

# THE AUTONOMY OF THE UNIVERSITY OF CALIFORNIA UNDER THE STATE CONSTITUTION\*

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## INTRODUCTION

Under article IX, section 9 of the California Constitution, the Regents of the University of California are delegated "full powers of organization and government" of the University. The intensified concern in legislative and executive branches of state government throughout the nation with accountability, coordination, and resource allocation in public higher education raises a significant issue under article IX, section 9: To what extent does this constitutional provision give the Regents autonomy in the governance of the University, free of control by the Legislature? Phrased another way, to what extent does the delegation to the Regents of the "full" powers of governance of the University limit the Legislature's delegated lawmaking power?

This broad constitutional question includes a variety of specific issues. For example, can the Legislature establish tenure criteria for faculty positions in the University? Can the Legislature bring the University within the reach of a statute creating a system of collective bargaining for public employees? If so, should there be a distinction between academic and non-academic employees? Can the Legislature regulate the manner of use within the University of confidential peer evaluations of performance of faculty members? Can the Legislature prohibit or regulate recombinant DNA research within the University? Can a state regulatory agency, pursuant to legislatively-granted authority, as part of a general regulation of

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My personal views are expressed in this paper, and these views should not necessarily be attributed to the University of California.

conflict of interests in employment in state agencies, determine when a faculty member may select his or her own book as a required course text? Can such a state agency regulate the conflict of interests aspects of functions of University employees engaged in procurement of equipment? Can the Legislature impose controls on the fields of specialization in which the University's medical schools may or must offer residency programs, or on the number of individuals who may or must be admitted to such programs, or prescribe specific courses which must be included in the schools' curricula in order to qualify their graduates to become licensed physicians? Can the Legislature validly appropriate sums to be expended solely for specifically defined academic programs in the University? Can the Legislature place conditions on expenditure by the University of the annual basic lump-sum appropriation to the University, such as requiring compliance with one or another of the types of regulations set forth above, requiring prior legislative approval for major capital outlay programs or placing restrictions upon purchases of computers?

Analysis of the broad constitutional question—to what extent is the University autonomous?—can shed light on the legal framework within which these and similar issues should be approached. This Article is an effort to develop such an analysis, working toward a statement of principles for application of article IX, section 9 in specific factual contexts.

### I. THE CALIFORNIA CONSTITUTIONAL PROVISIONS

The legal status of a public university under state law is generally described as either "constitutional" or "statutory," designating whether the university has or has not been constitutionally delegated a substantial measure of exclusive powers of governance.<sup>1</sup> Article IX, section 9 places the University in the former category. In contrast, the other two systems of public higher education in California—the California State University and Colleges, and the community colleges—were created by statutory enactment, with governance powers set forth by legislative act and subject to ultimate legislative control.<sup>2</sup> The constitutional delegation of powers of governance of the University to the Regents, in light of the

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1. See L. GLENNY & T. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW (1973). The authors list the following states as having constitutional status universities: California, Colorado, Georgia, Idaho, Michigan, Minnesota, Montana, and Oklahoma. *Id.* at 15. See also Board of Regents of Univ. of Neb. v. Exon, 256 N.W.2d 330 (Neb. 1977) (adding Nebraska to the list of state universities having constitutional status); M. MOOS & F. ROURKE, THE CAMPUS AND THE STATE 18-34 (1959).

2. CAL. EDUC. CODE §§ 92030-92040, 92430-92450 (West Special Pamphlet 1977).

historical background to adoption of article IX, section 9<sup>3</sup> seems clearly to have created a separate branch of state government in the area of higher education, with whatever mix of presumably exclusive governmental powers is implicit in that delegation.

The allocation of full governance powers to the University, originally statutory, was made in the Organic Act of 1868<sup>4</sup> which created the University. The concept in the Organic Act of the separate governing board was modeled on that of Michigan, which had provided constitutional status for the University of Michigan in 1850.<sup>5</sup> During the period in which the University functioned under the Organic Act there was intensive legislative concern with the governance of the University. Specific issues involved whether the University should offer programs not only in "agriculture and mechanical arts" but also in "scientific and classical studies," and whether the Regents had administered the funds of the University in accordance with applicable restrictions.<sup>6</sup> The second president of the University, Daniel Coit Gilman, resigned, stating that "however well we may build up the University, its foundations are unstable, because dependent on legislative control and popular clamor."<sup>7</sup> The "decisive battle for a real University was waged in the constitutional convention of 1879, when, after prolonged consideration and discussion," article IX, section 9 was adopted. "This section of the constitution removed the University from the changeable and sometimes capricious ideas of education and methods of administration advocated from time to time in legislatures."<sup>8</sup>

Since 1879, then, the Regents, under the constitution, have been delegated the powers of governance of the University. Three separate provisions of article IX, section 9 delineate the scope of the exclusive governance powers of the Regents: (a) The Regents are delegated "full powers of organization and government;" (b) these "full powers" are "subject *only* to such legislative control as may be necessary to insure the security of its funds and compliance with

3. See W. FERRIER, ORIGIN AND DEVELOPMENT OF THE UNIVERSITY OF CALIFORNIA (1930) [hereinafter cited as FERRIER].

4. 1867-68 Cal. Stats. ch. 244.

5. Article IX, § 9(a) now provides that "The University of California shall constitute a public trust, to be administered by the existing corporation known as The Regents of the University of California . . . . Said corporation shall be in form a board . . . ." There are seven ex officio members of the Board of Regents, including the Governor, the Lieutenant Governor, the Speaker of the Assembly, and the Superintendent of Public Instruction, and 18 appointed members, nominated by the Governor and approved by the Senate. The Board is empowered to appoint as additional members a faculty member and a student. In selecting Regents, the Governor is required to consult with a designated advisory committee. CAL. CONST. art. IX, §§ 9(a), (c), (e) (1879, amended 1918, 1974, 1976).

6. FERRIER, *supra* note 3, at 355-63, 372-74.

7. *Id.* at 362.

8. *Id.* at 372.

the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services;" (c) the University "shall be entirely independent of all *political* . . . influence and kept free therefrom in the appointment of its regents and in the administration of its affairs."<sup>9</sup>

Several other sections of the California Constitution also bear on the extent of autonomy of the Regents. Article IV, section 12, provides that all state agencies are subject to requirements prescribed by the Legislature concerning submission, approval, and enforcement of budgets. Article IV, sections 10 and 12, provide that the Governor may require a state agency to provide information necessary for preparation of the budget, that the Governor shall submit to the Legislature the budget for state expenditures, and that the Governor may eliminate or reduce the amounts of legislatively enacted appropriations (*i.e.*, veto the amount of an item of appropriation in whole or in part). The autonomy of the Regents, thus, does not extend to the budget and appropriations process, where the legislative and executive branches have their traditional functions. But, as will be shown, this does not mean that the Legislature and Governor can, by placing conditions on the use of appropriated

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9. CAL. CONST. art. IX, § 9(a), (f) (1879, amended 1918, 1974, 1976) (emphasis added).

