

Spring 1989

Constitutional Power of the Board of Curators of the University of Missouri, The

Ronald F. Bunn

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THE CONSTITUTIONAL POWER OF THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI

Ronald F. Bunn*

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I. INTRODUCTION

Although public accountability has never been far removed from the environment in which colleges and universities function, added in the 1970's to that environment, especially by state legislatures, was the insistence that public colleges and universities abandon the notion, encouraged by the

* Professor of Political Science, University of Missouri-Columbia; Provost, University of Missouri-Columbia, 1980-86; B.A. 1951, Rhodes College; M.A. 1953, Ph.D. 1956, Duke University. Professor Bunn will graduate from the University of Missouri-Columbia School of Law in December 1989.

expansionist mood of the 1950's and 1960's, that they were routinely entitled to substantial increases in state appropriations. Financial considerations were not the sole inspirations of efforts in the 1970's to subject higher education to stricter accountability; to argue otherwise is to ignore concerns expressed in various circles about the perceived reluctance of higher education to accommodate the educational needs of the high-technology and service-based economy of post-industrial society, the apparent lack of planning among many colleges and universities for the demographic changes either already occurring or predictably to occur over the 1980's and 1990's, and, more pervasively, the possibility that public education at all levels in the United States was failing to make its appropriate contribution to enhancing both the quality of life at home and the competitiveness of the United States abroad.

That many, if not all, colleges and universities in the United States attempted to respond to these concerns is still only vaguely recognized outside the academic community. Evidence of the responses, or attempted responses, however, is readily available.¹ Strategic planning headed the agenda, programmatically consequential on certain campuses and more controversial than consequential on other campuses. A new lexicon, including "retrenchment," "reallocation," "early retirement," "self-funding," "prioritization," and "selective improvement," developed to describe the variety of strategies which administrators employed in response to the separate, and not always congenial, goals of qualitative improvement and costs reductions. State legislatures adopted a variety of approaches to encourage, if not to compel, public colleges and universities both to change and to economize. The use of state higher education coordinating agencies, with regulatory as well as advisory powers, became widely accepted.²

Whatever the long-term consequences of the efforts initiated in the 1970's by state legislatures to secure economy and programmatic change in public higher education, the intensified state regulation that accompanied these efforts exposed both the realities and tensions that have long characterized higher education in the United States. If the ivory tower image of the American college and university was ever anything other than a caricature, suggesting as it did a complete indifference by both the faculty and the curriculum to the problems of the workaday world and a strict

1. See, e.g., J. HYATT, C. SHULMAN, & A. SANTIAGO, *REALLOCATION: STRATEGIES FOR EFFECTIVE RESOURCE MANAGEMENT* (1984); G. KELLER, *ACADEMIC STRATEGY: THE MANAGEMENT REVOLUTION IN AMERICAN HIGHER EDUCATION* (1983); J. MINGLE, *CHALLENGES OF RETRENCHMENT* (1981).

2. By 1980, thirty-five states had a single state agency for coordinating higher education. EDUCATION COMMISSION OF THE STATES REPORT, No. 134, *CHALLENGE: COORDINATION AND GOVERNANCE IN THE 80's*, at 9 (1980). For the perspective of a state legislator on the need for state coordination of higher education, see Faxon, *The Need for Constitutional Reform of Michigan's Higher Education System*, 1983 DET. C.L. REV. 1209.

immunity from the influences and interests of public policy makers and "practical" people, by the last quarter of the 19th century it hardly described the partnership that had emerged between higher education and the society of which it was very much a part. The partnership was especially evidenced by the way in which colleges and universities were beginning to secure a substantial part of their funding and by the diversified purposes they were increasingly attempting to serve through specialized disciplines and professional programs.³ The federal Land Grant (Morrill) Act⁴ of 1862 did not simply advance this partnership; the act symbolized the already developing understanding in the United States that higher education, whether "public" or "private," was as much worldly as it was unworldly in its responsibilities.

That this partnership between higher education and the larger society entailed costs, as well as benefits, was probably as predictable as it was inevitable. In the case of private colleges and universities, major gifts and donations not only implied the privilege of membership on and access to the governing boards but also presented opportunities to shape the configuration, if not the content, of the institution's teaching and research missions. In the case of the public colleges and universities, the public generally, and legislators specifically, could similarly expect, in exchange for periodic appropriations from public funds, a role in influencing governing boards and affecting the choices of programs to be offered and facilities to be established.

To this collaboration between higher education and the larger society American colleges and universities typically brought a set of balancing principles, as fundamental in their importance as they were imprecise in their application. Heading the list were academic freedom and political neutrality, the first suggesting considerable, if not absolute, control by individual faculty members of the content of their courses and the focus of their research, and the second, the inappropriateness, and ultimately the dysfunctionality, of the institution's deliberately attempting to foist upon either its students, its faculty, or anyone else the values of a particular partisan cause or political doctrine.⁵ The surest guarantee that these principles would be honored in the partnership between higher education and the American public would be, of course, in their acceptance by those who directly participated in the partnership. But institutional arrangements can sometimes facilitate principled behavior, and one of the arrangements that attracted attention, in the 19th century, as legal structures were developed to secure a continuing relationship between the state and higher education was that of granting constitutional status to public universities.

3. B. BERELSON, *GRADUATE EDUCATION IN THE UNITED STATES* 9-16 (1960).

4. 7 U.S.C. §§ 301-05, 307, 308 (1982).

5. *See, e.g.,* D. BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 3-7 (1982).

Its purpose was to provide the university, and especially the governing board, a measure of independent power to counter that which the legislature would have over the university as a result of the anticipated dependency of the public university on periodic appropriations of state funds.

Constitutional status for a public university in the United States has always had two meanings; although they are compatible, they are distinguishable. It is possible for a public university to have constitutional status simply due to a state constitutional provision mandating the university's establishment or perpetuation. Judged by the language of the state constitutions currently in effect in the United States, at least twenty-one states appear to accord one or more of their public universities this type of constitutional status.⁶ In starkest terms, this type of constitutional status means that the legal termination of the university is beyond the reach of statutory law; a constitutional amendment would be necessary to "disestablish" the university.

The second meaning of constitutional status describes a sub-set of the constitutionally established universities. In this sense of constitutional status, university governing boards and state higher education governing boards receive direct grants of power, in some cases without any language of qualification and in other cases with elaborations that could arguably be interpreted either as qualifications or as illustrations of the powers granted. The number of states that currently provide constitutional status to one or more of the public universities, in the second sense of the term, is the subject of some disagreement.⁷ Variations among the states in the development of the case law, usage, and judicial construction of the relevant constitutional provisions make tentative, at best, any precise calculation. As many as sixteen states might qualify as having university or higher education governing boards which have effectively received grants of power directly from state constitutional provisions.⁸

6. ALA. CONST. art. XIV, §§ 264-67; ALASKA CONST. art. VII, §§ 2-3; CAL. CONST. art. IX, § 9; COLO. CONST. art. VIII, § 5; CONN. CONST. art. VIII, § 2; HAW. CONST. art. X, §§ 5-6; IDAHO CONST. art. IX, § 10; LA. CONST. art. VIII, § 7; MASS. CONST. art. V; MICH. CONST. art. VIII, § 5; MINN. CONST. art. XIII, § 9(b); MISS. CONST. art. VIII, § 213-A; MO. CONST. art. IX, § 9(b); NEB. CONST. art. VII, § 10; NEV. CONST. art. XI, § 4; N.M. CONST. art. XII, § 11; OKLA. CONST. art. XIII, § 8; S.D. CONST. art. XIV, § 3; TEX. CONST. art. VII, § 10; UTAH CONST. art. X, § 4; WYO. CONST. art. 7, § 15.

7. L. GLENNY & T. DALGISH, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE 3-7 (1973); cf. Beckham, *Constitutionally Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution*, 30 U. FLA. L. REV. 543, 545-46 (1978); Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. REV. 23, 24-25 (1977).

8. Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, and South Dakota. For decisions affirming constitutionally derived power

That the University of Missouri is a constitutionally established university is beyond argument; on this point, both the language of the state constitution and judicial confirmation of the meaning of the language permit no doubt.⁹ It has not always been equally clear to certain commentators, however, that the University of Missouri governing board, the Board of Curators, derives power directly from the state constitution. In spite of constitutional language, first appearing in the 1875 Missouri Constitution and continued in 1945 in the present Missouri Constitution, that vests "the government of the university" in the Board of Curators, some commentators conclude that judicial construction has effectively foreclosed the use of this language as an independent source of power.¹⁰ This Article argues, to the contrary, that Missouri case law supports the conclusion that the constitutional grant of power to the Board of Curators authorizes it to act in the absence of enabling legislation. The more troublesome issue which this Article also examines is whether the constitutional grant of power serves additionally as a bar to statutory regulation of the University of Missouri.

