

INSTITUTIONAL AUTONOMY AND PUBLIC INSTITUTIONS OF HIGHER EDUCATION

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No branch of government should have the authority, or even the means, of preventing the teaching of new truths or the development of theories contrary to its special policies or its momentary interests.

Marquis de Condorcet¹

ABSTRACT

Traditionally, public colleges and universities have been held to possess a robust autonomy from interference by other branches of state government. But what, exactly, are the contours of this autonomy? More specifically, what factors determine the sphere of autonomy that state institutions of higher education possess? It is the intent of this paper to explore this question. This paper concludes that in order to possess and retain institutional autonomy, public institutions of higher education must proactively protect and assert that which their state constitutions, statutory law, and case law provide for them -- however great or insipid their grants of institutionally autonomy may be.

¹ John S. Brubacher, *The Autonomy of the University: How Independent is the Republic of Scholars?* 38 J. HIGHER EDUC. 237, 238 (1967) (quoting the Marquis de Condorcet).

INTRODUCTION

Traditionally, public colleges and universities have been held to possess a robust autonomy from interference by other branches of state government.² But what, exactly, are the contours of this autonomy?³ More specifically, what factors determine the sphere of autonomy that state institutions of higher education possess? It is the intent of this paper to explore this question. Part I examines the historical establishment of institutions of higher education and the importance of an institution's source of control. Part II considers the emergence of public colleges and universities and the significance of state constitutions, statutes, and case law vis-à-vis the sphere of autonomy these institutions possess. Finally, Part III considers a case pending before the Utah Supreme Court and what insights can be gained from it regarding public colleges and university's possession and exertion of institutional autonomy. This paper concludes that in order to possess and retain institutional autonomy, public institutions of higher education must proactively protect and assert that which their state constitutions, statutory law, and case law provide for them – however great or insipid their grants of institutionally autonomy may be.

I. THE ESTABLISHMENT OF INSTITUTIONS OF HIGHER EDUCATION

During the first phase of the establishment of institutions of higher education in the United States, the colonial colleges – Harvard College, the College of William and Mary, Yale College, the College of New Jersey, King's College of New York, the College of Philadelphia, the College of Rhode Island, Queen's College, and Dartmouth College – were founded.⁴ The principal

² Lois A. Fisher, *State Legislatures and the Autonomy of Colleges and Universities*, 59 J. HIGHER EDUC. 133 (1988).

³ According to David M. Rabban, "prior cases offer scant guidance in determining exactly when state actions violate the constitutional rights of institutions that the state itself has created." *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 273 (1990).

⁴ *Id.* See also, JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 1 (2004). The nine "colonial colleges" are not the only colleges established during the colonial period. Between 1636 and 1776, Moravian College, Washington and Lee, College of Charleston, Salem College,

impetus behind the establishment of these institutions of higher education was the perceived necessity of a well-educated clergy.⁵ The colleges' scope and mission, however, was not narrowly religious.⁶ As articulated in their charters, a liberal education and service to the public were also fundamental concerns.⁷ This is not unexpected, for the "tradition of liberal learning, as it had come down from the Middle Ages and had been broadened by the Renaissance, was the sole collegiate education [the colonial settlers] knew – and this was the fare of all students, whether their ultimate vocation was to be clerical or secular."⁸

Each of the colonial colleges was established by colonial authorities or through royal charters.⁹ Harvard College, for instance, was established by the General Court in the Massachusetts Bay Colony;¹⁰ the College of William and Mary was established by a royal charter;¹¹ Yale College was founded when the Connecticut General Court selected trustees to

Dickenson College, and Hampden-Sydney College were also founded. AMERICAN COUNCIL ON EDUCATION, AMERICAN UNIVERSITIES AND COLLEGES 4 (13th ed. 1987). However, the nine colonial colleges are the only institutes of higher education that began awarding degrees prior to the revolutionary war.

⁵ RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 81-83, 115-16 (1955); JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION 6-7 (1958); FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY 6, 12-13 (1965). The College of Philadelphia is an exception to this claim, its principal purpose being "the education of youth for the purpose of supplying qualified men who would serve the public with honor." ARTHUR M. COHEN, THE SHAPING OF AMERICAN HIGHER EDUCATION 19-21. Of the remaining institutions, Harvard College, Yale College, and Dartmouth College were affiliated with the Congregationalists, the College of New Jersey with the Presbyterians, King's College and the College of William and Mary with the Anglican Church, Queen's College with the Reformed Dutch Church, and the College of Rhode Island with the Baptists. WALTER C. BRONSON, THE HISTORY OF BROWN UNIVERSITY 3 (1971); COHEN, *supra*, at 20.

⁶ RUDOLPH, *supra* note 5, at 7; HUGH S. BROWN & LEWIS B. MAYHEW, AMERICAN HIGHER EDUCATION 5, 21 (1965); COHEN, *supra* note 5, at 16, 18-21.

⁷ HOFSTADTER & METZGER, *supra* note 5, at 115; BRUBACHER & RUDY, *supra* note 5, at 6.

⁸ HOFSTADTER & METZGER, *supra* note 5, at 83.

⁹ COHEN, *supra* note 5, at 43.

¹⁰ GERALD L. GUTEK, AN HISTORICAL INTRODUCTION TO AMERICAN EDUCATION 138 (1991); COHEN, *supra* note 5, at 40; BRUBACHER & RUDY, *supra* note 5, at 32.

¹¹ GUTEK, *supra* note 10, at 138; COHEN, *supra* note 5, at 41; RUDOLPH, *supra* note 5, at 7, 33.

organize the school;¹² the College of New Jersey was established by a royal charter approved by the colonial legislature;¹³ King's College of New York was founded by a royal charter;¹⁴ the College of Rhode Island was established by the Rhode Island General Assembly;¹⁵ Queen's College was established by a royal charter;¹⁶ and Dartmouth College was granted a charter, on the authority of George III, by the Colony of New Hampshire.¹⁷

Additionally, Harvard College, the College of William and Mary, Yale College, King's College, the College of Philadelphia, and Dartmouth College all received financial support from their respective provincial treasury. For instance, the General Court in the Massachusetts Bay Colony provided Harvard College with legislative grants and bestowed upon the school "the income from the ferry across the Charles River and later on the tolls when a bridge replaced the ferry."¹⁸ The College of William and Mary began with a royal grant of £2,000 and "later received from Virginia the duties levied on skins and furs and still later a tax levied on tobacco."¹⁹ In addition to yearly grants,²⁰ Yale College received the "proceeds from a French prize of war brought into the port of New London."²¹ Between the years 1745 and 1775, King's College, the College of Philadelphia, and Dartmouth College collected £2,776 in public funds.²² Moreover,

¹² COHEN, *supra* note 5, at 41-42.

¹³ *Id.* at 42.

¹⁴ HORACE COON, COLUMBIA: COLOSSUS ON THE HUDSON 39 (1947).

