The Dartmouth College Case Decision

By JOHN Z. WHITE

With an Introduction by Wm. Marion Reedy, Editor of the St. Louis Mirror

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THE DARTMOUTH COLLEGE CASE DECISION.

John Z. White in the St. Louis Mirror of Oct. 4, 1906
With an Introduction by Wm. Marion Reedy,
Editor of The Mirror.

Mr. Bryan's proposal of government ownership of railways; Mr. Folk's proposal of taxing corporations upon the actual value of their property, including franchises, or upon the earning capacity as an estimate of valuation; every proposal to do anything to a corporation that the corporation doesn't want done, is met with the proclamation by corporation lawyers: "You can't do it. Marshall's decision in the Dartmouth College case forbids. That decision holds a charter, or a franchise, is a contract, that no State can impair the obligation of contracts. If the corporations aren't willing to submit to those things you can't do them without impairing the obligation of contracts." This Marshall decision is the backbone, the vitality of all corporate power. It is the secret of corporate tyranny over the people. It is the buttress of every corporation iniquity which reformers try to remedy. It is the fetich of all the courts. It is the gospel of all lawyers. It is sacred because it was formulated by Webster, and embodied in the law by Marshall and Story. It has been so for eighty-seven years. But now the law as laid down by these giants is questioned. Their logic is attacked. The conclusions of the Supreme Court that have been held sacred and binding on all courts forever are denied. They are shown to be absurd. With government ownership and corporation regulation the intensely vital issues they have become, we shall hear much of the Dartmouth College decision

being as unassailable as Divine Writ. The war of the new democracy, the true republicanism of this day and the future, must be against this decision, which supports all the corporation iniquities and infamies. This article by John Z. White sounds the first note of the battle cry to which all American radicals must rally, for the law of the Dartmouth College decision is the issue upon which both the great parties are to split in such way that all those in both parties who believe in liberty, in the rule of reason, in freedom from the tyranny of "artificial persons" will eventually be in one party, and all the beneficiaries of the tyranny and corruption of artificial persons will be in another party. Marshall's decision has made for the enslavement of men to corporations. It must be reversed and its logic denounced if this government is to fulfil the purposes of its founders or realize the hope and faith of mankind that found expression in the Declaration and in the Constitution.

EDITOR OF THE MIRROR.

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The people of the United States are much disturbed by private monopolies.

Very many, possibly the majority, appear to view the situation as hopeless.

All manner of remedial measures are proposed.

Kansas attempted a public oil refinery; various municipal enterprises are under consideration; it is even suggested that the amount of business that one corporation may do shall be limited to a given fraction of the total business of the country in any particular line; while a message from the President to Congress informs us that state regulation of railroads has thus far achieved but little.

"How not to do it," is still the distinctive characteristic of American public life.

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Is the President not aware of the fact that early in our history the Supreme Court adopted a policy and established a precedent that deprived the people of their natural remedy for corporate aggression?

The doctrine affirmed by the decision in the Dartmouth College case is the source of most of our present industrial abuses.

Instead of seeking the overthrow of that doctrine, our so-called statesmen seem bent on devising schemes that admit its truth, but attempt to dodge its consequences.

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Daniel Webster conducted the case for the college. John Marshall and Joseph Story delivered the principal opinions.

Those opinions were essentially repetitions of Webster's argument.

On fundamental law Blackstone was favorably quoted.

The case is interesting. Story said so, and in this respect his opinion is sound.

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As told by Wheaton, the story is as follows:

In 1754 Dr. Wheelock began teaching the Christian religion to Indian children. He included some white children, and added educational to religious instruction.

The school was charitable, and contributions were sought. Finally the favorable attention of Lord Dartmouth and others in England was secured.

Originally, Dr. Wheelock intended to bequeath the school and its funds to twelve men with power to fill vacancies, that the trust so formed be perpetual.

The English contributors believed an incorporated organization more desirable, and in 1769 there was secured from the English crown a charter.

The "Trustees of Dartmouth College" is formed

in harmony with the plan of Dr. Wheelock, being composed of twelve men who, with other privileges, have power to fill vacancies, and thus is self perpetuating.

The charter declares its provisions unalterable by the crown, and that the twelve trustees may make rules and regulations for the government of the college not repugnant to the laws of Great Britain or New Hampshire.

After the Revolution the State of New Hampshire increased the number of trustees to twenty-one, and appointed a board of twenty-five overseers.

The college corporation resisted this action, and was defeated before the Supreme Court of that State.

The constitution of New Hampshire (art. [illegible]) reads: "No person shall be deprived of his property, or 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."