The phrase "full powers of organization and government," now in § 9(a), was added to the constitution in 1918. The 1879 constitutional provision stated that "[t]he University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the Organic Act creating the same." Sections 11 and 13 of the Organic Act provided that "[t]he general government and superintendence of the University shall vest in the Board of Regents," and that the Regents "have power . . . to enact laws for the government of the University." Organic Act of 1868, 1867-68 Cal. Stats. ch. 244, §§ 11, 13. The ballot argument accompanying the proposed constitutional amendments in 1918 stated that the amendments to art. IX, § 9 made "no change in the status of the university or of the regents, faculty or student body, either as to the legislature or the public, or as between themselves. It does not affect the control or management of the funds of the University or the responsibility of the regents therefor." The amendments were said to have

two purposes: (a) To permit of the adaptation of the details of the internal organization of the university to meet modern-day requirements; (b) to give to the alumni of the university direct representation on the governing body of the university.

Other than the changes mentioned, the amendment makes no change whatever in the governing law of the university under which it has been conducted and administered.

AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 23 (1918) (voter information pamphlet for Nov. 5, 1918 California general election).

The reference to legislative control of competitive bidding procedures was added in 1976.

funds, impair the Regents' powers of governance of the University.<sup>10</sup>

The subject to be examined, then, is the pattern of separation of reciprocally-limited governmental powers created by these provisions of the California Constitution. The question is, to what extent does the constitution vest in the Regents what might be called sovereign "University powers" which cannot be impaired by the Legislature's exercise of its delegated legislative powers? Two groups of cases can shed light on this question—California cases dealing with article IX, section 9 or analogous provisions of the constitution, and United States Supreme Court and California cases dealing with similar separation of powers and other conflict of governmental powers issues. These cases are discussed in the following two sections.

## II. JUDICIAL DECISIONS UNDER ARTICLE IX, SECTION 9

Article IX, section 9, makes the University in a sense a fourth branch of state government for some purposes. Judicial opinions have described the University as "a constitutional department or function of the state government,"<sup>11</sup> "a branch of the state itself,"<sup>12</sup> "a statewide administrative agency possessing adjudicatory powers derived from the Constitution,"<sup>13</sup> "intended to operate as independently of the state as possible."<sup>14</sup> Judicial language has also referred to the Regents' "almost exclusive responsibility for administering the University"<sup>15</sup> and to "matters which are . . . exclusively university affairs."<sup>16</sup> Opinions of the Attorney General have referred to the "large degree of independence and discretion [of the Regents] in respect of the details of the internal government of the University,"<sup>17</sup> and to the University as a "branch of the state government equal and coordinate with the legislative, the judiciary and the executive."<sup>18</sup> These phrases convey a general sense of a

10. See note 56 *infra*. Article XVI, § 8 of the constitution does state a general restraint on the appropriations process as it affects the University: "From all state revenues there shall first be set apart the monies to be applied by the State for support of the public school system and public institutions of higher education." CAL. CONST. art. XVI, § 8 (1974).

11. *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1st Dist. 1967).

12. *Pennington v. Bonelli*, 15 Cal. App. 2d 316, 321, 59 P.2d 448, 450 (3d Dist. 1936).

13. *Ishimatsu v. Regents of the Univ. of Cal.*, 266 Cal. App. 2d 854, 864, 72 Cal. Rptr. 756, 763 (1st Dist. 1968).

14. *Regents of the Univ. of Cal. v. Superior Court*, 17 Cal. 3d 533, 537, 551 P.2d 844, 846-47, 131 Cal. Rptr. 228, 230-31 (1976).

15. *Regents of the Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 534, 476 P.2d 457, 459, 91 Cal. Rptr. 57, 59 (1970), *cert. denied*, 403 U.S. 931 (1971).

16. *Tolman v. Underhill*, 39 Cal. 2d 708, 712, 249 P.2d 280, 282 (1952).

17. 3 OPS. CAL. ATT'Y GEN. 108, 109 (1944).

18. 30 OPS. CAL. ATT'Y GEN. 162, 166 (1957).

cluster of delegated powers which make up the content of "University power," but do not, in themselves, provide a basis for more specificity in measuring or describing this power.

While only a few California cases have raised the question of the mutual limits on the constitutionally-vested University power and the lawmaking power vested in the Legislature, two decisions of the state supreme court do provide a structure for analysis.

In *Tolman v. Underhill*,<sup>19</sup> faculty members of the University brought suit contending that a University-required loyalty oath was invalid as a condition of employment. It was held that the Legislature had validly prescribed an oath applicable to employees in all state agencies, including the University, and that this legislative action "occupied the field," so that the University's duplicative action in the same field was invalid. Although the court did not discuss in detail why the legislative regulation was valid as applied to the University, as will be seen, the decision seems correct. The sole references to the issue of validity were the statements that "the loyalty of teachers at the University . . . is a subject of general statewide concern," and that statutes enacted by the Legislature "under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively University affairs."<sup>20</sup> It is important to emphasize that the latter sentence does *not* say that a statute enacted by the Legislature under its general police power will, without further inquiry, be applicable to the University. Such an interpretation would strip article IX,

19. 39 Cal. 2d 708, 249 P.2d 280 (1952).

20. 39 Cal. 2d at 712, 249 P.2d at 282. See also *Fraser v. Regents of the Univ. of Cal.*, 39 Cal. 2d 717, 249 P.2d 283 (1952). *Tolman* held validly applicable to University employees an oath required by the Legislature of all state employees, containing a promise to support the United States and California Constitutions and faithfully to discharge the duties of office. *Fraser* held validly applicable to University employees an oath subsequently required of all state, county, and city employees, containing the *Tolman* provisions and additional affirmations that the individual did not advocate the overthrow of the government by force and violence and was not, and would not become, a member of an organization which so advocated. At the time these cases were decided art. XX, § 3 of the California Constitution required that all public employees subscribe to an oath similar to that in *Tolman*, and provided that "no other oath, declaration, or test shall be required as a qualification for any office or public trust." The oath in *Fraser* was upheld, in *Pockman v. Leonard*, 39 Cal. 2d 676, 249 P.2d 267 (1952), *appeal dismissed*, 345 U.S. 962 (1953), as being "substantially the same" as the constitutional oath. *Pockman* also upheld the *Fraser* oath against a first amendment challenge. The first amendment holding in *Pockman* was overruled in *Vogel v. County of Los Angeles*, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

It would appear that the constitutional provision in art. XX, § 3 setting forth the required oath for all public employees in the state was a sufficient basis for concluding that the legislatively required oaths in *Tolman* and *Fraser*, "substantially the same" as the constitutional oath, were validly applicable to University employees, on the ground that art. XX, § 3 applied to all government agencies, including constitutional agencies such as the University.

section 9 of most of its significance, and would omit what appears to be a principle necessarily implicit in the court's statement: A statute enacted by the Legislature under its general police power will *not* be validly applicable to the University in areas which are "exclusively University affairs." The critical variable in the formula is not whether a state statute is or is not an exercise of the general police power, but whether the statute deals with a matter which falls within the Regents' exclusive powers of governance of the University. The general applicability of a statute does not conclusively establish that, as applied to the University, the Regents' constitutional power to govern has not been impaired. Further, *Tolman* assumes that there are matters, not described in the opinion, which are "exclusively University affairs."

