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Legal Dimensions of Higher Education Governance

Neal H. Hutchens, J.D., Ph.D.
The Pennsylvania State University

Kaitlin A. Quigley, M.S., Ph.D. Candidate
The Pennsylvania State University

Introduction

This chapter examines legal issues related to the legal control and oversight of colleges and universities. That is, where does the legal power to govern an institution reside? In the context of this chapter, the term “governance” is used predominantly in relation to the legal structures and standards establishing what groups and individuals possess legal authority to direct and oversee the affairs of higher education institutions. Additionally, governance is meant to refer primarily to macro-level institutional authority and control rather than the day-to-day management and administration of colleges and universities.

A long-established facet of American higher education involves reliance on largely lay governing boards (primarily composed of individuals who are not academic professionals) to serve as the principal controlling bodies for colleges and universities, both public and private.¹ Governing boards exercise final, or at least significant, decision-making authority or approval over fundamental and important institutional decisions, such as the selection of an institution's or system's president, faculty hiring and the awarding of tenure, and the overall strategy or means a college or university should pursue in fulfilling its mission or purpose. Besides discussing the kinds of legal authority that governing boards possess over institutional functions and direction, this chapter considers how multiple legal standards help to shape, and at times constrain, the ways in which governing boards may act. To provide important

¹ JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* 26 (4th ed. 1997); ARTHUR M. COHEN & CARIE B. KISKER, *THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM* 43 (2d ed. 2010); JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 11-12 (2004).

context and background, the chapter begins with a brief historical overview of the development of governance structures and patterns in the United States.

Another significant aspect of governance from a legal perspective covered in the chapter involves how status as a public or private institution has potentially important implications for governance and the legal control of colleges and universities. As discussed, the private/public division is not always as clear as one might initially assume, with some colleges and universities having both private and public attributes. Still, designation as public or private often holds legal significance, including in relation to governance issues. Private institutions, while far from immune to governmental regulation, generally possess greater legal latitude in governance matters than their public counterparts. With public colleges and universities, a key topic addressed in the chapter involves how the degree of legally protected independence, or autonomy, an institution possesses depends on several factors. Besides consideration of the central role of the states in higher education matters, the chapter also discusses the increasing role of federal legal standards in how colleges and universities operate, which has important implications for governance.

Historical Development of American Governance Patterns and Structures

In the United States, higher education evolved along decentralized lines, with activity occurring at the colonial and then state levels rather than any kind of centralized planning or oversight.² Early colleges, while influenced by the models and ideas found in Europe, represented a response to the unique factors existing in the colonies.³ Reliance on an external governing board and a strong president to oversee the administration of the early colleges were two of the key attributes of this process of borrowing from and adapting the practices found in Europe.⁴ Especially in relation to issues of governance addressed in this chapter, another important aspect of higher education during the colonial period related to the lack of a distinction between public versus private higher education.⁵ While a conception of public higher education as it is now understood did not exist, colonial legislatures gave important, if often inconsistent, support to schools.⁶ This assistance included the granting of charters and also varying degrees of financial assistance, such as occasional donations or the granting of funds derived from taxes on items like tobacco or furs.⁷

The ambiguous status of governmental control over colleges in the colonial period resulted in tensions between institutions and legislatures.⁸ Before the American Revolution, the issue of control over colleges also involved the English monarchy. Harvard and Yale did not seek royal charters, in part, out of concern over interference with institutional operations.⁹ After the formation of the United States, just as during the colonial period, no clear distinction between public and private colleges initially existed.¹⁰

The U.S. Supreme Court's decision in 1819 in a case involving Dartmouth College, while perhaps not having the dramatic and immediate impact on the development of private higher education as sometimes suggested,¹¹ did contribute to the establishment of legal standards that differentiate between institutions as public or private.

Trustees of Dartmouth College v. Woodward and Private Higher Education

The facts surrounding the case *Trustees of Dartmouth College v. Woodward*¹² illustrate the indeterminate legal relationships that existed between schools and state governments in the early American republic. Dartmouth, established in the colonial era, had gained a royal charter that permitted a self-perpetuating board of trustees and allowed the president to name his successor.¹³ The founder of the college and its president, Eleazar Wheelock, designated his son, John Wheelock, to succeed him.¹⁴ During his presidential tenure, John Wheelock came into conflict with the trustees, who eventually acted to remove him from office.¹⁵ John Wheelock turned for assistance to the New Hampshire legislature, which amended the college's charter to create Dartmouth University and enlarged the board of trustees to provide a majority supporting him as president.¹⁶

The dispute between the original board of trustees and John Wheelock festered and for a time two institutions—Dartmouth College and Dartmouth University—operated in opposition to one another.¹⁷ As the conflict turned into a legal dispute, state courts in New Hampshire sided with the state legislature and John Wheelock. The case made its way to the U.S. Supreme Court, where famed politician and orator Daniel Webster, a Dartmouth alumnus, argued on behalf of the original trustees.¹⁸ The Court, deciding against Wheelock, held that

² COHEN & KISKER, *supra* note 1, at 19-26, 43-49.

³ *Id.* at 19-26; THELIN, *supra* note 1, at 11-12.

⁴ BRUBACHER & RUDY, *supra* note 1, at 24-25; COHEN & KISKER, *supra* note 1, at 19-26.

