

## ABSTRACT

Title of Dissertation: A COMPARATIVE LEGAL ANALYSIS OF STATE  
CONSTITUTIONAL AUTONOMY PROVISIONS FOR  
PUBLIC COLLEGES AND UNIVERSITIES

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This study contributes to our understanding of state constitutional provisions designed to provide constitutional authority for state college and university governing boards to direct the internal affairs of institutions under their control. In these states, independent constitutional authority for public colleges and universities is meant to limit excessive political interference from other parts of state government (Beckham, 1977, 1978; Glenny & Dalglish, 1973). This authority granted to governing boards of public colleges and universities is commonly referred to as constitutional autonomy (Beckham, 1977, 1978; McKnight, 2004). While constitutional language serves as the initial grant of internal control, court cases interpreting the provisions determine to a significant extent the legally recognized constitutional authority exercised by these governing boards (Beckham, 1977, 1978; Glenny & Dalglish, 1973). This study builds on the work of Beckham (1977, 1978) to update the current legal status of constitutional autonomy.

The study shows that Michigan, California and Minnesota continue as the states with the most substantial legal recognition of constitutional autonomy. Court decisions in six states (Louisiana, Montana, Nevada, New Mexico, North Dakota and Oklahoma) and attorney general opinions in Idaho confirm the existence of moderate to limited constitutional authority for public higher education governing boards. A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota. In Florida and Georgia, the legal status of constitutional autonomy is ambiguous. The status of constitutional autonomy was still not completely settled in the four states of Alabama, Alaska, Hawaii and Mississippi, but cases suggest judicial recognition of constitutional autonomy in these states unlikely. For Arizona, Colorado, Missouri and Utah, legal opinions reflect judicial rejection of constitutional autonomy.

In addition to assessing whether case law suggests strong, weak or ambiguous judicial treatment of constitutional autonomy or outright rejection of the legal doctrine, the study also analyzes constitutional autonomy cases using the concepts of procedural and substantive autonomy derived from the higher education literature. This analysis indicates that the concepts of procedural and substantive autonomy provide a useful analytical lens to better understand the impact of the legal doctrine on institutional autonomy.

A COMPARATIVE LEGAL ANALYSIS OF STATE CONSTITUTIONAL  
AUTONOMY PROVISIONS FOR PUBLIC COLLEGES AND UNIVERSITIES

by

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## DEDICATION

To my parents, A.C. and Shirley Hutchens, whose love and support I will always cherish.

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## CHAPTER 1

### INTRODUCTION

#### Introduction

The aims of making state colleges and universities sensitive to the public interest while also providing institutions with the requisite internal authority and flexibility to fulfill their academic, research and service missions have produced a persistent tension between public higher education and state government (McClendon, 2003b). Public colleges and universities generally enjoyed wide latitude in the management of their internal affairs through World War II, but the decades that followed witnessed a consistent ratcheting up of oversight by state governments (Glenny & Dalglish, 1973; McClendon, 2003b). The emergence of mass enrollment in higher education in the 1940s and a growing view of public colleges and universities as tools of economic growth served as key factors driving increased accountability efforts by state governments (Alexander, 2000; McClendon, 2003b). The heightened oversight of public colleges and universities in the post-World War II era continues to engender policy debates over the correct mix of state regulation and institutional authority (Heller, 2004; Marcus, 1997; McGuinness, Jr., 1999).

A select number of states use constitutional provisions as one legal mechanism to help preserve the autonomy of public colleges and universities. In these states, independent constitutional authority for public colleges and universities is meant to limit excessive political interference (Beckham, 1977, 1978; Glenny & Dalglish, 1973). Specifically, these provisions vest constitutional powers in public higher education governing boards to manage the internal affairs of institutions under their control. The

use of a constitutional provision to establish and provide legal protection for the internal institutional control of public colleges and universities is commonly referred to as constitutional autonomy (Beckham, 1977, 1978; McKnight, 2004).

While constitutional language serves as the initial grant of internal control, court cases interpreting the provisions determine to a significant extent the legally recognized constitutional authority exercised by these governing boards (Beckham, 1977, 1978; Glenny & Dalglis, 1973). For instance, in his research of constitutional autonomy Beckham (1977) initially identified 10 state constitutions with language appearing to grant unrestricted independent authority to governing boards. A review of cases in these states revealed no judicial decisions recognizing constitutional autonomy in three of the states and negative judicial treatment in two of them. Beckham (1977) also identified California at first as a state appearing to grant constitutional autonomy but with certain authority still reserved to the legislature. His analysis of cases in California led him to conclude, however, that state courts interpreted a level of constitutional autonomy in the state rivaled only by Michigan and Minnesota. These examples from Beckham's (1977, 1978) research show the centrality of judicial interpretations in giving practical legal effect to constitutional autonomy provisions.

California, Michigan and Minnesota are generally recognized as the states with the most extensive judicial recognition of constitutional autonomy (Beckham, 1977, 1978; Glenny & Dalglis, 1973; McKnight, 2004). Beckham (1977, 1978), based on an analysis of case law interpreting constitutional provisions, concluded that nine states granted judicial recognition of constitutional autonomy: California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada and Oklahoma. According to

Beckham, numerous legal opinions supporting constitutional autonomy existed in California, Michigan and Minnesota. Though with less extensive case law, he cited judicial recognition for more than 60 years in Idaho and Oklahoma. At the time, relatively recent opinions in Georgia, Louisiana, Montana and Nevada supported constitutional autonomy but lack of a large number of cases made “assessment of the precise degree of autonomy difficult to discern” (p. 181).

In their study, Glenny and Dalglis (1973) identified California, Colorado, Georgia, Idaho, Michigan, Minnesota and Oklahoma as the seven states with constitutional autonomy provisions. McKnight (2004), focusing on constitutional autonomy in Minnesota, did not undertake a comparative legal analysis among the states, but in an appendix listed 13 states alongside Minnesota with at least one case appearing to judicially recognize constitutional autonomy: Alabama, California, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota and Oklahoma. The appendix also listed seven states with state constitutions appearing to grant constitutional autonomy but with courts in these states rejecting constitutional autonomy or giving the legal doctrine minimal effect: Alaska, Colorado, Mississippi, Missouri, New Mexico, South Dakota and Utah. Table 1.1 list states identified by Beckham (1978), Glenny and Dalglis (1973) and McKnight (2004) as having cases recognizing constitutional autonomy.



Table 1.1 *States Identified as Having Case Law Supportive of Constitutional Autonomy*

Beckham (1978)	Glenny & Dalglish (1973)	McKnight (2004)
---	---	Alabama
California	California	California
---	Colorado	---
---	---	Florida
Georgia	Georgia	Georgia
---	---	Hawaii
Idaho	Idaho	Idaho
Louisiana	---	Louisiana
Michigan	Michigan	Michigan
Minnesota	Minnesota	Minnesota
Montana	---	Montana
---	---	Nebraska
Nevada	---	Nevada
---	---	North Dakota
Oklahoma	Oklahoma	Oklahoma

Almost three decades have elapsed since the last comparative legal analysis of constitutional autonomy provisions (Beckham, 1977, 1978). While McKnight (2004) in an appendix listed states with at least one court case interpreting constitutional autonomy provisions, she confined her analysis to the current legal status of constitutional autonomy in Minnesota. Like McKnight's legal analysis, other studies on constitutional autonomy conducted since 1977 focus on specific states (Petroski, 2005; Reynolds, 1992; Scully, 1987). Given the importance of court decisions in giving meaningful legal effect to constitutional autonomy provisions and the possibility of amendments to state constitutions, periodic re-assessment of constitutional autonomy is warranted. An updated comparative legal analysis of constitutional autonomy provides scholars, policy makers and campus leaders interested in formal constitutional legal protections for public

colleges and universities with current information regarding the legal status of constitutional autonomy among states. This information is also relevant in relation to ongoing policy and research discourse related to suitable mechanisms, especially legal ones, for protecting the autonomy of institutions.

In addition to reviewing the legal status of constitutional autonomy since 1977, this study also considers the merit of analyzing the legal doctrine of constitutional autonomy using the concepts of procedural and substantive autonomy derived from the higher education literature. Previous studies, while acknowledging the seemingly obvious connections between the legal doctrine of constitutional autonomy and concepts related to autonomy developed in the higher education literature (Beckham, 1977, 1978; Glenny & Dalglis, 1973), have not analyzed and/or categorized constitutional autonomy using the concepts of procedural and substantive autonomy. These concepts may prove useful to better understand how constitutional autonomy provisions affect the autonomy of institutions and to make constitutional autonomy a more relevant topic of discourse in higher education literature related to institutional autonomy.

Accordingly, this study seeks to fill a void in the higher education literature in two ways. First, it provides an updated comparative legal analysis of constitutional autonomy provisions among states, focusing on legal decisions since 1977 as well as ratification of any new constitutional provisions since that time. Second, the study analyzes and categorizes constitutional autonomy legal decisions located for the study using the concepts of procedural and substantive autonomy.

## Purpose

The primary aim of the study is to build on previous examinations of constitutional autonomy, especially the work of Beckham (1977, 1978), to provide an updated comparative legal analysis of constitutional autonomy. The study fulfills this purpose through a legal analysis of court cases and constitutional provisions. A secondary goal of the study is to analyze the legal doctrine of constitutional autonomy using the concepts of procedural and substantive autonomy derived from the higher education literature.

Specifically, this study addresses the following two research questions:

1. What is the legal status of state constitutional autonomy for public higher education in the United States?
  - Based on constitutional provisions and court decisions, what states grant constitutional autonomy to public higher education and how does this list correspond to states identified by Beckham (1977, 1978)?
  - What commonalities and differences exist in the legal interpretations given constitutional autonomy provisions by state courts?
  - For each state examined, have cases interpreting constitutional autonomy provisions decided since Beckham's (1977, 1978) study maintained consistent judicial support for constitutional autonomy, expanded the legal scope of constitutional autonomy or diminished the legal scope of constitutional autonomy?

2. Does analyzing court cases located for this study using the concepts of procedural and substantive autonomy developed in the higher education literature contribute to an increased understanding of how constitutional autonomy serves as a legal safeguard for institutional autonomy?

### Conceptual Framework

Along with tenure and academic freedom, institutional autonomy comprises one of the distinguishing features of higher education in the United States (Glenny & Dalglish, 1973). The concept of institutional autonomy refers to the amount of discretion or authority held by a college or university to manage its internal affairs free of external controls (Berdahl & McConnell, 1999). Moos and Rourke (1959) describe institutional autonomy as a necessary element for colleges and universities to fulfill their basic functions of preserving, disseminating and developing knowledge. Rather than an absolute concept, institutional autonomy operates in a flexible manner with public colleges and universities subject to varying degrees of control (Berdahl & McConnell, 1999; McLendon, 2003b). “Because neither complete accountability of the campus *to* the state, nor absolute autonomy of the campus *from* the state is feasible, the crucial question confronting policymakers is where the line between campus and state should be drawn” (McLendon, 2003a, p. 479).

Institutional autonomy reflects historic patterns in American higher education recognizing colleges and universities as distinct social and legal entities, and views of institutional autonomy continue to evolve in response to contemporary social, economic and political conditions (Brubacher & Rudy, 1999). In colonial society, a period of no

clear demarcation between public and private higher education, control of colleges eventually settled with governing boards, usually composed of lay members from the community. With the emergence of expressly public colleges and universities in the nineteenth century following the Dartmouth case in 1819, the governing board structure was adopted for use in these institutions. Governing boards developed as a key mechanism to insulate public colleges and universities from overly restrictive state control and interference and to safeguard institutional autonomy.

Several attributes have been offered to delineate institutional autonomy. Berdahl, Altbach, and Gumport (1999) classify autonomy on the basis of procedural and substantive autonomy (see also Berdahl, 1971). Substantive autonomy entails “the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)” (Berdahl, Altbach, & Gumport, 1999, p. 6). Procedural autonomy refers to the “power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe)” (Berdahl, Altbach, & Gumport, 1999, p. 6). Volkwein and Malik (1997) categorize autonomy on the basis of the degree of academic and administrative flexibility granted to colleges and universities. Autonomy has also been classified in terms of control over budgeting or finance, personnel and academic matters (Carnegie Foundation, 1982; Levy, 1980). Despite some variation, the classifications agree in distinguishing between control over core academic functions such as teaching and research versus activities like budgeting more removed from academic and research endeavors.

A review of the legal status of constitutional autonomy since 1977 provides updated information regarding the ways the legal doctrine continues to impact the legal

protections given colleges and universities to control their internal management. While research (Beckam, 1977, 1978; Glenny & Dalglis, 1973; Moos & Rourke, 1959) acknowledges constitutional autonomy as an important legal factor affecting institutional autonomy, studies have generally not moved beyond this basic assessment in analyzing constitutional autonomy in relation to concepts derived from the higher education literature. Accordingly, an additional goal of this study is to analyze the legal doctrine of constitutional autonomy using the concepts of procedural and substantial autonomy from the higher education literature.

### Research Method

Legal analysis seeks “to make sense of the evolving reality known as the law” by employing a time line that “looks to the past, present, and future” (Russo, 1996, p. 35). “Rooted in the historical nature of the law and its reliance on precedent, legal research requires students to look to the past to locate authority that will govern the disposition of the question under investigation” (Russo, 1996, p. 35). The historical dimension of legal inquiry stems from the importance of courts looking to previous decisions, especially from higher courts within a given jurisdiction, to guide the interpretation of legal standards (Russo, 1996).

This study relies on methods associated with reasoning by analogy or example to guide the analysis of state court cases interpreting constitutional autonomy provisions. Reasoning by analogy or example is often associated with the legal thought and writings of Edward Levi (Sunstein, 1993). Levi (1949) describes three steps taking place in the process of legal reasoning: “similarity is seen between cases; next the rule of law inherent

in the first case is announced; then the rule of law is made applicable to the second case” (p. 2). This approach to legal interpretation provides a “dynamic quality” to the law in which legal standards are constantly shaped by new factual circumstances deemed similar or different to previous cases (Levi, 1949, p. 2). Analogical reasoning continues to maintain currency in legal thought, and according to Sunstein (1993), “Reasoning by analogy is the most familiar form of legal reasoning” (p. 741).

Methods associated with reasoning by analogy provide a useful approach to compare legal opinions interpreting constitutional autonomy provisions within and across states and to analyze constitutional autonomy using the concepts of procedural and substantive autonomy. The approach focuses on the facts of particular cases, which allows elaboration of the specific ways that constitutional autonomy permits public colleges and universities to control their internal affairs. An emphasis on similarities and differences between cases proves ideal for research questions attempting to compare and categorize constitutional autonomy legal decisions.

To address the research questions, the study identifies potential states with constitutional autonomy and compares and contrasts the case law from these states. In addition to cases, in states with ambiguous legal recognition of constitutional autonomy or limited judicial treatment, advisory legal opinions from state attorney generals will also be considered. Previous studies provide an important source to help identify states for inclusion in the study (Beckham, 1977, 1978; Glenny & Dalglish, 1973; McKnight, 2004). The Education Commission of the States (ECS) maintains an online database of higher education governance structures that indicates whether statewide and institutional governing boards are established by statute or constitution. The database, though limited

to indicating whether constitutional or statutory language establishes a particular board and containing no legal analysis, proves useful to identify states that might possess constitutional autonomy. The WESTLAW and LEXIS-NEXIS legal databases provide key tools to search for case law and, for select states, attorney general opinions interpreting constitutional autonomy provisions.

### Significance of the Study

The issue of state governmental oversight versus institutional autonomy of public colleges and universities represents an enduring tension in American higher education (Alexander, 2000; Heller, 2004; McGuinness, Jr., 1999; McLendon, 2003b). While recent decades reveal a general trend marked by increases in accountability measures aimed at public higher education at the expense of institutional autonomy, the 1990s witnessed renewed interest in increasing institutional autonomy in some states, a process referred to as deregulation (McGuinness, Jr., 1999). State legislators and policymakers continue to view safeguards to and enhancements of institutional autonomy as one option to attain desired higher education outcomes and to help achieve the desired balance between state oversight and institutional independence.

Institutions with constitutional autonomy are described as possessing heightened institutional autonomy (see, e.g., Berdahl & McConnell, 1999; Bowen, Bracco, Callan, Finney, Richardson, Jr., & Trombley, 1997). Several institutions with constitutional autonomy, notably the University of Michigan and the University of California, enjoy national reputations, which further increases interest in them in relation to research and policy discourse dealing with institutional autonomy (Glenny & Dalglish, 1973). Thus,



institutions with independent constitutional authority are of potential interest to policy makers, legislators, campus leaders and researchers concerned with legal mechanisms to protect institutional autonomy.

Assessing the current legal status of constitutional autonomy allows policy makers, campus leaders and researchers concerned with linkages between this legal doctrine and institutional autonomy to possess accurate and up-to-date information. States may add or amend constitutional provisions and/or legal decisions may clarify, strengthen or weaken the legal status of constitutional autonomy in particular states. Reliance on older studies of constitutional autonomy may fail to capture how the legal meaning of constitutional autonomy provisions evolve over time in response to new judicial decisions. Understanding the contemporary legal status of constitutional autonomy provisions requires regular re-assessment of state court cases interpreting these provisions. With almost three decades elapsed since the most recent comparative legal analysis of state constitutional autonomy provisions (Beckham, 1977, 1978), fresh consideration of the legal interpretations of constitutional autonomy provisions is warranted.

Another contribution of the study centers on the analysis of the legal doctrine of constitutional autonomy using the concepts of procedural and substantive autonomy. While noting the seemingly obvious linkages between independent constitutional authority for public colleges and universities and institutional autonomy, previous scholarship has largely not sought to analyze and categorize constitutional autonomy legal decisions using concepts derived from the higher education literature. These concepts may prove useful in working to better understand the impact of constitutional

autonomy on institutions and to help make constitutional autonomy a topic more integrated into the higher education literature.

## CHAPTER 2

### REVIEW OF THE LITERATURE AND CONCEPTUAL FRAMEWORK

#### Introduction

This study provides a comparative analysis of the current legal status of court decisions interpreting constitutional provisions granting some degree of independent authority to public higher education governing boards and analyzes constitutional autonomy cases using the concepts of substantive and procedural autonomy. Specifically, the study focuses on legal decisions issued during the past three decades, covering the period following the most recent comprehensive study of the topic. The review of the literature provides context for the study and a conceptual framework to guide the analysis of constitutional autonomy provisions.

The first part of the chapter provides a historical overview of the development of public colleges and universities and the role of state governments in relation to their control. This historical overview situates the discussion of constitutional autonomy within the overall context of the relationship between state governments and public colleges and universities. In providing context to the period highlighted in this study, special attention is paid to how in the twentieth century, especially following World War II, state governments began to assume a more prominent role in the management of public colleges and universities. Building on the discussion of the historical evolution and contemporary patterns of state governmental oversight of public higher education, the discussion then turns to institutional autonomy, with a special emphasis on the concepts of substantive and procedural autonomy. Finally, previous studies dealing with constitutional autonomy are discussed.

## Development of Public Higher Education and the Role of State Governments

Higher education in the United States, drawing on models and ideas found in Europe but responding to unique American historical factors, evolved in a distinctive way (Cohen, 1998; Brubacher & Rudy, 1999). During the colonial period no clear demarcation existed between public and private in relation to the founding of colleges. The concept of public higher education did not begin to take hold until after the creation of the United States (Cohen, 1998). Still, public colleges and universities came to reflect the patterns of higher education established in the colonial era, most notably in their reliance on an external board to oversee them (Cohen, 1998).

While Cambridge provided a key example for curriculum and the residential pattern for the colonial colleges, reliance on lay governing boards was borrowed from Scottish universities (Cohen, 1998). Particular colonial institutions, representative of the overall distinctiveness of the evolution of American higher education, developed in ways grounded in the unique social and political contexts of the individual colonies, but institutions during this period generally followed a pattern of lay dominance with church influence (Cohen, 1998). Institutions in Europe had evolved from largely self-controlling groups of teachers or students, but colonial universities developed as institutions overseen by outside trustees (Cohen, 1998). From the beginning of American higher education, a president and an external governing board were at the top of the institutional hierarchy (Brubacher & Rudy, 1999). Control over the colonial colleges by the president and the influence of a lay board in control of the institutions did not go unchallenged by faculty. While some institutions had elements of faculty input and control, notably William and Mary, ultimate power came to rest with governing boards, often comprised of individuals

from the external community. Even William and Mary, however, would lose faculty autonomy under its colonial charter with the advent of the American Revolution (Brubacher & Rudy, 1999).

In addition to institutional control by an external board, another feature of colonial higher education involved the important, if often sporadic role, of colonial legislatures in the support and administration of colleges. Harvard, for instance, was formed through a grant of the colonial legislature with the colonial governor and deputy governor serving on the Harvard corporation, and colonial legislatures were involved in the founding or oversight of the other colleges (Cohen, 1998).

The relationship between colonial governments and the colleges extended to financial support. Harvard received a tax levee, land and revenues from operation of a ferry and later a toll bridge (Cohen, 1998). William and Mary received financial support from taxes on tobacco and furs, and Yale received periodic support from the colonial legislature. Other colonial legislatures, even if not dispensing regular financial support, provided institutions with occasional donations.

The ambiguous nature of control in the colonial era resulted in tensions between colleges and the colonial legislature (Brubacher & Rudy, 1999). Before the American Revolution, the issue of control also involved the English monarchy. Harvard and Yale did not seek royal charters, in part, out of concern over royal interference in the religious views of the institutions. This ambiguous relationship between government and the colonial colleges resulted in a tension that continued after the formation of the United States (Brubacher & Rudy, 1999).

Continuing uncertainty over legislative oversight of colleges in the early nineteenth century following the American Revolution culminated in the U.S. Supreme Court's decision in 1819 in the Dartmouth College case. The Court's decision in the case provided an important impetus to the development of private higher education in the United States as well as for state governments to establish colleges that were clearly public institutions subject to state authority (Brubacher & Rudy, 1999). The facts surrounding the case illustrate the ambiguous relationship between colleges and state governments that often existed in the early nineteenth century as a result of the uncertain legal connections between institutions and state governments established during the colonial period. Dartmouth had gained a royal charter that permitted a self-perpetuating board of trustees and allowed the president to name his successor (Brubacher & Rudy, 1999). The founder of the school and its president, Eleazar Wheelock, had designated his son, John Wheelock, to succeed him. Upon assuming office, the younger Wheelock came into conflict with the trustees, who eventually chose to remove him. John Wheelock turned to the New Hampshire legislature, which amended the charter of the college to create Dartmouth University and enlarged the board of trustees to provide a majority sympathetic to Wheelock (Brubacher & Rudy, 1999).

The dispute between the board of trustees and John Wheelock festered and for a time two institutions—Dartmouth College and Dartmouth University—operated in opposition to one another. As the conflict moved into the courts, state courts in New Hampshire sided with the state legislature and John Wheelock. The case was reviewed by the U.S. Supreme Court, with Daniel Webster arguing on behalf of the original trustees. The Court ruled that Dartmouth was a private corporation and that the state

legislature could not interfere in its governance. The Supreme Court held that the charter granted to Dartmouth created a contract between the legislature and the college, and the legislature's attempt to alter the charter unilaterally violated the Contract Clause of the federal constitution (Brubacher & Rudy, 1999).

The Dartmouth case provided legal status for the existence of private higher education institutions beyond the direct control of state governments (Brubacher & Rudy, 1999). Following the decision, maintaining state control of a college or university required the clear establishment of a school as a public college. Though the Dartmouth case clarified the legal status of private colleges versus that of public institutions, even before the case, states had begun to establish colleges that were chartered and conceived of as state institutions. According to Cohen (1998), between 1790 and 1869, 17 states established state public higher education institutions. The role of state governments in public higher education, however, was far from clear and often characterized by narrow involvement and limited financial support.

Brubacher and Rudy (1999) describe the late eighteenth century and early decades of the nineteenth century as a period of limited activity in the establishment of state universities and note that public institutions established during this era were often of dubious quality. In addition, the role of the state government was often not fully delineated, creating a situation similar to that in the colonial period (Brubacher & Rudy, 1999). Thomas Jefferson's role in the founding of the University of Virginia provided an important example of the creation of an institution clearly meant to function as a state university. The University of Michigan provided another a leading model (Brubacher & Rudy, 1999). The South and West, places lacking the private higher education

infrastructure of the East, were most active in the establishment of state public universities in the first decades of the nineteenth century. While these early state colleges generally faced difficult financial conditions, animosity from private schools, and often failed to live up to lofty goals, they helped establish the foundation for publicly supported higher education (Brubacher & Rudy, 1999).

Other trends and initiatives would also spur the development of public colleges and universities. While not immediately realizing the goal of providing technological and practical education, passage of the first Morrill Act and establishment of state land grant institutions marked an important event in the development of public higher education (Brubacher & Rudy, 1999). The initial, but unfulfilled, promise of the first Morrill Act received a significant boost with the second Morrill Act in the 1890s, which provided federal funds to the land grant institutions (Brubacher & Rudy, 1999). During the second part of the nineteenth century, states also began to start normal schools for teacher education (Berdahl, 1971). These schools were initially governed under state boards of education and, in the twentieth century, a number developed into colleges and universities with their own governing boards (Berdahl, 1971). In addition to more federal and state financial support, the emergence of public secondary education in the late nineteenth and especially in the early decades of the twentieth century provided a larger pool of students to attend the burgeoning public universities (Brubacher & Rudy, 1999).

While the nineteenth century witnessed the establishment of colleges expressly conceived of as public institutions, these institutions were generally afforded wide latitude in their internal affairs by state governments, a pattern that would continue into the twentieth century (Zumeta, 2001). Political leaders in early America viewed state



colleges as sources of pride and economic development in need of support instead of intense regulation (Zumeta, 2001). To insulate public institutions from political wrangling, some states, with Michigan the most notable example, placed provisions in their constitutions regarding the structure and control of public colleges and universities (Moos & Rourke, 1959). As the university structure of higher education emerged in the late nineteenth and early twentieth centuries, governors often appointed members of the boards of trustees, but the schools were protected from some external interference by the trustees, who insulated institutions from the political winds of state politics (Cohen, 1998).

Following World War II, states began to expand public systems of higher education, especially in regions like New England where a strong system of public schools had not existed previously (Cohen, 1998). In addition to expansion of colleges and universities during this period, normal schools began to transform into colleges (and then universities) and junior colleges also came into existence. The increase in size and types of public institutions was reflective of a large upswing in higher education enrollment that began to take place after World War II, with the Servicemen's Readjustment Act (the G.I. Bill) providing a significant boost to enrollment (Berdahl, 1971). In 1900 only about four percent of the college-age population attended a college or university, but this percentage began to climb significantly after 1945 (Berdahl, 1971).

#### Increased State Oversight of Public Colleges and Universities following World War II

The decades after World War II marked the emergence of mass higher education (Trow, 2001). No longer an enterprise serving an elite slice of society, higher education

was viewed as an important means to achieving individual and national economic success. Increased enrollment and state governmental interest marked a shift from the limited state regulation of higher education that existed before World War II (McClendon, 2003a). Zumeta (2001) argues “the halcyon days of academic autonomy were left behind” following World War II due to the increasing social and economic role of higher education (p. 155).

The increased regulation of higher education was achieved largely through the creation of state coordinating boards and consolidated governing boards (McClendon, 2003a). While 13 states created consolidated boards for higher education between 1864 and 1945, most state governments continued to deal separately with individual institutions during this period (Berdahl, 1971). A major impetus to increased state oversight was given by the Higher Education Act of 1965 and the requirement that each state have a coordinating agency for higher education (Cohen, 1998). Statewide coordinating or governing boards became viewed as mechanisms that could help buffer the relationship between public higher education and state government by protecting institutions from undue state control but also make public colleges and universities more responsive to societal needs (Berdahl, 1971).

In explaining reasons for increased state oversight of public higher education, McClendon (2003a) points to large growth in student enrollment, institutional competition that hampered cooperation between state public schools, and the increased regulatory capacity of state governments as setting the stage for dramatic increases in state oversight of higher education. Alexander (2000) cites similar reasons and also emphasizes how state governments increasingly view public colleges and universities as

engines of economic growth. Emphasis on colleges and universities as an investment in human capital has meant that state governments have been increasingly unwilling to stay out of higher education governance (Alexander, 2000). Greater state regulation also resulted from a general increase in the regulatory activities of various state agencies with control over such areas as budgeting and purchasing (Mactaggert, 1998; Moos & Rourke, 1959).

The increase in state oversight that emerged following World War II in the 1950s and 1960s continued in the decades that followed. In the 1970s, 12 states enacted significant reforms of their higher education systems, with greater centralization emerging as the key trend (Marcus, 1997). The 1980s witnessed a continued focus on making public higher education institutions more accountable with 27 states conducting significant studies of their public higher education systems and 12 of them initiating reforms seeking increased centralization (Marcus, 1997).

The 1990s marked an even more intense effort on the part of some state governments to seek increased accountability from higher education institutions. Zumeta (2001) asserts that these aggressive accountability initiatives marked a new interest in issues related to academic decisions. Zumeta (2001) points to lean economic times during the early 1990s and an emphasis by business and state governmental leaders to make colleges and universities function more like businesses to explain increased scrutiny during this decade. As colleges and universities turned to tuition to compensate for reduced state appropriations, the unpopularity of these increases prompted state officials to seek even greater efficiency from public institutions to control costs (Zumeta, 2001). Additionally during this decade, social and cultural criticisms of higher education

began to “mesh neatly with fiscal pressures and broader political forces to facilitate public officials' criticisms of higher education” (Zumeta, 2001, p. 159).

While increased centralization and state oversight continue to characterize state oversight efforts of public higher education, some states have begun to enact deregulation strategies in response to efforts to promote efficiency (McLendon, 2003a). Four trends characterize such state deregulation initiatives: (1) enacting legislation that transfers certain management decisions to the campus level while maintaining the overall role of coordinating or governing boards; (2) creating less unified university governance structures; (3) permitting a degree of privatization of public institutions; and (4) weakening or dismantling state coordinating systems (McLenon, 2003a).

An emerging divergence between centralization and deregulation strategies in recent years illustrates the relevance of debate and discussion over the appropriate level of state oversight of public higher education, a theme taken up in recent years by several higher education scholars (see, e.g., Alexander, 2000; Heller, 2004; Marcus, 1997; Zumeta, 2001). In assessing whether to take a centralization or deregulation approach, states with constitutional autonomy may prove a useful example for consideration. In these states, institutions remain a part of the governmental fabric but potentially with greater legal protections for areas of internal governance beyond legislative oversight. As states begin to consider the costs and benefits of loosening governmental controls and/or allowing a degree of privatization, states and their experiences with constitutional autonomy may contribute to discourse regarding the desirability of providing special legal safeguards to limit excessive governmental intrusion into college and university affairs.

Zumeta (2001) contends that issues related to state oversight of higher education merit periodic re-assessment due to changing political, social and economic conditions. While the post-World War II era has been marked by a general increase in state oversight, higher education deregulation initiatives illustrate the potential for the oversight pendulum to swing in the other direction. Achieving the appropriate balance between state oversight and the independence of public colleges and universities represents an issue marked by persistent tension and change. Consideration of the legal relationship between public colleges and universities and state government—including in relation to constitutional autonomy—also represents a dynamic issue. While far from the only factor, in some states constitutional autonomy provisions provide one important ingredient to help define the boundaries of state control over higher education versus the appropriate authority that should reside with institutions.

### Institutional Autonomy

The concept of institutional autonomy has developed in the higher education literature to describe the internal control of colleges and universities, including public ones, to direct their own affairs in administrative and academic matters. The oversight role of state government in public higher education must be balanced against the appropriate control, or institutional autonomy, left to public colleges and universities to manage their internal affairs. Glenny & Dalglish (1973) describe academic freedom, tenure, and institutional autonomy as key in the development of American higher education. Noting the interrelatedness of these concepts, the authors also point out how each is malleable and constantly undergoing reinterpretation in response to contemporary

social and political conditions (Glenny & Dalglish, 1973). As with academic freedom and tenure, institutional autonomy is concerned with unwarranted outside influences into an institution's internal affairs, especially in relation to academic issues (Glenny & Dalglish, 1973).

It is useful to distinguish the concept of institutional autonomy from academic freedom. According to Berdahl and McConnell (1999), academic freedom represents an absolute concept while institutional autonomy operates in a much less rigid manner with colleges and universities subject to considerable governmental oversight in numerous areas. The authors also describe academic freedom as attaching to individual scholars (Berdahl & McConnell, 1999). Though the line between academic freedom and autonomy, especially in interpretation of First Amendment cases, has become fuzzier in recent years, autonomy remains a concept marked by attachment to institutions or systems as opposed to individuals. Additionally, while academic freedom represents an unyielding idea for faculty and students (in some instances) to follow the pursuit of academic truth, autonomy represents a concept subject to various degrees of state intrusion (Berdahl, 1971).

Tracing the development of institutional autonomy, Glenny and Dalglish (1973) state the concept of a self-governing corporation grew out of medieval social structures, including the role of guilds in medieval society. They discuss how during the medieval period the modern state had not yet emerged and sovereignty was dispersed, though unevenly, among social units, including universities (Glenny & Dalglish, 1973). Institutional autonomy for the medieval university was not conceived as a means to insulate institutions from outside interference but, instead, was "simply a social fact, a

state of being, a given on the basis of which the organizational structure and traditions of the university developed” (Glenny & Dalglis, 1973, p. 9).

As modern forms of civil government began to take shape, the idea that social institutions, including universities, derived support from and were also subject to governmental authority began to develop slowly (Glenny & Dalglis, 1973). As a means of insulating certain social structures, especially the church, from direct control of the government, the idea of the corporate form began to emerge. American colleges and universities, drawing on organizational structures governing churches in the colony, stressed the corporate form as establishing a degree of independence from external control (Glenny & Dalglis, 1973).

