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A CASE FOR CONTINUED CONSTITUTIONAL
AUTONOMY AT THE UNIVERSITY OF MINNESOTA

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The constitutional autonomy of the University of Minnesota to manage its own affairs will undoubtedly be discussed again in the coming session of the Minnesota State Legislature. The fundamental issue has been and probably will be one of control. Should the elected representatives of the people in the legislature and governor's office have the largest share of power to make policy for the University, or should the University be insulated from partisan and political battlefields by retaining its constitutional autonomy? In arguing the question, projections range from fears that the University could become an arrogant, inefficient agency unresponsive to public policy imperatives, to anxiety that it will become a sychophant of government bureaucrats and politicians.

** Because this paper is intended for internal University of Minnesota discussion and not for publication, it is not documented in detail. Concepts and, at times, specific wording has been liberally extracted from the core sources without footnoting. The primary sources for this paper are Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline by Lyman A. Glenny and Thomas K. Dalglis; The Capitol and the Campus--State Responsibility for Postsecondary Education by the Carnegie Commission on Higher Education, and Governance of Higher Education, also by the Carnegie Commission.

Constitutional autonomy (also, constitutional status or independence) shall be defined hereafter, as it is in Glenny and Dalglish: "The practice of providing in state constitutions for the vesting of exclusive management and control of the institution in the governing board, presumably to the exclusion of state executive and legislative officials."

However, autonomy is not a social reality, but rather a legal concept. In the sense of total absence of control, autonomy is neither sought by higher education nor can it be given by public authority.

Autonomy of any state university is limited by law, by the influence that goes with financial support, by professional and academic considerations, and by public policy. Because universities are created, rather than self-created, and thus are not self-supporting, they are dependent upon external sources of financial support, and such dependence necessarily limits their autonomy.

In sum, university autonomy is a matter of degree. Complete autonomy is neither possible nor generally desirable.

Regardless of the relativity of the issue, institutional autonomy must be preserved, according to the Carnegie Commission on Higher Education, in three areas:

- 1) intellectual--protection of academic freedom and of free choice and conduct of research projects by faculty members and students;
- 2) academic--acceptance of decision making by academic authorities in specific academic areas such as conduct of courses;
- 3) administrative--allowing substantial leeway in handling financial and personnel matters in detail.

(Governance in Higher Education.)

In its report on higher education, the Carnegie Commission also made the important distinction between external influence and external control. Influence can be exerted by providing special funds for special activities--and these funds can serve as a great magnet for campus activity--or by creating a climate of public opinion that may either encourage or discourage campus actions, or by direct persuasion.

But influence is not control. Control exists when an order can be given to do or not to do some certain thing with penalties attached for noncompliance.

The Land-Grant Act of 1862 was an example of influence. It provided an attractive idea and some resources, but it did not require any action. On the other hand, the action of a state legislature in specifying faculty teaching loads is control requiring compliance.

Influence recognizes freedom of action. Control limits freedom of action. Control involves mandatory, external decisions. Influence permits internal decisions. As long as public authorities rely upon influence and not control, institutions of higher education may rely upon their own wisdom in selecting among whatever alternatives are made available. (Governance of Higher Education.)

Influence and control lie on a continuum, and as such, there are many borderline cases. To aid in making the distinction, man has developed legal mechanisms such as constitutional autonomy. It is the contention in this paper that constitutional autonomy of public universities continues to be an effective tool, although probably not the best tool, in preventing the slide from legitimate influence by the public or their elected representatives to inappropriate controls which will ultimately reduce the quality of university scholarship.

The Historical Relationship Between The University and Government

The concept of the autonomous university has its roots in the social organization of medieval Europe. In that society, there was an absence of a monolithic power structure and a real plurality of interests. The universities were able to effectively balance the powers of the church and the court. If a king would attempt to control the university, it would appeal to the bishop for protection, and vice versa.

However, during those times, university autonomy was probably less dependent on the balance of structural controls than on the special status accorded to universities:

In the social structure of the Middle Ages the universities were centers of power and prestige, protected and courted, even deferred to, by emperors and popes. They held this position chiefly because great importance was attached to learning, not only as a necessary part of the whole spiritual enterprise, but also for its own sake. (Hofstadter - Metzger)

As the power of the church declined during the 17th, 18th, and 19th centuries, so did the autonomy of the European universities. As nation states arose, sovereigns and parliaments alike took increasing control over all elements of society. As a consequence, university autonomy and intellectual freedom suffered to the point where governments were appointing and discharging professors at will. (Glenny - Dalglish)

With the American revolution, autocratic rule gave way to democracy. Individual freedom advanced. Higher education

gained in status, quality, size, and complexity. Predictably, the university became more independent within the increasingly pluralistic society. As with its predecessors in Europe, the American colleges and universities were not entirely autonomous but rather were able to balance the various controls to prevent intrusion into their internal affairs. As though higher education was under the ambit of the church, states routinely made grants to private institutions with no strings attached.

The Dartmouth College case of 1819 was probably the most important legal precedent in establishing the basic independence of American private institutions from public control. In essence, the decision conferred corporate status on colleges and universities. The New Hampshire legislature had sought to modify the charter of Dartmouth College and reconstitute the board of trustees into a body more representative of the state as a whole. The U.S. Supreme Court, however, invalidated the attempt, ruling that the original charter was, in effect, a contract between New Hampshire and the college, which the state was without constitutional power to impair. (Glenny - Dalglish)

In pleading the Dartmouth case before the Supreme Court, Daniel Webster clearly pointed out the consequences of legislative involvement in college affairs:

It will be dangerous, a most dangerous experiment to hold these institutions subject to the rise and fall of political parties, and the fluctuations of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted...and learned men will be deterred from devoting themselves to the services of such institutions...Colleges and halls will be deserted by all better spirits, and become a theatre for the contentions of politics. (Quoted in Glenny - Dalglish.)