⁵ THELIN, *supra* note 1, at 71.

⁶ BRUBACHER & RUDY, *supra* note 1, at 35-36; COHEN & KISKER, *supra* note 1, at 49-51; THELIN, *supra* note 1, at 12-13.

⁷ BRUBACHER & RUDY, *supra* note 1, at 35-36.

⁸ *Id.* at 30-32.

⁹ *Id.* at 30-31.

¹⁰ *Id.* at 32-33.

¹¹ THELIN, *supra* note 1, at 70-73 (discussing an exaggeration of the role of the Dartmouth decision in the formation of private higher education).

¹² 17 U.S. (4 Wheat) 518 (1819).

¹³ BRUBACHER & RUDY, *supra* note 1, at 33.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 34.

Dartmouth essentially constituted a private corporation, one created on the basis of a contract between the trustees and the government because of the charter granted to the institution.¹⁹ According to the Court, the legislature's attempt to alter the charter violated the Contract Clause of the Federal Constitution.²⁰ Thus, the Supreme Court held that the state legislature could not interfere with the authority of the original trustees in their oversight of the institution.

The case is notable in the development of higher education in that the Supreme Court thwarted the legislative effort to alter the original charter and intervene in Dartmouth's internal governance struggle. But, as historian John Thelin cautions, one should not overemphasize the decision's influence in sparking the development of private colleges and universities in the United States.²¹ Other trends and legal developments would contribute in significant ways to the formation of the public/private distinction in higher education. Notably, for instance, the rights protected by the Fourteenth Amendment, such as those associated with due process protections, are applicable only in the context of state (i.e., governmental) action, a requirement that helped spur development of legal distinctions between public and private entities, including in the educational realm. Additionally, as discussed later in the chapter, the public/private divide becomes blurry at times in higher education. Accordingly, care should be taken not to overstate the case's immediate impact in the development of clearly private and public institutions. Still, the decision marked a noteworthy step in the development of legal standards contributing to legal distinctions between public and private colleges and universities.

Emergence of More Clearly Public Higher Education Institutions

According to Cohen and Kisker, between 1790 and 1869, seventeen states engaged in efforts of varying quality to establish institutions that generally align with more contemporary notions of a public higher education institution.²² However, the role of state governments in the development of public colleges and universities during the late eighteenth and early and middle decades of the nineteenth centuries was often characterized by narrow or unclear involvement and limited financial support.²³ Additionally, the authority of state governments in relation to institutions remained ambiguous, creating a situation with certain similarities to conditions existing during the colonial period and representative of continuing ambiguity over the public/private divide.²⁴

While an uneven state of affairs, progress took place in regard to the development of more clearly public colleges and universities in the opening decades of the nineteenth century. Thomas Jefferson's founding of the Uni-

versity of Virginia served as an important example of creating an institution intended to function as a state university.²⁵ The University of Michigan provided another leading model.²⁶ Southern and more western states, which lacked the higher education infrastructure of the eastern states, proved most active in the establishment of state public universities in the opening and middle decades of the nineteenth century.²⁷ While these early state institutions faced difficult financial conditions, experienced animosity from schools with a more private orientation, and often initially failed to live up to lofty goals, they helped establish the foundation for publicly supported higher education.²⁸

Other trends and initiatives helped foster the development of public colleges and universities and the drawing of clearer lines between public and private. Though the goals of providing technological and practical education largely went unrealized initially, due to insufficient funding, passage of the first Morrill Act and establishment of state land-grant institutions contributed to the continued development of public higher education.²⁹ The original, but unfulfilled, promise of the first Morrill Act received a significant boost with the second Morrill Act in the 1890s, which provided annual federal appropriations to the land-grant institutions.³⁰ During the second part of the nineteenth century, states also began to start normal schools for teacher education; a number of these would develop into colleges and universities with their own governing boards in the twentieth century.³¹ The emergence of public secondary education in the late nineteenth and, especially, in the early decades of the twentieth century provided a larger pool of students to attend the burgeoning public colleges and universities.³²

Even as clearer conceptions of decidedly public higher education took hold during the nineteenth century, the institutions designated as such generally received wide latitude in their internal affairs from state governments, a pattern that continued into the twentieth century.³³ To insulate public institutions from political wrangling, some states (with Michigan the most prominent example) placed provisions in their constitutions establishing governing bodies with independent constitutional authority.³⁴ As the university structure emerged in the late nineteenth and early twentieth centuries, governors often appointed individuals to the governing boards of these emerging state institutions, but

¹⁹ *Dartmouth College*, 17 U.S. at 643-50.

²⁰ *Id.* at 654.

²¹ THELIN, *supra* note 1, at 70-73.

²² COHEN AND KISKER, *supra* note 1, at 68.

²³ BRUBACHER & RUDY, *supra* note 1, at 145-146; COHEN AND KISKER, *supra* note 1, at 68-69.

²⁴ BRUBACHER & RUDY, *supra* note 1, at 145-146; COHEN AND KISKER, *supra* note 1, at 68-69.

²⁵ BRUBACHER & RUDY, *supra* note 1, at 147-53.

²⁶ *Id.* at 156.

²⁷ *Id.* at 145-158.

²⁸ BRUBACHER & RUDY, *supra* note 1, at 153-156; COHEN AND KISKER, *supra* note 1, at 94-97.