The New Hampshire court said: "That the right to manage the affairs of this college is a privilege within the meaning of the bill of rights, is not to be doubted. But how a privilege can be protected from 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."

Upon appeal to the Supreme Court of the United States it was held that the charter from the crown is a contract, and therefore that said laws are null and void, because in violation of the Constitution of the United States, which reads (art. 1, sec. 10): "No State shall pass any law impairing the obligation of contracts."

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In his contribution to this interesting case Judge Story said: "It is a principle of the common law * * * that the division of an empire works no forfeiture of previously vested rights of property."

And of course the division of empire does not de-

stroy sovereign power—that power passes, it does not disappear.

The people of England, through their agent, Parliament, as an act of sovereignty, can, could and did revoke grants made by the crown. All grants issued by the crown were and are subject to this condition.

Webster admitted this power of Parliament, but urged that "in modern times it has exercised this power very rarely"; that "even in the worst times this power of Parliament to repeal and rescind charters has not been exercised"; that "Parliament could not annul charters as a matter of ordinary legislation, but only as an act of omnipotent sovereignty"; that "no legislature in the United States has such power."

The people of New Hampshire, by their sovereign agency (legislative, executive and judicial), declared these laws in full force and effect.

When these agree has not sovereignty spoken? What further appeal is possible—save to the mob?

Therefore, unless the Constitution of the United States delegated to the Federal Government power to annul charters, or prohibited it to the States, it has continued to reside in each State as an inherent sovereign right.

The tenth amendment to the Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There was no pretense that power to annul charters was delegated to the United States, but it was held the clause declaring that "No State shall pass any law impairing the obligation of contracts," is such prohibition to the States.

In our early history some of the States too readily altered the basis of debt liquidation. For this reason this Constitutional prohibition was inserted, and yet this decision pretends that in it is concealed the destruction of a great sovereign prerogative

And even a hasty perusal of the proceedings of the Constitutional convention show the subject under consideration to have been private contracts.

Even if a grant be absurd or unjust, or secured through corruption, still are the sovereign people helpless. According to this decision there is no power in the United States that can annul charters—because of a Constitution ordained "to promote tranquillity," and to secure other "blessings."

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The vital question before the Supreme Court, therefore, was—Is the charter from the crown a contract?

Chief Justice Marshall disposed of the matter by saying: "It can require no argument to prove that the circumstances of this case constitute a contract."

On the contrary, very energetic argument is required; much more forceful than any advanced by either counsel or court.

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As a point from which to view the matter in hand, let us first perceive the conditions of equitable social adjustment.

Blackstone says truly that: "The laws of nature are coeval with mankind and are binding everywhere and at all times," and that "all human enactments derive whatever force and vitality they may have from their conformity to those great originals," and that "any human laws made in contradiction of the laws of nature must eventually fail and become null and void."

As a condition of nature, then, men live on the earth, and must produce things from its materials in order to continue life.

Some, if able, will rob, or wantonly or carelessly injure others, and to prevent such trespass all the people (strictly, the majority) within a given territory organize the police power.

To utilize the earth efficiently it is necessary that parcels be exclusively occupied by individuals. To this end the whole people ordain a method of holding land.

In other words, each man has the right to peacefully occupy and use the earth, and the only known way to maintain this right (security of person and property) is by the exercise of the supreme force.

This supreme force is sovereignty. Sovereignty is dominion; government its organized agency.

States are not corporate agencies to be compelled. They are sovereign agencies that command. They bow not to the past; they rule not the future; but they control the present.

To yield this power in any degree is, in that degree, to yield the only power in nature whereby civilized society is possible.

To argue that sovereignty can, in part, surrender itself, is to argue that a thing can divest itself of its essential characteristics.

If we argue that sovereignty can partly surrender itself, must we not logically agree that it can do so wholly?

Sovereignty is the arbitrary will of the majority, and finds justification for its exercise in the fact that nature (i. e. the constitution of man, together with that of his environment) compels the assertion of that will.

The supreme force is often used to the disadvantage of some, but such act is in violation of natural equity and "must eventually become null and void."

This is nature's social law. "Conformity to this great original" is the State's duty.

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It will be observed that sovereignty does not originate in the divine right of the King, nor in the legislature, nor in the so-called social compact, nor in the conscious contract that James Wilson tried to de-

duce from the assertion that governments de[rive] "their just powers from the consent of the governe[d]."

Like the right of each man to peacefully use [the] earth, sovereignty exists of itself. The State is [but] the agency of sovereignty, organized to conserve th[e] right to peacefully occupy.

