

How to Think about the Dartmouth College Case

Author(s): John S. Whitehead and Jurgen Herbst

Source: *History of Education Quarterly*, Vol. 26, No. 3 (Autumn, 1986), pp. 333-349

Published by: Cambridge University Press

Stable URL: <https://www.jstor.org/stable/368242>

Accessed: 12-01-2020 02:12 UTC

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Cambridge University Press is collaborating with JSTOR to digitize, preserve and extend access to *History of Education Quarterly*

Forum

How to Think about the Dartmouth College Case

Editor's note: The essays below are the product of an exchange between two scholars who have studied the impact of the Dartmouth College case on American higher education. The first essay is by John S. Whitehead, professor of history at the University of Alaska, Fairbanks; the second by Jurgen Herbst, professor of history and educational policy studies at the University of Wisconsin, Madison.

John S. Whitehead

When I wrote *The Separation of College and State* almost fifteen years ago my goal was to trace the origins of the distinction between “public” and “private” higher education in the United States. In the 1960s the terms were well recognized; no historian of education argued with that. But when did the distinction first become well recognized by educators and the general public alike? I was suspicious of the claims sometimes bandied about at private institutions like my own Yale that the distinction dated to the very origins of American higher education. Even a cursory review of the existing literature revealed that in the colonial and early postrevolutionary periods there was at least a quasi-public relationship in terms of support and control between such institutions as Yale, Harvard, and Columbia and the colonial and early state governments of Connecticut, Massachusetts, and New York.

I concluded in *The Separation* that “a distinction between private and public or state institutions was not commonly recognized before the Civil War.” After the war, particularly in the 1870s, people such as Harvard’s Charles Eliot advocated that “private” colleges should be totally separate from any connection with state government. Dependence

on the state, Eliot asserted, was “a most insidious and irresistible enemy of republicanism.” About the same time university presidents in states such as Wisconsin and Michigan finally convinced their legislatures to make annual appropriations to the “state university” and accept some type of permanent responsibility for these institutions.

To make my case that the public/private distinction was a *postwar* phenomenon, I had a major obstacle to overcome—the Dartmouth College case of 1819. Almost every previous historian of higher education from Merle Curti to Frederick Rudolph to Lawrence Cremin had asserted in one form or another that the Supreme Court’s decision in that case encouraged the development of “private” colleges by protecting them from state encroachment. Private donors were thus stimulated to found colleges. Public universities would have to be direct creations of the state, not state transformations of existing colleges. Most historians saw the spread of “private” or denominational colleges after 1819 as proof of the encouraging effects of the Dartmouth decision. They were, however, somewhat undecided whether or not public or state universities were retarded by the decision. These institutions did not appear to spring up with the same vigor as their private counterparts. The traditional interpretation portrayed the Dartmouth College case as a major watershed in educational history; it clearly affirmed the existence of the public/private distinction by 1819.

After a close observation of the available documents on the case, I revised the traditional interpretation. The case, I concluded, was not a watershed; it did not affirm a widely accepted public/private distinction. In fact, I could find few people except Justices Joseph Story and John Marshall who were particularly interested in such a distinction. Shortly after winning the case the Dartmouth trustees asked the New Hampshire legislature to pay for the legal fees they incurred in fighting the state. Throughout the 1820s Dartmouth continued to seek an alliance with New Hampshire, offering state representation on its board of trustees in exchange for financial support.

Looking beyond Dartmouth, I observed that the Supreme Court decision received scant attention after it was issued. I discovered no private college promoters who cited the case in sponsoring new institutions. In fact, some denominational colleges quite eagerly sought state aid and often received it. There was little evidence that the states paid any more attention or accepted any greater responsibility for the so-called state universities than for the denominational colleges in their boundaries. In many states, particularly in the West, the state legislature performed no other function in the prewar period than to transfer federal land grants designated for higher education to a group of state university trustees. Only in South Carolina and Virginia did I find a continuous

state sponsorship of one university. In my revisionist view neither educators nor the general public saw denominational colleges and state universities in a particularly different light before the war. This is not to say that all institutions were viewed identically. It is to say that the public/private distinction so well known in the twentieth century was simply not on the minds of antebellum Americans.

