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Justice Story's Doctrine of Judicial Supremacy and the Uncertain Search for a Neutral Principle in the Charles River Bridge Case

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JUSTICE STORY'S DOCTRINE OF JUDICIAL SUPREMACY
AND THE UNCERTAIN SEARCH FOR A NEUTRAL
PRINCIPLE IN
The Charles River Bridge Case
RETRIEVING STORY'S DISSENT FROM CLIO'S JUNKPILE

A traditional and altogether legitimate test of a great Supreme Court dis-
sent is its eventual vindication by a later Court.1 Justice Joseph Story's dissent
in The Charles River Bridge Case,² however, remains perhaps the most
famous American dissent which does not meet this test, yet still qualifies as
great. It is a singular distinction which testifies to legal academics' enduring
fascination with Story's genius and his Bridge opinion.³ Because Story's
holding was never adopted, scholars assume that the dissent is of merely
historical, rather than legal, significance.⁴ Accordingly, one historian recently
dismissed Justice Story's "legal cosmology . . . [as] a relic of history, a curiosi-
ty on Clio's junkpile."⁵

Unfortunately, Story's Bridge cosmology has been dismissed only because
it has been largely misunderstood. Far from being a relic, Story's theory of
the Constitution has been a tenacious force in American law. The ultimate
issues Story confronted in the Bridge Case concerned the most delicate ques-
tions of separation of powers⁶—the very same which continue to perplex the

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³Certainly, few cases or judges have generated more debate among American constitution-
and legal historians. See, e.g., M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW,
1780-1860, at 127-39 (1977) [hereinafter cited as TRANSFORMATION]; S. KUTLER, PRIVILEGE AND
CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971); Newmyer, Justice Joseph Story,
The Charles River Bridge Case and the Crisis of Republicanism, 17 Am. J. Legal Hist. 232 (1973) [hereinafter cited as Crisis].
⁴See, e.g., Crisis, supra note 3, at 232.
⁵Id. at 245.
⁶See also 1 L. BOUDIN, GOVERNMENT BY JUDICIARY 337 (1952):
[T]he question of the "impairment of the obligation of contracts" within the
meaning of the United States Constitution [art. 1, § 10] . . . is one of the most abstruse
questions in our law; but its solution . . . is not a matter of legal learning but of
political opinion. . . . But back of it all looms the question to which all of our political
problems ultimately gravitate—the question of the Judicial Power.

In other words the question which always presents itself to the people of this
country in such an emergency is not: What is an impairment of the obligation of a
contract?—but: Who is ultimately to decide what is an impairment of the obligation of
a contract—the people or the courts? Hence, the question . . . turned into the question
of Old Court or New Court—i.e., whether the courts have or have not the right to
declare legislation unconstitutional.
modern Supreme Court and its critics. By placing the case in this context, this Note endeavors to prove an extreme thesis: that a plausible argument can be made that Story's only overarching principle in the Bridge Case was the preservation of judicial supremacy.

The argument is necessarily speculative. For any number of practical reasons, neither Story nor his intellectual successors on the bench ever pro-

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See, e.g., C. BERGER, GOVERNMENT BY JUDICIARY (1977); C. KILGORE, JUDICIAL TYRANNY (1977); L. LUSKY, BY WHAT RIGHT? (1975).

But then so are other recent explanations of the dissent. See, e.g., Crisis, supra note 3, at 242 (express disclaimer).

Three other initial caveats are in order:

(1) It is submitted that the Bridge Case represented, in addition to a debate over the doctrine of separation of powers, a debate over the nature of federalism. This Note, however, confines itself to a discussion of the former for that debate has been completely overlooked. The Taney-Story debate over the nature of federalism has received only passing attention. The few scholars who mention Taney's states' rights arguments in the Bridge Case (e.g., S. KUTLER, supra note 3, at 86; authorities cited in note 10 infra) miss the partisan, nationalist overtones in Story's dissent, focusing instead on what is perceived to be Story's formalism. The present Note merely posits the Bridge dissent's nationalist principles as an important corollary to the opinion's separation of powers argument. See also note 10 infra.

(2) Because the federal contract clause (U.S. CONST. art. I, § 10, quoted in note 21 infra) plays a relatively minor role in modern constitutional law, one tends to forget that, prior to the development of substantive economic due process, the contract clause was constantly invoked to regulate business and overrule legislation. See G. GUNTER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 604 (9th ed. 1975). See also L. DAVIS & D. NORTH, INSTITUTIONAL CHANGE AND AMERICAN ECONOMIC GROWTH 72 (1971). At a number of levels, the Bridge dissent presages substantive due process jurisprudence. Nevertheless, this Note does not pursue this theme except in the most tangential fashion.

(3) Story's Bridge dissent relied upon the doctrine of public and private corporations enunciated in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), and Story's concurrence therein. Id. at 666-713. See generally note 58 infra. That doctrine has been the subject of innumerable articles, most recently Newmyer, Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the American Business Corporation, 25 DePaul L. REV. 825, 840-41 (1976) [hereinafter cited as Story's Doctrine].

For purposes of argument, this Note accepts the traditional interpretation of the origins of the public-private distinction and the corporation. In fact, there is increasing evidence which suggests that the standard account is incomplete and perhaps implausible. See Hartog, Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860 (paper delivered to American Society for Legal History meeting, Nov. 4, 1977, Boston, Mass.) (unpublished) (copy of ms. on file with Indiana Law Journal).

Not the least of these reasons is the awkwardness inherent in attempting to justify any final arbiter of power in a democratic society. Besides, no matter how legitimate the exercise of that power might be, any judicial attempt to insist upon its legitimacy invites the wrath of public opinion—and the risk of curtailment of that power. Above all, an admission of judicial supremacy presupposes that there is no check upon a court's power—that the judge really is supreme, and hence, potentially lawless. See generally Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 2 passim (1971). If one believes the exercise of judicial power is illegitimate under the particular circumstances of a case, the above tactical reasons would apply a fortiori. For some striking examples, consult Berger, Academe vs. the Founding Fathers, XXX NATIONAL
claimed that judicial supremacy was a first principle. Certainly Story's Bridge dissent sought to conceal this principle. Similarly, Story never admitted to any tension between judicial supremacy and judicial objectivity. Yet it is in the same dissent where one discovers an extraordinary collision between principles of supremacy and objectivity. And it is Story's ultimate resolution of this conflict which makes the case so instructive to any modern reader seeking to unravel moral dilemmas of judicial process and substantive justice.

Heretofore, valuable lessons to be learned from the Bridge dissent have been overlooked because the clash within the dissent has itself been overlooked. For 140 years Story's war with his conscience has been obscured by historians' preoccupation with more obvious antebellum economic and ideological conflicts in the Bridge opinions. Indeed, precisely because Chief Justice Taney's jurisprudence devolved into a principle of judicial supremacy, historians may have assumed that Story, Taney's foremost antagonist, could not possibly have been operating from judicial supremacist principles. In order to suggest the incomplete nature of existing interpretations and to test the proposed thesis, this Note shall first review the historical debate over the Bridge dissent, and then focus primarily upon one historian's new explanation of the case.

THE CHARLES RIVER BRIDGE CASE

In 1650 the Massachusetts legislature granted Harvard College a perpetual franchise over the Charlestown-Boston ferry. In 1785, in response to a citizens' petition, the state legislature passed a statute incorporating a

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note 10 Taney substituted judicial supremacy for the principle of national supremacy. G. GARVEY, CONSTITUTIONAL BRICOLAGE 99 (1971) (following E. CORWIN, COMMERCE POWER v. STATES RIGHTS 135-36 (1936) (Garvey chiefly relies on Taney's opinions for the Court in The Charles River Bridge Case and Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837)). Compare Story's very different kind of judicial supremacy which was a principle of national supremacy—not a substitute for the latter. See notes 115-39 infra & text accompanying.

note 11 Thus even scholars intent on finding judicial supremacist premises in every Supreme Court case (see note 6 supra) never found them in Story's Bridge dissent. A far simpler explanation seemed to suffice:

The naiveté with which Mr. Justice Story appeals to the authority of the remnants of the feudal law still lingering in the English Common Law as the proper constitutional rule for the government of the United States is indeed tragic. Again and again he pathetically reverts to the fact that he is placing himself squarely on a rule of law three centuries old—little realizing that the older the rule of law the less serviceable is it likely to be in our times.

1 L. BOUDIN, supra note 6, at 390, see id. at 388-96. But see, e.g. notes 79 & 110 infra & text accompanying.

Professor R. Kent Newmyer's article, Crisis, supra note 3.

See 36 U.S. (11 Pet.) at 536 (1837). The petition "stated the inconvenience of the transportation by ferries, over Charles [R]iver, and the public advantages that would result from a bridge." Id.
The above map appears as a frontispiece in Professor Stanley I. Kutler's book, PRIVILEGE AND CREATIVE DESTRUCTION. Copyright © 1971 by J.B. Lippincott Company. All rights reserved. Map and title reprinted with the kind permission of the publisher.

company, the Proprietors of Charles River Bridge, for the purpose of building a bridge across the ferry route. The charter authorized the collection of tolls, limited its term to forty years, and required the proprietors "to pay two hundred pounds, annually, to Harvard College . . . [as] reasonable annual compensation, for the annual income of the ferry, which [Harvard] might have received had not the said bridge been erected." The charter specified that "at the expiration of the forty years the bridge was to be the property of the commonwealth." But in 1792, six years after the opening of the bridge, the legislature "for the encouragement of enterprise" extended the charter to seventy years.

In 1828, however, the Massachusetts legislature incorporated the Proprietors of the Warren Bridge for the purpose of erecting another bridge over the Charles, a bridge to be built directly adjacent to the Charles River Bridge. The Warren Bridge was to be a free bridge, and its charter specified that tolls were to be collected only until the builders were reimbursed, or for six years, whichever occurred first.

Upon the granting of the Warren Bridge charter, the Charles River Bridge proprietors sought a preliminary injunction in state court to prevent the building of the Warren Bridge on the ground "that the act for the eprice

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14 Id. at 537 (quoting but not directly citing 1784 Mass. Acts, ch. 53 (March 9, 1785) ("An Act for Incorporating Certain Persons for the purpose of Building a Bridge over Charles River, Between Boston and Charlestown, and Supporting the Same During the Term of Forty Years" [Charles River Bridge charter]).
15 36 U.S. (11 Pet.) at 537 (1837).
16 1791 Mass. Acts, ch. 62 (March 6, 1792) [West Boston Bridge charter]. The occasion for the extension was the legislature's chartering of another bridge. The significance of this fact will be developed later in the Note. At the outset, however, it is essential to demonstrate that—contrary to the Bridge majority—the compensatory nature of this statute was unambiguous: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise . . ." the original charter was extended. Id. quoted in 36 U.S. (11 Pet.) at 550 (1837).

The West Boston Bridge was "distant only between one and two miles from the old bridge." Id. at 550. In its statement of the facts (36 U.S. (11 Pet.) at 536-39), the Court had facilely omitted reference to the West Boston Bridge charter and the rationale behind the extension of the Charles River Bridge charter. When the Court finally mentioned the West Boston Bridge charter (id. at 550), Chief Justice Taney trivialized its significance. See id. at 550-51 (construing but not directly citing 1791 Mass. Acts, ch. 62 (March 6, 1792) [West Boston Bridge charter]).

As a conclusion of law and matter of statutory construction, Chief Justice Taney stated, "[F]rom the language used in the clauses of the [West Boston Bridge charter] by which the [Charles River Bridge] charter is extended, it would seem, that the legislature was especially careful to exclude any inference that the extension was made upon the ground of compromise with the [Charles River Bridge Company], or as a compensation for rights impaired." 36 U.S. (11 Pet.) at 550-51 (emphasis added); see id. at 552-53. Contra, id. 648-49 (Story, J., dissenting); note 78 infra; see Crisis, supra note 3, at 237. (Crisis mistakenly implies that the compensatory nature of the act incorporating West Boston Bridge charter was undisputed.)
18 1828 Mass. Acts, ch. 127 (March 12, 1828) ("An Act to Establish the Warren Bridge Corporation").
19 Id.; see 36 U.S. (11 Pet.) at 537 (1837).
tion of the Warren Bridge impaired the obligation of the contract between
the commonwealth and . . . the Charles River Bridge," in violation of the
contract clause. The Massachusetts Supreme Judicial Court denied the
plaintiffs' bill for a preliminary injunction in 1829. In the meantime the
Warren Bridge was completed and opened. In 1830 the same court dismissed
the plaintiffs' supplementary bill for a permanent injunction and general
relief.

The Supreme Court heard oral arguments in March, 1831, but, unable
to reach a decision, it consented, in 1833, to hear rearguments. As the case
languished on the docket, the character of the Court changed dramatically
with the deaths of Justice Johnson and Chief Justice Marshall and the resigna-
tion of Justice Duvall. Before the case was reheard and decided in 1837,
President Andrew Jackson had filled five vacancies.