Plainly, while a State may contract with a citi[zen] to build a school house, it cannot contract with h[im] regarding matters of sovereignty.

Such act would be an attempt to "agree" that [the] greatest force is not the greatest force—an atte[mpt] in degree to surrender sovereign agency.

A charter gives power to the possessors as agai[nst] other citizens, but not as against the State.

A State therefore may create a corporation by permitting a group of persons to exercise sovereign powers, but such act is to delegate, not to surrender power. It is a license, a permit—not a contract.

In short, a State may delegate portions of its power, but it can abdicate no part of its sovereign agency.

Any agent may make contracts as to matters in the conduct of business proper to his agency, but who will urge that he may contract away any part of the title to the enterprise itself? Are we to understand that an agent may absolve himself of his agency, in any degree?

A corporation holds power only because it is sustained by sovereignty. It is not only created by law, but also is sustained by law, and has no being save for law.

To admit the power to grant charters and deny the power to annul them, is like admitting the existence of one side of an object while disputing the existence of the other side; or like asserting the positive and denying the negative pole of electricity; or like disputing the similar conversion of a syllogism.

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The Supreme Court was right, when, in the

"Slaughter House" and other cases, it held that no part of the police power may be "contracted" away. Each citizen must submit to this phase of sovereign authority.

But is land-holding less a result of sovereignty than police regulations? One may refuse a particular parcel of land, but cannot refuse all land and live. Either as owner or tenant he must conform to the methods ordained. He may, however, refuse to erect any building.

Men and land include all things social, and if sovereignty be asserted as to these it is complete.

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Webster dimly perceived that to contract, all parties must be free to withhold consent, and he said: "What proves all charters of this sort to be contracts is that they must be accepted, to give them force and effect."

Can we not with equal justice say the relation between master and slave is contractual?

The master grants permission to attend a picnic. The slave "accepts"—and we have a contract.

Or, the master commands a like act, and the slave refuses, even preferring death—and no contract results.

Is not the permission or the command without "force and effect" unless the slave "accepts"?

"Accept," says the master, "and live a slave, or fail to 'accept' and die a man."

Corporations live. Men die. Therefore, says the State, according to this decision, accept this charter and live an artificial, immortal person, or fail to accept and die as the God of nature designed in his "great originals."

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If we are agreed as to the nature of sovereignty and its agency, we perceive the validity of the British rule that the Parliament can annul charters.

Also we will be able to note the virtue of the positions taken by the court.

Two principal assumptions were made:

First, that land grants are irrevocable.

Second, that corporations are persons.

Some positions were evaded, but, on the important matter of "privileges" there is agreement, as follows:

Blackstone said: "Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the King's prerogative, subsisting in the hands of the subject."

Webster quoted Prof. Sullivan as saying that, "The term liberty signifies the privileges that some of the subjects, whether single persons, or bodies corporate, have above others, by the lawful grant of the King."

Webster then said: "The plaintiffs have such an interest in this corporation."

Privileges, then, are partialities, favoritisms, "grants of the King's prerogative," "advantages that some have above others."

Per contra: They are handicaps, burdens, oppressions, tyrannies upon those same "others."

"What is one man's privilege is another man's right," is a wise saying attributed to Andrew Carnegie.

Of corporations Justice Story said: "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. * * * 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."

Marshall said of this corporation: "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 received by it."

And said Webster: "A grant of corporate powers and privileges is as much a contract as a grant of land."

"Was it ever imagined," asked Story, "that land voluntarily granted to any person by a State was liable to be resumed at its own good pleasure?"

The nature of privileges is agreed to; also that corporations hold privileges; also that "a grant of franchises is not in principle distinguishable from a grant of any other property," as asserted by Story.

But cannot the State take the physical thing, land, under power of eminent domain; and did not John Marshall say, in Providence Bank v. Billings (4 Peters, 562), referring to a land grant, that: "This grant is a contract, the object of which is, that the profits issuing from it shall inure to the benefit of the grantee? Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of contracts? The idea is rejected by all," etc.

If the State can take the land under condemnation, and its value (profits) by taxation, what becomes of the contention of Webster and Story that land granted may not be resumed? And we are all agreed that land grants and franchises stand or fall together.

Thus one principal assumption is destroyed. It has no validity in reason, and from a different point of view, as shown in the case cited, even Marshall was able to perceive the truth.

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The second principal assumption was necessary to the conclusion, because if the corporation was not a "person," there was no party with whom the crown might contract.

It is agreed that a contract is "an agreement between two or more persons to do or not to do a particular act."

As a corporation does not exist until the charter issues, it would seem that, if the charter is a contract, the corporation must be a party to its own creation.