The other instructive decision of the California Supreme Court is *Regents of the University of California v. Superior Court*,<sup>21</sup> in which it was held that the University was subject, in lending money in the commercial market, to provisions of usury laws applying to "any person, company, association or corporation." While Article IX, section 9 was not specifically mentioned, the case is instructive in describing the scope of University autonomy. As stated by the court, the question was whether the University, a state agency, was excluded from the coverage of the usury laws under the canon of construction that state agencies are not included in general statutory provisions if inclusion would result in an impairment of "sovereign governmental powers." The inquiry was thus into the scope of the University's "sovereign governmental powers." The holding that the University was subject to the usury regulations was, implicitly, a holding that article IX, section 9 also permitted this result. It was not necessary, the court said, to define precisely "the extent of immunity, if any, which the University enjoys."<sup>22</sup> In investing its endowment by making commercial loans the University was "acting in a capacity no different from a private [entity] investing in a similar manner. . . . [I]ts investment decisions are not so closely related to its educational decisions to cloak the former with immunity even if the latter are immune."<sup>23</sup> This hypothesized "immunity" of the University with respect to "educational decisions" could be based not only on general "sovereign governmental powers" of the University, but upon article IX, section 9 as well.

These two cases support the proposition that state legislation is not invalid simply because it bears in some way upon the affairs of the University. "Exclusively University affairs" do not include all "affairs" of the University, and, as will be seen below, neither

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21. 17 Cal. 3d 533, 551 P.2d 844, 131 Cal. Rptr. 228 (1976).

22. *Id.* at 536, 551 P.2d at 846, 131 Cal. Rptr. at 230.

23. *Id.* at 537, 551 P.2d at 846, 131 Cal. Rptr. at 230.

oaths of loyalty and faithful performance of duties by employees nor restrictions on the rate of interest which may be charged on loans fall within the scope of "exclusively University affairs." *Tolman* seems to answer affirmatively, while *Regents v. Superior Court* leaves unexplored, the question whether there are matters which, though included in generally applicable legislation, are subject to regulation only by the Regents. In neither of the cases was there reason for the court to go further in identifying such matters.

There are other illustrations of what is *not* an "exclusively University affair." It has been held that adoption by the Regents of salary rates for employees of the University did not thereby subject the Legislature and the Governor to an obligation to approve the appropriation of funds necessary to enable the Regents to pay those salaries.<sup>24</sup> Here the courts said, and correctly, in light of the constitutional provisions regarding the budget process, that the University's exclusive power to fix salary rates within the University did not limit the vested powers of the Legislature and the Governor to determine the amounts which would be appropriated to the University. Further, it has been said that a statute requiring smallpox vaccination for admission to educational institutions would be validly applicable to the University.<sup>25</sup>

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24. *California State Employees' Ass'n v. Flournoy*, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (2d Dist.), *cert. denied*, 414 U.S. 1093 (1973); *California State Employees Ass'n v. State*, 32 Cal. App. 3d 103, 108 Cal. Rptr. 60 (3d Dist. 1973).

25. *Wallace v. Regents of the Univ. of Cal.*, 75 Cal. App. 274, 242 P. 892 (1st Dist. 1925); *Williams v. Wheeler*, 23 Cal. App. 619, 138 P. 937 (1st Dist. 1913).

*See also* *Estate of Royer*, 123 Cal. 614, 56 P. 461 (1899) (bequest to University subject to statutory limits on testamentary gifts to charities); *Newmarker v. Regents of the Univ. of Cal.*, 160 Cal. App. 2d 640, 648, 325 P.2d 558, 564 (1st Dist. 1958) ("[T]he employment and wage conditions of university employees at different campuses is [not] a matter of general statewide concern like the loyalty of teachers at the university."); 39 OPS. CAL. ATT'Y GEN. 182, 184 (1962) ("A distinction must be drawn between the authority of the regents to provide sick leave benefits or set wages and hours, on the one hand, and the employee's right to organize, be presented and confer on such matters on the other. While the former must, of necessity, relate to the functions of the university and the purpose which it serves, the problems involved in the latter are neither exclusively the concern of the university nor do they limit or control the regents in their authority to govern.").

Members of the faculty of the University recently brought suit to enjoin the Regents from preparing and enforcing a conflict of interest code under the Political Reform Act of 1974, which requires governmental agencies to adopt such codes after review by the Fair Political Practices Commission. CAL. GOV'T CODE §§ 87300-87312 (West 1976). Plaintiffs contended that application of the Act to the University would be a violation of art. IX, § 9. The trial court, on motion for summary judgment, held that the Act was "not an unconstitutional intrusion on the authority of the Regents to administer the internal affairs of the University," that of the Act would not "constitute an impermissible impairment of the Regents' powers of organization and government," and that the "contention that the Act would violate the constitutional independence of the University, with respect to academic function, is premature and, therefore, presently without merit." *Barnett v. Regents of the Univ. of Cal.*, No. 491611-8 (Super. Ct., Alameda Co., Cal., May 6, 1977).



One other California Supreme Court decision should be mentioned which, although it did not involve article IX, section 9, illustrates the potential scope of that provision's application as a limitation on the Legislature's lawmaking powers in the budget and appropriations process. In *State Board of Education v. Levit*,<sup>26</sup> the Board of Education, which has some specific delegated powers under the state constitution,<sup>27</sup> challenged a budget control provision that none of the designated appropriated funds should be expended for the purchase of two named science textbooks. This provision was held invalid, in view of the Board's constitutionally delegated power "to provide . . . and adopt a uniform series of textbooks,"<sup>28</sup> for use in public elementary schools. This power to select textbooks, the court said, was exclusively delegated to the Board, and thus could not be exercised by the Legislature. The delegated powers of the Legislature in the appropriations process were thus held to be subordinate to the Board's powers with respect to selection of textbooks. *Levit* involved a relatively specific power vested in the State Board of Education by the constitution. To the extent that exclusive "University powers" are vested in the Regents by article IX, section 9, budget control provisions in legislative appropriations of funds to the University which are found significantly to impinge upon those powers of the Regents would be similarly invalid.