Berdahl, Altbach, and Gumport (1999) define autonomy as the ability to govern without external interference. Moos and Rourke (1959) describe autonomy as necessary to allow colleges and universities to achieve their basic function of collecting, disseminating and advancing knowledge. As discussed, institutional autonomy for public colleges and universities does not represent an absolute concept. The issue confronting state legislators and policymakers concerns “where the line between campus and state should be drawn” (McLendon, 2003a, p. 479). At its simplest level, institutional autonomy for public colleges and universities is limited by the need for institutions to seek state funding, but state governments care about much more than simply deciding the level of state appropriations (Berdahl, 1971). Conflict arises in determining the appropriate level of state oversight while not interfering with areas deemed central to the academic functioning of institutions.

Berdahl, Altbach, and Gumpert (1999) classify autonomy on the basis of procedural and substantive autonomy. Substantive autonomy refers to “the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)” (Berdahl, Altbach, & Gumpert, 1999, p. 6; see also Berdahl, 1971). Procedural autonomy involves the “power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe)” (Berdahl, Altbach, & Gumpert, 1999, p. 6; see also Berdahl, 1971). Substantive autonomy, according to Berdahl (1971), warrants an important state role to ensure the public interest is integrated with internal institutional aspirations and agendas. However, he contends that excessive intrusion on procedural autonomy often proves overly cumbersome while doing little to protect the public interest.

Substantive autonomy encompasses the right of an institution to control core academic decisions—admission of students, “what is to be taught and by whom,” and evaluation of learning (McLendon, 2003b, p. 68). Procedural autonomy pertains to how institutions go about achieving an institution’s substantive goals, including allocation and accounting of funds and decisions related to personnel hiring (McLendon, 2003b, p. 68). Berdahl, Altbach, and Gumpert (1999), citing Asby (1966) describe the following attributes of substantive autonomy: (1) the freedom to choose staff and students and to set standards for continued employment or enrollment; (2) the freedom over curriculum and standards to obtain a degree; and (3) the freedom to control the internal budget of a campus. Berdahl and McConnell (1999) state that a college or university must enjoy considerable substantive autonomy to define its institutional goals and to select ways to achieve those goals.



Berdahl (1971) contends that governmental influence over substantive autonomy issues should be flexible depending on the specific context of an issue. For instance, the amount of state appropriations are more exclusively under the purview of state government while new courses or academic standards are more appropriate issues for institutional decision makers (Berdahl, 1971). Issues related to master planning or establishment of new professional schools provide examples of areas requiring partnerships with inputs from state government and institutions (Berdahl, 1971).

In seeking to achieve the appropriate balance between state oversight and the autonomy of public colleges and universities, some states have enacted constitutional provisions to designate areas of authority and control intended to reside with institutions and shield them from undue state governmental interference. Michigan led the way in establishing constitutional autonomy for public colleges and universities through its 1850 constitution (Elliot & Chambers, 1936). Constitutional protection was intended to shield the University of Michigan from previous political infighting that had plagued the school. A select number of states followed Michigan's lead and included higher education provisions in their state constitutions.

### Constitutional Autonomy

The term constitutional autonomy, also referred to as constitutional status or constitutional independence, is used to describe a grant of independent constitutional authority for public colleges and universities (Beckham, 1977, 1978; Glenny & Dalglis, 1973). The following section reviews literature focused on constitutional autonomy provisions. In reviewing these studies a relevant point is that constitutional autonomy

represents a legal doctrine rather than a concept developed in the higher education literature. Though sharing an obvious overlap recognized in previous studies (Beckham, 1977, 1978; Glenny & DalGLISH, 1973; Moos & Rourke, 1959), constitutional autonomy has primarily evolved as the result of courts interpreting the meaning of constitutional provisions.

The section begins with a review of how different authors have defined constitutional autonomy. Next, states identified in previous studies as enacting constitutional autonomy provisions are presented. Previous legal analyses of constitutional autonomy provisions, divided on the basis of comparative and state-specific studies, are then considered. A review of literature specifically focused on constitutional autonomy reveals three decades since the last comparative legal analysis of constitutional autonomy provisions. Examination of the studies (Beckham, 1977, 1978; Glenny & DalGLISH, 1973; McKnight, 2004; Moos and Rourke, 1959) also highlights that an understanding of the current legal status of constitutional autonomy requires assessment of more recent legal opinions issued by courts interpreting constitutional provisions issues since previous studies.

### *Definitions of Constitutional Autonomy*

Several definitions and descriptions, often with much in common, have been offered to characterize the granting of institutional autonomy to public colleges and universities through state constitutional provisions. Moos and Rourke (1959) state that public universities covered by these constitutional provisions comprise almost a separate branch of state government with institutional functioning that occupies a higher level than

most state activities. Glenny and Dalglish (1973) describe the concept of constitutional status, which they deem synonymous with the terms constitutional autonomy or constitutional independence, to mean using a state constitutional provision to place ultimate authority for the management of an institution in a governing board and beyond the reach of state officials. Constitutional status has permitted institutions to determine priorities, control funds and manage their internal affairs (Glenny & Dalglish, 1973).

Beckham (1977) defines constitutional autonomy as a constitutional provision supported by case law that grants a governing board sole control over an institution. He distinguishes between the terms constitutional status and constitutional autonomy. Constitutional status, according to Beckham (1977), means the establishment of a governing board or structure in the state constitution but does not necessarily vest public higher education with autonomy protected by the state's constitution. Despite the semantic difference, Beckham's use of constitutional autonomy is akin to Glenny and Dalglish's (1973) reliance on the term constitutional status. Both refer to a grant of control or authority to public colleges and universities beyond simply establishing a governing entity in the constitution completely subject to state control. Beckham's differentiation between constitutional status and constitutional autonomy is useful to highlight the difference between a constitutional higher education provision that still leaves public colleges and universities subject to complete executive and legislative control and one that vests some form of constitutionally protected institutional autonomy in public higher education.

McKnight (2004) offers the following definition of constitutional autonomy:

Constitutional autonomy is a legal principle that makes a state university a separate department of government, not merely an agency of the executive or legislative branch. A university with this status is subject to judicial review and to the legislature's police power and appropriations power. However, its governing board has a significant degree of independent control over many university functions. (p. 3)

Like Moos and Rourke (1959), McKnight asserts that a constitutional autonomy provision establishes public universities as a distinct branch of state government. The definition also includes several important qualifications useful to consider the concept of constitutional autonomy. Rather than an absolute grant of autonomy, colleges and universities with constitutional autonomy remain subject to substantial oversight from other branches of state government. McKnight's definition points out that while a constitutional autonomy provision grants authority to a public college or university, this autonomy is balanced against powers held by other agencies of state government. Most notably, legislative authority over appropriations represents a key check on constitutionally autonomous schools (Beckham, 1977, 1978; Berdahl & McConnell, 1999; Scully, 1987). Institutions with constitutional autonomy also remain subject to numerous federal laws and regulations. McKnight's (2004) definition serves as an important reminder that an array of forces influence the autonomy of public colleges and universities, even ones protected by a constitutional provision, including tradition,

attitudes of citizens toward the institutions and political considerations (see also Glenny & Dalglisch, 1973).

While multiple forces affect the institutional autonomy enjoyed by a college or university, constitutional autonomy represents an important legal mechanism affecting the autonomy of some public colleges and universities (Glenny & Dalglisch, 1973). The various definitions of constitutional autonomy agree that constitutional autonomy represents a mechanism adopted in some states to buffer public colleges and universities from excessive state oversight. The exact legal meaning of a constitutional autonomy provision evolves over time based on court cases interpreting the provision.

#### *States Identified with Constitutional Autonomy Provisions*

In 1936, Elliot and Chambers identified five states (California, Idaho, Michigan, Minnesota and Oklahoma) as having constitutional provisions providing considerable freedom from other units of state government. In a follow-up work, Chambers (1952) added the Board of Regents of the University System of Georgia to the list and noted court decisions in Arizona and Nevada recognizing some form of constitutional protection for public universities in those states. Moos and Rourke (1959) list six to seven states (California, Colorado, Idaho, Michigan, Minnesota, Oklahoma and potentially Georgia) as providing public universities with equal legal status to the other branches of government.

Glenny and Dalglisch (1973) determined that California, Colorado, Georgia, Idaho, Michigan, Minnesota and Oklahoma have independent constitutional authority for public higher education. The authors also state that Montana potentially granted its university

system a level of constitutional autonomy untested by litigation (Glenny & Dalglish, 1973). Alabama, Arizona and Nevada received designation as having constitutional status, but with independent autonomy significantly limited by court cases, attorney general opinions or tradition (Glenny & Dalglish, 1973). Despite constitutional provisions appearing to support constitutional autonomy, Glenny and Dalglish (1973) concluded the status had been denied to institutions in Louisiana, Missouri and Utah.

Beckham (1977) determined that constitutional provisions in 20 states appeared to grant some form of constitutional power and structured his analysis by grouping the states into three categories: (1) provisions appearing to grant unrestricted authority; (2) provisions appearing to grant power but with limited legislative authority; and (3) provisions appearing to grant power restricted by substantial legislative authority.

Beckham placed 10 states in the first category (Alabama, Georgia, Louisiana, Michigan, Minnesota, Missouri, Montana, North Dakota, Oklahoma and Utah). Four states (California, Idaho, Nevada and South Dakota) were in the second category and six states (Alaska, Arizona, Colorado, Hawaii, Mississippi and New Mexico) in the third.

Using constitutional language as a starting point, Beckham (1977, 1978) then examined the legal interpretations given provisions by state courts. He found legal decisions supportive of constitutional autonomy in nine states (California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada and Oklahoma) (Beckham, 1977, 1978). Among these nine states, he concluded considerable legal support existed in California, Michigan and Minnesota in terms of the number of cases and the depth of judicial recognition of constitutional autonomy. He described long-held judicial support for constitutional autonomy in Idaho and Oklahoma. Though limited case law left some

ambiguity, Beckham also concluded courts had recognized constitutional autonomy in Georgia, Louisiana, Montana and Nevada. Courts had not issued opinions or made clear statements of law in Alabama, Hawaii, New Mexico, North Dakota and South Dakota, and judicial treatment meant constitutional autonomy was denied or doubtful in Alaska, Arizona, Colorado, Mississippi, Missouri and Utah (1977).

McKnight (2004), in analyzing legal recognition of constitutional autonomy in Minnesota in a handbook for state legislators, included an appendix listing other states besides Minnesota with at least one legal decision related to constitutional autonomy. The appendix grouped the states in three ways: (1) extensive case law (California and Michigan), (2) states with at least one case recognizing constitutional autonomy (Alabama, Florida, Georgia, Hawaii, Idaho, Louisiana, Montana, Nebraska, Nevada, North Dakota and Oklahoma); and (3) states with cases rejecting constitutional autonomy or giving it limited effect (Alaska, Colorado, Mississippi, Missouri, New Mexico, South Dakota and Utah) (McKnight, 2004). While McKnight's work contained representative cases, she limited her legal analysis to Minnesota.

#### *Comparative Analyses of Constitutional Autonomy Provisions*

Beckham (1977, 1978) and Glenny and Dalglish (1973) provide the most recent comprehensive comparative legal analyses of constitutional autonomy. Beckham's (1977, 1978) review of constitutional autonomy located and analyzed constitutional provisions, state court cases, and state attorney generals' opinions. The study also considered the legal consequences of Florida adopting a constitutional provision for the State University System of Florida. Beckham (1978) identified several general areas in

which courts have weighed in on constitutional autonomy provisions. First, the legislature may not enact laws mandating that institutions undertake specific management actions (Beckham, 1978). Under this category, Beckham discussed instances in which courts struck down or restricted statutes dictating the location of a campus, altering institutional governance or impermissibly placing conditions on the employment of university employees (1978). A second category identified by Beckham (1978) involves legislation attempting to transfer power from the university system to other state agencies, illustrated by court invalidation of efforts to control university expenditures (Beckham, 1978). Under a third category, Beckham (1978) concluded constitutional autonomy generally does not provide immunity to state laws of general applicability, citing worker's compensation, employment, public health, and minimum wage laws as examples.

Under a fourth category relating to appropriations and expenditures, Beckham determined that decisions reveal that legislatures may impose standards as long as they do not unduly infringe on the constitutional powers granted to the governing authority (1978). Examples of permissible legislative oversight include placing conditions on accounting procedures, requiring use of standardized reporting mechanisms, allocating funds on a line-item appropriations basis, or stipulating the general purpose of an appropriation. Beckham (1978) found an overstepping of state oversight occurred when the state government attempted to control the expenditures for a department, directed the offering of a program at a particular location or distributed funds in such a way to bypass the constitutional authority vested in the governing board.



In a fifth category, Beckham (1978) discusses authority to public higher education recognized by courts as implied in constitutional autonomy provisions. Institutional powers identified by Beckham (1978) include authority to ignore legislative caps on tuition, set the amount of campus parking fines, establish health requirements for admission or set residency standards to qualify for in-state tuition. Courts have also recognized the exclusion of institutions from certain municipal authority such as building or construction codes (Beckham, 1978). In this category, Beckham (1978) includes the power to regulate numerous faculty and student issues, describing a general authority to enact rules related to the health, welfare and education of students.

Glenny and Dalglish (1973) compared four states deemed to provide constitutional autonomy to state universities with four states in which the state universities operated on a completely statutory basis. Despite focusing on eight states, considerable space in the study is given to an overview of the general state of constitutional autonomy. The subtitle of the study, *Constitutional Autonomy in Decline*, reflects Glenny and Dalglish's belief that constitutional protections were providing reduced autonomy to institutions in light of increasing state control over public colleges and universities.

The authors describe constitutionally autonomous colleges and universities as exercising “fairly exclusive authority over the internal affairs of the institution,” including admissions standards, academic programs offered, hiring and firing decisions, tenure, student discipline, purchasing, control of property and litigation (Glenny & Dalglish, 1973, p. 148). Constitutionally autonomous schools still possessed more autonomy than statutorily based institutions in certain areas, but the authors found an

overall weakening of constitutional autonomy, reporting a “rapidly deteriorating” situation in relation to budget and appropriations and “to some extent even in the management of institutions” (Glenny & Dalglish, 1973, p. 73). Glenny and Dalglish (1973) describe state governments as seeking greater control of public universities with constitutional autonomy, citing “the recent development of new organizational forms, management techniques, and information systems, and the imposition of new state agencies and their staffs on institutions of higher education” (p. 143). Despite finding a decline in the authority provided by constitutional autonomy, one of the most important benefits of constitutional autonomy identified by the authors lies in providing a negotiating tool for institutions, with constitutional autonomy held out as a potential legal obstacle to block certain legislative demands (Glenny & Dalglish, 1973).

In discussing the legal boundaries of constitutional autonomy, Glenny and Dalglish (1973) describe the legislature's authority over higher education appropriations, the state's police power, and other constitutional provisions assigning powers to the executive and legislative branches as placing limits on constitutional autonomy provisions. With the caveat that standards differ among states, the authors suggest conditions on appropriations might violate constitutional autonomy if they encroach on matters such as admissions, graduation standards, tenure and new programs (Glenny & Dalglish, 1973). Glenny and Dalglish also state that, in general, constitutional autonomy would yield to a valid exercise of generally applied state powers, which refers to the ability of state governments to enact laws that protect the health, safety and welfare of the public (Glenny & Dalglish, 1973).

*Examinations of Constitutional Autonomy Since the 1970s*

While an analysis like that by Beckam (1977, 1978) or Glenny and Dalglish (1973) has not occurred since the 1970s, other authors, focusing on constitutional autonomy in particular states, have examined the topic. McKnight (2004), for instance, provides a legal analysis of constitutional autonomy in Minnesota. The analysis was intended to help legislators address the consequences of proposed constitutional amendments designed to eliminate constitutional autonomy and to evaluate the legality of proposed bills in relation to the constitutional protections afforded the University of Minnesota. In her analysis, she notes that courts have interpreted constitutional autonomy provisions as a means to insulate public higher education from excessive political interference by the state legislature (McKnight, 2004). Another reason for a constitutional autonomy provision involves having decisions concerning a university's operation made by an independent governing board with a commitment to higher education management (McKnight, 2004).

Four broad areas delineate the contours of constitutional autonomy in Minnesota: (1) the Board of Regents, subject to certain limits, possesses sole authority to manage the university; (2) courts may intervene when the Regents abuse management powers granted in the constitution; (3) the legislature has certain authority to stipulate conditions on appropriations to the university; and (4) the university must bow to laws of general applicability as long as they do not excessively infringe on the Regents' management ability (McKnight, 2004).

The first category prohibits a statute from turning complete oversight of university finances to another state agency (McKnight, 2004). While the Regents'

authority over the university is protected from excessive control by other state agencies, laws aimed at the general welfare of state citizens and only resulting in limited interference with the Regents' authority appear permissible (McKnight, 2004). This internal control over university affairs also includes complete control of university revenues from sources other than legislative appropriations.

Regarding an abuse of management powers by the Regents, courts in Minnesota have authority to intervene in matters where officials are deemed to be acting arbitrarily or in contravention of established university rules (McKnight, 2004). Instances of abuse of power include the Regents failing to adhere to the requirements of a validly enacted state law (McKnight, 2004). As part of this standard, claimants are required to exhaust administrative remedies before claiming that the university acted capriciously or arbitrarily.

Under the third category, the legislature may place conditions on university appropriations if such restrictions minimally intrude on the Regents' authority and promote the general welfare and the law does not specifically target the university (McKnight, 2004). McKnight (2004) discusses in the fourth category how the Regents are subject to the general lawmaking power of the legislature as long as it does not interfere with the Regents' management authority. For instance, the university is not immune from the state's open information and meetings law (McKnight, 2004). Unless deemed an unwarranted intrusion in the management functions of the university, according to McKnight (2004) a generally applicable law for state agencies is assumed to apply to the University of Minnesota.

McKnight (2004) lists numerous state laws regulating the university. In relation to finance and real property, state laws that the University of Minnesota must adhere to include a requirement that half of funds for endowed chairs must come from non-state sources, the permitting of financial auditing of the university by external state agencies, granting tuition refunds to students who are drafted, requiring the university to follow state bond regulations and making the university award 20% of procurement contracts to small businesses. Among health and safety laws, the university must follow the standards of a law pertaining to the safe handling of bleach, engage in mosquito abatement, permit fire marshal inspections, ensure its students meet state immunization standards, and follow state traffic laws on roads or property owned by the Regents. The reach of state law also includes personnel, as the university must comply with workers' compensation law, labor relations law, payment of life insurance premiums for employees and filing of an annual public financial report for the university's faculty retirement plan. The list illustrates that, despite constitutional autonomy, the University of Minnesota remains subject to state regulation in a number of areas.

Reynolds (1992) considers historic, legal and judicial issues related to the legal status of the Arizona Board of Regents. The dissertation examines the development of higher education structures in Arizona, including the adoption of constitutional provisions and amendments and judicial decisions interpreting the meaning of constitutional autonomy in the state for the Board of Regents. The author reviewed territorial laws related to higher education and the passage of the state's constitution in 1910 (Reynolds, 1992). Evaluating the constitutional provisions related to higher education, Reynolds concluded that the Board of Regents is granted authority over

universities under its supervision but that the powers and membership of the Board are under legislative control. In reviewing judicial decisions, Reynolds discusses cases involving the financial and spending authority of the Board of Regents in the areas of finance, construction, students and employment/personnel. Reynolds' analysis indicated that the legislature retained significant control over the Board of Regents.

The dissertation also compared Arizona with Kansas, South Dakota and Wyoming. Reynolds (1992) selected these states based on their identification as having public governing boards authorized by the state's constitution but subject to substantial authority of the state legislature. The states were also chosen based on similar language in their state constitutions for higher education as that in Arizona's constitution.

Following the classification of cases in the Arizona analysis, Reynolds grouped judicial decisions according to finance, taxation, construction, student issues and employment/personnel. Reynolds (1992) concluded that courts in all four states permitted extensive legislative control over public higher education.

Shekleton (1994) confirmed the findings of Beckham (1977, 1978) and Reynolds (1992) concerning a lack of constitutional autonomy in South Dakota. In a law review article he argued that state courts had misinterpreted the intent of constitutional language by not granting judicial recognition of constitutional autonomy for the South Dakota Board of Regents. In addition to addressing the legal status of constitutional autonomy in one state, the study also demonstrates that courts may stray from the apparently plain meaning of constitutional language. The study shows that legal interpretation often involves entering contested terrain in which advocates may urge courts to reverse positions taken in previous legal decisions. A successful advocate may convince a court

to deviate from legal standards seemingly announced in earlier cases. In his article, Shekleton (1994), though acknowledging the current legal status of constitutional autonomy in South Dakota, argued for a change in existing legal interpretations of constitutional authority for the Board of Regents.

In California, Scully (1987) classified case law involving the constitutional status of the University of California as dealing with issues related to governance, curriculum, state open meeting or records laws, university interactions with other state or federal agencies or corporations and labor issues (Scully, 1987). The study also discussed that constitutional autonomy, while preserving institutional control over internal governance, did not let the university ignore generally applicable statewide laws. Petroski (2005) considered constitutional autonomy in California in relation to federal First Amendment protections for individuals in higher education. The study focused on how courts in California had interpreted constitutional autonomy to protect institutional rights as opposed to a constitutional doctrine deemed to protect the rights of individuals.

While studies conducted since the 1970s provide insight into constitutional autonomy in specific states or a few comparison states, they were not designed to present a comparative legal analysis of provisions. Gaining an understanding of the current legal status of and trends in constitutional autonomy provisions requires examination of state cases decided since the studies by Beckham (1977, 1978) and Glenny and Dalglish (1973). According to Beckham (1977, 1978), determining the degree of constitutional autonomy given to a governing board requires analyzing court cases interpreting the constitutional provision. Glenny and Dalglish (1973) offer a similar view, stating that while state constitutional language serves as the initial basis for constitutional autonomy,

judicial interpretation proves key in giving meaning to these provisions. McKnight (2004), though listing states with cases dealing with constitutional autonomy, did not conduct a systematic comparative legal analysis of provisions among states. Accordingly, understanding the contemporary legal landscape of constitutional autonomy requires fresh analysis of court interpretations of constitutional autonomy provisions.

### Conclusion

Constitutional autonomy provisions provide a legal mechanism to help establish the amount of control that public colleges and universities exercise over their internal affairs. The provisions represent one way that states have sought to safeguard institutional autonomy from excessive political influence. While similarities exist among states with constitutional autonomy provisions, varying constitutional language and the interpretations given to the provisions in state legal decisions result in characteristics unique to each state. Previous studies have acknowledged the apparent connections between constitutional autonomy and institutional autonomy but studies have generally not sought to assess and categorize constitutional autonomy more fully within the context of institutional autonomy as a concept from the higher education literature. More specifically, research has not sought to analyze the legal doctrine using the concepts of substantive and procedural autonomy. Additionally, interpretation of constitutional autonomy provisions evolves over time due to new judicial decisions or constitutional language. This evolving nature of the legal interpretation of constitutional autonomy provisions demonstrates the need for periodic re-assessment of the topic.



## CHAPTER 3

### RESEARCH DESIGN AND METHODOLOGY

#### Introduction

The study builds on previous examinations of constitutional autonomy, especially the work of Beckham (1977, 1978), to provide a comparative legal analysis of the current status of constitutional provisions appearing to grant constitutional autonomy to public colleges and universities within a state. This occurs through an analysis of court cases and constitutional provisions, with an emphasis on cases decided since 1977. An analysis of cases since this period updates the work of Beckham (1977, 1978) to provide an assessment of the current legal status of constitutional autonomy among states. The study also analyzes the legal doctrine of constitutional autonomy using the concepts of substantive and procedural autonomy from the higher education literature.

Specifically, this study addresses the following two research questions:

1. What is the legal status of state constitutional autonomy for public higher education in the United States?
  - Based on constitutional provisions and court decisions, what states grant constitutional autonomy to public higher education and how does this list correspond to states identified by Beckham (1977, 1978)?
  - What commonalities and differences exist in the legal interpretations given constitutional autonomy provisions by state courts?
  - For each state examined, have cases interpreting constitutional autonomy provisions decided since Beckham's (1977, 1978) study maintained consistent judicial support for constitutional autonomy,

expanded the legal scope of constitutional autonomy or diminished the legal scope of constitutional autonomy?

2. Does analyzing court cases located for this study using the concepts of procedural and substantive autonomy developed in the higher education literature contribute to an increased understanding of how constitutional autonomy affects institutional autonomy?

### Data

In legal research, constitutions, statutes, regulations issued by administrative agencies and case law constitute primary sources (Russo, 1996). State court cases and constitutional provisions constitute the primary data for this study. In states with ambiguous legal decisions concerning constitutional autonomy or moderate to limited judicial opinions interpreting constitutional autonomy provisions, advisory legal opinions from states' attorney general offices are also considered. These advisory opinions do not have the force of law but do represent the legal opinion of the state's highest ranking legal official. The study is limited to cases from states with constitutional provisions potentially granting independent constitutional autonomy for public higher education governing boards. Cases from states in which the public higher education governance system is completely subject to statutory authorization and legislative authority are not considered.

The WESTLAW and LEXIS-NEXIS electronic legal databases provide the primary research tools for locating state court cases interpreting constitutional autonomy provisions. The two major databases commonly used for legal research (Russo, 1996),

WESTLAW and LEXIS-NEXIS permit keyword searches for cases and constitutional provisions and searches based on the citation of a case or constitutional provision in legal opinions. Previous studies (Beckham, 1977, 1978; Glenny & Dalglis, 1973; McKnight, 2004) provide an important resource to locate new court decisions addressing constitutional autonomy. Using a case citation identified in a previous study, a search can be conducted in WESTLAW and LEXIS-NEXIS for more recent opinions that cite to that decision. A database compiled by the Education Commission of the States (ECS) also aided in the location of states that might grant constitutional autonomy. The ECS database, while not referencing specific constitutional provisions and containing no legal analysis, does discuss whether statewide or institutional governing boards are established through statutory or constitutional language.

#### Method of Analysis

Legal analysis seeks “to make sense of the evolving reality known as the law” by employing a time line that “looks to the past, present, and future” (Russo, 1996, p. 35). The reliance by courts on precedent to guide in the disposition of current cases requires legal researchers to consult previous cases for legal authority relevant to the legal issue under consideration (Russo, 1996). To guide the examination of the legal interpretation of constitutional autonomy provisions in state court decisions, this study relies on a method of legal analysis referred to as reasoning by analogy or example. Reasoning by analogy or example is often associated with the legal thought and writings of Edward Levi, who served as Dean of the University of Chicago Law School, President of the University of Chicago and Attorney General of the United States (Huhn, 2003; Sunstein,

1993). Levi's approach to legal reasoning maintains currency in legal thought, and according to Cass Sunstein (1993), the Karl N. Llewellyn Professor of Jurisprudence at the University of Chicago Law School, reasoning by analogy represents the most common form of legal reasoning.

Levi outlined three steps that take place in legal reasoning: “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case” (1949, p. 2). This approach to legal interpretation provides a dynamic quality to the law in which legal standards are constantly shaped by new factual circumstances deemed similar to previous cases, with a determination of similarity or difference between the situations the most important step in the legal process (Levi, 1949). Furthermore, Levi described a cyclical process in which legal rules are constantly formed and re-formed. A legal rule is first “built up” as cases are compared and contrasted and courts attempt to define the rule (Levi, 1949). In the second phase, the legal rule is “more or less fixed, although reasoning by example continues to classify items inside and out of the concept” (Levi, 1949, p. 9). Finally, the rule begins to break down in response to emerging social conditions (Levi, 1949). Use of reasoning by analogy in legal interpretation fosters a kind of legal tectonics in which legal standards constantly are formed and reformed by comparing circumstances from prior cases to new factual situations in contemporary legal disputes.

The key challenge involved in analogical reason pertains to determining when factual differences or similarities between cases are relevant (Sunstein, 1993). Sunstein describes relevancy determinations as involving four overlapping features: (1) “principled consistency;” (2) “a focus on particulars;” (3) “incompletely theorized

judgments;” and (4) “principles operating at a low or intermediate level of abstraction” (1993, p. 746). Principled consistency refers to reliance upon some guiding principle or standard to make decisions appear consistent with one another, even among cases with seemingly disparate outcomes (Sunstein, 1993). The second feature of relevancy determinations stems from a focus on the facts of particular cases as the key tool to rely upon in developing guiding principles (Sunstein, 1993). Sunstein (1993) describes this focus on details in the development of guiding principles as a bottom-up form of thinking in which legal principles are derived through constantly referencing particular cases. The third facet of relevancy determinations deals with lawyers and judges often making their legal interpretations and judgments without articulation of a complete theory (Sunstein, 1993). To illustrate, Sunstein (1993) discusses how a lawyer may believe that the constitution protects political speech from certain forms of governmental interference without articulating a comprehensive theory that accounts for this belief or position. Despite a focus on the particular in relation to the factual circumstances of cases, a fourth component of reasoning by analogy is a degree of abstraction concerning development and application of generalized principles to compare and contrast factual situations (Sunstein, 1993).

Reasoning by analogy, with a stress on the importance of precedent, also contains a historical dimension, calling some researchers to describe this method of legal analysis as historical-legal research (Russo, 1996). The historical component stems from the significance of precedent or *stare decisis* in which earlier legal controversies provide the legal authority to shape contemporary legal standards (Russo, 1996). The present study reflects and embraces the historical orientation of reasoning by analogy by focusing on

pre-1977 cases in Chapter Four to provide the reader with the necessary background to place later cases, discussed in Chapters Five and Six, in the appropriate legal context.

While this study relies on reasoning by analogy, several approaches to legal analysis exist—with the merits and limitations of different methods often subject to considerable debate by legal scholars. Toma (1997) divides legal scholars into four paradigms based on their ontological, epistemological and methodological assumptions: (1) legal formalists; (2) legal realists; (3) critical scholars; and (4) interpretive scholars. In constructing the categories, he looked to Lincoln and Guba's (1994) classification of social science researchers into positivist, postpositivist, critical, and constructivist paradigms. Legal formalist scholars “endeavor to organize legal cases and generalize about them in order to discern their general patterns, articulating these generalizations as principles of law” (Toma, 1997, p. 21). Toma (1997) classifies legal formalists as parallel to the use of positivist by Guba and Lincoln. He describes legal realists as postpositivists who focus on how social factors help define legal principles (Toma, 1997). Legal realists do not make claims concerning an objective reality but aspire to achieve a realist ontology and an objectivist epistemology (Toma, 1997). Critical scholars assume a realist ontology but one that is not neutral and view reality as formed by social, economic and political forces (Toma, 1997). Toma (1997) states that interpretive scholars operate from the assumption of the existence of multiple realities.

Huhn (2003) divides methods of legal interpretation into the three broad categories of formalism, realism, and analogy. Legal formalists endeavor to rely on deductive logic and often operate using a syllogistic approach (Huhn, 2003; Posner, 1987). Formalists are often associated with advocates of plain meaning in legal

interpretation, with Justice Scalia's plain text approach to legal interpretation representative of this form of legal analysis. Legal formalism relies on a deductive logic approach in which "the rule of law is the major premise, the facts of the case are the minor premise, and the legal result is the conclusion" (Huhn, 2003, p. 309). Legal realism—also called policy analysis or practical reasoning—represents a process of interpretation and decision-making that seeks to guide decisions based on the potential consequences of a judgment rather than reliance on pre-determined legal standards (Huhn, 2003). This form of legal analysis evolved from the philosophical currents of utilitarianism and pragmatism (Huhn, 2003). Judge Richard Posner (1987) states that a realist approach means "deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis. A 'realist' decision is more likely to be judged sound or unsound than correct or incorrect" (p. 181).

Reasoning by analogy tends to draw from both the legal formalist and realist camps (Huhn, 2003). According to Huhn (2003), an analogy is formalistic when focusing upon factual similarities between a previous and current case. An analogy takes on realist dimensions when "the similarities between the values served by the rule of law from the cited case and the values that are at stake in the case at hand" come to the fore (Huhn, 2003, p. 315). Reasoning by analogy, then, combines elements of positivism and postpositivism based on Toma's (1997) categorization of approaches to legal interpretation.

The selection of a method of legal analysis involves entering into a disputed realm. Some scholars even contend that reasoning by analogy does not exist as a distinct form of legal analysis but instead as a deficient use of deductive or inductive logic

(Sherwin, 1999). Reasoning by analogy has been criticized on grounds of not providing a logical, rational framework for legal interpretation and as providing too much leeway to judges in interpretation (Sherwin, 1999). While acknowledging the criticisms, Sherwin argues that analogical reasoning provides a useful approach to legal interpretation, including the fact that reliance on previous cases provides some degree of predictability for parties. In addition, Sherwin (1999) offers the following reasons:

First, a diligent process of studying and comparing prior decisions produces a wealth of data for decisionmaking. Second, the rules and principles that result from analogical reasoning represent the collaborative efforts of a number of judges over time. Third, analogical reasoning tends to correct biases that might otherwise lead judges to discount the likelihood or importance of reliance on prior decisions. Fourth, analogical reasoning exerts a conservative force on law: by holding the development of law to a gradual pace, it limits the scope of error and contributes to public acceptance of law as a standard of conduct. (p. 1186)

For purposes of this study, perhaps the most serious critique of reasoning by analogy pointed out by Sherwin (1999) involves the charge that analogical reasoning fails as an independent form of analysis but, instead, represents either diluted forms of deductive or inductive logic. Huhn (2003), in responding to criticism of analogy as not comprising a distinct form of legal reasoning, contends that analogical reasoning forms a middle road between formalism and realism and cites this as a strength of reasoning by analogy.

