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JEREMY BENTHAM, THE CONTRACT CLAUSE AND JUSTICE JOHN ARCHIBALD CAMPBELL

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The influence of legal philosophy upon the decision-making process of the Supreme Court of the United States has largely been limited to the natural law doctrines implicit or explicit in scattered opinions written in virtually every historical period since 1789.[1] In fact, with the exception of a few pragmatists among the ninety-one individuals who have served on the Court, advocates of natural law on the high bench have scarcely encountered any serious opposition to this philosophy. Consequently, the judicial career of Associate Justice John Archibald Campbell is of especial interest, for Campbell attempted, in his brief tenure on the Court (1853-1861), to apply the principles of a philosophy basically antithetical to that of natural law, Benthamite utilitarianism. Natural law was most effectively invoked during the Marshall Court period to establish contract clause interpretations which became the cornerstones of economic conservative doctrine. It is the purpose of this paper to assess the consequences of the predominant influence of natural law for the Supreme Court's interpretations of the contract clause prior to the Civil War, and especially to explore the related contributions of this early supporter of Benthamite utilitarianism, Justice John Archibald Campbell.

Background of the Problem

Conflicts between the desire to meet the felt needs of society and the desire to maintain existing property rights have long perplexed modern governments. The methods adopted for the resolution of such conflicts quite naturally reflect the prevailing social and political ideology in each nation. In the United States in the period of the Philadelphia Convention, the prevailing temper, at least among the influential, was one of insistence upon the preservation of the sanctity of private property. This insistence and the widespread public reverence for law and judicial institutions determined that state interference with or modification of private contracts be subject to a constitutional limitation prohibiting impairment of the obligation of a contract. The constitutional framers, themselves extensive property holders and creditors, did not suggest in their debates that this prohibition be extended to contracts of a public character.[2] How-

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1. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 280-306 (1931).
2. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 16 (1938).

ever, such an extension was made within three decades of the framing of the Constitution through the judicial decision-making process of the Supreme Court of the United States.

The main stream of contract clause interpretation before the Civil War reflected the serious conflict between members of the Supreme Court who sought to establish a doctrine of vested property rights and those who opposed them. Protagonists of the vested rights doctrine, such as Chief Justice John Marshall and Justice Joseph Story, endeavored to establish contract rights as virtually absolute. They achieved a large measure of success during the period 1810-1827 by broadening the constitutional definition of the word "contract" to include public grants,[3] corporate charters,[4] and state legislative enactments which exempted particular tracts of land from state taxation.[5] The sweeping character of this doctrine as it applied to governmental power was strikingly illustrated in Justice Story's concurring opinion in the *Dartmouth College* case:[6] "[G]overnment has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses."

The supporters of judicial expansion of the scope of the contract clause utilized three ideological approaches to justify such expansion. To a limited extent, they depended upon legal analysis of the meaning of the contract clause and allegations concerning the intentions of the framers of the Constitution. To a much greater extent, they argued upon the basis of economic expediency. And thirdly, and perhaps of greatest importance, they grounded their interpretative policy solidly upon the prevailing political and legal philosophy of natural law and its concommitant, natural rights.

It should be noted, of course, that the natural law philosophy need not be considered exclusively an intellectual weapon of economic conservatism. Even during the turbulent period of the American Revolution, it became apparent that the conception of a law of nature discoverable by right reason might be invoked by individuals for basically contradictory purposes. Consequently, one enunciator of radical democratic thought argued that "Nature itself abhors . . . a system of civil government [which bases representation upon property], for it will make an inequality among the people and set up a number of lords over the rest," while contemporary conservative property holders contended that a political system based upon natural law required that the majority selected to make statutory laws for a state "should include those who possess a major part of the property

3. Fletcher v. Peck, 10 U.S. (6 Cranch) 48 (1810).
4. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 250 (1819).
5. New Jersey v. Wilson, 11 U.S. (7 Cranch) 103 (1812).
6. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 250, 316-38 (1819).

of the state."[7] However, it was in the later sense, as a protection for property rights against the limitations upon such rights invoked by representatives of popular majorities in the states, that the natural law philosophy made its greatest impact in American legal circles after 1789.

Perhaps the most important reason for the decidely conservative emphasis given natural law in American legal training was the strong influence of Blackstone. From the time of its appearance in America, the *Commentaries* of Blackstone over-shadowed all the other contemporary works in law. Although Blackstone actually dealt with the subject inconsistently, his emphasis upon "The Absolute Rights of British Subjects"[8] conditioned generations of American lawyers in their attitudes toward property rights. Furthermore, the Blackstonian attitude toward individual rights was perpetuated in the writings and teachings of the more influential American teachers of law in the period before the Civil War, Chancellor Kent, Henry St. George Tucker and Justice Joseph Story.[9] In fact, natural law and natural rights, with this decidedly conservative emphasis, remained an integral and vital part of American legal training long after both the philosophy and the emphasis began to lose their importance outside the field of American law.[10] To most American students of law in the pre-Civil War period, statements such as Chancellor Kent's reference to the rights of personal security, personal liberty and the acquisition and enjoyment of property as "natural, inherent and inalienable"[11] ones were basic to their intellectual conditioning for private practice and, in many instances, public service.