Since the publication of *The Separation* in 1973, several historians have supported or accepted my revision, even while seeing further ramifications to the case. In 1974 the Dartmouth literature expanded with Steven Novak's article, "The College in the Dartmouth College Case: A Reinterpretation" in *The New England Quarterly*, Vol. 47, Novak noted that I offered "an elevated discussion of the implications of the case on the concepts of 'private' and 'public' education." However, he argued that the trustees were not really concerned with legislative control of the college. Their real concern was the religious direction of the institution. Would it be controlled by the evangelical, revivalist faith of the majority of the trustees or the liberal, Arminian-like theology of John Wheelock and his supporters? Novak concluded:

To the participants in the college and the community, then, the significance of the Dartmouth College Case was not the political battle between Federalists and Republicans or the contest between the state legislature and the United States Supreme Court. It was, rather, the question who would control the religious future of Dartmouth and Hanover. The Supreme Court's 1819 decision in favor of the trustees was thus a major victory for the cause of evangelical education (p. 563).

Novak did not say whether Chief Justice Marshall or others outside the Dartmouth community shared the same religious, rather than political, concerns. Nor did he specifically confirm or refute my interpretation. However, his reinterpretation indicates that a public/private distinction was *not* on the minds of the Dartmouth trustees. This helps to explain why the trustees so readily interacted with the state after the case. They had never really objected to the state; only to its support of John Wheelock in their religious feud.

Further direct acceptance of my Dartmouth interpretation came in 1980 with the publication of Lawrence Cremin's masterful *American Education: The National Experience*. Here Cremin abandoned the traditional view he and Freeman Butts had espoused a quarter century earlier in their *History of Education in American Culture*. Instead he accepted my revision by name and concluded, "it is unlikely that it [Marshall's decision] had any significant effect one way or another upon the image of colleges as community institutions in the public mind." Throughout the same volume Cremin made repeated mention of the difficulty of defining private and public education at all levels, primary and collegiate,

in the nineteenth century. "The distinctions," he noted, "were in process of becoming and therefore unclear and inconsistent."

With the imprimatur of Cremin it looked as if my revision was becoming the accepted view as *The Separation* approached its tenth birthday. Such was not to be the case. In 1982 Jurgen Herbst's *From Crisis to Crisis* appeared. With it the traditional version of the Dartmouth case reemerged along with a challenge to my postwar dating of the private/public distinction. "The Dartmouth College decision," proclaimed Herbst, "was the stimulus for American higher education as we have known it since 1819."

Herbst found in *From Crisis to Crisis* that America's colonial colleges, with one exception, were even more public than I had asserted in *The Separation*. He called them "provincial" colleges, public in nature not merely because of various evidences of public control and support, but also for the acknowledged monopoly function of training leaders in each of the respective colonies. The publicness started to break down in 1766 with the founding of Queen's College (Rutgers). By ending Princeton's monopoly as the provincial college of New Jersey, Queen's led the way for the creation of "private" colleges. Over the next half century the vast multiplication of colleges nationwide effectively de-monopolized higher education in most of the states. Herbst saw the Dartmouth decision as the Supreme Court's sanction of the de-monopolizing trend, hence affirming the privatizing movement in higher education that had been taking place since 1766.

In a review of *From Crisis to Crisis* for the Summer 1984 *History of Education Quarterly* I challenged Herbst's use of the term "private" in describing both Queen's and the host of local colleges that emerged prior to 1819 and said, "His definition rests on function and clientele rather than on the presence or absence of state officials on the governing boards. . . . Private now equals local; public equals statewide." It even seemed to me ironic that Queen's, Herbst's first private college, was the only colonial college to emerge as a state university in the twentieth century. I found no new evidence in *Crisis* suggesting that "private" college promoters cited the Dartmouth decision as a stimulus for their colleges and held to my revision that the decision at best "gave guidelines for and limits to the college-state relationship; it did not separate the two."

Since the appearance of my review, Jurgen Herbst and I have had a lively correspondence on these issues. Herbst now concedes that the term "private" may not be the best denominator for the local colleges, but he holds fast to the importance of the Dartmouth decision—particularly as it related to the numerous quarrels between legislatures and colleges that took place before 1819. I too have taken a long look at my previous work.

On dating the emergence of the private/public distinction I still hold that it was a postwar phenomenon. But Jurgen Herbst has convinced me that the de-monopolization or localizing of higher education which began with the founding of Queen's and which signaled the death of the provincial college requires even more study by historians of education. Clearly something of great consequence was happening here. But exactly what? How were colleges defining their educational function to the student bodies and communities they served? In this localizing phenomenon lie the origins of the diverse, pluralistic system that characterizes twentieth-century American higher education as much, if not more so, than the public/private distinction. What should we call this localizing process? We need a name for it.

