PRESERVING THE INDEPENDENCE OF PUBLIC HIGHER EDUCATION: AN EXAMINATION OF STATE CONSTITUTIONAL AUTONOMY PROVISIONS FOR PUBLIC COLLEGES AND UNIVERSITIES

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INTRODUCTION

In American higher education, the need to make public colleges and universities responsive to the public interest is often in tension with the necessity of providing institutions with the requisite authority to manage their internal affairs.[1] In seeking to strike a balance between acceptable state oversight versus the need to safeguard the authority of public colleges and universities to manage their own affairs, some states rely on constitutional provisions to limit excessive state governmental intrusion.[2] Specifically, these provisions vest constitutional authority in public higher education governing boards to direct the affairs of institutions or systems under their direction. In contrast to this approach, in most states the powers and duties of public college and university governing boards are often largely subject to or defined by statutory authority.[3] The use of a constitutional provision to establish and provide legal protection for the internal control of a public college or university is commonly referred to as constitutional autonomy.[4]

Constitutional autonomy represents a distinctive governance mechanism

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1. Michael K. McLendon, *State Governance Reform of Higher Education: Patterns, Trends, and Theories of the Public Policy Process*, *in* 18 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 57, 57 (John C. Smart ed., 2003).

2. Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 177–79 (1978).

3. In some states, a governing board may be established by constitutional provision but with the powers and duties of the board subject to complete legislative control.

4. Beckham, *supra* note 2, at 179.

in public higher education, and several colleges and universities with independent constitutional authority enjoy national reputations, including the University of Michigan and campuses within the University of California system.[5] Examination of the current legal status of constitutional autonomy provisions is potentially useful to courts faced with the task of applying constitutional provisions to new cases. In addition, higher education stakeholders may find an analysis of constitutional autonomy beneficial in relation to ongoing policy discourse concerning the appropriate degree of state oversight for public higher education.[6] One author has even examined constitutional autonomy in California as a basis to explore issues related to federal constitutional protections for institutions under the First Amendment and principles of academic freedom.[7] Accordingly, consideration of constitutional autonomy has possible relevance in several law and policy arenas that extend beyond just those states with judicial recognition of constitutional autonomy.

Approximately three decades have elapsed since the last comparative legal analysis of constitutional autonomy provisions by Joseph Beckham in 1978.[8] Along with seeking to provide an updated comparative analysis covering roughly the decades since Beckham's study, the author was also motivated to examine a forecast offered in 1973 by Lyman A. Glenny and Thomas K. Dalglish that constitutional autonomy appeared to be waning, with their work entitled *Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline*.[9] Glenny and Dalglish, considering non-legal trends along with legal decisions, determined that, especially in relation to control of financial issues, institutions possessing independent

5. *See infra* Part IV-A. Michigan and California, along with Minnesota, have been recognized as the states possessing the strongest forms of constitutional autonomy. *See* Beckham, *supra* note 2, at 181; DEBORAH K. MCKNIGHT, UNIVERSITY OF MINNESOTA CONSTITUTIONAL AUTONOMY: A LEGAL ANALYSIS 21 (2004), *available at* http://www.house.leg.state.mn.us/hrd/pubs/umcnauto.pdf.

6. For background on ongoing policy debates in this area, see generally McLendon, *supra* note 1.

7. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

8. *See* Beckham, *supra* note 2. While McKnight listed states with at least one court case interpreting constitutional autonomy provisions in an appendix, she confined her analysis to the current legal status of constitutional autonomy in Minnesota. MCKNIGHT, *supra* note 5. Like McKnight's legal analysis, other studies on constitutional autonomy conducted since Beckham's study focus on specific states. *See, e.g.*, Petroski, *supra* note 7; Caitlin M. Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); James F. Shekleton, *The Road Not Taken: The Curious Jurisprudence Touching upon the Constitutional Status of the South Dakota Board of Regents*, 39 S.D. L. REV. 312 (1994).

9. LYMAN A. GLENNY & THOMAS K. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE (1973).

constitutional authority were experiencing a loss of power "to exercise final judgment on the use not only of [their] state funds but also of those derived from other sources."[10] Their conclusions, along with the desire to update Beckham's study, helped to prompt inquiry into the current status of constitutional autonomy, including whether or not judicial decisions indicate eroding support for the legal doctrine during recent decades.

Consideration of how to deepen the study's assessment of constitutional autonomy triggered a secondary interest in the value of looking to concepts developed in the higher education literature to examine the topic. Specifically, the concepts of substantive and procedural autonomy and their relationship to the internal authority, or institutional autonomy, possessed by public and private colleges and universities to control their internal affairs seemed to provide a promising conceptual lens. Substantive autonomy refers to the authority of institutional leaders to establish significant institutional goals and priorities.[11] Procedural autonomy deals with an institution's control over determining the appropriate methods to implement major goals and objectives, including those, in the case of public institutions, established by the legislative and executive branches of state government.[12] The appeal of applying these concepts, in a somewhat exploratory fashion, to constitutional autonomy provisions motivated the undertaking of the current analysis as well.

Seeking to evaluate the current legal status of constitutional autonomy among the states and to enhance the analysis of the legal doctrine using concepts developed in the higher education literature, the article takes a fresh look at constitutional autonomy provisions for public higher education. To provide background and context, Part II of the article considers previous assessments of constitutional autonomy, with special emphasis on the scholarship of Beckham.[13] The article in Part III provides an overview of the concepts of substantive autonomy and procedural autonomy and discusses their potential usefulness in assessing and describing how constitutional autonomy provisions may affect the overall institutional autonomy of colleges and universities with constitutional autonomy.

Part IV assesses the current legal status of constitutional autonomy and categorizes states on the basis of (1) strong judicial support for constitutional autonomy, (2) moderate to limited judicial recognition of constitutional autonomy, (3) ambiguous legal status for constitutional

10. *Id.* at 143.

11. *See infra* Part III.

12. *See infra* Part III.

13. In addition to Beckham's analysis and that of Glenny and Dalglish, works discussing constitutional autonomy include: MALCOLM MOOS & FRANCIS E. ROURKE, THE CAMPUS AND THE STATE (1959) and MERRITT M. CHAMBERS, THE COLLEGES AND THE COURTS SINCE 1950 (1964).

autonomy, or (4) rejection of the legal doctrine. As discussed in the section, cases from the past three decades do not suggest that constitutional autonomy has experienced a decline, at least in terms of judicial treatment of constitutional provisions. The article turns in Part V to an analysis of constitutional autonomy provisions using the concepts of substantive autonomy and procedural autonomy where older, landmark cases are also considered alongside more contemporary decisions. Part VI of the article summarizes how constitutional autonomy persists as a distinctive and significant governance mechanism in public higher education and the promise of using the concepts of substantive and procedural autonomy to analyze constitutional autonomy provisions.

II. PREVIOUS SCHOLARSHIP RELATED TO CONSTITUTIONAL AUTONOMY

A. Definitions of Constitutional Autonomy

Beckham defines constitutional autonomy as a constitutional provision interpreted and supported by case law that grants, with certain limits, a governing board sole control over an institution.[14] Deborah McKnight 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.[15]

Her definition highlights that constitutional autonomy provisions can elevate public higher education institutions or systems to a special place within a state's constitutional structure, one not occupied by other state entities. McKnight's definition also points out, however, that this independent grant of authority must be balanced against other constitutional provisions and powers vested in other state governmental entities. Most notably, legislative authority over appropriations represents a key check on constitutionally autonomous schools.[16] In general, the

14. Beckham, *supra* note 2, at 179. Beckham distinguishes between the terms constitutional status and constitutional autonomy. Constitutional status, according to Beckham, means the establishment of a governing board or structure in the state constitution but this status alone does not mean that a public college or university institution or system enjoys some form of independent constitutional authority. *Id.* Constitutional language may still vest the legislative and executive branches with complete control over the higher education institution or system. Alternatively, court opinions may not provide judicial recognition of constitutional autonomy, even if the language in a constitutional provision might suggest otherwise.

15. MCKNIGHT, *supra* note 5, at 3.

16. Beckham, *supra* note 2, at 188.

constitutional autonomy of institutions also often must yield to generally applicable state laws passed to protect the general welfare or to establish state public policy.[17] Institutions with constitutional autonomy remain subject as well to numerous federal laws and regulations. The description offered by McKnight serves as an important reminder that multiple forces, including tradition, the attitudes of the citizenry, and political factors, influence the degree of control institutions and systems with constitutional autonomy exercise in relation to their internal affairs.[18]

B. States Recognized as Possessing or Potentially Possessing Constitutional Autonomy

Authors have designated between seven and thirteen states as possessing constitutional autonomy.[19] Beckham concluded that judicial recognition of constitutional autonomy existed in nine states: California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada, and Oklahoma.[20] He determined that numerous legal opinions supporting constitutional autonomy existed in California, Michigan, and Minnesota,[21] a result consistent with determinations by other sources that these states constitute a kind of "Big Three" in terms of constitutional autonomy.[22] Though with less extensive case law, he cited judicial recognition for more than sixty years in Idaho and Oklahoma.[23] While limited case law left some ambiguity, Beckham also concluded courts had appeared to recognize constitutional autonomy in Georgia, Louisiana, Montana, and Nevada.[24]

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17. *Id.*; *see also* MCKNIGHT, *supra* note 5, at 9.

18. *See generally* GLENNY & DALGLISH, *supra* note 9.

19. This range of numbers includes the more contemporary studies, with contemporary designated as the studies of Beckham and Glenny and Dalglish conducted in the 1970s. *See* Beckham, *supra* note 2; GLENNY & DALGLISH, *supra* note 9. In addition, the figures also represent the findings of some earlier studies of constitutional autonomy. In 1936, Edward C. Elliot and Merritt M. Chambers identified five states (California, Idaho, Michigan, Minnesota, and Oklahoma) as having constitutional provisions providing public colleges and universities considerable freedom from other units of state government. EDWARD C. ELLIOT & MERRITT M. CHAMBERS, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, THE COLLEGES AND THE COURTS, 134–44 (1936). Later, Chambers, as shown in a 1964 work, added Arizona, Colorado, Georgia, and Nevada to the list of states appearing to recognize some form of constitutional protection for public universities. CHAMBERS, *supra* note 13, at 147. Moos and Rourke listed six to seven states (California, Colorado, Idaho, Michigan, Minnesota, Oklahoma and potentially Georgia) as providing public colleges and universities with independent constitutional authority. MOOS & ROURKE, *supra* note 13, at 22 n. 4.

20. Beckham, *supra* note 2, at 181.

21. *Id.*

22. *See, e.g.*, GLENNY & DALGLISH, *supra* note 9, at 23–25; MCKNIGHT, *supra* note 5, at 21.

23. Beckham, *supra* note 2, at 181–83.

24. *Id.*

Courts had not issued opinions in the three states of Alabama, North Dakota, and South Dakota, and judicial treatment made constitutional autonomy doubtful in Arizona, Colorado, Hawaii, Mississippi, Missouri, New Mexico, and Utah.[25] Table 1 summarizes Beckham's findings.

Table 1: Judicial Interpretations of Constitutional Autonomy in Public Higher Education as Analyzed by Beckham.

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

In their study, Glenny and Dalglish identified seven states (California, Colorado, Georgia, Idaho, Michigan, Minnesota, and Oklahoma) with constitutional autonomy provisions.[26] McKnight, focusing on constitutional autonomy in Minnesota, did not undertake a comparative legal analysis among the states, but in an appendix listed thirteen states alongside Minnesota with at least one case appearing to recognize judicially constitutional autonomy: Alabama, California, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, and Oklahoma.[27] The appendix also listed seven states with constitutions appearing to grant constitutional autonomy but with courts in these states rejecting constitutional autonomy or giving the doctrine minimal effect: Alaska, Colorado, Mississippi, Missouri, New Mexico,

25. *Id.*
26. GLENNY & DALGLISH, *supra* note 9, at 15.
27. MCKNIGHT, *supra* note 5, at 21–23.

South Dakota, and Utah.[28] Table 2 summarizes states identified by Beckham, Glenny and Dalglish, and McKnight as having court cases or attorney general opinions recognizing constitutional autonomy.

Table 2: States Identified as Having Case Law or Attorney General Opinions 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

28. *Id.*

III. CONCEPT OF INSTITUTIONAL AUTONOMY TO ANALYZE CONSTITUTIONAL AUTONOMY PROVISIONS

Concepts related to institutional control and authority developed in the higher education scholarship to discuss and describe institutional autonomy provide a potentially useful conceptual lens through which to analyze constitutional autonomy provisions. Though obvious overlap exists, the legal doctrine of constitutional autonomy is not synonymous with the concept of institutional autonomy. Constitutional autonomy is derived from legal interpretations and language in constitutional provisions while the concept of institutional autonomy has developed in the higher education literature to describe the degree of control possessed by colleges and universities, including both public and private institutions, to direct their internal affairs in administrative and academic matters free from external interference.[29] Thus, while the focus of this article is public colleges and universities, institutional autonomy does not represent a concept distinct to only public higher education, nor to institutions possessing constitutional autonomy.

