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David M. Rabban

# From Impairment of Contracts to Institutional Academic Freedom: The Enduring Significance of the *Dartmouth College Case*

18 U.N.H. L. REV. 9 (2019)

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Most scholarship on the *Dartmouth College* case falls into two broad categories. One category focuses on its role in the emerging legal treatment of business corporations.<sup>1</sup> Another category emphasizes that its legal differentiation of private from public universities promoted the transformation of American institutions of higher education, which had previously combined what later became identified as private and public features, into structurally dissimilar private and public universities.<sup>2</sup> Ironically, relatively little scholarship has explored the implications of the *Dartmouth College* decision for the legal regulation of higher education. That topic is the context in which the case arose and the subject of this article. Analyzing the *Dartmouth College* decision itself and subsequent decisions that cited it while addressing a fascinating variety of legal disputes at universities, I will focus on two related issues that remain vitally important in the 21st century: (1) the extent of university independence from regulation by the state, and (2) the extent to which that independence depends on the public or private status of the university.

From the *Dartmouth College* case to the present, courts have recognized that institutional independence from the state promotes public interests in education. They have provided more independence to private universities, but they have also recognized that in some circumstances even public universities should be sheltered from the state that created them. At the same time, courts have identified state interests that justify regulation of private, as well as public, universities. The legal concepts used to analyze these issues have changed over time. The constitutional provision precluding the “impairment of contracts” was the primary conceptual tool in the *Dartmouth College* case itself.<sup>3</sup> The ratification of the Fourteenth Amendment after the Civil War prompted its prohibition against various forms of “state action” to become the doctrinal vehicle for differentiating public from private universities and for determining their respective rights against the state. Judicial decisions in

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<sup>1</sup> See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 174–75* (1973); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 136–37 (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 11, 67, 106, 206 (1992); J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 66 (1956); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 106–08 (1996); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835* 627–28 (1988).

<sup>2</sup> See, e.g., John S. Whitehead & Jurgen Herbst, *How to Think About the Dartmouth College Case*, 26 *HIST. OF EDUC. Q.* 333 (1986); Eldon L. Johnson, *The Dartmouth College Case: The Neglected Educational Meaning*, 3 *J. OF THE EARLY REPUBLIC* 45 (1983); George Thomas, *Rethinking the Dartmouth College Case in American Political Development: Constituting Public and Private Educational Institutions*, 29 *STUD. IN AMERICAN POL. DEV.* 23 (2015).

<sup>3</sup> *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 588–96 (1819) [hereinafter *Dartmouth*].

recent decades declaring that universities have institutional rights of academic freedom protected by the First Amendment have provided an important new constitutional barrier to state regulation.

Henry Friendly, the eminent federal judge, lectured at Dartmouth College in 1968 during its celebration of the sesquicentennial of the famous oral argument in the *Dartmouth College* case by its distinguished alumnus, Daniel Webster. Judge Friendly used the occasion to propose a new interpretation of the “state action” provision of the Fourteenth Amendment. Asserting that Justice John Marshall’s opinion in *Dartmouth College* drew too bright a line between private and public while construing the impairment of contracts clause, Judge Friendly suggested a more flexible approach to this distinction in determining the existence of state action.<sup>4</sup> Following Judge Friendly’s example in the context of state action, at the end of this article I will use another anniversary of the Dartmouth College decision to suggest flexibility in applying the First Amendment’s protection of institutional academic freedom to public and private universities.

## I. THE DARTMOUTH COLLEGE DECISION

Amendments by the New Hampshire legislature to the original charter of Dartmouth College provoked the litigation that ultimately reached the United States Supreme Court. The amendments gave the governor power to appoint members to an enlarged board of trustees and to a new board of overseers with control over the trustees.<sup>5</sup> The existing trustees challenged this legislation in state court. The court rejected their claim that the amendments constituted an unconstitutional impairment of the contract created by the original charter. The impairment of contracts clause, it maintained, was clearly intended to protect private rights of property, not to limit the power of states over “civil institutions,”<sup>6</sup> such as “public corporations.” The key question for the court, therefore, was whether Dartmouth College was a private or a public corporation.<sup>7</sup> Based on its reading of the original charter of Dartmouth College from the British King in 1769, the court stated that it “was founded for the purpose of ‘spreading the knowledge of the great Redeemer’ among the savages and of furnishing ‘the best means of

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<sup>4</sup> H. Friendly, *The Dartmouth Case and the Public-Private Penumbra*, XII, No. 2 TEXAS QUARTERLY 10–11 (1971).