¹⁵ BRONSON, *supra* note 5, at 9, 14.

¹⁶ WILLIAM H. S. DEMAREST, A HISTORY OF RUTGERS COLLEGE 57-61 (1924).

¹⁷ Walter Crosby Eells & Ernest V. Hollis, *Origin and Development of the Public College in the United States*, 31 J. NEGRO EDUC. 221, 224 (1962); BRUBACHER & RUDY, *supra* note 5, at 34.

¹⁸ BRUBACHER & RUDY, *supra* note 5, at 37.

¹⁹ *Id.*

²⁰ Beverly McAnear, *The Raising of Funds by the Colonial Colleges*, 38 THE MISSISSIPPI VALLEY HISTORICAL REVIEW 591, 592 (1952).

²¹ BRUBACHER & RUDY, *supra* note 5, at 37.

²² McAnear, *supra* note 20, at 593.

almost every colony supported its college by granting the institution the right to operate a lottery in order to obtain the necessary funds to sustain itself.²³

Despite the fact that the colonial colleges were founded by colonial authorities or through royal charters and that they each received financial support from the colonies or king, the “colonial colleges considered themselves private foundations”²⁴ This is because the institutions, according to John S. Brubacher and Willis Rudy, “never surrendered control over policy formation, not even when the state gained ex officio representation on some boards of control.”²⁵ Thus, an institution’s foundation and sources of support are not valid bases for determining whether the institution is private or public; rather, the distinction between private and public institutions of higher education is determined by an institution’s source of control.²⁶ The foremost case establishing this principle is the Dartmouth College Case.²⁷

²³ Beverly McAnear, *College Founding in the American Colonies, 1745-1775*, 42 THE MISSISSIPPI VALLEY HISTORICAL REVIEW 24, 39 (1955); BRUBACHER & RUDY, *supra* note 5, at 37.

²⁴ BRUBACHER & RUDY, *supra* note 5, at 37.

²⁵ *Id.*; See also, F. King Alexander, *The Decline and Fall of the Wall of Separation between Church and State and Its Consequences for the Funding of Public and Private Institutions of Higher Education*, 10 FLA. J. LAW PUB. POLICY 103, 107 (1998). In reality, the colonial colleges were never in complete control over themselves. The colonial legislatures exerted a considerable amount of control over the colonial colleges. See, e.g., John S. Whitehead & Jurgen Herbst, *How to Think about the Dartmouth College Case*, 26 HISTORY OF EDUCATION QUARTELY 333-349 (1986); RUDOLPH, *supra* note 5, at 13-17; HOFSTADTER & METZGER, *supra* note 5, at 142, 145. Thus, they are best viewed as quasi-private institutions. For a thorough discussion of the competing views regarding the status of the colonial colleges and their relationship with the colonial authorities see JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE STATE* (1973), JURGEN HERBST, *FROM CRISIS TO CRISIS* (1982), Steven Novak, *The College in the Dartmouth College Case: A Reinterpretation*, 47 NEW ENGLAND Q. 550-563 (1974), LAWRENCE CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE* (1980), and John S. Whitehead & Jurgen Herbst, *How to Think about the Dartmouth College Case*, 26 HISTORY OF EDUCATION QUARTELY 333-349 (1986).

²⁶ Eells & Hollis, *supra* note 17, at 223.

²⁷ There is considerable debate regarding what the Dartmouth College Case actually establishes. Nevertheless, two issues appear reasonably well grounded. First, neither the trustees of Dartmouth College nor the New Hampshire legislature were concerned with the distinction between public and private institutions of higher education. Rather, their concern seems to be over the religious inclination of the college. Second, even after the Supreme Court decision in *Trustees of Dartmouth College v. Woodward*, the distinction between public and

A. The Trustees of Dartmouth College v. Woodward

In 1754, Eleazar Wheelock, a Congregationalist minister from Connecticut, established Moor's Charity School for the education of Native Americans.²⁸ The success of the school motivated Wheelock to broaden his undertaking and establish a college.²⁹ Thus, he applied to the crown for an act of incorporation.³⁰ In 1769, the Royal Governor of New Hampshire imparted a charter from King George which established Dartmouth College. According to the charter, Wheelock was appointed president of the college, "with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees."³¹ In 1779, following the death of his father Eleazar, John Wheelock assumed the presidency of Dartmouth College.³² In 1815, the trustees voted to remove Wheelock from the presidency.³³ In response, Wheelock petitioned the New Hampshire legislature.³⁴ In 1816, the legislature amended the college's charter, reorganized it as Dartmouth University, and restored Wheelock to the presidency.³⁵ Among other changes in the charter, the legislature's actions increased the number of trustees, gave to the executive of the state of New Hampshire the power to appoint the additional trustees, and created a board of overseers imbued with the power to inspect and control the acts of the

private institutions of higher education was not fully developed. It took many years and much thought for the concept to mature. The Dartmouth College Case, however, provided the means by which the distinction could later be exploited. See Whitehead & Herbst, *supra* note 25, at 333-349.

²⁸ Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 631 (1819).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 632.

³² Knight, *supra* note 27, at 118.

³³ *Id.*

³⁴ *Id.*

³⁵ BRUBACHER & RUDY, *supra* note 5, at 35.

trustees.³⁶ The college's original board of trustees sued, claiming that the actions of the legislature were invalid.³⁷

In *Trustees of Dartmouth College v. Woodward*, Daniel Webster, counsel for Dartmouth College, explained the facts in the following manner:

The substance of the facts recited in the preamble to the charter is, that Dr. Wheelock had founded a CHARITY, on funds owned and procured by himself; that he was, at that time, the sole dispenser and sole administrator, as well as the legal owner of these funds; that he had made his will, devising this property in trust to continue the existence and uses of the school, and appointed trustees; that, in this state of things, he had been invited . . . to extend the design of it to the education of the youth of that province [i.e., establish a college]; that . . . he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, viz. the persons whom he had already appointed to be the future trustees of his charity by his will. The Charter, or letters patent, then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the "Trustees of Dartmouth College;" to have perpetual existence, as such corporation, and with power to hold and dispose of lands and goods, for the use of the College, with all the ordinary powers of corporations. They are in their discretion to apply the funds and property of the College to the support of the president, tutors, ministers, and other officers of the College, and such missionaries and schoolmasters as they may see fit to employ among the Indians. There are to be twelve trustees forever, and no more; and they are to have the right of filling vacancies occurring in their own body. The Rev. Mr. Wheelock is declared to be the FOUNDER of the College, and is, by the charter, appointed first president, with power to appoint a successor, by his last will. All proper powers of government, superintendence, and visitation, are vested in the trustees. They are to appoint and remove all officers at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders, and laws, for the government of the students These letters patent are to be good and effectual in law, against the king, his heirs and successors forever, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties, and immunities, to them and to their successors forever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain.³⁸

³⁶ Trustees of Dartmouth College, 17 U.S. at 626.