During this period of the ascendency of the natural law philosophy in American legal circles, an English intellectual leader, Jeremy Bentham, developed a body of philosophical doctrine which was implicity antithetical to natural law, and, while not antagonistic to property rights in general, was opposed to the perpetuation of property rights when such immutable perpetuation thwarted the purpose of social utility. Bentham did, of course, ground his utilitarian doctrine upon a reference to nature: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure."[12] But nature, in Bentham's analysis, did not provide an ideal standard for the resolution of social conflicts. Rather, the test was pragmatic: "It is for them (pain and pleasure) alone to point out what we ought to do, as

7. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 104-13 (1931).

8. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 85 (1955).

9. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 286-91 (1931).

10. *Id.* at 280.

11. *Id.* at 289, quoting from KENT, COMMENTARIES ON AMERICAN LAW (1836).

12. 1 STEPHEN, THE ENGLISH UTILITARIANS 237 (1900).

well as to determine what we shall do."[13] In terms of social policy, the test to be applied was whether a proposed course of action would achieve the "greatest happiness of the greatest number." This standard would inevitably find itself in conflict with a doctrine of vested property rights such as that espoused and applied by a majority of the members of the Supreme Court of the United States during the period 1810-1827.

One of the strongest statements of Bentham's disavowal of the conception of natural rights was his *Critical Examination of the Declaration of Rights* which had been drawn up by the French National Assembly of 1791. Analyzing article II of the Declaration,[14] Bentham denied that there were rights anterior to the establishment of governments and insisted, instead, that men who live without government actually live without rights. All of the items listed in the article as *natural* rights were, argued Bentham, in reality, secured only under established government as *legal* rights. The attempt to establish such rights as imprescriptable ones was denounced as "rhetorical nonsense—nonsense upon stilts." Under the utilitarian principle "there is no right which, when the abolition of it is advantageous to society, should not be abolished."[15]

Lest it be thought that Bentham's stricture against natural rights was simply a manifestation of contemporary British distaste for the excesses of the French Revolution, his *Book of Fallacies* castigates those who would espouse the natural rights doctrine to protect legislatively granted privileges. The attempts by Coke and others to establish that certain laws were "irrevocable" or "immutable" was termed "a sophism of the same cast as that expressed by the words *rights of man,* though played off in another shape, by a different set of hands, and for the benefit of different class."[16]

The utilitarian position on the immutability of laws was given by Bentham in these terms:

> Every arrangement by which the hands of the sovereignty for the time being are attempted to be tied up, and precluded from giving existance to a fresh arrangement, is absurd and mischievious; and, on the supposition that the utility of such fresh arrangement is sufficiently established, the existence of a prohibitive clause to the effective question ought not to be considered as opposing any bar to the establishment of it . . . .
>
> A declaration or assertation that this or that law is immutable, so far from being a proper instrument to insure its permancy, is rather a presumption that such a law has some mischievous tendancy.[17]

13. *Ibid.*
14. "The end in view of every political association is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security, and resistance to oppression."
15. 2 BOWRING, WORKS OF JEREMY BENTHAM 500-01 (1843).
16. *Id.* at 403.
17. *Id.* at 407.

It is not surprising the Blackstone was one of the first of the British advocates of natural law and its correlative doctrine of natural rights to be subjected to Bentham's attack.[18] But whether concerning Blackstone or his later American disciples, the Benthamite position brooked no compromise with natural law or natural rights. Appeals to moral laws or to the individual rights which were purportedly based upon them were, in Bentham's eyes, not only unhistorical, but arbitrary because they lacked "any external standard." The principle of utility, argued Bentham, supplied such a standard.

The political and legal philosophy of Jeremy Bentham had begun to influence governmental leaders in many parts of the world by the early years of the nineteenth century. During this period Americans of such disparate characteristics as Aaron Burr and John Quincy Adams conferred with Bentham personally. President Madison corresponded with the British utilitarian regarding a plan for codification of the national laws, but this exchange did not bear fruit. Perhaps the most important contribution to the American legal system was the application of Bentham's ideas by advocates of revision of the state legal systems. Notable successes were achieved in Louisiana under the leadership of Edward Livingston[19] and in New York under the initial direction of John Duer, Henry Wheaton, and Benjamin F. Butler.[20] However, there is little evidence in the development of American legal philosophy to indicate widespread acceptance of Benthamite utilitarianism, for, as was noted above, the natural law philosophy retained much of its vigor in legal circles in America. To be sure historian Richard Hildreth,[21] Harvard law professor Nicholas St. John Green,[22] and Thomas Cooper, president of South Carolina College,[23] ably espoused the utilitarian intellectual cause, but these protagonists were not able to make any great impression upon American legal development during their lifetimes. It is important to note, however, that these leading American advocates of utilitarianism were out-and-out critics of natural law and natural rights. In America, as in England, consequently, Benthamite utilitarianism emerged as a legal and political philosophy which was basically in conflict with the philosophy of natural law. In addition, the pragmatic character of the Benthamite test of social desirability often made

18. STEPHEN, *op. cit. supra* note 12, at 238-40.

19. *Id.* at 220-21.

20. Stevenson, *Influence of Bentham and Humphreys on the New York Property Legislation of 1823,* 1 AM. J. LEGAL HIST. 155-69 (1957).