Perhaps the State creates a corporation, or artificial person, and then contracts with that artificial person to do what it has already done, viz., create a corporation.

Story dealt with this point in the following manner:

"From the nature of things, the artificial person called a corporation must be created before it can be capable of taking anything. 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. * * * There may be, in intendment of law, a priority of time, even in an instant, for this purpose."

The corporation must exist before it is "capable of taking anything."

Certainly; and it must "be" before it can contract to "be." To "be" is one of its liberties, and all of its liberties are in the "contract."

As Marshall said: "A corporation is an artificial being, invisible, intangible, and, existing only in contemplation of law, it possesses only those properties which the charter expressly confers upon it."

One of which properties is to "be." "The law deems the corporation to be first brought into existence and then clothes it," etc. Never mind about clothing it. Get the thing born first—as a contract.

Story said those who oppose his view should "consider whether or not they do not at the same time establish that the grant itself is a nullity for precisely the same reason."

As a contract, we do establish "precisely" that.

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Story had yet another line of approach. He said: "An executory contract is one in which a party binds himself to do or not to do a particular thing. An executed contract is one in which the object of the contract is performed."

The non-professional mind can readily perceive how one may contract to make a pair of boots, or to sell or to deliver a pair, but how can one contract to make a pair that is already made?

Seemingly, in the court's view, a charter is an executed contract. That is, "the object of the contract is performed." But this does not relieve the situation. For, even though the making and the performance of the contract be simultaneous, there can be no contract without parties, and the corporation or artificial person does not exist until the charter issues.

Not only is the "person" artificial but the whole concept is artificial and woodeny and bears no semblance to those "great originals" to which Blackstone rightly declared all permanent law must conform.

One feels impelled to warn the profane reader that this is not a discussion of farce-comedy.

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The facts in the case appear simple enough, before Webster indulged in intellectual gymnastics, or the court applied its alchemy.

It seems that a group of persons applied for, and received, "an advantage above others," a "branch of the King's prerogative," or a privilege sustained by sovereign power, that is, a charter.

The grant being secured, the group thereby becomes an organization of persons upon whom the State has conferred certain specified favors

If the corporation is an artificial person "in contemplation of law," it can very bluntly be asserted that the law assumes as true what is not true, but absurd.

When told that in the eye of the law his wife supposed to act under his direction, Mr. Bumble replied: "If the law supposes that, the law is a ass—idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."

We are getting experience, and it is to be hoped our eyes will open. Mr. Bumble's estimate of the law was, in some respects, extremely accurate.

The second assumption seems untenable, and with its dismissal the case vanishes.

A corporation is an organization—not an organism, and certainly not a person.

Its charter is but the expression of the grant of authority conferred. If the State has power to confer, it also has power to withhold or withdraw—that is, to annul. Unless, of course, there is some power in government greater than sovereign agency.

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Story suggested that power to annul charters might be reserved by the legislature, either in each charter or by general law.

Such reservation surely cannot give to a legislature a power not already possessed. Otherwise an act may not only tend, as Webster feared, but easily secure, "the union of all powers in the legislature." And if the legislature cannot so add to its own powers, but can by act secure the reservation, does it not follow that the reservation exists regardless of the act?

Does a legislature possess power through contract with individual citizens, or is its power delegated to it by the sovereign people?

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After agreeing to the nature of privilege, and listening to the definition of corporations, and observing Justice Story's assurance that these grants imply on the part of the grantor "a contract not to reassert the right" (although it is agreed that Parliament can annul), and being told that "the only effect of the charter was to give permanency to the design;" in fact, being duly impressed with the solemnity of the whole proceeding (and why should not artificial, immortal beings be viewed with awe?), we are suddenly startled by Marshall's assertion that 'From the fact that a charter of incorporation has been issued nothing can be inferred which changes the character of the institution or transfers to the government any new power over it."

If this assertion is true, why do men seek charters?

If the character of the institution was not changed, what contract was made?

And what did Story mean in saying that a corporation possesses "certain immunities, privileges and capacities in its collective character which do not belong to the natural persons composing it"?

We must infer a change in the character of the institution, and that change is the possession of political powers not before held.

It is these political powers that Story said "do not belong to the natural persons composing" the corporation.

These "branches of the King's prerogative" are political because the whole of the King's prerogatives are political. The State is political. It has political power only to give.

It was to this sort of power that Webster referred when, after describing privilege, he declared that his clients "have such an interest in this case."

The character of the institution was changed by the exchange of a private for a public administrator. All corporations are public for the reason that all

their powers are derived from the State. Corporate powers are part of the State—(sovereign powers subsisting in the hands of the citizen.—to use our terms in place of the British form).