It is also important to note that while constitutional autonomy provisions represent a potentially important legal mechanism to help preserve the institutional autonomy of public colleges and universities, the degree of institutional autonomy possessed by institutions arises from multiple sources, including non-legal ones such as support from alumni and other constituencies or a tradition of non-interference with colleges and universities by other parts of state government.[30] Most significantly, public colleges and universities, including those with constitutional autonomy, are dependent upon state appropriations, which creates a significant incentive for institutions to respond to the concerns and wishes of elected officials. In relation to legal mechanisms besides constitutional autonomy provisions, many states have, for instance, provided corporate status to their public colleges and universities to provide them with greater control over their internal affairs.[31] In the case of institutions with constitutional autonomy, they too may receive corporate status and exist as a constitutional corporation.[32] Whether from a statute or from a non legal source, it is necessary to keep in mind that multiple factors combine to shape the overall level of institutional autonomy possessed by a public college or university, including those with constitutional autonomy.

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29. *See generally* Robert O. Berdahl & T.R. McConnell, *Autonomy and Accountability: Who Controls Academe?*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 70 (Philip G. Altbach et al., 1999); McLendon, *supra* note 1.

30. Berdahl & McConnell, *supra* note 29, at 73–74.

31. *See* MOOS & ROURKE, *supra* note 13, at 37; Beckham, *supra* note 2, at 178.

32. GLENNY & DALGLISH, *supra* note 9, at 15.

Along with tenure and academic freedom, institutional autonomy constitutes one of the distinguishing features of American higher education.[33] It is useful to distinguish the concept of institutional autonomy from academic freedom, at least as that term is described in the higher education literature. According to Berdahl and McConnell, academic freedom represents an absolute concept usually vested in faculty members, while institutional autonomy operates in a much less rigid manner with colleges and universities subject to considerable governmental oversight in numerous areas.[34] They attribute the term academic freedom to individuals and autonomy to institutions.[35] Courts have often not made such a distinction when discussing federal constitutional protections for academic freedom, and among legal scholars and courts considerable disagreement also currently exists regarding the contours of constitutional protections for academic freedom.[36] One federal circuit court has declared, for instance, that to the extent that academic freedom receives any sort of special judicial protection, such rights are vested in institutions and not individuals.[37] For purposes of this article, it is sufficient to note the ongoing disagreement among courts and scholars over First Amendment protections for academic freedom, both at the individual and institutional levels, and to point out that in the higher education literature the term academic freedom is often reserved to apply to individual scholars, with the term autonomy applied to institutions.

Rather than an absolute concept, institutional autonomy operates in a flexible manner with public colleges and universities subject to varying degrees of control. McClendon states, "[b]ecause neither absolute autonomy of the campus from the state nor complete accountability of the campus to the state is likely to be feasible, the vexing question confronting policymakers is where, precisely, the line should be drawn between campus

33. Robert O. Berdahl et al., *The Contexts of American Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 1, 5–8 (Philip G. Altbach et al. eds., 1999).

34. Berdahl & McConnell, *supra* note 29, at 71–72.

35. Part of this distinction among courts and higher education scholars stems from the fact that courts are generally focused on First Amendment legal standards in relation to discussing academic freedom, but academic freedom represents more than a legal doctrine. Academic freedom for individual scholars at colleges and universities rests in great part on professional standards designed to promote and protect scholarly inquiry. For a discussion of the development of academic freedom based on professional standards in higher education, see J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 267–88 (1989).

36. *See, e.g.*, *id.*; Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

37. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000).

and state."[38] In seeking to achieve the appropriate balance between state oversight and the institutional autonomy of public colleges and universities, some states have enacted constitutional provisions to shield public higher education institutions or systems from excessive governmental interference. Institutions with constitutional autonomy have been described as possessing heightened institutional autonomy.[39]

The concept of institutional autonomy has also been broken down by scholars to categorize and describe the kinds of institutional functions and activities potentially left to the internal control of colleges and universities. Berdahl, Altbach, and Gumport, for instance, classify institutional autonomy on the basis of substantive autonomy and procedural autonomy.[40] 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)."[41] 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)."[42] Procedural autonomy relates to such issues as "preaudits and controls over purchasing, personnel, and some aspects of capital construction."[43] The authors contend that to function efficiently institutions need to retain considerable control over procedural autonomy.[44] In respect to substantive autonomy, relating to such core educational issues as curriculum and academic programs and to other major decisions concerning institutional goals and priorities, the authors point to this area as meriting greater state involvement, though also stating that institutional actors should play an important role in relation to decisions related to substantive autonomy.[45]

The concepts of institutional autonomy generally, and, more specifically, of procedural and substantive autonomy, provide a potentially useful conceptual lens through which to analyze constitutional autonomy provisions. These concepts may offer greater clarity for courts comparing and contrasting various constitutional autonomy provisions and may also help better link consideration of constitutional autonomy provisions with ongoing discussions in higher education policy circles regarding issues related to institutional autonomy. Accordingly, the combination of

38. McLendon, *supra* note 1, at 57.

39. *See, e.g.*, Berdahl & McConnell, *supra* note 29, at 75. The authors discuss, however, that even colleges and universities with constitutional autonomy have witnessed an erosion of their institutional autonomy in recent decades due to increasing efforts by states to enact accountability measures over public higher education. *Id.*

40. Berdahl et al. , *supra* note 33, at 6; *see also* ROBERT O. BERDAHL, STATEWIDE COORDINATION OF HIGHER EDUCATION (1971).

41. Berdahl, Altbach, & Gumport, *supra* note 33, at 5 (emphasis in the original).

42. *Id.* at 6.

43. *Id.*

44. *Id.*

45. *Id.*

analytical tools drawn from legal opinions and scholarship as well as from the higher education literature potentially offers insights of value to both legal and non-legal audiences. Following a discussion focused on the current legal status of constitutional autonomy provisions in Part IV, this analysis then turns to an assessment of constitutional autonomy using the concepts of substantive and procedural autonomy.

IV. CURRENT STATUS OF CONSTITUTIONAL AUTONOMY

The article now turns to consideration of constitutional autonomy during the past three decades, the period since the most recent comprehensive comparative analysis of constitutional autonomy provisions by Beckham.[46] While looking to previous studies as a guide for states to include in the study, all states were considered. In addition to previous studies and searches for cases related to constitutional autonomy, the Education Commission of the States database of postsecondary governance structures was also used to help identify states to include in the analysis.[47] While the database does not provide interpretation or analysis of particular statutory or constitutional provisions or of legal decisions, it served as a helpful resource in selecting states that might have constitutional autonomy provisions. Twenty-two states were identified as potential constitutional autonomy candidates. To guide the comparative analysis, the states were organized on the basis of (1) substantial judicial recognition of constitutional autonomy, (2) moderate to limited judicial recognition of constitutional autonomy, (3) ambiguous legal status regarding constitutional autonomy, and (4) judicial rejection or negative treatment of constitutional autonomy.

Several factors determined separation of states into the four categories. The "substantial judicial recognition" section includes states that have tended to generate a greater number of cases concerning constitutional autonomy in comparison to other states, where state courts have offered relatively well-developed standards for the overall legal framework of constitutional autonomy, and, most significantly, where cases reflect considerable judicial deference to the constitutional autonomy possessed by institutional or system governing boards. 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, with a less well-developed legal framework regarding the contours of constitutional autonomy in the state. The third category, "ambiguous legal status," represents states in which case law has not clearly answered whether constitutional autonomy exists as a recognized

46. Beckham, *supra* note 2.

47. Education Commission of the States, Postsecondary Governance Structures Database, http://www.ecs.org/clearinghouse/31/02/3102.htm (last visited Feb. 4, 2009).

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 its recognition by courts. Given the significance of the states with substantial judicial recognition, these states are discussed separately to highlight attributes of constitutional autonomy in each of them. Discussion of the states in the other categories is grouped together, with relevant illustrative examples mentioned to highlight the status of constitutional autonomy in these states.

A. Substantial Judicial Recognition (The "Big Three")

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 study that continue to recognize substantial grants of independent constitutional authority for public higher education. In these states, courts continue to look favorably on precedent establishing and upholding strong grants of constitutional autonomy, even when ruling against governing boards in particular cases. Cases involving these three states, at least from the perspective of case law, do not indicate any substantial erosion of authority for constitutionally autonomous governing boards and their independent authority to control the internal affairs of institutions under their control. At the same time, contemporary decisions reinforce the findings of Beckham and others that, though extensive, constitutional autonomy certainly does not negate all state governmental authority over public higher education in these states.

1. Michigan

In Michigan, constitutional autonomy enjoys a long tradition. It was the first state in the nation to enact a constitutional autonomy provision,[48] and

48. Constitutional autonomy was first established for the University of Michigan by the constitution of 1850 and continued in the 1908 constitution. *See* Beckham, *supra* note 2, at 182. The 1908 constitution continued to vest constitutional autonomy in the University of Michigan and also gave similar constitutional autonomy to the state's agricultural college, which later became Michigan State University. State Bd. of Agric. v. State Admin. Bd., 197 N.W. 160, 160–61 (Mich. 1924) (stating that the "state board of agriculture was made a constitutional body; it was given the sole management of the affairs of the [agricultural] college and exclusive control of all of its funds"). Constitutional autonomy was expanded in the 1963 constitution to governing boards of multiple institutions. MICH. CONST. art. VIII, §§ 5–6 (amended 1963). Section 5 of Article 8 specifically names the University of Michigan, Michigan State University, and Wayne State University, and Section 6 refers to "[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees." *Id.* at §

cases decided during the past three decades show that courts continue to maintain strong judicial support for constitutionally autonomous governing boards in the state. Michigan courts, for example, continue to interpret constitutional autonomy as providing significant institutional control over issues related to college and university funds, an area of concern specifically noted by Glenny and Dalglish in relation to the future status of constitutional autonomy.[49] In a 1988 case dealing with a state law that limited investments in South Africa and the former Soviet Union, a Michigan court considered the law's applicability to the University of Michigan.[50] In discussing the constitutional authority of the Regents of the University of Michigan, the court quoted the constitution as saying that "the State cannot control the action of the Regents. It cannot add to or take away from [the property held by the Regents] without the consent of the Regents."[51]

The opinion discussed how Michigan courts had repeatedly rejected legislative attempts to place controls over constitutionally authorized governing boards in the state.[52] According to the decision, state courts had interpreted constitutional authority clearly to include "fiscal autonomy" for the individual college or university governing boards.[53] While the lower court held that the statute did not "impinge on the expenditure of university funds but only on the investment of those funds," the court of appeals stated that the constitution conferred "general fiscal autonomy on the university boards."[54] In holding that the statute could not be applied to college or university governing boards, the court also rejected that the law represented a clear statement of public policy in Michigan, which would have been a basis to override constitutional autonomy.[55]

In addition to control over finances, decisions have re-affirmed that constitutional autonomy also vests control over college or university owned property. In a 1998 case, the plaintiffs challenged a university ordinance that declared lands under the control of the Board of Trustees of Michigan State University as fish and wildlife sanctuaries not open to hunting.[56] In

6; *see also* GLENNY & DALGLISH, supra note 9, at 17–18.

49. GLENNY & DALGLISH, *supra* note 9, at 73.

50. Regents of Univ. of Mich. v. State, 419 N.W.2d 773, 774 (Mich. Ct. App. 1988).

51. *Id.* at 777 (quoting MICH. CONST. art. XIII, § 8).

52. *Id.*

53. *Id.* at 778.

54. *Id.* Even in an opinion holding that the university could not ignore a law requiring a security bond for construction projects, the Michigan Supreme 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 Sur. Corp., 545 N.W.2d 351, 354 (Mich. 1996).

55. Regents of Univ. of Mich., 419 N.W.2d at 779–80.

56. Mich. United Conservation Clubs v. Bd. of Trs. of Mich. State Univ., 431 N.W.2d 217, 219 (Mich. Ct. App. 1988) (per curiam).

ruling in favor of the university, the court discussed that the constitution gave the regents the "power to control and manage [university] property to the exclusion of all other state departments."[57]

The continuing reach and depth of constitutional autonomy in Michigan is also shown by a case dealing with the state's open meeting and records laws. While even the Minnesota Supreme Court has declined to accept constitutional autonomy as a shield to an open meeting law,[58] in a 1999 decision, the Michigan Supreme Court held that the state's Open Meetings Act could not be applied to the "internal operations of the university in selecting a president."[59] In *Federated Publications v. Board of Trustees of Michigan State University*,[60] the court dealt with an issue left open from a 1993 decision,[61] where the defendant institution failed to properly raise constitutional autonomy in arguing against applying the state's open meeting law.[62] The court in *Federated Publications* stated that making the law apply to the governing boards of public colleges and universities under these circumstances infringed on the boards' constitutional authority and noted that constitutional language already required formal sessions of governing boards to be open to the public.[63] The decision highlights the ongoing vitality of constitutional autonomy in Michigan in relation to state court interpretation of the doctrine.

While the past three decades do not indicate erosion of judicial support for constitutional autonomy, Michigan courts still recognize limits on independent constitutional authority for public colleges and universities. In *Federated Publications*, even while describing governing boards as

57. *Id.*

58. Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 281 (Minn. 2004). The case is discussed in the next sub-section dealing with the University of Minnesota.

59. Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ., 594 N.W.2d 491, 498 (Mich. 1999).

60. *Id.*

61. Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents, 507 N.W. 2d 422 (Mich. 1993).

62. *Federated Publ'ns, Inc.*, 594 N.W.2d at 495.

