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Notes

Autonomy and Accountability: The University of California and the State Constitution

On March 23, 1868, the California Legislature passed an act creating the University of California. In 1879 the California Constitution declared the University "a public trust." The University's Regents administer this trust. The state constitution grants the Regents "full powers of organization and government" over the University, permitting legislative control only to "insure . . . the security of its funds." This grant has enabled the Regents to exercise virtually complete independent control over University operations. California courts have regularly confirmed this broad authority, solicitously guarding the independence granted the University in the state constitution. The tradition of academic freedom, linked as it is to the protection of free speech, has enhanced public and legislative respect for the University's constitutionally ordained autonomy.

2. CAL. CONST. art. IX, § 9.
3. The Regents comprise the University's governing board. See CAL. CONST. art. IX, § 9.
4. Id.
6. The doctrine of "academic freedom" involves the freedom of individual faculty members to teach and conduct research without administrative interference. In a series of cases in the 1950s and 1960s, the United States Supreme Court gave academic freedom constitutional status under the protection of first amendment freedom of speech. The most famous of these cases is Sweezy v. New Hampshire, 354 U.S. 234 (1957). In Sweezy, a state attorney general brought suit to force a lecturer to disclose the contents of a lecture given at a state university. The lecturer claimed that this demand infringed upon his first amendment rights. The Court upheld this defense, finding that the governmental interest did not outweigh the individual speaker's first amendment rights, preserved against state interference by the due process clause of the fourteenth amendment. In a concurring opinion, Justice Frankfurter emphasized the vital importance of preventing governmental intrusion in the intellectual life of a university. He quoted extensively from The Open University in South Africa, a treatise by several South
Nevertheless, there are spheres of legislative authority that override this independence. California courts have declared that University policies and regulations are subordinate to the police power of the legislature,7 to the provisions of the federal Constitution,8 and to the general policies of state government.9 Matters which are "exclusively university affairs," such as decisions concerning faculty employment or student admissions, fall within the scope of the University's autonomy.10 Conversely, issues of general statewide concern are outside the scope of that autonomy and the courts have held that the University is not free to deviate from statewide policies and laws governing such matters.11

In the past decade, a number of areas of conflict between the legislature and the University of California have brought about challenges to the traditional independence of the University. These conflicts reflect complex changes in the University's internal and external political and social relationships, changes that have resulted from its tremendous growth. Under these circumstances, the continuing judicial deference to the University's autonomy has resulted in increased University power in many areas bearing, at best, a questionable relationship to academic freedom and the purposes of the public trust.

This Note argues that the tendency of California's courts not only to affirm, but to broaden, the University's autonomy in the face of legislative and other challenges stems from a misperception that "matters of statewide concern" and "exclusively University affairs" are mutually exclusive. In fact, the changing character of University-society relations indicates that exclusively University affairs may be—indeed often are—matters of statewide concern.

A recognition of the wide-ranging changes in the University's structure and functions, as well as a reexamination of the legal and philosophical bases upon which University autonomy rests, leads to the conclusion

African professors that formulated a broader doctrine protecting institutions rather than individuals, delineating the "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 262-63 (Frankfurter, J., concurring). See infra Section IV for a further discussion of academic freedom.

8. See Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 875, 57 Cal. Rptr. 463, 469 (1967) (regulations on student conduct may not require students to waive constitutional rights).
9. See infra text accompanying notes 35-45.
10. Tolman v. Underhill, 39 Cal. 2d 708, 712-13, 249 P.2d 280, 282-83 (1952) (employee loyalty oath is matter of general statewide concern and Regents may not specify an oath at variance from the oath required of all state employees); see also Wall v. Board of Regents, 38 Cal. App. 2d 698, 102 P.2d 533 (1940) (employment of faculty); Williams v. Wheeler, 23 Cal. App. 619, 138 P. 937 (1913) (admissions requirements).
that the policy of automatic, nearly unquestioning support for that autonomy needs to be reconsidered. This conclusion emerges from an examination of several situations in which the legislature has attempted to regulate the University's treatment of its employees. One of these situations involves the issue of University autonomy in determining procedures affecting the retention and promotion of academic personnel.\(^{12}\) The State of California has expressed specific concerns in overseeing state employee relations and labor practices, yet the University remains essentially autonomous in these areas.\(^{13}\) This Note argues that the University's treatment of its personnel, although an "exclusively University affair," is nevertheless a "matter of statewide concern" and therefore should be subject to a greater degree of legislative oversight.

Section I examines the history of the University of California and its legal status as a constitutionally autonomous state agency. Section II looks at the growth of the University since its founding. It considers both internal changes and broad modifications in the University's relation to the society within which it exists. Section III examines legislative attempts to regulate University activities, concentrating on two instances in which the legislature unsuccessfully tried to exercise power over University employment practices and employee relations. This section focuses in particular on the controversy surrounding the Open Files Act of 1977,\(^{14}\) which considerably extended the rights of access of academic personnel to certain material in their personnel files. Section IV analyzes the concepts of academic freedom and institutional autonomy that have traditionally protected the University of California and universities in general from legislative control. This section demonstrates that the values these concepts are intended to protect can often best be preserved by legislative or judicial oversight. The section then examines the growing acceptance of such oversight in the area of collective-bargaining rights for academic personnel. The Note concludes that, given the extent of the University's present-day operations and its pervasive significance to the state, the scope of its autonomy should be limited. The state should be allowed broader oversight of University operations, particularly personnel-related policies, in light of the strong state interest in affording fair treatment to all its employees.

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\(^{12}\) An ongoing controversy surrounds the use of confidential information in the University's academic personnel procedures. See Petition for Writ of Mandate, Scharf v. Regents of the Univ. of Cal., No. 544468-5 (Cal. Super. Ct., County of Alameda, filed May 6, 1986). In Scharf, six individual plaintiffs and the University [of California] Council of the American Federation of Teachers challenge the University's confidential files system as a violation of the due process guarantees of the United States and California Constitutions, the right to privacy guarantee of the California Constitution, and Education Code § 92612. See also infra notes 75-79 and accompanying text.

\(^{13}\) See infra section III.

\(^{14}\) CAL. EDUC. CODE § 92612 (West 1978 & Supp. 1985); see infra text accompanying notes 75-79.
I. Historical Background

Daniel Webster's plea on behalf of the Dartmouth College Trustees has remained a cogent and compelling argument in support of freeing systems of higher education from the political interference of state government. In arguing the case for the autonomy of colonial colleges, Webster concluded:

They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability of their charters. It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. . . . [L]earned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits and become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning.\(^\text{15}\)

Like Dartmouth College, the University of California was intended to be a place consecrated to learning. As one historian noted:

By design, the University of California was . . . intended to be apolitical. In reality, it could not be. It was the creature of the people of the state. Right or wrong, they would exercise their right to criticize or to applaud the institution they regarded as the capstone of their public education system.\(^\text{16}\)

The University was established in 1868 as California's land-grant University. The Organic Act of 1868 described in detail the University's governing structure and curricula, yet it granted the University substantial discretion in the handling of its affairs.\(^\text{17}\) In the early 1870s, workingmen and farmers challenged the notion that the people of California were served as well by the comprehensive University that had been established as they might be by a narrower institution offering instruction in agriculture and the mechanical arts.\(^\text{18}\) At the same time, the public and the legislature began to question the Regents' authority.\(^\text{19}\) In 1874, the Regents entrusted construction of the College of Letters (North Hall) to one of their own, Dr. Samuel Merritt. Dr. Merritt was allowed considerable latitude in changing specifications, and he was given a special legislative exemption from a statute that required work on public buildings to


\(^{17}\) Organic Act of 1868, ch. 244, 1867-68 Cal. Stat. 244. The federal Morrill Land Grant College Act of 1862 gave each state in the union a grant of 30,000 acres for each of its senators and representatives. The funds received from the sale of the land were to be held as a perpetual trust for the endowment of at least one college. W. Ferrier, Origin and Development of the University of California 44-46 (1930).