On the same point Mr. Hopkinson, of counsel for the college, asked: "If the property of this corporation be public property, when did it become so? It was once private property; when was it surrendered to the public?"

The property was not surrendered to the public, but its administration was given to the public by the voluntary act of its owners.

The owners preferred to entrust it to a publicly established agency (viz., the corporation), rather than to leave it by bequest to private parties, in accord with the original intention of Dr. Wheelock.

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Distinguishing between public and private corporations and indicating that the physical property with which a college corporation is endowed is called its "foundation," Story said: "If 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."

And in this class of private corporations he places hospitals, banks, canals, insurance, turnpike and bridge companies.

This conclusion gives to a corporation the character of its physical property, while common sense asserts its character to be that of the source of its authority.

It is a corporation because the State created it. Is it not more in harmony with right reason to say, 'if the grant be from the public, the corporation is public, however slight be the uses to which its political power is devoted"?

Do the privileges of a corporation spring from its foundation, or from the State?

Its power "to be" is of the State; its permanence, or "immortality," is of the same source.

How can we say that the privileges of a corporation are sovereign powers in the hands of a citizen, and at the same time say the corporation is private?

To classify corporations as civil and eleemosynary, or as public and private, is to divide them according to their uses, and is entirely proper as an aid to convenient identification; but to make this classification the basis of philosophical distinction is merest twaddle.

A corporation is a group of persons holding "privileges," and the nature of privileges is agreed to. Whether the corporation is used to conduct a Sunday school, a great city, a railroad, or a manufacturing plant is immaterial.

A gun, whether a toy pistol or the most improved rifle, is still a gun; and whether in the hands of an honest man defending his home, or in the hands of a highwayman attacking his victim, it is still a gun.

A corporation holds political power. Its power to "be" is political. And all the fancy balancing indulged by counsel and court operates to conceal, not to destroy, this truth.

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The New Hampshire court, as before stated, said it is difficult to understand "how a privilege can be protected from 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."

In reply Webster quoted Blackstone as follows. "And first it (i. e., the law), is a rule; not a transient or sudden order from a superior, to or concerning a particular person; but something permanent or universal. Therefore a particular act of the legislature to confiscate the goods of Titus 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 on Titus, and has no relation to the community in general; it is rather a sentence than a law."

Webster added, "Everything that may pass under the form of an enactment is not therefore to be considered the law of the land. Such construction would render constitutional provisions of highest importance inoperative and void."

All of which is true, but the case in hand is an instance of the "universal and permanent" rule that sovereignty can annul charters.

Webster seems to have dodged the issue, or begged the question; which reminds us that of one of counsel's arguments Story said, "The fallacy of the argument consists in assuming the very ground in controversy."

This is precisely the method of the court throughout most of this case.

Many eminent authorities, voicing sound doctrines as to the proper relation between sovereignty and the person, were quoted—and then the doctrines were applied to corporations.

Herein lies the plaintiff's need for asserting corporations to be persons—and herein is the lameness of this absurd decision.

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In conclusion, sovereignty is not a subject of contract.

Nature forces the majority to be sovereign. Sovereignty of necessity relates to persons and to land.

These two exist of themselves. All else in the social state is subsidiary.

The whole string of sophistries indulged by the court were to the end that these simple truths be submerged.

It is only as these simple truths are clearly ap-

prehended that social freedom is possible. Marshall was a Tory. His whole career proves it. A Tory is not a friend of freedom.

The truth is that power to regulate corporations or annul their charters inheres in each State—save for this precedent.

Deprived of this power by this invasive rule, the people flounder on, rapidly losing faith in the great American experiment.

Does anyone doubt that our Western States would long since have regulated railroads and other corporations in the interest of common honesty if the group of attorneys called the Supreme Court did not bar the way?

The people think they live under the Constitution. In fact, they live under Marshall's decisions.

If it were not for the slavish submission of the present court to the name of Marshall, would we need to be outraged by the spectacle of sovereign States like Idaho, Montana and Colorado in the West, and Pennsylvania and New Jersey in the East, lying bound at the feet of a lot of soulless corporate pirates, as reckless of human rights as any horde that ever sailed the Spanish Main?

Let the court confine itself to its own affairs, and leave the States to attend to theirs.

The decision was in degree destructive of the rights of the States (which in itself is of no moment), and thereby of the people's rights (which is of great moment).

It was not adjudication. It was usurpation. Thus far it has been endured.

One judge dissented. Let us revere his name—it was Duvall.

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