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Private Universities: The Right to Be Different

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PRIVATE UNIVERSITIES: THE RIGHT TO BE DIFFERENT

Chief Justice John Marshall, in the *Dartmouth College Case*,[1] set the precedent for the unique position that private universities hold in our educational and social systems. Education, he said, when engaged in by private institutions, is fundamentally a private activity. These institutions "do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant."[2] Private universities were free to make decisions based on their own priorities even though operating with aid from the state government, for "money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government."[3] Thus, the strict independence of private universities from governmental control was established.

This decision has never been overturned, and what the Chief Justice said in 1819 has been especially important in fostering judicial restraint regarding the activities of private universities. Yet, some courts in recent years have found cause to enter the academic community by applying the ubiquitous "state action" doctrine. They have reasoned that the totality of governmental financial aid, chartering, and regulation have created such a close relationship that private universities are in effect an extension of the state government. Thus, they are subject to the sanctions of the fourteenth amendment.[4]

These decisions may ultimately provide an intolerable strain on the continuation of private higher education. Judge Friendly has conceded that Chief Justice Marshall may have "made things too easy for himself."[5] Yet, when the Second Circuit expanded its concept of "state action" recently in *Jackson v. Statler Foundation*,[6] he vigorously dis-

1. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
2. *Id.* at 647.
3. *Id.* at 635.
4. "No 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." U.S. CONST. amend. XIV, § 1.
5. H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 10 (1969).
6. 496 F.2d 623 (2d Cir. 1974).

sented. That case involved a suit brought by a black minister against various charitable foundations alleging racial discrimination and seeking declaratory relief and damages under title 42, section 1983 of the United States Code.[7] The majority opinion found that private tax-exempt foundations are so "entwined" with government that they "in many instances may well involve 'state action'."[8] Private universities are, of course, endowed by tax-exempt institutions. It is this tax-exempt status that enables them to obtain the capital necessary to carry on the research and experimentation for which they are noted. Judge Friendly realizing this, called *Jackson*

> the most ill-advised decision with respect to "state action" yet rendered . . . .
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> . . . Simply because of tax exemptions . . . institutions of higher education . . . endowed by private donors for the sole or preferential benefit of particular creeds or races, must open their doors equally to all, with every decision subject to judicial reexamination, even though this may impair or destroy the very purpose which led the donor to endow them.[9]

Freedom from judicial interference has historically been the keystone of private higher education in this country. Educational innovation cannot always harmonize with the strictures of governmental sanction. To be sure, many state universities are among our finest institutions. But conservative boards of regents, responsible to an elected governor, at times view change as a violation of their sacrosanct duty. Private universities, on the other hand, can welcome the controversial with impunity. Judge Friendly has seen the value of such freedom:

> It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law . . . .[10]

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7. 42 U.S.C. § 1983 (1970). The section provides:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The "under color of" provision has the same meaning as state action under the fourteenth amendment. United States v. Price, 383 U.S. 787 (1965).

8. Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974).

9. *Id.* at 637-38.

10. H. FRIENDLY, *supra* note 5, at 30.

What then, if private universities become accountable at law for their decisions under the "state action" theory? James Perkins, former President of Cornell University, has noted the possibility with alarm:

> Qualitative decisions are the essence of academic life. To replace this kind of decision with either civil laws that must not distinguish between the plumber and the philosopher or with the kind of wrangling over technicalities to which court action can so easily degenerate would do permanent damage not only to the sensitive academic process for judging quality but indeed to quality itself.
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> Even more fundamental is the damage that constant legal interference can do to institutional autonomy. Institutional autonomy is the surest guardian of academic freedom. To shift from the rules and procedures that academic institutions have evolved as central to the teaching-learning process and to put academic discipline, appointment, grading, and all manner of educational requirements at the mercy of the courts would mean, quite simply, that civil jurisdiction over intellectual inquiry would be complete. . . .[11]

The Supreme Court has recognized this danger in becoming involved in academic affairs and has traditionally shied away from it. In *Sweezy v. New Hampshire*[12] the Court held that a state legislature had no right to conduct an investigation into the contents of university lectures. Mr. Justice Frankfurter, in a concurring opinion, spoke of "the grave harm resulting from governmental intrusion into the intellectual life of a university" and concluded:

> The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of a manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.[13]

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11. Address by James Perkins, *The University and Due Process*, American Council on Education, Dec. 8, 1967, Washington, D.C., 62 AM. LIBRARY ASS'N BULL. 977, 981 (1968).