\(^{18}\) W. Ferrier, supra note 17, at 32-37.

\(^{19}\) Id. at 355-59.
be done during the day and under the eight-hour system. Public charges were made that Merritt and his friends profited financially while the University acquired an inferior building at exorbitant costs. The ensuing scandal led to a legislative inquiry. In the aftermath of that inquiry, the Regents became convinced that the state's political climate was hostile to the development of the University.

In 1879, the California Constitutional Convention, seeking a suitable mechanism to ensure reasonable political autonomy for the University, adopted article IX, section 9 of the California Constitution. In the more than one hundred years since the University was first given constitutional status, the provisions describing the University and its governance have been substantially amended four times—in 1918, 1970, 1974, and 1976. Three of those amendments limited the autonomous operation of the University. In 1970, the legislature passed, and the electorate adopted, a constitutional amendment to article IX, section 9, which required meetings of the Regents to be open to the public, with certain exceptions. The 1974 amendment shortened the length of Regents' terms of office from sixteen to twelve years and required that the appointed Regents be "broadly reflective of the economic, cultural, and social diversity of the state, including ethnic minorities and women." In 1976, the constitution was again amended to authorize the legislature to regulate "competitive bidding procedures... for the letting of construction contracts, sales of real property, and purchasing of materials, goods and services by the University." The University, in its ballot argument against this provision, contended that the amendment would "undermine the independence of the University and would result in greater costs" to the people of the state. "University administrators expressed fears that the regulations could force the University to purchase superficially similar lower-cost items which would not meet researchers' precise requirements or that, where the desired products did not exist, the University would be unable to negotiate with an individual contractor to develop them." However, these arguments did not prevail and the amendment passed.

As amended, article IX, section 9 vests in the Regents of the Uni-
sity of California extensive control over the University’s affairs. The section states in part:

The University of California shall constitute a public trust, to be administered by the existing corporation known as “The Regents of the University of California,” with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university . . . .

. . . . Said corporation shall also have all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued, to use a seal, and to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise . . . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . .27

A constitutional provision vesting power over a higher education system in a governing board denotes the constitutional status of that system, but such a provision is not self-executing. “Constitutional autonomy” refers to the degree of control exercised by the governing board in relation to external state governmental entities.28

A number of court decisions have affirmed the extensive autonomy granted the University of California by the California Constitution. Interpreting the state constitution’s grant of “full powers of governance,” the courts have upheld the University’s right to employ socially controversial figures as lecturers,29 to enforce order on campus “by all appropriate means,” including the suspension or dismissal of students,30 to use or manage its property without regulation by local government,31 and to

27. CAL. CONST. art. IX, § 9(a), (f).
28. Fifteen states confer constitutional status on their respective higher education systems. The precise degree of constitutional autonomy available to a given system can be determined only by examining the case law interpreting the constitutional grant. See L. GLENNY & T.K. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE 15 (1973); CHARTERS AND BASIC LAWS OF SELECTED AMERICAN UNIVERSITIES AND COLLEGES (E.C. Elliott & M.M. Chambers eds. 1934) [hereinafter CHARTERS AND BASIC LAWS]. Glenny and Dalglish cite 14 states as having constitutionally autonomous universities. In 1977 Nebraska joined the list. See Board of Regents v. Exon, 256 N.W.2d 330 (Neb. 1977).
31. Oakland Raiders v. City of Berkeley, 65 Cal. App. 3d 623, 626, 137 Cal. Rptr. 648, 650 (1976). A similar issue has recently arisen regarding the claimed exemption of Hastings College of the Law, an affiliate of the University of California, from local planning and zoning laws. The issue involves Hastings’ intention to build a six-story office building on property it
ignore locally prevailing wage rates in setting salaries for its employees, even though some state agencies were compelled to meet prevailing rates.\textsuperscript{32}

Statutes have also contributed to the University’s autonomy. One of the most important of these is the Donahue Higher Education Act of 1976, which sets forth the missions and levels of instruction of each of California’s three public systems of higher education: the University of California, the State Colleges and Universities system, and the Community College system.\textsuperscript{33} The Donahue Act ensures the University’s monopoly over doctoral programs, thereby consolidating the University’s power in relation to other institutions.

The University’s autonomy is nevertheless limited by the legislature’s own extensive powers. These powers include authority over the appropriation of state monies; exercise of the general police power to provide for the public health, safety, and welfare; and legislation on matters of “general statewide concern,” which are not “exclusively University affairs.”\textsuperscript{34} As a rule, California courts have recognized the University’s obligation to conform to legislative policies of the state government only when the legislature has specifically included the University in the relevant statute.\textsuperscript{35}

The state constitution vests the legislature with the responsibility to support the University through the appropriation of state monies: article IV, section 12 of the constitution empowers the legislature to “control the submission, approval, and enforcement of budgets and the filing of claims for all State agencies.”\textsuperscript{36} Thus, the legislature can establish fiscal controls over the University by placing limitations and conditions on the University’s use of monies appropriated by the state. “For example, the Legislature has inserted [into University appropriations bills] budget control language requiring that certain funds be used only to support additional primary care medical residencies. Other budget control lan-

\textsuperscript{32} San Francisco Labor Council v. Regents of the Univ. of Cal., 26 Cal. 3d 785, 608 P.2d 277, 279-80, 163 Cal. Rptr. 460, 462-63 (1980); see infra section III.A.


\textsuperscript{34} Tolman v. Underhill, 39 Cal. 2d 708, 712, 249 P.2d 280, 282 (1952); see also Horowitz, supra note 11, at 37-38.

\textsuperscript{35} See California State Employees Ass’n v. Regents of the Univ. of Cal., 267 Cal. App. 2d 667, 668, 73 Cal. Rptr. 449, 450 (1968) (law governing state personnel policies that did not specifically include the University did not apply to the University). Even explicit inclusion of the University in a statute will not always suffice. See infra section III.B.

\textsuperscript{36} CAL. CONST. art. IV, § 12(c).
guage temporarily prohibited the University from expending funds for new large-scale computers."

Even outside the fiscal realm, the constitutional grant to the University of "full powers of organization and government" does not accord absolute power of self-governance. There are limitations beyond which the Regents cannot go. "The power vested under the Constitution in the Regents is not so broad as to destroy or limit the general power of the Legislature to enact laws for the general welfare of the public." "It is well settled . . . that laws passed by the Legislature under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively university affairs." Matters of "statewide concern" are not "exclusive university affairs."

In the landmark case of Tolman v. Underhill, the California Supreme Court held that, since the loyalty of teachers was a matter of statewide concern, the University could not impose on faculty members a loyalty oath diverging from that required of all state employees. Similarly, in Regents of the University of California v. Superior Court, the supreme court held that the University was subject to the provisions of statewide usury laws. The court stated that the University's "investment decisions are not so closely related to its educational decisions as to cloak the former with immunity even if the latter are immune." In contrast, in Newmarker v. Regents of the University of California, an appellate court held that "the employment and wage conditions of University employees at different campuses is [not] a matter of general statewide concern."