As the distinction between public and private institutions evolved, states ceased giving grants to private institutions and established their own. The first state university, the University of North Carolina, was founded in 1789 and endowed by the state legislature with a grant of "all property that has heretofore or shall hereafter escheat to the state." In 1800, the legislature decided that it had been too generous and repealed this grant of public lands. The new act provided that all escheated lands not already sold by the university should revert to the state. The trustees of the university refused to comply with the provision of the act contending that the institution had acquired vested rights under the previous act which could not be impaired by subsequent action of the legislature. The state supreme court agreed with the governing board. The court was of the opinion that the property of the university was completely beyond the control of the legislature, thus treating the state university as a private corporation. The courts in several other jurisdictions continued for many years to look upon state universities,

as well as private colleges, as corporations with certain rights beyond the reach of legislative interference.

The degree of control established over other state educational institutions varied widely among states and also among different types of institutions within a state. Nonetheless, virtually all the states recognized the need for a greater degree of autonomy for public colleges and universities than that afforded to other agencies of the state. However, since World War II this principle has been in rapid decline to the point where public education is taking on the status of a public utility subject to constant regulation in the name of public interest. More state coordinating boards and superboards, more gubernatorial and legislative investigation and intrusion, more federal regulation and supervision, and more external authority for independent associations have severely squeezed the ability of both public and private universities to govern themselves.

The resistance to intrusion into a public university's internal affairs has, to some extent, depended on the degree of constitutional and statutory protection it is afforded. The University of Minnesota is one such university that has substantial constitutional protection against unwarranted controls by the state.

Tradition of Constitutional Autonomy in Minnesota

In February 1851, the Territorial Legislature formed the Regents of the University of Minnesota as a body corporate empowered to "govern" the University. Subsequently, the Minnesota Constitution of 1858 confirmed the institution as the University of the State of Minnesota and "perpetuated unto said university" "all rights, immunities, franchises, and endowments heretofore granted or conferred." Despite this language, 70 years of heavy legislative involvement in university affairs followed.

The question of constitutional autonomy was not raised by the regents until the well-known Chase case in 1928. As the result of a financial squeeze in state government in 1925, the governor and the legislature sought ways to economize. To this end, they formed a Commission of Administration and Finance to review the finances and approve all contracts and expenditures of each state agency, including the University.

After a review of the legal history of the University, the president and the dean of the law school became convinced that the 1925 act creating the commission was an unlawful impingement on the yet unrecognized constitutional status of the University. However, in deliberation with the regents, they concluded that due to the economic situation facing the state,

it was unwise to seek a legislative amendment of the law. Rather, they decided to comply for the time being, wait until the issue appeared in its clearest form, and then litigate once and for all the autonomous status of the University. (Glenny - Dalglish)

Years later, the Board of Regents submitted a voucher for payment for an actual survey of a group insurance plan for its faculty and staff. The voucher was disapproved by the commission solely on policy grounds. The regents went to court to compel payment of the voucher, and in 1928 the Minnesota Supreme Court issued the landmark decision confirming clear constitutional status for the University. Speaking for the Court, Mr. Justice Stone stated:

So the University, in respect to its corporate status and government, was put beyond the power of the Legislature by paramount law, the right to amend or repeal which exists only in the people themselves. (175 Minn. 259, 220 N.W. 951)

Elsewhere, he said:

The right so to control University finances is the power to dictate University policy and direct every institutional activity---The Legislature cannot transfer any of these constitutionally confirmed powers from the regents to any other board, commission or officer whatever.

And Concluded:

The Constitution of the state has declared, in effect, that the management of the University shall be, until the people themselves say otherwise, in a relatively small, slowly changing board, chosen for their special fitness for an interest in the work...The purpose of the constitution remains clear. It was to put the management of the greatest state educational institution beyond the danger of vacillating policy, ill-informed or careless meddling and partisan ambition that would be possible in the case of management by either Legislature or executive, chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher learning.

The governor's immediate response was to cut the University's proposed appropriation in the next budget message, and when the senate restored most of his cuts, he vetoed the entire appropriation bill. The final outcome of this dispute was a substantially reduced appropriation for the University and a defeat for the governor in his next bid for reelection. According to some sources, his defeat was directly attributable to his struggles with the University. (Glenny - Dalglish)

Although the limits of the regents-authority and other such specific issues have since been examined by the courts, the basic principle of autonomy defined in the Chase case has never been contested. This paucity of court battles on the principle speaks well for the University, the governor, and the legislature in accomodating the needs of the people of the state within the limits of their respective powers.