12. 354 U.S. 234 (1957).

13. *Id.* at 261-62 (Frankfurter, J., concurring). This may help explain the recent dismissal for mootness of Defunis v. Odegeard, 416 U.S. 312 (1974).

More recently, in *Healy v. James*,[14] the Court clearly stated its approach to problems involving the administration of university affairs:

> As the case involves delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process.[15]

And the Chief Justice, in a concurring opinion, echoed that it is "within the academic community that problems such as these should be resolved. The courts, state or federal, should be a last resort."[16]

Where, then, have some courts found the authority to bring private universities within their jurisdiction? One common method is by applying the "public function" theory.[17] This reasoning stems from *Evans v. Newton*, wherein it was held that a municipal park, by coming under private control, cannot lose its public character.[18] Building on this logic, courts have held that education is a public function, and that, like a park, a university is accountable under the "state action" theory even though under private ownership.[19] But these decisions ignore the language in *Evans* that contrasts parks with "schools such as Tuskeegee" which are in the *private* sector. The *Evans* Court went on to note that "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."[20]

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14. 408 U.S. 169 (1972). The Court struck down a university's denial of official recognition to a local chapter of the Students for a Democratic Society.

15. *Id.* at 171.

16. *Id.* at 195 (Burger, C.J., concurring).

17. That is, that by providing a service generally identified with the government, a private entity becomes in effect a branch of the government.

18. 382 U.S. 296 (1966). The Court observed that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Id.* at 299.

19. "This court holds that the conduct of the chief executive of a private university, in light of the public function of a private university in education, could amount to sufficient 'state action' . . . ." Belk v. Chancellor of Washington University, 336 F. Supp. 45, 49 (E.D. Mo. 1970). *See also* Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962).

20. Evans v. Newton, 382 U.S. 296, 300 (1966) (footnote omitted, emphasis in original). The distinction has been put this way:

> Thus, *public* education is a state function. . . . Yet the fact that the State provides tuition-free schools in order to promote an educated citizenry does not mean that *all private* educational institutions perform a "public function," as that term is used in *Evans*. . . . To conclude otherwise would have the effect of eliminating private education.

Bright v. Isenbarger, 314 F. Supp. 1382, 1398 (N.D. Ind. 1970) (citations omitted, emphasis in original); *aff'd per curiam* 445 F.2d 412 (7th Cir. 1971).

To be sure, education is the key to the proper functioning of our constitutional system. This was acknowledged in the landmark case of *Brown v. Board of Education*.[21] Indeed, the importance attached to secondary education in 1954 may well apply to university education today.[22] But this should not be allowed to blur the essential differences between public and private education. The right to establish private schools, and the right of parents to send their children to these schools is constitutionally protected,[23] and the state cannot regulate the curricula of these schools.[24] The value of private universities is, as seen by the Heald Committee, that they "give American education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity."[25]

It is this diversity that must be protected from encroachment, by maintaining the public-private distinction. Parents are willing to spend thousands of dollars to send their children to what they consider to be the "right" schools.[26] The value of a particular school may stem from such an esoteric quality as its name. It may also depend on what is taught there, who teaches there, or who else attends. It may even depend on who does not attend, for as Mr. Chief Justice Burger has said,

> [t]he private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in educa-

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21. 347 U.S. 483 (1954). The Court pointed out:

> It [education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

22. The New York Regents have said that "[c]ollege attendance and a college degree are as necessary today as high school attendance and a high school diploma were in the past. The economic, social, and cultural forces in our society are all pushing in that direction." Regents of the University of the State of New York, The Regents Statewide Plan for the Expansion and Development of Higher Education 9 (1964). And see Martzen v. Martzen, 163 N.E.2d 840 (Ill. 1960), calling college education a necessity.

23. Pierce v. Society of Sisters, 268 U.S. 510 (1924), reaffirmed in Wisconsin v. Yoder, 406 U.S. 205 (1972).

24. Meyer v. Nebraska, 262 U.S. 390 (1923).

25. Meeting the Increasing Demand for Higher Education in New York State: A Report to the Governor and the Board of Regents 24 (Heald Comm. ed. 1968).

26. For an interesting discussion of the underlying rationale to parental preferences, see C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION (1968).