³⁷ *Id.* at 624.

³⁸ Trustees of Dartmouth College, 17 U.S. at 552-553.

According to Webster, the institution's charter created a corporation, the legal representatives of which was the institution's trustees and that, in conformity with the charter, control of the institution was vested not in the state of New Hampshire but in the board of trustees. Furthermore, Webster argued that because the charter constituted a contract, the actions of the legislature abrogated the inviolability of that contract and, therefore, were unconstitutional.³⁹

In the opinion of the Court, written by Chief Justice Marshall, the Court stated that the case rests on an evaluation of the charter.⁴⁰ According to the Court,

[i]f the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New-Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.⁴¹

However, if the charter created a private eleemosynary institution, the Court continued, the actions of the legislature would be found to be invalid.⁴² In evaluating the charter, the Court found that it created a private eleemosynary institution.⁴³

First, the Court noted that the mere fact that individuals were engaged in the education of young people did not transform them into public officers, exercising any portion of those duties belonging to the government, nor did the fact that private funds were used for educational purposes make them subject to legislative control.⁴⁴ Second, the Court observed that the college was "endowed by private individuals, who . . . bestowed their funds for the propagation of the

³⁹ Eells & Hollis, *supra* note 17, at 224.

⁴⁰ Trustees of Dartmouth College, 17 U.S. at 629.

⁴¹ *Id.* at 629-630.

⁴² *Id.* at 630.

⁴³ *Id.* at 633-634.

⁴⁴ *Id.* at 635.

christian [sic] religion among the Indians, and for the promotion of piety and learning generally.”⁴⁵

Third, the Court claimed that the particular interests of New Hampshire were never a consideration of the donors and never constituted an incentive for their donations.⁴⁶ The propagation of the Christian religion and the dissemination of knowledge were their avowed and sole goals.⁴⁷ In these, the Court observed, “New-Hampshire would participate; but nothing particular or exclusive was intended for her.”⁴⁸ Thus, the Court made the following determination:

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officials, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.⁴⁹

Nevertheless, the Court stated that one particularly vexing issue remained to be resolved.

Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in [the institution’s] charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the constitution [sic] intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution [sic] is solicitous, and to which its protection is extended.⁵⁰

In response to this issue, the Court observed that when the charter was granted, an artificial and immortal being was created, “capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it.”⁵¹ This entity is the corporation created by

⁴⁵ *Id.* at 633.

⁴⁶ *Id.* at 640.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 640-641.

⁵⁰ *Id.* at 641-642.

⁵¹ *Id.* at 642.

the charter; it is the legal representative of the founders of the institution.⁵² According to the Court, the “corporation is the assignee of [the founders’] rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.”⁵³ The entire legal interest of the corporation resides, as the contract specifies, in the trustees and, accordingly, can be asserted by them.⁵⁴ Thus, the Court concluded that the trustees are legally entitled to bring forward the complaint as they did.⁵⁵

The Court then observed that, according to the charter, the whole power of governing the institution was invested in the trustees.⁵⁶ However, the Court noted that by the actions of the legislature, the “whole power of governing the college [was] transferred from the trustees appointed according to the will of the founder, expressed in the charter, to the executive of New-Hampshire.”⁵⁷ The Court held that this is clearly subversive of the charter and, as a result, repugnant to the Constitution.⁵⁸ Thus, the Court concluded that, according to the terms of its charter, Dartmouth College is a private institution, controlled not by the state of New Hampshire, but by the institution’s trustees.⁵⁹ Accordingly, the actions of the legislature were held to be invalid.⁶⁰

B. Administrative Organization: The President and External Boards of Control

Trustees of Dartmouth College v. Woodward is a landmark case; it affirms the inviolability of contracts and provides the means by which the distinction between private and public institutes of higher education – namely, an institution’s source of control – could later be developed and

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 644-645.

⁵⁵ *Id.* at 645-646.

⁵⁶ *Id.* at 651.

⁵⁷ *Id.* at 652.

⁵⁸ *Id.* at 653, 654.

⁵⁹ *Id.* at 654.

⁶⁰ *Id.*

exploited.⁶¹ Additionally, the decision “gave to the Court the incidental opportunity of endorsing the American principle of academic organization whereby *control resides not in the hands of the faculty but in an external board* (italics added).”⁶² The practice of European institutions of higher education since the Middle Ages has been one of faculty self-government.⁶³ The University of Paris, for instance, is a corporation of teachers; the faculty is responsible for the governance of the institution. In contrast, there emerged in American institutions of higher education a system of lay governmental control.⁶⁴ External boards of trustees, as in the Dartmouth College Case, comprise, by law, the institution and it is the trustees’ responsibility, not the faculty’s, to govern the school.⁶⁵

There are at least three reasons for this unique development in American higher education. First, the colonial colleges were Protestant institutions that were formed in a robustly Protestant environment.⁶⁶ Thus, they were disconnected in many ways from the traditions characteristic of the institutions of the Middle Ages.⁶⁷ The universities of the Middle Ages, for instance, were ecclesiastical organizations which the ecclesiastical authorities protected from lay incursions.⁶⁸ The Protestant Reformation, however, had the effect of sharply curtailing such guarded autonomy.⁶⁹ For example, the Puritans afforded lay persons a significant opportunity to control their local churches; and, it is “not a very drastic step from admitting [persons] who were not clerics into the government of churches to admitting those who were not teachers into the

⁶¹ See, e.g., COHEN, *supra* note 3, at 60; HOFSTADTER & METZGER, *supra* note 5, at 220; Eells & Hollis, *supra* note 17, at 224; RUDOLPH, *supra* note 5, at 210; Whitehead & Herbst, *supra* note 25 at 333-349.

⁶² RUDOLPH, *supra* note 5, at 211.

⁶³ BRUBACHER & RUDY, *supra* note 5, at 26.

⁶⁴ HOFSTADTER & METZGER, *supra* note 5, at 120-144; BRUBACHER & RUDY, *supra* note 5, at 26-31.

⁶⁵ HOFSTADTER & METZGER, *supra* note 5, at 120.

⁶⁶ *Id.* at 121.

⁶⁷ *Id.* at 122.

⁶⁸ *Id.*

government of colleges.”⁷⁰ Thus, the forms of Protestant church government exerted some influence on the development of the emerging American institutions of higher education.⁷¹ Second, while the institutions of higher education in Europe evolved out of organized bodies of scholarship and instruction that had a rich and long history, American institutions of higher education were created *ex nihilo*;⁷² there was no long history of scholarship in the colonies nor was there an extant set of instructors.⁷³ Thus, external boards were required to care for and nurture these immature institutions.⁷⁴ Third, the faculty of these newly emerging institutions of higher education were comprised of young men teaching temporarily until they were called into the ministry.⁷⁵ Harvard existed for more than eighty-five years, Yale more than fifty, and Princeton for more than twenty before each could boast of an actual professor; before this time, the faculty was composed of transient tutors.⁷⁶ Lay boards of trustees, thus, provided for a much more stable and established group of individuals to lead the colleges.⁷⁷

It was in this environment that the president of the college emerged as the dominant figure in American higher education.⁷⁸ The governing boards were comprised of ministers, businessmen, and civic leaders for whom active involvement in the daily affairs of the schools did not occur.⁷⁹ Moreover, it was often the case members of the governing boards could spare little time from their professional and personal lives to dedicate to the institutions that they were

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 123.