<sup>5</sup> *Dartmouth*, 17 U.S. at 626.

<sup>6</sup> Trustees of Dartmouth Coll. v. Woodward, 1 N.H. 111, 132 (1817) [hereinafter *Woodward*].

<sup>7</sup> *Id.* at 115.

education' to the province of New-Hampshire."<sup>8</sup> These purposes, the court concluded, are clearly matters of substantial public concern in which the trustees have no greater interest than any other members of the community.<sup>9</sup>

The decision concluded by emphasizing that its legal analysis promoted the public interest in education. After highlighting the need to maintain the "just rights and privileges" of universities, the court expressed concern about the unchecked power of university trustees.<sup>10</sup> Higher education, the court reasoned, "is a matter of too great moment, too intimately connected with the public welfare and prosperity," to be entrusted to the "absolute control of a few individuals, and out of the control of the sovereign power."<sup>11</sup> It warned that independent trustees:

will ultimately forget that their office is a public trust—will at length consider these institutions as their own—will overlook the great purposes for which their powers were originally given, and will exercise them only to gratify their own private views and wishes, or to promote the narrow purposes of a sect or a party.<sup>12</sup>

Interestingly, the 1915 Declaration of Principles on Academic Freedom, the foundational document of the American Association of University Professors (AAUP) and still the most influential theoretical analysis of academic freedom in the United States, used very similar language in addressing the dangers posed by university trustees, although there is no evidence of any borrowing from this decision. Asserting that private as well as public universities constitute a "public trust," the Declaration stressed that their trustees are "trustees for the public."<sup>13</sup> After acknowledging that many university trustees fulfilled this role, the Declaration observed that many did not, but instead used their legal power to dismiss faculty "to gratify their private antipathies or resentments."<sup>14</sup> The New Hampshire court conceded that legislative power, like any power, may be unwisely exercised, but concluded that there was no better alternative: "If those whom the people annually elect to manage their public affairs, cannot be trusted," it asked rhetorically, "who can?"<sup>15</sup>

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<sup>8</sup> *Id.* at 119.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 135.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 136.

<sup>13</sup> American Association of University Professors, The 1915 Declaration of Principles, *in* ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 155, 160 (Louis Joughin ed., 1967).

<sup>14</sup> *Id.*

<sup>15</sup> *Woodward*, 1 N.H. at 137.

The United States Supreme Court reversed. Chief Justice Marshall's majority opinion agreed with the New Hampshire court that the impairment of contracts clause applies only to private property and not to "civil institutions," but he disagreed with its conclusion that Dartmouth College was a civil institution. He acknowledged that "education is an object of national concern, and a proper subject of legislation."<sup>16</sup> A legislature could create a university entirely under its control, which would be a civil institution. But he rejected the claim that all colleges are civil institutions simply because their general purpose is education. This position, he pointed out, would treat education as an exclusive function of government, making all teachers public officers, all donations public property, and the will of the legislature paramount to the will of the donor.<sup>17</sup> He observed that Dartmouth College was funded entirely from private donations at the time of its founding and incorporation,<sup>18</sup> and denied that a charter of incorporation from the state automatically creates a civil institution.<sup>19</sup> He doubted that any private donor would endow a college if the state could control its funds immediately upon incorporation.<sup>20</sup> Having determined that Dartmouth College was a private rather than a civil institution, Marshall concluded that the New Hampshire legislation violated the impairment of contracts clause by transferring control of the college from the self-perpetuating private board of trustees guaranteed by the original charter to "a machine entirely subservient to the will of the government."<sup>21</sup>

While reaching a different constitutional conclusion than the New Hampshire Supreme Court, Chief Justice Marshall similarly maintained that his legal analysis promoted the interests of higher education and that those interests require freedom from external interference. But whereas the New Hampshire court worried about interference from self-interested trustees, Marshall referred to the pernicious influence of legislative bodies "whose fluctuating policy and repeated interferences, produced the most perplexing and injurious embarrassments."<sup>22</sup> In contrast to the New Hampshire court, which recognized the potential abuse of legislative power while concluding that it posed a lesser threat to universities than the trustees, Marshall did not address the potential abuse of power by trustees even

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<sup>16</sup> *Dartmouth*, 17 U.S. at 634.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 633.

<sup>19</sup> *Id.* at 638–39.