The decisions focusing on matters of statewide concern reflect an attempt to define and delineate internal university affairs as invariably and inevitably separate from statewide concerns. But that attempt itself, as seen in the decisions, evidences a conception of what the University is—or should be—which sometimes fails to see what the University has become.

37. A. Zusman, supra note 26, at 25.
38. Wallace v. Regents of the Univ. of Cal., 75 Cal. App. 274, 278, 242 P. 892, 894 (1925); see also In re Estate of Royer, 123 Cal. 614, 624, 56 P. 461, 470 (1899) (The University is "not the sovereign.").
40. Id. But see Horowitz, supra note 11, at 41 ("That a legislative regulation deals with a matter of statewide concern would not be a compelling argument for validity of application to the University, for the Regents are delegated powers of government with respect to one category of matters of statewide concern—University affairs.").
42. 17 Cal. 3d 533, 551 P.2d 844, 131 Cal. Rptr. 228 (1976).
43. Id. at 537, 551 P.2d at 537, 131 Cal. Rptr. at 230.
45. Id. at 648, 325 P.2d at 564.
II. The Modern University

Before 1900, American universities were quiet enclaves having little direct impact on the outside world and little to do with the corporations, banks, and legislative bodies that were transforming America into a modern industrial state. Less than five percent of the nation's youth attended college. In 1870, the University of California had forty students and ten faculty members. At the time of the Constitutional Convention in 1879, the student body had grown to 332. "Few universities enrolled more than a thousand students or employed as many as a hundred professors. There were no large endowments, no foundation grants, no federal funding for research." In terms of internal governance and relations with the state, the principles of academic freedom and constitutional autonomy offered these small and rather detached universities a workable means to protect faculty members from the meddlings of a distant and conservative world. After World War II, however, the image of the ivory tower rapidly grew obsolete. Instead, a vast and intricate network arose linking universities to other major institutions in society.

Thus, by 1962, the University of California had "operations in over a hundred locations, counting campuses, experiment stations, agricultural and urban extension centers, and projects abroad involving more than fifty countries; nearly 10,000 courses in its catalogues; some form of contact with nearly every industry, nearly every level of government, nearly every person in its region." Today, the University has over 135,000 students, 20,000 faculty members, and a total staff of over 75,000. In 1982, its total operating budget was approximately $4.3 billion, of which state appropriations comprised thirty-nine percent.

The University of California is among the major research universities in the United States, receiving approximately $500 million from the federal government for research purposes, exclusive of the $1.2 billion in federal contract funds for its three major nuclear research and development laboratories. In addition, as a result of private industry's interest in university research and university interest in private funding of research efforts, a new alliance has been forged between the campus and

47. V. Stadtmann, supra note 16, at 52, 86.
48. W. Ferrier, supra note 17, at 374.
49. D. Bok, supra note 46, at 3.
50. Id. at 7.
52. University of California, Statistical Summary (Fall 1985).
53. A. Zusman, supra note 26, at 21.
54. Id.
The corporate world.\textsuperscript{55} The legal and policy implications of these developments are enormous. The University's ties with the private sector create complex problems concerning the structuring of research agreements, patent and licensing arrangements, and trade secrets.\textsuperscript{56} This new situation raises the spectre of conflicts of interest for both faculty researchers and the institution.\textsuperscript{57} The Carnegie Foundation has concluded that the connection between industry and higher education will be "[t]he most dramatic governance issue of the future."\textsuperscript{58} The scale of this activity has placed the University at the focus of pressures far different from anything envisioned by those who granted its autonomy in 1879.

The areas in which, in the recent period, the University of California has come into conflict with forces both within and beyond its walls are well known. Students and faculty have mounted concerted efforts to alter the University's practices of internal governance, its curricula, its relation to other government agencies, such as the United States Department of Energy, for whom the University administers weapons laboratories, and its relation to foreign states, as illustrated by the pressure to cease its investments in corporations doing business in the Union of South Africa. In the 1960s and '70s, campuses became focal points of student concerns over social and political issues, particularly the role of the United States in the Vietnam conflict. In diverse ways, students, faculty, and staff have created pressure to urge the University of California to respond to their concerns as employees or as participants in the University's functioning.

Publicity concerning conflicts within the University, and public awareness of the University's growing connections with government and industry have led to increased efforts by groups within the larger society to influence or determine University conduct, policies, or practices. For example, since a number of University researchers engage in publicly funded research that could benefit commercial firms for which they consult or which they themselves have founded, important questions of propriety have arisen. Legislators have expressed concern that private monies and the lure of profits could distort the University's academic and public goals if these lures inhibit researchers from freely disseminating ideas and research findings of potential commercial value.\textsuperscript{59} In other in-

\textsuperscript{55} See, e.g., Bach & Thornton, Academic-Industrial Partnerships in Biomedical Research: Inevitability and Desirability, 64 EDUC. REC. 26 (1983).


\textsuperscript{57} See Comment, Ties that Bind: Conflict of Interest in University-Industry Links, 17 U.C. DAVIS L. REV. 895 (1984); see also Fowler, supra note 56, at 532.

\textsuperscript{58} CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING BULLETIN 88 (1982).

\textsuperscript{59} In 1980, the University adopted a Conflict of Interest Code pursuant to the requirements of the Political Reform Act of 1974. CAL. GOV'T CODE §§ 87300-87312 (West 1976).
stances, public interest groups and legislators have questioned use of the University's public funds for research that does not anticipate a public benefit. The general concern underlying all these pressures is that the extension of the University's reach and power be accompanied by an extension of its accountability.

Other areas of conflict or pressure, notably labor relations problems, have resulted in attempts to determine or regulate University of California activity by legislative enactment. Such enactments have provided the most complex and consequential tests of the University's autonomy.

III. Legislative Intervention

The California Legislature has been generally, and persistently, reluctant to intervene in University affairs. Nevertheless, when public policy concerns have appeared to be of overriding importance, the legislature has enacted laws designed to limit the University's political independence. In 1977, the California Legislature passed two bills, each of which regulated the University's treatment of its personnel: the Prevailing Wage Rate Act, which was directed at nonacademic personnel, and the Open Files Act, which was directed at academic personnel.

The Prevailing Wage Rate Act, the Open Files Act, and the judicial response to them, raise questions about University autonomy and the legislature's power to guarantee fair and equitable treatment of state employees. An examination of the controversy surrounding these Acts provides a focus for reconsideration of these questions.