²⁹ BRUBACHER & RUDY, *supra* note 1, at 62-63; COHEN AND KISKER, *supra* note 1, at 115.

³⁰ BRUBACHER & RUDY, *supra* note 1, at 62-64; THELIN, *supra* note 1, at 135-36.

³¹ ROBERT O. BERDAHL, STATEWIDE COORDINATION OF HIGHER EDUCATION 27 (1971).

³² COHEN AND KISKER, *supra* note 1, at 123.

³³ William Zumbeta, *Public Policy and Accountability in Higher Education: Lessons from the Past and Present for the New Millennium*, in THE STATES AND PUBLIC HIGHER EDUCATION POLICY 155 (Donald E. Heller ed., 2001).

³⁴ Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J. L. & Educ. 177-79 (1978).

the board structure tended to provide schools with a degree of insulation from excessive governmental interference.³⁵

Following World War II, states began to expand public systems of higher education, especially in regions like New England where a strong system of public schools previously did not exist.³⁶ The increase in size and types of public institutions reflected a large upswing in higher education enrollment that began after the war, with the Servicemen's Readjustment Act (the G.I. Bill) providing a significant boost to enrollment.³⁷ In 1900, only about 4% of the college-age population attended colleges, but this had risen to approximately 40% by 1964.³⁸ The decades after World War II marked the emergence of what Martin Trow has referred to as "mass higher education."³⁹ No longer thought of as an enterprise serving only an elite slice of society, higher education increasingly was viewed as an important means to achieving individual and national economic goals. Larger enrollment and state governmental interest marked a shift from the more limited state regulation of higher education that generally existed before World War II.⁴⁰

Summary on Historical Development of Governance Structures

Divisions between public and private higher education developed over a long period in American history, which helps to explain how the private/public line continues to blur at times. This historical overview highlights that whether public or private, reliance on external governing boards has roots in practices established before the formation of the United States. Similarly, a tradition of state control over educational matters reflects well-established patterns and practices. The section also helps to highlight that tensions have always existed in American higher education regarding control of colleges and universities and the level of independence that institutions should possess to control their internal affairs. With these points in mind, the chapter now shifts to a more contemporary consideration of issues related to the states and higher education governance.

State Oversight of Colleges and Universities

The concept of institutional autonomy refers to the authority possessed by a college or university to manage its internal affairs free of external controls

or interference.⁴¹ Berdahl, Altbach, and Gumpert divide autonomy along its procedural and substantive dimensions.⁴² Substantive autonomy entails "the power of the university or college in its corporate form to determine its own goals and programs (the *what* of academe)."⁴³ Procedural autonomy refers to the "power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the *how* of academe)."⁴⁴ Especially for public colleges and universities, whether in the procedural or substantive realms, institutional autonomy operates in a flexible manner with institutions subject to varying degrees of governmental control.⁴⁵ The legal arrangements and structures developed by states to monitor and oversee higher education institutions comprise an important factor contributing to institutional autonomy, especially for public colleges and universities. But, a variety of elements, such as reliance on state funding, shape the overall institutional autonomy possessed by a college or university. Even so, the concept of autonomy proves helpful in contemplating how state governmental regulation and oversight shapes and affects matters related to higher education governance and the legal control of colleges and universities.

In the context of public colleges and universities, striving toward the dual aims of making institutions sensitive to the public interest—while also providing institutions with the requisite internal authority and flexibility to fulfill their academic, research, and service missions—has produced an ongoing tension.⁴⁶ As noted, public colleges and universities generally enjoyed substantial latitude in the management of their internal affairs through World War II, but the decades that followed resulted in a consistent ratcheting up of oversight by state governments.⁴⁷ Along with increased enrollments and a growing view of higher education as essential to economic growth, another noteworthy impetus to increased state oversight resulted from the Federal Higher Education Act of 1965 and the requirement that each state have a coordinating agency for higher education.⁴⁸ Statewide coordinating or governing boards became the primary mechanism for increased regulation of public colleges and universities.⁴⁹ These boards were also envisioned as a means to help buffer the relationship between public institutions and state government by protecting schools from undue state control.⁵⁰ This section outlines the multiple approaches taken by states in the

⁴¹ Robert O. Berdahl, Philip G. Altbach, & Patricia J. Gumpert, *Introduction*, in *IN DEFENSE OF AMERICAN HIGHER EDUCATION* 5-6 (Philip G. Altbach, Patricia J. Gumpert, & D. Bruce Johnstone eds., 2001).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Michael K. McLendon, *Setting the Governmental Agenda for State Decentralization of Higher Education*, 74 J. HIGH. EDUC. 479, 479 (2003).

⁴⁷ *Id.*

⁴⁸ COHEN AND KISKER, *supra* note 1, at 254.

⁴⁹ BERDAHL, *supra* note 31, at 33.

⁵⁰ See generally BERDAHL, *supra* note 31.

³⁵ COHEN AND KISKER, *supra* note 1, at 161-62.

³⁶ *Id.* at 199.

³⁷ BRUBACHER & RUDY, *supra* note 1, at 257-58.

³⁸ *Id.* at 257.

³⁹ Martin Trow, *From Mass Higher Education to Universal Access: The American Advantage*, in *IN DEFENSE OF AMERICAN HIGHER EDUCATION* 123 (Philip G. Altbach, Patricia J. Gumpert, & D. Bruce Johnstone, eds., 2001).