Several years later, the court reaffirmed its position in *Fanning v. University of Minnesota*:

Of the effect of the adoption of the constitution there is no doubt. The people by their constitution chose to perpetuate the government of the University which had been created by their territorial legislature in a board of regents, and the powers they gave are not subject to legislative or executive control; nor can the courts at the suit of a taxpayer interfere with the board while governing the University in the exercise of its granted powers. (103 Minn. 222, 236 N.W. 217)

The court summarized its prior decisions on autonomy in *State ex rel Sholes v. University of Minnesota* and then concluded:

From these cases it is clear that the Board of Regents, as constituted by our territorial legislature and confirmed by our constitution, is a corporate entity endowed with the power to govern, and that so long as it stays within the powers conferred upon it by its charter, as confirmed by the constitution, the courts may not interfere. (236 Minn. 452, 54 N.W. 3d 122)

For other decisions that bear on the issue, also see the following:

Regents of the University of Minnesota v. Hart (1862) 7 Minn. R. (Gil.) 45 (construction of building-university responsibility)

Gleason v. University of Minnesota (1908) 104 Minn. 359, 116 N.W. 650 (reinstatement of student)

Knapp v. State (1914) 125 Minn. 194, 145 N.W. 967 (eminent domain)

State ex rel Peterson v. Quinlivan (1936) 198 Minn. 65, 268 N.W. 858 (manner of selection of regents)

- Bailey v. University of Minnesota (1971) 290 Minn. 359, 187 N.W. 2d 702 (court power to enter declaratory judgment regarding management of university)
- Op. Atty. Gen. 270-D (July 8, 1947) (conciliation of employee dispute-application of state statute to regents)
- Op. Atty. Gen. 618-B (March 21, 1955) (control of university funds)
- Op. Atty. Gen. 618-a-2 (August 28, 1947) (powers of state executive)
- Op. Atty. Gen. No. 769, p. 1099 (1934) (applicability of building regulations)
- Op. Atty. Gen. 359-A-11 (Nov. 4, 1929) (legislative control over university property)
- Op. Atty. Gen. 616-A-2 (Nov. 13, 1936) (legislative power regarding tuitions)
- Op. Atty. Gen. 618-a-5 (August 11, 1938) (purchasing procedure-- control by state)

Constitutionally Autonomous Universities in Other States

There is a widely held misconception in the media, state government and academic community that the legal status of the University of Minnesota is unique, or, at least, unconventional. In fact, there are several other major institutions that hold similar constitutional status. Although the degree of autonomy varies with the language of university charters and state constitutions and their subsequent court interpretation, scholars of college law and governance concur that the following states have granted constitutional autonomy, as previously defined, to one or more of its public universities: California, Colorado, Georgia, Idaho, Michigan, Minnesota, Montana, and Oklahoma.

The constitutions of three other states, Alabama, Arizona and Nevada, granted substantial protection to their public universities, however their actual legal status has been heavily qualified by court decisions, attorney general opinions, or long established practice. Three other states, Louisiana, Missouri, and Utah, have constitutional language which permits independent universities, but they clearly do not due to adverse court decisions. (Glenny - Dalglish)

Several other states have granted substantial statutory protection from governmental encroachment to its universities. Most notable among this later group is Maryland, where the

legislature passed in 1953 what is now called the "Autonomy Act." In part, the act said:

Notwithstanding other provision of law to the contrary, the board of regents shall exercise with reference to the University of Maryland...all the powers, rights, and privileges that go with the responsibility of management...and said board shall not be superceded in authority by any other state board, bureau, department or commission, in the management of the university...

A list of exceptions followed this language demonstrating the vulnerability of legislatively conferred autonomy.

The following are brief discussions of other states affording legal status to its public universities similar to that of the University of Minnesota:

Michigan

In 1850, the University of Michigan became the first educational institution to be granted constitutional autonomy following 30 years of struggle between the university trustees, the governor, and the legislature for control of the institution. Prior to that time, both the legislature and the governor ventured into the hiring and firing of faculty, establishing academic departments and curricula, and selling of university lands. Clearly unstable in its early years, the University of Michigan was far from a distinguished institution. Some scholars attribute the early failure of the university to its utter dependency on the changing political climate of the legislature.

Despite the direct mandate of the people of the state, the legislature continuously attempted to interfere in the internal administration of the institution.

To protect its constitutional status, the university has repeatedly gone to the courts, most recently in 1975. In the court decisions, the constitutional authority of the Board of Regents was confirmed. (Glenny - Dalglish and Blackwell)

Evidently satisfied with the excellent record of the University of Michigan after it was granted freedom from executive and legislative control, the Michigan people granted similar status to Michigan State University, and later to Wayne State University.

California

The University of California was the second university to receive constitutional independence "subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and the proper investment and security of its funds." Because of this constitutional language, Glenny and Dalglish believe that the university might be subject to the requirements of the state budget act. No court has ruled on its applicability to the university, but previous appropriation bills have contained wording that exempts the university from portions of the budget act indicating that the legislature believes it is applicable.

Oklahoma

State courts ruled in 1909 that constitutional provisions freed Oklahoma State University from legislative and administrative controls. Subsequent litigations and opinions of the state attorney general have confirmed this autonomy. (Monk)

Idaho

The Idaho constitution says:

The regents shall have the general supervision of the University and control and direction of all funds of and appropriations to, the University, under such regulations as may be prescribed by law.

This language was not, in itself, sufficient to free the board from legislative and executive interference. In 1920, the legislature attempted to bring the fiscal affairs of the university under direct control of the state administrative officers.