63. *Id.* at 498. Deference to constitutional autonomy in the context of open records arose in a case in which a professor sued for the ability 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. *Id.* at 493–94. While granting the employee access to some records, the court did not grant access to records that might reveal the identities of the reviewers. *Id.* at 497. 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. *Id.* at 498–99. Accordingly, the court balanced a general state policy of openness with employment records against the protections afforded institutions through constitutional autonomy.

possessing almost absolute control over their institutions,[64] the court found it worthwhile to point out that the boards did not constitute a separate branch of state government.[65] The opinion looked to a previous Supreme Court case,[66] which quoted a court of appeals decision stating that though it is an "independent branch" of government, an independent governing board is "not an island."[67]

In terms of limitations on constitutional autonomy, Michigan courts during the past three decades have continued to recognize that legislative authority may trump constitutional autonomy in the context of generally applicable laws passed under the state's police powers to protect the general welfare[68] or that constitute a clear statement of public policy.[69] In a 1978 case, *Central Michigan University Faculty Association v. Central Michigan University*,[70] for instance, the Michigan Supreme Court refused to allow constitutional autonomy as a basis to restrict certain issues related to promotion and tenure as not appropriate matters for collective bargaining.[71] While not arguing against legislative authority to permit collective bargaining at colleges or universities under the state's employment relations law, the university argued that these specific issues touched on educational matters and encroached on the university's constitutional autonomy.[72] 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.[73]

The issue of legally established public policy overriding constitutional autonomy came into play in a 2007 case involving the extension of public employee benefits to include same-sex couples as an issue of collective bargaining.[74] Reversing the trial court, the court of appeals held that the passage of a state constitutional amendment defining marriage as between a man and a woman prohibited extending domestic partner benefits to same-sex partners.[75] Specifically in relation to public colleges and universities,

64. *Federated Publ'ns, Inc.*, 594 N.W.2d at 497.

65. *Id.* at 498.

66. Regents of the Univ. of Mich. v. Employment Relations Comm'n, 204 N.W.2d 218, 224 (Mich. 1973).

67. *Federated Publ'ns, Inc.*, 594 N.W.2d at 497 (quoting Branum v. State, 145 N.W.2d 860, 862 (Mich. Ct. App. 1966)).

68. *Id.* at 497.

69. Regents of the Univ. of Mich. v. State, 419 N.W.2d 773, 778–79 (Mich. Ct. App. 1988).

70. 273 N.W.2d 21 (Mich. 1978).

71. *Id.* at 26.

72. *Id.* at 24–25.

73. *Id.* at 25.

74. Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 143 (Mich. Ct. App. 2007).

75. *Id.*

the court held that constitutional autonomy did not permit institutions to offer such benefits.[76] According to the opinion, the constitutional amendment established a clear statement of public policy, which constituted one of the areas where constitutional autonomy must yield to a general statewide policy or standard.[77] Based on interpreting the constitutional amendment as a clear statement of public policy, the court held that institutions could not rely on constitutional autonomy to offer same-sex domestic partner benefits.[78]

Despite limits on constitutional autonomy under certain circumstances, courts in Michigan continue to remain sensitive to the fact that a generally applicable law might unduly interfere with the constitutional authority of governing boards. Even when ruling against the institution in *Central Michigan University Faculty Association*, the court acknowledged that legislative power could not interfere with colleges' and universities' control over educational matters.[79] This sentiment was echoed in the *Federated Publications* case where the court, in discussing the state's Open Meetings Act, looked to *Central Michigan University Faculty Association* to state that while the legislature can include colleges and universities under the state's public employee relations law, the "regulation cannot extend into the university's sphere of educational authority."[80] Thus, even a statewide law otherwise applicable to Michigan colleges and universities might impermissibly interfere with constitutional autonomy if the law unduly encroaches on clearly educational matters.

While limitations on constitutional autonomy in Michigan exist in certain instances, cases indicate that governing boards of public institutions in Michigan during the past three decades have continued to possess substantial authority to control and direct the affairs of institutions under their control. With the exception of California and possibly Minnesota, other states with constitutional autonomy do not vest their governing boards with such expansive independent constitutional power. Cases decided since the period of Beckham's study have maintained substantial judicial protection for the constitutional autonomy of individual institutional governing boards in Michigan. While state courts have not always held in favor of institutional governing boards during this period in particular cases, decisions do not indicate any substantial erosion of judicial support for constitutional autonomy, especially in relation to the financial control that governing boards possess over institutions under their control.

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76. *Id.* at 152.

77. *Id.* at 152–53.

78. *Id.* at 151–52.

79. Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ., 273 N.W.2d 21, 27 (Mich. 1978).

80. Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ., 594 N.W.2d 491, 497 (Mich. 1999).

2. California

Beckham's analysis[81] and other studies, including more recent ones specifically focused on California,[82] describe the Board of Regents of the University of California system as possessing substantial independent authority under the state constitution.[83] Unlike in Michigan, in which governing boards of individual institutions possess constitutional autonomy, the University of California System consists of ten campuses,[84] making the regents in several respects more akin to a system governing board than to a governing board for an individual institution. While not mirroring the constitutional autonomy language in Michigan's constitution,[85] California courts employ similarly strong descriptions regarding the reach and depth of the regents' authority, describing them as enjoying almost complete autonomy in the management and control of the University of California. And like in Michigan, constitutional autonomy enjoys a long history, with constitutional provisions addressing the authority of the regents placed in the state's constitution adopted in 1879.[86] Cases decided during the past thirty years show that constitutional autonomy continues to provide meaningful legal protection to institutional autonomy for the University of California.

The California Supreme Court in a 1980 case,[87] for example, looked favorably on previous decisions that had characterized the regents as enjoying "broad powers" to control the University of California and exercising almost exclusive control of the university.[88] More recently, a state appellate court stated in a 2000 decision that the regents were meant "to operate as independently of the state as possible."[89] The court also discussed that the autonomy of the regents meant that their rules and policies enjoy a status similar to statutes for purposes of judicial interpretation.[90] As in Michigan, strong general statements of constitutional autonomy are complemented by specific legal holdings in

81. *Id.* at 181.

82. *See* Petroski, *supra* note 7; *see also* Scully, *supra* note 8. This section discusses several illustrative California decisions during the past three decades, but with Petroski's discussion of constitutional autonomy in California, the recent status of constitutional autonomy in California has been well covered in a recent work.

83. CAL. CONST. art. IX, § 9.

84. University of California, UC Campuses, http://www.universityofcalifornia.edu/campuses/welcome.html (last visited Jan. 28, 2009).

85. *Compare* CAL. CONST. art. IX, § 9, *with* MICH. CONST. art. VIII, §§ 5–6.

86. Beckham, *supra* note 2, at 183.

87. San Francisco Labor Council v. Regents of Univ. of Cal., 608 P.2d 277 (Cal. 1980).

88. *Id.* at 278.

89. Kim v. Regents of Univ. of Cal., 95 Cal. Rptr. 2d 10, 14 (Cal. Ct. App. 2000).

90. *Id.* at 13.

favor of the regents. Exemption of the University of California from municipal construction regulations[91] and local wage laws[92] provide examples of the areas where constitutional autonomy decisions continue to bolster the regents' control over university operations. In a 2005 decision, the California Supreme Court held that employees seeking to sue the university must exhaust internal administrative remedies, demonstrating continued judicial support for constitutional autonomy in California and the constitutional independence of the regents.[93]

Despite strong judicial support for constitutional autonomy, California courts, like their Michigan counterparts, permit general limits on the regents' authority under certain circumstances. Karen Petroski, in her 2005 study, categorized these limits on the regents' authority into three broad areas: (1) certain legislative control over fiscal issues, with the regents unable to compel appropriations for salaries and under a degree of legislative oversight to make certain the safety of its funds, (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.[94]

Though tempering the regents' absolute control over the University of California in certain instances, decisions rendered during the past three decades reveal the persistence of strong judicial protection of constitutional autonomy in California. State courts have maintained an interpretation of the constitution that provides the regents with substantial independent control over the University of California. As in Michigan, decisions from California courts support the fact that the state continues to occupy a position as one of the most prominent in relation to strong judicial recognition of, and support for, constitutional autonomy.

3. Minnesota

As with Michigan and California, the Board of Regents of the University of Minnesota also continues to possess considerable constitutional independence, with the state constitution providing the regents substantial control over internal university affairs.[95] Constitutional authority for the University of Minnesota has its roots in the state constitution of 1858,[96] and state court cases, including a pivotal 1928 Minnesota Supreme Court decision,[97] have helped cement legal recognition for constitutional

91. Regents of the Univ. of Cal. v. Santa Monica, 143 Cal. Rptr. 276, 280–81 (Cal. Ct. App. 1978).

92. *San Francisco Labor Council*, 608 P.2d at 279–80.

93. Campbell v. Regents of the Univ. of Cal., 106 P.3d 976, 990 (Cal. 2005).

94. *See* Petroski, *supra* note 7, at 180–81; *see also Campbell*, 106 P.3d at 982.

95. MINN. CONST. art. XIII, § 3.

96. *See* MCKNIGHT, *supra* note 5, at 4.

97. State v. Chase, 220 N.W. 951 (Minn. 1928).

autonomy in the state. Deborah McKnight's guide to assist Minnesota legislators in understanding the legal implications of constitutional autonomy in the state underscores the ongoing practical legal impact of the doctrine on the University of Minnesota.[98] As stated in a 1993 Minnesota Supreme Court decision, the "internal management of the University [of Minnesota] has been constitutionally placed in the hands of the regents alone . . . ."[99]

A 2000 case dealing with employment grievances demonstrates how Minnesota courts have continued to recognize and defer to the constitutional autonomy of the regents. In *Stephens v. Board of Regents of the University of Minnesota*,[100] the court made a unionized employee exhaust internal university grievance procedures before being able to seek a writ of certiorari to permit her to bring suit against the university.[101] The opinion noted that whether or not a University of Minnesota employee had to exhaust administrative remedies before seeking judicial relief represented an issue of first impression for state appellate courts.[102] In its analysis, the court stated that it "must be mindful of the unique grant of authority given to the university" by the state's constitution.[103] This authority means that the regents "are not subject to legislative or executive control."[104] Relying in large measure on the constitutional autonomy given to the University of Minnesota, the court determined that making a claimant exhaust administrative remedies served to help safeguard the independence of the University of Minnesota.[105] The decision helps illustrate the continued strength of constitutional autonomy in Minnesota during the past three decades.

While *Stephens* and other cases demonstrate the continuation of strong judicial recognition of constitutional autonomy in Minnesota, in a 2004 decision, *Star Tribune Co. v. University of Minnesota Board of Regents*,[106] the state's supreme court refused to define constitutional autonomy in the expansive manner sought by the regents. In *Star Tribune* the Minnesota Supreme Court considered whether the state's Government Data Practices

98. *See generally* MCKNIGHT, *supra* note 5. Her work provides a useful analysis of constitutional autonomy in Minnesota.

99. Winberg v. Univ. of Minn., 499 N.W.2d 799, 803 (Minn. 1993) (citing *Chase*, 220 N.W. 951); *see also* Regents of the Univ. of Minn. v. Lord, 257 N.W.2d 796, 802 (Minn. 1977) (holding that the legislature could attach reasonable conditions to appropriations but the regents possessed control over the internal operations of the University of Minnesota).

100. 614 N.W.2d 764 (Minn. Ct. App. 2000).

101. *Id.* at 774–75.

102. *Id.* at 771.

103. *Id.* at 772.

104. *Id.* (quoting Fanning v. Univ. of Minn., 236 N.W. 217, 219 (Minn. 1931)).

105. *Id.* at 774.

106. 683 N.W.2d 274 (Minn. 2004).

Act and Open Meeting Law applied to the Regents of the University of Minnesota.[107] The regents argued that the acts did not appropriately name them as subject to the laws or, alternatively, that the statutes impermissibly infringed on their constitutional autonomy.[108]

With respect to the Data Practices Act, which did in fact specifically name the University of Minnesota as a covered state agency, the regents argued that it should not apply to presidential searches because the "legislature did not specifically reference university presidential search data and because only the University, and not the Regents, is named in the definition of state agency."[109] The court rejected this position, determining that the Act generally makes data available unless a special exception is listed.[110] Additionally, the opinion stated that the law's reference to the university as opposed to the regents "was likely intended to convey a more *inclusive* meaning that would encompass all the units of the University that might possess data, including the Regents."[111]

In relation to the Open Meeting Law, the regents argued that it should not apply to them because the legislature did not specifically name the university or the regents in the act.[112] For support, the regents looked to *Winberg v. University of Minnesota*,[113] where the Minnesota Supreme Court held that the state's Veterans' Preference Act did not apply to the university because the law did not specifically name the institution.[114] The *Winberg* court discussed that the "legislature recognizes the University's unique constitutional status and, in the great majority of laws it passes affecting the University, it expressly includes or excludes" the university or the regents as subject to or exempt from the law.[115] According to the opinion, the legislature would have likely named the university if it intended the Veterans' Preferences Act to apply to the institution.[116] The court also rejected that the statute represented a generally applicable law representing the "broad public policy" of Minnesota that should apply to the university.[117] The opinion stated that the Veterans' Preferences Act indicated a narrower description of applicable state agencies or entities than

107. *Id.* at 278. The case arose in the context of members of the media seeking access to information and meetings related to a presidential search. *Id.* at 278–79.

108. *Id.* at 278.

109. *Id.* at 279.

110. *Id.* at 279–80.

111. *Id.* at 280.

112. 683 N.W.2d at 280–81.

113. 499 N.W.2d 799 (Minn. 1993).

114. *Id.* at 802–03.

115. *Id.* at 801.

116. *Id.* at 802.