While acknowledging continuing debates over legal analysis methods, including criticism of reasoning by analogy, several specific rationales support use of reasoning by



analogy for this study, in addition to its common acceptance and use by legal scholars and judges in making legal interpretations. First, this method of legal analysis facilitates comparison among states of the specific ways that constitutional autonomy affects institutions by its emphasis on factual circumstances in terms of assessing legal rules. Second, the stress on precedent in reasoning by analogy aligns with the goal of assessing whether state courts have maintained consistent judicial support for constitutional autonomy, expanded the legal scope of constitutional autonomy or diminished the legal scope of constitutional autonomy. Third, this emphasis on factual circumstances also aligns with the goal of the study to analyze constitutional autonomy using the concepts of substantive and procedural autonomy. Accordingly, while acknowledging the contested terrain of legal interpretation, reliance on reasoning by analogy to analyze the cases fits with the research questions pursued in the study.

## CHAPTER 4

### LEGAL STATUS OF CONSTITUTIONAL AUTONOMY THROUGH THE PERIOD OF PRIOR LEGAL ANALYSIS

#### Introduction

The following chapter provides background and context concerning the legal status of constitutional autonomy primarily through the period analyzed by Beckham (1977, 1978). In instances when a state-specific study has updated the status of case law since 1977, these studies are considered along with Beckham's assessment, namely studies in California (Petroski, 2005), Minnesota (McKnight, 2004) and South Dakota (Shekelton, 1994). Unless an intervening state-specific study has occurred, the chapter focuses on pre-1977 cases addressing constitutional autonomy. The chapter examines prior constitutional autonomy decisions because of the importance of legal precedent in influencing how courts decide new legal disputes. Under the decision making process of *stare decisis*, courts look to the legal rules and facts from previous cases when deciding later cases (Russo, 1996). Accordingly, an assessment of the current legal status of constitutional autonomy rests on familiarity with and an understanding of how previous court decisions have interpreted constitutional autonomy, and this chapter provides that necessary legal background.

Since the study largely builds on the work of Beckham (1977, 1978), whose research provides the most recent comparative legal analysis of constitutional autonomy, states are organized and discussed in this chapter based on two of the three categories that structured his study in 1977. In that study, his dissertation, he categorized states on the basis of state constitutions (1) appearing to grant unrestricted grants of constitutional

power to governing boards, (2) appearing to grant power to governing boards subject to certain legislative authority, and (3) appearing to grant power to governing boards restricted by extensive legislative authority. Table 4.1 displays these categories and the states included in each one based solely on constitutional language.

Table 4.1 *States Identified by Beckham (1977) with Constitutional Provisions Suggestive of Constitutional Autonomy*

Provisions Appearing to Grant Unrestricted Authority	Provisions Appearing to Grant Power but with Limited Legislative Authority	Provisions Appearing to Grant Power Restricted by Substantial Legislative Authority
Alabama	California	Alaska
Georgia	Idaho	Arizona
Louisiana	Nevada	Colorado
Michigan	South Dakota	Hawaii
Minnesota		Mississippi
Missouri		New Mexico
Montana		
North Dakota		
Oklahoma		
Utah		

He placed 10 states (Michigan, Minnesota, Missouri, Utah, Alabama, Oklahoma, North Dakota, Louisiana, Georgia and Montana) in the first category, four states (California, Idaho, Nevada and South Dakota) in the second category and six states in the third category (Colorado, New Mexico, Arizona, Mississippi, Alaska and Hawaii). States in the third category are not included for discussion in this chapter based on Beckham's (1977) conclusion that neither constitutional language nor judicial decisions confirmed the existence of constitutional autonomy in these states. Though not discussed in this chapter, these states were included in the independent search and analysis of court cases

dealing with constitutional autonomy discussed in Chapter Five to determine if any changes in judicial recognition had taken place since Beckham's study (1977, 1978). The 14 states from Beckham's (1977) first two categories are organized and discussed based on his initial ordering and classification of states, which relied solely on language in constitutional provisions. Beckham (1977, 1978) then determined whether or not constitutional autonomy existed in a state based on legal decisions interpreting constitutional provisions.

States Initially Identified by Beckham with Constitutional Provisions Appearing to Grant

Unrestricted Authority

*Michigan*

Michigan's constitution of 1835 placed the University of Michigan under the control of the legislature (*Sterling v. Regents of the Univ. of Mich.*, 68 N.W. 253 (Mich. 1896)). To insulate the university from excessive political interference, the constitution of 1850 authorized a Board of Regents that would be elected by the citizens and responsible for the management of the university. According to Beckham (1977), *Sterling* represents one of the early landmark cases cementing constitutional autonomy in the state. The case involved a dispute over a legislative order that directed the university to move the institution's homeopathic medical school to Detroit. The Michigan Supreme Court declared the directive unconstitutional and in violation of the authority granted by the constitution to the University of Michigan Regents. In its opinion, the court stated:

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. . . . 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. (p. 257)

Later cases would reaffirm the University of Michigan's constitutional autonomy, recognize the autonomy of other governing boards and also help define when the university was subject to the legislature's reach (Beckham, 1977, 1978). The constitutional authority granted to the Regents of the University of Michigan remained as a part of the 1908 constitution and was extended to the state's Board of Agriculture as Regents for the state's agricultural and mechanical college (*State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160 (Mich. 1924)). In 1911, *Sterling* served as a basis for the Michigan Supreme Court to reject the state's Auditor-General's position that Michigan's general accounting laws applied to funds appropriated by the legislature for the use and maintenance of the university in *Regents of the University of Michigan v. Auditor-General*, 132 N.W. 1037 (1911). In ruling against the Auditor-General, the court characterized the 1908 constitution as increasing the Regent's control of university funds and described the Regents as exercising an authority equal to the legislature in relation to the control and supervision of the university.

In another case decided in 1911, the Michigan Supreme Court held that the state Board of Agriculture, the constitutionally designated Regents for the agricultural and mechanical college (now Michigan State University), was equivalent in constitutional

standing to the Regents of the University of Michigan (*Bauer v. State Bd. of Agric.*, 129 N.W. 713 (Mich. 1911)). The 1908 constitution contained a provision vesting the Board of Agriculture with administrative and supervisory control over the agricultural college. In *State Board of Agriculture v. Fuller*, 147 N.W. 529 (Mich. 1914), Michigan's Supreme Court considered the lawfulness of the state auditor refusing to release funds from the state treasury for the college. The state auditor acted pursuant to a state law that attempted to place a funding cap on the school's mechanical and engineering department. The court ruled that the law placed an impermissible condition on the Regents for the agricultural college.

In supporting the existence of constitutional autonomy, court decisions in the 1920s also affirmed that the Board of Regents and their property constituted departments of state government for purposes of eminent domain and sovereign immunity. In *People, for Use of the Regents of University of Michigan v. Brooks*, 194 N.W. 602 (Mich. 1923), the state's highest court held that the University of Michigan could use the state's eminent domain law to acquire private property for university purposes.

A year later, the Michigan Supreme Court ruled that, even though the University of Michigan constituted a unique constitutional corporation, the Board of Regents performed governmental functions and, thus, qualified for immunities available to other state governmental actors and agencies (*Robinson v. Washtenaw Circuit Judge*, 199 N.W. 618 (Mich. 1924)). Also in 1924, the state supreme court invalidated a legislative attempt to remove exclusive supervision of the state's agricultural school from the state Board of Agriculture by giving certain oversight functions to the state administrative board (*State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160 (Mich. 1924)). The

majority opinion described the agricultural college and the University of Michigan as “constitutionally immune” from legislation seeking to usurp their supervisory authority (p. 162). In salvaging the constitutionality of part of the act, the court did note that the legislature could stipulate that particular appropriations were designated for use only in the school's extension activities if the agricultural college chose to accept the appropriation.

While strongly acknowledging the concept of constitutional autonomy, the Michigan Supreme Court has also recognized instances when institutional constitutional authority must bow to legislative power, specifically when the legislature acts to promote the general welfare or uses its police power to protect the health and safety of individuals (Beckham, 1977, 1978). These limitations mean that constitutional autonomy may not conflict with established state public policy. Based on these limitations, Michigan courts have held, for example, that constitutional autonomy does not shield institutions from the state's workmen's compensation law (*Peters v. Mich. State College*, 30 N.W.2d 854 (Mich. 1948)) and public employee relations law (*Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n*, 204 N.W.2d 218 (Mich. 1973)).

In the area of employment law, for instance, in *Michigan Employment Relations Commission* (1973), the state supreme court held that the University of Michigan Hospital could not decline to engage in collective bargaining with medical interns, residents and post-doctoral fellows. The court noted that in a previous case the university had lost in its challenge to seek exemption under the state's public employee relations law based on its constitutional status. In this case, the university contended that declaring interns, residents and post-doctoral fellows employees for purposes of the act, rather than

viewing them more as students, violated the institution's constitutional authority. The court disagreed and ruled the university could not refuse to engage in collective bargaining with the interns, residents and fellows. While holding that the university must engage in collective bargaining in this instance, the opinion discussed that the school's constitutional autonomy imposed certain limitations. Issues within the "educational sphere" fell outside of the permissible scope of collective bargaining. As examples, the opinion stated that topics related to salary clearly fell within the permissible scope of bargaining while a decision to make interns work in the hospital's pathology department squarely fell within the educational sphere. Other issues would require determination on a case-by-case basis.

A significant decision dealing with established public policy and university autonomy involved a general statute that abrogated sovereign immunity for state agencies in Michigan and the law's applicability to the Board of Regents of the University of Michigan (*Branum v. State*, 245 N.W.2d 860 (Mich. 1966)). In *Branum*, the Michigan Supreme Court rejected the Regents' position that a state law abolishing sovereign immunity for state agencies in tort actions represented an impermissible intrusion on their constitutional autonomy. The opinion stated that despite its independence, the Board of Regents still constituted a part of the state government and the legislature could infringe on the Regents' autonomy in the exercise of its police power. According to the court, the university stood as an independent branch of state government, but "not an island" that permitted the Regents to use their constitutional independence to "thwart the clearly established public policy" of Michigan (p. 862).



Despite announcing limitations, Michigan courts continued to uphold the broad authority of institutions with constitutional autonomy through the 1970s (Beckham, 1977, 1978). Constitutional autonomy also expanded to encompass other institutions in the state following an amendment to the state constitution in 1963 to provide constitutional autonomy to the governing boards of additional institutions (Beckham 1977). Article VIII, Section 5 of the 1963 constitution provides: “Each board shall have general supervision of its institutions and the control and direction of all expenditures from the institution's funds” (Mich. Const. art. VII, § 5).

Illustrative of the continued latitude given to institutions with constitutional autonomy, in *Schmidt v. Regents of the University of Michigan*, 233 N.W.2d 855 (Mich. Ct. App. 1975), the court held that the university's constitutional autonomy permitted the Regents to determine residency status for the purpose of tuition charges (p. 856). In another tuition case, the court held that a community college held similar power to set tuition rates as that granted to the University of Michigan (*Kowalski v. Bd. of Trustees of Macomb County Cmty. Coll.*, 240 N.W.2d 272 (Mich. Ct. App. 1976)).

A significant case decided in 1975 dealt with the proper balance between the powers of the universities and the legislature and also between institutions and the Michigan Board of Education, also a constitutionally established agency (*Regents of the Univ. of Michigan v. State*, 235 N.W.2d 1 (Mich. 1975)). The case dealt with the constitutionality of a series of legislative conditions on appropriations and also considered whether the State Board of Education possessed authority to approve new programs at Michigan State University. The court discussed that while the legislature

may impose certain conditions on appropriations, it “may not interfere with the management and control of those institutions” (p.6).

The Michigan Supreme Court opinion went section by section through statutory requirements that had been placed on the university, with the court noting that the legislature had modified many of the requirements to no longer make them mandatory. One of the provisions that remained required the institution to issue a report to the legislature concerning debt retirement for self-liquidating (self-supporting) construction projects. The court held the reporting requirement did not infringe on the university’s constitutional autonomy. The court abstained from deciding on a provision requiring the university not to use operating funds in meeting debt obligations for self liquidated projects until an actual controversy arose. Though declining to weigh in on the provision, the court discussed that the controversy in the case went beyond judicial considerations to issues related to “power and politics,” because whatever power the constitution grants to universities, the legislature “holds the power of the purse” (*Regents of the Univ. of Michigan v. State*, 235 N.W.2d at 9). The opinion stated that if the university failed to please the legislature, then appropriations might be denied. The court offered that universities would likely show good political sense by following the legislature's admonition to not use funds appropriated for operating expenses for self-liquidating projects. Doing otherwise risked reduced legislative appropriations. Beckham (1977) described the court's abstention on the issue of legislative conditions on appropriations as leaving unclear the relationship between the legislature's appropriations power and the Regents' authority to manage and control university funds.

In relation to the authority of the Board of Education, the court determined that the agency was meant to serve as a general coordinating and planning agency but not to exercise control over institutions (*Regents of the Univ. of Michigan*, 235 N.W.2d 1). The opinion stated an institution could go directly to the legislature if its governing officials disagreed with recommendations of the Board of Education. The court held that while acceptable to make institutions submit new programs to the Board of Education, the board possessed no authority to disallow new academic programs by institutions.

### *Minnesota*

The University of Minnesota was created by the territorial legislature in 1851 (McKnight, 2004). The law creating the university called for a legislatively elected Board of Regents that would exercise general supervisory control over the institution. Following statehood in 1858, the authority given the Regents under the territorial act became a part of the state constitution, with “All the rights, immunities, franchises and endowments heretofore granted or conferred upon the University of Minnesota . . . perpetuated unto the university” (Minn. Const. art. XIII, § 3).

The opinion in *State v. Chase*, 220 N.W. 951 (Minn. 1928), firmly established constitutional autonomy for the University of Minnesota (Beckham, 1977, 1978). *Chase* involved the Regents seeking a court order to make the state auditor pay an expense incurred by the university in considering a health insurance plan for university employees. The controversy in the case centered on a commission appointed by the governor that claimed, among its powers, authority to supervise any university expenditure. The university argued that the commission, acting under a statewide law,

did not possess the authority to scrutinize the expenditures of the Regents in such a manner. The opinion characterized the status of the Regents as follows:

So we find the people of the state, speaking through their Constitution, have invested the regents with a power of management of which no Legislature may deprive them. That is not saying they are the rulers of an independent province or beyond the lawmaking power of the Legislature. But it does mean that the whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature. (p. 954)

The court defined the general distinction between the legislature and the Regents as that between legislative and executive power. While stating the line between the two could not be drawn with “mathematical precision,” the opinion discussed that the legislature could not usurp or transfer the Regents' authority to make academic policy for the University of Minnesota (p. 954). The legislature exercised the power “within reason to condition appropriations as it sees fit” (p. 955). The opinion also looked to cases involving provisions in state constitutions in Oklahoma, Idaho and Michigan as examples of states making similar constitutional grants of authority to governing boards in those states as that described in the court's opinion.

Cases in following years would re-affirm the view of the constitutional status and authority of the Regents articulated in *Chase*. In *Fanning v. University of Minnesota*, 236 N.W. 217 (Minn. 1931), the Minnesota Supreme Court held that the university possessed complete control of funds not obtained from the legislature. In the suit, a taxpayer sought to prevent the University of Minnesota from constructing a dormitory. The university intended to pay for the dormitory with income from its university press, rental property

and earnings from the dormitory. The court determined that new construction, including dormitories, comported with the constitutional authority of the university to grow and improve the campus. The opinion re-affirmed that the university enjoyed constitutional powers beyond legislative reach.

In 1936 the state's high court held that the number of Regents and their appointment by the legislature as opposed to the governor could not be altered (*State ex rel. Peterson v. Quinlivan*, 268 N.W. 858 (Minn. 1936)). In a case involving claims that the University of Minnesota impermissibly permitted sectarian religious activity on its campus, the Minnesota Supreme Court described the Regents as possessing independent authority to govern the university (*State ex rel. Sholes v. Univ. of Minn.*, 54 N.W.2d 122 (Minn. 1952)). The court described their powers over the university as almost complete as long as the Regents did not overstep the constitutional authority granted them or violate state or federal constitutional legal standards. McKnight (2004) discusses how a 1971 case, *Bailey v. University of Minnesota*, 187 N.W.2d 702 (Minn. 1971), demonstrates that courts will intervene to review the actions of the Regents only in “limited circumstances” (p 9). The judicial deference to the authority of the Regents also means that individuals must exhaust administrative remedies (*Stephens v. Bd. of Regents*, 614 N.W.2d 764 (Minn. Ct. App. 2000); McKnight, 2004).

Despite enjoying considerable constitutional authority, as discussed by McKnight (2004), the legislature may affect the University of Minnesota through its legislative power. First, the legislature may place reasonable conditions on university appropriations. In *Regents of University of Minnesota v. Lord*, 257 N.W. 2d 796 (Minn. 1977), the Minnesota Supreme Court held that the legislature could condition an

appropriation for the construction of a building on the university's compliance with a state law that stipulated conditions state agencies had to follow in the selection of architects. The court discussed that the act promoted the general welfare, applied to all state agencies and only sought to place a condition in one area as opposed to all university appropriations. The opinion noted the need to decide on a case-by-case basis when conditions might infringe on the university's constitutional autonomy.

Second, the legislature may regulate the University of Minnesota under its general lawmaking authority as long as the legislation does not interfere with the Regents' supervision and control of the university (McKnight, 2004). Constitutional autonomy did not shield the Regents from the state's open meeting and data practices law (*Star Tribune v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274 (Minn. 2004)). The court stated that in exercising this general lawmaking authority, the legislature did not need to expressly include the Regents in an act and that this authority operated independent of the body's power to influence the university through appropriations. Despite these limitations, similar to those found in Michigan, the University of Minnesota enjoys substantial constitutional autonomy to direct its internal affairs.

### *Missouri*

Beckham (1977) stated that despite an apparent grant of broad constitutional authority to the Board of Curators of the University of Missouri in the state constitutions in 1865 and 1875, judicial decisions had not interpreted the provision in such a way (see, e.g., *State ex rel. Heimberger v. Bd. of Curators*, 188 S.W. 128 (Mo. 1916)). *Heimberger* dealt with a challenge by the Curators to a legislative order to offer specific courses and

degrees. The Missouri Supreme Court refused to invalidate the legislative requirement and noted previous instances in which the Curators had bowed to legislative enactments. A 1975 case, *Curators of the University of Missouri v. Public Service Employees Local No. 45, Columbia*, 520 S.W.2d 54 (Mo. 1975), appeared to re-affirm that the constitution did not grant constitutional autonomy to the Board of Curators in holding that the state labor law for public employees applied to the University of Missouri. While courts have held state labor laws applicable to institutions with constitutional autonomy, the decision went beyond the applicability of one law and indicated that the Board of Curators did not possess independent constitutional power.

#### *Utah*

Beckham (1977) identified Utah as containing a constitutional provision for higher education with language similar to that in Minnesota's constitution. However, state court decisions in Utah had failed to recognize constitutional autonomy for the University of Utah. In *Spence v. Utah State Agricultural College*, 225 P.2d 18 (Utah 1950), the Utah Supreme Court held, among the issues decided, that the legislature could alter the membership of the governing board of the college. The Utah Supreme Court followed a similar stance in *University of Utah v. Board of Examiners*, 295 P.2d 348 (Utah 1956), where the court declined to recognize the governing board of the University of Utah as akin to a separate branch of government and enjoying independent constitutional authority over university funds.

### *Alabama*

While the state constitution placed the University of Alabama and Auburn University under the control of their respective boards of trustees, Beckham (1977, 1978) identified no cases that suggested judicial recognition of constitutional autonomy in the state. He stated that a pattern of legislative control of these universities and no judicial recognition of constitutional autonomy meant that the status of constitutional autonomy was uncertain.

### *Oklahoma*

The 1907 constitution in Article VI, Section 31 designated the State Board of Agriculture as the board of Regents for all agricultural and mechanical colleges (Okla. Const. art. VI, § 31). A 1909 decision discussed that the provision meant the legislature could impose additional duties on the Board but not diminish the powers that existed under the territorial authority given to the Board as it existed at the adoption of the constitution (*Trapp v. Cook Const. Co.*, 105 P. 667 (Okla. 1909)). In the case, the Oklahoma Supreme Court held that a law placing control over college construction projects with a state board unconstitutionally applied to the Regents.

In 1941, the state constitution was amended to create the Oklahoma Regents for Higher Education, and in 1944 a constitutional provision created the Board of Regents for the University of Oklahoma (Beckham, 1977, 1978). In 1944, the authority over the agricultural and mechanical colleges was transferred to a separate Board of Regents from the state agricultural board. An additional constitutional provision granted supervision, management and control of certain other state colleges to the Board of Regents of



Oklahoma Colleges. The provisions mean that multiple higher education governing entities in the state appear to possess constitutional autonomy. Accordingly, alongside the statewide Oklahoma Regents for Higher Education, three other constitutionally authorized governing entities exist: (1) the Board of Regents for the University of Oklahoma; (2) the Board of Regents for Oklahoma Agricultural and Mechanical Colleges; and (3) the Board of Regents of Oklahoma Colleges with six institutions under the Board's control.

Beckham (1977) stated that courts had not defined the legal relationship between the constitutionally created statewide board and the other constitutional governing boards. He did cite cases supporting constitutional autonomy for the Oklahoma State Regents for Higher Education. In a 1946 case, the Oklahoma Supreme Court held a separate appropriation to a hospital controlled by the Board of Regents for the University of Oklahoma impermissible, with the legislature required to make collective allocations to the institutions managed by the Regents (*Bd. of Regents of Univ. of Okla. v. Childers*, 170 P.2d 1018 (Okla. 1946)). The opinion also noted that the Regents control the courses of study at institutions under their control, but the case did not elaborate on this point.

A case involving the Regents for Higher Education, *Board of Regents for the Oklahoma Agricultural and Mechanical Colleges v. Oklahoma State Regents for Higher Education*, 497 P.2d 1062 (Okla. 1972), involved a plan to change the name and governance structure of Murray State College of Agricultural and Applied Science. The opinion discussed that while the legislature could not change the status of institutions expressly placed under the control of a particular governing board, Murray State College enjoyed no such special status. The state's high court also held that the Oklahoma State

Regents for Higher Education possessed the constitutional authority to determine the appropriate “functions and courses of study” for Murray State (p. 1071). This authority to change the school’s main focus from agricultural and mechanical to a technical focus also permitted the Regents to rename the school and reorganize its governance structure. Beckham (1977) described Oklahoma decisions as affirming constitutional autonomy, but the existence of several institutional higher education boards and a statewide board created legal uncertainty that would “probably require additional resolution by the courts” (p. 78).

#### *North Dakota*

Beckham (1977) determined that the status of constitutional autonomy in North Dakota appeared uncertain and at most limited to certain specific areas. Article 54, Section 1 of the North Dakota constitution authorizes a State Board of Higher Education to control and administer state colleges and universities (N.D. Const. art. LIV, § 1). The Board assumed the powers and duties of a statutorily created board that existed previously (Beckham, 1977, 1978). In *Posin v. State Board of Higher Education*, 86 N.W. 2d 31 (N.D. 1957), the North Dakota Supreme Court stated the Board’s power and authority were to be construed from the constitutional provision creating it and statutory authorizations. The case involved the Board’s authority to dismiss a faculty member for cause. In finding for the Board, the court did not explicitly define its authority as created and protected by the constitution, but did describe the Board as a constitutional body vested with some form of constitutional authority.

Other decisions would leave doubt concerning constitutional autonomy in North Dakota (Beckham, 1977, 1978). In 1966, the North Dakota Supreme Court considered the legality of a fee charged to students to help in the repayment of bond debt in *Nord v. Guy*, 141 N.W.2d 395 (N.D. 1966). A statute had allowed the issuance of bonds for facility construction at state higher education institutions. In the case, the court described the State Board of Higher Education as a constitutional body with full authority over the institutions under its supervision. However, the court held that the legislature impermissibly delegated authority to the Board to oversee the construction of new facilities, a stance indicating the Board possessed limited authority. In an instance of upholding the Regent's authority, in *Zimmerman v. Minot State College*, 198 N.W. 2d 108 (N.D. 1972), the North Dakota Supreme Court held the Board could establish employment policies and practices, but only so long as the policies comported with legislative authorizations. These opinions left doubt concerning the status of constitutional autonomy in North Dakota.

### *Louisiana*

A 1940 amendment to Louisiana's constitution placed control of Louisiana State University under the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (Beckham, 1977, 1978). In a case dealing with whether Louisiana State University could charge a \$5 parking fine when the legislature passed legislation limiting such fines at state supported schools to \$1, the Louisiana Supreme Court held the university could charge more than the statutorily set maximum (*Student Gov't Ass'n of La. State Univ. and Agric. and Mech. Coll. v. Bd. of Supervisors of La.*

*State Univ. and Agric. and Mech. Coll.*, 264 So. 2d 916 (1972)). In reviewing the purposes of the 1940 constitutional provision, the court discussed that the provision sought to place the “daily affairs” of the university beyond the executive and legislative branches and under the direction of a “nonpolitical board” (p. 919). According to the court, the authority of the Board of Supervisors extended to course selections, the hiring and firing of employees, and the power to adopt “reasonable regulations” for faculty, staff and students (p. 920). In *Roy v. Edwards*, 294 So. 2d 507 (La. 1974), the Louisiana Supreme Court struck down a law that attempted to merge the Board of Supervisors and the Louisiana Coordinating Council for Higher Education into one governing board. A 1974 constitutional change left the Board of Supervisors with control and supervision of Louisiana State University but placed the Supervisors under the power of a statewide Louisiana Board of Regents (Beckham, 1977, 1978). Institutional governing boards at other schools were also elevated to constitutional status. When Beckham (1977) conducted his study, no court decision had interpreted the relationship between institutional governing boards and the statewide Board of Regents.

### *Georgia*

The state's 1945 constitution in Article VIII, Section 4 included a provision that the Georgia Regents would exercise “government, control and management” of the University System of Georgia and its institutions (Ga. Const. art. VIII, § 4). Beckham (1977) located only one case that appeared to support constitutional autonomy, *Villyard v. Regents of the University System of Georgia*, 50 S.E.2d 313 (Ga. 1948). In this case, the Georgia Supreme Court held that the University of Georgia could operate a college

laundry and dry cleaning facility. With only some Attorney General rulings and one case not directly addressing constitutional autonomy as the only other evidence, Beckham (1977) determined the constitutional autonomy of the Regents appeared to exist but remained uncertain.

### *Montana*

The state constitution of 1972 in Article X, Section 9 describes the Montana University System Board of Regents as enjoying full power to “supervise, coordinate, manage, and control” the state's university system (Mont. Const. art. X, § 9). Beckham (1977) located one case, *Board of Regents of Higher Education v. Judge*, 543 P.2d 1323 (Mont. 1975), dealing with the issue of constitutional autonomy for the Board of Regents. The Regents challenged a state law requiring certifications from them regarding compliance with line item appropriations from the legislature. The Regents argued that the state constitution made them a distinctive branch of government not subject to such legislative oversight. The court, though characterizing it as a narrower grant of authority than that urged by the Regents, agreed that the constitution granted certain autonomy to the Regents. The court held that the legislature did possess line item appropriation authority within certain limitations (p. 1332). According to the court, line item appropriations become impermissible when they infringe on the Regents’ constitutional autonomy to “supervise, coordinate, manage and control the university system” (p. 1333). Based on this standard, the court invalidated provisions dealing with the salaries and raises of university employees and attempts to control university funds derived from

private and federal sources. The case, as noted by Beckham (1977), suggests the Regents enjoy a level of independent constitutional power.

States Initially Identified by Beckham with Constitutional Provisions Appearing to Grant  
Restricted Authority

*California*

California's constitution in 1849 did not include constitutional status for higher education in the state (Petroski, 2005). The 1868 enabling legislation for the University of California, creating the state's land grant institution, placed the institution under legislative control. In 1879, amendments to the state constitution elevated the university to constitutional status. As in Michigan, a key purpose of the provision was to elevate higher education beyond disruptive political influences as well as to prevent sectarian religious influence. Changes to the constitution in 1918 left the provision largely the same. Under Article IX, Section 9 of the California constitution, the Board of Regents of the University of California possess the “full powers of organization and government” over the institutions under their control (Cal. Const. art. IX, § 9). The constitutional provision allows the legislature to exercise oversight to make sure the Board complies with “the terms of its endowments, and the proper investment and security of its fund” (Cal. Const. art. IX, § 9). Beckham (1977) described this provision as appearing to vest the legislature with certain limited control over the Regents.

In his study, Beckham (1977) looked at a series of early cases that confirmed the constitutional autonomy of the Regents to make rules and policies for institutions under their control. For example, in *Regents of the University of California v. January*, 6 P.

376 (Cal. 1885), the California Supreme Court held the state treasurer must disburse university funds without exercising oversight regarding the reason for disbursement. Other early cases would deal with the issue of immunity from lawsuit for the Regents (*Lundy v. Delmas*, 38 P. 445 (Cal. 1894); *In re Royer's Estate*, 56 P. 461 (Cal. 1899); and *Davie v. Bd. of Regents of Univ. of Cal.*, 227 P. 243 (Cal. Ct. App. 1924)). In *People ex rel. Hastings v. Kewen*, 10 P. 393 (Cal. 1886), the California Supreme Court repudiated a legislative effort to affect the governance of Hastings College of Law, an institution that became affiliated with the University of California prior to the 1879 constitutional provision. These cases confirmed that California courts would uphold the concept of constitutional autonomy for the Regents.

Later decisions continued to recognize the Regents' authority over the University of California System. In *Wall v. Board of Regents of the University of California*, 102 P.2d 533 (Cal. 1940), the court ruled that the unique status of the Regents as a constitutional corporation required the exhaustion of administrative remedies before seeking judicial relief. Cases confirmed that the Regents possess the authority to determine salary and wages free from interference by other state agencies (see, e.g., *Cal. State Employees' Ass'n v. Flournoy*, 32 Cal. App. 3d 219 (1973)). The authority of the Regents to regulate employment matters also extended to discipline and termination (Beckham, 1977, 1978). In *Ishimatsu v. Regents of the University of California*, 266 Cal. App. 2d 854 (1968), a librarian dismissed from her position claimed that she should be treated and classified as an academic employee, which meant she could only be dismissed for cause, rather than as a non-academic employee. In appealing the decision, one of the questions considered upon review involved whether or not the university possessed

quasi-judicial powers in relation to termination hearings. If so, a reviewing court would be limited to a determination of whether substantial evidence supported the university's decision, and the reviewing court could not initiate a new finding of facts. The court concluded, in large part due to the extensive constitutional authority of the Regents, that the university possessed quasi-judicial authority in personnel matters.

Court decisions also recognized the Regents as enjoying wide latitude in issues related to student discipline. For example, in a case involving the disciplining of students who participated in rallies and protests following the arrest of a non-student protesting on the campus, the court stated that the Regents may enact rules designed to "maintain order and decorum on the campus and the enforcement of the same by all appropriate means, including suspension or dismissal from the University" (*Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 874 (1967)). The students raised a number of objections, but the Court held that the university properly exercised its constitutional powers to maintain order on campus (p. 881).

While upholding the constitutional authority of the Regents, cases have also stipulated that they remain subject to legislative control under certain circumstances (Petroski, 2005; Beckham, 1977, 1978). Petroski (2005) classifies three main areas of control over the University of California System: (1) the legislature possesses certain "fiscal powers" over the university, with the Regents unable to compel appropriations for salaries and the legislature having some authority to "ensure the security of its funds;" (2) the Regents' autonomy yields when the legislature acts under its police powers to protect the health and safety of the state's citizens; and (3) the legislature's authority trumps



when it enacts legislation of statewide concern not involving the internal management of the University of California (p. 180).

In one early case dealing with the legislature's authority to regulate the Regents, a state court held that a law allowing individuals with a conscientious objection to forego vaccinations could not be applied to the University of California (*Williams v. Wheeler*, 138 P. 937 (Ca. Ct. App. 1913)). The opinion stated that power placed in the university “must be held to include the power to make reasonable rules and regulations relating to the health of its students” (p. 939). However, the opinion discussed the legislature possessed “ultimate control” in passing laws affecting the university that sought to protect the general welfare of the state and when the legislature exercised its police power (p. 940). Ultimately, the court held that the legislative exemption was not an exercise of the state’s police power and, thus, did not override university autonomy. A similar result in a case involving vaccination was reached in *Wallace v. Regents of the University of California*, 242 P. 892 (Cal. Ct. App. 1925).

Several cases illustrate limitations on the Regents’ authority. Two cases in which courts ruled against the Regents dealt with the permissibility of the legislature requiring loyalty oaths for public employees, including those at the University of California (*Tolman v. Underhill*, 249 P.2d 280 (Cal. 1952); *Fraser v. Regents of the Univ. of Cal.*, 249 P.2d 283 (Cal. 1952)). In another case, in *Newmarker v. Regents of the University of California*, 325 P.2d 558 (Cal. Ct. App. 1958), the court upheld a law prohibiting strikes by public employees to include the University of California. The university has also been found subject to the state usury law (*Regents of Univ. of Cal. v. Superior Ct.*, 551 P.2d 844 (Cal. 1976)). As in Michigan and Minnesota, constitutional autonomy stands as a

well-established legal concept in California, a conclusion reached by Beckham (1977) and confirmed in later studies (Petroski, 2005)

### *Idaho*

Article IX, Section 10 of the Idaho constitution provides that the Board of Regents of the University of Idaho shall exercise the “general supervision of the university and the control and direction of all funds of, and appropriations to, the university, under such regulations as may be prescribed by law” (Ida. Const. art. IX, § 10). Beckham (1977) located limited case law related to constitutional autonomy in Idaho.