Finding that name has caused considerable consternation for many historians. According to Herbst, "The appearance of *private* colleges thus came to signal the effectiveness of *local* efforts at development." Lawrence Cremin discovered the same colleges in *American Education*, but said, "They were essentially *local* institutions . . . seen primarily as community—and in that sense *public*—institutions." Daniel Boorstin disliked both terms and concluded in the second volume of *The Americans*, "The distinctly American college was *neither public nor private*, but a *community* institution." Public, private, neither public nor private—what is the real definition of the local or community college? Possibly we should abandon the terms public and private until we can define the local college without them. (The italics are mine.)

In searching for this elusive name we must also pay greater attention to the antebellum state universities. Most of the recent literature that I have read focuses on the prewar denominational colleges, probably because there were so many more of them. It has been my observation that the same localizing forces shaped the state universities of the period. If a distinction between public and private was emerging before the Civil War, we would expect to see the state universities developing differently. I don't see that they did. As Cremin claims in *American Education*, "Most state universities during the pre-Civil War period were no more public, or enlightened, or university-like in character than the dozens of denominational colleges that surrounded them and competed with them for students." So what should we call all these institutions that seem so indistinguishable? I intend to suggest a name. But first I want to look again at the Dartmouth decision in light of Jurgen Herbst's steadfast position.

The Dartmouth decision seems to mesmerize most historians of higher education. Even those who agree with my interpretation of the impact of the decision seem compelled to see the case as a milestone in American educational history. In 1983 Eldon Johnson expanded the Dartmouth

literature once again with “The Dartmouth College Case: The Neglected Educational Meaning” in the *Journal of the Early Republic*. Writing a year after *Crisis* appeared, he still affirmed that I had shown with “convincing documentation” that the case had not “immediately severed the college-state alliance.” Nonetheless, he concluded that the “Dartmouth episode . . . was an event in the formative years of American higher education which helped shape the future.” The existence of a Supreme Court decision in antebellum college development must be too irresistible to dismiss. Possibly I de-emphasized it too much. Having reviewed the decision and the ever-growing literature on it, I am prepared to offer a slightly different interpretation. The decision still should be approached from two angles: (1) its effect on Dartmouth and (2) its wider implications for the development of American higher education.

Looking at the decision in terms of Dartmouth, I now find the issue even stranger than before. Jurgen Herbst and I both agree that Dartmouth was a quasi-public or provincial college when it was founded in 1769. It had not surrendered its monopoly role in New Hampshire higher education by 1819, nor did it lose it after 1819. Not only did the Dartmouth trustees seek new alliances with the New Hampshire legislature in the 1820s, they also successfully defeated an attempt in the same legislature to charter a competing state university. Dartmouth retained its monopoly role in New Hampshire, in contrast to neighboring Vermont and to every other state except Rhode Island in which a provincial college existed. If the Dartmouth decision allowed state and private institutions to exist side by side, it did so almost everywhere except in the state directly addressed in the case! I am inclined to agree with Steven Novak that the significance of the case for Dartmouth was a victory for piety rather than for privateness.

Still we must look beyond Dartmouth. To say that the case was not important because it did not directly affect New Hampshire would be like saying the Dred Scott decision was unimportant because Scott was manumitted the next year. In the wider arena I think there is a greater significance to the decision than I have previously acknowledged.

My previous contention has been that a public/private distinction was not *commonly recognized* before the Civil War. However, I must now make it clear that the public/private distinction had obviously been made. After all, that is what the Supreme Court’s decision was all about. The court clearly declared there were two kinds of institutions—public and private. It made the distinction, placed Dartmouth in the private category, and indicated that the two kinds of colleges were entitled to different kinds of immunities. Clearly in the minds of *some* people the distinction existed.