At the outset of his opinion for the Court, the new Chief Justice, Roger
B. Taney, recognized, "The questions involved in this case are of the gravest
character." The constitutional issue, as the state court pleadings had in-
dicated, was whether the Warren Bridge charter impaired the charter of the
Charles River Bridge and the latter's alleged right to exclusive tolls, in viola-
tion of the contract clause.
Since the Charles River Bridge charter was silent on the question of monopoly rights, the case turned, in one sense, entirely upon statutory construction. The Taney majority construed the charter narrowly and refused to imply any exclusive franchise, thus the new charter did not impair the old contract. Upholding the right of the legislature to charter the Warren Bridge, the Chief Justice "argued that the charter issued by the legislature to the old bridge was analogous to a royal grant, which he reasoned from the common law must always be interpreted in favor of the king and against the grantee in doubtful cases."

In a 57 page dissent rejecting the royal grant analogy, Justice Story, joined by Justice Thompson, construed the Charles River Bridge charter liberally, found an implied exclusive franchise, and thus held the new Warren Bridge charter unconstitutionally impaired the old bridge's charter.

HISTORICAL DEBATE OVER STORY'S BRIDGE DISSENT

Distinguished historians still romantically teach undergraduates that the Charles River Bridge Court heroically defended the people against the oppression of monopoly. Others have characterized and defended the minority...
opinion as inspired and compelled by natural law. But legal historians who admire the case have in the past few years offered an engaging economic rationale which now constitutes an orthodox view to explain both the majority and the dissent. Professor Kutler, the foremost proponent of this economic interpretation, captures the theme in his book's title, *Privilege and Creative Destruction.*

Kutler et al believe that Taney and Story were in fundamental agreement over the virtues of capitalism and the business corporation. Both believed economic growth was desirable; both believed law could and should facilitate that growth.

The Chief Justice and Story differed, says Kutler, only over macroeconomic strategy. The Taney majority, by refusing to infer monopoly privileges in preexisting charters, lowered all barriers to entry to new competition. Story, on the other hand, convinced that the old bridge (like hundreds of other bridges, ferries, turnpikes, and canals) would never have been built without implicit assurances of freedom from competition, believed that investors, in search of capital preservation and appreciation, relied on these implicit exclusive franchises and needed, above all, certainty in the construction of legislative charters. If the public wanted another bridge, said Story, let the legislature condemn the first and pay just compensation. Alternatively, if the public wished to avoid exclusive franchises, the legislature could expressly disavow any intention of exclusivity in the original charter.

By laying “the unavoidable social costs of economic growth upon static capital,” Taney decided upon an instrumentalist, Jacksonian policy of “creative destruction.” By contrast, says Kutler, Story’s anachronistic, blackletter dissent was obsessed with saving vested property rights.

However useful Kutler’s economic argument may be as a partial explanation, it obscures larger themes of political theory in the *Bridge* case. For ex-

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*(Kent Newmyer’s Paper, *Crisis*, supra note 3, 17 AM. J. LEGAL HIST. 271, 272 (1973); cf. 36 U.S. (11 Pet.) at 606-07 (1837) (Story, J., dissenting) (insisting this was not a monopoly case in any event).)


**Even as an economic interpretation it has been criticized as incomplete. First, the original Charles River Bridge was built with venture capital, and it is difficult to understand how a decision which in effect confiscates property built by venture capital can be interpreted as an encouragement to entrepreneurs.** M.M.M., Book Review, 24 ALA. L. REV. 249, 252 (1971); see
ample, the orthodox interpretation simply cannot explain the intensity and reality of the conflict provoked by the Bridge decision. Daniel Webster, losing counsel for appellant-Charles River Bridge, quickly discerned that his Presidential aspirations would remain only aspirations.  

Crestfallen by the result, Justice Story considered resigning, but took solace that at least some lawyers had seen that more than economics was involved. Chancellor Kent shared his private thoughts with Story:

"I have just now finished a studied perusal of the [11th] volume of Peters Reports and I cannot avoid venting my grief and mortification in confidence to you. It appears to me that the Court has fallen from its high station and commanding dignity, and has lost its energy, and spirit, and independence, and accuracy, and surrendered up to the temper of the day, the true principles of the Constitution." 

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Second, the practical effect of Taney's holding—far from lowering barriers to entry—raised them, for investors simply demanded and received express exclusive charters. Kutler recognizes as much (S. Kutler, supra note 3, at 94) but does not reconcile this consequence with his creative destruction thesis. See 24 ALA. L. REV. at 252. See generally L. Friedman, A HISTORY OF AMERICAN LAW 175-76 (1973).

Query whether the first criticism is legitimate. Does it not beg the issue, viz. whether the plaintiffs had a vested property right to exclusive tolls? Besides, one man's venture capital is another man's static capital. What Story and M.M.M. considered the former, Taney and Kutler considered the latter. Finally, the venture capital aspect of the plaintiffs' case only went to the question of reliance and intent of the parties under the Charles River Bridge charter. In construing this statute, Story paid lip service to a will theory of contract, but it was not his dispositive effect. See note 79 infra. This Note, in fact, argues that Story suspected that Taney's economic strategy for growth was indeed more workable than his own. See note 75 infra.


"James Kent to Joseph Story (June 23, 1837), quoted in C. Swisher, supra note 37, at 92 & n.77 (citations omitted); J. Horton, JAMES KENT: A STUDY IN CONSERVATISM. 1763-1847, at 293-94 (1939 rpt. 1969).

In the same letter, Kent added, "I abhor the [Taney] doctrine that the legislature is not bound by everything that is necessarily implied in a contract, in order to give it effect and value, and by nothing that is not expressed in haec verba, that one rule of interpretation is to be applied to their engagements, and another rule to the contracts of individuals." Quoted in C. Swisher, at 92; see Charles Sumner to Joseph Story (March 25, 1837), reprinted in 2 LIFE AND LETTERS OF JOSEPH STORY 270 (W. W. Story, ed. 1850) [hereinafter cited as LETTERS], quoted in C. Swisher, at 92 n.84; [James Kent], Supreme Court of the United States, 2 N.Y.L. REV. 372, 390 (1838), quoted in C. Swisher at 95 & n.56. Compare id. ("What a deep injury has this [Bridge] decision inflicted on the Constitution, jurisprudence, and character of the United States! We are fast sinking even below the standard of Pagan antiquity.") and Crisis, supra note 3, at 245 (citation omitted) (Story "argued strenuously that Christianity was a part of the common law. . . .") with Bozell, The Unwritten Constitution, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY 52, 55 (W.F. Buckley, Jr. ed. 1970) ("The 'obligation of contracts' clause . . . says a lot
... [The Bridge decision] abandons, or overthrows, a great principle of constitutional morality, and I think goes to destroy the security and value of legislative franchises. It injures the moral sense of the community, and destroys the sanctity of contracts. If the legislature can quibble away, or whittle away its contracts with impunity, the people will be sure to follow. . . . But I had the consolation, in reading the case, to know that you have vindicated the principles . . . of the old law, with your accustomed learning, vigor, and warmth, and force.40

Recently, Professor Newmyer, a constitutional historian, rediscovered these larger themes in Story's dissent. "The problem," Newmyer contends, "is to avoid anachronism, to take Story seriously, to reread his opinion with an open mind and to see the Bridge Case as he saw it—as part of a desperate struggle for the preservation of Republican society itself."41 Newmyer asks us, therefore, to recall the philosophical underpinnings of Republicanism:

The original and fundamental principle of Republican political theory was sovereignty of the people, but what the Framers gave to the people with one hand they took back with the other, for the corollary to popular sovereignty was the axiom that law, not men, governed. The American people were sovereign but they could speak in their sovereign capacity only in organic convention and had spoken only in their Constitution. Beneath this supreme law, permeating and informing it, was the common law, which the newly-constituted states made the foundation of their respective jurisdictions. Law, then, and the system of courts designed to administer and maintain it, provided the basic framework of public and private action—one designed, first, to maximize the individual energies unleashed by the Revolution (and both the Constitution and the common law took on this promotive function), and second, to prevent the abuse of public power by both the magistrates and the people.42

Newmyer's "revisionist" interpretation recognizes that Story, Kent, Webster, and their fellow Whigs embraced these principles. Story perceived in the Bridge Case the final assault upon the citadel of Republicanism: "The basic Republican principle that the sovereign people spoke only in constitutional convention was forgotten as the new breed of professional politicians about what we now call the Protestant ethic, and has played no small role in causing its observance in American public life.")

40James Kent to Joseph Story (June 23, 1837), reprinted in 2 LETTERS, supra note 39, at 270, quoted in J. McCLELLAN, supra note 55, at 216; accord, C. SWISHER, supra note 37, at 92.
In an earlier letter "Kent wrote to Justice Story that he had read the opinion of the Chief Justice in the Bridge Case and dropped it in disgust. By contrast he referred to Story's 'masterly and exhausting argument.' Later he reread the opinion of the Court 'with increased disgust.' " Id. (citations omitted).

But cf. TRANSFORMATION, supra note 3, at 139 ("No longer [viz., "by the time the . . . Bridge case was decided"] did Kent write of the need to provide legal guarantees to encourage the investment of private capital.").

41Crisis, supra note 3, at 233.
42Id. at 234 & n.4 (following G. WOOD, CREATION OF THE AMERICAN REPUBLIC (1969)). See also note 65 infra.
claimed sovereignty for themselves by virtue of their election. Republicanism succumbed to democracy, law to politics.\textsuperscript{44} To Story then, \textit{Charles River Bridge} offered the Court its last chance to "bring the people back to their Republican senses and restore the system of law which kept republican citizens moral and virtuous."\textsuperscript{44} The Court declined the invitation. Taney's holding represented, to Story, the culmination of an unmistakable pattern of disaster, which included the resurgence of political parties, the election of Andrew Jackson, the rise of states' rights and nullification, the defeat of the Cherokees, the destruction of the Second Bank of the United States and national economic planning, the movement for codification of the common law, the death of Marshall and the emergence of the Jacksonian Court.\textsuperscript{44}

Newmyer concludes, "What Story wanted to achieve through law was not just economic expansion, as some historians have assumed, but economic expansion and the preservation of Republican morality. Indeed, in his dire forecast about the effect of Taney's opinion, he went the final step to argue that only with such morality could progress be achieved."\textsuperscript{46}

Newmyer's goal is to demonstrate that "[t]he power struggle which Story saw . . . was between law and politics—a struggle which originated in the ambiguities and tensions within Republicanism itself."\textsuperscript{47} But his argument begins with a consideration of Story's "formula for a moral economic growth."\textsuperscript{48}

The two classic arguments against Story's formula for contractual morality have always been (1) that it worked only to the advantage of the corporation (to the disadvantage of the legislature) and (2) that that formula could only retard, never promote, economic growth.\textsuperscript{49} To rebut the first contention, Newmyer marshals three cases in which Story, writing for the Court, created law in order to impose new duties on corporations.\textsuperscript{50} In refutation of the se-

\textsuperscript{44}\textit{Crisis}, supra note 3, at 235.  
\textsuperscript{45}\textit{Id.}  
\textsuperscript{46}\textit{Id.} at 239-34.  
\textsuperscript{47}\textit{Id.} at 239. It is irrelevant to Newmyer and this Note that "history disproved Story's proposition that contractual morality as he laid it out in his dissent was the \textit{sine qua non} of corporate expansion." \textit{Id.} But cf. Dunne, \textit{Justice Story and the Modern Corporation—A Closing Circle?}, 17 AM. J. LEGAL HIST. 262 (1973) (arguing that Story's contractual morality may be finding new expression in recent cases involving fiduciaries, etc.).  
\textsuperscript{48}\textit{Crisis}, supra note 3, at 234.  
\textsuperscript{49}"[I.]e., economic expansion that would not undercut the basic principles of private contract." \textit{Id} at 239.  
\textsuperscript{50}\textit{See id.} at 239-40.  
cond criticism, viz., "that Story's dissent would not have worked at all—that it would have forestalled corporate expansion by fortifying existing corporations with monopoly protections," Newmyer essentially repeats at least four of Story's arguments which prove that the dissent did not "preclude considerable economic advancement." On the basis of this evidence, Newmyer concludes that Story's modern economic critics have failed to establish the inefficacy of Story's economic philosophy: "[T]he idea that Story saw and provided for controlled economic growth is certainly consistent with the promotive thrust of his entire legal system."

Having identified one of Story's goals, economic growth (and the viability of Story's strategy for its achievement), Newmyer then argues that Story had another goal: the preservation of Republican morality. It is essential that Newmyer prove each half of his dual thesis.