The regents declared their independence from any such controls and were eventually supported by the state supreme court. In its opinion, the court cited the following sentence from a Michigan supreme court decision as accurately describing the status of the University of Idaho:

It is made the highest form or juristic person known to law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to, that of the Legislature. (Blackwell)

Colorado

The constitution of Colorado vested the "general supervision of the state university" and "executive control and direction of all funds of, and appropriations to, the university" in a board of regents. Although the Colorado courts have neither affirmed nor denied complete autonomy to the University of Colorado, the state government has resorted to provisions of the constitution other than those relating to the university to delimit the autonomy of the regents in certain narrowly defined matters. (Blackwell and Glenny-DalGLISH)

Georgia

In 1945, the voters of Georgia adopted a new constitution which raised the Board of Regents of the University System of Georgia to constitutional status. Since then, the state supreme court confirmed that the powers and duties of the Regents "are untrammelled except by such restraints of law as are directly, expressly, or necessarily implied." Whether those powers and duties are as extensive as those exercised by other constitutionally independent state universities remains to be tested in the courts. (Blackwell)

Montana

Under the 1972 constitution, the Montana board of regents has been transformed from a purely legislative creation to a

constitutional department. The reason for this change, according to the chairman of the education committee of the constitutional convention, was that direct legislative control under the old system had proven unworkable. "There was a need for autonomy and relief from state administrative bureaucracy." He further stated that higher education must be something more than simply another state service. (Schaefer)

Encroachments on this constitutional authority have since been tested in the Montana courts. For example, in 1975, the regents protested that line item appropriations of general fund monies by the legislature infringed on the authority of the regents granted by the new constitution. The supreme court of Montana ruled that the legislature cannot do indirectly through means of line item appropriations and conditions what is impermissible for it to do directly. (Board of Regents of Higher Education of the State of Montana v. Judge)

In conclusion, the universities generally recognized as constitutionally autonomous actually enjoy varying degrees of independence to manage and control their own internal affairs. The constitutional language is usually qualified by a host of interdependent, non-legal factors such as tradition, the current political winds in the state, the popular respect for higher

education or the institution itself and its administrators, faculty and students. In other words, a university with strong constitutional language protecting its autonomous status may, in actual practice, have less independence in its own management than another university with weaker constitutional protection.

Further, court interpretations of autonomy have been selective. The courts generally have been reluctant to permit legislative regulation in academic or educational policy areas of universities with constitutional status. They have, however, permitted the legislatures in some states, such as Idaho, Oklahoma, Georgia and Colorado, to exercise some control in fiscal and monetary activities and purely procedural or administrative matters.

National Trends Affecting University Autonomy

It has been noted previously and will be discussed in considerable detail later in this paper that the freedom of public universities to manage their own internal affairs without external controls is increasingly constrained. This has been the unanimous conclusion of all scholars, commission and other authorities published in the current literature. The only questions remaining are concerning the degree and propriety of the constraints, their causes, and appropriate responses.

Regardless of the outcome of such discussions, it seems clear that the growing interrelationship between state government and higher education is a primary variable. A myriad of other social and political trends are either causes or catalysts. Those trends most commonly mentioned in the literature are briefly discussed below:

*** The real and proportional expenditures on higher education have increased significantly. In the past decade, higher education's share of the GNP has risen from 1.1 percent to 2.5 percent, and the prospect is that it will continue to climb. But while the demand for funds increases, the sources of those funds have not equally multiplied. Indeed, most new taxes turn out to be increased rates on old taxes. Political leaders, in responding to public concerns (and at times, capitalizing on

them politically), are seeking ways to reduce the spiraling costs or increase productivity of the universities. (Governance in Higher Education.)

*** Social priorities seem to be shifting away from university education. In the past, state governments gave priority to roads, prisons, secondary schools, etc. In the 1950's and 1960's, higher education, among other concerns, fared very well. Recently however, community and junior colleges have been growing in numbers and receiving larger shares of state money. Attention is also focused on environmental protection, expanded parks and recreation opportunities, increased health care, and many others. Legislators and governors look for places to save money in order to reallocate it to new uses. In sum, public universities have serious rivals for state funds.

*** Government has been rapidly centralized in the name of increasing the efficiency of its agencies, reducing costs and coordinating its services and programs. With the growing complexity of their problems, political leaders are attracted to program budgeting, management information systems, and the systems approach in solving governmental management problems. The result is more reorganization, more central reviews and staff services, and more control over expenditures and budget formulations.

*** Sophisticated professional analysts are replacing former political appointees and technical clerks in the legislative and executive offices of government.

*** Although it may not be applicable to Minnesota, much attention in other states has centered on the growing power of the governor. In many strong-governor states, the legislatures have been challenging this concentration of power. The usual consequence is that the universities are caught in the middle of the power conflict. While universities may gain temporary advantage from the political chaos, they are most likely subjected to demands for information, reviews, hearings, and needless harassment from both the governor and legislature.

*** The introduction of new federal programs in higher education has been followed by commensurate funding and controls.

*** The authority of coordinating councils and superboards is increasing in virtually every state.

*** The expanded public attention of the actual and potential contributions of higher education in solving social problems has led to the desire to determine the types of research conducted with state funds.

*** The transition from elite to universal-access higher education means that more members of the general public know about and care about higher education.

*** There is a higher percentage of students in public institutions rather than private.

*** Throughout American society, there has been a general ascension of public control over once autonomous or private interests. The trend is prevalent for corporations, labor unions, and universities alike.

Comparison of Constitutional and Statutory Status of Universities

The most complete and authoritative analysis of constitutional autonomy of public universities is by Glenny and Dalglish for the Center for Research and Development in Higher Education at the University of California, Berkeley. Much of this paper is based on their work.

In the Glenny-Dalglish study, four states (California, Colorado, Michigan, and Minnesota) that provided their state universities with great autonomy from state government through their constitutions were matched with four states (Hawaii, Illinois, Maryland, and Wisconsin) which have distinguished universities of similar size whose legal base is purely statutory.