<sup>20</sup> *Id.* at 647.

<sup>21</sup> *Id.* at 653.

<sup>22</sup> *Id.* at 648.

as a lesser threat than legislative interference. Justice Joseph Story's concurring opinion did respond to this concern by pointing out that a court of equity has jurisdiction to remedy abuses of trust and can even remove the trust and vest it in others.<sup>23</sup> The New Hampshire court, by contrast, had denied the efficacy of judicial review, claiming that many abuses by trustees can be corrected "by the sovereign power alone."<sup>24</sup>

Story's concurring opinion is particularly helpful in elaborating Marshall's conclusion that the public interest in education does not justify categorizing all universities as civil institutions. He acknowledged that "in a certain sense, every charity, which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects."<sup>25</sup> Under this interpretation, he observed, a university is a public charity whenever it offers its charitable purpose of promoting learning and piety to a broad community.<sup>26</sup> But he stressed that a public charity is often a private corporation. The assumption that "because the charity is public, the corporation is public," he declared, "manifestly confounds the popular with the strictly legal sense of the terms."<sup>27</sup> In the legal sense, a public corporation means more than "that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure."<sup>28</sup> A public corporation, he added, must be "the exclusive property and domain of the government itself."<sup>29</sup>

Story maintained that the original charter for Dartmouth College created a private corporation endowed with legal perpetuity and subject to governance by a board of trustees whose successors would be appointed by the existing board.<sup>30</sup> Under the terms of the charter, the land and property held and subsequently acquired by the board, including from the states of Vermont and New Hampshire, were for the use of Dartmouth College in promoting piety and learning, not for the more general use of the people of New Hampshire.<sup>31</sup> Story observed that the charter

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<sup>23</sup> *Id.* at 676–77.

<sup>24</sup> *Woodward*, 1 N.H. 111, 136 (1817).

<sup>25</sup> *Dartmouth*, 17 U.S. at 670.

<sup>26</sup> *Id.* at 669.

<sup>27</sup> *Id.* at 671.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 672.

<sup>30</sup> *Id.* at 681–82.

<sup>31</sup> *Id.* at 702.

provided no endowment from the crown and did not reserve any power of amendment in the crown.<sup>32</sup> This charter, Story reasoned, created an implied contract between the crown and every benefactor to Dartmouth College “that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation.”<sup>33</sup> The American Revolution, he added, did not alter the validity of the original charter.<sup>34</sup>

Despite the disagreement between the New Hampshire court and the Supreme Court about the application of the impairment of contracts clause, the *Dartmouth College* litigation revealed two key areas of agreement that would continue to be endorsed by American courts in cases arising at colleges and universities. Both courts stressed that higher education serves the vital social function of diffusing knowledge, which is essential to the effective operation of American society. Both also stressed that external interference can jeopardize the ability of universities to perform this central institutional function. Their differing interpretations of the impairment of contracts clause reflected their disagreement over the source of the greatest threats to the necessary independence of universities. Viewing trustees as the greatest threat, the New Hampshire court did not construe the clause as a barrier to legislative checks on their power. Viewing legislators as the greatest threat, the Supreme Court construed it to limit their ability to intervene in university affairs.

## II. DECISIONS FOLLOWING THE *DARTMOUTH COLLEGE* CASE

Throughout the 19th century, subsequent decisions about universities cited the Dartmouth College case while reinforcing and elaborating its holding. They expanded the definition of a private college, and restricted the ability of trustees themselves to deviate from the purposes of the original charter. They upheld the power of states to create and control public universities, but they identified circumstances in which states granted substantial autonomy even to these universities. Decisions also upheld state laws of general applicability that restricted both private and public universities whose charters guaranteed independence to make educational decisions.

In an 1833 opinion holding that the Maine legislature violated the impairment of contracts clause by firing the president of Bowdoin College, Story, sitting as a Circuit Justice, relied heavily on the *Dartmouth College* decision. The fact that

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<sup>32</sup> *Id.* at 680.

<sup>33</sup> *Id.* at 689.

<sup>34</sup> *Id.* at 706–07.