### III. JUDICIAL DECISIONS CONCERNING SEPARATION OF GOVERNMENTAL POWERS

Although California cases neither establish what are "exclusively University affairs" which fall solely within the Regents' governance powers, nor delineate the scope of article IX, section 9 as a limitation on the lawmaking power vested in the Legislature, guidelines for an approach to these questions can be developed from decisions by the United States Supreme Court and California courts in analogous cases. Cases involving issues of separation of powers and other conflicts of governmental powers identify three inter-related factors which are relevant to the article IX, section 9 issue: (1) what will be referred to here as the "centrality" of the subject matter to the functioning of the branch of government involved; (2) the degree of impairment of the powers of the branch of government involved; and (3) the interest advanced by the act of a branch of government said to impair the powers of another branch.

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*See also* *People v. Kewen*, 69 Cal. 215, 10 P. 393 (1886) (Legislature could not validly change form of governing board of Hastings College of Law from what it was at time of adoption of art. IX, § 9 in 1879).

26. 52 Cal. 2d 441, 343 P.2d 8 (1959).

27. CAL. CONST. art. IX, § 7.5 (1970).

28. *Id.*

*United States v. Nixon*<sup>29</sup> illustrates the relevance of these factors. There it was held that a subpoena for tape recordings of conversations in the President's office for use in a criminal prosecution in a federal court was enforceable. The interest advanced by recognition of the asserted constitutionally based executive privilege was said to be insufficient to outweigh the consequent impairment of exercise of the federal courts' constitutionally delegated powers in the administration of criminal justice. The Court pointed out that the outcome would not necessarily be the same in other fact situations where assertion of the confidentiality of presidential communications might have an impact on the exercise of legislative or judicial powers: "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets."<sup>30</sup>

A similar approach to separation of powers issues is found in decisions of the California Supreme Court. The court has held, for example, that the Legislature can validly regulate the "practice and procedure" by which the courts can impose sanctions in summary proceedings for criminal contempt. Such valid regulation can include legislatively declared maximum fines and periods of imprisonment, so long as they do not deny to the courts "sufficient power to maintain [their] dignity" by the exercise of a power essential to the "very existence" of the courts.<sup>31</sup> The courts' power, under statute, summarily to impose punishment on a contemnor of not more than five days imprisonment and of not more than a \$500 fine, in light of a statutory pattern which included various sanctions, among them the possibility of criminal prosecution which could lead to six months imprisonment, was thus held not "inadequate for a court to vindicate its authority."<sup>32</sup>

Similar separation of powers issues have arisen in California cases with respect to the power of the courts to prohibit or to require specific actions by the legislative or executive branches. It is generally said, for example, that a court cannot interfere with the constitutionally delegated legislative function by enjoining the adoption of an ordinance or other similar legislative act.<sup>33</sup> Further, it has been held that a court cannot compel the Legislature to appropriate funds

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29. 418 U.S. 683 (1974).

30. *Id.* at 712 n.19.

31. *In re McKinney*, 70 Cal. 2d 8, 11-12, 447 P.2d 972, 974-75, 73 Cal. Rptr. 580, 582-83 (1968).

32. *Id.* at 12, 447 P.2d at 975, 73 Cal. Rptr. at 583.

33. *See, e.g., Santa Clara County v. Superior Court*, 33 Cal. 2d 552, 203 P.2d 1 (1949); *Johnston v. Board of Supervisors*, 31 Cal. 2d 66, 187 P.2d 686 (1947).

to support salary rates in the University fixed by the Regents, because the appropriation of tax revenues is a legislative power,<sup>34</sup> and that a court may not declare the Governor's veto of a salary appropriation by the Legislature to be a nullity, because the "signing or vetoing of bills are acts inherently executive or political in nature, and the courts will not interfere with their performance."<sup>35</sup>

Cases involving conflicts of governmental powers other than between separate branches of the same governmental entity are also relevant to the extent to which article IX, section 9 may be viewed as a limitation on the powers of the California Legislature. One such case, decided by the United States Supreme Court, is *National League of Cities v. Usery*,<sup>36</sup> which held invalid an act of Congress making the minimum-wage, maximum-hour provisions of the Fair Labor Standards Act applicable to employees of state and local governments. The majority concluded that determination by federal law of wages and hours of state employees had such potential adverse impact on state governmental functions—increase in costs, reduction in programs, displacement of state policies regarding the manner in which governmental programs will be structured, impairment of the state's ability to structure the employer-employee relationship—that the federal statute was an impermissible interference with the exercise of those state functions. The terminology used in the majority opinion is useful for article IX, section 9 purposes: identification of "functions essential to [the] separate and independent existence" of state and local governments.<sup>37</sup> The result in *National League of Cities* was distinguished by the majority from that in an earlier case, *Fry v. United States*,<sup>38</sup> which upheld the validity of a federal statute which temporarily froze the salaries of state and local government employees. That regulation, the Court said, dealt with "an extremely serious problem which endangered the well-being of all of the component parts of our federal system," was "carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time," did not displace state policy choices but only temporarily froze choices states had already made, and did not increase, but acted to reduce, pressures on state budgets.<sup>39</sup> A concurring opinion highlighted what the majority said in deciding the case and in distinguishing *Fry*: The Court was adopting a "balancing approach," so that federal power

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34. *California State Employees' Ass'n v. Flournoy*, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (2d Dist.), *cert. denied*, 414 U.S. 1093 (1973).

35. *California State Employees' Ass'n v. State*, 32 Cal. App. 3d 103, 109, 108 Cal. Rptr. 60, 65 (3d Dist. 1973).

36. 426 U.S. 833 (1976).

37. *Id.* at 845 (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

38. 421 U.S. 542 (1975).

39. 426 U.S. at 853.

was not denied "in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."<sup>40</sup>

In the cases dealing with state regulation of interstate commerce, the Supreme Court has followed a similar approach in resolving conflicts of federal and state powers. Here the interest advanced by the state regulation and the impairment of the national interest in having unburdened interstate commerce are weighed against each other in determining whether the state regulation constitutes an unreasonable burden on interstate commerce, with possible significance given to the availability to the state of other means of achieving the purposes of the state regulation with a less burdensome impact on the national interest.<sup>41</sup>

Certain aspects of the California Supreme Court's approach to the issue of "vertical" conflict of governmental powers under California law, an issue analogous to that in *National League of Cities*, appear relevant in developing an approach to article IX, section 9. The issue of vertical conflict involves the scope of "municipal affairs" under article IX, section 5(a) of the California Constitution, which provides that charter cities may regulate "in respect to municipal affairs . . . and in respect to other matters they shall be subject to general laws." Under this provision the Legislature cannot validly enact legislation applicable to a charter city on a matter which is a "municipal affair," while such cities are subject to applicable state law on matters of "statewide concern."<sup>42</sup> The delegation of lawmaking powers in municipal affairs to charter cities is a limitation on the legislature's lawmaking powers. In each case it is for the court to declare whether the subject matter is of statewide or municipal concern, the result of the decision being recognition of exclusive lawmaking power at the city level if the matter is found to be a municipal affair.