⁷³ *Id.*; BRUBACHER & RUDY, *supra* note 5, at 26.

⁷⁴ HOFSTADTER & METZGER, *supra* note 5, at 123.

⁷⁵ BRUBACHER & RUDY, *supra* note 5, at 31.

⁷⁶ HOFSTADTER & METZGER, *supra* note 5, at 124.

⁷⁷ See HOFSTADTER & METZGER, *supra* note 5, at 124; BRUBACHER & RUDY, *supra* note 5, at 31.

⁷⁸ See HOFSTADTER & METZGER, *supra* note 5, at 124-126.

⁷⁹ BRUBACHER & RUDY, *supra* note 5, at 26-31.

supposed to govern.⁸⁰ In between the young, transient faculty members and the distracted governing boards emerged the college president.⁸¹ The president was the individual most familiar with the affairs of the institution, often playing multiple roles such as administrator, teacher, minister, fundraiser, disciplinarian, registrar, and in some cases even librarian, all the while participating as a member of the governing board of trustees.⁸² Thus, he alone was uniquely qualified to make the major decisions confronting the institutions.⁸³ The president, thus, became the center of authority and the symbol of the institution that he represented.⁸⁴

The first phase of the establishment of institutions of higher education in the United States occurred in a unique religious and educational milieu that fostered an academic organizational structure wherein an external board of individuals are, by law, the actual institution and responsible for its governance. This is a marked break from the traditions of academic governance of Europe where the responsibility for academic governance is in the hands of the members of the faculty. Furthermore, it is this source of control over the institution that determines whether the institution is a public institution, amenable to legislative regulation or a private institution, beyond the reach of the state.⁸⁵

II. PUBLIC COLLEGES AND UNIVERSITIES

⁸⁰ See HOFSTADTER & METZGER, *supra* note 5, at 124-125.

⁸¹ HOFSTADTER & METZGER, *supra* note 5, at 125.

⁸² Richard G. Durnin, *The Role of the Presidents in the American Colleges of the Colonial Period*, 1 HIST. EDUC. Q. 23-31 (1961); BRUBACHER & RUDY, *supra* note 5, at 28-29.

⁸³ See HOFSTADTER & METZGER, *supra* note 5, at 124-126.

⁸⁴ HOFSTADTER & METZGER, *supra* note 5, at 125.

⁸⁵ Beyond the reach of the state in regard to exclusively academic affairs; no board of regents possesses absolute power of self-governance. For instance, a board of regents at a private or public college or university cannot "abridge rights protected by the federal or state constitution, and would be subject to state legislation enforcing statewide standards for public welfare, health and safety." Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J. L. & EDUC. 177, 191 (1978).

During the second phase of the establishment of institutions of higher education in the United States, an unambiguous distinction between private and public institutions of higher education emerged.⁸⁶ Recall that the principal impetus for the establishment of the colonial colleges was the perceived necessity of a well-educated clergy.⁸⁷ As such, Harvard College, Yale College, and Dartmouth College were affiliated with the Congregationalists, the College of New Jersey with the Presbyterians, King's College and the College of William and Mary with the Anglican Church, Queen's College with the Reformed Dutch Church, and the College of Rhode Island with the Baptists.⁸⁸ The boards of trustees were composed of members of the colonial governments and representatives of the affiliated churches.⁸⁹ According to Jurgen Herbst, these "governmental arrangements reflected the Reformation concept of the unity of established secular and ecclesiastical government with the college, a concept which in turn rested on the assumed religious homogeneity of the province's population."⁹⁰ However, during the eighteenth century, the religious homogeneity that allowed for such a governmental organization to exist was in decline. In response, institutions of higher education developed in two directions: first, toward state sponsored and state supported education, and second, toward "an exclusively private type of higher education, eventuating in the denominationally oriented college of the nineteenth

⁸⁶ AMERICAN COUNCIL ON EDUCATION, *AMERICAN UNIVERSITIES AND COLLEGES* 3 (13th ed. 1987).

⁸⁷ HOFSTADTER & METZGER, *supra* note 5, at 81-83, 115-16; BRUBACHER & RUDY, *supra* note 5, at 6-7; RUDOLPH, *supra* note 5, at 12-13.

⁸⁸ RUDOLPH, *supra* note 5, at 7; BROWN & MAYHEW, *supra* note 6, at 21 (1965); COHEN, *supra* note 3, at 16, 18-21.

⁸⁹ Jurgen Herbst, *The Eighteenth Century Origins of the Split Between Private and Public Higher Education in the United States*, 15 HIST. EDUC. Q. 273 (1975).

⁹⁰ *Id.*

century.”⁹¹ The model exemplified by the colonial colleges, namely, a hybrid of church and state control, steadily disappeared.⁹²

A. Statutorily Created Public Institutions of Higher Education

The first state to charter a state university was Georgia.⁹³ By an act of the General Assembly, the University of Georgia was incorporated on January 27, 1785.⁹⁴ Nine years earlier, on February 5, 1776, Georgia’s first state constitution was unanimously approved by a constitutional convention held in Savannah. The constitution contained no discussion of higher education.⁹⁵ Thus, the first state university to be chartered in the United States was statutorily created. The second state to charter a state university was North Carolina. In 1789, an act chartering the University of North Carolina was passed by the General Assembly.⁹⁶ Thirteen years earlier, in December 1776, North Carolina’s first constitution was approved by the Fifth Provincial Congress; Article XLI expressed the following concerning education in the state of North Carolina:

That a School or Schools shall be established by the Legislature, for the convenient Instruction of Youth, with such Salaries to the Masters, paid by the public, as may enable them to instruct at low Prices; and all useful Learning shall be duely encouraged and promoted in one or more Universities.⁹⁷

Unlike Georgia’s constitution of 1776, North Carolina’s first state constitution does allude to higher education. Nevertheless, it does not establish the existence of a college or university.

⁹¹ THOMAS G. DYER, *THE UNIVERSITY OF GEORGIA: A BICENTENNIAL HISTORY 1785 – 1985* 7 (1985).

⁹² *Id.*

⁹³ ROBERT PRESTON BROOKS, *THE UNIVERSITY OF GEORGIA: UNDER SIXTEEN ADMINISTRATIONS 1785-1955* 5 (1956).

⁹⁴ DYER, *supra* note 92, at 10.