Bowdoin, unlike Dartmouth, had received its original funding from the state made no difference to Story. The state, he pointed out, can choose to fund private as well as public corporations.<sup>35</sup> He also observed that Bowdoin College, as its charter permitted, had subsequently received money from private donors.<sup>36</sup> Story conceded that the *Dartmouth College* decision allowed a state to reserve rights to intervene in a private college, and that Bowdoin's charter, unlike Dartmouth's, gave substantial power to the legislature. But he asserted that this admittedly "very broad" power was not "unlimited" and did not extend to the right to fire the president.<sup>37</sup> Although the Bowdoin board of trustees had "acquiesced" in the legislature's decision, Story maintained that it could not "give effect to an unconstitutional act" and abrogate its contract with the president.<sup>38</sup> At the end of his opinion, Story expressed regret that the dispute had reached the judiciary. While emphasizing the importance of the vested rights of private colleges, he also recognized the "extreme difficulty" of operating one without the support of the state, which might be reluctant to provide funds when it does not have confidence in the president.<sup>39</sup> He clearly hoped that his legal analysis would not undermine continued state support of private universities that were largely beyond the state's power to control.

Other decisions followed Story's reasoning in the Bowdoin College case. A Kentucky appellate court in 1855 found that the endowment provided by the City of Louisville did not make the University of Louisville a public corporation. The court emphasized that the charter establishing the university did not give the city any rights to intervene in its management or to revoke the endowment. If the city had wanted its donation to give it control over the university, the court observed, it should have bargained for that power in the charter before it made the donation. Otherwise, the law treats donations to universities from municipal corporations no differently than donations from private individuals.<sup>40</sup> The court invalidated as an unconstitutional impairment of contract<sup>41</sup> a new charter enacted by the City of Louisville that provided for popular election of an entirely new and enlarged board of trustees.<sup>42</sup>

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<sup>35</sup> *Allen v. McKean*, 1 F. Cas. 489, 497 (C.C.D. Me. 1833).

<sup>36</sup> *Id.* at 498.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 502.

<sup>39</sup> *Id.* at 503–04.

<sup>40</sup> *Louisville v. President and Trustees of the Univ. of Louisville*, 54 Ky. 642, 679 (Ct. App. Ky. 1855).

<sup>41</sup> *Id.* at 694.

<sup>42</sup> *Id.* at 663–67.

Reiterating that subsequent ratification by a university's trustees cannot validate legislative amendments that are inconsistent with the institution's charter, a decision by the Missouri Supreme Court in 1869 stated that trustees "can govern only according to the conditions of the foundation."<sup>43</sup> The court held that a legislative amendment requiring the concurrence of "an ecclesiastical body representing one of the religious denominations of the State" in the choice of college trustees was an unconstitutional impairment of contract because it endangered the purpose of the college set forth in its charter.<sup>44</sup> The court characterized this purpose "as an institution purely literary, affording instruction in ancient and modern languages, the sciences and the liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology."<sup>45</sup> Yet it stressed that the decision did not absolutely prohibit any modifications to the original provisions of a college charter, asserting that "strict adherence to all the formal requirements of a foundation might defeat its object,"<sup>46</sup> and observing that trustees have a right to alter the curriculum of a college based on changes in the conditions of knowledge. It maintained that "if in centuries past the founder of a college had enumerated alchemy and astrology among its studies, the study of chemistry and astronomy might be deemed a truer compliance with the object of the charity."<sup>47</sup>

As Story had pointed out in his *Dartmouth College* opinion, the requirement that trustees adhere to the original purposes of the trust, while functioning as a check on legislative interference with universities permitted judges to intervene in university affairs if they determined that the existing board had deviated from those purposes.<sup>48</sup> In 1925, the Supreme Judicial Court of Massachusetts invalidated a plan for a closer affiliation between the Andover Theological Seminary and the Harvard Divinity School because it would have transformed Andover into a different institution than contemplated by its founders. Emphasizing that Andover was established in 1805 to protest the dominance of Unitarianism at Harvard, the court described Andover's founding document as displaying "a settled and deliberate purpose to confine the donation to the maintenance of an institution for the

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<sup>43</sup> State ex rel. Pittman v. Adams, 44 Mo. 570, 582 (1869).

<sup>44</sup> *Id.* at 578.

<sup>45</sup> *Id.* at 574.

<sup>46</sup> *Id.* at 581.