117. *Id.* As examples of such laws, the respondent listed the Open Meeting Law and the Minnesota Human Rights Act.

the laws cited by the respondent.[118]

The court in *Star Tribune* found unpersuasive the contention that the Open Meeting Law did not apply to the regents because the act did not specifically name them and was unimpressed with the regents' efforts to rely on *Winberg*.[119] According to the opinion, "we decline to construe . . . language from *Winberg* as creating a generally-applicable rule that the University is not subject to a law unless expressly included."[120] Among its reasons, the court discussed that language in *Winberg* did not indicate an intent to create a bright-line rule regarding the regents and legislative enactments and also pointed out that the Open Meeting Law was listed in *Winberg* as a law of general applicability that included the regents and the University of Minnesota.[121]

In turning to the regents' second challenge to the laws, that the acts violated their constitutional autonomy, the opinion first pointed out the "special constitutional status" enjoyed by the regents and the university.[122] Noting that the exact boundaries of the regents' authority remained undetermined,[123] the opinion then stated that the regents argued the acts should not apply to them in this instance because "the search for a University President is a core function of the Regents."[124] The court concluded, however, that the laws did not infringe on "any aspect of substantive decision-making of the University" or impermissibly delegate authority over the regents to another state entity.[125] The court also made clear that the regents, while enjoying a special constitutional status, are not a distinct branch of state government. The opinion stated that the regents and the university did not exist as "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."[126] The court rejected as well any suggestion that the legislature could make legislation apply to the university only in the context of conditions attached to an appropriation,[127] stating the regents are

118. *Id.* at 802–03.

119. Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 280–82 (Minn. 2004).

120. *Id.* at 281.

121. *Id.*

122. *Id.* at 283.

123. *Id.* at 284.

124. 683 N.W.2d at 284.

125. *Id.* The opinion discussed that the Open Meeting Law and the Data Practices Act imposed a lesser burden on the regents than in *Lord*, 257 N.W.2d 796, 802 (Minn. 1977), where the Minnesota Supreme Court held that the legislature could require that the regents adhere to the requirements of a state act related to selecting designers for construction projects as a condition of an appropriation.

126. *Star Tribune Co.*, 683 N.W.2d at 284.

127. *Id.* at 286.

not immune to generally applicable laws "that are not conditions attached to appropriations."[128]

The court in *Star Tribune* also found the *Federated Publications* case from Michigan[129] unpersuasive.[130] The majority, though noting previous instances of positive citations to Michigan cases dealing with constitutional autonomy, found the rationale in *Federated Publications* "contradictory" based on the holding of the case and the Michigan Supreme Court's description of constitutionally autonomous governing boards as limited to their "proper spheres" and legislative enactments as failing only when interfering with a university's educational or financial autonomy.[131] The court in *Star Tribune* disagreed that the acts at issue somehow interfered with the regents' control over the daily operations of the University of Minnesota or their ability to supervise the institution.[132] The opinion also stated that the position advocated by the regents might result in no "discernible bounds" on their authority with the legislature only able to affect the university through attaching conditions on appropriations.[133]

Future decisions are required before determining whether Minnesota courts interpret constitutional autonomy somewhat less extensively than the independent authority possessed by governing boards in Michigan and California. But the court in *Star Tribune* stressed that the legislature possesses authority over the regents that goes beyond attaching conditions to appropriations. In potentially de-emphasizing the regents' special niche in state government, the case could provide room for future decisions to place more restrictions on the regents of the University of Minnesota than courts in Michigan and California might permit. Decisions interpreting *Star Tribune* are required, however, before making any conclusion that constitutional autonomy in Minnesota is more restricted than in Michigan and California. And even in *Star Tribune*, the court did not seek to undermine the basic principle that constitutional autonomy in Minnesota is meant to leave the internal control of the University of Minnesota with the Board of Regents. In sum, Minnesota cases issued during the past three decades suggest that the University of Minnesota continues to operate with substantial constitutional independence.

B. 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

128. *Id.*
129. *See supra* Part IV.A-1.
130. *Star Tribune Co.*, 683 N.W.2d at 288.
131. *Id.*
132. *Id.*
133. *Id.* at 289.

confirm continuing judicial recognition of moderate to limited constitutional authority for public higher education governing boards in these seven states. When Beckham conducted his study, New Mexico courts had not yet issued decisions regarding constitutional autonomy, but in 1998, the New Mexico Supreme Court issued such an opinion.[134] In Louisiana, the state added a new constitutional autonomy provision in 1998 related to community and technical colleges that has received judicial attention.[135] These seven states are primarily differentiated from Michigan, California, and Minnesota on the basis of the degree of constitutional autonomy granted, with the legislative and executive branches in these states appearing to exercise more legal control over constitutionally autonomous institutions or systems. Judicial opinions in these states also have not offered as comprehensive a legal framework for constitutional autonomy as exists in Michigan, California, and Minnesota. Despite less extensive legal recognition of constitutional autonomy than the "Big Three," courts in these seven states recognize varying degrees of independent constitutional authority.

In three states—Idaho, Montana, and North Dakota—constitutional autonomy persists as a recognized judicial doctrine; however it has received limited legal interpretation since Beckham's study. Cases and attorney general opinions demonstrate that constitutional autonomy persists, but such sources shed limited light on the general outlines of constitutional autonomy in these states. In Idaho, judicial recognition of constitutional autonomy can be traced to at least a 1943 state supreme court case,[136] which interpreted constitutional language contained in the state's constitution, which was ratified in 1889.[137] For the period dealt with in this article, attorney general opinions indicate continued recognition of the legal doctrine, with the Board of Regents of the University of Idaho considered constitutionally empowered to exercise control over university endowment funds[138] and an unofficial attorney general opinion concluding that municipal building codes cannot be applied to the University of Idaho

134. Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 962 P.2d 1236 (N.M. 1998).

135. LA. CONST. art. VIII, § 7.1.

136. Dreps v. Bd. of Regents of the Univ. of Idaho, 139 P.2d 467 (Idaho 1943). In *Dreps*, the Idaho Supreme Court stated:

> In considering the powers and authority of the legislature . . . as compared with the power and authority of the Board of Regents, we must bear in mind that each gets its authority direct from the people and each is created by the constitution itself, so that the one has no authority over the other, unless it is specifically so granted by the constitution under which each was created.

Id. at 471.

137. *Id.* at 470. The constitution was approved by Congress in 1890.

138. *Cf.* 2000 Idaho Op. Att'y Gen. 45 (2000).

because of the institution's constitutional status.[139] The attorney general opinions suggest continued recognition of constitutional autonomy under Article 9, Section 10 of the Idaho state constitution but with little new elaboration on the doctrine in the state.

Montana is another state with little in the way of legal interpretations during the past three decades regarding language contained in the state's 1972 constitution.[140] In a 1997 case, the Montana Supreme Court considered whether the renting of university property to private parties, as permitted under a state law, represented an unlawful delegation of legislative authority to the Board of Regents of the Montana University system.[141] The court's decision to allow the policy rested in part on the constitutional authority granted to the regents.[142] In relation to the period constituting the primary focus of this study, a 1978 attorney general opinion, though advising that the university had to grant certain fee waivers to students, noted that the Montana Board of Regents possessed some form of independent constitutional authority.[143]

Though slightly earlier than the years focused on in this article, a significant decision related to constitutional autonomy in Montana was issued in 1975 by the Montana Supreme Court.[144] In the case, the regents challenged a state law requiring certifications from them regarding compliance with line item appropriations from the legislature.[145] The opinion characterized the regents as asserting at oral argument that the state constitution made them a fourth branch of government with complete control over the University of Montana to the "exclusion of legislative and executive bodies."[146] While describing the constitutional authority as narrower than that sought by the regents, the court still agreed that the constitution granted them certain independent constitutional authority.[147]

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139. 1981 Idaho Op. Att'y Gen. 221 (1981), *available at* 1981 Ida. AG LEXIS 27. "It should be noted that the Board of Regents of the University of Idaho, who govern the University of Idaho, are a special case[.] The Board of [R]egents is a chartered preconstitutional body . . . . We believe that the University of Idaho would not be controlled by the city ordinances . . . ." *Id.*

140. MONT. CONST. art. X, § 9(2)(a). The constitution states that the University System Board of Regents possesses full power to "supervise, coordinate, manage, and control" the state's university system. *Id.*

141. Duck Inn, Inc. v. Mont. State Univ.-Northern, 949 P.2d 1179 (Mont. 1997).

142. *Id.* at 1183 (stating the regents have authority over the Montana university system which is independent of that delegated by the legislature).

143. 37 Mont. Op. Att'y Gen. 698 (1978) (stating the regents were subject to the legislature's appropriations power and also to established public policy).

144. Bd. of Regents of Higher Educ. v. Judge, 543 P.2d 1323 (Mont. 1975).

145. *Id.* at 1325.

146. *Id.* at 1329.

147. *Id.* at 1330 ("Our task then is to harmonize in a practical manner the constitutional power of the legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system.").

Though the legislature possessed line item appropriation's authority within certain limits, it could not infringe on the regents' constitutional autonomy to "supervise, coordinate, manage and control the university system."[148] 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 sources other than state appropriations.[149]

Similar to Montana and Idaho, constitutional autonomy in North Dakota represents a legal doctrine with apparent recognition by courts in relation to a 1938 addition to the state's constitution[150] but with somewhat limited legal interpretation. The North Dakota Supreme Court held in 2006 that exhaustion of administrative remedies is especially appropriate for the State Board of Higher Education because the North Dakota Constitution grants the board "full authority to control and administer the State's higher education institutions."[151] The state's high court in a 2004 opinion[152] described the state board as possessing independent constitutional autonomy.[153] According to the opinion, reviewing actions of the board was similar to reviewing decisions dealing with separation of powers issues between branches of state government.[154] In the case, which dealt with the discharge of a tenured faculty member for alleged misconduct,[155] the court stated that the board's constitutional power includes the authority to appoint and remove professors.[156] While acknowledging continuing judicial recognition of constitutional autonomy, the court did not elaborate on the general extent of constitutional autonomy in Montana.

Though not at the level of Michigan, California, or Minnesota, legal interpretations in recent years in Louisiana, Oklahoma, Nevada, and New Mexico have provided somewhat more guidance regarding the contemporary status of constitutional autonomy than in Idaho, Montana, and North Dakota. In Louisiana, constitutional autonomy is primarily vested in a statewide board of regents,[157] but some independent authority is also given to individual institutional governing boards[158] and to a

148. *Id.* at 1333.
149. *Id.* at 1334–35.
150. *See* Posin v. State Bd. of Higher Educ., 86 N.W.2d 31, 34–36 (N.D. 1957).
151. Brown v. State *ex rel* State Bd. of Higher Educ., 711 N.W.2d 194, 198 (N.D. 2006). For the applicable constitutional provision, see N.D. CONST. art. VIII, § 6.
152. Peterson v. N.D. Univ. Sys., 678 N.W.2d 163 (N.D. 2004).
153. *Id.* at 169 (citing *Posin*, 86 N.W.2d at 34–35).
154. *Id.*
155. *Id.* at 165.
156. *Id.* at 169.
157. LA. CONST. art. VIII, § 5.
158. LA. CONST. art. VIII, § 5 (pertaining to the Board of Supervisors of the University of Louisiana System); LA. CONST. art. VIII, § 7 (pertaining to 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

governing board for two-year institutions created by a constitutional provision enacted in 1998.[159] While a 1940 constitutional provision had dealt with the governance of Louisiana State University and its board of supervisors,[160] the state's constitution enacted in 1974 created a statewide governing board, but left certain functions to the discretion of individual governing boards or boards of supervisors.[161]

A key issue in relation to constitutional autonomy in Louisiana involves the relationship between the statewide regents and the individual governing boards. Unlike in Michigan, where a constitutionally authorized statewide board may not override the constitutional autonomy of institutional governing boards, the statewide governing board in Louisiana possesses extensive constitutional authority. A 2003 case,[162] tracking constitutional language, stated the following regarding the relationship between the statewide board of regents and the governing boards of particular institutions:

> [T]he Board of Regents was created . . . to manage the following functions of all public postsecondary education: to exercise budgetary responsibility; to approve, disapprove, modify, revise, or eliminate an existing or 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 or university 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.[163]

The opinion makes clear that the statewide governing board in Louisiana enjoys substantial authority over individual institutions. Governing boards for particular institutions, however, retain any powers not specifically

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College).

159. LA. CONST. art. VIII, § 7.1. A 2005 case, though not ruling in favor of the board of supervisors on all issues or elaborating on the extent of its constitutional authority, described the two-year board as possessing self-executing powers not dependent upon legislative grants of authority. Delahoussaye v. Bd. of Supervisors of Cmty. & Technical Colls., 906 So. 2d 646, 649–50 (La. Ct. App. 2005)

160. GLENNY & DALGLISH, *supra* note 9, at 34.

161. LA. CONST. art. VIII, §§ 5–7.1.

162. La. Pub. Facilities Auth. v. All Taxpayers, 868 So. 2d 124, 134 (La. Ct. App. 2003).

163. *Id.*

vested in the board of regents.[164] 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."[165]

A 1986 case dealt with a dispute over the statewide board's authority versus that of an institution to change a school's name.[166] Deciding for neither, the court held that only the legislature possesses the authority to change an institution's name.[167] Attorney general opinions have also addressed the legal relationship between the statewide board and individual institutional governing boards. A 1996 opinion stated that the authority to appoint chancellors and presidents could not be transferred to the statewide board from individual governing boards because this was not a power granted to the statewide regents in the constitution.[168] Another attorney general opinion advised that the statewide board had to follow the notice requirements contained in the state's Administrative Procedures Act when enacting regulations that affected institutions.[169]

In a case dealing with the Administrative Procedures Act and the authority of the statewide board, a 1983 decision limited application of certain provisions of the law to the board.[170] In the case, faculty members at Northeast Louisiana University contended that the Administrative Procedures Act established standards that had to be followed in processing faculty grievances.[171] The court held that enforcement of the Act under the circumstances presented would unduly interfere with the statewide board's discretion to manage the affairs of institutions under its control.[172]

Louisiana courts continue to offer judicial support for constitutional autonomy, and the past three decades have presented new wrinkles in the treatment of the doctrine in the state. Judicial recognition of the constitutional autonomy of the statewide governing board and its authority over institutional governing boards represents an important development. The granting of constitutional autonomy for a two-year governing board also represents a significant evolution of constitutional autonomy in Louisiana. Future cases may better delineate the constitutional authority

164. *Id.*

165. *Id.*

166. Bd. of Regents v. Bd. of Tr. for State Colls. & Univs., 491 So. 2d 399 (La. Ct. App. 1986).

167. *Id.* at 401.