What is puzzling to me about the decision, and in my mind unfortunate and downright pernicious, is the fact that the distinction bore little

if any resemblance to the existing form and function of American colleges. No college in 1819, or I would assert in 1986, was or wanted to be a *public* institution in the Court's sense of an agency or branch of government. How quickly those of us who teach in state universities rise up today to beat off any assertion by governors and legislatures that our institutions are state agencies and should be so administered. Nor did any college want to be merely a *private* eleemosynary foundation whose primary function was to hold, safeguard, and distribute the *funds* of a donor. Such private institutions are more akin to today's Ford, Rockefeller, and Carnegie Foundations. They aid education by distributing funds, but they do not educate. Several historians have noted the exaggerations in the Court's decision. Eldon Johnson observed that the Dartmouth decision "went too far." But why was the Court willing to issue an opinion that was so at odds with reality?¹

I would assert that even the justices of the Court were not really interested in making a public/private distinction. They wanted to protect educational institutions from legislative tampering. It is clear that men like Justices Marshall and Story along with other prominent Federalists

¹ One article in the recent literature on the Dartmouth College case clearly challenges my position that the Court's decision was at odds with reality. Bruce A. Campbell revives the traditional interpretation of the beneficent effects of the decision with added emphasis in "Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy," *Kentucky Law Journal* 70 (1981-82): 643-706.

Campbell claims that the case was beneficial because it dealt with the reality of the "negative American experience with relations between colleges and governments from the late colonial into the early national periods." Looking at the college-state relation from 1740 to the Dartmouth case, Campbell asserts, "legislative threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions and never any substantial permanent gain for education or government. In light of this record, the benign 'public' to whom Chief Justice Richardson thought colleges ought to be responsible was simply an unreal abstraction."

With this background of college-state relations, Campbell argues that the Court stretched and imaginatively adapted the English common law on private eleemosynary corporations to protect Dartmouth from state encroachment because the English law "did not fit the American situation." To Campbell, John Marshall shaped constitutional policy to fit a real need to protect American colleges.

Campbell's factual basis for the "negative experience" is highly questionable. He claims, "Functionally, Dartmouth had always been private, with only limited, sporadic contact with the state." This is at odds with both my work and Jurgen Herbst's. He calls the New Hampshire legislature's action an "attack." This is contrary to Eldon Johnson's perceptive analysis of the educational goals of New Hampshire governor William Plumer. He ignores the substantial financial aid given to such colleges as Yale and Harvard during this period.

Given this problem with the facts of the issue, I do not see that the inclusion of Campbell's article in the text would advance the dialogue between Herbst and me. Herbst does not take issue with Campbell as strongly as I do but agrees that it is difficult to know exactly what Campbell means by "negative experience" and the injury that the colleges sustained. The article does deserve to be noted as a part of the recent Dartmouth literature.

found legislative influence, particularly by Republicans, dangerous to an orderly society. Story clearly stated in his concurring opinion that all educational institutions, public and private, should be immune from legislative interference. But the Court would have had difficulty in providing such blanket protection. The New Hampshire Supreme Court had upheld the legislature's action on the ground that Dartmouth was a public institution. The trustees had not challenged the right of the state to tamper with a public college. To overturn the New Hampshire decision the Court merely had to place Dartmouth in the private category.

If neither the Dartmouth trustees nor the U.S. Supreme Court were really interested in the public/private distinction, but only in the use that could be made of these terms to achieve a victory for piety or against the Republicans, then it is not surprising that little mention was made of the decision by college sponsors in the prewar period. Why should other people cite a decision that did not fit their specific needs? Nonetheless, the deed had been done. After 1819 things would never be the same. Even if for all the wrong reasons, the terms public and private, and the immunities that each implied, had now been proclaimed and sanctioned as the law of the land. If Americans ever felt a need to differentiate the vast multiplicity of institutions that surrounded them, the Court had pointed the way. It was just a matter of time.

By the 1860s the college scene was simply too confusing. The old clarity of the function of the provincial college was slipping out of anyone's memory, and the headiness of the college boom was no longer new. College leaders needed a distinguishing tool to create a new order. Public and private now had a use. Eliot and others could easily make their institutions private simply by reaching for the terms the Court had offered. The Dartmouth decision had not been challenged for almost a half-century. It provided a truly *ancient* precedent for postwar Americans.

If the terms private and public were not really appropriate to the form of American colleges in 1819, I would argue that they were equally unfortunate choices after the Civil War. Private or public—is that really what Americans wanted their colleges to be? Is that the order they wanted to place on the diversity? Americans have long claimed that the coexistence of such institutions distinguishes their university system from Europe where dependence on the state is the rule. But is that a distinction to be proud of? In some European countries (Denmark is the example I know best) the state supports so-called private schools because the people believe that everyone is entitled to a fair portion of the public wealth, not merely those who conform to majority views. Yet in America, in both schools and colleges, the public/private distinction has forced us to say that only those students who attend institutions attached to the state are entitled to an education supported by the common funds to which

all have contributed. Is that a distinction Americans wanted to make or a cul-de-sac they backed themselves into by insisting that private and public are the terms that define their system?