<sup>47</sup> *Id.*

<sup>48</sup> *Dartmouth*, 17 U.S. 518, 676 (1819).

propagation of Calvinist orthodox trinitarianism.”<sup>49</sup> Because the document did not provide for significant modifications to these religious principles, the court considered itself obligated to enforce them despite evidence that the differences between trinitarians and unitarians had dissipated so much over the intervening hundred years that were only matters of historical interest.<sup>50</sup> In an article entitled *Education and the Dead Hand*, written a few years before this decision, the great scholar of trust law, Austin Scott, acknowledged that college trustees cannot deviate from the purposes of the original trust. But he urged courts to approve changes made by trustees that “are not unreasonable in view of the general purposes of the donors and of the changes that time has brought to pass,” such as the elimination of religious requirements.<sup>51</sup> He worried that courts would construe the *Dartmouth College* decision more rigidly than it required, which would “eventually create an intolerable situation” by obstructing valuable “educational reform.”<sup>52</sup>

While many subsequent decisions elaborated the distinction between private and public universities in the *Dartmouth College* case to create a broad definition of private universities, other courts applied the distinction to identify public universities over which the state had substantial control. In 1871, the Supreme Court of Missouri differentiated Dartmouth College, a “private corporation,” from the State University of Missouri. In founding the state university, the legislature established its own institution, “a public corporation for educational purposes,” and “provided for its control and government, through its own agents and appointees.”<sup>53</sup> The power vested in the board of curators “was made subject to the pleasure of the Legislature.”<sup>54</sup> In contrast to the origins of Dartmouth College, the court observed, the legislature did not contract with private parties in creating the university, so there was no contract to impair.<sup>55</sup> Just as some cases held that public funding did not make private universities public, this decision held that private contributions to the university’s original building fund did not make a public university private.<sup>56</sup> Finding that the legislature had the power to pass a law firing the entire faculty, the court denied a professor’s suit for lost salary. The Supreme Court of Wyoming used

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<sup>49</sup> Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 253 Mass. 256, 265 (1925).

<sup>50</sup> *Id.* at 294.

<sup>51</sup> Austin W. Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 17 (1920).

<sup>52</sup> *Id.* at 19.

<sup>53</sup> Head v. Curators of the Univ. of the State of Mo., 47 Mo. 220, 224–25 (1871).

<sup>54</sup> *Id.* at 224.

<sup>55</sup> *Id.* at 225–26.

<sup>56</sup> *Id.* at 225–26.

similar reasoning in 1906 to find that the Wyoming Agricultural College met the definition of a public university in the *Dartmouth College* case. The court, therefore, upheld the power of the state legislature to close this institution.<sup>57</sup> Decisions in other states held that legislatures had the power to remove the boards of trustees of public universities and appoint successors.<sup>58</sup>

Occasionally, courts indicated constraints on the power of state legislatures even over public universities. Not all universities that are “public corporations,” the Supreme Court of Alabama held in 1905, are “under the absolute control of the state.” The court found that the charter of the Medical College of Alabama, a public corporation, gave its self-perpetuating board of trustees entire control over its management. The board could change the curriculum or close the college entirely, although the legislature could amend the charter to place the Medical College under its absolute control.<sup>59</sup> In 1879, the Supreme Court of California quoted from the legislation creating the University of California, which provided that each college within the university could regulate its own affairs, including the curriculum and teaching materials.<sup>60</sup> While not necessary to the resolution of the case before it, the court seemed to interpret this language as a grant of power over these subjects by the legislature to the university.

Although courts provided substantial independence from legislative control to private and even to some public universities, decisions also upheld general legislation that both private and public universities challenged as illegal interference in their internal affairs. In 1838, a Maryland appellate court rejected the claim by the board of trustees of the University of Maryland that legislation establishing a state board of examiners to license physicians violated the charter granting the college of medicine the authority to award diplomas and certificates to practice medicine. The court concluded that the legislation was a “general police regulation” within the “political power” of the state, which was enacted “to shield the community from the pernicious effects of the ignorance of unskillful pretenders.”<sup>61</sup> Nothing in the charter of the medical school, the court stressed, indicated that the state gave up and transferred this “inviolable right to that political power.”<sup>62</sup>

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<sup>57</sup> State ex rel. Wyo. Agric. Coll. v. Irvine, 84 P. 90, 96–97, 108 (Wyo. 1906).

<sup>58</sup> See, e.g., Lewis v. Whittle, 77 Va. 415, 424 (Va. 1883); State v. Knowles, 16 Fla. 577, 596 (Fla. 1878); Univ. of N.C. v. Maultsby, 43 N.C. (8 Ired. Eq.) 257, 263–64 (N.C. 1852).

<sup>59</sup> State ex rel. Med. Coll. of Ala. v. Sowell, 143 Ala. 494, 500–01 (Ala. 1905).