21. For an analysis of the social, economic and philosophic contributions of Hildreth see PINGEL, AN AMERICAN UTILITARIAN (1948).

22. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 152-71 (1945). Green's major contributions to utilitarian thought were actually made after the Civil War.

23. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 307-10 (1931).

utilitarianism the logical enemy of conservative attempts at invocation of natural law and natural rights to perpetuate property rights.

The Marshall Court and Contracts

During the early years of the nineteenth century, the very years in which Bentham's political and legal philosophy was becoming increasingly influential in the western world, the advocates of application of the natural law philosophy on the Supreme Court of the United States were achieving their most notable successes. As was observed above, the scope of the contract clause was appreciably broadened during the crucial years, 1810-1827, an expansion largely facilitated by invocation of natural law. By 1827, the tide turned against the supporters of a vested rights doctrine when a majority of the Supreme Court refused to accept Chief Justice Marshall's argument that an existing state statute was void when it released a debtor from a subsequent contract obligation,[24] but the expansion of the scope of the contract clause made prior to that date was not seriously challenged either during the remainder of Chief Justice Marshall's tenure or under the Chief Justiceship of his successor, Roger Brooke Taney.

This failure to challenge the Marshall-Story expansion of the scope of the contract clause obviously did not stem from absence of public opposition, for Professor Benjamin F. Wright's careful survey of the leading accounts of the public reaction to the Marshall Court's contract clause decisions indicated that these opinions "met with strong, if not abusive, opposition."[25] Furthermore, the long accepted tradition that Chief Justice Marshall secured the interpretations that he desired simply by the very power of his intellect and the force of his personality has been thoroughly discredited by the researches of Professor Donald G. Morgan.[26] Rather, the failure to challenge the economically conservative contract clause decisions resulted to a great extent from the intellectual commitment to the philosophy of natural law of Marshall's potential Jeffersonian opponents. Most of the Jeffersonian Supreme Court members acquiesced silently in these decisions, but Story, appointed as a Jeffersonian, became an unshakable advocate of Marshall's interpretation and an unusually strong and outspoken supporter of the use of natural law to protect vested property rights.[27] Even the Jeffersonians who held deep reservations about the contract clause expansion were virtually disarmed intellectually by their inability or unwillingness to cope with the natural law foundation for this expansion. The judicial interpretations of

24. Ogden v. Saunders, 25 U.S. (12 Wheat.) 135 (1827).
25. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 53-58 (1938).
26. Morgan, JUSTICE WILLIAM JOHNSON (1954).
27. See, *e.g.*, Terrett v. Taylor, 13 U.S. (9 Cranch) 23, 29 (1815).

the contract clause made by the most vigorous protagonist of Jeffersonian Republicanism on the Supreme Court, Justice William Johnson of South Carolina, are illustrative.

Although Justice Johnson was the leading dissenter during the Marshall Court period, he actually acquiesced in most of the decisions extending the scope of the contract clause. In the initial case of *Fletcher v. Peck*,[28] Johnson disagreed with Marshall on virtually every particular but concurred in the decision in a separate opinion on natural law grounds. Then for over a decade, Johnson simply accepted silently the majority's subsequent expansion of the clause in the key decisions of *New Jersey v. Wilson*,[29] *Dartmouth College v. Woodward*,[30] and *Sturges v. Crowninshield*.[31] The reasons for Johnson's silence were not completely clear, but the consequences certainly were apparent. As Johnson's biographer aptly put it, "he had tolerated the sanctification of vested rights at the expense of social interests."[32]

What is somewhat surprising about Johnson's course of action is that a rather valid argument was available which would have permitted him to oppose the extension of the scope of the contract clause to public grants without repudiating, in principle, the philosophy of natural law. In *Fletcher v. Peck*, Marshall had argued that "it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."[33] This attempt at broadening the letter of the written Constitution by an appeal to a law of nature which was considered higher and prior to it was essentially similar to the efforts of several justices, such as Samuel Chase, who had served under Marshall's predecessors. One member of the pre-Marshall Court, Justice Iredell, had directed a sharp, two-pronged attack upon one of the early attempts at introducing natural law in the interpretation of the Constitution. Iredell first had pointed out that while "some speculative jurists" argued "that a legislative act against the natural justice must, in itself, be void . . . ," under a constitutional system characterized by separation of powers, "the judicial departments" possessed no authority to hold void laws which were not explicitly prohibited by the Constitution. Secondly, "the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed on the subject; and all that the court could properly say in such an event,

28. 10 U.S. (6 Cranch) 48 (1810).
29. 11 U.S. (7 Cranch) 103 (1812).
30. 17 U.S. (4 Wheat.) 250 (1819). Another Jeffersonian, Justice Duval, dissented in the *Dartmouth College* case, but did so without writing an opinion.
31. 17 U.S. (4 Wheat.) 120 (1819).
32. MORGAN, *op. cit. supra* note 26, at 214-17.
33. 10 U.S. (6 Cranch) at 135.

would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with abstract principles of justice."[34] Yet Justice Johnson's opinion in the *Peck* case contained no reference to Iredell's argument; instead, he concurred in the majority decision because, in his opinion, a state is prohibited to revoke its grants "on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[35]