168. La. Op. Att'y Gen. 96-491 (1996).

169. La. Op. Att'y Gen. 81-981 (1981). Because the Attorney General determined that the statewide board failed to satisfy notice requirements, it did not consider whether or not the board possessed the authority to establish admission standards for professional programs.

170. Grace v. Bd. of Tr. for State Colls. & Univs., 442 So. 2d 598 (La. Ct. App. 1983).

171. *Id.* at 600.

172. *Id.* at 601.

still held by individual institutional governing boards and offer clarification of the extent of constitutional independence enjoyed by the statewide board.

Oklahoma courts, without defining exact legal boundaries, continue to affirm judicial support for constitutional autonomy. Constitutional autonomy can be traced to the state's 1907 constitution and a provision regarding the governance of the state's agricultural and mechanical schools.[173] Amendments to the constitution in 1941,[174] 1944,[175] and 1948[176] resulted in a system in which a statewide board exists alongside governing boards with authority over particular colleges and universities, creating a situation with certain similarities to Louisiana. Alongside the statewide Oklahoma State Regents for Higher Education,[177] the three governing boards with authority over particular institutions are the Board of Regents of the University of Oklahoma, the Board of Regents of Oklahoma Colleges, and the Board of Regents of Agricultural and Mechanical Colleges.[178] State courts, without outlining the overall contours of constitutional autonomy in Oklahoma, and similarly without examining the relationship between the statewide board and other governing boards, have continued to provide judicial support for the doctrine. In 2001, for example, the Oklahoma Supreme Court, in a succinct opinion, held that the Oklahoma Merit Protection Commission could not exercise authority over the Board of Regents for Oklahoma State University and the Agricultural and Mechanical Colleges.[179]

A 1981 decision from the state's highest court also provides judicial support for constitutional autonomy, though it failed to outline the general nature of constitutional autonomy in Oklahoma. The case dealt with the Board of Regents of the University of Oklahoma and limits over legislative control over salaries of university employees.[180] In the opinion, the Oklahoma Supreme Court stated, "[w]e have no doubt that in elevating the status of [the] Board from a statutory to a constitutional entity the people

173. Trapp v. Cook Constr. Co., 105 P. 667, 669 (Okla. 1909).

174. OKLA. CONST. art. XIII.A, § 2.

175. OKLA. CONST. art. XIII, § 8; OKLA. CONST. art. VI, § 31a.

176. OKLA. CONST. art. XIII.B, § 1.

177. OKLA. CONST. art. XIII.A, § 2.

178. The constitutional provisions for these three governing boards are as follows: (1) the Board of Regents of the University of Oklahoma, OKLA. CONST. art. XIII, § 8, (2) the Board of Regents of Oklahoma Colleges, OKLA. CONST. art. XIII.B, § 1, which consists of six institutions, OKLA. CONST. art. XIII.B, § 2; and (3) the Board of Regents of Agricultural and Mechanical Colleges, OKLA. CONST. art. VI, § 31a.

179. State *ex rel.* Bd. of Regents of Okla. State Univ. v. Okla. Merit Prot. Comm'n., 19 P.3d 865, 866 (Okla. 2001) (stating that the "[l]egislature is powerless to delegate the petitioners' constitutional control over the management of their institutions to any department, commission or agency of state government.").

180. Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464 (Okla. 1981).

intended to limit legislative control over University affairs."[181] Pursuant to this general constitutional standard, the court held that salary determinations constituted a key component of the internal management functions of the Board of Regents of the University of Oklahoma and were not subject to legislative control.[182] While explicitly re-affirming judicial support for constitutional autonomy in Oklahoma, the court declined to flesh out the general extent of the regents' authority, though pointing out that constitutional autonomy in Oklahoma was not necessarily equivalent to that in other states.[183] The opinion demonstrates continuing judicial support for constitutional autonomy but without providing any sort of substantial legal framework to lay out the contours of constitutional autonomy in the state.

Several Oklahoma attorney general opinions have also dealt with constitutional autonomy. A 1988 opinion, for instance, advised that a college or university did not suffer an encroachment on constitutional authority in being made to follow state purchasing requirements.[184] Another opinion, issued in 1980, determined that the statewide regents, while possessing extensive authority, did not have the power without legislative approval to close a state institution or to establish a branch campus of an existing institution.[185] Other opinions have determined that constitutional autonomy places limits on legislative or executive control of institutions protected by constitutional autonomy. For instance, constitutional autonomy served as a basis for the attorney general to conclude in 1992 that institutions should be able to set internal policy in relation to paying the moving expenses of new employees, notwithstanding the provisions of a general statewide law.[186]

Attorney general opinions have also asserted that colleges and universities in Oklahoma covered by constitutional autonomy are not subject to all of the same conditions as institutions in the state that are created by statute or that are under the control of governing boards created by statute. A 1996 attorney general opinion stated that the legislature could not empower the governor to impose a hiring freeze on the statewide governing board that would apply to constitutionally authorized institutions and governing boards, though such authority could extend to institutions that were created by statute and not under the authority of a governing board possessing constitutional autonomy.[187]

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181. *Id.* at 467.
182. *Id.* at 469.
183. *Id.* at 467–69.
184. 19 Okla. Op. Att'y Gen. 16 (1988).
185. 12 Okla. Op. Att'y Gen. 343 (1980).
186. 24 Okla. Op. Att'y Gen. 7 (1992).
187. 25 Okla. Op. Att'y Gen. 19 (1996). This distinction between statutorily and constitutionally created boards was accepted by a court considering application of the

The attorney general in a 1992 opinion also advised that institutions with constitutional autonomy, in contrast to statutorily authorized institutions, are not subject to employee leave provisions covering other state agencies and institutions.[188] A 1999 attorney general opinion concluded that while the legislature could transfer additional institutions to the control of the Board of Regents of Oklahoma Colleges (a constitutionally authorized governing board), any such institutions had to be established by statute and the legislature must be unable to transfer the control of institutions with governing boards established by constitutional provision.[189] Without articulating the general distinctions between institutions in the state created by the constitution or governed by a constitutionally empowered governing board versus those institutions existing completely subject to legislative control, attorney general opinions indicate that constitutional autonomy enhances the institutional autonomy of covered colleges and universities.

Cases and attorney general opinions demonstrate the ongoing judicial recognition of constitutional autonomy in Oklahoma during the past three decades but several key questions persist. The exact contours of constitutional autonomy are uncertain on several fronts. One key issue involves the relationship between the statewide board and the governing boards that oversee particular institutions. Another area of uncertainty deals with the general areas of authority that constitutional autonomy encompasses in the state. Despite some vagueness concerning its scope and depth in Oklahoma, however, cases and attorney general opinions issued during the past thirty years support the notion that constitutional autonomy represents an active legal doctrine in the state, one that has certainly not experienced any sort of precipitous decline.

Judicial recognition of the constitutional autonomy of the Board of Regents of the University of Nevada system also persists, though somewhat lukewarm judicial support for the doctrine may exist. In Nevada, constitutional autonomy faces an initial hurdle based on language, incorporated into the state's 1864 constitution, stating that the legislature may determine the duties of the regents.[190] But in a 1948 decision, the Nevada Supreme Court invalidated a legislative effort to create an advisory board for the Regents of the University of Nevada, indicating that some degree of constitutional autonomy may exist in the state.[191] The regents sought to rely on this decision in seeking to assert constitutional autonomy in a 1981 Nevada Supreme Court case. While not accepting the regents' assertion that the university's constitutional status permitted it to

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state's Administrative Procedures Act to a statutorily created community college. Morehouse v. Okla., 150 P.3d 395, 399 (Okla. Civ. App. 2006).

188. 23 Okla. Op. Att'y Gen. 41 (1991).

189. 29 Okla. Op. Att'y Gen. 223 (1999).

190. NEV. CONST. art. XI, § 7(2)(c).

191. King v. Bd. of Regents of the Univ. of Nev., 200 P.2d 221, 238 (Nev. 1948).

implement a mandatory retirement age despite a prohibition in a general state law, the Nevada Supreme Court stated in *Board of Regents of the University of Nevada System v. Oakley*[192] that the regents enjoy freedom from legislative authority when a law interferes with essential university functions.[193] Besides limiting independent constitutional authority of the regents to the area of essential university functions[194]—a phrase upon which the opinion did not elaborate—the court also rejected the contention that policies of the regents stand on a legal footing akin to legislative acts for purposes of judicial scrutiny.[195] The language in *Oakley* does suggest, however, continued judicial recognition of at least limited constitutional autonomy for the University of Nevada, even if it remains somewhat undefined by judicial interpretation.

Beckham and other scholars did not identify New Mexico as a state recognizing constitutional autonomy, but a 1998 decision from the New Mexico Supreme Court, interpreting language contained in the state's constitution adopted in 1911, suggests judicial recognition of some form of constitutional autonomy in the state for the Regents of the University of New Mexico.[196] In the opinion, while holding that a state law dealing with the collective bargaining rights of public employees did not interfere with the regents' constitutional authority,[197] the court did state that the legislature may not impede the regents' power to make decisions related to the "education policy" of the university.[198] The decision listed salary determinations, budget decisions, and direct control over appropriations as illustrative of areas left to the regents' control by the constitution.[199] Similar to language by courts in California, Michigan, and Minnesota, the

192. 637 P.2d 1199 (Nev. 1981).

193. *Id.* at 1200. The regents argued that their constitutional status under Article 11, Section 7 of the state constitution meant that they could impose a mandatory retirement age despite non-discrimination standards in state law. *Id.*

194. *Id.*

195. *Id.*; *see also* Univ. & Cmty. Coll. Sys. v. DR Partners, 18 P.3d 1042, 1047 (Nev. 2001) (reaffirming that *Oakley* expressly rejected the argument that "the Board's own regulations are equal in status and dignity to legislative enactments (in other words, statutes).").

196. Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 962 P.2d 1236 (N.M. 1998).

197. The case dealt with the applicability of the state's Public Employee Bargaining Act. *Id.* at 1239. The court did, however, state that conditions could exist where application of the Act might interfere with the regents' constitutional authority, which could be addressed as needed. *Id.* at 1252.

198. *Id.* at 1250. Article 12, Section 13 of the state constitution specifically establishes the Board of Regents for the University of New Mexico, with the legislature directed to establish governing boards for other institutions. *New Mexico Federation of Teachers* dealt with the University of New Mexico, and the court did not address whether other governing boards in the state might also possess some form of constitutional autonomy.

199. *Id.* at 1250.

court stated that constitutional independence must yield to general statewide laws when the legislature acts to protect the public welfare or addresses issues of "statewide concern."[200] While seemingly recognizing some degree of constitutional autonomy, the court also described the regents' autonomy as ill-defined, highlighting a lack of cases elaborating the attributes of constitutional autonomy in the state.[201] Despite this ambiguity, New Mexico apparently should join those states determined to recognize some form of constitutional autonomy for public higher education institutions. New Mexico courts have also highlighted the ways in which new legal decisions may enhance or inhibit judicial recognition of constitutional autonomy provisions, as well as the need for periodic re-examination of the status of the doctrine.

C. Limited Independence Subject to Extensive Legislative Control

In 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 clearly rest at the opposite end of this continuum from California, Michigan, and Minnesota. Nebraska was not identified by Beckham as enjoying constitutional autonomy, ostensibly based on constitutional language going back to language in the state's 1875 constitution, stating that the legislature may define the powers and responsibilities of the Board of Regents of the University of Nebraska.[202] A decision from 1977 indicates, however, that the regents may possess some form of significantly restricted constitutional autonomy.[203] In the decision, the Nebraska Supreme Court declared that the legislature exercised substantial control over the board but stated the legislature could not usurp all "discretion and authority" possessed by the regents.[204] 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.[205]

Beckham's analysis discussed the South Dakota Board of Regents as potentially possessing constitutional autonomy.[206] However, cases issued

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200. *Id.*

201. *Id.*

202. NEB. CONST. art. VII, § 10.

203. Bd. of the Regents of Univ. of Neb. v. Exon, 256 N.W.2d 330 (Neb. 1977).

204. *Id.* at 333. ("The Legislature can not [sic] use an appropriation bill to usurp the powers or duties of the Board of Regents and to give directions to the employees of the University. The general government of the University must remain vested in the Board of Regents.").

205. *Id.* at 334–35.