At the same time that Eliot advocated privateness at Harvard and state universities began to receive annual appropriations, another kind of institution emerged which has tended to go by the wayside as an American norm. In *The Separation* I called it a hybrid institution; the prime example was Cornell. In founding Cornell, Andrew D. White blended the individual gifts of Ezra Cornell with the Morrill land grant for New York. Cornell was thus the manifestation of multiple forms of philanthropy—private and public. White thought he was doing the natural, the American thing in blending these gifts. I suggest that the Cornell example, which was duplicated in the West at Purdue, provides a clue to unraveling the localizing phenomenon in the antebellum period. Cornell was founded as an object of philanthropy. Possibly the one word that best describes the American college or university is philanthropic—not public or private. (Cornell has obviously not gone by the wayside. But one may well think what we try to call Cornell today. Is it public or private? Do we feel compelled to fit Cornell into terms that do not really describe it?)

American colleges and universities have been founded and sustained by multiple philanthropies ever since the blending of the funds of John Harvard and the Massachusetts General Court. Herbst's provincial colleges were philanthropic as were the multitude of denominational and civic colleges that took away the older institutions' monopoly. Colonial and early state support took on a philanthropic character with occasional gifts, land grants, bank bonuses, and refunds from the revolutionary war. The federal land grants in the Northwest Ordinance and the 1862 Morrill Act were also philanthropic in nature. Today state universities strive to receive "lump sum" legislative appropriations as much as private colleges long for unrestricted donations. Private and public universities receive generous contributions in their annual alumni appeals. Clearly the graduates see both kinds of institutions as philanthropic. Despite the IRS's willingness to accept voluntary contributions to reduce the national debt, how many of us want to direct our philanthropy to a branch of government—a truly public institution in John Marshall's view? Possibly the truly American quality of our colleges and universities has been the availability of vast, multiple sources of philanthropy in the United States and the ability of American institutions to blend those diverse contributions—in the same way that the American university blends so many diverse studies and disciplines in contrast to its European counterpart.

Private, public, philanthropic—where do these words now leave my discussion with Jurgen Herbst on the Dartmouth College case? I hope

my meandering has been with some purpose. Both Herbst and I agree that the terms public and private may not be the best to describe the multiplicity of colleges emerging in the first two decades of the nineteenth century, or for the ensuing decades up to the Civil War. We also agree that the Dartmouth College decision sanctioned a distinction between public and private, though we may differ on when that sanction became important and why.

What is even more significant is the fact that we both agree that the words or terms we call American institutions are crucial, though Herbst is more concerned with the legal implications of the words while I place the emphasis on their descriptive use. The words we choose, be they *provincial*, *public*, *private*, or *philanthropic*, tend to shape our conception of the form, function, and even the Americanness of our colleges and universities. Educators have at times, I believe, even changed the function of their institutions to fit the meaning of the words rather than the educational desires of their clientele. It seems to me that educators have let the lawyers and the judges tell them what their institutions really are. And that may well be a reality I have trouble accepting. Once an institution is defined in law, its function may well change over time to fit that legal category. But that could be the topic for another paper!

Jurgen Herbst and I agree that the name game is serious business. Choosing the wrong word is more than a simple case of mislabeling. As historians we need to find the right words to describe our antebellum colleges if we are to understand their function in American society and in American law. This choice of words calls for the best thought and exchange of ideas we can give it.

Jurgen Herbst

In *From Crisis to Crisis* I questioned John Whitehead's denial that the significance of the Dartmouth College case lay in its legal implications for the separation of college and state. Instead, I reaffirmed that traditional interpretation, basing my case on a comprehensive survey of the college-state relations throughout the entire preceding period from the founding of Harvard in 1636 to the Dartmouth decision in 1819.

What had prompted me to take another look at the circumstances and significance of the Dartmouth College case? As I stated in the preface to *From Crisis to Crisis*, it was the unrest of the 1960s on college campuses and the request I received in 1967 to prepare a statement on the relationship between civil and academic jurisdiction for use in federal court

that started me off on my inquiries into the legal history of American higher education. In that history, the Dartmouth College case loomed large as the first instance of a college dispute reaching the United States Supreme Court. That fact persuaded me to take the case as the closing point for my investigation. Consequently—and this will help to underline the difference in approach and conclusions between John Whitehead and me—I saw many of the major legal events concerning the American colonial college as stepping stones on the way to the Dartmouth decision. The decision itself, though of great significance for the establishment in this country of fairly unique traditions of both public and private higher education, appeared in my view as the capstone of a series of similar legal cases concerning the long-standing disputes over the relative rights of college corporations vis-à-vis the overriding powers of public government.