Many decisions concern the scope of municipal affairs under this provision, and no attempt will be made here to develop a

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40. *Id.* at 856 (Blackmun, J., concurring).

41. *See, e.g.,* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

42. *See generally* *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969) (state legislation requiring payment of prevailing wages not applicable to employees of charter cities); *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964) (city ordinance prohibiting "any game of chance" valid as regulation of a municipal affair); *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963) (state legislation regulating employer-employee relations applicable to charter cities, as employers, and their employees); *Younger v. Berkeley City Council*, 45 Cal. App. 3d 825, 119 Cal. Rptr. 830 (1st Dist. 1975) (state legislation applicable to maintenance by charter cities of state arrest records of individuals contained in city police department files).

synthesis of the doctrine of these cases.<sup>43</sup> In at least some of the cases, a balancing approach, similar to that in the cases discussed earlier, is used. For example, it has been held that state law controlled the issuance of bonds by a city to finance its share of an intercity water pollution control project, because, while treatment and disposal of sewage is generally a municipal affair, the project affected matters of statewide concern such as protection of navigable waters and public health.<sup>44</sup> It has also been held that while a charter city can validly regulate the location and manner in which telephone poles are installed on city streets, as well as require installation under the supervision of a city agency and restoration of the streets to their prior condition, the city cannot completely prohibit telephone lines within the city because of the impact of such a regulation on the statewide communication system.<sup>45</sup> In these cases, a holding that the city had exclusive lawmaking powers would have significantly impaired the Legislature's power to deal with matters of statewide concern. Other decisions do not as clearly identify the factors relevant in allocating lawmaking authority to the charter city or the state, but similarly illustrate the factor of impairment of state-level authority to deal with issues of statewide concern. For example, the court has held that although some aspects of regulation of public employment in charter cities are municipal affairs, such as personnel policy concerning hiring and salaries, a state statute could validly regulate other aspects of public employer-employee relations, such as the rights of employees to join labor organizations. "The total effect of all this legislation [state legislation dealing with employer-employee relations in private and public employment] was not to deprive local government . . . of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state."<sup>46</sup>

An important contrast between "municipal affairs" under article XI, section 5(a) and "University affairs" under article IX, section 9 should be emphasized. A holding that a matter is a "municipal affair" declares that the matter is not subject to regulation at the state level. The state is not a federation of charter cities with reserved sovereign powers (as is the federal government with respect to the states), and hence it might be expected that a relative-

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43. For a provocative discussion of the California decisions on municipal affairs, a discussion which should be influential, see Sato, "*Municipal Affairs*" in *California*, 60 CALIF. L. REV. 1055 (1972).

44. *City of Santa Clara v. Von Raesfeld*, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970), *cert. denied*, 403 U.S. 931 (1971).

45. *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959).

46. *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294-95, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).

ly narrow range of matters would be held to be municipal affairs, lawmaking power concerning which was exclusively delegated to local rather than statewide government. Article XI, section 5(a) distributes governmental powers between the state and local agencies; article IX, section 9 distributes governmental powers among branches of government at the state level. A holding that a matter has such impact on statewide concerns as not to be a municipal affair would thus not be closely relevant in determining whether the constitution has delegated governmental powers concerning a matter of statewide concern to the Legislature or to the University, each a branch of state government. A similar observation applies to the potential relevance under article IX, section 9 of a decision that a matter is not a municipal affair because of the need for uniformity in regulation of the matter throughout the state. Article IX, section 9 by definition contemplates that regulation of an exclusively University affair by the Regents may differ from regulation by the Legislature of that matter as applied other than to the University. Thus, although the general approach in some of the municipal affairs cases suggests elements of an approach to interpretation of article IX, section 9, the conclusion does not follow that decisions about the scope of "municipal affairs" would necessarily define the scope of "University affairs."

#### IV. THE SCOPE OF THE CONSTITUTIONAL AUTONOMY OF THE UNIVERSITY

The cases discussed in the preceding section suggest three factors which can now be discussed in the specific context of determining the application of article IX, section 9 as a limitation on the delegated lawmaking powers of the Legislature: (1) the centrality of the subject matter to the functioning of the University as a university; (2) the degree of impairment of the Regents' "full" powers of governance; and (3) the interest advanced by the legislative enactment. These three factors together provide the approach to application of the general constitutional principle advanced in this Article: An unreasonable impairment by the Legislature of the Regents' "full" powers of governance with respect to "University affairs" is unconstitutional under article IX, section 9.

##### A. *The Centrality of the Subject Matter to the Functioning of the University as a University*

The question considered in this section is what powers of governance with respect to University affairs should be held to have been delegated "exclusively" to the Regents by article IX, section 9 as that term was used by the California Supreme Court in *Tolman*. The inquiry is similar to that implicit in the cases discussed earlier:

the scope of the "judicial power" in the administration of criminal justice in *United States v. Nixon*; the scope of the judicial power to punish for contempt, said in the California cases to be essential to the "very existence" of the courts; the scope of the legislative lawmaking powers and executive veto powers held not to be subject to control by judicial order; and the scope of the state and local governmental powers protected against federal impairment in *National League of Cities v. Usery*. A useful phrase to describe the focus of the inquiry is found in *National League of Cities*: "functions essential to [the] separate and independent existence"<sup>47</sup> of the University, *as a university*, and as a separate branch of state government. It is with respect to such functions that the Regents should be said to have exclusive powers of governance under article IX, section 9.

Central functions of the University, as a university, as distinguished from the central functions of the legislative, executive and judicial branches of state government, and as distinguished from the University's "non-university" functions, would encompass the academic aspects of administration of the University. Included, for example, would be such matters as determination of the content of courses and curricula; requirements for degrees; conduct of research; establishment of policies and procedures concerning selection, retention, and conditions of employment of academic personnel; internal allocation of resources; initiation, administration, revision, and termination of academic programs; establishment of patterns of internal governance; and determination of at least the academic aspects of admissions criteria. Legislative enactments which unreasonably impair the power of the Regents to govern with respect to such matters would be invalid under article IX, section 9.