By the middle of the 1820's Justice Johnson began re-evaluating his conception of the relationship of property rights and social interests. His *Eulogy on Jefferson* of 1826 apparently contained his own convictions as well as those of the dead philosopher:

> He [Jefferson] knew that avarice was the besetting sin of a republican government. That the very security with which property was possessed, not less than the influence which it confers; operating with some of the leading propensities of our nature, fostered a devotion to its acquisition, which he would have directed to more exhalted objects. He dreaded the noxious and baneful influence of a passion for gain . . . .[36]

In 1827 in *Ogden v. Saunders*,[37] after thirteen years of silence, Johnson again came to grips with the question of the immutability of property rights. It is noteworthy that he felt impelled to rationalize his repudiation of the doctrine of vested rights by explaining, in a manner resembling the second of Justice Iredell's arguments, that natural law in itself did not provide an adequate standard in the interpretative process.

Johnson's position was not an abandonment of the natural law philosophy, but was essentially a recognition that natural law had limited efficacy as a guide to decision-making. His explanation implied, however, a deep and continuing intellectual commitment to the philosophy. Given this intellectual commitment, the transition in Johnson's thinking still was great, for if the interpretative standard suggested below had been originally applied by the Marshall Court, the whole course of contract clause interpretation would have been considerably different. Johnson stated his position as follows:

> The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution [of the

34. Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-99 (1798); Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 246, 250 (1914).
35. 10 U.S. (6 Cranch) at 80.
36. MORGAN, *op. cit. supra* note 26, at 219-20.
37. 25 U.S. (12 Wheat.) 135, 179 (1827).

> United States] was framed for society, and in an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole . . . .[38]

So sweeping was Johnson's victory on this issue that Marshall found himself in the position of a dissenter for the first and only time in a major case. Yet while *Ogden v. Saunders* represented the high tide of reaction against Marshall's development of an absolute doctrine of vested rights, no serious attempt was made by the Jeffersonians to overturn the earlier Marshall decisions. The remainder of Marshall's tenure was not marked by any significant expansion of the scope of the contract clause, but neither was it marked by any serious contraction. Of particular significance, philosophically, was the fact that Marshall's tenure paralleled the first three decades of the spread of Bentham's intellectual influence throughout the western world. And for the Supreme Court of the United States, like much of the rest of the American legal system, Benthamite utilitarianism, implicitly one of the most powerful philosophical challenges to the natural law philosophy, remained a remote and relatively unimportant intellectual influence. It should be noted, however, that Justice Johnson's expression of distaste for the use of natural law as a guide to decision-making concluded with a reference to the relative nature of individual rights which was similar to the Benthamite test of social desirability.

The Taney Court and Contracts

The death of Marshall and the advent of the new Chief Justice brought no fundamental change in the Supreme Court's treatment of the contract clause. The three broadest interpretations of the clause made by the Marshall Court—*New Jersey v. Wilson, Dartmouth College v. Woodward,* and *Fletcher v. Peck*—were as firmly entrenched at the end as at the beginning of the Taney Court period. The major decisions of the Taney Court which have variously been described as liberal or even radical did not challenge the immutability of established and recognized contracts, but concerned themselves with peripheral issues such as the resolution of ambignities in contracts[39] or the determination of the question whether an agreement of one kind or another is a contract within the meaning of the Constitution.[40]

For most of the members of the Taney Court, and particularly Justice McLean, the reasoning of Marshall in his early, determinative

38. *Ibid.*
39. See, *e.g.,* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 341 (1837).
40. See, *e.g.,* East Hartford v. East Hartford Bridge Co., 51 U.S. (10 How.) 536 (1850).

decisions was accepted and applied approvingly. The philosophical basis for these decisions was no longer invoked, but since natural law was an integral part of these precedents, the Taney Justices, by adherence to stare decisis, gave tacit approval to it.[41] Since the purpose of the invocation of natural law, the broadening of the scope of the contract clause, had been accomplished, further invocation of the philosophy was unnecessary.

It was not until the closing decade of the Taney Court era that the philosophical antithesis of natural law, Benthamite utilitarianism, began to exert limited influence in the Court's interpretative process. By this time the opportunity for direct utilization of Bentham's ideas to attack the natural law foundation for the doctrine of vested rights was, for practical purposes, lost. However, late in the Taney Court period, the appointive process brought to the high bench a supporter of broader state control of property and business who was quite capable of ingenious application of Benthamite philosophy to the bitter issues of contract clause interpretation. This was the successor to Justice McKinley, John Archibald Campbell of Alabama.

The Intellectual Attributes of Justice Campbell

Throughout American history, the men who have been chosen as members of the Supreme Court have, with very few exceptions, been well educated. But few of these appointees could in any true sense be referred to as possessors of a broad education in political and legal theory and an intellectual attitude of deep philosophic understanding. In the twentieth century perhaps only Oliver Wendell Holmes and Benjamin N. Cardozo would qualify. Over a century ago, such a man was appointed as associate justice in the midst of a period singularly unsuited for the retention of philosophic detachment—the decade before the outbreak of the Civil War.[42]

John Archibald Campbell possessed an unusual combination of abilities. At the time of his appointment in 1853, he was referred to as one of the most distinguished lawyers of his time. He was (and in fact still is) the only Justice who was appointed by a President upon the advice of all of the members of the Supreme Court. And of particular significance to this study, he was reputed to have

41. As a matter of fact where fundamental differences arose over the property right of slavery, a propensity to invoke natural law manifested itself; Justice McLean, for example, in Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 508 (1841), argued that, "Each state has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population . . . . The right to exercise this power, by a state, is higher and deeper than the Constitution."