The decision to wend my way along the major points of crisis in colonial college history while trying to look at them, as it were, from the standpoint of contemporaries, yet, at the same time, explaining much of what I found in the language of our own day, led to some of the issues under dispute between Whitehead and me. The changing definitions of public and private is a case in point.

Whitehead quite rightly observes that the usual definitions of public and private rest on the presence or absence of state officials on governing boards or on the acceptance or rejection of state support and influence in the colleges. But for the years I considered in *Crisis*, these definitions, I contend, do not adequately fit the situation.

At Queen's College, the one "private" college of the colonial period, the governor, council president, chief justice, and attorney general of New Jersey served on the board of trustees. In some private colleges founded after the Revolution, such as Blount in Tennessee, public officials also served on governing boards; in others, such as Transylvania in Kentucky and Dickinson in Pennsylvania, they merely served in their private capacities, not representing their public office. Still other private colleges—Washington College, Jefferson College, and Allegheny College in Pennsylvania—received legislative appropriations. On the other hand, throughout the colonial period Yale, Connecticut's provincial college, was governed by a board of trustees made up entirely of ministers.

The difficulty stems from the fact that during the colonial period the terms "public" and "private" were not used with reference to colleges. Colleges were chartered by either crown or colony to serve the people of a province. Before Queen's College opened in New Jersey, there had never been more than one college in a colony. The colonists regarded this college as their provincial institution, granted it a monopoly over higher education, and subjected it to public oversight by the colony's

authorities. It was the colony's public or provincial college. But as far as terminology was concerned, it was simply a college.

Things changed when, with the chartering of Queen's College, the provincial college monopoly was breached for the first time. Then an opportunity was given to regard a college as something other than a provincial, i.e. public, institution. To make that distinction evident I wrote of Queen's as a forerunner of our private colleges. That choice of term, it seems, has not been very felicitous.

As a parenthetical remark I should add that I do not use the term "provincial college" in the colloquial sense as an institution of low repute in the hinterlands, but in its technical or legal sense as a colony's or province's one chief institution of higher education. During the colonial period the provincial college enjoyed and jealously guarded its monopoly on higher education in the province. The 1762 fight of the Harvard overseers against the incorporation of Queen's College in western Massachusetts is a prime example.

When I moved into the early nineteenth century, matters got more complicated yet. I then spoke of the new degree-granting institutions sponsored by localities, churches, denominations, promotional settlement associations, and professional groups as private colleges. This raises the legitimate question why a college sponsored by a locality, whether city or region, should be a private rather than public institution? So Whitehead asks quite justifiably: Were all these institutions private "in the way we think of the term today?"

The answer, of course, is no. They were not private in the way we think of that term today. They were nonpublic or nonprovincial in the way the antebellum generation thought of them. That is to say, they neither belonged among the newly founded state universities, nor were they older institutions officially founded or taken over by a state legislature, nor could they be considered in any sense as descendants of the old provincial colleges. They were something different, something new.

How to explain the newness? Working on the book I became impressed with European and American tradition that, for generations, had seen colleges and universities as attributes of territorial or provincial sovereignty or establishment. That tradition came to be questioned toward the end of the eighteenth century. Ethnic and denominational diversity provided the first impulse for this questioning, the expansion of settlement after the Revolution the second. Thus something new came into being—colleges whose sponsors no longer desired that territorial, provincial, or public connection that would make them agencies of the state. As a group, no official name existed for these institutions. Thus they could not then have been known as private colleges in the way the later nineteenth century would use that term. I wrote of them as private

because, whether their governors knew it or not, they were on their way toward just that destination.

Whitehead has persuaded me that for the colonial as well as for the early national period my choice of the term "private" college was not a happy one. He has told me that, working his way back from the present, he found the modern public/private distinction emerging in the late 1860s and 1870s. That makes good sense to me. The "privatization" of Harvard and David Pott's thesis of the emergence of the denominational college after the Civil War fit into this picture. So what, then, do we call the nonprovincial colleges that came into their own during the one hundred years following the 1766 founding of Queen's?