A. The Prevailing Wage Rate Act

The Prevailing Wage Rate Act required that, when setting minimum and maximum salary limits for employees in various localities, the
Regents take into account local prevailing wage rates for laborers, workmen, and mechanics employed on an hourly or per diem basis. The law required that the Regents "shall not fix the minimum salary limits below the general prevailing wage rate so ascertained for the various localities." 65

When the University refused to implement the statutory process for determining wages, a coalition of Bay Area labor organizations brought a class action suit to compel the Regents to comply with the law. In this action, San Francisco Labor Council v. University of California, 66 the Regents won at the trial level but lost on appeal. Relying on Tolman, the appellate court held that the statute was a valid exercise of the legislature's police powers. 67 The court found that the legislature had acted with "the singular objective of inclusion of a specific class of University employees within a broad statutory scheme." 68

The Supreme Court of California overturned the decision, holding that the law was an unconstitutional invasion of the University's autonomy under article IX, section 9. 69 The court stated that a prevailing wage regulation, applied to the University, was not a matter of statewide concern, despite the legislature's explicit declaration to the contrary. The court based its opinion on an earlier decision which had held that "the determination of wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern." 70

In analogizing the University to charter cities and counties, the court ignored several significant differences between the "independence" of charter cities and the "independence" of the University. First, the University, unlike charter cities, depends upon the legislature for its funds. 71 Second, charter cities elect their local governing authorities as well as their representatives in the state legislature; University Regents are appointed by the governor. 72 Third, the University is a multiunit, multicity employer that transcends local boundaries. To the extent that its employees are to be treated as public employees, they should be

65. Id. § 92611.
67. 147 Cal. Rptr. at 793-94; 150 Cal. Rptr. at 674-75.
68. 147 Cal. Rptr. at 794.
70. Id. at 790, 608 P.2d at 279, 163 Cal. Rptr. at 462 (citing Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979)).
71. See supra text accompanying notes 36-37.
72. CAL. CONST. art. IX, § 9.
treated as employees of the state rather than of any given municipality. Finally, and most significantly, the relationship between separate levels of government is different from that between separate branches of government at the same level.\footnote{Even assuming, arguendo, the appropriateness of the charter-city analogy, it is significant to note that the California Supreme Court itself has found occasion to delimit the scope of "municipal affairs." For example, the court has held that although some aspects of regulation of public employment in charter cities are municipal affairs, such as policies concerning hiring and salaries, a state statute could validly regulate other aspects of public employer-employee relations. "The total effect of all this legislation was not to deprive local government . . . of the right to manage and control . . . but to create uniform fair labor practices throughout the state." Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 294-95, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).}

Despite the deficiencies in its reasoning, San Francisco Labor Council was a major triumph for the University. The decision marked the first time a statute had been held invalid because it violated the Regents' constitutionally assigned powers of governance. The precedential value of the case led almost immediately to a second victory for the University's broad view of its autonomy. That victory came in the form of a superior court decision holding the Open Files Act "unconstitutional as beyond the police power of the legislature as limited by article IX, section 9 of the California Constitution."\footnote{Regents of the Univ. of Cal. v. Deukmejian, No. C 266242 (Super. Ct. Cal., County of Los Angeles, Aug. 21, 1980.)}

\section*{B. The Open Files Controversy}

The Open Files Act had provided all University employees broadened rights of access to their personnel files, including access to material the University deems "confidential." At the University of California, as at most research universities, letters of reference by scholars in a candidate's field are a basic component of the process for the recruitment, tenure, and promotion of academic personnel. These letters, which the University maintains as confidential, form part of a candidate's personnel file, on which review is based.\footnote{While many universities also adhere to a policy of confidentiality, others, such as the universities of Wisconsin, Colorado, and Oregon, now follow an open-files practice.} Confidential "ad hoc" committees of faculty members are established at the campus level to review a department's request that an individual be granted appointment, tenure, or promotion. An ad hoc committee's recommendation to grant or deny tenure or promotion is also considered confidential, as are the reports and recommendations of the department chairperson and the dean.\footnote{UNIVERSITY OF CALIFORNIA, ACADEMIC PERSONNEL MANUAL §§ 160-0, 160-20 & app. A (1984).} In recognition of the University's use of confidential letters of evaluation in its academic peer-review process, the Act gave the Regents the right to protect the identity of evaluators by deleting their names and affiliations
before releasing the contents of their letters.\textsuperscript{77}

In its suit to have the Act declared invalid and unenforceable, the University argued that the law impinged on the University's "constitutional and academic freedom to determine who shall teach and conduct research."\textsuperscript{78} In granting summary judgment for the University, the court rejected the state Attorney General's argument that the law "reflected a statewide legislative policy favoring access by employees to those records which their employers rely upon in making personnel decisions about them."\textsuperscript{79} The superior court decision on the Open Files Act was not appealed and the law's validity remains unsettled. The University continues to maintain its own policies on confidentiality.

Supporters of confidentiality claim that it encourages evaluators to be forthright and candid, while its opponents argue that confidentiality can also mask bias, bigotry, and discriminatory attitudes on the part of those who are ostensibly evaluating the quality of the faculty member's scholarship and teaching. According to the latter view, confidentiality may also hide the use of selective, arbitrary, or impermissible criteria for evaluation, or the presence of decision-makers who may have a conflict of interest.

The protection generally afforded university records is an issue in universities and courts across the United States. Legally compelled exceptions to the confidentiality of academic records originate from a variety of sources, including state and federal public records legislation,\textsuperscript{80} legislation concerning individual rights of access,\textsuperscript{81} investigatory powers of state and federal agencies,\textsuperscript{82} state open meetings laws (sunshine

\textsuperscript{77} C.A.L. EDUC. CODE § 92612(c) (West 1978 & Supp. 1987).

\textsuperscript{78} Complaint for Declaratory Relief, Regents of the Univ. of Cal. v. Younger, No. 26642 (Super. Ct. Cal., County of Los Angeles, filed Dec. 18, 1978).

\textsuperscript{79} Notice and Motion for Preliminary Injunction, Deukmejian v. Regents of the Univ. of Cal., No. 26642 (Super. Ct. Cal., County of Los Angeles, filed Jan. 19, 1979).


\textsuperscript{81} Information Practices Act, C.A.L. CIV. CODE §§ 1798-1798.78 (West 1985 & Supp. 1987), sets forth procedures for providing access to and protection of personal information contained in state agency records. This statute protects the confidentiality of sources of letters of recommendation and other evaluations used in the personnel process. \textit{Id.} §§ 1798.3, 1798.34. The subject of such evaluations may receive copies of the text only after the name of the author and any other identifying information has been deleted; alternatively, the subject may be given only a summary of the contents of the material. \textit{Id.} § 1798.38. Federal Family Educational Privacy and Rights Act, 20 U.S.C. § 1232g (1982), popularly known as the Buckley Act, gives students access to their admissions files and other records while limiting the conditions under which such records may be released to others. See Implementing Regulations, Privacy Rights of Parents and Children, 34 C.F.R. pt. 99 (1979).

\textsuperscript{82} For example, under Exec. Order No. 11246 41 C.F.R. § 60-1.7(a) (1986), universities are annually required to file an EEO-6 report (Equal Employment Opportunity Higher Education Staff Information Report) detailing by job category the race, ethnic, and sex composition of the employment work force. Smith, \textit{Protecting the Confidentiality of Peer Records: Depart-

\textsuperscript{78}
laws), constitutional due process protections, and discovery rights during litigation.

The issue of confidentiality commonly arises during litigation when a plaintiff, usually one alleging discrimination in university employment proceedings, seeks to discover his or her own personnel records. For instance, in one case alleging discrimination by the University of California, a professor who had been refused tenure sought discovery of her personnel file. The court denied discovery of communications written in "official confidence." The court found "an important state interest" in safeguarding the confidentiality of the communications at issue, agreeing with the University that "confidentiality is a prerequisite to the effectiveness of a peer evaluation system of faculty selection."

Universities and their administrators have argued that courts should establish a qualified "academic freedom" privilege to protect confidential

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84. See infra notes 108-120 and accompanying text.