II. LEGAL FOUNDATIONS OF THE UNIVERSITY OF MISSOURI

A. *Pre-constitutional Status, 1839-1875*

Under the March 6, 1820 Act¹¹ of Congress enabling Missouri to seek statehood, the state agreed to establish and sustain a "seminary of learning." Some 40,000 acres of land were deeded to the state for the purpose of

of such governing boards in Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, Oklahoma, and South Dakota, see *infra* note 104. In the case of Missouri, see *infra* notes 39-46, 57-77, 91-102 and accompanying text. For Louisiana, see Board of Regents v. Board of Trustees, 491 So. 2d 399 (La. Ct. App. 1986). In the case of North Dakota, there is as yet no appellate court decision affirming constitutionally derived power for the state's Board of Higher Education, although the wording of art. XIV, § 3 of the North Dakota Constitution, placing "control" of the state university and other state supported educational institutions under the Board, lends itself to an interpretation that power is thereby constitutionally granted to the Board. See, e.g., Crockett, *Constitutional Autonomy and the North Dakota State Board of Higher Education*, 54 N.D.L. Rev. 529 (1978). Utah is an example of a state in which the state university and the agricultural college are constitutionally established without their governing boards thereby deriving a constitutional grant of power. See *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 295 P.2d 348 (1956).

9. See *infra* note 42 and accompanying text.

10. L. GLENNY & T. DALGISH, *supra* note 7, at 7, 37; Beckham, *supra* note 7, at 546-47; see also H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 57 (1979) (referring to the University of Missouri as a statutory university).

11. 3 Stat. 545 (1813-23).

funding the institution.¹² Article VI of the 1820 Missouri Constitution authorized this fund to be used for supporting a "university for the promotion of literature and of the arts and sciences." It was not until 1839, however, that the state, through statutory enactment,¹³ legally created the University. Providing for "the institution and support of a State University and for the government of Colleges and Academies," the 1839 Act established a "seminary fund" from the proceeds and sales of public lands, and authorized a university whose "government" was to be vested in a "board of curators."¹⁴ Article II of the 1839 Act characterized the University as a "body politic," to be known as the Curators of the University of Missouri.¹⁵ The Board of Curators was to "have power to make such by-laws or ordinances, rules and regulations, as they shall judge most expedient for the accomplishment of the trust reposed in them, and for the government of their officers, and to secure their accountability."¹⁶ Powers specifically enumerated for the Board of Curators included those of conferring "by diploma under their common seal, on any person whom they may judge worthy thereof, such degrees above that of master of arts, as are known to and usually granted by any college or university."¹⁷ In 1839 the Missouri General Assembly also directed that a competition be held among six central Missouri counties for the site of the University;¹⁸ this competition resulted in the selection of Boone County.

Present supporters of the University of Missouri who are continually disappointed by what they believe to be a level of state funding incommensurate with the responsibilities and potential of the University might find solace, however slight, in the even more desperate financial plight of the University during its formative years. During the first twenty-eight years of its existence, the University received no appropriated funds from the General Assembly.¹⁹ Throughout this period the University depended entirely upon other sources for both its operating and capital budgets. Principal sources were the gifts of money and land generated in 1839 by the Boone County campaign to secure the University's location, annual student fees, occasional private donations, and the proceeds and revenues from public lands which had been dedicated in 1820 to a state "seminary of learning."²⁰

12. *Id.* at 547.

13. 1836-40 Missouri Laws 173.

14. *Id.* at 173-76.

15. *Id.* at 176.

16. *Id.* at 177.

17. *Id.*

18. *Id.* at 184-87.

19. Data concerning the sources of University of Missouri financing during its early years are found in F. STEPHENS, A HISTORY OF THE UNIVERSITY OF MISSOURI 53-59 (1962); J. VILES, THE UNIVERSITY OF MISSOURI: A CENTENNIAL HISTORY 112-13, 256-57 (1939).

20. F. STEPHENS, *supra* note 19, at 14-18, 53-59.

In 1863, some 350,000 acres of land provided under terms of the Morrill Act²¹ and dedicated to supporting programs related to agriculture and the "mechanic arts" augmented these funding sources. Efforts made during the 1865 Missouri Constitutional Convention to secure, through constitutional language, a tighter obligation upon the part of the General Assembly to provide financial support to the University were of little consequence.²² The General Assembly's first appropriation of any funds to the University occurred in 1867; the legislature approved a one time allocation of \$10,000 to help restore the university presidential home, which had been damaged by fire.²³ Soon thereafter, however, the General Assembly began approving modest annual appropriations to the University; by the time of the 1875 Missouri Constitutional Convention, the annual state appropriation amounted to \$16,000.²⁴

B. *The Granting of Constitutional Status: The Constitutional Convention of 1875*

As a matter of public policy, the state's obligation to provide "free public schooling" had already been established in pre-Civil War Missouri and appears not to have been seriously challenged in the 1875 Constitutional Convention. Disagreements about the specifics and magnitude of the obligation, however, were clearly evident; even the most vigorous supporters of public education conceded that the state's public debt, aggravated by the demise of the soft currency movement and the Panic of 1873, cautioned against writing financial commitments into the new constitution that could not be honored.²⁵ Certain delegates viewed a commitment of public funds for higher education to be especially ill-advised, both for financial reasons and as a matter of educational philosophy. One delegate cited the support of no less an authority on the philosophy of higher education than President Charles Eliot of Harvard University to try to persuade the delegates that higher education is best left to private institutions.²⁶

21. 7 U.S.C. §§ 301-05 (1982).

22. The 1865 Missouri Constitution simply provided in art. IX, § 4 that "[t]he General Assembly shall also establish and maintain a state university, with departments for instruction in teaching, in agriculture, and in natural science, as soon as the public school fund will permit." The delegates at the 1865 Constitutional Convention reportedly refused to support a resolution specifying the University already established at Columbia as the state university recognized in the language of art. IX, § 4. See F. STEPHENS, *supra* note 19, at 202; J. VILES, *supra* note 19, at 116, 123.

23. F. STEPHENS, *supra* note 19, at 204.

24. 9 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 51 (1942).

25. *Id.* at 39, 170, 188, 200-202, 264.

26. *Id.* at 78-83.

On July 8, 1875, the Committee on Education submitted to the Missouri Constitutional Convention its recommended provision concerning the State university:

The General Assembly shall maintain the state university now established with its present departments. The government of the university shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, and the Superintendent of Public Schools shall be *ex-officio* a member of the Board, but shall have no vote in the proceedings.²⁷

The Committee chairman's presentation makes it reasonably certain that the principal purpose of this recommended provision was to secure regularized state financial support for the University at Columbia. In his extended remarks, the chairman stressed the state's "pledge of faith" to the University, first given by the state as one of the conditions of statehood, renewed when the state accepted lands and donations from the people of Boone County in the competition for the site of the University, and reaffirmed when the state received the federal grant of public lands in 1863 to support agricultural and mechanical arts programs as parts of the University.²⁸ The chairman noted that in its entire history the University had received an amount in state support significantly less than what Boone County alone had contributed and some \$6,000 less than the combined sums appropriated to the four statutory teachers' colleges located in various regions of the state.²⁹ Placing the state's commitment to the maintenance of the University in a constitutional provision was no more than what a number of other states had done, the chairman concluded, citing his knowledge of states such as Alabama, Florida, Louisiana, Mississippi, Nevada, North Carolina, South Carolina and West Virginia.³⁰

Dominating the floor debate on the Committee of Education's recommended provision were five issues, evidenced both by the several efforts to amend the Committee's recommended version and by statements from delegates either supporting or opposing such efforts:

(1) What was the nature of the financial commitment intended by the provision? The committee chairman assured the delegates that the "maintenance" clause was not intended to be self-executing as to a specific amount.³¹

(2) How much discretion, if any, would the provision permit the General Assembly in singling out specific departments for a denial of funding? The Committee chairman, joined by other delegates, concluded that the wording of the recommended provision proscribed legislative abolition of any existing

27. *Id.* at 21.

28. *Id.* at 40-51.

29. *Id.* at 52.

30. *Id.* at 174-76.

31. *Id.* at 172, 174.

departments and divisions of the University.³² The possibility that General Assembly might later want to add, by statutory enactments, to the existing complement of departments and divisions received only a momentary and inconclusive comment from floor.³³

(3) Would it not, nonetheless, be a wise precaution to refer specifically in the provision to existing departments and divisions of the University by name, to protect them against later efforts in the General Assembly to abolish them? The Committee chairman counseled the delegates against this approach, suggesting, instead, that the language of the proposed provision was sufficient to accomplish this purpose.³⁴

(4) Should not the provision contain language specifically mandating cooperation between the University and the public school system? The Committee chairman reported that the Committee saw value in simply structuring an "advisory" relationship, one by which the president of the University would serve as a non-voting member of the state Board of Education and the state superintendent of public schools would have a comparable position on the Board of Curators.³⁵ In the version the convention finally approved, no formal structuring of a relationship between the University and the public school system was attempted.

(5) Should not the legislature, at least through the Senate, share responsibility with the governor in appointment members to the Board of Curators? The Committee, the chairman explained, had deliberately excluded the legislature from the selection of curators to shield the University from "the whirlpool of politics"³⁶ and "the destroying influence of partisan politics."³⁷ On this point, the Committee lost; in the version approved by the Convention, the governor received the power to appoint curators only with the advice and consent of the Senate.