Various suggestions have been made. As Whitehead shows, the terms local and community college have been used. It is clear, however, that not all nonpublic colleges were local institutions. Those sponsored by denominational groups, settlement or proprietary professional associations, though always to be found in a given locality, were nonetheless not sponsored or supported by their locality. To refer to them as community institutions imparts to the term community so wide a meaning that I see no reason not to include state-sponsored colleges under that term as well. It then becomes impossible to distinguish public from nonpublic institutions altogether.

Now Whitehead recommends that we view these nonpublic institutions as philanthropic foundations. As he at the same time extends the use of the term philanthropic to colonial and early state support of the provincial colleges and to the Northwest Ordinance and the Morrill Act I do not see how that definition helps us. It brings us back to the dilemma I encountered in the use of the term community: both designations prevent us from distinguishing between public and nonpublic institutions.

Whitehead claims that that precisely is the advantage of the term philanthropic: it is closer to reality. His prime examples are Cornell and Purdue where public and private philanthropy exist side by side and do not permit the use of either an unqualified public or nonpublic designation.

Quite apart from the fact that we do not normally find it very difficult to distinguish the public and the nonpublic parts of the two institutions cited, Whitehead's suggestion does not address itself to the problem I encountered: is there a term we can use to distinguish the nonprovincial, nonstate institutions that in the one hundred years after the founding of Queen's College appeared as a historically new phenomenon in the United States? If, in our concern for descriptive accuracy we hesitate to employ the term used by the Supreme Court in 1819, then, I am afraid, we may have to settle for the not very elegant, but nonetheless descriptively more accurate "nonprovincial" or "nonstate."

Another observation of Whitehead's in his review of my book refers to the place of irony and logic in historical presentation. As I mentioned before, Whitehead wonders about my definitions of public and private and seems to think that the presence or absence of state officials on governing boards or the acceptance or rejection of state support and influence in the colleges might have made for a tighter, a more logical argument. Perhaps, but, as I pointed out above, it would not have worked.

We may well find this inconvenient, ironic, or illogical, but it is a fact we cannot well ignore. Somehow we have to cope with the illogicality of history and incorporate it into our interpretive structures without straining the logic of our presentation. For example, Whitehead finds it ironic that after the 1819 decision the Dartmouth trustees would again turn to the legislature for help. They even had the chutzpah to ask for state payment of the legal expenses incurred in their suit. He also finds it ironic that Queen's College, New Jersey, the institution to which I point as the first to demonstrate to us the beginnings of what became the private college in America, is today Rutgers, The State University. He could have added that it is ironic also that Harvard, our first provincial college, a little more than two centuries after its founding became a private university.

There is more that can be said on this point. It is, indeed, not logical that governing boards of nonstate colleges have again and again asked for state support. But, we should ask ourselves, what might have prevented them from doing so? Only the fear, I submit, that state support might carry with it certain obligations. As the case of Bowdoin College in 1820 shows, that fear was outweighed by the desire for cash and other privileges. Aren't we familiar with similar instances in the twentieth century as well? Colleges do not want legislative interference in their affairs, but they look for all sorts of government grants.

I find all this ironic, too, but I guess it disturbs me less than it bothers Whitehead. I tend to think that irony and illogicality are the stuff of history. As I tell my undergraduates in class, the history out there is not logic. Our history books and lectures, to be sure, had better be written and presented with excruciating care for logic if we expect anyone to read and comprehend them. But that's not the same as saying that history happens according to our rules of logic.

And finally, the meaning of the Dartmouth College case decision of the United States Supreme Court: Whitehead wrote in his book and repeats in his review that the Dartmouth decision did no more than give "guidelines for and limits to the college-state relationship. . . ." In the present discussion he says that the case was not a watershed and "did not affirm a widely accepted public-private distinction." I present the decision as the *magna carta* of the American system of higher education

in which private and public institutions develop side by side, and the private colleges are protected against state violation of their charter without their consent.