The major conclusion from their comparison was that while both groups suffered considerable interference into their internal affairs, the universities that were constitutionally protected were generally more autonomous. Any degree of autonomy enjoyed by the universities with only statutory status was derived from simple administrative discretion by the government, the long tradition of separation of the academy and government, the enactment of special legislation exempting universities from general state legislation, or legislation establishing the universities as public corporations. Nonetheless, these sources of institutional independence do not, alone or in combination,

offset the fundamental legal subordination of such institutions to the legislature. On the other hand, constitutionally autonomous institutions are legally viewed as a fourth and separated branch of government.

More specific distinctions identified in the Glenny-Dalglish study between universities with constitutional status (CS) and those with statutory status (SS) are discussed below:

Control over Educational Programs

Glenny and Dalglish's most important finding relative to the thesis of this paper was that "states are intervening more in academic programs than previously and that more controls apply to the statutory university than to the constitutional one. The controls tend to be exercised by the new coordinating boards and councils through their power to approve or disapprove new programs, rather than by the legislature through its hearings and appropriations, or by the governor through the executive budget."

Both CS and SS have a great deal of autonomy to develop, control and otherwise offer established educational programs. Historically, state government has intervened little if at all. Legislatures, and at times governors, have occasionally intervened in the establishment of new programs, primarily in response to constituent pressure. CS and SS universities are both vulnerable

to this governmental influence.

In areas of academic management such as organizing new campuses, setting tuition levels, retaining overages in tuition income, setting admission policy and enrollment ceilings, and determining levels of faculty salaries, or qualifications for tenure, CS universities have more flexibility than do the SS universities. Although direct controls regarding workload and faculty productivity are not applied to either CS or SS universities, this issue seems to have greater salience in CS states.

Control over Funding, Management and Budget

Glenny and Dalglish sum up the major distinction between CS and SS universities in the control of general university operations:

...the CS institutions in this study have largely succeeded in avoiding direct control of any activity by their respective state governments. Indeed, if CS has meant anything substantial, it has been the ability of the university to set its own priorities, move funds freely among its several functions, and manage its own affairs. This condition is rapidly deteriorating in the budgeting and appropriations process, and to some extent even in the management of the institution. ...the university's freedom to use its funds for the purposes and priorities set by the boards of regents has given way to increasing inflexibility and rigidity not only with respect to the use of state funds, but also those from other sources as well. Similarly, but with even greater accelerations, any flexibility in use of funds by the SS universities and colleges is also deteriorating.

The findings indicate that the greatest limits on the freedom of universities lie in the continued success of the state to control through the appropriations process.

Some of their more specific findings were:

*** Restrictions, usually built into the executive budget, more directly control the appropriations to SS universities.

Riders and negotiated agreements are most often used to control CS universities. Although the CS universities experience less direct control, they face a greater continuing dilemma after the appropriation. SS universities may have to play cat-and-mouse during the legislative sessions, but once they have ended, the laws applying to them are fairly clear. On the other hand, because of riders, resolutions, bills of particulars, and worksheets in lieu of legal mandates, the CS universities often find themselves caught in disagreements with the state government with no clear course of action.

*** There is no substantial difference in the treatment of federal overhead funds or foundation grants to CS and SS universities.

*** The prerogative of CS universities to transfer funds internally at will is one of the most marked contrasts with SS universities. SS universities are increasingly limited in transferring funds between budget items.

*** Another key power of CS universities is to receive and hold property in its own name, to invest its funds, and otherwise to manage resources gained from sources other than the state. Of the CS universities studied by Glenny and Dalglish, only Minnesota appeared in jeopardy of losing this option because the state offset a major portion of income from the state appropriation in 1971.

*** CS universities establish their own merit systems.

*** CS universities are exempted from state central purchasing.

*** SS universities are more subject to performance audits than the CS universities.

*** In the use of management information systems, CS and SS universities are about the same.

*** Pronounced differences exist between CS and SS universities in the construction of buildings. All CS universities can issue revenue bonds in their own name and construct buildings from proceeds without reference to state agencies.

*** CS universities are somewhat freer of numerous line items in the appropriations than are SS universities.

*** SS universities are somewhat better off than CS universities in the manner in which appropriated funds are received. CS universities usually receive their allotments monthly.

SS universities usually receive them quarterly or annually.

In summary, Glenny and Dalglish conclude that while the freedom of both CS and SS universities to govern their academic programs and operations is declining, there still are significant differences between the two types of universities. Perhaps the most important distinction is the ability of the CS university to slow this decline of autonomy. A tabular breakdown of some of these general distinctions follows:

From Glenny and Dalglish P.150-1.

| Constitutional Status Universities | Statutory Status Universities |
|--|--|
| may establish their own civil service (merit) system | comply with statutory requirements concerning civil service personnel |
| have exclusive control over academic affairs (degrees, programs, offerings, majors and minors, etc.) | confer degree as authorized by the legislature, and depend upon legislative and coordinating board procedures (approval, review, recommendations, etc.) on program offerings, majors and minors, schools and colleges. |
| may hire own attorney | are represented by the office of the attorney general through one of his assistants |
| may do their own purchasing | utilize the state purchasing department and comply with its requirements. |

| | |
|--|--|
| have charge of all building construction | follow state construction agency procedures and requirements regarding capital construction |
| control their own funds (e.g., with regard to banking, internal allocations transfers, reallocations) | are directly controlled by the state in fiscal matters |
| establish their own rules with respect to admissions and retention of students and hiring, firing and tenure of faculty | are subject to state statutes relating to admission and discipline of students and hiring, firing, and tenure of faculty |
| have power to decide what information to disclose to state executive and legislative officials in connection with budgeting, accounting, planning and auditing | comply with statutory and executive requirements regarding budgeting, accounting, planning and auditing |
| are not covered by general state legislation | are covered by general state legislation |
| are subject to proper exercise of state police power legislation | are subject to the proper exercise of state police power legislation |

Discussion of Arguments Against Constitutional Status

In the debate over the merits of constitutional status for the University of Minnesota, several arguments have been commonly raised. They are noted and discussed below:

The constitutional status of the University places it above the law.