> tion. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws . . . .[27]

Yet, the standards enunciated in *Jackson* for finding state actions, if taken literally, would mean that a university can take *no* private action. The *Jackson* court enumerated

> five factors which are particularly important to a determination of "state action": (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.[28]

Certainly, it would be easy enough to fit private universities into any of these categories. During the turbulent area of campus unrest in the sixties, many suits were in fact brought to challenge university decisions under the "state action" theory. A review of these cases will show that the courts have heretofore not been inclined to accept such an easy entry into the realm of university policymaking.

Petitioners, in *Grossner v. Trustees of Columbia University*,[29] sought redress for being expelled due to their participation in campus disruptions. Their allegation that state financial aid to education constituted a basis for a finding of "state action" was rejected by the court, which said that "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government."[30] This seems merely to be a reaffirmation of *Dartmouth College*, and has been echoed in a number of decisions.[31] What, then, constitutes "a good deal more"? Is it a governmental regulatory scheme? The Second Circuit has itself rejected this contention in *Powe v. Miles*:[32]

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27. Norwood v. Harrison, 413 U.S. 455, 469 (1973).
28. 496 F.2d at 629.
29. 287 F. Supp. 535 (S.D.N.Y. 1968).
30. *Id.* at 547-48.
31. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Brodench v. Catholic University, 365 F. Supp. 147 (D.D.C. 1973).
32. 407 F.2d 73 (2d Cir. 1968).

> To be sure . . . whatever Alfred University does is "under color of" the New York statute incorporating it. But this is also true of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far. . . .
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> . . . [T]he fact that New York has exercised some regulatory powers over the standard of education offered by Alfred University does not implicate it generally in Alfred's policies . . . .[33]

The *Jackson* rationale would also have us believe that governmental approval of private education might establish a basis for finding "state action". This theory was advanced in *Furumoto v. Lyman*,[34] another campus disruption case, this time dealing with Stanford University. The district court in *Furumoto* agreed that there certainly was governmental approval—but that that approval was of the pluralistic nature of our educational system—and "the legislature is thereby promoting what it views to be the public interest in the existence of *private* educational institutions."[35] Attacks under the "public function" theory, as noted earlier,[36] have met with some success. But here, too, the public nature of education in itself does not establish "state action". In *Gross*ner, the court acknowledged that "plaintiffs are correct in a trivial way when they say education is 'impressed with a public interest.' Many things are."[37] Continuing in a footnote, the court reasoned that "[i]f the law were what plaintiffs declare it to be, the difficult problem of aid to 'private schools'—specifically parochial schools—would not exist. . . . Indeed, the very idea of a parochial school would be unthinkable."[38]

This leads to the final question asked in *Jackson*: whether schools can be termed "private" in associational or other constitutional terms. This has been answered affirmatively in a line of Supreme Court cases from *Dartmouth to Norwood v. Harrison*.[39]

As the Court said in *Evans*:

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33. *Id.* at 80-81. *See also* Moose Lodge No. 17 v. Irvis, 407 U.S. 163 (1972), rejecting state licensing as the basis for state action.
34. 362 F. Supp. 1267 (N.D. Calif. 1973).
35. *Id.* at 1279 (emphasis in original).
36. *Supra* note 19.
37. 287 F. Supp. at 549.
38. *Id.* at 549 n.19 (citations omitted).
39. *See also* cases cited note 23 *supra*.

> The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.[40]

We have seen that a dissection of the *Jackson* criteria does not establish a sufficient basis for a finding of "state action"—but how about a combination of these factors? At Chatham College, a "state action" claim was based on the existence of a state charter, state regulations, tax exemptions, a zoning variance, and public monies.[41] At Stanford, the claim was based on a state charter, corporate powers and privileges, tax exemptions,and the power of eminent domain.[42] And at Tulane, the state had granted property to the school with a reversionary clause in the charter, and there were state officers in nominal positions on the board of directors of the university.[43] In each case the courts found no "state action", for

> [s]tate involvement sufficient to transform a private university into an agency of the state . . . requires more than incorporating or chartering the University . . . providing financial aid in the form of public funds . . . or granting tax exemptions. . . . Nor does a combination of these conditions constitute the requisite state involvement.[44]

Indeed, the Supreme Court

> has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . [S]uch a holding would utterly emasculate the distinction between private as distinguished from state conduct. . . .[45]

It would seem, then, that the *Jackson* criteria may not be enough to reach private university education. Care must be exercised though,

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40. 382 U.S. at 300.