85. The following section of this Note discusses the rights of plaintiffs seeking to discover their personnel records in the course of litigation against a university. A related issue concerns the protection from discovery of confidential academic research. The Seventh Circuit has recognized a "researcher's privilege," which shielded from discovery by a private corporation the notes, reports, working papers, and raw data of two University of Wisconsin researchers. Dow Chem. v. Allen, 672 F.2d 1262, 1274-77 (7th Cir. 1982). The court held that a researcher's right to academic freedom "extends as readily to the scholar in the laboratory as to the teacher in the classroom." Id. at 1275. The court noted, however, that a different result might be warranted if discovery were sought by a government agency such as the E.P.A. Id. at 1273-76.


87. Id. at 1276. But see In re Dinnan, 661 F.2d 426, 432 (5th Cir. 1981), in which the court stated:

Persons occupying positions of responsibility... often make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear.
documents in academic personnel records. Two leading cases have addressed the question of establishing an evidentiary privilege for peer review materials. In both cases, professors serving on peer review committees sought to keep their individual votes confidential during litigation by claiming an "academic freedom privilege." The Fifth Circuit, in In re Dinnan, refused to recognize such a privilege, while the Second Circuit, in Gray v. Board of Higher Education, recognized the privilege but found it to be outweighed by the plaintiff's need to prove discriminatory intent. Despite its result, Gray affirmed the importance of confidentiality of peer review records by recognizing the claimed "academic freedom privilege."

Cases upholding the confidentiality of documents in an academic plaintiff's personnel file tend to reflect the courts' traditional reluctance to intervene in academic disputes—a reluctance rooted in the doctrine of academic freedom and traditional judicial deference to university actions. As one leading commentator notes:

While there are many cases in which judges refuse to hold colleges or universities accountable in court due to some facet of the particular institution's legal identity, there are also numerous cases in which the courts, as a matter of common law, refuse to intrude on the academic process. The courts have traditionally refused to interfere in the basic academic process of the university, particularly in the evaluation of students or faculty.

Judicial deference or "academic abstention," as it is sometimes termed, has been particularly troublesome in cases involving claims of race or sex discrimination in promotion and tenure decisions. Studies of the results in Title VII cases are instructive in this regard.

88. See generally Smith, supra note 82 (statutory or qualified first amendment privilege necessary to protect against erosion of the peer review system); Comment, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 CALIF. L. REV. 1538, 1539 (1981) (U.S. Constitution and common law provide basis for an "academic freedom" privilege). But see Gregory, Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom, 16 U.C. DAVIS L. REV. 1023 (1983) (an evidentiary privilege is in derogation of the principles upon which academic freedom is based); Note, Academic Freedom Privilege: An Excessive Solution to the Problem of Protecting Confidentiality, 1 U. CIN. L. REV. 326 (1982) (no basis exists for a general privilege).

89. 661 F.2d 426, 427 (5th Cir. 1981) (alleging sex discrimination).

90. 692 F.2d 901 (2d Cir. 1982) (alleging race discrimination).

91. Id. at 905, 908-09. The Seventh Circuit has also recognized a qualified evidentiary privilege, requiring a showing of need before ordering disclosure of the names and identities of peer reviewers. Equal Employment Opportunity Comm'n v. University of Notre Dame du Lac, 715 F.2d 331, 337-38 (7th Cir. 1983).


93. The doctrine of academic abstention has probably had one of its clearest manifestations, and its most dramatic impact, in the area of academic sex discrimination, where none of the first thirty-odd cases reported was decided in favor of the plaintiff faculty member. Id.; see also Lee, Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation, 9 J.C. & U.L. 279, 281-82 (1983).
Partly as a consequence of academic insularity, the relative representation and status of women faculty members at colleges and universities from the 1930s to the 1970s deteriorated. One study found that the "proportion of women serving in academic positions actually declined."\(^9\) Another study noted that the proportion of women appointed to tenured teaching positions has been significantly lower than that of women who have earned doctorates, while the proportion of appointed men has been correspondingly higher than that expected from the number of degrees awarded. The researchers stated that "[e]ven if a woman is hired to a faculty position, it is very likely that she will encounter a struggle when it comes to promotion . . . . Most women are clustered at the lower ranks, in nonladder research and lecturer positions, and in the less prestigious institutions.\(^{95}\)

In an effort to limit insularity in the name of academic freedom, and to help alleviate sex-based discrimination, Congress in 1972 extended Title VII of the Civil Rights Act of 1964\(^96\) to institutions of higher education. A passage from the Report of the House Committee on Education and Labor expressed Congress' intent in extending Title VII: "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . . The committee feels that discrimination in educational institutions is especially critical."\(^97\)

Despite Congress' clear intent and the persistent problem of discrimination, courts have narrowed the scope of Title VII in hiring, reappointment, promotion, and tenure cases brought against universities.\(^98\) Generally, as a result of judicial deference, faculty plaintiffs have faced a heavier burden of proof and university defendants a lighter one than have litigants in Title VII cases arising in other employment settings.\(^99\) Consequently, academic plaintiffs in Title VII suits have suffered from a notable lack of success.\(^100\)

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95. WOMEN IN ACADEMIA: EVOLVING POLICIES TOWARD EQUAL OPPORTUNITIES 2 (E. Wasserman, A. Lewin & L. Bleiweis, eds. 1975).
99. See Note, supra note 98, at 1213.
100. See, e.g., Yurko, Judicial Recognition of Academic Collective Interests: A New Ap-
A number of courts, however, have recognized that the traditional judicial "anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias,"\footnote{101} at least when bias is not expressed overtly. In \textit{Powell v. Syracuse University},\footnote{102} the Second Circuit, criticizing the doctrine of judicial deference in academic matters, disaffirmed its earlier position in \textit{Faro v. New York University},\footnote{103} stating that "the commonsense position we took in \textit{Faro}, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964."\footnote{104} Similarly, in \textit{Kunda v. Muhlenberg College},\footnote{105} the Third Circuit rejected the defendant's assertion that the district court's order, forcing the college to promote the plaintiff and award back pay, was "an unwarranted intrusion by the judiciary into the academic mission of an educational institution which ... threatens academic freedom itself."\footnote{106} The court stated that "[t]he fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy."\footnote{107}

Some courts have also limited the application of "academic abstention" in cases involving a plaintiff's right of access to peer review records. In \textit{Lynn v. Regents of the University of California},\footnote{108} the Ninth Circuit held that, in the context of a discrimination suit, denying a plaintiff access to peer review records would violate due process. The district court had reviewed the plaintiff's personnel file \textit{in camera}, but had refused disclosure to the plaintiff. On appeal, the Ninth Circuit stated that a fair and accurate resolution of the issue of discrimination required vigorous and informed argument and that, to be adequately informed, the parties must see the evidence.\footnote{109} The Third and Fifth Circuits have also required disclosure of peer review records when a plaintiff alleges discrimination, but these courts did not rely on due process grounds.\footnote{110}

\footnote{101}{Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir.), \textit{cert. denied}, 439 U.S. 984 (1978).}
\footnote{102}{\textit{Id.}}
\footnote{103}{502 F.2d 1229 (2d Cir. 1974).}
\footnote{104}{\textit{Powell}, 580 F.2d at 1153.}
\footnote{105}{621 F.2d 532 (3d Cir. 1980).}
\footnote{106}{\textit{Id.} at 547.}
\footnote{107}{\textit{Id.} at 550; \textit{accord} Sweeney v. Board of Trustees, 569 F.2d 169, 176 (1st Cir. 1978) (rejecting judicial deference).}
\footnote{108}{656 F.2d 1337 (9th Cir. 1981).}
\footnote{109}{\textit{Id.} at 1345-46.}
\footnote{110}{Equal Employment Opportunity Comm'n v. Franklin & Marshall College, 775 F.2d}
Few courts have gone so far as to claim that denying a plaintiff access to peer review records would constitute a due process violation. In contrast to Lynn, the Ninth Circuit affirmed without opinion a trial court's refusal to find a right of access to peer review records in LaBorde v. Regents of University of California, another case involving confidentiality. In LaBorde, the plaintiff complained that she should be allowed access to information explaining why she was not promoted. The trial court disagreed, noting that the University's multi-step review process necessarily protected candidates from abuses. While courts have tended to accept an institution's procedures without question, most have not addressed the issue of whether a multi-step review process curbs the potential abuse of evaluations conducted in secret, but have simply concluded that a review process that is lengthy and thorough is sufficiently fair.