⁴⁰ ZUMETA, *supra* note 33, at 155-56.

regulation and oversight of higher education, particularly in relation to what agencies or boards possess governance responsibility for institutions. While much of this section deals with control over public colleges and universities, various state boards and agencies also exercise important oversight functions over private higher education, notably granting or denying permission to operate in a state. Discussion now turns to the different kinds of state-level higher education boards and agencies and their roles and legal authority over colleges and universities.

Types of State-Level Boards

State-level boards can be broken into three broad categories: governing boards, coordinating boards, or "planning, regulatory and/or service agencies."⁵¹ Rather than rigid categories, they should instead be understood as providing a general means to distinguish the different kinds of statewide boards and agencies. States have adopted and blended multiple approaches to governance structures for higher education, resulting in considerable variation. As McLendon and Ness point out, "[I]n two states share precisely the same governance design."⁵² Thus, the unique higher education governance arrangements existing in each state play a role in shaping the resulting legal implications.

Governing Board

A state-level governing board exercises authority over all, or a portion, of the public colleges and universities in a state. North Carolina provides an example of this kind of arrangement, relying on two statewide boards, one for four-year universities and another for community colleges. The Board of Governors for the University of North Carolina possesses management authority over seventeen four-year public institutions in the state. Members to the board are appointed by the state's General Assembly.⁵³ Each campus also has a board of trustees with extensive control over academic matters and institutional functioning, but with such authority delegated by the statewide board of governors. The State Board of Community Colleges is the governing body for the North Carolina Community College System and has responsibility for fifty-eight community colleges.⁵⁴ The North Carolina example demonstrates how statewide governing authority over public higher education may be split among one or more state-level boards. Variations exist on this approach. For instance, a state might choose to exercise statewide governance authority over

certain types of institutions, such as community colleges, or institutions under the authority of individual governing boards.

Coordinating Board

A coordinating board represents an agency that possesses some regulatory authority over public, and perhaps private, institutions in a state, but is not a governing body. For instance, a coordinating board might have duties related to tuition, or budgeting, or approval of new academic programs. The authority over institutions may not be insignificant, but a coordinating board does not possess final governing or administrative authority in the same manner as a state-level or institutional governing board.

Kentucky represents a state with a coordinating agency, but where primary governance control for public higher education is dispersed among institutional-level boards for universities and a consolidated board for two-year institutions. The state's Council on Postsecondary Education has authority related to tuition-setting and program approval, but it does not act as the legal governing authority for public institutions in the state.⁵⁵ Individual boards govern the eight public universities, and the sixteen colleges of the state's community and technical college system fall under the control of a single statewide governing board.⁵⁶ The council also serves as the licensing agency for many private postsecondary institutions in the state, including for-profit schools that grant baccalaureate degrees.⁵⁷ Thus, the council is meant to function as an intermediary agency for all public colleges and universities in the state, as well as private institutions, but it does not function as a governance authority over specific schools. Kentucky also provides a good example of how a state may mix and match approaches to governance and oversight of higher education.

Planning Agency

Finally, in some states, a state-level entity may possess a planning or policy role with no coordinating or governance authority over public or private higher education institutions. In these states, strong institutional or system governing boards have dominant legal authority over governance matters for public colleges and universities. Minnesota represents a state with this type of arrangement. The Minnesota Office of Higher Education is charged with helping to provide statewide data and information regarding higher education and to help facilitate collaboration among educational entities in the state, but it does not possess regulatory authority.⁵⁸ A constitutionally empowered board of regents governs the University of Minnesota's campuses.⁵⁹ Seven state universities and twenty-four two-year colleges fall under the authority of the Board of Trustees for the Minnesota State Colleges and University Sys-

⁵¹ Aims C. McGuinness, *Models of Postsecondary Education Coordination and Governance in the States* 1 (2003), <http://www.ecs.org/clearinghouse/34/23/3423.pdf>; See also Michael K. McLendon & Erick C. Ness, *The Politics of State Higher Education Governance Reform*, 78 PEABODY J. EDUC. 67 (2003).

⁵² McLendon & Ness, *supra* note 51, at 67.

⁵³ N.C. GEN. STAT. ANN. §§ 116-4, 116-6, 116-11.

⁵⁴ *Id.* at § 115D-2-1.

⁵⁵ K.Y. STAT. ANN. §§ 164.011, 164.020.

⁵⁶ *Id.* at §§ 164.310, 164.5807.

⁵⁷ *Id.* at §§ 164.945-47.

⁵⁸ MINN. STAT. ANN. §§ 136A.01, 136A.05.

⁵⁹ MINN. CONST. art. XIII, § 3.

1. ⁶⁰ Minnesota provides yet another example of how states follow unique approaches to issues of governance, coordination, and planning. A state-level governing agency exists alongside an institutional governing board for the state's flagship university and a consolidated board that has authority over both four- and two-year institutions.