For the purpose of judging the intent of the framers in granting constitutional status to the Board of Curators, a significant omission in the 1875 Constitutional Convention debates was its failure to discuss the phrase, recommended in the Committee's proposal and subsequently approved by the Convention, that "the government of the university shall be vested in a Board of Curators" In his initial remarks, introducing to the delegates the entire provision, the Committee chairman merely noted, in an apparent reference to the 1839 Act originally establishing the University, that this phrase embodied existing law.³⁸ No occasion arose during

32. *Id.* at 204, 206-210, 212, 213-14.

33. *Id.* at 208.

34. *Id.* at 212, 214.

35. *Id.* at 150.

36. *Id.* at 293-94.

37. *Id.* at 34.

38. *Id.* at 32.

the floor debates requiring the chairman's explanation of the Committee's specific intent in using this phrase.

Becoming effective on November 30, 1875, the Missouri Constitution provided in Article XI, § 5:

The General Assembly shall, whenever its Public School Fund will permit, and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State University shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate.

The present Missouri Constitution (1945) rearranges but reproduces in its Article IX, § 9 much of the earlier language:

(a). *State University—government by board of curators—number and appointment.* The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate.

(b). *Maintenance of state university and other educational institutions.* The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary.

III. *STATE EX REL. HEIMBERGER V. BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI*³⁹

Decided in 1916, *Heimberger* remains central to any analysis of the constitutional power of the Board of Curators. In the case the Missouri Supreme Court addressed for the first time the question of the meaning of Article XI, § 5 of the 1875 constitution and applied its interpretation of the provision in resolving a conflict between the Board of Curators and the General Assembly over a fundamental academic policy matter. Considerable confusion persists about both the reasoning and the ruling in *Heimberger* and their implications for the constitutional power of the Board of Curators.⁴⁰

A. *Facts, Reasoning, and Decision*

Heimberger was a writ of mandamus proceeding to compel the Board of Curators to obey a 1915 Act⁴¹ of the General Assembly requiring the

39. 268 Mo. 598, 188 S.W. 128 (1916) (en banc).

40. See, e.g., L. GLENNY & T. DALGISH, *supra* note 7, at 37 (concluding that *Heimberger* and subsequent litigation "clearly identify the University of Missouri as not among those universities possessed of constitutional status"); Beckham, *supra* note 7, at 546-47 (concluding that *Heimberger* marks the beginning of the erosion of "constitutional autonomy" for the University of Missouri).

41. MO. REV. STAT. § 172.450 (1986).

University of Missouri to provide through the School of Mines and Metallurgy at Rolla courses and degrees in general science and in several engineering sub-fields. The Curators challenged the validity of the statute, arguing that Article XI, § 5, by vesting the "government" of the University of Missouri in the Board, precluded the General Assembly from requiring through statutory enactment the addition of departments, courses of study, and academic degree programs at the University.

For purposes of reaching the principal question, the Missouri Supreme Court separated art. XI, § 5 into two parts. The first part, the "maintenance" clause represented by the first sentence in art. XI, § 5, the court held inapplicable to the dispute. The court construed this part of art. XI, § 5 simply to mean that the Missouri Constitution mandated the continuation of the University, so that, for example, the General Assembly could not by statute validly "disestablish" the University in its entirety or "disestablish" any of the University's departments which had been in existence in 1875 when the Constitution became effective.⁴²

The key to whether the statute was binding on the Board of Curators, the court concluded, was to be found in the meaning of "government," contained in the second sentence of art. XI, § 5. Up to this point in its analysis, the *Heimberger* court followed the argument made by the Curators' counsel. But the sweep of the argument tended toward exclusivity:

Counsel do not mince words. In plain language they state their contention to be that the quoted words [government of the state university shall be vested in a board of curators] constitute the board of curators a separate and distinct department of the State Government, over which the General Assembly has no power and with which it has practically nothing to do except to make such appropriations as it deems proper under that part of Section 5 which deals with appropriations as above pointed out.⁴³

The treatment accorded the Board of Regents of the University of Michigan in *Sterling v. Regents of the University of Michigan*⁴⁴ apparently encouraged the Curators to make the argument of exclusive power. The Curators' counsel cited *Sterling* in support of his argument⁴⁵ and the Missouri Supreme Court devoted a substantial part of its opinion justifying its rejection of the *Sterling* reasoning.⁴⁶

Sterling was a mandamus proceeding brought against the Board of Regents of the University of Michigan to compel the Regents to obey an 1895 statute requiring the University of Michigan to discontinue its medical school at Ann Arbor and to establish, instead, a medical school in Detroit. The Regents argued that the power granted to them by the Michigan

42. 268 Mo. at 608, 620, 188 S.W. at 130, 134.

43. *Id.* at 613-14, 188 S.W. at 131-32.

44. 110 Mich. 369, 68 N.W. 253 (1896).

45. 268 Mo. at 603; 188 S.W. at 133.

46. *Id.* at 615-18, 188 S.W. at 132-33.

Constitution precluded the state legislature from lawfully issuing binding instructions about the establishment and location of departments and schools of the University of Michigan.⁴⁷ The Regents had accompanied their constitutional argument with policy arguments stressing the political and educational implications of permitting the state legislature to override the judgment of the Board of Regents as to the appropriate scope and location of the University's instructional programs.⁴⁸ Agreeing with the Board of Regents' interpretation of art. XII, § 8 of the Michigan Constitution, which provided that "The board of regents shall have the general supervision of the University, and the direction and control of all expenditures from the University interest fund," the Michigan Supreme Court reviewed an earlier decision construing broadly the constitutional power of the Regents.⁴⁹ It noted the premier position which the University of Michigan had been able to achieve among "the most complete, and the best known institutions of learning in the world,"⁵⁰ and recalled the struggle of the University of Michigan in its formative years under "legislative supervision."⁵¹ The court further cited an 1840 report of a Michigan legislature select committee condemning legislative control of the University,⁵² interpreted the intent of the framers of the 1850 Constitution as seeking to correct the problems identified in the select committee report,⁵³ pointed to the "plain" meaning of the language used in art. XIII, § 8,⁵⁴ and emphasized that the people of Michigan expected to secure accountability of the Board of Regents not through legislative controls but through the popular electoral process employed for selecting members of the Board.⁵⁵ The ruling of the *Sterling* court was broad and explicit:

Now, in the face of the facts that the regents have for 46 years exercised such control, and openly asserted its exclusive right to do so; that the courts have refused to compel them to comply with the acts of the legislature; that this court held in *Weinberg v. Regents*, 97 Mich. 246, 56 N.W. 605 [Mich., 1893] that they were a constitutional body, upon whom was conferred this exclusive control; and in the face of this plain constitutional provision,—this court is now asked to hold that the regents are mere ministerial officers, endowed with the sole power to register the will of the legislature, and to supervise such branches and departments as any legislature may see fit to provide for. By the power claimed, the legislature may completely dismember the university, and remove every vestige of it from the city of Ann Arbor. It is no argument to say there is no danger

47. 110 Mich. at 372, 68 N.W. at 253.

48. *Id.* at 371-72, 68 N.W. at 253.

49. *Id.* at 380-82, 68 N.W. at 256-57 (citing *Weinberg v. Regents of the Univ.*, 97 Mich. 246, 56 N.W. 605 (1893)).

50. 110 Mich. at 377, 68 N.W. at 255.

51. *Id.* at 374, 68 N.W. at 254.

52. *Id.* at 375-77, 68 N.W. at 255-56.

53. *Id.* at 377, 68 N.W. at 255.

54. *Id.* at 380, 68 N.W. at 256.

55. *Id.* at 379, 68 N.W. at 256.

of such a result. The question is one of power, and who shall say that such a result may not flow?⁵⁶

The Curators' reliance on *Sterling* was unavailing. The Missouri Supreme Court explained why: (1) While the Michigan Supreme Court had partly relied on extrinsic, historical evidence in construing the Michigan constitutional provision, the Missouri Supreme Court viewed this mode of construction for the Missouri constitutional provision to be unnecessary and, therefore, inappropriate. Instead, the court looked for guidance to the "natural signification" of the language in art. XI, § 5.⁵⁷ (2) "Practical construction" in Missouri pointed to a different understanding in Missouri about the relationship between the legislature and the state university. For some 40 years following the adoption of the 1875 Missouri Constitution, the Board of Curators, the court noted, had consistently obeyed and observed, without court challenge, statutory directives, including at least two statutory directives establishing departments and faculty chairs.⁵⁸ (3) In contrast with the Michigan Supreme Court in *Sterling*, the Missouri Supreme Court in *Heimberger* was being asked to interpret the constitutional power of the university on first impression, unbound by previous court decisions on the subject.⁵⁹ (4) The language in the Missouri Constitution, by giving the Curators no specific control over funds, was less explicitly an exclusive grant of power than the language in the Michigan Constitution.⁶⁰ (5) Finally, the Michigan Supreme Court used a "questionable" rule of construction when it inferred that the framers of the Michigan Constitution, by using language to describe the Regents' power that differed from the language used to describe the power of municipalities and other corporate bodies, must have intended a special and exclusive power for the Board of Regents.⁶¹

Rejecting, therefore, *Sterling* as having no authority, and denying the need for extrinsic evidence, the Missouri Supreme Court sought the aid of dictionaries in determining the meaning of "government" as found in art. XI, § 5. Consulting the Century Dictionary and Cyclopedia and Webster's New International Dictionary, the court discovered agreement on such terms as "direction," "regulation," "guidance," and "control" for the definition of "government."⁶² None of these terms, the court reasoned, suggested the "idea of creation, origination, or the like, in whole or in part."⁶³ It follows, the court stated, illustrating the full consequences of its discovery,

56. *Id.* at 380, 68 N.W. at 256.