The due process issue is complicated by the fact that only tenured faculty have a property interest in their jobs and are, therefore, entitled to due process protection under the fourteenth amendment. The Cali-

110 117 (3d Cir. 1985); In re Dinnan, 661 F.2d 426 427 (5th Cir. 1981); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 1384 (5th Cir. 1980). The Third Circuit refused to reverse a district court's order compelling Franklin and Marshall College to comply with a subpoena duces tecum issued by the EEOC during an investigation of a charge of discrimination. 775 F.2d at 117. The court declined to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach. Id. at 114. The court stated, "we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality." Id. at 115. The Fifth Circuit, in Jepsen, held that the trial court must "weigh the potential harm from disclosure of privileged communications against the benefits of disclosure." 610 F. 2d at 1384. The court stated that "caution against intervention in a university's affairs cannot be allowed to undercut the explicit legislative intent of Title VII." Id. at 1383. The same court, in In re Dinnan, stated that "no privilege exists that would enable Professor Dinnan to withhold information regarding his vote on the promotion of the appellee. This result is required on the basis of fundamental principles of fairness and sound public policy." 661 F.2d at 427.


112. Id. at 1069. At the University of California, decisions on hiring, promotion, and tenure are final and nonappealable. Academic personnel may file a grievance with the Committee on Privilege and Tenure which "may" investigate the complaint. While the Committee may make a recommendation to the Chancellor that a particular case be reopened, or even reversed, the Committee has no authority to order the Chancellor to do so. See UNIVERSITY OF CALIFORNIA, ACADEMIC PERSONNEL MANUAL § 160 & app. A (rev. July 5, 1984); see also UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE BY-LAW 113.


114. See Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (a "unilateral expectation" of tenure not property for due process purposes); Perry v. Sindermann, 408 U.S. 593, 602
California Supreme Court, however, has held that when an individual is subject to deprivatory governmental action, that individual has a due process interest in fair and unprejudiced decision-making. This same concern is reflected in the California Supreme Court's application of the common-law rule of "fair procedure." The doctrine of "fair procedure" requires that, since all individuals have a fundamental right to practice a lawful profession, entities possessing substantial power to interfere with that right cannot thwart an individual's pursuit of such a profession without following fair procedures. In *Ezekiel v. Winkley*, the California Supreme Court held that a hospital could not discharge a surgeon from its residency program without affording him a fair procedure, because the discharge would effectively prevent his acceptance into any other such program. The denial of tenure to an assistant professor by a major university such as the University of California presents no less formidable an obstacle to career advancement. The United States Supreme Court has recognized similar principles. In *Greene v. McElroy*, the government's revocation of an aeronautical engineer's security clearance resulted in termination of his employment with a private company. The Supreme Court held that the revocation, based as it was on information from unidentified persons, deprived Greene of the traditional procedural protections of confrontation and cross-examination:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual . . . the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . [This] is even more important where the evidence consists of the testimony of individuals . . . .

Although untenured faculty have no property interest in their jobs for fourteenth amendment purposes, California has devised its own standard of due process protection for cases of deprivatory government action. Professors eligible for tenure should also be entitled to such protection as long-term probationary employees and, at the very least, entitled to the California doctrine of fair procedure. The *Greene* standard, as well as California's procedural protections, accord the individual alleging injury the right to see the evidence on which deprivation of em-

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(1972) (plaintiff must have a "legitimate claim of entitlement" to tenure). *See generally The Constitutional Status of Academic Tenure* (W. Metzger ed. 1977).


119. *Id.* at 496.
ployment was based. The necessity for this right is at the heart of the cases allowing academic plaintiffs access to their peer review records.

In the peer review cases, as in Greene, the interests of administrative confidentiality and adversarial determination of truth compete for predominance. At least one state appellate court has fashioned a compromise solution balancing these competing interests. In Board of Trustees of Leland Stanford Jr. University v. Superior Court, the court recognized a state interest in preserving confidentiality as to the identities of peer review evaluations, but not in maintaining the confidentiality of the contents of the letters of reference at issue. The court held that “privacy rights . . . will be fully respected by the withholding of the names and other identification of the confidential communications’ authors.” This is precisely what the Open Files Act sought to do.

The Open Files Act provided an opportunity at the administrative level for individuals employed by the state to counter potentially seriously injurious action through the most traditional and valued form of fair procedure. The Act is part of a statewide legislative scheme, affecting the University of California no more, yet no less, than it affects other public and private entities. Similar statutes grant other state employees access to their personnel records. Furthermore, the California Public Records Act protects an individual’s privacy interest in his or her personnel files. This protection is supported by the privacy guarantee of the California Constitution, which the California Supreme Court has interpreted as protecting the rights of citizens to have a “reasonable check on the accuracy of existing records” concerning them. Other statutes have implemented this same interest, protecting the rights of individuals to inspect their own criminal records, credit records, and information collected on them by insurance agencies. These provisions, and others like them, demonstrate quite clearly that the legislature has determined such rights of access to be a matter of general statewide concern.

121. Id. at 532, 174 Cal. Rptr. at 168.
124. CAL. CONST. art. I, § 1 (“All people . . . have certain inalienable rights, among which are those of . . . pursuing and obtaining safety, happiness, and privacy.”).
126. CAL. PENAL CODE §§ 11120-11125 (West 1982).
127. CAL. CIV. CODE § 1785.16 (West 1985).
IV. Autonomy and Academic Freedom

Universities base their claims to confidentiality of personnel records on academic freedom and institutional autonomy. Although academic freedom has received its most explicit constitutional protection as an individual right, its historic roots lie in the independence of academic institutions from other centers of power. The medieval university first shielded from outside pressures the freedom to teach and to learn. The economic power acquired by universities, and the respect that learning commanded both for its own sake and as an adjunct to theology, gave universities influence and leeway against encroachment by state or church. Institutional autonomy arose as a concept justifying this independence.

The judiciary's traditional deference towards academic decision-making has favored this autonomy, and thus favored university policies. This apparent indulgence toward universities has deep roots in American jurisprudence. But according to one leading commentary, "at the present time the concept of autonomy for the [academic] institution is more an ideological expression of academic custom and usage than a specifically enunciated legal doctrine." Another commentator, general counsel for a major university, stated in a recent article that the "past quarter century has been a tumultuous time for colleges and their lawyers who often have had to explain to trustees and presidents that education law is changing and that their old prerogatives are being eroded."