Sources of Governance Authority

Public Colleges and Universities

Just as states have responded to governance structures in assorted ways, multiple sources of legal authority establish what entities or agencies possess control over colleges and universities. A select number of states include divisions in their constitutions that preserve the autonomy of institutions systems in the state from undue interference by other divisions of state government. ⁶¹ This type of constitutionally protected governance authority is often referred to as constitutional autonomy. California, Michigan, and Minnesota are typically identified as the states with the strongest grants of such institutionally protected independence, with approximately seven other states giving some degree of constitutional autonomy for one or more institutions. ⁶² One reason for referring to an approximate number is that while language may suggest that constitutional autonomy should exist for an institution, such determination ultimately rests on judicial recognition of that independence. Thus, some states have constitutional provisions suggestive of constitutional autonomy, but courts have not issued decisions interpreting the constitutional language at issue. ⁶³

For California, Michigan, and Minnesota, courts have consistently determined that constitutional autonomy provides governing boards with legally protected authority. ⁶⁴ In California, for example, a court stated in a 2000 decision that the Regents of the University of California were intended to "operate independent of the state as possible." ⁶⁵ In a Michigan case especially relevant to this chapter's discussion, the state's supreme court, in a 1975 decision, considered the constitutionality of several conditions placed on legislative appropriations to universities in the state and a requirement that institutions had submit new academic programs for approval to the state board of education. ⁶⁶ The court held that while the legislature could impose certain conditions on appropriations, it could "not interfere with the management and control of

those institutions."⁶⁷ In relation to review of new academic programs, the court discussed that it was acceptable for the legislature to require universities to submit new academic programs to the state board of education, but the board possessed no authority to prohibit any new program. ⁶⁸ That authority remained with constitutionally empowered institutional governing boards in the state.

Even those institutions protected by judicially recognized constitutional autonomy have been subject to considerable pressure from state legislatures in recent years. In 2014, responding to concerns over rising tuition and the generous salaries of senior administrators, bipartisan lawmakers in California proposed a constitutional amendment that would put the University of California system under the control of the legislature. ⁶⁹ Minnesota's legislature has not attempted to challenge the University of Minnesota's autonomy directly, but it has sought to exert influence over the institution's decisions. In 2011, it attached conditions to some of the school's state funding; in order to receive the money, the university had to meet certain academic standards. ⁷⁰

In contrast to states with judicial recognition of constitutional autonomy, Utah provides an example of a state in which constitutional language would seem to grant some degree of constitutional autonomy to the University of Utah, but where state courts have rejected such a position. A 2006 decision from the state's supreme court squarely rejected any constitutional independence for the institution. ⁷¹ In *University of Utah v. Shurtleff*, the University of Utah sued the state's attorney general over a law that prohibited state and local entities from enacting or enforcing policies that interfered with the possession or use of firearms on public or private property. The university, which sought to prohibit guns from campus, argued that its firearms policy did not contravene the state law or, alternatively, that the university possessed the constitutional authority to enact and enforce a gun-ban policy. ⁷² During litigation over the law's applicability to the institution, the legislature amended the statute to explicitly include state universities. In upholding the law in relation to the University of Utah, the Utah Supreme Court held that the university was completely subject to full legislative oversight, even in matters related to the institution's "core academic functions." ⁷³

More common than a constitutional provision, public colleges and universities are often authorized by either a state-granted charter or statutory language, or a combination of these two approaches. Depending on the language in a charter and its treatment by courts, the governing board of a public college or

MINN. STAT. ANN. §§ 136F.06, 136F.11.

Beckham, *supra* note 34, at 177-79; Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271-72 (2009).

Beckham, *supra* note 34, at 181; Hutchens, *supra* note 61, at 282.

Beckham, *supra* note 34, at 179.

Id. at 34, at 181; Hutchens, *supra* note 61, at 282.

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

Regents of the Univ. of Mich. v. State, 235 N.W.2d 1 (Mich. 1975).

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 10-11.

⁶⁹ Nanette Asimov, *UC's Rising Tuition Sparks Bill to End College's Autonomy*, S.F. CHRONICLE, Dec. 5, 2014, <http://www.sfgate.com/education/article/State-senators-propose-wresting-control-of-UC-5936041.php>

⁷⁰ James Nord, *The Unouchable U*, MINN. DAULTY, Sep. 19, 2011, <http://www.mndaily.com/2011/09/19/unouchable-u>

⁷¹ *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1111 (Utah 2006).

⁷² *Id.* at 1113.

⁷³ *Id.* at 1118.

university may possess a level of legally protected independence. For example, a board may have some protected legal authority to select a certain portion of the board's membership and have other legally independent governing authority. Representative of this approach is the governing board for The Pennsylvania State University, which was granted a charter by the state in 1855, and along with three other institutions is designated as a state-related university.⁷⁴ This governance arrangement is a reminder that the public/private dichotomy in higher education is not always tidy. Still, a charter does not necessarily mean that a legislature does not ultimately hold legal authority over an institution, especially one considered primarily public in nature. In general, courts have recognized substantial authority for legislatures to regulate public corporate bodies.⁷⁵ But, a charter may provide a certain degree of legally protected autonomy for a public institution if a court views a governmental regulation as overly intrusive of a governing board's authority.

In general, the governing authority for most public higher education boards ultimately rests upon legislative power.⁷⁶ Language in a charter or constitution may provide for the creation of an institution's governing board, but leave the defining of the powers and duties of the board subject to legislative control.⁷⁷ As a legal matter, then, the powers and duties of public governing boards typically rest on a legislative grant of authority. However, public colleges and universities traditionally have been afforded substantial autonomy over their internal operations by state governments, though states have shown increasing interest in oversight in recent years. Due to factors that include rising costs for students, concern over college completion rates, and interest in colleges and universities as economic drivers, state lawmakers have seemed more willing to scrutinize and question institutional practices and priorities.