57. 268 Mo. at 620-21, 188 S.W. at 133-34.

58. *Id.* at 617, 188 S.W. at 133.

59. *Id.*

60. *Id.*

61. *Id.* at 618, 188 S.W. at 133; *Sterling*, 110 Mich. at 382-83, 68 N.W. at 257-58.

62. 268 Mo. at 620, 188 S.W. at 133-34.

63. *Id.* at 620-21, 188 S.W. at 134.

that "[t]he vesting of the powers of government in the legislative, executive, and judicial departments implies no attempt to vest in either [sic] magistracy any power to add to the state itself."⁶⁴

Based on such reasoning, the Missouri Supreme Court formulated its ruling:

If the word [government] vests no power to create or originate departments in the board of curators, it is manifest it gives rise to no implication excluding such powers from the field of the General Assembly's authority, and we cannot strike down the Act of March 23, 1915, on the theory that the Constitution commits to the board of curators alone the power of building as well as governing a university.⁶⁵

Thus, under the theory that power not constitutionally denied to the state legislature is reserved to the legislature, the Missouri Supreme Court held in *Heimberger* that the General Assembly could validly require, through statutory enactment, the Board of Curators to establish specific departments and programs of instruction at the University of Missouri.⁶⁶ To buttress its ruling, the court pointed to the appropriations power of the General Assembly. In this part of its opinion, *dictum* surely because no appropriation statute was at issue in *Heimberger* and the residual theory had disposed of the question before the court, the Missouri Supreme Court connected the establishment of new departments, courses of study, and degree programs to a presumptively indispensable need for legislatively appropriated funds to effect the establishment.⁶⁷ In making this connection, the court, without explanation, relaxed its original position that extrinsic evidence was unnecessary in interpreting the constitutional grant of power of the Board of Curators:

Neither at the time of the adoption of the Constitution in 1875 nor since has the State University had any income, independent of appropriations by the General Assembly, which bore any considerable ratio to the sums necessary for its maintenance. It must have been apparent to the framers of the Constitution that if the people adopted the Constitution, the University's development and growth, so far as money was required therefor, would depend upon appropriations from the State Treasury . . . Having thus necessarily left in the General Assembly the complete control of the funds available and necessary for the development of the University, it is hardly reasonable to give the language of section 5, of article 11, a meaning which can be given no actual force and effect, so far as concerns the establishment of new departments and courses of study, unless that force and effect are given by the General Assembly through appropriations for those purposes. We assume it was intended the University should grow.⁶⁸

64. *Id.* at 621, 188 S.W. at 134.

65. *Id.*

66. *Id.* at 620-21, 188 S.W. at 134.

67. *Id.* at 621-23, 188 S.W. at 134.

68. *Id.* at 622, 188 S.W. at 134.

On both semantic and historical grounds, the reasoning of the *Heimberger* court is less than convincing. The major curiosity of the reasoning is in the court's construction of "government." Although justifying its definition of "government" through the use of dictionaries, the court actually introduced a doctrinal argument: it asserts that a government usurps its legitimate power whenever it engages in acts of "origination" or "creation." Whatever the inspiration of this doctrine, reconciling it with the innumerable acts of creation by governments at all levels in the United States since the founding of the nation would appear to be a bizarre revision of history. The court's apparent purpose was to find a way to deny the Board of Curators' claim to an exclusive grant of power.

As noted below, courts in other jurisdictions have found several ways to find qualifications to the constitutional grant of power to university governing boards, but none has chosen the curious path the *Heimberger* court took.⁶⁹ The reasoning in *Heimberger* rejects the idea that adding new programs periodically at a university is a normal faculty and administration exercise of their responsibility to respond to the changing educational needs of the students and of the community which the university serves. At the core of the doctrine invoked in *Heimberger* is the confusion of the jurisdictional power of a government with the services that a government might provide within its jurisdictional power; without this distinction, the court treats new services as new powers. Fortunately for the credibility of the Missouri Supreme Court, it was not trying to apply its doctrine to test the validity of a state statute mandating the establishment of a new state agency or program of service; under the *Heimberger* doctrine, such acts of "origination" would be usurpations of existing power, or, to use the words of the court, they would be to "add to the state itself."⁷⁰ But by applying its doctrine to the state university, the court found a basis for denying the claim of the Board of Curators to an exclusive grant of power.

Even if the court's doctrinal reasoning is confined to the issue of the constitutional power of the Board of Regents, and is not extended to other governmental units in the state, the court created for itself a practical dilemma of considerable importance. If the Board of Curators' power permits no originating or creating of programs, were not all academic departments, courses of study, and degree programs which the Board of Curators established since the adoption of the 1875 Constitution the fruits of usurpations of power? The court chose to ignore the question.

Logic also fails to support the court's *dictum* that the power to create new programs and departments within the University is an inescapable adjunct of the legislature's appropriations power. Use of non-appropriated funds has always been an option available to the University to underwrite

69. See *supra* notes 39-68 and accompanying text.

70. 268 Mo. at 621, 188 S.W. at 134.

new programs. While a public university expects and prefers to secure increased appropriations whenever it undertakes additional responsibilities, to assert a necessary connection between the appropriation of new state funds and new university programs is asking logic to demonstrate a connection that more correctly rests on university preference. In the absence of such appropriations, the university might still find it financially possible to initiate a new program, especially if the university itself determines, as did the University of Missouri at the time of *Heimberger* and as it still does, its student fees and tuition charges.

Historical experience challenges the court's reasoning that the framers of the 1875 Constitution must have intended that the legislature prevail over the Board of Curators in making decisions about which degree and instructional programs should be provided at the University. With few exceptions, the creation and expansion of the University's programs of instruction between 1839 and 1875 were done without either legislative mandate or legislative appropriations.⁷¹ The 1875 Constitutional Convention debates provide no evidence that the framers intended to alter or limit this historic practice. The Committee on Education's concerns in the 1875 Constitutional Convention were not that the Board of Curators was too powerful but that the programmatic efforts of the University were unrewarded by the General Assembly. Contrary to the one asserted in *Heimberger*, an interpretation closer to the motivations of the Committee on Education, in recommending the constitutional provision concerning the state university, is that it sought to bind the General Assembly to an understanding that, as the Board of Curators continued to exercise its past practice of establishing programs responding to the needs to the state, the University could expect to receive at least more financial support from the state than it had been receiving.⁷² In any event, to state, as the court did, that at the time of the adoption of the 1875 Constitution the University had no income, "independent of appropriations by the General Assembly, which bore any considerable ratio to the sums necessary for its maintenance"⁷³ simply bears no relationship to the facts; during most of the period between 1839 and 1875, the University depended entirely upon non-appropriated funds.⁷⁴

B. *Interpreting Heimberger*

Commentators over-generalize when they interpret *Heimberger* to mean that the Board of Curators of the University of Missouri has effectively

71. See F. STEPHENS, *supra* note 19, at 39-118.

72. On this key issue, whether the state should be constitutionally bound to "maintain" the University, the convention voted favorably 38 to 17, with 13 abstaining or absent. 9 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 164, 204 (1942).

73. 268 Mo. at 622, 188 S.W. at 134.

74. See *supra* note 19 and accompanying text; see also 9 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 48-51 (1942).
<https://scholarship.law.missouri.edu/mlr/vol54/iss2/4>

lost whatever constitutional grant of power initially intended for it by the framers of the 1875 Missouri Constitution.⁷⁵ In analyzing the constitutional power granted to a university governing board, one must distinguish between the power to act in the absence of statutory authorization and the power to act contrary to a statute;⁷⁶ a governing board that is judicially denied the latter is not by that decision also denied the former. As long as a governing board retains the former it has a legal power of governance that remains substantially different from that of the governing boards of public colleges and universities which must look entirely to enabling legislation for their authority to act. *Heimberger* does not stand for the proposition that the constitutional grant of power to the Board of Curators is a nullity; to the contrary, the *Heimberger* court conceded that the Board received power through art. XI, § 5.⁷⁷ The question which the Curators posed to the Missouri Supreme Court in *Heimberger* was whether the constitutional grant of power to the Board precluded entry by the legislature into the governance of the University. To this question the court answered in the negative, at least for purposes of deciding which academic programs, degrees, and departments were to be added to the University. It is this denial of autonomy for the Board of Curators that commentators apparently have in mind when they assert that, as a result of *Heimberger*, the University lost its status as a constitutional university. This assertion, by ignoring the distinction between the power to act without statutory authorization and the power to prevail over a conflicting statute, results in an overly-broad interpretation of the *Heimberger* ruling.