Why do Whitehead and I differ? The reasons have much to do with our approaches to history. While Whitehead judges the major significance of the case to lie in what did or did not happen in the decades following the Supreme Court decision, I see it in the issues the decision had laid to rest in 1819 and in the avenues it had thereby opened for college development. As Whitehead fails to turn up any antebellum college sponsor who viewed or used the Dartmouth decision as a stimulus to private college development, he reports that he cannot find a “widely accepted” public/private distinction. I, on the other hand, see the decision as the terminus of a debate that had begun with Yale President Thomas Clap’s dispute with the Connecticut Assembly, had found its climax in the struggles of the College of Philadelphia trustees with the Pennsylvania legislature, had then been revived again by the governors of Liberty Hall and Davidson academies, and had reached its definitive end in the Dartmouth decision. Thus, I evaluate that decision for its importance as a basis for the subsequent legal history of American higher education.

While Whitehead focuses on events and popular perceptions in the antebellum decades I, having traced legal antecedents in the colonial and early national period, write of long-range legal developments. From Whitehead’s angle of vision, the Dartmouth decision revealed its *full* significance for the history of American higher education only after the Civil War; from my point of view it constituted a decisive *legal* turning point already in 1819.

Whitehead thinks it “unfortunate and downright pernicious” that the public/private distinction made by the Supreme Court in 1819 “bore little if any resemblance to the existing form and function of American colleges,” that not even the justices of the Court “were really interested in making a public/private distinction,” and that their purpose was “to protect educational institutions from legislative tampering.” Admittedly, these are speculations, but I disagree with all three of them. I can see nothing unfortunate or pernicious in contemporary reality not then corresponding to a judicial view. Why should it? The Court’s purpose was to set guidelines for the future, not to describe things as they then were. Given the long and technically highly complex history of the English law of corporations, the transformation of the legal distinction between English civil and charitable corporations into American public and private corporations was for the justices a challenging task. John Marshall and Joseph Story, as Whitehead himself writes, were indeed particularly interested in this subject. And, I submit, it may be doubted that the justices were any more interested in protecting educational institutions from gov-

ernment interference than they were in a far more important matter: to protect American business corporations under the contract clause of the Constitution from arbitrary legislative amendments or repeals of their charters.

How crucial is Whitehead's observation that few college founders referred to the Dartmouth decision as having encouraged the growth of private colleges? In a paper given at the April 1985 American Educational Research Association meeting in Chicago I countered with a question of my own: How often in the nineteenth century did the founders of turnpike and bridge companies, the entrepreneurs of railroads and canals, of iron smelters and lumber mills refer to the Dartmouth decision when they applied for charters for their enterprises? Whitehead responded that they did indeed quote from that decision, but not before the 1870s.

I have no quarrel with Whitehead on that point. I believe he is correct. But I was thinking of the decades between 1819 and 1870 when, due to Marshall's decision, the private corporation became *the* American way of doing business. That railroads and other private businesses prospered by happily accepting, even demanding, generous public subsidies may be illogical and ironic, indeed, but it did nothing to weaken the faith in free enterprise and private business as the nation's guardian angels.

As to whether there was a difference in the enthusiasm or lack of it shown by state legislatures in the chartering of public vis-à-vis private colleges in the period from 1829 to 1850, I am not prepared to go beyond impressions I gained from an admittedly cursory overview. I found that the chartering of private colleges in the state legislatures more often than not was routine business, done without much debate, unless the issue of denominational rivalry happened to be involved. It was otherwise with the promoters of public universities and colleges. They, like the promoters of public business corporations—public utilities, for example—required special pleading and extended legislative argument. In antebellum America it was cumbersome and frustrating to get support for chartering or maintaining a state university. It is hard to forget Philip Lindsley's poignant complaint when he, as president of the University of Nashville, found that he had no private sect or party "to praise, puff, glorify, and fight" for his institution. So why should college sponsors trot out the Dartmouth decision? At best they would have wasted their time; at worst they might have called a legislature's attention to the decision's reserve clause. So they were well advised to leave well enough alone.

The point I wanted to make is that after the Dartmouth decision we encounter no further serious challenge to the side-by-side existence of public and private colleges. The real significance of that arrangement—the essence of the American system of higher education—appears when one adopts a comparative perspective and looks to other countries. Al-

most everywhere else, public institutions are the rule, private the exception.

So, as I said, I'll stick to my guns and will say it once more: the Dartmouth decision laid the legal foundations on which our present public and private institutions and systems of higher education have been built. If the decision was not cited every time a new institution of higher education appeared in the United States, it only shows, I believe, how firmly entrenched the notion of the side-by-side existence of private and public institutions had become. In Whitehead's words, there may not have been a need for a *magna carta*. "College fever" could have spread without the decision. But, as we often say, it sure helped, and it remains the key to understanding that which is "American" about American higher education.