Beyond legislative or court mandates that directly implicate governance matters, other legal standards impact how institutions operate and coordinate their internal affairs. Notably, state open meetings and records laws mean that governing boards must conduct their affairs with a certain level of transparency.⁷⁸ Similarly, numerous state legal standards in such areas as civil rights protections, purchasing, regulation of collective bargaining for public employees, and health and safety influence how public colleges and universities must

function, even those with substantial legally protected autonomy.⁷⁹ Beyond the issue of express legal authority of states over higher education institutions, the desire to receive funding operates as an important enticement for governing boards not to alienate elected officials, and represents a significant way for states to influence higher education policy and practice.⁸⁰

Accordingly, while legal considerations are important in assessing governance-related matters, multiple variables influence the amount of control that institutions exercise over their internal affairs. Legislatures have traditionally shown considerable deference to public colleges and universities in relation to governance, though this state of affairs is potentially in a state of flux. Likewise, public institutions do not solely look to legal standards in determining how to respond to concerns voiced by public officials. The exercise of legal control is tempered by interest in receiving continued governmental and public support. In summary, legal standards directly related to governance, while important, exist alongside numerous other factors shaping and influencing the autonomy possessed by public higher education governing entities.

Private Colleges and Universities

Just as with many of their public counterparts, private colleges and universities often operate on the basis of a charter granted by the state or through a statutory process that establishes them as nonprofit, private corporations. As to the growing for-profit sector, these businesses may be treated in a legally distinct manner in certain respects from private, nonprofit higher education institutions for purposes of state regulation. One notable difference would be that private, nonprofit higher education institutions often enjoy certain kinds of tax exemptions. At a minimum, both nonprofit and for-profit private schools must gain permission to operate in a state.

While private institutions may be subject to considerable state regulation, they generally operate with a degree of legal control over their internal affairs greater than that of many of their public counterparts. Private institutions, for instance, often have a self-perpetuating governing board, which is frequently not the case for public college and university boards. Private institutions also typically possess greater legal control over matters related to their internal academic and management operations. A private school would not be subjected to the same kinds of purchasing and open records rules, for instance, which often apply to public colleges and universities. Another important distinction, addressed in more depth in Chapter 3, concerns the fact that a private college or university would not be treated as a state (governmental) actor under the Federal Constitution's Fourteenth Amendment, which limits the application of constitutional and statutory standards to the operations of private institutions.

⁷⁴ See generally *Corporate Charter of The Pennsylvania State University*, <http://www.psu.edu/trusts/pdf/charter.pdf>.

⁷⁵ See, e.g., Henry N. Butler, *The Contract Clause and the Corporation*, 55 Brook. L. Rev. 780-81 (1989); Liam Seamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 Geo. Wash. L. Rev. 242-43 (2006).

⁷⁶ Lyman A. Glenn & Frank A. Schmittlein, *The Role of the State in the Governance of Higher Education*, 5 Educ. Evaluation and Pol'y Analysis 134 (1983).

⁷⁷ Beckham, *supra* note 34, at 179.

⁷⁸ Michael K. McLeod & James C. Heam, *State Law, Policy, and Access to Information: The Case of Mandated Openness in Higher Education*, 112 TCHRS. C. REC. 7-8 (2010), available at <http://www.tcrecord.org>.

⁷⁹ See generally WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* (5th ed. 2013).

⁸⁰ GLENNY & SCHMITTEIN, *supra* note 76, at 134.

As a general matter, then, private institutions operate with more legal independence or autonomy in governance matters than their public counterparts.

In considering the private/public distinction, one should keep in mind that the division may blur at times. The legal relationship existing for several institutions in Pennsylvania illustrates how the private/public distinction is not always precise. Four institutions (The Pennsylvania State University, Temple University, the University of Pittsburgh, and Lincoln University) are designated as state-related institutions based on either the charters granted to the schools or through legislative enactment, indicating how these institutions contain both public and private features.⁸¹ In contrast, fourteen four-year schools in the state comprise the Pennsylvania State System of Higher Education, and these are considered public (state-owned) institutions under state law.⁸² While factors such as economic or political forces may affect how institutions are actually treated by the state, the arrangement in Pennsylvania demonstrates that institutions may have both private and public aspects in terms of governance matters and in their legal relationship to state government.

Cornell University provides another example of an institution with both public and private components. The institution is primarily private, but has four statutory colleges under its control that are supported in part with public funds.⁸³ For the public funds spent on these programs, the university is subject to certain oversight by the trustees of the State University of New York and other divisions of state government.⁸⁴ State courts have considered cases involving the applicability of state open records laws to operation of Cornell's statutory colleges. In one of the cases, *Stoll v. New York State College of Veterinary Medicine at Cornell University*, the court addressed a request for records by a professor who had sought copies of complaints against him after he had been disciplined for sexual harassment.⁸⁵ The court held that disciplinary matters at the four statutory colleges fell under the control of Cornell and were not subject to the state's open records law.⁸⁶ In contrast, in another case involving an open records request, the opinion stated that certain records related to funding issues were subject to disclosure.⁸⁷

Even for institutions clearly private in nature, states may impose legal standards with governance implications. States, for example, often require schools or particular institutional academic programs (e.g., a private university's law school) to receive accreditation from a state-approved agency as a condition of receiving state funds, or for graduates to be eligible for licensure required

to practice particular professions.⁸⁸ As a threshold matter, a state must grant a private institution the permission to operate, often in the form of a certain type of licensure. State agencies may also exercise authority over program approval and the degrees that private institutions offer. Laws generally affecting private entities, such as health and safety laws or hiring practices, often apply as well to private colleges and universities. While generally possessing legal control over governance and management issues greater than public institutions, a private college or university and its governing board still must comply with numerous state legal standards.