<sup>60</sup> Foltz v. Hoge, 54 Cal. 28, 32 (1879).

<sup>61</sup> Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 390–91 (Md. 1838).

<sup>62</sup> *Id.* at 391.

Similarly, the Supreme Court of Missouri, in its 1869 decision finding that legislation introducing ecclesiastical influence violated the original charter of a college, rejected the claim by the college trustees that the legislation also violated the charter by requiring an oath of loyalty to the union during the Civil War. The “duty of loyalty,” the court reasoned, “is antecedent, perpetual, paramount—and in granting a charter the State can make no engagement to dispense with that duty.”<sup>63</sup>

In its 1879 decision recognizing the substantial autonomy of the University of California over its educational decisions, the Supreme Court of California interpreted legislation in the state’s “political code,” which provided that “words used in the masculine gender comprehend as well the feminine gender,” as giving females the right to attend the University of California.<sup>64</sup> The court rejected the claim by the board of the University’s Hastings College of Law that the requirement to admit women violated its power under the charter to admit students.<sup>65</sup> While acknowledging that this power includes discretion to determine “who, for any sufficient reason, ought not to be admitted,” the court denied that the board had unlimited discretion to violate general laws and to reject any student “who does not possess some qualification arbitrarily selected by them.”<sup>66</sup>

The Supreme Court’s conclusion in 1908 that a state law prohibiting integrated classes did not violate the charter granting Berea College authority to educate “all persons”<sup>67</sup> is another example of how judicial enforcement of general legislation limited institutional independence. The college, which taught integrated classes, was convicted for violating this law and fined \$1000.<sup>68</sup> The majority reasoned that the law only separated the students “by time and place of instruction,” which did not prevent the College from furnishing an education to all of them.<sup>69</sup>

### III. STATE ACTION

In the decades following World War II, the distinction between private and public universities introduced in the *Dartmouth College* case became crucial in judicial interpretation of the “state action” requirement of the Fourteenth Amendment. Ratified in 1868 in response to the Civil War, the Fourteenth

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<sup>63</sup> State ex rel. Pittman v. Adams, 44 Mo. 570, 584 (1869).

<sup>64</sup> Foltz, 54 Cal. at 35.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 34.

<sup>67</sup> Berea Coll. v. Kentucky, 211 U.S. 45, 56 (1908).

<sup>68</sup> *Id.* at 53.

<sup>69</sup> *Id.* at 57.

Amendment provided that “[n]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>70</sup> After Supreme Court decisions following World War II expanded the concept of “state action” subject to the restrictions of the Fourteenth Amendment, judges analyzed whether nominally private universities had engaged in “state action.” Several decisions observed that the distinction between private and public universities introduced in the *Dartmouth College* case remained crucial in determining the existence of state action. More specifically, some of the same factors 20th century courts rejected as indicators of state action had been rejected as indicators of public university status in the *Dartmouth College* case and subsequent decisions interpreting the impairment of contracts clause.

Although Judge Friendly urged a more flexible interpretation of “state action” than the rigid distinction between private and public institutions set forth by Marshall while construing the impairment of contracts clause in the *Dartmouth College* case, shortly after his lecture he wrote a decision denying that the grant of state property to assist in the construction of a law school converted it from a private to a public institution. He pointed out that the *Dartmouth College* case, “although not, of course, directly in the context of ‘state action,’” was the first important decision that differentiated private from public universities, and that the substantial grants of land to Dartmouth by the states of Vermont and New Hampshire did not prevent the Court from concluding that Dartmouth was a private university.<sup>71</sup> Without referring again to the *Dartmouth College* decision, Friendly also maintained that the “public function” of universities in offering education does not constitute “state action.” This reasoning resembles the conclusion of Justices Marshall and Story that the public interest in higher education does not make universities public institutions.<sup>72</sup> Citing the *Dartmouth College* case, other decisions denied that public funding for programs and capital expenditures,<sup>73</sup> the general public interest in higher education,<sup>74</sup> or the receipt of a charter from the state<sup>75</sup> subjected universities to the requirements of state action. Because courts did not find state action under these circumstances, they did not address the constitutional claims by a professor that he was fired in retaliation for

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<sup>70</sup> U.S. CONST. amend. XIV, § 1.

<sup>71</sup> *Grafton v. Brooklyn Law Sch.*, 478 F.2d 1137, 1141 (2d Cir. 1973).