42. For a different view of Campbell's intellectual qualities, see TWISS, LAWYERS AND THE CONSTITUTION 44 (1942). Twiss concludes that Campbell's "mind was clear in its conceptions but without imagination, being massive rather than analytical."

(and to have used intensively) the most extensive private law library in America.[43] Today, when Campbell is referred to at all, it is generally his remarkable rise to professional eminence after the Civil War and his arguments as counsel in behalf of the butchers of New Orleans in *The Slaughterhouse Cases*[44] that are cited. His intellectual accomplishments on the Supreme Court in the years 1853-1861 were almost immediately overshadowed by the Civil War. As an individual, Campbell was not a popular figure. His public advocacy of measures to better the conditions of slaves, his liberation of his own slaves upon his acceptance of the associate justiceship, and his pre-Civil War opposition to secession embittered many Southerners, while his resignation from the Supreme Court and coldly-received services to the Confederacy scarcely endeared him to the victorious Northerners.[45]

Perhaps the best measure of Campbell's erudition is the quality of his judicial pronouncements and the scope of his knowledge of continental European as well as English jurisprudence. His mastery of civil law was unmatched on the Court. His familiarity with Roman and Canon law,[46] with the contributions of Savingy and the French commentators Pardesses, Lorce, Boulay, Paty and Pothier,[47] and with English legal history clearly made Campbell unique among his contemporaries on the Supreme Court. In his dissent in *Jackson v. Steamboat Magnolia*,[48] Campbell wrote an extensive and lucid analysis of English legal history which directly challenged the virtual intellectual monopoly in this field of the late Justice Joseph Story. A measure of the felicity of Campbell's literary style is present in his acid comment—"The opinion of Justice Story, in the cause of *Delovio v. Boit*, is celebrated for its research, and remarkable . . . for its boldness in asserting novel conclusions, and the facility with which authentic historical evidence that contradicted them is disposed of."[49]

Campbell's utilitarian spirit revealed itself in many judicial pronouncements which did not involve direct citation of Bentham or his disciples. Campbell's analysis of the principle of res judicata in *Washington, Alexandria and Georgetown Steam Packing Company v. Sickles*[50] is illustrative. In his dissents in *Jackson v. Steamboat Mag-*

43. CONNOR, JOHN ARCHIBALD CAMPBELL 16-20 (1920); 3 DICTIONARY OF AMERICAN BIOGRAPHY, 456-59 (1929).
44. 83 U.S. (16 Wall.) 36 (1872).
45. CONNOR, *op. cit. supra* note 43 at 192-98; Duncan, *John Archibald Campbell*, 5 TRANSACTIONS ALA. HIST. SOC'Y 107, 110 (1904).
46. See Washington, Alexandria and Georgetown Steam Packing Co. v. Sickles, 65 U.S. (24 How.) 333 (1860).
47. See Campbell's analysis of Roman law and modern continental civil law in Executors of McDonogh v. Murdock, 56 U.S. (15 How.) 367 (1853). See also his opinion for the Court in Wanzer v. Truly, 58 U.S. (17 How.) 584 (1854); and his dissent in Dupont de Nemours v. Vance, 60 U.S. (19 How.) 162 (1856).
48. 61 U.S. (20 How.) 296 (1857).
49. *Id.* at 336.
50. 65 U.S. (24 How.) 333 (1860).

nolia[51] and *Dodge v. Woolsey*,[52] Campbell drew upon the writings of Bentham's disciple, Sir John Romilly, and Bentham's legislative supporter and popularizer, Lord Brougham.[53] However, when Campbell had occasion to discuss fundamental problems of jurisprudence, such as the question of irrevocable laws, he preferred, as will be seen, to draw upon the doctrines and social analyses of Bentham himself. Like Bentham, Campbell viewed dogmatic assertions regarding doctrinal alternatives in jurisprudence simply as manifestations of ideological competition to favor or defeat various interests in society. Thus after conducting a careful analysis of English legal history regarding admiralty jurisdiction, Campbell concluded this portion of his dissent in the *Jackson* case with this characteristic ideological flourish —"The error of [Story's] . . . opinion [in *Delovio v. Boit*] . . . consists in its adoption of the harsh and acrimonious censures of discarded an discomfited civilians on the conduct of the great patriots of England, whose courage, sagacity, and patriotism, secured the rights of her people, as any evidence of historical facts."[54] However, the best example of this facet of Campbell's judicial philosophy is in the striking social analysis contained in his dissent in *Dodge v. Woolsey* which is discussed below.