⁹⁵ *Id.* at 7.

⁹⁶ WILLIAM S. POWELL, *THE FIRST STATE UNIVERSITY* 5 (1972).

⁹⁷ *Id.* at 4.

Thus, like the first state university to be chartered in the United States, the second was also statutorily created.

In Georgia's state constitution of 1945, however, the university was raised to the status of a constitutional corporation; Article VIII, § IV, reads as follows:

There shall be a Board of Regents of the University System of Georgia, and the government, control, and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia The said Board of Regents of the University System of Georgia shall have the powers and duties as provided by law existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereafter provided by law.⁹⁸

Notice that a board of regents is now placed in control of the government and management of the entire university system. In contrast, Article IX, § 8, of North Carolina's most recent constitution declares the following regarding the control of higher education:

The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

Although the University is recognized in the constitution, the General Assembly retains the power to direct the maintenance and management of higher education in the state.

In "Legal Status of State Universities," P. W. Viesselman divides state colleges and universities into three types. First, like the University of Georgia, there are those that are constitutional corporations and that, consequently, operate "independent of control by the administrative agencies and boards of the state."⁹⁹ Second, like the University of North Carolina, there are those that have certain aspects set forth in the state constitution, but which are

⁹⁸ GA. CONST. of 1945, art. VIII, § IV.

otherwise subject to legislative control.¹⁰⁰ Finally, there are those institutions of higher education that are entirely statutory public corporations, wholly “subject to the control of the legislature as to powers, form of government, and all other details.”¹⁰¹

B. Constitutionally Created Public Institutions of Higher Education and Constitutional Grants of Institutional Autonomy

The first public institution of higher education to become a purely constitutional corporation was the University of Michigan.¹⁰² The University of Michigan was established “in 1837 by an act of the legislature, and remained subject to legislative control until the constitution of 1850 raised it to the status of a constitutional corporation.”¹⁰³ Article 13, §§6-8, of the 1850 Michigan state constitution declare the following regarding higher education:

Sec. 6. There shall be elected in the year eighteen hundred and sixty-three, at the time of the election of a justice of the supreme court, eight regents of the University, two of whom shall hold their office for two years, two for four years, two for six years, and two for eight years. They shall enter upon the duties of their office on the first of January next succeeding their election. At every regular election of a justice of the supreme court thereafter, there shall be elected two regents whose term of office shall be eight years. When a vacancy shall occur in the office of regent, it shall be filled by appointment of the Governor. The regents thus elected, shall constitute the boards of regents of the University of Michigan.

Sec. 7. The regents of the university and their successor in office shall continue to constitute the body corporate, known by the name and title of "The Regents of the University of Michigan."

Sec. 8. The regents of the university shall, at their first annual meeting, or as soon thereafter as may be, elect a president of the university, who shall be ex officio a member of their board, with the privilege of speaking but not of voting. He shall preside at the meetings of the regents and be the principal executive officer of the university. *The board of regents shall have the general supervision*

⁹⁹ P. W. Viesselman, *Legal Status of State Universities*, 2 DAKOTA L. REV. 309 (1928-29).

¹⁰⁰ *Id.* at 309-10.

¹⁰¹ *Id.* at 310.

¹⁰² See M. M. Chambers, *The University as a Corporation: The Constitutionally Independent Status of Certain State Universities is Worthy of Attention*, 2 J. HIGHER EDUC. 24-49 (1931).

¹⁰³ *Id.* at 24.

*of the university, and the direction and control of all expenditures from the university interest fund (emphasis added).*¹⁰⁴

While the University of Michigan began as a purely statutory creation, like the University of Georgia, it was elevated to a constitutional corporation wherein a board of regents is granted plenary power of governance. Several cases confirmed the University's legal status and the board's plenary power of control.

In *Sterling v. Regents of University of Michigan*, the legislature passed an act that directed the board of regents to discontinue its medical college in Ann Arbor and to establish a medical college in Detroit.¹⁰⁵ The board of regents declined to comply with the act.¹⁰⁶ One of the reasons upon which the board of regents based its decision not to comply with the act was "that the legislature [had] no constitutional right to interfere with or dictate the management of the University."¹⁰⁷

According to the Supreme Court of Michigan, under the Michigan state constitution of 1835, "the legislature had the entire control and management of the University and the University fund."¹⁰⁸ However, the court noted that the university was not a success under the legislature's supervision. This is because

legislatures, wishing to retain all the power of the State in their own hands, as if they alone were competent or disposed to act for the general good, have not been willing to appoint trustees for a length of time sufficient for them to become acquainted with their duties, to become interested in the cause which they were appointed to watch over, and feel the deep responsibility of the trust committed to them. A new board of trustees, like a legislature of new members, not knowing well what to do, generally begins by undoing and disorganizing all that has been done before. At first they dig up the seed a few times, to see that it is going to come up; and, after it appears above the surface, they must pull it up, to see that the roots are sound; and they pull it up again, to see if there is sufficient root to support so vigorous branches; then lop off the branches, for fear they will

¹⁰⁴ *Sterling v. Regents of University of Michigan*, 68 N.W. 253, 256 (1896).

¹⁰⁵ *Id.* at 253.

¹⁰⁶ *Id.* at 253.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 254.

exhaust the root; and then pull it up again, to see why it looks so sickly and pining, and finally to see if they can discover what made it die. And, as these several operations are performed by successive hands, no one can be charged with the guilt of destroying the valuable tree. Whilst State institutions have been, through the jealousy of State legislatures, thus sacrificed to the impatience and petulance of a heterogenous and changeable board of trustees, whose term of office is so short that they have not time to discover their mistakes, retrace their steps, and correct their errors, it is not surprising that State universities have hitherto, almost without exception, failed to accomplish, in proportion to their means, the amount of good that was expected from them, and much less than colleges in their neighborhood, patronized by the religious public, watched over by a board of trustees of similar qualifications for duty, and holding the office permanently, that they may profit by experience.¹⁰⁹

Therefore, some members of the Michigan state constitutional convention of 1850 argued that the governance of the university be placed solely in the hands of a board of regents.¹¹⁰ The constitution was accordingly amended; the entire control of the university was placed in the hands of a permanent board of regents and was taken away from the legislature.¹¹¹

In reaching its decision, the *Sterling* court observed that

the board of regents and the legislature derive their power from the same supreme authority, namely, the Constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily excludes its existence in the other, in the absence of language showing the contrary intent. Neither the University nor the board of regents is mentioned in article 4, which defines the powers and duties of the legislature; nor in the article relating to the University and the board of regents is there any language which can be construed into conferring upon or reserving any control over that institution in the legislature. They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other.¹¹²

Interestingly, the *Sterling* court also observed that “the board of regents is the only corporation provided for in the Constitution whose powers are defined therein. In every other corporation provided for in the Constitution it is expressly provided that its powers shall be such as the

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 257.

legislature shall give.”¹¹³ The latter is the case with regard to the powers of the University of North Carolina, whose state constitution explicitly limit the institution’s powers to those granted by the legislature. In contrast, as the *Sterling* court makes clear, Michigan’s 1850 state constitution confers upon the University of Michigan, through the board of regents, full power of governance. Therefore, the court concluded that “in every case except that of the regents, the [Michigan state constitution] carefully and expressly reposes in the legislature the power to legislate and to control and define the duties of those corporations and officers.”¹¹⁴ Because the constitution does not grant such control over the university to the legislature, the act of the legislature mandating that the board of regents discontinue its medical college in Ann Arbor and establish a medical college in Detroit was held to be invalid. According to the state’s constitution, the board of regents, and not the legislature, possesses sole control and supervision over the university.