Neither the University of Minnesota nor its board of regents are above the law nor do they claim to be. The regents must govern the University within the boundaries prescribed by both the federal and state constitutions. Properly drafted laws exercising the general state police powers in matters of public health, safety and welfare prevail over university autonomy. The University considers itself subject to Minnesota laws on privacy, open meetings, the Public Employee's Labor Relations Act, all criminal laws, and legislation concerning gifts and grants. The University also complies with the state building code pursuant to regents policy, state fire marshall requirements, provisions concerning handicapped, Pollution Control Agency guidelines, to name a few in the area of health and safety.

Further, and perhaps most important, the University's constitutional autonomy is subject to the interpretation of the courts. Indeed, the strength of the University's constitutional status, in large part, is due to court examination of

the constitutional language and legal precedent.

For a more detailed and legalistic response to this charge, see The University and Minnesota Government and The Legal Status of University Governance, documents of the Office of the University Attorney.

Constitutional status prevents University accountability to the taxpaying citizens of the state through their elected representatives.

The University is clearly accountable to both those it serves and those who pay for its operation. It is not a question of whether the University is accountable. In fact, the institution is subject to a rapidly growing array of influences and controls that may well be suffocating the University's ability to effectively manage educational affairs. Therefore, the question is really whether the University has properly balanced these controls so that it can best respond to the needs of all its constituents.

At the outset, it should be remembered that approximately one third of the University's operating budget comes from state appropriation. About two-thirds of the budget comes from other sources such as student tuition, private and federal grants, etc. Further, the University is not a parochial institution.

It teaches students from every corner of the world. University research and service also reach far beyond state boundaries. As such, the University must be accountable to a much wider constituency than just the state taxpayers.

In reality, the term "autonomous" is a misnomer. The University is somewhat free, under its present constitutional status, to determine the weight of its resources it places on various public demands. But it simply does not have the power to ignore those publics that use its services and pay its bills. The following are some of the means at the government's disposal to insure university accountability.

*** The legislature retains the power to appropriate funds for the University. Manipulation of the appropriation process can strongly influence, and in some cases directly control, educational and administrative policy of the University. Without further discussion, it can be assumed that the power of the purse string is a means of accountability that the University cannot avoid. Parenthetically, the degree to which the legislature can condition its appropriations to a constitutionally autonomous university is currently in question before the courts. See Regents of the University of Minnesota v. Lord.

*** Other legislative and executive powers also insure university accountability to the public. Most notable among

*** Other legislative and executive powers also insure University accountability to the public. Most notable among these powers is the election of the regents who govern the University. The regents are selected by the legislature in joint convention or appointed by the governor during interim periods.

*** Restrictions on the investment media used by the regents are specified by the Minnesota constitution.

*** Unsold federal land grant lands and their surface and mineral interests are administered on behalf of the University by the State Department of Natural Resources.

*** The relationship of the University to the Minnesota Higher Education Coordinating Board is identical to that of all other eligible institutions.

*** The University coordinates and advises appropriate planning agencies and community groups such as the Metropolitan Council.

*** The University's relationship to the many municipalities, counties, and other political subdivisions is similar to that of all other state agencies.

The Carnegie Commission on Higher Education and other authorities have noted vast increases in the power of internal groups

to determine university policy. Both the student (in essence, a consumer of the university product) and the faculty (the primary employees of the university) have been granted great powers in university governance.

External sources of funds, particularly the federal government and private foundations, also have considerable voice in the conduct of university affairs. See A Review of the Current Criticisms of the Impact of the Federal Government on Higher Education.

In addition, other outside groups, without power of the purse string, exercise quasi-governmental authority over the institution. Included would be alumni, professional and accrediting associations. Recent headlines about the North Central Association's evaluation of university libraries or the National Collegiate Athletic Association's mandates regarding student-athlete eligibility demonstrate that internal decision-making is frequently influenced, and occasionally controlled by many groups representing various public interests.

In sum, not only is the University subject to numerous and complex influences and controls, and thus accountable to a wide range of constituents, but it is being squeezed to the extent that effective management of the University by balancing these diverse demands may no longer be possible.

Moreover, it is doubtful that direct public accountability is the best form of university governance. The University should be free to lead the Minnesota citizenry to higher goals instead of merely responding to the transitory fads of a vocal or powerful portion of the population. A closed loop system of accountability would starve off creativity and initiative, encourage mediocrity, and ultimately defeat the University's purpose of educational and research leadership. An excellent example is the University's program in Dutch Elm disease. University researchers had been attacking the problem for many years before it became a high priority issue with the state government and general populace. It is now the state's foremost resource in fighting Dutch Elm disease. If the University did not have the flexibility to approach issues not high on the public agenda, it would not have had the research and operational base upon which to act once the issue became important to the public. In short, a university cannot be run by popularity contests.

Centralizing the University's fiscal and administrative affairs under the state executive and legislative departments is a necessary cost cutting measure in times of financial austerity.