What did Republican morality presuppose of a constitutional decision? The answer for both Newmyer and Story is and was simple: judicial objectivity. And Newmyer, mirroring and reconstructing Story's beliefs, sees in the Charles River majority opinion the surrender of judicial objectivity. The result, for Story, was catastrophic because the Court abandoned rationality in favor of judicial subjectivism:

Taney's approach was irreconcilable with Marshall's "rational system of scientific inquiry" and "struggle for objectivity" as preeminently exemplified in Story's "delicately balanced system." Taney's approach was irreconcilable with Marshall's "rational system of scientific inquiry" and "struggle for objectivity" as preeminently exemplified in Story's "delicately balanced system."
shall's analysis in *The Dartmouth College Case*. Reconstructing Story's thoughts, Newmyer reasons, "It was a matter of scholarship. That Taney should misread the authorities on royal grants was one thing, but not to consult them was another, and to misconstrue the entire legal framework of the case was even worse. Taney was either cynical or incompetent." For Newmyer, then, Story's dissent rested on a "crisis" in Republican morality, based on Story's failed struggle to keep law and politics divorced:

If Republican law was so complex and so delicate, and if legal science was so demanding, it followed that lawyers and judges, not professional politicians and legislators, should be entrusted with the main duty of law-keeping and law-making. And herein lay Story's final argument with Taney in the *Bridge Case*, for the Chief Justice conceded too much authority to the legislature and professional politicians who then ruled there. By arguing that there was some principle of public welfare beyond the operation of the buyer-seller con-

Certainly no lawyer of the age save Kent was so committed to making law technically, scientifically pure. . . . And for all his respect for inherited principles, he never hesitated to depart from or go beyond them if practical necessity required—as in his conception of public and private corporations. . . . It was this very same practical, creative legal scientist who argued strenuously that Christianity was a part of the common law, who, of all judges of the period, revered and retained natural law notions of the eternal, unchanging and moral principles of jurisprudence.

. . .

Story's system of law . . . was organic and synthetic like the culture it hoped to conserve—that is to say, it reached out to integrate politics, economics and other aspects of society into a harmonious and moral community.

Story's undertaking was conservative in the largest sense. . . . But it does not follow that his legal system was static or retrogressive. Natural law assumptions of the eighteenth century permeated his legal thinking, to be sure, but he harmonized them, as Blackstone did earlier, with rational, systematic legal science. And to this fusion of morality and science he added a pragmatic instrumentalism quite alien to the eighteenth century common law—a pragmatism which was designed to bring law into harmony with the unique demands of American history. . . .

Id. at 242-44 (emphasis added). But see notes 101-12 infra & text accompanying.


Writing for the Court, Chief Justice Marshall held that a charter is a contract, protected by the contract clause, and held (implicitly) that a mere state legislature would be treated as an individual in its dealing with corporations (i.e., according to private law). *See Cris, supra* note 3, at 237, 240; cf. H. FRIENDLY, *The Dartmouth College Case and the Public-Private Penumbra*, 12 Tex. Q. (1969) (Supp. 2), reprinted in *The Dartmouth College Case and the Public-Private Penumbra 9* (1969) ("It was also necessary [in addition to holding that a charter is a contract] to determine whether Dartmouth was a public or a private institution, since if it were the former, the legislature would have been free to act as it willed."). Compare id. with notes 96-99 infra & text accompanying. In his concurrence, Justice Story proposed a solution (described in note 51 supra) which was immediately adopted by many state courts. Story emphasized that his rule was applicable only to future charters a state might grant, not to charters already executed. As for these latter, Story intended to hold legislatures bound, as his *Bridge* dissent attests.


*Cris, supra* note 3, at 243; accord, id. at 235-38. See generally note 98 infra.
tractual process and by conceding that the legislature had some special prerogative to voice that principle, Taney came dangerously close to the ultimate democratic heresy—the very one presumably stamped out by Republican constitutional theory—that the legislature itself and not the people was sovereign.  

What are the consequences of the revisionist approach? By positing the Bridge Case in the context of an ideological argument, Newmyer has transformed the terms and directions of the historiographical controversy. Not simply an argument over the means necessary to bring about an end in which all might believe (e.g., economic growth), the Bridge Case stands as an apotheosis of a conflict over the nature of Republican society. Yet, when one returns to Story's dissent, one is struck by the indirection of its argumentative structure. Perhaps this "defect" should be ascribed to the obligatory, technical language of the case. Nonetheless, by accepting all of Story's arguments sequentially and at face value, and then reporting them as historical truths, Newmyer's revisionist interpretation cannot help but miss some very basic questions. It is a generous reading of the dissent which raises for Newmyer the question of Republican morality. But it is that generous reading of the dissent which also prevents Newmyer from exhausting the possibilities in a Republican interpretation. As a consequence, Newmyer, no less than his predecessors, overlooks Story's implicit and idiosyncratic definition of Republicanism and cannot appreciate the peculiar ramifications of that definition in The Charles River Bridge Case.

**Justice Story Confronts "The Pure Interpretive Model": Judicial Objectivity, Republican Theory, and Neutral Principles of Constitutional Law**

Newmyer's simple dichotomies between Story's Republicanism and Taney's Jacksonianism exaggerate some ideological and cultural differences, and more importantly, leave unaddressed the most fundamental tensions within Story's dissent. Professor Newmyer asks only whether Story's jurisprudence, as revealed in his Bridge dissent, was consistent with the goal of the preservation of Republican society. No one appears, however, to have asked the distinctly different and altogether indispensable question: Was Story's jurisprudence (again, as revealed in his Bridge dissent) consistent with Republican morality itself? At a minimum the answer to this question will show that a simplistic view of the Bridge dissent cannot begin to unravel the severe conflicts within Story's private cosmology. Furthermore, the inquiry

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60Id. at 243 (emphasis added); see 36 U.S. (11 Pet.) at 598-604, 621-47, esp. 644, 647 (Story, J., dissenting); Legacy of 1776, supra note 34, at 623 passim. See generally G. GUNThER, supra note 8, at 16-20, esp. 17 n. †.
may begin to uncover in the dissent Story's secret hierarchy of Republican values.

At the core of traditional Republican theory must lie the principle of judicial objectivity for how else could one hope to justify the corollary principle, the divorce of law and politics? But in spite of Newmyer's graphic depiction of Story as a paragon of judicial objectivity, the Bridge dissent reveals, in spite of itself, a very different portrait.

If Story's opinion really reflected a struggle to maintain judicial objectivity and Republican morality against the onslaught of Taney's cynical subjectivism and dubious scholarship, there must be a way to confirm the assertion. One approach might be to ask whether the opinion comports with some serviceable notion of "neutral principles" of "neutral derivation." By testing Story's dissent against a "pure interpretive model," one can show (1) that

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62See notes 53-57, 59 supra & text accompanying.


The term "neutral principles" is slightly misleading, because "any legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another." Id. at 2 (following H. WECHSLER). By "neutral principles," constitutional scholars mean simply: the neutral application of principles, which is a requirement . . . that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge must believe in the validity of the reasons given in the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish." He must not, that is, decide lawlessly.


64The "neutral derivation" principle requires a judge to apply only values which have their source in "the text and history [of the Constitution], and their fair implications, and not construct new rights." Bork, supra note 9, at 8; accord, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 949 (1972); Linde, Judges, Critics, and the Realist tradition, 82 YALE L.J. 227, 254 (1972) quoted in Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 704 (1975). But see Grey.


65Together, the complementary tests of "neutral principle" and "neutral derivation" constitute the "pure interpretive model"—so named by Grey, supra note 64, at 703 (analogizing Bork's thesis to the late Justice Hugo Black's view).

Far from being a new test, the "pure interpretive model" merely overtly rephrases the Framers' Republican premises:

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really
Story's elaborate "formula for a moral economic growth" cannot be explained, let alone defended, on economic grounds, (2) that this formula worked only against the legislature and not the corporation, (3) that Story's scholarship in the Bridge dissent was at least as disingenuous as Taney's scholarship in the majority opinion, (4) that Story could be as instrumental and partisan (i.e., non-neutral) as Taney in a contract clause case. What if, however, it occurred to the Justice in 1837 that the goals of economic expansion and the preservation of Republican morality were mutually exclusive? The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."

Bork, supra note 9, at 2 passim (emphasis added) (arguing that both tests are constitutionally compelled).

Because Newmyer repeatedly argues that Story was defending Republican theory (see notes 41-44 supra & text accompanying) and because Chancellor Kent applauded Story's defense of Republicanism, purists should have no objection to testing the 1837 Bridge dissent against the "pure interpretive model" of the 1970's. Indeed, the "model" represents the ideal means by which to test the objectivity of any judge whose entire argument seeks to distinguish "between royal grants and legislative grants under our republican form of government. . . . [because] there is no provision of the [Constitution] authorizing their [legislative] grants to be construed differently from the grants of private persons, in regard to the like subject matter." 36 U.S. (11 Pet.) at 602 (Story, J., dissenting); see id. at 598, 601, 605, 606, 647.

Moreover, Justice Story would presumably welcome this inquiry into his Republican objectivity:

But see Crisis, supra note 3, at 239 (arguing that Story believed the twin aims were mutually inclusive): "Indeed, in his dire forecast about the effect of Taney's opinion, he went the final step to argue that only with such morality could progress be achieved." Id. (citing no
In other words, did Story himself truly believe that controlled, Republican, moral economic growth was possible?\textsuperscript{73} Worse, what if Story discovered that certain principles within Republicanism itself were mutually exclusive?

These and other questions raised earlier reflect this Note's fundamental objections to prior interpretations. By studying the dissent in terms of the clash between Taney and Story over economic and/or ideological values, legal historians have missed Story's private struggle with competing values. Story was preeminently interested in preserving Republicanism, if necessary at the cost of expansionism; if possible, with growth as a complementary consequence of Republicanism; in any event, with growth as a mere incidence of Republicanism.\textsuperscript{74}

As a practical matter, one could hardly expect Story to endorse economic stagnation. Perhaps intuitively, Story suspected that meaningful growth was incompatible with moral Republicanism (in much the same fashion that investment strategies which focus on growth are incompatible with strategies of preservation of capital), and he was prepared to sacrifice the former for the authority), quoted in text supra (accompanying note 46). Compare id. with 36 U.S. (11 Pet.) at 608 (Story, J., dissenting) (predicting economic catastrophe).

\textsuperscript{73}\textit{See also Legacy of 1776, supra note 34, 621, 623 passim.}

In fact, it is an inconsistency in \textit{Crisis, supra} note 3, which originally prompted the question in the text. Reconsider the economic half of Newmyer's dual thesis, \textit{viz.}, Story wanted economic expansion and Republicanism. It matters not that the nation endured and capitalism prevailed without adopting Story's "contractual morality." \textit{See also} note 46 \textit{supra.} Legal history has been concerned more properly with the rationale and motives behind Story's formula for moral economic growth, and as seen earlier, it is in defense of \textit{that} formula to which Newmyer rallies. However, in disposing of the formula's critics' two classic arguments, Newmyer is impelled to make a rather extraordinary concession: "It cannot be denied that Story's ruling would have worked to slow down and restrain corporate growth; \textit{and in a real sense that was his intention." Id. at 241 (emphasis added).}

If this is so, why then does Newmyer go to such great lengths, echoing Story's apologia, to prove that nonetheless, "it does not follow that his dissent precluded considerable economic advancement"? \textit{Id.} Of what relevance is that assurance (or historical accident?) to the question of Story's intention? If one points a gun at a person with the purpose of killing him, and the gun misfires, "it does not follow that" the assailant's conduct precludes the intended victim's continued existence on the planet—but that is irrelevant (or at least should be irrelevant) to the question of culpability. If then, "in a real sense" Story intended to "forestall corporate expansion" and "slow down and restrain corporate growth," how can Newmyer reconcile this with the first part of his dual conclusion, \textit{viz.}, that Story "wanted to achieve through law . . . economic expansion"? \textit{Id.} at 242.

\textsuperscript{74}Indeed, a charitable reading of \textit{Crisis, supra} note 3, might indicate that this is all Newmyer intends by his use of the term, "controlled economic growth" and his definition of "moral economic growth." (See note 48 \textit{supra} & text accompanying). But to ascribe this insight to Newmyer is to render inexplicable his exertions to prove the highly promotive impact of Story's system. Curiously, Newmyer at one point reserves "the question of workability" of Story's formula (\textit{Crisis} at 242), but utterly fails to ask the question in the text.