206. *See* Beckham, *supra* note 2, at 181. See S.D. CONST. art. 14, § 3 for the

during the past three decades prove unsupportive of any substantial independence for the board. This position is further supported by a 1994 law review article critical of how state courts refused to recognize the regents as possessing considerable constitutional authority despite language in the state's constitution.[207] At most the regents would appear to possess a significantly restricted form of autonomy, as courts have proven unwilling to overturn or distinguish precedent from as early as 1938 which is unsupportive of constitutional autonomy, despite language in the state's constitution.[208] Following this line of precedent, in a 1984 decision, *South Dakota Board of Regents v. Meierhenry*,[209] the South Dakota Supreme Court stated that the regents were not granted "political autonomy" and were subject to legislative enactments, as long as rules and policies "stop short of removing all power" from the regents.[210] In the state, a diluted form of constitutional autonomy may exist, but it remains far removed from that enjoyed by governing boards in California, Michigan, and Minnesota, and even states with more moderate degrees of constitutional autonomy. Still, the legislature may not strip the regents of all their authority.

D. States with Ambiguous/Unknown Legal Status for Constitutional Autonomy

In Florida and Hawaii, relatively recent constitutional provisions have made the status of constitutional autonomy uncertain. Similarly, in Georgia ambiguous legal opinions and language added to the state's 1983 constitution regarding the statewide governing board have clouded the issue of constitutional autonomy. A constitutional amendment in Florida that took effect in 2003 created the Board of Governors of the State University system to serve as a statewide governing entity.[211] The issue of legislative authority versus that of the board has created recent friction between the two bodies. A primary dispute has centered on whether the board or the legislature has the authority to establish tuition rates for public colleges and universities in the state.[212] In response to the board's assertions that the constitution permitted it to establish tuition levels, in

constitutional provision that creates the South Dakota Board of Regents.

207. *See generally* Shekleton, *supra* note 8.

208. State Coll. Dev. Ass'n v. Nissen, 281 N.W. 907 (S.D. 1938) (describing the regents as exercising control over higher education as subject to the power of the legislature); *see also* Worzella v. Bd. of Regents of Educ., 93 N.W.2d 411 (S.D. 1958) (stating the regents are subject to the rules and restrictions provided by the legislature).

209. 351 N.W.2d 450 (S.D. 1984).

210. *Id.* at 451.

211. FLA. CONST. art. IX, § 7; *see* United Faculty of Fla. v. Public Employees Relations Comm., 898 So. 2d 96, 98 (Fla. Dist. Ct. App. 2005).

212. Russell Ray, *Senate Backs University Authority Plan*, TAMPA TRIBUNE, Mar. 28, 2008, at Metro 5, *available at* 2008 WLNR 6569604.

2008 a constitutional amendment was proposed—though it did not make it to the ballot for consideration by state citizens—to strip the board of governors of its authority.[213] The dispute over tuition also resulted in a lawsuit against the state legislature brought by a group of private citizens, including former U.S. Senator Bob Graham, and joined by the statewide board; however, a Florida Circuit Court ruled that the plaintiffs lacked standing.[214] In the suit, the plaintiffs contended that the board possessed the constitutional authority to establish tuition rates.

While perhaps overshadowed by more recent events involving the conflict between the board and the state legislature, in 2005 a Florida state court ratified a binding mediation agreement that did involve the board's constitutional powers over the state university system.[215] Though approving the mediation agreement, the court did not engage in any sort of any independent analysis regarding whether it correctly characterized the board's constitutional powers. According to the agreement, the constitution provides the statewide board: (1) uninhibited authority and power 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, (7) authority over the selection of presidents at state universities, and (8) exclusive authority over collective bargaining for the state university system.[216]

While the mediation agreement was approved by the court and expressed substantial authority for the board, it does not represent an independent judicial interpretation of the potential constitutional powers possessed by the statewide board. The agreement is perhaps most useful in identifying areas of control and authority the board might likely assert it is granted by the state constitution. As demonstrated by the recent dispute over tuition, the state legislature appears far from ready to accept the notion that it must yield to the governing board's assertions of constitutional authority. The legislature has also demonstrated that it is more than willing to consider a constitutional amendment to nullify any independent constitutional power claimed by the statewide board. Future legal decisions and resolution of political disputes between the board and the state legislature will determine

213. *Id.* (noting passage of the measure in the state senate). The proposed amendment, however, did not make it to a vote by state citizens. Dave Weber, *Changes in Store for Public Schools*, ORLANDO SENTINEL, May 3, 2008, at A12, *available at* 2008 WLNR 8273026.

214. Graham v. Pruitt, No. 2007-CA-1818, 2008 WL 827840 (Fla. Cir. Ct. Jan. 3, 2008). The judge did dismiss the party's complaint without prejudice.

215. Floridians for Constitutional Integrity v. State Bd. of Educ., No. 2004-CA-3040 (Fla. Cir. Ct. Jan. 29, 2005).

216. *Id.*

whether some form of constitutional autonomy for the statewide board exists in Florida.

The conflict in Florida also illustrates that even if courts have supported the existence of constitutional autonomy, governing boards must be careful not to alienate or disregard other state government entities, especially the legislative branch. Even if the response is not to seek an amendment to curtail constitutional autonomy, the legislature may choose to cut state financial support to institutions. Accordingly, the power granted to an institutional or system governing board by the state constitution must be balanced against, and considered in the context of, the array of political and social forces affecting support for public colleges and universities covered by constitutional autonomy provisions.

A 2000 constitutional change in Hawaii presents the possibility that constitutional autonomy may exist for the Board of Regents of the University of Hawaii,[217] though the provision would still seem to leave the legislature with considerable authority. While giving the regents the authority to formulate policy and exercise control over the university without legislative authorization, the provision continues to provide that "[t]his 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."[218]

In a 1981 case, the Hawaii Supreme Court stated that the Board of Regents of the University of Hawaii must yield when the legislature acts on an issue of statewide concern.[219] If sole discretion is left with the legislature to determine what constitutes a matter of statewide concern, then this restriction would seem to place significant limits on the extent of independence of the University of Hawaii from the legislature. But court decisions may result in an interpretation of the constitutional provision addressing the regents' authority that results in some degree of autonomy for the regents that is not ultimately subject to legislative control.

Regarding Georgia, Beckham and other authors identified the state as appearing to recognize a grant of constitutional autonomy for the Board of

217. HAW. CONST. art. X, § 6. In my dissertation, I categorized constitutional autonomy as lacking judicial recognition in Hawaii. Despite the constitutional amendment, the constitutional provision states that the university must yield to legislative authority on matters of statewide concern, and the constitutional provision vests exclusive authority with the legislature to determine what constitutes a matter of statewide concern. While courts in Hawaii still have not determined whether constitutional autonomy creates some zone of authority for the University of Hawaii truly independent of the legislature's power to determine issues of statewide concern, upon reflection I decided that the state fits better in this category, especially given the change in constitutional language in 2000.

218. *Id.*

219. Levi v. Univ. of Haw., 628 P.2d 1026, 1029 (Haw. 1981) (stating the university "must act in accordance with legislative enactments that deal with statewide matters such as civil service and collective bargaining laws.").

Regents of the University System of Georgia.[220] But the adoption of a new constitution in Georgia in 1983 potentially left the status of constitutional autonomy in the state uncertain. The 1945 and 1976 constitutions stated that the board of regents possessed the powers and duties that existed by statutory authorization at the time of the ratification of the 1945 constitution.[221] The 1983 constitution, however, altered the language dealing with the powers of the statewide board.[222] According to the constitution, the "government, control, and management of the University System of Georgia" is given to the regents.[223] Additionally, "[a]ll 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 Board of Regents "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."[224] The constitution also provides that the regents may "hold, purchase, lease, sell, convey, or otherwise dispose of public property" and "may exercise the power of eminent domain in the manner provided by law."[225] However, the 1983 constitution also states that the regents "shall have such other powers and duties as provided by law" and does not provide that the regents possess any authority that existed at the time of the ratification of the 1945 constitution.[226]

The Georgia Court of Appeals, in a 2006 case involving a contract dispute, discussed the board's authority as "plenary"[227] but subject to "such restraints of law as are directly expressed, or necessarily implied."[228] The court, while referencing Article 8, Section 4 of the Georgia Constitution, looked as well to the board's powers as determined under statutory authority.[229] The decision makes unclear the status of independent constitutional authority for the statewide board.

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220. *See* Beckham, *supra* note 2, at 181 (discussing that courts had appeared to recognize constitutional autonomy but had not provided a large body of case law).

221. GA. CONST. of 1945, art. VIII, § 4; GA. CONST. of 1976, art. VIII, § 4.

222. GA. CONST. art. VIII, § 4.

223. GA. CONST. art. VIII, § 4(b).

224. GA. CONST. art. VIII, § 4(c).

225. GA. CONST. art. VIII, § 4(d).

226. GA. CONST. art. VIII, § 4(d).

227. Bd. of Regents of the Univ. Sys. of Ga. v. Doe, 630 S.E.2d 85, 91 (Ga. Ct. App. 2006).

228. *Id.* at 92.

229. *Id.* A 1991 case involving the regents centered heavily on sovereign immunity in relation to the state constitution and did not directly address the issue of whether or not the 1983 constitution altered any independent constitutional powers possessed by the board. Pollard v. Bd. of Regents of Univ. Sys. of Ga., 401 S.E.2d 272 (Ga. 1991). In *Pollard*, the court considered whether a specific provision related to sovereign immunity affected the board, but the court did not address the broader issue of any independent authority for the regents.

A 1988 attorney general opinion described the board as possessing a "broad grant of authority" and discussed the specific powers related to lump sum appropriations and the acquisition and disposition of property, but also noted that its other powers and duties were to be provided by law.[230] A 1996 attorney general opinion did offer an assessment supportive of constitutional autonomy for the board.[231] The opinion discussed that broad authority for the regents had been recognized in previous state constitutions.[232] The Attorney General, in assessing whether or not the regents were subject to a legislative resolution concerning a reserve officer training program at a state institution, concluded that "while this Joint Resolution does have the force and effect of law, it cannot bind the Board of Regents in relation to the exercise of its constitutional authority to govern, control and manage the University System of Georgia."[233] The Attorney General stated, "The power to determine the scope of an institution's educational curriculum is a power uniquely reserved to the Board . . . ."[234]

While Georgia attorney general opinions have been supportive of constitutional autonomy, Georgia courts have not squarely addressed the alterations in the 1983 constitution. Additional guidance from states courts is required before placing Georgia among those states recognizing constitutional autonomy, but the state may well deserve to be among those recognized as providing constitutional autonomy for public higher education based on future cases.

E. Lack of Judicial Recognition

In Alabama, Alaska, and Mississippi, courts, without outright rejection of constitutional autonomy, have either not issued opinions on the doctrine or have expressly declined to decide whether constitutional autonomy exists, even when parties to litigation have raised the issue. For these states, constitutional provisions related to higher education governing boards have been in existence since the effective dates of the current state constitutions, which is 1901 for Alabama,[235] 1959 for Alaska,[236] and 1890

230. 1988 Ga. Op. Att'y Gen. 33 (1988). The Attorney General Opinion concluded that the regents did not need legislative authorization to merge institutions. Creation of a new institution, however, does require legislative approval. *See* GA. CONST. art. VIII, § 4.

231. Ga. Op. Att'y Gen. No. 96-12 (1996), *available at* 1996 Ga. AG LEXIS 24.

232. *Id.*

233. *Id.* at *1.

234. *Id.* at *7.

235. *See* ALA. CONST. art. XIV, § 264. Article XIV, Section 264 addresses the governance of the University of Alabama. Article XIV, Section 266 deals with the governance of Auburn University and was added to the constitution in 1961.

236. *See* ALASKA CONST. art. VII, § 3. The constitution was ratified in 1956 and became effective in 1959 when Alaska was granted statehood.

for Mississippi.[237] In relation to these three states, previous authors have noted that state courts had declined to weigh in on the issue of constitutional autonomy,[238] and this analysis found the continuation of such a pattern during the past three decades.

In Alabama, the state's supreme court has only gone so far as to prevent the transfer of 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.[239] While not directly on point in relation to a determination of independent constitutional authority, the Alaska Supreme Court held in 1983 that the University of Alaska's constitutional status did not make the institution immune to the state's Public Records Statute.[240] An attorney general opinion has also discussed that state courts have offered unclear guidance concerning any independent constitutional authority for the University of Alaska.[241] In Mississippi, courts have squarely refused to address claims regarding constitutional autonomy, though parties have attempted to argue that Article 8, Section 213-A of the constitution creates some form of independent constitutional authority.[242] Attorney general opinions have also not indicated any legal recognition of constitutional autonomy in the state.[243]

While the possibility of judicial recognition of constitutional autonomy lingers in Alabama, Alaska, and Mississippi, the legal doctrine appears to have resulted in, at best, no to limited practical legal effect. Judicial decisions and attorney general opinions issued so far do not indicate that constitutional autonomy enjoys meaningful judicial recognition in these states. As such, these states should not be included among those states where constitutional autonomy is recognized. Despite this status, state courts also have not explicitly held that constitutional autonomy does not exist, and future decisions may recognize the legal doctrine in one or more of these states.

Future research may well want to consider why, despite language in state

237. *See* MISS. CONST. art. VIII, § 213–A.

238. *See, e.g.*, Beckham, *supra* note 2, at 179–81.

239. Opinion of the Justices, 417 So. 2d 946 (Ala. 1982).

240. Carter v. Alaska Pub. Employees Ass'n, 663 P.2d 916, 919 (Alaska 1983). The court relied heavily on the decision in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975), a case in which the court held that the University of Alaska's constitutional status did not shield it from a state law dealing with sovereign immunity. *Id.* at 128–29. Like *Carter*, the decision in *National Aircraft* did not directly address constitutional autonomy for the University of Alaska, but certainly does not offer a ringing endorsement that independent constitutional authority exists for the University of Alaska.