Heimberger permits three observations: (1) measured against the sweep of the claim made by the Board of Curators to an exclusive power to govern the University, *Heimberger* was a defeat for the Board of Curators; (2) considering the centrality to any university of the conflict in *Heimberger* between the Board and the General Assembly — determining which academic programs and degrees to be added—the court's finding that this area is open to a binding decision by the legislature did not bode well for any future Board of Curators' effort to secure judicial affirmation of autonomy in *any* area of university governance. After all, if the Board had to share with the legislature the power to make policy defining the University's academic purposes, was it not even more likely that the Board would be denied autonomy in determining policies concerning the non-academic side of the University's operations? (3) compared with the line sharply drawn by the Michigan Supreme Court in *Sterling* as a barrier against statutory

75. See *supra* note 40.

76. The importance of this distinction for analyzing also the distribution of power between the state and the home rule municipality is demonstrated in Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45 (1968).

77. 268 Mo. at 621, 188 S.W. at 134.

regulation of the University of Michigan, the line drawn by the Missouri Supreme Court in *Heimberger* is blurred, permitting legislative entry in at least one area of University of Missouri governance and revealing no general principle or formula for deciding whether legislative entry in still other areas is also permissible.

IV. CASE LAW AFTER *HEIMBERGER*

Since *Heimberger*, Missouri appellate courts on six occasions have addressed issues requiring them to interpret either the legal status of the University of Missouri (legally described as "The Curators of the University of Missouri") or the constitutional power of the Board of Curators. In two of these cases, *Clark v. McBaine*,⁷⁸ decided by the Missouri Supreme Court in 1923, and *Todd v. Curators of the University of Missouri*,⁷⁹ decided by the Missouri Supreme Court in 1941, the court confirmed the legal status of the University as a public corporation. The result in *Clark* was that, since the University and its departments are "proper and legitimate subjects of comment through the public press," plaintiff had no cause of action in a libel suit against certain of his faculty colleagues for their comments in a letter published in a newspaper concerning plaintiff's discharge from the faculty.⁸⁰ In *Todd* the court held that the University shared in the common law immunity accorded all Missouri public corporations against tort liability.⁸¹

Neither decision serves to clarify questions about the constitutional power of the Board of Curators, although one could infer from the reasoning in both that the Missouri Supreme Court saw no distinction between the University of Missouri and any other public or quasi-public corporation under Missouri law. On four occasions, however, Missouri courts have dealt more directly with questions concerning the constitutional power of the Board of Curators. Two involved the applicability of state statutes to the University and its governing board and two examined art. IX, § 9(a) as a source of authority for the Board of Curators in the absence of enabling legislation.

A. *Statutory Regulation of the University of Missouri*

*Curators of the University of Missouri v. Public Service Employees Local No. 45*⁸² presented the question whether the Missouri Public Sector

78. 299 Mo. 77, 252 S.W. 428 (1923).

79. 347 Mo. 460, 147 S.W.2d 1063 (1941).

80. 299 Mo. at 93, 252 S.W. at 432.

81. 347 Mo. at 464-65, 147 S.W.2d at 1064.

82. 520 S.W.2d 54 (Mo. 1975) (en banc).

Labor Law⁸³ applied to the University of Missouri in its relations with its non-academic employees. In answering the question affirmatively, the Missouri Supreme Court reaffirmed its reasoning in an earlier decision,⁸⁴ holding that the statute was applicable to municipal corporations, that the statute was a valid means to facilitate the exercise of Missouri public sector employees' constitutional rights of peaceable assembly and petition, and that employers in the public sector—though obligated by the statute to meet and confer with employees—retained their pre-existing prerogative to decide their employees' terms and conditions of employment.⁸⁵ Assuming without discussion that the University of Missouri is indistinguishable, at least for purposes of this statute, from other public employers in the state, the court held that the statute equally applied to the University. Although the court added the caveat that it might have to reconsider its decision if the General Assembly, in future action, further restricted public sector employers in their power to determine the terms and conditions of employment,⁸⁶ it is clear that the caveat was stated not for the purpose of suggesting a special constitutional protection for the University from statutory regulation. Rather, the caveat indicated that under the state constitution all of the state's public sector employers might be protected from legislative enactments further encroaching upon the prerogative of public employers to determine terms and conditions of employment of their employees.

Decided in 1983 by the Missouri Court of Appeals for the Western District, *Tribune Publishing Co. v. Curators of the University of Missouri*⁸⁷ involved a suit brought by plaintiff seeking to bring not only the Board of Curators but also the University's principal administrative officers and those reporting to these officers within the scope of the Missouri Open Meetings Law.⁸⁸ Acknowledging the broad language used in the statute in its definition of "public governmental body," to which the statute applied, the Missouri court of appeals nonetheless reasoned that only the Board of Curators, and not the several tiers of officers and committees within the entire university complex, could reasonably be defined as a "public governmental body."⁸⁹ The court concluded that the Open Meetings Law applied to activities of the Board of Curators and to documents and reports which

83. Mo. REV. STAT. §§ 105.500-.525 (1986).

84. *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947). For a discussion of the problems with the reasoning of the *Clouse* opinion, see Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law: Lessons from Cases That Have Perpetuated an Anachronism*, 30 St. LOUIS U.L.J. 331, 337-43 (1986).

85. 520 S.W.2d at 57-58.

86. *Id.* at 58.

87. 661 S.W.2d 575 (Mo. Ct. App. 1983).

88. Mo. REV. STAT. §§ 610.010-.030 (1986).

89. 661 S.W.2d at 579-80.

the Board consulted in conducting its business, but that the statute was inapplicable to the activities and reports of University officers, groups, and committees which were not directly related to the discussions and transactions of the Board of Curators.⁹⁰

Advocates of the view that the constitutional status of the University of Missouri shields the University and its governing board from statutory regulation will not find encouragement in the opinions of either of these cases. Without even invoking the authority of *Heimberger*, the courts in both cases appeared to assume that statutes, otherwise valid, apply to the University of Missouri and its governing body as they apply to any other state agency or sub-division of the state. No question was raised, nor was any addressed, about possible boundaries between areas of University affairs subject to statutory regulation and areas exclusively within the control of the Board of Curators.

B. *Art. IX. § 9(a)* as a Source of Authority

In *State ex rel. Curators of the University of Missouri v. McReynolds*,⁹¹ decided in 1946, the Missouri Supreme Court, for the first time since *Heimberger*, examined the meaning of the constitutional provision vesting the "government" of the University in the Board of Curators. *McReynolds* was a mandamus proceeding to test the power of the Board of Curators to issue revenue bonds for the purpose of financing the construction of student dormitories. The court reviewed two possible impediments to the Board's issuing such bonds; one was the absence of an express authorization, either in the constitution or in statute, for the Board to borrow money for this purpose and to issue bonds as security; the other was a statute⁹² requiring the University, in its expenditures, to stay within its appropriated budget. In rejecting the first of these impediments, the court concluded that there was an implied authorization for the Board to issue the bonds. In finding the authorization to be implied, the court relied on several arguments, combining them to produce the result: (1) without specifically providing for the use of revenue bonds, the legislature had, by statutory enactment,⁹³ authorized the Board of Curators to erect and maintain buildings for the use and accommodation of students;⁹⁴ (2) because of art. IX, § 9(a)'s direct grant of power to the Board of Curators and of the understanding developed of this power as a source of authority in the absence of enabling legislation, especially in light of the University's access to non-state and non-tax funds, the Board of Curators of the University

90. *Id.* at 584.

91. 354 Mo. 1199, 193 S.W.2d 611 (1946).

92. MO. REV. STAT. § 10791 (1939).

93. *Id.* § 10810.

94. 354 Mo. at 1204, 193 S.W.2d at 612.

of Missouri is not subject to as strict a standard of legislative control over its borrowing practices as are Missouri municipal corporations, which must rely explicitly on statutory authority to issue revenue bonds;⁹⁵ (3) holdings of courts in other jurisdictions support the reasoning that public universities need not be held to the same standard that is applied to municipal corporations in finding authority to issue revenue bonds.⁹⁶ The court dismissed, as inapplicable, the argument that the statutory prohibition of the University's spending in excess of its annual income prevented the University from issuing revenue bonds; the purpose of the statute prohibiting deficit spending, the court reasoned, was to prevent deficits which would result in claims against state revenues and no such claims could result from the proposed revenue bonds.⁹⁷

In *State ex rel. Curators of the University of Missouri v. Neill*,⁹⁸ decided by the Missouri Supreme Court in 1966, the Board of Curators again sought a writ of mandamus affirming its power to issue revenue bonds, this time to construct a parking facility. However, unlike the factual situation in *McReynolds* showing the Board of Curators to have statutory authority for constructing and maintaining dormitories, in *Neill* the Board could point to no statute expressly authorizing it to construct and maintain parking facilities. Because of this factual difference, the Missouri Supreme Court gave considerably more emphasis in *Neill* to art. IX, § 9(a) as a source of implied power. While the court's grant of the writ of mandamus ultimately rested on both statutory and constitutional construction, each source was addressed as a basis for the implied power. Since the General Assembly had granted authority to the Board of Curators to select sites on which to carry out the functions of the University and to acquire real estate for such purposes by purchase and condemnation, the court reasoned that the General Assembly had expressed an intent that the Board of Curators construct improvements, including parking facilities, on University property.⁹⁹ In finding separate support, however, for the Board's implied power to construct parking facilities on University property, the court turned to art. IX, § 9(a) and relied upon a contemporary dictionary, *Heimberger*, and usage in interpreting the meaning of the clause that vests the government of the University in the Board of Curators:

The term "government" has been defined as the act or process of governing; authoritative direction or control, and the office, authority or function of

95. *Id.* at 1204, 193 S.W.2d at 613.