In *Dreps v. Board of Regents of the University of Idaho*, 139 P.2d 467 (Idaho 1943), the Idaho Supreme Court considered whether the legislature had the authority to make the state's nepotism law applicable to the Board of Regents. The opinion noted that the university was created by the territorial legislature in 1889 and the constitution of 1889 guaranteed the institution all the rights and authorities that existed at its inception. The court stated that the constitution placed certain rights and powers of the Regents beyond the legislature's reach. The opinion pointed out that this position was consistent with *State ex rel. Miller v. Board of Education*, 415 P. 201 (Idaho 1935), where the supreme court held that legislative regulations could prescribe methods and rules for conducting business but could not interfere with the Board's constitutional authority to manage the university. The court in *Dreps* described the Board of Regents and the legislature as constitutional creations with one not superior to the other, and described the

constitutional authority granted to Idaho's Regents as similar to that granted to the University of Michigan and University of Minnesota.

The court concluded the legislature did not possess the power to regulate the university's hiring practices via the nepotism law. In the case, a concurring judge refused to decide whether or not the university enjoyed constitutional autonomy. The justice argued that the legislature did not intend to make the law applicable to the university, which he argued made it unnecessary for the court to consider the constitutional powers of the Regents. Other than these few cases recognizing constitutional autonomy, Beckham (1977) located attorney general opinions that exempted the University of Idaho from the state purchasing act but did not excuse the institution from pre-audit requirements stipulated under legislative appropriations.

### *Nevada*

Nevada's constitution of 1864 created a Board of Regents to manage the university but with the duties prescribed by the legislature. In *King v. Board of Regents of the University of Nevada System*, 200 P.2d 221 (Nev. 1948), the Nevada Supreme Court considered the constitutionality of the creation of an advisory board for the Regents of the University of Nevada. The decision discussed that the advisory board would have the authority to attend and offer comments at board meetings but that advisory board members would be excluded from voting. Still, the court determined that the board violated the constitutional authority granted to the Board of Regents, stating the constitution gave the members exclusive "executive and administrative control" over the university (p. 238). Though he located some attorney general opinions dealing with the

issue, Beckham (1977) found no other case law providing more detailed interpretation of the constitutional status of the Regents.

### *South Dakota*

Beckham (1977) located no cases directly recognizing constitutional autonomy in South Dakota for the Board of Regents of Education and Reynolds (1992) and Shekleton (1994) confirm this conclusion. In a case involving the Regents assuming indebtedness for dorm construction, the South Dakota Supreme Court described the Regents as exercising control over the state's higher education institution subject to the power of the legislature (*State Coll. Dev. Ass'n v. Nissen*, 281 N.W. 907 (S.D. 1938)). In a later case involving the dismissal of a tenured faculty member, the North Dakota Supreme Court described the Board of Regents of Education of the State as a constitutionally created body, but one subject to rules and restriction provided by the legislature (*Worzella v. Bd. of Regents of Educ.*, 93 N.W.2d 411 (S.D. 1958)). Shekleton (1994), discussing the continuing lack of judicial recognition of constitutional autonomy in the state, urged courts to abandon precedent interpreting no independent grant of constitutional autonomy for the Board of Regents.

### Beckham's Findings

After reviewing court decisions and attorney general opinions, Beckham (1977, 1978) identified nine states granting judicial recognition of constitutional autonomy: California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada and Oklahoma. According to Beckham (1977, 1978), numerous legal opinions supporting

constitutional autonomy existed in California, Michigan and Minnesota. Though with less extensive case law, he cited judicial recognition for more than 60 years in Idaho and Oklahoma (1977, 1978). While limited case law left some ambiguity, Beckham (1977, 1978) also concluded courts had recognized constitutional autonomy in Nevada, Georgia, Louisiana and Montana. Courts had not issued opinions in the states of Alabama, Hawaii, New Mexico, North Dakota and South Dakota, and judicial treatment made constitutional autonomy doubtful or rejected in Alaska, Arizona, Colorado, Mississippi, Missouri and Utah (1977, 1978). Table 4.2 summarizes Beckham’s findings.

*Table 4.2 Judicial Interpretations of Constitutional Autonomy in Public Higher Education as Analyzed by Beckham (1977, 1978)*

Courts have Recognized Constitutional Autonomy	Courts have Not Addressed Constitutional Autonomy	Courts have Rejected Constitutional Autonomy or Doubtful Judicial Recognition
California	Alabama	Alaska
Georgia	Hawaii	Arizona
Idaho	New Mexico	Colorado
Louisiana	North Dakota	Mississippi
Michigan	South Dakota	Missouri
Minnesota		Utah
Montana		
Nevada		
Oklahoma		

## CHAPTER 5

### DATA

#### Introduction

This chapter focuses on court interpretations dealing with constitutional autonomy decided since the period of Beckham's study (1977, 1978) and also considers constitutional provisions enacted since then that may result in constitutional autonomy. Twenty-two states were included in this chapter based on: (1) the states that Beckham analyzed in 1977; (2) the fourteen states identified by McKnight as having at least one case acknowledging constitutional autonomy and (3) an independent search of all states for constitutional provisions and for cases using the WESTLAW and LEXIS-NEXIS legal research databases and the Education Commission of the States' online database of higher education governance structures. The independent search of cases and constitutional provisions encompassed all 50 states. The Appendix contains current constitutional provisions for each state discussed in this chapter.

While Chapter Four arranged states using the initial grouping used by Beckham (1977) based on language in state constitutional provisions, this chapter lists states alphabetically. The purpose of the chapter is to update case law for states previously recognized as possessing constitutional autonomy, to review the ongoing legal status of constitutional autonomy in states where previous studies indicated courts did not accept the legal doctrine, and, based on an independent search of cases and constitutional provisions, identify states for analysis not included in previous studies. While discussing cases, this chapter does not offer in-depth analysis of the current legal status of constitutional autonomy, especially across states. The cases in this chapter form the data

to update the current status of constitutional autonomy, a task undertaken in Chapter Six, which provides detailed analysis of constitutional autonomy in the individual states, makes comparisons across states and uses the concepts of procedural and substantive autonomy to analyze the cases.

### New Legal Decisions and/or Constitutional Provisions Related to Constitutional Autonomy Since the Period of Beckham's Analysis

#### *Alabama*

Just as in Beckham's (1977, 1978) study, research for the current study did not locate any cases specifically supporting the concept of constitutional autonomy for the trustees of the University of Alabama or Auburn University. Cases discussing institutional autonomy focused on statutory authorizations for higher education institutions and did not address potential constitutional autonomy. In a 1979 case, the Alabama Supreme Court considered the legality of an education appropriations budget that included a provision requiring institutions to permit employees to have dues for membership in labor organizations deducted from employee paychecks (*Ala. Educ. Ass'n v. Bd. of Trustees of the Univ. of Ala.*, 374 So. 2d 258 (Ala. 1979)). Auburn University and the University of Alabama, two of the institutions challenging the requirement, asserted in their claims that their constitutional status prohibited the legislature from directing their labor and personnel policies. In considering the issue, the court found it unnecessary to consider the constitutional claims asserted by the universities. Four dissenting justices contended that the act did not violate any constitutional authority of Auburn University or the University of Alabama and represented a reasonable exercise of

the legislature's appropriations power. In a case in which a business challenged a university hearing center from selling hearing aids, the court did not consider constitutional autonomy (*Churchill v. Bd. of Trustees of Univ. of Ala.*, 409 So. 2d 1382 (Ala. 1982)). In holding that the activity complemented the university's educational, research and service missions, the court discussed the authority of the Board of Trustees as determined by statute and made no reference to any independent grant of constitutional authority for the trustees.

Though not directly dealing with independent grants of constitutional autonomy for higher education, at least one case supports the position that the legislature may not remove complete control or management from the Auburn University and University of Alabama boards. In *Opinion of the Justices*, 417 So. 2d 96 (Ala. 1982), the Alabama Supreme Court responded to a legislative inquiry concerning the constitutionality of giving the Alabama Higher Education Commission the authority to approve new programs or terminate existing ones at the University of Alabama and Auburn University. The justices responded that the management and control of these institutions must remain with their respective trustees and could not be transferred to the commission. Taken together, Beckham's (1977, 1978) research and the current study suggest that, though not denied in case law, constitutional autonomy has not achieved meaningful legal recognition by state courts.

### *Alaska*

No additional cases were located for Alaska but several opinions from the state's Attorney General addressed the issue. A 1977 Formal Opinion from the Attorney



General of Alaska considered the extent of independent financial authority possessed by the University of Alaska (1977 Op. Atty. Gen. Alas. No. 9, Alas. AG LEXIS 465 (1977)). According to the Formal Opinion, the Alaska Supreme Court in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975), offered conflicting views of any independent authority enjoyed by the university. The Formal Opinion discussed how the court described the university as co-equal to the legislature in some respects but also as subject to legislative and executive authority. The attorney general opinion concluded that legislative control extended to matters of university finance based on language in Article IX, Section 13 of the state constitution. Accordingly, the university enjoyed no special status in relation to budgeting and accounting, the university's budget could be made subject to a line item appropriation, and the legislature could "make appropriations to the university using different budget units than those requested by the board of regents" (p. \*4).

An Informal Opinion from the Attorney General in 1979 stated that while the Board of Regents could be made subject to accounting and financial procedures, ultimate administration of accounting and financial issues must remain with the Board of Regents and could not be assigned to members of the executive branch (*No. J-66-103-70, Op. (Inf.) Atty Gen. Alas, 1979 Alas. AG LEXIS 564 (1979)*). Another Informal Opinion stated that the University of Alaska could not place funds from appropriations into a certificate of deposit until such time the appropriations were needed to be spent for operating expenses or capital projects (*No. J-66-590-81, 1981 Op. (Inf) Atty Gen. Alas., 1981 Alas. AG LEXIS 457 (1981)*). A 1985 Informal Opinion, looking in part to *National Aircraft Leasing*, concluded that the University of Alaska was subject to regulation by the

Alaska Commission on Postsecondary Education despite the Board of Regent's constitutional status (*No. 366-150-85, 1 Op. (Inf.) Atty Gen. Alas. 263, 1985 Alas. AG LEXIS 278 (1985)*). The legal status of constitutional autonomy in Alaska remains uncertain overall, but state cases and Attorney General opinions do not support any form of extensive independent constitutional authority for the Board of Regents.

### *Arizona*

Arizona courts have continued since the period of Beckham's research (1977, 1978) to interpret the university's constitutional status as subject to considerable legislative control. In *Kromko v. Arizona Board of Regents*, 165 P.3d 168 (Ariz. 2007), students initiated a lawsuit following a 40 percent tuition increase claiming that the increase violated a constitutional provision that education should be as free as possible. In addressing the claims, the Arizona Supreme described the Board of Regents for the University of Arizona as a constitutionally created entity but with its powers defined by the legislature. The decision re-affirmed previous court decisions that placed the Regents as fundamentally under the control of the state legislature. The status in Arizona appears unchanged since Beckham's (1977, 1978) and Reynolds' (1992) studies.

### *California*

In California, constitutional autonomy has continued to enjoy substantial judicial recognition. One area that constitutional autonomy arose in legal decisions during this period dealt with oversight from municipal authorities. One case involved whether the city of Santa Monica could make the Regents obtain construction permits and pay fees

for renovation of a building leased by the university (*Regents of the Univ. of Cal. v. City of Santa Monica*, 143 Cal. Rptr. 276 (Cal. Ct. App. 1978)). In the case, Santa Monica argued that as a city granted a charter under the California constitution, it enjoyed the authority to subject the university to the city's construction regulations unless preempted by state law. The court did not expressly decide the issue on constitutional autonomy, but stated that the Regents qualified for an exception to California's government code that precluded jurisdiction over the issue by the city. Under state law, the state and its agencies were excluded from compliance with certain local building and construction ordinances. According to the court, the term "state" in the law characterized the Regents as a statewide agency enjoying plenary constitutional powers.

The Regents also operate independently of local wage laws. In *San Francisco Labor Council v. Regents of the University of California*, 608 P.2d 277 (Cal. 1980), the California Supreme Court held that the city could not require the Regents to adhere to a law requiring public educational entities to pay wages that were equivalent to local prevailing wages for laborers, workmen and mechanics employed on an hourly or per diem basis. The court discussed a previous decision exempting certain cities and counties with a special charter status from a similar prevailing wage law. According to the opinion, protecting the autonomy of universities is just as important as it was with charter cities and counties. Accordingly, San Francisco could not make the Regents subject to the prevailing wage law. In another case, a state appellate court held that the Regents were not required to meet a local prevailing wage law in the building of a married student and faculty/staff residence (*Regents of the Univ. of California v. Aubry*, 1996 Cal. App. LEXIS 105, (Cal. Ct. App. Feb. 6, 1996)). The land for the residents was not on the

university campus but was owned by the university. The court stated that providing housing for students and staff sought to promote the university's core educational functions of obtaining the best students and securing and maintaining the best faculty and staff. The wage law did not apply to the construction of the dormitory based on the constitutional authority granted to the Regents.

In *Kim v. Regents of the Univ. of California*, 80 Cal. App. 4th 160 (2000), the court considered application of a state minimum wage and maximum hour state law to the university. The law excluded state employees and municipal and county employees. Kim, the plaintiff, claimed that she was not a state employee for purposes of the act. The court determined that, no matter her employment status for the purposes of the law, the Regent's constitutional status exempted the university from the statute's requirements.

Constitutional autonomy has also come into play in legal challenges to the University of California in other areas dealing with employment law. In a consolidated case involving city, county and state employees, including individuals employed by the University of California System, the workers contended that employers should bear the cost of purchasing and maintaining work uniforms (*In re Work Uniform Cases v. State*, 34 Cal. Rptr. 3d 635 (Cal. Ct. App. 2006)). The employees claimed that not compensating them for costs related to work uniforms violated state indemnification laws. In analyzing the claim in relation to the University of California System, the court determined that compensation for uniforms clearly fell under the Regents' authority and did not qualify as an issue related to the legislature's police powers, involve the legislature's appropriation's power in relation to salaries, or rise to a level of statewide concern.

In addition to dealing with a state wage law, the *Kim* case also involved a breach of contract claim. The plaintiff alleged that a contractual relationship existed with the university and that the university breached a covenant of good faith and fair dealing. The opinion discussed that in California civil service employees may not state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing. According to the court, in California public employment is held and established by statute and, consequently, an employee must seek remedies established by law rather than judicially fashioned contract remedies. Since rules and regulations of the Regents have the force of a statute, the plaintiff could not rely on common law contract remedies. Thus, the court's opinion emphasized the legal significance of rules and policies enacted by the Regents.

In a case involving employee benefits, a state appellate court again noted the legal status of regulations enacted by the Regents (*Regents of the Univ. of Cal. v. Benford*, 128 Cal. App. 4th 867 (2005)). The court considered the permissibility of a Regents' regulation that prohibited a non-employee spouse who pre-deceased the employee from bequeathing an interest he or she had in the employee spouse's pension plan. The party suing the Regents claimed that a state law preempted the Regents' regulation and disallowed the termination of the non-employee spouse's interest in a pension plan, even if the individual pre-deceased the employee spouse. Rather than decide if the Regents could ignore the state law, the court held that no inconsistency existed between the policy and the law. Still, the court discussed that the Regents' regulations occupy a position almost equivalent to statutes.

In California, constitutional autonomy has also served as a basis to require the exhaustion of administrative remedies before seeking court relief. In *Campbell v. Regents of the University of California*, 106 P.3d 976 (Cal. 2005), the California Supreme Court held that a university employee was required to exhaust administrative remedies before filing suit against the university under a state law dealing with retaliatory termination. The employee claimed that the university retaliated against her for reporting allegations that the university violated state competitive bidding laws. In assessing the employee's claims, the court first described the Regent's broad powers to govern the university, a contrast with the legislature's authority over other state agencies. According to the opinion, regental actions may rise to a quasi-judicial level deserving of judicial deference. The Regents' extensive authority also permitted them to create a policy for whistleblower claims, with the policy enjoying a status equivalent to a statute. Respecting the constitutional authority of the Regents provided an important justification to require the exhaustion of administrative remedies.

In addition to wage and employment laws, the Regents' authority has survived legal challenges by students and private individuals in other areas. In one case, a group of students challenged the permissibility of mandatory student activity fees (*Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500 (Cal. 1993)). A group of students from the University of California at Berkeley challenged the fees under federal and state constitutional grounds. In reviewing the permissibility of the fee, the court discussed the constitutional authority given to the Regents, noting they possess almost exclusive authority over the University of California. In addition to rejecting the challenge based on federal constitutional grounds, the court discussed how the state constitutional

authority provided broad powers to the Regents, including the charging of a mandatory student fee.

In *Favish v. Regents of the University of California*, 46 Cal. App. 4th 49 (1996), the plaintiff contended that the law and medical schools in the University of California System violated state consumer protection laws based on the claim that the Regents did not disclose discrimination on the basis of race in admissions decisions. The court held that the state consumer law could not be applied to the Regents and did not fall within any of the three categories where the state legislature could override the Regents' autonomy. The opinion stated that placing the communications under the purview of the statute would represent a significant intrusion into the autonomy of the Regents.

State courts have also addressed the legal relationship between the Regents and institutions described as enjoying an affiliated status with the University of California. In *Tafuya v. Hastings College of the Law*, 191 Cal. App. 437 (1987), a group of students claimed that the faculty meetings of the Hastings College of the Law were subject to the state's open meeting law. The plaintiffs argued that Hastings unique legal status with the Regents made the school a state body or agency subject to the open meeting law. In 1878, the legislature approved an act to create the Hastings College of Law and designated the institution as enjoying an affiliate status with the University of California. At the outset of its analysis, the court described how the Regents' constitutional power was intended to make the University of California operate independently of the state.

The opinion stated that though the legislature intended to apply the open meeting law to meetings of the Regents, it did not intend to extend the act to bodies that advise the Regents or exercise delegated authority. In addition, the court pointed out no legislative

intent to treat Hastings as an “entity independent of the University” (p. 446). The opinion identified Hastings along with the California College of Medicine as the two schools considered affiliated with the University of California and under partial control of the Regents. Rather than a constitutional provision, the Regents exercise authority over these entities through legislative authorization. The opinion confirmed this unique legal relationship and also emphasized that the institutions may enjoy the benefits, even indirectly, of the constitutional autonomy bestowed on the Regents.

While recognizing a large degree of constitutional autonomy for the Regents, state courts have continued to identify three general areas of limitations on the Regents' authority: (1) legislative influence over appropriations made by the legislature related to salaries; (2) laws enacted under the legislature's police power; and (3) regulations touching on matters of statewide concern and not “involving internal university affairs” (*Kim v. Regents of the Univ. of Cal.*, 80 Cal. App. 4th 160, 166 (2000) (citing *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277 (Cal. 1980))). The foregoing cases show that constitutional autonomy remains vibrant in California. State court decisions have continued to demonstrate substantial judicial deference to the Regents.

### *Colorado*

Colorado cases decided since 1977 have resulted in ambiguous decisions concerning constitutional autonomy in the state, but overall suggest a lack of support for constitutional autonomy in Colorado. In a 1985 case, an instructor claimed that the offering of a one-year appointment as opposed to the standard three-year appointment for



senior instructors at the University of Colorado violated appointment rules enacted by the Regents of the University of Colorado (*Subryan v. Regents of Univ. of Colo.*, 698 P.2d 1383 (Colo. Ct. App. 1985)). While holding that the instructor was entitled to a three-year appointment, the court described the Regents as a constitutional body with a unique position in state government. According to the opinion, the Regents possessed powers to enact rules to govern the University of Colorado analogous to that enjoyed by the state's General Assembly to enact laws for the entire state. Though not discussing any limitations the legislature may impose on the Regents' authority or outlining the Regents' authority, the opinion stated that the rules enacted by the Regents enjoy a status similar to statutes for purposes of interpretation by the state courts.

In a case dealing with legislative authority over the University of Colorado, the Colorado Supreme Court rejected the Regents' contention that the state's civil rights commission may not exercise jurisdiction over the Regents (*Colo. Civil Rights Comm'n v. Regents of the Univ. of Colo.*, 759 P.2d 726 (Colo. 1988)). The case arose after a faculty member denied tenure filed a complaint with the commission alleging that he was denied tenure because he was Hispanic. The lower court held that the commission lacked jurisdiction, but the Colorado Supreme Court reversed.

The opinion discussed that the constitution gave the Regents and other higher education governing boards exclusive control over the supervision and management of their institutions but subject to any laws passed by the legislature. According to the opinion, the legislature demonstrated an intent to make the Regents and the university subject to the commission's jurisdiction, even though the body did not expressly make the law apply to the Regents. The opinion did not articulate the balance between the

Regents' authority and legislative oversight but indicated substantial legislative authority over the Regents.

In *Colorado Civil Rights Commission* the court did narrow and distinguish language in two previous cases indicating that the Regents' constitutional status required express legislative inclusion in a state law. In *Associated Students of the University of Colorado v. Regents of the University of Colorado*, 543 P.2d 59 (Colo. 1975), the state's supreme court considered a case involving an effort by faculty members and students to keep the Regents of the University of Colorado from holding executive session meetings closed to the public. The claimants argued that the state's open meeting law applied to these meetings. Prior to 1972, the state constitution granted the Regents the "general supervision of the university, and the exclusive control and direction of all funds of, and appropriations to, the university" (p. 61). A 1972 amendment added the phrase "unless otherwise provided by law" (p. 61). The court described the provision as giving the Regents "specific and particular powers" (p. 61). According to the court, the constitutional provision meant that the legislature had to expressly indicate when a provision would limit the Regents' control and supervision of the university. "In summary, we hold the specially granted authority of the Regents to govern the university and enact laws pursuant to that end can only be nullified by a legislative enactment (or constitutional amendment) expressly aimed at doing so" (p. 62). Based on this standard, the court invalidated a portion of the state's open meeting law, which permitted the Regents to hold executive sessions not open to the public.

In the other case, *Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984), a University of Colorado at Boulder professor claimed that the university's refusal to fully

grant an open records request violated the state's open records act. The opinion described the university and the Regents as created by a “combination of constitutional and statutory provisions,” noting that the Regents were authorized to exercise general control and supervision of institutions unless otherwise provided by law (p. 787). According to the court, the legislature did not demonstrate an intent to make the statute apply to the university.

The court in *Colorado Civil Rights Commission* rejected the position that the Regents’ constitutional status means that the legislature must explicitly make a law applicable to the Regents and described the two cases relied on by the Regents as deciding relatively narrow legal issues. The court's opinion left little room for the Regents' constitutional status to result in any meaningful degree of constitutional autonomy.

*Saxe v. Board of Trustees of Metropolitan State Colleges of Denver*, 2007 WL 686067 (Colo. Ct. App. March 8, 2007), involved a dispute over issuance of a new faculty handbook. Faculty members at the school claimed that the new handbook violated their due process rights in relation to decisions for reductions in teaching force and hearing procedures for a tenured faculty member dismissed for cause. The Board for the school asserted that its authority to modify the handbook came from the state constitution. The court, in rejecting the Trustees’ position, stated “the governing board of a Colorado university or community college derives its authority to modify an employment handbook from statute, and not, as the Board asserts from the Colorado Constitution” (p. 5). The decision described the board as statutorily authorized to promulgate policies not in conflict with the Colorado Constitution or laws of the state,

indicating a lack of constitutional autonomy. Cases in Colorado, though somewhat ambiguous, do not support judicial recognition of constitutional autonomy for higher education institutions.

### *Florida*

A constitutional amendment took effect in Florida in January 2003 that re-organized the state's higher education governance system (*United Faculty of Fla. v. Public Employee Relations Comm'n*, 898 So. 2d 96 (Fla. Dist. Ct. App. 2005); Fla. Const. art IX, § 7). Following the amendment, Article 9, Section 7 of the state constitution created the Board of Governors of the State University System (BOGSUS) “to govern the statewide university system” and with administration of each university delegated an institutional board of trustees (p. 98).

The most significant judicial document related to the 2003 constitutional provision comes from a mediation agreement involving a Florida non-profit group and the State Board of Education (*Floridians for Constitutional Integrity, Inc. v. State Bd. of Educ.*, No.: 04-CA-003040, Circuit Court for Second Judicial Circuit (Fla. Cir. Ct. Nov. 29, 2005)). The conflict also dealt with the authority of BOGSUS and as a result of the mediation agreement, the parties entered into a partial agreement regarding the powers of the Board. According to the agreement, the BOGSUS, under the state constitution, enjoys (1) “full control and authority over the state university system,” (2) the authority to establish new colleges and universities, but not community colleges, (3) exclusive authority over approving the budget for the state university system, (4) control over setting tuition and fees, (5) control over non-appropriated funds, (6) authority to select

the state university system chancellor and to establish the duties of the position, (6) authority over the selection of presidents at state universities, and (7) exclusive authority over collective bargaining for the state university system (p. \*1).

The agreement stated that it did not affect the authority of the BOGSUS to delegate power to individual boards of trustees. The document also stated that, while the State Board of Education agreed that the BOGSUS enjoyed “[c]onstitutional control and authority over the state university system” it disagreed that the BOGSUS possessed any authority over four-year degrees outside the state university system. As a mediation agreement, the document does not represent a judicial interpretation defining the constitutional powers of the BOGSUS. Thus, while the court approved an agreement outlining the powers as agreed to by the parties in a dispute, this is not the same as a court interpreting Article IX, Section 7 of the state constitution. Still, the agreement serves as a significant document concerning the interpretation the provision may receive in future judicial decisions.

Another case involving the transition of control over the state university system to the BOGSUS did not engage in an analysis of the 2003 constitutional provision. In *Public Employee Relations Commission*, 898 So. 2d 96 (Fla. Dist. Ct. App. 2005), the BOGSUS and two university board of trustees stopped taking deductions for union dues. Unions for employees charged that the action constituted an unfair labor practice on the part of the university boards and the BOGSUS. In a consolidated case, a state labor relations commission concluded that the university boards and the BOGSUS did not constitute successors to the entity that controlled the institutions under the prior governance entity, the state Board of Education. The commission opinion declared that

the BOGSUS and the institutional trustees did not constitute successor organizations and were not obligated to continue taking deductions for union dues. A dissenting hearing officer stated that the BOGSUS and the institutional trustees constituted successor employers with an obligation to honor the agreement to collect union dues.

Upon judicial review, the court overturned the commission's decision, stating that another constitutional provision prevented the state government from terminating “its obligations under a collective bargaining agreement simply by reorganizing the Executive Branch, where the employees affected perform the same work, in the same jobs, under the same supervisors, by operating the same facilities, carrying on the same enterprise, providing the same service” (*Pub. Employee Relations Comm’n*, 898 So. 2d at 99). The decision means that at least for purposes of collective bargaining, the new governance structure did not extinguish prior agreements. The opinion does not, however, address the issue of constitutional autonomy for the re-organized higher education system in the state. The 2003 constitutional provision may create some form of constitutional autonomy in Florida, depending on the legal interpretation given the provision in future court cases.

### *Georgia*

Though Beckham (1977, 1978) reported that courts in Georgia appeared to recognize constitutional autonomy, decisions since then cast doubt on this status. In *McCafferty v. Medical College of Georgia*, 287 S.E.2d 171 (Ga. 1982), litigants sued a medical college, the Board of Regents of the University Systems of Georgia and the Regents of the University System of Georgia. The defendants contended that they were

protected by sovereign immunity since at least 1976 and the passage of a new state constitution. The plaintiffs first argued that the Regents were elevated to constitutional status in 1931, with their constitutional status continued in the 1976 constitution. According to them, the elevation of the Regents to constitutional status meant that the legislature lacked the authority to add or diminish any of the powers and duties of the Regents through statute, including the power to sue and be sued.

In reviewing the constitutional status of the Regents, the Georgia Supreme Court discussed that an amendment in 1943 made the Board “a constitutional body with its statutory powers and duties protected by the constitution” (*McCafferty*, 287 S.E.2d at 175). When a 1945 constitution was ratified, a provision was included stating that the Regents enjoyed the powers that existed by law at the time of the ratification of the constitution with “such further powers and duties as may be hereafter provided by law” (p. 175 (quoting Ga. Const. of 1945, art. VIII, sec. 4, part I)). Constitutional language regarding the Regents was substantially reenacted in the 1976 constitution. The court determined that the power to sue and be sued was preserved by these various constitutional versions. Based on this analysis, the court held that the 1976 sovereign immunity law impermissibly sought to diminish the powers and duties of the Regents to sue and be sued. However, the opinion described the Regents as a legislatively created corporation, with powers and duties subject to legislative control. Thus, though finding no grant of sovereign immunity, the court did not describe the Regents as possessing constitutional autonomy.

In 1991, the Georgia Supreme Court revisited the issue of sovereign immunity for the Board of Regents of the University System of Georgia under a state constitution

enacted in 1983 (*Pollard v. Bd. of Regents of the Univ. System of Ga.*, 401 S.E.2d 272 (Ga. 1991)). The court's opinion stated that a previous case had overturned much of the language in *McCafferty* to permit the granting of sovereign immunity to the Board of Regents. However, the opinion described the powers of the Regents as “frozen into the Constitution” but the court did not describe the extent of this authority or the degree of legislative control over the Regents (p. 274).

Despite several statements in Georgia Supreme Court cases appearing to recognize some form of constitutional autonomy for the Board of Regents, a state appellate court seemingly rejected such a grant of authority in *Board of Regents of the University System of Georgia v. Doe*, 630 S.E.2d 85 (Ga. Ct. App. 2006). The case involved a dispute between an individual claiming that the Regents impermissibly sought to rescind an offer of employment, claiming breach of a contractual relationship. In considering the issue, the court described the Regents as legislatively authorized, though acknowledging that the Board asserted that it enjoyed both statutory and constitutional authority. Without specifically rejecting that the Regents enjoyed some degree of constitutional authority, the court stated that the Regents could not act in contravention not only of the constitution but also of state law. The opinion pointed to a provision in state law that stated the Board of Regents enjoyed plenary powers but discussed that such authority stemmed from a permissive grant of authority from the legislature.

Two cases applying the state's open meeting and records law to the Regents failed to specifically address the issue of constitutional autonomy. In one case, the court described the board as existing by virtue of the state constitution and state law but engaged in no further analysis (*Bd. of Regents of the Univ. System of Ga. v. Atlanta*



*Journal & Atlanta Constitution*, 378 S.E.2d 305 (Ga. 1989)). The Regents sought to protect records of a presidential search committee in the name of public interest but did not offer constitutional autonomy as a justification. Another case, involving disciplinary records of students, resulted in no discussion by the court of the constitutional status of the Regents, suggesting that the Regents did not raise the issue to shield disclosure of the records (*Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993)).

Attorney General opinions have also offered vague statements regarding constitutional autonomy. A 1988 Attorney General Opinion stated the Board of Regents possessed constitutional and statutory authorization to merge institutions (*No. 88-12, 1988 Op. Atty. Gen. Ga. 33, 1988 Ga. AG LEXIS 28* (1988)). In considering an inquiry related to sick leave, a 1990 Attorney General Opinion noted that the broad authority of the Regents is “limited only to the extent that it conflicts with the Constitution or the laws of this State” but did not discuss what constitutes a conflict with state law (p. \*1). A 1996 Informal Attorney General Opinion described the Board as enjoying independent constitutional authority and contended the legislature could not mandate continuation of a reserve officer training program at a particular institution (*No. U96-12, 1996 Ga. AG LEXIS 24* (1996)).

Georgia cases and Attorney General Opinions are ambiguous regarding any constitutional authority possessed by the Board of Regents. Despite language in two Georgia Supreme Court cases appearing to support some degree of constitutional power and Beckham’s (1977, 1978) determination that some form of constitutional autonomy exists, constitutional autonomy remains a cloudy legal issue in the state

## *Hawaii*

In *Levi v. University of Hawaii*, 628 P.2d 1026 (Haw. 1981), the plaintiffs argued that the Board of Regents of the University of Hawaii could not impose a mandatory retirement age of 65 on university employees. Among their arguments, the plaintiffs claimed that the policy exceeded the Regents' authority under the constitutional provision that outlined the powers and duties of the Regents. The lower court held that the policy was constitutional and within the authority of the Regents. Under the state constitution, the Board of Regents possessed:

[The] power, as provided by law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board; except that the board shall have exclusive jurisdiction over the internal organization and management of the university. This section shall not limit the power of the legislature to enact laws of statewide concern. (Haw. Const. art. X, § 6)

The section was adopted by a 1978 constitutional convention.

The court discussed that the section gave the Regents authority over internal issues related to university management such as course selection or admissions standards, areas in which the “university may operate autonomously” (*Levi*, 628 P.2d at 372). However, university authority must yield when the legislature acted on issues of statewide concern. The opinion also noted that board policy must operate in “accordance with law” but did not elaborate on how this language affected any constitutional autonomy possessed by the Board of Regents. The court held that a state employment law setting 70 as the mandatory retirement age for state employees addressed an issue of

statewide concern and, therefore, overrode the Regents' policy. The status of constitutional autonomy for the Board of Regents of the University of Hawaii remains somewhat uncertain, but *Levi* suggests considerable legislative authority over the Regents.

### *Idaho*

Beckham (1977, 1978) identified Idaho as a state with judicial recognition of constitutional autonomy, but research did not locate additional cases addressing constitutional autonomy for the Board of Regents of the University of Idaho. Attorney General Opinions, however, support continued legal recognition. In a 1993 case, the Idaho Supreme Court ruled that a law dividing the state Board of Education into three entities, which included removing supervision of certain schools from the Board, violated a state constitutional requirement that supervision of all educational entities in the state must be under a single board of education (*Evans v. Andrus*, 855 P.2d 467 (Idaho 1993)). This statewide Board of Education has its powers and duties subject to statutory authorization so the case does not address the issue of constitutional autonomy in Idaho since the period of Beckham's study (1977, 1978). Court decisions, however, did not reject the continued judicial recognition of constitutional autonomy in the state.