Responsibilities and Fiduciary Duties of Governing Board Members

Alongside their legal authority over colleges and universities, members of a governing board, often designated as trustees or regents, also possess important legal obligations.⁸⁹ Members are said to exist in a fiduciary relationship with the institution or system they serve. This term refers to how board members are supposed to act in the best interests of the institution or system and should not seek to use status as a board member for personal gain. As noted, the typical responsibilities of board members include such activities as selecting institutional presidents, helping to shape major goals and initiatives related to mission fulfillment, approving tenure decisions, and providing oversight of finances and budgeting. Governing boards, however, do not generally engage in the control or management of the day-to-day operations of an institution or system. Boards delegate this authority to institutional or system leaders, namely the president or chancellor, depending on the term used.

A well-publicized scandal involving the University of Illinois reveals the damage that can happen to an institution when governing board members act for personal gain or seek an inappropriate advantage for others. Trustees of the university used their positions to gain admission to the institutions for relatives and for other individuals outside of the regular admissions process.⁹⁰ When this "shadow" admissions system became public, it was reported that all of the trustees—except the newest member, who had only been serving a month—had sought to circumvent the normal admissions standards.⁹¹ An investigative committee convened by the governor eventually called for the resignation of all board members.⁹² The state and national fallout from the episode highlights the potentially negative consequences that may occur when governing board members fail to uphold their fiduciary responsibilities.

⁸¹ Commonwealth of Pennsylvania State Board of Education, *Master Plan for Higher Education* 7 (2005), http://www.portal.state.pa.us/portal/server.pl/community/master_plan_for_higher_education/8855/master_plan_for_higher_education/529145.

⁸² *Id.*

⁸³ *Alderson v. N. Y. State Coll. of Agric. and Life Sci. at Cornell Univ.*, 825 N.E.2d 585, 586 (N.Y. 2005).

⁸⁴ *Id.*

⁸⁵ *Stoll v. N. Y. State Coll. of Veterinary Med. at Cornell Univ.*, 723 N.E.2d at 65, 66 (N.Y. 1999).

⁸⁶ *Id.* at 68-69.

⁸⁷ *Alderson*, 825 N.E.2d at 589-90.

⁸⁸ Judith S. Eaton, *An Overview of U.S. Accreditation* 2-3 (2009), http://www.chea.org/pdf/2009_06_Overview_of_US_Accreditation.pdf.

⁸⁹ See generally, Judith Aron, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691 (2010).

⁹⁰ *Id.* at 709-10.

⁹¹ *Id.*

⁹² *Id.*

While the fiduciary duties of board members entail an important oversight role, governing boards delegate considerable authority over the carrying out of institutional functions. Besides institutional or system administrators such as the president or chancellor, the faculty often plays an important role in governance matters. A specific faculty position may be reserved for membership on governing board. Often most significantly, the faculty at many institutions is designated as having primary responsibility over curricular matters and other academic decisions, with the term *shared governance* used to describe this substantial role for faculty participation in governance issues.⁹³ Additionally, governing boards may permit varying degrees of participation by staff and students in governance matters. A student position, for example, is commonly designated as part of a board's membership, though student members may not possess voting privileges. Student government associations may also exercise certain kinds of authority and advisory responsibilities, such as distribution of mandatory student fees to various groups on campus. Staff senates also often serve in an advisory capacity to institutional leadership, and governing boards may also include a staff representative. Thus, responsibility for governance may be delegated to and diffused among various constituencies and stakeholders on campus. However, a governing board serves as the dominant point of legal control, and, in general, bears final legal discretion over institutional or system policies and practices.

Federal Legal Standards and Governance Considerations

Much of this chapter has focused on the dominant role that the states play in relation to higher education, reflective of historic patterns of state control over educational matters. Commentators also often point to the Tenth Amendment to the Federal Constitution as assigning the states control over education, as it reserves all powers not explicitly delegated to the federal government by the Constitution for the states or the people. Against this backdrop of historic state dominance over higher education, however, the federal government's "influence on American colleges and universities has been enduring and pervasive."⁹⁴ Both public and private institutions must adhere to numerous federal laws in areas that include financial aid, hiring and employment practices, nondiscrimination standards, student privacy, and guidelines related to research.⁹⁵ Federal legal standards have come to exert substantial influence, directly and indirectly, over higher education. Taking into account this increasing federal

role in higher education matters helps provide a fuller understanding of how legal standards may impact matters related to governance.