Since Newmyer recognizes that a central tenet of the economic school states that Story's scheme "would have forestalled corporate expansion," how can Newmyer pretend to refute this contention after conceding that "in a real sense that was [Story's] intention?" To rescue the economic half of his thesis, Newmyer is reduced to arguing, in effect, if not in terms, that Story's formula would have worked notwithstanding Story's intentions.
latter, without admitting as much. And perhaps in 1837, or even 1831, when the Supreme Court first heard arguments for The Charles River Bridge Case, Story discovered that a formula for growth within a Republican social order would not work. And perhaps he realized that Taney’s economics, if not his judicial principles, were sound. Whatever, Story did have a choice. On the one hand, he could join in Taney’s “creative destruction” and free dynamic capital around the country—at the double cost of acquiescing in the legislature’s claims of sovereignty and destroying the value of hundreds of existing franchises. Or he could adhere to the Framers’ Republicanism, hold the attempted legislative incursions unconstitutional, and incidentally protect the reliance interests of investors in preexisting corporations—at the cost of mean-

In no sense, however, does this observation require one to accede to the revisionist concession (discussed in note 73 supra). There is no evidence to suggest that Story wished to “restrain economic growth.”

To establish the plausibility of this suggested scenario, reconsider more skeptically the elements of Story’s economic formula and the claims made on behalf of its viability and fairness. To assuage any doubts about the efficacy of Story’s first plank (viz., that “implied grant[s] of exclusive rights, even if successfully claimed would last only for the period of time set by legislative discretion.”), Newmyer demonstrates, “[f]or example, [that] the Charles River Bridge would have reverted to the state in 1855.” Crisis, supra note 3, at 241. Since the new bridge, the Warren Bridge, was incorporated in 1828, had Story prevailed and permanent injunction been granted, Boston and Charlestown would have waited 27 years for a second bridge. See notes 18 & 32 supra & text accompanying. Who knows how much earlier a second bridge might have been incorporated but for Charles River Bridge’s inveterate claims of exclusivity? The Massachusetts and United States Supreme Court majority opinions in the Bridge Case emphasized the potential economic stagnation such a delay would have heralded—in Boston and transportation routes around the country. And latter day historians have consistently corroborated Taney’s economic concern as well founded. See, e.g., S. Kutler, supra note 3, Transformation, supra note 3, at 127-29; Legacy of 1776, supra note 34, at 651-52. See generally L. Davis & D. North, supra note 8, at 72-73, 137 n.1, 254-57 (1971).

As for Story’s proposition that legislatures could always insert express reservations in corporate charters to prevent implied exclusive franchises, even the revisionist interpretation admits this prophylactic device was only available to future charters. Crisis, supra note 3, at 241. In other words, the hundreds of existing bridge, canal, ferry, toll road, and nascent railroad charters, under Story’s model, would have remained exempt and protected by the contract clause. The inadequacy of these particular recommendations, in the context of economic efficiency and expansionism, has been recognized for almost half a century. See Boudin, John Marshall and Roger B. Taney, 24 Geo. L.J. 864, 891-93 (1936).

More subtle is another proposition offered to support the feasibility of Story’s formula. Newymer makes much of the argument that, had Story prevailed, damages to old bridges with exclusive rights by new bridges would always turn on “questions of degree—a question, in short, for future courts to decide on new facts.” Crisis, supra note 3, at 241. In other words, a pragmatic Court could incrementally narrow the scope of damages, in order to encourage competition. Curiously, this suggestion is at odds with the private contract law Story ostensibly wished to apply. If this is a radical proposition, it is easily proved. Recall that Story did find damages to Charles River Bridge, and did find violation of the contract. Story, one must presume, applying private contract law principles accordingly would have allowed recovery against Warren Bridge. How then could Story, who insisted this was a private contract, and that the legislature be treated as a private party—allow recovery at law or equity against Warren Bridge, which was not a party to the contract at issue, viz., the Charles River Bridge charter, a contract between the Massachusetts legislature and the plaintiffs?

Even more fundamental objections to Story’s formula are raised in note 79 infra.
ingful growth in gross national product. He could not do both. Story chose the latter.

Did Story's choice result from his commitment to private contract law as an organizing principle in an American Republican society?27 One might with justice look askance at the claim. If Story were truly following "neutral principles" of private contract law, then he should have invoked common law rules of estoppel, laches, or waiver, because the plaintiffs had failed to bring suit when the Massachusetts legislature had earlier chartered other competing bridges.28

27 "Given his premise that private contract law governed the case, Story's argument is all but irresistible." Crisîs, supra note 3, at 236-37. Contra, notes 78-90, 103-12, 123-31 infra & text accompanying.


One must not, however, assume from the statement in the text that the Charles River Bridge proprietors had stood by mutely as each new bridge was chartered. On the contrary, the proprietors, it is submitted, did everything short of filing suit. Before turning to the evidence, it is necessary to present the conventional wisdom. "The Charles River Bridge owners did not challenge the Canal Bridge [built in 1807]. They apparently acknowledged the legislature's right to act; and the success of their own enterprise was such that they could probably afford the luxury of acquiescence." S. Kutler, supra note 3, at 15 (citing no authority).

It is difficult to understand how such a contention can be maintained in the face of the Warren Bridge proprietors' forthright admission that the Charles River Bridge proprietors had, indeed, repeatedly protested the chartering of competing bridges. The defendants-appellees simply argued that precisely because the legislature had rejected such protests, it was clear that the legislature had consistently refused to recognize any exclusive right in the plaintiffs. [Greenleaf's] Brief for Appellees, 36 U.S. (11 Pet.) at 470.

Kutler also trivializes the Charles River Bridge proprietors' response in 1792 to the chartering of the West Boston Bridge. "In their petition to the legislature, they neither denied the state's power to create another bridge nor contended that the new [West Boston] bridge was illegal or violated any vested rights. Once the state gave them something—in the form of a charter extension—they came around." S. Kutler at 14. Such an explanation is as facile as Taney's own: it adulterates the legal argument. The Charles River Bridge proprietors maintained in 1792, that the new bridge would not be illegal provided there was just compensation for the old bridge. The Massachusetts legislature agreed. 1791 Mass. Acts, ch. 62 (March 6, 1792) [West Boston Bridge charter] (extending Charles River Bridge charter) quoted in 36 U.S. (11 Pet.) at 550 (1837) (Taney, C.J.) discussed in note 16 supra. Indeed, even counsel for Warren Bridge emphasized that "[T]he plaintiffs, at that time ["1792"], remonstrated against the grant of the charter of West Boston Bridge, on the grounds of their exclusive right; first, as purchasers of the ferry; and secondly, by their charter of 1785." [Greenleaf's] Brief for Appellees, 36 U.S. (11 Pet.) at 469. Appellees simply maintained that the Charles River Bridge charter was extended not as compensation, but "on grounds of public expediency, as a mere gratuity." Id. And if there had been no compensation, then the state had not conceded the existence of an exclusive right in the Charles River Bridge proprietors. Id. Greenleaf was mistaken on the question of compensation (note 16 supra), but his argument was at least internally consistent.

N. b. As for the criticism in the text, Newmyer might respond that Story would not have invoked these contract rules, on the ground that the uncontested bridges were distinguishable on the basis of termini, if not function. See Crisîs, supra note 3, at 241; quoted in note 51 infra. Story probably would have circumvented the equitable defenses by drawing just such a distinction, but his distinctions on the basis of function and termini amounted to a red herring at best, and at worst a disingenuous (and inconsistent) subterfuge. See notes 85-88 infra & text accompanying. See also note 79 infra.
What was worse, Story invoked and then deliberately misapplied tort nuisance cases to support his contract law argument. His intense reliance on nuisance cases to support his contract law argument. His intense reliance on nuisance cases has never struck historians as anything but unremarkable. Apparently without exception, students of the case have simply understood Story to have been merely "applying the common law of ferries to bridges," S. KUTLER, supra note 3, at 99. "As was done throughout . . . the litigation" by the parties and the state judges. Id. at 98.

Story said, "Wherever any other bridge or ferry is so near that it injures the franchise, or diminishes the toll in a positive and essential degree, there it is a nuisance, and is actionable. It invades the franchise, and ought to be abated." 36 U.S. (11 Pet.) at 634-35 (dissenting opinion) (emphasis added) quoted, but not directly cited, in S. KUTLER at 99. Immediately following this quotation, Kutler concludes, "Story had a powerful point." Id.; accord, Crisis, supra note 3, at 241 (same argument and conclusion but conspicuously omitting the term "nuisance.").

The above rule of law is clear. The application of it must [however] depend upon the particular circumstances of each case. . . . But whether there be such an injury ["a nuisance"] or not, is a matter not of law, but of fact. Distance is no otherwise important, than as it bears on the question of fact. All that is required, is, that there should be a sensible, positive injury. [i.e., "any other bridge . . . which diminishes the toll."]


Even though Story was at least incorrect in insisting that this doctrine was "also fully established by the case of Chadwick v. The Proprietors of Haverhill Bridge. . . ." id. at 634 (cited and discussed in notes 79-80, 100-01, esp. 101 infra), his rule appeared fair enough—standing alone.

Story, however, did not merely "apply the common law of ferry rights to bridges." His methodology was far more sophisticated. Earlier in his opinion, in what must be one of the most ingenious and artfully contrived tour de forces in nineteenth century legal writing, Story made the following introductory transition from contract law to nuisance law and back:

There is no difficulty in common sense, or in law, in maintaining such a doctrine [that a charter "may well include an exclusive franchise beyond the limits of the bridge"]; But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious; the grant carries with it an exclusive franchise to a reasonable distance on the river; so that the ordinary travel to the bridge shall not be diverted by any new bridge to the injury or ruin of the franchise. A new bridge, which would be a nuisance to the old bridge, would be within the reach of its exclusive [charter!] right. The question would not be so much the fact of distance, as it would be as to the fact of nuisance.

36 U.S. at 614 (dissenting opinion) (emphasis added).

The Justice meant exactly what he said. Not merely analogizing the law of ferries to bridges, Story now intended to apply nuisance law in order to construe implied charter (i.e. contract) rights! However relevant the intent of the parties might be, it was nuisance law, for Story, which would define the content and scope of exclusive contract rights where the parties (read "legislatures") had failed to provide for them.

Story did not say that if a new bridge were a nuisance it "would be within the reach of [the old bridge's] exclusive right." He said, in effect, a new bridge was a nuisance by definition whenever the old bridge's tolls were diminished, and hence "within the reach of its exclusive right." Reasonable distance (Story's putative test of the scope of the implied monopoly right) equalled that which would not diminish the existing bridge's tolls. A competing bridge which did siphon off tolls was ipso facto a nuisance which "invade[d] the franchise." 36 U.S. (11 Pet.) at 635. See also note 86 infra.

In short, the test was infinitely elastic. Diminution of tolls conclusively proved injury, injury conclusively proved nuisance, nuisance conclusively proved violation of charter monopoly rights, and legislative sanction of the nuisance conclusively proved impairment of contract and violation of the contract clause. See 36 U.S. (11 Pet.) at 635 ("In the present case there is no room to doubt upon this point [of "nuisance"]; . . . Warren Bridge took away three-fourths of the profits of the travel from Charles River Bridge. . . .").

One cannot grasp the full implications of Story's sleight-of-hand in these matters unless one recalls precisely the nature of the original suit in state court. The plaintiffs' bill for preliminary injunction relied on an 1827 Massachusetts statute conferring equitable jurisdiction upon the
state supreme court in cases of nuisance. "Resorting to the common law of ferries, Webster and
[Lemuel] Shaw maintained that where a party had exclusive rights, the erection of another ferry
nearby constituted a nuisance if it affected the rights of the existing ferry." S. KUTLER at 36 (em-
phasis added). Chief Justice Parker, for the court, accepted this analogy and the underlying for-
mulation, viz., "that establishing a ferry without right so near to an existing one with vested
rights as to diminish the latter's profits was a nuisance." Id. at 38 (emphasis added).

Thus, the threshold inquiry in the nuisance suit was whether the plaintiffs had a vested
right, (i.e., a condition precedent to maintaining a nuisance suit). But the question of vested
rights turned entirely upon a construction of the plaintiffs' charter—which was silent on the ques-
tion. Precisely because the plaintiffs' claim of monopoly right (based on charter) was not con-
trovertible, but was in fact a difficult question of first impression and statutory construction, the
state court could not immediately find a nuisance and thus denied the preliminary injunction.
And because the state court later split 2-2 on the question of whether the charter conferred im-
plied monopoly rights, the new charter was sustained and the plea for permanent injunction was
dismissed: the requisite showing of the condition precedent necessary for a nuisance suit had not
been met.

Webster's 1830 argument before the Massachusetts Supreme Court best summarized the
plaintiffs' very precise and disinjunctive legal theory.

If the new [Warren B]ridge is not protected by the act of 1827 [Warren Bridge
charter], we say it is a nuisance at common law; if it is so protected, then we say that
the act is contrary to the constitutions of this State and the United States.

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Since the state court held that the Warren Bridge charter overly authorized the construc-
tion of the new bridge, then (even before reaching the constitutionality of the challenged Act)
plaintiffs—at least in theory—had abandoned the nuisance theory altogether. As was seen earlier,
they appealed to the Supreme Court on the only appealable federal question open—the validity
of an act sustained by a state court against a constitutional challenge. See note 23 supra. Accor-
dingly, the federal question (viz. the contract clause question) ostensibly turned entirely upon the
constitutional and common law of contracts (Taney applying public law; Story applying private
law).