Two Attorney General Opinions support continuing judicial recognition for constitutional autonomy in the state. A Formal Idaho Attorney General Opinion discussed how the legislature may not place limitations on appropriations to the University of Idaho that are income from university endowment funds (2000 *Op. Atty Gen. Idaho 45*, 2000 *Ida. AG LEXIS 2* (2000)). A 1981 Informal Attorney General

Opinion advised that municipal building codes could not be applied to the University of Idaho based on the institution's constitutional status (*1981 Op. Atty Gen. Idaho 221, 1981 Ida. AG LEXIS 27* (1981)). Court cases have not revisited the issue of constitutional autonomy, but the doctrine has not encountered judicial rejection and Attorney General Opinions indicate continued judicial recognition of constitutional autonomy in Idaho.

### *Louisiana*

Article VIII of the Louisiana constitution includes multiple governance entities with apparent constitutional autonomy: (1) a Board of Regents with general supervisory authority for all of higher education; (2) a Board of Supervisors for the University of Louisiana System; (3) a Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and a Board of Supervisors of Southern University and Agricultural and Mechanical College; and (4) a Board of Supervisors of Community and Technical Colleges (La. Const. art. VII). These grants of apparent constitutional authority represent an expansion of the degree of constitutional autonomy identified by Beckham (1977, 1978) in Louisiana and reflect a constitutional provision enacted in 1998 for community and technical colleges. Since Beckham's (1977, 1978) study, Louisiana cases have continued to recognize constitutional autonomy, re-affirming the position taken in *Student Government Association of Louisiana State University v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 264 So. 2d 916 (La. 1972). In that case, discussed by Beckham (1977), the court upheld a parking fine amount as within the Board of Supervisors' constitutional authority and

recognized that the Board enjoys constitutionally authorized powers over the internal management of Louisiana State University (LSU).

Since the late 1970s, state courts have continued to follow the position taken in *Student Government Association*. In one case a state appellate upheld the authority of the Board of Supervisors for LSU to increase prices at home football games (*La. Public Facilities Auth. v. All Taxpayers*, 868 So. 2d 124 (La. Ct. App. 2003)). The raise in prices was part of an agreement between the school and the football athletic foundation to make improvements to the school's football stadium and construction of athletic-related facilities. The increase was challenged as impermissible under a constitutional provision that required a vote by the state legislature to authorize any increase in fees by a state agency. The court quoted at length from the *Student Government Association* case in re-affirming the constitutional autonomy enjoyed by LSU and other individual institutional governing boards in the state. The opinion discussed how the constitutional provisions sought to provide autonomy to state institutions "to manage their own affairs" (p. 136).

A 1983 case re-affirmed general judicial recognition of constitutional autonomy in the state and for the statewide governing Board (*Grace v. Bd. of Trustees for State Colleges and Univs.*, 442 So. 2d 598 (La. Ct. App. 1983)). In the case, faculty members at Northeast Louisiana University filed grievances objecting to issues related to teaching assignments, leaves of absences and merit pay raises. Following dissatisfaction with the university's internal grievance procedures, the professors claimed that the institution, subject to oversight by the state Board, should be held to the standards required by the state's Administrative Procedures Act.

The court discussed that the 1974 constitution elevated the statewide Board of Supervisors to possess certain authority beyond the “restraints of legislative control” (p. 600). The opinion discussed that the Board did not have a similar limitation on its authority like the board for secondary and elementary education, which remained subject to more extensive legislative control. According to the opinion, the constitutional authority given to the Board prohibited application of the state's Administrative Procedures Act, stating the “management board has authority to adopt rules and regulations governing the internal management of the universities without legislative consent or approval” (*Grace*, 442 So. 2d at 601).

In *Knecht v. Board of Trustees for State Colleges and Universities*, 591 So. 2d 690 (La. 1991), state employees initiated a suit when the statewide Board of Supervisors approved a retroactive policy that prohibited the employees from earning compensatory leave time based on overtime hours worked. Among its arguments, the Board contended that its “constitutional authority to manage and supervise the institutions under its control” allowed the retroactive abolishment of the policy (p. 696). The court, while recognizing the Board’s constitutional authority, held that the plaintiffs enjoyed a property interest as a result of a contractual agreement that could not be arbitrarily extinguished.

At least one case has dealt with the constitutional autonomy of community and technical colleges (*Delahoussaye v. Bd. of Supervisors of Cmty. and Technical Colls.*, 906 So. 2d 646 (La. Ct. App. 2005)). The case involved an allegation of sexual harassment against a tenured professor, with the faculty member first put on administrative leave and then terminated in response to allegations of sexual harassment.

In its opinion, the court described the Board of Supervisors for community colleges as possessing independent constitutional authority not subject to legislative control (pp. 649-50). The opinion described the policies at issue as enacted under the scope of the institution's constitutional authority. While finding against the Board on several issues, the opinion supported that the Board possesses constitutional autonomy.

One case located dealt with a legal dispute over the constitutional authority of an institutional governing board in the state versus the authority of the statewide governing Board (*Bd. of Regents v. Bd. of Trustees for State Colls. and Univs.*, 491 So. 2d 399 (La. Ct. App. 1986)). The case involved a dispute over whether the statewide Board or the institutional governing board possessed authority to change the name of the institution. Both entities claimed constitutional authority to determine the university's name. Rather than assigning authority to one of the governing boards, the court held that only the legislature had the authority to change the name of an institution. The case highlights the potential for uncertainty concerning the boundaries between the constitutional authority of individual boards and the statewide Board.

Several Attorney General Opinions have also considered the relationship between institutional governing boards and the statewide Board of Regents as well as addressing other issues related to constitutional autonomy. Attorney General Opinions have advised that the authority to select institutional presidents and chancellors may not be transferred to the Board of Regents from institutional governing boards (*La. Atty. Gen. Op. No. 1996-491, 1996 La. AG LEXIS 367* (1996)). While noting that the court in *Grace* had allowed the statewide Board to not follow the state's Administrative Procedures Act in relation to employee grievance procedures, a 1996 Attorney General Opinion stated that

the Board of Regents had to follow notice requirements contained in the act for proposed regulations affecting institutional governing boards (*La. Atty. Gen. Op. No. 1981-981, 1981 La. AG LEXIS 37* (1981)).

In the context of local government regulations, Attorney General Opinions have advised limitations on the authority of municipalities to regulate smoking in university sports arenas (*La. Atty. Gen. Op. No. 1990-69, 1990 La. AG LEXIS 284* (1990)) or to require a building permit for construction on campus (*La. Atty. Gen. Op. No. 1989-150, 1989 La. AG LEXIS 78* (1989)). In relation to oversight of institutions stemming from state regulations and executive orders, Attorney General Opinions have stated that institution's providing meals at university functions, such as for prospective faculty members, did not fall under the state's general travel regulations (*La. Atty. Gen. Op. No. 1989-38, 1989 La. AG LEXIS 289* (1989)) and that institutional leave policies for employees were not subject to an executive order covering other state agencies (*La. Atty. Gen. Op. No. 1989-537, 1989 La. AG LEXIS 149* (1989)). An Attorney General Opinion has also addressed the broad fiscal powers enjoyed by institutional governing boards (*La. Atty. Gen. Op. No. 1982-894, 1982 La. AG LEXIS 155* (1982)). While some ambiguity remains concerning the relationship between various constitutional governing entities in Louisiana and the statewide Board of Regents, state court decisions continue to support judicial recognition of constitutional autonomy, with Attorney General Opinions also reflecting legal recognition of this constitutional authority.



## Michigan

Courts in Michigan continue to issue opinions interpreting the legal scope of constitutional autonomy in the state. Since the period of Beckham's (1977, 1978) research, one notable area where constitutional protection has shielded universities in Michigan is in relation to the state's open meetings law. In one case, the Michigan Supreme Court held that legislative power did not extend to regulating informal meetings of the Michigan State University Board of Trustees in the context of presidential searches (*Federated Publ'ns, Inc. v. Mich. State Univ. Bd. of Trustees*, 594 N.W.2d 491 (Mich. 1999)). The state constitution required formal meetings of the Trustees be open to the public, but the court held that the Trustees possessed authority to determine public access to informal meetings. In another case, an unpublished decision, a state court rejected a claim that university trustees at Oakland University violated Michigan's open meeting law by meeting in closed session with the school's president to consider lobbying strategies to challenge anticipated state funding cuts (*Oakland Sail v. Oakland Univ. Bd. of Trustees*, 2005 WL2086134 (Mich. Ct. App. Aug. 30, 2005)). Relying on *Federated Publications*, the court, while noting the requirement under the constitution to make formal meetings of the Trustees open to the public, stated the Trustees could choose to meet in informal meetings pursuant to fulfilling their constitutional role. The opinion characterized meetings regarding lobbying efforts to challenge potential state funding cuts related to a matter of general supervision delegated by the constitution to the exclusive control of the Trustees.

A 1993 case also touched on university autonomy and open meetings and records law (*Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 507 N.W.2d 422 (Mich.

1993)). *Booth Newspapers* dealt with a suit by newspapers seeking access to the deliberations of a presidential search committee for the University of Michigan under the federal Freedom of Information Act and Michigan's open meeting statute. Among its defenses, the university claimed that the school's constitutional autonomy shielded the search committee's actions. While the majority opinion refused to hear the constitutional issue on the basis that the university failed to raise the issue until on appeal, a dissenting opinion concluded that applying the state law violated the constitutional autonomy granted to the Board. The dissenting opinion argued that selecting a president represented a core educational function not subject to legislative oversight. According to the dissenting judge, the selection of a president arguably represents the most important action of a governing board and that "legislative oversight of the presidential selection process strikes at the core of regental autonomy" (p. 445). This stance reflected the view that was later adopted in the *Federated Publications* case in 1999.

In a case dealing with employment records, a professor at Grand Valley State University sought to obtain copies of peer reviews submitted in relation to salary recommendations (*Muskovitz v. Lubbers*, 452 N.W.2d 854 (Mich. Ct. App. 1990)). After receiving a reduced salary increase due to an unsatisfactory performance evaluation, the professor challenged the decision and sought access to peer review records. The faculty member instituted a legal action under the state's Employee Right to Know Act. The school cited the constitutional autonomy granted to Michigan universities as among the reasons for the court to deny the disclosure. The opinion discussed that a California court, in interpreting a similar state law, allowed access to an individual's personnel, tenure and promotion files but only to the extent that identifiable information from

confidential communications would not be divulged. In agreeing with the stance taken by the California court, the Michigan court discussed that such an interpretation balanced the state's generally liberal discovery policy against the constitutional autonomy granted the state's universities. The professor, then, could not obtain information that would contain identifiable information.

In 1988, the Regents for the University of Michigan challenged the constitutionality of applying a provision in a state law restricting investments in companies that operated in South Africa or the Soviet Union (*Regents of the Univ. of Mich. v. State*, 419 N.W.2d 773 (Mich. Ct. App. 1988)). The lower court upheld application of the act to the university based on the distinction that the law did not impinge on the university's expenditure of funds but only directed how funds could be invested. On appeal, the Regents argued this prohibition on investment violated their constitutional authority to control expenditures for the university.

In reviewing the history of constitutional autonomy for the University of Michigan, the court discussed that the grant of constitutional autonomy to the Regents helped permit the university to become one of the best known and most successful universities in the world. While not removed from public oversight completely, the opinion discussed how the Regents are constitutionally designated to supervise the operation of the university and the legislature may not add or take away the property of the university without the Regents' consent.

While the lower court held that the state law did not interfere with expenditures but only on how funds were invested, the court of appeals determined that interference with the investment of funds in fact affected the Regents' control over expenditures. The

reviewing court rejected the lower court's determination that the law was similar to other cases where state courts had determined instances where the Regents' constitutional autonomy must bow to legislative authority when the legislature enacted a general law under its police powers or a law established a clear statement of public policy. According to the court, the provision at issue did not fall under any exception that permitted limits on the Regents' authority. The court also disagreed with the trial court's assertion that the Regents' autonomy was limited to the educational sphere. Agreeing with arguments by the Regents, the court stated that any attempt to differentiate between educational and non-educational spheres is "indistinct and often indiscernible" (*Regents of the Univ. of Mich.*, 419 N.W.2d at 780).

In *Michigan United Conservation Clubs v. Board of Trustees of Michigan State University*, 431 N.W.2d 217 (Mich. Ct. App. 1988), the plaintiffs challenged a university ordinance that declared lands and water under the control of the Board of Trustees of Michigan State University (MSU) as fish and wildlife sanctuaries not open to hunting. The opinion discussed precedent acknowledging the trustees as possessing the "power to control and manage MSU property to the exclusion of all other state departments" (p. 191). The court described the Trustees rationale for the ordinance, to maintain landscaping, prevent erosion, and use the lands as an educational tool, as within their constitutional authority.

Constitutional autonomy has also surfaced in relation to student discipline. A student expelled from the University of Michigan School of Dentistry for violating the school's honor code challenged that the school provided insufficient due process before the dismissal (*Imtiaz v. Bd. of Regents of the Univ. of Mich.*, 2006 WL 510057 (Mich. Ct.

App. March 2, 2006)). According to the court, the university provided sufficient due process and noted that the Regents enjoyed extensive authority to set appropriate standards students must follow to remain in good academic standing. In another case, a federal court considered claims by a former student challenging the authority of the Regents of the University of Michigan to revoke a master's degree based on charges of academic fraud (*Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987)). The former student contended, in addition to federal due process arguments, that the Regents lacked state constitutional and statutory authority to revoke the degree. The federal court disagreed, stating that the constitutional authority granted to the Regents bolstered their arguments that they possessed the authority to revoke degrees.

As the above cases clearly demonstrate, constitutional autonomy continues to provide substantial legal protections to public higher education in Michigan. In several cases, however, Michigan courts have determined that constitutional power must yield to state legislative authority. A 2007 case involved the applicability of a state constitutional amendment that recognized marriage as a legal state limited to one man and one woman to colleges and universities in Michigan in the context of collective bargaining (*Nat'l Pride at Work, Inc. v. Governor of Mich.*, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007)). At issue was whether the amendment prohibited state subdivisions or agencies, including state universities, from entering into agreements that permitted family employment benefits to same-sex couples. The court determined that the amendment prohibited the entering into of such agreements, and rejected claims that the constitutional autonomy of state universities allowed them to extend family benefits to same-sex couples. According to the opinion, the university could not ignore valid

exercises of the police power or circumvent established state public policy. The opinion described the amendment as a clear expression of state public policy, one that higher education institutions could not ignore.

In a 1996 case, the Michigan Supreme Court rejected an argument by the Regents of the University of Michigan that a state law designed to ensure that financial obligations to contractors on public building projects are met in the case of default by other contractors was applicable to the university (*W.T. Andrew Co. v. Mid-State Surety Corp.*, 545 N.W.2d 351 (Mich. 1996)). The university contended that making the institution subject to the law violated its constitutional autonomy. Reversing the Michigan Court of Appeals, the Michigan Supreme Court categorized the law as an exercise of the state's police power and not affecting the university financially or interfering with its educational endeavors (p. 354).

The opinion found the situation analogous to the decision permitting medical interns and residents to engage in collective organization in *University of Michigan Regents v. Employment Relations Commission*, 204 N.W.2d 218 (Mich. 1973). The opinion described the requirements in the present case as much less burdensome than the issues involved in that decision because the university was only required to make sure that general contracts for university construction projects obtained a bond to cover any default by the contractor or a sub-contractor.

The state public employee relations law has continued to restrict constitutional autonomy in Michigan. In *Central Michigan University Faculty Ass'n v. Central Michigan University*, 273 N.W.2d 21 (Mich. 1978), Central Michigan's faculty senate sought to include a teaching effectiveness program, which involved evaluation of

teaching, as an item included in mandatory bargaining. The university refused the request and the faculty senate filed an unfair labor practice action against the university. After the filing, the institution contended its constitutional autonomy let it reject the issue as a matter for collective bargaining and the state's employment relations committee agreed with the institution. Reversing, the Michigan Supreme Court characterized the dispute as whether or not promotion and retention criteria were excluded as subjects of collective bargaining. The court held that issues related to promotion and tenure were not strictly matters of educational policy exempt from collective bargaining. While certain matters related to promotion and tenure might impermissibly tread on constitutional autonomy in certain circumstances, the court refused to make a blanket exclusion of such issues from collective bargaining.

In *Garner v. Michigan State University*, 462 N.W.2d 832 (Mich. Ct. App. 1990), Michigan State University sought reversal of a trial court's order reinstating a dismissed professor. The professor, a psychologist, had been asked to leave a position at another university following inappropriate sexual contact with a former patient. Michigan State University officials, aware of the suspension, offered him a tenured faculty position. Following his appointment, a new allegation of sexual misconduct was filed. The school claimed that the professor had failed to inform them of any other existing sexual misconduct complaints and that this failure to report warranted the professor's dismissal. The professor did not deny the new allegations and admitted to past sexual relations with former patients, but he claimed the school failed to provide him with an adequate opportunity to rebut the charge that he lied during pre-employment discussions with university officials, including cross examining university witnesses or calling witnesses

on his own behalf. He claimed his firing violated the university's own policy for the standards related to the dismissal of tenured faculty.

According to the court, the university failed to provide sufficient due process in dismissing the professor because he was not given adequate post-termination due process. Among its arguments, the university sought to rely on the school's constitutional autonomy as one basis to uphold the school's handling of the matter, contending that public policy considerations merited leaving the appropriate degree of post-termination review to the discretion of university officials. The decision made clear that the school could indeed dismiss the professor but that any dismissal must comport with federal constitutional due process requirements. Constitutional autonomy failed to bolster arguments that the university could terminate the professor without more extensive post-termination proceedings. Despite limitations in certain instances, opinions addressing constitutional autonomy in Michigan continue to provide strong judicial support for the constitutional authority of higher education in the state.

### *Minnesota*

As indicated by Beckham (1977, 1978) and McKnight (2004), the Regents of the University of Minnesota possess considerable constitutional autonomy, and court decisions for this study indicate continued judicial support for constitutional autonomy in Minnesota. One important aspect of constitutional autonomy in Minnesota deals with judicial deference to administrative decisions by university officials. In *Stephens v. Board of Regents of the University of Minnesota*, 614 N.W.2d 764 (Minn. Ct. App. 2000), one of the issues addressed by the court included whether an individual had to



exhaust the university's internal grievance procedures before initiating legal action. The court noted the importance of considering the university's constitutional autonomy in deciding the issue, pointing out the constitutional authority granted to the university that existed independent of legislative or executive control. According to the opinion, the university's grievance policies were enacted pursuant to the institution's constitutional authority. The opinion discussed that unionized employees must exhaust grievance procedures contained in the collective bargaining agreement and the requirement of exhaustion of administrative remedies in federal court. The opinion stated that the constitutional authority vested in the Regents merited similar legal discretion to their control over the University of Minnesota. Accordingly, the court required the plaintiff to exhaust the university's internal grievance procedures before initiating a lawsuit against the university.

An unreported decision dealing with the dismissal of a faculty member also illustrates the judicial deference shown to the University of Minnesota (*Kobluk v. Regents of the Univ. of Minn.*, 1998 WL 297525 (Minn. Ct. App. June 9, 1998)). A professor denied tenure at the University of Minnesota challenged the dismissal in a lower state court. The university and administrators specifically named in the suit argued that the trial court lacked appropriate authority, known as subject matter jurisdiction, to hear the case. They argued that a review of the internal management of the university could only be reviewed pursuant to a writ of certiorari, a permissive request for judicial review. The court agreed with the university officials, holding that a permissive request for judicial review was the appropriate avenue to obtain court review when a state agency acts in a quasi-judicial capacity. According to the opinion, the constitutional autonomy possessed

by the Regents of the University of Minnesota merited this judicial deference to university decisions. The court described the dismissed professor's claims as arising out of the internal management of the university because they related to his teaching duties and tenure review.

Another issue faced by Minnesota courts in relation to constitutional autonomy has dealt with statewide laws and whether the legislature must specifically name the University of Minnesota in such acts to make them applicable to the university, even if an act otherwise represented a permissible limitation on the Regents' constitutional autonomy. In *Winberg v. University of Minnesota*, 499 N.W.2d 799 (Minn. 1993), the Minnesota Supreme Court considered if a state veteran's preference act applied to the university. The opinion noted that the case did not deal directly with constitutional autonomy. Rather, the court stated that the legislature, cognizant of the university's unique constitutional status, usually expressly includes or excludes the university and Board of Regents from laws that the legislature could make applicable to the Regents. The court determined that the legislature did not intend to make the law apply to the university because it did not specifically refer to the institution in the law.

In a case involving the state's open meeting and data practices laws, however, the Minnesota Supreme Court rejected arguments that the legislature's failure to specifically name the university excluded the Regents and the university from the acts (*Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 638 N.W.2d 274 (Minn. 2004)). Relying on *Winberg*, the Regents argued that the university was excluded from the acts because the legislature failed to specifically name the university as covered by the law. The court

stated that *Winberg* did not create a rule to apply to all state laws and pointed out the Regents were not included under any exceptions listed in the laws.

The court rejected the Regents' argument that their constitutional autonomy prevented applying the law to them. The Regents sought to rely on *State v. Chase*, 220 N.W. 951 (Minn. 1928), a case in which the state's supreme court held the legislature could not make the Regents seek prior approval before spending funds or entering into contracts. The opinion described the constitutional autonomy given the university as meant to protect the Regents in controlling the internal management of the university. According to the court, the open meeting and data laws did not interfere with the Regents' internal management authority and addressed “broader concerns of the relationship-and information flow-between public institutions and the people whom they serve” (*Star Tribune Co.*, 638 N.W.2d at 286). The opinion described the acts as permissible instances of legislative authority overriding constitutional autonomy because the acts: (1) sought to promote the general welfare; (2) were applicable to all state agencies and to local government; and (3) did not interfere with the Regents' internal management of the university.

In *Star Tribune*, the Regents sought to distinguish the issue before the court from those raised in *University of Minnesota v. Lord*, 257 N.W.2d 796 (Minn. 1977). That case dealt with a law requiring a state board to select the designer for public constructions projects of more than \$250,000. In *Lord*, the court upheld the legality of applying the act to the university based on the fact that the legislature sought to promote the general welfare with the law and made it applicable to all state agencies. In *Star Tribune*, the

Regents argued that the *Lord* decision rested in large part on the fact that the case involved legislative conditions on appropriations to the university.

The Minnesota Supreme Court in *Star Tribune* flatly rejected that legislative power over the university only occurred in the context of appropriations. The court stated language in *Lord* describing a reasonable condition on an appropriation and interference in academic matters as merely describing extremes, the first clearly acceptable and the second clearly not. In the present case involving the open meeting and data laws, the court found unpersuasive claims that the act hindered the Regents' efforts to conduct presidential searches by not permitting confidential interviews with candidates. Though acknowledging certain difficulties, the opinion stated the Regents did not demonstrate enough obstacles caused by the acts and pointed out that a majority of states made presidential searches subject to open meeting laws. Despite certain limitations, the Board of Regents of the University of Minnesota continues to enjoy considerable constitutional autonomy.

### *Mississippi*

Several cases in Mississippi have resulted in courts refusing to rule on the issue of constitutional autonomy for the Board of Trustees of State Institutions of Higher Learning. *State ex rel. Allain v. Board of Trustees of Institutions of Higher Learning*, 387 So. 2d 89 (Miss. 1980), involved whether the Board of Trustees of Institutions of Higher Learning could use self-generated funds for facilities construction without the consent of the state's building commission. The trustees argued that the state constitution afforded them autonomy to engage in such activities. In reviewing the issue, the court discussed

that the constitutional establishment of the Trustees was meant to limit political interference with state institutions and determined that the constitutional provision left self-generated funds under the control and discretion of the Trustees. However, the court stated it did not “reach the broad question of whether or not the Board of Trustees is an ‘autonomous’ board” (p. 93).

Five years later, the Mississippi Supreme Court heard a case involving allegations by a publishing corporation that the Board entered into executive session without satisfying certain requirements of the state’s open meeting law (*Bd. of Trustees of State Institutions of Higher Learning v. Miss. Publishers Corp.*, 478 So. 2d 269 (Miss. 1985)). The lower court agreed with the corporation regarding most of its claims. In reviewing the case, the state’s supreme court discussed the constitutional nature of the Board as established by provision in the 1942 constitution:

The State institutions of higher learning . . . shall be under the management and control of a Board of Trustees to be known as the Board of Trustees of state institutions of higher learning, the members thereof to be appointed by the Governor of the State with the advice and consent of the Senate. . . . [The] Board shall perform the high and honorable duties thereof to the greatest advantage of the people of the State of such educational institutions, uninfluenced by any political considerations. . . . Such Board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four years; but said Board shall have the power and authority to terminate any such contract

at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.

Noting herein contained shall in any way limit or take away the power of the Legislature had possessed, if any, at time of the adoption of this amendment, to consolidate or abolish any of the above name institutions. (p. 273 (quoting Miss. Const. art. VIII, § 213-A))

The Board asserted that its constitutional status meant that application of the open meeting law to the Board had to “yield in order for it to effectively function and perform its constitutional duty” (*Miss. Publishers Corp.*, 478 So. 2d at 275). Despite the opinion's discussion of the Board's constitutional status and the Board's arguments, the court expressly declined to answer the issue of the Board's constitutional autonomy, only stating “the intent and purposes of giving the Board constitutional status was to remove it from political interference, but not to make it a separate branch of government” (pp. 275-76). Refusing to define the constitutional authority of the Board, if any, the court held that the open meetings act fell within the legislature's power to engage in oversight over the Board. According to the opinion, the open meeting law did not intrude on the Board's authority to make decisions. The court listed Arizona, Louisiana, Michigan, Montana and Oklahoma as states with greater autonomy than granted to the Mississippi Board and noted that open meetings laws applied to governing boards in these states.

The Mississippi Supreme Court also passed on addressing the Board's constitutional autonomy in *Van Slyke v. Board of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872 (Miss. 1993). The case involved a long-standing legal dispute between a state representative and the Board that included claims that the Board

constituted an unconstitutional fourth branch of government. In dismissing this claim, the court discussed the nature of the Board. It described the Trustees as possessing constitutional authority with their power “implemented and supplemented” by law (p. 877). The court upheld a determination in a lower decision that the Board constituted a part of the executive branch of government based on the nature of the powers it exercised as opposed to a legislative body. As in other cases, the court declined to discuss the parameters of constitutional authority for the Board.

Attorney General Opinions have also not offered any distinctions between constitutional and statutory grants of authority for the Board when responding to legal inquiries concerning the power of the Board to authorize off-campus academic programs (*1998 Miss. AG LEXIS 546* (1998)) and to the purchase of a portion of a natural gas pipeline to meet the energy needs of an institution (*1979 Miss. AG LEXIS 359* (1979)). Mississippi courts have declined thus far to define the constitutional authority of the Board of Trustees of State Institutions of Higher Learning.

#### *Missouri*

No additional cases were located. A Missouri Attorney General Opinion, noting precedent unsupportive of constitutional independence for the Board of Curators for the University of Missouri, advised that the legislature was not required to make lump sum appropriations and, instead, could make itemized appropriations to the university (*1977 Mo. AG LEXIS 68* (1977)).

## Montana

Beckham (1977, 1978) identified Montana as a state with constitutional autonomy and at least one case decided since then supports continued judicial recognition of constitutional autonomy in the state for the Board of Regents of the Montana University System. In *Duck Inn, Inc. v. Montana State University-Northern*, 949 P.2d 1179 (Mont. 1997), a corporation asserted that a university renting its facilities to private individuals and organizations resulted in impermissible competition with the company under Montana's constitution. Among the arguments asserted, the plaintiff contended that a state law permitting the Regents to rent property owned by the system to private parties under certain circumstances constituted an illegal delegation of legislative power.

In upholding the right of the university to rent its facilities, the court discussed that in addition to any legislative grants of authority, the Regents possess independent constitutional authority under Article X, Section 9 of the state constitution (Mont. Const. art. X, §9). To support its position, the court pointed out that the U.S. Supreme Court had determined relaxed standards to analyze permissible delegations of legislative authority when an agency “possesses independent authority over the subject matter” (p. 1183 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975))). Accordingly, questions of delegation of authority to the Regents enjoyed a more relaxed judicial inquiry because of the grant of constitutional power to the Regents to manage the state's university system. The court determined that the plaintiff failed to show that the rental of facilities in this case contradicted or interfered with using the facilities for academic purposes. Additionally, the opinion noted that renting university property provided funds to further the system's educational activities. Confirming the holding of the case, the Montana



Supreme referred to *Duck Inn* in a later case involving another state agency as illustrative of the constitution making a grant of authority to a stage agency independent of legislative authority (*Baumgardner v. Pub. Employees' Retirement Bd. of the State of Mont.*, 119 P.3d 77 (Mont. 2005)).

A Montana Attorney General Opinion, while recognizing the constitutional authority of the Board, concluded that the University of Montana must grant fee waivers to veterans pursuant to established state public policy (*37 Op. Atty. Gen Mont. 698, 1978 Mont. AG LEXIS 13* (1978)). Though not providing detailed legal interpretation, the cases reveal that the Board of Regents of the Montana University System continues to receive judicial recognition of some degree of constitutional autonomy.

#### *Nebraska*

Though not identified as a state with constitutional autonomy for higher education by Beckham (1977), Nebraska cases indicate that the constitution may provide the governing boards in Nebraska with at least a limited form of constitutional authority. In *Board of Regents of the University of Nebraska v. Exon*, 256 N.W.2d 330 (Neb. 1977), the Nebraska Supreme Court considered the constitutionality of legislative enactments that sought to control the university's use of funds and to direct actions on the part of several administrative offices. The court considered: (1) control of funds derived from federal or private sources; (2) a requirement that approval by the legislature and/or governor was needed for gifts valued at more than \$10,000; (3) authority of the legislature to control raises given to employees of the Board of Regents; (4) requirements for the design and construction of new facilities or changes or repair to

existing structures; (5) requirements for data processing procedures; and (6) establishment of a “centralized purchasing and disposal program for property” (p. 334). The trial court struck down the provisions except for one related to raises for employees. The Nebraska Supreme Court upheld the trial court's determination with the exception of the pay raises provision, which it also declared invalid.

In reviewing the lower court's decision, the court considered the extent of constitutional authority granted to the Regents in the supervision and control of the University of Nebraska. Article VII, Section 10 of the state constitution placed the University of Nebraska under the control of a Board of Regents with their duties and power determined by the legislature (Neb. Const. art. VII, § 10). According to the court, the provision sought to insulate the university from political control and remove the school from the “plenary control of the Legislature” (p. 332). The opinion stated that while the “Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers and duties that should remain in the Regents cannot be delegated to other offices or agencies” (p.333).

In striking down the provisions, the court stated that the legislature could not use its appropriations power to “usurp the powers or duties of the Board of Regents and to give directions to the employees of the University” (*Exon*, 256 N.W.2d at 333). The court continued that in “prescribing the powers and duties of the Regents a legislative act must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed” (p. 333). Thus, though

the legislature may generally prescribe the duties of the Regents, it may not divest the Regents of control of the university.

The issue of constitutional authority became contested in another case when the legislature sought to transfer control of Kearney State College to the University of Nebraska system and the Board of Regents of the University of Nebraska (*Nebraska v. Beermann*, 455 N.W.2d 749 (Neb. 1990)). The act moved control of the university from the Board of Trustees of the Nebraska State Colleges. The state's attorney general argued that Article VII, Section 13 of the constitution placed control of Kearney under a board whose duties were to be prescribed by law but did not give the legislature authority to transfer control of the institution (Neb. Const. art. VII, § 13). The provision was similar to the language covering the Board of Regents of the University of Nebraska. Without commenting on the Board's power to the extent of the opinion in *Exon*, the court agreed with the state's attorney general that the legislature could not transfer control of the institution under the terms of the constitution. The *Exon* case demonstrates that certain constitutional limits may exist over the legislature's authority over the Regents.

#### *Nevada*

Beckham (1977, 1978) concluded that Nevada courts recognized constitutional autonomy. Research for cases, though recognizing some degree of judicial recognition of constitutional autonomy, make unclear the extent of legislative control over the Board of Regents of the University of Nevada System. In a case in which the Board of Regents of the University of Nevada System raised constitutional autonomy to defend a mandatory retirement policy, the Nevada Supreme Court rejected their arguments (*Bd. of Regents of*

*the Univ. of Nev. Sys. v. Oakley*, 637 P.2d 1199 (Nev. 1981)). In the case, a professor challenged a University of Nevada policy that required tenured faculty members to retire at the age of 65 and non-tenured faculty at the age of 70. The dismissed faculty member claimed that the policy violated a state employment law that, among its provisions, prohibited discrimination based on age by public employers. The Regents claimed that their constitutional status vested them with “virtual autonomy and thus immunity from the state non-discrimination policy” (p. 1200). The Regents cited the 1948 decision, *King v. Board of Regents*, 200 P.2d 221 (Nev. 1948), that struck down legislation requiring creation of an advisory committee for the Regents to bolster their position.

The court rejected the Regents' claim, stating the *King* case:

. . . does not stand for the proposition that the Board of Regents is free from all legislative regulation; rather, it holds that the legislature may not invade the constitutional powers of the Board through legislation which directly interferes with essential functions of the University. Since the law in question simply prescribes duties concerning fair treatment of its personnel, it in no apparent way interferes with the Board's essential management and control of the University. (p 1200)

The Regents also sought to rely on a decision, *Richardson v. Board of Regents*, 261 P.2d 515 (Nev. 1953), that described the Board's regulations as having the force of law and on an equal legal footing as legislative acts. The court rejected this argument, stating the *Richardson* case did not involve a conflict between a Board policy or regulation and state law but, rather, a requirement that the Regents must follow their own policies. The court referenced a Hawaii case, *Levi v. University of Hawaii*, 628 P.2d

1026 (Haw. 1981), where that state's supreme court upheld a state age discrimination policy against a conflicting university retirement policy. Though noting differences in the states' constitutional provisions relating to higher education, the Nevada Supreme Court found *Levi* analogous in the determination that a state law supercedes a contrary Board policy or regulation.