Justice Campbell and Property Rights

In order to present a complete picture of Justice Campbell's contract clause interpretations, it is necessary to describe briefly his attitudes toward several judicial issues which, while not involving interpretation of the contract clause, did indicate his feelings toward property rights in general and corporation privileges in particular. In Campbell's time, the chief burden of the social regulation of property rights, corporate or otherwise, lay with the state. The chief avenues of escape from state regulation lay, conversely, in the invocation of the federal contract clause or in the establishment of federal court jurisdiction as a legal alternative to the generally more hostile state court systems. Prior to Campbell's appointment, the Taney Court had enlarged the jurisdiction of the federal courts to include corporations within the meaning of the word "citizen" in diversity of state citizenship cases arising under article III of the Constitution.[55] In *Marshall v. Baltimore & O. R.R.*,[56] Campbell opposed this opinion in a dissent which emphasized the dangers to state governments presented by corporations whose "revenues and establishments mock at the frugal and stinted

51. 61 U.S. (20 How.) 296, 324 (1857).
52. 59 U.S. (18 How.) 331, 368 (1855).
53. 1 STEPHEN, *op. cit. supra* note 12, at 186-87, 225-27.
54. 61 U.S. (20 How.) at 332-41.
55. Louisville, Cincinnati and Charleston R.R. v. Letson, 43 U.S. (2 How.) 478 (1844).
56. 57 U.S. (16 How.) 314 (1853).

conditions of state administration; [whose] pretensions and demands are sovereign, admitting, impatiently, interference by state legislative authority."

Justice Campbell's majority opinion in *Zabriskie v. Cleveland, C. & C. R.R.*[57] harbingered Louis Brandeis' modern emphasis upon the need for corporation boards of directors to assume a greater sense of moral responsibility in dealing with stockholders and the investing public. As Campbell put it,

> A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced.[58]

The contract clause issue which absorbed much of Campbell's intellectual interest and which stimulated his application of Benthamite principles to contract clause interpretation was closely related to the issues underlying the jurisdictional cases discussed above. At the heart of all these issues was the question whether the state governments, then the primary protectors of social interests, would be placed by constitutional interpretation in a position in which they would be powerless to control or regulate the predatory activities of corporations. The resolution of this question had important consequences both for the evolution of American federalism and the development of American social and economic relationships.

Of grave concern in these matters was the continued vitality of state taxing power in the face of limitations earlier imposed by the Marshall Court's decision in *New Jersey v. Wilson*.[59] This decision had established the precedent that a state, by granting exemptions, might perpetually bargain away its indispensible taxing power. Shortly after his appointment, Campbell took part in the decision of the Taney Court in *Piqua Branch of the State Bank v. Knoop*.[60] An enactment of the Ohio Legislature had changed the method of taxation of banks in a manner different from the system established in the original charters. The Court's majority ruled, in accordance with the earlier view of the Marshall Court, that the taxation provision of the bank's charter was an irrevocable contract protected against subsequent state changes by the Federal Constitution. Justices Catron, Daniel and Campbell dissented, Catron writing a separate opinion based essentially on state sovereignty. Daniel supported Campbell's more broadly based dissent.

57. 64 U.S. (23 How.) 381 (1859).
58. *Id.* at 400-01.
59. 11 U.S. (7 Cranch) 103 (1812).
60. 57 U.S. (16 How.) 369 (1854).

While Justice Campbell did not explicitly refer to Bentham in his dissent in the *Knoop* case, his attack upon the majority's position was Benthamite in spirit in its insistence upon measuring the desirability of social policy in terms of its consequences, and in its emphasis upon the treatment of property rights as relative and subject to alteration when necessary for the achievement of a more desirable social purpose. State sovereignty also received great attention, but it is significant that Campbell equated the claims of state sovereignty with social obligation and social control of corporate behavior.

Campbell first argued that application of a doctrine of immutable contract rights to tax privileges granted by a legislature was incompatible with the principle of legislative sovereignty in a free society. In this respect he pointed out that:

> The subject matter of this section [of the Ohio tax law] is the contributive share of an important element of the productive capital of the State to the support of its government. The duty of all to make such a contribution in the form of an equal and apportioned taxation, is a consequence of the social organization. The right to enforce it is a sovereign right, stronger than any proprietary claim to property. . . . [The amount, conditions and time of tax payments are left to the] discretion of the legislative authority . . . there is no promise that the same authority may not, as it clearly has a right to do, apportion a different rate of contribution. I will not say that a contract may not be contained in a law, but the practice is not to be encouraged, and courts discourage the interpretation which discovers them.[61]

The last statement regarding the attitude of courts must be categorized as a hope rather than a description of the reality of the situation, for most state courts as well as the Supreme Court under Marshall and Taney actually tended to support the sanctification of statutory taxation privileges as vested contract rights.

Campbell recognized this implicitly, and attempted, in the following statement, to develop an interpretative distinction which would enable him later to persuade the Court's majority to permit greater state legislative discretion in the withdrawal of such privileges without openly repudiating the doctrines of *New Jersey v. Wilson* and the *Dartmouth College* case.

> The whole society is under the dominion of law, and acts, which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized state must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangements of the State, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the

61. *Id.* at 407.

> conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation . . . .
>
> A plain distinction exists between the statutes which create hopes, expectations, faculties, conditions and those which form contracts. These banks might fairly hope that without a change in the necessities of the State, their quota of taxes would not be increased, and that while payment was punctually made the form of collection would not be altered. But the general assembly represents a sovereign, and as such designated this rule of taxation upon existing considerations of policy, without annexing restraints on its will, or abdicating its prerogative, and consequently was free to modify, alter, or repeal the entire disposition.[62]

The basic issue raised in the *Knoop* case was presented in different form in the case of *Dodge v. Woolsey*.[63] Here a majority of the members of the Taney Court held unconstitutional an Ohio constitutional amendment which altered the method of taxing state banking corporations. The alteration was essentially the same as that which had been attempted by state legislative action some years earlier. The latter had been held unconstitutional under the contract clause in the *Knoop* case. The court majority in the *Dodge* case held the state constitutional amendment void under the *Knoop* doctrine.