<sup>72</sup> *Id.* at 1141–42.

<sup>73</sup> *Remy v. Howard Univ.*, 55 F. Supp. 2d 27, 28–29 (D.D.C. 1999).

<sup>74</sup> *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 403, 409 (Sup. Ct. 1962).

<sup>75</sup> *Greenya v. George Washington Univ.*, 512 F.2d 556, 560 n. 4 (D.C. Cir. 1975).

articles he had published,<sup>76</sup> or by students that they were dismissed for their unpopular speech<sup>77</sup> or free exercise of religion.<sup>78</sup> In a rare decision concluding that a previously private university had become public and, therefore, within the scope of state action, a judge found that Temple University had been integrated into the state system of higher education. Based on this finding, he reversed the summary judgment against professors who claimed that the university dismissed them for exercising rights protected by the Fourteenth Amendment. Discussing the *Dartmouth College* decision at length, the judge conceded that a college does not become a public institution simply because the state charters it or conveys real property to it. But he maintained that if Dartmouth had received the amount of funding provided to Temple by the state of Pennsylvania, Marshall would have characterized Dartmouth as a public institution.<sup>79</sup>

#### IV. INSTITUTIONAL ACADEMIC FREEDOM

Just as Judge Friendly used a previous anniversary of the *Dartmouth College* case to propose a flexible interpretation of the distinction between private and public institutions in defining the “state action” provision of the Fourteenth Amendment, I will close by proposing that this distinction should sometimes, but not always, influence interpretation of the First Amendment right of institutional academic freedom. Understandably, scholarly and judicial discussion of institutional academic freedom generally do not differentiate between public and private universities. Government funding,<sup>80</sup> like government employment,<sup>81</sup> does not extinguish First Amendment rights to academic freedom. Correspondingly, scholarship and legal decisions do not differentiate between public and private universities while recognizing government interests that can outweigh institutional academic freedom, such as national security, public health, and the protection of constitutional rights to free speech and statutory rights against employment discrimination. Yet I believe that on some matters that have educational implications the state has more legitimate control over its own universities than over private ones, leaving public universities with less institutional academic freedom.

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<sup>76</sup> *Id.* at 562.

<sup>77</sup> *See, e.g., Grafton*, 478 F.2d at 1142; *Remy*, 55 F. Supp. at 31.

<sup>78</sup> *See, e.g., Carr*, 231 N.Y.S.2d at 409.

<sup>79</sup> *Issacs v. Bd. of Trustees of Temple Univ.*, 385 F. Supp. 473, 493–95 (E.D. Pa. 1974).

<sup>80</sup> *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

<sup>81</sup> *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 508 (1968).

Institutional academic freedom should protect public as well as private universities from legislation that regulates the content of teaching and scholarship. The classic early Supreme Court cases that identified academic freedom as a First Amendment right arose at state universities. They convincingly asserted that the First Amendment prohibits legislation requiring disclosure of the contents of a classroom lecture<sup>82</sup> or interfering with the assignment and classroom discussion of controversial views.<sup>83</sup> It is in this context that Justice Felix Frankfurter laid the foundation for the First Amendment right to institutional academic freedom by emphasizing that “the dependence of a free society on free universities” requires “the exclusion of governmental intervention in the intellectual life of a university.”<sup>84</sup> Legislation prohibiting universities from teaching evolution<sup>85</sup> or requiring them to teach “creation science”<sup>86</sup> should similarly be deemed violations of institutional academic freedom at both public and private universities because they preempt the expertise of peer review in determining whether a theory meets academic standards. Legislation that conditions research grants to professors and universities on the right of government officials to approve publication also violates the institutional academic freedom of both public and private universities. The federal case that raised this issue arose at Stanford,<sup>87</sup> a private university, but the result should not be different at the public University of California. In addition to safeguarding teaching and scholarship, First Amendment academic freedom should protect the institutional right of public as well as private universities to select faculty and students on academic grounds without state interference.

Just as First Amendment academic freedom should protect some core educational functions of both public and private universities from state interference, some state interests are substantial enough to justify laws that constrain both public and private universities even though educational functions may be affected. State interests in national security may justify laws restricting dissemination of academic research that would reveal the details of military operations during wartime or how to produce dangerous weapons. State interests in public health may justify laws restricting research using toxic chemicals or endangering human subjects. State interests in preventing discrimination may

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<sup>82</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 248–50 (1957).