The author went on to argue:

In the past twenty-five years, commentators and courts alike have scrutinized the premises and scope of academic freedom and have questioned the motives of those in higher education who reflexively brandish the term to ward off investigation and criticism of decisions made in an academic institution. A few have even questioned the logic and propriety of judicial deference to academic decisions of colleges

129. See supra note 6.
130. Institutional autonomy does not equate with constitutional autonomy. Not all public universities have constitutional autonomy. All universities, public and private, claim some sort of institutional autonomy.
133. See supra text accompanying note 16; see also Bracken v. Visitors of William & Mary College, 7 Va. (3 Call.) 573 (1790) (governing board had the power to modify the college in any way it deemed proper).
134. H. Edwards & V. Nordin, supra note 92, at 17.
A number of courts have begun to reappraise the deferential judicial treatment granted to universities. This reappraisal, when applied to protect rather than to endanger academic freedom, can only bolster the purposes of autonomy.

When nonacademic (or antiacademic) values enter into a university's decision-making, the justification for protecting that university's autonomy disappears. A university does not have an academic freedom interest in decisions unrelated to promoting scholarship or setting academic goals. As one court stated, "[a]cademic freedom is illusory when it does not protect faculty from censorious practices but rather serves as a veil for those who might act as censors." The same court stated that "[u]nreviewable committee tenure decisions may promote the robust exchange of views within the sealed confines of the committee room but also serve to exclude tenure candidates from the college campus because of their race."

In In re Dinnan, the Fifth Circuit stated, "[t]he appellant [university] construes the term 'academic freedom' to include more than it does. . . . Indeed, if the concept were extended as far as the appellant argues, it would rapidly become a double-edged sword threatening the very core of values that it now protects." The court refused to allow the use of academic freedom as a justification for giving universities "a carte blanche to practice discrimination of all types." The court noted that United States Supreme Court cases upholding academic freedom all involved "an attempt to suppress ideas by the government. Ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses."

Extension of academic freedom beyond the protection of academic values could have the perverse result of permitting a university to use its first amendment rights to "reduce dissent or diversity within its own ranks by asserting the primacy of institutional interests over those of its individual members." Indeed, university autonomy and academic free-

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136. Id. at 383 (citing H.T. Edwards, Higher Education and the Unholy Crusade Against Governmental Regulation (1980)).
137. See supra notes 101-10 and accompanying text.
138. See Kunda v. Muhlenberg College, 621 F.2d 532, 547-48 (3d Cir. 1980) (supporting the doctrine of judicial deference in tenure cases, but refusing to apply it when plaintiff was a victim of discrimination).
139. Gray v. Board of Higher Educ. 692 F.2d 901, 909 (2d Cir. 1982).
140. Id. at 909 n.15.
141. 661 F.2d 426 (5th Cir. 1981).
142. Id. at 430.
143. Id. at 431.
144. Id. at 430 (emphasis in original).
dom are not identical. One commentator observes that, in some European university contexts, autonomy might function as an enemy of academic freedom, particularly from the standpoint of the junior teaching staff. University governing boards can, and have, limited the academic freedom of university members far more restrictively than has government. Yet institutions frequently base their claim to autonomy in nonacademic areas, or in areas tangential to academic processes, on the rationale of academic freedom.

The elasticity of the concepts of academic freedom and autonomy has extended their protection into areas well beyond the academic values that they were designed to protect. With its vast reach, an institution like the University of California should not be hermetically exempted from the public policy legislation that controls virtually every other state entity in a similar position. In passing the Prevailing Wage Rate Act and the Open Files Act, the California Legislature expressed legitimate statewide concerns regarding the fair treatment of a large number of state employees.

The policy of applying this sort of legislation to universities has gained wide acceptance. In 1973, the Supreme Court of Michigan addressed the relationship of the University of Michigan, the oldest constitutionally autonomous University in the country, to its employees. The court held that interns, residents, and postdoctoral fellows connected with University of Michigan hospital and its affiliates are public employees who have rights to organize and bargain collectively under the provisions of the Michigan Public Employee Relations Act without infringing on the constitutional autonomy of the Board of Regents. The court reasoned that the autonomy sought by the University in the labor

146. For an excellent discussion of the relationship between academic freedom and institutional autonomy, see Finkin, On "Institutional" Academic Freedom, 61 TEx. L. REV. 817 (1983) (theory of institutional academic freedom collapses the distinction between the two). According to Finkin, "the theory of 'institutional' academic freedom would constitutionalize the concept of administrative prerogative that the American professoriate struggled against at the turn of the century, and it would do so, perversely, in the name of academic freedom." Id. at 854.

147. UNIVERSITIES IN THE WESTERN WORLD 62 (P. Seabury ed. 1975).

148. See, e.g., Searle v. Regents of the Univ. of Cal., 23 Cal. App. 3d 448, 451-53, 100 Cal. Rptr. 194, 195-96 (1972) (Regents, not faculty, have power to authorize, supervise, and give credit for a course).

149. See A. Zusman, supra note 26, at 16; see also Regents of the Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 135-37, 143 Cal. Rptr. 276, 280-81 (1978) (Regents exempt from local building codes and zoning regulations as well as local permit and inspection fees); supra text accompanying notes 25-27.


151. MICH. COMP. LAWS ANN. §§ 423.201-216 (West 1972).
relations area was unnecessary for it to maintain the control and management of its affairs. The court concluded that

...the desires of the framers of the 1850 and subsequent constitutions to provide autonomy to the Board of Regents in the educational sphere have been protected by our Court for over a century. This concern for the educational process to be controlled by the Regents does not and cannot mean that they are exempt from all the laws of the state. When the University of Michigan was founded in the 19th Century it was comparatively easy to isolate the University and keep it free from outside interference. The complexities of modern times makes [sic] this impossible.\footnote{Michigan Regents, 389 Mich. at 106-07, 204 N.W.2d at 223 (footnote omitted).}

The appearance of collective bargaining on campuses represents a break with the long-standing tradition that unions had no place in the world of the university.\footnote{H. Edwards & V. Nordin, supra note 92, at 292.} In 1973, the American Association of University Professors joined the American Federation of Teachers and the National Education Association in endorsing collective bargaining in higher education.\footnote{American Association of University Professors Statement on Collective Bargaining, AAUP Bulletin (Summer 1973).} Seven years later, in \textit{NLRB v. Yeshiva University},\footnote{Id. at 672 (1980).} the United States Supreme Court considered for the first time how federal bargaining principles developed to deal with industrial labor-management relations apply to private academic institutions. A bare majority of the Court held that Yeshiva's full-time faculty members were "managerial employees" and thus excluded from the coverage of the Taft-Hartley Act.\footnote{Id. at 686-90.} Justice Brennan dissented:

[The Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decision-making that is a vestige of the great medieval university. But the university of today bears little resemblance to the "community of scholars" of yesteryear.\footnote{Yeshiva, 444 U.S. at 702 (Brennan, J., dissenting).}]

Justice Brennan thus recognized what one scholar has called "the continuing confrontation of the 19th century perspective with the realities of 20th century academic life."\footnote{Finkin, Toward a Law of Academic Status, 22 Buffalo L. Rev. 575, 576 (1973).}

The California Legislature effectively agreed with Justice Brennan in adopting the Higher Education
Employer-Employee Relations Act (HEERA). 159

HEERA granted the right of collective bargaining to higher education employees (faculty and staff) within the University of California and the State Colleges and Universities systems. In enacting HEERA, the legislature negated the ruling of a 1958 California Court of Appeal case which had held that University of California building and construction trade employees were public employees and therefore did not have the same right to bargain collectively as their counterparts in private industry. 160 In enacting HEERA, the legislature showed its power to limit University autonomy when statewide public policy concerns dictate such a result.