Governing boards at both public and private institutions must comply with multiple federal statutory and constitutional mandates. A noteworthy example of historic importance involves the desegregation of public education. In fact, much of the precedent leading to the *Brown v. Board of Education*⁹⁶ decision was built on cases involving public higher education institutions.⁹⁷ Constitutional standards create boundaries on governance authorities in other areas, especially for public institutions. As developed more in Chapter 15, a public college or university, for instance, must adhere to due process requirements in the disciplining of students and must follow First Amendment standards related to speech and religious rights in dealing with students and employees.

At the same time, the Supreme Court has interpreted constitutional requirements to recognize the importance of showing substantial deference to colleges and universities, especially in relation to matters involving academic decisions. Illustrative of this deference, in *Regents of University of Michigan v. Ewing*,⁹⁸ the Supreme Court considered a case involving the dismissal of a student, Ewing, from an academic program that would have resulted in his receiving an undergraduate and a medical degree.⁹⁹ Challenging the dismissal in federal court, the student, among his claims, argued that he possessed a property right related to continued enrollment in the program that was protected by the Due Process Clause of the Fourteenth Amendment.¹⁰⁰

The trial court dismissed the case, but the Court of Appeals reversed, holding that the university had acted arbitrarily in the student's dismissal.¹⁰¹ In reviewing the case, the U.S. Supreme Court accepted the assumption that the student could challenge an academic decision under the Due Process Clause of the Fourteenth Amendment.¹⁰² However, according to the opinion, "[c]onsiderations of profound importance counsel restrained review of the substance of academic decisions."¹⁰³ The Court also discussed a reluctance to interfere with state and local control over educational matters and noted the "responsibility" to "safeguard" the academic freedom of institutions. Looking to a previous decision, *University of Missouri v. Horowitz*,¹⁰⁴ which also dealt with the dismissal of a student from a medical degree program, the Court held in favor of the university and reaffirmed the proposition that federal courts should not seek to interfere with good-faith academic decisions by colleges and universities.

⁹⁶ 347 U.S. 483 (1954).

⁹⁷ See Leland Ware, *The Story of Brown v. Board of Education: The Long Road to Racial Equality, in EDUCATION LAW STORIES 21-36* (Michael A. Olivas & Roma Greff Schneider, eds., 2008).

⁹⁸ 474 U.S. 214 (1985).

⁹⁹ *Id.* at 216.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 220-21.

¹⁰² *Id.* at 223.

¹⁰³ *Id.* at 226.

¹⁰⁴ 435 U.S. 78 (1978).

⁹³ *Id.* at 698-704.

⁹⁴ Lawrence E. Gladieux, Jacqueline E. King, & Melanie E. Corrigan, *The Federal Government and Higher Education, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 163* (Philip G. Altbach, Robert O. Berdahl, & Patricia J. Gumpert, eds., 2d ed. 2005).

⁹⁵ *Id.*

Besides constitutional standards, colleges and universities must comply with numerous statutory requirements enacted pursuant to valid exercises of congressional power, such as the authority to regulate matters that affect interstate commerce and the national economy. Thus, colleges and universities, both public and private, must follow laws in such areas as nondiscrimination practices in hiring. While such federal laws do not directly usurp governance authority over higher education from the states, or from institutions or systems, governing boards bear a responsibility to ensure that institutional policies and practices conform to applicable legal requirements imposed by the federal government.

Significantly, rather than directly exercising its authority by expressly requiring colleges and universities, both public and private, to abide by certain conditions, the federal government predominately leverages institutional compliance by placing conditions on the receipt of federal funds. Accordingly, pending conditions have served as a means to entice states and institutions to follow federal directives pertaining to higher education. To provide one of the most notable examples, institutions obey various federal standards so that students are able to participate in federal financial aid programs.¹⁰⁵ One of the most important functions of accreditation involves eligibility for an institution's students to receive federal loans and grants to pay for their education. As another example, the Family Educational Rights and Privacy Act (FERPA)¹⁰⁶ addresses conditions on how colleges and universities use and protect student data, with receipt of federal funds used to ensure compliance. The allure of federal money has meant that colleges and universities, both public and private, have agreed to follow numerous federal standards.

The states continue to exert primary control over higher education institutions, but the federal role has become increasingly significant. Some legal requirements are imposed directly on colleges and universities while others are "voluntary" conditions accepted so that institutions or their students may be eligible to receive federal aid. Whether resulting from required or voluntary legal standards, governing boards oversee institutions and systems that must conform to multiple and increasing federal legal requirements.

Conclusion

Consideration of legal aspects of higher education governance defines multiple characterizations. Contemporary legal issues related to governance reflect deeply established patterns and practices, with the continuing role of governing boards a principal example. While important similarities exist, the lack of centralized control over educational matters has resulted in notable variations in how states regulate higher education. With public institutions, some states operate with strong, centralized statewide governing boards, while others provide legally protected autonomy to select universities. Given the

diversity of governance arrangements found in American higher education, even seemingly straightforward terms such as public and private may blur at times, depending on institutional and state context. Alongside state standards, the national government exercises an increasingly important role in higher education. Higher education governance, from a legal perspective, requires recognition of the important variations that exist among states in regulating higher education, the continuing importance of governance patterns and practices with historical roots that precede the nation's formation, and the growing federal role in higher education matters.

¹⁰⁵ Eaton, *supra* note 88, at 3; GLADIEUX, KING, & CORRIGAN, *supra* note 94, at 164.
¹⁰⁶ 20 U.S.C. § 1232g (2006).