From this perspective there would be, for example, a distinction between legislative regulation which affected matters related to curriculum and degree requirements in the University and matters related to health and safety aspects of construction and maintenance of buildings by public agencies. A legislative requirement that University employees subscribe to a constitutionally valid loyalty oath applicable to all public employees, not dealing with any special aspect of employment in the University as a university and not impairing the Regents' governance of University affairs, would not raise significant article IX, section 9 issues.<sup>48</sup> Nor would legislative requirement of a smallpox vaccination for admission to educational institutions, nor regulation of the amount of interest public agencies can charge in lending funds in the commercial market. There might,

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47. 426 U.S. at 845 (quoting from *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

48. See note 20 *supra*.

under the centrality principle, be a constitutional distinction between legislative regulation of policies and procedures, including collective bargaining, related to academic and to non-academic personnel in the University. There might also, under this principle, be a constitutional distinction between legislative regulations of conflict of interest matters within the University prohibiting, for example, a faculty member from assigning as a required text a book written by the faculty member, as compared with prohibiting any University personnel, academic or non-academic, with a financial interest in the matter, from participating in decision making concerning procurement of equipment from external vendors.

It would be irrelevant to application of the centrality principle whether or not a legislative regulation singled out the University. The degree of impairment of governance power delegated to the Regents by article IX, section 9 would not be affected by whether the legislative regulation was or was not of "general" application. This is illustrated by *National League of Cities v. Usery*, and by the principle that, to the extent that matters fall within the scope of exclusively "municipal affairs" under the California Constitution, the Legislature is not empowered to make provisions of otherwise valid "general law" applicable to charter cities. The centrality principle is an element of an approach to effectuating a constitutional separation of governmental powers, and the principle of separation should not be obscured because the Legislature simultaneously is validly regulating other entities and persons within the reach of the Legislature's delegated powers.

A legislative regulation need not concern a matter itself falling within the centrality principle in order for the regulation to have an unconstitutional impact on the Regents' powers of governance. For example, it was noted above that under the centrality principle there might be a distinction between legislative regulation of aspects of personnel policy pertaining to academic and non-academic employees in the University. But it would not follow that all legislative regulation of non-academic personnel policy would be beyond scrutiny under article IX, section 9. For example, legislative withdrawal from the Regents and placement in another state agency of the power to determine salary levels and other conditions of employment of non-academic personnel might so affect the power of the Regents to allocate resources effectively and to maintain a desired relationship between policies concerning academic and non-academic personnel as to be an unreasonable impairment of the Regents' full powers of governance with respect to matters central to the functioning of the University as a university.



B. *The Degree of Impairment of the Regents' "Full" Powers of Governance*

Several of the separation of powers and other cases discussed earlier illustrate the relevance of this second factor in applying article IX, section 9. The California courts have held, for example, that the Legislature can regulate aspects of the courts' exercise of summary judicial powers to punish for contempt, as long as the regulations do not deny to the courts sufficient authority to effectuate the contempt power.<sup>49</sup> *National League of Cities* distinguished between the impact on state and local governments, in the form of increase in costs and reduction in programs and the like, of the Fair Labor Standards Act and of a temporary federal freeze on salaries of employees of state and local governments that was limited to a specific time period and did not increase pressures on state budgets. One of the "municipal affairs" cases also illustrates this principle: The prohibition by a charter city of construction of telephone poles within the city was held not a municipal affair, although the city could regulate in a less prohibitory way by requiring a permit and city supervision of construction, and by requiring restoration of the construction site to status quo.<sup>50</sup>

This degree of impairment principle can be relevant under article IX, section 9. For example, there would be a constitutional distinction between a condition included in an appropriation item in the Budget Act requiring the University, in spending the appropriation, to follow a specific course of action on a matter falling within the core of the centrality principle, such as adopting or phasing out a specific academic program, and a "request" or "statement of intent" to the same effect. The condition on the appropriation would be invalid, while the statement of request or intent, phrased so as not to be binding on the University, would not violate article IX, section 9.<sup>51</sup> It might be constitutional under article IX, section 9 for the Legislature to require that *if* the University uses confidential peer evaluations of performance in administering the academic

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49. See note 31 & accompanying text *supra*.

50. *Pacific Tel. & Tel. Co. v. City and County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959).

51. There are several statutory provisions which illustrate this distinction: CAL. EDUC. CODE §§ 22508.5-.6 (West Supp. 1977) (State University and Colleges and community colleges directed to take into account an applicant's nontaxable income in awarding financial aid; University of California "requested" to do so); *id.* § 22509.18 (statute dealing with maintenance of student files applicable to University upon adoption of a resolution by the Regents to that effect); *id.* § 22864 (regulations of tuition fees for nonresidents applicable to University only if the Regents, "by resolution, make such provision applicable"); *id.* § 22636 (requirement that institutions of public higher education adopt regulations concerning student conduct applicable to University "to the full extent authorized" by art. IX, § 9).

personnel process, there should be reasonable procedures to permit an individual to learn the substance but not the source of such evaluations (Under the centrality principle it would be questionable whether the Legislature could validly declare that such confidential evaluations should or should not be used with respect to academic personnel.). But it would not follow that the Legislature could validly declare the specific procedure to be followed to provide substance but not source to the individual from among a range of procedures which would have varying impact on the academic personnel process. There would also be a constitutional distinction between a legislative requirement that the University solicit and consider the advice of the Postsecondary Education Commission before adopting new academic programs<sup>52</sup> and a legislative requirement that new programs not be initiated in the University without the approval of the Commission.

### C. *The Interest Advanced by the Legislative Enactment*

In resolving any issue concerning conflict of governmental powers, a relevant factor is the significance of the policy declared by the branch or entity of government which would be denied power. For example, while the interest advanced by recognition of the asserted executive privilege in *United States v. Nixon*—encouragement of candor in executive branch internal communications—was said to be insufficient to outweigh the consequent impairment of the courts' powers to administer criminal justice, the Court pointed out that the executive privilege would not necessarily have to give way in other fact situations, *e.g.*, where the interest advanced by recognition of executive privilege would be preservation of "state secrets." The validity of a state regulation of interstate commerce turns, in part, on the state interest advanced by the regulation. The Court, in *National League of Cities*, distinguished the unconstitutional application to state and local government of the Fair Labor Standards Act from the constitutional application to such governmental entities of a temporary federally-imposed wage freeze, which dealt with "an extremely serious problem which endangered the well-being of all of the component parts of our federal system."<sup>53</sup> In some of the "municipal affairs" cases a matter has been held not to be a municipal affair because of the consequence of such a holding on the power of the state effectively to deal with matters of statewide concern.

The preceding analysis has suggested some interests which should not be held to validate legislative impairment of the Regents'

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52. See CAL. EDUC. CODE §§ 22710-22716 (West Supp. 1977).