Story's arguments (analogizing ferries to bridges) are commonly equated with those made in
state court. In fact, his argument was utterly irreconcilable with those advanced by the parties
and judges in state court. Recall that all of these men agreed that the English and American
common law of nuisance was precise on one point: unless plaintiffs could establish a valid vested
right in themselves, they could never begin to prove a nuisance.

But Story effectively turned the common law of nuisance on its head. The effect was to
subvert or adulterate the entire legal framework of the case. Using his veiled syllogism, he first
(1) focused on the 'diminution of the old bridge's revenue to establish the existence of (2) a
nuisance—a state law question "of fact" (per Story, J.) not decided below and not properly before
the Supreme Court—in order to prove (3) the existence of a vested, exclusive toll right in the old
bridge.

None of Story's cited authorities had employed such an approach; they had used the op-
posite approach as the state court proceedings attested. Thus the two state Justices who were
prepared to uphold the plaintiffs' claim of implied right had done so under a will theory of con-
tract (one of them added an eminent domain argument). See S. KUTLER, supra note 3, at 48-50.
Only after deciding the exclusive toll right question did they reach the nuisance question. Story
had put the cart before the horse. More precisely, by making loss of revenue the dispositive test
of nuisance, Story had effectively assumed the very question to be decided: the claim of implied
right. Having found the right, there was nothing left to decide, for if the plaintiffs had a
monopoly right, then (4) the defendants' new bridge certainly infringed upon it. (5) Since the in-
fringement was the direct result of state action (here a statute, the Warren Bridge charter), then
(6) the state itself had impaired a contract, the Charles River Bridge Charter. (7) The Consti-
tution forbade such impairments, thus (8) the Warren Bridge charter was unconstitutional.

Story's step two should have been step nine, for as even Webster's state court brief conceded, if
the defendants' charter were unconstitutional, it would still be necessary to ascertain (what Story
one such case, *Chadwick v. The Proprietors of the Haverhill Bridge*[^80] is illuminating for a number of reasons. Story cited, and claimed *Dane’s Abridgement*[^81] "cites the case . . . as directly in point; that the erection of a neighbouring bridge under the authority of the legislature is a nuisance to the ferry."[^82] By analogy, then, Warren Bridge was a nuisance to the Charles River Bridge.[^93] Also by analogy, Story concluded that *Chadwick* showed that the latter bridge was bound by common law (and not just charter) to pay Harvard compensation for its exclusive ferry rights.[^84]

As if to ameliorate the harshly anticompetitive consequences of his formula, Story ostensibly drew a distinction between different modes of transportation. Newmyer believes that Story’s approach allowed one to “distinguish between [e.g.,] a canal and a railroad in such matters as function and termini”[^85]—in order to minimize findings of damages, and thus, encourage new competition. At one point, Story’s prose did suggest as much.[^86] Yet, using himself called) the state law question of "fact," *viz*, whether and to what extent the new bridge constituted a nuisance. Story’s step two would always require a finding of nuisance on remand.

Because Story’s opinion made much of intent and consideration, historians have always assumed Story’s step three (the issue of implied exclusive right) was the only issue. It was an altogether rational assumption. Was not that issue the only federal question properly before the court? To be sure, Story pretended to treat only that question, but he resorted to an inversion of nuisance law to reach his private contract law holding. Story’s ruse worked perfectly. There is, however, no principled explanation for Story’s artifice on this score. To be sure, “the great treatise writers of the early 19th century, James Kent and Joseph Story, did not perceive Torts as a discrete legal subject.” White, *The Intellectual Origins of Torts in America*, 86 Yale L.J. 671, 672 n.7 (1977) (citations omitted). Nonetheless, it is equally clear that legal commentators as early as Blackstone did perceive nuisance law as a discrete legal subject—one under the umbrella of “private wrongs.” *Id.* at 674 n.13 (citations omitted).

Historians have assumed that contract law governed the entire dissent (see, e.g., note 76 *infra*), without considering Story’s 33 page excursis on nuisance law. See 36 U.S. (11 Pet.) at 614-47. But only if one acknowledges that Story merged the two bodies of law for the purpose of making his argument, can one even contend that private contract law governed Story’s result.

[^80]: (Mass. 1787) [no official report] 2 N. DANE, ABRIDGEMENT AND DIGEST OF AMERICAN LAW ch. 67, at 683, 686 (1824) [hereinafter cited as DANE’S ABR.], cited in 36 U.S. (11 Pet.) at 625, 654, 647 (1837) (Story, J., dissenting) (citing the *Chadwick* case as controlling under both of the dissent’s holdings).

[^81]: 822 DANE’S ABR., *supra* note 80, ch.67, at 683, 686, cited in 36 U.S. (11 Pet.) at 625; see note 80 *supra*.

[^82]: 36 U.S. (11 Pet.) at 625 (1837) (Story, J., dissenting). See *id.* at 567-68 (McLean, J., concurring); [Dutton’s] Brief for Appellants, *id.* at 432-34, esp. 434; *Reconstruction* (see *id.* at 514 n.*) of [Webster’s] Brief for Appellants, *id.* at 523-24.

[^83]: 36 U.S. (11 Pet.) at 625.

[^84]: *Id.* at 647.

[^85]: *Crisis, supra* note 3, at 241, quoted in *note 50 supra* (discussed in *note 78 supra*).

[^86]: 36 U.S. (11 Pet.) at 613, 634-36 (dissenting opinion). *But see id.* at 614 ("The question [of exclusive right] would not be so much as to the fact of distance, as it would be as to the fact of nuisance."); *id.* at 620 ("[A] ferry[y] is a franchise, which approaches so near to that of a bridge, that human ingenuity has not as yet been able to state any assignable difference between them; except that one includes the right of portage, and the other of passage or ferriage."); *id.* at 621, 623, 626, 627, 628, 629, 630, 631 (only test is whether new ferry "draws away the custom" [revenue] of existing ferry) ("[T]he law will exclude all injurious competition, and deem every new ferry a nuisance which subtracts from him the ordinary custom and toll."). See generally *note 79 supra.*
Chadwick, Story went on to hold, alternatively, that because the Charles River Bridge indemnified Harvard, the bridge was the equitable assignee of the ferry's exclusive rights. In other words, Chadwick and other cases, as construed by Story, foreclosed distinctions between transportation modes.

How then can one maintain, as Newmyer does, "The important point is that future courts could [draw these distinctions] in function and termini, and Story's contention about the limited scope of the Bridge ruling would invite them do so"? Besides, Story's assurance that "the Court's decision was limited strictly to the case at hand" was of no force whatsoever since that prerogative belonged to the majority—and Taney surely gave no such disclaimer. Story's actions, moreover, belied his limited-holding theory; Story thought the ruling was of broad scope—so much so that he considered resigning from the Court in disappointment.

Why would Story have contemplated so drastic a step after the decision was handed down? Presumably, Story's defeat at the bar of macroeconomic jurisprudence was not the primary cause. On the other hand, is one really to believe that the self-described "last of the old race of judges" would resign because his new Brothers on the bench proved to be judicial subjectivists or poor scholars, or both? Or because Taney's law was somehow indelicate compared to the "delicate" of Republican law?

Before exploring this mystery, it is necessary to confront directly the other tier of the economic defense of Story's formula. So far the Note has challenged only efforts to demonstrate the formula's "workability" and efficacy. However, as was seen earlier, the revisionist defense also collects three cases to disprove the economic critics' complaint that Story's formula "worked only against the legislature and not the corporation...."

The difficulty with this evidence lies in its fundamental inappropriateness. All three examples constitute what legal purists would call "private-private" contract law. Here the parties in each case were good faith promisees or

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87Id. at 647 (dissenting opinion). As a practical matter, the same result obtained under Story's main holding based purely on charter rights (i.e., no distinctions drawn). Taney rejected any notion that the plaintiffs could claim under Harvard's title, for the latter was, in Taney's view, extinguished. See S. Kutler, supra note 3, at 87-88 (cited in support of the latter proposition only).

88Crisis, supra note 3, at 241, quoted in note 51 supra.

89Crisis, supra note 3, at 241.

90See note 38 supra & text accompanying.

91Mr. Taney is the Chief Justice. I am the last of the old race of Judges. I stand their solitary representative, with a pained heart, and a subdued confidence. Do you remember the story of the last diner of a club, who dined once a year? I am in the predicament of the last survivor.

Joseph Story to Harriet Martineau (Apr. 7, 1837), reprinted in 2 LETTERS, supra note 59, at 277, quoted in C. Swisher, supra note 37, at 93.

92See notes 57 & 60 supra & text accompanying.


94Crisis, supra note 3, at 240; see notes 49 & 50 supra & text accompanying.
creditors to whom Story held corporate promissory liable. The decisions worked neither for nor against legislative will, and the interests of the state were involved in only the most general way.95

More significantly, while Story's decisions in these three cases may have worked hardship upon individual corporate defendants, the decisions can hardly be said to have worked against the institution of the corporation.96 They were in fact decisions businessmen in the 1830s or today could applaud. To be sure these cases comport with Republican morality. Still, the true acid test to discover whether Story's Republican morality worked only against the legislature is to observe Story in cases where the legislature's interests or ambitions were vitally at stake. If cases like The Dartmouth College Case97 and The Charles River Bridge Case tell anything about Story's jurisprudence, it is that he uniformly applied private law principles—treated legislatures like any other private party to a contract. The grand paradox, of course, is that the state is almost invariably in the position of grantor, hence under Story's common law rules, doubts (e.g., questions of implied exclusive franchise) were to be decided in favor of grantees (i.e., the corporations via the charters from their states).

In short, the economic critics are inescapably correct in suspecting that Story's formula worked only against legislatures, or more precisely that the formula could almost never be invoked in their defense. Surely Taney grasped this intuitively, hence his subterfuge of royal grant law—in flat contradiction of Dartmouth College.98 The point here is that Story's subtle rules (spawned

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95Newmyer's own characterizations of the holdings in these three cases unintentionally demonstrate as much. See note 50 supra.

96But see Crisis, supra note 3, at 239-40. ("Using much the same reasoning he applied against the legislature in the Bridge Case . . . Story worked to enlarge corporate duties and responsibilities.").


98Recall that Taney's royal grant law analogy required doubts in a corporate charter to be construed in favor of grantors (i.e. legislatures). Accordingly, where, as here, the charter was silent or ambiguous, the grantees' claim of implied exclusive toll rights must be denied. In the absence of any exclusive right, a charter granted to a competing bridge (or other transportation mode) could not impair the first charter. See notes 28-30 supra & text accompanying.

This public contract law approach was anathetical to Dartmouth's private contract law model, because the latter favored grantees under the original charter in the identical situation. See notes 30, 31, 58, 59 supra & text accompanying. Moreover, even assuming arguendo that a royal grant law analogy should control the case, Taney had misapplied it.

Under English common law, only doubts in outright grants were to be resolved in favor of the king. Uncertainties in royal grants for consideration, however, had been resolved for centuries in favor of grantees, lest the honor of the king be besmirched. Taney completely ignored this latter doctrine. 36 U.S. (11 Pet.) at 589-91, 593, 597. (Story, J. dissenting); accord, authorities cited in note 51 supra; see note 106 infra & text accompanying.

Of course, "[t]he present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case." 36 U.S. (11 Pet.) at 598 (Story, J., dissenting); see id. at 598 passim. See generally notes 119 & 121 infra & text accompanying.
by Dartmouth College) virtually assured that grantee-plaintiffs would always prevail.\textsuperscript{9}

If it is senseless to defend Story's formula on economic grounds, what then can be said of the dissent's ideological ingredients? The problems with existing ideological proofs are initially structural. They overemphasize judicial objectivity, judicial scholarship, and the delicacy of Republican law in the matrix of Republicanism generally and Story's Republicanism in particular. What, after all, was a Republican? To paint Story as the antithesis of Taney, to juxtapose monolithic Republicanism with monolithic Jacksonianism, is to forget that Taney, and for that matter, Jackson, fashioned themselves Republicans.\textsuperscript{100}

It is all too easy, moreover, to contrast Story's erudition with Taney's revulsion for caselaw in order to show first, that Story's disenchantment was "a matter of scholarship"\textsuperscript{101} and second, that "Taney was either cynical or incompetent."\textsuperscript{102} But is not Story's scholarship suspect in light of his selective invocation of contract doctrines and his devious uses of Chadwick?\textsuperscript{103} Even assuming one could reconcile Story's strained uses of Chadwick, the fact remains that Chadwick supported none of his propositions.\textsuperscript{104} However much

\textsuperscript{9}The statement in the text does not mean to imply that Dartmouth itself ineluctably compelled such results; only that Dartmouth provided certain premises which Story could manipulate. See generally note 58 supra. See also note 125 infra. Under Dartmouth the existence and extent of an implied exclusive franchise was to be ascertained, at least in theory, by a will theory of contract. The Bridge dissent, on the other hand, looked to intent, but, in fact, looked dispositively to nuisance law to determine the scope of the claimed right. The practical effect of this extremely adroit combination (of Dartmouth's private law doctrine and an inverted nuisance law theory) was to compel the outcome described in the text. To understand the mechanics of Story's approach, see note 79 supra.