While the *Oakely* decision left open to an extent judicial recognition of constitutional autonomy in Nevada, the Nevada Supreme Court referred to the Board of Regents' constitutional status in holding the legislature meant to exclude the University of Nevada system from a state law directing cash payments to public employees for continuous service (*Roberts v. State*, 752 P.2d 221 (Nev. 1988)). In the case, current and former employees of the University of Nevada system claimed that a state law that awarded public employees semiannual cash payments for 10 or more years of continuous service applied to the system. The court held that the legislature did not express an intention to include the system under the legislation. In finding lack of legislative intent to include the system, the court discussed that the system's claim to a special constitutional autonomy, including control over professional positions, influenced officials in believing the legislation was meant to exclude the system during the drafting of the act and regulations. The case, while demonstrating that constitutional autonomy remains a live legal issue in the state, did not address the contours of any special constitutional authority enjoyed by the Regents.

In a case dealing with the state's open meeting law, a newspaper claimed that the Regents' constitutional status made the office of community college president subject to the act's purview (*Univ. and Cmty. Coll. Sys. of Nev. v. Dr Partners*, 18 P.3d 1042 (Nev.

2001)). The act applied to the appointment of any individual to a public office and defined public office to include positions created by statute. Among its arguments, the newspaper contended that acts of the Regents, who created the office in question, were equivalent to a statute. In holding that the position did not qualify as a public office under the act, the court cited *Oakley* for the proposition that the Regents' regulations do not hold a position equivalent to a state statute. The court did not address whether the Regents possessed any degree of constitutional authority. Cases in Nevada leave certain uncertainty regarding the extent of constitutional autonomy in the state.

### *New Mexico*

Beckham (1977) located no judicial decisions addressing constitutional status in New Mexico and could only point to attorney general opinions as appearing to support some form of constitutional autonomy. A 1998 decision from the New Mexico Supreme Court appears to confirm that the Board of Regents of the University of New Mexico possess some degree of independent constitutional authority (*Regents of the Univ. of New Mexico v. N.M. Federation of Teachers*, 962 P.2d 1236 (N.M. 1998)). The Regents challenged a state agency's decision that the university impermissibly exempted numerous categories of employees from the right to engage in collective bargaining.

In considering the claims, the court described the Regents as an “independent governing body which has a very real, though somewhat ill-defined, independence from outside control” based on Article XII, Section 13 of the state constitution (*N. M. Federation of Teachers*, 962 P.2d at 1250). According to the opinion, a legislative enactment that impaired the Regents' authority to “make decisions about the education

character of the university” would run afoul of their constitutional power (p. 1250). Without defining the term education character, the opinion stated that the constitutional authority granted to the Regents served to protect the education process from the “capricious whims of the political process” (p. 1250). While an independent grant of power, the autonomy granted the Regents was limited by exercise of the legislature’s police power, state laws enacted to “further the public welfare and that are of statewide concern and general applicability” (p. 1250). Looking to cases from other states and New Mexico, the opinion listed as examples of impermissible legislative regulation laws that sought to control budgetary decisions of the university, raise faculty salaries or take direct control over appropriations made to the university.

While recognizing the Regents' as possessing constitutional autonomy, the court rejected arguments that collective bargaining interfered with the Regents' control over educational matters. The court described the Regents' concerns as speculative, but offered that circumstances could arise in collective bargaining that impeded the Regents' authority. The opinion, citing a Michigan case, listed salary as an example of an issue clearly valid under collective bargaining while medical interns attempting to invoke collective bargaining rights to avoid working in a hospital’s pathology department as not proper for collective bargaining. The *New Mexico Federation of Teachers* case is significant in appearing to recognize some form of judicial recognition of constitutional autonomy in New Mexico.

### *North Dakota*

Though only in one case, the North Dakota Supreme Court appeared to give judicial recognition to constitutional autonomy in the period since Beckham's (1977, 1978) research. In *Peterson v. North Dakota University System*, 678 N.W.2d 163 (N.D. 2004), a discharged tenured faculty member at Bismarck State College (BSC) challenged her dismissal. The professor was fired after university officials determined that she disclosed confidential information about a student to other students and then made an ordered apology that school officials found unacceptable. As the case progressed, the school also alleged that the professor ended classes one month early without permission and demonstrated incompetence in her teaching. The BSC president dismissed the faculty member, but a faculty committee recommended against the firing after determining that the university failed to establish clear and convincing evidence that the faculty member merited termination. The BSC president chose to reject the committee's conclusions and did not reverse the dismissal. The faculty member appealed to the State Board of Higher Education, which appointed an administrative law judge (ALJ) to make recommended factual findings and legal conclusions. The ALJ determined clear and convincing evidence existed to support the dismissal and the Board adopted the ALJ's recommendations. The terminated faculty member sought judicial review and the trial court granted summary judgment in the school's favor.

In reviewing the lower court's decision, the North Dakota Supreme Court described the State Board of Higher Education as a “constitutional body with full power and authority to appoint and remove professors of higher education institutions under its control” (*Peterson*, 678 N.W.2d at 169 (citing *Posin v. State Bd. of Higher Educ.*, 86



N.W.2d 31, 34-35 (N.D. 1957)). The opinion stated that because the Board exercises constitutional powers that a “review of its substantive decisions is akin to the review we employ when the doctrine of separation of powers applies” (p. 169). While recognizing the Board as excluded from the state’s legal definition of a state administrative agency, the court determined a level of review similar to that for the decisions of administrative agencies was appropriate. Judicial review was limited to whether the factual determinations of the administrative agency were reasonable rather than de novo review of the facts. Based on this standard, the court upheld the granting of summary judgment. The *Peterson* decision supports continued judicial recognition of constitutional autonomy in North Dakota.

#### *Oklahoma*

Oklahoma courts have continued to issue opinions affirming constitutional autonomy in Oklahoma. In the most significant case, the Regents challenged as unconstitutional a legislative resolution that directed state agencies to provide a salary increase for all employees (*Bd. of Regents of the Univ. of Okla. v. Baker*, 638 P.2d 464 (Okla. 1981)). The Board contended that the provision interfered with its constitutionally vested control over the University of Oklahoma. The lower court determined that while the board usually has exclusive authority to determine employee salaries the state legislature ordered the raise to combat inflation and, thus, to address an issue of statewide concern. According to the opinion, designating an issue a matter of statewide concern permitted the legislature to override the otherwise constitutional authority of the Regents.

In its analysis, the Oklahoma Supreme Court, noting that before 1944 the board's authority was only statutory, stated, "We have no doubt that in elevating the status of Board from a statutory to a constitutional entity the people intended to limit legislative control over University affairs" (p. 467). The court pointed out that Oklahoma was one of the few states with constitutional autonomy and discussed cases from other states striking down wage provisions, including decisions from California and Montana. The opinion pointed out that in the California case a local wage law was determined not to touch on a matter of statewide concern. Rejecting the lower court's opinion, the Oklahoma Supreme Court described salary determinations as an "integral part of the power to govern the University and a function essential in preserving the independence of the Board" (p. 469). The court held that the resolution impermissibly interfered with the Board's constitutionally protected authority.

In *Randolph v. Board of Regents of Oklahoma Colleges*, 648 P.2d 825 (Okla. 1982), assistant professors at Central State University challenged a Board policy that altered the standards for promotion from assistant to associate professor. In rejecting the professors' claims, the Oklahoma Supreme Court held that they enjoyed no vested property rights but only a contingent right with the Board possessing authority to change the standards. The case did not directly address constitutional autonomy, but in assessing the Board's power to change the standards, the court discussed that the Regents derived their authority from the constitution with the alteration in policy well within the Board's constitutional autonomy.

Courts have also assessed constitutional autonomy for other higher education entities in Oklahoma. In a brief decision, the Oklahoma Supreme Court held the state's

Merit Protection Committee could not exercise control over the Board of Regents for Oklahoma State University and the Agricultural and Mechanical Colleges and Langston University (*Okla. ex rel. Bd. of Regents of Okla. State Univ. and Okla. A&M Colls. v. Okla. Merit Prot. Comm.*, 19 P.3d 865 (Okla. 2001)). The order to the committee stated the legislature was “powerless to delegate the petitioners’ constitutional control over the management of their institutions to any department, commission or agency of state government” (p. 865). The court held that the state's whistle blower act could not constitutionally give authority to the Merit Protection Committee without violating the constitutional autonomy of the Board and Langston University.

Attorney General Opinions have touched on several issues dealing with constitutional autonomy in the state. One Attorney General Opinion determined that the statewide governing board could make a special contribution to the retirement benefits of employees under the Board’s constitutional authority (*19 Op. Atty. Gen. Okla. 207, 1987 Okla. AG LEXIS 15* (1987)). According to a 1980 Attorney General Opinion, the authority of the statewide Oklahoma Regents for Higher Education did not extend to closing a college or university then in existence or establishing a branch campus without legislative approval (*12 Op. Atty. Gen. Okla. 343, 1980 Okla. AG LEXIS 74* (1980)). A 1988 Attorney General Opinion advised that the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges did not suffer an encroachment on their authority in being required to follow state purchasing and leasing requirements (*19 Op. Atty. Gen. Okla. 16, 1988 Okla. AG LEXIS 9* (1988)). In other areas, Attorney General Opinions have advised that constitutional autonomy has resulted in the inapplicability of certain state laws, including in relation to (1) employee leave (*No. 91-6, 23 Op. Atty. Gen. Okla.*

41, 1992 Okla. AG LEXIS 7 (1992)), (2) a prohibition on the payment of moving expenses for new employees (*No. 92-10, 24 Op. Atty. Gen. Okla., 1992 Okla. AG LEXIS 14* (1992)), (3) the inapplicability of a state hiring freeze to constitutionally authorized governing boards (*No. 95-12, 1996 Okla. AG LEXIS 30* (1996)) and (4) the impermissibility of applying statutory requirements for building design consultants to constitutional governing boards (*No. 01-49, 2001 Okla. AG LEXIS 42* (2001)). Cases and Attorney General Opinions support the continued judicial recognition of constitutional autonomy in Oklahoma.

#### *South Dakota*

Beckham (1977) described the constitutional powers of the South Dakota Board of Regents as not well established with no court expressly interpreting the Board's authority. Cases located, though not completely dismissive of constitutional autonomy, did not offer strong judicial support of the doctrine. One case, dealing with a labor dispute, demonstrated some judicial deference to the Regents' constitutional status (*S.D. Bd. of Regents v. Heege*, 428 N.W.2d 535 (S.D. 1988)). In the case, the Regents appealed the granting of an injunction by a state trial court prohibiting the Regents from issuing individual contracts to faculty members when the Regents and the collective bargaining agent for the faculty members failed to agree on a new general, or master, contract. The individual contracts stated individuals would be compensated at current levels subject to any adjustments called for under a new master contract. The Regents challenged the injunction, arguing that jurisdiction of the matter properly rested with the

South Dakota Department of Labor because the labor union failed to demonstrate extraordinary circumstances that warranted the court's intervention.

In assessing the authority of the trial court to issue the injunction, the court discussed a prior decision, *South Dakota Board of Regents v. Meierhenry*, 351 N.W.2d 450 (S.D. 1984), which held the state labor department could exercise jurisdiction over the institutions governed by the Regents. The court described that case as establishing that the Regents possess the exclusive hiring and firing authority for employees, but subject to any rules and restrictions provided by the legislature. The *Meierhenry* decision also suggested that the legislature could not remove all authority from the Regents in the governance of institutions under their oversight.

Along with acknowledging the legislature's authority to direct the Regents, the court in *Heege* also held that the injunction encroached on the Regents' constitutionally granted authority. The court noted the dissenting opinion in *Meierhenry* warned that allowing the kind of legislative interference at issue in that case threatened to eventually strip the Regents of their power. According to the *Heege* court, issuance of the injunction was not proper because as a matter of the law the Regents' action did not on its face constitute an unfair labor practice. As such, jurisdiction remained with the state labor department. While recognizing some grant of constitutional autonomy, the *Heege* decision also illustrates substantial limitations of constitutional autonomy in South Dakota.

The limits of the Regents' autonomy showed clearly in a case in which taxpayers challenged the legislature's authority to close a university and turn it into a minimum security prison and transfer control of the prison to the Board of Charities and

Corrections (*Kanaly v. State*, 368 N.W.2d 819 (S.D. 1985)). According to the claimants, one basis for the impermissibility of the law involved taking control of the institution away from the South Dakota Board of Regents. The opinion cited previous cases for the description of the Board as a constitutional administrative body (citing *Worzella v. Bd. of Regents of Educ.*, 93 N.W.2d 411 (S.D. 1958)) but not as an independent fourth branch of government. Citing *Meierheny*, the court described the Regents as subject to legislative rules and restrictions with the caveat that the legislature may not remove all power from the board. The legislature's authority extended to decisions to close institutions and transfer their control to other state agencies. These cases show that the legislature possesses considerable control over the South Dakota Board of Regents, though the constitution prohibits stripping the Regents of all their authority.

#### *Utah*

If any doubt lingered, a 2006 decision by the state's supreme court squarely rejected constitutional autonomy for higher education in Utah (*Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006)). The University of Utah sued the state's attorney general over a state law that prohibited state and local entities from enacting or enforcing policies that interfered with the possession or use of firearms on public or private property. The university argued that its firearms policy did not contravene the state law or, alternatively, that the university enjoyed the constitutional authority to enact and enforce the policy. A state trial court ruled that the university's policy did not conflict with the state law, but while on appeal, the state legislature amended the law to explicitly include state universities.

In reviewing the case, the Utah Supreme Court opinion first stated that no language in Article X, Section 4 of the state constitution could be read to limit legislative oversight of the university (Utah Const. art. X, § 4). According to the opinion, a plain language reading of the section continued the rights of the university enjoyed at the time of statehood in 1896 with the passage of the first state constitution and enactment of another state constitution in 1987. The court determined that an 1892 territorial law establishing the rights of the university did not grant the institution the power “to act in contravention of legislative enactments” (p. 1118). While a dissenting opinion rejected that the university possessed no independent authority, the majority described the relevant constitutional language as subjecting the university to full legislative oversight, even in matters related to the institution’s “core academic functions” (p. 1118).

Prior to the *Shurtleff* decision some lingering uncertainty remained regarding judicial recognition of at least some form of constitutional autonomy. In *Hansen v. Utah State Retirement Board*, 652 P.2d 1332 (Utah 1982), the state attorney general filed a suit against several state agencies claiming that under the state constitution, he alone could act as the legal counsel for the agencies. In relation to the University of Utah, the Utah Supreme Court stated that it “enjoys a degree of constitutionally rooted independence” in holding that the university could employ independent legal counsel (p. 1340). In contrast, in a case dealing with student fees, the court had described the University of Utah as subject to the “general legislative control and budgetary supervision” of the legislature like other state agencies (*Petty v. Utah State Bd. of Regents*, 595 P.2d 1299, 1301 (Utah 1979)). The *Shurtleff* decision appears to close any remaining debate regarding constitutional autonomy in Utah.

## CHAPTER 6

### DISCUSSION, CONCLUSIONS, IMPLICATIONS, LIMITATIONS AND DELIMITATIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

#### Introduction

Using a comparative legal analysis, this study examined cases from 22 states based on their inclusion in previous studies (Beckham, 1977, 1978; Glenny & Dalglish, 1973; McKnight, 2004) and from an independent search for cases and constitutional provisions relating to constitutional autonomy. The study builds primarily on the work of Beckham (1977, 1978) to examine the legal status of constitutional provisions that grant independent constitutional authority to public higher education governing boards. The study also analyzes the legal doctrine of constitutional autonomy using the concepts of procedural and substantive autonomy derived from the higher education literature.

Specifically, this study addresses two research questions:

1. What is the legal status of state constitutional autonomy for public higher education in the United States?
  - Based on constitutional provisions and court decisions, what states grant constitutional autonomy to public higher education and how does this list correspond to states identified by Beckham (1977, 1978)?
  - What commonalities and differences exist in the legal interpretations given constitutional autonomy provisions by state courts?
  - For each state examined, have cases interpreting constitutional autonomy provisions decided since Beckham's (1977, 1978) study maintained consistent judicial support for constitutional autonomy,



expanded the legal scope of constitutional autonomy or diminished the legal scope of constitutional autonomy?

2. Does analyzing court cases located for this study using the concepts of procedural and substantive autonomy developed in the higher education literature contribute to an increased understanding of how constitutional autonomy affects institutional autonomy?

The following chapter is divided into two main sections. The first part focuses on a comparative analysis of the current legal status of constitutional autonomy in the 22 states in relation to the findings of Beckham's (1977, 1978) study. The second major part of the chapter builds on the comparative legal analysis to consider constitutional autonomy in relation to the concepts of procedural and substantive autonomy.

## Discussion

### *Research Question One: Current Legal Status of Constitutional Autonomy*

Beckham's (1977, 1978) study represents the most recent comprehensive comparative legal analysis of state constitutional autonomy provisions related to public higher education. States were identified for discussion primarily using Beckham's study (see also Glenny & Dalglish, 1973; McKnight, 2004), the Education Commission of the States' online database of higher education governance structures, and through searches of the WESTLAW and LEXIS-NEXIS legal databases.

To guide the comparative analysis, the states were organized on the basis of substantial judicial recognition of constitutional autonomy, moderate to limited judicial recognition of constitutional autonomy, ambiguous legal status regarding constitutional

autonomy and judicial rejection or negative treatment of constitutional autonomy.

Several factors determined separation of states into the four categories. The “substantial judicial recognition” section reflects that these states have tended to generate more cases concerning constitutional autonomy than other states, state courts have offered relatively well-developed standards for the overall legal framework of constitutional autonomy, and cases reflect considerable judicial deference to the constitutional autonomy of institutions in these states. The “moderate to limited judicial recognition” division contains states with favorable judicial treatment of constitutional autonomy but with relatively fewer cases and, even more importantly, without a well-articulated legal framework in cases regarding the contours of constitutional autonomy in the particular state. The third category, “ambiguous legal status,” represents states in which case law has not clearly answered whether or not constitutional autonomy exists as a recognized legal doctrine by state courts. As its name implies, the “judicial rejection or negative treatment” category discusses states in which courts have either explicitly rejected constitutional autonomy or cast heavy doubt on the potential for recognition by courts.

### *Substantial Judicial Recognition*

Michigan, California and Minnesota continue as the states with the strongest judicial recognition of constitutional autonomy, not only in the number of cases but also in the language used by state courts to describe the legal protections that result from constitutional autonomy. Especially in Michigan and California, state courts have consistently issued opinions since the period of Beckham's (1977, 1978) study that continue to recognize substantial grants of independent constitutional authority for public

higher education. In these three states, courts continue to look favorably on precedent establishing and upholding strong grants of constitutional autonomy, even when courts have ruled against university governing boards in particular cases. At the same time, contemporary decisions reinforce the findings of Beckham (1977, 1978) that, though extensive, constitutional autonomy in these states does not negate all governmental authority over public higher education.

*Michigan.*

In Michigan, courts continue to describe constitutional autonomy as making the governing boards of public higher education in the state analogous to a separate branch of state government. In a 1988 case dealing with a state law that limited investments in South Africa and the Soviet Union, a Michigan court considered the law's applicability to the University of Michigan (*Regents of the Univ. of Mich. v. State*, 419 N.W.2d 773 (Mich. Ct. App. 1988)). In deciding in favor of the Board of Regents of the University of Michigan, the court looked to previous cases for the proposition that the "State cannot control the action of the Regents. It cannot add to or take away from its property without the consent of the Regents" (p. 777). The opinion discussed how the state's supreme court had repeatedly rejected legislative attempts to place control over constitutionally authorized governing boards in the state. According to the court, constitutional authority clearly included "fiscal autonomy" for the university boards (p. 778). In addition to monetary property, constitutional autonomy also vests control over physical property, as illustrated in a case where the claimants challenged a hunting ban on university owned

property (*Mich. United Conservation Clubs v. Bd. of Trustees of Mich. State Univ.*, 431 N.W.2d 217 (Mich. Ct. App 1988)).

Even in an opinion holding that the university could not ignore a law requiring a security bond for construction projects, the court acknowledged that the Regents for the University of Michigan possess “complete power over financial decisions affecting the university” (*W.T. Andrew Co. v. Mid-State Surety Corp.*, 450 Mich. 655, 662 (Mich. 1996)). Thus, as with cases decided before 1977, Michigan courts continue to recognize the supremacy of governing boards in the state to make decisions related to the management of their institutions.

The continuing reach and depth of constitutional autonomy in Michigan stands out in relation to decisions dealing with the state's open meeting and records laws. While courts in other states, including Minnesota, have declined to accept constitutional autonomy as a shield to open meeting laws, this has not occurred in Michigan. In a 1999 decision, the Michigan Supreme Court held that the state's open meeting law could not apply to the “internal operations of the university in selecting a president” (*Federated Publ'ns v. Mich. State Univ. Bd. of Trustees*, 594 N.W.2d 491, 498 (Mich. 1999)). In the case, the court dealt with an issue left open in a 1993 decision, where the defendant institution failed to properly raise constitutional autonomy in arguing against applying the state's open meeting law. In *Federated Publications*, the court stated that making the law apply to the governing boards of public universities under these circumstances infringed on the Boards' constitutional authority and noted that constitutional language already required formal sessions of governing boards be open to the public. Strongly relying on precedent, the opinion described constitutional governing boards as possessing almost

absolute control over their institutions. The court also described constitutionally authorized governing boards in the state as occupying a co-equal status to the other branches of state government.

Deference to constitutional autonomy in the context of open records arose in a case in which a professor sued to review peer employment evaluations (*Muskovitz v. Lubbers*, 452 N.W.2d 854 (Mich. Ct. App. 1990)). The professor sought the records under a state law granting employees access to employment records. While granting the employee access to some records, the court, looking to a California decision, did not grant access to records that might reveal the identities of the reviewers. The court characterized the information as confidential and protected under the constitutional autonomy granted to universities in the state based on the fact that release of the information could hamper the effective administration of the institution. Accordingly, the court balanced a general state policy of openness with employment records against the protections afforded institutions through constitutional autonomy.

The cases dealing with the state's open meeting law and the law permitting access to employment records demonstrate how courts in Michigan have relied upon and extended precedent upholding strong characterizations of constitutional autonomy discussed by Beckham (1977, 1978). Rather than distinguishing or minimizing precedent, Michigan courts continue to look to previous decisions as establishing legal principles that place substantial limits on any legislative interference with the constitutional authority of governing boards to control and manage their institutions. Decisions located for this study indicate no legal erosion of strong judicial support for constitutional autonomy since Beckham's (1977, 1978) study.

While upholding the principles of constitutional autonomy announced in previous decisions, cases located for the study show that state courts also continue to place limits on this autonomy in certain instances. As in cases included in Beckham's (1977, 1978) study, Michigan courts still permit legislative authority to trump constitutional autonomy in the context of generally applicable laws passed under the state's police powers or laws deemed to establish clear statements of public policy. In relation to the legislature's power to pass generally applicable laws that may override constitutional autonomy, since the period of Beckham's (1977, 1978) study Michigan courts have upheld the application of laws dealing with security bonds (*W.T. Andrew Co.* (1996)) and employee relations laws (*Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ.*, 273 N.W.2d 21 (Mich. 1978)). In *Central Michigan University Faculty Ass'n*, the state's supreme court did not allow constitutional autonomy to restrict certain issues related to promotion and tenure as appropriate matters for collective bargaining. While not arguing against legislative authority to permit collective bargaining at universities under the state's employment relations law, the university argued these specific issues touched on educational matters and encroached on university constitutional autonomy. The court disagreed, describing the matters as related to employment and not a significant enough intrusion into academic issues to require exclusion from collective bargaining.

Still, even in *Central Michigan University Faculty Ass'n* the court acknowledged that legislative power could not interfere with universities' control over educational matters. This sentiment was echoed in the *Federated Publications* case where the court noted that while the legislature can include universities under the state's public employee relations law, the "regulation cannot extend into the university's sphere of educational

authority” (594 N.W.2d at 497). Thus, even a statewide law otherwise applicable to Michigan universities might impermissibly interfere with constitutional autonomy if the law intrudes into clearly educational matters, though the court stated identification of an educational matter required determination on a case-by-case basis.

The issue of legally established public policy overriding constitutional autonomy has come into play in the area of extending employee benefits to include same-sex couples (*Nat'l Pride at Work, Inc. v. Governor of Mich.*, No. 265870, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007)). In this case, the court held that the University of Michigan could not extend employee benefits to same-sex couples without violating clear state public policy as established in a constitutional amendment. The case shows that, despite extensive judicial recognition of constitutional autonomy, Michigan courts continue to permit regulation of public universities in certain instances. Even though previous decisions referred to the absolute control governing boards in the state possess over university affairs, the case highlights the limits of this authority.

Though limitations on constitutional autonomy arise in certain instances, governing boards of public institutions in Michigan continue to possess substantial authority to control and direct the affairs of institutions under their control. With the exception of California and possibly Minnesota, even other states with constitutional autonomy do not vest their governing boards with such expansive independent constitutional power. Cases decided since Beckham's (1977, 1978) study relied on precedent in the vigorous protection of the constitutional authority of governing boards. Michigan continues as one of the three states with the most robust judicial protection for constitutional autonomy. As in Beckham's study, the Michigan example continues to

stand out among states vesting public higher education governing boards with constitutional authority.

*California.*

Beckham (1977) initially characterized California's constitution as appearing to make a restricted grant of constitutional autonomy based on constitutional language and placed the state in a separate category from states appearing to make unrestricted grants of constitutional autonomy in their constitutions. Beckham's (1977, 1978) analysis and studies since (see, e.g., Petroski, 2005) reveal, however, that California courts interpret constitutional autonomy in the state to bestow considerable constitutional protection on the Board of Regents of the University of California. State courts interpret constitutional autonomy in California as resulting in a legal status for the Board of Regents similar to that of governing boards in Michigan and Minnesota.

As in Michigan, California courts continue to describe the Regents as enjoying almost complete autonomy in the management and control of the University of California since the period of Beckham's (1977, 1978) study. A 2000 decision described the Regents as meant "to operate as independently of the state as possible" (*Kim v. Regents of the Univ. of Cal.*, 80 Cal. App. 4th 160, 166 (2000)). In *Kim*, the court also discussed that the rules and policies of the Regents enjoy a status similar to statutes for purposes of judicial interpretation. The California Supreme Court in a 1980 case discussed how previous decisions had characterized the Regents as enjoying "broad powers" to control the University of California and exercising almost exclusive control of the university (*San Francisco Labor Council v. Regents of the Univ. of Cal.*, 608 P.2d 277 (Cal. 1980)).



Though not mirroring the constitutional autonomy language in Michigan's constitution, courts in California employ similarly strong descriptions regarding the reach and depth of the Regents' authority. In both states, governing boards stand on an equal footing with the other branches of state government in the context of controlling the internal affairs of institutions under their authority. Even though multiple governing boards in Michigan enjoy constitutional autonomy as opposed to the granting of constitutional autonomy to one board in California, legal conceptions regarding the breadth and depth of constitutional autonomy are strikingly similar in both states.

As in Michigan, strong general statements of constitutional autonomy are complemented by specific legal holdings in favor of the Regents. Exemption of the University of California from state municipal construction regulations (*Regents of the Univ. of Calif. v. City of Santa Monica*, 143 Cal. Rptr. 276 (Cal. Ct. App. 1978)) and local wage laws (*San Francisco Labor Council* (1980)) provide specific examples of the depth of the Regents' control over university operations. The requirement that employees seeking to sue the university must exhaust internal administrative remedies reveals that limits on state governmental control over the Regents extend not only to the executive and legislative branches but the judicial as well (*Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976 (Cal. 2005)).

In addition to cases dealing with control over university property and lawsuits by employees, cases decided since Beckham's (1977, 1978) study also deal with claims involving university policies directly affecting students. In *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993), the state's supreme court characterized the university's charging mandatory student fees as within the Regents'

constitutional autonomy. The Regents assessed the fees in an effort to promote a wide spectrum of student speech, and the court discussed the almost exclusive authority they possess to manage university affairs. In another case, a state court rejected an effort to use a state consumer protection law to prohibit the use of race as a factor in admissions in law and medical schools (*Favish v. Regents of the Univ. of Cal.*, 46 Cal. App. 4th 49 (1996)). While constitutional autonomy cases often involve the business related or corporate functions of universities, these cases serve as an important reminder of the relevancy of constitutional autonomy in California and other states for issues related to explicitly educational functions. In California, a plausible reason for a lack of cases dealing directly with clearly educational functions stems from strong judicial support of constitutional autonomy acting as a preemptive check on any legislative efforts to regulate issues closely related to teaching, learning and scholarship.

Despite strong judicial support for constitutional autonomy, California courts, like their Michigan and Minnesota counterparts, permit general limits on the Regents' authority under certain circumstances: (1) in the context of appropriations related to salaries; (2) acts passed under the legislature's police powers; and (3) acts affecting issues of statewide concern that do not involve the internal management of the university (Beckham, 1977, 1978; Petroski, 2005). Beckham discussed these restrictions and California courts continue to recognize these limits on the Regents' constitutional authority. As in Michigan, California courts continue to allow curtailment of the Regents' authority under certain circumstances. Cases located for this study and Petroski's (2005) research confirm the continued reliance by California courts on these general limitations on the Regent's authority over the University of California.

Though tempering the Regents' absolute control over the University of California in certain instances, the decisions rendered since Beckham's (1977, 1978) study reveal that a strong judicial conception of constitutional autonomy persists in California. The state stands alongside Michigan and Minnesota as possessing the strongest judicial interpretations of constitutional autonomy.

*Minnesota.*

The Board of Regents of the University of Minnesota continues to possess considerable constitutional independence, with the Regents exercising powers "not subject to legislative or executive control" (*Stephens v. Bd. of Regents of the Univ. of Minn.*, 614 N.W.2d 764, 773 (Minn. Ct. App. 2000)). In large part, cases revealed a steady continuation of the judicial support for constitutional autonomy identified by Beckham (1977, 1978). McKnight's (2004) guide to help Minnesota legislators understand the legal implications of constitutional autonomy in the state underscores the ongoing practical legal impact of the doctrine on the University of Minnesota. As in Michigan and California, constitutional autonomy remains a dynamic legal doctrine in Minnesota.

The *Stephens* case and *Kobluk v. Regents of the University of Minnesota*, 1998 WL 297525 (Minn. Ct. App. June 9, 1998), illustrate the ongoing legal strength of constitutional autonomy as well as how deference to the Regents' authority extends to the judiciary. In *Stephens*, the court made a unionized employee exhaust internal university grievance procedures before suing the university. This exhaustion requirement sought to limit court intervention in the internal affairs of the university and to safeguard the

Regents' constitutional autonomy. In the *Kobluk* case, a professor denied tenure challenged the decision in state court. The court held that when deemed a matter related to the internal management of the university, a claimant must seek a grant of permissive judicial review as opposed to enjoying an automatic right to pursue legal action. The court held that matters related to tenure and promotion touched on an internal management decision and limited the claimant to seeking permissive judicial review. *Stephens* and *Kobluk* demonstrate the strong judicial deference to constitutional autonomy that continues in Minnesota.

While cases decided since Beckham's (1977, 1978) study looked favorably on the legal doctrine of constitutional autonomy, a 2004 decision may distinguish the depth and scope of constitutional autonomy in Minnesota from Michigan and California (*Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 638 N.W.2d 274 (Minn. 2004)). In *Star Tribune* the Supreme Court of Minnesota stated that the Regents' constitutional autonomy did not "create an entity coordinate to the state government, or even coordinate to the legislature. Rather, the intent was to protect the internal management of the University from legislative interference" (p. 284). Rejecting an argument that the legislature must specifically name the university to make it subject to a generally applicable law, the court stated laws may regulate the university when the legislature seeks to promote the general welfare, the law is of general applicability and the act does not impede the Regents' internal management functions. While this limit on the Regents' authority comports with similar standards in Michigan and California, the opinion also refused to characterize the Regents as equivalent to the other branches of state government when exercising their constitutional powers. Unlike in California and Michigan, the Minnesota Supreme Court

clearly rejected the Regents as equivalent to a separate branch of state government. In addition, the court in *Star Tribune* discussed that the legislature may impose reasonable conditions on the Regents beyond the context of appropriations. In declining to view the Regents as occupying a special and separate niche in state government, the decision potentially provided room for future decisions to place more restrictions on the Regents than courts in Michigan and California would permit.

Despite language in *Star Tribune* that may result in a more restricted grant of constitutional autonomy in Minnesota than in Michigan and California, decisions also reaffirmed that the Regents enjoy substantial independent authority in relation to the internal management of the University of Minnesota. Cases located since Beckham's (1977, 1978) study reveal constitutional autonomy as enjoying continued legal strength and relevance in the state.