53. 426 U.S. at 853.

powers of governance with respect to central University affairs. That a legislative regulation deals with a matter of statewide concern would not be a compelling argument for validity of application to the University, for the Regents are delegated powers of governance with respect to one category of matters of statewide concern—University affairs. That application of a legislative regulation to the University would provide statewide uniformity of regulation of the subject matter would not be a compelling argument for validity, for the Regents are delegated powers of governance with respect to University affairs, and the necessary consequence of that distribution of powers must be that the Legislature and the Regents might regulate the same subject matter in different ways. That the Legislature has the delegated power to appropriate, and to oversee the expenditure of, state funds would not be a compelling argument in itself that the Legislature could therefore regulate University affairs through the appropriations process, for such an interpretation of the appropriations power would negate the delegation of governance powers to the Regents.

The question of the relationship between article IX, section 9 and the Legislature's lawmaking powers in the appropriations process is of special significance: Can the autonomy of the University, as defined in this Article, be effectively reconciled with the power of the Legislature with respect to appropriation of funds for support of the University? There appears to be no compelling reason why there should be a difference between the effect of article IX, section 9 as a limitation on the lawmaking powers of the Legislature exercised in the form of regulatory legislation and exercised in the form of conditions on the appropriation of funds. Control language in appropriations—whether in the general support appropriation to the University or in individual line-item appropriations<sup>54</sup>—can as effectively impair the powers of the Regents to govern the University as can regulatory legislation. Article IX, section 9 is thus as much a limitation on the Legislature's powers in the appropriations process as it is a limitation on the other delegated lawmaking powers of the Legislature. *State Board of Education v. Levitt*,<sup>55</sup> discussed earlier, demonstrates this point: the Board of Education was not bound by a condition on an appropriation which would have impaired the Board's exercise of its constitutionally delegated power to select public school textbooks.

54. For the year 1977-78 the general support appropriation to the University was approximately \$700,000,000. 1977-78 Budget Act, 1977 Cal. Stats. ch. 219, § 2, item 311. Two separate appropriations, totaling approximately \$36,000,000, were designated for salary increases, *id.* items 379.2-3, and approximately \$7,000,000 was appropriated in a dozen separate items for specifically designated purposes. *Id.* items 311.1-322.1.

55. 52 Cal. 2d 441, 343 P.2d 8 (1959).

This does not mean that the Legislature cannot influence the expenditure of funds by the University. The University can, and should, be required to justify its requests for funds, and the Legislature can properly request, and seek to persuade, the University to expend its funds in specific ways. The University can, without impairing its autonomy, indicate its willingness or unwillingness to comply with requests of the Legislature as to the expenditure of funds which might be appropriated. Although the Legislature ultimately determines the amount of funds to be appropriated to the University, it should no more thereafter control how the University expends appropriated funds within the range of "University affairs" under article IX, section 9 than should the University's requests control the amount the Legislature appropriates for support of the University.<sup>56</sup>

56. "The power of the legislature to provide the requisite money and to limit and decrease the amount considered by the regents to be necessary is entirely a different function from the administration and control of the University itself." *King v. Board of Regents*, 65 Nev. 533, 569, 200 P.2d 221, 238 (1948). For references to decisions concerning the validity of conditions on appropriations to constitutional status universities, see L. GLENNY & T. DAGLISH, *PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW* 155-63 (1973); *Regents of the Univ. of Mich. v. Michigan*, 395 Mich. 52, 235 N.W.2d 1 (1975).

A separation of powers limitation on the powers of the Legislature in the appropriations process was illustrated in the Governor's approval of the 1977-78 California state budget. Governor Brown vetoed language which would have required approval by a legislative committee of authorization by the Director of Finance of augmentations from federal sources of funds for social services programs. One of the reasons given by the Governor for elimination of this requirement was that this "language constitutes an encroachment upon the duties and responsibilities of the executive branch in violation of the separation of powers provision . . . of the California Constitution." The Governor also eliminated a similar reference to approval of an executive action by a legislative committee in another provision of the Budget Act. 1977 Cal. Stats. ch. 219, at 11 (statement of Governor in approving budget).

The Legislative Counsel of California has in a recent opinion dealt with art. IX, § 9 aspects of various conditions on appropriations considered by the Legislature in the 1977-78 Budget Act for support of the University (The provisions opined about were not included in the Budget Act as finally enacted.). The opinion stated the following general principles:

[1] appropriations for the support of the University [cannot] be conditioned or limited in such a way as to constitute, by indirection, the assumption by the Legislature of some phase or aspect of internal university administration.

[2] [I]t is within the exclusive province of the Legislature to determine the amount or amounts which the fiscal exigencies of state government will permit to be appropriated for the support of the university, or for some particular purpose connected with university operation. . . .

[3] [T]he Legislature may also validly condition an appropriation of a specific sum upon some undertaking by the regents if there is a correlation between the sum and the undertaking. . . . Since the regents have the option of exercising a real choice, there would be no interference in the internal affairs of the university.

[4] However, an unrelated condition upon a budgeted item which would infringe upon the internal affairs of the university would be unconstitutional.

An example of a legislative regulation which might be validly applicable to the University, even though University affairs would thereby be regulated, would be the current statutory provision requiring that an applicant for a license to practice as a physician be a graduate of a medical school approved by a state agency and setting forth specific subjects which must be covered in a school's curriculum in order for the school to be approved.<sup>57</sup> Here a legislative regulation of the qualifications for licensing in a profession has direct impact on a matter central to the functioning of the University as a university, and the interest in protection of the public health advanced by the regulation would be a relevant argument in favor of its validity.

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[5] The requirements of Section 9 of Article IV of the California Constitution that a statute embrace a single subject only, operate to preclude the Legislature from appending to appropriations made by that act conditions and limitations going beyond the immediate fiscal concerns and extending into the realm of statutory law.

OPS. CALIF. LEGISLATIVE COUNSEL, UNIVERSITY OF CALIFORNIA APPROPRIATIONS 2-3 (No. 10903) (June 2, 1977), on file in the *UCLA Law Review* office.

It seems difficult to reconcile these principles. Why does the fact that a condition is in a line-item appropriation of a "specific sum" instead of in the general support lump-sum appropriation make it, for that reason, any less an "assumption by the Legislature of some phase or aspect of internal university administration"? If the Legislature can "validly condition an appropriation of a specific sum upon some undertaking by the regents if there is a correlation between the sum and the undertaking," why cannot the same condition be attached to the lump-sum appropriation? Why, for art. IX, § 9 purposes, should it make any difference whether "there is a correlation between the sum and the undertaking"?

