent-laden concurring opinion.

17. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* 95-96 (1955).

18. *Trustees of Dartmouth College v. Woodward*. *Supra* note 13, at 630-631.

it must be preserved inviolate for the benefit of all parties, because its destruction will take from both sides the subject of controversy.¹⁹

Marshall himself, as a lawyer, in pressing the point that the visitors might modify the schools of William and Mary, had added: "provided they did not depart from the great outlines marked in the charter."²⁰ He admitted that they had "no power to change that which is established by the charter."²¹

"If the acts of the Visitors are at all examinable in this Court, none can be supported which transcend the limits prescribed for them in the charter which gives them being, and from which their power is drawn."²² The William and Mary charter had granted certain joint life estates to the masters of the college. In speaking of these, Marshall had reasoned:

But, these estates are the gift of the founder. They are his voluntary gift. To this gift he may annex such conditions as his own will or caprice may dictate. Every individual, to whom it is offered, may accept or reject it; but, if he accepts, he accepts it subject to the conditions annexed by the donor.²³

Moreover, although most of the legal questions involved in the *William and Mary* and *Dartmouth* cases were only indirectly related, there was in both (at least as counsel argued the *William and Mary* case) a common, pivotal issue: were the institutions public or private ones? If public, then it followed that both legislature and courts could rightly consider the colleges within their bailiwick. If private, the contrary result should be reached.

Counsel for the discharged grammar master had implied that the college was a public or quasi-public institution:

The acts of Assembly, which give a revenue to the College arising from certain duties, convert it into an object of public concern.

It is, in many respects in its origin, a corporation for public government, and whose proceedings must therefore be subject to the control of this Court.

It has a right to a member of Assembly. . . .

19. 3 Call 573, 581.

20. *Id.* at 580.

21. *Id.* at 596.

22. *Id.* at 595.

23. *Id.* at 592.

They [the masters of the college] have the office of the surveyor general; and, having that office, appoint all the surveyors to the different counties throughout *Virginia*. This is an office which nearly concerns the public and gives to the College completely a public character.²⁴

But advocate Marshall pointed out that the power of the College to elect a member of the Virginia Assembly had been taken from it by the state constitution, and he argued that even though the office of surveyor general held by the college was "of public concern... it cannot affect the case."

As this mandamus is not applied for to compel the College to proceed... to the appointment of a county surveyor, the argument does not touch the case, unless it be intended to prove, that if a case can exist in which a mandamus might be awarded to the College, it may be awarded in any case; that if there be a power annexed to the corporation to do any one act which concerns the public, the whole corporation immediately changes its nature, and from a private, becomes a public corporation. Unless the argument proves this, it proves nothing.²⁵

With respect to the revenues from duties granted to the College by the Virginia Assembly, Marshall reasoned:

... the acts of Assembly giving certain duties to the College are relied on as giving the government a right, by its Courts, to supervise the disposition of those revenues.

The College was founded by *William and Mary*. Since its foundation, the bounty of *Virginia* has been added to that of the original founders. It is an established principle, that all annexed foundations follow, and are governed by the rules of the old foundation to which they are annexed (*The King v. The Bishop of Ely*), 1 Wm. Black. Rep. 77, 87. The gift of any individual, then, to a chartered corporation, is subject to the laws which control the original donation. That this gift was made by the public, does not alter the case; because, it is decided, that Colleges of Royal foundation are not different from those of private foundation. Where the King has appointed Visitors, their power is precisely the same as where a private founder has appointed them. Of consequence, a donation to an old foundation,

²⁴. *Id.* at 590.

²⁵. *Id.* at 593.

though made by the public, is as subject to the fundamental law of the corporation, as the donation of an individual would be.²⁶

And Marshall also maintained:

[T]his [is] a private, and not a public institution. The persons who compose it have no original property of their own, but it belongs to the corporation. It is, then, completely Eleemosynary. In many of the cases, Colleges and hospitals are classed together as private Eleemosynary corporations, subject to the will of the founder. There would seem to be no principle on which this College should be placed in a different class of corporations from all other Colleges.²⁷

... That the masters have estates, as masters, cannot convert this into a public corporation; for, all masters must have salaries as masters; in all charitable institutions something is given, which the professors, if there be any, receive as professors; and, if this was the criterion of a public institution, there could be none private in their nature.²⁸

Just as Marshall, the lawyer, could argue for this conclusion on the facts of the *William and Mary* case, so Marshall, the Chief Justice, quite understandably, had no difficulty in holding Dartmouth College to be a private corporation.

Whence... 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 the act of incorporation? ²⁹

[No, for] 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.³⁰

The particular interests of New Hampshire never entered the mind of the donors... 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 con-

26. *Id.* at 592, 593.

27. *Id.* at 591.

28. *Id.* at 592.

29. 4 Wheat. 518, 635, 636 (1819).

30. *Id.* at 638.

tributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her.³¹

Thus did Chief Justice Marshall reach one of the fundamental propositions upon which his 1819 opinion was based: Dartmouth College was a private eleemosynary corporation.

CONCLUSION

A comparison of the *William and Mary* case, in which John Marshall represented his alma mater, with his noted *Dartmouth College* opinion shows that there was a vital issue common to both: was the college concerned a private eleemosynary corporation? Other questions involved in the two cases were only collaterally related. However, it seems that the Chief Justice's reasoning in 1819 was in certain respects grounded upon premises only one step removed from the reasoning of Marshall, the lawyer, in 1790.³²

It is not insignificant that eyewitness Professor Chauncey A. Goodrich related to Rufus Choate that the eloquent Daniel Webster in his argument to the Supreme Court in behalf of the trustees of Dartmouth College was overcome by emotion after he had addressed Marshall:

Sir, you may destroy this little Institution; it is weak; 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 radiance over our land!

It is, Sir, as I have said, a small College. And yet, there are those who love it—³³

Webster's tender eloquence was not lost upon his sympathetic listener. Tears came to Marshall's eyes. Quite likely the mind and heart of the Great Chief Justice went back to another small college which he had attended and for which he had once been counsel. There were those who loved it, too!

31. *Id.* at 640.

32. Perhaps the most noteworthy statement of Marshall in his less known college case was a general observation, which in its context referred to institutions of learning, but which was pregnant with governmental implications and indicative of a philosophy of constitutional law:

In institutions, therefore, which are to be durable, only great leading and general principles, ought to be immutable. 3 Call 573, 581 (1790).

33. Quoted in 4 BEVERIDGE 248-249.