96. Decisions cited from other jurisdictions were *State v. Regents of the Univ. Sys.*, 179 Ga. 210, 175 S.E. 567 (1934); *Caldwell Bros. v. Board of Supervisors*, 176 La. 825, 147 So. 5 (1933); *Fanning v. University of Minn.*, 183 Minn. 222, 236 N.W. 217 (1931); *State College Dev. Ass'n v. Nissen*, 66 S.D. 287, 281 N.W. 907 (1938).

97. 354 Mo. at 1205, 193 S.W.2d at 613.

98. 397 S.W.2d 666 (Mo. 1966).

99. *Id.* at 669.

governing. To govern is to control the workings or operations of, and to control, guide and regulate *Webster's Third New International Dictionary*. These definitions have been approved by the court with respect to the government of the University. *State ex rel. Heimberger v. Board of Curators of the University of Missouri*¹⁰⁰

. . . . It is an admitted fact that for more than twenty-five years the Curators have been providing parking facilities on its campuses in Columbia and at Rolla and more recently at St. Louis and Kansas City. The administrative interpretation given a constitutional or statutory provision by public officers charged with its execution, while not controlling, is entitled to consideration, especially in case of doubt or ambiguity.¹⁰¹

Having thus found an implied power, on the basis of both statutory and constitutional construction, for the Board of Curators to build and maintain parking facilities on University property, the court cited *McReynolds* as authority for the additional conclusion that revenue bonds are a permissible means for implementing this power.¹⁰²

C. *Evaluation of the Post-Heimberger Decisions*

Without burdening themselves with the task of either explaining or justifying the curious doctrine of *Heimberger* that the power of "government" does not include the power to create or originate, Missouri courts have nonetheless continued the lines of development initiated in *Heimberger* of conceding, on the one hand, that the University of Missouri Board of Curators derives power directly from constitutional grant and of denying, on the other hand, that this grant of power precludes statutory regulation of the University of Missouri. Although incompatible, if each position is absolutely maintained, both are easily maintained in the absence of a direct conflict between an action of the Board of Curators and a statutory enactment.

Except for the obvious invalidity of Board of Curators' actions that would otherwise conflict with the federal and Missouri constitutions, art. IX, § 9(a) authorizes the Board to make decisions without express authorization from the General Assembly. *Neill* most clearly supports this proposition, but *McReynolds* also employs reasoning that includes it. These cases specifically place the powers to construct parking facilities on University property and to issue revenue bonds to finance construction of dormitories and parking facilities within the powers implied by art. IX, § 9(a), but the ramifications of this proposition are better appreciated when account is taken of the courts' invoking usage and administrative practice as aids in identifying Board actions permissible under art. IX, § 9(a). Historical usage and administrative practice abundantly evidence Board of

100. *Id.*

101. *Id.* at 670.

102. *Id.* at 671.

Curator's actions taken over the years, including most of the steps necessary to expand the University from a single campus to a multi-campus system, without express statutory authorization.¹⁰³

It is the other dimension of the constitutional grant of power to a university's governing board, the shielding of the university from the binding effect of statutory law, which has eluded the University of Missouri in the case law. In *Heimberger's* pronouncement that the legislature can mandate the establishment of new academic programs and *Public Service Employees Local 45* and *Tribune Publishing Co.'s* assumptions that statutes such as the Public Sector Labor Law and the Open Meetings Law are as applicable to the University of Missouri as they are to other state agencies and municipal corporations, there is no positive indication from the courts that the constitutional grant of power to the Board protects some areas of university governance from statutory regulation. To conclude, however, simply on the basis of these three opinions that any otherwise valid state statute is binding on the University of Missouri and its governing board seems premature. Since *Heimberger* in 1916, Missouri decisions have avoided or glossed over the issue. Such avoidance, however, does not typify most jurisdictions having constitutionally empowered universities.

V. STATUTORY REGULATION OF CONSTITUTIONALLY EMPOWERED UNIVERSITIES: PRACTICES IN OTHER JURISDICTIONS

In fourteen of the fifteen states, other than Missouri, in which the governing boards of higher education generally or of one or more of the public universities specifically receive grants of power from state constitutional provisions, the courts have explicitly dealt with the issue of whether the grant of power shields the governing board or the university from

103. Beginning with no academic degree programs in 1839, the University of Missouri by 1975 offered a combined total of more than 1100 separate degree programs through its four campuses: Columbia, Kansas City, Rolla and St. Louis. Except for the half dozen or so degree programs that resulted from the 1915 legislative mandate contested in *Heimberger*, all of these programs were established by the Board of Curators independently of formal approval by the legislature or by any other state agency. The calculation of the number of degree programs is based on the degree inventory reported in University of Missouri Academic Program Inventory 1976-77, IR-774. Since 1839, the Board of Curators has established, also without express legislative authority or directive, two new campuses (St. Louis and Kansas City), and on the four campuses combined, some 29 separate academic schools and colleges embracing more than 160 separate academic departments and units. Other major initiatives taken by the Board of Curators, without legislative mandate or express authorization, include the establishment of a medical malpractice insurance program, a nuclear reactor facility, and a commercial television station.

statutory regulation.¹⁰⁴ In none of these jurisdictions have the courts accepted the proposition that the constitutional grant of power to the governing board is without effect in lawfully restraining the legislature from entering, through statutory enactment, certain areas of university management and control. It is equally evident from these jurisdictions' case law that courts resist the notion that the constitutional grant of power to the governing board, however broadly worded in its language, accords indiscriminant and total autonomy to the university. Taking positions between these two extremes, courts have formulated a variety of tests to decide whether statutory enactments bind the university and its governing board.

In all fourteen jurisdictions, courts accept the corollary that, because power is directly granted to the governing board of the university, statutory enactments do not routinely apply to the university.¹⁰⁵ The question, therefore, becomes whether the particular statute at issue nonetheless applies to the university because the statute qualifies as an exception to the general rule. Explicit wording in a few jurisdictions' constitutional grants of power that either assigns exclusive authority to the university's governing board

104. These states, and representative decisions in each of them, are Alabama: Opinion of Justices, 417 So. 2d 946 (Ala. 1982); *Stevens v. Thames*, 204 Ala. 487, 86 So. 77 (1920); Alaska: *Carter v. Alaska Pub. Employees Ass'n*, 663 P.2d 916 (Alaska 1983); *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975); California: *San Francisco Labor Council v. Regents of Univ. of Cal.*, 26 Cal. 3d 785, 608 P.2d 277, 163 Cal. Rptr. 460 (1980); *Regents of Univ. of Cal. v. Superior Court*, 17 Cal. 3d 533, 551 P.2d 844, 131 Cal. Rptr. 228 (1976); Colorado: *Uberoi v. University of Colo.*, 713 P.2d 894 (Colo. 1986) (en banc); *Uberoi v. University of Colo.*, 686 P.2d 785 (Colo. 1984) (en banc); *Associated Students v. Regents of Univ. of Colo.*, 189 Colo. 482, 543 P.2d 59 (1975) (en banc); Georgia: *McCafferty v. Medical College*, 249 Ga. 62, 287 S.E.2d 171 (1982); Hawaii: *Levi v. University of Haw.*, 63 Haw. 366, 628 P.2d 1026 (1981); Idaho: *Williams v. State Legislature*, 111 Idaho 156, 722 P.2d 465 (1986); *Dreps v. Board of Regents*, 65 Idaho 88, 139 P.2d 467 (1943); Michigan: *Regents of the Univ. of Mich. v. State*, 395 Mich. 52, 235 N.W.2d 1 (1975); *Board of Regents v. Auditor General*, 167 Mich. 444, 132 N.W. 1037 (1911); *Sterling v. Regents of the Univ. of Mich.*, 110 Mich. 369, 68 N.W. 253 (1896); Minnesota: *Regents of Univ. of Minn. v. Lord*, 257 N.W.2d 796 (Minn. 1977); *State ex rel. Sholes v. University of Minn.*, 236 Minn. 452, 54 N.W.2d 122 (1952); *Fanning v. University of Minn.*, 183 Minn. 222, 236 N.W. 217 (1931); *State ex rel. Univ. of Minn. v. Chase*, 175 Minn. 259, 220 N.W. 951 (1928); Montana: *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975); Nebraska: *Catania v. University of Neb.*, 204 Neb. 304, 282 N.W.2d 27 (1979); *University Police Officers Union Local 567 v. University of Neb.*, 203 Neb. 4, 277 N.W.2d 529 (1979); *Board of Regents v. Exon*, 199 Neb. 146, 256 N.W.2d 330 (1977); Nevada: *Board of Regents v. Oakley*, 97 Nev. 605, 637 P.2d 1199 (1981); *State ex rel. Richardson v. Board of Regents*, 70 Nev. 144, 261 P.2d 515 (1953); Oklahoma: *Board of Regents v. Baker*, 638 P.2d 464 (Okla. 1981); South Dakota: *Kanaly v. State*, 368 N.W.2d 819 (S.D. 1985); *South Dakota Board of Regents v. Meierhenry*, 351 N.W.2d 450 (S.D. 1984); *South Dakota Board of Regents v. Meister*, 309 N.W.2d 121 (S.D. 1981).