The one possibly controlling distinction between the conditioned lump-sum appropriation and the conditioned line-item appropriation is, in the latter case, the Regents' "option of exercising a real choice, [so that] there would be no interference in the internal affairs of the University." It can be argued that in a practical sense there would not be a significant difference between an appropriation with a non-binding legislative request as to how the funds should be expended and an appropriation with a binding condition, with the option in the University to reject the appropriated funds. But it is not the difference in form between the request and the rejectable appropriation which creates doubt about this aspect of the Legislative Counsel's opinion. It is, rather, the proposed principle that the Legislature in some circumstances can appropriate funds in a manner in which, if the University accepts the appropriation, the University's discretion in matters falling within the scope of exclusive University affairs would thereby be subjected to legislative control. It can indeed be argued that the University would not have a "real choice" to reject the general support appropriation (approximately \$700,000,000 in 1977-78) because of unacceptable conditions, while it would have such choice with respect to a \$25,000 appropriation conditioned on use in a prescribed way on a matter falling within the scope of "University affairs." But one need not hypothesize too many subdivisions of the lump-sum appropriation into units of smaller amounts before binding conditions on the appropriated sums could indeed add up to a pattern of legislative control of University affairs. The degree of "freedom of choice" available to the University in deciding whether or not to accept a specific appropriation does not appear to be a viable principle on which to base determinations of constitutionality under art. IX, § 9. The principle should be that any condition on appropriated funds is invalid if, in the form of a regulatory measure, the condition would be found to be an unreasonable impairment of the Regents' powers of governance with respect to University affairs.

57. CAL. BUS. & PROF. CODE § 2192 (West Supp. 1977).

Although the interest advanced by a legislative regulation is a factor to be considered in determining whether there has been an unconstitutional impairment of the Regents' powers of governance with respect to University affairs, it does not follow that any rational basis for a legislative enactment should lead to the conclusion that the legislation is validly applicable to University affairs. Article IX, section 9 declares a basic principle concerning allocation of "full" powers of governance concerning University affairs. This is a constitutional delegation of lawmaking powers to the Regents with respect to a subject area which would otherwise fall within the scope of the Legislature's delegated powers. The presumption should be that in a case of conflict of governmental powers this delegation to the Regents will prevail. If a legislative regulation significantly impairs the powers of the Regents to govern the University with respect to a central University affair, there should be a demonstrable compelling interest advanced by the regulation in order to validate its application to the University.

#### CONCLUSION

The purpose of this Article has been to suggest a statement of the principle declared by article IX, section 9 of the California Constitution—an unreasonable impairment by the Legislature of the Regents' "full" powers of governance with respect to "University affairs" is invalid under article IX, section 9—and to suggest specific factors which are relevant in applying this principle. Faithfulness to the constitutional status of the University requires that this principle be in the forefront of discussion in the articulation of public policy concerning the University, in whatever forum the issue might arise. Resort to the courts is not likely to be a totally effective way to implement this principle, because litigation in what is essentially a political relationship between the University and the other branches of state government can be only an ad hoc means of enforcing the principle, and because the Legislature and the Governor have the ultimate power of appropriation of funds for support of the University.<sup>58</sup> Thus it is essential that the University, the Legisla-

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58. [T]he real question here [in a suit challenging validity of conditions on appropriations to constitutional status universities] is not judicial power but legislative power . . . . [W]hatever powers the universities may constitutionally hold, the Legislature holds the power of the purse. Regardless of what this Court might find, the matter remains one of power and politics.

Regents of the Univ. of Mich. v. Michigan, 395 Mich. 52, 73, 235 N.W.2d 1, 9 (1975).

It has taken 70 years to raise this first issue of power between regents and Legislature. [The litigation challenged the validity of a statute which subjected University expenditures to supervision and control by an executive branch agency.] That makes safe the assumption (very comforting to the

ture, and the Governor be continually sensitive to the significance of article IX, section 9 in the day-to-day relationships between the University and these other branches of state government, and that in these relationships this constitutional principle be accorded its appropriate import.<sup>59</sup>

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characteristic judicial aversion to issues between departments or officers of government) that, with this broad indication of their respective fields of power, their mutual regard for each other's constitutional provinces will make unnecessary any further judicial attempt to mark the precise line dividing their respective jurisdictions.

State *ex rel.* University of Minn. v. Chase, 175 Minn. 259, 267, 220 N.W. 951, 954 (1928). See R. O'Neil, *Law and Higher Education in California*, in PUBLIC HIGHER EDUCATION IN CALIFORNIA 191, 192-93 (N. Smelser & G. Almond eds. 1974).

59. In November, 1977, the Legislative Counsel of California issued an opinion on the validity under art. IX, § 9 of a pending bill in the California Legislature (Senate Bill 251, introduced February 7, 1977, as amended August 8, 1977) which would regulate various aspects of the University's personnel system. The Legislative Counsel concluded that some provisions of the bill would be unconstitutional. OPS. CAL. LEGISLATIVE COUNSEL, UNIV. OF CAL. EMPLOYEES (No. 6528) (November 2, 1977), on file in the UCLA Law Review office.

The bill covered solely the maintenance of personnel files and the operation of the personnel process in the University. The basic principle referred to in the opinion was that such regulatory legislation would be validly applicable to the University if the legislation dealt with a matter of general statewide concern. Some provisions of the bill were said to be constitutional because existing legislation made similar policies generally applicable to state employees. Other provisions of the bill were said to be unconstitutional, because there were not analogous existing legislative regulations applicable to other state agency personnel systems. The conclusions of unconstitutionality seem clearly correct. If a legislative regulation applies *only* to the University and does not pertain to a matter of general statewide concern, it is very likely that the subject matter is an "exclusively University affair."

But the analysis in the opinion is incomplete in focusing only on whether the legislative regulation to be applied to the University is of general statewide applicability. Such an approach does not sufficiently and separately identify the ultimate inquiry whether the regulation unreasonably impairs the Regents' powers of governance with respect to University affairs. See notes 19-20, 53-55 & accompanying text *supra*. Other provisions of the bill would be unconstitutional under this standard. For example, the bill provided, as an exception to the principle declared in the bill that University employees should have access to information in their personnel files, that sources of written evaluations of the performance of some categories of academic employees were not required to be disclosed to those employees as long as they were provided access to the content of that material. But the bill did not permit this procedure with respect to other categories of academic employees, as to whom the University also receives such evaluations with the understanding that the sources will not be disclosed. Thus this legislative regulation would have specifically prescribed the University's procedures for evaluation of the performance of these categories of academic personnel. Because of the impact on the Regents' powers of governance with respect to University affairs—*i.e.*, conduct of the University's academic personnel process—this provision, and similar provisions, of the bill would, entirely aside from the question of general statewide applicability, violate art. IX, § 9. See notes 51-52 & accompanying text *supra*.