\textsuperscript{100}The point was most recently made by White, supra note 79, at 673-74 & 674 n.11 ("National politicians could simultaneously portray themselves as guardians of a simpler, more orderly republican society and as apostles of democratic progress. Andrew Jackson personified these tendencies.") (following, inter alia, M. Meyers, THE JACKSONIAN PERSUASION (1957)).


\textsuperscript{102}Id.

\textsuperscript{103}Id.

\textsuperscript{104}Chadwick v. The Proprietors of Haverhill Bridge, (Mass. 1787) [no official report] 2 DANE'S ABR., supra note 80, ch. 67 at 683, 686 (1824); 9 DEC. DIG. § 19, item 5 (1906); see notes 80-88 supra & text accompanying.

\textsuperscript{105}Although the report is confusing, all the court appears to have held was that "the act [authorizing defendants to erect a bridge] did not, and perhaps could not, deprive the plaintiff of his common law, and constitutional right, to try his title and damages, by a jury in a civil action [as opposed to non-jury proceedings]." 2 DANE'S ABR., supra note 80, at 686 (1824). But cf. Nelson, supra note 36, at 522 n.54 (compares Chadwick with the Bridge Case in order to demonstrate that the latter represented "the rejection of established American authority.") Indeed, even that holding is doubtful because the bridge company's defense on the ground that the statute authorized construction—the defense successfully made in The Charles River Bridge Case 50 years later—"was struck out, not being filed in time." 2 DANE'S ABR. at 686. See also TRANSFORMATION, supra note 5, at 127. Compare id. with id. at 912 n.72. Story omitted this essential fact.
one might wish to ascribe the Justice's misreading of Chadwick to simple carelessness, the evidence forecloses such a charitable inference.105

All the larger questions in the case, including the one Story claimed was decided, "were not formally decided by the court." 2 DANES ABR. 687 (emphasis added). Compare 36 U.S. (11 Pet.) at 625, 634, 647 (1837) (Story, J. dissenting) and id. at 567-68 (McLean, J., concurring) with Proprietors of Charles River Bridge v. Proprietors of the Warren Bridge, 24 Mass. (7 Pick.) 344, 472 (1830) (Wilde, J., separate opinion) aff'd 36 U.S. (11 Pet.) 420 (1837).

105The statement in the text implies, of course, that Story purposely, or at least knowingly, misinterpreted and misapplied Chadwick. The evidence supports this implication, but the statement in the text is designed to leave open the possibility of a psychodynamic explanation. Nonetheless, several reasons make it unlikely that Story's misreading of Chadwick was the result of subconscious or otherwise innocent error.

Language in the Bridge dissent strikingly reveals Story's embarrassed exertions to elevate Chadwick to the status of controlling precedent. Although neither Taney's opinion nor appellees' brief had mentioned Chadwick, Story felt constrained to defend his reading of the old case. As if in anticipation of criticism, Story justified his reliance on Chadwick by arguing.

Notwithstanding all the commentary bestowed on that case to escape from its legal pressure, I am of opinion that the report of the referees never could have been accepted by the court, or judgment given thereon, if the declaration had not stated a right which in point of law was capable of supporting such a judgment. The court seems, from Mr. Dane's statement of the case, clearly to have recognized the title of the plaintiff, if he should prove himself the owner of the ferry. Besides, without disparagement to any other man, Mr. Dane himself, (the chairman of the referees []), from his great learning and ability, is well entitled to speak with the authority of a commentator of the highest character upon such a subject.

36 U.S. (11 Pet.) at 625 (Story, J., dissenting) (citing 2 DANES ABR., supra note 80, ch. 67, 683) (The Chadwick report actually appears in Dane's treatise at 686-87).

Later in the dissent, Story found it necessary to defend his reading of Chadwick again.

If the Charles River Bridge did not exist, the erection of Warren Bridge would [still] be a nuisance to [Harvard's] ferry, and would in fact ruin it. It would be exactly the case of Chadwick v. The Proprietors of Haverhill Bridge; which notwithstanding all I have heard to the contrary, I deem of the very highest authority.

Id. at 647.

In fact the two cases were, if not entirely disanalogous, at least easily distinguishable. First, the plaintiff in Chadwick did not claim under a charter. Second, defendant-Haverhill Bridge's affirmative defense based on charter was struck out having been filed late (see note 104 supra). Third, the Chadwick court decided almost nothing (see id. and authorities cited therein). To be sure, Chadwick remains "shrouded in the mysteries of the doctrine of prescription." TRANSFORMATION supra note 3, at 312 n.72. Granting those mysteries, this Note simply contends that Chadwick did not address, let alone hold, what Story said it did. See note 104 supra & text accompanying. Assuming this premise is correct, what then is one to make of Story's belabored apologia?

Since DANES ABRIDGMENT did not include the underlying declaration in Chadwick, the above excerpts from the dissent indicate that Story deliberately extrapolated points of law, not from Dane's report, but instead from the declaration in the Chadwick case. If Story wished to rely on the declaration rather than on Dane, why did he cite only Dane? Moreover, Dane's report showed that the Chadwick court had declined to enunciate the very doctrines Story now inferred. See Chadwick v. Proprietors of Haverhill Bridge (Mass. 1787) [no official report], 2 DANES ABR., note 80 supra, ch. 67, at 686-87, discussed in note 104 supra. In short, Story misrepresented Dane's analysis as well as Chadwick itself.

The misrepresentation of both authorities was compounded by Story's concomitant failure to cite Dane's source for the Chadwick declaration, viz., "Declarations, Am. Preced. 202," cited in 2 DANES ABR. ch. 67, at 686. (This was almost certainly a citation to page 202 of AMERICAN PRECEDENTS OF DECLARATIONS (B. Perham ed. Boston 1802) (see discussion infra)). There would have been nothing improper about this omission in the Bridge dissent, but for the fact that Story was attempting to rely on Dane's source, rather than Dane's report. Under these peculiar circumstances, what could have possibly prompted Story's silence?
It is true that on the question of construction of royal grants, Story's scholarship overwhelmed and refuted Taney's contrary construction. But how can that excuse Story's problematic constitutional scholarship? Even Story's foremost admirer concedes:

Story's dissent was a brilliant attempt, but unfortunately failed to take account of recent constitutional developments. He surely had the better argument regarding the common law rules of statutory interpretation but Taney's reliance on a number of cases holding that states withheld certain powers when issuing grants, was not as outlandish as Story supposed. In Providence Bank v. Billings and Pittman, decided in 1830 by none other than Chief

This Note ventures two possible reasons. Perhaps Story did not cite Dane's source because it did not support Story's analysis either. (Certainly Dane's Abridgement could be taken out of context more easily than the terse declaration.) Compare Chadwick v. Proprietors of Haverhill Bridge (Mass. 1787) (declaration) (Parsons, C.J.) originally published in American Precedents of Declarations No. 13, at 202 (B. Perham ed. 1802) ("Actions on the Case") ("For erecting a Bridge near a Ferry") (no commentary by editors) [copy in Beinecke Library, Yale University] reprinted in id. at 252 (J. Anthon ed. 1810) [copy in Yale Law School Founders' Collection] with 2 Danes ABR. ch. 67, 686-87. Even if Story could have reconciled his interstitial reasoning with the text of the declaration, his technique still would have been indefensible in light of the Chadwick court's limited holding.

There is another reason, however, why Story may have preferred to focus on the declaration without citing it directly. Had he cited Dane's source, the 1802 version of American Precedents of Declarations, he might have felt obliged to identify its two anonymous editors, which included a young Essex, Massachusetts lawyer—Joseph Story. See generally G. Dunne, supra note 100, at 4 & n.32 (citations omitted) (citing Story's claims to authorship).

The Bridge dissent omitted then, not only all reference to Dane's ultimate source, but also Story's association with that source. Without presuming to judge Story's judicial ethics or nineteenth-century notions of morality, one may still impute to Story a measure of cynicism. At the very least, the scholar in Story should have cited his actual source. Without presuming to judge Story's judicial ethics or nineteenth-century notions of morality, one may still impute to Story a measure of cynicism. The Bridge dissent omitted then, not only all reference to Dane's ultimate source, but also Story's association with that source. Without presuming to judge Story's judicial ethics or nineteenth-century notions of morality, one may still impute to Story a measure of cynicism. At the very least, the scholar in Story should have cited his actual source. But the judge in Story found it convenient not to do so. Query how Story could find room in his dissent for hundreds of citations (including several from the fourteenth century) (see generally, G. Dunne at 362, quoted in note 110 infra) but could not find room to cite the one source he treated as controlling.

The Note author was unable to inspect originals of the 1802 and 1810 editions of American Precedents of Declarations. Instead, he relied upon photocopies of the Chadwick declarations as reported in those volumes (copies on file with Indiana Law Journal). These copies were obtained, at the author's request, through the kind efforts of Mr. Richard J. Ovelmen, Yale Law School, Class of 1978—C.L.M.

[104] See, e.g., J. McClellan, supra note 38, at 225 (following M. Baxter, Daniel Webster and the Supreme Court 134 (1966)); accord, Crisis, supra note 5, at 243; see id. at 236-37; note 98 supra & text accompanying.

[102] 29 U.S. (4 Pet.) 514 (1830). The following excerpts are drawn from the Reporter's official summary:

In 1791 the legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated for the purpose of banking. They were incorporated by the name of the president, directors, and company of the Providence Bank, with the ordinary powers of such associations. In 1822 the legislature passed an act imposing a tax on every bank in the state, except the Bank of the United States. The Providence Bank refused the payment of the tax, alleging that the act which imposed it was repugnant to the [C]onstitution of the United States; as it impaired the obligation of the contract created by the charter of incorporation. Held, that the act of the legislature of Rhode Island, imposing a tax, which, under the law, was assessed on the Providence Bank, does not impair the obligation of the contract created by the charter granted to the bank.

The power of legislation, and consequently of taxation, operates on all the persons
Justice Marshall, the Court had held that in construing grants, the relinquishment of the power of taxation should never be implied. Marshall's modified rule of statutory construction caught the searching eye of Taney, who quoted Marshall at length in support of his opinion in Charles River Bridge v. Warren Bridge. Story kept silent about the Providence Bank case, concentrating instead on the weaker points of Taney's reasoning. As "a matter of scholarship," one would have thought Story owed Taney an answer regarding Providence Bank. Moreover, Story's problematic reliance on the Chadwick case renders the scholarship argument even more suspect. His holdings in the Bridge dissent wear the patina of irresistibility only if one allows Story to ignore available common law contract doctrines and countervailing constitutional precedents. He chose not to follow these neutral principles.

For over a century, jurists and other legal commentators have remarked upon Story's cavalier "manner in disposing of contradictory authority." Certainly a reading of the Bridge dissent confirms such a charge. In short,

and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself; and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.

However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the correction of every abuse of power which may be committed to the state governments. The intrinsic wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.

Id. at 514-15 (emphasis added).


Taney accomplished this ostensible reversal of Marshall's position without flagrant disregard of precedent. He worked within the inherited tradition of a constitutional bricoleur. Indeed, Taney's casting about in the old Supreme Court reports turned up no fewer than four Marshall Bench opinions in which doctrines had been advanced that could now be turned to service of the new constitutional jurisprudence. Taney cited, even quoted, the precedents, resting his argument particularly on Marshall's holding in Providence Bank v. Billings (1830). Manifestly, the Taney Court remade Marshall's fabric, but using Marshall's loom, and cutting with Marshall's tools—quoting passages from that judicial exemplar's own opinions. The justices helped maintain the form if not the substance of continuity in American public law.


"E.g., 36 U.S. (11 Pet.) 420, 595-96, 600-01, 625 (1837) (Story J., dissenting). It has been observed, that Story's dissent in Charles River Bridge contrasted strangely not only with the Chief Justice's [viz., Taney's] majority views but also with some of his own, particularly
neither the scholarship argument nor the portrayal of Story as an objectivist *vox clemente in deserto* is persuasive. Like defenses of Story's formula, they are simply unrealistic. All of these arguments appear overwhelmingly correct only because the structure of Story's dissent makes them seem so. Buried in the opinion are the disclaimers, provisos, and omissions which render the sympathetic explanation fanciful.\(^{111}\) Within Story's allegedly controlling precedents lurked expressly reserved questions.\(^{112}\) The encyclopedic dissent gave the illusion, but only the illusion, of completeness and authoritativeness.