Justice Campbell's dissent in *Dodge v. Woolsey* was technically an objection to the extension of the jurisdiction of federal courts to cases involving diversity of state citizenship in which stockholders sought to enjoin actions of a corporate board of directors which were in compliance with state taxation laws. However, it contains the clearest exposition of Campbell's essentially utilitarian view that judicial policy should be determined by social utility rather than rigid adherence to the notion that certain laws are irrevocable. In developing his analysis of the social consequences of the majority opinion, Campbell drew upon the writings of Bentham's disciple, Romilly, and, as will be seen, Bentham himself. The major portion of Campbell's analysis follows:

> The proposition of this confederacy of some fifty banking corporations, having one fortieth of the property of the state, is that by the law of their organization for the whole term of their corporate being, there exists no power in the government nor people of Ohio to impair the concessions contained in the Act of 1845, particularly that determining the amount of their contribution to the public revenue . . . .
>
> In . . . [the Turkish Empire], the ecclesiastical and judicial is the dominent interest, for the Ulemas are both priests and lawyers, just as the corporate moneyed interest is dominant in Ohio, and in either country that interest claims exemption from the usual burdens and ordinary legislation of the State. The [present] judgment of this court would establish the permanent existance of such an incumbus upon the

62. *Id.* at 408.
63. 59 U.S. (18 How.) 331 (1855).

> resources and growth of that country, if that interest should have taken their privileges in the form of a contract, and had such a constitution as ours. Yet the first step for the regeneration of Turkey, according to the wisest statesmanship, is to abolish [this privileged exemption] the vakuf.
>
> Bentham, treating upon constitutional provisions in favor of contracts, says: "If all contracts were to be observed, all misdeeds would be committed, for there is no misdeed the committal of which may not be made the subject of a contract; and to establish in favor of themselves, or of any other person or persons, and absolute despotism, a set of legislators would have no more to do than to enter into any engagement . . . for this purpose." And were this to happen, should it be that a state of this Union had become the victim of vicious legislation, its property alienated, its powers of taxation renounced in favor of chartered associations, and the resources of the body politic cut off, what remedy has the people against the misgovernment? Under the doctrines of this court none is to be found in this government, and none exists in the inherent powers of the people, if the wrong has taken the form of a contract.[64]

The extension of jurisdiction approved by the Supreme Court's majority would, in Campbell's dissenting summation, "establish on the soil of every State a caste made up of combinations of men for the most part under the most favorable conditions of society, who will habitually look beyond the institutions and authorities of the State, to the central Government for the strength and support necessary to maintain them in the enjoyment of their special privileges and exemptions,"[65] a statement rather prophetic both of the post-Civil War era of the "robber barons" and of C. Wright Mills' conception of contemporary America.[66] Campbell's dissent failed to shake the majority in the *Dodge* case, but may conceivably have had persuasive influence in later decisions.

Whatever the ultimate explanation, the "plain distinction . . . between statutes that create hopes, expectations . . . and those which form contracts" which Campbell enunciated in his earlier dissent in the *Knoop* case was destined to bring limited success to his efforts to curtail the perpetuation of legislative tax privileges, for by 1860, he was able to apply this distinction in a majority opinion unanimously supported by the other members of the Taney Court. The opinion, written by Justice Campbell in *Christ Church v. County of Philadelphia*,[67] was explicitly grounded in Benthamite theory. The case concerned the following set of facts. In 1833 the Pennsylvania legislature sought to aid the Christ Church Hospital, "an asylum to numerous poor and distressed widows," by providing that,

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64. *Id.* at 370-71.
65. *Id.* at 373.
66. MILLS, THE POWER ELITE (1956).
67. 65 U.S. (24 How.) 300 (1860).

> the real property, including ground rents, now belonging and payable to Christ Church Hospital, . . . so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes.[68]

Later, in 1851, the state legislature repealed all such property tax exemptions. As a consequence, the hospital authorities attacked the repealing law as an unconstitutional violation of a "perpetual" tax exemption contract. To a great extent the arguments of counsel in the case were devoted to the question "whether the reason given for exempting the property was a legal consideration of a contract or only a motive alleged for passing the laws."