In enacting HEERA, the University implicitly recognized both this power and the significance of the policies behind it. Before HEERA, the autonomy granted to the University seemed to inhere in a unified, self-identical body. Since HEERA, the adversarial, internally conflicted character of University labor relations is legally recognized. Under such circumstances, University autonomy no longer appears a neutral grant. Rather, it forces the University administration to deal with a legally equal, 161 contradictory group. HEERA thus represents a curtailing of some University autonomy in an effort to promote a broader societal policy—collective bargaining—which the University itself might never have voluntarily promoted.

The issue, then, is whether the legislature has the right to regulate this conflict. This Note has already examined the difficulty that academic plaintiffs confront in arguing discriminatory conduct by universities in the face of practices of confidentiality. This difficulty exemplifies the adversarial relations between academic employers and employees that argue for limited legislative and judicial oversight.

Courts have begun to realize that their traditional deference toward universities as defendants cannot be allowed to lead to judicial abdication of the role courts must play in enforcing the mandates of Title VII and other civil rights statutes. California courts must now recognize that as the University of California has grown, its autonomy has correspondingly diminished. The process of growth has been in large part a voluntary one. With it the University has thrived. But the University cannot expect to continue to involve itself in the social, political, and economic world around it while maintaining a fictional "autonomous" status as protection against accountability. That accountability is nowhere more significant, and necessary, than in the area of personnel relations. The passage of HEERA demonstrates the University's recognition that its


161. I.e., granted by law the power to bargain as an equal.
nearly 100,000 employees—academic and nonacademic—deserve to be afforded the same protections that federal and state law afford to other employees.

For many years, academic personnel stood on the borderline between professional (managerial) and employee (nonmanagerial) status. HEERA represents California’s break with Yeshiva and that case’s assumption that faculty are managerial rather than nonmanagerial personnel. In enacting the Open Files Act, the California Legislature attempted to grant University of California faculty procedural protections similar to those granted other state employees. The legislature has expressed no interest in telling the University whom it should hire, promote, or fire; it has simply attempted to extend to University faculty the due process and fair procedure protections that California law grants to all California employees. Given the numbers of nontenured faculty members and the public concern with opportunities in higher education for women and minorities, legislative oversight of the procedures used in academic personnel decisions is appropriate.

A reexamination of the Prevailing Wage Rate Act might reach a similar result. The court in San Francisco Labor Council analogized the autonomy of the University of California to the autonomy of California’s charter cities. The court’s failure to even consider the incongruities in such an analogy are indicative of the court’s traditional deference towards the University. However, frank recognition that the University is a multicity employer, dependent upon the legislature for its funds, yet controlled by Regents who are not accountable in a representative capacity to those they govern, should compel the conclusion that the state has a legitimate interest in the wage rates of University employees. Like HEERA, the Prevailing Wage Rate Act makes no attempt to tell the University whom it should hire, promote, or fire; it simply expresses the legislature’s interest in ensuring that employees of state institutions be paid fairly. The University’s employment of over 75,000 staff throughout the state strongly suggests that this interest is a matter of statewide concern, rather than an exclusively University affair.

While the courts have not formulated a test for determining what are “exclusively university affairs,” one commentator has attempted to do so. In a 1978 article entitled The Autonomy of the University of California Under the State Constitution, Harold W. Horowitz, Vice Chancellor for Faculty Relations and Professor of Law, University of California, Los Angeles, concluded: “If a legislative regulation signifi-

162. San Francisco Labor Council v. Regents of the Univ. of Cal., 26 Cal. 3d 785, 608 P.2d 277, 163 Cal. Rptr. 460 (1980); see supra text accompanying notes 66-74.
163. 26 Cal. 3d at 790-91, 608 P.2d at 279-80, 163 Cal. Rptr. at 462-63; see CAL. CONST. art. XI, § 5.
cantly impairs the powers of the Regents to govern the University with respect to a central University affair, there should be a demonstrable compelling interest advanced by the regulation in order to validate its application to the University." In reaching this conclusion, Professor Horowitz relied heavily on the United States Supreme Court's decision in *National League of Cities v. Usery.* Horowitz suggested three factors to be examined in "determining the application of article IX, section 9 as a limitation on the delegated lawmaking powers of the Legislature: (1) the centrality of the subject matter to the functioning of the University as a university; (2) the degree of impairment of the Regents' 'full' powers of governance; and (3) the interest advanced by the legislative enactment."

The factors Horowitz used in his analysis raise more questions than they answer. The "centrality" factor raises the question of what functions are "functions of the University as a university." This is very much like asking what are "exclusively university affairs." As this Note has shown, answering this question is not easy; implicated within it are complex issues regarding the role the University plays in our society and in our state. Horowitz' second factor—the "degree of impairment"—begs the entire question: what are the Regents' "full" powers of governance? The third factor, the interest advanced by the legislative enactment, cannot be examined without a clearer idea of the policy against which we are balancing the interest at issue.

These difficulties are not unlike those that lower courts faced as they attempted to apply the test the Supreme Court formulated in *Usery.* In overruling *Usery,* the Supreme Court called the test "unworkable." "The goal of identifying 'uniquely' governmental functions ... has been rejected by the Court ... because the notion of a 'uniquely' governmental function is unmanageable." As *Usery* had provided little guidance to lower federal courts in their attempts to find where the reach of the Commerce Clause ends and state sovereignty begins, so Horowitz' test provides us little guidance in attempting to determine the limits of University autonomy under the California Constitution.

This Note has argued that those limits must be construed in light of the University as it exists today, and in light of the society that coexists

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165. Id. at 44.
166. 426 U.S. 833 (1976).
167. Horowitz, supra note 11, at 36.
168. In *Usery,* the Supreme Court held that state sovereign immunity protects from federal regulation under the Commerce Clause "functions essential to [the] separate and independent existence" of "States as States." 426 U.S. at 845. The Court further defined the protected area as that of "traditional governmental functions." Id. at 852.
170. Id.
with it in this state.\textsuperscript{171} Only in that light can we balance the interests of University autonomy against the interests of the state as expressed by the legislature. The California Legislature has expressed its concern with ensuring fair treatment for University of California employees. The implementation of such a policy is a matter of statewide concern and poses no threat to the values that University autonomy and academic freedom are intended to protect.

**Conclusion**

The California Constitution vests the Regents of the University of California with “full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of [the University’s] funds and compliance with the terms of [its] endowments . . . .”\textsuperscript{172} California courts have interpreted these powers to mean that the University shall have full control over “internal university affairs,” and shall be subject to legislative enactments only in “matters of statewide concern.”

Measured against this standard, several legislative attempts to regulate University labor practices governing both academic and nonacademic personnel have been declared unconstitutional.

This Note has argued that, given the University’s status as one of California’s major employers and economic entities, its constitutional autonomy should be modified to allow for a greater degree of legislative oversight, particularly in the area of personnel relations. The concerns expressed by the legislature in this area indicate that, although direct attempts to regulate University labor practices do impinge upon internal University affairs, these affairs are, nonetheless, matters of statewide concern.

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\textsuperscript{171} In rejecting Usery’s “attempt to draw the boundaries of state regulatory immunity in terms of ‘tradition governmental function,’” the Garcia Court stated, “[t]he most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States . . . .” Id. at 543. This Note has argued that we must take a similar evolutionary approach to university autonomy.

\textsuperscript{172} Cal. Const. art. IX, § 9.

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