<sup>83</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 597–604 (1967).

<sup>84</sup> *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

<sup>85</sup> *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>86</sup> *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987).

<sup>87</sup> *See Bd. of Trustees of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991).



justify laws limiting university discretion over student admissions and faculty employment. State interests in protecting peaceful expression or in preventing incitement to unlawful violence may justify laws regulating campus speech. State interests in preventing fraud may justify state scrutiny of the educational claims and programs of universities. More controversial assertions of state interests have arisen in connection with federal legislation denying funds to universities that restrict military recruitment<sup>88</sup> and state legislation permitting concealed weapons in class,<sup>89</sup> but the weight of the state interests in these cases does not vary between public and private universities.

Other state interests, by contrast, seem within the state's authority to regulate public, but not private, universities. State legislators often fund various institutions of higher education with quite different goals and programs, including research universities, community colleges, liberal arts colleges, agricultural universities, and medical schools. Insufficient legislative funding can lead to the elimination of faculty positions, and legislatures can decide to end funding entirely for institutions of higher education they previously established. These legislative decisions clearly limit the freedom of state colleges and universities to determine "who may teach," "what may be taught," and "who may be admitted to study," which courts have recognized as key elements of academic freedom.<sup>90</sup> Yet no one has ever maintained that these decisions violate a public university's institutional academic freedom, and it is difficult to imagine convincing arguments that they do. A legislature's determination of the kinds of institutions of higher education and the extent of their funding seems clearly within its legitimate power. These arguments for legislative authority do not apply to private universities, whose decisions about their educational goals and programs should be protected by institutional academic freedom from state interference.

Some states require that certain courses be taught in its public universities. The Texas education code, for example, requires that all its public universities offer a course covering the United States and Texas constitutions<sup>91</sup> and a course in American history.<sup>92</sup> Imposing these course requirements clearly affects "what may be taught." But just as the legislative designation of an "agricultural" university

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<sup>88</sup> See, e.g., *Rumsfeld v. Forum for Academic and Individual Rights, Inc.* 547 U.S. 47 (2006).

<sup>89</sup> See, e.g., *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018).

<sup>90</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, concurring). Frankfurter's concurrence is the first judicial use of this language, which has frequently been cited in subsequent decisions.

<sup>91</sup> TEX. EDUC. CODE ANN. § 51.301 (West 2012).

<sup>92</sup> *Id.* at § 51.302.

affects “what may be taught” without violating institutional academic freedom, I think the imposition of particular courses to promote the public interest in civic education is a legitimate interest of a state legislature that does not violate the institutional academic freedom of a state university. The state interest in civic education, by contrast, seems weaker with respect to private universities, which should have more discretion in determining for themselves the values they wish to promote. Requiring that public universities enroll at least a certain percentage of state residents in each entering class of students similarly seems a legitimate legislative regulation even though it constrains the university’s ability to select its student body on academic grounds. The state has a strong interest in spending its money to educate its own residents, an interest that does not apply to privately funded universities within the state.

Either in prohibiting or requiring affirmative action, I think a legislature should be able to regulate public more than private universities. Affirmative action raises broad issues of public policy that are matters of legitimate legislative concern. While I agree with Justice Lewis F. Powell’s famous opinion in *Regents of the University of California v. Bakke*<sup>93</sup> that the institutional academic freedom of universities, including public ones, should include the right to make decisions about the educational value of affirmative action, I do not think a public university should be able to invoke this right if the state has legislated on this subject. No such legislation existed at the time of the *Bakke* case in 1978, and Justice Powell’s opinion did not reach this issue. Subsequent cases have upheld state laws prohibiting affirmative action in public universities,<sup>94</sup> and judges should similarly uphold state laws that require it. By contrast, because I think there is less public interest in the affirmative action policies of private universities, I would recognize their institutional academic freedom to make educational policy on this issue free from state interference. Under this analysis, a state law on affirmative action could be valid as applied to public universities but unconstitutional as applied to private universities.

Examples could easily be multiplied, but I hope these are sufficient to demonstrate the complexity of assessing university claims that the First Amendment right of institutional academic freedom precludes government regulation. These examples should also illustrate that the importance of the distinction between public and private universities in determining the extent of their independence from the state, which was at the core of the analysis in the *Dartmouth College* case, remains significant two hundred years later.

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<sup>93</sup> 438 U.S. 265, 311–13 (1978).

<sup>94</sup> See, e.g., *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).