. Perhaps the most apt comparison of this decision is with the Marshall Court's *Dartmouth College decision.* Like Christ Church Hospital, Dartmouth College was a private eleemosynary institution. Both were operated for purposes other than the acquisition of profit. But where in the *Dartmouth College* case, Marshall simply assumed that a charter of incorporation is a contract,[69] Campbell, in the *Christ Church Hospital* case, turned directly to an inquiry into the motives of the state legislators, concluding that,

> The inducements that moved the Legislature to concede the favor contained in the Act of 1833 are special, and were probably temporary in their operation.[70]

The concurring opinion of Justice Story in the *Dartmouth College* case spelled out in much greater detail than the more politic Marshall the precise implications of that early decision. Consequently, a comparison of Story and Campbell on several key issues is of especial importance in establishing the ideological bases for the two cases. The Pennsylvania tax exemption of 1833 was not, of course, a portion of a corporate charter, but did represent the type of special privilege which so frequently was granted in that period by state legislatures in such charters. To a great extent Campbell's decision turned on the question of consideration; since the tax exemption was "spontaneous, and no service or duty, or other remunerative condition was imposed upon the corporation," the law did not constitute a contract but belonged to a class "denominated *privilegia favorabilia.*" Story, on the other hand, had dismissed the question of consideration, although he did claim, incidentally, that consideration was present in the Dartmouth College Charter transaction. His major position, however, was grounded firmly on Blackstone's assertion that "a gift, completely executed, is irrevocable." He also made explicit a principle implicit in Marshall's majority opinion that unless the power to revise or amend a charter is reserved by the grantor of a charter,

68. *Id.* at 301.
69. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 463, 484 (1819).
70. 65 U.S. (24 How.) 300, 303 (1860).

revision and alteration are forbidden. To repeat Story's words, "government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses."[71]

Although Campbell carefully avoided any reference to the earlier Marshall decision, his reasoning in the *Christ Church Hospital* decision was virtually a point by point refutation of Marshall and Story. Campbell argued that an interpretation supporting the view that the tax exemption was perpetual "is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth." Drawing directly upon the political theory of Bentham, Campbell observed:

> All laws for political institutions are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable; and the principle upon which all laws ought to be, and the greater part have been established, is that of defeasible perpetuity—a perpetuity defeasible by an alternation of the circumstances and reasons on which the law is founded."[72]

This virtually complete ideological reversal by the full membership of the Taney Court in 1860 was accomplished without overt objection despite the fact that a majority of the same Court had heretofore consistently applied the contract clause interpretations of Marshall and Story. Technically, the *Christ Church* case was not precisely similar to the earlier Marshall Court decisions, but intellectually, it incorporated contradictory conceptions of property rights and social obligation. The implications of possible application of Campbell's reasoning were tremendous for future corporate relations with state governments. But because of the crisis in American history precipitated by the slavery issue, Benthamite influence in the contract clause interpretations of the Supreme Court literally disappeared at the very occasion of its emergence in a majority opinion, for the outbreak of the Civil War brought Justice Campbell's resignation early in 1861.

By the time of his resignation Campbell had been considered one of the three most influential men on the Court (with Chief Justice Taney and Justice Nelson), and was known to be Taney's choice as successor to the Chief Justiceship.[73] Instead, Campbell was destined to devote his talents, during the war years, to the task of administering the draft laws of the Confederacy. Within a decade all but two members of the Taney Court that handed down the *Christ Church* decision of 1860 had died or resigned. In their places sat Justices like Stephen J. Field and Joseph Bradley who not only largely ignored the contract clause

71. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 506-533 (1819).
72. 65 U.S. (24 How.) 302-03 (1860).
73. Duncan, *supra* note 45, at 113.

interpretations of Campbell, but revived natural law as an explicit medium in constitutional interpretation,[74] and evolved a series of substantive interpretations of the due process clause of the newly adopted fourteenth amendment which proved far more effective safeguards to the rights of corporate property than anything that Marshall or Story had dreamed of.

In one of the great ironies of history, it was former Supreme Court Justice Campbell in his argument before the Supreme Court in the *Slaughterhouse Cases* who contributed significantly to the development of the very ideas so ably applied by Justices Field and Bradley.[75] As counsel for the butchers of New Orleans, Campbell was still arguing against corporate power and especially monopoly. But he recognized clearly that the states no longer represented the main bulwark of social justice against the predatory aspirations of corporations. In fact the slaughterhouse monopoly which he opposed had been bestowed by the Louisiana legislature. By implication Campbell discounted the possibility of positive intervention by the federal government, a conclusion which may have been amply justified in the era of President Grant. The logic of Campbell's position may well have suggested a retreat to natural law and the negative protection afforded by federal judicial intervention. Campbell's invocation of natural law and his appeal for "free competition in business, free enterprise . . . the absence of all spoliation of private right by public authority"[76] was not completely inconsistent with Bentham's philosophy, for Bentham himself admired the economic thought of Adam Smith.[77] Yet despite the fact that Campbell obviously directed his argument against monopoly, here public in origin, conservative justices as well as conservative lawyers seized upon his brief for interpretative purposes quite different from those espoused by Campbell when he had served on the Court. The main beneficiaries of this interpretative development were not the small businessmen, the local butchers of New Orleans, whom Campbell had sought to defend, but the very corporations which Campbell had once characterized as motivated by "a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom . . . ."[78]

The philosophy of Jeremy Bentham, which had, for a brief interlude, served as a medium for establishing a greater measure of state power to safeguard social interests in America was destined to remain for many years of remote intellectual influence in American legal

74. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 299-301 (1931).
75. TWISS, *op. cit. supra* note 42, at 42-58.
76. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 45-48 (1872).
77. STEPHEN, *op. cit. supra* note 12, at 307-09.
78. Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855).

affairs. So far as the Supreme Court was concerned, this essentially pragmatic philosophy did not have an advocate until the appointment of Associate Justice Oliver Wendell Holmes.