105. See cases cited *supra* note 104.

in enumerated areas or exempts certain areas from the jurisdiction of the governing board assists courts in formulating these exceptions.¹⁰⁶ In such instances, the court's role has been to determine not whether the statute comes within a court-devised test permitting its application but whether the statute, by its subject matter and effect, comes within the enumerated areas. Explicit guidance from the language of the state constitution is rare, however, and even if an area is named as belonging to the exclusive control of the university's governing board, courts will have to judge whether the statute, in fact, is within the meaning of the specified area.

Tests which courts most frequently apply in determining whether a statute is lawfully binding upon the constitutionally empowered university are formulated in broad and conclusory terms such as "statewide concern," "public policy," "state policy," and "general police power."¹⁰⁷ Under one or more of these formulations, for example, the worker unemployment compensation statutes applicable to the private sector may also be applied to the University of California,¹⁰⁸ the University of Idaho must observe statutory regulations for the accounting and reporting of expenditures of public funds,¹⁰⁹ courts have applied public sector labor law and the statutory waiver of governmental immunity from tort liability to the University of Michigan,¹¹⁰ state statutes affecting public sector labor relations, highway traffic control, the sale of intoxicants, and forest conservation have been found to be permissible limitations of the power of the Board of Regents

106. See, e.g., CAL. CONST. art. IX, § 9(a) (subjecting the University of California Board of Regents' "full powers of organization and government" to "such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and . . . competitive bidding procedures. . ."); COLO. CONST. art. VIII, § 5 (exempting from legislative or statutory regulation the power of the Regents of the University of Colorado to determine whether to establish and operate schools of medicine, dentistry, nursing, and pharmacy, together with hospitals and supporting facilities and health-related programs, at Denver); HAW. CONST. art. X, § 6 (providing the University of Hawaii Board of Regents exclusive jurisdiction over the internal organization and management of the university).

107. See, e.g., *San Francisco Labor Council v. Regents of Univ. of Cal.*, 26 Cal. 3d 785, 608 P.2d 277, 163 Cal. Rptr. 460 (1980) ("statewide concern" and "police power"); *Levi v. University of Hawaii*, 63 Haw. 366, 628 P.2d 1026 (1981) ("statewide concern"); *Board of Regents v. Board of Trustees*, 491 So. 2d 399 (La. App. 1986) ("public policy"); *William C. Reichenbach Co. v. State*, 94 Mich. App. 323, 288 N.W.2d 622 (1979) ("public policy"); *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975) ("public policy"); *Board of Regents v. Oakley*, 97 Nev. 605, 637 P.2d 1199 (1981) ("public policy").

108. *San Francisco Labor Council v. Regents of the Univ. of Cal.*, 26 Cal. 3d 785, 789, 608 P.2d 277, 279, 163 Cal. Rptr. 460, 462 (1980).

109. *Dreps v. Board of Regents*, 65 Idaho 88, 96, 139 P.2d 467, 471 (1943).

110. *Regents of Univ. of Mich. v. Employment Relations Comm'n*, 389 Mich. 96, 204 N.W.2d 218 (1973) (public sector labor law); *Branum v. Board of Regents*, 5 Mich. App. 134, 145 N.W.2d 860 (1960) (statutory waiver of governmental immunity).

to govern the University of Minnesota,¹¹¹ state statutes concerning worker unemployment compensation and public employee grievance procedures have been held superior to any conflicting governing board rules and regulations at the University of Nebraska,¹¹² and a statute prohibiting any state department, agency, or board from discharging an employee because of age has been held to override the mandatory retirement age policy of the University of Nevada.¹¹³

The use of such generalized and conclusory formulas in testing the permissible limits of statutory regulation of constitutionally empowered universities can easily create an illusion, rather than a reality, of effective limits to statutory regulation. Except for statutes which are clearly special legislation, all state statutes arguably deal with matters of statewide concern; "public policy" and the "police power" tests are equally receptive to conclusions favoring legislatures over special purpose bodies such as university or higher education governing boards.¹¹⁴ In most of these jurisdictions, however, the case law indicates that the courts will bring to the application of these broad and conclusory tests a variety of considerations that can work to defeat arguments favoring applicability of the statutes. At the core of these considerations is the court's attempt to identify the functions which are "essential" or "integral" to the role of a university governing board and without which the constitutional provision granting the governing board the power to perform its role is meaningless.¹¹⁵ As a

111. *Regents of Univ. of Minn. v. Lord*, 257 N.W.2d 796, 801 (Minn. 1977).

112. *University Police Officers Union Local 567 v. University of Neb.*, 203 Neb. 4, 11, 277 N.W.2d 529, 534 (1979).

113. *Board of Regents v. Oakley*, 97 Nev. 605, 637 P.2d 1199 (1981).

114. Similarly broad formulas have been used by courts in deciding whether state statutes prevail over conflicting ordinances and charters of municipalities operating under a home rule constitutional provision. See Westbrook, *supra* note 76, at 61-66, 70-74. However, to analogize between the problems of constitutional construction arising from conflicts between state statutes and ordinances of home rule municipalities and the problems of constitutional construction arising from conflicts between statutes and actions of governing boards of constitutionally empowered universities appears questionable. This is due to the differences typically employed by the framers of the state constitutions in describing the powers of each. Constitutional provisions empowering university governing boards, for example, frequently do not contain a qualifying phrase making it explicit that the boards are to govern in accordance with statutory laws.

115. See, e.g., *Opinion of the Justices*, 417 So. 2d 946, 947 (Ala. 1982); *San Francisco Labor Council v. Regents of Univ. of Cal.*, 26 Cal. 3d 785, 789, 791, 608 P.2d 277, 278, 280, 163 Cal. Rptr. 460, 461, 463 (1980); *Levi v. University of Haw.*, 63 Haw. 366, 371, 628 P.2d 1026, 1029 (1981); *Board of Regents v. Baker*, 638 P.2d 464, 469 (Okla. 1981); *Dreps v. Board of Regents*, 65 Idaho 88, 96, 139 P.2d 467, 471 (1943); *Regents of Univ. of Mich. v. State*, 395 Mich. 52, 65, 235 N.W.2d 1, 6 (1975); *Regents of Univ. of Minn. v. Lord*, 257 N.W.2d 796, 800-01 (Minn. 1977); *Board of Regents v. Judge*, 168 Mont. 433, 450, 543 P.2d 1323, 1335 (1975); *Board of Regents v. Exon*, 199 Neb. 146, 149, 256 N.W.2d 330, 333 (1977); *Board of Regents v. Oakley*, 97 Nev. 605, 608, 637 P.2d 1199, 1200 (1981); *Board of Regents v. Baker*, 638 P.2d 464, 469 (Okla. 1981).

result of this functional screening, courts have held a number of statutes, even if arguably involving matters of "statewide concern" or "public policy," to be impermissible infringements of governing boards's power. In Alabama, the governing boards of the constitutional universities, the University of Alabama and Auburn University, cannot be bound by the statutory requirement that public colleges and universities must have approval of the state higher education commission for either adding or eliminating academic programs and departments.¹¹⁶ In California, the constitutional university, the University of California, cannot be bound by statutory directives fixing either minimum salaries or salary ranges of its employees, whether academic or non-academic.¹¹⁷ In Hawaii, the constitutional university, the University of Hawaii, is immune to statutory regulation of its course offering and student admissions policies.¹¹⁸ In Idaho, the state's nepotism law cannot be made lawfully binding on the constitutional university, the University of Idaho.¹¹⁹

In Minnesota, the constitutional university, the University of Minnesota, is immune to both executive and legislative actions that would deprive the Board of Regents of its autonomy in the University's "internal control and management," including specifically but not exclusively the determination of "educational policy."¹²⁰ Even if, by accepting state appropriations, the Board of Regents appears to have agreed to certain conditions expressly stated in the appropriating legislation, the Board need not honor the conditions if they are "intrusive into the internal control and management" of the university.¹²¹ In Nevada, the legislature may not, through a statute, alter or modify the constitutionally granted power of the Board of Regents of the University of Nevada by mandating the establishment of a group of advisers who would, without the right to vote in Board proceedings, nonetheless be entitled to participate in Board discussions.¹²² In Oklahoma, the constitutionally empowered Board of Regents of the University of Oklahoma is not bound by a statutory directive requiring it to provide to all employees of the University a minimal increase in salaries and wages.¹²³ In Montana, the constitutionally empowered Board of Regents of Higher Education, administering the state's university system, is not bound by statutes limiting salary increases for presidents of campuses within the system, prescribing salary schedules for non-academic employees within the

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

117. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 26 Cal. 3d 785, 608 P.2d 277, 163 Cal. Rptr. 460 (1980).