41. Pendrell v. Chatham College, 370 F.2d 494 (W.D. Pa. 1974).

42. Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Calif. 1973).

43. Guillory v. Administrators of Tulane University, 212 F. Supp. 674 (E.D. La. 1962), *aff'd per curiam*, 306 F.2d 489 (5th Cir. 1962).

44. Braden v. University of Pittsburgh, 343 F. Supp. 836, 839 (W.D. Pa. 1972) (citations omitted).

45. Moose Lodge No. 17 v. Irvis, 407 U.S. 163, 173 (1972). *See also* Norwood v. Harrison, 413 U.S. 455 (1973), where the Court said "[w]e do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory." *Id.* at 465 (emphasis in original).

to be sure. The threat posed by judicial interference cannot be underestimated. As Judge Holtzoff has said:

> An entering wedge seemingly innocuous at first blush, may lead step-by-step to a serious external domination of universities and colleges and a consequent damper and hindrance to their intellectual development and growth.[46]

It would be incumbent upon the courts to reiterate the protected position of private university education in our system. Perhaps Jefferson's "wall of separation" should apply to education as well as religion. There seems to be some basis in what the Supreme Court has said for this view. In *Keyishian v. Board of Regents*[47] it talks of the sanctity of academic freedom:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . .[48]

Doesn't that mean that educators must be free to make decisions, based not always on constitutionally acceptable criteria, without fear of intervention from the courts? The Court has said that

> [t]he essentiality of freedom in the community of American universities is almost self-evident . . . To impose any strait jacket upon the intellectual leaders . . . would imperil the future of our Nation.[49]

Surely this freedom must include latitude to try new ideas, to formulate novel integrations in academic endeavors, to make education socially relevant.[50] The emergence of private universities to the forefront of academic achievement[51] has been in large part due to the existence of a buffer zone of breathing space in which to experiment. In *San Antonio Independent School District v. Rodriquez*,[52] the Supreme Court warned that

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46. Green v. Howard University, 271 F. Supp. 609, 615 (D.D.C. 1967).
47. 385 U.S. 589 (1967).
48. *Id.* at 603.
49. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
50. The President's Commission on Campus Unrest has said that
> [a]cademic institutions must be free—free from outside interference, and free from internal intimidation. Far too many people who should know better—both within the university communities and outside them—have forgotten this first principle of academic freedom. The pursuit of knowledge cannot continue without the free exchange of ideas.

REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, R-11 (1970).
51. The seven best medical schools, four of the top six law schools, and five of the top six business schools belong to private universities, according to a recent poll of professional school deans. The National Observer, February 1, 1975, at 9, col. 1.
52. 411 U.S. 1 (1973).

> the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.[53]

If such is the restraint applied to public schools, then clearly private universities must be so protected, for as Judge Holtzoff said:

> It would be a dangerous doctrine to permit the Government to interpose any degree of control over an institution of higher learning, merely because it extends financial assistance to it. . . . Such a result would be intolerable, for it would tend to hinder and control the progress of higher learning and scientific research. Higher education can flourish only in an atmosphere of freedom, untrammelled by Governmental influence in any degree.[54]

The principles outlined in *Dartmouth College*, then, must be revitalized. Our dual educational system must be preserved. The public university serves the function of producing an educated citizenry, fostering the state's concept of academic goals, and providing an opportunity for betterment to all. As an official extension of governmental policy, it is necessarily subject to constitutional sanctions. There is no room for unequal treatment or classifications of suspect validity. Decisions must be based on true governmental concern for representation of all the people. Private universities, on the other hand, have a right to be different. They can try any innovations without being subject to constitutional inhibitions. Their actions may not always be justifiable, but, importantly, their mistakes are not imputed to the government. Therein lies the special value of private universities—their detachment from the government. Judge Friendly noted:

> "If I were asked, 'Would you have Oxford with its self-government, freedom, and independence, but yet with its anomalies and imperfections, or would you have the University free of those anomalies and imperfections, and under the control of the Government?' I would say, 'Give me Oxford, free and independent, with all its anomalies and imperfections'."[55]

So, too, this freedom and independence deserves preservation today.

Franklin J. Pacenza

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53. *Id.* at 43.
54. Greene v. Howard University, 271 F. Supp. 609, 613 (D.D.C. 1967).
55. H. FRIENDLY, *supra* note 5, at 30 n.130.