In a much more recent case, *Regents of the University of Michigan v. Michigan*, the Court of Appeals of Michigan reaffirmed the University’s legal status and the board of regents’ plenary power of control.¹¹⁵ Article 8, §5, of the state of Michigan’s 1963 constitution states the following concerning higher education:

The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. *Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds* (emphasis added).¹¹⁶

In *Regents*, the state legislature passed an act that amended Michigan’s Civil Rights Act, mandating that educational institutions, which included public universities, shall not knowingly

¹¹³ *Id.*

¹¹⁴ *Id.* at 258.

¹¹⁵ *Regents of the University of Michigan v. State of Michigan*, 419 N.W.2d 773 (1988).

make or maintain investments in organizations operating in South Africa or the Union of Soviet Socialist Republics.¹¹⁷ The board of regents sought a declaratory judgment that the act was unconstitutional because it contravened Article 8, § 5, of the 1963 Michigan constitution which granted the board of regents full control to direct the university's funds. The court agreed with the board of regents and held that the act impermissibly encroached upon the board of regents' authority as explicated in the state's constitution.¹¹⁸

As Viesselman observed, there are indeed at least two types of state colleges and universities.¹¹⁹ There are those, like the University of Georgia and the University of Michigan, that are granted constitutional autonomy and that, consequently, operate "independent of control by the administrative agencies and boards of the state."¹²⁰ Additionally, there are those, like the University of North Carolina, that have certain aspects set forth in the state constitution, but which are otherwise subject to legislative control.¹²¹

C. Statutory Grants of Institutional Autonomy

Viesselman's keen observation notwithstanding, the language of a state's constitution is not always the harbinger of a particular college or university's scope of institutional autonomy; a college or university may benefit from a statutory grant of autonomy. For instance, Rutgers, the State University of New Jersey, originated as the colonial Queen's College. However, the institution became a land-grant college in 1864 and in 1945 and 1956 legislative acts designated all its divisions a state university. Nevertheless, New Jersey state law confers upon Rutgers a high degree of self governance:

¹¹⁶ MICH. CONST. of 1963, art. 8, § 5.

¹¹⁷ Regents, 419 N.W.2d at 774.

¹¹⁸ *Id.* at 780.

¹¹⁹ Viesselman, *supra* note 100, 309-10.

¹²⁰ *Id.* at 309.

¹²¹ *Id.* at 309-10.

I. It is hereby declared to be the public policy of the State of New Jersey that:

a. the corporation and the university shall be and continue to be given a high degree of self-government and that the government and conduct of the corporation and the university shall be free of partisanship.

. . . .

II. In consideration of the utilization by the State for the purposes of public higher education of privately donated properties and funds valued as at September 1, 1956 at approximately \$ 50,000,000, and the prospect of future private donations, the State by this chapter agrees with the board of trustees and its successors that:

. . . .

c. if provision shall not be made by the State sufficient to enable the board of trustees to discharge its trust to apply the trust assets described in subsection 2 of section 18A:65-26 for public higher education through the conduct of a university with high educational standards, the board of trustees, after careful consideration and on not less than 60 days' prior written notice to the board of governors and to the Governor, shall have and may exercise the right to withhold or withdraw the use of the properties and funds above described in subsection 2 of section 18A:65-26, or any part of them, (aa) subject to adjudication by the courts of the State, and (bb) subject to their proper application for the purposes of public higher education and in accordance with the terms of any applicable testamentary, trust or other special provision.¹²²

According to the statute, it is the public policy of the state of New Jersey that the institution be granted a "high degree" of autonomy from interference by the state and the political partisanship that may accompany such intervention. Furthermore, if the board of trustees makes a determination that a legislative mandate is insufficiently funded, it is free to "withhold or withdraw the use of [its] properties and funds." Similarly, the state of Delaware statutorily grants the University of Delaware the entire control and management of the University:

The Board of Trustees shall have the entire control and management of the affairs of the University. The Board may exercise all the powers and franchises of the University, appoint and remove all subordinate officers and agents, and make bylaws as well for their own government as that of the University.¹²³

¹²² N.J. Stat. § 18A:65-27 (2004).

¹²³ 14 Del. C. § 5106 (2005).

The University possesses the entire control and management of the institution, notwithstanding the fact that the University of Delaware is a statutory creation.

D. The Erosion of Constitutional Autonomy

As we have seen, the autonomy any particular public institution of higher education possesses is more than a mere function of the language of the respective state's constitution. At the very least, the degree of autonomy a public college or university possesses is a result of the language of the respective state's constitution and the statutory law of the state. Moreover, even when a state's constitution putatively grants a college or university constitutional autonomy, an institution may let this grant of constitutional autonomy erode. For instance, the Utah state constitution appears "to grant unrestricted power of management and control over the state higher education system to a governing board."¹²⁴ However, in *University of Utah v. Board of Examiners of State of Utah*, the Utah Supreme Court found that long acquiescence by the university to legislative and judicial construction of constitutional provisions denying the university constitutional autonomy was of great weight in determining the legal status of the university,¹²⁵ and the court ultimately found that the university was not a constitutional corporation free from control by the state, but a "public corporation not above the power of the Legislature to control."¹²⁶ Thus, as Joseph Beckham has observed, "constitutional autonomy may be substantially eroded, if not altogether lost, where a presumably autonomous governing board acquiesces in unconstitutional higher education legislation."¹²⁷

The exact measure of autonomy a public college or university enjoys is a consequence of many factors. Certainly, the language of a state's constitution provides the foundation upon

¹²⁴ Beckham, *supra* note 85, at 180.

¹²⁵ *University of Utah v. Board of Examiners of State of Utah*, 295 P.2d 348, 360-368 (1956).

¹²⁶ *Id.* at 371.

¹²⁷ Beckham, *supra* note 85, at 181.

which considerations of autonomy are grounded. Nevertheless, statutory law may augment the language of a state's constitution, thereby bestowing upon a college or university a more significant degree of autonomy than is ostensibly granted in the institution's state constitution. However, as *University of Utah* demonstrates, a putative constitutional grant of robust institutional autonomy may erode if the college or university fails to assert its autonomy against state encroachment.