#### *Moderate to Limited Judicial Recognition*

Court decisions in six states (Louisiana, Montana, Nevada, New Mexico, North Dakota and Oklahoma) and attorney general opinions in Idaho confirm the existence of moderate to limited constitutional authority for public higher education governing boards. When Beckham (1977, 1978) conducted his study, New Mexico courts had not issued decisions regarding constitutional autonomy, but have since issued an opinion. In Louisiana, the state added a new constitutional autonomy provision in 1998 related to community and technical colleges that has received judicial interpretation. These seven states are primarily differentiated from Michigan, California and Minnesota on the basis of the degree of autonomy granted, with legislatures in these states appearing to exercise

more legal control over the governing boards in their states. Judicial opinions in these states also have not offered as comprehensive a legal framework for constitutional autonomy as exists in California, Michigan and Minnesota. Despite less extensive legal recognition of constitutional autonomy than the three previously discussed states, courts in these seven states recognize varying degrees of independent constitutional authority.

*Idaho.*

While no new court cases affirming constitutional autonomy were located for Idaho, state Attorney General Opinions indicate continued legal recognition for the Regents of the University of Idaho (see *Dreps v. Bd. of Regents of the Univ. of Idaho*, 139 P.2d 467 (Idaho 1943)). The Attorney General Opinions advised that the Regents exercised control over university endowment funds (2000 *Op. Atty Gen. Idaho* 45, 2000 *Ida. AG LEXIS* 2 (2000)) and that municipal building codes could not be applied to the university (1981 *Op. Atty Gen. Idaho* 221, 1981 *Ida. AG LEXIS* 27 (1981)). While indicating continued judicial recognition of constitutional autonomy in the state, a lack of case law makes assessment concerning the current status of constitutional autonomy somewhat difficult. Still, Idaho continues as a state with judicial recognition of constitutional autonomy.

*Louisiana.*

Constitutional autonomy in Louisiana operates at multiple levels, consisting of a constitutionally authorized statewide board for all of higher education, a Board of Supervisors for two-year institutions with constitutional authority and grants of

independent constitutional power for the boards of supervisors or trustees for several individual institutions (La. Const. art. VIII). A significant development for constitutional autonomy in Louisiana since Beckham's (1977, 1978) study involves a 1998 constitutional amendment that created a constitutionally empowered board for technical and community colleges (*Delahoussaye v. Bd. of Supervisors of Cmty. and Technical Colls.*, 906 So. 2d 646 (La. Ct. App. 2005)). Decisions and Attorney General Opinions located for the study reveal that Louisiana represents a state with clear judicial recognition of constitutional autonomy, though state courts have not fully articulated the boundaries of independent constitutional authority for higher education in the state. Cases decided since 1977, however, provide some additional guidance regarding the legal relationship between the statewide Board of Regents and boards of supervisors or trustees for individual institutions. Overall, the legal decisions in the past thirty years demonstrate continued judicial support for constitutional autonomy in Louisiana.

Beckham (1977) discussed the creation of a constitutionally authorized statewide governing board with the ratification of a new state constitution in 1974, which left undetermined the relationship between the state board and governing boards for individual institutions. Unlike in Michigan, where a constitutionally authorized statewide board may not override the constitutional authority of institutional governing boards (Beckham 1977, 1978), the statewide governing board in Louisiana possesses extensive legal authority.

A 2003 case, tracking constitutional language, offered the following regarding the relationship between the statewide Board of Regents and the governing boards of individual institutions:

[T]he Board of Regents was created . . . to manage the following functions of all postsecondary education: to exercise budgetary responsibility; to approve, disapprove, modify, revise, or eliminate an existing proposed degree program, department of instruction, division, or similar subdivision; to study the need for and feasibility of creating a new institution of postsecondary education, including modifying degree programs, merging institutions of postsecondary education, establishing a new management board, or transferring a college from one board to another; to formulate and make timely revision of a master plan for postsecondary education that shall include a formula for equitable distribution of funds . . . ; to require that every postsecondary education board submit to it an annual budget . . . ; submit its budget recommendations for all institutions of postsecondary education in the state; and recommend priorities for capital construction and improvements. (*La. Pub. Facilities Auth. v. All Taxpayers*, 868 So. 2d 124, 134 (La. Ct. App. 2003))

The opinion makes clear that the statewide Board of Regents exercises considerable authority over institutions. In Louisiana, then, the statewide governing board enjoys a level of authority over institutions seemingly much greater than that of the statewide board in Michigan. Boards of supervisors or trustees for individual institutions, however, retain any powers not specifically vested in the Board of Regents. The court described the



statewide Board of Regents as possessing “ultimate budgetary and curricular control” with the other boards retaining “all other decision-making responsibility” (p. 134).

A 1983 decision illustrates how constitutional autonomy may limit application of a general state law to the statewide Board (*Grace v. Bd. of Trustees for State Colls. and Univs.*, 442 So. 2d 598 (La. Ct. App. 1983)). In *Grace*, faculty members at Northeast Louisiana University sought to rely on the state’s administrative procedures act in pursuing remedies for faculty grievances. The court discussed how the state’s 1974 constitution elevated the statewide Board to constitutional status, giving it independent authority to enact rules for institutions under the Board’s control. The court held that the Board’s constitutional authority prohibited enforcement of the state’s administrative procedures law in this situation because applying the statute would unduly interfere with the Board’s discretion to manage the affairs of institutions under its control.

A 1986 case raised the issue of the statewide Board of Regents’ authority in relation to the legislature and to individual institutions (*Bd. of Regents v. Bd. of Trustees for State Colls. and Univs.*, 491 So. 2d 399 (La. Ct. App. 1986)). The case involved a dispute over changing the name of a university with the statewide Board of Regents and trustees for the school both claiming the authority to determine the institution’s name. Deciding for neither, the court held that the state legislature possesses the authority to name institutions. The case demonstrates that in Louisiana debates over constitutional autonomy may continue to involve the legal relationship between the statewide Board, governing boards of individual institutions and the legislature.

Two Attorney General Opinions have addressed issues related to the statewide Board and institutional governing boards. One opinion stated that the authority to

appoint chancellors and presidents could not be transferred to the statewide Board because this was not a power granted it in the constitution (*La. Atty. Gen. Op. No. 1996-491, 1996 La. AG LEXIS 367* (1996)). Another 1996 Attorney General Opinion advised that the statewide Board had to follow the notice requirements of the state's Administrative Procedures Act in enacting regulations that affected institutions (*La. Atty. Gen. Op. No. 1996-491, 1996 La. AG LEXIS 367* (1996)). Though not court decisions, these Attorney General Opinions indicate that the statewide Board's powers may not encroach beyond their enumerated authority and must respect the constitutional authority given to individual institutional governing boards.

In addition to four-year institutions, constitutional autonomy in Louisiana has also come to encompass community and technical colleges. A 2005 case raised the issue of the extent of constitutional autonomy for the Board of Supervisors for community and technical colleges stemming from a 1998 constitutional amendment (*Delahoussaye v. Bd. of Supervisors of Community and Technical Colls.*, 906 So. 2d 646 (La. Ct. App. 2005)). The court did not rule in favor of the Board of Supervisors on all issues or elaborate on the extent of constitutional authority, but the opinion described the Board as possessing self-executing powers not requiring a legislative grant of authority. The decision supports the expansion of constitutional autonomy to technical and community colleges, a new development since Beckham's (1977, 1978) study.

Louisiana courts have maintained judicial support for constitutional autonomy, continuing the judicial pattern identified by Beckham (1977, 1978). While clearer than 30 years ago, future cases may better delineate the boundaries between the statewide Board of Regents and governing boards of individual schools. However future opinions

determine its exact legal boundaries, constitutional autonomy represents a well-established legal doctrine in Louisiana.

*Montana.*

Though with only one decision since 1977 directly addressing constitutional autonomy, Montana courts continue to uphold constitutional autonomy for the Board of Regents of the Montana University System, confirming the conclusion reached by Beckham (1977, 1978). Despite this judicial recognition, a dearth of cases means that no comprehensive legal description of the nature of constitutional autonomy has emerged in the state. In the one case located for the study, the Montana Supreme Court considered whether the renting of university property to private parties, as permitted under state law, represented an unlawful delegation of legislative authority to the Board of Regents (*Duck Inn, Inc. v. Mont. State University-Northern*, 949 P.2d 1179 (1997)). The court's decision to allow the policy rested in part on the constitutional authority granted to the Regents. The court looked upon this independent grant of authority as warranting more relaxed judicial scrutiny of decisions made by the Board, a position taken by courts in other states with constitutional autonomy. While not elaborating on the extent of constitutional authority, a 1978 Attorney General Opinion noted the independent constitutional authority given the Regents even while advising that the university had to grant fee waivers to veterans (*37 Op. Atty. Gen Mont. 698, 1978 Mont. AG LEXIS 13* (1978)). The sparse case law in Montana has not elaborated on the constitutional powers granted to the Board of Regents identified by Beckham (1977, 1978) but some form of constitutional autonomy persists as a judicially accepted legal doctrine.

*Oklahoma.*

Oklahoma courts, without defining its exact legal boundaries, continue to affirm the existence of constitutional autonomy in the state in the decades since Beckham's (1977, 1978) study. In a 1981 case, the Oklahoma Supreme Court stated "We have no doubt that in elevating the status of the Board from a statutory to a constitutional entity the people intended to limit legislative control over University affairs" (*Bd. of Regents of the Univ. of Okla. v. Baker*, 638 P.2d 464 (Okla. 1981)). In *Baker*, the court found salary determinations a key component of the internal management functions of the Board of Regents of the University of Oklahoma. While explicitly re-acknowledging the existence of constitutional autonomy in Oklahoma, the court in *Baker* declined to flesh out the overall extent of this autonomy. The court did state that the constitution leaves major governance decisions with the Regents, though pointing out that constitutional autonomy in Oklahoma was not necessarily equivalent to that in other states. Still, the language suggests strong judicial support for constitutional autonomy, representing continuity with the findings of Beckham.

Attorney General Opinions have dealt with several instances of whether or not the Regents must abide by statewide laws. One opinion advised that the university did not suffer an encroachment on constitutional authority in being made to follow state purchasing requirements (*19 Op. Atty. Gen. Okla. 16, 1988 Okla. AG LEXIS 9 (1988)*), but other opinions advised that the Regents' legal status excluded them from various generally applicable laws, especially regarding control over employment-related issues (*No. 91-6, 23 Op. Atty. Gen. Okla. 41, 1992 Okla. AG LEXIS 7 (1992)*; *No. 92-10, 24 Op. Atty. Gen. Okla., 1992 Okla. AG LEXIS 14 (1992)*; *No. 95-12, 1996 Okla. AG LEXIS 30*

(1996)). Oklahoma lacks the extensive case law of Michigan, California or Minnesota, but the *Baker* opinion suggests that constitutional autonomy in the state continues as a meaningful legal doctrine.

### *Nevada*

Opinions in Nevada since 1977 upheld the legal doctrine of constitutional autonomy but indicate somewhat lukewarm judicial support of the doctrine. In several decisions, courts adopted more narrow legal interpretations of constitutional autonomy than advocated for by the Board of Regents of the University of Nevada System. In a 1981 case, the state's supreme court held that the Regents enjoy freedom from legislative influence only when a law sought to regulate essential university functions (*Bd. of Regents of the Univ. of Nev. System v. Oakley*, 637 P.2d 1199 (Nev. 1981)). The court also rejected that policies of the Regents stand on a legal footing akin to legislative acts for purposes of judicial scrutiny.

While not defining essential function, the language in *Oakley* may embrace a narrower grant of constitutional authority than in California, Michigan and Minnesota and potentially other states as well. Future cases might interpret the language as on par with decisions in other states using such terms as educational sphere or educational character or, alternatively, as an even narrower grant of independence than in other states. Though somewhat speculative, legal interpretations of constitutional autonomy in Nevada appear more restrictive than during Beckham's (1977, 1978) study. Future cases will determine whether a restricted form of constitutional autonomy emerges in the state, but constitutional autonomy has not received overall favorable treatment by state courts since

1977. Despite a seemingly more narrow judicial interpretation of constitutional autonomy since 1977, Nevada continues to belong among the states where courts recognize some form of constitutional autonomy.

*New Mexico.*

Beckham (1977, 1978) located no cases addressing constitutional autonomy in New Mexico, but a 1998 judicial decision from the state's supreme court appears to confirm the existence of constitutional autonomy in the state (*Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 962 P.2d 1236 (N.M. 1998)). The decision laid out basic principles of constitutional autonomy regarding the scope of authority granted the Regents. In the case, the court stated that the legislature may not impede the Regents' authority to make decisions related to the "education character" of the university, with the decision listing salary determinations, budget decisions and direct control over appropriations as illustrative of areas of the Regents' authority (p. 1250). Similar to language by courts in Michigan, California and Minnesota, the court stated that constitutional independence must yield to the legislature's police power when it acts to protect the general welfare through passage of generally applicable laws. One area that future cases may address concerns whether the term education character results in a more limited form of constitutional autonomy than what exists in other states. The court also described the Regents' autonomy as ill-defined, highlighting a lack of cases elaborating on the attributes of constitutional autonomy in the state. Despite some ambiguity and limited legal authority, New Mexico should join those states determined to possess some

form of constitutional autonomy. Future cases may flesh out the attributes of constitutional autonomy in the state.

*North Dakota.*

Identified by Beckham (1977, 1978) as a state in which recognition of constitutional autonomy was uncertain, a 2004 decision from the North Dakota Supreme Court indicated judicial recognition of constitutional autonomy in the state (*Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004)). In the case, involving the discharge of a tenured faculty member for alleged misconduct, the court described the North Dakota State Board of Higher Education as possessing independent constitutional powers. This power includes the authority to appoint and remove professors. As with several other states, the court stated that the constitutional authority granted to the Board merited relaxed judicial scrutiny, with the opinion characterizing the review as similar to reviewing an issue of separation of powers between branches of state government, language somewhat similar to decisions in Michigan and California. In the case, the court dealt with the question of whether or not factual findings by university officials sufficed for judicial review as opposed to the court undertaking an independent finding of facts. Despite demonstrating judicial deference to the Board's factual findings, the decision shed limited light on the legal scope of constitutional autonomy in relation to the extent of legislative authority over the Board of Higher Education. Similar to Montana and New Mexico, constitutional autonomy represents a legal doctrine accepted by courts but not one with extensive judicial interpretation.

*Limited Independence Subject to Extensive Legislative Control*

For Nebraska and South Dakota, a form of substantially limited constitutional autonomy may exist. In both states, court decisions indicate that, while subject to substantial legislative control, all power may not be removed from public governing boards. The states conceivably belong on the constitutional autonomy continuum, but they rest at the opposite end of this continuum from Michigan, California and Minnesota.

*Nebraska.*

Nebraska represents a state not identified by Beckham (1977, 1978) as enjoying constitutional autonomy based on constitutional language stating that the legislature may define the powers and responsibilities of the Board of Regents of the University of Nebraska. However, a 1977 decision indicates the Board or Regents may possess a substantially restricted form of constitutional autonomy (*Bd. of Regents of the Univ. of Neb. v. Exon*, 256 N.W.2d 330 (Neb. 1977)). In the decision, the Nebraska Supreme Court declared that the legislature enjoyed substantial authority in relation to defining the duties and authority of the Board, but also placed limits on this authority. The opinion stated that the legislature could not usurp all the “discretion and authority” enjoyed by the Regents (p. 333). The court struck down as overly prescriptive legislative conditions related to salaries, funds from private and federal sources, gifts to the university, and purchasing and auditing requirements (p. 333). The authority given the Regents stands inferior to that granted to other states, but still places limits on the legislature enjoying plenary control over the powers and duties of the Board of Regents.



*South Dakota.*

While Beckham (1977) described the legal status of constitutional autonomy in South Dakota as ambiguous due to a lack of decisions, cases located for this study were not supportive of substantial independence for the South Dakota Board of Regents but possibly for a significantly restricted form of autonomy. In decisions since Beckham's study the Board has been characterized as subject to legislative control with the exception that all authority may not be removed from the Board (*S.D. Bd. of Regents v. Heege*, 428 N.W.2d 535 (S.D. 1988); *S.D. Bd. of Regents v. Meierhenry*, 351 N.W.2d 450 (S.D. 1984)). Like Nebraska, a diluted form of constitutional autonomy may exist in the state but far removed from the legal autonomy enjoyed by governing boards in Michigan, California and Minnesota and even states with more moderate degrees of constitutional autonomy.

*States with Ambiguous/Unknown Legal Status for Constitutional Autonomy*

Limited case law for Florida and Georgia indicate uncertainty concerning judicial recognition of constitutional autonomy. In Florida the enactment of a 2003 constitutional provision raises the possibility of judicial recognition of constitutional autonomy, but the one case located addressing the issue resulted in a settlement agreement in which the court did not make an independent determination of the authority of a newly created statewide governing board. Beckham (1977, 1978) identified Georgia as a state appearing to grant constitutional autonomy but cases since then have offered inconsistent statements regarding judicial recognition of the legal doctrine.

*Florida.*

In Florida, a state constitutional provision added in 2003 creates the possibility that some form of constitutional autonomy exists (*United Faculty of Fla. v. Public Emp. Relations Comm.*, 898 So. 2d 96 (Fla. Ct. App. 2005)). The constitutional provision created the Board of Governors of the State University System as a statewide governing entity. A case involving the Board of Governors resulted in an agreement between parties concerning the Board's authorized powers, but this consent agreement does not represent a judicial determination of whether or not the Board enjoys some degree of constitutional autonomy. Future legal decisions hold the key to determining whether or not some form of constitutional autonomy exists in Florida.

*Georgia.*

In Georgia, state courts have issued ambiguous legal decisions concerning constitutional autonomy, at times appearing to refer to the independent authority of the Regents of the University System of Georgia (*Pollard v. Bd. of Regents of the Univ. System of Ga.*, 401 S.E.2d 272 (Ga. 1991)) and at other times discussing that the Regents must conform to state law (*Bd. Regents of the Univ. System of Ga. v. Doe*, 630 S.E.2d 85 (Ga. Ct. App. 2006)). Attorney General Opinions have also not offered clarification regarding constitutional autonomy with one opinion stating that the Regents must abide by state law (*No. 88-12, 1988 Op. Atty. Gen. Ga. 33, 1988 Ga. AG LEXIS 28* (1988)) and an informal opinion stating that the Regents possess independent constitutional authority that made a legislative directive to retain a reserve officer program at a university

inapplicable (*No. U96-12, 1996 Ga. AG LEXIS 24* (1996)). Inconsistent legal opinions make the status of constitutional autonomy ambiguous in Georgia.

#### *Lack of Judicial Recognition*

In Alabama, Alaska, Hawaii and Mississippi, courts, without outright rejection of constitutional autonomy, have either not issued opinions on the doctrine or have expressly declined to decide constitutional authority even with the issue raised by parties in cases. In Alabama, the state's supreme court has only gone so far as to prevent transferring control of the University of Alabama and Auburn University from their respective governing boards and declined to address any constitutional authority possessed by the boards (*Opinion of the Justices*, 417 So. 2d 96 (Ala. 1982)).

In Alaska, no additional cases since 1977 were located, but Attorney General Opinions discussed that state courts had offered unclear guidance concerning any independent constitutional authority for the University of Alaska (*1977 Op. Atty. Gen. Ala. No. 9, Alas. AG LEXIS 465* (1977)). These opinions do not suggest however that, even if judicially recognized, any significant degree of constitutional autonomy would exist in Alaska.

The Hawaii Supreme Court in a 1981 case stated that the Regents of the University of Hawaii must yield when the legislature acts on an issue of statewide concern (*Levi v. Univ. of Haw.*, 628 P.2d 1026 (Haw. 1981)). At first blush this language might appear similar to other states where constitutional autonomy exists. However, the Alaska constitution leaves sole discretion with the legislature to determine what constitutes a matter of statewide concern. Even if state courts eventually recognize some

degree of independent authority, language from *Levi* suggests the legislature possesses considerable legal authority over the Regents.

In Mississippi, courts have squarely refused to address claims regarding constitutional autonomy (*Bd. of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp.*, 478 So. 2d 269 (Miss. 1985)). Attorney General Opinions have also not indicated any legal recognition of constitutional autonomy in the state (1998 Miss. AG LEXIS 546 (1998); (1979 Miss. AG LEXIS 359 (1979))).

In these states, while the possibility of judicial recognition of constitutional autonomy lingers, the legal doctrine has seemingly resulted in no practical legal effect. While future cases may result in decisions dealing with the issue of constitutional autonomy, opinions issued so far do not indicate that constitutional autonomy enjoys any meaningful judicial recognition in these states. As such, these states should not be listed as among those states where constitutional autonomy is legally recognized. At most, constitutional autonomy in these six states represents an ambiguous legal doctrine with the potential for legal recognition doubtful. Despite this status, however, state courts also have not explicitly held that constitutional autonomy does not exist, and a future line of cases might recognize the legal doctrine in one or more of these states. Still, at this time constitutional autonomy appears to exert no to very limited practical legal effect for public higher education in these states.

#### *Negative Case Treatment or Judicial Recognition Denied*

For Arizona, Colorado, Missouri and Utah constitutional autonomy does not appear to exist as a viable legal doctrine. Beckham (1977) described the legal status of

constitutional autonomy as uncertain to doubtful in all four states and this study confirms that conclusion. As illustrated by a 2006 case, Arizona case law continues to characterize the Arizona Board of Regents as subject to extensive legislative authority (*Kromko v. Ariz. Bd. of Regents*, 165 P.3d 1016 (Ariz. 2007)). While not totally dismissive, Colorado courts have described the Regents as bound by legislative authority and more recent cases have not endorsed independent authority for the Regents (see, e.g., *Colo. Civil Rights Comm'n v. Regents of the Univ. of Colo.*, 759 P.2d 726 (Colo. 1988)). In Missouri, research did not locate new opinions but an Attorney General Opinion described case law in the state as not recognizing constitutional autonomy (1977 Mo. AG LEXIS 68 (1977)). The status is even more certain in Utah where the state's supreme court expressly rejected any form of constitutional autonomy for the University of Utah in 2006 (*Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006)).

*Research Question 2: Constitutional Autonomy Interpreted Using the Concepts of  
Substantive and Procedural Autonomy*

Another aim of this study centers on analyzing the legal doctrine of constitutional autonomy through the concepts of substantive and procedural autonomy found in the higher education literature. While the specific legal attributes of constitutional autonomy depend on constitutional language and decisions from state courts, the concepts of substantive and procedural autonomy reflect the work of higher education scholars to categorize and analyze issues related to higher education governance. Despite the legal doctrine seemingly sharing much overlap with the concepts derived from the higher

education literature, constitutional autonomy and procedural and substantive autonomy have developed in largely different intellectual and professional arenas.

Previous literature dealing with constitutional autonomy, with the exception of Glenny and Dalglish (1973), has largely not attempted to fully analyze the legal doctrine of constitutional autonomy within the context of autonomy as discussed in the higher education literature. Instead, authors have tended to categorize constitutional autonomy on the two bases of strong or weak grants of autonomy and/or the areas of law (such as laws related to health, employment or finance) considered in constitutional autonomy cases (see, e.g., McKnight, 2004). Thus, while autonomy represents an important theme in the field of higher education, the legal doctrine of constitutional autonomy stands incompletely analyzed and is not fully integrated into the larger higher education literature. This study provides an initial foray into using these two concepts from the higher education literature to analyze constitutional autonomy. The author hopes this analytical approach may open the door to making constitutional autonomy more relevant to scholarship and policy discourse related to autonomy in higher education.

Altbach, Berdahl, and Gumport (1999) define autonomy as “the power to govern without outside controls” (p. 5). Substantive autonomy refers to “the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)” (p. 6). Procedural autonomy relates to the “power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe)” (p. 6).

Constitutional autonomy provisions would seem to affect procedural and substantive autonomy by placing limits on ways in which state governmental authorities

regulate public higher education institutions. Rather than placing ultimate legal control over higher education with the legislative and/or executive branches of state government, constitutional autonomy provisions shift part of this responsibility to constitutionally empowered governing boards.

Altbach, Berdahl, and Gumport (1999) cite Asby (1966) as providing three central areas of freedom needed by university governing authorities to ensure and protect substantive autonomy: (1) control over selection of students and employees and the conditions required to remain enrolled or employed with an institution; (2) control over curriculum content and degree standards; and (3) and control over allocations of funds. These three areas served as organizing categories to assess the relationship between constitutional autonomy and substantive autonomy based on cases located for this study.

The following sub-sections consider constitutional autonomy cases in relation to the concepts of substantive autonomy and procedural autonomy. Constitutional autonomy is first assessed using the concept of substantive autonomy, with analysis guided by the three categories identified by Asby (1966). Discussion then turns to an assessment of constitutional autonomy based on the concept of procedural autonomy.

### *Substantive Autonomy*

#### *Control over Employees and Students.*

A number of cases dealt with issues related to employment. Courts consistently relied on constitutional autonomy provisions to resolve issues related to employment, often bowing to the discretion of institutions.

One area involving employment in which constitutional autonomy shielded universities in several states dealt with judicial deference to university administrative decisions, such as in tenure denials or employee discipline procedures. In these cases, courts showed deference to institutional decisions by only reviewing institutional findings of facts using a reasonableness standard as opposed to an independent judicial inquiry of facts, making claimants exhaust administrative remedies before pursuing legal action, limiting access to employment records, prohibiting application of general employment laws and treating university policies as equivalent to statutes for purposes of judicial review.

Several cases illustrate these areas of decision. A Minnesota professor denied tenure could only gain judicial review through a writ of certiorari, a permissive grant of judicial review (*Kobluk v. Regents of the Univ. of Minn.*, 1998 WL 297525 (Minn. Ct. App. June 9, 1998)). In Michigan, a professor denied a promotion and raise could not gain access to employment records that might identify anonymous peer reviewers (*Muskovitz v. Lubbers*, 452 N.W.2d 854 (Mich. Ct. App. 1990)). Minnesota and California decisions required claimants to exhaust administrative grievance procedures before filing suit (*Stephens v. Bd. of Regents of the Univ. of Minn.*, 614 N.W.2d 764 (Minn. Ct. App. 2000); *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976 (Cal. 2005)). In Louisiana constitutional autonomy prohibited application of the state's administrative procedures act to issues determined to involve internal management decisions (*Grace v. Bd. of Trustees for State Colls. and Univs.*, 442 So. 2d 598 (La. Ct. App. 1983)). In California, constitutional autonomy shielded the Regents from local prevailing wage laws (*San Francisco Labor Council v. Regents of the Univ. of Cal.*, 608



P.2d 277 (Cal. 1980)). The outcome in several employment cases turned in part on treating university policies as akin to state laws for judicial review (see, e.g., *Kim v. Regents of the Univ. of Cal.*, 80 Cal. App. 4th 160 (2000)).

The reach of constitutional autonomy in relation to employee salaries represented a consistent theme in such cases as *San Francisco Labor Council*. The Oklahoma Supreme Court held that salary determinations comprise a key internal management function protected by constitutional authority (*Bd. of Regents of the Univ. of Okla. v. Baker*, 638 P.2d 464 (Okla. 1981)). Even in a state with a weaker form of constitutional autonomy, the Nebraska Supreme Court struck down several legislative salary provisions in a 1977 case as overly prescriptive (*Bd. of Regents of the Univ. of Neb. v. Exon*, 256 N.W. 2d 330 (Neb. 1977)).

While constitutional autonomy often protected institutional control over employment matters, cases revealed that universities did not always prevail in litigation in this area. In Michigan, a state court held that permitting family benefits to same-sex couples as part of the collective bargaining process violated clearly established state public policy (*Pride at Work, Inc. v. Governor of Mich.*, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007)). Another Michigan case dealt with the permissibility of promotion and tenure issues as acceptable matters for collective bargaining despite arguments by the university that such issues touched on educational matters and threatened to encroach on constitutional autonomy (*Cent. Mich. Fac. Assoc. v. Cent. Mich. Univ.*, 273 N.W.2d 21 (Mich. 1981)). The University of Minnesota Board of Regents argued unsuccessfully that applying the state's open meeting law impeded presidential searches and, thus, violated constitutional autonomy (*Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 638

N.W.2d 274 (Minn. 2004)). The decisions show that constitutional autonomy does not provide absolute control over issues related to employment.

Despite limitations in some decisions, the cases make clear that constitutional autonomy provisions enhance legal guarantees of governing boards to determine policies affecting employees. Constitutional autonomy certainly does not represent a complete bar to state governmental influence in the employee context, but the cases suggest that constitutional autonomy has relevance regarding substantive autonomy in the employment context.

Though not as many cases as those dealing with employees, research also located decisions involving authority over students in the areas of academic discipline and student speech. In a federal case, the court held that the University of Michigan possessed authority to revoke degrees based on academic fraud, resting its decision in part on the constitutional autonomy enjoyed by the school's Board of Regents (*Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987)). In another case involving the University of Michigan, a court referred to the extensive deference given to universities in educational matters in upholding the dismissal of a student for violating the school's honor code (*Imtiaz v. Bd. of Regents of the Univ. of Mich.*, 2006 WL 510057 (Mich. Ct. App. March 2, 2006)). In a California case, the state's supreme court offered constitutional autonomy as one ground to permit the assessment of mandatory student fees (*Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500 (Cal. 1993)). One reason, somewhat speculative, for the paucity of student cases probably stems from the fact that such cases often center on federal constitutional claims. The cases located though support the conclusion that constitutional autonomy enhances institutional legal authority to make decisions

concerning students. However, research for this study suggests that constitutional autonomy provisions do not largely appear a basis relied upon by institutions to defend actions taken against students in relation to student discipline. Additionally, as discussed in the following sub-section, the issue of constitutional autonomy and control over issues related to students appears more relevant in the context of curriculum and academic content.

*Control over Curriculum and Academic Content.*

The cases also suggest that constitutional autonomy protects substantive autonomy regarding curriculum and degree requirements. In fact some of the strongest language in cases located for the study described academic issues as obvious examples of when constitutional autonomy concerns are triggered. In Minnesota and California, courts consistently point out that constitutional autonomy shields the internal control and management of institutions from undue governmental control. Opinions in other states indicate that constitutional autonomy covers curriculum and academic content, even in those states enjoying a weaker form of constitutional autonomy than Michigan, California and Minnesota. A 1981 Nevada decision stated that the constitutional power of the Board of Regents of the University of Nevada is violated when legislation interferes with the Board's essential management functions (*Bd. of Regents of the Univ. of Nev. Sys. v. Oakley*, 637 P.2d 1199 (Nev. 1981)). In New Mexico, the state's highest court issued an opinion stating that legislative enactments may not interfere with the Regents' ability to make decisions concerning the "education character" of the University of New Mexico (*Fed'n of Teachers*, 962 P.2d 1236, 1250 (N.M. 1998)). Without greatly elaborating on

the term education character, the opinion indicates that issues related to such matters as curriculum or faculty selection raise constitutional autonomy concerns.

A plausible reason for the lack of litigation during the past three decades directly addressing curriculum and academic standards is the general acceptance that, at a minimum, constitutional autonomy applies to these areas. The Minnesota Supreme Court, for example, described interference in academic matters as clearly not permissible under constitutional autonomy (*Univ. of Minn. v. Lord*, 257 N.W.2d 796 (Minn. 1977)). Language in this decision and in other cases indicates that constitutional autonomy applies to curriculum and academic content. Even in states with limited or moderate judicial recognition of constitutional autonomy, legislative encroachment on curriculum and other academic matters would likely trigger constitutional autonomy concerns.

#### *Control over Funds.*

Just as some of the earliest constitutional autonomy cases dealt with control over university funds (Beckham 1977, 1978), cases located for this study show continued relevance for constitutional autonomy in the area of finance. In a 1988 decision, a Michigan court stated that governing boards possess “fiscal autonomy” (*Regents of the Univ. of Mich. v. State*, 419 N.W.2d 773, 777 (Mich. Ct. App. 1988)). In a later case, the Michigan Supreme Court noted that governing boards exercise “complete power over financial decisions” involving their universities (*Andrew Comp. v. Mid-State Surety Corp.*, 450 Mich. 655, 662 (Mich. 1996)). In cases in other states, courts have also rendered decisions upholding the authority of governing boards to direct decisions regarding university funds and other forms of property (see, e.g., *Duck Inn, Inc. v. Mont.*

*State University-Northern*, 949 P.2d (Mont. 1979)). Court decisions have also limited legislative efforts to control employee salaries and funds derived from federal and private sources (*San Francisco Labor Council v. Regents of the Univ. of Cal.* (Cal. 1980); *Bd. of Regents of the Univ. of Neb. v. Exon*, 256 N.W.2d 330 (Neb. 1977)).

While research located favorable decisions regarding university funds and finances, universities do not enjoy absolute autonomy in this area. Beckham (1977, 1978) and Glenny and Dalglis (1973) discuss how legislatures may impose reasonable conditions on appropriations to universities, and the cases located for this study do not contradict this position. The cases demonstrate that state courts consistently consider constitutional autonomy to encompass issues related to university finances and property. In the case of Michigan, court decisions describe this power as extensive. Even in Nebraska, with a more diluted form of constitutional autonomy than other states, constitutional autonomy may curtail excessive legislative control over university funds. Issues related to finance clearly fall under the constitutional autonomy umbrella.

#### *Procedural Autonomy*

The concept of procedural autonomy also seems to be a useful concept to assess constitutional autonomy. For Michigan, Minnesota and California, procedural autonomy appears nested within the strong grants of substantive autonomy already guaranteed in constitutional autonomy provisions. In addition to controlling much of the “*what*” concerning institutional goals and priorities, institutions in these states exercise extensive control over the “*how*” as well. The Regents of the University of California are meant “to operate as independently of the state as possible” (*Kim*, 80 Cal. App. 4th at 166).

Michigan and Minnesota cases also discuss the extensive authority that constitutional autonomy vests in governing boards to make decisions related to the internal management of institutions under their legal control, referring at times to this power as almost absolute. In these states, procedural autonomy appears to be included within the strong grants of substantive autonomy that result from constitutional autonomy.