241. 1977 Alaska Op. Att'y Gen. 9, *available at* 1997 Alaska AG LEXIS 465.

242. Bd. of Trs. of State Insts. of Higher Learning v. Miss. Publishers Corp., 478 So. 2d 269, 275 (Miss. 1985).

243. *See, e.g.*, Miss. Op. Att'y Gen. (1998), *available at* 1998 Miss. AG LEXIS 546; Miss. Op. Att'y Gen. (1979), *available at* 1979 Miss. AG LEXIS 349.

constitutions, courts have been reluctant to recognize constitutional autonomy. Have public colleges and universities, for instance, demonstrated reluctance to press assertions of independent constitutional authority in state courts out of a fear of loss of financial support from the state legislature?[244] Alternatively, have political and historical forces in particular states and the resulting connections between state judges and the legislature somehow made the judiciary more resistant to refute assertions against the legislature's authority? Researchers may also determine other possible explanations to consider as well. While states such as California, Michigan, and Minnesota are perhaps of more obvious interest because of strong judicial recognition of constitutional autonomy, these states, along with those in which courts have rejected the legal doctrine, are also of interest. What trends and forces in these states related to higher education governance or to broader political and social trends resulted in the failure of constitutional autonomy to take root, despite the existence of constitutional language suggesting it should exist?

F. 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, despite longstanding constitutional language in these states potentially supportive of some degree of constitutional autonomy. Beckham determined that judicial recognition of constitutional autonomy was lacking in these states,[245] and this analysis reached the same conclusion. As illustrated by a 2006 Arizona Court of Appeals decision, Arizona case law continues to characterize the Arizona Board of Regents as subject to extensive legislative authority.[246] In Colorado, language in the state's constitution of 1876 stated that the Regents of the University of Colorado possessed control over the university and its funds, but this language was repealed in 1973.[247] In addition to the repeal of constitutional language related to the powers of the regents, state court cases in the period since Beckham's study certainly have not endorsed the notion of independent constitutional authority for the Regents of the University of Colorado and, instead, have emphasized the legislature's authority over the regents.[248]

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244. Beckham, *supra* note 2, at 181, for instance, discusses that in Missouri the failure of the university to assert constitutional rights influenced judicial denial of the legal doctrine.

245. Beckham, *supra* note 2, at 179–80.

246. Kromko v. Ariz. Bd. of Regents, 146 P.3d 1016, 1022 (Ariz. Ct. App. 2006). The regents are created by Article 11, Section 5 of the state constitution, which took effect in 1912. *See* ARIZ. CONST. art. XI, § 5.

247. *See* COLO. CONST. art. IX, § 14 (repealed 1973).

248. *See, e.g.*, Colo. Civil Rights Comm'n v. Regents of the Univ. of Colo., 759 P.2d 726, 727–28 (Colo. 1988) (noting that Article VIII, Section 5 of the state constitution established the regents but that the state's General Assembly has conferred

Regarding Missouri, while research did not locate new opinions, an attorney general opinion described case law in the state as not recognizing constitutional autonomy.[249] Both Beckham[250] and Glenny and Dalglish[251] discussed the Missouri Supreme Court's rejection of constitutional autonomy for the Board of Curators of the University of Missouri, despite constitutional language seemingly suggestive of constitutional autonomy.[252] Beckham and Glenny and Dalglish also concluded judicial denial of constitutional autonomy had occurred in Utah[253] based on a 1956 Utah Supreme Court decision.[254] In a 2006 case dealing with the right of the state to permit individuals to possess firearms on campus, the Utah Supreme Court once again rejected claims that the University of Utah possesses some form of constitutional autonomy.[255] The university argued that the state constitution granted it the constitutional authority to prohibit possession of firearms on campus.[256] The Utah Supreme Court, in rejecting this challenge, specifically described the university as completely subject to legislative and executive control.[257] This case, especially when considered in conjunction with the determinations of previous studies, indicates that, absent a dramatic reversal on the part of the Utah Supreme Court or a constitutional amendment, the University of Utah does not belong among those states with constitutional autonomy for public higher education.

G. Summary of Findings of Contemporary Status of Constitutional Autonomy Provisions

California, Michigan, and Minnesota continue to be the preeminent states with judicial recognition of constitutional autonomy. Research found support for continued recognition of constitutional autonomy for seven states, Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma, though without the extensive case law as the

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governing powers on the regents).

249. Mo. Op. Att'y Gen. 68 (1977), *available at* 1977 Mo. AG LEXIS 68. Article IX, Section 9(a) of the state constitution creates the Board of Curators for the University of Missouri. *See* MO. CONST. art. IX, § 9(a).

250. Beckham, *supra* note 2, at 181.

251. GLENNY & DALGLISH, *supra* note 9, at 36.

252. MO. CONST. art. XI, § 9(a).

253. GLENNY & DALGLISH, *supra* note 9, at 31–33; Beckham, *supra* note 2, at 181.

254. Univ. of Utah v. Bd. of Exam'rs, 295 P.2d 348, 370–71 (Utah 1956) (rejecting the university's claims that its constitutional status limited the authority of other agencies of state government over the university in relation to the institution's finances).

255. Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1118–21 (Utah 2006) (interpreting Article 10, Section 4 of the Utah Constitution).

256. *Id.* at 1112.

257. *Id.* at 1118.

aforementioned trio. A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota. In Florida, Georgia, and Hawaii the legal status of constitutional autonomy is ambiguous. Recognition by courts of constitutional autonomy in Alabama, Alaska, and Mississippi, though not completely settled, appears unlikely. For Arizona, Colorado, Missouri, and Utah, legal decisions and attorney general opinions indicate that constitutional autonomy does not enjoy judicial recognition. Table 3 at the end of this section summarizes these findings.

The analysis also suggests some other conclusions and reflections on constitutional autonomy. An important result from looking at the status of constitutional autonomy during the past three decades relates to its continued viability. The legal doctrine has not experienced a steep decline of the kind which could have occurred, based on the findings of Glenny and Dalglish.[258] In Louisiana, and potentially in Hawaii and Florida, the existence of new constitutional provisions during this period demonstrates that it is not politically impossible to obtain adoption of a constitutional autonomy provision. Montana also added a provision in the 1970s that has received favorable judicial treatment. In addition, in states with long-established judicial recognition of constitutional autonomy, in general state courts have not demonstrated any kind of wholesale effort to invoke narrow interpretations of constitutional autonomy provisions. One of the concerns of Glenny and Dalglish centered on control over financial issues,[259] and courts during the past three decades have viewed constitutional autonomy as safeguarding institutional control over finances, including limitations on legislative power to place conditions on appropriations.[260]

While recent decades have witnessed a general increase in state oversight of higher education,[261] one potentially useful way to consider constitutional autonomy provisions is alongside decentralization and deregulation efforts that have also taken place in higher education.[262] This is not to suggest that deregulation efforts, which are often based in statutory authority, are completely analogous to constitutional autonomy provisions. A state in which constitutional autonomy exists might experience efforts to increase state oversight or coordination over public higher education. Still, policy analysts and higher education stakeholders might find it useful to view constitutional autonomy provisions alongside other measures designed to leave colleges and universities with greater control of their

258. *See generally* GLENNY & DALGLISH, *supra* note 9.

259. *Id.* at 73–103.

260. *See, e.g.*, Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464, 467–69 (Okla. 1981).

261. *See generally* Aims C. McGuinness, Jr., *The States and Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 182, 183–215 (Philip G. Altbach et al., eds., 1999).

262. *See generally* Michael K. McLendon, *Setting the Governmental Agenda for State Decentralization of Higher Education*, 74 J. HIGHER EDUC. 479 (2003).

internal operations. Even if a constitutional autonomy provision is not deemed a viable policy choice, higher education stakeholders may determine that statutory or other policy mechanisms could help achieve certain benefits identified with constitutional autonomy.

In trying to make generalizations about constitutional autonomy provisions, one issue that arises is how to make comparisons and distinctions at a somewhat more generalized level than, for instance, that provisions have been found to limit application of municipal building codes or that institutions must generally adhere to statewide health and safety laws. Comparisons and contrasts at a slightly more generalized level might prove useful not only to individuals and organizations concerned with higher education policy issues. Courts might also find such assessments worthwhile in considering the status of constitutional autonomy in other states and in addressing what areas of college and university functioning should be protected by a state's constitutional autonomy provision. The analysis of constitutional autonomy among the states on the basis of strong, moderate, weak, and ambiguous or negative treatment of constitutional autonomy provisions undertaken in this article is hopefully of assistance in making such contrasts and comparisons.

Beyond classifying constitutional autonomy along the basis of the degree of judicial recognition, other approaches to evaluating constitutional autonomy provisions may prove beneficial as well, both to courts and to higher education stakeholders. In the next section, the article turns to one such approach by using the concepts of substantive and procedural autonomy to analyze constitutional autonomy provisions. Analysis of constitutional autonomy with these concepts provides another way to describe and to compare and contrast constitutional autonomy provisions among the states. Accordingly, the article now turns to an analysis of constitutional autonomy using the concepts of substantive autonomy and procedural autonomy.

Table 3: 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	Idaho	Nebraska
Michigan	Louisiana	South Dakota
Minnesota	Montana	
	Nevada	
	New Mexico	
	North Dakota	
	Oklahoma	
Judicial Rejection of Constitutional Autonomy		
	Arizona	
	Colorado	
	Missouri	
	Utah	
Ambiguous Recognition		
	Florida	
	Georgia	
	Hawaii	
Unsettled but Unlikely Recognition		
	Alabama	
	Alaska	
	Mississippi	

V. USING SUBSTANTIVE AUTONOMY AND PROCEDURAL AUTONOMY TO ASSESS CONSTITUTIONAL AUTONOMY

Analyzing constitutional autonomy using the concepts of substantive and procedural autonomy provides a means of deepening the analysis offered in Part IV and of considering the ways in which constitutional autonomy may contribute to an institution's overall institutional autonomy. Multiple factors, as discussed in Part III, in addition to legal forces, shape the degree of institutional autonomy a college or university possesses, including a tradition of deference to public colleges and universities in a state or support for an institution from alumni and other groups. Analysis of constitutional autonomy represents just one piece of the institutional autonomy puzzle. As covered in Part III, substantive autonomy deals with "the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)."[263] And 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)."[264]

In applying the concepts of substantive and procedural autonomy, it is important to keep in mind that at times a particular case or category of cases could potentially be viewed as implicating substantive autonomy as well as procedural autonomy. For instance, while control over financial decisions is often considered related to procedural autonomy, a decision permitting extensive legislative oversight of financial issues could be viewed as interfering with substantive autonomy by leaving an institution with limited meaningful control over the ways to allocate funds to implement goals or programs determined by the governing board absent extensive oversight by the legislature. While the line between procedural and substantive autonomy might appear fuzzy in particular cases, the concepts may still prove useful to courts in determining whether or not a legislative enactment encroaches on an institution's constitutional autonomy. In the case of substantive autonomy, for instance, courts can inquire as to whether a particular legislative directive intrudes into the authority of a governing board such that it unreasonably hampers the board's ability to set and/or implement major institutional goals and priorities. In relation to procedural autonomy, courts can assess whether the legislature has unduly hampered the constitutional authority of a governing board to decide how best to implement major goals and priorities, even if appropriately determined by other parts of state government.

The section first considers cases that potentially implicate substantive autonomy, and then turns to procedural autonomy. While drawing from the

263. Berdahl et al., *supra* note 33, at 6.
264. *Id.*

cases previously discussed in Part IV, this section also looks at times to foundational constitutional autonomy cases. Thus, the focus is no longer limited to cases exclusively from the past thirty years.

A. Substantive Autonomy

In cases from California, Michigan, and Minnesota, courts have consistently stated that constitutional autonomy shields the internal control and management of institutions from undue governmental control.[265] In *Sterling v. Regents of the University of Michigan*,[266] for example, one of the landmark constitutional autonomy cases in the state, the Michigan Supreme Court invalidated a legislative directive to relocate the university's homeopathic medical school.[267] In describing the constitutional powers of the Regents of the University of Michigan in relation to the legislature, the court declared:

> 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.[268]

As discussed in Part IV.A.1, Michigan courts have stated that constitutional autonomy is meant to reserve the internal control of institutions to their designated governing boards. The Michigan Supreme Court has noted that even a law otherwise applicable to an institution with constitutional autonomy could infringe on independent constitutional authority if the act interfered with educational decisions.[269] The Michigan Supreme Court stated in a 1975 case that while the legislature may impose certain conditions on appropriations it "may not interfere with the management and control of those institutions."[270] In that same decision, the court held that a statewide board of education was meant to serve as a general coordinating and planning agency but could not exercise any kind of direct control over institutions.[271] While it was acceptable to require institutions to submit new programs to the statewide board, the board possessed no

265. *See supra* Part IV.A.
266. 68 N.W. 253 (Mich. 1896).
267. *Id.* at 258.
268. *Id.* at 257.
269. Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ., 273 N.W.2d 21, 25–26 (Mich. 1978).
270. Regents of Univ. of Mich. v. State, 235 N.W.2d 1, 6 (Mich. 1975).
271. *Id.* at 11–12.

authority to prohibit new academic programs by institutions.[272] Michigan courts have made it clear that constitutional governing boards possess extensive authority, and this constitutional power is not simply limited to deciding how to implement legislative enactments. Governing boards in the state are constitutionally empowered to set major institutional goals and priorities in such areas as academic programs. These kinds of major decisions and priority setting are hallmarks of attributes used to describe substantive autonomy.