I now turn to a case pending before the Utah Supreme Court and to what insights can be gained from it and the foregoing for public institutions of higher education, particularly in regard to public colleges and university's possession and exertion of institutional autonomy.

III. INSTITUTIONAL AUTONOMY: *UNIVERSITY OF UTAH V. SHURTLEFF*

University of Utah v. Shurtleff is presently pending before the Utah Supreme Court.¹²⁸ At issue is the validity of the University of Utah's Internal University Firearms Policy, which prohibits the possession of concealed weapons on campus, in light of Utah's Uniform Firearms Act and Concealed Weapons Act. According to the Uniform Firearms Act, "all authority to regulate firearms [is] reserved to the state except where the Legislature specifically delegates

¹²⁸ *University of Utah v. Shurtleff*, No. 20030877-SC. The case was originally argued before the Third Judicial District Court in and for Salt Lake County. The District Court held in favor of the university. The University of Utah then brought the issue before United States District Court for the District of Utah Central Division, asserting a federal constitutional right of academic freedom. The university also claimed that "Article X, Section 4 [of the Utah Constitution] protects the University's autonomy from state interference on matters relating to the University's core mission." *University of Utah v. Shurtleff*, 252 F.Supp.2d 1264, 1267 (D.Utah 2003). The court determined that it could not "address the merits of the [university's] state law claims [and the claims were] dismissed without prejudice." *Id.* at 1283. The Utah Attorney General appealed the state trial court's decision, and the case is now pending before the Utah Supreme Court. In their briefs filed with the state court and the federal court, the University of Utah employed the same argument in substantiation of its claims. I will be relying on these briefs, provided to me by Michelle Ballantyne, Associate General Counsel at the University of Utah's Office of General Counsel, and the opinion of the federal court in an analysis of the university's argument. I also rely on the arguments presented in the briefs of the Utah Attorney General (*available at* <http://attygen.state.ut.us>).

responsibilities to local authorities or state entities.”¹²⁹ According to the Concealed Weapons Act, concealed weapons permits issued in accordance with the Concealed Weapons Act are “valid throughout the state without restriction.”¹³⁰ However, the University of Utah’s Internal University Firearms Policy prohibits students and all university employees from possessing or using firearms on campus without authorization from the university. In 2001, Utah Attorney General Mark Shurtleff “concluded that the University of Utah’s policy prohibiting students and faculty from possessing firearms on University premises was contrary to [the Firearms Act and the Concealed Weapons Act].”¹³¹ Without “an express grant of authority from the Utah State Legislature, [the Attorney General contends that] the University of Utah is without the power to regulate firearms.”¹³² Thus, the issue is whether the university must comply with the Firearms Act and the Concealed Weapons Act or whether it possesses the institutional autonomy to determine its own firearms policy, without interference from the state legislature.

A. Statutes, Constitutions, and Case Law

According to the university, Article X, §4, of the Utah constitution grants the university the right of self-governance and institutional autonomy.¹³³ The university observes that Article X, §4, of the Utah state constitution states, in part, the following:¹³⁴

All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.

According to the university, the constitutional language refers to the territorial laws at the time the constitution was adopted.¹³⁵ The university was created by the Territorial Legislature of Utah on February 28, 1850. The ordinance instituting the university reads as follows:

¹²⁹ Utah Code Ann. §§ 76-10-500 – 531 (1999 & Supp. 2001).

¹³⁰ *Id.* at §53-5-704(1).

¹³¹ University of Utah, 295 P.2d at 1272.

¹³² Brief of Defendant at 12 (No. 20030877-SC).

¹³³ Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 10 (No. 2:02CV-0212K).

Sec. 1. Be it ordained by the General Assembly of the State of Deseret: That a University is hereby instituted and incorporated, located at Great Salt Lake City, by the name and title of the University of the State of Deseret.

Sec. 2. The powers of the University shall be vested in a Chancellor and twelve Regents; the number of which Regents may be increased when necessary, who shall be chosen by the joint vote of both Houses of the General Assembly, and shall hold their office for the term of four years; and until their successors are qualified.

Sec. 3. The Chancellor shall be the chief executive officer of the University, and chairman of the Board of Regents.

Sec. 4. The Chancellor and Board of Regents are a body corporate, to sue and be sued; to act as Trustees of the University, to transact, or cause to be transacted, all business needful to the prosperity of the University in advancing all useful and fine arts and sciences; to select and procure lands; erect and purchase buildings; solicit donations; send agents abroad; receive subscriptions; purchase books, maps, charts, and all apparatus necessary for the most liberal endowment of any library, and scientific institution; employ professors and teachers; make by-laws, establish branches of the University throughout the State; and do all other things that fathers and guardians of the Institution ought to do.

Sec. 5. The Chancellor and Regents may appoint a Secretary, and define his duties.

Sec. 6. The Chancellor, Regents, and Secretary, before entering upon the duties of their respective offices, shall each take an oath of office, and file a bond in the office of the Secretary of State, with approved securities, in a sum not less than ten thousand dollars, conditioned for the faithful performance of their several duties; which sum may be increased at the discretion of the Executive of the State.

Sec. 7. There shall be a Treasurer of the University elected in the same manner, and for the same time as the Chancellors and Regents; whose duty it shall be to receive and safely keep the funds of the University, or dispose of the same, as he shall be directed by the Board of Regents; and keep accurate records of all funds that may come into his possession; and keep his books open at all times for the inspection of the Chancellor and Regents, or any of them, and of the Executive and Secretary of State.

Sec. 8. The Treasurer, before entering upon the duties of his office, shall take an oath of office, and file a bond with approved security, in the office of the Secretary of State, in the sum of one hundred thousand dollars; conditioned for

¹³⁴ See *id.*

¹³⁵ See *id.*

the faithful performance of his duties, which sum may be increased at the discretion of the Executive of the State.

. . . .

Sec. 10. It shall be the duty of the officers of the University, to prepare and open books; and be ready to receive subscriptions, donations and appropriations, on or before the sixth day of April next; and shall legibly enter upon their books, all subscriptions and donations to the University, with the names of the donors, time and place, and preserve the same.

. . . .

Sec. 13. The Secretary and Treasurer shall each present a full and explicit report in writing of the situation, funds, and doings of the University in their several departments, by the fifteenth of October in each year, to the Auditor of Public Accounts.¹³⁶

The powers of the university are placed in the control of a chancellor (i.e., the president) and a board of twelve regents; the chancellor and board of regents are chosen by the legislature. The chancellor and the board of regents – just as we saw in the Dartmouth College Case – comprise a corporate entity which, legally, embodies the institution, and wherein the entire legal interest of the corporation resides. According to the territorial laws, the corporation is responsible for conducting all of the affairs of the institution required for advancing its mission. Additionally, the chancellor and board of regents are responsible for procuring the land upon which it is in charge of erecting the university's infrastructure. They must develop the institution's funds and retain instructors, as well as create the rules governing the internal affairs of the university. In short, as the territorial laws lyrically explicate, the chancellor and board of regents must "do all other things that fathers and guardians of the Institution ought to do."