118. *Levi v. University of Haw.*, 63 Haw. 366, 371, 628 P.2d 1026, 1029 (1981).

119. *Dreps v. Board of Regents*, 65 Idaho 88, 139 P.2d 467 (1943).

120. *Gleason v. University of Minn.*, 104 Minn. 359, 116 N.W. 650 (1908).

121. *Regents of Univ. of Minn. v. Lord*, 257 N.W.2d 796 (1977).

122. *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948).

123. *Board of Regents v. Baker*, 638 P.2d 464 (Okla. 1981).

system, and requiring the deposit of the non-state funds of the university system with the state treasurer.¹²⁴ In Michigan, the governing boards of the constitutional universities, the University of Michigan, Michigan State University, and Wayne State University, are not bound by statutes requiring payment and performance bonds of principal contractors for projects financed by public funds.¹²⁵ While the legislature may advise these universities as to quotas and fees concerning enrollments of out of state students, and may require these universities to inform the state's Board of Education of their plans to initiate new instructional and degree programs, Michigan courts have indicated that if the legislature sought to go beyond the giving of advice in the one area and the requiring of information in the other area, it would be usurping the power constitutionally residing in the universities' governing boards.¹²⁶

VI. CONCLUSION

Of the two fundamental questions about the meaning of a constitutional grant of power to the governing board of a public university in the United States, Missouri courts have directly addressed one and substantially avoided the other in cases involving the Board of Curators of the University of Missouri. The question that has been addressed, and affirmatively answered, is whether the constitutional grant of power permits the governing board to act in the absence of enabling legislation. The Missouri Supreme Court specifically confirmed the Board of Curators' authority, derived from art. IX, § 9(a) of the Missouri Constitution vesting the "government" of the University of Missouri in the Board of Curators, to issue revenue bonds. Indicating a much broader reach of the Board's constitutionally derived power is both a practice of frequent and significant Board use of such power since 1839 and the court's endorsement in *McReynolds* and *Neill* of past usage as an aid in interpreting the permissible scope of this power. The second question, whether a constitutionally empowered university governing board is immune, in exercising its power, to certain, if not all, statutory restrictions, remains unsettled in the case of the Board of Curators of the University of Missouri.

Heimberger, decided in 1916, could be argued as having settled, adversely to the Board of Curators, this second question. However, neither the reasoning nor the subsequent history of *Heimberger* convincingly supports that argument. *Heimberger's* doctrinal reasoning asserting that, by definition, "government" cannot include acts of creation, is so lacking in historical and logical foundations as to make *Heimberger* highly vulnerable

124. Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).

125. William C. Reichenbach Co. v. State, 94 Mich. App. 323, 288 N.W.2d 622 (1979).

126. Regents of Univ. of Mich. v. State, 395 Mich. 52, 235 N.W.2d 1 (1975).

as controlling authority for the proposition that the constitutional grant of power to the Board of Curators becomes a nullity in the face of each and every statute, otherwise valid, that conflicts with a Board rule, regulation, or act. Even when the Missouri Supreme Court later cited *Heimberger*, it did not do so to sustain the applicability of a statute to the University of Missouri, but for the purpose of affirming the validity of art. IX, § 9(a) as a source of implied power for the Board of Curators.¹²⁷

More recent opinions of Missouri courts, in *Public Service Employees Local 45* and *Tribune Publishing Co.*, involving respectively the application of the Public Sector Labor Law and the Open Meetings Law to the University of Missouri, assume without discussion the applicability of both statutes to the University. To state on the basis of these two decisions alone, however, that all statutes, otherwise valid, can be applied to restrict the power granted by art. IX, § 9(a) stretches beyond recognition the limited holdings of these decisions. It also runs counter to the weight of authority in other jurisdictions with constitutionally empowered universities which have deliberately examined the question.

Why is it that, in contrast with the result reached in other jurisdictions with constitutionally empowered university or higher education governing boards, there is still missing, in Missouri, judicial confirmation of the constitutional grant of power as a shield as well as a sword, as a defense against certain types of statutory restrictions of the Board of Curator's power as well as a source of authority for the Board to act in the absence of enabling legislation? Both the grant of power's language in the Missouri Constitution and the 1875 Missouri Constitutional Convention Committee on Education's expectations that its recommended constitutional provision would not allow the legislature to disestablish the University in its entirety or its departments separately seem to encourage, rather than deny, a construction of the constitutional grant of power that includes protective as well as authorizing purposes. History in a broader context also appears to support such a construction: if the 19th century inspiration of constitutional status for the public university in the United States had a single purpose, it was that of assuring the public university some measure of leverage in its relationship with the state legislature to offset the substantial power that would be the legislature's through its control of the appropriations of funds to the university.¹²⁸ A grant of power that can be exercised only as long as it is not affirmatively countered by another body hardly meets the test of leverage that reasonable people have in mind.

A fully developed explanation for Missouri's failure to have secured judicial recognition of a protective purpose, in addition to the authorization purpose, of the constitutional grant of power to the Board of Curators

127. *State ex rel. Curators of the Univ. of Mo. v. Neill*, 397 S.W.2d 666, 669 (Mo. 1966) (en banc).

128. See L. GLENNY & T. DALGISH, *supra* note 7, at 13-19.

of the University of Missouri is not likely to be found solely in an analysis of case law. The refusal in 1916 of the Missouri Supreme Court to follow the 1896 Michigan Supreme Court's lead in declaring a broadly protective purpose in the constitutional grant of power to the state university, may, for example, be explained as much by the differences in public and political perceptions within each state of the purposes of their respective state universities and in the national stature, comparatively, of the two universities as by the reasoning marshalled by the *Heimberger* court to justify its refusal.¹²⁹ But there are elements of an explanation in an examination of the case law in Missouri and they are traceable to the *Heimberger* decision. The reasoning in *Heimberger* stultified further judicial examination of the issue; its interpreting "government" in the constitutional provision pertaining to the Board of Curators so as to exclude acts of "origination" not only ignored the logical and historical contradictions inherent in such an interpretation but as well made unacceptably risky further litigation by the Board on the issue. Without further litigation that either challenged or forcefully argued a modification of the reasoning of *Heimberger*, Missouri courts, in contrast with their counterparts in other jurisdictions, have managed to ignore the issue.

Since 1916, the Board of Curators has avoided a strategy of aggressively testing the limits of the *Heimberger* ruling and, with a few exceptions, the General Assembly has also avoided enacting legislation that is so intrusive into the internal operations and management as to compel the Board of Curators to go to court to test the limits of such regulation.¹³⁰ Although

129. The inordinate difficulty experienced by the University of Missouri in consistently securing state-wide public and financial support is a recurring theme in both of the leading histories of the University. See F. STEPHENS, *supra* note 19, and J. VILES, *supra* note 19. Not unrelated is the failure of the University of Missouri to take a place among the nationally ranked public universities, judging especially by standards appropriate to post-baccalaureate programs. Summarizing the first half-century of the University's development, Viles writes:

It would be idle to assert that these fifty-six years of beginning and preparations contribute any very distinctive chapter in the history of higher education or of state universities. Certainly Missouri did not dominate the intellectual and social history of its state as Harvard did Boston and much of New England, nor even remotely approach such a place in the social history of Missouri. Nor was Missouri the trial laboratory for ideas such as made Michigan unique among western state universities.

J. VILES, *supra* note 19, at 242.

130. In terms of subject matter and potential effect on the future development of the University of Missouri, especially at its more recently established Kansas City and St. Louis campuses, the most significant statutory restriction imposed in recent years by the General Assembly on the Board of Curators results from a provision in the 1974 Reorganization Act, requiring approval by the state Coordinating Board for Higher Education for "proposed new degree programs to be offered by the state institutions of higher education." Mo. REV. STAT. § 173.005(2)(1) (1986). The Board of Curators has chosen not to contest the constitutionality of

legally untidy, the result in Missouri is not without its merits. Ambiguity has its purposes, in law as in other areas of human affairs. Both the Board of Curators and the General Assembly have undoubtedly observed that there is value in not depending principally upon the courts to resolve whatever jurisdictional disagreements they may have in their relationships. Flexibility, conflict avoidance, and compromise frequently advance good purposes, in higher education as in other sectors of society. There is, however, a future price possibly to be paid by the Board of Curators for this ambiguity. In the absence of aggressive efforts to secure judicial acceptance of the claim that the Board's constitutionally granted power limits the statutory regulation of the University of Missouri, the Board might discover in court, at some later date, that its failure to have previously litigated the issue is convincing evidence, in the form of usage, that the claim is without merit.

the applicability of this provision to the Board of Curators, and has followed the practice of first submitting to the Coordinating Board, for its approval, new degree programs proposed for any of the University's four campuses before implementing the programs.