No factor has contributed more to recent stress in the relations between the state and higher education than the widespread belief that centralized control over all state activity cheapens the cost while improving the services provided to the public. Any yet it is paradoxical that states have been moving to centralized control over their administrative structures at the same time that developments in management theory and practice elsewhere have been underscoring the value of decentralizing decision-making authority wherever possible within institutional systems as complicated as state government.

Animating this trend toward decentralization in both public and private administration is the knowledge that the broad range of functions carried on by any large and complex organization makes it impossible for all authority to be concentrated at a single center of control without serious loss of both the speed and competence with which decisions are made. It is also recognized that informed judgment in each area of administrative operations demands a specialized knowledge and experience that is only present in the agency that has immediate responsibility for performance.

The Minnesota-based 3M Company has been an industry leader in decentralized management. Because of the highly specialized and technical nature of its products and research activity, 3M has made each division autonomous in most of its administrative, production and marketing functions. For example, each division can hire its own advertising agency catering to its special needs.

Certainly, there is no state activity other than higher education with a greater need for leaving authority in the hands of those with immediate and intimate knowledge of its affairs. For the task of a university is infinitely more complex than that of conventional state activities. An institution of higher education engages in a wide range of teaching, research and service activities in such diverse fields as law, medicine, engineering, agriculture, fine arts, and even government. No other state activity comes close to duplicating a college or university in the multiplicity of fields that it encompasses in its operation.

(Moos-Rourke)

If sprawling decentralization was a problem in the past, excessive centralization will be the problem of the future. The rampant centralization of the federal government, for example, has reached the point of diminishing returns. Each additional layer of bureaucracy or centralized agency that is now added seems to increase the cost of government while reducing the actual y

service to the taxpayer. It is now becoming recognized that increased freedom, rather than increased constraints, promotes efficiency.

Further, the centralization argument assumes that the University of Minnesota is poorly managed. There is no evidence to support this. In fact, it appears that the University delivers greater and more direct benefits to the public at a more efficient cost than do most of the state agencies. Inefficient management of the University should be clearly proven before a change is warranted.

Bringing the University under the state higher education coordinating structure will result in less duplication and better educational opportunities for the citizens.

My experience in government is that when things are non-controversial, beautifully coordinated, it must be that there is not much going on.

John F. Kennedy
Quoted in The Kennedy
Wit by Bill Adler

The pluralistic structure of higher education has produced a system with greater strength, diversity and vitality than in any other nation. Academic free enterprise has parallels with the economic free enterprise in eliciting effort and accountability.

Any organizational structure for higher education which

limits the number of minds to think about a problem or creatively teach a concept will ultimately be the most inefficient.

Mediocrity will thrive.

Eliminating duplication in education implies that there is only one way to teach any given curricula or one way to research a given problem. For example, although the Mayo Medical School and the University Medical School have differing philosophies and specific teaching techniques, both are in the top ranks of medical education. How can it be determined which is the one way to teach medicine? Who do we trust with the decision? What some see as duplication might actually be diversity.

For more detailed discussion on this issue, see the unpublished MPIS paper, A Survey of the Literature on State-Wide Coordinating Boards and Consolidated Governing Boards.

The autonomous status of the University is merely a constitutional oddity not afforded to any other educational institution in the state and therefore should be rescinded.

The people of the state, through their constitution, granted exclusive power to the regents to supervise and control the University. The wisdom of the constitutional structure has been borne out in policy and practice. In dividing the government

into coordinate branches, the founding fathers and the people of Minnesota wisely recognized that centralization in the name of efficiency may easily be carried so far as to endanger the very foundation of our form of government. (University of Minnesota v. Lord) The principle of separation of powers is hardly an oddity of American government.

It certainly is unnecessary to list other instances in which separation of powers has best served the governance of other American institutions. However, it is often overlooked that the constitutional farmers in Michigan, California, Colorado, Idaho, Georgia, Oklahoma, Montana, Alabama, Arizona, Nevada, Louisiana, Missouri, and Utah, in varying degrees, also saw the need for separation of powers in the governance of higher education. (Glenny-DalGLISH)

Higher education provides, through its faculty and students, one of the checks and balances in a democratic society along with a free press, a free church (both constitutionally protected), and the split of executive, legislative and judicial authority. The campus community should be fully free to study, evaluate and advise on the conduct of other institutions in society. This critical function is more likely to be performed adequately if there is independence in higher education.

In regards to the statutory status of other institutions

of higher education in Minnesota, it should be remembered that the University of Minnesota is unique within the state. It is the preeminent institution in the state with the largest and most comprehensive teaching, research and service program. It is the only land grant, doctoral-granting university. The University is the eighth largest system in the country and the fifth largest in research expenditures. And these are but a few of the characteristics that distinguish it from other state institutions.

Because the University of Minnesota is unique, the governance of the University should be unique. It would be unimaginative and inappropriate to apply the same control mechanism used in institutions with vastly different educational missions to the University. This is not to say that increasing local control within the state university system should not be considered.

Glenny and Dalglish noted that parity is a compelling principle in the treatment of all state institutions, but they finally conclude that:

The extension of CS to all state institutions may not be as advantageous as is usually assumed. There seems to be some value in having institutions with different legal status in the same state; it is more likely to lead to competition, innovation and diversity... With diversity in legal status, state controls, if asserted at all, tend accordingly to take into account the unique character of each type of institution.