Similar to Michigan, California courts have described the Regents of the University of California as possessing almost exclusive authority, with the regents possessing "broad powers"[273] and meant "to operate as independently of the state as possible."[274] In a 2005 decision, the California Supreme Court discussed how the broad grant of autonomy to the regents to control the affairs of the University of California stood in contrast to the "comprehensive power of regulation the Legislature possesses over other state agencies."[275] In assessing the authority of the regents, the opinion stated previous decisions had established that they enjoyed almost complete autonomy over the governance of the university.[276]

Minnesota courts have also described the Board of Regents of the University of Minnesota as possessing extensive authority to control and direct the affairs of the university. In the milestone decision of *State v. Chase*,[277] the Minnesota Supreme Court, in rejecting the authority of a commission appointed by the governor to supervise any expenditure by the University of Minnesota, described the extensive constitutional authority of the regents:

> 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.[278]

The court defined the general distinction between the legislature and the

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272. *Id.*

273. San Francisco Labor Council v. Regents of Univ. of Cal., 608 P.2d 277, 278 (Cal. 1980).

274. Kim v. Regents of Univ. of Cal., 80 Cal. Rptr. 2d 10, 14 (Cal. Ct. App. 2000).

275. Campbell v. Regents of Univ. of Cal., 106 P.3d 976, 982 (Cal. 2005).

276. *Id.*

277. 220 N.W. 951 (Minn. 1928).

278. *Id.* at 954.

regents as that between legislative and executive power.[279] 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.[280]

Even in states with more moderate constitutional authority for public higher education institutions or governing boards than in California, Michigan, or Minnesota, constitutional autonomy may also protect substantive autonomy. In a 1981 Nevada decision, in which the court appeared somewhat unenthusiastic concerning constitutional autonomy, the opinion nonetheless stated that the constitutional power of the Board of Regents of the University of Nevada is violated when legislation interferes with "essential functions of the University."[281] While declining to outline the overall contours of constitutional autonomy in Oklahoma, the state's supreme court has stated that the constitution leaves major governance decisions with the Board of Regents of the University of Oklahoma.[282] In New Mexico, the state's supreme court has held that legislative enactments may not interfere with the regents' ability to make decisions concerning the "educational character" of the University of New Mexico.[283]

Especially in California, Michigan, and Minnesota, a probable reason for a lack of cases in more contemporary decisions dealing with control over issues related to basic institutional goals and objectives, such as the establishment or re-location of academic programs, is that constitutional autonomy leaves governing boards with significant discretion in this area. That is, in these states constitutional autonomy means that institutions possess constitutionally protected authority in setting significant institutional goals and priorities, with such authority reflective of attributes associated with substantive autonomy.[284] Major decisions related to academic programs or standards such as those involving the curriculum, tuition, faculty selection, location of colleges or departments, or standards required for admittance are required by the constitution to rest largely with a constitutionally empowered governing board.

This constitutionally mandated substantive autonomy is in contrast to most other public colleges and universities. While many other public institutions in the United States may enjoy moderate to high levels of substantive autonomy due to such factors as tradition, statutory

279. *Id.*

280. *Id.* (citing Springer v. Philippine Islands, 277 U.S. 189 (1928) (Holmes, J., dissenting)).

281. Bd. of Regents of Univ. of Nev. v. Oakley, 637 P.2d 1199, 1200 (Nev. 1981).

282. Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464, 467 (Okla. 1981).

283. Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 962 P.2d 1236, 1250 (N.M. 1998).

284. *See supra* Part III.

authorization, or alumni support, this position is not mandated by the state's constitution. In states such as California, Michigan, and Minnesota, however, substantive autonomy appears protected by constitutional autonomy provisions and the interpretations given these provisions by state courts.

The concept of substantive autonomy may prove of value to courts faced with deciding whether a legislative enactment intrudes on an institution's constitutionally protected independence. In assessing a law, a court may use as a guiding inquiry whether the legislature has removed or unduly interfered with the authority of a governing board to establish institutional goals and priorities. While not suggesting a rigid analysis and, of course, dependent on a case's particular facts, the concept of substantive autonomy might assist courts in determining whether legislation crosses the line into excessive interference with an institution's constitutional autonomy in relation to establishing core institutional goals, especially in relation to clearly academic matters such as issues related to teaching and research.

Protection of substantive autonomy through a constitutional autonomy provision does not mean of course that other parts of state government are powerless to influence public colleges and universities, even in relation to areas implicating substantive autonomy. Most notably, public colleges and universities running too far afield from the wishes of the executive and legislative branches of government risk a reduction in appropriations. This power of the purse means that institutions with constitutional autonomy cannot lightly ignore the concerns of state leaders in setting major institutional goals and priorities. Conversely, constitutional autonomy may help protect substantive autonomy by requiring state elected officials to respect the role of constitutionally empowered governing boards in establishing major institutional goals and objectives.

B. Procedural Autonomy

The concept of procedural autonomy also appears useful in assessing constitutional autonomy provisions. For California, Michigan, and Minnesota, procedural autonomy appears nestled 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, public colleges and universities in these states exercise extensive control over the "*how*" as well. From municipal regulations,[285] to prevailing wage laws,[286] to requiring exhaustion of

285. *See* Regents of Univ. of Cal. v. Santa Monica., 143 Cal. Rptr. 276 (Cal. Ct. App. 1978).

286. San Francisco Labor Council v. Regents of Univ. of Cal., 608 P.2d 277 (Cal. 1980).

administrative remedies,[287] courts in these states have determined that constitutional autonomy is meant to provide governing boards with considerable control over the day-to-day affairs of institutions under their control along with the authority to set broad institutional goals and policies.

Beyond California, Michigan, and Minnesota, cases in other states suggest that constitutional autonomy may play an important role in protecting and providing procedural autonomy for those states with more moderate to restricted forms of constitutional autonomy. In these states, while the legislature may perhaps predominate in matters of substantive autonomy, constitutional autonomy may require that certain discretion be left to institutional or system governing boards 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.[288]

The *Exon* decision from Nebraska decision demonstrates the ways in which a constitutional autonomy provision may vest certain procedural autonomy with a governing board, even if it does not provide substantive autonomy.[289] 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.[290] While recognizing considerable legislative authority, the Nebraska Supreme Court still held that the act impinged too much on the authority of the Board of Regents of the University of Nebraska.[291] 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.[292] Accordingly, constitutional autonomy in Nebraska may confer little substantive autonomy but appears to reserve certain procedural autonomy to the Board of Regents. Thus, the legislature is able to set major institutional goals and priorities, but it must leave room for the regents to best determine how to implement those legislative directives.

Decisions in Montana also appear to touch on issues related to

287. Stephens v. Bd. of Regents of Univ. of Minn., 614 N.W.2d 764 (Minn. Ct. App. 2000).

288. *See* Opinion of the Justices, 417 So. 2d 946 (Ala. 1982); Evans v. Andrus, 855 P.2d 467 (Idaho 1993); S.D. Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988). In *King v. Board of Regents of the University of Nevada*, the Nevada Supreme Court considered the constitutionality of the creation of an advisory board for the Regents of the University of Nevada. 200 P.2d 221, 222 (Nev. 1948). The court determined that the creation of the advisory board violated the constitutional authority granted to the Board of Regents, stating the constitution gave the regents the exclusive control over the university. *Id.* at 238.

289. Bd. of Regents of Univ. of Neb. v. Exon, 256 N.W.2d 330 (Neb. 1977).

290. *Id.* at 333–35.

291. *Id.*

292. *Id.* at 333.

procedural autonomy. In *Judge*, the Montana Board of Regents challenged certain provisions of a state law involving line item appropriations from the legislature.[293] The regents argued that the state constitution made them a distinctive branch of government not subject to such legislative oversight.[294] The court, though not recognizing the extent of authority sought by the regents, said that limits existed on the legislature's authority related to appropriations.[295] The court invalidated provisions dealing with the salaries and raises of university employees and attempting to control university funds derived from private and federal sources.[296] As in Nebraska, the court rejected legislative efforts to exert too much management control over the regents in relation to exercising their control over day to day operations.

Courts in Oklahoma have also weighed in on issues that appear related to procedural autonomy. In a 1981 Oklahoma Supreme Court case,[297] the Board of Regents of the University of Oklahoma challenged as unconstitutional a legislative resolution that directed state agencies to provide a salary increase for all employees.[298] The board contended that the provision interfered with its constitutionally vested control over the University of Oklahoma.[299] In overturning the lower court's decision, 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."[300] The court held that the legislature had impermissibly interfered with the board's constitutional authority.[301]

The preceding cases indicate that, as with substantive autonomy, procedural autonomy represents a useful concept through which to assess constitutional autonomy provisions. For states with substantial judicial recognition of constitutional autonomy, independent constitutional authority appears to protect both substantive and procedural autonomy. Even if constitutional autonomy does not result in strong protection for substantive autonomy, it may provide institutions with discretion over how to achieve substantive goals identified by the legislature. That is, governing boards may be able to determine the *how* of achieving goals and targets identified by the legislature.

Cases reveal that constitutional autonomy has placed limits on executive

293. Bd. of Regents of Higher Educ. v. Judge, 543 P.2d 1323, 1325 (Mont. 1975).
294. *Id.* at 1329.
295. *Id.* at 1333.
296. *Id.* at 1334–35.
297. Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464 (Okla. 1981).
298. *Id.* at 466.
299. *Id.*
300. *Id.* at 469.
301. *Id.*

and legislative authority in such areas as hiring, salaries, accounting procedures, purchasing practices, and control over funds not from legislative appropriations. While constitutional autonomy, even in California, Michigan, and Minnesota, does not leave institutions with unfettered control over their day-to-day operations, courts are often sensitive to viewing constitutional autonomy as providing governing boards with control over activities and functions that touch on areas encompassed by the concept of procedural autonomy.

The use of a procedural/substantive autonomy distinction also appears to provide a meaningful basis to distinguish constitutional autonomy provisions among states. A constitutional autonomy provision that protects substantive and procedural autonomy stands in marked contrast to one in which constitutional autonomy is more limited to issues affecting procedural autonomy. The concepts of procedural and substantive autonomy also underscore the reality that constitutional autonomy provisions may vary significantly among states in relation to what college and university activities and functions courts interpret the provisions to cover. Rather than a homogenous legal doctrine, constitutional autonomy should be viewed as resulting in unique attributes among the states that have adopted provisions. The analysis in this article suggests that constitutional autonomy clearly may differ among states in relation to procedural and substantive constitutional protections for institutional autonomy.

VI. CONCLUSION

Constitutional autonomy persists as a distinctive governance mechanism in American higher education, and courts continue to interpret constitutional autonomy provisions in ways that provide independent authority to governing boards possessing constitutional powers to direct the affairs of institutions or systems under their control. California, Michigan, and Minnesota remain the premier states in relation to constitutional autonomy. Courts in Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma also have recognized constitutional autonomy. Though heavily restricted, a limited form of constitutional autonomy may exist in Nebraska and South Dakota, and the status of constitutional autonomy is ambiguous in Florida, Georgia, and Hawaii.

Analysis of legal decisions from the past three decades reveals that constitutional autonomy, in terms of its treatment by courts, has not experienced a steep decline. In those states in which courts had previously recognized constitutional autonomy, decisions continue to reveal judicial concern with preserving the authority granted to constitutionally empowered governing boards. Courts in several states, in particular, have not been willing to permit legislatures to use appropriations to effectively override constitutional autonomy. In Louisiana and potentially in Hawaii

and Florida, new constitutional provisions can be viewed as marking a modest expansion of constitutional autonomy. This analysis shows that, at least as reflected by court cases, constitutional autonomy has not experienced any sort of extensive decline.

At the same time, consideration of court cases suggests that analysis of constitutional autonomy should not be limited to legal decisions. As discussed, the level of institutional autonomy possessed by public colleges and universities results from multiple forces, including many non-legal in nature. Additionally, a constitutional autonomy provision may impact how state officials treat public colleges and universities in ways that are not reflected in litigation. Future examinations of constitutional autonomy could seek to examine how legal forces interact with non-legal ones to affect institutional autonomy. Such studies could draw from data such as interviews with higher education officials or state legislators to assess whether constitutional autonomy provisions affect institutions in ways not readily captured in legal documents.

Future analysis might also seek to apply conceptual and theoretical structures that have not been previously used to examine constitutional autonomy. In looking to expand discussions related to constitutional autonomy along this line, this article took a preliminary step by using the concepts of substantive autonomy and procedural autonomy to analyze constitutional autonomy provisions. The initial assessment looks promising, as the concepts appear to have provided a helpful analytical lens. Significantly, the assessment indicated that constitutional autonomy may differ markedly among states in relation to whether a constitutional provision is limited to protecting issues related to procedural or substantive autonomy. Applying the concepts of procedural and substantive autonomy to constitutional autonomy provisions may assist courts with the task of defining areas of independent authority appropriately protected by constitutional autonomy provisions and may also help better integrate constitutional autonomy into ongoing debates among higher education policymakers regarding legal mechanisms to protect institutional autonomy.

Analysis of cases from the past three decades shows that constitutional autonomy continues as an integral part of the governance structure of public higher education in a select number of states. From the perspective of legal decisions, constitutional autonomy has not experienced any sort of decline, but rather has remained steady and perhaps can even be viewed as having experienced a modest expansion. Analysis using the concepts of substantive and procedural autonomy suggests that constitutional autonomy provisions provide one legal alternative to support the overall institutional autonomy of public colleges and universities. In sum, constitutional autonomy remains very much a vibrant part of the higher education landscape.