Because no further inquiry appeared necessary, historical explanations worked like a self-fulfilling prophecy: if Story was despondent over the result, then *post hoc ergo propter hoc*, it must have been because the pristine science of the law had been defiled. And because Taney had presided over the sacrifice of Story's neutral principles, Story's despair seemed inevitable and unremarkable.

Such a romanticist explanation for Story's anxiety simply cannot account for the Justice's own manipulation of legal rules. Story's desperation and sense of catastrophe had little to do with either rationalism or commitment to craft. His sense of loss was profound, but what had he lost? What *had* the Court surrendered on the altar of economic efficiency?

Power.

"THE ONLY QUESTION HERE IS OF SHEER POWER."

There remains but one final possible explanation of Story's dissent in *The Charles River Bridge Case*, one which goes to the essence of Republicanism itself: Story's dread of the marriage of law and politics. As was seen earlier:

> By arguing that there was some principle of public welfare beyond the operation of the buyer-seller contractual process and by conceding that the legislature had some special prerogative to voice that principle, Taney came

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*DeLovio v. Boit.* Back in 1815, Story had scoffed at the idea that Lord Coke's *Institutes* and the statues of Richard II could possibly be relevant norms for the judicial power of the United States. Now he venerated Lord Coke and sought relevance in medieval precedents on royal fisheries and manorial advowsons even though he had to clamber over English authorities to do it ("I am aware, that Mr. Justice Blackstone... has laid down some rules apparently varying from what has been stated... Much relevance [sic] has also been placed upon the language of Lord Stowell").


In addition to the examples in notes 101 and 106 *supra*, see 36 U.S. (11 Pet.) at 685 where Story "qualifi[es]" his distinctions regarding function and termini (discussed in notes 50, 84-87 *supra*) into oblivion. Even without the qualifications, Story's *other* rules would have rendered such distinctions meaningless. See note 79 *supra*. See also note 99 *supra*.

\(^{111}\)See, e.g., note 101 *supra*. 
dangerously close to the ultimate democratic heresy— the very one presumably stamped out by Republican constitutional theory—that the legislature itself and not the people was sovereign.\textsuperscript{113}

Rather than consider organic sovereignty as merely another of Story's arguments, imagine for a moment "the ultimate democratic heresy" festering in Story's mind when he first read Taney's opinion, in preparation for writing his own reply. It must have occurred to Story that if one were to rail against Taney's "public welfare" model, one would hardly be so foolish as to confront it directly.\textsuperscript{114} Story had to anticipate and diffuse both Taney's pandering and the appearance of invidious elitism which might otherwise surface in Story's dissent.

Since all the commentators grant Story's genius, surely one can conceive of Story constructing his opinion opaquely, in purposely inverse order.\textsuperscript{115} If Story perceived a "crisis of Republicanism," he surely perceived it immediately, \textit{i.e.}, in 1831 at the original oral argument when he confided to his diary, "The only question here is of sheer power."\textsuperscript{116} He wrote a draft opinion in 1831 which failed to convince the Marshall Court.\textsuperscript{117} The case was continued. Story had six years to research and perfect a persuasive opinion. He did not

\begin{itemize}
  \item \textsuperscript{113}Crisis, supra note 3, at 243, quoted in text supra (accompanying note 59) (emphasis added); cf. Leslie, Similarities in Lord Mansfield's and Joseph Story's View of Fundamental Law, 1 Am. J. Legal Hist. 278, 306 (1957) ("The Mansfield-Story concept of fundamental law was consistent with these ideas [of an "absolutist concept of sovereignty"] which in turn were harmonious with the absolutes of Roman law.")
  \item \textsuperscript{114}Recall Taney's emphasis on the happiness of the community and the cruel negative inference. See note 32 supra & text accompanying.
  \item \textsuperscript{115}Indeed, Story's opinion is an imaginative precursor of Brandel'sian principles: construe the statute first, delineate the common law, then reach the constitutional question only if necessary. See 36 U.S. (11 Pet.) at 587. But see [Felix] Frankfurter, Twenty Years of Mr. Justice Holmes' Constitutional Opinions, 36 Harv. L. Rev. 918 (1923), quoted in G. Jacobsohn, Pragmatism. Statesmanship, and the Supreme Court 131 n.54 (1977) (contrasting Taney's Bridge opinion as an "act of statesmanship" with Story's dissent to "prove that even vast erudition is no substitute for creative imagination.")
  \item \textsuperscript{116}[Story's] "Memorandums of arguments in the Supreme Court of the United States beginning with the Jan[uar]y Term 1831 and ending with the Jan[uar]y Term 1832," at 4 (ms. in Treasure Room, Harvard Law School), quoted in Crisis, supra note 3, at 234 & n.3.
  \item \textsuperscript{117}S. Kutler, supra note 3, at 3 & app. 172. "Story's opinion was substantially the one he had prepared in 1831 tailored somewhat to respond to Taney." Id. at 96; accord, id. at app. 172; cf. G. Dunne, supra note 100, at 362, ("[The Bridge dissent] was almost a set piece of a Story opinion, and it should have been, for he had first written it back in 1821 [sic] and presumably had polished it during the interim.") (citing no authority) (meaning unclear) (1831?). Compare id. with note 118 infra.
  \item Scholars have often wondered \textit{why} Story's 1831 opinion did not convince the Marshall Court—and perhaps Marshall himself. For present purposes, it is sufficient, but still important, to distinguish between Marshall's 1819 opinion in Dartmouth College (see note 58 supra), which is indeed irreconcilable with Taney's rationale in Charles River Bridge, and the opinion Marshall might have written or joined in 1837 had he lived. See S. Kutler at 72 app. 179 ("Chances are Marshall would have reached Taney's result in the Bridge Case.) (indirect evidence). See generally R. Faulkner, The Jurisprudence of John Marshall (1969).
\end{itemize}
need to anticipate the probable counterarguments: the Massachusetts court in 1830 entirely anticipated the Taney-Jacksonian arguments.\textsuperscript{118}

Is it not plausible then that Story's true major premise was to prevent "the ultimate democratic heresy," legislative sovereignty—at all costs? Allow the state its way here, Story might have said to himself, and the power of the judiciary becomes impotent illusion. What appalled Story were the implications of Taney's royal grant law analogy. English common law construed ambiguities in the King's outright grants in favor of the king, not because that was the intent of the parties, but because the king was sovereign.\textsuperscript{119} Taney was, in effect, silently equating the legislature with the king. As Kent's letters and Story's dissent discerned, if the legislature were permitted to avoid its contracts by cloaking itself in the mantle of Taney's public welfare model, what was to prevent a future legislature from invoking the same doctrine and the same unspoken premise to immunize its statutes from judicial review generally. In other words, if the legislature were sovereign, by reason of its democratic character, upon what possible grounds could an undemocratic judiciary presume to overrule the sovereign?

The issue then which the Bridge Case posed for Story was only nominally the contract clause question. Story's observation that "[t]he only question here is of sheer power" underscored the real issue: not what is an impairment of contract but who is to decide what is an impairment of contract.\textsuperscript{120} What was


In fact, it is possible to suggest that Story may have begun writing his monumental Bridge opinion before the second state Supreme Court decision was rendered! As early as 1815, "Story appears to have developed a practice of prefabricating, at least prewriting, opinions, absolutely devoid of facts, on suitably undeveloped legal areas." Zobel, supra note 109, at 529 (citing G. Dunne, supra note 100, at 129) (examples omitted). Dunne himself says Story wrote the Bridge dissent in 1821 (see note 117 supra), but apparently offers no evidence. Most likely, however, "1821" is a misprint which should read "1831."


\textsuperscript{120}The text's characterization of the "real issue" is a deliberate paraphrase of a generalization (about contract clause cases) made in 1 L. BOUDIN, supra note 6, at 337, quoted in note 6 supra. By way of caveat, it must be understood that (1) Boudin made the observation in the context of a discussion of \textit{The Dartmouth College Case—not The Charles River Bridge Case}; (2) Boudin's own analysis of the latter case neither pursues nor attempts to support his generalization; (3) his evidence would not support the text's proposition in any event; (4) Boudin's discussion of the Bridge dissent peremptorily dismisses what Boudin perceived to be Story's "naive" formalism. \textit{See id. at} 390, quoted in note 11 supra. \textit{Compare id. with Nelson, supra note 36, at} 518-19, 525 reprinted in Essays, supra note 36, at 151-52, 156.

Boudin assumed too readily that Story's opinion amounted to formalism. (This Note, of course, disagrees with those who still so assume.) Despite his loathing for Story and judicial supremacy, even Boudin overlooked the possibility of a supremacist interpretation of the Bridge dissent. \textit{See note 11 supra}. (This is not by way of criticism. Remember, until 1973—when Newmyer's article, \textit{Crisis, supra} note 8, appeared—historians had missed the dissent's ideological premises almost completely.) The crux here is simply that the Bridge dissent's brilliant illusion of formalism was so complete that it survived the revisionist interpretation to become part of it.
at stake was not merely a claim of implied exclusive toll rights, but rather the doctrinal underpinnings of the Framers' separation of powers doctrine. To save that doctrine and to justify the judiciary's reliance upon it, Story's dissent repeatedly remonstrated, "The legislature . . . is in no just sense sovereign." 121

In short, whatever were the doctrinal and prudential merits of the Warren Bridge's defense, Story deliberately ignored them: the legislature had to be reminded of its constitutional status; more importantly, the new Chief Justice needed to be reminded of the Court's constitutional role. The principle of organic sovereignty provided Story with the constitutional means by which to justify "the seeming anomaly of judicial supremacy in a democratic society." 122 That would be easy enough. But there was an immense practical difficulty: how to make this controversial premise palatable. It would not do to chastize the legislature in a concurrence, only to uphold the challenged statute. The Justice realized he needed to find an impairment of contract in order to legitimize his excoriation of the legislature. However, even under Dartmouth 123 and the most expansive application of private contract law principles, the record in the Bridge Case did not admit of such a conclusion—particularly in light of Providence Bank's 124 deference to legislatures.

To Story, then, fell the self-appointed and unsavory task of finding an impairment where none appeared to exist. Certainly Story had left plenty of maneuvering room for himself in his Dartmouth concurrence, 125 and other opinions, 126 for future cases like Charles River Ridge. He now drew upon this

11136 U.S. (11 Pet.) at 648; repeated at 644. Instead, "[t]he sovereignty belongs to the people of the state in their original character as an independent community; and the legislature possesses those attributes of sovereignty, and those only, which have been delegated to it by the people of the state under its constitution." Id. at 644; see id. at 601-03.

122The quotation in the text is from Bork, supra note 9, at 2, quoted in note 65 supra, where it appears in a discussion of Madison's model of the Constitution. Professor Bork was not referring to Story or the Bridge dissent, but the particular statement in the text is entirely faithful to Bork's argument. See note 65 supra.


125For all its apparent simplicity, [Story's Dartmouth] doctrine ["of public and private corporations"] had a remarkably protean quality, and it entered the fabric of history not only as law but as propaganda." Story's Doctrine, supra note 8, at 835. Compare id. with note 99 supra.

126E.g., Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815). Although Terrett never invoked the contract clause (compare F. Stites, supra note 58, at 132 n.45 with id. at 137 n.49 with W. Wieck, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 260-61 (1977)), the opinion's Republican premises dramatically influenced the result in later contract clause cases.

[1]In the course of that opinion protecting the vested rights of the Episcopal church in Virginia, Justice Story had defined the legal nature of private corporations. Story would not admit that legislatures could repeal statutes creating private corporations and by such repeal transfer their property to others without consent of the corporators. This decision, Story had thought, stood "upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the [C]onstitution of the United States, and upon the doctrines of the most respected
concurrence, ignored Providence Bank,\textsuperscript{127} conveniently overlooked Warren Bridge's equitable defenses as well as flaws in the plaintiffs' argument, and engraffed a sui generis theory of nuisance law\textsuperscript{128} to achieve what seemed to be an altogether objective result. It was an extraordinary feat of constitutional \textit{bricolage}—at least as remarkable (and disingenuous) as Taney's own.\textsuperscript{129}

Whether Story could have legitimately reconciled Providence Bank with his Bridge dissent is unclear.\textsuperscript{130} What is clear, however, is that Providence Bank was decided by Marshall and Story upon purely instrumentalist grounds—policy considerations almost identical to Taney's Bridge arguments.\textsuperscript{131} When Providence Bank was decided in 1830, Jackson was not only in the White House, but had already appointed two Justices to the Supreme Court. Whatever reservations Story harbored at the time about Jackson and his populism were assuaged by a quick glance at the roster of old-line Federalist Justices. Moreover, the new Justices were essentially mavericks, not partisan Democrats.\textsuperscript{132} Thus despite Jackson's tenure, in 1830 at least, Story did not yet fear for the Republic and the supremacy of the judiciary. Yet only a year later, at the original oral arguments in the Bridge

\textit{tribunals.} These were precisely the grounds of Webster's [winning] argument [in \textit{Dartmouth College}].