The treasurer of the university is to be directed by the board of regents and must make its books available for inspection by the chancellor, the board of regents, and the executive and the secretary of the state. Moreover, the university must account for its funds before the state.

¹³⁶ University of Utah, 295 P.2d at 350-51.

In 1892, by an act of the Territorial Legislature of Utah, the name of the institution was changed to the University of Utah. The act also made the following declarations:

Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:

Section 1 . . . [The university] shall be deemed a public corporation and be subject to the laws of Utah, from time to time enacted, relating to its purposes and government, and its property, credits and effects shall be exempt from all taxes and assessments.

. . . .

Sec. 3. The government of the University and the management of its property and affairs is vested in a board of nine regents

"Sec. 4 . . . The regents shall make a biennial report to the Governor and Legislature during the first ten days of each session, (not special) showing the condition, income and expenditures to the end of the preceding fiscal year, with an additional general statement of its affairs from the end of the fiscal year to the 31st of December prior to the meeting of the Legislature, and with estimates of the income and expenses for the remainder of the fiscal year and for the ensuing two fiscal years, with such other statements and recommendations as they may deem useful.

. . . .

Sec. 11. The regents may adopt by-laws and from time to time repeal, amend or add to them, and therein provide for the organization of the board; for its general and special meetings; for the distribution of the business of the university to committees; for an executive committee of five of its members a majority of whom shall constitute a quorum having the powers of the board in the ordinary business of the University between meetings of the board.

The board shall employ and appoint a President of the University, and employ or provide for the employment of all instructors and employees. They may provide for the organization of a faculty of the instructors of which the President shall be the chairman and executive officer, and they may commit to the faculty the general management and control of instruction, and the exercise of such powers regarding the examination, admission, classification and instruction of students as the regents may deem proper. All contracts hereafter made with instructors and other employees, whether for a definite or indefinite time, shall be subject to termination at any time at the will of the regents or their executive committee when in their judgment the interests of the university require it.¹³⁷

¹³⁷ *Id.* at 351-354.

According to university, the principle that emerges from this constitutional history is that the “Legislature has authority to control the University’s finances and disposition of property, [but] the University possesses the authority to govern its own internal academic affairs free of legislative control.”¹³⁸ Thus, the university has the “right to take reasonable steps to govern its internal affairs and encourage the free exchange of ideas in the classroom.”¹³⁹ General management and control of the university is possessed by the institution. Moreover, the university claims that firearms policy is an academic matter, intimately related to the free exchange of ideas at the institution as well as the safety and welfare of the faculty, students, and staff at the university.¹⁴⁰ Therefore, the university possesses the constitutional right to determine its own firearms policy, without interference from the state legislature. Accordingly, it is not prohibited from establishing internal institutional policies pertaining to firearms.

The attorney general of the state of Utah, relying on the same constitutional history, argues that “Utah’s constitution, its statutes (current and historic) and the decisions of the courts have never provided the University of Utah the autonomy that it seeks”¹⁴¹ and that the university is not a “constitutionally-created autonomous entity.”¹⁴² The attorney general observes that at “the time of statehood, Utah’s laws expressly made the University ‘subject to the laws of Utah, from time to time enacted, relating to its purpose and government.’”¹⁴³ Additionally, the attorney general argues that the university’s claims to institutional autonomy “based on [its] reading of Utah Const. art. X, §4 . . . have been repeatedly rejected by the courts”¹⁴⁴ In particular, the

¹³⁸ Plaintiffs’ Memorandum in Opposition to Defendant’s Motion for Judgment on the Pleadings at 5 (No. 2:02CV-0212K).

¹³⁹ Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 10 (No. 2:02CV-0212K).

¹⁴⁰ *Id.* at 11-12.

¹⁴¹ Brief of Defendant at 12 (No. 20030877-SC).

¹⁴² *Id.*

¹⁴³ Reply Brief of Defendant at 8 (No. 20030877-SC).

¹⁴⁴ *Id.* at 2

attorney general relies on *University of Utah v. Board of Examiners of State of Utah* discussed in II. D. above. In light of the statutory history, constitution, and case law, the attorney general contends that the University of Utah has no power or autonomy that would permit it to disregard general laws enacted by the state “even when such laws relate to the purposes and government of the University.”¹⁴⁵

B. Insights for Public Institutions of Higher Education

What insights can be gained for public institutions of higher education? First, an analysis of the precise degree of institutional autonomy a public college or university possesses begins with an examination of the language of a state’s constitution. For instance, as is the case with regard to the language of the state constitution of Michigan, the public institutions of higher education in the state may be granted plenary power of governance and control. However, as *University of Utah v. Board of Examiners of State of Utah* demonstrates, if a public college or university acquiesces to legislative and judicial construction of constitutional provisions, putatively granting to the college or university institutional autonomy, in such a way that it denies a constitutional grant of institutional autonomy, then the college or university may suffer the loss of its ostensible right of self governance. Therefore, if a state constitution appears to grant a public institution of higher education institutional autonomy, the college or university must be prepared to assert its right of self governance against the state. If a state constitution does not grant the public institution of higher education institutional autonomy, the college or university may yet possess a grant of self governance. For instance, neither the state constitutions of New Jersey or Delaware provide Rutgers or the University of Delaware institutional autonomy. Nevertheless, each institution is statutorily granted a robust claim to management and control of the universities. Thus, while an analysis of the precise degree of institutional autonomy a public college or

¹⁴⁵ Brief of Defendant at 6 (No. 20030877-SC).

university possesses begins with an examination of the language of a state's constitution, the case law and statutory law of the state must be evaluated to determine the specific contours of self governance the institution may actually assert.

Second, the history and tradition of higher education in the United States allocates control of colleges and universities to those it has deemed most capable of directing such a unique and important institution, namely, a board of trustees and the president of the college or university. Boards of trustees and presidents must embrace and assert this tradition and history. Otherwise, our public colleges and universities may be left to political and governmental interference; like the University of Utah, public colleges and universities may face legislative intervention into the matters admittedly academic. To hold these institutions subject to the rise and fall of popular parties, as Daniel Webster has observed, is exceedingly dangerous. No less because

[b]enefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their officers. Colleges and halls will be deserted by all better spirits, and become a theater for the contention of politics. Party and faction will be cherished in the place consecrated to piety and learning.¹⁴⁶

CONCLUSION

Therefore, in order to possess and retain institutional autonomy, public institutions of higher education must proactively protect and assert that which their state constitutions, statutory law, and case law provide for them – however great or insipid their grants of institutionally autonomy may be.

¹⁴⁶ Trustees of Dartmouth College, 17 U.S. at 598.

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