Constitutional autonomy may play an even more important role concerning procedural autonomy for those states with moderate to restricted forms of constitutional autonomy. In these states, while the legislature may predominate in matters of substantive autonomy, constitutional autonomy might require that certain discretion be left to institutions in carrying out these aims. At a basic level, a constitutional provision may prohibit the legislature from divesting a governing board of all control over higher education (*Evans v. Andrus*, 855 P.2d 467 (Idaho 1993); *S.D. Bd. of Regents v. Heege*, 428 N.W.2d 535 (S.D. 1988); *Opinion of the Justices*, 417 So. 2d 96 (Ala. 1982)).

The *Exon* (1977) decision from Nebraska shows how a constitutional autonomy provision may vest certain procedural autonomy with a governing board, even if it does not provide substantive autonomy. The case dealt with a series of legislative requirements that pertained to university funds, faculty salaries, repair and construction of facilities, requirements on data processing and accounting procedures. The state's supreme court held that the act impinged too much on the authority of the Board of Regents of the University of Nebraska. Despite noting the legislature's substantial authority to define the duties and obligations of the Regents, the court stated that management of the university must remain under the Regents' control. Accordingly,

constitutional autonomy in Nebraska may confer little substantive autonomy but appears to reserve certain procedural autonomy to the Board of Regents.

In another illustrative case, *Grace v. Board of Trustees for State Colleges and Universities* (1983), a Louisiana court declined to apply the state's administrative procedures act to a state university. While other state agencies in Louisiana had to follow administrative regulations established in the statute, constitutional autonomy prohibited the state from mandating these regulations at the university. The opinion discussed that constitutional autonomy sought to restrict legislative interference with the management of university operations.

Decisions in Montana involving rental of university facilities to private groups or individuals and in Oklahoma dealing with the authority of a state merit employment agency over higher education also appear to touch on issues related to procedural autonomy (*Duck Inn*, 949 P.2d 1179 (Mont. 1979); *Okla. ex rel. Bd. of Regents of Okla. State Univ. v. Okla. Merit Protection Comm'n*, 19 P.3d 865 (Okla. 2001)). As with the cases from Louisiana and Nebraska, these decisions indicate both governing boards enjoy certain constitutional discretion regarding the day-to-day operations of institutions under their control, even if not approaching the scope of legal control exercised by governing boards in Michigan, California and Minnesota. Constitutional autonomy may act to preserve the procedural autonomy a university possesses.

While only representing an initial step in attempting to better link the legal doctrine of constitutional autonomy with the concepts of substantive and procedural autonomy, analysis of cases from this study provides a promising start. Substantive autonomy and procedural autonomy appear to be useful concepts in analyzing

constitutional autonomy. For states with judicial recognition of a strong degree of independent authority, constitutional autonomy appears to vest governing boards with significant substantive autonomy.

Procedural autonomy seems to provide an especially helpful analytical lens in relation to governing boards possessing moderate to restricted forms of constitutional autonomy. Even if not exercising the same degree of constitutional control over the “*what*” of academe as institutions in Michigan, California and Michigan, governing boards in other states identified with some degree of constitutional autonomy may possess meaningful authority in relation to the “*how*” of academe. That is, these institutions may retain certain independent control over the methods or means to achieve substantive goals identified by the legislature. In areas such as hiring, salaries, accounting procedures, purchasing practices, control over funds not from legislative appropriations and specific decisions related to academic programs, constitutional autonomy may result in limits on legislative control over governing boards. When examined with other forms of data besides legal opinions, such as interviews with higher education officials and lawmakers and non-legal documents, substantive and procedural autonomy may result in more complete understanding of how constitutional autonomy impacts issues related to higher education governance.

### Conclusions

Michigan, California and Minnesota continue to represent the preeminent states with judicially recognized constitutional autonomy for public higher education governing boards. Research found additional or new cases affirming continued judicial recognition



of constitutional autonomy for six states, Louisiana, Montana, Nevada, New Mexico, North Dakota and Oklahoma, though without the extensive case law as the previously mentioned trio. In Idaho, though no new case law was located, advisory legal opinions from the state's attorney general support the continued legal recognition of constitutional autonomy in the state. A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota. In Florida and Georgia the legal status of constitutional autonomy is ambiguous. The status of constitutional autonomy was still not completely settled in Alabama, Alaska, Hawaii and Mississippi, but cases suggest that judicial recognition of constitutional autonomy in these states is unlikely or, at most, that a severely restricted form of constitutional autonomy exists. For Arizona, Colorado, Missouri and Utah, legal decisions or attorney general opinions indicate that constitutional autonomy does not enjoy judicial recognition. Table 6.1 summarizes these findings and Table 6.2 compares the findings of this study with the findings of Beckham's (1977, 1978) study.

Table 6.1. *Current Status of Judicially Recognized Constitutional Autonomy*

Affirmative Judicial Recognition		
Substantial Recognition, Extensive Constitutional Autonomy	Moderate-Limited Recognition, Varying Degrees of Constitutional Autonomy	Judicial Recognition, Constitutional Autonomy Subject to Extensive Legislative Control
California Michigan Minnesota	Idaho Louisiana Montana Nevada New Mexico North Dakota Oklahoma	Nebraska South Dakota
Judicial Rejection of Constitutional Autonomy		
	Arizona Colorado Missouri Utah	
Ambiguous Recognition		
	Florida Georgia	
No Judicial Recognition/Recognition Doubtful		
	Alabama Alaska Hawaii Mississippi	

Table 6.2 *Comparison of Beckham's (1977, 1978) and Hutchens' Findings of States Recognizing Constitutional Autonomy of Higher Education Governing Boards*

Beckham (1977, 1978)	Hutchens
States with Judicial Recognition of Constitutional Autonomy	
California	California
Georgia	---
Idaho	Idaho
Louisiana	Louisiana
Michigan	Michigan
Minnesota	Minnesota
Montana	Montana
---	Nebraska
	(Subject to Extensive Legislative Control)
Nevada	Nevada
---	New Mexico
---	North Dakota
Oklahoma	Oklahoma
---	South Dakota
	(Subject to Extensive Legislative Control)
States Where Courts Have Not Addressed Constitutional Autonomy or Ambiguous Judicial Treatment	
Alabama	---
---	Florida
---	Georgia
Hawaii	---
New Mexico	---
North Dakota	---
South Dakota	---
States Where Courts Have Rejected Constitutional Autonomy or Judicial Recognition Doubtful	
---	Alabama
Alaska	Alaska
Arizona	Arizona
Colorado	Colorado
---	Hawaii
Mississippi	Mississippi
Missouri	Missouri
Utah	Utah

Judicial recognition of extensive constitutional authority for the Board of Regents of the University of California illustrates that constitutional language alone proves insufficient to gauge the authority possessed by governing boards with independent constitutional power. Beckham (1977) initially did not group California among the 10 states that appeared to give unrestricted constitutional autonomy to public higher education in their state constitutions. However, cases discussed by Beckham and new cases analyzed for this study show that only Michigan and perhaps Minnesota rival the constitutional autonomy that exists in California due to legal interpretations rendered by state courts. In contrast, in Utah, one of the initial 10 states identified by Beckham as appearing to grant unrestricted autonomy, the state's supreme court held in a 2006 decision that constitutional autonomy does not exist in the state (*Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006)).

In four of the 10 states initially identified by Beckham as seeming to grant unrestricted constitutional autonomy based on their state constitution, courts in Missouri and Utah have expressly rejected the doctrine, Alabama courts have refused to weigh in on the issue even when brought up by parties in litigation, and Georgia courts have issued ambiguous decisions. In four of the other 10 states (Louisiana Montana, Oklahoma and North Dakota) judicial recognition exists but not at the same level in California. While constitutional language is an important starting point to assess constitutional autonomy, judicial interpretations of constitutional provisions are key in understanding the legal scope of constitutional autonomy for public higher education governing boards.

In addition to showing the importance of ongoing assessment of legal opinions to understand the current status of constitutional autonomy, another basic outcome from

cases analyzed in the study is the finding that constitutional autonomy continues as a distinctive governance mechanism in American higher education. While not incorporated into large numbers of state constitutions, constitutional autonomy did not appear to decline as predicted by Glenny and Dalglis (1973). Though not undergoing any great expansion, the legal status of constitutional autonomy has remained largely stable. While several states identified by Beckham (1977, 1978) have dropped from the constitutional autonomy radar screen, other states have emerged for consideration. Among the states recognizing constitutional autonomy, cases indicate that the doctrine provides meaningful constitutional legal protections to governing boards granted constitutional authority.

In assessing the constitutional independence vested by constitutional autonomy provisions, the concepts of procedural and substantive autonomy, derived from the higher education literature, provide a useful analytical lens. Analysis using the concepts of procedural and substantive autonomy indicates that constitutional autonomy provisions provide a strong legal mechanism to support institutional autonomy. Furthermore, rather than simply describing states as possessing strong or weak constitutional autonomy, the concepts of procedural and substantive autonomy appear useful in allowing a better understanding of the legal impact of constitutional autonomy provisions on institutional autonomy.

### Implications

This study has at least three implications for theory, policy and practice. First, the findings provide higher education leaders and researchers with up-to-date and accurate

information regarding the legal status of constitutional autonomy in particular states. Specifically, this study shows that Michigan, California and Minnesota continue to represent the states with the most well developed legal recognition of constitutional autonomy and deserve special recognition in considerations regarding constitutional autonomy. The findings of the study provide evidence to add New Mexico to the states with judicially confirmed constitutional autonomy and identified Nebraska and South Dakota as enjoying perhaps a substantially restricted form of constitutional autonomy. The findings of the study also indicate that a constitutional provision in Florida may result in judicial recognition of constitutional autonomy depending on future case law. The findings provide conclusive evidence for removing Utah from the list of states with constitutional autonomy and strongly indicate limited to no relevance for the legal doctrine in Alabama, Alaska, Hawaii and Mississippi. These findings demonstrate that constitutional autonomy, rather than being a static legal doctrine, evolves in response to new cases and constitutional provisions. The study also shows that substantial variations exist regarding the legal scope of constitutional autonomy among states.

Second, the research contributes to theory by applying the concepts of procedural and substantive autonomy to the legal doctrine of constitutional autonomy. The findings show that legal interpretations of constitutional autonomy provisions reflect attributes of procedural and substantive autonomy discussed in the higher education literature. The concepts of procedural and substantive autonomy provide a useful analytical lens to consider the impact of independent constitutional authority on institutional autonomy.

Third, the study demonstrates for policy makers and campus leaders specific instances in which constitutional provisions affect the autonomy of institutions. In such

areas as control over institutional funds, hiring of employees, mandatory student fees, acceptable uses of university property, freedom from municipal regulations, judicial deference to the decisions of university officials, and limits on applying general statewide laws to institutions, the study shows specific instances of constitutional autonomy limiting governmental oversight. This information may prove useful to actors in the particular states identified as possessing constitutional autonomy and individuals in other states weighing issues related to institutional autonomy. The study may also prove helpful in identifying areas of institutional autonomy desirable to protect, even if through means other than a constitutional provision.

#### Limitations and Delimitations of the Study

The study is limited to legal interpretations of constitutional autonomy provisions in state court cases and Attorney General Opinions. While constitutional grants of authority to public colleges and universities represent an important element affecting institutional autonomy, other legal, political, social and economic forces play significant roles as well (Glenny & Dalglish, 1973). A legal analysis of constitutional autonomy does not examine all aspects that affect and determine the amount of institutional autonomy enjoyed by a public college or university. Despite these limitations, the study does examine an important mechanism meant to limit excessive political interference with public higher education in some states.

Just as an analysis of constitutional autonomy cases does not encompass all forces impacting institutional autonomy, the analysis also cannot capture the complete legal extent to which constitutional autonomy provisions impact colleges and universities. A

legal standard may influence the behavior of individuals and institutions without ever being reflected in a legal decision. Case law does not provide as comprehensive an understanding of the impact of constitutional autonomy provisions that could come from the addition of other sources, such as non-legal documents or interviews with campus leaders and elected officials.

Rather than an end point, this analysis of constitutional autonomy cases provides a starting place for more research on the ways the legal doctrine affects institutional autonomy. Before further analyzing the impact of constitutional autonomy, one must clarify what states actually possess some form of independent constitutional authority recognized by courts and the legal scope of this authority as determined by case law. This study offers that clarification regarding the legal status of constitutional autonomy in particular states. Finally, the study offers an analysis of constitutional autonomy using the concepts of procedural and substantive autonomy, an approach that may enhance understanding of how the legal doctrine affects colleges and universities

#### Recommendations for Future Research

This study suggests at least three recommendations for future research. First, new assessments of the legal status of constitutional autonomy are periodically required. The importance of legal decisions in defining the scope of constitutional autonomy provisions means that future research will have to update the legal status of provisions among the states. Just as passage of time dated Beckham's (1977, 1978) research, this study will become stale due to the addition of new cases and/or constitutional provisions.



Second, the study suggests the need for additional research of constitutional autonomy that delves beyond case law. While cases are certainly one indication of the importance of constitutional autonomy in particular states, the ways in which legal doctrines affect institutional and individual behavior may not always appear in court decisions. For example, McKnight's (2004) guidebook on constitutional autonomy for Minnesota lawmakers indicates legislative awareness of constitutional autonomy. A legislator familiar with the legal doctrine might decide not to introduce a bill in the belief that it would likely encroach on constitutional autonomy. A review of cases, however, would not reveal this instance of constitutional autonomy influencing legislative behavior. State specific studies that encompass non-legal documents and interviews with key higher education stakeholders may better illuminate the impact of constitutional autonomy provisions. Though a legal doctrine, constitutional autonomy may influence institutions in ways not readily captured in court opinions. Additionally, as Glenny and Dalglish (1973) note, multiple forces affect institutional autonomy in addition to constitutional authority, and future research could explore the ways in which constitutional autonomy interacts with these various social, political and economic forces.

A third area for future research involves consideration of constitutional autonomy in relation to federal First Amendment protections for institutions and individuals. At least one author, Petroski (2005), has explored how the doctrine of constitutional autonomy in California may inform understanding of federal legal conceptions of the First Amendment rights of institutions and individuals. Further research is needed, however, regarding similarities and differences between state constitutional autonomy and federal First Amendment protections relevant to higher education. The need for

research in this area is noteworthy since, as Petroski discusses, considerable uncertainty and disagreement have emerged over federal legal conceptions of academic freedom. The controversy centers over whether any cohesive doctrine of academic freedom actually exists and, if so, whether First Amendment academic freedom primarily protects institutions as opposed to individuals

The U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), may have opened a new legal rift concerning the First Amendment protections of employees in the educational arena. In *Garcetti*, the Supreme Court held that when a public employee makes statements as part of his or her official duties, then such statements are not protected speech under the First Amendment. In the case, the court refused to answer a concern raised in Justice Souter's dissenting opinion concerning the impact of the decision on academic freedom at colleges and universities. With the federal legal doctrine of academic freedom in flux, studies that consider state constitutional autonomy may prove useful in scholarship and debates regarding the First Amendment protections of scholars, students and institutions.

This study shows that constitutional autonomy continues as an integral part of the governance structure of public higher education in a select number of states, and future research can better illuminate the ways in which the legal doctrine affects institutional autonomy and also potentially explore parallels between constitutional autonomy and federal First Amendment protections for scholars, students and institutions.

## APPENDIX

### CONSTITUTIONAL PROVISIONS OF STATES INCLUDED IN STUDY

#### Alabama Constitution

##### *Article 14, Section 264*

The state university shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the university is located, one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board . . . .

##### *Amendment 161, Section 1*

Auburn University, formerly called the Alabama Polytechnic Institute, shall be under the management and control of a board of trustees. The board of trustees shall consist of two members from the congressional district in which the institution is located, one from each of the other congressional districts in the state as the same were constituted on the first day of January, 1961, the state superintendent of education, and the governor, who shall be ex officio president of the board. The trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of twelve years, and until their successors shall be appointed and qualified.

#### Alaska Constitution

##### *Article VII, Section 2*

The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

##### *Article VII, Section 3*

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

#### Arizona Constitution

##### *Article XI, Section 1A*

The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include:

1. Kindergarten schools.
2. Common schools.
3. High schools.
4. Normal schools.

5. Industrial schools.

6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character. . . .

*Article XI, Section 5*

The regents of the university, and the governing boards of other state educational institutions, shall be appointed by the governor with the consent of the senate in the manner prescribed by law, except that the governor shall be, ex-officio, a member of the board of regents of the university.

California Constitution

*Article 9, Section 9*

(a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services. Said corporation shall be in form a board composed of seven ex officio members, which shall be: the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and the vice president of the alumni association of the university and the acting president of the university, and 18 appointive members appointed by the Governor and approved by the Senate, a majority of the membership concurring; provided, however that the present appointive members shall hold office until the expiration of their present terms.

...

(f) The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, or gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct; provided, however, that sales of university real property shall be subject to such competitive bidding procedures as may be provided by statute. Said corporation shall also have all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued, to use a seal, and to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. The Regents shall receive all funds derived from the sale of lands pursuant to the act of Congress of July 2, 1862, and any subsequent acts amendatory thereof. The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex.

(g) Meetings of the Regents of the University of California shall be public, with exceptions and notice requirements as may be provided by statute.

#### Colorado Constitution

##### *Article VIII, Section 5*

(1) The following educational institutions are declared to be state institutions of higher education: The university at Boulder, Colorado Springs, and Denver; the university at Fort Collins; the school of mines at Golden; and such other institutions of higher education as now exist or may hereafter be established by law if they are designated by law as state institutions. The establishment, management, and abolition of the state institutions shall be subject to the control of the state, under the provisions of the constitution and such laws and regulations as the general assembly may provide; except that the regents of the university at Boulder, Colorado Springs, and Denver may, whenever in their judgment the needs of that institution demand such action, establish, maintain, and conduct all or any part of the schools of medicine, dentistry, nursing, and pharmacy of the university, together with hospitals and supporting facilities and programs related to health, at Denver; and further, that nothing in this section shall be construed to prevent state educational institutions from giving temporary lecture courses in any part of the state, or conducting class excursions for the purpose of investigation and study; and provided further, that subject to prior approval by the general assembly, nothing in this section shall be construed to prevent the state institutions of higher education from hereafter establishing, maintaining, and conducting or discontinuing centers, medical centers, or branches of such institutions in any part of the state.

(2) The governing boards of the state institutions of higher education, whether established by this constitution or by law, shall have the general supervision of their respective institutions and the exclusive control and direction of all funds of and appropriations to their respective institutions, unless otherwise provided by law.

#### Florida Constitution

##### *Article IX, Section 7*

(a) **PURPOSES.** In order to achieve excellence through teaching students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies, the people hereby establish a system of governance for the state university system of Florida.

(b) **STATE UNIVERSITY SYSTEM.** There shall be a single state university system comprised of all public universities. A board of trustees shall administer each public university and a board of governors shall govern the state university system.

(c) **LOCAL BOARDS OF TRUSTEES.** Each local constituent university shall be administered by a board of trustees consisting of thirteen members dedicated to the purposes of the state university system. The board of governors shall establish the powers and duties of the boards of trustees. Each board of trustees shall consist of six citizen members appointed by the governor and five citizen members appointed by the board of

governors. The appointed members shall be confirmed by the senate and serve staggered terms of five years as provided by law. The chair of the faculty senate, or the equivalent, and the president of the student body of the university shall also be members.

(d) STATEWIDE BOARD OF GOVERNORS. The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs. The board's management shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law. The governor shall appoint to the board fourteen citizens dedicated to the purposes of the state university system. The appointed members shall be confirmed by the senate and serve staggered terms of seven years as provided by law. The commissioner of education, the chair of the advisory council of faculty senates, or the equivalent, and the president of the Florida student association, or the equivalent, shall also be members of the board.

## Georgia Constitution

### *Article VII, Section 4*

(a) There shall be a Board of Regents of the University System of Georgia which shall consist of one member from each congressional district in the state and five additional members from the state at large, appointed by the Governor and confirmed by the Senate. The Governor shall not be a member of said board. The members in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for seven years. Members shall serve until their successors are appointed and qualified. In the event of a vacancy on the board by death, resignation, removal, or any reason other than the expiration of a member's term, the Governor shall fill such vacancy; and the person so appointed shall serve until confirmed by the Senate and, upon confirmation, shall serve for the unexpired term of office.

(b) The board of regents shall have the exclusive authority to create new public colleges, junior colleges, and universities in the State of Georgia, subject to approval by majority vote in the House of Representatives and the Senate. Such vote shall not be required to change the status of a college, institution or university existing on the effective date of this Constitution. The government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents of the University System of Georgia.

(c) All appropriations made for the use of any or all institutions in the university system shall be paid to the board of regents in a lump sum, with the power and authority in said board to allocate and distribute the same among the institutions under its control in such way and manner and in such amounts as will further an efficient and economical administration of the university system.

(d) The board of regents may hold, purchase, lease, sell, convey, or otherwise dispose of public property, execute conveyances thereon, and utilize the proceeds arising therefrom;

may exercise the power of eminent domain in the manner provided by law; and shall have such other powers and duties as provided by law.

(e) The board of regents may accept bequests, donations, grants, and transfers of land, buildings, and other property for the use of the University System of Georgia.

(f) The qualifications, compensation, and removal from office of the members of the board of regents shall be as provided by law.

#### Hawaii Constitution

##### *Article X, Section 5*

The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of as provided by law.

##### *Article X, Section 6*

There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. At least part of the membership of the board shall represent geographic subdivisions of the State. The board shall have the power to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board. The board shall also have exclusive jurisdiction over the internal structure, management, and operation of the university. This section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have the exclusive jurisdiction to identify laws of statewide concern.

#### Idaho Constitution

##### *Article IX, Section 10*

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation.

#### Louisiana Constitution

##### *Article VIII, Section 5*

A) Creation; Functions. The Board of Regents is created as a body corporate. It shall plan, coordinate, and have budgetary responsibility for all public postsecondary education and shall have other powers, duties, and responsibilities provided in this Section or by law.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one from the state at large appointed by the governor, with consent of the Senate, for overlapping terms of six years, following initial terms which shall be fixed by law. The board should be representative of the state's population by race and gender to ensure diversity.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

(D) Powers. The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of postsecondary education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3)(a) To study the need for and feasibility of creating a new institution of postsecondary education, which includes establishing a branch of such an institution or converting any non-degree granting institution to an institution which grants degrees or converting any college or university which is limited to offering degrees of a lower rank than baccalaureate to a college or university that offers baccalaureate degrees or merging any institution of postsecondary education into any other institution of postsecondary education, establishing a new management board, and transferring a college or university from one board to another.

(b) If the creation of a new institution, the merger of any institutions, the addition of another management board, or the transfer of an existing institution of higher education from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or after one year from the receipt of a request for a report from the legislature if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for postsecondary education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of postsecondary education.

(5) To require that every postsecondary education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of postsecondary education in the state. It shall recommend priorities for capital construction and improvements.

(E) Powers Not Vested. Powers of management over public institutions of postsecondary education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, the Board



of Supervisors of Community and Technical Colleges, and any other such board created pursuant to this Article, as to the institutions under the control of each.

*Article VIII, Section 6*

(A) Creation; Functions. The Board of Supervisors for the University of Louisiana System is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

*Article VIII, Section 7*

(A) Creation; Powers. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

(B) Membership; Terms. Each board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

*Article VIII, Section 7.1*

(A) Creation; Powers; Institutions; Divisions. (1) The Board of Supervisors of Community and Technical Colleges is created as a body corporate to manage the Louisiana Community and Technical College System subject to powers vested by this Article in the Board of Regents. The system shall include all programs of public postsecondary vocational-technical training, and, as provided by law, institutions of higher education which offer associate degrees but not baccalaureate degrees and such programs and institutions shall be supervised and managed by the board. The system shall be comprised of two divisions, the vocational-technical division which shall include all public postsecondary vocational-technical schools and the community college division which shall include the community colleges in the system.

(2) All public institutions which exclusively or predominantly provide programs of postsecondary vocational-technical education shall be under the jurisdiction of the Board of Supervisors of Community and Technical Colleges. Such institutions may not be transferred from the Louisiana Community and Technical College System.

(3) The provision of any program subject to the supervision and management of and offered at any institution under the jurisdiction of the Board of Supervisors of Community and Technical Colleges which is not a degree program shall require no approval beyond that of the Board of Supervisors of Community and Technical Colleges.

(B) Membership; Terms; Initial Membership and Terms. The board shall be composed of fifteen members appointed by the governor, as provided by law. In addition, the board shall have two student members as provided by law. All members selected and appointed by the governor shall be appointed with the consent of the Senate. Of those members selected and appointed by the governor, there shall be two members from each congressional district and the remaining member or members from the state at large. The board should be representative of the state's population by race and gender to ensure diversity. The members selected and appointed by the governor shall serve terms of six years, except that the initial members shall serve terms as provided by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term of a member selected and appointed by the governor shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate. Any other vacancy shall be filled as provided by law.

...

## Michigan Constitution

### *Article VIII, Section 3*

Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

The state board of education shall consist of eight members who shall be nominated by party conventions and elected at large for terms of eight years as prescribed by law. The governor shall fill any vacancy by appointment for the unexpired term. The governor shall be ex-officio a member of the state board of education without the right to vote. The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.

### *Article VIII, Section 5*

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. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law. The governor shall fill board vacancies by appointment. Each appointee shall hold office until a successor has been nominated and elected as provided by law.

*Article VIII, Section 6*

Other institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. It shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution and be ex-officio a member of the board without the right to vote. The board may elect one of its members or may designate the president, to preside at board meetings. Each board of control shall consist of eight members who shall hold office for terms of eight years, not more than two of which shall expire in the same year, and who shall be appointed by the governor by and with the advice and consent of the senate. Vacancies shall be filled in like manner.

Minnesota Constitution

*Article XIII, Section 3*

All the rights, immunities, franchises and endowments heretofore granted or conferred upon the University of Minnesota are perpetuated unto the university.

Mississippi Constitution

*Article 8, Section 213-A*

The state institutions of higher learning now existing in Mississippi, to-wit: University of Mississippi, Mississippi State University of Agriculture and Applied Science, Mississippi University for Women, University of Southern Mississippi, Delta State University, Alcorn State University, Jackson State University, Mississippi Valley State University, and any others of like kind which may be hereafter organized or established by the State of Mississippi, shall be under the management and control of a board of trustees to be known as the Board of Trustees of State Institutions of Higher Learning, the members thereof to be appointed by the Governor of the state with the advice and consent of the Senate.

...

Such board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four (4) years; but said board shall have the power and authority to terminate any such contract at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.

Nothing herein contained shall in any way limit or take away the power the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate, abolish or change the status of any of the above named institutions.

#### Missouri Constitution

##### *Article IX, Section 9(a)*

The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate.

#### Montana Constitution

##### *Article X, Section 9*

(1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio non-voting members of the board.

## Nebraska Constitution

### *Article VII, Section 10*

The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided and three students of the University of Nebraska who shall serve as nonvoting members. Such nonvoting student members shall consist of the student body president of the University of Nebraska at Lincoln, the student body president of the University of Nebraska at Omaha, and the student body president of the University of Nebraska Medical Center. The terms of office of elected members shall be for six years each. The terms of office of student members shall be for the period of service as student body president. Their duties and powers shall be prescribed by law; and they shall receive no compensation, but may be reimbursed their actual expenses incurred in the discharge of their duties.

## Nevada

### *Article 11, Section 4*

The Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.

### *Article 11, Section 6*

1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law. . . .

### *Article 11, Section 7*

The Governor, Secretary of State, and Superintendent of Public Instruction, shall for the first Four Years and until their successors are elected and qualified constitute a Board of Regents to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of Office of said Board of Regents provide for the election of a new Board of Regents and define their duties.

## New Mexico

### *Article XII, Section 13*

The legislature shall provide for the control and management of each of said institutions, except the university of New Mexico, by a board of regents for each institution, consisting of five members, four of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the institution and no more than three of whom at the time of their appointment shall be members of the same political party . . . .

The legislature shall provide for the control and management of the university of New Mexico by a board of regents consisting of seven members, six of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the university of New Mexico and no more than four of whom at the time of their appointment shall be members of the same political party. The governor shall nominate and by and with the consent of the senate shall appoint the members of the board of regents. . . . Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate, and its decision in connection with such matters shall be final.

#### North Dakota Constitution

##### *Article VIII, Section 6*

1. A board of higher education, to be officially known as the state board of higher education, is hereby created for the control and administration of the following state educational institutions, to wit:
  - a. The state university and school of mines, at Grand Forks, with their substations.
  - b. The state agricultural college and experiment station, at Fargo, with their substations.
  - c. The school of science, at Wahpeton.
  - d. The state normal schools and teachers colleges, at Valley City, Mayville, Minot, and Dickinson.
  - e. The school of forestry, at Bottineau.
  - f. And such other state institutions of higher education as may hereafter be established.
2. a. The state board of higher education consists of eight members. The governor shall appoint seven members who are qualified electors and taxpayers of the state, and who have resided in this state for not less than five years immediately preceding their appointments. These seven appointments are subject to confirmation by the senate.

The governor shall appoint as the eighth member of the board a full-time resident student in good academic standing at an institution under the jurisdiction of the state board. . . .

3. The members of the state board of higher education may only be removed by impeachment for the offenses and in the manner and according to the procedure provided for the removal of the governor by impeachment proceedings.
4. Each appointive member of the state board of higher education, except the student member, shall receive compensation set by the legislative assembly for the time actually spent devoted to the duties of the member's office. All members shall receive necessary expenses in the same manner and amounts as other state officials for attending meetings and performing other functions of their office.
5. The legislature shall provide adequate funds for the proper carrying out of the

functions and duties of the state board of higher education.

6. . . . b. The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.

c. Said board shall prescribe for all of said institutions standard systems of accounts and records and shall biennially, and within six (6) months immediately preceding the regular session of the legislature, make a report to the governor, covering in detail the operations of the educational institutions under its control.

. . .  
e. The said state board of higher education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state; provided, however, that funds appropriated by the legislature and specifically designated for any one or more of such institutions, shall not be used for any other institution.

. . .  
8. This constitutional provision shall be self-executing and shall become effective without the necessity of legislative action.

## Oklahoma Constitution

### *Article VI, Section 31a*

There is hereby created a Board of Regents for the Oklahoma Agricultural and Mechanical College and all Agricultural and Mechanical Schools and Colleges maintained in whole or in part by the State. The Board shall consist of nine (9) members, eight (8) members to be appointed by the Governor by and with the advice and consent of the Senate, a majority of whom shall be farmers, and the ninth member shall be the President of the State Board of Agriculture. Any vacancy occurring among the appointed members shall be filled by appointment of the Governor by and with the advice and consent of the Senate. The members of the Board shall be removable only for cause as provided by law for the removal of officers not subject to impeachment. The members shall be appointed for terms of eight (8) years each, with one term expiring each year, provided that the members of the first Board shall be appointed for terms of from one (1) to eight (8) years respectively. Provided that no State, National or County officer shall ever be appointed as a member of said Board of Regents until two years after his tenure as such officer has ceased.

*Article XIII, Section 8*

The government of the University of Oklahoma shall be vested in a Board of Regents consisting of seven members to be appointed by the Governor by and with the advice and consent of the Senate. The term of said members shall be for seven years, except and provided that the appointed members of the Board of Regents in office at the time of the adoption of this amendment as now provided by law shall continue in office during the term for which they were appointed, and thereafter as provided herein. Appointments for filling vacancies occurring on said Board shall be made by the Governor with advice and consent of the Senate and said appointments to fill vacancies shall be for the residue of the term only. Members of the Board of Regents of the University of Oklahoma shall be subject to removal from office only as provided by law for the removal of elective officers not liable to impeachment.

*Article XIII-A, Section 1*

All institutions of higher education supported wholly or in part by direct legislative appropriations shall be integral parts of a unified system to be known as "The Oklahoma State System of Higher Education."

*Article XIII-A, Section 2*

There is hereby established the Oklahoma State Regents for Higher Education, consisting of nine (9) members, whose qualifications may be prescribed by law. The Board shall consist of nine (9) members appointed by the Governor, confirmed by the Senate, and who shall be removable only for cause, as provided by law for the removal of officers not subject to impeachment. . . .

The Regents shall constitute a co-ordinating board of control for all State institutions described in Section 1 hereof, with the following specific powers: (1) it shall prescribe standards of higher education applicable to each institution; (2) it shall determine the functions and courses of study in each of the institutions to conform to the standards prescribed; (3) it shall grant degrees and other forms of academic recognition for completion of the prescribed courses in all of such institutions; (4) it shall recommend to the State Legislature the budget allocations to each institution, and; (5) it shall have the power to recommend to the Legislature proposed fees for all of such institutions, and any such fees shall be effective only within the limits prescribed by the Legislature.

*Article XIII-B, Section 1*

There is hereby created a Board to be known as the Board of Regents of Oklahoma Colleges, and shall consist of nine (9) members to be appointed by the Governor, by and with the consent of the Senate. . . .

*Article XIII-B, Section 2*

The said Board of Regents of Oklahoma Colleges shall hereafter have the supervision, management and control of the following State Colleges: Central State College at Edmond; East Central State College at Ada; Southwestern Institute of Technology at Weatherford; Southeastern State College at Durant; Northwestern State College at Alva, and the Northeastern State College at Tahlequah, and the power to make rules and



regulations governing each of said institutions shall hereafter be exercised by and is hereby vested in the Board of Regents of Oklahoma Colleges created by this Act, and said Board shall appoint or hire all necessary officers, supervisors, instructors, and employees for such institutions.

#### South Dakota Constitution

##### *Article XIV, Section 3*

The state university, the agriculture college, the school of mines and technology, the normal schools, a school for the deaf, a school for the blind, and all other educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide. The Legislature may increase the number of members to nine.

#### Utah Constitution

##### *Article X, Section 4*

The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.

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