F. STITES at 63 (footnote omitted).
\textsuperscript{127}See text supra (accompanying note 108).
\textsuperscript{128}See note 79 supra & text accompanying.
\textsuperscript{129}But cf. G. GARVEY, supra note 10, at 91-93 (recognizes Taney's achievement but not Story's; contrasts the former's with what Garvey sees as Story's formalism). \textit{See generally id. at 92 quoted in note 108 supra.}
\textsuperscript{130}See also Stephenson, supra note 100, at 335.
As if to avoid the potentially unflattering conclusion in the text, it has become fashionable among Story's apologists to treat as historical accidents both the Providence Bank result and Story's participation therein. To do so, one historian, for example, is reduced to claiming that the outcome in Providence Bank was due to"Marshall's inadequate preparation in the common law" and Story's (unwitting?) \textit{"acquiescence"} in the opinion. J. MCCLELLAN, supra note 33, at 226 (citing no authority); \textit{see S. KUTLER, supra note 3, at 98. But cf. Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEGAL Hist. 275, 289 passim (1973) (review of G. DUNNE, note supra 100, and J. MCCLELLAN) (exposing McClellan's \textit{"many gratuitous slaps at John Marshall,"} without quoting this particular slur).}
\textsuperscript{128}It is one thing to say that "Providence Bank unconsciously paved the way for the Taney coup [in the Bridge Case]." J. MCCLELLAN at 226. But it is quite another to assume as well that Marshall and Story were unaware of the implications of Providence Bank in 1830 or that they somehow did not intend what they said. In the absence of some evidence, such academic excursions to cast doubt upon the Justices' consciousness and deliberateness in Providence Bank are simply outrageous. Nevertheless, one historian has postulated that, \textit{[i]n the Providence Bank Case Story could [i.e., might] have dissented in silence." Stephenson, supra note 100, at 336 n.27 (citation omitted) (author cites a single 1842 letter in which Story implicitly claimed to have silently dissented—not in Providence Bank, but in an 1825 slave trade case).}
None can \textit{disprove} these assertions and speculations offered to extricate Story from Providence Bank. What can be said with certainty is that such arguments do constitute a convenient means by which to avoid the obvious inference: Story could be as instrumentalist as Taney in a contract clause case. Query whether a natural law or formalist interpretation of the Bridge dissent could survive such an inference.

\textsuperscript{131}See Stephenson, supra note 100, at 334.
Case, Story foreboded the coming crisis. Worse, he could not convince the Marshall Court that the power of the judiciary was at stake. Story's prescience was for nought. By 1837 events had proved Story correct, but by then it was too late: the Court and the country had changed; Story was an anachronism; Republicanism was in collapse.

To read the Bridge dissent from this parallax is to see Republicanism not merely as a goal, but as Story's major premise; to see, if one will, judicial supremacy as Story's only fundamental principle. For Story, judicial supremacy equalled Republicanism. If natural law should happen to comport with Republicanism, it would be, for Story, only a happy coincidence. Conversely, if, when, and where natural law were incompatible with Republicanism, then Story would require natural law to yield to the Framers' theory. Story regarded formalism and natural law not as surplusage, but as persuasive authority to be selectively cited and relied upon in order to rescue judicial supremacy—via the contract clause—not the plaintiff-stockholders, not even America's macroeconomy.

Similarly, the Bridge dissent's public-private distinction (including Story's exhaustive exigesis of royal grant law and private contract law) never qualified as an independent principle in Story's jurisprudence, but was instead a propitious device—a surrogate standard—which could be manipulated as a case required to achieve and preserve Republican results. Moreover, this proposed rigid model presupposes even more severe ramifications: if, for example, in Charles River Bridge, assuming arguendo that national economic growth must suffer under the dissent's result, that was for Story, a truly regretted cost of Republican jurisprudence, but it was a tertiary factor when measured against the necessity of Republican government.

Finally, if in the process, Story discovered that he must himself sacrifice one of Republicanism's pristine and premier virtues—judicial objectivity—in order to preserve another, even more precious Republican tenet—organic sovereignty, the sine qua non of judicial supremacy—then Story appeared ready to pay the price. This is not necessarily an uncharitable conclusion. Republicanism and the preservation of Republicanism may very well have been worth it: the end probably did justify the means, if only because they were essentially inseparable. At a minimum, Story's means and ends were no less legitimate than Taney's. If Story found the irony of his subjective technique embarrassing (because at odds with objectivity), at least he could reconcile himself to it: ignominy as reward for Republican beau geste.

Indeed, the moment one sees Republicanism not merely as an end (i.e., a society to be preserved), but as an immutable means of adjudicating constitutional cases, Story's Republican jurisprudence is metamorphosed into predictable principle—arguably (and ironically), a neutral principle at that, because applied evenhandedly in all cases, and more ironically, a principle of neutral derivation, because directly traceable to the Framers' structure of the
Constitution. Insofar as this model is correct, Story's dissent assumes a qualitatively different and higher status upon rereading. Even stripped of its private law disguise, it transcends the merely “reckonable” result to become an ineluctably principled one. The catch, of course, is that all of Story’s other rules become nonneutral principles; there is something hollow about a neutral principle that subsumes and subverts all others. Yet in the collision of neutral principles some choice had to be made.

133 Even as a merely arguable proposition, the statement in the text requires some explanation. In the first place, the rubric, “judicial supremacy,” can stand for at least two different concepts: (A) a process of “extraconstitutional” (i.e., nontextual) creation of new constitutional rights in violation of the “pure interpretive model”; (B) the supremacy of the judiciary which is theoretically justified, indeed compelled, by the “pure interpretive model.” (Both concepts are to be distinguished from the principle of judicial independence.) In Story’s view, Taney’s Bridge rationale would fall under category A, because it endorsed legislative sovereignty. In Story’s view, Story himself would fall under category B. Story also qualifies under category A if, as some believe, Story’s contract clause rationale rationale in Dartmouth College (which was applied in the Bridge dissent) finds no support in the Constitution or in the original understanding of the Framers. See Story’s Doctrine, supra note 28, at 839 (citation omitted); accord, F. Stites, supra note 58, at 137 n.47. Contra, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); accord, [Webster’s] Brief for Appellant, Dartmouth College Case, 17 U.S. (4 Wheat.) 518, 551-600, esp. 575 passim (Framers intended contract clause to be a constitutional bulwark against legislative assaults on private vested rights) (relying on The Federalist No. 44 (J. Madison)) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) and New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812)). See generally F. Stites at 57; B. Wright, supra note 21, at 3-26; Story’s Doctrine at 828-35. See also note 126 supra.

Giving Story the benefit of the doubt, he remains in category B. Category B represents a principle which is itself a principle of “neutral derivation.” See Bork, supra note 9, at 2, quoted in notes 64 & 65 supra. Assuming Story applied the principle of judicial supremacy in all cases, can it also be said that Story’s doctrine was a neutral principle?

The answer reveals a limitation of the neutral principles test, and the elasticity of its definition. Under one reading, “neutral principles” requires only (a) the neutral application of principle and (b) sincere belief in the “validity of reasons given for the decision at least in the sense that [the judge] is prepared to apply them to a later case which he cannot honestly distinguish.” L. Jaffe, supra note 68, at 38, quoted in Bork at 2, quoted in note 65 supra (emphasis added).

In other words, Story, could apply all of his surrogate private law distinctions and his formula of false economics and still satisfy this neutral principle test—even if he believed in none of them—so long as he did so consistently. Hence, assuming Story could distinguish Providence Bank as a tax case, and assuming that future claims of exclusive right would never jeopardize judicial supremacy, then his supremacist doctrine qualifies as neutral principle—even though it was not the principle upon which he purported to rely. In other words, the neutral principles test is not very rigorous at all, and Story could rationalize his results, and the surrender of objectivism in favor of judicial supremacy.

However, the argument collapses if one reads into the neutral principles test the contradiction and more rigorous requirement that the judge himself “sincerely believe in the principles upon which he purports to rest his decision.” L. Jaffe at 38, quoted in Bork at 2, quoted in note 63 supra (emphasis added). Story would fail this test, because he never purported to rest his decision on judicial supremacy, but rather upon divers contract principles. Since he could not fall within the ambit of the neutral principles banners, he would be, by definition, a lawless judge of the category A variety.

Beyond this, the neutral principles test proves quite unhelpful when neutral principles collide. If Story’s public-private distinction was not a surrogate standard but a real one, his inconsistency in the Bridge dissent can be excused as the conscious preference of one neutral principle (judicial supremacy) over another neutral principle (private contract law rules).

134 One way to test this hypothesis is to remove or add variables in Charles River Bridge. For example, if there had never been a public-private distinction in Story’s day, would Story have
CONCLUSION

Professor Newmyer implores us to "take Story seriously." Yet he, too, still reads the Bridge dissent uncritically. His evidence, if not his argument, makes for an eclectic, emphatically self-contradictory portrait of one Justice's seemingly fickle and discretionary jurisprudence. Yet the instant one redefines Story's jurisprudence—making it a Republican judicial supremacist theory rather than a Republican private law theory—Story's dissent in The Charles River Bridge Case obtains new meaning. Indeed, if one accepts classical Republican premises and Story's hierarchy of values, the dissent also obtains new legitimacy.

It was fidelity to the principle of judicial supremacy, and not private law, which dictated Story's result in the Bridge Case. Fealty to that principle allowed Story to take solace and endure the slings and arrows of a mostly venomous press. And it was that principle, not contractualism, formalism, natural law, or economic efficiency, which informed all of his opinions.

reached a different result? Though one can never know, one suspects not, because to Story, Republicanism could not yield to legislatures, for law could never yield to politics. Indeed, one could describe Story's universe of private law as the product of his Republicanism.

Or consider the converse: assume the public-private distinction as enunciated by Story was universally understood and followed by the Justices (e.g., that royal grants are different from and superior to legislative grants; that, in any event, royal grants for consideration are to be construed in favor of the grantee, like private contracts). Would these rules have necessarily guaranteed a victory for the Charles River Bridge proprietors? Probably not, for if the plaintiffs' claim in any way had threatened Republicanism (it did not here, of course), Story could have glibly appealed to a whole spectrum and panoply of contract rules to defeat the plaintiffs (e.g., estoppel, laches, and/or waiver, because the plaintiffs had failed to take legal action against the competing Canal Bridge; lack of privity, because the plaintiffs had made no contract with the defendants, but only with the legislature, etc.).

*Crisis, supra note 3, at 233, quoted in text supra (accompanying note 41).

Newmyer's remonstrance has not gone unheeded. Striking evidence of the renewed interest in Story is reflected in two new books which reach opposite conclusions about the antebellum judiciary. Each relies on Story as its chief protagonist and paradigm. Compare Presser, Revising the Conservative Tradition, 52 N.Y.U. L. REV. 700, 714 (1977) (review of TRANSFORMATION, supra note 3) ("All these themes coalesce in the discussion of Joseph Story, whom Horwitz seems to regard as the most important nineteenth-century jurist. At this level, Horwitz is writing a sort of judicial biography and is seeking to correct earlier writing on Story. Horwitz has Story participating at every stage of nineteenth-century legal development and shows how the philosophy of Story's opinions mirrored most of the changes in law.") with Ely, Book Review, 53 IND. L. J. 277, 284 (1978) (review of R. BRIDWELL & R. WHITTEN, note 137 infra) ("[T]he authors' stress on the importance of Justice Story comes close to an indispensable man theory of history. Describing Story 'as the most learned and scholarly man ever to sit on the high bench,' they attribute in large measure the decline of the common law system to his death.") (citation omitted).

For discussion of partisan responses in the press, see S. kutler, supra note 3, at 117-20 and C. SWISHER, supra note 36, at 94.

History has credited later cases, later judges for the establishment of judicial supremacy. The Charles River Bridge Case reveals that they were merely emulating "the last of the old race of judges." Lest Justice Story doubt the continuing vitality of his principles of judicial supremacy and organic sovereignty in American society, one may assure him that laws, not men, still govern. As one recent case put it:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

... Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government. ... We therefore reaffirm that it is the province and the duty of this Court "to say what the law is". ...

C. LEE MANGAS

The model could perhaps also explain Story's exceedingly broad assertion of admiralty jurisdiction in the seminal case of DeLovio v. Boit, 7 Fed. Cas. No. 3776, at 442 (C.C.D. Mass. 1815). See generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 11 n.36 (2d ed. 1975) ("It is quite impossible to substantiate Story's view ... and rather clear his expressions there were at least hyperbolical.").

Significantly, DeLovio's treatment of common law precedents is often seen as utterly irreconcilable with the Bridge dissent's fealty to "the old law." See G. DUNNE, supra note 100, at 362, quoted in note 110 supra. The proposed model suggests why Story could rationalize his contradictory approaches.