Other Reasons for Continued Constitutional Autonomy

In addition to those discussed in the previous section, the following are often cited reasons why continued constitutional status or institutional independence are important for higher education and the public:

*** Academic and administrative freedom cannot be realistically separated. Although politicians usually intend only to exercise greater administrative and financial control over public universities, the ultimate result is greater political control over educational programs. For example, a state auditor in West Virginia (a state without constitutional status for its public universities) took it upon himself to deny a state college the right to pay the salary of a professor on sabbatical on the grounds that a sabbatical only benefits the individual and not the educational institution. In another state, a state purchasing officer upset a carefully planned experiment in animal nutrition by substituting an inferior grade of cattle feed for the one specified by the agricultural researcher in the university. Moos and Rourke cite scores of other examples in which administrative controls have had planned or inadvertent academic impact.

For a current example, also see "New Jersey Higher Education:

Accountability vs. Autonomy" which describes the current dissension between the state department of higher education and the state's universities. The department is moving toward greater scrutiny of university research. University faculty and administrators argue that this is an intrusion on academic decision-making without an understanding of the value of university research.

*** History shows that the best colleges and universities, in academic terms, have generally been among those with the greatest institutional independence--the private institutions and the freer state institutions. Autonomy does not assure quality, but academic quality is less likely without it.

(The Capitol and the Campus)

*** By the mere fact that a constitution is more difficult to amend than a statute, a university with constitutional status has considerably more stability to carry out long range plans and to experiment in educational programs. Governance by legislators who are elected every two or four years would not allow the continuity necessary to implement innovative educational policies and programs.

*** Control by the state means responsibility by the state. In countries such as France, with a single national system of higher education, an important university issue often causes a

major crisis in the national government. Our pluralistic system has helped to prevent this. Both the university and the body politic derive advantages from such an arrangement.

*** Higher education is more a function of society than a function of government. As such it is desirable to have a governing board that is directly accountable to the people instead of to the legislature or the governor.

*** As is readily apparent from previous discussion, constitutional status is not a fool proof prevention from encroachment on institutional autonomy or a guarantee of a larger or less conditioned appropriation; it is, however, an effective bargaining tool. Such leverage is, of course, not available to institutions with statutory status.

Agenda for Continued Institutional Autonomy

Although granting constitutional status is generally considered the most effective legal device in protecting university autonomy, it is not the only device and, in practice, probably is not the most important. Constitutional protection does not and should not isolate a university from social realities. The people of the state, through their constitution, granted the University of Minnesota legal autonomy, but if the University were to become arrogant, unresponsive, ineffective, or unconcerned with the needs of the state, the people could, through constitutional amendment, officially revoke the University's autonomy or tacitly allow their elected representatives to tightly control university affairs through indirect means. In sum, the power of a university to protect itself and its academic values from political and bureaucratic interference rests primarily on public trust and confidence.

The following are means, suggested by various scholars, by which institutions can assure continued public support and thereby earn continued autonomy:

*** Demonstrating the capacity for effective self-government. In the Glenny-Dalglish study, the University of Minnesota Board of Regents had a higher perceived influence in the governance of higher education than did similar boards in all other states

in the sample. As long as the board is seen as an effective and powerful governing body instead of a weak constitutional anachronism, it can neutralize legislative interference. By attending to volatile and complex public issues such as enrollment limitations, the regents are publicly seen as an effective governmental department exercising its delegated powers. Continued public discussion of difficult educational issues by the regents should have the long range effect of reinforcing the University's autonomy.

*** Making effective and efficient use of the resources provided by the public. The taxpayer's impatience with waste and frivolity in university management will be no less than in other tax support institutions.

*** Abiding by the law on campus. In past years, constitutional autonomy has been seen as a shield for lawlessness and disorder unacceptable off the campus.

*** Assuring institutional neutrality in partisan politics and in public controversies external to the university. This should not be construed as an impediment to individual academic freedom.

*** Guarding the legal integrity of constitutional status by confronting gross encroachments on institutional autonomy. The constitutional status of a university is a valuable weapon when employed judiciously. According to Glenny and Dalglish,

the University of Michigan regents have resorted to court battle so often that their constitutional status has lost much of its effectiveness in both the eyes of the courts and the public. On the other hand, universities such as Utah lost their constitutional status because the trustees' failure to defend years of previous encroachments was interpreted by the courts as implied consent. The balance between overuse and atrophy of constitutional status is difficult, yet extremely important, to determine.

*** Preserving the institution's intellectual integrity from attacks within as well as from without. Internal academic strength is a powerful defense against political manipulation.

*** Performing functions that are important to the public.

*** Giving full and honest explanations to the public in general and to legislators and elected administrators in particular about all matters of broad public concern.

As the foregoing sections have indicated, complete autonomy in the governance of higher education is neither possible nor desirable. Nonetheless, from the perspective of the university community, the growing number and intensity of controls over campus affairs currently prevent meaningful local governance. Trustees and administrators no longer have the choice of

accepting or rejecting certain external controls and influences. Their only latitude now is trying to balance conflicting demands and thus continue operation of the university under less than desirable circumstances. In essence, the choice is not if the university will be externally controlled, but rather who will control it.

And in performing this delicate balancing act, constitutional autonomy will be an important legal fulcrum. Glenny and Dalglish conclude:

If the university performs its knowledge-seeking and dissemination and critical functions at all well it is bound to suffer various degrees of adverse reactions from the public and the politicians. It is thus ultimately advantageous to society for the university to have in its armamentarium a constitutional tool or two to defend itself against those immediate incursions into its autonomy that sometimes are precipitated by temporary conditions. Much of the value of constitutional status may lie, therefore, in the role it plays in giving the university time to re-establish public confidence in its substantive value to the state.

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